

THE VOTING GAME

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“People will stop at nothing now that they understand that voting is a game and that whoever is in charge can change the rules anytime.”¹

In the summer of 2013, the U.S. Supreme Court ruled unconstitutional the most effective provisions of the Voting Rights Act of 1965 (“V.R.A.”)² in *Shelby County v. Holder*.³ The ruling would have the effect of allowing several jurisdictions, mostly in Southern states, to freely enact restrictions on voting procedures without the federal oversight that had previously been required. By this decision, the Court placed a new burden on Congress to develop new and complex criteria for minority protections. Given the highly polarized status of Congress, however, most commentators agree that the passage of such legislation anytime in the near future is unlikely. Yet, the factual record about the state of discrimination in previously covered jurisdictions presented to the Court in *Shelby County*, and which was confirmed by the restrictive voting policies enacted by various states immediately thereafter, prove that the decision will have dire consequences for the power of minority votes, primarily in the South.

The V.R.A., and its provision of oversight of potentially racially discriminatory voting procedures, had been one of the most popular and longstanding pieces of legislation in the latter half of the 20th century. The Act, in its 2013 form, had withstood extensive Congressional oversight, and had been reenacted in 2006 with overwhelming support. The decision to strike it down, therefore, was a bold exercise of judicial power.

Although the decision had enormous political and historic import, its conclusion stands on shaky legal ground. In this note, I bring in the perspective of a veteran voting rights attorney from South Carolina and some of my own views to outline some of the ways in which I believe that the decision failed to establish a justification for striking a duly authorized act of Congress that has a profound impact on the landscape of minority voting rights in the United States.

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¹ *Telephone Interview with Armand Derfner*, Partner, Derfner, Altman & Wilborn (August 25th, 2013).

² Voting Rights Act of 1965, 52 U.S.C. § 10301.

³ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

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The decision is flawed for a number of reasons: failing to properly articulate a standard for overturning an act of congress in this context, inserting seemingly wholly invented legal doctrines, and judicial overreaching. The majority criticizes the VRA as placing an overly disparate a burden on the formerly covered jurisdictions, but it glosses over the ways in which the Act will allow those jurisdictions to unburden themselves.

The majority does not engage with the extensive Congressional findings used to justify the VRA's thoroughly deliberated reauthorization in 2005, fails to identify a standard of review, and places too much emphasis on the effectiveness of other remedies.

Shelby County struck down Section 4(b) of the Voting Rights Act of 1965⁴, the provision establishing which jurisdictions would have to submit any proposed changes to voting procedures to the United States District Court for the District of Columbia or the U.S. Attorney General. Section 4(b) struck down the criteria for preclearance, but it left the Section 5 preclearance tool intact, but inert. Without Section 4(b), Section 5's preclearance requirements cannot be applied to any jurisdiction until Congress develops a new coverage formula. Those jurisdictions that have been released from the preclearance requirement were mostly in the South, and the majority opinion commented that the South's progress toward racial equality since the 1960's justified unburdening it from preclearance.⁵

The Court based its 23 page decision on principles of federalism and "equal sovereignty" between the states, expanding on some of its holding in a 2009 case, *Northwest Austin Municipal Utility District Number One v. Holder*.⁶ That decision challenged coverage by the Voting Rights Act, and held that the Voting Rights Act "imposes current burdens and must be justified by current needs".⁷

⁴ Prior to the changes mandated by *Shelby County*, the Voting Rights Act of 1965 as amended had several provisions. Section 2 is a prohibition against States enacting any voting measure that would have the effect of discriminating against minority (including language minority) voters. Section 5 is applied only to certain States and requires that any voting measure be "precleared" by the U.S. Attorney General or the U.S. District Court for D.C. to ensure that they do not have the purpose or effect of discriminating against minority voters. Section 4(b), at issue in *Shelby County*, provides the criteria for Section 5 coverage. Section 3 includes a "bail-in" provision and Section 4(a) a "bail-out" provision. "Bail-in" is also called "pocket trigger" and it provides the circumstances by which a jurisdiction not covered in Section 4(b)'s coverage formula may become subject to preclearance. The "bail-out" provision provides that under certain circumstances, a covered jurisdiction may be relieved from the preclearance requirements, based upon a showing of a record clean of discriminatory voting measures.

⁵ *Shelby Cnty v. Holder*, 133 S. Ct. 2612, 2625-29 (2013).

⁶ *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193 (2009).

⁷ *Northwest Austin*, 557 U. S. at 203.

Justice Thomas authored a three page concurrence asserting that preclearance should have been entirely struck down, and Justice Ruth Ginsburg authored a 36 page dissent arguing that the decision's analysis was improper and that Congress's 2006 re-authorization provided ample rationale for justifying the current coverage formula.

Data From the Record

One of objections the majority had with the preclearance coverage formula was its reliance on data from 1965. Yet, the formula had been reauthorized several times by Congress after collecting a record of extensive evidence of continued racial discrimination and racial disparities in voting in those areas of the country. The most recent re-authorization passed through Congress largely unopposed and on the solid foundation 15,000 pages of Congressional record⁸ and months of hearings documenting voting procedures negatively affecting minorities in the covered jurisdictions.

The breadth and substance of this record were hardly touched upon by the majority in *Shelby County*. As Justice Ginsburg's well founded dissent noted, "without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record;" and declines to enter the "debate about what the record shows."⁹ To have done so would have assured a finding that the burdens imposed by the preclearance requirements were indeed "be justified by current needs."¹⁰

The "Bail Out" Provision, Overlooked

Surprisingly, although the decision relies heavily on *Northwest Austin*, it makes only passing reference to the Act's Section 3(c)'s "bail-out" provision. This provision would allow a covered jurisdiction to "bail-out" of the preclearance requirement by demonstrating a clean record of non-discriminatory voting procedure proposals for ten years. The majority in *Shelby County* relies heavily on the decision in *Northwest Austin* to substantiate the relatively novel legal theories it bases its conclusions upon, but seems to sidestep *Northwest Austin*'s extensive discussion of the bail-out provision. The majority in *Northwest Austin* had recognized bail-out as effective mitigation of the onerous restraints imposed by preclearance, although the Court never reached the question of Section 4's constitutionality in that decision. Bail-out squarely addresses the issues the majority has with

⁸ H.R. Rep. 109-478, at 5, 11-12; S. Rep. 109-295, at 2-4, 15.

⁹ *Shelby Cnty.*, 133 S. Ct. at 2644 (2013).

¹⁰ *Id.* at 2646 (citing *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009)).

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the age of the coverage formula's data set. It allows those States that have truly changed to come out from under the burden imposed by preclearance.

The Novel Application of the "Equal Sovereignty" Doctrine

One of the most unusual aspects of the decision is Chief Justice Roberts' utilization of the so-called "Equal Sovereignty" doctrine, which, along with federalism, is the main legal principle the majority relies upon to underpin its holding.

Equal Sovereignty, in the context of states' abilities to regulate voting, had only been articulated in *Northwest Austin* (discussed above), also authored by the Chief Justice. The doctrine is further supported only by references to three older cases, including one proscribing disparate geographical treatment of the states by the federal government in a case from 1911.¹¹ The Court acknowledges that "equal sovereignty" as articulated in that case concerned the admission of new states to the Union and not how Congress could impose burdens on states as part of its enforcement power under the Thirteenth, Fourteenth and Fifteenth Amendments (the Civil War Amendments).

The usage of the words "equal sovereignty" and the reference to that phrase as a "fundamental principle"¹² may be seen as an effort by the majority to skirt the standard previously articulated for overturning an act of Congress to enforce the Civil War Amendments.

The dissent in *Shelby County* argues that the standard that should have been used is that which set forth in *South Carolina v. Katzenbach*: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."¹³

The language of the Fifteenth Amendment ("Congress shall have power to enforce this article by appropriate legislation") accords Congress broad authority¹⁴ to enact measures to prevent minority voting suppression by "all

¹¹ *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

¹² *Shelby Cnty.*, 133 S. Ct. at 2623 (citing *Northwest Austin*, 557 U. S. at 203).

¹³ *South Carolina v. Katzenbach*, 383 U.S. 301, at 324 (1966).

¹⁴ "The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use 'all means which are appropriate, which are plainly adapted' to the constitutional ends declared by these Amendments. *McCulloch*, 4 Wheat., at 421. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally

means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the constitution.”¹⁵

Insofar as the decision in *Shelby County* sidesteps a lengthy discussion of which standard to apply, and seemingly ignores the standard applied in previous decision addressing the constitutionality of the Voting Rights Act, the decision fails to engage in the necessary analysis to support its bold abrogation of Congressional decision making. “Substitut[ing] its own judgment,”¹⁶ argues Justice Ginsburg in her dissent, the majority of the Court affronts the balance of powers.

Judge Richard Posner, writing for *Slate*, agreed. In a post to the website on June of 2013, Posner wrote of the ‘fundamental principle of equal sovereignty’ of the states¹⁷:

“This is a principle of constitutional law of which I had never heard—for the excellent reason that [...] there is no such principle. Section 3 of Article IV of the Constitution authorizes Congress to admit new states to the Union [...] Usually when new states are admitted it is on the same terms as the existing ones. But not always: Utah and several other western states were required as a condition of admission to outlaw polygamy—a novel condition. Not that any other state permitted polygamy. But other states, not having been subjected to such a condition when they were admitted, were free to permit polygamy without risk of being expelled from the Union.

It’s possible that the federal government would subject a state to unequal treatment so arbitrary and oppressive as to justify a ruling that Congress exceeded its constitutional authority. But Justice Ruth Bader Ginsburg’s very impressive opinion[...] marshals convincing evidence that the reasons Congress has for treating some states differently for purposes of the Voting Rights Act are not

selected means appropriate to a legitimate end. ‘It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.’ *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966).

¹⁵ *McCulloch v. Maryland*, 4 Wheat 316, 421 (1819).

¹⁶ *Shelby Cnty.*, 133 S. Ct. at 2638.

¹⁷ Posner, *The Supreme Court and the Voting Rights Act Striking Down the Law is All*, SLATE, June 26, 2013, available at [Http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html).

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arbitrary, though they are less needful than they were in 1965, when the law was first enacted.”

Similarly, in his reaction on the SCOTUSblog, Zachary Price, a Constitutional law professor from UC Hastings and former Department of Justice official, agrees that the doctrine is a recent invention that is misapplied in the context of the protection of minority voting rights. He notes that the opinion seems to imply that any federal law which treats states differently would be treated with a different level of scrutiny. The opinion makes reference to the need for the state to demonstrate a "sufficient showing," but fails to explicitly link this to a higher level of scrutiny. By doing this, the majority not only invented a new doctrine, but also a blurred new version of the tiers of scrutiny analysis. Price writes:

". . .the Constitution guarantees some other, quite specific forms of equality. Congress cannot adopt unequal “Duties, Imposts, and Excises,” nor can it enact any “Preference . . . given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.” At least in the absence of some compelling reason to infer a broader unenumerated principle of state equality, the specificity of such guarantees suggests that no general rule otherwise guards states against unequal treatment in federal legislation.”¹⁸

In *Northwest Austin*, Roberts' citations to “equal sovereignty,” including *U.S. v. Louisiana*,¹⁹ create the illusion of stare decisis. Even in *Louisiana* the theory is only used in the context of newly admitted states' rights to natural resources within their borders. The other cases he cites to, *Lessee of Pollard v. Hagen*²⁰ and *Texas v. White*²¹, are even more remote in terms of their discussion of equal treatment of states by the federal government.

Critics have posited that the Chief Justice may have been developing a stance against the VRA for some time. He first introduced “equal sovereignty” as a “fundamental principle”²² in Supreme Court jurisprudence in *Northwest Austin* in order to justify the utility district's exemption from VRA's preclearance coverage, providing the only clear usage of the doctrine in the voting rights context.

¹⁸ Zachary Price, “*Shelby County v. Holder: The Voting Rights Act doesn't need to treat states equally*,” SCOTUSblog (Feb. 16, 2013, 2:23 AM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-the-voting-rights-act-doesnt-need-to-treat-states-equally/>.

¹⁹ *United States v. Louisiana*, 363 U.S. 1 (1960).

²⁰ *Lessee of Pollard v. Hagen*, 44 U.S. 212 (1845).

²¹ *Texas v. White*, 74 U.S. 700 (1869).

²² *Shelby Cnty.*, 133 S. Ct. at 2623 (citing *Northwest Austin*, 557 U. S. at 203).

Armand Derfner, a veteran voting rights litigator²³ I spoke with, referred to a series of memos Roberts wrote when he was an assistant at the Department of Justice during the Act's re-authorization in the 1980s. In these memos, which resurfaced during his confirmation for Chief Justice, he was already making arguments against the Act's constitutionality. Voting rights advocates were prescient to predict that the memos revealed the truth about Roberts' attitude towards the V.R.A.

The South is Slow to Shange: Possible Results of a New Coverage Formula

Congress never acted to update the coverage formula after the Court indicated in *Northwest Austin* that it might consider finding it unconstitutional in the future.²⁴ The formula covers states that both had low voter turnout and registration in the 1965 general election, and which have in the past have enacted voter tests. Roberts' rationale depends upon the premise that it is unjust to tie the covered jurisdictions to voter turnout from half a century ago. Implicit in the arguments made by both the majority and the dissent and in oral argument before the Court is the understanding that had Congress enacted a reform to the coverage formula that simply updated the voter turnout part of the law to something that reflected more recent numbers, some of the covered jurisdictions would have been brought out of the law, but Armand Derfner disagreed with that characterization.

When asked about Congress's possible adoption of a new coverage formula, Derfner posits that even one that is designed with relatively recent indications (the last 20 or 25 years) of voting discrimination such as settlements involving voting discrimination, objections under the voting rights act preclearance provision and successful section 2 litigation would probably bring the same jurisdictions of the Old Confederacy under preclearance.

Other Routes to Preclearance: Section 3(c) and the Political Problem of Finding Intentional Discrimination

Since the decision, jurisdictions formerly covered by preclearance and anxious to move on with restrictive voting measures have moved swiftly to

²³ Derfner has litigated key voting rights cases up to the Supreme Court, including *Allen v. State Board of Elections* (1969) and *Perkins v. Matthews* (1971), helping to shape the jurisprudence of voting rights in America. Currently, Derfner is participating in a private case that was brought to go along with the Department of Justice challenge to the voter ID law in *U.S. v. Texas*, No. 2:13-cr-00263, August 22nd, 2013.

²⁴ *Northwest Austin*, 557 U.S. at 207.

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enact a series of measures that are being variously challenged by private actors and by the Department of Justice. Derfner has been involved in a case in Texas challenging a voter ID law that had not survived preclearance by the U.S. Department of Justice. The law would require voters to present a state-approved form of identification before voting. On the very same day that *Shelby County* was handed down, the Texas legislature breathed new life into it.

Derfner, the lawyers for the Department of Justice, and other civil rights advocates are seeking to have Texas brought in for preclearance under Section 3(c) which gives a federal court the power to mandate preclearance for a period of time to be determined by the Court upon a showing of a violation of the 14th or 15th Amendment. The provision is known as the "bail-in" section. However, this requires a finding of intentional discrimination. Travis Crum, a former federal clerk who worked with the federal district judge who penned the lower court's decision in the *Northwest Austin* case wrote, in a Delphic note for the Yale Law Review in 2010²⁵,

“If and when the Court invalidates section 5, the pocket trigger can perform triage, creating a deterrent effect and bailing-in jurisdictions that engage in racial discrimination in voting. [...]

Initiated as a section 2 suit, section 3 requires a court to find—or a jurisdiction to admit—a constitutional violation. Under the Court's plurality opinion in *City of Mobile v. Bolden*, discriminatory intent is necessary to establish a violation of the Fourteenth or Fifteenth Amendment.

Additionally, *Mobile* limits the Fifteenth Amendment's protections to state action that prevents citizens from registering to vote or casting a ballot. Section 2's effects test, therefore, is insufficient for pocket trigger litigation. Rather, district courts must find that the jurisdiction intentionally denied or abridged a citizen's right to vote on account of race, under either a Fifteenth Amendment ballot access standard or a Fourteenth Amendment vote dilution standard.”

Derfner agrees with this analysis of the application of Section 3(c) in terms of the need to establish intentional discrimination, but argues that the violation does not have to involve registration or voting. He elaborated--since the meaning of "abridge" in the 15th Amendment hasn't been settled, and the scope of the 14th Amendment can range far beyond registering, voting, and dilution.

²⁵ Travis Crum, *The Voting Rights Act Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

Derfner brought up an important point about findings of intentional discrimination: Such a finding is difficult when the judges who must make the finding will have to call people in their community racists.

As an example, he recalled the social pressure surrounding the district court judge in a 2003 case. As a litigator in *U.S. v. Charleston County*²⁶, he helped challenge at-large elections of the Charleston County school board. Part of the complaint asked for a finding of intentional discrimination. Judge Patrick Duffy, found that the electoral scheme did violate Section 2, but didn't find intentional discrimination. The case was appealed to the Fifth Circuit, which upheld the finding of a violation of section 2 but said that it wasn't necessary to reach the question of whether there was intentional discrimination. It set aside his finding that there had not been a violation.

Derfner said, "I have no doubt that Judge Duffy knew and believed and thought that there was a purposeful violation."

The ambivalence with which Judge Duffy handed down his order striking the school board's scheme as having a racist effect is evident in the first two paragraphs of his decision. He writes:

"As an initial matter it is important to clarify what this Order rigorously says about the at-large electoral system of Charleston County and what it unequivocally does not say about her citizens. The Court recognizes that its decision does not merely operate mechanically against a political subdivision of the State of South Carolina but in fact against individual citizens whose lives in various measure are today changed. While the Court is otherwise disinclined to editorialize, those individuals, whether white or black, 1 who have had no voice in this debate but whose liberties are invariably altered by its resolution, deserve as clear and direct an explanation of this action as can be reasonably provided. There is a fundamental gravity to any decision of a federal court which calls into question actions taken by the people through the legislative process of their local and state communities. Federalism and separation of powers demand vigilant consideration... With that said, this Order is radically not a condemnation of the citizenry of Charleston County but rather a recognition that the specific bulwark of an at-large system... Undoubtedly there are bigots among us..."²⁷ (emphasis added)

²⁶ *United States v Charleston Cnty.*, 316 F. Supp. 2d 268 (D.S.C. 2003).

²⁷ *Id.* at 271.

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And the judge concludes his analysis declining to find intentional discrimination by stating:

“Certainly the timing of the General Assembly's adoption of the at-large system raises suspicions, but the Court will not disparage its authors without more compelling evidence, particularly in light of other reasonable and historical explanations for the adoption of the at-large system.”²⁸

Derfner recalls going to Judge Duffy's father's wake after the trial (“the Duffy's are a big family down here”) and shaking the judge's wife's hand. She told him, “It's nice to see someone who doesn't hate my husband.”

Intent is difficult enough to prove, but, even in cases with plenty of evidence to support such a finding, judges may be reluctant to find it. The bail-in right claims, if the provision is interpreted to require intentional discrimination, will be a much harder standard than that of the Section 2 “effects test.”

Perhaps one avenue for voting rights advocates seeking to undo some of the impact of *Shelby County* is pushing for an amendment to the bail-in provision to clarify that it only requires satisfaction of the "effects" test.

Section 2 Preliminary Injunctions are Rarely Obtained

Although *Shelby County* does not address the right of action and injunctive relief envisioned by Section 2²⁹, the Supreme Court has curtailed the application of Section 2 over the last 30 years. If the Court in *Shelby County* were relying on this provision as an alternative remedy to the preclearance formula, critics allege, it is not nearly as effective of a protection against discriminatory voting practices.

Section 2 cases can take years to litigate to completion, but it is possible to obtain a preliminary injunction that would put a stop to implementation of a suspect voting procedure. The preliminary injunction standard would require a likelihood of winning on the merits. Yet, since the 1970s the Court has required an increasingly complex analysis and presentation of data to prevail on a Section 2 claim. This makes obtaining a preliminary injunction extremely difficult.

At oral argument, Justice Kennedy suggested at oral argument that a preliminary injunction can be obtained to stop a potentially discriminatory

²⁸ *Id.* at 272.

²⁹ *Shelby Cnty.*, 133 S. Ct. at 2619.

voting measure and he speculated that this could thereby provide the same relief as preclearance. The Solicitor General argued that this route to halting discriminatory measures was a difficult one, as plaintiffs had been unable to obtain preliminary injunctions in only 25% of the cases.

Section 2 may be an even more remote remedy than the Solicitor General had argued. Derfner, who has litigated numerous Section 2 cases, says that 25% is too high an estimate of the numbers of Section 2 preliminary injunctions. In an informal poll, he called around to eight or nine of the lawyers who do the voting rights cases across the country, and they together found that preliminary injunctions against proposed racist voting practices had actually only been obtained in less than 2% of the cases.

If a preliminary injunction isn't obtained to prevent the institution of the voting procedure in the particular election, whatever the results of that election are become a part of history. They aren't invalidated, even if a permanent injunction is later obtained.

Furthermore, there is some speculation³⁰ that Section 2, as amended in 1982, might be struck down as unconstitutional. In a 1980 case *City of Mobile v. Bolden*³¹, the Court decided that Section 2 was identical to the 15th Amendment, and it therefore required a finding of intentional discrimination. This requirement sets a much higher bar for proponents of minority voting rights to achieve in litigation.

After *City of Mobile*, the Act was amended, implementing an "effects" test into Section 2. Some commentators believe that this amendment could be struck down if a case involving the "effects" test comes up to the Supreme Court in the wake of *Shelby County*.

***Bush v. Gore* and the VRA**

Derfner sees possible avenues of litigation strategy in expanding voting rights by pushing the bounds of what is considered a "severe burden" and what is discrimination on its face. He sees hope for voting rights litigators in *Bush v. Gore*.³² He sees an analogous argument to be made out of the Court's

³⁰ Jeffrey Rosen, *Eric Holder's Suit Against Texas Gives The Supreme Court A Chance to Gut Even More of the V.R.A.*, NEW REPUBLIC, Sept. 1, 2013, available at <http://www.newrepublic.com/article/114524/eric-holder-texas-suit-supreme-court-might-gut-more-voting-rights.com>.

³¹ *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

³² *Bush v. Gore*, 531 U.S. 98 (2000).

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holding that having a recount of votes in some counties but not others amounts to impermissible discrimination.

Derfner believes this rationale could be advanced to strike down the voter ID law in the recent Texas case, *Veasey v. Perry*.³³ The litigants allege that differences in the operation of drivers' bureaus between counties create disparate treatment. Since the IDs required to vote in Texas must be obtained there, it has the effect of a discriminatory voting practice. Certain driver's bureaus that have longer hours on more days in some counties as opposed to others is a facial discrimination that requires strict scrutiny because people in some counties can get a photo ID and some cannot.³⁴ Derfner and the litigation team behind the case believe this should be squarely controlled by *Bush v. Gore*.³⁵

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Shelby County leaves in its wake a litany of unanswered questions about the future of Section 2 jurisprudence, the usage of the "bail-in" provision, and the rest of the heretofore lesser litigated provisions of the Voting Rights Act, but there is no mystery as to whether the decision represents a setback in the short term for minority voters in the South. Over time, the evisceration of these constituencies will serve to further undermine their power to elect those that would fight to retain existing protections against discrimination. As Armand Derfner said, "They understand that voting is a game, and whoever is in charge can change the rules at any time."

In this case, the Court's conservative majority was in charge, and they have eliminated the main obstacle to arbitrary rulemaking at the hands of those who oppose minority enfranchisement.

³³ *Veasey v. Perry*, 29 F. Supp. 3d 896 (S.D. Tex. 2014).

³⁴ "According to Plaintiffs' allegations, DPS offices generally provide services only Monday through Friday during ordinary business hours. Some Texas counties have DPS offices that are open fewer days or have limited hours per week and some counties have no DPS office, requiring voters to travel significant distances beyond their polling place to satisfy the S.B. 14 requirements" *Id.* at 900.

³⁵ *Telephone Interview with Armand Derfner*, Partner, Derfner, Altman & Wilborn (August 25th, 2013).