Section 3: Election Law

Institute of Bill of Rights Law at The College of William & Mary School of Law

Repository Citation

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III. Election Law

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Shelby County, Alabama v. Holder

No. 12-96


Shelby County, Alabama, filed a challenge to Section 5 of the Voting Rights Act in the U.S. District Court for the District of Columbia, alleging the Act exceeds Congress’s enumerated powers because the preclearance burdens imposed can no longer be justified and the geographic coverage disparities are no longer sufficiently related to the targeted problem. The district court found for the United States and granted summary judgment, upholding Section 5’s constitutionality as a “congruent and proportional remedy.” The Court of Appeals for the D. C. Circuit affirmed, upholding Section 5 under the “congruence and proportionality” standard and deferring to Congress.

Question Presented: Whether Congress’s decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution.


United States Court of Appeals for the District of Columbia Circuit

Decided May 18, 2012

[Excerpt; some text, footnotes and citations omitted.]

TATEL, Circuit Judge:

In Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009), the Supreme Court raised serious questions about the continued constitutionality of section 5 of the Voting Rights Act of 1965. Section 5 prohibits certain “covered jurisdictions” from making any change in their voting procedures without first demonstrating to either the Attorney General or a three-judge district court in Washington that the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.” 42 U.S.C. § 1973c(a). The Supreme Court warned that the burdens imposed by section 5 may no longer be justified by current needs and that its geographic coverage may no longer sufficiently relate to the problem it targets. Although the Court had no occasion to resolve these questions, they are now squarely before us. Shelby County, Alabama, a covered jurisdiction, contends that when Congress reauthorized section 5 in 2006, it exceeded its enumerated powers.
The district court disagreed and granted summary judgment for the Attorney General. For the reasons set forth in this opinion, we affirm.

I.

The Framers of our Constitution sought to construct a federal government powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence. They feared not state government, but centralized national government, long the hallmark of Old World monarchies. As a result, “[t]he powers delegated by the ... Constitution to the federal government, are few and defined,” while “[t]hose which are to remain in the State governments are numerous and indefinite.” The Federalist No. 45 (James Madison).

But the experience of the nascent Republic, divided by slavery, taught that states too could threaten individual liberty. So after the Civil War, the Reconstruction Amendments were added to the Constitution to limit state power.

Following Reconstruction, however, “the blight of racial discrimination in voting . . . infected the electoral process in parts of our country for nearly a century.” South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). The courts and Congress eventually responded. The Supreme Court struck down grandfather clauses, Guinn v. United States, 238 U.S. 347 (1915), and white primaries, Smith v. Allwright, 321 U.S. 649 (1944). Congress “enact[ed] civil rights legislation in 1957, 1960, and 1964, which sought to “facilitate case-by-case litigation against voting discrimination.”” Shelby Cnty., 811 F.Supp.2d at 430. But Congress soon determined that such measures were inadequate: case-by-case litigation, in addition to being expensive, was slow—slow to come to a result and slow to respond once a state switched from one discriminatory device to the next—and thus had “done little to cure the problem of voting discrimination.” Katzenbach, 383 U.S. at 313. Determined to “rid the country of racial discrimination in voting,” id. at 315, Congress passed the Voting Rights Act of 1965.

Unlike prior legislation, the 1965 Act combined a permanent, case-by-case enforcement mechanism with a set of more stringent, temporary remedies designed to target those areas of the country where racial discrimination in voting was concentrated.

Reaching beyond case-by-case litigation and applying only in certain “covered jurisdictions,” section 5—the focus of this litigation—“prescribes remedies . . . which go into effect without any need for prior adjudication.” Katzenbach, 383 U.S. at 327–28. Section 5 suspends “all changes in state election procedure until they [are] submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General.” Nw. Austin, 129 S.Ct. at 2509. A jurisdiction seeking to change its voting laws or procedures must either submit the change to the Attorney General or seek preclearance directly from the three-judge court. If it opts for the former and if the Attorney General lodges no objection within sixty days, the proposed law can take effect. 42 U.S.C. § 1973c(a). But if the Attorney General lodges an objection, the submitting jurisdiction may either request reconsideration, 28 C.F.R. § 51.45(a), or seek a de novo determination from the three-judge district court. 42 U.S.C. § 1973c(a).

Either way, preclearance may be granted only if the jurisdiction demonstrates that the proposed change to its voting law neither
“has the purpose nor . . . the effect of denying or abridging the right to vote on account of race or color.” Id.

Prior to section 5’s enactment, states could stay ahead of plaintiffs and courts “by passing new discriminatory voting laws as soon as the old ones had been struck down.” Beer v. United States, 425 U.S. 130, 140 (1976). But section 5 “shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim.” Katzenbach, 383 U.S. at 328. It did so by placing “the burden on covered jurisdictions to show their voting changes are nondiscriminatory before those changes can be put into effect.” Shelby Cnty., 811 F.Supp.2d at 431. Section 5 thus “pre­empted the most powerful tools of black disenfranchisement,” Nw. Austin, 129 S.Ct. at 2509, resulting in “undeniable” improvements in the protection of minority voting rights, id. at 2511.

Section 4(b) contains a formula that, as originally enacted, applied section 5’s preclearance requirements to any state or political subdivision of a state that “maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election.” Shelby Cnty., 811 F.Supp.2d at 432. Congress chose these criteria carefully. It knew precisely which states it sought to cover and crafted the criteria to capture those jurisdictions. Id.

As originally enacted in 1965, section 5 was to remain in effect for five years. In South Carolina v. Katzenbach, the Supreme Court sustained the constitutionality of section 5, holding that its provisions “are a valid means for carrying out the commands of the Fifteenth Amendment.” 383 U.S. at 337.

Because section 4(b)’s formula could be both over- and under-inclusive, Congress incorporated two procedures for adjusting coverage over time. First, as it existed in 1965, section 4(a) allowed jurisdictions to earn exemption from coverage by obtaining from a three-judge district court a declaratory judgment that in the previous five years (i.e., before they became subject to the Act) they had used no test or device “for the purpose or with the effect of denying or abridging the right to vote on account of race or color.” 1965 Act § 4(a). This “bailout” provision, as subsequently amended, addresses potential overinclusiveness, allowing jurisdictions with clean records to terminate their section 5 preclearance obligations. Second, section 3(c) authorizes federal courts to require preclearance by any non-covered state or political subdivision found to have violated the Fourteenth or Fifteenth Amendments. 42 U.S.C. § 1973a(c). Specifically, courts presiding over voting discrimination suits may “retain jurisdiction for such period as [they] may deem appropriate” and order that during that time no voting change take effect unless either approved by the court or unopposed by the Attorney General. Id. This judicial “bail-in” provision addresses the formula’s potential underinclusiveness.
these criteria moved from 1964 to include 1968 and eventually 1972.” *Nw. Austin*, 129 S.Ct. at 2510. In 1975 Congress made one significant change to section 4(b)’s scope: it amended the definition of “test or device” to include the practice of providing only English-language voting materials in jurisdictions with significant non-English-speaking populations. Act of Aug. 6, 1975, Pub.L. No. 94–73, § 203, 89 Stat. 400, 401–02. Although not altering the basic coverage formula, this change expanded section 4(b)’s scope to encompass jurisdictions with records of voting discrimination against “language minorities.” *See Briscoe v. Bell*, 432 U.S. 404, 405 (1977). The Supreme Court sustained the constitutionality of each extension, respectively, in *Georgia v. United States*, 411 U.S. 526 (1973), *City of Rome v. United States*, 446 U.S. 156 (1980), and *Lopez v. Monterey County*, 525 U.S. 266 (1999).

Significantly for the issue before us, the 1982 version of the Voting Rights Act made bailout substantially more permissive. . . . After 1982 the Act allowed bailout by any jurisdiction with a “clean” voting rights record over the previous ten years. *Id.* The 1982 reauthorization also permitted a greater number of jurisdictions to seek bailout. Previously, “only covered states (such as Alabama) or separately-covered political subdivisions (such as individual North Carolina counties) were eligible to seek bailout.” *Id.* After 1982, political subdivisions within a covered state could bail out even if the state as a whole was ineligible. *Id.*


The 2006 Act’s constitutionality was immediately challenged by “a small utility district” subject to its provisions. *See Nw. Austin*, 129 S.Ct. at 2508. . . . On appeal, the Supreme Court identified two “serious . . . questions” about section 5’s continued constitutionality, namely, whether the “current burdens” it imposes are “justified by current needs,” and whether its “disparate geographic coverage is sufficiently related to the problem that it targets.” *Nw. Austin*, 129 S.Ct. at 2512–13. But invoking the constitutional avoidance doctrine, *id.* at 2508, 2513, the Court interpreted the statute to allow any covered jurisdiction, including the utility district bringing suit in that case, to seek bailout, thus avoiding the need to resolve the “big question,” *id.* at 2508: Did Congress exceed its constitutional authority when it reauthorized section 5? Now that question is squarely presented.

II.

Shelby County filed suit in the U.S. District Court for the District of Columbia, seeking both a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional and a permanent injunction prohibiting the Attorney General from enforcing them. *Shelby Cnty.*, 811 F.Supp.2d at 427. Unlike the utility district in *Northwest Austin*, Shelby County never sought bailout, and for good reason. Because the county had held several special elections under a law for which it failed to seek preclearance and because the Attorney General had recently objected to annexations and a redistricting plan proposed by a city within Shelby County, the County was clearly ineligible for bailout. *See id.* at 446 n. 6. As the district court—Judge John D. Bates—recognized, the
“serious constitutional questions” raised in *Northwest Austin* could “no longer be avoided.” *Id.* at 427.

Addressing these questions in a thorough opinion, the district court upheld the constitutionality of the challenged provisions and granted summary judgment for the Attorney General. After reviewing the extensive legislative record and the arguments made by Shelby County, the Attorney General, and a group of defendant-intervenors, the district court concluded that “Section 5 remains a ‘congruent and proportional remedy’ to the 21st century problem of voting discrimination in covered jurisdictions.” *Id.* at 428. Responding to the Supreme Court’s concerns in *Northwest Austin*, the district court found the record evidence of contemporary discrimination in covered jurisdictions “plainly adequate to justify section 5’s strong remedial and preventative measures,” *id.* at 492, and to support Congress’s predictive judgment that failure to reauthorize section 5 “‘would leave minority citizens with the inadequate remedy of a Section 2 action,’” *id.* at 498. This evidence consisted of thousands of pages of testimony, reports, and data regarding racial disparities in voter registration, voter turnout, and electoral success; the nature and number of section 5 objections; judicial preclearance suits and section 5 enforcement actions; successful section 2 litigation; the use of “more information requests” and federal election observers; racially polarized voting; and section 5’s deterrent effect. *Id.* at 465–66.

As to section 4(b), the district court acknowledged that the legislative record “primarily focused on the persistence of voting discrimination in covered jurisdictions—rather than on the comparative levels of voting discrimination in covered and non-covered jurisdictions.” *Id.* at 507. Nonetheless, the district court pointed to “several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement”—including the disproportionate number of successful section 2 suits in covered jurisdictions and the “continued prevalence of voting discrimination in covered jurisdictions notwithstanding the considerable deterrent effect of Section 5.” *Id.* at 506–07. Thus, although observing that Congress’s reauthorization “ensured that Section 4(b) would continue to focus on those jurisdictions with the worst historical records of voting discrimination,” *id.* at 506, the district court found this continued focus justified by current evidence that discrimination remained concentrated in those jurisdictions. *See id.* Finally, the district court emphasized that Congress had based reauthorization not on “a perfunctory review of a few isolated examples of voting discrimination by covered jurisdictions,” but had “‘approached its task seriously and with great care.’” *Id.* at 496. Given this, the district court concluded that Congress’s predictive judgment about the continued need for section 5 in covered jurisdictions was due “substantial deference,” *id.* at 498, and therefore “decline[d] to overturn Congress’s carefully considered judgment,” *id.* at 508. Our review is de novo. *See McGrath v. Clinton*, 666 F.3d 1377, 1379 (D.C.Cir.2012).

On appeal, Shelby County reiterates its argument that, given the federalism costs section 5 imposes, the provision can be justified only by contemporary evidence of the kind of “‘unremitting and ingenious defiance’” that existed when the Voting Rights Act was originally passed in 1965. Appellant’s Br. 8. Insisting that the
legislative record lacks “evidence of a systematic campaign of voting discrimination and gamesmanship by the covered jurisdictions,” Shelby County contends that section 5’s remedy is unconstitutional because it is no longer congruent and proportional to the problem it seeks to cure. Id. at 8–9. In addition, Shelby County argues, section 4(b) contains an “obsolete” coverage formula that fails to identify the problem jurisdictions, and because the jurisdictions it covers are not uniquely problematic, the formula is no longer rational “in both practice and theory.” Appellant’s Br. 11–12.

III.

Northwest Austin sets the course for our analysis, directing us to conduct two principal inquiries. First, emphasizing that section 5 “authorizes federal intrusion into sensitive areas of state and local policymaking that imposes substantial federalism costs,” the Court made clear that “[p]ast success alone . . . is not adequate justification to retain the preclearance requirements.” 129 S.Ct. at 2511. Conditions in the South, the Court pointed out, “have unquestionably improved”: racial disparities in voter registration and turnout have diminished or disappeared, and “minority candidates hold office at unprecedented levels.” Id. Of course, “[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act.” Id. at 2511–12. But “the Act imposes current burdens,” and we must determine whether those burdens are “justified by current needs.” Id. at 2512.

Second, the Act, through section 4(b)’s coverage formula, “differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.” Id. And while equal sovereignty “‘does not bar . . . remedies for local evils,’” id., the Court warned that section 4(b)’s coverage formula may “fail [] to account for current political conditions”—that is, “[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.” Id. These concerns, the Court explained, “are underscored by the argument” that section 5 may require covered jurisdictions to adopt race-conscious measures that, if adopted by non-covered jurisdictions, could violate section 2 of the Act or the Fourteenth Amendment. Id. (Kennedy, J., concurred). To be sure, such “[d]istinctions can be justified in some cases.” Id. But given section 5’s serious federalism costs, Northwest Austin requires that we ask whether section 4(b)’s “disparate geographic coverage is sufficiently related to the problem that it targets.” Id.

Before addressing Northwest Austin’s two questions, we must determine the appropriate standard of review. As the Supreme Court noted, the standard applied to legislation enacted pursuant to Congress’s Fifteenth Amendment power remains unsettled. See id. at 2512–13. Reflecting this uncertainty, Shelby County argues that the “congruence and proportionality” standard for Fourteenth Amendment legislation applies, see City of Boerne, 521 U.S. at 520, whereas the Attorney General insists that Congress may use “any rational means” to enforce the Fifteenth Amendment, see Katzenbach, 383 U.S. at 324. . . . We thus read Northwest Austin as sending a powerful signal that congruence and proportionality is the appropriate standard of review. In any event, if section 5 survives the arguably more rigorous “congruent and proportional” standard, it would also survive Katzenbach’s “rationality” review. . . .
We read this case law with two important qualifications. First, we deal here with racial discrimination in voting, one of the gravest evils that Congress can seek to redress. See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). When Congress seeks to combat racial discrimination in voting—protecting both the right to be free from discrimination based on race and the right to be free from discrimination in voting, two rights subject to heightened scrutiny—it acts at the apex of its power. See Hibbs, 538 U.S. at 736; Lane, 541 U.S. at 561–63. Expressly prohibited by the Fifteenth Amendment, racial discrimination in voting is uniquely harmful in several ways: it cannot be remedied by money damages and, as Congress found, lawsuits to enjoin discriminatory voting laws are costly, take years to resolve, and leave those elected under the challenged law with the benefit of incumbency.

Second, although the federalism costs imposed by the statutes at issue in Hibbs and Lane are no doubt substantial, the federalism costs imposed by section 5 are a great deal more significant. To be sure, in most cases the preclearance process is “routine” and “efficient[,]” resulting in prompt approval by the Attorney General and rarely if ever delaying elections. See Reauthorizing the Voting Rights Act’s Temporary Provisions: Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. 312–13 (2006) (testimony of Donald M. Wright, North Carolina State Board of Elections). But section 5 sweeps broadly, requiring preclearance of every voting change no matter how minor. Section 5 also places the burden on covered jurisdictions to demonstrate to the Attorney General or a three-judge district court here in Washington that the proposed law is not discriminatory. Given these significant burdens, in order to determine whether section 5 remains congruent and proportional we are obligated to undertake a review of the record more searching than the Supreme Court’s review in Hibbs and Lane.

Although our examination of the record will be probing, we remain bound by fundamental principles of judicial restraint. Time and time again the Supreme Court has emphasized that Congress’s laws are entitled to a “presumption of validity.” City of Boerne, 521 U.S. at 535. As the Court has explained, when Congress acts pursuant to its enforcement authority under the Reconstruction Amendments, its judgments about “what legislation is needed . . . are entitled to much deference.” Id. . . . And critically for our purposes, although Northwest Austin raises serious questions about section 5’s constitutionality, nothing in that opinion alters our duty to resolve those questions using traditional principles of deferential review. Indeed, the Court reiterated not only that “judging the constitutionality of an Act of Congress is ‘the gravest and most delicate duty that [a court] is called on to perform,’” Northwest Austin, 129 S.Ct. at 2513 (Holmes, J., concurring), but also that “[t]he Fifteenth Amendment empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is needed to enforce it,” id.

A.

Guided by these principles, we begin with Northwest Austin’s first question: Are the current burdens imposed by section 5 “justified by current needs”? 129 S.Ct. at 2512. The Supreme Court raised this question because, as it emphasized and as Shelby County argues, the conditions which led to the passage of the Voting Rights Act “have unquestionably improved[,] . . . no doubt due in significant part to the Voting Rights Act itself.” Id. at 2511. Congress also recognized this progress when it
reauthorized the Act, finding that “many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated.” H.R.Rep. No. 109–478, at 12. The dissent’s charts nicely display this progress. Racial disparities in voter registration and turnout have “narrowed considerably” in covered jurisdictions and are now largely comparable to disparities nationwide. Id. at 12–17; see also Dissenting Op. at 890–91 figs. I & II. Increased minority voting, in turn, has “resulted in significant increases in the number of African–Americans serving in elected offices.” H.R.Rep. No. 109–478, at 18; see also Dissenting Op. at 892 fig.III. For example, in the six states fully covered by the 1965 Act, the number of African Americans serving in elected office increased from 345 to 3700 in the decades since 1965. H.R.Rep. No. 109–478, at 18.

But Congress found that this progress did not tell the whole story. It documented “continued registration and turnout disparities” in both Virginia and South Carolina. Id. at 25. Virginia, in particular, “remain[ed] an outlier,” S.Rep. No. 109–295, at 11 (2006): although 71.6 percent of white, non-Hispanic voting age residents registered to vote in 2004, only 57.4 percent of black voting age residents registered, a 14.2–point difference. U.S. Census Bureau, Reported Voting and Registration of the Total Voting–Age Population, at tbl.4a. Also, although the number of African Americans holding elected office had increased significantly, they continued to face barriers to election for statewide positions. Congress found that not one African American had yet been elected to statewide office in Mississippi, Louisiana, or South Carolina. . . .

Congress considered other types of evidence that, in its judgment, “show[ed] that attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future.” Id. at 21. It heard accounts of specific instances of racial discrimination in voting. It heard analysis and opinions by experts on all sides of the issue. It considered, among other things, six distinct categories of evidence: (1) Attorney General objections issued to block proposed voting changes that would, in the Attorney General’s judgment, have the purpose or effect of discriminating against minorities; (2) “more information requests” issued when the Attorney General believes that the information submitted by a covered jurisdiction is insufficient to allow a preclearance determination; (3) successful lawsuits brought under section 2 of the Act; (4) federal observers dispatched to monitor elections under section 8 of the Act; (5) successful section 5 enforcement actions filed against covered jurisdictions for failing to submit voting changes for preclearance, as well as requests for preclearance denied by the United States District Court for the District of Columbia; and (6) evidence that the mere existence of section 5 deters officials from even proposing discriminatory voting changes. Finally, Congress heard evidence that case-by-case section 2 litigation was inadequate to remedy the racial discrimination in voting that persisted in covered jurisdictions.

Before delving into the legislative record ourselves, we consider two arguments raised by Shelby County that, if meritorious, would significantly affect how we evaluate that record. First, Shelby County argues that section 5 can be sustained only on the basis of current evidence of “a widespread pattern of electoral gamesmanship showing
systematic resistance to the Fifteenth Amendment.” Appellant’s Br. 23. According to the County, the preclearance remedy may qualify as congruent and proportional only “when it addresses a coordinated campaign of discrimination intended to circumvent the remedial effects of direct enforcement of Fifteenth Amendment voting rights.” Id. at 7. We disagree. . . . Shelby County’s argument rests on a misreading of Katzenbach. Although the Court did describe the situation in 1965 as one of “unremitting and ingenious defiance of the Constitution,” Katzenbach, 383 U.S. at 309, nothing in Katzenbach suggests that such gamesmanship was necessary to the Court’s judgment that section 5 was constitutional. Rather, the critical factor was that “Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting.” Id. at 328; see also id. at 313–15. . . .

Second, Shelby County urges us to disregard much of the evidence Congress considered because it involves “vote dilution, going to the weight of the vote once cast, not access to the ballot.” Appellant’s Br. 26. . . . According to the County, because the Supreme Court has “never held that vote dilution violates the Fifteenth Amendment,” Bossier II, 528 U.S. at 334 n. 3, we may not rely on such evidence to sustain section 5 as a valid exercise of Congress’s Fifteenth Amendment enforcement power.

It is true that neither the Supreme Court nor this court has ever held that intentional vote dilution violates the Fifteenth Amendment. But the Fourteenth Amendment prohibits vote dilution intended “invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.” City of Mobile v. Bolden, 446 U.S. 55, 66 (1980). Although the Court’s previous decisions upholding section 5 focused on Congress’s power to enforce the Fifteenth Amendment, the same “congruent and proportional” standard, refined by the inquiries set forth in Northwest Austin, appears to apply “irrespective of whether Section 5 is considered [Fifteenth Amendment] enforcement legislation, [Fourteenth Amendment] enforcement legislation, or a kind of hybrid legislation enacted pursuant to both amendments.” Shelby Cnty., 811 F.Supp.2d at 462. Indeed, when reauthorizing the Act in 2006, Congress expressly invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments. See H.R.Rep. No. 109-478, at 90; id. at 53 & n. 136, 100 S.Ct. 1490. Accordingly, like Congress and the district court, we think it appropriate to consider evidence of unconstitutional vote dilution in evaluating section 5’s validity. See City of Rome, 446 U.S. at 181.

Having resolved these threshold issues, we return to the basic question: Does the legislative record contain sufficient probative evidence from which Congress could reasonably conclude that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy? Reviewing the record ourselves and focusing on the evidence most probative of ongoing constitutional violations, we believe it does.

To begin with, the record contains numerous “examples of modern instances” of racial discrimination in voting, City of Boerne, 521 U.S. at 530. Just a few recent examples:

Webster County, Georgia’s 1998 proposal to reduce the black population in three of the education board’s five single-member districts after the school district elected a majority black school board for the first time, Voting Rights Act: Hearing Before Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong. 830–31 (2006);

The legislative record also contains examples of overt hostility to black voting power by those who control the electoral process. . . . In addition to these examples of flagrant racial discrimination, several categories of evidence in the record support Congress’s conclusion that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed. We explore each in turn.

First, Congress documented hundreds of instances in which the Attorney General, acting pursuant to section 5, objected to proposed voting changes that he found would have a discriminatory purpose or effect. Significantly, Congress found that the absolute number of objections has not declined since the 1982 reauthorization: the Attorney General interposed at least 626 objections during the twenty-two years from 1982 to 2004 (an average of 28.5 each year), compared to 490 interposed during the seventeen years from 1965 to 1982 (an average of 28.8 each year). Evidence of Continued Need 172.

Formal objections were not the only way the Attorney General blocked potentially discriminatory changes under section 5. Congress found that between 1990 and 2005, “more information requests” (MIRs) prompted covered jurisdictions to withdraw or modify over 800 proposed voting changes. . . . Congress found that because “[t]he actions taken by a jurisdiction [in response to an MIR] are often illustrative of [its] motives,” the high number of withdrawals and modifications made in response to MIRs constitutes additional evidence of “[e]fforts to discriminate over the past 25 years.” H.R.Rep. No. 109–478, at 40–41.

Shelby County contends that section 5 objections and MIRs, however numerous, “do[ ] not signal intentional voting discrimination” because they represent only the Attorney General’s opinion and need not be based on discriminatory intent. Appellant’s Br. 30–31. Underlying this argument is a fundamental principle with which we agree: to sustain section 5, the record must contain “evidence of a pattern of constitutional violations,” Hibbs, 538 U.S. at 729, and voting changes violate the constitution only if motivated by discriminatory animus, Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481 (1997) (“Bossier I “). Although not all objections rest on an affirmative finding of intentional discrimination, the record contains examples of many that do. See Nw. Austin, 573 F.Supp.2d at 289–301. . . . Moreover, in the 1990s, before the Supreme Court limited the Attorney General’s ability to object based on discriminatory but non-retrogressive intent, see Bossier II, 528 U.S. 320, “the purpose prong of Section 5 had become the dominant legal basis for objections,” Preclearance Standards 177. . . .

Shelby County also points out that the percentage of proposed voting changes blocked by Attorney General objections has steadily declined. An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 219
But the most dramatic decline in the objection rate—which, as the district court observed, "has always been low," *Shelby Cnty.*, 811 F.Supp.2d at 470—occurred in the 1970s, before the Supreme Court upheld the Act for a third time in *City of Rome*. See *Introduction to the Expiring Provisions* 219. . . . As the district court pointed out, there may be "many plausible explanations for the recent decline in objection rates." *See Shelby Cnty.*, 811 F.Supp.2d at 471. . . .

As for MIRs, we agree with Shelby County that they are less probative of discrimination than objections. An MIR does not represent a judgment on the merits, and submitting jurisdictions might have many reasons for modifying or withdrawing a proposed change in response to one. But the record contains evidence from which Congress could "reasonab[ly] infer[ ]," *id.*, that at least some withdrawals or modifications reflect the submitting jurisdiction's acknowledgement that the proposed change was discriminatory. *See Evidence of Continued Need* 178, 809–10; H.R.Rep. No. 109–478, at 41. Given this, Congress reasonably concluded that some of the 800–plus withdrawals and modifications in response to MIRs "reflect[ ]" "[e]fforts to discriminate over the past 25 years." H.R.Rep. No. 109–478, at 40.

The second category of evidence relied on by Congress, successful section 2 litigation, reinforces the pattern of discrimination revealed by objections and MIRs. The record shows that between 1982 and 2005, minority plaintiffs obtained favorable outcomes in some 653 section 2 suits filed in covered jurisdictions, providing relief from discriminatory voting practices in at least 825 counties. *Evidence of Continued Need* 208, 251. Shelby County faults the district court for relying on evidence of successful section 2 litigation "even though 'a violation of Section 2 does not require a showing of unconstitutional discriminatory intent.'" Appellant's Br. 34. The County's premise is correct: although the Constitution prohibits only those voting laws motivated by discriminatory intent, section 2 prohibits all voting laws for which "'based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class.'" *Bartlett v. Strickland*, 556 U.S. 1, 10–11 (2009). In practice, however, this "results test," as applied in section 2 cases, requires consideration of factors very similar to those used to establish discriminatory intent based on circumstantial evidence. *Compare Gingles*, 478 U.S. at 36, *with Rogers v. Lodge*, 458 U.S. 613 (1982). Also, as the district court pointed out, "courts will avoid deciding constitutional questions" if, as is the case in virtually all successful section 2 actions, the litigation can be resolved on narrower grounds. *Shelby Cnty.*, 811 F.Supp.2d at 482. This explains why the legislative record contains so few published section 2 cases with judicial findings of discriminatory intent, *see Dissenting Op.* at 26;—courts have no need to find discriminatory intent once they find discriminatory effect. But Congress is not so limited. Considering the evidence required to prevail in a section 2 case and accounting for the obligation of Article III courts to avoid reaching constitutional questions unless necessary, we think Congress quite reasonably concluded that successful section 2 suits provide powerful evidence of unconstitutional discrimination. In addition, as with Attorney General objections, we cannot ignore the sheer number of successful section 2 cases. This high volume of successful section 2 actions is particularly dramatic given that Attorney General objections block discriminatory laws before
they can be implemented and that section 5 deters jurisdictions from even attempting to enact such laws, thereby reducing the need for section 2 litigation in covered jurisdictions. See Continuing Need 26.

Third, Congress relied on evidence of “the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions.” 2006 Act § 2(b)(5). . . Of these, sixty-six percent were concentrated in five of the six states originally covered by section 5—Alabama, Georgia, Louisiana, Mississippi, and South Carolina. H.R.Rep. No. 109–478, at 44. In some instances, monitoring by federal observers “became the foundation of Department of Justice enforcement efforts.” Id. As Congress saw it, this continued need for federal observers in covered jurisdictions is indicative of discrimination and “demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations.” H.R.Rep. No. 109–478, at 44.

. . . The record shows that federal observers in fact witnessed discrimination at the polls, sometimes in the form of intentional harassment, intimidation, or disparate treatment of minority voters. See id. at 30–31, 34, 43. Thus, although the deployment of federal observers is hardly conclusive evidence of unconstitutional discrimination, we think Congress could reasonably rely upon it as modest, additional evidence of current needs.

Fourth, Congress found evidence of continued discrimination in two types of preclearance-related lawsuits. Examining the first of these—actions brought to enforce section 5’s preclearance requirement—Congress noted that “many defiant covered jurisdictions and State and local officials continue to enact and enforce changes to voting procedures without the Federal Government’s knowledge.” H.R.Rep. No. 109–478, at 41 . . .

Congress could reasonably have concluded that such cases, even if few in number, provide at least some evidence of continued willingness to evade the Fifteenth Amendment’s protections, for they reveal continued efforts by recalcitrant jurisdictions not only to enact discriminatory voting changes, but to do so in defiance of section 5’s preclearance requirement.

In addition to section 5 enforcement suits, Congress found evidence of continued discrimination in “the number of requests for declaratory judgments [for preclearance] denied by the United States District Court for the District of Columbia.” 2006 Act § 2(b)(4)(B). The number of unsuccessful judicial preclearance actions appears to have remained roughly constant since 1966: twenty-five requests were denied or withdrawn between 1982 and 2004, compared to seventeen between 1966 and 1982. Evidence of Continued Need 177–78, 275. Shelby County does not contest the relevance of this evidence.

Finally, and bolstering its conclusion that section 5 remains necessary, Congress “[f]ound that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes.” H.R.Rep. No. 109–478, at 24. In Congress’s view, “Section 5’s strong deterrent effect” and “the number of voting changes that have never gone forward as a result of [that effect]” are “[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes” that had actually
been proposed. *Id.* As Congress explained, "[o]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result." *Id.* For this reason, the mere existence of section 5 "encourage[s] the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process." *Id.*


Shelby County argues that Congress’s finding of deterrence reflects "‘outdated assumptions about racial attitudes in the covered jurisdictions’" that we should not "‘indulge[ ]’" Appellant’s Br. 38 (Thomas, J., concurring in judgment in part and dissenting in part)). We agree that evaluating section 5’s deterrent effect raises sensitive and difficult issues. . . . We also agree with the dissent that section 5 could not stand based on claims of deterrence alone, nor could deterrence be used in some hypothetical case to justify renewal "to the crack of doom," *id.* But the difficulty of quantifying the statute’s deterrent effect is no reason to summarily reject Congress’s finding that the evidence of racial discrimination in voting would look worse without section 5—a finding that flows from record evidence unchallenged by the dissent. As explained above, Congress’s deterrent effect finding rests on evidence of current and widespread voting discrimination, as well as on testimony indicating that section 5’s mere existence prompts state and local legislators to conform their conduct to the law. And Congress’s finding—that is, a finding about how the world would have looked absent section 5—rests on precisely the type of fact-based, predictive judgment that courts are ill-equipped to second guess. See *Turner Broad.*, 520 U.S. at 195.

This brings us, then, to Congress’s ultimate conclusion. After considering the entire record, including

- 626 Attorney General objections that blocked discriminatory voting changes;
- 653 successful section 2 cases;
- over 800 proposed voting changes withdrawn or modified in response to MIRs;
- tens of thousands of observers sent to covered jurisdictions;
- 105 successful section 5 enforcement actions;
- 25 unsuccessful judicial preclearance actions;
- and section 5’s strong deterrent effect, i.e., “the number of voting changes that have never gone forward as a result of Section 5,” H.R.Rep. No. 109-478, at 24;

Congress found that serious and widespread intentional discrimination persisted in covered jurisdictions and that “case-by-case enforcement alone . . . would leave minority citizens with [an] inadequate remedy.” *Id.* at 57. In reaching this conclusion, Congress considered evidence that section 2 claims involve “intensely complex litigation that is both costly and time-consuming.” *Modern Enforcement* 96; see also *Introduction to the Expiring Provisions; City of Boerne*, 521 U.S. at 526. It heard from witnesses who explained that “it is incredibly difficult for minority voters to pull together the resources needed” to pursue a section 2 lawsuit,
particularly at the local level and in rural communities. Modern Enforcement 96; see also History, Scope, and Purpose 84. . . . Given all of this, and given the magnitude and persistence of discrimination in covered jurisdictions, Congress concluded that case-by-case litigation—slow, costly, and lacking section 5’s prophylactic effect—“would be ineffective to protect the rights of minority voters.” H.R.Rep. No. 109-478, at 57.

According to Shelby County, “[e]valuation of the probative evidence shows there is no longer systematic resistance to the Fifteenth Amendment in the covered jurisdictions that cannot be solved through case-by-case litigation.” Appellant’s Br. 38. Congress, however, reached a different conclusion, and as explained above, the County has offered no basis for thinking that Congress’s judgment is either unreasonable or unsupported by probative evidence. . . .

The point at which section 5’s strong medicine becomes unnecessary and therefore no longer congruent and proportional turns on several critical considerations, including the pervasiveness of serious racial discrimination in voting in covered jurisdictions; the continued need for section 5’s deterrent and blocking effect; and the adequacy of section 2 litigation. These are quintessentially legislative judgments, and Congress, after assembling and analyzing an extensive record, made its decision: section 5’s work is not yet done. Insofar as Congress’s conclusions rest on predictive judgments, we must, contrary to the dissent’s approach, apply a standard of review even “more deferential than we accord to judgments of an administrative agency.” Turner Broad., 520 U.S. at 195. Given that we may not “displace [an agency’s] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo,” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951), we certainly cannot do so here. Of course, given the heavy federalism costs that section 5 imposes, our job is to ensure that Congress’s judgment is reasonable and rests on substantial probative evidence. See Turner Broad., 520 U.S. at 195. After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress’s judgment deserves judicial deference.

B.

Having concluded that section 5’s “current burdens” are indeed justified by “current needs,” we proceed to the second Northwest Austin inquiry: whether the record supports the requisite “showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” 129 S.Ct. at 2512. Recall that this requirement stems from the Court’s concern that “[t]he Act . . . differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’” Id. “The evil that § 5 is meant to address,” the Court observed, “may no longer be concentrated in the jurisdictions singled out [by section 4(b)] for preclearance.” Id.

Before examining the record ourselves, we emphasize that the Act’s disparate geographic coverage—and its relation to the problem of voting discrimination—depends not only on section 4(b)’s formula, but on the statute as a whole, including its mechanisms for bail-in and bailout. . . . [T]he question before us is whether the statute as a whole, not just the section 4(b) formula, ensures that jurisdictions subject to section 5 are those in which unconstitutional
voting discrimination is concentrated.

The most concrete evidence comparing covered and non-covered jurisdictions in the legislative record comes from a study of section 2 cases published on Westlaw or Lexis between 1982 and 2004. *Impact and Effectiveness* 964–1124 (report by Ellen Katz et al.). Known as the Katz study, it reached two key findings suggesting that racial discrimination in voting remains “concentrated in the jurisdictions singled out for preclearance,” *Nw. Austin*, 129 S.Ct. at 2512. First, the study found that of the 114 published decisions resulting in outcomes favorable to minority plaintiffs, 64 originated in covered jurisdictions, while only 50 originated in non-covered jurisdictions. . . . Second, the study found higher success rates in covered jurisdictions than in non-covered jurisdictions. *Impact and Effectiveness* 974.

The difference between covered and non-covered jurisdictions becomes even more pronounced when unpublished section 2 decisions—primarily court-approved settlements—are taken into account. As the Katz study noted, published section 2 lawsuits “represent only a portion of the section 2 claims filed or decided since 1982” since many claims were settled or otherwise resolved without a published opinion. *Id.* at 974. . . .

The section 2 data, moreover, does not tell the whole story. As explained above, Congress found that section 5, which operates only in covered jurisdictions, deters or blocks many discriminatory voting laws before they can ever take effect and become the target of section 2 litigation. “Section 5’s reach in preventing discrimination is broad. Its strength lies not only in the number of discriminatory voting changes it has thwarted, but can also be measured by the submissions that have been withdrawn from consideration, the submissions that have been altered by jurisdictions in order to comply with the [Voting Rights Act], or in the discriminatory voting changes that have never materialized.” H.R. Rep. No. 109–478, at 36. Accordingly, if discrimination were evenly distributed throughout the nation, we would expect to see fewer successful section 2 cases in covered jurisdictions than in non-covered jurisdictions. *See Continuing Need* 26. Yet we see substantially more. . . .

Of course, Shelby County’s real argument is that the statute fails this test, i.e., that it no longer actually identifies the jurisdictions “uniquely interfering with the right Congress is seeking to protect through preclearance.” Appellant’s Br. 62. . . .

Shelby County’s first point—that Congress failed to make a finding—is easily answered. Congress did not have to. *United States v. Lopez*, 514 U.S. 549, 562 (1995). The proper question is whether the record contains sufficient evidence to demonstrate that the formula continues to target jurisdictions with the most serious problems. *See Nw. Austin*, 129 S.Ct. at 2512. This presents a close question. The record on this issue is less robust than the evidence of continued discrimination, *see supra* Part III.A, although this is in part due to the difficulty of comparing jurisdictions that have been subject to two very different enforcement regimes, i.e., covered jurisdictions are subject to both sections 2 and 5 while non-covered jurisdictions are subject only to section 2. And although the Katz data in the aggregate does suggest that discrimination is concentrated in covered jurisdictions, just three covered states—Alabama, Louisiana, and Mississippi—
account for much of the disparity. . . .

However, this data presents an incomplete picture of covered jurisdictions. When we consider the Katz data in conjunction with other record evidence, the picture looks quite different. . . . Even if only a relatively small portion of objections, withdrawn voting changes, and successful section 5 enforcement actions correspond to unconstitutional conduct, and even if there are substantially more successful unpublished section 2 cases in non-covered jurisdictions than the McCrary data reveals, these middle-range covered jurisdictions appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests. In fact, the discrepancy between covered and non-covered jurisdictions is likely even greater given that, as Congress found, the mere existence of section 5 deters unconstitutional behavior in the covered jurisdictions. . . .

To be sure, the coverage formula’s fit is not perfect. But the fit was hardly perfect in 1965. Accordingly, Katzenbach’s discussion of this issue offers a helpful guide for our current inquiry, particularly when we consider all probative record evidence of recent discrimination—and not just the small subset of section 2 cases relied upon by the dissent, see Dissenting Op. at 898–99. In 1965, the formula covered three states in “which federal courts had repeatedly found substantial voting discrimination”—Alabama, Louisiana, and Mississippi, Katzenbach, 383 U.S. at 329, the same three states that, notwithstanding more than forty years of section 5 enforcement, still account for the highest rates of published successful section 2 litigation, as well as large numbers of unpublished successful section 2 cases, section 5 objections, federal observer coverages, and voting changes withdrawn or modified in response to MIRs. But the 1965 formula also “embrace[d] two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which there was more fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission.” Id. at 329–30. Today, the middle-range covered jurisdictions—North Carolina, South Carolina, Virginia, Texas, and Georgia—look similar: although the legislative record contains fewer judicial findings of racial discrimination in these states, it contains at least fragmentary evidence, in part based on Attorney General objections, that these states continue to engage in unconstitutional racial discrimination in voting. Finally, the 1965 formula swept in several other jurisdictions—including Alaska, Virginia, and counties in Arizona, Hawaii, and Idaho—for which Congress apparently had no evidence of actual voting discrimination. See id. at 318. Today, the Act likewise encompasses jurisdictions for which there is some evidence of continued discrimination—Arizona and the covered counties of California, Florida, and New York, see Evidence of Continued Need 250–51, 272—as well as jurisdictions for which there appears little or no evidence of current problems—Alaska and a few towns in Michigan and New Hampshire.

Critically, moreover, and as noted above, in determining whether section 5 is “sufficiently related to the problem that it targets,” we look not just at the section 4(b) formula, but at the statute as a whole, including its provisions for bail-in and bailout. Bail-in allows jurisdictions not captured by section 4’s coverage formula, but which nonetheless discriminate in voting, to be subjected to section 5 preclearance. Thus, two non-covered states with high numbers of successful published
and unpublished section 2 cases—Arkansas and New Mexico—were subjected to partial preclearance under the bail-in provision. See Jeffers, 740 F.Supp. at 601; Crum, 119 Yale L.J. at 2010. Federal courts have also bailed in jurisdictions in several states. See Crum, 119 Yale L.J. at 2010 & nn.102–08.

Bailout plays an even more important role in ensuring that section 5 covers only those jurisdictions with the worst records of racial discrimination in voting. As the Supreme Court explained in City of Boerne, the availability of bailout “reduce[s] the possibility of overbreadth” and helps “ensure Congress’ means are proportionate to [its] ends.” 521 U.S. at 533. As of May 9, 2012, having demonstrated that they no longer discriminate in voting, 136 jurisdictions and sub-jurisdictions had bailed out, including 30 counties, 79 towns and cities, 21 school boards, and 6 utility or sanitary districts. U.S. Dep’t of Justice, Section 4 of the Voting Rights Act. In fact, by ruling in Northwest Austin that any jurisdiction covered by section 5 could seek bailout—a development unmentioned by the dissent—the Supreme Court increased significantly the extent to which bailout helps “ensure Congress’ means are proportionate to [its] ends,” Boerne, 521 U.S. at 533. Not surprisingly, then, the pace of bailout increased after Northwest Austin: of the successful bailout actions since 1965, 30 percent occurred in the three years after the Supreme Court issued its decision in 2009. See DOJ Bailout List. Also, the Attorney General “has a number of active bailout investigations, encompassing more than 100 jurisdictions and sub-jurisdictions from a range of States.” Br. for Att’y Gen. as Appellee at 47–48, LaRogue v. Holder, 679 F.3d 905 (D.C.Cir.2012). . . . The importance of this significantly liberalized bailout mechanism cannot be overstated. Underlying the debate over the continued need for section 5 is a judgment about when covered jurisdictions—many with very bad historic records of racial discrimination in voting—have changed enough so that case-by-case section 2 litigation is adequate to protect the right to vote. Bailout embodies Congress’s judgment on this question: jurisdictions originally covered because of their histories of discrimination can escape section 5 preclearance by demonstrating a clean record on voting rights for ten years in a row. See 42 U.S.C. § 1973b(a)(1). As the House Report states, “covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so.” H.R.Rep. No. 109–478, at 25. Bailout thus helps to ensure that section 5 is “sufficiently related to the problem that it targets,” Nw. Austin, 129 S.Ct. at 2512.

This, then, brings us to the critical question: Is the statute’s “disparate geographic coverage . . . sufficiently related to the problem that it targets”? Nw. Austin, 129 S.Ct. at 2512. Of course, if the statute produced “a remarkably bad fit,” Dissenting Op. at 898–99, then we would agree that it is no longer congruent and proportional. But as explained above, although the section 4(b) formula relies on old data, the legislative record shows that it, together with the statute’s provisions for bail-in and bailout—hardly “tack[ed] on,” id. at 901 (internal quotation marks omitted), but rather an integral part of the coverage mechanism—continues to single out the jurisdictions in which discrimination is concentrated. Given this, and given the fundamental principle that we may not “strik[e] down an Act of Congress except upon a clear showing of unconstitutionality,” Salazar v. Buono, 130 S.Ct. 1803 (2010) (plurality opinion), we see no principled basis for setting aside the
district court's conclusion that section 5 is “sufficiently related to the problem that it targets,” Nw. Austin, 129 S.Ct. at 2512. . .

IV.

In Northwest Austin, the Supreme Court signaled that the extraordinary federalism costs imposed by section 5 raise substantial constitutional concerns. As a lower federal court urged to strike this duly enacted law of Congress, we must proceed with great caution, bound as we are by Supreme Court precedent and confined as we must be to resolve only the precise legal question before us: Does the severe remedy of preclearance remain “congruent and proportional”? The legislative record is by no means unambiguous. But Congress drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments, which entrust Congress with ensuring that the right to vote—surely among the most important guarantees of political liberty in the Constitution—is not abridged on account of race. In this context, we owe much deference to the considered judgment of the People’s elected representatives. We affirm.

So ordered.

WILLIAMS, Senior Circuit Judge, dissenting:

Section 5 of the Voting Rights Act imposes rather extraordinary burdens on “covered” jurisdictions—nine states (and every jurisdiction therein), plus a host of jurisdictions scattered through several other states. See Voting Section, U.S. Dep’t of Justice, Section 5 Covered Jurisdictions. Unless and until released from coverage (a process discussed below), each of these jurisdictions must seek the Justice Department’s approval for every contemplated change in election procedures, however trivial. See 42 U.S.C. § 1973c. Alternatively, it can seek approval from a three-judge district court in the District of Columbia. See id. Below I’ll address the criteria by which the Department and courts assess these proposals; for now, suffice it to say that the act not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.

Section 4(b) of the act states two criteria by which jurisdictions are chosen for this special treatment: whether a jurisdiction had (1) a “test or device” restricting the opportunity to register or vote and (2) a voter registration or turnout rate below 50%. See 42 U.S.C. § 1973b(b). But § 4(b) specifies that the elections for which these two criteria are measured must be ones that took place several decades ago. The freshest, most recent data relate to conditions in November 1972—34 years before Congress extended the act for another 25 years (and thus 59 years before the extension’s scheduled expiration). See id. The oldest data—and a jurisdiction included because of the oldest data is every bit as covered as one condemned under the newest—are another eight years older. See id.

Of course sometimes a skilled dart-thrower can hit the bull’s eye throwing a dart backwards over his shoulder. As I will try to show below, Congress hasn’t proven so adept. Whether the criteria are viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of § 5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?), they seem to me defective. They are not, in my view, “congruent and proportional,” as required by
controlling Supreme Court precedent. My colleagues find they are. I dissent.

***

Although it is only the irrational coverage formula of § 4(b) that I find unconstitutional, it is impossible to assess that formula without first looking at the burdens § 5 imposes on covered jurisdictions. Any answer to the question whether § 4(b) is “sufficiently related to the problem it targets,” *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009), that is, whether it is “congruent and proportional,” must be informed by the consequences triggered by § 4(b).

[Section] 5 requires much more than notice. For covered jurisdictions, it mandates anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes. *See* 42 U.S.C. § 1973c(a). When it first upheld the VRA, the Supreme Court recognized it as a “complex scheme of stringent remedies” and § 5 in particular as an “uncommon exercise of congressional power.” *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). And only a few years ago the Supreme Court reminded us that the federalism costs of § 5 are “substantial.” *Northwest Austin*, 129 S.Ct. at 2511.

A critical aspect of those costs is the shifted burden of proof (a matter I’ll discuss below in the realm of its most significant application). So too is the section’s broad sweep: § 5 applies to any voting change proposed by a covered jurisdiction, without regard to kind or magnitude, and thus governs many laws that likely could never “deny or abridge” a “minority group’s opportunity to vote.” *See* 42 U.S.C. § 1973c(a); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). . . . In the vast majority of cases, then, the overall effect of § 5 is merely to delay implementation of a perfectly proper law.

Of course the most critical features of § 5 are the substantive standards it applies to the covered jurisdictions. In practice this standard requires a jurisdiction not only to engage in some level of race-conscious decision-making, but also on occasion to sacrifice principles aimed at depoliticizing redistricting. . . .

[In 2006,] New subsections (b) and (d) were added to § 5 to overturn *Georgia v. Ashcroft*, thereby restricting the flexibility of states to experiment with different methods of maintaining (and perhaps even expanding) minority influence. . . .

Preclearance now has an exclusive focus—whether the plan diminishes the ability of minorities (always assumed to be a monolith) to “elect their preferred candidates of choice,” irrespective of whether policymakers (including minority ones) decide that a group’s long-term interests might be better served by less concentration—and thus less of the political isolation that concentration spawns. *See* 42 U.S.C. § 1973c(b); *id.* § 1973c(d). The amended § 5 thus not only mandates race-conscious decisionmaking, but a particular brand of it. In doing so, the new § 5 aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between § 5 and the Reconstruction Amendments’ commitment to nondiscrimination.

Another 2006 amendment makes the § 5 burden even heavier. Section 5 prohibits preclearance of laws that have the “purpose”
of “denying or abridging the right to vote on account of race or color.” 42 U.S.C. § 1973c(a). The Court had interpreted “purpose” to be consistent with § 5’s effects prong, so that the term justified denying preclearance only to changes with a “retrogressive” purpose, rather than changes with either that or a discriminatory purpose. See Reno v. Bossier Parish School Bd., 528 U.S. 320, 341 (2000) (“Bossier II”). The 2006 amendments reversed that decision, specifying that “purpose” encompassed “any discriminatory purpose.” 42 U.S.C. § 1973c(c). This broadening of the § 5 criteria may seem unexceptionable, but the Court had previously found that assigning covered jurisdictions the burden of proving the absence of discriminatory purpose was precisely the device that the Department had employed in its pursuit of maximizing majority-minority districts at any cost: “The key to the Government’s position, which is plain from its objection letters if not from its briefs to this court . . . , is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create [an additional] majority-minority district.” Miller, 515 U.S. at 924. By inserting discriminatory purpose into § 5, and requiring covered jurisdictions affirmatively to prove its absence, Congress appears to have, at worst, restored “the Justice Department’s implicit command that States engage in presumptively unconstitutional race-based districting,” id. at 927, and at best, “exacerbate[d] the substantial federalism costs that the preclearance procedure already exacts,” Bossier II, 528 U.S. at 336. . . .

Whether Congress is free to impose § 5 on a select set of jurisdictions also depends in part, of course, on possible shortcomings in the remedy that § 2 provides for the country as a whole. That section creates a right to sue any jurisdiction to stop voting practices that “result[ ] in a denial or abridgement” of the right to vote “on account of race or color.” 42 U.S.C. § 1973(a). Doubtless the section is less drastic a remedy than § 5 (and thus by some criteria less effective). But it is easy to overstate the inadequacies of § 2, such as cost and the consequences of delay. Compare Maj. Op. at 872. . . . So far as Departmental resource constraints are concerned, narrowing § 5’s reach would, as a matter of simple arithmetic, enable it to increase § 2 enforcement with whatever resources it stopped spending on § 5. . . . Finally, as to the risk that discriminatory practices may take hold before traditional litigation has run its course, courts may as always use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay. See Perry v. Perez, 132 S.Ct. 934, 942 (2012).

Indeed, the ubiquitous availability of § 2 is of course a reminder that § 5 was created for the specific purpose of overcoming state and local resistance to federal antidiscrimination policy. When the Supreme Court first upheld the act in 1966, it found that § 5 was necessary because “case-by-case litigation,” now governed by § 2, was “inadequate to combat the widespread and persistent discrimination in voting.” Katzenbach, 383 U.S. at 328. While § 2 was tailored to redress actual instances of discrimination, § 5 was crafted to overcome a “century of systematic resistance to the Fifteenth Amendment” and ongoing “obstructionist tactics.” Id.

But life in the covered jurisdictions has not congealed in the 48 years since the first triggering election (or the 40 years since the most recent). “[C]urrent burdens . . . must be justified by current needs,” Northwest
Austin, 129 S.Ct. at 2512, and the burden imposed by § 5 has only grown heavier in those same years.

In order for § 4(b) to be congruent and proportional then, the disparity in current evidence of discrimination between the covered and uncovered jurisdictions must be proportionate to the severe differential in treatment imposed by § 5. Put another way, a distinct gap must exist between the current levels of discrimination in the covered and uncovered jurisdictions in order to justify subjecting the former group to § 5’s harsh remedy, even if one might find § 5 appropriate for a subset of that group. . . .

To recap, of the four metrics for which comparative data exist, one (voter registration and turnout) suggests that the coverage formula completely lacks any rational connection to current levels of voter discrimination, another (black elected officials), at best does nothing to combat that suspicion, and, at worst, confirms it, and two final metrics (federal observers and § 2 suits) indicate that the formula, though not completely perverse, is a remarkably bad fit with Congress’s concerns. Given the drastic remedy imposed on covered jurisdictions by § 5, as described above, I do not believe that such equivocal evidence can sustain the scheme.

The Supreme Court’s initial review of the formula in 1966 provides a model for evaluating such an imperfect correlation. It assessed the evidence of discrimination before it and divided the covered jurisdictions into three categories: (1) a group for which “federal courts have repeatedly found substantial voting discrimination”; (2) another group “for which there was more fragmentary evidence of recent voting discrimination”; and (3) a third set consisting of the “few remaining States and political subdivisions covered by the formula,” for which there was little or no such evidence of discrimination, but whose use of voting tests and low voter turnout warranted inclusion, “at least in the absence of proof that they have been free of substantial voting discrimination in recent years.” Katzenbach, 383 U.S. at 329–30. In that original review, the Supreme Court placed three states (Alabama, Mississippi, and Louisiana) in category one, another three (Georgia, South Carolina, and the covered portions of North Carolina) in category two, and finally two fully covered states (Virginia and Alaska) plus a few counties in Hawaii, Idaho, and Arizona, in category three.

The evidence adduced above yields a far worse fit than the data reviewed in Katzenbach. Indeed, one would be hard-pressed to put any of the covered jurisdictions into Katzenbach’s first category. Based on any of the comparative data available to us, and particularly those metrics relied on in Rome, it can hardly be argued that there is evidence of a “substantial” amount of voting discrimination in any of the covered states, and certainly not at levels anywhere comparable to those the Court faced in Katzenbach. . . .

All of this suggests that bailout may be only the most modest palliative to § 5’s burdens. One scholar hypothesizes that bailout may “exist [ ] more as a fictitious way out of coverage than [as] an authentic way of shoring up the constitutionality of the coverage formula.” Persily, supra, at 213. In fairness, the same scholar also entertains various other explanations, including the possibility that the eligible jurisdictions are just the ones for whom § 5 poses only a very light burden, see id. at 213–14, and ultimately concludes that no one knows
which theory “best explains the relative absence of bailouts,” id. at 214. Regardless of the reason for the trivial number of bailouts, irrational rules—here made so by their encompassing six states and numerous additional jurisdictions not seriously different from the uncovered states—cannot be saved “by tacking on a waiver procedure” such as bailout. *AllTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C.Cir.1988).

Finally the government argues that because the VRA is meant to protect the fundamental right of racial minorities (i.e., a suspect classification), a heightened level of deference to Congress is in order. Appellees’ Br. 22–23. Purportedly supporting this proposition is Chief Justice Rehnquist’s statement in *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003), that when a statute is designed to protect a fundamental right or to prevent discrimination based on a suspect classification, “it [is] easier for Congress to show a pattern of state constitutional violations.” Id. at 736. But the passage simply makes the point that where a classification is presumptively invalid (e.g., race), an inference of unlawful discrimination follows almost automatically from rules or acts that differentiate on the presumptively forbidden basis, whereas for classifications judged under the “rational basis” test, such as disability or age, “Congress must identify, not just the existence of age- or disability-based state decisions, but a widespread pattern of irrational reliance on such criteria.” Id. at 735. This special element of race or other presumptively unconstitutional classifications has no bearing on review of whether Congress’s remedy “fits” the proven pattern of discrimination. To hold otherwise would ignore completely the “vital principles necessary to maintain separation of powers and the federal balance” that the Court held paramount in *Boerne. City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

The analysis above is my sole basis for finding § 4(b) of the VRA unconstitutional and thus for dissenting from the court’s opinion. I need not and do not reach the constitutionality of § 5 itself. But before concluding, I want to address a critical aspect of § 5, and of some of the cases interpreting earlier versions of that section.

Section 5(b) makes unlawful any voting practice or procedure with respect to voting “that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect *their preferred candidates of choice.*” 42 U.S.C. § 1973c(b). And of course similar phrasing has been included in § 2 since 1982. See Voting Rights Act Amendments of 1982, Pub.L. No. 97–205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b)).

The language (or a close equivalent) seems to have originated in one of the Court’s earliest opinions on § 5, though only as an offhand phrase in its explanation of how a shift from district to at-large voting might dilute minority impact: “Voters who are members of a racial minority might well be in the majority in one district, but a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice.” *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). But the use of such language became troubling in *Georgia v. Ashcroft*, where the Court said that in the application of § 5 “a court should not focus *solely* on the comparative ability of a minority group to elect a candidate of its choice.” 539 U.S. 461, 480 (2003). The “solely” of course
indicates approval of such a consideration as one among several criteria for compliance with § 5.

Implied from the statutory “their” is necessarily a “they.” In the context of a statute speaking of impingements on citizens’ voting “on account of race or color,” and indeed in the universally accepted understanding of the provision, the “they” are necessarily members of minority groups. But in what sense do minority groups as such have a “preferred candidate”? Individuals, of course, have preferred candidates, but groups (unless literally monolithic) can do so only in the limited sense that a majority of the group may have a preferred candidate. Thus, when the provision is translated into operational English, it calls for assuring “the ability of a minority group’s majority to elect their preferred candidates.”

This raises the question of what happened to the minority group’s own minority—those who dissent from the preferences of the minority’s majority?

Of course in any polity that features majority rule, some people are bound to be outvoted on an issue or a candidate and thus to “lose”—on that round of the ongoing political game. Such losses are a necessary function of any system requiring less than unanimity (which would be hopelessly impractical). And in an open society that allows people freely to form associations, and to design those associations, some people obviously will be members of associations whose representatives from time to time express, in their name, opinions they do not share. But that again is a necessary function of having associations free to adopt a structure that empowers their leadership to speak with less than unanimous backing.

But the implied “they” of § 5 is not a polity in itself; nor is it an association freely created by free citizens. Quite the reverse: It is a group constructed artificially by the mandate of Congress, entirely on the lines of race or ethnicity.

On what authority has Congress constructed such groups? Purportedly the 15th Amendment to the Constitution. But that says that 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.”

It is hard to imagine language that could more clearly invoke universal individual rights. It is “citizens” who are protected, and they are protected from any denial of their rights that might be based on the specified group characteristics—race, color, or previous condition of servitude. The members of Congress who launched the amendment, said Senator Willard Warner, “profess to give to each individual an equal share of political power.” Cong. Globe, 40th Cong., 3d Sess. 861 (1869).

The 15th Amendment was a pivot point in the struggle for universal human rights. The roots of the struggle are deep and obscure. Many trace the concept to the three great monotheistic religions, Judaism, Christianity, and Islam. . . . Perhaps the Enlightenment, though in tension with organized religion, has a better title; it is clearly the immediate root of the French Declaration of the Rights of Man and of the Citizen. But at all events the 15th Amendment states a clear national commitment to universal, individual political rights regardless of race or color.

Of course conventional political discourse often uses such terms as “the black vote,”
“the youth vote,” “the senior vote,” etc. But those who use these terms . . . know perfectly well that they are oversimplifications, used to capture general political tendencies, not a justification for creating or assuming a political entity that functions through a demographic group’s “majority.” The Supreme Court has recognized that these generalizations are no such justification. In Shaw v. Reno, 509 U.S. 630 (1993), it confronted racial gerrymandering that took the form of including in one district persons separated by geographic and political boundaries and who “may have little in common with one another but the color of their skin.” Id. at 647. Such a plan bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible stereotypes.

Id.

... Section 5’s mandate to advance “the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice” is a partial retreat to pre-Revolutionary times, an era perhaps now so long past that its implications are forgotten.

None of this is to suggest that the country need for a minute countenance deliberate voting rule manipulations aimed at reducing the voting impact of any racial group, whether in the form of restrictions on ballot access or of boundary-drawing. And in judicial proceedings to stamp out such manipulations, it would of course be no defense for the perpetrators to say that they sought only to downweight a minority’s majority. But a congressional mandate to assure the electoral impact of any minority’s majority seems to me more of a distortion than an enforcement of the 15th Amendment’s ban on abridging the “right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude.” Preventing intentional discrimination against a minority is radically different from actively encouraging racial gerrymandering in favor of the minority (really, the majority of the minority), as § 5 does. Assuming there are places in which a colorblind constitution does not suffice as a “universal constitutional principle,” Parents v. Seattle School Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J.), the voting booth should not be one of them.
Attorneys for challengers to the constitutionality of the 1965 voting rights law’s key provision for federal regulation of state and local election laws urged the Supreme Court on Friday to settle the issue in the next Term, starting October 1. One new case arrived from the town of Kinston in North Carolina and a second case came from Shelby County in Alabama. The D.C. Circuit Court has upheld the provision at issue—Section 5—although the Supreme Court itself three years ago raised significant questions about its validity.

The Kinston case reached the Court this morning. The Shelby County case was filed in early afternoon. Not only has the time come to examine the constitutional questions the Court has raised, the Kinston petition argued, but the Justice Department’s “overzealous manner” of enforcement of Section 5 has put heavy new burdens on state and local governments covered by that provision. The Shelby County petition argued that the renewed law puts states into “federal receivership,” raising “fundamental questions of state sovereignty,” while denying equality only to designated states—predominantly in the South. Shelby County also assailed the Justice Department’s “needlessly aggressive exercise” of its veto powers over state and local election laws.

Although the Kinston case was found to be moot by the D.C. Circuit, the petition challenged that conclusion and argued that the Justices should grant review of both that case and the one from Shelby County, contending that the North Carolina case pinpoints some of the key alterations in the law made by Congress in 2006. When Congress renewed Section 5 for an additional 25 years, it imposed added requirements on state and local governments covered by that section, toughening the standards for Washington approval of election law changes. The challengers in the Kinston litigation argued that those new burdens prove even more convincingly that Section 5 is now unconstitutionally broad as it applies to the state and local governments that remain the only ones targeted by Section 5. Shelby County’s petition contended that the new requirements reinforce its argument that the entire 2006 renewal law is invalid.

Section 5 applies throughout nine states, and to various county or city governments in seven other states. The provision requires state and local governments that had a prior record of racial bias in voting to submit any change in their election laws, in advance of implementing such a change, either to the Justice Department or to a special three-judge District Court in Washington. Only if a change was given “pre-clearance” in Washington could it be put into effect. When the Supreme Court was last faced with a constitutional challenge to Section 5, three years ago, it bypassed the constitutional question by expanding the option of covered governments to “bail out.” In doing so, however, the Court raised a variety of questions that suggested that the coverage formula may be seriously out of date, and thus may no longer be justified for just those covered governments.

The negative comments by the Court then
encouraged challengers to go after Section 5 anew. The Kinston and Shelby County cases were among a series of new challenges, along with lawsuits by states that seek to enforce new photo ID requirements for voters, but have been blocked by Justice Department objections.

In its petition, Shelby County said that Section 5 interferes directly in “the basic operation of state and local government,” which has the practical effect of barring “the implementation of more than 100,000 electoral changes (more than 99 percent of which will be noncontroversial) unless and until they are pre-cleared by federal officials in Washington, D.C. . . . A covered jurisdiction must either go hat in hand to DOJ officialdom to seek approval, or embark on expensive litigation in a remote judicial venue if it wishes to make any change to its election system. It should be no surprise, then, that states such as Florida, Texas, and Alaska have joined Shelby County in challenging the 2006 reauthorization.”

It summed up: “Only this Court, the ultimate guardian and arbiter of the division of powers that lies at the heart of our constitutional system, can settle these important issues.” Although the Court had previously upheld Section 5, the county petition argued, a new assessment is necessary to judge “whether Section 5’s current needs justify its current burdens.” The constitutional issues, it added, “will continue to fester until they are definitively settled.”

The Shelby County case is a challenge to the 2006 extension both for its unchanged definition of the state and local governments that are targeted, as well as to the new requirements for pre-clearance that were imposed on those governments. The Kinston case is a challenge to the extension with a special emphasis on the new pre-clearance standard. “This Court should grant review of both cases,” the North Carolina petition argued, in order “to facilitate a timely and definitive resolution of the exceptionally important question whether the 2006 version of Section 5 is facially valid.”

Here, in paraphrase, is the way the Kinston petition described the before and after versions of the two changes that Congress made in the pre-clearance standard:

**Before:** A state or local government could be barred from making a change only if it had the purpose or the effect of taking away some of the voting power of minorities, taking into account all circumstances. Without that kind of proof, a government entity need not make a change to make minorities better off. **After:** The Justice Department can now object to a change that it believes discriminates against minorities by failing to make them better off. (This might be called the “Bossier II change” because Congress made it in 2006 in response to a Supreme Court decision in 2000, in the case of *Reno v. Bossier Parish*, that Congress found had frustrated the goals of Section 5.)

**Before:** Even if a change would take away some of the voting power of minorities, the change could be made anyway if the state or local government had offset that loss by doing something to improve minorities’ voting power, or if it really had no choice but to make the change. **After:** A state or local government must provide proof that the change would not diminish the ability of minorities “to elect their preferred candidates of choice.” This makes minorities’ election success the decisive factor on whether they have lost
voting power. (That might be called the “Ashcroft change” because Congress in 2006 was reacting to a 2003 Supreme Court decision, Georgia v. Ashcroft, which the lawmakers saw as narrowing the protection for minorities under Section 5.)

In adopting those changes, the Kinston case lawyers argued, Congress essentially wiped out the Supreme Court rulings in Ashcroft and Bossier II. The effect of those alterations of Section 5, that petition asserted, is to put a new and unconstitutional emphasis on using race, with the Justice Department conditioning its pre-clearance upon the use of race as a determining factor. Shelby County, too, argued in its petition that Congress’ challenge to those two rulings by the expanded pre-clearance hurdle “compounded the problem” of relying on an out-of-date coverage formula.

The Kinston case grew out of a 2008 voter-approved change in the way Kinston chose its local government officials, from one based on party identification of candidates to a non-partisan approach. Because Kinston is located in a county covered by Section 5, it needed Washington clearance to implement the change. The Justice Department objected, contending that switching to non-partisan voting would diminish blacks’ voting strength because it would not allow their preferred candidates who had run as Democrats to count on the voters of whites who also were Democrats.

Section 5 was then challenged in federal court by John Nix, who had wanted to run as a non-party candidate for city council, and by a local organization that favored non-partisan elections. The lawsuit challenged the old and unchanged coverage formula, and the new changes in the pre-clearance standard. A federal District judge rejected both challenges. But, during briefing in the D.C. Circuit Court, the Justice Department changed position, and said it was withdrawing its objection to the switch to non-partisan voting. That led the Circuit Court to conclude that the Kinston case was now moot.

In the petition to the Supreme Court, the Kinston challengers argued that the Department’s claim of “new evidence” was only “a transparent pretext for DOJ to try to moot this case to avoid defending on appeal the 2006 amendments”—amendments that had not been challenged in the separate Shelby County case. No other challenger has specifically protested in court against those changes, the petition said. “This Court cannot properly discharge [its] vital responsibility without fully considering the nature and degree of the burden that the substantive pre-clearance standard imposes.” With the issue of mootness in that case, the petition went on, the Supreme Court should still vote to grant multiple cases—the two new ones—in order to address the full range of issues now affecting Section 5. In any event, they contended, the D.C. Circuit was clearly wrong in allowing the Justice Department to come in at the last minute to try to scuttle the broader challenge to the 2006 extension of Section 5.

In its challenge to Section 5 on the merits, the Kinston petition argued that the Supreme Court had sent a clear signal to Congress that it ought to consider modifying the coverage formula for Section 5, based as it is on out-of-date considerations. But, it noted, Congress has done nothing to respond to the Court’s constitutional concerns. “In the three years since,” the petition said, “Congress has refused to take any action, declining to update (or even revisit) the pre-clearance regime to ensure that its ‘disparate geographic coverage is sufficiently related to the problem that it targets,’” quoting from
the Court’s 2009 opinion in the case of *Northwest Austin v. Holder*.

Shelby County’s petition echoed that complaint. “In the more than three years after *Northwest Austin*, Congress held not one hearing, proposed not one bill, and amended not one law in response to the concern” that Section 5 and other coverage formulas in the 1965 law are not justified by the evidence before Congress in 2006. While praising Congress for enacting the original bill in 1965, when it crafted “a coverage formula that was sound in theory and in practice” at that time, the same cannot be said of the 2006 extension, according to the county’s filing.

Besides challenging Section 5 itself, the Shelby County petition also contests the constitutionality of the 1965 law’s Section 4(b), which is the provision that lays out the formula that brought a state or a local government under Section 5’s pre-clearance requirement.

Shelby County, while it is covered by the law, did not file its lawsuit after having a voting change vetoed by the Justice Department or by a federal court. Instead, it filed a lawsuit seeking to strike down the 2006 renewal as written, so that, if this challenge succeeded, the law could not be validly applied in any factual situation.

The Kinston case, *Nix v. Holder*, has now been docketed as 12-81. The Shelby County case has now been docketed as 12-96.
Four years ago, in this small city of gentle hills, tall oaks and nine stoplights, an invisible line was drawn a few miles north of the center of town. It stretched up beyond Highway 22 and looped west across Interstate 65, sweeping in recent housing developments, the brown-brick Concord Baptist Church and a new Wal-Mart. The narrow five-square-mile rectangle enlarged Voting District 2.

It also radically changed the district’s racial mix. The expansion brought in hundreds of white voters, cutting the proportion of black registered voters to one-third from more than two-thirds. The city, which said it had to redraw its district map to account for a population increase and land annexations, contended the new boundaries would not discriminate against blacks.

The U.S. Department of Justice was not persuaded. In a tersely worded, three-page letter emailed to the Calera city attorney on August 25, 2008, it voided the new map.

The letter set off a chain of events resulting in what could be the most important challenge in years to the 1965 Voting Rights Act. A lawsuit later brought by Shelby County, where Calera is situated, seeks to strike down the law’s requirement that Alabama and other states with a history of discrimination obtain federal approval for any changes to districting and ballot rules. They argue that this federal “preclearance” obligation, mandated by Section 5 of the Voting Rights Act, is an outdated, unfair and unconstitutional relic of an Old South that no longer exists.

Now *Shelby County v. Holder* is poised to reach the U.S. Supreme Court. Last month a federal appeals court in Washington rejected the claim and upheld the Section 5 preclearance requirement, saying Congress had enough evidence of recent racial discrimination to justify reauthorizing the law when it did so in 2006. Racial discrimination in voting is “one of the gravest evils that Congress can seek to redress,” U.S. Appeals Court Judge David Tatel declared for the court majority.

But Chief Justice John Roberts of the U.S. Supreme Court appears ready to re-examine the preclearance rule, which covers all or part of 16 states, most of them in the South. In deciding another case three years ago, he wrote: “Things have changed in the South.” He suggested that the provision may no longer be needed.

As events in Calera show, however, whether the law is unnecessary is far from obvious.

**DARK CHAPTERS**

Like many places in the Old South, Calera and surrounding Shelby County witnessed dark chapters of racial violence after the Civil War. Lynching continued into the early 1900s. In Calera, older residents still recall poll taxes and Dairy Queen drinking fountains marked “whites” and “colored.” As recently as 1999 a large Confederate flag hung in the entrance to the Shelby County Historical Society Museum, according to Bobby Joe Seales, society president, who said he removed the flag that year when he took office.
But Calera has changed. Thanks partly to spillover from bedroom communities in Birmingham to the north, its population has more than doubled in the last decade to 11,700. A city once known for its rail hub and lime manufacturing now boasts a growing service and retailing sector. Blacks continue to make up slightly more than a fifth of the population, but neighborhoods are much less clearly defined by race.

Recently, as he drove a visitor around new subdivisions off Highway 31, Calera’s 41-year-old mayor, Jon Graham, pointed out houses owned by blacks alongside others owned by whites. “We see no difference in skin color in Calera,” he said.

The mayor, who has close-cropped brown hair and an open boyish face, said the city was not trying to reduce black voter strength when it redrew District 2 in 2008. To the contrary, he said, thanks to increased integration, it would have been hard to draw a majority-black district without creating wildly gerrymandered lines.

“Integration has been effective,” said Graham, who in addition to his civic duties operates an auto-parts shop. “It’s hard to take this city and dissect it and come up with one true, heavily populated minority district.”

**A VOIDED ELECTION**

In rejecting Calera’s new districts, the Justice Department claimed that the city had not adequately tracked black population nor properly apprised the department of some 177 land annexations. Its letter to the city stated that basic information from the city about its voting-age population and racial makeup was “unreliable.”

Lawyers for the city disagreed and thought they could persuade federal authorities to accept the new map. Plus, they had a city council election scheduled for the next day, which they believed could not be postponed under state law. So on August 26, 2008, Calera went to the polls.

The outcome only proved the problem. Ernest Montgomery, the District 2 representative and the only African American on the five-member city council, was voted out.

The Justice Department swiftly blocked certification of the election results, and Montgomery kept his seat pending a new vote.

In an interview at the New Mount Moriah Missionary Baptist Church that he has attended since childhood, Montgomery, a 55-year-old machinist with a reserved manner, said he believed some whites voted for his opponent simply based on the color of his skin. He did not feel the redrawn district had been “intentionally stacked.” But, he added, “I know others in the community thought so.”

His pastor, Harry Jones, 48, is one of them. “The only African American that we had in there got the short end of the stick,” he said.

After a year of negotiation, Calera decided to get rid of its five-district map entirely and created six “at large” council seats that would be filled by members elected by the city as a whole. In a new election in 2009, Montgomery won one of them.

**TROLLING FOR A TEST CASE**

Things might have ended there. But in 2008 a Washington, D.C.-based conservative advocate named Edward Blum was trolling the Justice Department website for potential
voting-rights test cases. The Calera letter, which was posted on the site, caught his eye.

Blum picked up the phone and called Frank "Butch" Ellis, the lawyer for Calera and for Shelby County. Ellis, who had been working as a municipal lawyer in central Alabama for 40 years, was as frustrated as Blum was with the federal preclearance requirement.

Blum told Ellis he already was busy with a Section 5 challenge involving an Austin, Texas, water district that was working its way up through the courts but said he was always on the lookout for other opportunities. The men agreed to stay in touch. "We felt that the Justice Department was stuck in a 1960s time warp," Blum said.

A former investment banker, Blum had been challenging race-based policies since 1992, when he lost an election for Congress in a racially drawn Houston district. His case against Texas officials over the line-drawing went all the way to the U.S. Supreme Court, and in 1996 the court ruled the district unconstitutional. Since then Blum, thin, angular, with a formal presence, has sought out government programs that he believes wrongly use racial criteria. Now 60 and a visiting fellow at the American Enterprise Institute, Blum raises money through his foundation, the Project on Fair Representation, to hire lawyers to challenge racial redistricting, affirmative action and other such policies.

In the Austin water district case, Blum thought he had found the perfect plaintiff for an attack on Section 5. But when the U.S. Supreme Court decided the case in 2009, it punted on the big constitutional issue—whether Congress had enough evidence of discrimination to justify reauthorizing the law. It said the water district was exempt from Section 5 based on its clean voting-rights record.

Blum was in the courtroom when the decision was announced, and his heart sank. "I was waiting for a few key words, and I didn't get them," he said. Yet Roberts's opinion for the court offered him some hope when it suggested the South had changed.

BACK TO SHELBY COUNTY

In frustration, Blum reached out again to Butch Ellis in Shelby County. The two men commiserated over their disappointment. Blum said he thought Shelby County could bring a stronger case against Section 5 than the Austin water district. After all, Calera's conflict with the Justice Department meant the county did not have a clean voting-rights record so its argument could not get tossed out on the same technicality.

Ellis, a 72-year-old county lawyer who grew up on a nearby dairy farm, said he supports the overall principles of the Voting Rights Act and its provision allowing people to sue for intentional discrimination. But the Section 5 preclearance obligation, he said, unnecessarily covers the smallest electoral change, even moving a polling place across the street.

"It had its time. Its time has come. And it's gone," he said. Ellis said racial tensions had faded in Shelby County, one of the more prosperous and highly educated in Alabama. He boasted that any visitor to the county would observe black and white children playing together.

Realizing that a big constitutional challenge would need major legal firepower, Blum connected Ellis to the prominent Washington, D.C., lawyer Bert Rein, whose
firm, Wiley Rein, has handled cases for Blum since the mid-1990s. Rein is representing the plaintiff in another high-profile lawsuit that Blum coordinated, a challenge to affirmative action at the University of Texas, to be heard by the Supreme Court this autumn.

SHELBY COUNTY TAKES AIM

In April 2010, Shelby County filed a lawsuit against the Justice Department at the U.S. District Court in Washington, taking direct aim at Section 5. The suit argued that Congress when reauthorizing the law in 2006 did not have enough evidence to justify its continuation or the places covered.

When NAACP Legal Defense Fund lawyer Ryan Haygood in New York saw the lawsuit he immediately realized its importance. But he also thought Blum had picked a problematic plaintiff. The Calera, Shelby County, election in which the only black candidate lost, he said, proved how the law protects racial minorities. “They absolutely chose the wrong venue for the proposition that Section 5 has outlived its usefulness,” Haygood said, adding flatly, “See Ernest Montgomery.”

Haygood flew out to Calera and met with council member Montgomery, pastor Jones, and other African Americans at the New Mount Moriah church. They agreed to intervene in the case on the side of the Justice Department, arguing that Section 5 is still vital to minority voting rights. The NAACP defense fund would represent them.

Last year the district court ruled against Shelby County. Judge John Bates, a George W. Bush appointee, said Congress had extensive evidence of recent voting abuses in Alabama, such as “reports of voting officials closing doors on African-American voters.” He noted that Calera’s redistricting plan would have eliminated the sole majority-black district. Last month, the U.S. Court of Appeals for the D.C. Circuit upheld the district court ruling.

Rein, representing Shelby County, said he planned to file an appeal this summer.

Montgomery, who attended segregated schools until junior high, said his elderly parents were nervous about his becoming part of the national case. They remembered how, in their day, blacks who took a stand were threatened, harassed or worse. “I know we’ve gone a long way,” said Montgomery, “but we have a long way to go.”
An appeals court upheld a federal voting-rights law that requires some local governments to seek Washington’s approval before changing election procedures, rejecting a challenge by an Alabama county. In a 2-1 decision, the U.S. Court of Appeals for the District of Columbia Circuit ruled Friday that Section 5 of the Voting Rights Act of 1965 remains constitutional. The judges said Congress acted properly in 2006 to reauthorize the law in order to protect minority voters.

Section 5 requires parts or all of 16 states with a history of racial bias in elections to seek federal approval, or preclearance, before altering voting procedures.

The decision came in a challenge by Shelby County, Ala., and was viewed as an important test of Section 5, which a 2009 Supreme Court ruling suggested may no longer be justified given changes in voting patterns. The appellate court cited that decision, which upheld the Voting Rights Act but also opened the door to challenges to Section 5.

The appellate panel said it weighed concerns about whether Section 5 remains “congruent and proportional” to the problem it seeks to prevent. It determined that “Congress drew reasonable conclusions from the extensive evidence it gathered” and acted in accordance with the Constitution in “ensuring that the right to vote...—surely among the most important guarantees of political liberty in the Constitution—is not abridged on account of race.” Congress deserved deference in making the judgment, the court said.

The county indicated it plans to appeal to the Supreme Court.

Shelby County, which includes suburbs of Birmingham, argued Section 5 places an undue burden on local governments. The provision could only be justified if there were current evidence the jurisdiction was carrying out the “unremitting and ingenious defiance” that existed in 1965 when the original law was passed, the county said.

The majority opinion by Judge David Tatel, a Clinton appointee, was joined by Judge Thomas Griffith, a George W. Bush appointee.

Dissenting Judge Stephen Williams, a Reagan appointee, suggested Section 5 could be used to encourage “racial gerrymandering in favor of the minority.” He said “a congressional mandate to assure the electoral impact of any minority’s majority seems to me more of a distortion than an enforcement of the 15th Amendment’s ban on abridging” the right to vote because of race.

County attorney Frank “Butch” Ellis said Shelby County supported the Voting Rights Act and wanted only to be released from the burden of preclearance in recognition of how much the county has changed in nearly 50 years.

“’I’m pleased with the strong dissent,” Mr. Butch’ Ellis said.
Ellis said in an interview, adding that the county believes now is the time to seek a Supreme Court decision on Section 5’s constitutionality.

A U.S. Justice Department statement said it welcomed the ruling and that Section 5 “continues to serve as a critical tool in both blocking and deterring discriminatory voting practices.”
"Do We Still Need the Voting Rights Act?"

The New Yorker
May 22, 2012
Jeffrey Toobin

The chances to remake American law—and maybe American society—are stacking up for the Supreme Court. Next month, the Justices will render their verdicts on the Affordable Care Act and on the Arizona immigration law. The fate of affirmative action in university admissions will likely be determined by the Roberts Court in its next term, and now another blockbuster appears headed for the Justices as well. The future of the Voting Rights Act—probably the Great Society’s greatest landmark—will almost certainly be in the Court’s hands next year.

The heart of the Voting Rights Act is its famous Section 5, which essentially put the South on perpetual probation. In rough terms, the law requires the states of the old Confederacy (as well as a few smaller areas outside the South) to submit any changes in their electoral law to the Justice Department for what’s known as “pre-clearance”—to make sure that the changes don’t infringe on minority voting rights. Before Section 5, states and municipalities could simply change their rules—about everything from the location of polling places to the borders of district lines—and dare civil-rights activists to sue to stop them. It was a maddening, and very high-stakes, game of whack-a-mole. As a result of Section 5, though, the Justice Department monitored these moves and made sure there would be no backsliding on voting rights.

In 1965, Congress authorized Section 5 for five years. In subsequent years, Congress has extended the provision several times, and in 2006, it was reauthorized for another twenty-five years. In 2009, the Supreme Court ducked a challenge to the law on procedural grounds, but now the issue cannot be evaded any longer. Last week, a three-judge panel of the United States Court of Appeals for the D.C. Circuit voted two-to-one to uphold the Voting Rights Act and reject a challenge to Section 5 by Shelby County, in Alabama. Next stop for the case: the Supreme Court.

The questions at the heart of the case are both simple and profound. How much has American society, and especially the South, changed with regard to race relations since 1965? Is Section 5 still a necessary check on the white majority—or is the law a patronizing relic of a vanished age? Judge David Tatel, writing for the majority, said Congress still had the right to insist that the Justice Department continue to monitor voting rights in the South.

Tatel’s opinion acknowledged the obvious: that a great deal had changed for the better in the South, and elsewhere, since 1965. He said further that the evidence of continuing discrimination was “by no means unambiguous.” Still, while the days of Bull Connor are long gone, Tatel said that Congress still had reason to keep Section 5 in place when it held the reauthorization vote in 2006. “Vote dilution” remained a big problem for black citizens; that is, white legislators were still “packing” minorities into a single district, spreading minority voters thinly among several districts, annexing predominantly white suburbs, and so on.” Certain facts, too, were unavoidable, notably that “not one African American had yet been elected to statewide office in
Mississippi, Louisiana, or South Carolina.” In short, Tatel concluded that “serious and widespread intentional discrimination persisted in covered jurisdictions and that case-by-case enforcement alone . . . would leave minority citizens with an inadequate remedy.” Without Section 5, Tatel concluded, the rights of minority voters would be in jeopardy.

The dissent of Judge Stephen Williams came down to a simple idea: times have changed. Even the Justice Department, he pointed out, scarcely ever objects to the changes submitted for preclearance. (There were only five objections for every ten thousand submissions between 1998 and 2002.) Williams acknowledges that racial bias still exists, but he noted, with some justification, that it’s now as evident in uncovered jurisdictions (i.e., the rest of the country) as in the South. But that melancholy observation led Williams to conclude that the Voting Rights Act should not apply anywhere anymore.

It’s a hard case. “Things have changed in the South,” Chief Justice John G. Roberts, Jr., wrote in the 2009 opinion that put off the Voting Rights Act’s day of reckoning. “Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” All true, to be sure. One might also add that the President of the United States, who won office with the Electoral College votes of Virginia and North Carolina, is African-American. In this way, the United States of 2012 is an almost unrecognizable version of the country in 1965.

But as those changes illustrate, nothing about the nation is static, and it’s not easy to say which way the country is moving on racial matters. By overwhelming majorities, both Houses of Congress thought it was worthwhile to maintain the federal monitoring that has made such changes took place. It’s a more complicated country these days, but it’s not a fully healed one, either. So far, the Roberts Court has been eager to portray the nation as beyond the need for racial remedies—especially with regard to public schools. In light of that record, the odds are that the Court will reach the same kind of conclusion with regard to the Voting Rights Act and declare Section 5 unconstitutional. At that point, the white-controlled legislatures of the former Confederacy will be largely on their own in protecting minority voting rights. For better or worse, our problems are solved when the Court says they are—and these Justices appear determined indeed to close the door to an era that may not be completely over.
United States v. Danielczyk

No. 11-4667


William Danielczyk and Eugene Biagi were indicted under the Federal Election Campaign Act of 1971 (FECA), which bans direct corporate contributions to political campaigns. The district court granted Danielczyk and Biagi’s motion to dismiss count four, paragraph 10(b) of their indictment that asserted they conspired and facilitated direct contributions to Hillary Clinton’s 2008 presidential campaign. The district court held that in light of Citizens United v. FEC, FECA section 441b(a) was unconstitutional as applied to the defendants and dismissed count four, paragraph 10(b). On appeal, the Court of Appeals for the Fourth Circuit reversed the district court’s decision. The Fourth Circuit held that Citizens United does not render FECA’s ban on direct corporate contributions unconstitutional as applied to the defendants.

Question Presented: Whether the holding in Citizens United v. FEC also held unconstitutional the prohibition of direct corporate contributions to political campaigns under the Federal Election Campaign Act of 1971.

UNITED STATES OF AMERICA, Plaintiff-Appellant,
v.
WILLIAM P. DANIELCZYK, JR., a/k/a Bill Danielczyk; Eugene R. Biagi, a/k/a Gene Biagi, Defendants-Appellees

United States Court of Appeals for the Fourth Circuit

Decided June 28, 2012

[GREGORY, Circuit Judge:

The Government appeals the district court’s grant of William P. Danielczyk, Jr. and Eugene R. Biagi’s (the “Appellees”) motion to dismiss count four and paragraph 10(b) of the indictment, alleging that they conspired to and did facilitate direct contributions to Hillary Clinton’s 2008 presidential campaign in violation of 2 U.S.C. § 441b(a) of the Federal Election Campaign Act of 1971 (“FECA”), and 18 U.S.C. § 2. The district court reasoned that in light of Citizens United v. Federal Election Commission, ___ U.S. ___, 130 S.Ct. 876 (2010), § 441b(a) is unconstitutional as applied to the Appellees. We disagree for the following reasons and thus reverse the district court’s grant of the motion to dismiss count four and paragraph 10(b) of the indictment.

I.

Danielczyk and Biagi were officers of Galen Capital Group, LLC, and Galen Capital Corporation (together, “Galen”). At the time]
of the charged conduct, Danielczyk was Galen’s chairman, while Biagi was Galen’s secretary. In March of 2007, Danielczyk co-hosted a fundraiser for Clinton’s campaign and had individuals, including Biagi, give donations to the campaign with the promise that they would be reimbursed by Galen. Danielczyk and Biagi concealed Galen’s reimbursements by writing “consulting fees” on the reimbursement checks’ memorandum lines, by issuing the checks for amounts larger than the actual contributions, and by creating false back-dated letters to the individual donors that characterized the reimbursement payments as “consulting fees.” In total, Danielczyk and Biagi reimbursed the donors for $156,400 in contributions made to Clinton’s 2008 campaign, and the campaign in turn reported the contributions to the Federal Election Commission.

Danielczyk and Biagi were indicted on seven counts for this contribution scheme. Count four and paragraph 10(b) respectively charged the Appellees with knowingly and willfully causing contributions of corporate money to a candidate for federal office, aggregating $25,000 or more, in violation of § 441b(a) and 2 U.S.C. § 437g(d)(1)(A)(i), and conspiring to do so. On April 6, 2011, Danielczyk and Biagi moved to dismiss count four, contending that § 441b(a) is unconstitutional as applied to them in light of *Citizens United.*

Prior to the Supreme Court’s decision in *Citizens United,* § 441b(a) made it unlawful for corporations to make both direct contributions to political candidates and independent expenditures on speech that expressly advocates for or against the election or defeat of a candidate. However, the FECA permitted individuals to make independent expenditures and direct contributions within limits. *See, e.g., 2 U.S.C. § 441a(a).* The act also allowed corporations wanting to make either type of expenditure to form political action committees (“PACs”), which were entities separate from the corporations subject to regulatory requirements. *See 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. §§ 114.1(a)(2)(iii), (b), and 114.5(d). *Citizens United* struck down § 441b(a)’s prohibition against corporate independent expenditures, reasoning in part that the ban was not supported by the interest in preventing quid pro quo corruption, 130 S.Ct. at 908–99, and further that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity,” *id.* at 903. *Citizens United* left untouched § 441b(a)’s ban on direct corporate contributions.

Relying on *Citizens United,* the district court held that § 441b(a)’s ban on direct corporate contributions as applied to Galen is unconstitutional because it impermissibly treats corporations and individuals unequally for purposes of political speech. The district court rejected the Government’s contention that the differential treatment of corporations in the context of direct contributions fulfills legitimate governmental interests, such as the prevention of quid pro quo corruption. It concluded that the interest in preventing quid pro quo corruption could be fulfilled by requiring corporations to comply with the act’s contribution limits for individual donors.

Five days after it granted the motion to dismiss, the district court sua sponte ordered the parties to file briefs on whether, in light of *Agostini v. Felton,* 521 U.S. 203 (1997), and *Federal Election Commission v. Beaumont,* 539 U.S. 146 (2003), the court should reconsider its decision. In *Beaumont,* the Supreme Court rejected an as-applied challenge to § 441b(a)’s ban on direct
corporate contributions. 539 U.S. at 163. The Government argued that Beaumont directly controlled the case and must be applied even if Citizens United may have eroded Beaumont’s reasoning. This is because the Agostini principle requires lower courts to apply Supreme Court precedent that directly controls the case before it despite subsequent Supreme Court case law that may have affected the precedent by implication. 521 U.S. at 237.

After considering the briefs, the district court denied reconsideration of its dismissal. It reasoned that Beaumont did not directly control the case because it addressed an as-applied challenge of § 441b(a)’s ban on direct corporate contributions against a nonprofit corporation and not, as in this case, a for-profit corporation like Galen. The district court further affirmed the rationale in its earlier ruling that § 441b(a) violated Citizens United by treating corporations and individuals unequally. Accordingly, it concluded that count four and paragraph 10(b) remained dismissed. The Government timely appealed.

II.

For the following reasons, we hold that § 441b(a) is not unconstitutional as applied to the Appellees. Beaumont clearly supports the constitutionality of § 441b(a) and Citizens United, a case that addresses corporate independent expenditures, does not undermine Beaumont’s reasoning on this point. The district court erred when it granted the Appellees’ motion to dismiss.

A.

The Agostini principle provides that in circumstances when Supreme Court precedent has “direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the line of cases which directly controls, leaving to [the Supreme] Court the prerogative of overturning its own decisions.” Agostini v. Felton, 521 U.S. 203, 237 (1997)). Thus, lower courts should not conclude that the Supreme Court’s “more recent cases have, by implication, overruled [its] earlier precedent.” Id.

In Beaumont, the Supreme Court addressed a First Amendment challenge to § 441b(a) as it applied to nonprofit advocacy corporations. Federal Election Commission v. Beaumont, 539 U.S. 146, 156 (2003). In that case, North Carolina Right to Life, Inc. (“NCRL”), a nonprofit corporation organized to provide counseling to pregnant women and to promote alternatives to abortion, brought an as-applied challenge to § 441b(a)’s ban on direct corporate contributions and independent expenditures. Id. at 150. A panel of this Circuit found the ban on both independent expenditures and direct contributions unconstitutional as applied to NCRL. Beaumont v. FEC, 278 F.3d 261, 279 (4th Cir.2002), rev’d by Beaumont, 539 U.S. 146.

With respect to direct contributions, the panel reasoned that the ban was unjustified in light of Federal Election Commission v. Massachusetts Citizens for Life, Inc. (“MCFL”), 479 U.S. 238, 259 (1986), a decision in which the Supreme Court held that § 441b(a)’s ban on independent expenditures was unconstitutional as applied to a nonprofit corporation that, in many respects, was similar to NCRL. Id. at 275. As a result, the panel extended MCFL’s holding that solely addressed § 441b(a)’s ban on independent expenditures to the context of the provision’s ban on direct contributions, concluding that “[i]n neither case is there the threat of quid pro quo, monetary influence, or distortion corruption
that the prohibitions seek to prevent.” *Id.* After this Circuit denied a rehearing en banc, the Federal Election Commission petitioned the Supreme Court for certiorari only on the issue of whether the ban on direct contributions was constitutional. *Beaumont*, 539 U.S. at 151.

In a 7–2 decision, the Supreme Court reversed this Circuit’s opinion. 539 U.S. at 163. In doing so, the Supreme Court thoroughly explained its longstanding jurisprudence upholding Congress’s “original, core prohibition on direct corporate contributions” and warned that this jurisprudence “would discourage any broadside attack on corporate campaign finance regulation of corporate contributions.” *Id.* at 153, 156. It remarked that it had previously held that § 441b(a) had “broad applicability” to both corporations and labor unions regardless of their financial disposition and rejected NCRL’s various arguments to limit this applicability, including that the ban did not adequately consider the variations between corporations with respect to affluence and diversity of corporate form. *Id.* at 157. It then recognized four government interests that supported the ban on direct corporate contributions: anti-corruption, anti-distortion, dissenting-shareholder, and anti-circumvention (preventing the evasion of valid individual contribution limits). *Id.* at 153–55. The Supreme Court rejected NCRL’s position that these government interests are implicated only by for-profit corporations, reasoning that non-profits, just like for-profits, benefit from state-created advantages, can amass political war chests, and are susceptible to corruption and misuse as conduits for circumventing individual contribution limits. *Id.* at 160. Thus, in addressing § 441b(a)’s applicability to a nonprofit advocacy corporation, the Court based its conclusion on a century of law that has supported bans on direct contributions against for-profit corporations. *Id.* at 157. Overall, *Beaumont* makes clear that § 441b(a)’s ban on direct corporate contributions is constitutional as applied to all corporations.

B.

The Appellees contend that *Beaumont* does not govern our inquiry here because its holding was limited to nonprofit corporations. For the reasons expressed above, we do not read *Beaumont* so narrowly. *Beaumont* stands for the proposition that a nonprofit corporation does not differ from a for-profit corporation for purposes of § 441b(a) because all corporations implicate the asserted government interests, and § 441b(a) is closely drawn to further those interests. However, even if we did agree with the Appellees, we cannot ignore *Beaumont*’s extensive discussion of Congress’s legitimate interests in regulating direct contributions made by all corporations. As the Supreme Court has stated, “When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.” *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). Nor should we forget that NCRL recognized the uphill battle it faced in challenging the general ban on direct contributions and thus did not request complete upheaval of the law, but only that non-profits, like it, be exempt. *Beaumont*, 539 U.S. at 156. Thus, at the very least, *Beaumont*’s discussion of the ban as it applies to all corporations informs our inquiry here.

C.

The Appellees would have this Court hold that *Citizens United* repudiated *Beaumont*’s
entire reasoning; this we cannot do. *Citizens United* held that in the context of independent expenditures, the Government could not suppress political speech on the basis of the speaker’s corporate identity. In reaching its decision, the Court did not discuss *Beaumont* and explicitly declined to address the constitutionality of the ban on direct contributions. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 909 (2010). Nor did the opinion indicate that its “corporations-are-equal-to-people” logic necessarily applies in the context of direct contributions. *Id.* at 903. Leaping to this conclusion ignores the well-established principle that independent expenditures and direct contributions are subject to different standards of scrutiny and supported by different government interests. *See Preston v. Leake*, 660 F.3d 726, 735 (4th Cir.2011) (concluding that *Citizens United* did not overrule “*Buckley* v. *Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)); *Nixon v. [Shrink Mo. Gov’t PAC*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000)], *Beaumont*, or other cases applying ‘closely drawn’ scrutiny to contribution restrictions”).

Independent expenditure limitations are “substantial rather than merely theoretical restraints on the quantity and diversity of political speech.” *Buckley*, 424 U.S. at 19. “By contrast . . . a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication,” *id.* at 20–21, and thus “lie[s] closer to the edges than to the core of political expression,” *Beaumont*, 539 U.S. at 161. The “markedly greater burden” on basic freedoms imposed by independent expenditure limitations requires that these limitations survive “exact scrutiny applicable to limitations on core First Amendment rights of political expression.” *Buckley*, 424 U.S. at 44.

Direct contribution limitations, on the other hand, require the “lesser demand of being closely drawn to match a sufficiently important interest.” *Beaumont*, 539 U.S. at 162 (internal quotation marks omitted). The reason for this difference in scrutiny is clear: independent expenditures, by definition, are direct means by which political speech enters into the marketplace, *see Citizens United*, 130 S.Ct. at 898; direct contributions, conversely, do not necessarily fund political speech but must be transformed into speech by an individual other than the contributor, *see Beaumont*, 539 U.S at 161–62. To minimize the constitutional differences between regulations that govern independent expenditures and regulations that ban direct contributions by applying *Citizens United* to this case would repeat the same error this Circuit committed in *Beaumont*. *See Beaumont*, 539 U.S. at 151 (rejecting this Circuit’s conclusion that “the rationale utilized by the Court in [*MCFL*] to declare prohibitions on independent expenditures unconstitutional as applied to MCFL-type corporations is equally applicable in the context of direct contributions”).

As recently recognized by the Second and Ninth Circuits, *Citizens United* preserved two of the four important government interests recognized in *Beaumont*: anti-corruption and anti-circumvention. *Ognibene v. Parkes*, 671 F.3d 174, 195 n. 21 (2d Cir.2011) (declining to hold that *Beaumont* was overruled by *Citizens United*, and determining that *Citizens United* preserved the anti-corruption and anti-circumvention interests); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir.2011) (holding that *Citizens United* did not disapprove of the anti-circumvention
interest); Green Party of Conn. v. Garfield, 616 F.3d 189, 199 (2d Cir. 2010) ("Beaumont . . . remain[s] good law. Indeed, in the recent Citizens United case, the Court . . . explicitly declined to reconsider its precedent involving campaign contributions by corporations to candidates for elected office.").

Prevention of actual and perceived corruption and the threat of circumvention are firmly established government interests that support regulations on campaign financing. See Beaumont, 539 U.S. at 154; Nixon, 528 U.S. at 390 ("Even without the authority of Buckley, there would be no serious question about the legitimacy of the interest[ ] [of preventing corruption and the appearance of it] [ ] , which, after all, underlie[s] bribery and anti-gratuity statutes."); Buckley, 424 U.S. at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements [through contributions] is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse."). While clarifying that the anti-corruption interest is limited to actual quid pro quo corruption or the appearance of it, as opposed to the appearance of influence or access, Citizens United did not deny that anti-corruption was a sufficiently important governmental interest, which is all that is required for closely drawn scrutiny. 130 S.Ct. at 909–10. Instead, it held that the interest did not justify a ban on corporate independent expenditures under strict-scrutiny review. Id. at 911.

With respect to the anti-circumvention interest, the Beaumont court explained that without limitations on corporate contributions, individuals “could exceed the bounds imposed on their own contributions by diverting money through the corporation.” 539 U.S. at 155. Thus the interest in preventing such evasion is grounded in the “experience” of “candidates, donors, and parties [that] test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced.” Id. (internal quotation marks and citations omitted). Citizens United did not undercut Beaumont’s endorsement of this interest. Indeed, the majority opinion did not even discuss this interest when it struck down the independent expenditure ban, and thus prior Supreme Court precedent affirming this interest remains the law this Court must follow. See e.g., FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 456 (2001); Cal. Med. Ass’n v. FEC, 453 U.S. 182 (1981).

III.

For the foregoing reasons, we hold that the district court erred in granting the Appellees’ motion to dismiss count four and paragraph 10(b) of the indictment. The district court’s grant of the motion to dismiss with respect to count four and paragraph 10(b) is reversed.

REVERSED
A federal appeals court ruled Thursday that a judge was wrong when he declared a century-old ban on corporate campaign contributions in federal elections unconstitutional.

U.S. District Judge James Cacheris ruled last year that the ban violates corporations’ free-speech rights. In his first-of-its kind ruling, Cacheris said it was not logical for an individual to be able to donate up to $2,500 while a corporation “cannot donate a cent.” Cacheris based his decision on the U.S. Supreme Court’s landmark 2010 Citizens United decision, which struck down a prohibition against corporate spending on campaign activities by independent groups, such as ads by third parties to favor one side. However, the Citizens United ruling left untouched the ban on direct contributions to candidates, the appeals court noted.

The lower court viewed independent expenditures and direct contributions the same, saying both are political speech, but the appeals court said they must be regulated differently.

“The reason for this difference in scrutiny is clear: independent expenditures, by definition, are direct means by which political speech enters into the marketplace,” Judge Roger Gregory wrote. “Direct contributions, conversely, do not necessarily fund political speech but must be transformed into speech by an individual other than the contributor.”

The Justice Department cited the government’s interest in preventing corruption in defending the contribution limit, and the appeals court agreed.

“Prevention of actual and perceived corruption and the threat of circumvention are firmly established government interests that support regulations on campaign financing,” Gregory wrote.

The issue arose when William P. Danielczyk Jr. and Eugene R. Biagi, who both live in the Washington suburb of Oakton, Va., were charged with illegally funneling contributions to Hillary Clinton’s Senate and presidential campaigns. The defendants, officers with a corporation called Galen Capital Group, allegedly persuaded dozens of individuals to contribute to Clinton’s campaigns and reimbursed them with company money. According to prosecutors, they tried to cover their tracks by writing “consulting fees” on the memo line of reimbursement checks and by issuing the checks for amounts larger than the contributions.

Cacheris dismissed one count of the indictment related to contributions to Clinton’s 2008 presidential bid, but the ruling by the appeals court reinstates it.

Neither Jeffrey A. Lamken, attorney for Danielczyk, nor Lee E. Goodman, attorney for Biagi, immediately returned phone messages.

The Justice Department said it was pleased with the ruling.

Judges William Traxler and Judge Albert Diaz joined in the panel’s decision.
The indictment of a top Northern Virginia fundraiser last week is the latest in a series of criminal cases that have ensnared campaign donors to Hillary Rodham Clinton, who relied heavily on wealthy bundlers in her failed 2008 bid for the presidency.

Federal grand jury indictments handed up in Alexandria allege that Galen Capital Group Chairman William P. Danielczyk Jr. and his treasurer illegally reimbursed nearly $190,000 in donations to Clinton’s 2006 and 2008 campaigns, sometimes with corporate funds.

Under federal law, major fundraisers known as bundlers are free to help solicit and package what are known as conduit contributions for favored candidates, but they are not allowed to reimburse other donors as a way to evade campaign finance limits.

Employees of Galen Capital, including Danielczyk and the other defendant in the case, company treasurer Eugene R. Biagi, gave more than $50,000 to Clinton’s campaigns for the Senate in 2006 and for the White House in 2008, according to the Center for Responsive Politics, which tracks money in politics. Danielczyk helped raise about $100,000 for the Clinton presidential campaign, records show.

A number of major donors to Clinton, now secretary of state, have faced criminal allegations in connection with fundraising scandals since she dropped out of the race for the White House in 2008. Federal prosecutors have mounted four major cases involving six defendants, who together helped raise more than $1.1 million for Clinton’s presidential and senatorial campaigns, records show.

None of the cases has revealed any wrongdoing by Clinton or her top advisers, and most of the money has been returned or donated to charity. But Craig Holman, government affairs lobbyist for the watchdog group Public Citizen, said Clinton effectively put her campaign at risk by relying so heavily on wealthy bundlers to help her raise money.

“When you turn to that traditional wealthy donor base, you’re going to run into a lot of problems because they encompass the type of people who know that big money buys influence,” Holman said.

The State Department referred questions to people who worked on Clinton campaign, who did not respond to requests for comment Friday.

Perhaps the most well-known defendant linked with Clinton was Norman Hsu, a former top Democratic fundraiser who was convicted in 2009 of campaign-finance fraud for making nearly $100,000 in illegal donations through “straw donors.” Clinton returned about $850,000 to more than 200 donors linked to Hsu, who also pleaded guilty to separate fraud charges for bilking investors in a Ponzi investment scheme.

In another case involving Clinton’s campaign in January, a former business
manager for crime novelist Patricia Cornwell pleaded guilty to lying about the source of nearly $50,000 in donations to Clinton. Prosecutors said Evan Snapper used funds from Cornwell to reimburse donors without the novelist’s knowledge.

Another major Clinton fundraiser, New York City investment banker Hassan Nemazee, was sentenced to 12 years in prison last year for defrauding banks of nearly $300 million. Some of the funds were given to Democratic politicians, including Clinton, Barack Obama and Joseph R. Biden Jr., court records showed.

Nemazee was national finance chairman for Clinton’s 2008 campaign and served as New York finance chairman for the failed 2004 presidential bid by Sen. John F. Kerry (D-Mass.).

Clinton, Obama and other politicians either returned most of Nemazee’s contributions or donated them to charity after his arrest, court records show. Hundreds of thousands of dollars in other donations to charitable foundations—including one headed by Clinton’s husband, former president Bill Clinton—were forfeited to the government.

As the Nemazee case suggests, many presidential candidates have had to grapple with fundraising scandals over the years, heightening calls from watchdog groups for tighter campaign finance regulations. During the George W. Bush administration, at least half a dozen top Bush bundlers were caught up in allegations of illegal fundraising, influence peddling or other financial crimes, including superlobbyist Jack Abramoff.

Holman noted that Obama so far has avoided any major fundraising controversies in connection with his 2008 campaign, which broke new ground by relying more heavily on small donations than previous presidential runs.

But a major supporter of Obama’s 2004 Senate campaign, Chicago businessman Tony Rezko, was convicted of 16 felony corruption charges in 2008 for shaking down companies seeking state contracts in Illinois. Republicans labeled Rezko as “Obama’s longtime friend and money man” because of his past ties to the president, although Obama had no connection to the criminal case.

Obama gave past donations linked to Rezko to charity. During the 2008 campaign, Obama also said he regretted a “boneheaded” decision in which he bought a slice of property from Rezko to expand the size of his Chicago house lot.

In the most recent case, Danielczyk and Biagi are charged with conspiracy, illegal reimbursement of contributions and obstruction. A personal assistant to Danielczyk has agreed to cooperate with prosecutors in exchange for pleading guilty to a lesser charge.
“Corporate Contribution Ban Upheld”

Brennan Center for Justice Blog
July 2, 2012
Shanna Reulbach

Amid the excitement over last week’s health care decision, the Fourth Circuit’s major campaign finance decision in a case called *United States v. Danielczyk* received relatively little attention. However, *Danielczyk* is a crucially important case, affirming the constitutionality of a longstanding federal law banning corporations from giving campaign donations directly to candidates. The opinion overturned a flawed lower court decision—and limited the reach of *Citizens United*.

The federal ban on corporate contributions, now located in the Bipartisan Campaign Finance Reform Act, has been in force since Congress passed the Tillman Act in 1907. For more than a century, it has been one of the core protections against corruption in our democracy.

The *Danielczyk* case began when two businessmen gave corporate money directly to Hillary Clinton’s 2008 presidential campaign. During their trial, they argued that after *Citizens United*, the ban on corporate campaign contributions is unconstitutional. In effect, they urged the court to find that *Citizens United* invalidated the Supreme Court’s 2003 decision in *F.E.C. v. Beaumont*, which recently decided that the very same ban was constitutional.

While the lower court wrongly accepted this argument, the Fourth Circuit found that *Citizen United’s* reasoning is limited to independent expenditures—the *Citizens United* Court expressly declined to disturb any laws governing direct contributions. Circuit Judge Gregory, writing for a three-judge panel, refuted the proposition that the “corporations-are-equal-to-people’ logic necessarily applies in the context of direct contributions.” In other words, nothing about *Citizens United* weakens Beaumont’s holding that the government can ban corporate campaign contributions in order to prevent corruption and stop violations of other campaign finance laws.

In reaching this conclusion, the Fourth Circuit emphasized the different treatment given to direct contributions versus independent expenditures—a distinction that dates back to the Supreme Court’s seminal campaign finance case, *Buckley v. Valeo*. In that 1976 case, the Court found that independent expenditures implicate greater First Amendment rights than campaign contributions. This is because, as reaffirmed in *Beaumont*, contributions “do not necessarily fund political speech but must be transformed into speech by an individual other than the contributor.” This crucial difference is at the heart of the Fourth Circuit’s correct decision in *Danielczyk*, limiting the reasoning of *Citizens United* to independent expenditures.

The *Danielczyk* court also resolved a potential circuit split—another important aspect of the decision. While the Second Circuit, in *Ognibene v. Parks*, and the Ninth Circuit, in *Thalheimer v. City of San Diego*, recently upheld the federal corporate contribution ban, the Virginia lower court decision threatened to create the appearance of unsettled law. According to some experts, *Danielczyk* will “inevitably” be appealed to the Supreme Court. But thankfully, without
a circuit split, the high Court will not face the same pressures to grant review.

And so, by affirming the corporate contribution ban as a valid and meaningful protection against corruption, and by limiting the reach of *Citizens United*, the Fourth Circuit took an important step towards protecting U.S. democracy from some of the most damaging effects of corporate money in politics.
A divided U.S. Supreme Court threw out Montana’s ban on corporate campaign spending in a reaffirmation of the 2010 decision that unleashed super-PACs and left federal elections awash in money from big spenders.

Deciding they didn’t need to hear arguments, the justices yesterday summarily reversed a Montana Supreme Court decision upholding the state’s century-old ban. The state court had ruled the law’s limits could stand for state elections even after Citizens United v. Federal Election Commission, the two-year-old Supreme Court ruling that let corporations and unions spend unlimited sums.

The court’s unsigned opinion in the 5-4 ruling said the case asked whether Citizens United applied to a state law. “There can be no serious doubt that it does,” the court said.

“Montana’s arguments in support” of the lower court ruling “either were already rejected in Citizens United or fail to meaningfully distinguish that case,” the opinion said.

The majority was identical to the 5-4 Citizens United decision, which altered the national political landscape and opened the way for campaign spending by outside groups to more than double from the level four years ago.

Missed Opportunity

The latest action makes clear the court’s five Republican appointees stand behind their conclusion that corporate campaign spending is entitled to broad protection under the First Amendment.

“Citizens United mistakenly overruled longstanding cases that protected the fairness and integrity of elections,” White House spokesman Eric Schultz said in a statement yesterday. “Unfortunately, the court today missed an opportunity to correct that mistake.”

President Barack Obama criticized the Citizens ruling in his 2010 State of the Union address. He has since given his blessing to a super-political action committee supporting his re-election, saying it is necessary to compete with Republican challenger Mitt Romney. Obama campaign aides have said they expect to be outspent by Romney and his allies because of several super-PACs backing him.

More than 600 super-PACs have raised more than $240 million and spent $133 million this election cycle, according to the Center for Responsive Politics, a nonpartisan research group in Washington.

Nonprofit Organizations

Nonprofit organizations that don’t have to report donors have spent at least $12.4 million in this election cycle so far, according to the Sunlight Foundation, a Washington-based group that promotes campaign-finance disclosure.

The expenditures by super-PACs and nonprofits add up to more than twice what
outside groups had spent by this point in the 2008 election cycle, according to the Center for Responsive Politics.

The U.S. Chamber of Commerce said in court papers that “to the extent that there has been more speech in recent elections, that is a First Amendment good, not an excuse to resurrect a censorship regime.” The business trade group opposed the Montana law.

Outside spending on state and local races— which include judgeships, ballot measures and gubernatorial and mayoral posts—is more difficult to tally, in part because of differing disclosure requirements and deadlines.

The National Institute on Money in State Politics, a campaign-finance research group in Helena, Montana, said that in a sample of 20 states, spending by groups other than candidates rose to $139 million in 2010 from $65 million in 2008.

State Bans

Critics of the Citizens United ruling had sought to leave room for spending bans at the state level, saying they guard against corruption.

“The states have a compelling interest in preventing domination of state and local elections by nonresident corporate interests,” argued New York, joined by 21 other states and the District of Columbia, in a court filing backing Montana in the case.

“The decision today says that other states struggling to deal with corrupting political spending are essentially handcuffed,” Adam Skaggs, senior counsel of the Brennan Center’s Democracy Program at the New York University School of Law, said in an interview. “The court has removed a promising tool for states.”

U.S. Senator Mitch McConnell, the Republican Senate minority leader from Kentucky, said in a statement the ruling is “another important victory for freedom of speech.”

There has been “only minimal corporate involvement in the 2012 election cycle,” McConnell wrote in the statement and in a brief filed in support of the group seeking to toss out Montana’s corporate political spending ban.

Secret Donors

Those committees are required to report donors; many nonprofit groups that also spend money in elections may keep their donors secret.

David Bossie, president of Citizens United, the nonprofit behind the Supreme Court case of the same name, said in a statement that the Montana decision is “another win for the First Amendment.”

The five members of the Citizens United majority—Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito—remain on the court and made up the majority in yesterday’s decision. Dissenting were Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan.

At the time of the 2010 Citizens United ruling, 22 states had laws banning or restricting spending by corporations and unions, according to a report this month by the Corporate Reform Coalition, made up of 75 organizations and individuals from good-government groups, environmental groups and organized labor. Those states generally repealed their limits or declared that their laws are unenforceable, according to the report.
Appearance of Corruption

The exception was Montana, which chose to continue enforcing its corporate money ban.

At issue in the Montana case was the statement by the Citizens United majority that corporate campaign expenditures “do not give rise to corruption or the appearance of corruption.” That’s an important conclusion because the court has allowed campaign-finance restrictions as a means of fighting corruption.

Montana argued that local and state elections are especially susceptible to corruption from corporate spending.

The Supreme Court put a hold on the law in February.

Montanans enacted the 1912 Corrupt Practices Act by ballot initiative. In its 5-2 ruling upholding the law, the Montana Supreme Court said the state had “unique and compelling interests” in barring corporate election spending. The majority pointed to the so-called “copper king” battle at the beginning of the 20th century, when entrepreneur Augustus Heinze and the Anaconda Co., controlled by Standard Oil, used their money to vie for dominance of the state’s government.

Shell of Authority

When the law was enacted, “the state of Montana and its government were operating under a mere shell of legal authority, and the real social and political power was wielded by powerful corporate managers to further their own business interests,” the Montana court majority said.

The Montana law barred direct election spending by corporations, including incorporated interest groups. Corporations must establish traditional political action committees, which can solicit voluntary contributions from employees. The committees were subject to contribution limits and disclosure requirements.


An obscure procedural order issued the day after the Supreme Court’s decision to uphold President Barack Obama’s health care law got lost in the saturated media coverage of the health ruling and the palace intrigue over whether Chief Justice John Roberts switched his vote and alienated his conservative colleagues. Without comment or dissent, the justices declined to hear Minnesota’s appeal of a federal appeals court ruling in 281 Care Committee v. Arneson—holding that Minnesota’s law banning false campaign speech about ballot measures is likely unconstitutional under the First Amendment. The result could be even nastier campaigns and more political dirty tricks.

Minnesota had asked the Supreme Court to hold its petition until the court decided United States v. Alvarez, the so-called “Stolen Valor” case. The court decided Alvarez the same day as health care, striking down as a free speech violation a federal law making it a crime to falsely claim to be a recipient of the Congressional Medal of Honor.

Alvarez casts considerable doubt over when, if ever, states can take actions to combat false campaign statements and campaign dirty tricks—including lying about the location of a polling place or the voting date. The court could have used the 281 Care Committee case to clear up the muddle next term. But it just denied the petition.

Without new clarity, I expect anyone charged with making election-related lies to raise a First Amendment defense. Which they just may win.

It’s too bad the Supreme Court didn’t take the 281 Care Committee case, because the current uncertainty over false campaign speech laws provides an opening for those who might consider using political dirty tricks in November. The government has a compelling interest in stopping that kind of voter suppression—even if we don’t trust it to police campaign statements.

Before Alvarez, the Supreme Court had recognized certain categories of speech and expression, like “fighting words,” which were not entitled to any First Amendment protection. The U.S. government, defending the Stolen Valor law in Alvarez, relied on statements in earlier Supreme Court cases suggesting that deliberately false speech is similarly undeserving of First Amendment protection.

Four justices, led by Justice Anthony Kennedy, rejected the government’s argument, ruling that laws regulating lying are subject to “strict scrutiny” under the First Amendment—the court’s toughest standard of review, under which few laws can survive. (The court did indicate that certain longstanding laws barring certain false statements, like perjury laws, remained constitutional.)

“Only a weak society,” these four justices concluded, “needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.”

Justice Stephen Breyer, joined by Justice Elena Kagan, agreed with Kennedy’s
conclusion that even false speech is usually entitled to some First Amendment protection, and that the Stolen Valor law was unconstitutional. But Breyer applied an “intermediate scrutiny” test for laws punishing false speech—determining a law’s constitutionality by balancing the speaker’s First Amendment rights against the government’s interest in preserving the truth in particular contexts.

Breyer’s opinion noted the special difficulty of laws punishing false statements in the context of political campaigns, where prosecutors might use false campaign speech laws for political reasons, going after political opponents. In this area, the “risk of censorious selectivity by prosecutors is . . . high.”
The Supreme Court has left town for the summer, and in doing so, has left the state of West Virginia waiting in suspense over the fate of a federal court ruling that would have required its legislature to come up with new, equal population districts for electing its three members of the U.S. House of Representatives this year. But the Court has definitely put a stop, for this year’s elections, at least, to Arizona’s plan to require voters to prove they are U.S. citizens before they may register to take part in elections there.

The Justices have been weighing an appeal, filed in March by West Virginia state officials, challenging a three-judge District Court ruling that ordered state legislators to come up with new congressional districts, or else that court would do so itself. The state officers’ appeal raised a significant issue over whether the Constitution now requires that the difference in population between House districts must either be absolutely zero, or as close to that as possible. That is what the District Court had declared, on the theory that Census data and computer science are now so refined that absolute equality can be achieved.

On January 20, before that appeal actually had arrived at the Court, the Justices put the District Court ruling on hold until the state appeal could be filed, and resolved. Preliminary briefing in the case was completed on June 5, and the case was scheduled for consideration by the Justices at their private Conference on June 21. So far as anyone in the public knows, the Court has taken no action on the case, and the case was not scheduled to be considered on Thursday with the final Conference of the Justices before the summer recess. There is no word at the Court on what is happening with the case.

It is not customary for the Court to leave a case like that dangling over the summer recess. And the underlying constitutional dispute would not be resolved merely by the stay order issued in January, although that had the effect of putting into effect the plan adopted by the legislature. The primary election, using that plan, has been held, so those districts will remain in effect for the general election in November. That plan was found unconstitutional by a divided three-judge court because the majority of the judges said the legislature either had to do better to come close to zero variation, or else justify the failure to do so with explicit reliance on public policy goals served by the failure to achieve zero variation.

The maximum variation between the largest of the three districts and the smallest created by the legislature-approved plan was .79 percent, or a deviation of a total of 4,871 persons from the ideal, equal population figure of 617,665 for each of the three districts. Of the nine different redistricting plans that the legislature had considered, seven had a lower total variation, while only two had higher comparisons. The District Court found that it would be possible to get closer to zero, and that would be required, unless remaining variations were explained away.
West Virginia officials contended in their appeal that their state legislature has had a long tradition of shying away from partisan fights over the drawing of congressional district lines, and has been in the habit, after each Census is taken, in making as few changes as necessary in the districting array. While that case remains in an uncertain state on the Court's docket, the Court has turned aside a request by Arizona officials to postpone a Ninth Circuit Court ruling striking down an eight-year-old mandate that voters must prove they are U.S. citizens in order to get on the election registration rolls. (The Justices issued that order on Friday, over the dissent of Justice Samuel A. Alito, Jr., but the order was overlooked in the excitement over the Court's health care decision.)

State officials in Arizona had asked the Court to allow election aides to demand proof of citizenship before registering any individual to vote. The Ninth Circuit had ruled in April that the citizenship proof requirement conflicts with a 1993 federal law passed to make it easier for individuals to register to vote—the National Voter Registration Act.
Washington Democrats and Libertarians are asking the U.S. Supreme Court to hear yet another challenge of the state’s popular Top 2 Primary. Various appeals have been underway since voters approved the system by a landslide eight years ago.

The open primary, which allows all voters to select their favorite candidates for each office, without regard to party label, has been successfully used since 2008, when the U.S. Supreme Court ruled 7-2 to allow it. The high court did leave open the possibility of further challenge based on the way the state administered the winnowing election.

Barring some unexpected development, the state plans to use the Top 2 Primary on Aug. 7 to winnow the field for governor and other statewide offices, Congress, the Legislature and other offices. The two top votegetters will advance to the General Election in November, with no party guaranteed a runoff spot.

Both the U.S. District Court and the 9th Circuit Court of Appeals have rejected arguments by the Democratic, Republican and Libertarian parties of Washington that their constitutional rights are violated. The Republicans have dropped out of the new challenge. Just before the deadline late Wednesday, the Democrats and Libertarians filed separate requests that the high court hear a further appeal.

Secretary of State Sam Reed, the state’s elections chief, expressed disappointment that the Libertarians and Democrats persist in their challenge. He said he’s pleased that Republicans have heeded the request he has made repeatedly for all three parties to stop challenging a voter-approved system that is working well and producing good candidates and officeholders.

“Our system, which is a model for other states, really honors the way Washingtonians want to vote — for the person, not the party label. It really fits our populist, independent streak and allows people to split their ticket, rather than be confined to one party’s candidates. The parties’ challenge of our old blanket-primary led to our Top 2 system, with a very unpopular detour to the Pick-a-Party system that limited our primary choices to a single party’s line of candidates.

“I hope the Supreme Court will decline to take the case, and will acknowledge that we followed the court’s roadmap for how to conduct the primary as a nonpartisan, winnow election that puts the voter in the driver’s seat.”

Attorney General Rob McKenna, who personally argued the original case before the Supreme Court, said:

“The people of the state of Washington have made it clear that they support a people’s primary—not a partisan primary.

“We’ve already argued this case all the way to the U.S. Supreme Court—
and won. The Secretary of State’s office then followed the direction of the court to ensure the Top 2 Primary was instituted in a manner that respects the parties’ rights to association while still honoring the will of the people to vote for the person not the party.

“During these tough budget times, it’s unfortunate that we’re still forced to spend state tax dollars defending the will of the people.”

The Democrats, writing in their request to the court, complained that the system gives the parties no say in which candidate is allowed to claim their label. They also said the state hasn’t been required to show that disclaimers on the ballot are adequate remedy for voter confusion. The disclaimer essentially says that the candidate chooses which party they prefer, but that the party may or may not endorse their candidacy. Apart from the primary process, the parties are able to “nominate” one or more candidates for each office—their seal of approval. Candidates may publicize that in their yardsigns, Voter’s Pamphlet and advertising.

The system easily survived a constitutional challenge to the U.S. Supreme Court, which handed down a 7-2 ruling back in March of 2008. The state has used the system ever since, with polls showing heavy public support. But the parties continue to argue that the Top 2 system causes voter confusion and thereby violates the parties’ freedom of association.

In January of last year, U.S. District Judge John Coughenour dismissed challenges brought by the parties over the way Washington operates the primary. Reed and Attorney General Rob McKenna called it a major victory for the voters of Washington and expressed hope that the case was resolved at long last. But the parties decided to appeal.

The judge said the state Elections Division has carefully adopted the recommendations of the high court, making it clear that candidates “prefer” a particular party of their designation, but that the party may or may not endorse the candidate. Coughenour dismissed the parties’ contention that voters are confused by the party references.

He said the system “does not create the possibility of widespread confusion among the reasonable, well-informed electorate.”

The parties appealed to the 9th Circuit, which handles cases from the West. Again, the three-judge panel upheld Washington. The Secretary of State, represented by McKenna, and backed by the Washington State Grange, promoters of the Top 2 Initiative 872, asked the appeals judges to agree with the district judge that Washington has carefully implemented the primary using the roadmap suggested by the U.S. Supreme Court. Voters are not confused by the system and the high court already has said the parties do not have a right to demand that their favored candidates be identified, they said.

In their latest filing, the Democrats said “The 9th Circuit did not independently analyze whether, as implemented, Washington’s system is a reasonable, politically neutral regulation that serves an important regulatory interest when the system provides potentially misleading or inaccurate information.” The party should be allowed to object to use of its name in conjunctions with the candidate’s in state-
sponsored publications, the Democrats said.

Libertarians concurred with the Democrats’ arguments, including their concerns about unauthorized use of their party label or trademark and their lack of authority to “disavow false candidacies.”

McKenna’s attorneys will file reply briefs later this spring; there is no clear timeline for when the high court might say if the justices will hear the case. Statistically, few very cases are accepted for review. If it were accepted, it likely would be heard sometime next year.
A landmark federal law used to block the adoption of state voter identification cards and other election rules now faces unprecedented legal challenges.

A record five federal lawsuits filed this year challenge the constitutionality of a key provision in the Voting Rights Act. The 1965 statute prevents many state and local governments from enacting new voter ID requirements, redistricting plans and similar proposals on grounds that the changes would disenfranchise minorities.

The plaintiffs, which include Alabama, Florida and Texas, are aiming for the Supreme Court because some justices in a previous ruling openly questioned the continued need for parts of the Voting Rights Act. The high court recently received two of the cases on appeal and could take them up in the fall term.

The complaints ask the courts to strike down the central provision in the law, known as “pre-clearance,” which requires governments with a history of discrimination to get federal permission to change election procedures. Pre-clearance is enforced throughout nine states and in portions of seven others. Most of the jurisdictions are in the South.

The Justice Department has used the pre-clearance provision to reject several of the plaintiffs’ initiatives, including Texas’ strict voter ID law.

Across the nation, legal battles are escalating over a wave of state laws passed in the past two years that impose photo ID requirements, scale back early voting periods and restrict voter-registration efforts, among other changes. The litigation has become sharply partisan because the changes could influence voter turnout in the November elections. Voter ID laws have been the most contentious, as nine of the 11 states that have passed photo ID laws have Republican governors.

Proponents of the Republican-led initiatives say their intent is to prevent voter fraud and shore up the election system. Opponents, mainly Democrats and voting and civil rights groups, insist the measures are aimed at suppressing turnout among minorities and young people, who tend to vote for Democratic candidates. The Justice Department has challenged many of these measures in lawsuits filed under the Voting Rights Act.

Challengers argue that they should no longer be forced to comply with the pre-clearance mandate because efforts to prevent minorities from registering, voting or winning elected office were abolished many years ago.

“These jurisdictions have made enormous strides in increasing minority participation
in elections and voter registration, but also in the election of minority officials,” says Washington attorney Michael Carvin. He represents the plaintiffs in the Kinston, N.C., case, which is one of two jurisdictions that have petitioned the Supreme Court.

Critics Question Methodology

Since its passage, judges have consistently upheld the Voting Rights Act and Congress has reauthorized it four times based on determinations that discrimination in elections continues. The civil rights law is widely considered the most effective of its kind in U.S. history.

But a push to scale back the statute gained momentum from the last challenge before the Supreme Court, in 2009. The justices declined to answer the constitutional question but signaled that the law’s future isn’t assured.

“In part due to the success of that legislation, we are now a very different Nation,” Chief Justice John Roberts wrote in the majority opinion, adding that continued enforcement “must be justified by current needs.”

Roberts was alluding to one of the strongest criticisms of the pre-clearance provision and one detailed in the federal complaints—that enforcement is determined by a formula of minority voting statistics from 1964, 1968 and 1972. The methodology fails to account for decades of gains in minority voting and representation in office.

Critics fault Congress for failing to update the formula when it reauthorized the statute in 2006 for another 25 years. Many state and local officials believe that the use of current figures would exempt most jurisdictions from pre-clearance, as Alabama explained in its complaint filed last week:

“[I]t is no longer constitutionally justifiable for Congress to arbitrarily impose disfavored treatment on Alabama and other covered jurisdictions by forcing them to justify all voting changes to federal officials . . . for another 25 years even though, if the coverage formula were applied using 2000, 2004 and 2008 voter registration and participation rates, Alabama would no longer be covered.”

Alabama has long chafed at compliance and, in 1965, was the first jurisdiction to challenge the Voting Rights Act. The Supreme Court ruled against the state.

But supporters credit pre-clearance, as the enforcement arm of the law, with breaking the most blatant and unrepentant systems of discrimination.

“It has been extraordinarily successful at changing people’s habits,” says veteran civil rights attorney Armand Derfner of South Carolina, who has successfully argued voting rights cases before the Supreme Court. He represents the League of Women Voters in a lawsuit against South Carolina’s voter ID law. “I think a lot of public officials actually like pre-clearance because it keeps the government bodies on their toes.”

Clearest Impact in the South

Most data show minority voter participation, both in registration and balloting, has gradually increased since the 1960s.

The Pew Research Center says the 2008 elections had the most diverse U.S. electorate, as nonwhites made up nearly 24 percent. Whites’ share of total turnout
dropped 3 percentage points from 79 percent in 2004.

Black turnout reached a record 65 percent in 2008, compared with 55 percent in 1988, according to the Pew study. Driven by Barack Obama’s presidential campaign, blacks voted at the same rate as whites for the first time.

The greatest impact of the Voting Rights Act is clear among blacks in the South.

In the 1964 presidential election, 72 percent of blacks in the Northeast, Midwest and West voted, according to the Census Bureau. Only 44 percent of blacks in the South cast ballots.

By 2008, black turnout in the South reached 63 percent, surpassing black turnout in all other regions, the Census data show.

“No rational person can think the South of today looks anything like the South of the 1960s,” Carvin says. “There’s no cognizable difference between the South and other jurisdictions.”

Increased minority voting also has boosted minority representation in local, state and federal elected offices.

More than 10,500 blacks held elected posts last year, compared with 1,469 in 1970, according to the National Roster of Black Elected Officials.

The number of elected Hispanics reached 5,850 last year, a gain of 87 percent since 1984, according to the National Association of Latino Elected and Appointed Officials.
"Legal Battles Erupt Over Tough Voter ID Laws"

The New York Times
July 19, 2012
Ethan Bronner

Four years ago as Viviette Applewhite, now 93, was making her way through her local Acme supermarket, her pocketbook hanging from her shoulder, a thief sliced the bag from its straps.

A former hotel housekeeper, Ms. Applewhite, who never had a driver’s license, was suddenly without a Social Security card. Adopted and twice married, she had several name changes over the years, so obtaining new documents was complicated. As a result, with Pennsylvania now requiring a state-approved form of photo identification to vote, Ms. Applewhite, a supporter of President Obama, may be forced to sit out November’s election for the first time in decades.

Incensed, and spurred on by liberal groups, Ms. Applewhite and others like her are suing the state in a closely watched case, one of a number of voter-identification suits across the country that could affect the participation of millions of voters in the presidential election.

“They’re trying to stop black people from voting so Obama will not get re-elected,” Ms. Applewhite said as she sat in her modest one-bedroom apartment in the Germantown section of Philadelphia, reflecting a common sentiment among those who oppose the law. “That’s what this whole thing is about.”

Whether true or not, the focus on what Democrats call “voter suppression” is accelerating as the Nov. 6 election looms.

Last week, Texas took the Obama administration to federal court because it blocked a voter identification law there on racial discrimination grounds. In Florida, officials successfully sued for access to a federal database of noncitizens in hopes of purging them from voter rolls, a move several other states plan to emulate.

Advocates say the laws have nothing to do with voter suppression and are about something else entirely: ensuring the integrity of elections, preventing voter fraud and improving public confidence in the electoral process in an era when photo identification is routine for many basic things, including air travel.

Thirty-three states have passed laws requiring identification for voting. Five—Pennsylvania, Indiana, Kansas, Tennessee and Georgia—have what are called strict photo identification requirements, meaning voters must present specific kinds of photo IDs before voting. Six states—Michigan, South Dakota, Idaho, Louisiana, Hawaii and Florida—have less strict photo requirements, meaning voters may be able to sign affidavits or have poll workers who recognize them verify their identities.

Attorney General Eric H. Holder Jr. said last week of the Texas statute, “We call those poll taxes,” a reference to fees that were once used in some Southern states to prevent blacks from voting. He said that while 8 percent of whites do not have the type of documentation that would be required by the Texas election law, the percentage among blacks is triple that.
Opponents of the laws note that nearly every state legislature that has passed them in the past two years is Republican-run and that those most affected are minority groups and the urban poor, constituencies that tend to vote Democratic.

In a report issued on Wednesday, the Brennan Center for Justice at New York University School of Law said it had found that obtaining proper voter identification in the affected states was difficult. More than 10 million eligible voters live more than 10 miles from their nearest ID-issuing office, and many of the offices maintain limited hours, the report said. Moreover, it said, despite pledges to make voter identification free, birth and marriage certificates, often needed for the process, cost $8 to $25, and many affected voters are poor.

The argument by the Pennsylvania law’s proponents that it has nothing to do with partisan politics took a blow late last month when Mike Turzai, the majority leader of the state’s House of Representatives, addressed a group of fellow state Republicans. Listing the accomplishments of the Republican-controlled legislature, he said, “Voter ID—which is going to allow Governor Romney to win the state of Pennsylvania—done.”

In Wisconsin, a voter identification requirement has been declared to be in violation of the state Constitution, but that ruling is expected to be appealed. Some Southern states, like Texas and South Carolina, have to clear any voting law changes with the Department of Justice under the Voting Rights Act of 1965. The department has rejected their identification requirements as discriminatory, and this past week Texas has been challenging that ruling in federal court in Washington. In September, South Carolina will take its case against the department to court.

One of the most closely watched cases is here in Pennsylvania, where polls show a tight race shaping up between Mr. Obama and Mitt Romney, the former Massachusetts governor.

“We don’t know whether voter fraud is a huge or a small problem, but we believe the new law will preserve the integrity of every vote,” said Ronald G. Ruman, spokesman for the Pennsylvania Department of State. “The goal is to make sure that every vote cast counts.”

Supporters also point to accusations that Acorn, a community organizing group that worked to register minority group members, was engaging in voter registration fraud several years ago.

This month, the Pennsylvania Department of State estimated that 759,000 registered voters may be at risk of not having the required identification. It promised to send a letter to each one explaining what needed to be done.

“Obama won Pennsylvania in 2008 by 600,000 votes,” said Witold Walczak, legal director of the American Civil Liberties Union of Pennsylvania, which is leading the challenge to the law. “What is most galling is to hear the law’s proponents argue that one person voting improperly undermines the integrity of the election. What about all the people prevented improperly from voting? Doesn’t that undermine the integrity of the election?”

When the trial against the law starts this month in the capital, Harrisburg, Mr. Walczak will put on the stand a number of Pennsylvanians with cases like Ms. Applewhite’s, asserting that they are unable to meet the requirements in time for the November election.
Among them will be Wilola Shinholster Lee, a 60-year-old retiree who was born in Georgia and has been unable to replace her birth certificate, which was lost in a house fire. Officials in Georgia told her that they too had suffered a fire and no longer had a record of her birth.

“I came here when I was 5 with my grandmother, who worked as a domestic,” Ms. Lee said. “She’s 98 and doesn’t have a photo ID either. She’s upset because she loves Obama.”

Ms. Lee has a Social Security card and an employee photo identification from her years working for the Philadelphia Board of Education. But without her birth certificate, she is unlikely to be able to vote in November.

In 2008, the Supreme Court upheld Indiana’s voter identification law, saying that although there was little evidence of fraud, the law did not pose an undue burden on voters. But the case in Pennsylvania is based on the state Constitution, which is more specific than the federal Constitution about the right to vote. The Pennsylvania law also has tighter restrictions than the one in Indiana.

Stewart J. Greenleaf, a Republican state senator in Pennsylvania and chairman of the judiciary committee, said in an interview in Harrisburg that he opposed the law because it was unnecessary given how uncommon in-person voter fraud has been. That will be a central argument in the lawsuit as well.

Mr. Walczak of the civil liberties union said: “The real danger from this law will come from people who don’t even know it exists or who think they have the right ID but don’t. Our position is that we will not know until Election Day how big a problem it is, and then it will be too late.”