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IN THE AFTERMATH OF *SHELBY COUNTY*: AN ANALYSIS ON WHY TEXAS SHOULD BE REQUIRED TO PRE-CLEAR ALL VOTING CHANGES

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I. INTRODUCTION

The history of the Voting Rights Act of 1965 begins with the passage of the Fifteenth Amendment.[1] Since being granted suffrage, African-Americans have faced many roadblocks to their ability to exercise their constitutionally protected right to vote.[2] These roadblocks include things like literacy and property tests, poll taxes, and gerrymandering of voting districts.[3] After realizing these abhorrent procedures, the Federal Government created laws in an attempt to combat them.[4] These initial laws endeavored to use case-by-case litigation as a weapon.[5] However, the widespread use of voter discrimination and the sluggish pace of the litigation process made these laws ineffective.[6] Something more needed to be done; something extraordinary. The result would become the most powerful and effective tool in the history of civil rights legislation: the Voting Rights Act of 1965.[7]

Before passage of the Voting Rights Act of 1965, Congress attempted to deal with "systematic discrimination" on a case-by-case basis by utilizing the Civil Rights Act of 1957, which allowed the Attorney General of the United States to bring injunctions against state and private actors who were restricting the ability to vote based on race.[8] When problems persisted with gathering evidence needed for this litigation, amendments were added to the Civil Rights Act of 1960 authorizing the Attorney General to access the voting records implicated in voting rights litigation.[9] While the goal and effort to combat racial discrimination in voting

1. *See* S. Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (stating that Congress' power for passage of the Voting Rights Act of 1965 stems from the Fifteenth Amendment).

2. *See* J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 678–81 (2008) (describing the various attempts and methods used to prevent African-Americans from voting).

3. *See id.*

4. *See id.* at 680 (discussing the passage of Section 5 of the Voting Rights Act to guard against voter discrimination).

5. S. Carolina v. Katzenbach, 383 U.S. at 313.

6. *See id.* at 313–14 (evidencing the shortcomings of previous legislation which attempted to curb voter discrimination).

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

8. S. Carolina v. Katzenbach, 383 U.S. at 313. *See generally* Kousser, *supra* note 2, at 679 (passing the Civil Rights Act of 1957 allowed the Attorney General of the United States of America to bring actions against racially discriminatory voting procedures).

9. S. Carolina v. Katzenbach, 383 U.S. at 313.

practices existed within Congress, their attempts proved unsuccessful until 1965.[10]

The Voting Rights Act of 1965 was specifically designed to fight the pervasive racial discrimination in voting practices seen more readily in specific states and political subdivisions.[11] This statute was not without opposition;[12] the various requirements for state compliance quickly brought a legal fight to the steps of the Supreme Court of the United States.[13] The Supreme Court upheld the challenged provisions and the states lost their fight.[14]

Even today, opposition continues to surround this piece of legislation.[15] Forty-seven years after the Court upheld the Voting Rights Act of 1965 a new case, *Shelby County. v. Holder*, rose out of one of the preclearance required states.[16] The result of this case shocked voting rights advocates.[17] The *Shelby County* decision eviscerated the preclearance section of the law, which offered voters the most protection.[18]

In the face of racial polarization in voting practices and more subtle racially discriminatory voting laws, civil rights groups are still searching for a workable remedy.[19] While case-by-case litigation continues to pose

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10. *See id.* at 313–14 (1966) (detailing that the former legislation used to correct voting practices which discriminated on the basis of race were was unsuccessful due to the amount of time needed for preparation, the difficulty in gathering all the evidence needed, the length of time before the case would be resolved, and the unfortunate practice of simply changing the voting law to require all new litigation).

11. S. Carolina v. Katzenbach, 383 U.S. at 317–19.

12. *See id.* at 307–08 (noting many states responded with briefs in support of South Carolina).

13. *See id.* at 315–17 (explaining the measures the states objected to in front of the Supreme Court).

14. *See id.* at 337 (holding the Voting Rights Act constitutional).

15. *See* Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612–13 (2013) (illustrating the continuing opposition to voting legislation); Charles Kuffner, *Texas Says "No Preclearance Now, No Preclearance Forever!,"* OFF THE KUFF (Aug. 12, 2013), http://offthekuff.com/wp/?p=55069 (discussing the recent redistricting lawsuit in Texas).

16. *See* Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2621 (2013) (challenging the Voting Rights act).

17. *See generally* Adam Serwer, *The Secret Weapon that Could Save the Voting Rights Act*, MSNBC (July 8, 2013, 12:36 PM), http://www.msnbc.com/politicsnation/the-secret-weapon-could-save-the-voting (gauging the reaction to the Supreme Court ruling Section 5 unconstitutional).

18. *See* Shelby Cnty. v. Holder, 133 S. Ct. at 2632 (striking down the coverage formula of the Voting Rights Act).

19. *See id.* at 2635, 2643 (Ginsburg, J., dissenting) (identifying subtle second-generation barriers to minority voting and evidence of racial polarization in jurisdictions covered by preclearance).

the same problem as it did at the creation of the Act, there remains a need to prevent the discrimination from initially taking place.[20]

Texas was one of the nine states covered by the preclearance requirement of the Voting Rights Act of 1965.[21] Texas passed two new discriminatory laws immediately following the Court's decision, underscoring the need for continued federal oversight of these states in the form of preclearance.[22] This article explores the continuing utility of preclearance requirements and the route to recovering preclearance coverage for Texas, an achievement that could provide greater equality for racial minority voters in Texas.

II. WINNING THE INITIAL SECTION 5 BATTLE: *SOUTH CAROLINA V. KATZENBACH*

Most of the controversy surrounding the Voting Rights Act of 1965 stems from Section 5 of the Act and surrounds a discussion of states' rights.[23] Section 5 addressed the persistent racial discrimination in voting practices within particular areas of the United States of America by requiring some states, counties, and municipalities to clear any voting changes made in their districts with the Department of Justice or the U.S. District Court in Washington D.C.[24] Arguments against the validity of this section focus on the Tenth Amendment and principles of federal-

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20. *See id.* at 2633–34 (Ginsburg, J., dissenting) (observing the failure of case-by-case litigation and the need for preclearance).

21. *See Areas Covered by Section 5 of the Voting Rights Act*, WASH. POST (June 25, 2013), http://www.washingtonpost.com/wp-srv/special/politics/section-five-voting-rights-act-map (listing Texas as one of the jurisdictions covered by Section 5).

22. *See* Holly Yeager, *Justice Department Sues Texas Over Voter ID Law*, WASH. POST, Aug. 22, 2013, *available at* http://articles.washingtonpost.com/2013-08-22/politics/41436941_1_voter-id-law-1965-voting-rights-act-photo-id (reporting the Justice Department has brought suit against Texas over two state voting laws).

23. *See generally* Kousser, *supra* note 2, at 667 (providing an overview of the preclearance provision of the Voting Rights Act); Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S.C. L. REV. 827 (2006) (studying the impact of the Voting Rights Act on voter discrimination); Michael Ellenment, Note, *The New Voter Suppression: Why the Voting Rights Act Still Matters*, 15 SCHOLAR 261 (2013) (discussing the continued need for voter protection in the United States).

24. S. Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); *see* Cynthia Grace Lamar, *The Resolution of Post-Election Challenges Under Sections of the Voting Rights Act*, 97 YALE L.J. 1765, 1765 (1988) (clarifying that the areas covered under Section 5 of the Voting Rights Act must preclear any voting changes with the Department of Justice of the United States or the United States District Court in Washington D.C.).

ism,[25] while the arguments in favor of Section 5 have traditionally focused on the Fourteenth and Fifteenth Amendments.[26] However, the Court has long held that the preclearance requirement of Section 5 constitutes a valid exercise of congressional authority specifically granted to them by the language of the Fifteenth Amendment itself.[27]

The first opposition to Section 5 came from South Carolina just one year after the passage of the Voting Rights Act of 1965 when the Court addressed the Act's constitutionality in *South Carolina v. Katzenbach.*[28] In *Katzenbach*, Chief Justice Earl Warren, writing the opinion for an eight-justice majority, held Section 5 to be a valid exercise of Congressional power.[29] Justice Black, articulating the same concerns still voiced today, offered the sole dissenting opinion.[30]

The Supreme Court opened its opinion in *Katzenbach* by explaining the political and social circumstance that motivated Congress to enact the Voting Rights Act of 1965.[31] Illegal, racially discriminatory voting practices surfaced after the passage of the Fifteenth Amendment, which made the denial or abridgement of a citizen's right to vote on the basis of race or color unlawful under the United States Constitution.[32] Following ratification of the Fifteenth Amendment in 1870, Congress created the Enforcement Act of 1870 pursuant to Section 2 of the Fifteenth

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25. *See* Fuentes-Rohwer & Charles, *supra* note 23, at 830 (stating the debate over the extension of the Voting Rights Act of 1965 will encompass the scope of congressional powers and federalism); U.S. CONST. amend. X (reserving specific powers for the States).

26. *See* S. Carolina v. Katzenbach, 383 U.S. at 308 (finding that Section 5 of the Voting Rights Act of 1965 is a proper use of Congressional power under the Fourteenth and Fifteenth Amendments to the United States Constitution); *see also* Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 17 (1965) (explaining that the Voting Rights Act of 1965 was written following the language and purpose of the Fifteenth Amendment to the United States Constitution). *See generally* U.S. Const. amend. XIV (establishing the Equal Protection Clause); U.S. Const. amend. XV (providing an unabridged right to vote).

27. S. Carolina v. Katzenbach, 383 U.S. at 337.

28. *Id.*

29. *Id.* at 337.

30. *Id.* at 361 (Black, J., dissenting) (arguing that nothing in the Fourteenth or Fifteenth Amendments of the United States Constitution has ever been construed to allow the United States Congress to take away the state government's power to pass their own laws).

31. *See id.* at 308–16 (narrating the circumstances which promulgated the Voting Rights Act).

32. *See id.* at 310 (starting after the passage of the Fifteenth Amendment to the United States Constitution, "the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting"); U.S. CONST. amend. XV, § 1 (prohibiting the abridgment of a person's right to vote); Fuentes-Rohwer & Charles, *supra* note 23, at 831 (furthering the discussion of unlawful tests employed within states like South Carolina).

Amendment, which granted Congress the power to enforce Section 1.[33] Even after the passage of these laws, the protections of the Fifteenth Amendment and its enforcement legislation did not guarantee racial minorities a vote.[34]

Countless litigation arose from barriers placed in front of African-Americans attempting to vote.[35] The Supreme Court struck down many cases in which it recognized common voting practices as illegal.[36] For example, tests requiring the ability to read and write frequently qualified the ability to vote.[37] Furthermore, the literacy tests employed by various states had different standards of passage for white and African-Americans which would ensure white voters would not be turned away.[38] The tests chosen effectively accomplished the desired goal of reducing African-American participation in the voting process because at the time over three quarters of African-American adults were unable to read and write.[39] In contrast, during the same period, less than one-fourth of white adults were illiterate.[40] Voting laws protected the white vote further by utilizing things such as grandfather clauses, property qualifications, and "good character" tests.[41] In response to these insidious blockades and the frequent litigation challenging such racially charged voting laws, Congress decided that the perpetuation of racial discrimination at the voting polls should be confronted and the remedies in place would not ade-

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33. *See* S. Carolina v. Katzenbach, 383 U.S. at 310 (enforcing the provisions found in the Enforcement Act of 1870 was "spotty and ineffective"); *see also* Christopher, *supra* note 26, at 1–2 (determining the purpose of the Enforcement Act of 1870 was to enforce the Fifteenth Amendment to the United States Constitution by prohibiting racially discriminatory practices in voting).

34. *See* Christopher, *supra* note 26, at 2 (revealing that the unsuccessful nature of the enforcement legislation led to the repeal of most of the provisions found within the Enforcement Act of 1870).

35. *See* S. Carolina v. Katzenbach, 383 U.S. at 311–12 (detailing the cases and types of discriminatory voting laws found in the South including poll taxes, white primaries, literacy tests, gerrymandering, and the exceptions given to white voters in these same states when they were unable to pass a literacy test).

36. *See id.* (listing previous cases that came before the United States Supreme Court challenging the voting laws in states such as Alabama, Louisiana, and Mississippi where the Court struck down all of these laws based on the discriminatory nature of the policies with examples of white primaries, voting tests, and gerrymandering).

37. *Id.* at 311.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*; *see* Luis Fuentes-Rohwer & Charles, *supra* note 23, at 831–32 (2006) (finding that the disparity between the registration of voting aged African-Americans and their white counterparts was stark and achieved by employing poll taxes and literacy tests and when these efforts failed officials would instruct African-Americans to deposit their ballot in the "wrong box").

quately address the problem.[42] The United States needed stricter measures in place to ensure that racial minorities could exercise their constitutionally guaranteed right to vote as citizens of the United States.[43]

After the Court explained this background, it detailed the need for the new voting legislation and explained the new remedy offered by Section 5,[44] which would prevent discriminatory voting practices from even taking effect by requiring all new voting regulations to be reviewed by federal authorities.[45] Dismissing South Carolina's argument that the Fifth Amendment's Due Process Clause prevented the United States Supreme Court from upholding Section 5 of the Voting Rights Act of 1965, Chief Justice Earl Warren opined that at no time or in any case had the Court expanded the word "person" within the Due Process Clause of the Fifth Amendment to include and cover states within the Union.[46]

The Court continued to explain that all other constitutional defenses raised by South Carolina were misplaced. States do not have the power to call on the concept of Separation of Powers, a principle reserved for individuals and private groups.[47] Furthermore, these attempted constitutional defenses merely added different aspects to the question presented to the Court: Does the United States Congress have the power under the Fifteenth Amendment to enact Section 5 of the Voting Rights Act of 1965 when considering its relation to the states?[48]

In answering this question, the Chief Justice relied on three things: the language of the Fifteenth Amendment and what it was meant to accomplish, any prior Supreme Court decisions construing the provisions found in the Fifteenth Amendment, and the traditional doctrines of constitutional interpretation utilized by the Court.[49] The first section of the Fifteenth Amendment has been interpreted as fully establishing a right that does not require any implementing legislation.[50] The Fifteenth Amendment independently invalidates discriminatory voting policies, whether facial or in practice.[51] While states have been given the broad power to administer the right to vote, the Fifteenth Amendment remains supreme

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42. S. Carolina v. Katzenbach, 383 U.S. at 309.

43. *See id.* (pointing to the majority reports submitted by the United States House of Representatives and Senate along with the considerable amount of evidence pondered by both houses).

44. *Id.* at 315–16.

45. *Id.* at 316.

46. *Id.*at 323–24.

47. *Id.*at 324.

48. *Id.*

49. *Id.*

50. *Id.*at 325.

51. *Id.*

when a state exerts its power in a manner contrary to the United States Constitution.[52] State power never justifies circumventing a right granted by the Constitution.[53]

Additionally, Section 2 of the Fifteenth Amendment gives Congress the sole authority to enact enforcement legislation regarding the right to vote guaranteed in Section 1.[54] The Court echoed Chief Justice Marshall by asking if the legislation was appropriate and adopted to further the object of the Fifteenth Amendment.[55] The Court answered both questions affirmatively and declared Section 5 to be a constitutional use of congressional authority pursuant to the explicit enforcement powers granted to the United States Congress.[56] While this offered a major victory in the fight for voter equality, forty-seven years later a challenge brought against the Voting Rights Act of 1965 resulted in the demise of the most powerful civil rights legislation ever enacted.

III. Preclearance Requirements Under the Voting Rights Act of 1965

While voting rights advocates watched *Shelby County v. Holder* make its way up the ladder to the Supreme Court of the United States, many recognized the *possibility* that the preclearance requirement of Voting Rights Act of 1965 could be declared unconstitutional; however, others were certain the Court would not strike such a heavy blow to this category of civil rights litigation. They were wrong.[57] Instead of attacking Section 5 of this important legislation the Court "mercifully" held Section 4(b), which provides the coverage formula for the preclearance requirement of Section 5, to be unconstitutional.[58] Without Section 4(b)'s coverage formula dictating which jurisdictions are required to seek

52. *Id.*

53. *Id.*

54. *Id.* at 325–26.

55. *Id.* at 326–27.

56. *Id.* at 327.

57. *See* Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2631 (2013) (ruling section 4(b) of the Voting Rights Act unconstitutional).

58. *Id.*; *see* Lyle Denniston, *Preclearance Requirement Sought for Texas on Voting*, SCOTUSBLOG (July 25, 2013, 10:43 AM), http://www.scotusblog.com/2013/07/preclearance-sought-for-texas-on-voting (acknowledging that the U.S. Supreme Court did not touch Section 5 of the Voting Rights Act, but held its coverage formula in Section 4(b) to be unconstitutional); *see also* Madison Underwood, *Holder Messes With Texas, Wants Required Pre-clearance in Wake of Shelby County SCOTUS Call*, AL.COM (July 25, 2013, 10:35 AM), http://blog.al.com/wire/2013/07/ag_holder_requests_texas_get_p.html (relaying that the Supreme Court of the United States overturned Section 4(b) of the Voting Rights Act of 1965).

preclearance, Section 5 has been rendered ineffective.[59] In effect, what the *Shelby County* holding means is that even though Section 5's preclearance requirement still stands, it cannot be applied to any area of the country.[60]

A. *Nullification of the Nation's Most Successful Piece of Civil Rights Legislation*

To those carefully watching the Voting Rights Act litigation at the Supreme Court level, Justice Roberts' ominous remarks in *Northwest Austin Municipal Utility District No. 1 v. Holder,* just four years prior to *Shelby County,* had left a lingering concern regarding the constitutionality of the Act in the eyes of the Chief Justice.[61] In his *Northwest Austin* majority opinion, Chief Justice Roberts clearly stated that the preclearance requirement and the coverage formula used to apply it raised serious constitutional concerns.[62] In *Shelby County*, the Court then reiterated the exceptional nature of the Act by explaining that no other legislation in existence intrudes so far into those rights granted to the states under the Tenth Amendment.[63] According to the Court, the unique circumstances of the time—such as different requirements and tests specifically created to prevent African-Americans from voting—necessitated the passage of the Act.[64] Moreover, the extreme racial discrimination in voting practices also justified the extreme legislation.[65]

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59. *See* Ed Morrissey, *Holder Vows to Force Texas into Pre-clearance Despite Supreme Court Ruling on VRA*, HOT AIR (July 25, 2013, 12:01 PM), http://hotair.com/archives/2013/07/25/holder-vows-to-force-texas-into-pre-clearance-despite-supreme-court-ruling-on-vra (explaining that while Section 5 of the Voting Rights Act is still in place, it cannot be used by the Department of Justice any longer). Since the Supreme Court's Ruling, Section 5 can only be used by the Department of Justice if Congress creates "a rational formula for singling out states and other jurisdictions for the intrusive level of scrutiny pre-clearance imposes." *Id.*; *see also Controversial Texas Voter ID Law Likely Enforced Next Week*, DFW CBS LOCAL (Aug. 23, 2013, 5:14 PM), http://dfw.cbslocal.com/2013/08/23/controversial-texas-voter-id-law-likely-enforced-next-week (articulating that the Supreme Court ruled that Congress needs to update how the Voting Rights Act of 1965 is enforced).

60. Underwood, *supra* note 58; Pete Yost & Keith Collins, *Eric Holder Wants Texas Voting Law Changes to be Cleared by U.S.*, HUFFINGTON POST (July 25, 2013, 6:16 PM), http://www.huffingtonpost.com/2013/07/25/eric-holder-texas-voting-law_n_3652367.html; Maya Rhodan, *Department of Justice Files Suit Against Texas Voting Law*, TIME (Aug. 22, 2013), http://swampland.time.com/2013/08/22/department-of-justice-files-suit-against-texas-voting-law.

61. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009).

62. *Id.*

63. Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2623–24 (2013).

64. *Id.* at 2624–25.

65. *Id.* at 2625.

The Court noted that now, almost fifty years later, the gap between voter registration and turnout among the races is closing, blatant discrimination does not occur often, the number of minority candidates holding office is at its highest, and the types of tests and devices the Act was originally created to ban have been illegal since the Act went into effect.[66] Specifically looking at the coverage formula, which was based on voting practices and data from the 1960s and 1970s,[67] the Court found that there is no longer such a racial disparity in voter turnout or voter registration to justify the coverage formula found in Section 4(b).[68]

The government attempted to save the coverage formula by arguing it was reverse-engineered by Congress in order to achieve preclearance coverage for the worst offenders.[69] The majority found, however, that allowing reverse-engineering to justify a current formula would ultimately affect "a disfavored subset of states" based upon "a comparison between the States in 1965."[70] Emphasizing that the coverage formula must be relevant to the problem it is meant to address; the Court opined that a claim of reverse-engineering could not save Section 4(b) because it fails to address the "current political conditions."[71]

The Court also addressed the "fundamental problem" of reenacting a formula created with reliance on data from the 1960s and 1970s.[72] The Court reasoned that, because the Act was created to prevent future racial voting discrimination rather than punish past discrimination, any further attempts by the Federal Government to subject specific states or areas to such extraordinary measures could not be justified by old data.[73] The Federal Government must now identify the states it will subject to the preclearance requirement by looking to current conditions.[74] While the Court acknowledged the overwhelming scope of data cited by Congress in identifying the worst offenders, it explained that the record compiled by Congress was not actually used to create the formula.[75] In other

66. *Id.*

67. *Id.*

68. *Id.* at 2627–28.

69. *See id.* at 2628 (arguing that identifying the jurisdictions that needed coverage first and then applying the criteria was a sanctioned approach). "Reverse-Engineer" is defined as "to study or analyze (a device, as a microchip for computers) in order to learn details of design, construction, and operation, perhaps to produce a copy or an improved version." *Reverse-Engineer Definition*, DICTIONARY.COM, http://dictionary.reference.com/cite.html?qh=reverse-engineer&ia=dict21 (Jan. 5, 2014).

70. Shelby Cnty. v. Holder, 133 S. Ct. at 2628.

71. *Id.*

72. *Id.* at 2629.

73. *Id.*

74. *Id.*

75. *Id.*

words, the new data compiled by Congress bore no logical connection to the decade old formula created in 1965 and reauthorized in 2006.[76] The Court concluded that the failure to reassess the preclearance coverage formula and tailor it to reflect changes in discriminatory practices rendered Section 4(b) unconstitutional.[77]

B. *Continuing Need for Preclearance*

In the face of overwhelming data continuing to demonstrate indisputable need for anti-discriminatory practices, voting rights litigators found the idea of losing preclearance coverage for places like Texas inconceivable.[78] Justice Ginsburg's powerful dissent echoed that sentiment, diligently attacking the majority's reasoning and conclusion of Section 4(b) unconstitutionality.[79] Setting the tone for her dissent, Ginsburg declared that the immense success of the preclearance requirement is the majority's very reason for forcing Section 5 into dormancy.[80] After detailing the success of the Voting Rights Act in eliminating first-generation barriers—overt voting discrimination such as literacy tests and similar devices[81]—Justice Ginsburg acknowledged that there were still "vestiges of discrimination against the exercise of the franchise by minority citizens"[82] and discussed the problems surrounding second-generation barriers.[83]

Second-generation barriers, unlike first-generation barriers that directly attempt to block minorities' access to the polls,[84] consist of indirect attempts to lower the impact of minority votes through vote dilution and similar measures.[85] Several different forms of second-generation barriers have been employed, such as gerrymandering.[86] Congress has consist-

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76. *Id.* at 2628–29.

77. *Id.* at 2631.

78. *See* Nina Perales et al., *Voting Rights Act in Texas: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 728–49 (2008) (detailing the various Section 5 and Section 2 violations successfully litigated in Texas from 1982–2006). *See generally* Nina Perales, *Shelby County v. Holder: Latino Voters Need Section 5 Today More Than Ever*, SCOTUSBLOG (Feb. 12, 2013, 05:29 PM), http://www.scotusblog.com/2013/02/shelby-county-v-holder-latino-voters-need-section-5-today-more-than-ever/ (arguing that Section 5's preclearance requirement plays a critical role in protecting Latino voter rights).

79. Shelby Cnty. v. Holder, 133 S. Ct. at 2632–33, 2652 (Ginsburg, J., dissenting).

80. *Id.* at 2632, 2629.

81. *Id.* at 2633–34.

82. *Id.* at 2634.

83. *Id.* at 2635.

84. *Id.* at 2634.

85. *Id.*

86. *Id.* at 2635.

ently used evidence of these new barriers as justification for the continued use of preclearance and its coverage formula.[87]

When deciding whether to reauthorize the entirety of the Voting Rights Act in 2006, Congress found the Act to be directly responsible for eradicating first-generation barriers and leading to an increase in minority voter registration and voter turnout.[88] However, Congress also recognized that second-generation barriers have continued to be employed consistently and that racially polarized voting in the areas covered by Section 4(b) make minorities particularly politically vulnerable.[89] The ultimate congressional finding established that a refusal to continue the Voting Rights Act would result in minority vote dilution or even deprivation of their right to vote altogether.[90] Accordingly, Ginsburg's compelling dissent calls for deference to Congress when it creates legislation for the purpose of enforcing the Fifteenth Amendment because it is the branch specifically charged with this task.[91]

While the majority took issue with the Act's forty-year-old references found in Section 4(b), the dissent explained the importance placed on history by the members of Congress.[92] Two important reasons for the reauthorization were a fear of backsliding after the tremendous progress and the reality of racial polarization in voting.[93]

While significant gains have been made since the creation of the Voting Rights Act, the need for reinforcement still exists.[94] The record presented to Congress demonstrated greater racial polarization[95] in jurisdictions covered by preclearance requirements than in the rest of the country.[96] This reality makes racial minorities more vulnerable to discriminatory changes in voting laws in two significant ways.[97] First, there is greater risk of vote dilution and underrepresentation of racial minority interests.[98] Moreover, the controlling party will pursue maintenance of

87. *Id.*
88. *Id.*
89. *Id.* at 2636.
90. *Id.*
91. *Id.*
92. *Id.* at 2642.
93. *Id.* at 2642–43.
94. *Id.* at 2642.
95. *See* Matt A. Barreto, *Polarized Voting*, UNIV. OF WASH. POWERPOINT (Feb. 6, 2013), http://faculty.washington.edu/mbarreto/papers/polarized_voting_wa.pdf ("Racially polarized voting exists when voters of different racial or ethnic groups exhibit very different candidate preferences in an election.").
96. Shelby Cnty. v. Holder, 133 S. Ct. at 2643 (Ginsburg, J., dissenting).
97. *Id.*
98. *Id.*

their rule and, when political ideologies fall along racial lines, there is a predictable effect on racial minorities.[99]

The incentive to retain power within a racially polarized political environment inevitably leads to racial discrimination in voting laws.[100] Ginsburg found the majority's opinion particularly troubling, given the overwhelming data identifying the covered jurisdictions as requiring federal oversight due to a significant danger of voting discrimination.[101] Congress looked to the Katz Study for guidance when considering the Act's reauthorization.[102] The study documented all Section 2 lawsuits from 1982 to 2004.[103] The comparison of Section 2 lawsuits is particularly relevant because Section 2 applies nationwide.[104] If the jurisdictions identified by Section 4(b) truly do not require greater federal oversight, the amount of successful Section 2 lawsuits should be roughly comparable.[105] This, however, is not the case.[106] The Katz Study found that the covered jurisdictions were responsible for fifty-six percent of successful Section 2 litigation while only accounting for less than twenty-five percent of the population.[107] In fact, Section 2 lawsuits succeeded more prevalently in the covered jurisdictions than in non-covered jurisdictions.[108] Therefore, the current conditions in the covered jurisdictions establish an ongoing need for preclearance coverage, despite the majority's conclusion that the formula does not address a current need.[109]

Given the substitution of first-generation barriers for second-generation barriers in the covered jurisdictions, along with the data gathered through the Katz Study, it is clear that the 2006 reauthorization of the Voting Rights Act *was* based on current conditions observed by Congress.[110] Consequently, Justice Ginsburg argued the progress achieved by preclearance should not be the reason for its dormancy, but actually evinces the very reason for its continued necessity.[111] The elimination of specific first-generation barriers did not eliminate all voter discrimination.[112] It has led to the creation of more subtle and difficult to identify

99. *Id.*
100. *Id.*
101. *Id.* at 2636.
102. *Id.* at 2642.
103. *Id.*
104. *Id.*
105. *Id.* at 2642–43.
106. *Id.* at 2643.
107. *Id.*
108. *Id.*
109. *Id.* at 2650.
110. *Id.* at 2651.
111. *Id.*
112. *Id.*

second-generation barriers, demonstrating the vital need for ongoing preclearance in the jurisdictions singled out by Section 4(b) of the Voting Rights Act of 1965.[113]

IV. TAKING THE FIGHT TO TEXAS

Devastated by the *Shelby County* ruling, voting rights litigators, activists, and minority rights groups immediately went into action.[114] In Texas, the fight has begun.[115] Republican lawmakers in Texas have long claimed the Voting Rights Act of 1965 to be unconstitutional, encroaching on the rights granted to the State by the Tenth Amendment of the United States Constitution.[116] On the other hand, groups working to keep Texas covered have pointed to numerous Section 5 and Section 2 violations that have been successfully litigated, demonstrating a continu-

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113. *Id.* at 2651–52.

114. *See* Brentin Mock, *In Denial About Its Racism, Texas Fights Preclearance Under the Voting Rights Act*, THE LOUISIANA WEEKLY, Aug. 26, 2013, *available at* http://www.louisianaweekly.com/in-denial-about-its-racism-texas-fights-preclearance-under-the-voting-rights-act (listing the Mexican-American Legislative Caucus, the Texas Latino Redistricting Task Force, and the Texas NAACP as some of the civil rights groups joining suit against Texas to fight for preclearance coverage under Section 3).

115. Kuffner, *supra* note 15; *see* Sahil Kapur, *Holder's Move Against Texas Could Send the Voting Rights Act Back to the Supreme Court*, TPM (July 25, 2013, 8:10 PM) http://talkingpointsmemo.com/dc/holder-s-move-against-texas-could-send-the-voting-rights-act-back-to-the-supreme-court (recognizing that the U.S. Department of Justice has "joined the battle" in Texas preclearance for voting changes); *see also* Andrew Cohen, *U.S. v. Texas and the Stringent Language of the Voting Rights Fight*, THE ATLANTIC (Aug. 26, 2013, 11:17 AM) http://www.theatlantic.com/national/archive/2013/08/-i-us-v-texas-i-and-the-strident-language-of-the-voting-rights-fight/278564 (noting that "[t]he Justice Department's lawsuit is the latest battle in a nasty political war between the Obama Administration and its most conservative critics . . . "); Sahil Kapur, *Texas Launches New Legal Attack on Voting Rights Act*, TPM (Aug. 8, 2013, 1:38 PM) http://talkingpointsmemo.com/dc/texas-launches-new-legal-attack-on-voting-rights-act (observing an escalation in the confrontation between the State of Texas and the Obama Administration regarding Section 5's preclearance requirement of the Voting Rights Act).

116. *See* Stephen Stromberg, *Texas Republicans Get it Wrong on Holder and the Voting Rights Act*, WASH. POST (July 26, 2013, 4:22 PM), http://www.washingtonpost.com/blogs/post-partisan/wp/2013/07/26/texas-republicans-get-it-wrong-on-holder-and-the-voting-rights-act (discussing Texas republicans' opinions of Holder's continued effort to force Texas into following the Voting Rights Act, including actions which defy the Supreme Court's ruling and the Court already declared the Act as "constitutionally infirm"); *see also* Yeager, *supra* note 22 (quoting Governor Rick Perry, "[Texas] will continue to defend the integrity of our elections against this administration's blatant disregard for the 10th Amendment."); Lyle Denniston, *New Challenge to Texas Voting Laws*, SCOTUSBLOG (Aug. 23, 2013, 3:13 PM), http://www.scotusblog.com/2013/08/new-challenge-to-texas-voting-laws (relating that top elected officials in Texas have issued statements accusing the federal government of interfering with Texas' sovereignty by challenging the new voting laws).

ing need for preclearance coverage in Texas.[117] Furthermore, before the Court handed down the *Shelby County* decision, the State of Texas proffered two pieces of voting litigation regarding a new redistricting plan and a proposed voter identification law.[118] While the United States District Court for the District of Columbia rejected both of these proposals, they went into effect immediately after Section 4(b) of the Voting Rights Act of 1965 was named unconstitutional.[119] Following these enactments, civil rights groups[120] and the United States Justice Department began the difficult task of proving that Texas still needs preclearance coverage.[121]

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117. *See* Freddie Allen, *Rights Groups Call for Congress to Act on Voting Rights Act*, NEW PITTSBURGH COURIER (Jul. 1, 2014), http://newpittsburghcourieronline.com/2014/07/01/rights-groups-call-for-congress-to-act-on-voting-rights-act (reporting on a study by the Leadership Conference that revealed from 2000 to the middle of 2013, 29 states had a total of 148 Section 5 objections or additional violations of the Voting Rights Act, Texas being the leader with 30); *see also* Perales et al., *supra* note 78, at 14–17 (outlining historical Section 5 and Section 2 objections in Texas); Perales, *supra* note 78 (noting numerous attempts to pass discriminatory redistricting and election procedures in Texas, which were blocked by courts under Section 5).

118. Perales, *supra* note 78.

119. Ryan J. Reilly, *Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Act Ruling*, THE HUFFINGTON POST (June 25, 2013, 2:04 PM), http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html. Governor Rick Perry signed Texas' voter identification law and the redistricting plan drawn by the legislature into law. *Id.*

120. *See* Mock, *supra* note 114 (naming the Mexican-American Legislative Caucus, the Texas Latino Redistricting Task Force, and the Texas NAACP as some of the civil rights groups joining suit against Texas in favor of preclearance); *see also Civil Rights Attorney on Voter ID Law: 'Everybody Knows Somebody Who's Going to Have a Problem,'* AMERICA NOW (Oct. 14, 2013, 6:23 PM), http://www.americanownews.com/story/23689214/civil-rights-attorney-on-voter-id-law-everybody-knows-somebody-whos-going-to-have-a-problem (pointing to the Lawyers Committee for Civil Rights Under Law as a group which has filed suit against Texas to repeal the Texas voter identification law).

121. *See* Natasha M. Korgaonkar, *Texas' Voter ID Laws are Plain and Simple Discrimination*, U.S. NEWS & WORLD REPORT (Aug. 30, 2013, 3:49 PM), http://www.usnews.com/debate-club/is-the-justice-department-right-to-sue-over-texas-voter-id-law/texas-voter-id-laws-are-discriminatory (affirming the U.S. Department of Justice sued Texas in July over the State's discriminatory voter identification law); *see also* Charlie Savage, *U.S. is Suing in Texas Cases Over Voting by Minorities*, N.Y. TIMES, Aug. 23, 2013, at A12, *available at* http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html (outlining the fact the federal government—through the U.S. Justice Department—became a co-plaintiff in the case against Texas' redistricting plan, and filed a "statement of interest" supporting the civil rights groups who filed the existing lawsuit, allowing the federal government to send its own attorneys to make arguments before the court and present evidence).

A. *Demonstrating a Continuing Need for Minority Voter Protection: Texas' Redistricting and Voter ID Law*

The two new Texas voting laws have gathered considerable attention following the Supreme Court's decision in *Shelby County*.[122] Prior to the Court's ruling in *Shelby County*, the United States Department of Justice rejected both of these laws, a redistricting map and a voter identification law.[123] Immediately after the *Shelby County* ruling, these laws nevertheless went into effect.[124] Civil rights groups, as well as the Department of Justice, have since moved to challenge these laws by using Section 2 of the Voting Rights Act of 1965.[125] Additionally, these groups argue that Texas should be required to once again preclear any changes to voting laws and procedures.[126]

While the Court struck down one avenue to establishing preclearance coverage in *Shelby County*, a second method remains.[127] Section 3 of the Voting Rights Act was left intact, and this section is being employed within this litigation for the purpose of bringing Texas back under Section 5's requirements.[128] Texas lawmakers argue that neither law is discriminatory, but the current and predicted impacts indicate the laws pose a significantly greater risk to racial minority voters.[129] These laws show that once Texas was freed from Section 5's preclearance requirement, the backsliding that Congress and Justice Ginsburg feared has quickly become reality.[130]

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122. *See* Kapur, *Holder's Move Against Texas Could Send the Voting Rights Act Back to the Supreme Court*, *supra* note 115 (recognizing that the U.S. Department of Justice has "joined the battle" in Texas preclearance for voting changes).

123. *See* Savage, *supra* note 121, at A12 (informing that in 2011 both Texas voting changes were rejected by federal courts).

124. Rhodan, *supra* note 60; Reilly, *supra* note 119.

125. Savage, *supra* note 121, at A12.

126. Denniston, *Preclearance Requirement Sought for Texas on Voting*, *supra* note 58.

127. Jerry H. Goldfeder, *After 'Shelby County' Ruling, Are Voting Rights Endangered?*, BRENNAN CENTER FOR JUSTICE (Sept. 23, 2013), http://www.brennancenter.org/analysis/after-shelby-county-ruling-are-voting-rights-endangered.

128. Denniston, *Preclearance Requirement Sought for Texas on Voting*, *supra* note 58.

129. *See* DFW CBS LOCAL, *supra* note 59 (discussing that Attorney General Greg Abbott does not find anything wrong with the voter ID law and he believes that it's implementation is crucial to preventing voter fraud); *see also* Mock, *supra* note 114 (pointing out that "a federal district court stocked with George W. Bush-appointed judges found a preponderance of racist intentions to dilute Black and Latino votes in Texas' 2011 redistricting"). Texas lawmakers continue to hold that the redistricting lines were politically, not racially, motivated. *Id.*

130. *See generally* Savage, *supra* note 121, at A12 ("Last year, under the old pre-clearance procedures, federal courts blocked Texas from using both its redistricting plan and photo ID law. They found evidence that the Legislature had intentionally discriminated

Hours after the announcement of the Supreme Court's decision in *Shelby County* Attorney General Greg Abbott announced that Texas' voter identification law and its 2011 redistricting map would take effect "immediately."[131] The voter ID law was rejected by a federal court in Washington D.C. in 2012, because it was found to be discriminatory against minorities.[132] The law in question places strict requirements[133] on voters by requiring them to present specified types of government-issued photo identification at polling stations.[134] The federal court charged with evaluating the law had already blocked Texas from using its voter ID law after deciding that it would have a discriminatory effect by suppressing minority voter turnout.[135] Despite this ruling the State of Texas has stated its determination to stand behind this law.[136]

Only one day following the *Shelby County* decision, Texas announced that it's voter ID law would take effect.[137] In response, several groups immediately brought suit against the state.[138] These challengers have since been joined by others.[139] Attorney General Eric Holder quickly announced his displeasure with the Supreme Court's decision,[140] and soon after the suit was filed in a South Texas federal district court, the Justice Department filed its own suit against the voter ID law in the same court.[141]

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against minority voters in drawing the districting map, and held that the photo ID law would have the effect of disproportionately suppressing minority voter turnout.").

131. Rhodan, *supra* note 60; Reilly, *supra* note 119.

132. Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) *vacated and remanded*, 133 S. Ct. 2886, 186 L. Ed. 2d 930 (U.S. 2013); Rhodan, *supra* note 60; Savage, *supra* note 121, at A12.

133. *See* Tex. S.B. 14, 82d Leg., R.S. (2011) (listing the requirements of voters to be implemented upon passage of the bill); Rick Lyman, *Texas' Stringent Voter ID Law Makes a Dent at Polls*, N.Y. TIMES (Nov. 6, 2013), http://www.nytimes.com/2013/11/07/us/politics/texas-stringent-voter-id-law-makes-a-dent-at-polls.html?_r=0 ("the list of acceptable identification includes a driver's license, a passport, a military ID and a concealed gun permit, but not a student photo ID").

134. Yeager, *supra* note 22.

135. *Id.*; Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) *vacated and remanded*, 133 S. Ct. 2886.

136. Kapur, *Holder's Move Against Texas Could Send the Voting Rights Act Back to the Supreme Court*, *supra* note 115.

137. Rhodan, *supra* note 60; Reilly, *supra* note 119.

138. Denniston, *New Challenge to Texas Voting Laws*, *supra* note 116.

139. *See generally* Ari Berman, *Rep. John Lewis: 'The Voting Rights Act is Needed Now like Never Before,'* THE NATION BLOG (July 17, 2013, 3:51 PM), http://www.thenation.com/blog/175336/rep-john-lewis-voting-rights-act-needed-now-never# (detailing how the Department of Justice has joined the suit over the Texas voter ID law).

140. Rhodan, *supra* note 60.

141. *See* Denniston, *New Challenge to Texas Voting Laws*, *supra* note 116 (quoting Eric Holder's announcement that the Justice Department will file suit in federal court in

Texas has taken chosen to focus on the prevention of voter fraud during in-person voting.[142] While Texas lawmakers have claimed that this focus motivated the creation of the law, others refer to this phenomena a "phantom epidemic."[143] Texas has been unable to show even one occasion of in-person voter fraud.[144] The state continues to insist the voter ID law does not intentionally discriminate against Hispanic or African-American voters,[145] however, the legislature rejected several offered amendments to the law[146] that would have lessened the burdens particularly affecting minority voters.[147] Texas lawmakers continue to insist upon the validity of the voter ID law and claim that it is necessary to prevent fraudulent voting in elections.[148] Texas Attorney General Greg Abbott also explained that the United States Supreme Court held that states may require photo identification before a person is allowed to vote.[149]

Opponents of Texas' strict voter ID law argue that requiring a person to present a state-issued identification card makes casting a ballot too cumbersome, particularly for minority voters.[150] Prior to the passage of the voter ID law, Texas voters were able to cast a ballot after producing a "voter registration card, or state, federal, city and college IDs."[151] Currently, only state-issued photo identification will be accepted before a ballot can be cast in Texas.[152]

Another hurdle for voters comes from the process of obtaining an accepted form of identification.[153] The only place to obtain the required

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Texas to request the application of the Voting Rights Act, and further discussing that a federal court in San Antonio was, at that time, reviewing the Act regarding Texas' redistricting plans).

142. Korgaonkar, *supra* note 121.

143. *See id.* (reflecting that Hilary Rodham Clinton referred to in-person voter fraud as a "phantom epidemic").

144. *Id.*

145. *Id.*

146. *Id.* (naming amendments offered for SB14 that would have allowed student identification cards to be accepted and provide a way for low income Texans to receive a truly free state-issued identification card).

147. *See Texas Takes Aim at Blocked Voter ID Law*, FOX NEWS LATINO (Mar. 15, 2012), http://latino.foxnews.com/latino/politics/2012/03/15/texas-takes-aim-at-blocked-voter-id-law (acknowledging that the Voter ID law could prevent "hundreds of thousands of registered Hispanics statewide" from having the right to vote).

148. DFW CBS LOCAL, *supra* note 59.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (discussing the difficulty of accessing a Department of Motor Vehicles office as well as the cost of obtaining a copy of a birth certificate or naturalization papers).

state-issued photo identification is from the Department of Motor Vehicles.[154] It is particularly troublesome that many areas do not have a Department of Motor Vehicles office and these offices in other areas are only open a one or two days out of the week.[155] Furthermore, these days never fall on a weekend and the offices are never open late, which is one fact leading to the federal district court's finding that the law forces poor minorities to choose between voting and wages.[156]

The Justice Department also pointed out that while the state offers a free Election Identification Card, many Texas voters still must pay for it indirectly.[157] To receive a free Election Identification Card a person must present either a certified copy of their birth certificate, which costs twenty-two dollars, or a copy of their naturalization and citizenship papers, which costs three hundred and forty-five dollars.[158] Adding to the validity of the claim by voting rights advocates is state data finding that Texas citizens of Hispanic and African-American descent are disproportionately more likely to lack the state-issued photo ID required for casting a ballot.[159]

While issues already exist for those attempting to secure the proper identification needed to vote, another problem from the implementation of Texas' voter identification law comes in the form of name discrepancies.[160] The Texas voter identification laws not only requires a voter to possess the requisite state-issued identification to vote, but also that the name appearing on that identification matches exactly the name in the voter registration database.[161] This has particularly affected women.[162] The disproportionate effect on women voters comes from the fact that many women change their name once they marry.[163] It should also be noted that this effect goes beyond socioeconomic status, race, or ethnicity. For example, a Texas district judge was questioned when attempting to vote because either the database or her identification stated that her maiden name was her middle name.[164] The State of Texas has argued

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154. *Id.*

155. *Id.*

156. *Id.* (illustrating current obstacles to obtaining identification); Korgaonkar, *supra* note 121 (alleging Texas' Voter I.D. laws are discriminatory).

157. DFW CBS LOCAL, *supra* note 59.

158. *Id.*

159. *Id.*

160. Tom Benning, *Texas Voter ID Law Causing Hiccups at Polls Over Name Discrepancies*, DALLAS NEWS (Oct. 27, 2013, 12:14 AM), http://www.dallasnews.com/news/politics/headlines/20131026-voter-id-law-causing-hiccups-at-polls-over-name-discrepancies.ece.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

that as long as the names are "substantially similar" voters can sign an affidavit to verify their identity.[165] Further, voters with name discrepancies can vote provisionally, but of course, these votes will not count until election officials approve them.[166]

Texas' voter identification law is only the first voting change which has been challenged by voting rights advocates.[167] The burdens placed on racial minorities and women by Texas' voter identification law are concerning, but civil rights groups and the Department of Justice have also challenged the 2011 redistricting map formerly rejected by the United States Department of Justice.[168] The rejection of Texas redistricting maps is nothing new; the extensive use of redistricting has been employed by Texas lawmakers in the past to dilute minority voting power.[169] From 1992 to 2006, at least thirty-three different redistricting plans were found to dilute minority voting power by the United States Department of Justice.[170]

Even as Texas' voter identification law was rejected by a federal district court because of its discriminatory effect, the latest redistricting map was similarly rejected after the court found that it was created with discriminatory intent.[171] During litigation, many disturbing emails were found referring to an "Optimal Hispanic Republican District," which contained a high number of Hispanic citizens with a low eligibility to vote.[172] After the redistricting map took effect, civil rights advocates and the United States Department of Justice filed suits against Texas.[173]

Both of Texas' laws were originally prevented from taking effect by the preclearance requirement triggered by Section 4(b) coverage.[174] Now, no such barrier exists to Texas implementation of these discriminatory voting laws. Without the benefit of automatic preclearance, voting rights advocates must fight these laws through litigation under Section 2 of the Voting Rights Act of 1965 while scrambling for an avenue to get back under the protection of Section 5.

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165. *Id.*

166. *See id.* (illustrating an example of a voter who has had to vote provisionally due to lack of proper I.D.).

167. Rhodan, *supra* note 60.

168. *Id.*

169. Perales et al., *supra* note 78, at 731.

170. *Id.* at 732.

171. Yost & Collins, *supra* note 60.

172. Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, THE AMERICAN PROSPECT (Aug. 19, 2013), http://prospect.org/article/get-know-section-3-voting-rights-act.

173. Savage, *supra* note 121, at A12.

174. *See* Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) (rejecting the voter identification law); Texas v. United States, 887 F. Supp. 2d 133, 144 (D.D.C. 2012) (three-judge court) (rejecting one of the redistricting attempts by Texas).

B. *Section 2 of the Voting Rights Act of 1965 is Not Enough*

There is another section of the Voting Rights Act, Section 2, that is often utilized in the fight against voting discrimination. Section 2 has been a helpful tool, particularly in the area of vote dilution; however, it is arguably not enough to fix the underlying problem.[175] Section 2 is a general ban on voting discrimination based on race, color, or language of a minority group.[176] All states and jurisdictions are subject to Section 2 of the Voting Rights Act, unlike the preclearance requirement under Section 5, which only applies to the areas identified by the coverage formula found in Section 4(b).[177] The enforcement of Section 2 occurs through the litigation process, which markedly differs from enforcement of Section 5.[178] Where Section 5 required changes in voting laws in the covered jurisdictions to be preapproved before they are implemented, Section 2 litigation involves voting laws that have gone into effect and are challenged by bringing suit against the state or political subdivision.[179] Voting laws under Section 2 may be challenged by the federal government or private citizen acting as plaintiff in the suit.[180]

Many people argue that Section 2 of the Voting Rights Act is enough because it covers the entire nation rather than a select few locations and allows challenges to discriminatory voting laws.[181] Others claim that the best legislation for the prevention of voting discrimination is a more expansive and stronger under Section 2.[182] The main problem identified by voting rights advocates concerning the overall effectiveness of Section 2 is the fact that enforcement can only begin after the discriminatory voting law takes effect.[183]

Currently, Section 2 only allows for enforcement after the discriminatory law has taken effect.[184] The issues surrounding after-the-fact litiga-

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175. Dylan Matthews, *Here's How Congress Could Fix the Voting Rights Act*, WASH. POST (June 25, 2013, 3:58 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/25/heres-how-congress-could-fix-the-voting-rights-act.

176. Meteor Blades, *Advocates Can Still Sue Under Voting Rights Act if New Laws Discriminate, But It's Expensive*, DAILY KOS (July 1, 2013, 10:30 AM), http://www.dailykos.com/story/2013/07/01/1220333/-Advocates-can-still-sue-under-Voting-Rights-Act-if-new-laws-discriminate-but-it-s-expensive#.

177. *See id.* (detailing how nine states were covered under the pre-clearance requirement).

178. *Id.*

179. Matthews, *supra* note 175.

180. *Id.*

181. *Voting Rights Act*, ALLIANCE FOR JUSTICE, http://www.afj.org/our-work/issues/supreme-court/voting-rights-act; Matthews, *supra* note 175.

182. Matthews, *supra* note 175.

183. *Id.*

184. ALLIANCE FOR JUSTICE, *supra* note 181.

tion are predictable. Enjoining a discriminatory voting law through Section 2 is costly and it can take years before it is finally resolved.[185] Once the discriminatory voting law is actually enjoined, a number of elections may have already taken place, disenfranchising many minority voters.[186] Additionally, it has the result of giving the benefits of incumbent status to any person elected while the discriminatory law was in effect.[187] These concerns were of paramount importance to the creators of the Voting Rights Act.[188]

Before the preclearance requirement was added to this legislation, the Federal Government attempted to address voting discrimination through case-by-case litigation.[189] Their efforts failed to fix the problem for a number of reasons.[190] The Court in *Katzenbach* explained that the time needed to prepare for litigation can take up to six thousand hours and, even if a favorable outcome is reached, the state or political subdivision can simply enact a new discriminatory law which must go through the entire process again.[191] These problems concerning racial discrimination in voting in 1965 were the very reason for creating the preclearance requirement and are still relevant today.[192] Modern second-generation barriers emphasize a current need for preclearance, especially given the subtle nature of this type of voting discrimination.[193]

Another benefit of the Section 5 preclearance requirement revolves around deterrence.[194] Deterrence is an important function of Section 5 of the Voting Rights Act that is much less effective under Section 2.[195] Preclearance was designed to deter states and political subdivisions from implementing discriminatory voting laws by requiring every change to voting laws to be reviewed before it could take effect.[196]

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185. *Id.*

186. *Id.*

187. *Id.*

188. *See* S. Carolina v. Katzenbach, 383 U.S. 301, 314 (1966) (detailing the inefficiencies of the law prior to the Voting Rights Act).

189. *Id.* at 313.

190. *Id.*

191. *Id.* at 314.

192. *Id.* at 315–16.

193. Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2634–35 (2013).

194. *See The Voting Rights Act and Shelby County v. Holder*, RESTORE VOTING RIGHTS, http://restorevotingrights.org/backgrounder-the-voting-rights-act-and-shelby-county-v-holder/ (requiring preclearance before allegedly discriminatory laws take effect).

195. *See* ALLIANCE FOR JUSTICE, *supra* note 181 (illustrating the ineffectiveness of Section 2 because states could gain an advantage "by passing new discriminatory laws as soon as the old ones had been struck down").

196. *Hearing on "The Voting Rights Act After the Supreme Court's Decision in Shelby County" Before the Subcomm. on the Constitution and Civil Justice of the Comm. on the Judiciary United States H.R.*, 113th Cong. 10 (2013) (statement of Robert A. Kengle, Co-

While preliminary injunctions through Section 2 are possible, they are difficult.[197] Not all voting changes are quickly publicized.[198] Even once they are known, the time between litigation becoming ripe and the first time the change goes into effect may offer only a small window.[199] Also, a narrower window for a preliminary injunction is to be expected when the potential for litigation is probable in the eyes of lawmakers.[200] Even some of the most egregious cases under Section 2 have not led to a successful preliminary injunction.[201]

Furthermore, incumbent status is an undoubtedly powerful tool within American politics.[202] Once it is achieved the chance of reelection rises greatly.[203] If a discriminatory voting law is not enjoined until after elections, it is much more difficult to correct the effects of that discrimination, especially after an elected official is granted incumbent status in the next election.[204] Thus, it is inevitable that those incumbents wishing to retain power will seek avenues that will prevent change to the "existing balance of voting power."[205] The strong advantage gained from incumbent status and the desire to keep power once it has been won easily explains how Section 5's preclearance requirement is effectively more deterrent than case-by-case litigation.

Finally, while Section 5 places the burden on the state or political subdivision to prove that any change to its voting laws is not discriminatory in intent or effect, Section 2 of the Voting Rights Act places the burden on the plaintiff bringing suit to prove the voting law is discriminatory in intent or effect.[206] This burden shift from the state government entity to

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Director, Voting Rights Project Lawyers' Committee for Civil Right Under Law) *available at* http://judiciary.house.gov/_files/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *See* Beth Shuster, *Being an Incumbent Has Many Benefits*, LOS ANGELES TIMES (Apr. 7, 2001), http://articles.latimes.com/2001/apr/07/local/me-48101 (describing the benefits of incumbency as "a battle-tested army of aides, ready attention from the media, and that most important political asset of all, access to money").

203. *Id.*

204. *See* ALLIANCE FOR JUSTICE, *supra* note 181 (expressing those elected under the discriminatory law receive the benefit of incumbency).

205. *See* Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2643 (2013) (Ginsburg, J., dissenting) (discussing the inclinations of incumbents to prevent fluctuations in the voting balance in order for reelection).

206. Suevon Lee, *Why the Supreme Court May Rule Against the Voting Rights Act*, PROPUBLICA (June 25, 2013), http://www.propublica.org/article/the-other-crucial-civil-rights-case-the-supreme-court-will-be-ruling-on.

the party challenging the law leads to problems stemming from both cost and judicial resources.[207] When considering any litigation, is important to consider the amount of judicial resources required, the costs of attorneys, and the costs of expert witnesses.[208] The cost of Section 5 challenges to changes in voting procedures is greatly exceeded by the cost of Section 2 challenges.[209] The cost of litigation under Section 2 can daunting, amounting up to one million dollars.[210]

All the features of Section 2 that have worried many voting rights advocates have led others to argue that a "beefed up" version would work and make preclearance unnecessary.[211] Some commentators have proffered a solution in the form of a stronger and more expansive Section 2.[212] According to this option, an updated Section 2 is all that is needed rather than continued preclearance.[213] This "weaponized" version of Section 2 would hold the state or political subdivision to a precise standard.[214] The burden would be shifted from the plaintiffs and would require a showing of a legitimate purpose connected to the voting process.[215] This option allows for legitimate voting changes to be made, but still provides protection from the laws created as a pretext for discrimination.[216] These advocates claim the courts are equipped to handle the caseload that would inevitably follow and that there are more than enough civil rights groups to challenge the laws through litigation.[217]

Strengthening Section 2 appears to be a viable option; however, it does not address the various additional concerns surrounding its effectiveness in eliminating racial discrimination in voting.[218] Time and money are still very real problems under this proposed solution because Litigation is costly, can take years, and an injunction of a discriminatory law might only happen after the discrimination has taken place.[219]

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207. *Id.*

208. *See* Liz Halloran, *Has the U.S. Outgrown the Voting Rights Act?*, NPR (Feb. 26, 2013, 5:10 PM), http://www.npr.org/blogs/itsallpolitics/2013/02/26/172971321/has-u-s-outgrown-the-voting-rights-act (noting the burden placed on a plaintiff due to the extremely high cost of litigation).

209. *See* Lee, *supra* note 206.

210. Halloran, *supra* note 208.

211. *See* Matthews, *supra* note 175 (offering a more expansive litigation approach for claims under Section 2).

212. *Id.*

213. *See id.* (calling for a more expansive litigation approach).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.* (addressing the additional concerns of burden shifting and response time).

219. *See id.* (identifying the high cost of litigation and the extended response time as causing problems to expanded litigation).

Other concerns in addition to finite judicial resources include the importance of a quick response to the offending laws.[220] At the time the Voting Rights Act of 1965 was enacted, a timely response was of paramount concern, as it still is today.[221] The courts were not able to keep up with changing state laws; as one commentator described, "[i]t was like wrestling with a shapeshifter."[222] While there are many negatives for following this option, it does offer greater protection through burden shifting and exacting standard.[223] Unfortunately Section 2 litigation does not provide enough protection from the underlying problems, but there are two ways to bring Texas under the preclearance requirement once again.[224]

V. UNCERTAINTY REMAINS IN THE LONE STAR STATE

A. *New Coverage Formula under Section 4(b) is Possible, but is it Probable?*

The Court, in *Shelby County*, did not invalidate all of the Voting Rights Act of 1965, only Section 4(b).[225] Section 4(b) created a coverage formula that was used to determine the states or political subdivisions that would be covered under Section 5's preclearance requirements.[226] The formula took into account three specific criteria for its determination of whether to apply the preclearance requirements.[227] Section 5 coverage became required if, first, the Attorney General concluded that the state or political subdivision maintained any test or device.[228] It also became required if, second, the Director of the Census concluded less than fifty percent of eligible voters were registered to vote or, third, there were less than fifty percent of eligible voters that voted in the presidential elec-

220. *See id.* (detailing how the judicial system was unable to keep with changing laws).

221. *See id.* ("[T]he rise in voter suppression in recent years means being able to respond quickly is key. It certainly was in the 1960s, when . . . state laws were changing faster than the judicial system could handle.").

222. *Id.*

223. *Id.*

224. Serwer, *supra* note 17.

225. Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2631 (2013).

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

227. *Id.*

228. *See id.* (defining test or device as ". . . any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class").

tion.[229] These three threshold questions were qualified within Section 4(b) with the years 1964, 1968, and 1972.[230]

When making its decision in *Shelby County*, the Court was confronted with a large amount of data considered by Congress when deciding whether to renew the Voting Rights Act in 2006.[231] While this data was mentioned, the Court found that it was not used to create the coverage formula within Section 4(b), which was renewed by Congress with no change based on the forty-year-old data.[232] The last year alluded to within the coverage formula was the year 1972.[233] Congress did not heed the warning found in *Northwest Austin* and, therefore, the Court focused on the outdated nature of Section 4(b) held the section to be unconstitutional.[234]

The Court emphasized *Katzenbach* as well as *Northwest Austin* when it commented that while Congress has the ability to enforce the Fifteenth Amendment, its measures must still address current needs.[235] The dissent's efforts to show that the coverage formula relates to current conditions by continuing to cover the worst offenders under the Voting Rights Act ultimately failed, despite an emphasis made on second-generation barriers and racial polarization in voting.[236] The result of the majority's opinion is that Section 5, as well as the rest of the Voting Rights Act, remains untouched; the Court did not reach the question of the constitutionality of any other sections within this piece of legislation.[237] The opinion explains that Congress must create a new coverage formula based on current need and data when subjecting any states or political subdivisions to Section 5 preclearance requirements.[238]

i. Options for a Modern Coverage Formula

In order to create a constitutional new coverage formula under Section 4(b) of the Voting Rights Act of 1965, Congress must be guided by the Courts specifications of what would not work, as articulated in the *Shelby County* decision. The old coverage formula struck down by the Court focused on the use of "tests" or "devices" as well as, using 1964, 1968, and

229. *Id.*
230. *Id.*
231. Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2650 (2013).
232. *Id.* at 2627.
233. Voting Rights Act of 1965, 42 U.S.C. § 4(b) 1973 (2006).
234. Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2631 (2013).
235. *Id.* at 2627.
236. *Id.* at 2642–43.
237. *Id.* at 2631.
238. *Id.*

1972 as the determinative years.[239] According to the majority in *Shelby County*, Congress must use a new set of criteria designed to meet current needs.[240]

Unlike in the recent past, voter discrimination does not exist today in the shape of a literacy tests.[241] The formula found to be unconstitutional in *Shelby County* addressed the first-generation barriers that were blatant and most common at the time of the enactment of the Voting Rights Act.[242] Today, however, voter discrimination looks very different.[243] First-generation barriers have been nearly eliminated, but second-generation barriers.[244] Any modern formula must address modern forms of racial voting discrimination and be based on more current data.[245] Additionally, after *Shelby County*, any new formula cannot be justified by reverse engineering.[246]

While voting rights advocates agree that Congress must take action, no one knows for sure what a new coverage formula will look like.[247] What *is* known is that any proposed formula must be based on modern racial discrimination in order to justify taking the "strong medicine" in the form of preclearance.[248] There are, however, several offered ideas on what a modern coverage formula will look like and what factors should be considered.[249]

Of all the proposed considerations, there is one that remains most appealing—a new coverage formula under Section 4(b) that focuses on states or political subdivisions that have lost or settled the most racial voting discrimination lawsuits.[250] However, any coverage formula solely considering the amount of voting discrimination cases that have been lost

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239. Voting Rights Act of 1965, 42 U.S.C. § 4(b) 1973 (2006).

240. Shelby Cnty. v. Holder, 133 S. Ct. at 2620.

241. Shereen Marisol Meraji, *What Would A 2013 Voting Rights Act (Section 4) Look Like?*, NPR (June 26, 2013, 4:34 PM), http://www.npr.org/blogs/codeswitch/2013/06/26/195907874/what-would-a-2013-voting-rights-act-section-4-look-like.

242. Shelby Cnty. v. Holder, 133 S. Ct. at 2651.

243. Erin Fuchs, *Justice Ginsburg: There's Still Racism in the South, and Minority Voters There Need Protection from Discrimination*, BUSINESS INSIDER (June 25, 2013, 1:19 PM), http://www.businessinsider.com/justice-ginsburgs-dissent-in-shelby-2013-6.

244. *Id.*

245. Meraji, *supra* note 241.

246. Shelby Cnty. v. Holder, 133 S. Ct. at 2628.

247. Meraji, *supra* note 241.

248. *Id.*

249. *Id.*; *The Formula Behind the Voting Rights Act*, N.Y. TIMES (June 22, 2013), http://www.nytimes.com/interactive/2013/06/23/us/voting-rights-act-map.html?_r=0; Spencer Overton, *How to Update the Voting Rights Act*, HUFFINGTON POST (June 25, 2013, 12:52 PM), http://www.huffingtonpost.com/spencer-overton/how-to-update-the-voting_b_3497350.html.

250. Meraji, *supra* note 241.

might not be broad enough; many of these cases are not published and many more are settled in favor of minority voters.[251] Also, it should be noted, that the number of Section 2 cases lost in covered jurisdictions compared to non-covered jurisdictions is almost four times higher.[252] While this number is significant, Judge Stephen F. Williams found that a truly tailored formula based on lost discrimination suits would only cover Mississippi, Alabama, Louisiana, and maybe parts of North and South Dakota.[253] The difference between the previously covered and non-covered jurisdictions becomes more pronounced, however, once all settled voting discrimination cases are also considered.[254] Such consideration would draw other states, such as Texas, back into the preclearance fold.[255]

The other proposals include jurisdictions with low voter turnout today, jurisdictions with consistently large registration gaps, jurisdictions that are most "prejudiced," or jurisdictions where elected officials rarely match racial demographics.[256] There are several ways Congress can restore preclearance through the creation of a modern version of Section 4(b), but there have not been conclusive answers on what it will entail.[257] Congress clearly has options to resolve the issue, but it is uncertain whether this branch will write any of them into law.[258]

ii. The Ability to Create a New Coverage Formula Exists but it is Unlikely to Happen

While a new coverage formula under Section 4(b) creates the most protection against voter discrimination by requiring any state or political subdivision to preclear any voting changes under Section 5, there is no indication that a new coverage formula will be created in the near future.[259] When considering the 2006 reauthorization of the Voting Rights Act of 1965, Congress recognized a need to update Section 4(b)'s coverage formula.[260] It considered several amendments to the preclearance coverage formula and rejected them all, including a proposed amendment

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251. N.Y. TIMES, *supra* note 249.

252. Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2643 (2013).

253. N.Y. TIMES, *supra* note 249.

254. *Id.*

255. *Id.*

256. Meraji, *supra* note 241.

257. *Id.*

258. Amy Howe, *We Gave You a Chance: Today's Shelby County Decision in Plain English*, SCOTUSBLOG (June 25, 2013, 2:45 PM), http://www.scotusblog.com/2013/06/we-gave-you-a-chance-todays-shelby-county-decision-in-plain-english.

259. Rachel George, *Voting Rights Act: Can Congress Come Up with a "New Formula" to Protect Voters?*, POLICYMIC (June 27, 2013), http://www.policymic.com/articles/51629/voting-rights-act-can-congress-come-up-with-a-new-formula-to-protect-voters.

260. Lee, *supra* note 206.

considering jurisdictions with low voter turnout, which failed by a large margin.[261] The parameters Congress must follow to create a constitutional and modern formula are clear, but it is doubtful that its members are willing to take up the task.[262]

The current state of partisan politics makes the possibility of a new coverage formula uncertain.[263] Moreover, any newly proposed formula will undoubtedly make its way to the political stage with an eye on the 2016 elections, and even if a compromise is reached, delays to its application can be expected.[264] The possibility of a new modern coverage under Section 4(b) does exist; however, the current state of politics makes it an unlikely avenue for the elimination of racial voting discrimination.[265] This leaves Section 3 of the Voting Rights Act of 1965 as the most promising piece of this legislation for the protection of minority voting rights through preclearance coverage.[266]

B. *Section 3: This Uncharted Territory is the Most Likely Route to Preclearance Coverage for Texas*

Now that the coverage formula for Section 4 of the Voting Rights Act has been made ineffective through the Supreme Court's ruling in *Shelby County*,[267] many advocates are turning to Section 3 as a possible replacement for the protection of voting rights.[268] This section "permits the federal government, or private challengers, to ask a federal court to put a state or local government under the preclearance regime provided by Section 5, if such a government has a recent history of discriminating against minority voters."[269] Unfortunately, Section 3 of the Voting Rights Act has rarely been used, has only being invoked eighteen times

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261. *See id.*

262. *See id.*

263. Emily Wang, *Shelby County v. Holder*, HARVARD POLITICAL REVIEW (Nov. 14, 2013, 12:50 PM), http://harvardpolitics.com/united-states/shelby-county-v-holder.

264. George, *supra* note 259.

265. *See id.* (advising that the best solution to the issue of voting rights in the United States is to focus on a new formula, which will help the country move in a forward direction on this issue).

266. *See generally* Courtney Mills, *Is 3 the New 5? The New Focus on Section 3 of the VRA*, FAIR ELECTIONS LEGAL NETWORK (July 30, 2013), http://www.fairelectionsnetwork.com/blog/3-new-5-new-focus-section-3-vra (stating that the lesser known Section 3 of the Voting Rights Act could offer a solution to the problems presented in *Shelby County* which has been forgotten by many in recent years).

267. Howe, *supra* note 258; *see* Shelby Cnty. v. Holder, 570 U.S. __, 133 S. Ct. 2612 (2013) (making Section 5 of the Voting Rights Act of 1965 dormant due to the Court finding the coverage formula in Section 4(b) unconstitutional).

268. Denniston, *Preclearance Requirement Sought for Texas on Voting*, *supra* note 58.

269. *Id.*

since the enactment of the Voting Rights Act in 1965, and leaves a lot of uncertainty to its effectiveness as a primary strategy for voting right advocate.[270]

While nothing within the Voting Rights Act of 1965 offers as much protection as Section 5,[271] Section 3 may serve as the best option because of the inefficient protection offered by Section 2 and the low chance of a newly created modern coverage formula.[272] Under Section 5, nine states, as well as a few counties, were required to preclear any voting changes with the United States Department of Justice or the District of Columbia's Circuit Court.[273] Section 3 does not give this guarantee.[274] Once a judge decides a jurisdiction should be submitted to preclearance, or "bailed in," they are given broad discretion with preclearance.[275] Even after a jurisdiction is "bailed in" by the court, however, the details of the preclearance requirement are uncertain.[276]

Before any jurisdiction can be "bailed in" under Section 3 there is a tough burden that must be met.[277] Unlike Section 5 of the Voting Rights Act, which placed the burden on the state and prevented any change in the voting laws from going into effect if the law would have a discriminatory effect,[278] Section 3 is much stricter.[279] For instance, Section 3 shifts the burden of proof to the voting rights advocates to prove the state or jurisdiction intentionally discriminated against minority voters.[280]

Proving intent is not an easy task and usually requires a "smoking gun."[281] Finding direct evidence of the lawmaker's desire to discriminate against minorities is difficult.[282] Most lawmakers have learned not to

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270. Rapoport, *supra* note 172.

271. *Id.*

272. Jeffrey Rosen, *Eric Holder's Suit Against Texas Gives the Supreme Court a Chance to Gut Even More of the Voting Rights Act*, THE NEW REPUBLIC (Sept. 1, 2013), http://www.newrepublic.com/article/114524/eric-holder-texas-suit-supreme-court-might-gut-more-voting-rights.

273. *Areas Covered by Section 5 of the Voting Rights Act*, *supra* note 21.

274. *See* Rapoport, *supra* note 172 (explaining that Section 5 offered the most comprehensive protection, and its coverage cannot be completely replaced by the coverage in Section 3).

275. *Id.*

276. *Id.*

277. Serwer, *supra* note 17.

278. Rapoport, *supra* note 172.

279. Serwer, *supra* note 17.

280. *See* Savage, *supra* note 121, at A12 (stating that intentional discrimination must be proven to use Section 3).

281. Rapoport, *supra* note 172.

282. *See* Rick Hasen, *Thoughts on the Road Ahead in North Carolina*, ELECTION LAW BLOG (Aug. 12, 2013, 9:19 PM), http://electionlawblog.org/?p=54296 (noting the difficulty in finding smoking gun evidence).

communicate such desires through emails, memos, letters, or even on the legislative floor.[283] The required proof of intentional discrimination under the Voting Right's Act is made harder because of its required qualifier—race or color.[284] It is not, for example, enough to prove intentional discrimination on the basis of partisan politics.[285] Voting rights advocates must prove intentional discrimination on the basis of race or color.[286] If voting rights advocates can overcome the hurdles of Section 3 and effectively gain "bailed in" status, the court still has complete discretion in the area to be covered by preclearance.[287] The hurdles to coverage and the uncertainty of Section 3 are concerning, but they do not mean that coverage similar to Section 5 is impossible.[288]

In Texas, voting rights advocates and the United States Department of Justice are challenging two Texas laws under Section 3 and are required to prove intentional discrimination on the basis of race or color for both the new voter identification law and the redistricting map that was signed into effect after the *Shelby County* Decision.[289] Meanwhile Texas continues to support its new laws, and the state is not backing down.[290] It claims that any requirement to preclear voting changes may only be asserted "where there is rampant, widespread, recalcitrant discrimination" is present.[291] In other words, a state or political subdivision can only be forced into preclearance if it is proven that discrimination akin to the type that originally justified the imposition of preclearance in 1965 exists.[292]

Texas lawmakers argue that any relief granted in both pending Texas cases must be proportional to any violation found.[293] While Texas believes its newly enacted laws are valid, if a court decides otherwise, the state claims that a "bail in" bringing Texas back under the preclearance

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283. *See id.*

284. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006). *See* U.S. CONST. amend. XV, § 1 (guiding the enactment of the Voting Rights Act to prevent voting discrimination based on race or color).

285. *See* Rapoport, *supra* note 172.

286. *See id.* (examining multiple instances of discrimination being proven because the parties being discriminated against were racial minority groups).

287. *See* Rapoport, *supra* note 172 (examining different possible decisions a judge could make in imposing Section 3 of the Voting Rights Act on a state); *see also* Lyle Denniston, *New Texas Voting Disputes*, SCOTUSBLOG (July 3, 2013, 7:05 PM), http://www.scotusblog.com/2013/07/new-texas-voting-disputes (stating Section 3 can only subject states to regulations for a specific period of time).

288. Serwer, *supra* note 17.

289. Yeager, *supra* note 22; Rapoport, *supra* note 172.

290. Kapur, *Texas Launches New Legal Attack on Voting Rights Act*, *supra* note 115.

291. *Id.*

292. *Id.*

293. Mock, *supra* note 114

requirement through Section 3 is too severe a punishment for the violation.[294] The aggressive legal interpretation seen from Texas brings a fear that Section 5, itself, may soon end up in front of the Supreme Court of the United States.[295] Voting rights advocates and United States Attorney General, Eric Holder, have a different interpretation themselves.[296] Given the discriminatory nature of both Texas laws, this side believes Texas has exhibited the exact type of behavior that allows for preclearance coverage under Section 3.[297]

The effects of both new Texas laws on racial minorities and their ability to vote demonstrate a continued need for protection. Preclearance appears to be necessary given that Section 2 of the Voting Rights Act of 1965 does not provide enough protection to minority voters. In fact, the opponents of both Texas' redistricting map and its voter identification law argue that these laws are the very reason Texas still needs the preclearance requirement.[298] However, with two different interpretations of Section 3 seen from the State of Texas and civil rights advocates along with the United States Department of Justice, this country just might soon see the Voting Rights Act of 1965 before the "conservative-leaning" Supreme Court once again.[299]

VI. Conclusion

Congress was specifically charged with the task of creating legislation to enforce the provisions of the Fifteenth Amendment to the United States Constitution. In accordance with this power, Congress enacted the Voting Rights Act of 1965 to address a great evil. While opponents to the preclearance requirement of the Voting Rights Act claim that Congress exceeded its authority and encroached upon state's rights, the Court in *Katzenbach* clearly came to a different conclusion. The widespread racial discrimination in voting practices required an extraordinary measure seen in the form of Section 5's preclearance requirement.

The persistent challenges to the Voting Rights Act of 1965 were inevitable. When *Shelby County v. Holder* was accepted for oral arguments, voting rights advocates were concerned, but optimistic. Unfortunately,

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294. *Id.*

295. Kapur, *Texas Launches New Legal Attack on Voting Rights Act*, *supra* note 115.

296. *See* Kapur, *Holder's Move Against Texas Could Send the Voting Rights Act Back to the Supreme Court*, *supra* note 115 (arguing that Texas displayed an intent to discriminate in its redistricting laws and should be subjected to preclearance under Section 3).

297. Kapur, *Holder's Move Against Texas Could Send the Voting Rights Act Back to the Supreme Court*, *supra* note 115 (claiming the redistricting legislation in Texas shows exactly why Texas needs preclearance).

298. Savage, *supra* note 121, at A12.

299. Kapur, *Texas Launches New Legal Attack on Voting Rights Act*, *supra* note 115.

the most successful piece of civil rights legislation was made dormant. The Court held that Section 4(b), which created a coverage formula used to identify which states or political subdivisions would be subject to the preclearance requirement of Section 5, to be unconstitutional. While preclearance itself was not ruled on in this case, the Court demanded that if Congress wanted to reinstate Section 5's automatic application it must create a new coverage formula designed to meet a current need. Despite the data showing a greater concern of racial polarization in voting within the covered jurisdictions and the modern use of subtler second-generation barriers to minority voting, a landmark piece of legislation is no longer in use.

The continuing need for preclearance is evidenced clearly in Texas, especially after the passage of two new voting laws that took effect immediately after the Court's decision in *Shelby County*. Texas' voter identification law and its redistricting map that were previously rejected as discriminatory demonstrate that Texas has not learned its lesson. Attempting to counter these laws through Section 2 litigation will create big hurdles for voting rights advocates in Texas. Racial minority voters need more protection against Texas' continued use of second-generation barriers to voting. It is pertinent that Texas be required to preclear its voting changes once again. With a politically polarized Congress it unlikely that this branch will create and pass a new coverage formula under Section 4(b) that will satisfy the Supreme Court of the United States. Therefore, Section 3 is arguably the best avenue to preclearance coverage under Section 5 for Texas. The uncertainty surrounding Section 3 and its tougher standards are concerning but do not make this path impossible. Unfortunately, even if Texas is forced back into the preclearance coverage of Section 5, it is very likely the Voting Rights Act of 1965 will soon be back before the Supreme Court.