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RIDING WITHOUT A LEARNER'S PERMIT: HOW TEXAS CAN GUARANTEE THE VOTING RIGHTS OF MINORITIES ON ITS OWN HOOF

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I. INTRODUCTION

For nearly 40 years, Texas could not enact changes to voting laws or procedures without approval from the federal government.[1] In 1975, Texas was added to the list of states and counties

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1. *See* U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIVISION, *Jurisdictions previously cov-*

that were subject to the preclearance requirements of Section 5 of the Voting Rights Act.[2] Preclearance required the U.S. Attorney General or the U.S. District Court for the District of Columbia to approve any Texas legislation that changed voting qualifications, practices, or procedures before the legislation could take effect.[3] Although the Texas Legislature could enact election changes and draw new political maps, care had to be taken during the legislative process to ensure that federal preclearance approval could be obtained. The preclearance requirement extended to all cities, school districts, and other political subdivisions in the state.[4] Even state judicial opinions that resulted in a change in voting requirements required preclearance approval.[5]

In June 2013 the Supreme Court decided *Shelby v. Holder*, holding that the coverage formula in Section 4(b) of the Voting Rights Act, which identified jurisdictions subject to Section 5 preclearance requirements, was unconstitutional.[6] After 38 years of federal supervision, Texas was freed from Section 5 oversight and may now make changes and enact new political maps without obtaining federal permission. However, as the former preclearance process demonstrated, election changes can be quite complex, with unintended consequences severely impacting the voting rights of citizens. This paper explores how Texas can proactively create its own process to ensure 1) that voting changes do not discriminate under the Voting Rights Act and 2) that election changes are thoroughly analyzed and vetted before any measures are enacted.

The Texas Legislature already uses impact statements to ensure certain proposed legislation is analyzed for unintended consequences. For example, fiscal notes are developed for most bills that go before the House or the Senate to ensure that proposed legislation is carefully analyzed for fiscal implications to the state as a whole, particular agencies, and other specially af-

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ered by Section 5 at the time of the Shelby County decision, https:// https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 [hereinafter Originally Covered Jurisdictions].

2. *See* Voting Rights Act Amendments of 1975: Partial List of Determinations, 40 Fed. Reg. 43,746 (Sept. 18, 1975) [hereinafter 1975 VRA Amendments]. The 1975 VRA Amendments applied to Texas retroactively based on the 1972 Census and election practices that failed to account for Mexican-American Spanish speakers. *See* Nina Perales et al., *Voting Rights in Texas: 1982—2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 718-19 (2008).

3. 52 U.S.C. § 10304 (formerly codified at 42 U.S.C. § 1973c (2006)).

4. *See* 1975 VRA Amendments, *supra* note 2 (applying the requirement to "any political subdivision" of a covered state).

5. *See* Lulac of Texas v. Texas, 995 F. Supp. 719 (W.D. Tex. 1998) (holding that a procedural election change announced by the Texas Supreme Court required preclearance).

6. *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013).

fected parties.[7] Additionally, certain legislative topics such as criminal justice, higher education, and public retirement funding require impact statements with specific analysis on the relevant issue before they are heard in committee.[8] Election legislation deserves an equally careful and thoughtful analysis, which can be similarly incorporated into the state legislative process.

II. BACKGROUND

The civil rights movement of the 1960s exposed the racial discrimination that had been built into the election and voter registration infrastructure in primarily the southern part of the country. States enacted poll taxes, literacy tests, and other discriminatory prerequisites to voter registration. President Lyndon Johnson urged Congress to pass the Voting Rights Act in March 1965, explaining, "Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we have on the books . . . can ensure the right to vote when local officials are determined to deny it."[9] Congress passed the Voting Rights Act soon after and President Johnson signed it into law on August 6, 1965.[10]

The Voting Rights Act is comprised of nationwide provisions, some of which are still effective and bar states and localities from employing voting mechanisms that would deny or abridge the right to vote on account of race or color.[11] The preclearance requirement was contained in Sections 4–9 of the Act. It originally applied to states that, in 1964, used literacy or other tests as a condition for registering or voting and in which less than half the voting age population voted in the 1964 presidential election.[12] The states initially covered under the preclearance requirement were Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.[13]

In 1975, Texas was added to the list of jurisdictions subject

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7. Texas Comptroller of Public Accounts, *The Fiscal Noting Process: Doing the Math on New Legislation*, https://comptroller.texas.gov/economy/fiscal-notes/2017/january/fiscal-note.php (last visited Apr. 3, 2018).

8. *See infra* Part II.

9. President Lyndon Johnson, *President Johnson's Special Message to the Congress: The American Promise* (Mar. 15, 1965) (transcript available at http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise).

10. *See* U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIVISION, *The Voting Rights Act of 1965*, https://www.justice.gov/crt/history-federal-voting-rights-laws (describing the history of the Voting Rights Act).

11. 42 U.S.C. § 1973 (2006) (current version at 52 U.S.C.S. § 10301 (2018)).

12. *See* 52 U.S.C.S. § 10303 (2018).

13. *See* Originally Covered Jurisdictions, *supra* note 1.

to the preclearance requirement of the Voting Rights Act.[14] By this time, the Voting Rights Act preclearance provisions had repeatedly withstood legal challenges which asserted that preclearance was an unconstitutional provision. In 1966, the Supreme Court concluded in *Katzenbach v. South Carolina* that the Voting Rights Act was a valid exercise of Congress' power under the enforcement clause of the Fifteenth Amendment.[15] The court found that Congress had been:

> confronted by an insidious and pervasive evil which had been perpetuated in certain parts of [the] country through unremitting and ingenious defiance of the Constitution.. . . [and had] concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.[16]

While under the preclearance requirement, Texas passed some of the most progressive election laws in the country, including:

1975 Mail-in voter registration. While many states still required in-person voter registration, Texas passed mail-in voter registration.[17] In 1977, the state legislature even required the state to offer paid postage for voter registration applications.[18]

1987 Early Voting. Texas was one of the first states to implement early voting, which allows voters to vote in advance of election day at locations other than their precinct polling place.[19]

1991 Motor Voter. Two years before Congress passed the National Voter Registration Act of 1993, which required drivers license agencies to offer voter registration[20], Texas passed its own motor voter law, requiring that voter registration be offered at Texas Department of Public Safety offices.[21]

1997 Accessible Voting Machines. In 1987, Texas passed a law which required that any new voting system adopted by a political subdivision must allow voters with disabilities to vote privately and independently.[22]

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14. *See* 1975 VRA Amendments, *supra* note 2.

15. South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).

16. *Id.* at 309.

17. Act effective August 31, 1975, 64th Leg., R.S., ch. 296, 1975 Tex. Gen. Laws 750

18. Act effective August 29, 1977, 65th Leg., R.S., ch. 468, 1977 Tex. Gen. Laws 1212.

19. Act effective September 1, 1987, 70th Leg., R.S., ch. 472, 1987 Tex. Gen. Laws 2061 (permitting "absentee voting by personal appearance," or early voting).

20. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77.

21. Act effective August 26, 1991, 72nd Leg., 1st C.S., ch. 7, § 3.03, 1991 Tex. Gen. Laws 226, 243.

22. Act effective September 1, 1999, 76th Leg., R.S., ch. 319, 1999 Tex. Gen. Laws

Whether these progressive laws were enacted due to the impact of the preclearance requirement is unclear. However, Texas legislators knew that they must satisfy the preclearance requirement before election legislation could go into effect. They would have to prove to the satisfaction of the U.S. Attorney General or the U.S. District Court for the District of Columbia that the legislation did not create "retrogression in the position of racial minorities with respect to [the change]."[23] Procedurally, the office of the Texas Secretary of State submitted most preclearance requests by letter submission. The Code of Federal Regulations required specific information in the submission letter, including minority contacts and a description of the impact that the change had upon minority voters. Although most legislation was routinely precleared administratively, the U.S. Attorney General could stall or object to occasional legislation.

As such, the preclearance process served as a de facto backstop to passing harmful election legislation in the past. However, the review was limited to federal Voting Rights Act mandates, and failed to fully consider existing state law or how the legislation might affect the Texas election administration process as a whole. For example, the Texas Legislature initially met with DOJ objections when it sought to pass state law implementing the federal National Voter Registration Act of 1993 (NVRA).[24] The federal NVRA, also known as the Motor Voter law, required motor vehicle departments and public assistance agencies to offer voter registration opportunities to clients as they applied for a driver's license or for public assistance. Because the Texas legislature meets biennially, the NVRA was initially implemented by administrative rule. During the initial implementation, Texas election officials realized non-citizens were being offered the opportunity to register to vote. Election officials heard from concerned, improperly registered voters who had not realized they were ineligible, or even that they had registered, to vote. Accordingly, the state legislation implementing the NVRA included a separate section related to voter eligibility, and provided that voter registration was not required to be offered to non-citizens.[25] Ultimately, the Texas Secretary of State overcame the U.S. Department of Justice objection concerning the eligibility provisions,[26] but the initial objection exemplifies how an out-of-state

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23. Beer v. United States, 425 U.S. 130, 141 (1976).

24. Letter from U.S. Department of Justice, Civil Rights Division to the Secretary of State of Texas, (Jan. 16, 1996) (available at https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2860.pdf).

25. *See* TEX. ELEC. CODE § 20.006.

26. The Texas Secretary of State did end up adopting an administrative rule to ad-

analysis of possible VRA violations is not always well-situated to address circumstances unique to Texas. This limitation can lead to unwarranted objections to valid legislation, as well as missed recognition of actual voter discrimination. In one instance, the Department of Justice precleared new legislative maps which were later found to violate voting rights by the Supreme Court.[27]

On June 25, 2013, the Supreme Court struck down the preclearance requirement in *Shelby v. Holder*.[28] Chief Justice Roberts wrote for the majority that the Voting Rights Act employed "extraordinary measures to address an extraordinary problem" that was pervasive in 1965, though the means were meant to be temporary.[29] The court concluded that "the evil" that Section 5 preclearance was designed to combat "may no longer be concentrated in the jurisdictions singled out for preclearance."[30]

III. POST-PRECLEARANCE

Although the preclearance process was not perfect, the threat of opposition by the Department of Justice during the preclearance process generally encouraged legislators to shore up legislation against possible voting rights act challenges. Without the federal preclearance requirement, there is no systematic process required to analyze election legislation and ensure the protection of voting rights. While election legislation is closely followed by voters, candidates, political parties, voter advocacy groups, and election interest groups, there is no formal analysis which would help ensure that election laws safeguard 1) the ability of all eligible voters to vote and 2) the integrity of the election process.

The Texas Legislature has an opportunity to implement good government policies to ensure that Texas, rather than a federal agency or court, responsibly analyzes election legislation before it is enacted to protect voting rights and the integrity of the state election process. This article asserts that formal analysis of election-related legislation should be considered before it can be passed and enacted into state law. The additional analysis should be performed as part of the Texas legislative process, similar to that of fiscal notes and certain impact statements.

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dress the objections in the determination letter. *See* 1 Tex. Admin. Code § 81.402 (1997).

27. *See* Texas Legislative Council, *Texas Redistricting: Redistricting history*, TEXAS LEGISLATIVE COUNCIL, http://www.tlc.state.tx.us/redist/history/2000s.html. For the Supreme Court's decision, *see* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 400 (2006).

28. Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013).

29. *Id.* at 534.

30. *Id.* at 540.

IV. ELECTION IMPACT STATEMENT

Under current state law, Chapter 314 of the Texas Government Code requires that the Legislative Budget Board (the "LBB") establish a system of fiscal notes identifying probable costs of each bill or resolution that authorizes or requires expenditures or diversion of state funds for a purpose other than one provided for in the general appropriation bill. Under this system, the LBB flags bills with a state fiscal impact and then solicits feedback from affected state agencies concerning the impact to their budget. The LBB then reviews agency submissions and creates a fiscal note which is attached to the bill. The LBB may or may not agree with a particular agency's determination, but the assumptions, agency evaluations, and other data sources are noted in the methodology section of the fiscal note.

In the case of a bill that proposes to change the benefits of members of a public retirement system or that proposes to change the fund liability of a public retirement system, the Government Code requires an actuarial impact statement.[31] The Pension Review Board is responsible for preparing the actuarial impact statement and, similarly to the fiscal note process, contacts the appropriate retirement system and requests an actuarial analysis.[32] Most public retirement systems employ outside actuaries to perform this analysis.

Other impact notes that may be required by House or Senate Rules include:

- Criminal Justice Policy Impact Statements that provide estimates of how legislation may change prison capacity;
- Equalized Education Funding Impact Statements that analyze equity implications associated with changes to school district state aid;
- Higher Education Impact Statements that estimate changes related to creating or changing the classification, mission, or governance of an institution of higher education;
- Open Government Impact Statements that analyze possible changes regarding access to government information;
- Tax/Fee Equity Notes that analyze how a proposed increase or decrease in a tax or fee would affect the

31. TEX. GOV'T CODE § 802.301.

32. The actuarial analysis must be prepared by an actuary who is a fellow of the Society of Actuaries, a member of the American Academy of Actuaries, or an enrolled actuary under the Employees Retirement Income Security Act of 1974. *Id.* at § 802.301(b).

state taxpayers; and

- Water Development Policy Impact Statements that analyze changes resulting from the creation of water districts.

A basic pattern has developed through the years, whereby the Legislature recognizes that certain legislative subject matters require more thorough scrutiny and subsequently implements specific reporting requirements. As the chief election officer in the state, the Secretary of State is the logical party to prepare an Election Impact Statement. Under current law, the Secretary of State is required to obtain and maintain uniformity in the administration of election laws, and to protect the voting rights of citizens from abuse.[33] The Elections Division of the Secretary of State's Office is in a unique position to gather relevant data from election officials, voters, candidates, voter advocacy groups, and election integrity groups to analyze the impact of election legislation. Just as the state requires by law that the Pension Review Board develop actuarial impact statements by collaborating with relevant retirement systems and outside experts, the legislature should enact a law which requires the Secretary of State to prepare Election Impact Statements which would attach to an election bill heard in committee.

In some respects, the preparation of an Election Impact Statement could follow the process that state law requires for the preparation of explanatory statements for constitutional amendments. Article 17, Section 1 of the Texas Constitution requires that a brief explanatory statement of the nature of a proposed amendment to the constitution be published in newspapers throughout the state.[34] The explanatory statement is prepared by the Secretary of State and then approved by the Texas Attorney General. However, unlike the preparation of an explanatory statement, the preparation of an Election Impact Statement should incorporate mechanisms for mandating the cooperation of other state agencies. For example, after the passage of the voter identification legislation in 2011, the Texas Secretary of State worked closely with the Texas Department of Public Safety and the Attorney General to provide information to the Justice Department concerning the number of registered voters who did not have a driver's license or identification card.

In addition, the preparation of an Election Impact Statement should also include an opportunity for input from recognized stakeholders in the election process. For example, all political

33. TEX. ELEC. CODE ANN. §§ 31.001, 31.003-005.

34. TEX. CONST. art. 17, § 1.

parties with ballot access; voter advocacy groups, such as the League of Women Voters; and election integrity groups should be asked for comment on the impact of proposed bills. The Secretary of State could identify appropriate stakeholders and define the timing, format, and substance of comments by administrative rule. Obviously, tight timelines would be necessary for this process, and the Secretary of State should be given rulemaking authority to implement this process. Similar to the LBB, the Secretary of State would not have to agree with agency or stakeholder proposals. But the opportunity for comment should exist, and stakeholder input would constitute a valuable feature of the analysis.

V. CONCLUDING THOUGHTS

The preclearance process was enacted to ensure compliance with federal voting laws. With preclearance no longer required, the Texas Legislature should consider an alternative, independent analysis to safeguard the voting process. Election bills can be quite complicated and frequently involve competing constitutional issues, as well as issues of first impression. The Legislature should afford election bills the same level of reasoned analysis as it does for public retirement and public education finance bills. Although election bills generally do not involve state revenue, defending elections laws that were not properly vetted during the legislative process can be very expensive.[35] In addition, court determinations that Texas has passed legislation that violates the Voting Rights Act could place Texas back under the preclearance mandate by virtue of a Section 3(c) injunction. Regardless of political affiliation, most Texas election officials do not want to see state Voting Rights Act violations force Texas to fall back under preclearance requirements. Texas should be proactive and self-regulate legislative methods that allow for well-studied and effective election changes. In doing so, the state could set an example for the rest of the country in ensuring a fair election experience while maintaining state sovereignty post-*Shelby*.

35. *See, e.g.*, Jim Malewitz and Lindsay Carbonell, *Texas Voter ID Defense Has Cost $3.5 Million*, TEXAS TRIBUNE, June 17, 2016, https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/.