



---

[GW Law Faculty Publications & Other Works](#)

[Faculty Scholarship](#)

---

2013

## Voting Rights Disclosure

Spencer A. Overton

*George Washington University Law School*, [soverton@law.gwu.edu](mailto:soverton@law.gwu.edu)

Follow this and additional works at: [https://scholarship.law.gwu.edu/faculty\\_publications](https://scholarship.law.gwu.edu/faculty_publications)

 Part of the [Law Commons](#)

---

### Recommended Citation

Spencer Overton, Voting Rights Disclosure, 127 HARVARD LAW REVIEW FORUM 19 (2013).

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact [spagel@law.gwu.edu](mailto:spagel@law.gwu.edu).

---

---

## VOTING RIGHTS DISCLOSURE

*Spencer Overton\**

In the aftermath of the Supreme Court's decision in *Shelby County v. Holder*<sup>1</sup> to scale back parts of the Voting Rights Act of 1965<sup>2</sup> (VRA), the question is, what's next? Professor Samuel Issacharoff's comment *Beyond the Discrimination Model on Voting* attempts to provide an answer.<sup>3</sup> Issacharoff describes section 5 of the VRA as an outdated, race-based, command-and-control, ex ante approach to regulation that misses "major voting concerns of recent years"<sup>4</sup> — including restrictive voter identification laws and restrictions on access to early voting — which stem from "Republican control" of state legislatures.<sup>5</sup> Issacharoff asserts that "[i]nstead of the limited race-driven use of equal protection and the Fifteenth Amendment, there is untested room for expansion of congressional intervention under the Elections Clause."<sup>6</sup> In exercising this "expansive" power under the Elections Clause, Issacharoff proposes that Congress compel "states to disclose alterations of voting rules or practices, as they will affect the conduct of federal elections."<sup>7</sup>

I agree with Issacharoff and several other scholars that disclosure holds promise as a significant tool to protect voting rights.<sup>8</sup> More transparency would deter unfair voting practices, increase legal compliance, and reduce the amount and cost of litigation. I also appreciate

---

\* Professor of Law, The George Washington University Law School. Ian Bassin, Bruce Cain, David Fontana, Heather Gerken, Justin Levitt, Mark Posner, Jason Qu, Franita Tolson, Fane Wolfer, Brenda Wright, and William Yeomans provided comments that helped develop my thinking. Lyndsay Steinmetz provided invaluable research assistance.

<sup>1</sup> 133 S. Ct. 2612 (2013).

<sup>2</sup> 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011).

<sup>3</sup> Samuel Issacharoff, *The Supreme Court, 2012 Term — Comment: Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

<sup>4</sup> *Id.* at 112.

<sup>5</sup> *Id.* at 103.

<sup>6</sup> *Id.* at 113.

<sup>7</sup> *Id.* at 120.

<sup>8</sup> See, e.g., Heather K. Gerken, Essay, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 724 (2006) (proposing that states and localities disclose new election law changes in a publicly accessible format, so that community leaders and public interest groups can negotiate the changes with them); Bruce Cain & Daniel P. Tokaji, *Promoting Equal Participation: A Voting Rights Act for the 21st Century*, ELECTION L. BLOG (June 23, 2009, 12:04 PM), <http://electionlawblog.org/archives/013914.html> (proposing that states and localities "be required to issue an 'electoral impact statement,' analogous to environmental impact statements"); see also Spencer Overton, *How to Update the Voting Rights Act*, HUFFINGTON POST (June 25, 2013, 12:52 PM), [http://www.huffingtonpost.com/spencer-overton/how-to-update-the-voting\\_b\\_3497350.html](http://www.huffingtonpost.com/spencer-overton/how-to-update-the-voting_b_3497350.html) (proposing that Congress modernize the VRA by requiring disclosure and detailing the benefits of disclosure).

that Issacharoff's disclosure regime is nationwide (thereby avoiding problems with the preclearance coverage formula identified by the Court in *Shelby County*), and that it facilitates both private and public enforcement. I also agree that both Congress and the states should take steps to curb politicians' manipulations of voting rules and make voting more accessible for all Americans.

Yet the benefits of congressional interventions under the Elections Clause should not prompt us to abandon the Fifteenth Amendment. Attempts to protect "access to the franchise" for all Americans need not displace a commitment to craft modern tools that prevent voting discrimination. There is no reason the two regimes cannot coexist, since they address separate, legitimate goals.

Indeed, absent a strong commitment to preventing voting discrimination, Issacharoff's approach alone is incomplete. For example, Issacharoff's Elections Clause-based disclosure proposal applies only to federal elections. Congress should also use the Fifteenth Amendment to require disclosure in state and local elections. Further, while disclosure is important, it is not enough. Rather than abandon preclearance, Congress should update preclearance by tying coverage to areas with recent voting rights violations. Congress should also streamline voting rights litigation to make it more efficient and effective.

## I. RACE MATTERS

Issacharoff sees the "major voting concerns of recent years" not as discrimination against voters of color, but as partisan efforts "to restrict . . . access [to the franchise] in order to diminish the political impact of vulnerable constituencies."<sup>9</sup> Examples include restrictive voter identification, the rollback of early voting times and places, and regulations that make voter registration more difficult.<sup>10</sup> According to Issacharoff, the likely site of these new, major voting concerns is not the South, but presidential battleground states such as Ohio.<sup>11</sup> Issacharoff acknowledges that these laws "likely had . . . a disparate racial impact,"<sup>12</sup> but he argues that race is just one avenue in which politicians violate their duties to voters to gain advantage. Others include "partisanship, personal gain, political favoritism, or outright corruption."<sup>13</sup>

Echoing the language of race-neutral affirmative action skeptics, Issacharoff suggests that there exists an "increasing mismatch between the narrow civil rights model and the nature of contemporary threats

---

<sup>9</sup> Issacharoff, *supra* note 3, at 103.

<sup>10</sup> *See id.*

<sup>11</sup> *See id.* at 104.

<sup>12</sup> *Id.* at 103.

<sup>13</sup> *Id.* at 113.

to the right to vote.”<sup>14</sup> Rather than continue to live in the past, Issacharoff urges us to look beyond the discrimination model on voting. In updating the VRA, Issacharoff asserts that “[i]nstead of the limited race-driven use of equal protection and the Fifteenth Amendment, there is untested room for expansion of congressional intervention under the Elections Clause.”<sup>15</sup> Issacharoff offers what he describes as a “new model,” based on “a non-civil rights vision”<sup>16</sup> that would help “insulate the right to vote from naked efforts at partisan manipulation.”<sup>17</sup>

While the desire to minimize race is understandable in light of dramatic improvements in race relations in the past fifty years, discounting the need to prevent racial discrimination is a mistake. In many parts of the country, many whites and people of color cast ballots for different candidates along racial lines, and some political operatives try to benefit from this racially polarized voting by manipulating election rules to lower turnout or dilute the votes of racial or language minorities. Although Issacharoff largely cabins this problem into a 1965 black/white framework, the problem is increasing in many areas, due in large part to fast-growing populations of Latinos and Asian Americans that threaten the political status quo, as well as the fact that voting patterns of different racial groups in many areas are becoming increasingly divergent. Nueces County, Texas, provides a recent example. After the rapidly growing Latino community surpassed fifty-six percent of its population, the county gerrymandered local election districts to diminish the influence of Latino voters. The section 5 preclearance process blocked Nueces County’s racial gerry-

---

<sup>14</sup> *Id.* at 120.

<sup>15</sup> *Id.* at 113.

<sup>16</sup> *Id.* at 104.

<sup>17</sup> *Id.* at 106. Issacharoff is part of a school of scholars who have recently pushed for a shift from preventing discrimination to general election reform. See, e.g., Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006); Rick Pildes & Daniel P. Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality*, ELECTION L. BLOG (Aug. 19, 2013, 4:39 AM), <http://electionlawblog.org/?p=54521> (asserting that other tools may be more effective than section 5 at protecting access, including voter registration modernization, disclosure about voting systems, and reasonable identification requirements); Eric Posner & Nicholas Stephanopoulos, *Don't Worry About the Voting Rights Act*, SLATE (Nov. 20, 2012, 3:35 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2012/11/supreme\\_court\\_and\\_section\\_5\\_of\\_the\\_voting\\_rights\\_act\\_it\\_s\\_ok\\_to\\_strike\\_it.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/11/supreme_court_and_section_5_of_the_voting_rights_act_it_s_ok_to_strike_it.html) (“[A]ttention . . . should be focused less on the Voting Rights Act, and more on electoral reform that limits gerrymandering.”). Many of these voting rights scholars seem to borrow from the facially race-neutral trend in the affirmative action context (for example, class-based preferences) without distinguishing educational admissions and voting. Race-consciousness in educational admissions is designed to advance diversity, whereas voting rights protections aim to prevent contemporary discrimination by politicians who use race as a predictor of voting preferences in order to manipulate voting rules.

mandering in 2012.<sup>18</sup> And in Runnels County, Texas, where ninety percent of Latino voters speak Spanish at home, the county defied a court order requiring that every polling place have at least one bilingual poll worker — in November 2009, not one county polling place satisfied that requirement.<sup>19</sup>

Part of the problem is Issacharoff's characterization of section 5 as limited to blocking access-based discrimination. Issacharoff writes that, by the 1980s,<sup>20</sup> section 5 "had accomplished much of its purpose, removing the literacy tests and other barriers to black enfranchisement,"<sup>21</sup> and that "section 5 was receding in importance as voting rights moved into the domain of political power, not simply access to the franchise."<sup>22</sup> This argument downplays, however, the language of section 5 itself, which requires preclearance not just of a change to "any voting qualification or prerequisite to voting," but also of a change to "any . . . standard, practice, or procedure with respect to voting."<sup>23</sup> The Justice Department followed the express intent of Congress and originally enforced section 5 to apply to all voting changes (not just changes relating to access to voting). The Supreme Court's opinion in *Allen v. State Board of Elections*<sup>24</sup> affirmed such an application.<sup>25</sup> Generally, problematic jurisdictions did not try to reintroduce voting tests and devices but instead enacted measures that discriminated through other means, particularly by dilutive redistricting, methods of elections, and annexations.<sup>26</sup>

---

<sup>18</sup> See Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Joseph M. Nixon, Esq. et al. (Feb. 7, 2012), available at [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/1\\_020712.pdf](http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_020712.pdf).

<sup>19</sup> See Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Elesa Ocker, Cnty. Clerk, Runnels Cnty., Tex. (June 28, 2010), available at [http://www.iustice.gov/crt/about/vot/sec\\_5/pdfs/1\\_062810.pdf](http://www.iustice.gov/crt/about/vot/sec_5/pdfs/1_062810.pdf).

<sup>20</sup> Issacharoff describes the 1990s as a period of "a brief reawakening" of section 5 due to the Justice Department's "so-called 'max black' strategy." Issacharoff, *supra* note 3, at 98. I agree the Supreme Court concluded that the Justice Department misapplied section 5 to a few statewide plans, but those instances were not representative of the vast majority of objections lodged during the 1990s.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 97.

<sup>23</sup> 42 U.S.C. § 1973c(a) (2006).

<sup>24</sup> 393 U.S. 544 (1969).

<sup>25</sup> *Id.* at 565–66, 568 (recognizing that section 5 was "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race," *id.* at 565, and concluding that Congress intended that "all changes, no matter how small, be subjected to § 5 scrutiny," *id.* at 568); see also *City of Rome v. United States*, 446 U.S. 156, 180–81 (1980) (finding that Congress recognized in 1975 the critical role that section 5 played in addressing discriminatory dilutive measures enacted after literacy tests and other barriers to black enfranchisement had been removed).

<sup>26</sup> See also *Voting Rights Act After the Supreme Court's Decision in Shelby County: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*,

Voting discrimination is not simply political gerrymandering, but a special problem that warrants unique protections. Diminishing minority votes does not become acceptable because it is motivated by political gain rather than racial animus. Historically, political operatives have excluded minorities for political purposes. Politicians shut out African Americans in the late 1800s because many voted Republican. They also excluded African Americans in the 1900s because many would have voted for pro-integration candidates.<sup>27</sup> Diminishing the votes of minorities poses special dangers because it reduces incentives for cross-racial coalitions, increases incentives for politicians to scapegoat minorities, and fuels racial division. The unique dangers of voting discrimination are so significant that we altered the Constitution through the Fifteenth Amendment to prevent the practice.

Granted, it is important to protect the voting rights of all Americans. There is no reason, however, that we must retreat from strong protections to prevent racial discrimination in voting or abandon congressional use of the Fifteenth Amendment.<sup>28</sup> Choosing between the Fifteenth Amendment and the Elections Clause is a false choice. We can simultaneously work to prevent racial discrimination in voting and improve election administration for voting for all Americans. The 1960s and 1970s yielded the passage and extension of both a VRA that prevented voting discrimination and various legal directives that expanded voting rights to new residents, members of the military, eighteen-year-olds, and those unable to pay a poll tax.<sup>29</sup>

---

113th Cong. 52–53 (2013) (statement of Spencer Overton, Professor of Law, The George Washington University Law School).

<sup>27</sup> Issacharoff acknowledges the historic connection between political strategy and voting discrimination, but he fails to expand upon the unique implications of it. See Issacharoff, *supra* note 3, at 97 n.10.

<sup>28</sup> See Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012) (arguing that the Elections Clause as well as the Fourteenth and Fifteenth Amendments validate the VRA preclearance regime as it applies to local, state, and federal elections).

<sup>29</sup> While Issacharoff purports to describe a new “non-civil rights” model, Issacharoff, *supra* note 3, at 104, Fourteenth Amendment challenges to restrictions on voting and the extensive power Congress enjoys over federal elections have been recognized for decades, see *Ex parte Siebold*, 100 U.S. 371, 384 (1879) (“[T]he regulations [for federal elections] made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.”). Several other decisions have used the Fourteenth Amendment to invalidate restrictions on the fundamental right to vote. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating a Tennessee restriction that limited voting to people who had lived in the state for at least a year); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (invalidating a New York restriction that disqualified individuals who did not own or lease taxable real property or did not have children enrolled in the local public schools from voting for school district elections); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (invalidating Virginia’s poll tax); *Carrington v. Rash*, 380 U.S. 89 (1965) (invalidating a Texas restriction that disqualified active members of the military who did not live in Texas at the time they entered their service from voting). Granted, pushing general federal election reforms that seem parti-

When Issacharoff actually proposes legislation implementing his new “non–civil rights” model, even he is not “beyond” race. He requires disclosure of the anticipated effect on access to the ballot “and any known anticipated impact on minority voters in particular.”<sup>30</sup> This is the right policy, as a disclosure requirement without a consideration of race would be woefully inadequate,<sup>31</sup> but it illustrates that a “non–civil rights” perspective can go only so far.

## II. EXPAND DISCLOSURE

Instead of limiting disclosure to federal elections, I would expand disclosure to include federal, state, and local elections. I would also require more detailed demographic information in areas with significant minority populations and racially polarized voting, particularly for redistricting, annexations, and other changes that may dilute minority voting strength without impeding voter access.

Issacharoff touts the “broad” power of the Elections Clause as preferable to the “limited race-driven use” of the Fifteenth Amendment,<sup>32</sup> but his choice to move “beyond” racial discrimination limits his proposal to federal elections. As a result, Issacharoff’s disclosure proposal misses manipulation of local election rules for offices such as sheriff, county commissioner, city council, or school board member. These offices are often nonpartisan and escape national attention, but they make important decisions related to schools, criminal justice, health and family services, and economic opportunity that directly affect our daily lives.

Granted, most states have elections for state and federal offices at the same time, and thus Issacharoff’s federal disclosure proposal would cover many voting changes that simultaneously apply to federal, state, and local elections (for example, voter identification, early vote roll-

---

san — like relaxed photo identification requirements and mandatory early voting — may prevent bipartisan agreement on updating the VRA and may endanger protections against voting discrimination upon which Democrats and Republicans can agree. See Spencer Overton, *Against a “Post-Racial” Voting Rights Act*, AM. PROSPECT (Aug. 21, 2013), <http://prospect.org/article/against-post-racial-voting-rights-act>. Nevertheless, aside from strategic decisions about the proper venues to make arguments, we should press for both measures that prevent voting discrimination and those that protect voting rights for all Americans. We should not use the vacuum created by *Shelby County* as an opportunity to push general election reform while abandoning the quest for tools to effectively prevent voting discrimination.

<sup>30</sup> Issacharoff, *supra* note 3, at 121.

<sup>31</sup> This approach modifies and improves upon an earlier nonracial approach in the *New Republic*, in which Issacharoff claims disclosure “would not be triggered by racial concerns,” and articulates factors that would not request basic information about the racial and language minority populations affected by voting changes. See Samuel Issacharoff, *So the VRA Is Guttled. Here’s How to Still Fight Voter Discrimination*, NEW REPUBLIC (June 28, 2013), <http://www.newrepublic.com/article/113672/voting-rights-act-overturned-how-still-fight-voter-discrimination>.

<sup>32</sup> Issacharoff, *supra* note 3, at 113.

back, and registration rules). Issacharoff's rule, however, would not disclose the bulk of unfair local and state activity. At least 86.4% of all election changes that resulted in section 5 objections since 2000 would *not* have been disclosed under Issacharoff's proposal.<sup>33</sup> That is because even when federal, state, and local elections are conducted at the same time, many important changes would remain undisclosed under Issacharoff's proposal, including state and local redistricting (such as in Nueces County, Texas) and changes to special elections, candidate qualifications, the method of elections, and the structure of government (for example, reductions in the number of members of a county commission). Also, Issacharoff's proposal would not disclose local annexations, consolidations, or divisions of political units.

These local changes, however, would benefit the most from disclosure. American democracy is unique because state, county, and municipal officials have great discretion with respect to promulgating and administering election rules. There are, for example, over 3000 counties in the United States. While decentralization breeds innovation, it also obscures the adverse effects of a regulatory change in one locality.

Issacharoff acknowledges that his proposal does not aspire to "comprehensive perfection, but to a regulatory approach that captures more of the contemporary issues than one designed in 1965."<sup>34</sup> The effects of many of the statewide "contemporary issues" he lists, however — such as photo identification and early vote rollback in swing states — would be publicly debated and analyzed even without disclosure. These statewide changes generally receive statewide and often national press coverage; and they can spur public education, legislative advocacy, and lawsuits funded by state and national political campaigns, good government groups, and civil rights groups. Indeed, two national advocacy groups already monitor and periodically report on restrictive voting bills in state legislatures.<sup>35</sup>

Local changes, in contrast, often do not appear in the *New York Times* or *Washington Post*. Voters in places such as Runnels County, Texas (population 11,500), often lack the thousands and sometimes millions of dollars necessary to bring a lawsuit to challenge an unfair

---

<sup>33</sup> Percentages were determined by an analysis of objections posted by the Department of Justice. See *About Section 5 of the Voting Rights Act: Section 5 Objection Determinations*, U.S. DEP'T OF JUST., [http://www.justice.gov/crt/about/vot/sec\\_5/obj\\_activ.php](http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php) (last visited Nov. 9, 2013).

<sup>34</sup> Issacharoff, *supra* note 3, at 123.

<sup>35</sup> See, e.g., Erin Ferns Lee, *Election Legislation 2013: Legislative Threats and Opportunities*, PROJECT VOTE (Sept. 2013), <http://projectvote.org/images/publications/Threats%20and%20Opportunities/September%202013/ELECTION-LEGISLATION-2013-Threats-and-Opportunities-September-2013.pdf>; *Voting Laws Roundup 2013*, BRENNAN CENTER FOR JUST., <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup> (last updated Nov. 4, 2013) (reporting that at least ninety restrictive bills were introduced in thirty-one states between January 1, 2013, and October 24, 2013).



local election change. Not only does Issacharoff's disclosure proposal fall short of "comprehensive perfection," it also misses the vast majority of the types of changes that have been problematic in recent years and that are most in need of disclosure.

Aside from failing to require disclosure of local election changes, Issacharoff's plan falls short in other ways. While Issacharoff would require a reporting of "all changes made to election practice," the voting impact statement "need not be elaborate, only a statement of the likely anticipated effect on *access to the ballot* and any known anticipated impact on minority voters in particular."<sup>36</sup> This "access to the ballot" seems to focus on regulations that make voting harder, such as restrictions on early vote opportunities (certainly a reasonable reading by an election official looking to avoid disclosure), and if so would miss racial manipulation of other voting rules implemented to dilute minority voting strength.

Discriminatory practices can diminish the impact of minority votes without diminishing formal "access to the ballot." For example, while the discriminatory gerrymander in Nueces County split up the votes of Latinos, it did not reduce the number of Latinos who voted. Similarly, the city council of Calera, Alabama, lost its sole African American member after officials redrew the only city council district that had a majority African American constituency in 2006; that district dropped from seventy percent to thirty percent African American.<sup>37</sup> Another example: In 2010, African Americans in Augusta-Richmond, Georgia, made up a much larger percentage of the electorate in elections held in November (52 percent) than in elections held in July (43 percent);<sup>38</sup> two years later, officials moved local elections from November back to July.<sup>39</sup> Other changes in which discriminatory effects might not be disclosed under an "access to the ballot" standard include changes to candidate qualifications, the method of elections, the structure of government, and local annexations, consolidations, or divisions of political units.

Further, despite extensive criticism of command-and-control, ex ante civil rights regulation (a criticism that would counsel in favor of repealing the ban on literacy tests), Issacharoff does not articulate a fully theorized view of disclosure. As a result, important larger norma-

---

<sup>36</sup> Issacharoff, *supra* note 3, at 121 (emphasis added).

<sup>37</sup> See Letter from Grace Chung Becker, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Dan Head, Esq. (Aug. 25, 2008), available at [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/l\\_082508.pdf](http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082508.pdf).

<sup>38</sup> See Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Dennis R. Dunn, Esq., Deputy Attorney Gen., Attorney Gen. of Ga. (Dec. 21, 2012), available at [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/l\\_122112\\_ga.pdf](http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122112_ga.pdf).

<sup>39</sup> See *id.*

tive questions remain unanswered, such as how to balance the need for detailed and effective disclosure with reasonable, nonburdensome reporting requirements that are both politically and constitutionally feasible.

While Issacharoff's Elections Clause disclosure proposal is limited to federal elections, I propose that Congress adopt a disclosure regime covering federal, state, and local elections based on the Fifteenth Amendment and the Elections Clause.

Enhanced disclosure rules are needed now in state and local elections in large part because the Court has rolled back preclearance. The primary benefit of preclearance was disclosure of all local voting changes in particular jurisdictions, which deterred countless numbers of unfair election changes that were either withdrawn or never submitted. The law required that all or parts of fifteen states and localities submit all proposed changes to election rules to federal officials for review. Politicians in covered states and localities knew that the effects of *all* new election rules would be reviewed, and this comprehensive disclosure deterred a great deal of bad activity. Preclearance increased states' and localities' compliance with the Act and thereby reduced the amount and cost of litigation, both to voters and to governments.

Various factors, including the pervasiveness of racially polarized voting, political campaigns' and parties' attention to the racial composition of election districts, and the relatively minor burden of disclosure on states (especially compared with preclearance), suggest that such federal, state, and local disclosure would be appropriate nationwide in areas with significant minority populations.<sup>40</sup> The Court has already recognized that disclosure is less burdensome than absolute restrictions in the election context.<sup>41</sup> Voting rights disclosure that applies

---

<sup>40</sup> In *Shelby County*, the Court did not resolve whether federal voting rights legislation enacted pursuant to the Fifteenth Amendment should be reviewed by courts using a "rationality" standard or a "congruence and proportionality" standard. Compare *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (holding that the Court will only examine whether Congress has chosen a "rational" means of enforcing its Fifteenth Amendment powers), with *City of Boerne v. Flores*, 521 U.S. 507, 518–20 (1997) (acknowledging several cases in which federal voting rights protections have been held constitutional despite burdens placed on the states — including the nationwide ban on literacy tests in *Katzenbach v. Morgan* — and noting that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *id.* at 520). See also Richard L. Hasen, *Shelby County and the Illusion of Minimalism* 10 (Univ. of Cal., Irvine Sch. of Law & Legal Studies Research Paper Series No. 2013-1116, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2291612](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291612) ("*Shelby County* ignores the *Boerne/Katzenbach* standard of review question entirely (the majority fails even to cite *Boerne* in its opinion) . . ." (footnote omitted)). As discussed below, a reasonable disclosure regime would satisfy either standard.

<sup>41</sup> The Court has already weighed the burdens of disclosure on important constitutional interests in the campaign finance, lobbying, and petition-gathering contexts, and upheld disclosure. Although a relatively low percentage of campaign contributions over \$200 and independent expenditures over \$250 may be corrupting and disclosure may deter campaign contributions and

to federal, state, and local election changes is “rational” and “congruent and proportional” to preventing and remedying discrimination.

While Issacharoff would require disclosure of the “likely anticipated effect on access to the ballot and any known anticipated impact on minority voters in particular,”<sup>42</sup> I would require more. In states and localities with significant minority populations and racially polarized voting, I would require disclosure of information identifying the anticipated effect of all types of voting changes on racial and language minorities (not just voter access changes). For redistricting and for annexations, consolidations, and divisions of political units, I would require demographic information about the voting-age population of the jurisdiction before and after the change, maps of the location of minorities, and the previous and new boundaries of voting districts.<sup>43</sup>

The disclosure regime should also grapple with practical details, such as the need to prevent jurisdictions from circumventing true disclosure through misreporting or providing technically true but incomplete reporting. It should also provide enforcement measures for noncompliance (many states currently fail to comply with existing federal requirements to disclose the numbers of voters registered in department of motor vehicles’ offices, public assistance offices, and disability offices).

---

independent expenditures, the Supreme Court has upheld disclosure of contributions and expenditures. The Court found such disclosure valuable in deterring corruption, providing information helpful to voters, and aiding in the enforcement of other campaign finance laws. See *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (per curiam); see also *Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding in an 8–1 vote disclosure of referendum petition signatures); *Citizens United v. FEC*, 130 S. Ct. 876, 915–16 (2010) (stating that “the informational interest alone is sufficient to justify” the challenged disclosure provisions); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding registration and disclosure mandates on lobbyists, even though Congress lacks the power to ban lobbying). The Court has recognized that “disclosure is a less restrictive alternative to more comprehensive regulations of speech” such as absolute bans on activity. *Citizens United*, 130 S. Ct. at 915; see also *id.* at 914 (“Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities,’ and ‘do not prevent anyone from speaking.’” (first quoting *Buckley*, 424 U.S. at 64, and then quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003))). By analogy, disclosure of all federal, state, and local voting changes would deter discrimination, provide critical information to citizens in successfully voting, and aid in the enforcement of other voting rights protections. Even though a relatively low percentage of voting changes may be discriminatory and jurisdictions may experience slight burdens in submitting information, disclosure of voting changes is reasonable. Disclosure of voting changes is much less restrictive than preclearance, as disclosure alone does not prevent any jurisdiction from enacting a voting change. Disclosure is also less restrictive than other regulations the Court has upheld, such as the nationwide ban on literacy tests that applies to federal, state, and local elections. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

<sup>42</sup> Issacharoff, *supra* note 3, at 121.

<sup>43</sup> This information, like the bulk of the information required by the Issacharoff disclosure proposal, was required to be submitted to the Justice Department under the preclearance administrative regulations. See 28 C.F.R. §§ 51.27–.28 (2013).

I agree with Issacharoff's borrowing of Dodd-Frank's requirement that a responsible official should sign, under oath, to affirm that the submitted information is true, but more details are needed. Many insights may come from disclosure in other fields — including not just securities disclosure and environmental impact statements, but also campaign finance disclosure and antitrust requirements for mergers. Areas that require disclosure to advance civil rights enforcement might provide particular insights, such as state laws requiring racial impact statements for new criminal law legislation, equal employment opportunity disclosure, and preclearance rules that require disclosure. That said, one cannot assume that the specifics of disclosure in one context will be identical to disclosure in a different context. For example, securities and environmental impact statement disclosures are detailed and lengthy, whereas the voting context may require less extensive disclosure due to constitutional considerations.

### III. BEYOND DISCLOSURE

While Professor Issacharoff criticizes preclearance and focuses on disclosure alone to update the VRA, I believe Congress should also update preclearance and the voting rights litigation process. Some jurisdictions with recent voting rights violations should be required to produce more detailed information than would be required by the disclosure proposals above, and this information should be scrutinized by experts before these particular jurisdictions implement their voting changes. Disclosure is important, but it is not enough.

Even if geographic section 5 preclearance coverage is more limited in the future, it still has a role in dealing with the worst offenders. Issacharoff described preclearance as a “fixed rule trying to hold back the subtle changes of politics”<sup>44</sup> — a “static regulatory structure” unable to account for changed circumstances and the dynamic nature of politics.<sup>45</sup> In fact, preclearance was not a fixed prohibition on a discriminatory practice (unlike, say, the ban on literacy tests), and it could adapt and prevent new forms of discrimination that were unforeseeable in 1965 or even in 2000.<sup>46</sup> It accommodated decentralization, diversity, and innovation by allowing jurisdictions to devise all types of

---

<sup>44</sup> Issacharoff, *supra* note 3, at 117.

<sup>45</sup> *Id.* (quoting Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131, 132 (2013)) (internal quotation marks omitted).

<sup>46</sup> See Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 955 (2011) (asserting that “preclearance has operated as a regime of forced disclosure, or ‘information-pushing’” and that preclearance is consistent with “new institutionalist” models of administration rather than centralized command-and-control regulation).

rules as long as they could simply show that they did not discriminate against people of color. It was — as many regulatory devices are — less expensive and more efficient, effective, and expeditious than litigation. While Issacharoff touts independent election administration as the “most attractive” alternative after *Shelby County*<sup>47</sup> (which Issacharoff concedes is unrealistic for political reasons<sup>48</sup>), the preclearance procedure gave state and local politicians in covered jurisdictions wide discretion to administer elections, but used generally independent administrative experts to review each change and ensure that it was not discriminatory. Contrary to Issacharoff’s suggestion, *Shelby County* did not strike down the ex ante race-discrimination nature of preclearance.<sup>49</sup> The case simply held that the coverage formula was outdated.<sup>50</sup> The answer to *Shelby County* is not to abandon the Fifteenth Amendment or preclearance as a tool, but to devise a coverage process that is more current and dynamic — making it easier to bail in to preclearance — and to seriously time-limit the preclearance, and to ensure that it is supervised by a court.

In updating preclearance, Congress should amend the section 3(c) bail-in provision of the VRA,<sup>51</sup> so that jurisdictions that commit a voting rights violation — including not just those motivated by a discriminatory purpose, but also those that simply had a discriminatory effect — may be ordered by a court to preclear future election changes for a fixed period of time.<sup>52</sup>

Congress should also update the voting rights litigation process. While Issacharoff believes disclosure alone will “lessen the litigation burden on those challenging suspected official misconduct” by setting “the template for either DOJ challenge or private party challenge, with the disclosure serving as the prima facie evidentiary basis,”<sup>53</sup> he is probably overly optimistic. Despite disclosure under oath, some clever politicians intent on implementing a change can probably devise a pretext that satisfies the formal disclosure requirements and is technically true without providing an easy roadmap upon which to file a voting rights lawsuit. Instead, disclosure’s true benefit is likely the deterrence

---

<sup>47</sup> Issacharoff, *supra* note 3, at 117.

<sup>48</sup> *See id.* at 118.

<sup>49</sup> *See id.* at 117 (“One reading of the Court’s opinion is that the race discrimination structure of section 5 could not be justified . . .”).

<sup>50</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (“We issue no holding on § 5 itself, only on the coverage formula.”).

<sup>51</sup> 42 U.S.C. § 1973a(c) (2006).

<sup>52</sup> *See* Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2037 (2010) (observing that Congress could allow a finding of discriminatory effect to trigger coverage under section 3(c)).

<sup>53</sup> Issacharoff, *supra* note 3, at 122.

of bad acts, and that could increase compliance and reduce the number of lawsuits.

Congress should update the voting rights litigation process to make it less expensive, more expeditious, and more efficient in stopping discriminatory procedures before they are used in elections and harm voters. For example, litigation expenses often run into the hundreds of thousands of dollars. In addition to the attorney time required to take depositions and request and review mountains of paper, one or more expert witnesses are almost always needed to analyze data, and the cost of retaining these experts is only increasing.<sup>54</sup>

States and localities generally have greater access to information about proposed election law changes, and the updated VRA should lower costs by shifting more responsibility to states and localities to show in court that a change is fair and that less harmful alternatives do not exist. The burden-shifting framework in the federal employment discrimination context is a good model. (Issacharoff believes that new election rules could be “effectively scrutinized even under a rational relations standard of review,”<sup>55</sup> which would do little to lower the cost of litigation and would leave too many unfair voting rules in place.) Along these same lines, a modern VRA should update section 2 litigation standards designed for redistricting cases so that they more effectively address other problems — such as hurdles to casting a ballot.<sup>56</sup>

## CONCLUSION

Professor Issacharoff’s “beyond discrimination” approach is incomplete. We need not choose between the Fifteenth Amendment and the Elections Clause — we can work simultaneously both to prevent racial discrimination in voting and to improve access to the franchise for all Americans. To that end, Congress should require disclosure not only in federal elections using the Elections Clause, but also in state and local elections using the Fifteenth Amendment. Further, Congress should update preclearance so that it is closely tied to areas with contemporary voting rights violations, and it should streamline voting rights litigation.

---

<sup>54</sup> See Note, *Admitting Doubt: A New Standard for Scientific Evidence*, 123 HARV. L. REV. 2021, 2023 (2010) (describing the Court’s cases allowing trial judges to serve a gatekeeping function with respect to expert testimony). Although the Voting Rights Act provides a successful plaintiff with reasonable expert fees, 42 U.S.C. § 1973l(e) (1965), the substantial upfront cost to plaintiffs may act as an obstacle to securing voting rights.

<sup>55</sup> *Id.*

<sup>56</sup> See Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579 (2013); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).