The Voting Rights Act at 50: The Texas Voter ID Story

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A Weakened VRA at 50

On August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act (VRA or the Act) into law, implementing the promise of the Fifteenth Amendment to the Constitution that voting rights cannot be "denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[i] This landmark event was preceded by a long struggle that included the pivotal marches from Selma to Montgomery, Alabama in March 1965. As enacted and later amended, Section 5 of the Act "froze" the existing voting standards and procedures in states and political subdivisions with histories of voting discrimination (or covered jurisdictions). Under Section 5, covered jurisdictions that sought to enforce new or different voting practices or procedures first had to demonstrate, either to the U.S. Attorney General or to the U.S. District Court for the District of Columbia, that the proposed changes did not have the purpose or effect of denying or abridging the right to vote on the grounds or race, color or membership in a language minority group. This process was known as "preclearance" because it was designed to screen changes affecting voting before they were placed into effect. On June 25, 2013, the U.S. Supreme Court **decision** in *Shelby County v. Holder* (*Shelby County*) effectively stripped the Act of this important protective mechanism.

Within hours of the *Shelby County* decision, then-Texas Attorney General (and now Texas Governor) Greg Abbott announced that the State would "immediately" implement Senate Bill 14 (SB 14), a voter identification law establishing a strict photo ID requirement for in-person voting.[ii] Abbott's announcement was significant because in 2012, the U.S. Attorney General and a three-judge panel of a federal district court had **determined** that SB 14 (a voting-related change) would have a discriminatory effect on the State's African American and Latino citizens. Under Section 5 of the VRA, the Attorney General and the federal district court had prevented Texas from implementing the law.

Shelby County forced Texas voters and their advocates to use a different section of the VRA to file suit against implementation of SB 14. That provision, Section 2, placed the burden on them to prove that the law was racially discriminatory, unlike Section 5, which placed the burden on the State of Texas. On October 9, 2014, Judge Nelva Gonzales Ramos of the United States District Court for the Southern District of Texas found that the Texas photo ID law not only has the effect of discriminating against African Americans and Latinos in their access to the political

process, but also had been enacted with a discriminatory purpose, all in violation of Section 2 of the VRA. Despite these findings, the Fifth Circuit Court of Appeals (Fifth Circuit) and the Supreme Court allowed the law to be used in the November 2014 general election.

On August 5, 2015, the Fifth Circuit issued an **opinion**, affirming Judge Ramos' decision to the extent that she had found that SB 14 violated Section 2 of the VRA, because it had a discriminatory effect on the voting rights of Latinos and African Americans. The Fifth Circuit reversed the portion of Judge Ramos' decision that found SB 14 was enacted with discriminatory purpose and sent the case back to the trial court for additional consideration of that issue and for further findings and conclusions. Most important for Texan voters, the Fifth Circuit's ruling affirmed that SB 14 should never have been in effect; however, without the prevention mechanism afforded by Section 5 of the VRA, SB 14 has been in effect for four statewide and local elections since November 2013.

For over two years, Texas voters have had to comply with a restrictive law that three courts and seven different judges have found to be racially discriminatory. Stories of the tremendous obstacles that some of these voters have faced in merely trying to exercise their most fundamental right are described in this report. As the nation commemorates the 50th anniversary of the VRA, the history of the Texas photo ID law provides a compelling illustration of the consequences of the Supreme Court's *Shelby County* decision and the need for Congress to revitalize the protections of "the Nation's signal piece of civil-rights legislation."[iii]

At-a-Glance: Section 2 and Section 5 of the Voting Rights Act

Section 2 and Section 5 are two significant provisions of the VRA. Section 2 is a permanent provision that does not expire. It allows the U.S. Attorney General and citizens to file lawsuits against state and local governments to stop any "voting qualification or prerequisite to voting, or standard, practice, or procedure" that will "deny or abridge the right of any citizen of the United States to vote on account of race or color."[iv] In other words, Section 2 allows plaintiffs to challenge discriminatory voting practices or procedures. Section 2 covers ballot access (e.g. polling place locations, early voting schedules, and voter identification laws) and vote dilution (e.g. racial gerrymandering). The plaintiffs in a Section 2 suit bear the burden of proving that a voting practice or procedure, in the "totality of the circumstances," has a discriminatory effect that restricts the ability of racial, ethnic, or language minorities to engage in the political process compared to the White majority.[v] For voting, the totality of the circumstances refers to all known facts, including an area's history of racial discrimination and evidence of voting along racial lines. Congress amended Section 2 to include this assessment of a voting change's effect or result—also known as the Section 2 results test—when it reauthorized the VRA in 1982. Under Section 2, plaintiffs can alternatively seek to prove that the voting practice or procedure was adopted with the intent to discriminate against minorities.

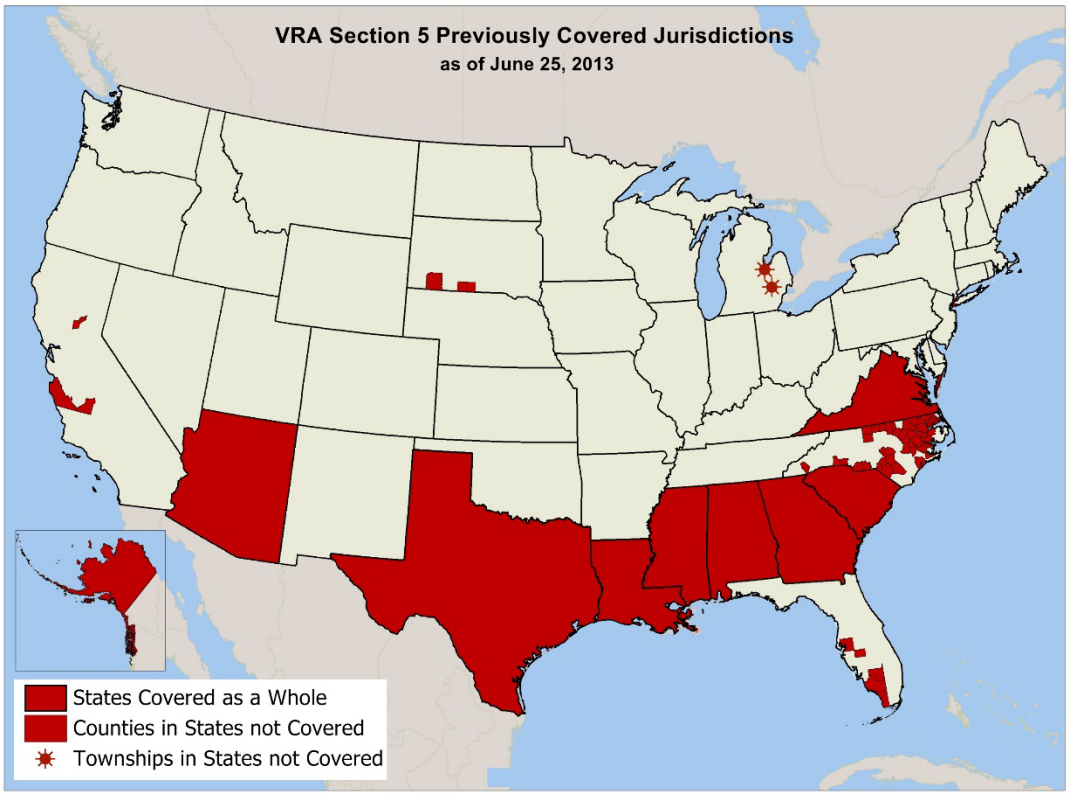

Figure 1: Map of Section 5 Jurisdictions as of June 25, 2013[vi]. Attribution: Dr. Megan A. Gall @DocGallJr

Section 5 sets out a separate federal review process. Specifically, Section 5 requires certain jurisdictions to submit any change to voting practices or procedures for review by either the Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia (the federal district court) before implementation. This process of federal review is known as "preclearance." Until the *Shelby County* decision, a coverage formula found in a different section of the Act determined the jurisdictions subject to Section 5. The coverage formula was originally based on a jurisdiction's history of low voter participation, which typically reflected racial and ethnic discrimination in voting. In later reauthorizations, Congress found that discrimination had continued in the covered areas.

Covered areas were not limited to the South, but included jurisdictions in Alaska, New York, California, and other locations. A Section 5-covered jurisdiction could not implement any change to voting practices or procedures without federal review, and neither the Attorney General nor the federal district court could approve any change found to diminish minority voting opportunities. Jurisdictions covered at the time of the *Shelby County* decision are shown in Figure 1.[vi]

Shelby County: "Throwing Away [an] Umbrella in a Rainstorm"[vii]

When it was enacted in 1965, Section 5 of the VRA was initially given a five-year life span and had what is called a "sunset" provision that allowed it to expire unless reauthorized by Congress.[viii] Between 1970 and 2006, Congress extended and expanded the Act five times, each time determining that Section 5's protections were still needed.

In each reauthorization, Congress preserved the federal review process and passed various other amendments to the VRA, including:

- expanding the coverage formula to additional districts and counties in 1970;
- extending the Act's federal review process to cover language minorities in three states and eight political subdivisions, and establishing the Section 203 language assistance provision[ix] in 1975;
- extending Section 5 for 25 years, amending the criteria by which a covered area could be released from, or "bailed out" of, coverage,[x] and amending Section 2 with the results test in 1982; and
- altering the coverage formula and Section 5 submission requirements in 1992.

Ahead of the most recent reauthorization in 2006, Congress considered the historical record of voting discrimination, along with the more recent record beginning in 1982, to inform its decision to reauthorize the federal review provisions and other key protections.[xi] A bipartisan Congress, including a 98-0 vote in the Senate, extended the Act for another 25 years. President George W. Bush signed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act into law on July 27, 2006.

In addition to the congressional reauthorizations, the Supreme Court has upheld Section 5 and the coverage formula three times, in 1966, 1980, and 1999.[xii] The constitutionality of the 2006 reauthorization was challenged eight days later by a municipal utility district in Texas, but the Supreme Court did not rule on this constitutional claim.[xiii] Four years after the nearly unanimous, bi-partisan 2006 reauthorization, Shelby County, Alabama challenged the constitutionality of the coverage formula, making Section 5 vulnerable again. Ultimately, the Supreme Court struck down the coverage formula, rendering Section 5 inoperable.

Speaking for the majority in a 5-4 decision, Chief Justice John Roberts reasoned that the coverage formula was unconstitutional because Congress had not adequately re-examined it in the 2006 reauthorization, and therefore, the coverage formula was outdated. He suggested that the Section 5 protections were no longer needed, because racial discrimination was not as "pervasive" and "flagrant" in 2013 as it was in 1965.[xiv] In a scathing dissent, Justice Ruth Bader Ginsburg described the voluminous record Congress relied on to reauthorize the Act. The record included the 2006 **report** of the National Commission on the Voting Rights Act (NCVRA), organized and led by the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) and other civil rights groups. The NCVRA report detailed 626 objections to proposed election changes between 1982 and 2004, averaging four per month.[xv] Justice

Ginsburg countered the majority opinion with a powerful analogy underscoring the importance of the federal review or "preclearance" provisions: "[t]hrowing out preclerarance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[xvi]

Section 2: Not an "Adequate Substitute" for Section 5[xvii]

Congressional opponents to Section 5's extension have claimed that Section 2 of the VRA can adequately replace Section 5.[xviii] While Section 2 provides vital protections under the VRA, unlike Section 5, it does not prevent discriminatory voting changes from taking effect without litigation. Among other protections that differentiate it from Section 2, Section 5: (1) requires a jurisdiction to give early notice of a voting change; (2) requires that the jurisdiction be transparent about why the change was made; (3) places the burden on jurisdictions rather than private citizens to prove that the change is discriminatory or not; (4) prevents the costs of litigation from falling on the communities impacted by the voting change; and (5) prevents a jurisdiction from implementing a voting change without federal government review.

Notice

Before the *Shelby County* decision, Section 5 required covered jurisdictions to notify the federal government and request review of any voting change before the change was permitted to take effect. Therefore, voting rights advocates and private citizens were able to detect discriminatory actions much earlier.[xix] Many voting changes occur at the local level, e.g. changes in a polling place location or a precinct closure. Changes of that nature often do not attract the sort of publicity that a statewide change might, so Section 5's notification provisions were precious to advocates who are now often unaware of changes as they develop.

Without Section 5's protections, a subtle voting change or one proposed in a small or rural area risks going unnoticed. Consider the three separate Section 5 objections to voting changes in Bailey County, Texas with a population of just over 7,000.[xx] In 1992, the Department of Justice (DOJ) objected to a 1991 redistricting plan that reduced the Latino share of the population in the proposed district and "lessen[ed] the opportunity for [Latinos] to elect representatives of their choice."[xxi] About one year later, the DOJ objected to Bailey County's procedures for holding a special election that involved the district in question in 1992.[xxii] And in mid-1993, the DOJ objected to the reduction of justice of the peace and constable districts, noting concerns about the timing of the plan, which "came on the heels of" improved Latino "voting potential."[xxiii] Because of Section 5, voters and the federal government had notice of each of these changes before they could take effect.

In comparison, Section 2 does not provide for notification, meaning that voters in small counties like Bailey and elsewhere would have to file suit against discriminatory changes, assuming that those changes are detected in the first place.

Transparency

Voting changes in covered jurisdictions were made very transparent because Section 5 submissions to the DOJ required a substantial amount of detail. When there were serious questions about the potential discriminatory intent or effect of a change, the DOJ had an opportunity to request additional information about the submission. Not only was the jurisdiction required to notify the federal government before implementing a change, but it was also required to spell out any potential effect of the change on a jurisdiction's current voting conditions. In addition, DOJ staff would contact minority members of the community to obtain their views.[xxiv] Other times, the transparency afforded by Section 5 allowed citizens to decide whether it was necessary either to intervene in a Section 5 lawsuit filed by a jurisdiction seeking review from the federal district court or to file a Section 2 suit against an approved voting change.

Burden

Section 5 placed the burden of proof on the jurisdiction to convince the federal government to allow the proposed voting change. Before *Shelby County*, the covered jurisdiction had to prove that the proposed change lacks a discriminatory purpose and would not have the effect of worsening the position of minority voters compared to the majority population. Section 2, in contrast, places the burden of proof on the plaintiffs.[xxv] The plaintiffs, be they the United States or private citizens, including public interest groups, must prove that a jurisdiction had a discriminatory purpose in enacting the voting change or must prove that a discriminatory result flows from the jurisdiction's voting change. This shift in the burden of proof from the jurisdiction to the plaintiff makes it more difficult to stop a discriminatory change.

Costs

The elimination of Section 5 makes it more expensive for private citizens and civil rights groups to try to stop discriminatory voting practices. With Section 5, if the Attorney General refused to approve a voting change, private plaintiffs had no need to use their own resources. And if a jurisdiction sought review from the federal district court, the Attorney General became the defendant in the case. Public interest groups could intervene in such actions in support of the federal government. Without the Section 5 record, plaintiffs have to conduct pricey investigations at the outset of building a case. In addition, Section 5's federal review procedure provided an alternative to filing a lawsuit, saving taxpayers the costs of Section 2 litigation. In other words, "the fees and costs incurred by covered jurisdictions in one significant [Section 2] litigation would pay for several hundred, if not more than a thousand, [Section 5] preclearance applications."[xxvi]

Prevention

Under Section 5, a voting change submitted by a covered area was blocked while the federal government reviewed the change. Section 2 lacks an equivalent mechanism, meaning a discriminatory voting change can be implemented while litigation is in progress, as Texas has done with its discriminatory photo ID law. Plaintiffs in a Section 2 case can ask the court for preliminary injunction that blocks implementation of the voting change while the court considers the case. However, courts rarely grant this kind of order because they are usually wary of

changing existing voting rules near or during an election cycle.[xxvii] And in some circumstances, even when plaintiffs prevail in a Section 2 lawsuit against a jurisdiction, there is no mechanism for preventing the jurisdiction from enacting a change that has a similar discriminatory effect later. The beauty of Section 5 is that the jurisdiction would have to submit the subsequent change for federal review too, clearing the way for the DOJ to object to it as well.

Texas SB 14 and the Evidence of Discrimination

Background of SB 14

The Texas photo ID law, SB 14, was called "the most stringent" voter ID law in the country when it was reviewed and blocked by the federal district court in Section 5 litigation.[xxviii] SB 14 marked a drastic change from the previous law in Texas that had permitted non-photo IDs as proof of identification at the polls. In contrast, SB 14 limited the acceptable IDs for in-person voting to seven kinds of documents, all of which must contain a photograph and be current or no more than 60 days past expiration:

- Texas driver's license
- Texas concealed handgun license
- Texas personal ID card
- U.S. passport
- U.S. military ID
- U.S. citizenship certificate (with a photograph)
- Texas Election Identification Certificate (a form of ID created by lawmakers while SB14 was being considered in the Texas State Legislature).

When Texas enacted SB 14 in 2011, the State was under the VRA's coverage formula and could not implement the law without Section 5 federal review. The State first submitted the law to the DOJ. After then-Attorney General Eric Holder objected to the law, Texas pursued the second avenue for federal review by filing the lawsuit *Texas v. Holder* seeking review for the law from the federal district court. The Lawyers' Committee, along with the Brennan Center for Justice, Dechert LLP, the Law Office of Jose Garza, and attorneys from the national and Texas offices of the NAACP, intervened in the lawsuit, representing the Texas State Conference of NAACP Branches (NAACP) and the Mexican American Legislative Caucus of the Texas House of Representatives (MALC). Other individuals and organizations intervened as well.[xxix]

On August 30, 2012, after a week-long trial, a three-judge panel of the federal district court found that Texas failed to satisfy its Section 5 requirement of proving that SB 14 would not make it harder for minorities in Texas to vote. The federal district court ruled that the law was the "most stringent" of its kind and "imposes strict, unforgiving burdens on the poor, and racial

minorities in Texas are disproportionately likely to live in poverty."[xxx] The judges did not need to rule on whether the law was enacted with discriminatory purpose, because the court found that the law had a discriminatory effect.[xxxi] As a result of this ruling, Texas voters voted in two elections between mid-2012 and mid-2013 without SB 14 restrictions.

That all changed on June 25, 2013, with the *Shelby County* decision and Texas Attorney General Abbott's announcement that he would put SB 14 in effect "immediately."[xxxii] Following those events, several plaintiffs, including the United States, filed separate complaints to block Texas' photo ID law under Section 2 of the VRA and the U.S. Constitution. The Lawyers' Committee and co-counsel filed one of those complaints, again representing the Texas NAACP and MALC. All of the complaints were consolidated in the United States District Court for the Southern District of Texas in Corpus Christi as *Veasey v. Perry* (*Veasey*).[xxxiii] Judge Ramos heard the case in an eight-day trial ending on September 22, 2014. On October 9, 2014, Judge Ramos issued a comprehensive **147-page opinion**, ruling that: "SB 14 creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African-Americans, and was imposed with an unconstitutional discriminatory purpose…[and] constitutes an unconstitutional poll tax."[xxxiv]

Reviewing the Evidence and Data

SB 14 Follows Texas History of Racial Discrimination in Voting

Judge Ramos based her findings in part on evidence of Texas' "uncontroverted and shameful history" of racial discrimination in voting.[xxxv] Historically, the State has habitually devised techniques to silence minority voices, including: banning racial minorities from participating in primaries; prohibiting literacy and language assistance at the polls; instituting a poll tax requirement implemented for decades; enforcing annual voter reregistration; infringing upon the voting rights of minority students; and repeatedly gerrymandering districts to the detriment of racial or ethnic minority voting power.[xxxvi]

This history of discrimination was brought to life at the trial by the testimony of Rev. Peter Johnson, a Lawyers' Committee witness. Dr. Martin Luther King, Jr. had assigned Rev. Johnson to Texas to help in the struggle against racial discrimination in voting. Rev. Johnson testified that racial discrimination at the polling place continues in Texas to this day: "…in certain high voting Black precincts in Houston and in Dallas, in some places in east Texas, you have White men, kind of poll-watching White men, intimidating Black voters who come in to vote."[xxxvii]

Judge Ramos found that Texas voters have historically voted for candidates along racial lines, a practice known as "racially polarized voting," citing evidence of racially polarized voting in 252 out of 254 Texas counties.[xxxviii] Judge Ramos also noted evidence that political campaigns of White candidates in Texas have contributed to this racially-charged atmosphere by using "overt or subtle" racial appeals in their campaign mailers to voters. And despite the growing population of racial minorities in Texas, Latinos, in particular, are underrepresented as elected officials.[xxxix]

SB 14 and Other Restrictions Follow Minority Voter Growth[xl]

In the decade leading up to SB 14's enactment in 2011, Texas underwent a demographic shift, becoming a majority-minority state, a change that was not lost on the Texas legislature throughout this period.

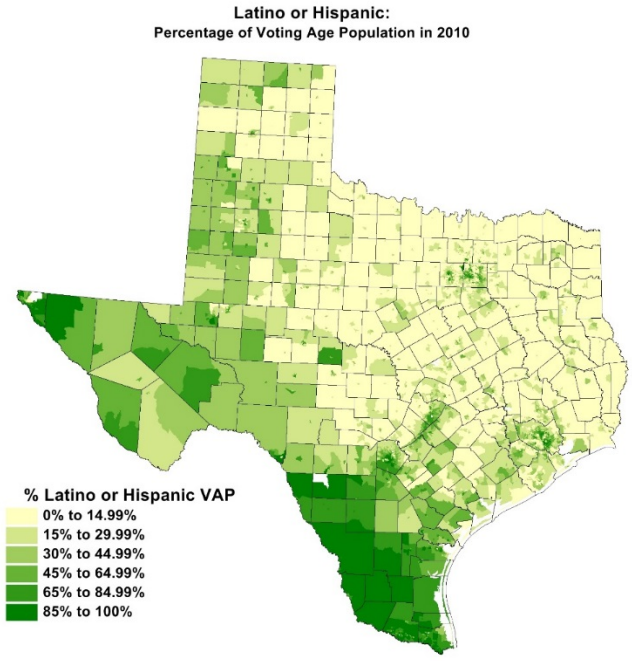

Figure 2: Latino Voting Age Population[xliii]
Attribution: Dr. Megan A. Gall @DocGallJr

Texas joined Hawaii, California, and New Mexico as the first states to see non-Latino White populations fall below 50%.[xli] Figure 2 shows the geographic distribution of the Latino voting age population (VAP) in Texas in 2010. A portion of the southwestern part of Texas shows Latino VAP above 50%. As of 2010, only 40 of the 254 Texas counties had Latino VAP above 50%, but things are changing rapidly.[xlii]

Three intertwined dynamics are at play in this demographic shift. First, the most notable population shifts in Texas are confined to the White and Latino populations. Between 2000 and 2010, the White VAP dropped from 56.3% to 49.6%, nearly 7 percentage points. At the same time, the Latino VAP grew by 5 percentage points from 28.6% to 33.6%.[xliii] Although other racial groups including African Americans and Asians grew in total numbers, the group percentages did not shift markedly.[xliv] All of the notable demographic change was in the Latino and White populations.

Second, within the White/Latino shift are marked generational differences. Between 2000 and 2010 in Texas, Latinos accounted for 90% of the population growth in children aged 0 to 14.[xlv] This difference is reiterated in Census data. There is a 16 percentage point gap between the White and Latino VAP (49.6% and 33.6% respectively) but only a 7.7 percentage point gap between the White and Latino *total* population (45.3% and 37.6% respectively).[xlvi] The 2010 U.S. Census data also show that Latinos comprise 48.3% of the population aged 18 years and younger, while Whites comprise 33.8%.[xlvii] These data clearly point to a total Latino population that is overall younger than the total White population.

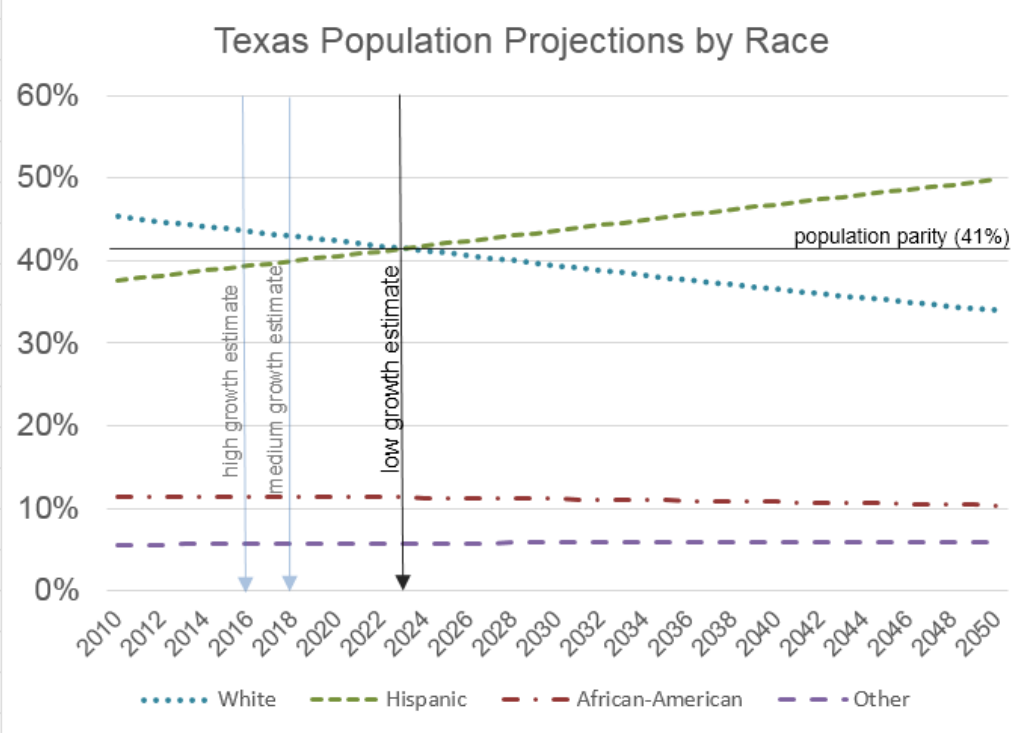

Figure 3: Population Parity Estimates for Low, Medium, and High Growth Projections[xlix]. Attribution: Dr. Megan A. Gall @DocGallJr

Third, the demographic shift is ongoing, and the observed trends are expected to continue. Population parity, or two or more groups being equal in number, will soon describe Latinos and Whites in Texas. This dynamic is detailed in the chart below. When parity is reached, Latinos and Whites will each constitute approximately 41% of the Texas population. The most conservative projection, or *low growth estimate*, projects population parity by 2023.[xlviii] However, if trends seen from 2000 to 2010 continue, parity will be reached in 2017, as shown in the *high growth estimate*.[xlix] This reality is on the very near horizon.

In her ruling, Judge Ramos noted the significance of this demographic shift in relation to the Texas legislature's reasoning, or purpose, behind enacting SB 14. Judge Ramos cited one of the plaintiffs' experts, Dr. O. Vernon Burton, a professor of history and director of the Clemson Cyber Institute at the University of Clemson. Dr. Burton testified that there is "a predictable pattern when the party in power perceives the threat of minority voter increases."[l]

Dr. Burton's analysis supports the testimonies of members of the Texas State Senate and House of Representatives. They described a "racially charged" atmosphere, with "a lot of anti-Hispanic sentiment" following the revelations of the 2010 Census data. Along with SB 14, bills touching upon illegal immigration, English-only measures, and redistricting were introduced in the legislature in 2011.[li]

SB 14's Movement through the Texas Legislature was "unorthodox" [lii]

The Texas legislature tried to pass photo ID bills in 2005, 2007, and 2009, but was unsuccessful, largely due to the opposition of minority legislators who continuously warned that such a law would disproportionately and negatively impact African Americans and Latinos.[liii] When the

photo ID bill was introduced in the Texas Senate again in 2011, the legislature, along with the Governor's office, followed a series of unprecedented steps to rush the bill through the legislature.

The photo ID bill was originally filed with a higher bill number, but it was re-filed with the lower number of 14, making it a legislative priority. Then-Governor Rick Perry subsequently designated voter ID bills as emergency legislation, which allowed SB 14 to be considered out-of-order and earlier in the legislative session. The Senate convened an unusual committee hearing just to consider SB 14. One day after the hearing, the committee recommended the bill's passage, and it passed in the Senate the following day, which was unconventional.[liv]

Judge Ramos noted that one state senator asked for an analysis from the Secretary of State's (SOS's) office that would shed light on the estimated number of voters who lacked an SB 14 ID.[lv] The SOS's office performed the analysis and determined that anywhere from over 600,000 to over 800,000 voters lacked one of the acceptable photo IDs to vote.[lvi] The SOS did not report this analysis to the legislature for reasons that remain unclear. A different state senator claimed that he vocalized warnings about the law's detrimental impact on racial minorities to the State Legislature.[lvii]

The bill's trajectory in the House was also rapid. The House eliminated the standard rules allowing filibustering, appointed a special committee to deal only with SB 14, and passed the bill with unprecedented speed. In addition, Judge Ramos noted that, although at least one representative asked about the bill's racial impact, he received no clear answers.[lviii] Significantly, throughout the brief debate on the Senate and House floors, the bill's sponsors would routinely respond to questions about SB 14's effect on minorities by saying, "I am not advised."[lix]

SB 14 was a "solution looking for a problem"[lx]

Texas' previous voter ID law provided every registered voter with a voter registration certificate and allowed a number of non-photographic IDs to prove identity when a voter lacked the certificate at the polls. Throughout the efforts to pass SB 14, its proponents asserted a number of "shifting rationales" for adopting the new stricter photo ID law, ranging from prevention of voter fraud, preventing non-citizen voting, improving election integrity, and increasing voter turnout.[lxi] Judge Ramos found that no evidence to support that any of these rationales was credible. For example, the bill's proponents claimed that the measure was necessary for preventing in-person voter fraud. Yet between 2002 and 2011, there had been only two tried cases of in-person voter fraud that had resulted in convictions out of tens of millions of votes cast.[lxii] Similarly, Texas produced only one example of non-citizen voting (by a non-Latino), and one representative "admitted that he had no facts to support his concerns about non-citizen voting, but was reacting to allegations."[lxiii] SB 14 was a "solution looking for a problem."[lxiv]

SB 14 became more and more restrictive

Of more than 100 amendments proposed by both chambers of the legislature, "those that would have ameliorated the harsh effects of SB14 were largely tabled."[lxv] In her ruling, Judge Ramos included a table addendum listing those proposed amendments. The tabled amendments included language that would have: allowed eligible voters to use a much wider range of photo

ID to vote; provided exemptions to low-income voters for fees associated with getting a photo ID; expanded voter education about the photo ID requirement; required the SOS's office to conduct detailed analyses of the photo ID law's impact on voters; and other less restrictive language[lxvi].

Although none of the above amendments appeared in the bill's final text, a committee of the House and Senate amended the bill with language about an unprecedented (for Texas) Election Identification Certificate (EIC).[lxvii] The EIC was proposed as a free way to obtain a photo ID to vote. However, testimony at trial and stories and data gathered by researchers, reporters, attorneys, and civil rights groups, including the Lawyers' Committee-led nonpartisan Election Protection national coalition, have illustrated many associated costs of getting an EIC. For instance, travel expenses, documentation fees, postage fees, and unpaid time off work all make the EIC difficult to obtain for minorities. In addition, there was a general lack of awareness about EICs and insufficient funding allocated for voter education and advertising related to EICs.[lxviii] Judge Ramos noted that some trial court witnesses for the plaintiffs had never heard of an EIC and that some witnesses arrived at the polls without an SB 14 ID, but poll workers did not tell them about EICs.[lxix]

Some of the other acceptable forms of photo ID also created problems for minority voters. As one state senator testified, "all of the legislators knew that SB 14, through its intentional choices of which IDs to allow, was going to affect minorities the most."[lxx] For example, Judge Ramos found that minorities are disproportionately public employees, but public employment identification was not included in SB 14; minorities are overrepresented among students at public universities, but public university identification was not included in SB 14. Yet concealed handgun licenses were included in SB 14, and handgun licenses in Texas are disproportionately held by Whites compared to African Americans and Latinos.[lxxi]

African Americans and Latinos Disproportionately Lack SB 14 Photo ID

The opponents of SB 14 drew attention to its effect on minorities. In support of those opposing legislators, substantial trial evidence demonstrated that minorities were less likely to possess an acceptable SB 14 ID and were more likely than Whites to face significant burdens in getting an ID.

Judge Ramos noted Harvard political scientist Dr. Stephen Ansolabehere's estimation that over 600,000 Texas voters, representing 4.5% of total registered voters, lack an acceptable SB 14 photo ID. A disproportionate number of those registered voters were African Americans and Latinos.[lxxii] Political science experts for the plaintiffs, Drs. Matt Barreto and Gabe Sanchez (of the University of California, Los Angeles and the University of New Mexico, respectively, and both with the organization Latino Decisions) produced survey results indicating that 7.2% of eligible voters or 1.2 million eligible citizens of voting age population (CVAP) did not have an SB 14 photo ID.[lxxiii] Their survey of 2,300 eligible voters in Texas found that African American eligible voters are 1.78 times more likely and Latino voters are 2.42 times more likely to lack an acceptable SB 14 photo ID than are White eligible voters.[lxxiv] These figures are significant for the Latino population in particular: 11.4% of Latino eligible voters lacked an acceptable ID to vote under SB 14.

Socioeconomic Factors: "we couldn't eat the birth certificate"[lxxv]

Judge Ramos noted that several of the plaintiffs' experts testified about the difficulties faced by minorities in getting an SB 14 ID. Over 26% of Texans who did not have an accepted photo ID also lacked the documents needed to get an EIC.[lxxvi] The Texas Department of State Health Services recently adopted a fee exemption for birth certificates requested specifically for getting EICs.[lxxvii] This fee reduction applies only to Texas birth certificates, and does not apply to the costs of getting birth certificates from other states. In addition, the exemption applies only to individuals who can request the EIC birth certificate in person at "the Vital Statistics Unit…a local registrar, or a county clerk."[lxxviii] These are not the locations where an individual would go to apply for an EIC, which makes the process more complicated and less convenient.

Transportation poses a bigger problem for minority Texans. At least four Texas counties do not have a system of public transportation, and throughout Texas, the percentage of African American and Latino CVAP living in households without a car is higher than the percentage of White CVAP without a car.[lxxix] Expert for the plaintiffs, Dr. Daniel G. Chatman, an associate professor of city and regional planning at the University of California Berkeley, analyzed the transportation burdens of getting an EIC. Of the African American CVAP who do not possess a car, 91.1% would have a roundtrip of 90 minutes or more to get to an EIC-issuing office. Of the Latino CVAP in the same situation, nearly 80% would have to travel roundtrip for more than 90 minutes.[lxxx]

The total costs are insurmountable for some voters. One African American witness for the plaintiffs who voted regularly in Texas elections before SB 14's implementation spoke of the hardships to gather the documents needed to get an EIC. In a video-taped deposition, she explained that she was born at home, like a number of elderly African Americans in rural Texas, and had to choose between providing for her family and getting the documents needed to obtain an EIC. In the end, she chose not to spend the money and time getting documents for an SB 14 ID because her family "couldn't eat the birth certificate…and couldn't pay rent with the birth certificate."[lxxxi] Significantly, of African Americans who do not have an unexpired photo ID to vote, 30.4% lack the documents required to get an EIC; for Latinos in the same circumstances, that figure is 23.4%.[lxxxii]

According to surveys conducted by Drs. Baretto and Sanchez, nearly 45% of Texans who lack a photo ID to vote reported an annual household income of less than $20,000 in 2013. Of survey respondents who lack an unexpired SB 14 photo ID, those with reported earnings of less than $20,000 were 61% African American and 51% Latino, compared to 23% White.[lxxxiii] In addition, of eligible voters earning less than $20,000 per year, 21.4% lack an accepted photo ID.[lxxxiv] These economic disparities further show that SB 14 disproportionately burdens Texan minorities.

There were noted gaps in voter education about the EIC and other aspects of the photo ID law. Results of the surveys conducted by Drs. Baretto and Sanchez, showed that 7.0% of Blacks and 9.1% of Latinos "believe" they do have a photo ID to vote "when in fact they do not," compared to 3.8% of White voters in this category.[lxxxv] In addition, U.S. Supreme Court Justice Ruth Bader Ginsburg has noted that the federal district court found that the State inadequately funded

efforts to educate the public and poll workers about the photo ID law requirements, and U.S. District Court Judge Ramos pointed out that proposed amendments to SB 14 aimed at increasing education were tabled.[lxxxvi]

Texas Photo ID and the 2014 General Election

On October 9, 2014, Judge Ramos issued her opinion, concluding that SB 14 "creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African Americans, and was imposed with an unconstitutional discriminatory purpose."[lxxxvii]

Judge Ramos blocked implementation of SB 14 and ordered Texas to reinstate the non-strict voter ID law in place before SB 14's implementation. Texas appealed to the Fifth Circuit, and despite the strength of Judge Ramos' opinion, the Fifth Circuit overruled her order, thus allowing SB 14's implementation. The Lawyers' Committee and co-counsel filed an emergency application to the Supreme Court, asking the Justices to block the law's implementation before the upcoming general election of November 4, 2014. Two days before the start of early voting in Texas, the Supreme Court denied the emergency application, allowing the law's implementation for that 2014 election.[lxxxviii]

1-866-OUR VOTE Hotline Addresses Concerns about Photo ID

To counteract confusion related to Texas' photo ID requirement, the Lawyers' Committee-led nonpartisan Election Protection (EP) coalition recorded radio ads in English, Spanish, and multiple Asian languages that began to air on October 31 and ran through Election Day. These radio ads were meant to inform voters about the importance of voting, detail the photo ID requirements, and encourage voters to call 1-866-OUR-VOTE (EP's national hotline) for assistance. The radio ads aired in the key markets of McAllen-Brownsville-Harlingen, Laredo, El Paso, Dallas, and Houston.[lxxxix]

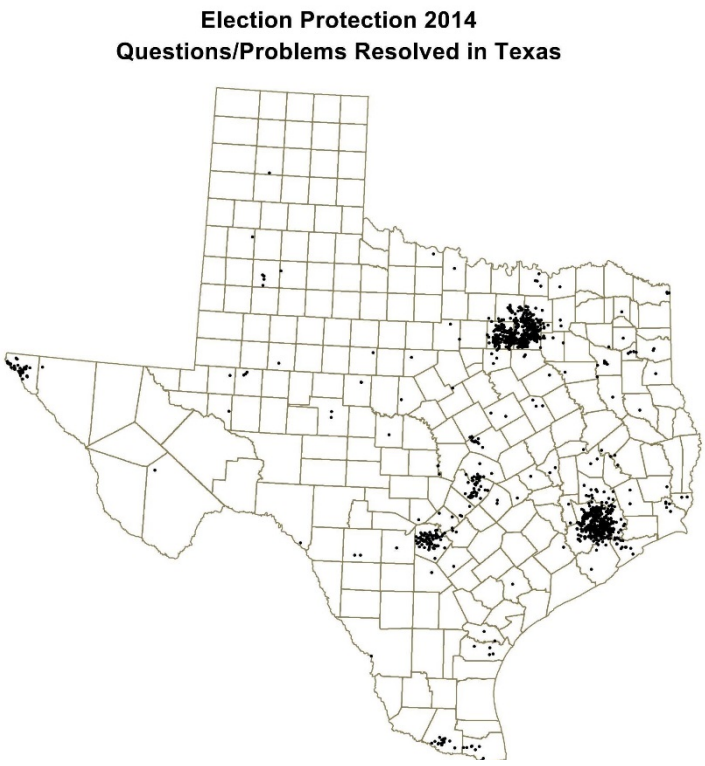

Figure 4: Election Protection map of questions/problems from Texas. Attribution: Dr. Megan A. Gall @DocGallJr

Voters and EP volunteers contacted 1-866-OUR-VOTE with numerous questions and concerns and shared experiences related to the photo ID law. Some Texans were able to vote with an accepted photo ID; others were not able to vote a regular ballot or vote at all. For example, Latasha C. discovered in the early voting period that none of her ID documents met the photo ID requirement. She called 1-866-OUR-VOTE, and an EP volunteer told her about the option to get an EIC. But Latasha did not have a copy of her birth certificate.[xc]

She went to a county elections office to get a certified copy of her birth certificate. An official told her that the elections office did not issue them, even though the state website stated otherwise. Latasha showed the official a printout of an email from the EP volunteer with information about how to get her birth certificate and EIC. She ultimately paid $3 for her birth certificate despite the fee waiver that Texas claims to grant to voters.[xci] Latasha next went to a Department of Public Safety (DPS) office for the EIC, which was not issued at the elections office. The first office she tried refused her an ID. After going home to gather additional documents, she went to another DPS office with her voter registration card, birth certificate, student ID, divorce decree, and lease in hand. After two hours at the second DPS office, Latasha was permitted to buy a state ID card for $16. She finally voted around 6 pm, after spending time and money getting the documents she needed.[xcii]

Patrick S. called 1-866-OUR-VOTE from Texas to get information about getting an EIC.[xciii] An EP volunteer called him back and left a message explaining how the EIC application process works. Patrick reported back that when he went to the DPS office, officials erroneously tried to charge him $16 for an EIC. The EP volunteer advised him that the EIC is free but realized that he could not get one because Patrick, who was born in Louisiana but was living in Texas, lost his birth certificate when his car was stolen. Patrick told the volunteer that he would vote a provisional ballot and try to get the EIC after November 4. In January 2015, a Lawyers' Committee coordinator followed up with Patrick and found out that he drove to Louisiana, got a certified copy of his birth certificate, secured his EIC, and presented it to the county voter registrar in time for his provisional ballot to count.[xciv]

Trish B. called 1-866-OUR-VOTE because she was refused an EIC.[xcv] Trish reported that she has regularly voted since she was 18 and was raised in Texas, yet was not able to vote in the

2014 general election. She reported that a DPS employee told her that she would need an ID, a birth certificate, and a marriage license to receive a Texas EIC. She had all of those items but was told that the birth certificate was unacceptable because it was not sealed or a recent copy. She then returned with her Social Security card and her voter registration card, and was again refused an EIC. Trish reported that the DPS employee referred her first to the Department of Vital Records in Del Rio, Texas and then to an official at the Texas Secretary of State office. An official at the Texas Secretary of State office instructed Trish to travel 70 miles to another Texas office to get a certified copy of her birth certificate, which she did.[xcvi]

Since the 2014 election, the Lawyers' Committee has kept in touch with Trish and referred her to a local Texas voting rights advocacy group that can give her on-the-ground support. At the end of 2014, Trish reported that she had received notice that her provisional ballot did not count and was still struggling to get an EIC.[xcvii]

Status of the Texas Photo ID Law on the VRA 50th Anniversary

The Texas photo ID law remains under review.[xcviii] On August 5, 2015, the Fifth Circuit issued its opinion on SB 14. Most important, it affirmed Judge Ramos' judgment that SB 14 violated Section 2 of the VRA, because it had a discriminatory effect on the voting rights of African Americans and Latinos in Texas. The Fifth Circuit sent the case back to the trial court for additional consideration, or "remanded", the portion of Judge Ramos' opinion that found discriminatory intent behind SB 14 on the basis that the trial court had relied too heavily on the older history of racial discrimination in voting, the testimony of legislators who had opposed SB 14, and the unorthodox procedural steps that the legislature took in passing SB 14. Significantly, the Fifth Circuit found that the fact that socioeconomic disparities hindered the ability of African Americans and Latinos to effectively participate in the political process was a prime factor in concluding that SB 14 was discriminatory.[xcix]

Four elections have taken place in Texas since the *Shelby County* decision allowed for SB 14's implementation. According to multiple experts, this means that the law has had an impact on anywhere from 600,000 to over one million voters, a disproportionate number of whom are African American or Latino. There is no way of ascertaining the precise number of Texan voters who may not have cast a ballot in these elections because of (1) lack of the required ID; (2) the costs of getting an acceptable photo ID; (3) inability to compile the underlying documents needed to get the photo ID; or (4) lack of education about the photo ID requirement or the option of getting an EIC. It is fact, however, that in addition to the Census Bureau's recent observation that the November 2014 election turnout at 41.9% was the lowest since the Bureau started surveying Americans about voting and citizenship, [c] Texas had one of the lowest voter turnout rates of the 2014 general election.[ci]

In sum, Texan voters are being forced to comply with a law that discriminates against racial minorities. Those racial minorities have faced generations of voting and socioeconomic discrimination that persists in Texas today.

Section 5 blocked the photo ID law and would have blocked it for the past three years if the VRA were operating at full strength. If not for *Shelby*[cii]: (1) the Attorney General's objection and the decision of the three-judge panel in *Texas v. Holder* would have prevented SB 14 from taking effect; (2) the Department of Justice and the various civil rights groups, including the Lawyers' Committee, would not have had to bear the tremendous expense of proving SB 14 was racially discriminatory; and most important, (3) Texan voters would not have been subjected to a racially discriminatory voting requirement for multiple elections while litigation in this case continues.

It Is Time to Restore the VRA

The Voting Rights Act at its full strength has been one of the most effective pieces of civil rights law. In the VRA's weakened state, formerly covered areas in states from Texas to Georgia to North Carolina to South Dakota have moved and are moving forward with voting changes that would have required federal review under Section 5. Congress must restore the VRA to its full potential. If Congress fails to act, for the first time in over 50 years, 2016 will see America's first presidential election without Section 5's protections. As illustrated by the story of the Texas photo ID law, that unfortunate possibility jeopardizes the hard-won victories of civil rights advocates and citizens who risked their lives and died for an equal voice in America's democracy.

The story of Texas photo ID illustrates that voting rights are under attack. Racial discrimination in voting still exists, and the VRA remains a vital tool to defend against it. Today, just as 50 years ago, America's racial and ethnic minorities need the full protections of the VRA to ensure equal access to the ballot. Congress must take action now to fulfill "the destiny of [our] democracy."[ciii] #DestinyVRA50[civ]

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