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Hasen, Richard L.

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***RACE OR PARTY?:
HOW COURTS SHOULD THINK ABOUT REPUBLICAN
EFFORTS TO MAKE IT HARDER TO VOTE IN
NORTH CAROLINA AND ELSEWHERE***

Richard L. Hasen

rhasen@law.uci.edu

University of California, Irvine ~ School of Law

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RACE OR PARTY?:
HOW COURTS SHOULD THINK ABOUT
REPUBLICAN EFFORTS TO MAKE IT HARDER
TO VOTE IN NORTH CAROLINA AND ELSEWHERE

*Richard L. Hasen**

INTRODUCTION

I begin with a story which may sound familiar. Following election reforms in North Carolina, African American voter turnout surges, setting records. The North Carolina legislature then changes hands, and the new party in power, which has few, if any, African American supporters, passes new voting restrictions that make it very difficult for African Americans to vote. Turnout plummets in the state, cratering among African American voters.

The story is true. The year was not 2008 — when African American voters helped North Carolina’s electoral votes go to Democrat Barack Obama before a new Republican legislature (in 2013) passed a tough set of voting rules — but 1900, and the party doing the disenfranchising was not the Republican Party but the Democratic Party. Professor J. Morgan Kousser in his path-breaking 1974 book, *The Shaping of Southern Politics*, tells the compelling story of African American disenfranchisement at the beginning of the last century.¹

North Carolina had “perhaps the most democratic”² political system in the late-nineteenth century South, with very high turnout among adult males, with black men voting in large numbers, and without the extensive ballot-box stuffing and election fraud that had been occurring in most other Southern states. Back then, of course, African American voters supported the Republican Party, the party of Lincoln. Republicans had strong black support in the state, but their white support was largely limited to hill and mountain areas, as racist white voters in much of the state would not vote for a party supported by blacks. Populists put up their own candidates and gained some support. Republicans and Populists put up a joint, or fused, set of candidates by the mid-1890s, and they captured the North Carolina legislature from Democrats in 1894.

* Chancellor’s Professor of Law and Political Science, UC Irvine School of Law. Thanks to Guy Charles, Morgan Kousser, and Rick Pildes for useful comments and suggestions. This Essay is based upon the 2013 American Public Values Lecture the author delivered in October 2013 at North Carolina State University.

¹ J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910*, at 182–95 (1974).

² *Id.* at 183.

Then, as now, North Carolina was a closely divided partisan state, and state laws changed as the parties changed power. Along with adopting a more progressive legislative agenda, the fused Republican-Populists passed major election reforms, reversing earlier Democratic laws that suppressed African American turnout. Kousser says that North Carolina had “probably the fairest and most democratic election law in the post-Reconstruction South.”³ The new laws required appointment of neutral election judges, smaller precincts, limitations on registrars’ ability to disqualify voters, tougher standards to challenge voters, and colored ballots with symbols to help illiterate voters cast effective ballots.

The reforms worked: turnout hit a whopping 85.4% of eligible voters in 1896, black turnout was the highest in any southern election since 1876, Republicans got their first North Carolina governor since Reconstruction, and the fused Republican-Populist parties increased their majorities. African American George H. White was elected to Congress from North Carolina. But Congressman White would be the last African American member of Congress from the South until 1972 and the last from North Carolina until 1992 (with the election of Mel Watt and Eva Clayton).⁴

There was a backlash against African American success. Democrats resorted to violence and fraud in 1898, and the Republican-Populist coalition became strained, including in disputes over racial policies. Democrats took over the state legislature, and their first order of business was to reverse the election reforms in order to ease the passage of a state constitutional amendment to disenfranchise African American voters. The *Raleigh News and Observer* editorialized in favor of reversing the election reforms, stating that the legislature should “make it impossible for any element of white voters to appeal to the Negro voters upon any public question.”⁵ The purpose of the reforms was to disenfranchise blacks and lower-class whites. Democrats’ new election law changed Election Day from November to August. It required all voters to register anew and gave registrars discretion to exclude voters. “Finally,” Kousser explains, “the law provided that any ballot placed in the wrong box — there were six — whether by election officers or the voter himself, would be void.”⁶

With the new election law in place, the fight, which got ugly, turned to the plebiscite over the disenfranchising state constitutional amendment.⁷

³ *Id.* at 187.

⁴ See *People Search*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/People/Search> (last visited Nov. 24, 2013).

⁵ KOUSSER, *supra* note **Error! Bookmark not defined.**, at 190 (quoting Editorial, *About Submitting Questions to the People*, NEWS & OBSERVER (Raleigh, N.C.), Jan 20, 1899, at 4) (internal quotation marks omitted).

⁶ *Id.*

⁷ The amendment imposed a poll tax and literacy test, with a grandfather clause. For the text, see 8.7: *The Suffrage Amendment*, LEARN NC, <http://www.learnnc.org/lp/editions/nchist-newsouth/4365> (last visited Nov. 24, 2013).

Former Member of Congress Alfred Moore Waddell told a crowd the day before the election: “You are Anglo-Saxons. You are armed and prepared, and you will do your duty. . . . Go to the polls to-morrow, and if you find the negro out voting, tell him to leave the polls, and if he refuses, kill him.”⁸

Thanks to fraud, intimidation, violence, and racial animus, the amendment passed. Afterward, overall voter turnout in North Carolina plummeted and African American turnout dried up completely. Eventually, the state Republican Party gave up on African Americans — now disenfranchised and unable to support the Party — seeing them as what Kousser terms “a lost and damaging cause.”⁹

The fight in 1900 was about race — and it was about partisan politics. You could not separate the two: racial politics affected the composition of the political parties, and parties engaged in racial politics in part for partisan ends. The story Kousser tells is a story of race *and* party: the only way to understand it fully is to see the complexity and interaction between these forces.

Fast forward to 2013 and the new fight in North Carolina over House Bill 589, which has gotten national attention.¹⁰ The law was passed by a new Republican legislature over staunch Democratic objections following a Democratic presidential victory in 2008 and a closely contested 2012 presidential race. It includes a strict voter identification provision. The law also cuts a week off early voting in the state (used by up to seventy percent of African American voters in 2012) and bars local election boards from keeping the polls open on the final Saturday before the election after 1:00 PM. It keeps the same number of hours on a fewer number of days. It eliminates same-day voter registration. It opens up the precincts to “challengers,” who can gum up the works at polling places and dissuade voters from showing up in the first place. It bans paying voter registration-card circulators by the piece. It eliminates preregistration of sixteen- and seventeen-year-olds in high schools. It provides that a voter who votes in the wrong precinct (perhaps because of a poll worker’s error) will have her whole ballot thrown out (earlier law had allowed such ballots to count for those races in which the voter was eligible to vote).

Like the fights in 1900, today’s fight over North Carolina’s controversial new voting law is about race and party politics. In this way, it is noth-

⁸ GLENDA ELIZABETH GILMORE, *GENDER AND JIM CROW* 110–11 (1996) (alteration in original) (quoting *The North Carolina Race Conflict*, 60 THE OUTLOOK (New York, N.Y.) 707, 708 (1898)) (internal quotation marks omitted).

⁹ KOUSSER, *supra* note **Error! Bookmark not defined.**, at 195.

¹⁰ For the text of the law, see H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), available at <http://www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H589v8.pdf>; see also Evan Perez, *Justice Department Sues North Carolina over Voting Law*, CNN (Sept. 30, 2013, 6:01 PM), <http://www.cnn.com/2013/09/30/us/north-carolina-voting-lawsuit>.

ing new. But thanks to how the U.S. Supreme Court has conceived of the meaning of the U.S. Constitution and how Congress has defined racial politics in the Voting Rights Act of 1965,¹¹ we may be forced to choose: race or party?

The realignment of the parties in the South following the Civil Rights movement of the 1960s has created a reality in which today most African American voters are Democrats and most white conservative voters are Republicans. That was not the case back in 1900 or before the Civil Rights movement, when Southern Democrats were conservative and Northern Democrats were more liberal. The Voting Rights Act, when passed, was not seen as a law that helped the Democratic Party — quite the opposite. But today, many Republicans view the Voting Rights Act as a law that favors Democrats, especially with a Democratic and African American President and Attorney General administering the law.

When party and race coincide, as they did in 1900 and they do today, it is much harder to separate racial and partisan intent and effect. Today, white voters in the South are overwhelmingly Republican and, in some of the Southern states, are less likely to be willing to vote for a black candidate than are white voters in the rest of the country.¹² The Democratic Party supports a left-leaning platform that includes more social assistance to the poor and higher taxes. Some Republicans view such plans as aiding racial minorities.

Given the overlap of considerations of race and party, when a Republican legislature like North Carolina's passes a law making it harder for some voters to vote, is that a law about party politics or a law about race?

As I explain, if courts call this a law about party politics and view it through the lens of partisan competition, then the law is more likely to stand and the fight over it will be waged at the ballot box. If courts call this a law about race and view it through the lens of the struggle over race and voting rights, then the law is likely to fall and the fight will be settled primarily in courts.

This contrast was on display in a brief that the State of Texas recently filed in its fight with the U.S. Department of Justice over whether to put Texas back under federal voting supervision. The Justice Department argues that proof of intentional racial discrimination in voting is found in Texas's recent redistricting plan, which disfavors minority voters and officeholders. Texas's defense is that its law is about partisan politics, not about race, and it is therefore acceptable:

DOJ's accusations of racial discrimination are baseless. In 2011, both houses of the Texas Legislature were controlled by large Republican majorities, and

¹¹ 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011).

¹² See Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 208 (2013).

their redistricting decisions were designed to increase the Republican Party's electoral prospects at the expense of the Democrats. It is perfectly constitutional for a Republican-controlled legislature to make partisan districting decisions, even if there are incidental effects on minority voters who support Democratic candidates.¹³

Note that Texas's defense is that it was deliberately passing its law "at the expense of Democrats." Leave aside for a moment the fact that discriminating on the basis of political party should serve as an indictment rather than a defense of Texas's policy. Instead, note the bifurcation of race and party. To Texas, there is just an "incidental" effect on minority voters. If Texas is right that party discrimination is a valid defense under the law, but that racial discrimination violates the Voting Rights Act, then courts need to make a distinction: race or party?

The race versus party bifurcation is unhelpful, and the solution to these new battles over election rules — what I call "the Voting Wars" — is going to have to come from the federal courts. Courts should apply a more rigorous standard to review arguably discriminatory voting laws. When a legislature passes an election-administration law (outside of the redistricting context) discriminating against a party's voters or otherwise burdening voters, that fact should not be a defense. Instead, courts should read the Fourteenth Amendment's Equal Protection Clause to require the legislature to produce substantial evidence that it has a good reason for burdening voters and that its means are closely connected to achieving those ends. The achievement of partisan ends would not be considered a good reason (as it appears to be in the redistricting context). This rule would both discourage party power grabs and protect voting rights of minority voters. In short, it would inhibit discrimination on the basis of both race and party, and protect all voters from unnecessary burdens on the right to vote.

I. NORTH CAROLINA AS PART OF THE VOTING WARS

It is easy to situate North Carolina's law in the context of a national battle we have witnessed since 2000 over the rules for running our elections. I have told the story many times before¹⁴ and will not dwell on it here. The last decade has included great partisan battles over the rules for running our elections. Voter identification laws, for example, have been passed along partisan lines, with Republicans supporting them in the name of fraud prevention and Democrats blasting them in the name of voter suppression. There is virtually no impersonation fraud which a voter iden-

¹³ Defendants' Response to Plaintiffs and the United States Regarding Section 3(c) of the Voting Rights Act at 19, *Perez v. Texas*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Aug. 5, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/Texas-reply-on-Sec.-3-of-VRA-8-5-13.pdf>.

¹⁴ I tell it in most detail in RICHARD L. HASEN, *THE VOTING WARS* (2012). On the extent and veracity of claims of voter fraud and suppression, see chapters 2 and 3. *Id.* at 41–104.

tification law would prevent, but it also appears that Democrats have exaggerated the extent to which these laws disenfranchise eligible voters who want to vote.¹⁵

The latest wave of Republican-led laws, however, may be increasing the burden on voters. While some of the early voter identification laws were not that onerous, Texas's and North Carolina's laws appear to make it more difficult to vote by accepting fewer forms of ID for voting and, in Texas's case, offering fewer (and more distant) locations at which a person can obtain a "free" voter identification card. Other North Carolina changes, such as eliminating same-day voter registration and preventing the counting of ballots cast in a wrong precinct, may have an even larger effect on voter registration and turnout than the identification laws.

Judged through a partisan lens then, North Carolina's law is just the latest Republican attempt to skew the electorate at least moderately to gain electoral advantage.

II. NORTH CAROLINA AS PART OF THE CIVIL RIGHTS STRUGGLE

I turn the lens from partisan politics to race and back to the 1965 passage of the Voting Rights Act. The Voting Rights Act first suspended and then later banned literacy tests and other voting rules. The ban on tests, combined with the presence of federal observers, mattered a great deal at the beginning. Over time, the preclearance provision became the most significant piece of the Act. Under this provision, a state or locality covered by section 5 had the burden to prove that any change in voting rules that it proposed would not have the effect, and was not enacted with the purpose, of making minority voters worse off.

The Voting Rights Act has been very successful. Although the percentage of objections was never high, because so many voting changes were submitted (everything from a ten-year redistricting plan to moving a polling place across the street) there were over 2000 objections between 1969 and 1989.¹⁶ Racial gaps in voter registration fell. The number of minority officeholders grew, especially after Congress expanded the Voting Rights Act in 1982 to include a new section 2, which mandated the creation of new majority-minority districts across the country. In the seven originally covered section 5 states, there were fewer than 100 black elected officials in 1975. That number rose to 3265 in 1989. In six states with especially large Hispanic concentrations, the number of Hispanic officeholders increased from 1280 to 3592 in 1990.¹⁷

¹⁵ See *id.*

¹⁶ DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* 168–69 (5th ed. 2012).

¹⁷ *Id.* at 203.

The greatest significance of the law in recent years has been to give minority voters a bargaining chip — a chance to sit at the table and express concerns about proposed voting rules.¹⁸ The Justice Department has brought in minority voters into investigations and into negotiations with covered jurisdictions over proposed voting rules. Covered jurisdictions changed their laws to ease the impact on minority voters.

A nice recent example of this comes from South Carolina, which passed a voter identification law, one that was not quite as strict as Texas's. South Carolina's law allowed election officials to accommodate voters who had "reasonable impediment[s]" that prevented them from getting the type of photo identification needed for voting.¹⁹ The Justice Department still objected, as did legal organizations representing minority voters.²⁰ And because of section 5, South Carolina had the burden of showing that the voter identification requirement did not discriminate.²¹ As the Justice Department's case against South Carolina proceeded, the state watered down its law, making it easier for people without photo identification to vote by expanding the "reasonable impediment" provision.²² The court eventually approved South Carolina's law for use in 2013, but only because section 5 spurred those changes. As Judge John Bates observed: "Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive."²³

A different federal court blocked Texas's new voter identification law.²⁴ Its reasoning was simple: voter identification laws disproportionately affect the poor in Texas, like those voters who would have to travel up to 250 miles at their own expense to the county seat to get the so-called "free" voter identification.²⁵ African Americans and Latinos are disproportionately poor in Texas, and therefore Texas could not demonstrate under the section 5 standard that the law would not make minority voters worse off.

Whatever impact these laws are going to have, their burdens are going to fall hardest on the poor and the less educated. To the extent that the vestiges of past discrimination mean that the poor will disproportionately include minority voters, section 5 assured that at least in covered jurisdictions these new burdensome laws would not make minority voters worse off. But the covered states objected. Texas in effect argued: "Why should

¹⁸ Richard L. Hasen, *What's Lost If the Voting Rights Act Falls?*, SLATE (Jan. 10, 2013, 5:42 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/01/voting_rights_act_what_s_lost_if_the_supreme_court_kills_it.html.

¹⁹ See *South Carolina v. United States*, 898 F. Supp. 2d 30, 34 (D.D.C. 2012).

²⁰ See *id.* at 38.

²¹ *Id.*

²² See *id.* at 35–36.

²³ *Id.* at 53–54 (Bates, J., concurring).

²⁴ *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013) (mem.).

²⁵ *Id.* at 139–40.

we have to get federal approval before we implement a voter identification law when a state like Indiana or Pennsylvania can implement a voter identification law without getting such permission?”

This past summer, the Supreme Court agreed. States and jurisdictions that were covered under the section 5 preclearance rule were those with a history of racial discrimination in voting, as measured by a formula based in part on voter turnout statistics from 1964, 1968, or 1972. Section 5 was supposed to be temporary, but Congress kept reauthorizing it without updating this coverage formula. The most recent update occurred in 2006, when Congress renewed preclearance for another twenty-five years.²⁶ In 2009, the Supreme Court issued an opinion warning that section 5 was in danger of being struck down as an encroachment on states' rights,²⁷ but Congress did nothing to update the coverage formula.²⁸ Then in 2013, on a 5-4 party line vote, the Supreme Court in *Shelby County v. Holder*²⁹ held that the coverage formula's use was unconstitutional, because it treat the covered jurisdictions unfairly in violation of their rights to “equal sovereignty.”³⁰ Although Congress might be able to pass a new coverage formula which would meet the Supreme Court's test — I am doubtful about that³¹ — there is no political will in Congress to do so.

The loss of section 5 and the passage of new restrictive voting laws by states such as Texas and North Carolina in response has led the Justice Department to challenge Texas's and North Carolina's rules, under provisions of the Voting Rights Act that were not challenged in *Shelby County*.³² Section 2 of the Act, which applies nationwide, allows minority voters to sue for denial or abridgement of the right to vote on account of race.³³ The language of the section provides that one can prove denial or abridgement by showing that the political processes leading to the nomination or election of officials in the state are not equally open to protected minority members, in that minority voters have “less opportunity than oth-

²⁶ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2621 (2013).

²⁷ *Nw. Austin Mun. Util. Dist. No. One v. Holder* (NAMUDNO), 129 S. Ct. 2504, 2511–13 (2009).

²⁸ See *Shelby Cnty.*, 133 S. Ct. at 2628.

²⁹ 133 S. Ct. 2612.

³⁰ *Id.* at 2623; see also *id.* at 2623–24.

³¹ I explain the reasons in Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291612.

³² For documents related to Texas, see *Litigation: United States v. Texas*, ELECTION L. @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/litigation/USv.Texas.php> (last updated Aug. 27, 2013, 11:08 AM). For documents related to North Carolina, see *Litigation: United States v. North Carolina*, ELECTION L. @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/litigation/UnitedStatesV.NorthCarolina.php> (last updated Oct. 10, 2013, 8:52 AM).

³³ See 42 U.S.C. § 1973(b) (2006 & Supp. V. 2011).

er members of the electorate to participate in the political process and to elect representatives of their choice.”³⁴

Section 2 has been extremely successful in the redistricting context, causing the creation of many majority-minority districts. But courts have *not* read section 2 widely in the context of nonredistricting measures, such as voter identification requirements or restrictions on early voting.³⁵ Unlike section 5, the burden here is on the challengers, not on the state, to disprove discriminatory effect. And unlike section 5, courts do not compare the old law to the new law; instead, courts compare the law in place to the abstract principles of nondiscrimination contained in the language of section 2.

Thus far, section 2 has not been a successful tool to challenge these laws, and unless courts change course it likely will not work now. Concededly, there have been few section 2 cases considering application of the provision to voter identification laws.³⁶ However, if lower courts *do* change course and start holding that section 2 covers things like voter identification laws with a discriminatory effect, the Supreme Court could hold that section 2 is unconstitutional on the grounds that it exceeds congressional power and encroaches on states’ rights along the lines of the reasoning in *Shelby County*.

The other provision that the Department of Justice is relying upon is section 3 of the Voting Rights Act. This provision gives courts discretion to impose preclearance on a state or locality that has recently been guilty of intentional race discrimination in voting.³⁷ It is discretionary; even if the Justice Department could prove intention, a court need not impose preclearance and even if it does, it can limit preclearance to particular changes or to a short period of time. The section 3 standard is tougher than both the section 5 and section 2 standards. How will the Department show that a state has discriminated on the basis of race, particularly when the state defends and says: “We were acting in good faith in passing our laws for good reasons, or at worst we were discriminating on the basis of party, not race?”

That is Texas’s argument and could well be North Carolina’s, although the latter is more likely to defend itself by claiming that its laws are necessary to prevent fraud or to promote efficiency. Texas may have a hard time defending itself against charges of intentional racism, because just a few years ago a federal court held that Texas *did* engage in intentional racial discrimination in its 2011 redistricting plan when, among other things, it cut the “economic guts” out of Black Democratic legislators’ districts

³⁴ *Id.*

³⁵ See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 708–09 (2006).

³⁶ *Id.* at 709.

³⁷ See 42 U.S.C. § 1973a(c).

but not white Democratic legislators' districts.³⁸ We will see what kind of evidence the Justice Department produces of intentional racial discrimination in North Carolina. It is also unclear if courts will infer discriminatory intent based upon discriminatory effects.³⁹ And once again, if any court actually reimposes preclearance on Texas or North Carolina under section 3, the Supreme Court could reverse under *Shelby County's* equal sovereignty principle. Texas argues in its briefs that it is unconstitutional to impose preclearance unless a state's racist conduct is as bad as what existed in 1965, when Congress first passed the Voting Rights Act.⁴⁰

III. RACE OR PARTY? YES

I turn now to address the race-or-party question head-on. Recall Texas's defense to the attack on its redistricting plan: this is about party, rather than race. But the lines between the two are inextricably intertwined.

To illustrate, consider another aspect of North Carolina history. In the 1990s, the state legislature was still controlled by Democrats, and redistricting was still subject to preclearance from the Justice Department.⁴¹ North Carolina had a long history of racial discrimination in its redistricting plans, and North Carolina knew it was going to have to do more to foster minority representation to avoid Voting Rights Act liability.

The 1990s process of redistricting was brutal and political. Democrats passed a congressional plan with just one majority-minority district, and the Justice Department, then under the control of the first Bush Justice Department, demanded the creation of a second district to satisfy the requirements of section 5 of the Voting Rights Act. Republicans thought this requirement would work to their advantage, as the packing of African-American voters into two districts would lead to more districts with a majority of Republican voters, helping give Republicans a majority in the Congressional delegation.

Democrats, still controlling the redistricting process, nonetheless created two majority-minority districts of quite unusual shapes. One of these districts ran 160 miles down I-85 from Durham to Charlotte. The Supreme Court noted: "At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that '[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the dis-

³⁸ *Texas v. United States*, 887 F. Supp. 2d 133, 160 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem); *see also id.* at 160–61.

³⁹ *See* LOWENSTEIN, HASEN & TOKAJI, *supra* note 16, at 179 (discussing the factors laid out in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

⁴⁰ Defendants' Response to Plaintiffs and the United States Regarding Section 3(c) of the Voting Rights Act, *supra* note 13, at 2–3.

⁴¹ For the history of North Carolina's 1990s redistricting, *see generally* J. MORGAN KOUSSER, *COLORBLIND INJUSTICE* 243–76 (1999).

trict.”⁴² The initial Republican objection to this plan was that it was an unconstitutional *partisan* gerrymander. Republican plaintiffs, led by controversial conservative political player Art Pope,⁴³ claimed it is unconstitutional to draw district lines to hurt one political party.⁴⁴

The courts, however, rejected a partisan gerrymandering claim. The Supreme Court in the 1986 case *Davis v. Bandemer*⁴⁵ had made it very hard to bring claims based upon discrimination on the basis of party in redistricting, and more recently made bringing such claims even harder in *Vieth v. Jubelirer*.⁴⁶ The Court held that the Equal Protection Clause of the Fourteenth Amendment provides no standard for separating unconstitutional partisan gerrymanders from permissible consideration of party, rendering all partisan gerrymandering claims losers.⁴⁷

After the party-based claim challenging North Carolina’s redistricting failed, opponents argued that the districting plan constituted an unconstitutional *racial* gerrymander. In the 1993 case of *Shaw v. Reno*,⁴⁸ the Supreme Court agreed, holding that when voters are separated on the basis of race into districts without adequate justification, this separation violates the Fourteenth Amendment’s Equal Protection Clause. This was not a claim of vote dilution, but one based upon what Professor Richard Pildes has called *expressive harms*⁴⁹: the problem, the Court said, was the message the district shapes sent to voters that race is all that matters in politics.⁵⁰

Shaw was controversial, and the Supreme Court heard an unprecedented four challenges to North Carolina’s districts within the next decade. The last challenge was the most interesting. In *Easley v. Cromartie*,⁵¹ the Court held that the crazy-shaped district lines in the latest North Carolina plan were not unconstitutional because they were designed to protect party, not to divide on the basis of race.⁵²

⁴² *Shaw v. Reno*, 509 U.S. 630, 636 (1993) (alteration in original) (citation omitted) (quoting Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting*, WASH. POST, Apr. 20, 1993, at A4) (internal quotation marks omitted).

⁴³ On Pope, see generally Jane Mayer, *State for Sale*, NEW YORKER, Oct. 10, 2011, at 90, available at http://www.newyorker.com/reporting/2011/10/10/111010fa_fact_mayer.

⁴⁴ See Pope v. Blue, 809 F. Supp. 392, 395, 397 (W.D.N.C.), *aff’d*, 506 U.S. 801 (1992) (mem).

⁴⁵ 478 U.S. 109 (1986).

⁴⁶ 541 U.S. 267 (2004).

⁴⁷ See *id.* at 291 (plurality opinion); see also *id.* at 308 (Kennedy, J., concurring in the judgment).

⁴⁸ 509 U.S. 630 (1993).

⁴⁹ See Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 MICH. L. REV. 483, 493 (1993).

⁵⁰ See *Shaw*, 509 U.S. at 647 (noting that such a redistricting plan “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”).

⁵¹ 532 U.S. 234 (2001).

⁵² *Id.* at 257.

Easley is the origin of Texas's argument that it should be able to pass its tough redistricting law because the law was motivated by party rather than race. Yet it is hard to credit Texas's explanation that the redistricting's effect on racial minorities is merely "incidental" if it targeted the Democratic Party. Consider the local Republican official in North Carolina who recently told *The Daily Show* not only that if the state's new voter identification law will hurt "a bunch of lazy blacks that wants the government to give them everything — so be it," but also that "the law is going to kick the Democrats in the butt."⁵³

The "Race or Party?" question is an artificial way of dividing up a world that has been dictated by American law and the Supreme Court. Why artificial? Part of the reason that the Democratic Party appeals to minority voters is that it supports policies that benefit minority voters. It is hard to think of discrimination against Democrats as having a mere "incidental" effect on minority voters, given the significant overlap between the two groups. On the flip side, part of the Republican opposition to Democratic policies is that they are more redistributive, and that redistribution helps racial minorities who are disproportionately poor.

Republican operative Lee Atwater explained in 1981 how the Republican Party could appeal to racists without appearing racist itself by moving from explicit racial appeals to talking about forced busing, cutting taxes, and supporting other economic policies in which "blacks get hurt worse than whites."⁵⁴ Things have changed for the better, but perhaps not enough. A Republican strategist recently told the *New York Times* that the "Republican party needs to stop pandering to" racism.⁵⁵ A recent report on focus groups conducted with committed Republican voters by Democratic pollster Stan Greenberg found that "while few explicitly talk about Obama in racial terms, the base supporters are very conscious of being white in a country with growing minorities. Their party is losing to a Democratic Party of big government whose goal is to expand programs that mainly benefit minorities. Race remains very much alive in the politics of the Republican Party."⁵⁶

⁵³ *Suppressing the Vote*, DAILY SHOW WITH JON STEWART (Oct. 23, 2013), <http://www.thedailyshow.com/watch/wed-october-23-2013/suppressing-the-vote>.

⁵⁴ Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, THE NATION (Nov. 13, 2012), <http://www.thenation.com/article/170841/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy>.

⁵⁵ John Harwood, *Behind the Roar of Political Debates, Whispers of Race Persist*, N.Y. TIMES, Oct. 31, 2013, at A17, available at <http://www.nytimes.com/2013/10/31/us/politics/behind-roar-of-politics-whispers-of-race-persist.html> (quoting Republican pollster Fred Steeper).

⁵⁶ STAN GREENBERG ET AL., DEMOCRACY CORPS, INSIDE THE GOP: REPORT ON FOCUS GROUPS WITH EVANGELICAL, TEA PARTY, AND MODERATE REPUBLICANS 2 (2013), available at <http://www.democracycorps.com/attachments/article/954/dcor%20rpp%20fg%20memo%20100313%20final.pdf>.

IV. A NEW STANDARD BEYOND RACE OR PARTY

As the earlier sections demonstrated, race and party are intertwined, especially in the South, but the legal standard is bifurcated. If a plaintiff can raise a statutory Voting Rights Act or constitutional race-based claim under the Fourteenth or Fifteenth Amendments, the claim may well succeed. But claims of party discrimination go unchecked. In *Crawford v. Marion County Election Board*,⁵⁷ a voter identification case, for example, Judge Posner held that the Democratic Party had standing to contest Indiana's law because the law was going to make it harder to get Democratic voters to the polls — but that the discrimination did not render the law unconstitutional.⁵⁸ It did not matter to the Seventh Circuit majority, or later to the Supreme Court, that this was a law aimed at Democrats. As Judge Evans declared in dissent, “Let’s not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”⁵⁹

This bifurcation puts courts to an either/or choice: in the redistricting cases, if “partisan” factors predominate in the legislature then those challenging the proposed district lines lose, but if “racial” factors predominate they win. In the case of North Carolina’s new voter law, even if opponents can prove a bad “partisan” intent in passage of the law, they likely will still lose if the court accepts North Carolina’s posited-but-not-proven state interests, but if opponents can prove “racial” intent, they likely will win.

Worse, the focus on race requires courts to make decisions about what is in legislators’ hearts: is there a racist intent? That question puts off some people who would otherwise be sympathetic to the argument that states should not impose laws which make it harder to register and vote for no good reason. A search for racist intent is not the most productive way to think of these issues. Instead, we need to question the assumption that it is permissible outside the redistricting context to discriminate on the basis of party.

It is understandable why the Supreme Court has been reluctant to set out a workable standard for policing partisan gerrymandering claims in cases from *Bandemer* to *Vieth* to *Easley*: it is legitimate to have *some* con-

⁵⁷ 472 F.3d 949 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008)

⁵⁸ *Id.* at 951, 954. Judge Posner recently admitted he “absolutely” made a mistake in his vote upholding Indiana’s voter identification law in *Crawford* given that such laws now are “widely regarded as means of voter suppression rather than fraud prevention.” John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES, Oct. 15, 2013, at A16, available at <http://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html>. He has since moved away from that claim, saying only he is sure he “may” have been wrong. Richard A. Posner, *I Did Not ‘Recant’ on Voter ID Laws*, NEW REPUBLIC (Oct. 27, 2013), <http://www.newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id>.

⁵⁹ *Crawford*, 472 F.3d at 954 (Evans, J., dissenting).

sideration of party in drawing district lines, if only to make sure that those drawing district lines group together people with similar views and outlooks. But it is not so difficult to separate permissible from impermissible consideration of party outside the redistricting context. When it comes to the rules for running our elections (as opposed to rules for constructing our legislative districts), there is a neutral standard against which we can judge election laws: election rules should be crafted so that all eligible voters — but only eligible voters — can easily register and cast a vote which will be accurately counted.

In reviewing laws which impose burdens on voters, courts should adopt something along the lines of the “strict scrutiny light” standard which Judge Evans advanced in his Seventh Circuit *Crawford* dissent.⁶⁰ When a legislature passes an election-administration law discriminating against a party’s voters or otherwise burdening voters, courts should read the Fourteenth Amendment’s Equal Protection Clause to require the legislature to produce real and substantial evidence that it has a good reason for burdening voters and that its means are closely connected to achieving those ends. This approach would not require delving into the motives of legislators to determine if they were merely self-interested and had passed laws to hurt the other party,⁶¹ as opposed to being motivated by a desire to prevent fraud, save money, or instill voter confidence. Instead, evidence of such intent should prompt courts to look skeptically upon asserted state interests unsupported by actual evidence.

When it comes to state voter identification laws, for example, the state would have to show that impersonation voter fraud is a real problem, that a photo identification requirement is a reasonably necessary means to solve the problem, and that voters would not be overburdened by the requirement given the nature and extent of the state’s interest. A law limiting absentee balloting, for example, would be easier to sustain than a voter identification law, because of the more extensive evidence of vote buying connected with the use of such ballots.⁶²

An equal protection standard which requires substantial evidence justifying a burden on voters before a law would be considered constitutional applies beyond voter identification. Think of North Carolina’s cutbacks in early voting or the failure to count wrong precinct ballots. The United States Court of Appeals for the Sixth Circuit ruled against Ohio on both of these issues in the 2012 election season.⁶³ The fact that the Republican

⁶⁰ *Id.* (internal quotation marks omitted).

⁶¹ On problems with the search for “bad” legislative intent, see Richard L. Hasen, *Bad Legislative Intent*, 2006 WISC. L. REV. 843.

⁶² See HASSEN, *supra* note 14, at 41–73.

⁶³ *Obama for Am. v. Husted*, 697 F.3d 423, 425 (6th Cir. 2012) (early voting); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 584 (6th Cir. 2012) (wrong-precinct voting as a result of poll-worker error).

legislature passed the cutbacks over strenuous Democratic objections may have raised the judges' concerns.

One panel of the Sixth Circuit held that Ohio could not, absent a good reason, cut back early voting for all voters except for military voters — who could, but need not, be given extra early voting days by local election boards.⁶⁴ While the majority rule concerned discrimination between classes of voters, both the district court⁶⁵ and concurring Judge White on the Sixth Circuit⁶⁶ focused on the fact that Ohio fixed its long-line problem in 2008 by extending early voting, and these judges feared that eliminating early voting in 2012 would have made things worse for voters. Under Judge White's standard, the Equal Protection Clause would prevent a state from making things worse for voters without good reason once it has made them better.⁶⁷

A different, and quite conservative, Sixth Circuit panel held that Ohio could not disenfranchise voters who cast their votes in the wrong precinct because of pollworker error.⁶⁸ For example, the record showed that some Ohio voters were disenfranchised because poll workers could not determine whether the numerical portion of a registrant's address contained an odd or even number.⁶⁹ The court held the disenfranchisement caused by poll worker error demonstrated likely success on the merits under the Equal Protection and Due Process Clauses.⁷⁰

The precise contours of judicial protection for voters remains to be worked out. Applying a broader voter-protection standard as in Judge Evans' *Crawford* dissent or the Sixth Circuit provisional ballot case, or even a nonretrogression standard as in Judge White's concurrence in the early-voting case, could solve some of the problems of the Voting Wars and discrimination against minority voters simultaneously: if a state deviates from sound election administration practices, or imposes rules which increase burdens on voters, the state could not defend doing so on grounds that the law is meant to discriminate against Democratic voters. Nor could the state defend it with conjecture about supposed but unproven harms. Instead, a state should have to justify the law with reasonable, nondiscriminatory reasons supported by substantial evidence. It is time to extend elec-

⁶⁴ *Obama for Am.*, 697 F.3d at 425. There are reasons to be skeptical of this equal protection holding. Edward B. Foley, *Voting Rules and Constitutional Law*, GEO. WASH. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322765. Foley advocates for a search for bad partisan intent, which differs from the approach I advocate for here.

⁶⁵ *Obama for Am. v. Husted*, 888 F.Supp.2d 897, 900 (S.D. Ohio 2012).

⁶⁶ *Obama for Am.*, 697 F.3d at 440–41 (White, J., concurring in part and dissenting in part).

⁶⁷ *Id.* at 442.

⁶⁸ *Ne. Ohio Coal. for the Homeless*, 696 F.3d 580.

⁶⁹ *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 819–20 (S.D. Ohio 2012).

⁷⁰ *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 591.

tion administration precedent in this voter-protective way that protects everyone from students to the elderly and all in-between.⁷¹

Some may reject my argument because it does not give race a sufficiently explicit role in policing elections. But it is unrealistic to expect the current Supreme Court to endorse laws policing subtle racial discrimination in voting. The stronger claim before this Supreme Court is to protect the voting process from partisan manipulation.

Despite *Crawford*, and its acceptance of the state's purported but unproven interest in preventing voter impersonation fraud,⁷² there is some reason to think that courts seeing the new Republican legislative overreach on voting laws are becoming amenable to stricter scrutiny for laws burdening voters.⁷³ Consider Judge Posner's turnabout on voter identification laws. Or consider what Justice Kennedy said in the *Vieth* partisan gerrymandering case: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated."⁷⁴ Justice Kennedy's principle is close to the reality of Texas's and North Carolina's recent voting laws: they appear to have been enacted to burden the Democratic Party's rights to fair and effective representation. Indeed, preferring one party for no good reason in election administration is akin to awarding patronage jobs based upon partisan affiliation, a practice which the Court has held violates the First Amendment.⁷⁵ There is simply no logical relation between party affiliation and the government choice.

Some may reject my argument because it puts a thumb on the scale favoring voters, contending that election "integrity" should be a paramount value over preventing disenfranchisement. I do not reject integrity as a value but argue it should be proven and not simply posited, especially when many of the posited reasons appear pretextual. A rule making absentee balloting harder, for example, given ample evidence of absentee ballot fraud could well be justified under my standard despite the burden

⁷¹ I remain concerned, as I was when *Northeast Ohio Coalition for the Homeless*, 696 F.3d 580, issued, about courts adopting new rules such as these just before an election, when those rules could affect the outcome of the election.

⁷² *Crawford*, 427 F.3d at 953; see also Richard L. Hasen, *Why Judge Posner Changed His Mind on Voter ID Laws*, DAILY BEAST (Oct. 23, 2013, 2:35 PM), <http://www.thedailybeast.com/articles/2013/10/23/why-judge-posner-is-right-on-voter-id-laws.html> ("Justice Stevens' opinion literally had to go back to the 1860s and Boss Tweed, plus a possible single case of impersonation fraud in a 2004 Washington State election.").

⁷³ Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, GEO. WASH. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182857.

⁷⁴ *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment).

⁷⁵ *Elrod v. Burns*, 427 U.S. 347, 360 (1976) (plurality opinion); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 66 (1990) (patronage-based firings unconstitutional).

on voters who prefer the convenience of absentee voting. But a rule cutting back on early voting days (but keeping the same number of voting hours) would not be sustained absent a good reason grounded in election administration to do so.

My proposed rule would apply nationwide, not just to those states with a history of discrimination in voting. But I suspect that, thanks to *Shelby County*, there will be more attempts to game the system in formerly covered states, and that courts stepping in to require sound election administration will also be greatly helping the position of minority voters. Consider, for example, the City of Augusta, Georgia, which announced soon after the *Shelby County* decision that it might move Election Day to the summer,⁷⁶ just as Democrats did in North Carolina in 1898. There is no legitimate reason to move an election to a time when many voters are away from home.

Finally, some may argue that the Court is unlikely to find a constitutional violation when a state favors one party in its election administration, given that the Court has allowed states to favor incumbents in redistricting and to protect the two-party system from competition.⁷⁷ No case, however, has said that states can stack the rules about the casting and counting of votes — the most basic election laws — to promote one major party over that of another. The next step is for courts to recognize that states often make voting rules for partisan reasons under the pretext of following sound election administration practices.

Back in 1900, North Carolina resolved its election administration disputes with violence, intimidation, and ballot-box stuffing. We are mercifully no longer at that stage and I don't expect we will never be there again. North Carolina's new law is not that. But we need to do more to protect all voters when states take steps which make it harder, for no good reason, for some voters to exercise the precious right to vote.

⁷⁶ Susan McCord, *Court Ruling Revives Effort to Move Augusta Elections to July*, AUGUSTA CHRON. (Jun. 29, 2013), <http://chronicle.augusta.com/news/government/elections/2013-06-29/court-ruling-revives-effort-move-augusta-elections-july>.

⁷⁷ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).