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PROHIBTING BARRIERS TO THE BOOTH: THE CASE FOR LIMITED NATIONWIDE PRECLEARANCE UNDER A MODIFIED VOTING RIGHTS ACT

HAYLEY TRAHAN-LIPTAK*

Abstract: The right to vote is fundamental to American democracy, yet for hundreds of years American history has been marked by efforts to restrict voting. Often, voting restrictions disproportionately affect minority voters, through both intentional discrimination and facially-neutral voting laws. Since its 1965 implementation, the Voting Rights Act (“VRA”) has been used to fight discriminatory voting laws through affirmative suits and mandatory federal approval of voting changes for states with a history of voter discrimination. On June 25, 2013, the Supreme Court struck down a crucial part of the VRA, eliminating the requirement that jurisdictions with storied pasts of voter discrimination seek federal approval for voting law changes. Despite this holding, discriminatory voting laws persist and are on the rise nationwide. In the wake of the Court’s holding and renewed state efforts to implement restrictive voting laws, this Note argues for a limited, nationwide expansion of federal preclearance under the VRA to confront modern, wide-ranging threats to voting rights.

INTRODUCTION

Ninety-three-year-old Viviette Applewhite marched in Civil Rights protests during the 1960s, worked as a wartime welder, and voted in every presidential election for the past fifty years.¹ Under a Pennsylvania law passed in early 2012, however, Ms. Applewhite could no longer vote because she did not have the required photo identification.² At the time of the law’s passage, Ms. Applewhite did not have a driver’s license, a copy of her birth certificate, or any other identifying document.³ Ms. Applewhite was not alone.⁴ As many as 76,000 other

* Executive Note Editor, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE (2013–2014).

¹ Amy Worden & Jan Hefler, *City Woman Is Lead Plaintiff Against PA Voter ID*, PHILA. INQUIRER, May 2, 2012, at A01.

² H.B. 934, 195th Gen. Assemb., Reg. Sess. (Pa. 2012); Worden & Hefler, *supra* note 1.

³ Worden & Hefler, *supra* note 1.

⁴ *Id.*

Pennsylvania citizens were ineligible to vote under the new requirements and thus disqualified from participation in the upcoming 2012 presidential election.⁵ At the time of the law's passage, studies showed that voters from predominately black districts, like Ms. Applewhite—who is African American—were eighty-five percent more likely to be disenfranchised by the new law.⁶

The 2012 Pennsylvania law was passed in a highly partisan environment.⁷ In June of 2012, five months before the presidential election, Republican House Majority leader Mike Turzai stated that, “[v]oter ID, which is gonna [sic] allow Governor Romney to win the state of Pennsylvania [is] done.”⁸ Although there were no cases of voter fraud in the state, the law took effect immediately without a nonpartisan review to determine its discriminatory effect.⁹ The Commonwealth Court of Pennsylvania later found, however, that the law could have disenfranchised as many as 76,500 voters, including many minorities.¹⁰

* * *

The Voting Rights Act (“VRA” or “the Act”) of 1965 attempted to prevent this sort of discrimination in voting, discrimination that in the first half of the 20th century took the form of literacy tests and poll taxes aimed at restricting minority voters.¹¹ Section 2 of the VRA banned voting requirements that discriminated based on race or

⁵ See *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 3332376, at *3 & n.16 (Pa. Commw. Ct. Aug. 15, 2012), *vacated*, 54 A.3d 1 (Pa. 2012), *remanded to* 2012 WL 4497211 (finding between 1% and 9% of registered Pennsylvania voters lacked appropriate identification); PA. DEP'T OF STATE, *Voter Registration Statistics*, http://www.dos.state.pa.us/portal/server.pt/community/voter_registration_statistics/12725 (last modified Feb. 20, 2013, 11:47 AM).

⁶ Ari Berman, *Partisan Pennsylvania Voter ID Law Wrongly Upheld by Court*, NATION (Aug. 15, 2012, 2:17 PM), <http://www.thenation.com/blog/169409/partisan-pennsylvania-voter-id-law-wrongly-upheld-court>; *Voter ID Client Bios*, AM. CIVIL LIBERTIES UNION OF PA., <http://www.aclupa.org/our-work/legal/legaldocket/applewhite-et-al-v-commonwealth-pennsylvania-et-al/voter-id-clients/> (last visited Feb. 18, 2014).

⁷ See Mackenzie Weinger, *Mike Turzai: Voter ID Helps GOP Win State*, POLITICO (June 25, 2012), <http://www.politico.com/news/stories/0612/77811.html>.

⁸ *Id.*

⁹ *Applewhite*, 2012 WL 3332376, at *28; see H.B. 934, 195th Gen. Assemb., Reg. Sess. (Pa. 2012).

¹⁰ See *Applewhite*, 2012 WL 3332376, at *3 n.16 (finding “somewhat more than 1% and significantly less than 9%” of registered voters do not possess adequate ID); PA. DEP'T OF STATE, *supra* note 5.

¹¹ See Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); Karen McGill Arrington, *The Struggle to Gain the Right to Vote: 1787–1965*, in *VOTING RIGHTS IN AMERICA: CONTINUING THE QUEST FOR FULL PARTICIPATION* 25, 30 (Karen McGill Arrington & William L. Taylor eds., 1992).

color.¹² Section 5 of the VRA instituted federal “preclearance” of changes to voting procedures and requirements in specific states with a history of discriminatory practices.¹³ Within months of the VRA’s enactment in August of 1965, a quarter of a million new black voters registered to vote.¹⁴ Congress reauthorized and amended the statute in 1970, 1975, 1982, and 2006.¹⁵

Despite the Supreme Court’s 2013 holding in *Shelby County v. Holder* that “things have changed dramatically” since the VRA’s 1965 implementation, state officials continue to play an active role in deciding who can vote.¹⁶ For example, in the month preceding the 2012 election, local election boards throughout Ohio established poll hours for early voting through a board vote.¹⁷ In suburban, majority white, counties, where voters have tended to vote Republican, all board members voted to extend voting hours.¹⁸ Yet in the urban counties home to the major cities of Cleveland, Columbus, and Akron, Republicans on the election boards voted not to extend voting hours, while Democratic members voted in favor of the measure, resulting in a tie.¹⁹ As required

¹² 42 U.S.C. § 1973(a); Civil Rights Div., *Section 2 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last visited Feb. 18, 2014).

¹³ 42 U.S.C. § 1973c; Civil Rights Div., *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Feb. 18, 2014).

¹⁴ *We Shall Overcome: The Prize*, NAT’L PARK SERV., http://www.nps.gov/nr/travel/civil_rights/prize.htm (last visited Feb. 21, 2014). By 1970, Southern voter registration had increased twofold. *Id.*

¹⁵ 42 U.S.C. § 1973; Civil Rights Div., *History of Federal Voting Rights Laws*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited Feb. 18, 2014). In 1970 and 1975, Congress extended Section 5 and reiterated the Supreme Court’s broad view of Section 5’s scope while extending the VRA’s protections to members of language minority groups. Civil Rights Div., *supra*. In 1982, Congress created a new standard for how jurisdictions could “bail out” from Section 5 preclearance. *Id.* Most recently in 2006, Congress reauthorized the Act. *Id.*

¹⁶ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625 (2013); *see, e.g.*, *Texas v. Holder*, 888 F. Supp. 2d 113 (D.C. Cir. 2012), *vacated*, 133 S. Ct. 2886 (2013) (refusing preclearance for voter ID law passed by the Texas legislature); Barry M. Horstman, *Voting Time a Partisan Battle*, CINCINNATI ENQUIRER, Aug. 6, 2012, at A1, *available at* <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/201208052259/NEWS0106/308050053> (detailing Ohio election official’s control over voting hours); Worden & Hefler, *supra* note 1 (noting that Pennsylvania’s 2012 voter ID law was passed by state legislators).

¹⁷ Horstman, *supra* note 16.

¹⁸ *See* Editorial, *Overt Discrimination in Ohio*, N.Y. TIMES, Aug. 15, 2012, at A22; Horstman, *supra* note 16.

¹⁹ *Overt Discrimination in Ohio*, *supra* note 18; Horstman, *supra* note 16. Election boards in Ohio counties are composed of four members: two Democrats and two Republicans. Massimo Calabresi, *Jon Husted: The Powerful Official Behind Ohio’s Vote*, TIME SWAMPLAND

by law, Ohio's Secretary of State, Jon Husted, a Republican, broke the ties, each time voting with the Republican members of the board against extended hours.²⁰

Husted and the election boards' decisions had both partisan and discriminatory results.²¹ According to the state's decisions, Ohio counties that in 2008 overwhelmingly voted for Republican presidential candidate John McCain were given extended hours to vote in 2012.²² Meanwhile, urban counties, which strongly supported President Obama in 2008, did not extend early voting hours.²³ Because these urban counties are home to twice as many black residents than the rural counties, the election boards' decisions gave minorities a smaller window of time to vote.²⁴ Furthermore, early voting in Ohio has been found to favor Democratic candidates.²⁵ The Ohio legislature also eliminated early voting for non-military members during the Saturday, Sunday, and Monday before the election, times when voters cast the largest portion of early votes in 2008.²⁶

(Nov. 6, 2012), <http://swampland.time.com/2012/11/06/jon-husted-the-most-powerful-man-in-the-ohio-vote>.

²⁰ Horstman, *supra* note 16.

²¹ See *Obama for Am. v. Husted*, 697 F.3d 423, 426–27 (6th Cir. 2012); Horstman, *supra* note 16.

²² Horstman, *supra* note 16. Ohio's Warren County voted for McCain in 2008 two to one and Butler County voted for McCain three to two. *Id.* Both counties received extended voting hours. *Id.*

²³ *Id.*

²⁴ *Id.*; *State and County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/39000.html> (follow "Select a county" link; then search for "Butler," "Cuyahoga," "Franklin," "Summit," and "Warren" counties) (last visited Feb. 18, 2014). The urban counties of Cuyahoga, Franklin, and Summit had between 30% and 14.6% black populations, while those that permitted additional hours, including Butler and Warren counties, had 7.7% and 3.5% black populations. *State and County QuickFacts*, *supra*.

²⁵ *A Study of Early Voting in Ohio Elections*, RAY C. BLISS INST. OF APPLIED POLITICS 1–2 (2010), www.uakron.edu/bliss/research/archives/2010/EarlyVotingReport.pdf. Early voters, who in Ohio's 2008 presidential election cast almost 30% of the total votes, are largely composed of African Americans, the elderly, women, and people of lower income and educational achievements. *Id.*

²⁶ See *Obama for Am.*, 697 F.3d at 426, 427. In July 2011, the Ohio legislature enacted H.B. 194 in an attempt to reduce early voting hours. Am. Sub. H.B. No. 194, 129th Gen. Assemb. (Ohio 2011), *invalidated by Obama for Am.*, 697 F.3d at 426; *Obama for Am.*, 697 F.3d at 427. The bill's passage, however, led to contradictory voting deadlines for members of the military. *Obama for Am.*, 697 F.3d at 427. Despite attempts by the legislature to fix the discrepancy, the inconsistency in voting deadlines continued. *Id.* Finally, in August of 2012, Ohio Secretary of State Husted chose to apply the more lenient deadline for military personnel and allow members of the military to vote early through the Monday before the election, while barring non-military members from early voting the Monday and final weekend before the election. *Id.*

In Ohio, efforts of out-of-state private organizations protected the voting process.²⁷ After national publicity and scrutiny of Husted's decisions, Husted extended early-voting hours uniformly in all Ohio counties.²⁸ Additionally, the Democratic National Committee, the Ohio Democratic Party, and the Obama for America campaign sued Secretary of State Jon Husted, alleging his ban on weekend voting before the election violated the Equal Protection Clause of the Fourteenth Amendment.²⁹ The Sixth Circuit granted a preliminary injunction to prevent Ohio from enforcing the law barring weekend voting.³⁰ Consequently, polls stayed open in all counties the weekend before the election.³¹ Without intervention from these groups, the Ohio election law may have severely burdened women, elderly, low income, and black voters during the highly contested 2012 election.³² For a swing state like Ohio, control over who votes and who does not can quickly turn into control over who becomes president and who does not.³³

* * *

Discriminating against voters based on color or race, like the practices in Ohio and Pennsylvania in 2012, was prohibited over forty years ago under the VRA.³⁴ Still, voting inequality remains in challenges to voting rights across the country, including both the original "covered jurisdictions," as well as in states like Ohio, Pennsylvania, and Wisconsin.³⁵ Attempts to suppress the vote extend beyond the limitations of

²⁷ *Obama for Am.*, 697 F.3d at 425, 437.

²⁸ Calabresi, *supra* note 19; see *Overt Discrimination in Ohio*, *supra* note 18.

²⁹ *Obama for Am.*, 697 F.3d at 425; see U.S. CONST. amend. XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

³⁰ *Obama for Am.*, 697 F.3d at 425, 437. The court found that based on the evidence presented of the law's disproportionate effect on some groups of voters, Plaintiffs would likely prevail in an Equal Protection claim if they could demonstrate that the restricted hours were not sufficiently justified. *Id.* at 431–32.

³¹ *Id.* at 437.

³² See *id.* at 431.

³³ See Calabresi, *supra* note 19; Chris Cillizza, *The 9 Swing States of 2012*, WASH. POST: THE FIX (Apr. 16, 2012, 11:51 AM), http://www.washingtonpost.com/blogs/the-fix/post/the-9-swing-states-of-2012/2012/04/16/gIQABuXaLT_blog.html.

³⁴ Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); see Berman, *supra* note 6; *Overt Discrimination in Ohio*, *supra* note 18.

³⁵ See *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211 at *5 (Pa. Commw. Ct. Oct. 2, 2012) (finding the potential for disenfranchisement under a 2012 Pennsylvania voter identification law and granting a preliminary injunction against 2012

polling times, often involving stringent voter registration requirements, electoral districting, and voter identification.³⁶ Despite overwhelming pressure to encourage voting equality, the Supreme Court in *Shelby County* struck down a key voting protection, stating that the VRA's formula identifying jurisdictions that must receive federal approval for voting changes was no longer indicative of current discrimination.³⁷ Since even the Supreme Court in *Shelby County* noted that the VRA has been massively effective, while simultaneously eliminating the crucial preclearance requirement, the VRA needs to proactively monitor more jurisdictions and more types of discrimination to protect the fundamental right of democracy.³⁸

This Note argues for limited nationwide preclearance under Section 5 of the VRA as a means to ensure equal protection for all citizens' voting rights, from registration through Election Day. Part I explains the history of the VRA and voting discrimination following the enactment of the Fifteenth Amendment. Part II contrasts the vast bipartisan support the 2006 VRA reauthorization received with the abrupt shift in support following the 2008 election and the eventual termination of the VRA's coverage formula. Part III discusses current threats to voting rights and their limited remedies. Finally, Part IV argues that the Supreme Court's removal of the VRA's preclearance formula, paired with the implementation of aggressive nationwide voting limitations, demonstrates that voter rights are still in danger. The Note concludes by advocating for a limited extension of preclearance to all "key changes" to voting laws and increased federal takeover of meritorious voting challenges to prevent additional voting discrimination.

enforcement of the law); *Milwaukee Branch of the NAACP v. Walker*, No. 2012AP557-LV, 2012 WL 1020254, at *1 (Wis. Ct. App. Mar. 28, 2012) (granting an injunction against a Wisconsin law requiring voters to show government-issued identification at the polls); Horstman, *supra* note 16 (describing Ohio election board decisions to limit early voting hours); Civil Rights Div., *Section 5 Objection Determinations*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Feb. 18, 2014) (listing federal objections to proposed voting laws in covered jurisdictions).

³⁶ See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 400 (2006) (holding that Texas's redistricting plan violated the Voting Rights Act's vote dilution requirements); *Applewhite*, 2012 WL 4497211, at *5 (recognizing the potential for voter disenfranchisement under Pennsylvania's voter ID law); Horstman, *supra* note 16 (detailing changes to polling times); Civil Rights Div., *supra* note 35 (listing federal objections to proposed voting laws, including objections to voter registration procedures in Alabama and Mississippi).

³⁷ *Shelby Cnty.*, 133 S. Ct. at 2631.

³⁸ See *Obama for Am.*, 697 F.3d at 426, 427; *Applewhite*, 2012 WL 4497211 at *3; Civil Rights Div., *The Effect of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_c.php (last visited Feb. 18, 2014).

I. THE ORIGINAL ASSAULT ON VOTING RIGHTS: DISCRIMINATION IN THE POSTWAR SOUTH

In early April of 1950, the South Carolina legislature passed a new election law for the upcoming United States Senate primaries.³⁹ The new law required that registered voters be able to read and write any section of the state's 1895 constitution, a prerequisite that voters could avoid only if they had paid all of their previous property taxes.⁴⁰ For many poor, illiterate black citizens, the new requirements completely barred them from voting, while the administration of the test by poll workers allowed subjectivity for even those who could meet the requirements.⁴¹

At the time South Carolina's legislature passed the election law, the state senate Democratic primary race was a toss-up between Governor J. Strom Thurmond and incumbent Senator Olin Johnson.⁴² Despite his opposition to civil rights, Johnson was popular among black voters, especially compared to Thurmond, who was widely considered an even stauncher opponent of black rights.⁴³ Estimates held that the new law would cut participation by black voters in South Carolina in half.⁴⁴ Thurmond supporters "triumphed."⁴⁵

In the 1950s, the Supreme Court permitted literacy tests and poll taxes like South Carolina's.⁴⁶ Moreover, such discriminatory laws had been widely used since the 1870s.⁴⁷ During the first half of the twentieth century, minorities comprised as little as 1% of the electorate in Louisiana and 6% in Mississippi.⁴⁸ The 1965 VRA was Congress's answer to voting discrimination, allowing affirmative suits against dis-

³⁹ W.H. Lawrence, *Negro Vote Reined in South Carolina*, N.Y. TIMES, Apr. 14, 1950, at 12. A 1944 Supreme Court decision invalidated South Carolina's previous primary voting statutes when it struck down a Texas statute that completely barred black citizens from voting in party primaries. *Smith v. Allwright*, 321 U.S. 649, 656–57, 662, 666 (1944); Lawrence, *supra*.

⁴⁰ Lawrence, *supra* note 39.

⁴¹ See LAWRENCE GOLDSTONE, *INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865–1902*, at 135, 136 (2011).

⁴² Lawrence, *supra* note 39.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See, e.g. *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51, 54 (1959) (holding that North Carolina's voting literacy test requirement was constitutional).

⁴⁷ Don Edwards, *The Voting Rights Act of 1965, As Amended*, in *THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS* 3, 4 (Lorn S. Foster ed., 1985); GOLDSTONE, *supra* note 41, at 134–36.

⁴⁸ Arrington, *supra* note 11, at 30.

criminy voting restrictions while requiring approval for new voting regulations in many states.⁴⁹

A. *Widespread Discrimination Before the Voting Rights Act*

Following the abolition of slavery in 1865, the enactment of the Fifteenth Amendment assured the newly liberated people one of the most fundamental rights of a democracy: the right to vote.⁵⁰ The Amendment provided that a U.S. citizen's right "to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."⁵¹ Despite racial prejudice throughout the country, the requisite number of states finally ratified the Amendment in 1870.⁵² Initially, the Fifteenth Amendment served its purpose as black citizens throughout the South swept into office with the support of large, newly created, black voting blocs.⁵³ Yet, as many Southern states witnessed the influx of black politicians and the black community's growing power, they began to rebel against the changes through both violence and voting.⁵⁴

By the mid-1870s, states began to restrict voting through poll taxes and literacy tests designed to allow white citizens access to the polls while disqualifying blacks.⁵⁵ Under Mississippi's constitution, for example, citizens were required to read and interpret a selected part of the state constitution.⁵⁶ In practice, officials helped white voters through simple portions of the constitution while black voters had to read long, elaborate passages by themselves.⁵⁷ Other states instituted "grandfather clauses," which allowed descendants of voters qualified to vote in 1866 to register without any tests or poll taxes.⁵⁸ With black people in many states unable to vote before the 1870 passage of the Fifteenth Amendment, "grandfather clauses" applied only to white individuals.⁵⁹ Initiatives like these resulted in massive disenfranchisement, diminishing

⁴⁹ See Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

⁵⁰ U.S. CONST. amend. XV; Edwards, *supra* note 47, at 3.

⁵¹ U.S. CONST. amend. XV, § 1.

⁵² Edwards, *supra* note 47, at 3.

⁵³ *See id.*

⁵⁴ *See id.* at 3–4.

⁵⁵ Arrington, *supra* note 11, at 30; Edwards, *supra* note 47, at 3. By 1910, twelve states had passed laws effectively making voting a whites-only privilege. Arrington, *supra* note 11, at 30.

⁵⁶ GOLDSTONE, *supra* note 41, at 134–35.

⁵⁷ *Id.*

⁵⁸ Arrington, *supra* note 11, at 30.

⁵⁹ *Id.*

black voter registration in Louisiana from 44% of the electorate to less than 1% and from 70% to 6% in Mississippi.⁶⁰

The Fifteenth Amendment and the Supreme Court initially did little to prevent the marginalization of Southern black voters.⁶¹ In its 1898 *Williams v. Mississippi* decision, the Supreme Court upheld Mississippi's literacy test and property tax requirements for voting.⁶² The Court reasoned that the requirements were constitutional under the Fourteenth Amendment because they did not facially discriminate against black citizens.⁶³ Over half a century later, in 1956, the Court continued its refusal to protect black voting rights, holding in *Lassiter v. Northampton County Board Of Elections* that states have "broad powers to determine the conditions under which the right of suffrage may be exercised . . ."⁶⁴

The Civil Rights Acts of 1957, 1960, and 1964 did little to remedy the problem.⁶⁵ Even successful litigation of individual cases was short-lived, as states reinstated new discriminatory laws in place of the old.⁶⁶ Finally, Congress responded to both states' consistent disfranchisement of black voters and the Supreme Court's refusal to protect voting rights by enacting the Voting Rights Act of 1965.⁶⁷

B. Congress Responds with the Voting Rights Act of 1965

President Johnson signed the VRA into law on August 6, 1965.⁶⁸ The VRA's enactment capped a summer filled with violence, including the attack on peaceful marchers by state policemen in Selma, Alabama and the murder of a mother registering voters in Arkansas.⁶⁹ The Act

⁶⁰ *Id.*

⁶¹ See *Lassiter*, 360 U.S. at 51, 53; *Williams v. Mississippi*, 170 U.S. 213, 225 (1898); GOLDSTONE, *supra* note 41, at 199.

⁶² *Williams*, 170 U.S. at 221–22, 225 (“[Mississippi’s Constitution and statutes] do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them.”).

⁶³ *Id.* at 225.

⁶⁴ *Lassiter*, 360 U.S. at 50. The Court found literacy tests permissible as part of a state’s power to raise the education of voters. *Id.* at 52–53.

⁶⁵ Arrington, *supra* note 11, at 30. The 1957 Civil Rights Act gave the U.S. Attorney General the ability to intervene on behalf of black citizens who were denied the right to vote. *Id.* The 1960 and 1964 Civil Rights Acts supplemented this law, but the changes had little effect. *Id.*

⁶⁶ Civil Rights Div., *supra* note 15.

⁶⁷ Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); Civil Rights Div., *supra* note 15.

⁶⁸ 42 U.S.C. § 1973; Civil Rights Div., *supra* note 15.

⁶⁹ See Edwards, *supra* note 47, at 4–5; Civil Rights Div., *supra* note 15.

targeted current and future voter discrimination on multiple fronts.⁷⁰ Section 2 of the VRA banned discriminatory voting requirements, Section 4 laid out a formula for identifying states with storied pasts of voting discrimination, and Section 5 required voting law changes in those states to undergo federal review before implementation.⁷¹

1. Section 2 of the Voting Rights Act of 1965

For years, courts had found literacy tests and other obstacles to the polls acceptable under the Fourteenth and Fifteenth Amendments.⁷² Congress responded with the VRA, which banned voting requirements that discriminated based on race or color.⁷³ Section 2 of the VRA prohibited any “qualification or prerequisite to voting or standard, practice, or procedure” that resulted “in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”⁷⁴ No longer could courts uphold the constitutionality of practices that, although not facially discriminatory, resulted in a discriminatory effect.⁷⁵

In addition to banning devices like literacy tests, that disproportionately affected minorities, Section 2 permitted affirmative suits to challenge discriminatory voting practices as well as racial gerrymandering.⁷⁶ Before the VRA, courts only considered whether the requirement at issue was facially discriminatory.⁷⁷ Violations of Section 2, however, can be based on a “totality of circumstances” analysis, including “[t]he extent to which members of a protected class have been elected” and if “members [of the racial group] have less opportunity than other members of the electorate to participate in the political process.”⁷⁸ Unlike other sections of the Act, Section 2 permanently applied to all states and districts.⁷⁹ Section 2 of the VRA remains in effect today.⁸⁰

⁷⁰ See 42 U.S.C. § 1973.

⁷¹ *Id.* §§ 1973(a), 1973b(b), 1973c.

⁷² See *Lassiter*, 360 U.S. at 53; *Williams*, 170 U.S. at 221–22, 225; GOLDSTONE, *supra* note 41, at 174, 175.

⁷³ 42 U.S.C. § 1973(a).

⁷⁴ 42 U.S.C. § 1973(a); see Civil Rights Div., *supra* note 12.

⁷⁵ See 42 U.S.C. § 1973(a); *Williams*, 170 U.S. at 225 (upholding Mississippi’s voting restrictions because they were not facially discriminatory).

⁷⁶ 42 U.S.C. § 1973; see *Edwards*, *supra* note 47, at 5.

⁷⁷ See, e.g., *Lassiter*, 360 U.S. at 54; *Williams*, 170 U.S. at 225.

⁷⁸ 42 U.S.C. § 1973(b).

⁷⁹ *Id.* § 1973(a)–(b); Civil Rights Div., *supra* note 12.

⁸⁰ 42 U.S.C. § 1973(a)–(b); see *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

2. Preclearance Under Sections 4 & 5 of the Voting Rights Act

Before the VRA, case-by-case litigation of discriminatory voting laws was largely unproductive.⁸¹ When courts did strike down discriminatory voting practices, states simply enacted new regulations and litigation began anew.⁸² In its 1966 *South Carolina v. Katzenbach* decision upholding the constitutionality of the VRA, the Supreme Court recognized that “case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting,” especially based on the time required to litigate individual cases.⁸³

Congress responded to the problem of continual litigation with Section 5.⁸⁴ This section of the VRA froze the voting procedures in specified jurisdictions and required that all proposed changes to voting regulations in those jurisdictions receive federal preclearance before implementation.⁸⁵ To receive preclearance, a proposed change either had to undergo administrative review by the United States Attorney General or prevail in a lawsuit before the United States District Court for the District of Columbia.⁸⁶ During preclearance, covered jurisdictions had the burden of showing proposed laws would not create a discriminatory retrogressive effect, meaning the law would not worsen the existing position of minority voters compared to the jurisdiction’s previous voting practices.⁸⁷

Section 5 imposed its preclearance requirements on all states and jurisdictions covered by the formula set forth in Section 4.⁸⁸ Section 4’s formula covered a jurisdiction if (1) on November 1, 1964 the state or jurisdiction used a test or device in voting practices to limit one’s ability

⁸¹ Civil Rights Div., *supra* note 15; *see Lassiter*, 360 U.S. at 53, 54 (upholding literacy tests as a valid exercise of state power); *Williams*, 170 U.S. at 225 (upholding literacy testing and property tax requirements because they were not facially discriminatory).

⁸² Civil Rights Div., *supra* note 15.

⁸³ *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 337 (1966), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612.

⁸⁴ 42 U.S.C. § 1973c; *see* Civil Rights Div., *supra* note 15.

⁸⁵ 42 U.S.C. § 1973c. Covered jurisdictions were determined by a formula set forth in Section 4. *Id.* Congress identified jurisdictions with a storied past of voting discrimination and then created a formula that encompassed the deficient areas. *See id.* § 1973b; Brief for Federal Respondent at *3, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96); *infra* note 89 and accompanying text.

⁸⁶ 42 U.S.C. § 1973c. Congress was concerned about both the potential bias of local judges and uniformity of interpreting laws, and thus required that suits be litigated in the U.S. District Court for the District of Columbia. *Id.*; William Colbert Keady & George Colvin Cochran, *Section 5 of the Voting Rights Act: A Time for Revision*, 69 Ky. L.J. 741, 749–50, 751 (1981).

⁸⁷ *Beer v. U.S.*, 425 U.S. 130, 141 (1976).

⁸⁸ 42 U.S.C. §§ 1973b, 1973c.

to register to vote, or (2) less than 50% of voting-age people residing in the state or jurisdiction were registered on November 1, 1964 or less than 50% of the eligible voters voted in the November 1964 presidential election.⁸⁹ Section 5 allowed states and jurisdictions that could demonstrate a lack of voter discrimination in the past ten years to ask for an exemption from preclearance, a process known as “bailing out.”⁹⁰

The bailing out process is complemented by the more obscure and little-used “bail-in” provision of Section 3.⁹¹ Under Section 3, the Attorney General or a private plaintiff may petition a federal court to place a state or jurisdiction under the federal preclearance requirement.⁹² If the court finds the jurisdiction has intentionally discriminated in voting practices, the court may freeze the jurisdiction’s voting laws and require preclearance for as long as it deems appropriate.⁹³

Congress initially intended Section 5 preclearance to last five years.⁹⁴ Recognizing the continued need for preclearance in the covered states, however, Congress renewed the VRA for another five years in 1970.⁹⁵ The renewal also added additional jurisdictions from ten dif-

⁸⁹ *Id.* § 1973b(b). States that qualified under this test in 1965 were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as political subdivisions in Arizona, Hawaii, Idaho, and North Carolina. Civil Rights Div., *supra* note 13. Congress last updated the formula in its 1975 reauthorization of the Act to reflect data from the 1972 presidential election. *Id.*

⁹⁰ 42 U.S.C. § 1973b; Civil Rights Div., *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Feb. 20, 2014). Bailout was first devised as a way to remedy any over inclusion produced by the formula. Civil Rights Div., *supra*. Congress, however, amended the bailout provision in 1982. *Id.* Today, a state or jurisdiction may bail out if: (a) no test or device has been used with the state or subdivision “for the purpose or with the effect” of restricting the right to vote of people based on color or race, (b) no final judgment from a US court has found the state or jurisdiction has restricted the right to vote on account of race or color, (c) no federal examiners have been sent to the state or subdivision, (d) the challenging jurisdiction has complied with Section 5, (e) there has been no declaratory judgment or objection to voting procedures submitted for preclearance, (f) there are no longer restrictive voting procedures, harassment in the appealing subdivision and the appealing jurisdiction has tried to expand opportunity to vote in the jurisdiction. 42 U.S.C. § 1973b; Civil Rights Div., *supra*.

⁹¹ 42 U.S.C. § 1973a(c); Richard L. Hasen, *Holder’s Texas-Size Gambit: Will It Save the Voting Rights Act?*, NAT’L L. J. (Aug. 5, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202613130666&thepage=1>.

⁹² 42 U.S.C. § 1973a(c).

⁹³ *See id.*

⁹⁴ U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION 2 (2006), *available at* <http://www.usccr.gov/pubs/051006VRAStatReport.pdf> [hereinafter VOTING RIGHTS ENFORCEMENT].

⁹⁵ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified at 42 U.S.C. § 1973 (2006)); Civil Rights Div., *supra* note 13.

ferent states to the preclearance requirement.⁹⁶ Congress again extended the VRA in 1975, 1982, and 2006.⁹⁷ The Supreme Court's 2013 decision in *Shelby County v. Holder* struck down Section 4's coverage formula, leaving the VRA's future and necessity uncertain.⁹⁸

C. Aftermath of the Voting Rights Act

The VRA had a substantial impact on voting throughout the covered jurisdictions.⁹⁹ Registration of black voters in Mississippi rose 886% between 1964 and 1976, and over one million new black voters registered in the covered jurisdictions between 1964 and 1972.¹⁰⁰ Still, when Congress reauthorized the Act in 1975, black voter registration remained proportionally less than that of white registration.¹⁰¹

The VRA did not eliminate all barriers nor did the required federal approval extend to all aspects of voting.¹⁰² The 1975 report of the United States Commission on Civil Rights found that ten years after the VRA's enactment, barriers to voting for black citizens still existed throughout the covered states.¹⁰³ While changes to voting practices had to be federally cleared, federal laws did not regulate poll workers.¹⁰⁴

⁹⁶ Civil Rights Div., *supra* note 90; *see* Voting Rights Act Amendments of 1970, 84 Stat. at 315. The additional jurisdictions included parts of Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York, and Wyoming. Civil Rights Div., *supra* note 90. Since 1970, Connecticut, Idaho, Maine, Massachusetts, and Wyoming have successfully bailed out of coverage. *Id.*

⁹⁷ Civil Rights Div., *supra* note 13.

⁹⁸ *Shelby Cnty.*, 133 S. Ct. at 2631; *see* Charlie Savage, *Justice Department Poised to File Lawsuit Over Voter ID Law*, N.Y. TIMES, Sept. 30, 2013, at A11; VOTING RIGHTS ENFORCEMENT, *supra* note 94, at 2; *see* Richard Hasen, *Online VRA Symposium: The Voting Rights Act, Congressional Silence, and the Political Polarization*, SCOTUSBLOG (Sept. 10, 2012, 11:45 AM), <http://www.scotusblog.com/2012/09/online-vra-symposium-the-voting-rights-act-congressional-silence-and-the-political-polarization>.

⁹⁹ *See* Edwards, *supra* note 47, at 5.

¹⁰⁰ *Id.*; U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 41 (1975) [hereinafter TEN YEARS AFTER].

¹⁰¹ TEN YEARS AFTER, *supra* note 100, at 56–57. Black registration was still 23.6 percentage points less than white registration in Alabama, as well as 20.9 and 15.9 percentage points less in Louisiana and North Carolina respectively. *Id.* at 43.

¹⁰² *See id.* at 130.

¹⁰³ *Id.* at 1, 130. Under the Civil Rights Act of 1957, the bipartisan U.S. Commission on Civil Rights was created to, among other tasks, investigate complaints of voting discrimination, evaluate federal laws and policies regarding equal protection, and submit regular reports, findings, and recommendations to the President and Congress. *Mission*, U.S. COMM'N ON CIVIL RIGHTS, <http://www.usccr.gov/about/index.php> (last visited Feb. 20, 2014); *Powers*, U.S. COMM'N ON CIVIL RIGHTS, <http://www.usccr.gov/about/powers.php> (last visited Feb. 20, 2014).

¹⁰⁴ *See* TEN YEARS AFTER, *supra* note 100, at 130.

Many poll workers told minorities they were “not on the list” of registered voters, driving many people away from the polls.¹⁰⁵ Other poll workers asked minority voters specific questions about their residence while allowing white voters to vote freely.¹⁰⁶ During the Act’s 1981 reauthorization, a congressional subcommittee heard testimony that included reports of voter harassment and falsification of election returns in Texas, and voter registration books kept under a judge’s desk in Alabama to keep black citizens from registering.¹⁰⁷

As required by Section 5, states and jurisdictions covered under Section 4’s formula began submitting proposed voting law changes to the Department of Justice (DOJ) in 1965.¹⁰⁸ In the first ten years, jurisdictions submitted 1542 changes for approval, and the DOJ struck down 14.2% of the proposals.¹⁰⁹ Since 1975, the number of proposed changes has increased dramatically, yet the percent of objections from the DOJ has decreased, falling as low as 0.7% in the period between 1982–2004.¹¹⁰ Despite the decreasing percentage of DOJ objections to proposed laws, the total number of laws failing DOJ preclearance has increased from 219 in the first ten years, to approximately 750 between 1982 and 2004.¹¹¹

The exact number of Section 2 claims filed by independent parties is unknown, although estimates place the number at over 1600 filings since 1982.¹¹² Of the documented cases, claims against state voting laws succeeded more often in covered jurisdictions than in non-covered jurisdictions.¹¹³ This disparity is especially pronounced considering that covered jurisdictions account for less than a quarter of the U.S. population.¹¹⁴

¹⁰⁵ *Id.* at 99.

¹⁰⁶ *Id.* at 98.

¹⁰⁷ Edwards, *supra* note 47, at 7.

¹⁰⁸ VOTING RIGHTS ENFORCEMENT, *supra* note 94, at 22.

¹⁰⁹ *Id.* Proposed changes that were not precleared included, among others, assistance to illiterates (Alabama), poll official qualifications (Georgia), literacy tests for registration (Alabama), at large election schemes (South Carolina), and redistricting (South Carolina). Civil Rights Div., *supra* note 35 (select “Alabama,” “Georgia,” and “South Carolina” hyperlinks).

¹¹⁰ VOTING RIGHTS ENFORCEMENT, *supra* note 94, at 22. From 1975–1982, submitted changes increased to 13,874 while Justice Department objections shrunk to 3.1%. *Id.* From 1982–2004, submissions grew again to 101,641, however only 0.7% of the submissions were rejected. *Id.*

¹¹¹ *Id.*

¹¹² Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 29 U. MICH. J.L. REFORM 643, 654, 655 (2006).

¹¹³ *Id.* at 655.

¹¹⁴ *Id.*

The reduced percentage of DOJ objections in relation to submissions under Section 5 sparked a debate over the continuing necessity of the VRA.¹¹⁵ Supporters of the VRA point to the disproportionate number of successful Section 2 claims in covered jurisdictions as evidence that preclearance is still necessary.¹¹⁶ Finally, some believe that the declining percentages are not an accurate depiction of voting laws that may have discriminatory effects and the preclearance requirement is necessary to ensure voter rights.¹¹⁷ These arguments played out following Congress's 2006 reauthorization of the VRA, the Supreme Court's *Shelby County* decision, and continue to be hotly debated.¹¹⁸

II. THE MODERN VOTING RIGHTS ACT

Congress renewed the expiring provisions of the VRA in 2006 with bipartisan support.¹¹⁹ Two years later, an unprecedented number of minority voters helped elect Barack Obama, a liberal Democrat and the first black President.¹²⁰ After the 2008 elections, support for the VRA suddenly wavered as Republican-controlled states began to challenge the Act.¹²¹ In 2013, the Supreme Court struck down Section 4's preclearance formula.¹²² Within hours, states previously blocked from implementing strict voter laws redoubled their initial efforts.¹²³ The sud-

¹¹⁵ VOTING RIGHTS ENFORCEMENT, *supra* note 94, at 63.

¹¹⁶ See Ellen Katz, *Shelby County v. Holder: Why Section 2 Matters*, SCOTUSBLOG (Feb. 15, 2013, 12:05 PM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-why-section-2-matters>.

¹¹⁷ See VOTING RIGHTS ENFORCEMENT, *supra* note 94, at 94 (dissenting statement of Commissioner Michael Yaki joined by Commissioner Arlan Melendez).

¹¹⁸ Charles Babington, *GOP Rebellion Stops Voting Rights Act*, WASH. POST, June 22, 2006, at A27; see Brief for Petitioner at 23, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

¹¹⁹ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified at 42 U.S.C. § 1973 (2006)); Charles Babington, *Voting Rights Act Extension Passes in Senate*, 98 *to 0*, WASH. POST, July 21, 2006, at A1.

¹²⁰ See Sam Roberts, *2008 Surge in Black Voters Nearly Erased Racial Gap*, N.Y. TIMES, July 21, 2009, at A14.

¹²¹ Hasen, *supra* note 98; see Sydney Sarachan, *Ask the Experts: Voter ID Laws*, NEED TO KNOW (Oct. 26, 2012), <http://www.pbs.org/wnet/need-to-know/ask-the-experts/ask-the-experts-voter-id-laws/15236/>.

¹²² *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

¹²³ Adam Liptak, *Justices Void Oversight of States, Issue at Heart of Voting Rights Act*, N.Y. TIMES, June 26, 2013, at A1; Holly Yeager, *N. Carolina Faces Suit Over Voting Law*, WASH. POST, Sept. 20, 2013, at A3 (noting that six previously covered states passed voter ID laws following the *Shelby County* decision). Within hours of the *Shelby County* decision, Texas announced that its previously blocked voter ID law would take effect immediately. Liptak, *supra*.

den shift in support for the VRA, amidst a changing political climate where minorities control a new, liberal voting bloc, shows voting rights are still under attack.¹²⁴

A. *Wide Support for the 2006 Renewal of the VRA*

Since its enactment, the VRA has been renewed three times, most recently in July of 2006.¹²⁵ Efforts to renew the Act, which was set to expire in 2007, enjoyed wide bipartisan support.¹²⁶ President George W. Bush supported the measure and Republican Speaker Dennis Hastert was “committed to passing the Voting Rights Act” despite several unexpected objections from several Republican members of the House.¹²⁷ Some Republican members opposed the VRA’s bilingual ballot requirement, while other representatives from covered jurisdictions argued discrimination at the polls had disappeared and coverage was no longer necessary.¹²⁸ Still, Republican leaders overcame the objections with the help of Democrats.¹²⁹ The final bill was passed in the Senate 98 to 0 and 390 to 33 in the House.¹³⁰

The reauthorization process produced an extensive congressional record documenting numerous firsthand accounts of voting discrimination in the covered states.¹³¹ Testimony included reports of proposed laws with apparent discriminatory purposes, efforts to eliminate majority-minority districts, discrimination resulting from abuse of discretion on behalf of local officials, discrimination witnessed by Federal Election Observers, and covered jurisdictions’ resistance to abiding by require-

¹²⁴ See Hasen, *supra* note 98.

¹²⁵ Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified at 42 U.S.C. § 1973 (2006)).

¹²⁶ Babington, *supra* note 119; Civil Rights Div., *supra* note 13.

¹²⁷ Babington, *supra* note 118.

¹²⁸ *Id.*

¹²⁹ Babington, *supra* note 119. Several Republican members offered two amendments to the VRA, one making it easier for states to bail out of preclearance, and another to eliminate a bilingual ballot requirement. See Babington, *supra* note 118.

¹³⁰ Babington, *supra* note 119; Ari Berman, *Why We Still Need Section 5 of the Voting Rights Act*, NATION BLOG (Nov. 12, 2012, 12:21 PM), <http://www.thenation.com/blog/171199/why-we-still-need-section-5-voting-rights-act>.

¹³¹ Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 403 (2008). For example, congressional testimony included statements that since 1965, all of Louisiana’s redistricting plans have received objections. *Id.* at 404. Congress also received testimony of local events. *Id.* at 406. In Kilmichael, Mississippi, the mayor and Board of Alderman, all white, cancelled the election in a move the House Judiciary Committee found to be intentionally done to prevent the election of minorities. *Id.* at 406–07.

ments of the VRA.¹³² This testimony showed that the “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process” and revealed a vital need for continued federal preclearance.¹³³

B. *The Widely Supported VRA Is Challenged*

Despite wide legislative and presidential approval of the reauthorized VRA in 2006, just three years later the Act quickly became the subject of contentious debate.¹³⁴ First, opponents alleged that the discrimination the VRA was intended to remedy had ended, and thus preclearance was no longer necessary.¹³⁵ Second, opponents claimed that the existing pre-coverage formula was outdated and no longer rationally based on reality in the covered jurisdictions.¹³⁶ Finally, some objected to the Act as an unnecessary and unconstitutional intrusion on state sovereignty.¹³⁷

Coincidentally, these arguments against the VRA coincided with active pursuit of restrictive state voting laws by both covered and non-covered jurisdictions.¹³⁸ The Democrat-controlled DOJ aggressively blocked many of these changes through preclearance objections and affirmative lawsuits.¹³⁹ Thus, some observers have identified the push to end federal preclearance as a backlash resulting from the DOJ’s proac-

¹³² *Id.* at 403–12.

¹³³ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(2)–(3), 120 Stat. 577 (codified at 42 U.S.C. § 1973 (2006)).

¹³⁴ See Hasen, *supra* note 98. Seven states filed amicus briefs in support of Supreme Court review of the VRA. *Id.*

¹³⁵ Brief for Petitioner, *supra* note 118, at 23.

¹³⁶ *Id.* at 40 (calling the coverage formula “archaic”).

¹³⁷ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); Adam Liptak, *Justices to Revisit Voting Act in View of a Changing South*, N.Y. TIMES, Nov. 10, 2012, at A1.

¹³⁸ Hasen, *supra* note 98. States that have filed amicus curiae briefs in support of *Shelby County* include Alabama, Arizona, Georgia, South Carolina, South Dakota, and Texas. Brief of Arizona et al. as Amici Curiae in Support of Petitioner at 1, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96). All of these states are headed by Republican governors as of 2013. *50 State Governors*, NETSTATE (Mar. 7, 2013), http://www.netstate.com/states/tables/st_governors.htm. The Texas Republican party placed the repeal of the Voting Rights Act as part of its official 2012 platform. PLATFORM COMMITTEE, 2012 STATE REPUBLICAN PARTY PLATFORM 5 (2012), available at <http://www.tfn.org/site/DocServer/20...pdf?docID=3201>.

¹³⁹ See WENDY WEISER & DIANA KASDAN, VOTING LAW CHANGES: ELECTION UPDATE 3, at 11–12 (2012), available at http://www.brennancenter.org/content/resource/voting_law_changes_election_update.

tive enforcement of voting rights.¹⁴⁰ Still, other observers see the change as backlash against a new political climate featuring a growing number of minority voters that helped elect President Barack Obama in 2008 and again in 2012.¹⁴¹

Litigation of these arguments began shortly after the Act's 2006 reauthorization and by 2009 reached the Supreme Court in *Northwest Austin Municipal Utility District Number One v. Holder*.¹⁴² There, Chief Justice John Roberts noted that the coverage formula was based on outdated data and that there was "considerable evidence that [the formula] fails to account for current political conditions."¹⁴³ The Court sidestepped the question of the VRA's current constitutionality and decided the case on other grounds.¹⁴⁴ Although the Court's 2009 decision was seen as an invitation to Congress to adjust the VRA, Congress did not respond.¹⁴⁵

Consequently, VRA litigation reached its climax on June 25, 2013 in *Shelby County v. Holder*, where the Supreme Court struck down the VRA's Section 4 coverage formula.¹⁴⁶ The Court drew from its *Northwest Austin* jurisprudence, noting that, where an act intrudes on a state's sovereignty, the intrusion must be "justified by current needs" and that targeting some states over others must be "sufficiently related" to the act's purpose.¹⁴⁷ After reviewing the data compiled by the House and Senate during the reauthorization process, the Court found that the rationale behind Section 4's coverage formula was no longer reflected in modern conditions.¹⁴⁸ While the Court acknowledged that "problems remain in [covered] States and others," it also noted that the coverage formula

¹⁴⁰ Hasen, *supra* note 98.

¹⁴¹ See Berman, *supra* note 130; Sarachan, *supra* note 121.

¹⁴² 557 U.S. at 194.

¹⁴³ *Id.* at 202, 203.

¹⁴⁴ *Id.* at 205. The Court employed the canon of constitutional avoidance, the principal by which the Court does not decide a case on constitutional grounds if there are other grounds on which to dispose of the case. *Id.* Here, the Court decided the case based on petitioner's statutory argument, defining the term "political subdivision" broadly and allowing the utility district to file suit to bail out of preclearance. *Id.* at 211.

¹⁴⁵ Hasen, *supra* note 98.

¹⁴⁶ *Shelby Cnty.*, 133 S. Ct. at 2631.

¹⁴⁷ *Id.* at 2622.

¹⁴⁸ *Id.* at 2626–29. The Court noted that data from 2004 shows that African American voter turnout in five of the six covered states exceeded that of white turnout. *Id.* at 2626. While the coverage formula developed in 1965 distinguished between states by those with a history of voting struggles, the Court noted that the same distinctions no longer exists, yet the VRA has not changed. *Id.* at 2628.

reauthorized in 2009 relied on “decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”¹⁴⁹

C. *The Future of the VRA*

Although the *Shelby County* decision removed Section 4’s coverage formula, the holding left the remainder of the act intact, including the Section 5 preclearance procedure.¹⁵⁰ Thus, a new coverage formula, adapted to current needs, could reinstitute Section 5 preclearance.¹⁵¹ Without the Section 4 formula, however, jurisdictions previously required to obtain DOJ approval may freely implement new voting laws, including those laws previously prohibited by the DOJ.¹⁵²

Within hours of the termination of Section 5 coverage, previously covered jurisdictions took action.¹⁵³ Texas announced implementation of its previously DOJ-blocked voter ID law, while North Carolina passed an aggressive four-part voting law that reduces early voting, eliminates same day registration, prohibits provisional ballot counting, and requires stricter voter identification.¹⁵⁴

The DOJ’s response has been two-fold.¹⁵⁵ First, the DOJ declared it would request federal courts bail-in jurisdictions under Section 3 of the

¹⁴⁹ *Id.* at 2626, 2627.

¹⁵⁰ *Id.* at 2631.

¹⁵¹ *Id.* Section 5 still applies to jurisdictions bailed in to coverage under Section 3. 42 U.S.C. § 1973a(c); see *Shelby Cnty.*, 133 S. Ct. at 2631.

¹⁵² *Shelby Cnty.*, 133 S. Ct. at 2631; see Liptak, *supra* note 123 (noting that following the Court’s decision, Texas announced it would implement a previously blocked voter identification law).

¹⁵³ Liptak, *supra* note 123.

¹⁵⁴ 2013 N.C. Sess. Laws 381; Editorial, *North Carolina Law Takes War on Voting Rights to a New Low*, WASH. POST (Aug. 15, 2014), http://www.washingtonpost.com/opinions/north-carolina-law-takes-war-on-voting-rights-to-a-new-low/2013/08/15/5b25a88c-0452-11e3-a07f-49ddc7417125_story.html; Liptak, *supra* note 123. Estimates show that over 300,000 registered voters in North Carolina did not have appropriate IDs, many of them poor. Josh Gerstein, *Justice Department Challenges North Carolina Voter ID Law*, POLITICO (Sept. 30, 2013), <http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html>.

¹⁵⁵ See Complaint at 31, *United States v. North Carolina*, No. 13-cv-00861 (D.N.C. Sept. 9, 2013) [hereinafter *North Carolina Complaint*] (asking the court to find that North Carolina’s House Bill 589 violated Section 2 of the VRA and for renewed preclearance under Section 3); Complaint at 14, *Perez v. Texas*, No. 5:11-cv-00360 (S.D.Tex. Aug. 22, 2013) [hereinafter *Texas Complaint*] (requesting that the court find that Texas violated Section 2 of the VRA and the Fourteenth and Fifteenth Amendments and enjoin Texas from enforcing the law, and requesting preclearance for Texas under Section 3 of the VRA).

VRA.¹⁵⁶ Second, the DOJ has filed suit against offending jurisdictions in federal court, seeking a declaration that the laws violate Section 2 of the VRA as well as the Fourteenth and Fifteenth Amendments.¹⁵⁷ In filing a suit against the North Carolina voting law, Attorney General Eric Holder announced that “the Justice Department will never hesitate to do all that we must to protect the Constitutionally-guaranteed civil rights of all Americans,” indicating that such federal suits would continue.¹⁵⁸ Despite these efforts to save preclearance jurisdiction-by-jurisdiction, the bail-in process is an insufficient substitute for Section 4’s coverage formula.¹⁵⁹ The next part of this Note compares covered and non-covered jurisdictions in the run-up to the 2012 election, showing the importance of preclearance nationwide and shining a light on the future without Section 4.

III. REMEDYING RESTRICTIONS TO VOTING RIGHTS

Even before the *Shelby County* decision removed the preclearance formula, states had already begun to push for more restrictive voting laws.¹⁶⁰ Attorney General Eric Holder addressed the new political climate’s threats to voting rights at the Lyndon B. Johnson Library in December 2011.¹⁶¹ The Attorney General asked: “Are we willing to allow this era—our era—to be remembered as the age when our nation’s proud tradition of expanding the [voting] franchise ended?”¹⁶² His department answered the question in the following months with preclearance objections in multiple covered jurisdictions and affirmative suits against jurisdictions not covered by Section 5.¹⁶³ While preclearance allowed the DOJ and the courts to prevent new, discriminatory

¹⁵⁶ Eric Holder, Att’y Gen., Remarks at the National Urban League Annual Conference (July 25, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html> (announcing the DOJ would use every tool remaining in the VRA, especially the “bail in” mechanism).

¹⁵⁷ See North Carolina Complaint, *supra* note 155, at 31; Texas Complaint, *supra* note 155, at 14.

¹⁵⁸ Eric Holder, Att’y Gen., Remarks as Prepared for Delivery by Attorney General Eric Holder on the Lawsuit Against the State of North Carolina (Sept. 30, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130930.html>.

¹⁵⁹ Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES, July 26, 2013, at A1 (quoting Richard L. Hasen calling Section 3 a “clunky way to cover” for Section 4’s preclearance formula).

¹⁶⁰ See WEISER & KASDAN, *supra* note 139, at 1; Hasen, *supra* note 98.

¹⁶¹ WEISER & KASDAN, *supra* note 139, at 11.

¹⁶² *Id.*

¹⁶³ See *id.* at 11–15.

voting laws in covered jurisdictions, those states not covered by the VRA received varying results.¹⁶⁴

*A. The Department of Justice & Federal Courts Refuse Preclearance
for Covered Jurisdictions in 2012*

Among the recent voting requirements passed nationwide, changes in the covered states of Texas, South Carolina, and Florida demonstrate the immense barriers new voting laws can have on minority voters.¹⁶⁵ Yet because these states were covered under Section 4 when the laws were passed, the DOJ and federal courts prevented the implementation of such laws, subsequently protecting minority voters from large-scale disenfranchisement.¹⁶⁶ The stories in these states show that preclearance is a crucial part of VRA and essential to prevent large-scale voter disenfranchisement.¹⁶⁷

I. Texas Voter Identification Law Denied Preclearance

In 2011, the Texas legislature passed what the U.S. District Court for the District of Columbia later called “the most stringent [voter ID law] in the country.”¹⁶⁸ The law required registered voters to present a government issued photo identification when voting.¹⁶⁹ Voters without the necessary identification could obtain a “free” identification certificate by presenting a completed form and two pieces of secondary identification or one piece of secondary identification and two supporting

¹⁶⁴ See *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.C. Cir. 2012) (denying preclearance for the 2012 elections for South Carolina’s voter ID requirement); *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.C. Cir. 2012), *vacated*, 133 S. Ct. 2886 (2013) (refusing preclearance for voter ID law); *Obama for Am. v. Husted*, 697 F.3d 423, 431–32, 437 (6th Cir. 2012) (finding potential for disenfranchisement in early poll hours and requiring that polls remain open for the days leading up to the 2012 election); *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 3332376, at *3 (Pa. Commw. Ct. Aug. 15, 2012), *vacated*, 54 A.3d 1 (Pa. 2012), *remanded to* 2012 WL 4497211 (finding the potential for disenfranchisement and granting a preliminary injunction against enforcement of a 2012 Pennsylvania voter identification law).

¹⁶⁵ See WEISER & KASDAN, *supra* note 139, at 13–15.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ S.B. 14, 82nd Leg., Reg. Sess. (Tx. 2011), 2011 Tex. Gen. Laws 619 (requiring photo identification for voting); *Texas v. Holder*, 888 F. Supp. 2d at 115.

¹⁶⁹ S.B. 14, §§ 9, 14; Letter from Thomas E. Perez, Assistant Att’y Gen., Dep’t of Justice, to Keith Ingram, Dir. of Elections, Office of the Tex. Sec’y of State, at 1 (Mar. 12, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_031212.pdf [hereinafter DOJ Letter to Texas].

documents at a driver's license office.¹⁷⁰ A voter without the requisite documents could pay twenty-two dollars, the least expensive alternative, to obtain a copy of his or her birth certificate.¹⁷¹

Texas was a covered jurisdiction under Section 4's formula and therefore the DOJ had to review and approve the new Texas law before it took effect.¹⁷² In March 2012, the DOJ objected to the law, finding that Texas had not met its burden of proving that the law would not have a discriminatory "retrogressive effect."¹⁷³ Using data supplied by Texas, the DOJ found that between approximately 604,000 and 795,000 already registered Texas voters lacked the appropriate identification required under the law.¹⁷⁴ Furthermore, Hispanic voters were between 46.5% and 120% less likely than non-Hispanic voters to not possess the requisite ID.¹⁷⁵ The DOJ found no evidence of significant in-person voter fraud to justify Texas's law.¹⁷⁶

Following denial of preclearance, Texas filed suit in the U.S. District Court for the District of Columbia.¹⁷⁷ The court agreed with the DOJ's analysis that Texas failed to show the law would not create discriminatory retrogressive effects.¹⁷⁸ Moreover, the court found the ID needs, including both the cost and travel requirements involved in receiving a new ID, would weigh heavily on the poor.¹⁷⁹ This would significantly affect minorities because a "disproportionately high percentage of African Americans and Hispanics in Texas live in poverty."¹⁸⁰ The law thus imposed greater discriminatory barriers to voting than other, acceptable voter ID laws, such as those in Indiana or Georgia.¹⁸¹

One year later, within hours of the Supreme Court's holding in *Shelby County*, the Texas Attorney General implemented the original

¹⁷⁰ S.B. 14, § 20; DOJ Letter to Texas, *supra* note 169, at 3.

¹⁷¹ DOJ Letter to Texas, *supra* note 169, at 3.

¹⁷² *Id.* at 1.

¹⁷³ *Id.* at 5.

¹⁷⁴ *Id.* at 3. Texas supplied differing sets of voter registration numbers to the DOJ and did not explain the difference between the sets, leading to the span of numbers. *Id.* at 2–3.

¹⁷⁵ *Id.* at 3. Texas's submission did not provide data on any other minorities. *Id.*

¹⁷⁶ *Id.* at 2.

¹⁷⁷ *Texas v. Holder*, 888 F. Supp. 2d at 124.

¹⁷⁸ *Id.*; DOJ Letter to Texas, *supra* note 169, at 2.

¹⁷⁹ *Texas v. Holder*, 888 F. Supp. 2d at 118, 124.

¹⁸⁰ *Id.* at 124.

¹⁸¹ *Id.* at 125. Texas argued the proposed law was similar to the voter ID laws of Indiana and Georgia, where experts found that no more than 1% of black, Hispanic, and white voters were not allowed to vote due to the law. *Id.* The court found, however, that these laws differed considerably because Indiana and Georgia allowed more forms of ID, including expired IDs, and the economic burden of obtaining requisite IDs in Texas was far higher than either Indiana or Georgia. *Id.*

voter ID law, without repairing any of the law's discriminatory effects.¹⁸² The end of preclearance thus has already led directly to the implementation of a law that will weigh heavily on the rights of poor and minority voters.¹⁸³

2. South Carolina's Voter Identification Law Delayed

Like Texas, the South Carolina legislature also passed a voter identification law in the fall of 2011.¹⁸⁴ The law required voters to show one of five different acceptable types of photo identification in order to vote at a polling location.¹⁸⁵ In denying preclearance, the DOJ compared motor vehicle records with voter lists and found that black voters were nearly twenty percent more likely than white voters to lack acceptable identification.¹⁸⁶

In response to the DOJ's denial, South Carolina sought judicial preclearance in U.S. District Court.¹⁸⁷ The court noted that voters lacking ID under the new law were disproportionately African American.¹⁸⁸ Still, the court recognized that the law contained a "reasonable impediment provision" that allowed those without acceptable identifications to present an affidavit listing why they could not produce an ID.¹⁸⁹ The court reasoned that due to the reasonable impediment provision, the new law did not have a discriminatory retrogressive effect compared to the state's previous photo ID law.¹⁹⁰ The court noted that without the provision, the law might not have survived preclearance.¹⁹¹ Therefore, South Carolina could not apply the new law to the upcoming 2012 elections because voters would not have time to obtain new voter registration cards or learn about the new law.¹⁹²

¹⁸² Liptak & Savage, *supra* note 159.

¹⁸³ *Texas v. Holder*, 888 F. Supp. 2d at 124; Liptak & Savage, *supra* note 159.

¹⁸⁴ H.B. 3003, 2011 Leg., 119th Sess. (S.C. 2011); Letter from Thomas E. Perez, Assistant Att'y Gen., Dep't of Justice, to C. Havird Jones, Jr., Assistant Deputy Att'y Gen., S.C., at 1 (Dec. 23, 2011), available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_122311.pdf [hereinafter DOJ Letter to South Carolina].

¹⁸⁵ H.B. 3003, § 5; DOJ Letter to South Carolina, *supra* note 184, at 2.

¹⁸⁶ DOJ Letter to South Carolina, *supra* note 184, at 2.

¹⁸⁷ *South Carolina v. United States*, 898 F. Supp. 2d at 32.

¹⁸⁸ *Id.* at 32, 50.

¹⁸⁹ *Id.* at 32.

¹⁹⁰ *Id.* South Carolina has had a voter ID law since 1988, requiring voters show a driver's license, Department of Motor Vehicles photo ID card, or non-photo voter registration card. *Id.* The new law, the court found, was no more likely to produce a discriminatory effect than the existing law. *Id.*

¹⁹¹ *Id.* at 50.

¹⁹² *Id.*

Although the court ultimately approved the law, the result of preclearance in South Carolina meant that approximately 82,000 registered voters without the required ID were allowed to vote for the 2012 election.¹⁹³ Furthermore, in his concurrence, Judge John Bates praised Section 5, noting that without DOJ preclearance, “South Carolina’s voter photo ID law certainly would have been more restrictive. Several legislators have commented that they were seeking to structure a law that could be precleared,” indicating that the act that was “presented to [the] Court [was] driven by South Carolina officials’ efforts to satisfy the requirements of the Voting Rights Act.”¹⁹⁴

3. Florida Early Voting Laws & Voter Registration Requirements Blocked

Florida, also a covered jurisdiction under Section 4’s formula, made similar changes to voting laws in 2011.¹⁹⁵ First, Florida altered procedures for voter registration drives, requiring applications be submitted to the Division of Elections within forty-eight hours of completion.¹⁹⁶ A federal court blocked enforcement of the registration drive restrictions under the First Amendment and the Motor Voter Law, and the parties later reached a settlement.¹⁹⁷ Second, Florida reduced the total number of early voting days from twelve to eight and voting hours from

¹⁹³ *Id.*; see DOJ Letter to South Carolina, *supra* note 184, at 3.

¹⁹⁴ *South Carolina v. United States*, 898 F. Supp. 2d at 53–54 (Bates, J., concurring).

¹⁹⁵ Comm. Substitute for H.B. 1355, § 4, 22nd Leg., Reg. Sess. (Fla. 2011), 2011 Fla. Laws 585, 593, *invalidated by* *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.C. Fla. 2012) (requiring voter registration organization to submit registration applications to the election division within 48 hours after receipt); H.B. 1355, § 39, 2011 Fla. Laws at 631, *invalidated by* *Florida v. United States*, 885 F. Supp. 2d 299 (D.C. Cir. 2012) (reducing early voting days and hours); see WEISER & KASDAN, *supra* note 139, at 13.

¹⁹⁶ H.B. 1355, § 4, 2011 Fla. Laws at 594.

¹⁹⁷ *League of Women Voters*, 863 F. Supp. 2d at 1157–58; WEISER & KASDAN, *supra* note 139, at 13. The law caused the League of Women Voters of Florida and Rock the Vote, two community voter registration groups, to entirely shut down their voter registration programs in Florida. WEISER & KASDAN, *supra* note 139, at 13. In a suit by the League of Woman Voters, the court noted that under the First and Fourteenth Amendments, an election law must serve a legitimate purpose “sufficient to warrant the burden it imposes on the right to vote.” *League of Women Voters*, 863 F. Supp. 2d at 1157. Under the National Voter Registration Act, commonly known as the Motor Voter Law, organizations have a right to conduct voter registration drives and mail the collected applications to the state’s voter registration office. *Id.*; WEISER & KASDAN, *supra* note 139, at 13. In granting a preliminary injunction, which blocked the law’s enforcement, the court found the Florida statute severely restricted registration drives and violated both the Constitution and the Motor Voter Law. *League of Women Voters*, 863 F. Supp. 2d at 1157–58.

ninety-six to forty-eight.¹⁹⁸ The court found that minority voters would be disproportionately affected by the proposed changes because minorities in Florida are more likely to use early in-person voting.¹⁹⁹ Thus, Florida did not meet its burden of proving the change would not disproportionately harm minority voters, and that the law would be “analogous to . . . closing polling places in disproportionately African-American precincts.”²⁰⁰

Three out of the four voting laws altered by covered jurisdictions were blocked from 2012 implementation by either the DOJ or federal courts due to their potential for creating a discriminatory retrogressive effect.²⁰¹ Without Section 5 preclearance, all four laws would likely have been enforced in the 2012 elections in states that accounted for more than half of the necessary electoral votes in the presidential election.²⁰² Those preclearance victories for voting rights, however, may be short-lived as the formerly covered jurisdictions no longer need to follow DOJ preclearance.²⁰³

B. *Struggles to Block Discriminatory Voting Changes in Non-Covered Jurisdictions*

States exempt from Section 5 preclearance prior to *Shelby County* were not immune from discriminatory voter laws.²⁰⁴ Between 1982 and 2006, the DOJ initiated 117 successful suits against jurisdictions nation-

¹⁹⁸ H.B. 1355, § 39, 2011 Fla. Laws at 631–32; *Florida v. United States*, 885 F. Supp. 2d at 329.

¹⁹⁹ *Florida v. United States*, 885 F. Supp. 2d at 322. In the 2008 general election in Florida, more than 54% of African American voters used early in-person voting, two times the rate of white voters. *Id.* Minorities in Florida especially favor early voting during the first five days of the early voting period, days that would be eliminated under the proposed law. *Id.* at 323–24. Furthermore, the court noted that reports indicate a growing trend of early voting among minorities since the 2008 election. *Id.* at 323.

²⁰⁰ *Id.* at 329.

²⁰¹ *South Carolina v. United States*, 898 F. Supp. 2d at 50; *Texas v. Holder*, 888 F. Supp. 2d at 124; *Florida v. United States*, 885 F. Supp. 2d at 329; *League of Women Voters*, 863 F. Supp. 2d at 1167–68; WEISER & KASDAN, *supra* note 139, at 11–12. The DOJ refused to preclear two changes to Florida’s elections laws, as well changes to election laws in Texas and South Carolina. WEISER & KASDAN, *supra* note 139, at 11–12. In suits by the individual states, the U.S. District Court for the District of Columbia also refused to approve Texas and Florida’s laws and did not permit the South Carolina law to take effect for the 2012 election. *Id.* Although Mississippi’s law was submitted for preclearance, the DOJ requested more information before making a determination. *Id.* at 11.

²⁰² See WEISER & KASDAN, *supra* note 139, at 11–12, 15.

²⁰³ See *Shelby Cnty.*, 133 S. Ct. at 2631.

²⁰⁴ See Katz et al., *supra* note 112, at 655.

wide.²⁰⁵ This number demonstrates that laws with discriminatory retrogressive effects are created by both covered and non-covered jurisdictions.²⁰⁶ Still, without Section 5 review, discriminatory laws may remain in place for elections before courts strike them down.²⁰⁷ These laws can result in diminished minority votes, voter confusion, and considerable expense to challenging parties.²⁰⁸ The struggle to address discriminatory laws in non-covered jurisdictions reveals what a voting system without the protections of Section 5 and the preclearance formula looks like.

1. Voting Laws Take Effect Immediately Despite Potential for Discriminatory Effects

Without preclearance under Section 5, states do not need to submit their voting law changes for federal preclearance.²⁰⁹ Changes to voting laws in non-covered states take effect without any extra-legislative review.²¹⁰ For example, in 2011, the Pennsylvania legislature passed a law requiring voters to present a PennDot driver's license or non-driver equivalent before voting.²¹¹ As the law was implemented by the Pennsylvania Department of Transportation, individuals without a PennDot driver's license could obtain an equivalent identification by providing a birth certificate with a raised seal, a social security card, and two documents showing residency.²¹² Although obtaining the appropriate ID was

²⁰⁵ VOTING RIGHTS ENFORCEMENT, *supra* note 94, at 96. Claims under Section 2 of the VRA include suits against South Dakota, Philadelphia, and Boston, and counties in New York, Ohio, Colorado, and North Dakota, among others. Civil Rights Div., *Civil Rights Division Voting Cases List*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/litigation/case_list.php (last visited Feb. 20, 2014).

²⁰⁶ See VOTING RIGHTS ENFORCEMENT, *supra* note 94, at 96.

²⁰⁷ See Voting Rights Act of 1965, 42 U.S.C. § 1973c (2006); Ryan J. Reilly, *What the Justice Department Can Actually Do About Voter ID Laws*, TALKING POINTS MEMO (Oct. 5, 2011), http://tpmmuckraker.talkingpointsmemo.com/2011/10/what_the_justice_department_can_actually_do_about_voter_id_laws.php.

²⁰⁸ See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 23 (2007) (explaining the expense of private party suits); Sarachan, *supra* note 121 (explaining that laws enacted and then lifted by courts can cause voter confusion and fewer minority votes).

²⁰⁹ See 42 U.S.C. § 1973c.

²¹⁰ See *id.*

²¹¹ H.B. 934, 195th Gen. Assemb., Reg. Sess., (Pa. 2012); *Applewhite*, 2012 WL 3332376, at *1, 3.

²¹² *Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012). The PennDot ID requires extensive identifying documents because it is considered a secure form of identification, admissible in such situations as boarding an airplane. *Id.* An alternative version of the ID was under development in the months following the law's passage. *Id.* at 4. Undergoing

arguably more arduous than the Texas voter ID law, which was initially blocked by the DOJ and the D.C. District Court, the law took effect immediately because Pennsylvania laws did not require preclearance under Section 5.²¹³

The Pennsylvania legislature passed the law in a highly partisan environment.²¹⁴ Republican House Majority leader Mike Turzai had previously stated that “[v]oter ID, which is gonna [sic] allow Governor Romney to win the state of Pennsylvania [is] done.”²¹⁵ Furthermore, the Commonwealth conceded that there were no cases of voter fraud in Pennsylvania.²¹⁶ Still, because Pennsylvania was a non-covered state, no outside organization reviewed the law prior to its enactment to determine if it created retrogressive discrimination.²¹⁷

2. Private Challenges to Voting Laws Are Burdensome for Private Parties

Without preclearance, private parties may challenge discriminatory voting laws in state court.²¹⁸ Alternatively, an individual or the DOJ may challenge the law under Section 2 in federal court.²¹⁹ Even though the DOJ may take over cases started by private parties, private parties seldom initiate suits due to prohibitive costs.²²⁰

the process of obtaining a PennDot ID, however, was still required, and the non-secure form existed simply as a “safety net” if the PennDot process was unsuccessful. *Id.*

²¹³ See *Texas v. Holder*, 888 F. Supp. 2d at 115, 124 (refusing preclearance to Texas voter ID law); *Applewhite*, 54 A.3d at 3–4. Texas’s Voter ID law included a procedure to obtain an alternative photo ID, called an election identification certificate (“EIC”). *Texas v. Holder*, 888 F. Supp. 2d at 115. Under the law, an EIC could be obtained by providing “primary identification” such as an expired driver’s license, two pieces of secondary identification such as a birth certificate or citizenship papers, or one piece of secondary identification, plus two pieces of supporting identification. *Id.* Supporting identification includes school records and Social Security cards. *Id.*

²¹⁴ See Weinger, *supra* note 7.

²¹⁵ *Id.*

²¹⁶ *Applewhite*, 2012 WL 3332376, at *28.

²¹⁷ See Voting Rights Act of 1965, 42 U.S.C. § 1973c (2006). Due to a private suit by several affected voters, the Pennsylvania law did not take effect during the 2012 elections. *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211 at *8 (Pa. Commw. Ct. Oct. 2, 2012); *Applewhite*, 2012 WL 3332376, at *1. The court noted that “disenfranchisement expressly occurs” under the law. *Applewhite*, 2012 WL 4497211, at *5; see *infra* notes 208–15 and accompanying text.

²¹⁸ See, e.g., *Applewhite*, 2012 WL 3332376, at *1 (private individual bringing suit against Pennsylvania’s voter ID law).

²¹⁹ *Voting Rights Act*, CORNELL UNIV. LAW SCH.: LEGAL INFO. INST., http://www.law.cornell.edu/wex/voting_rights_act (last visited Feb. 20, 2014).

²²⁰ Karlan, *supra* note 208, at 22, 23. In a 1982 lawsuit, the plaintiff lawyers spent \$96,000 before the Department of Justice took over the case. *Id.* at 23; see *Shelby Cnty.*, 133

While the DOJ can also sue jurisdictions under Section 2, such suits are rare and difficult to prove.²²¹ A successful Section 2 case must show, based on a totality of circumstances, that the political process is “not equally open to participation” by racial minorities.²²² In most cases, a Section 2 claim requires evidence of discrimination occurring during an election.²²³ Consequently, the law may remain in place for elections before the courts review its discriminatory impact.²²⁴

In Pennsylvania’s case, several affected plaintiffs, with the help of the American Civil Liberties Union, challenged the law in state court before the 2012 election.²²⁵ A month before the 2012 general election, after multiple hearings and an appeal, the Commonwealth Court issued a preliminary injunction prohibiting the law’s enforcement in the upcoming election.²²⁶ The court found that “disenfranchisement expressly occurs” under the law and the month remaining before the election was insufficient time to allow people without IDs to procure the necessary documents.²²⁷

During the litigation in Pennsylvania, a similar case developed in Ohio, another swing state.²²⁸ Ohio’s county election boards voted repeatedly to extend hours in suburban, mostly white, counties, while the Republican Secretary of State broke election board ties in urban coun-

S. Ct. at 2640 (Ginsberg, J., dissenting) (noting the heavy financial burden Section 2 litigation places on minority voters).

²²¹ Karlan, *supra* note 208, at 22 n.106; *see* Reilly, *supra* note 207.

²²² 42 U.S.C. § 1973.

²²³ *See* Civil Rights Div., *supra* note 12 (noting that factors to consider in a Section 2 suit include the practices the jurisdiction has already used to discriminate, the number of minority group members elected, and the use of racial appeals in political campaigns); Reilly, *supra* note 207.

²²⁴ *See* *Shelby Cnty.*, 133 S. Ct. at 2640 (Ginsberg, J., dissenting) (stating that illegal voting laws may govern several elections before enough evidence is available to challenge the law); Abby Rapoport, *Do We Need a New Voting Rights Act?*, AM. PROSPECT (Jul. 23, 2012), <http://prospect.org/article/do-we-need-new-voting-rights-act>. In Pennsylvania, the DOJ requested documents regarding Pennsylvania’s voter ID laws under Section 2. Larry Miller, *PA Official Blocks DOJ Request for Vote Info Citing Political Motivations*, POLITIC365 (Aug. 24, 2012), <http://politic365.com/2012/08/24/pa-official-blocks-doj-request-for-vote-says-its-politically-motivated>. Pennsylvania, however, rejected the request, noting the DOJ’s lack of authority to compel the state to produce information. *Id.*

²²⁵ *Applewhite*, 2012 WL 3332376, at *1; Worden & Hefler, *supra* note 1. The lead plaintiff, ninety-three-year-old Viviette Applewhite, could not obtain an official ID because she had only a copy of her birth certificate. Worden & Hefler, *supra* note 1. The claim alleged that the law violated the Pennsylvania Constitution by “unduly burden[ing]” the right to vote, placing burdens on voting that do not effect voters equally, and qualifying the right to vote. *Applewhite*, 2012 WL 3332376, at *1.

²²⁶ *Applewhite*, 2012 WL 4497211, at *8.

²²⁷ *Id.* at *2, 5.

²²⁸ *See* Horstman, *supra* note 16; Cillizza, *supra* note 33.

ties to favor reduced early voting hours.²²⁹ At the same time, the Ohio legislature eliminated the three most popular early voting days.²³⁰

As with the suit in Pennsylvania, it took an affirmative lawsuit by a private organization to combat the removal of the early voting days.²³¹ In the absence of the private suit, however, the law may have taken effect for the 2012 election.²³² The result would have eliminated voting times where the largest majority of early votes were made in 2008, a time that was particularly popular for minority voters.²³³ Furthermore, without a private party's challenge, the law would have likely placed a "discriminatory burden . . . on some but not all Ohio voters."²³⁴

3. Potential for Unseen Discriminatory Effects Without Preclearance

Absent the private challenge to the Pennsylvania law, the law would likely have taken effect for the 2012 general election and potentially disenfranchised many minority and low-income voters.²³⁵ The size of potential disenfranchisement is difficult to measure, mostly because according to the Commonwealth Court of Pennsylvania, analyzing the size of the law's effect was not "necessary for preliminary injunctive purposes."²³⁶ The court merely provided an "estimate" of the law's effect.²³⁷ Thus, without private challenges to the law, the unknown number disenfranchised voters in a "swing state" could have altered the election's outcome.²³⁸

For covered jurisdictions, denial of preclearance and Section 5 deterrence prevented discriminatory actions from ever taking effect.²³⁹ Political analysts theorize that the threat of failing preclearance likely

²²⁹ See *Overt Discrimination in Ohio*, *supra* note 18; Horstman, *supra* note 16.

²³⁰ *Obama for Am.*, 697 F.3d at 427; Am. Sub. H.B No. 194, 129th Gen. Assemb. (Ohio 2011).

²³¹ *Obama for Am.*, 697 F.3d at 425. Here, the Obama for America campaign, the Democratic National Committee, and the Ohio Democratic Party provided the monetary funds and resources to pursue the suit. *See id.*

²³² *See id.* at 443.

²³³ *Id.* at 431.

²³⁴ *Id.*

²³⁵ See WEISER & KASDAN, *supra* note 139, at 14.

²³⁶ See *Applewhite*, 2012 WL 4497211, at *3 n.16.

²³⁷ *Id.* The court estimated that the law would affect more than 1% but less than 9% of voters. *Id.*

²³⁸ *See id.*; Jeff Zeleny, *Explaining the Times's Battleground State Ratings*, N.Y. TIMES (May 7, 2012 9:31 AM), <http://thecaucus.blogs.nytimes.com/2012/05/07/explaining-the-times-battleground-state-ratings/>.

²³⁹ Karlan, *supra* note 208, at 22; *see* Voting Rights Act of 1965, 42 U.S.C. § 1973c (2006).

prevented some states from proposing discriminatory laws.²⁴⁰ Yet without preclearance, laws are not subject to third party review, therefore, legislatures and governors are not deterred from passing discriminatory laws.²⁴¹ When adopting new voting laws without the threat of preclearance, officials need only worry about rare DOJ challenges.²⁴²

The lack of thorough investigation or preliminary review of voting laws may also result in voter confusion.²⁴³ For Ohio voters, for example, courts and election officials disputed the length of early voting until October 16, twenty days before the general election.²⁴⁴ Such uncertainty may discourage turnout.²⁴⁵

The passage of voting laws that were then denied preclearance in South Carolina, Texas, and Florida before the 2012 election cycle demonstrates the continued need for the VRA and preclearance.²⁴⁶ Section 5 ensured that laws with the potential to disenfranchise voters never took effect in covered jurisdictions.²⁴⁷ Even before *Shelby County*, states not covered by the 1965 formula disenfranchised voters.²⁴⁸ Cases of voter disenfranchisement in Pennsylvania and Ohio in 2012 showed the growing need to expand the VRA's preclearance mechanism to non-covered jurisdictions, not to eliminate preclearance all together.²⁴⁹ Expanding the VRA's preclearance requirements would prevent voting laws with the potential for a discriminatory retrogressive impact from ever taking effect.²⁵⁰

IV. THE VOTING RIGHTS ACT MUST ADAPT TO MODERN, NATIONWIDE THREATS TO VOTING

The Supreme Court in *Shelby County* struck down the coverage formula first developed in 1965.²⁵¹ At the time of the Act's 1965 passage

²⁴⁰ Karlan, *supra* note 208, at 22.

²⁴¹ *See id.* at 22, 23.

²⁴² *See id.* at 22 n.106.

²⁴³ WEISER & KASDAN, *supra* note 139, at 20.

²⁴⁴ *Id.* at 21.

²⁴⁵ *See* Sarachan, *supra* note 121.

²⁴⁶ *See South Carolina v. United States*, 898 F. Supp. 2d at 50; *Texas v. Holder*, 888 F. Supp. 2d at 145; *Florida v. United States*, 885 F. Supp. 2d at 329; Berman, *supra* note 130.

²⁴⁷ *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

²⁴⁸ VOTING RIGHTS ENFORCEMENT, *supra* note 94, at 96.

²⁴⁹ *See Obama for Am.*, 697 F.3d at 426; *Applewhite*, 2012 WL 4497211, at *3; Rapoport, *supra* note 224.

²⁵⁰ *See Obama for Am.*, 697 F.3d at 426; *Applewhite*, 2012 WL 4497211, at *3; Rapoport, *supra* note 224.

²⁵¹ Voting Rights Act of 1965, Pub. L. 89-110, § 4, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973b(b) (2006)); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631

and in the ensuing years, the formula was “rational in both practice and theory” because it covered states with substantial and fragmented evidence of voter discrimination.²⁵² Today, however, voting by racial minorities in the states originally covered by the formula has increased, while the percentage of federal objections to preclearance requests has decreased.²⁵³ Meanwhile, non-covered jurisdictions have experienced their own rise in Section 2 suits.²⁵⁴ Noting these changes, the Supreme Court determined that Section 4’s formula was not “justified by current needs,” yet left it to Congress to devise a new formula that provides for modern voting disenfranchisement.²⁵⁵ That need today includes nationwide voter protection.²⁵⁶

A. VRA Must Expand to Remain Relevant & Effective

The 2012 battles over voter registration and polling hours in non-covered states like Ohio, Pennsylvania, and Texas demonstrate the need for out-of-state, non-partisan oversight of elections.²⁵⁷ Without preclearance, elected partisan officials have substantial power over crucial voting laws that may take immediate effect without any analysis of potential discriminatory results.²⁵⁸

Instead of solely creating a new preclearance formula, Congress must look beyond formulas to address voting discrimination on a na-

(2013). The formula was last updated in 1972 based on data from the 1972 presidential election. 42 U.S.C. § 1972b(b).

²⁵² See *South Carolina v. Katzenbach*, 383 U.S. 301, 329, 330 (1966), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612.

²⁵³ Brief for Petitioner, *supra* note 118, at 9–10.

²⁵⁴ See *id.* at 47. Illinois, a non-covered jurisdiction, has had more Section 2 suits since 1982 than any of the covered jurisdictions. *Id.* Section 2 suits, however, remain prevalent in covered jurisdictions and are more successful than those in non-covered jurisdictions. Katz, *supra* note 116.

²⁵⁵ *Shelby Cnty.*, 133 S. Ct. at 2628–29, 2631 (“Congress may draft another formula based on current conditions.”).

²⁵⁶ See, e.g. *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012); *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 3332376, at *3, (Pa. Commw. Ct. Aug. 15, 2012), *vacated*, 54 A.3d 1 (Pa. Super. Ct. 2012), *remanded to* 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

²⁵⁷ See *Obama for Am.*, 697 F.3d at 425; *Texas v. Holder*, 888 F. Supp. 2d 113, 124 (D.C. Cir. 2012), *vacated*, 133 S. Ct. 2886 (2013); *Applewhite*, 2012 WL 3332376, at *3.

²⁵⁸ See *Overt Discrimination in Ohio*, *supra* note 18. The Ohio Republican secretary of state cast the deciding vote in multiple battles over election hours, each time agreeing with Republican board members in favor of reduced voting hours for urban, Democratic counties. *Id.*

tional level.²⁵⁹ First, Congress should require that all states obtain DOJ preclearance for key changes to voting requirements.²⁶⁰ “Key changes” requiring preclearance should be designated by Congress and should incorporate voting requirements that courts have found to have a potential to disenfranchise large numbers of voters.²⁶¹ Rather than allowing such potentially discriminatory laws to take effect immediately in some jurisdictions but not others, a preclearance requirement for specific election changes, rather than the traditional coverage formula, would create equality among all states and voters.²⁶²

Second, Congress should establish an easier path for litigating Section 2 claims.²⁶³ The DOJ should take over all litigation of private Section 2 claims that demonstrate credible evidence of discriminatory impact, while freezing the implementation of such laws until further

²⁵⁹ See Lynn Westmoreland, Op-Ed., *Fixing the Voting Rights Act*, WASH. POST, June 28, 2009, at A15 (suggesting that Congress should evaluate all states for voter inequality or update the current formula).

²⁶⁰ See Keady & Cochran, *supra* note 86, at 781–82 (proposing that all states obtain preclearance of changes with the “potential for discrimination” in U.S. District Court); Westmoreland, *supra* note 259 (suggesting that Congress extend preclearance to all states); GERALD R. FORD, *Letter to the Senate Minority Leader Urging Extension of the Voting Rights Act of 1965. July 23, 1975*, in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 1016, 1016–17 (advocating for the extension of the Voting Rights Act to all states).

²⁶¹ See Keady & Cochran, *supra* note 86, at 781–82. Keady and Cochran propose that changes with a “potential for discrimination” should require screening in a federal district court. *Id.* Similar proposals have suggested limiting the scope of Section 5 to exclude voting rules unlikely to have discriminatory effects, such as candidacy requirements. John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 131 (1972). Roman mentions that other changes with a “non-discriminatory effect” could include voter registration or changes to voting hours. *Id.* As illustrated by recent court findings in Ohio and Florida that found that changes to voting registration and hours could create a discriminatory impact, however, the evaluation of what should qualify as a “key change” should be left up to Congress to conduct a regular consideration of modern discriminatory measures. See WEISER & KASDAN, *supra* note 139, at 13, 14; Roman, *supra*; *Overt Discrimination in Ohio*, *supra* note 18.

²⁶² Compare DOJ Letter to South Carolina, *supra* note 184, at 2, 5 (denying administrative preclearance for a law with the potential to disenfranchise up to 20% of voters), with *Applewhite*, 2012 WL 3332376, at *2 (finding up to 9% of registered Pennsylvania voters could be affected by a Voter ID law). Preclearance halted the South Carolina law before implementation, while a private citizen was required to personally appeal a similar law in Pennsylvania. *South Carolina v. United States*, 898 F. Supp. 2d 30, 52 (D.C. Cir. 2012); *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211 at *8 (Pa. Commw. Ct. Oct. 2, 2012).

²⁶³ See Karlan, *supra* note 208, at 22–23 (explaining that the expense of current Section 2 litigation is often prohibitive for private parties, especially given limited motivation of individual voters).

review.²⁶⁴ DOJ litigation would lessen the current monetary burden on private citizens, while automatic injunctions would allow acts with the potential for discriminatory results to be reviewed before implementation.²⁶⁵ While the DOJ already takes over some litigation from private parties, this extension would allow for more proactive and effective takeovers.²⁶⁶

Extending preclearance to all states for key voting changes while creating an easier path to litigation for all other voting requirements would modify the VRA with respect to the “current needs” and “current conditions” of modern voting concerns.²⁶⁷ While national preclearance is often decried as overreaching “nationalization” of elections, too expensive, and not necessary given the VRA’s other provisions, this proposal’s limitations to key changes is cost effective, allows local influence, and addresses the biggest gaps in the pre-2013 VRA.²⁶⁸

Requiring preclearance for key changes to voting laws would allow the majority of voting regulations to remain in the hands of state and local lawmakers.²⁶⁹ At the same time, preclearance for key changes

²⁶⁴ See *id.*; Heather Gerken, *Opting into the Voting Rights Act*, REUTERS (Jan. 30, 2013), <http://blogs.reuters.com/great-debate/2013/01/30/opting-into-the-voting-rights-act>. Gerken suggests an “opt-in approach” for minority voters to submit one-page complaints to the DOJ when a problem with voting requirements is recognized. Gerken, *supra*. Under Gerken’s approach, the DOJ would investigate substantial claims and suspend such discriminatory changes. *Id.* The change proposed here is similar but would expand current DOJ takeover of Section 2 claims after a claim has already been filed in court and shows credible evidence of discrimination. See *id.*

²⁶⁵ See Karlan, *supra* note 208, at 22–23; Gerken, *supra* note 264.

²⁶⁶ See Karlan, *supra* note 208, at 22–23; Civil Rights Div., *supra* note 12.

²⁶⁷ See *Shelby Cnty.*, 133 S. Ct. at 2629 (“Congress . . . must identify those jurisdictions to be singled out [for preclearance] on a basis that makes sense in light of current conditions.”); Karlan, *supra* note 208, at 22–23; Westmoreland, *supra* note 259.

²⁶⁸ See Dale Krane, *Implementation of the Voting Rights Act: Enforcement by the Department of Justice*, in *THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS* 123, 124–27 (Lorn S. Foster ed., 1985) (explaining time and expense of existing DOJ preclearance); Richard L. Hasen, *Nationalize Oversight and Control*, N.Y. TIMES (updated Oct. 4, 2013, 4:31 PM), <http://www.nytimes.com/roomfordebate/2012/11/08/does-our-voting-system-need-to-be-fixed/nationalize-oversight-and-control-of-elections> (explaining the “nationalization” of elections idea); R. Doug Lewis, *Local Officials Must Remain in Control*, N.Y. TIMES (updated Nov. 9, 2012, 2:48 PM), <http://www.nytimes.com/roomfordebate/2012/11/08/does-our-voting-system-need-to-be-fixed/local-officials-must-remain-in-control-of-elections> (arguing nationalization of elections would ignore the essential local elements of elections); Ilya Shapiro, *Shelby County v. Holder: Section 5 of the Voting Rights Act Conflicts with Section 2*, SCOTUSBLOG (Feb. 14, 2013, 12:20 PM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-section-5-of-the-voting-rights-act-conflicts-with-section-2-which-provides-the-proper-remedy-for-racial-discrimination-in-voting> (arguing that Section 2 is the appropriate remedy for racial discrimination in voting).

²⁶⁹ See Westmoreland, *supra* note 259; Calabresi, *supra* note 19; Shapiro, *supra* note 264.

would prevent partisan battles over laws with the potential for retrogressive discrimination.²⁷⁰ Local election administration is beneficial because it allows states to tailor their process to local customs and demographics.²⁷¹ For example, in Florida, early voting in 2008 allowed large numbers of African Americans to get to the polls through a “souls to the polls” initiative by local churches.²⁷² Yet as demonstrated by Florida’s repeal of early voting hours for the 2012 election, leaving elections entirely in state control can create partisan and discriminatory results.²⁷³ Requiring preclearance for key changes would continue to allow locally tailored decisions while monitoring those with the greatest potential for harm.²⁷⁴ Expanded DOJ Section 2 litigation would fill the void between preclearance for key changes and un-reviewed, independently created regulations.²⁷⁵

While expanding preclearance is expensive, limited “key changes” coverage is a reasonable alternative to nationwide preclearance.²⁷⁶ Prior to *Shelby County*, the DOJ Voting Section reviewed 14,000 to 22,000 changes per year, and was required to enter objections within sixty days of a proposal’s submission.²⁷⁷ Proposals to add all states and all election law changes to preclearance coverage could inundate the DOJ, making work less reliable.²⁷⁸ As opposed to requiring universal preclearance, extending preclearance only for key changes is a minor expansion.²⁷⁹ While this extension would be expensive, the expense paid in limiting democracy is even greater.²⁸⁰

Many opponents of preclearance argue that Section 2 is an adequate remedy for voting discrimination and thus it is the only part of

²⁷⁰ See *Obama for Am.*, 697 F.3d at 431; Westmoreland, *supra* note 259; Calabresi, *supra* note 19.

²⁷¹ Lewis, *supra* note 268 (noting that voters prefer methods of voting they are used to, especially methods designed by and for people like them).

²⁷² Douglas C. Lyons, *Souls to the Polls Survives State’s Early Voting Fix*, SUN SENTINEL (Nov. 3, 2012), available at http://articles.sun-sentinel.com/2012-11-03/news/fl-dlcol-11312-20121103_1_electoral-votes-historic-presidential-election-black-voters.

²⁷³ See *id.*; *supra* notes 195–203 and accompanying text.

²⁷⁴ See *Applewhite*, 2012 WL 4497211, at *3; Keady & Cochran, *supra* note 86, at 781–82; Lewis, *supra* note 268.

²⁷⁵ See Gerken, *supra* note 264.

²⁷⁶ See Krane, *supra* note 268, at 127; Westmoreland, *supra* note 259.

²⁷⁷ Civil Rights Div., *supra* note 13.

²⁷⁸ See Krane, *supra* note 268, at 127; Civil Rights Div., *supra* note 13.

²⁷⁹ See Krane, *supra* note 268, at 127; Westmoreland, *supra* note 259.

²⁸⁰ See Krane, *supra* note 268, at 127; Myrna Perez & Lucy Zhou, *To Protect Democracy, Supreme Court Must Fully Uphold Voting Rights Act*, CHRISTIAN SCIENCE MONITOR (Feb. 27, 2013), <http://www.csmonitor.com/Commentary/Opinion/2013/0227/To-protect-democracy-Supreme-Court-must-fully-uphold-Voting-Rights-Act>.

the VRA that remains necessary.²⁸¹ These individuals correctly note that in 1965, Congress deliberately made Section 5 temporary, intending instead for Section 2 to be the lasting core provision of the Act.²⁸² Furthermore, they point to Section 2's ability to target specific legislation that has already produced harm while empowering citizens who litigate the claims.²⁸³ Yet Section 2 litigation by itself is slow and is highly cost prohibitive considering the expensive experts required to prove discriminatory retrogressive effects.²⁸⁴ Additionally, Section 5 supplements Section 2, helping protect gains recognized by Section 2 litigation.²⁸⁵ The proposed expansion would allow preclearance to continue protecting Section 2 gains for suspect regulations while providing a faster litigation option than Section 2 provides.²⁸⁶ Expanding Section 2 to allow the DOJ to take over cases that have made a bare showing of discriminatory effect would help make Section 2 more powerful, the way advocates of Section 2 seem to believe it already is.²⁸⁷

Extending Section 2 of the VRA would reduce the threat of voter disenfranchisement during the lawsuit.²⁸⁸ Pennsylvania's 2012 voter ID law was halted only after an independent plaintiff filed suit against the state, surviving multiple appeals and remands.²⁸⁹ A "key change" preclearance requirement would have automatically halted Pennsylvania's law simply because voter ID has routinely been found to have the potential for discriminatory impact.²⁹⁰ Similarly, in Ohio, where only a suit by the Obama for America campaign prevented reduced poll hours, a claim raised by a private citizen could have resulted in a DOJ takeover and instant freeze of the law's implementation.²⁹¹

²⁸¹ Shapiro, *supra* note 268; Hans von Spakovsky, *Shelby County v. Holder: The Shelby County Section 5 Showdown*, SCOTUSBLOG, (Feb. 15, 2013, 5:51 PM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-the-shelby-county-section-5-showdown>.

²⁸² Von Spakovsky, *supra* note 281.

²⁸³ Shapiro, *supra* note 268.

²⁸⁴ Clarke, *supra* note 131, at 416. To prove a law's discriminatory retrogressive effect, experts must analyze both the previous voting law's discriminatory effects and either projections or actual data from elections after the new law's enactment. *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*; see Keady & Cochran, *supra* note 86, at 781–82; Gerken, *supra* note 264.

²⁸⁷ See Gerken, *supra* note 264; von Spakovsky, *supra* note 281.

²⁸⁸ See *Applewhite*, 2012 WL 3332376, at *8; WEISER & KASDAN, *supra* note 139, at 17; Gerken, *supra* note 264.

²⁸⁹ *Applewhite*, 2012 WL 4497211, at *1, 8.

²⁹⁰ See *id.* at *5 (finding disenfranchisement occurs under the voter ID law); e.g., *Texas v. Holder*, 888 F. Supp. 2d at 124 (finding that the Texas voter ID law is likely to create a discriminatory effect); *South Carolina v. United States*, 898 F. Supp. 2d, at 32 (granting a preliminary injunction for voter ID law because it was likely to burden voters).

²⁹¹ See *Obama for Am.*, 697 F.3d at 437; Gerken, *supra* note 264.

This proposal for nationwide preclearance of key changes follows the initial impetus for administrative preemption first proposed by Attorney General Katzenbach in the 1965 Senate Judiciary Committee Hearings.²⁹² Katzenbach stated the VRA should:

prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th Amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated [P]erhaps this could be improved by applying [preclearance] only to those laws which the Attorney General takes exception to within a given period of time.²⁹³

Katzenbach's suggestion resulted in the Section 5 DOJ preclearance process.²⁹⁴ Yet because Section 5 only covers some states, it only solved part of the problem.²⁹⁵ Katzenbach's suggestion remains relevant today; "getting judicial determinations" of voting laws for non-covered states still takes a long time.²⁹⁶ In the meantime, "the purposes of the act" are still "frustrated."²⁹⁷ These problems can be solved today in the same fashion as they were in 1965, by requiring preclearance for key changes to voting requirements.²⁹⁸

B. *Constitutionality of the VRA Depends on Expanding Section 5 Coverage*

A proposal to expand the VRA may seem untimely considering the Court recently struck down limited preclearance as no longer supported by current conditions.²⁹⁹ Expanding the Act's key provisions to more states and increasing DOJ power, however, is the most effective way to address modern threats to voting and keep the Act relevant.³⁰⁰

²⁹² See *Voting Rights: Hearings on S. 1564 Before the S. Judiciary Comm.*, 89th Cong. 192, 237 (1965) [hereinafter *Voting Rights Hearings*] (testimony of Att'y Gen. Katzenbach).

²⁹³ *Id.*

²⁹⁴ Keady & Cochran, *supra* note 86, 755–56.

²⁹⁵ See Voting Rights Act of 1965, 42 U.S.C. §§ 1973b, 1973c (2006); Keady & Cochran, *supra* note 86, at 779–80.

²⁹⁶ *Voting Rights Hearings*, *supra* note 292, at 237; see Reilly, *supra* note 207.

²⁹⁷ *Voting Rights Hearings*, *supra* note 292, at 237; see *Applewhite*, 2012 WL 4497211, at *8; Reilly, *supra* note 207.

²⁹⁸ See Westmoreland, *supra* note 259.

²⁹⁹ See, e.g. Brief for Petitioner, *supra* note 118, at 18, 40.

³⁰⁰ See *id.* at 40; Westmoreland, *supra* note 259.

The suggested changes would ensure the constitutionality and purpose of the VRA.³⁰¹

1. Standards for Evaluating the Constitutionality of Congressional Enforcement Power

Prior to *Shelby County*, the Supreme Court had addressed the constitutionality of the VRA multiple times. Each time, the Court repeatedly found the Act to be within the scope of Congress's powers because the principles of federalism may be superseded by "rational" or "appropriate means."³⁰² In its first analysis of the VRA in *South Carolina v. Katzenbach*, the Supreme Court noted that the traditional principles of express congressional power and reserved state sovereignty govern Congress's power under the Fifteenth Amendment.³⁰³ Therefore, the Court decided voting legislation should be analyzed by the traditional *McCulloch v. Maryland* test; congressional action is permitted if the ends of the law are legitimate and within the scope of the Constitution, and the means used are appropriate and not unconstitutional.³⁰⁴ Since *Katzenbach*, courts have continued to apply the rational means *McCulloch* test to analyze voting legislation.³⁰⁵

Applying the *McCulloch* standard, the *Katzenbach* Court found the VRA was an acceptable use of congressional power because the Act's purpose was legitimate based on the atmosphere of voting discrimination in the targeted states prior to the enactment.³⁰⁶ Furthermore, the preclearance method was appropriate because (1) preclearance was confined to specific states, (2) the coverage formula was rationally based on historic data, and (3) the VRA included a termination provision for the end of preclearance.³⁰⁷

Nearly fifty years later, the Court in *Shelby County* applied a similar analysis, yet found Section 4 invalid.³⁰⁸ Although the Court did not articulate a standard or explicitly refer to *McCulloch*, the Court's analysis

³⁰¹ See Brief for Petitioner, *supra* note 118, at 40.

³⁰² See, e.g., *Katzenbach*, 383 U.S. at 324, 337; *City of Rome v. United States*, 446 U.S. 156, 178 (1980).

³⁰³ See *Katzenbach*, 383 U.S. at 326–38. The Court held that the Fifteenth Amendment's grant that "Congress shall have the power to enforce this article by appropriate legislation" meant that Congress has full power to act to ensure the right to vote. U.S. CONST. amend. XV, § 2; *Katzenbach*, 383 U.S. at 327–28.

³⁰⁴ *Katzenbach*, 383 U.S. at 326; see *McCulloch v. Maryland*, 17 Wheat. 316, 421 (1819).

³⁰⁵ See *Shelby Cnty.*, 133 S. Ct. at 2625–29; *Katzenbach*, 383 U.S. at 326.

³⁰⁶ See *Katzenbach*, 383 U.S. at 326–28.

³⁰⁷ *Id.* at 327–31.

³⁰⁸ See *Shelby Cnty.*, 133 S. Ct. at 2625–29.

mirrored the *Katzenbach* Court's application of *McCulloch*.³⁰⁹ First, the *Shelby County* Court turned to the current condition of voting rights.³¹⁰ Where the *Katzenbach* Court found the VRA passed the first prong of *McCulloch* because the ends of the law were legitimate given the culture of discrimination in the targeted states, the *Shelby County* Court found that the culture had "changed dramatically."³¹¹ Next, the Court considered if Section 4's coverage formula was appropriate given current conditions by taking a close look at the formula.³¹² While in 1966 the *Katzenbach* Court said the formula was properly tailored, the *Shelby County* Court noted the formula was based on outdated data that no longer targeted states with high rates of discrimination.³¹³ Therefore, due to changing conditions and outdated data, the Court struck down Section 4 using the same analysis first employed in upholding the law.³¹⁴

The Court has also applied the "rational means" principal to determine the scope of congressional power in enforcing other parts of the Constitution.³¹⁵ In the 1997 case of *City of Boerne v. Flores*, the Court clarified the rational means standard while striking down the Religious Freedom Restoration Act ("RFRA") as an excessive use of Congress's enforcement powers.³¹⁶ Using an inquiry similar to that of *Katzenbach*

³⁰⁹ See *id.* at 2622, 2625–29 (noting that the court's review is still guided by the "basic principles of *Northwest Austin*," specifically the requirements that the VRA's burdens be justified by current needs and that targeted jurisdictions be related to the statute's goal); William S. Consovoy, *Discussion and Webcast at the Brookings Institution: Voting Rights After Shelby County v. Holder*, BROOKINGS INST. (July 1, 2013) at 15, available at <http://www.brookings.edu/events/2013/07/01-voting-rights-shelby-holder> (noting the *Shelby County* Court applied the *McCulloch* standard); Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), <http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/> (noting that the Court failed to discuss the scope of Constitutional power and did not refer to the key case *Boerne v. Flores*). The *Shelby County* Court noted that the coverage formula when enacted was rationally based on needs at the time, yet after contrasting historic data with current needs, the formula was found to be no longer justified. See 133 S. Ct. at 2625.

³¹⁰ See *Shelby Cnty.*, 133 S. Ct. at 2625–26.

³¹¹ *Id.* at 2625; see *Katzenbach*, 383 U.S. at 326–28.

³¹² See *Shelby Cnty.*, 133 S. Ct. at 2627–28.

³¹³ See *id.* at 2628–29; *Katzenbach*, 383 U.S. at 327–28, 329, 330, 331.

³¹⁴ See *Shelby Cnty.*, 133 S. Ct. at 2625–31; *Katzenbach*, 383 U.S. at 326–31; Consovoy, *supra* note 309.

³¹⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

³¹⁶ See *id.* at 536; Clarke, *supra* note 131, at 398. The RFRA provided that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it furthers a "compelling governmental interest" and "is the least restrictive means" of promoting that interest. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488–89 (1993), *invalidated by City of Boerne*, 521 U.S. at 536.

and *City of Rome v. United States*, the Court found the RFRA did not have “proportionality or congruence between the means adopted and the legitimate end to be achieved.”³¹⁷ In applying the standard, the *Boerne* Court considered the historical violations of religious rights and whether the law was appropriately tailored to address the violations.³¹⁸

Given the continued use of the *McCulloch* test in analyzing the scope of congressional power, the rational means analysis remains the most consistent standard by which to evaluate the validity of expanding the VRA to cover all states.³¹⁹

2. Extending Preclearance to Key Changes Is an Appropriate & Rational Use of Congress’s Enforcement Powers

Under the rational means analysis, expanding DOJ preclearance to all states is an appropriate use of Congress’s enforcement powers.³²⁰ An expansion will protect the vital right to vote by addressing requirements with a high likelihood of discriminatory retrogressive effects.³²¹ The proposal’s narrow tailoring, expanding preclearance coverage only to suspect “key changes,” based on the history of discriminatory voting rights violations for such changes, makes it a proportional and congruent response to modern threats to the Fifteenth Amendment.³²²

The Fifteenth Amendment grants Congress enforcement power to guarantee that the right to vote shall not be denied or abridged.³²³ Courts have interpreted this clause to mean that Congress is chiefly responsible for enforcement of the Amendment.³²⁴ The original VRA was acceptable under the Fifteenth Amendment and therefore, a modified

³¹⁷ *City of Boerne*, 521 U.S. at 530, 532, 533; see *City of Rome*, 446 U.S. at 178, 180 (upholding Section 5 preclearance as a valid use of congressional power and affirming the DOJ’s refusal to preclear a redistricting scheme); *Katzenbach*, 383 U.S. at 326, 327–29; Clarke, *supra* note 131, at 398.

³¹⁸ See *City of Boerne*, 521 U.S. at 530, 532, 533; Clarke, *supra* note 131, at 389–90.

³¹⁹ See Clarke, *supra* note 131, at 390; see also *City of Boerne*, 521 U.S. at 532, 533, 536 (holding the Religious Freedom Restoration Act of 1993 unconstitutional because of a “lack of proportionality or congruence between the means adopted and the legitimate end to be achieved”); *City of Rome*, 446 U.S. at 178, 183 (finding federalism may be overridden by “appropriate legislation” and the VRA is an “appropriate means” for carrying out Congress’s duty of protecting the right to vote); *Katzenbach*, 383 U.S. at 324, 334 (finding the VRA’s ban on literacy tests is a “rational means” to prevent racial discrimination in voting).

³²⁰ See *City of Boerne*, 521 U.S. at 525–26, 530.

³²¹ See *id.*

³²² See *id.*; *Katzenbach*, 383 U.S. at 324, 330.

³²³ U.S. Const. amend. XV, § 1. “The Congress shall have power to enforce this article by appropriate legislation.” *Id.* § 2.

³²⁴ *Katzenbach*, 383 U.S. at 325–26.

VRA also targeting voting discrimination is within the bounds of Congress's Fifteenth Amendment enforcement power.³²⁵ Additionally, voting rights, as a fundamental right, enjoy heightened scrutiny and thus a modified VRA formula would be accorded greater latitude in congressional enforcement.³²⁶

Requiring DOJ preclearance for specific, problematic "key changes" in all states is well supported by historic restrictions of voting rights and Supreme Court precedent.³²⁷ Under the proposed modification, Congress would designate a set of key changes to voting laws that must receive preclearance.³²⁸ Key changes would be identified through a review of court findings where specific voting laws have been found to likely cause discriminatory retrogressive effects.³²⁹ Therefore, preclearance of "key changes" would only apply to voting laws already exhibiting violations.³³⁰ Just as the original VRA targeted jurisdictions with extensive violations of voting rights, a key change preclearance requirement would also target specific laws demonstrating a history of discriminatory effects.³³¹ Additionally, a modified VRA would address a similar issue the *Katzenbach* court found essential in the 1965 VRA: the alleviation of the slow process of case-by-case litigation.³³²

The *Boerne* Court found that measures intending to prevent constitutional violations are acceptable uses of congressional power if there is a significant likelihood that the resulting law would be unconstitu-

³²⁵ See *City of Boerne*, 521 U.S. at 532; *Katzenbach*, 383 U.S. at 337.

³²⁶ See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (holding that voting rights are a fundamental right and deserve heightened scrutiny).

³²⁷ See *Obama for Am.*, 697 F.3d at 426, 432 (finding that voters of minority groups were most likely to be harmed by Ohio's restriction of early voting); *Applewhite*, 2012 WL 4497211, at *2, 3 (finding that Pennsylvania's voter ID law was likely to restrict between 1% and 9% of voters); see *supra* notes 134–49 and accompanying text.

³²⁸ See Gerken, *supra* note 264 (suggesting an "opt-in" modification to require preclearance when there is a change that voting laws have a potential for discrimination).

³²⁹ See *Texas v. Holder*, 888 F. Supp. 2d at 124 (finding the Texas voter ID law likely to create a discriminatory effect); *Applewhite*, 2012 WL 4497211, at *3 (finding that the Pennsylvania voter ID may produce voter disenfranchisement). A key change may include voter ID, which has been found to cause discriminatory retrogressive effects. See *Texas v. Holder*, 888 F. Supp. 2d at 124. Yet not all voter ID laws cause discriminatory effects, and therefore, an independent analysis should be conducted of such suspect laws before they can be instituted. See *South Carolina v. United States*, 898 F. Supp. 2d at 15 (finding South Carolina's voter ID requirement does not create a retrogressive effect given the law's reasonable impediment provision).

³³⁰ See Gerken, *supra* note 264; see, e.g., *Texas v. Holder*, 888 F. Supp. 2d at 124; *Applewhite*, 2012 WL 4497211, at *1.

³³¹ Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); see *Katzenbach*, 383 U.S. at 315.

³³² See *Katzenbach*, 383 U.S. at 328.

tional.³³³ The proposed “key change” preclearance requirement would only cover laws previously presenting a significant likelihood of discriminatory effects and therefore is an acceptable use of congressional enforcement power.³³⁴ The *Boerne* Court invalidated RFRA under this principal, finding it was not responsive to current laws and instead created sweeping coverage of state laws.³³⁵ Likewise, *Shelby County* overturned Section 4 because it was no longer supported by current conditions.³³⁶ Unlike RFRA, this proposal is specifically tailored only to laws with a high likelihood of impermissibility.³³⁷

Requiring DOJ preclearance for specific laws rather than specific jurisdictions is not without precedent in the VRA itself.³³⁸ Section 2 of the VRA banned the use of literacy tests, a ban the Court found acceptable because it was a particular type of qualification with a long history of abridging voting rights.³³⁹ Like literacy tests, this proposal is responsive to the current history of violations.³⁴⁰

Expanding DOJ preclearance is a congruent and appropriate act narrowly tailored to address historic violations of voting rights.³⁴¹ In *City of Boerne*, the Court lauded the VRA for targeting specific districts with a history of violations and its requirements for periodic reauthorization.³⁴² Even though *Shelby County* found the formula outdated, the Court still noted the importance of targeting specific jurisdictions for enhanced protection.³⁴³ The proposed VRA would also feature specific, targeted enforcement, applying only to those laws likely to carry a discriminatory retrogressive effect.³⁴⁴ Furthermore, the “key changes”

³³³ *City of Boerne*, 521 U.S. at 532.

³³⁴ *See id.*

³³⁵ *Id.* at 532, 534, 536.

³³⁶ *See Shelby Cnty.*, 133 S. Ct. at 2629.

³³⁷ *See id.*

³³⁸ *See* 42 U.S.C. § 1973(a); *Katzenbach*, 383 U.S. at 330.

³³⁹ 42 U.S.C. § 1973(a); *Katzenbach*, 383 U.S. at 330.

³⁴⁰ *See Katzenbach*, 383 U.S. at 330; *see, e.g., Obama for Am.*, 697 F.3d at 426, 432; *Applewhite*, 2012 WL 4497211, at *2, 3. Additionally, the court found it was permissible for Congress to identify states with historical evidence of discrimination and “infer a significant danger of the evil” from the remainder of the covered jurisdictions. *Katzenbach*, 383 U.S. at 329. Similarly, Congress here may also infer a discriminatory retrogressive effect from key changes regularly found to have a disproportionate effect. *See id.*

³⁴¹ *See City of Boerne*, 521 U.S. at 520; *Katzenbach*, 383 U.S. at 329–31.

³⁴² *City of Boerne*, 521 U.S. at 532–33.

³⁴³ *See Shelby Cnty.*, 133 S. Ct. at 2629 (“To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.”).

³⁴⁴ *See id.*

could be regularly reviewed by Congress and updated to include additional laws carrying discriminatory effects.³⁴⁵

When the Court struck down the Section 4 formula, it noted that Congress should identify jurisdictions to target based on current conditions.³⁴⁶ The current condition of voting discrimination, however, is reflected in increasingly strict laws passed nationwide.³⁴⁷ The proposed changes would target those specific laws found to have a discriminatory effect and thus is narrowly tailored to laws with a significant likelihood to be unconstitutional.³⁴⁸

CONCLUSION

Today, there is a renewed assault on voting rights through an old method, discriminatory voting laws. Yet these laws are no longer confined to the South. In the 2012 election, efforts to restrict voting rights took the form of voter ID requirements, constraints on voter registration, and reduction of polling hours across the country. While federal preclearance prevented the implementation of many laws with discriminatory effects, private parties in non-covered jurisdictions had to fight to prevent similar changes that would have disproportionately hurt minorities. Following the Supreme Court's decision in *Shelby County v. Holder*, which ended Section 4's coverage formula, all voting changes now take effect without preclearance. What is left of the VRA, private Section 2 litigation, and Section 3 "bail-in" procedures, does not adequately protect minorities. There is an imminent need to address nationwide voting discrimination on a federal scale.

The tools for fixing the voting system are already in place in the Voting Rights Act of 1965. Congress designed the VRA to combat prolific discrimination in the post-war South, yet its method of affirmative suits supplemented by federal preclearance is sound and remains applicable to modern voting challenges. Harnessing the existing power of Section 5 to create limited nationwide preclearance for key changes to voting regulations would help fight modern voting assaults. This limited preclearance would prevent implementation of suspect laws before an outside analysis of the law's discriminatory effects. Meanwhile, extending Section 2 to create an easier path for DOJ takeover of existing litigation would supplement Section 5 preclearance. These two solu-

³⁴⁵ *See id.*

³⁴⁶ *Id.*

³⁴⁷ *See, e.g.*, Texas v. Holder, 888 F. Supp. 2d at 124; *Applewhite*, 2012 WL 4497211, at *3.

³⁴⁸ *See, e.g.*, Texas v. Holder, 888 F. Supp. 2d at 124; *Applewhite*, 2012 WL 4497211, at *3.

tions would help supplement the current preclearance bail-in procedure of Section 3, creating broader protection for voter rights.

While political polarization makes it difficult to implement new nationwide voting laws, partisan officials should not have the ultimate power to determine who votes and who gets elected. The United States Constitution ensures that voting should not be abridged due to race or minority status. A modified VRA is the best way to ensure the Constitution's guarantees in a democratic society.

