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THE NEED TO RESURRECT SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

KEESHA M. MIDDLEMASS, PH.D.*¹

INTRODUCTION

The Voting Rights Act of 1965, as amended (VRA),² has protected minority voting rights across the country since its passage, and its significant power lies in the combination of Section 4(b)³ and Section 5.⁴ Together, these two Sections function to stop purposeful discriminatory voting practices, procedures and policies from being implemented.⁵ Until recently, Sections 4(b) and 5 had the backing of the Department of Justice (DOJ) and the force of the U.S. Supreme Court behind them. However, with the 2013 decision in *Shelby County v. Holder*,⁶ the Supreme Court undermined a key provision of the Voting Rights Act, Section 4(b). The Court held that “Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as basis for subjecting jurisdictions to preclearance.”⁷ The preclearance provision in Section 5 only retains its power in Section 4(b) of the VRA; Section 4(b) determines the states and political subdivisions “covered” by the VRA and subject to Section 5 preclearance. With the Court’s invalidation of Section 4(b) in *Shelby County*, the foundation of Section 5 no longer remains.

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¹ Large parts of this manuscript are from the author’s dissertation. KEESHA MIDDLEMASS, *The U.S. Justice Department & the Voting Rights Act of 1965: Preclearance and the Implementation of Section Five* (2004) (unpublished Ph.D. dissertation, University of Georgia) (on file with author).

² Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1973a-p, 2006).

³ 42 U.S.C. § 1973c (containing the “coverage formula” that defines the jurisdictions mandated to have their electoral changes precleared under Section Five by federal authorities in Washington, D.C.).

⁴ 42 U.S.C. §1973c(a) (explaining that “covered” jurisdictions, as designated by Section 4(b), must have any changes in their voting laws precleared by either the U.S. Attorney General or the U.S. District Court of the District of Columbia).

⁵ 42 U.S.C. § 1973c (outlining the procedure for the types of electoral changes that must be precleared).

⁶ *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013).

⁷ *Id.* at 2615.

Through a historical analysis, I argue that Section 4(b) must be resuscitated in order to resurrect Section 5; without these two Sections of the VRA, the federal government has few legal resources to prevent the passage and implementation of racially and ethnically discriminatory voting procedures and election laws. Pre-*Shelby County*, previously covered states, such as Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia, as well as covered political subdivisions, such as counties, in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota were captured by Sections 4 and 5.⁸ Post-*Shelby County*, these states and subdivisions can now amend, change, and alter their voting and election laws, including redrawing legislative districts, without prior approval from DOJ or the U.S. District Court of the District of Columbia (D.C.D.C.). There is no preemptive federal law that forbids the implementation of voting changes that have a discriminatory purpose or intent, and there are no laws to protect the ability of racial, ethnic or language minorities in electing their preferred candidate.⁹ *Shelby County* is significant because it opened the legislative flood gates to a new era of “voting rights” that resemble pre-1965: Conservative state legislators have been passing and implementing new election laws with the intent to restrict access to the ballot and undermine the voting rights of the very groups the VRA was designed to protect.

In this Article, Part I analyzes the history and purpose of the Voting Rights Act of 1965, focusing specifically on the preclearance provision in Section 5 and the coverage formula in Section 4(b). Part II describes the role of DOJ and its enforcement of Section 5 in states subject to preclearance. Part III examines *Shelby County*, and discusses the magnitude of the decision, and its determination of why Section 4(b) of the Voting Rights Act is unconstitutional. Part IV considers the changing political environment since *Shelby County*, and how previously covered states are now actively passing new voting and election laws with the knowledge that they no longer have to submit their electoral changes for Section 5 review. Taking into consideration recent legislative developments in formerly covered states, I argue that when Congress reauthorized the Voting Rights Act preclearance provision in 2006 for

⁸ 42 U.S.C. § 1973c (establishing that these states were captured under Section 4(b), and had to preclear their electoral laws under the 1965 Voting Rights Act); 1970 Amendments, Pub. L. 91-285, June 22, 1970, 84 Stat. 314; 1975 Amendments, including the Language Amendments, Pub. L. 94-73, August 6, 1975, 89 Stat. 402.

⁹ 42 U.S.C. §§1973c(b)-(d).

another 25 years, to 2031, Sections 4 and 5 were still necessary to combat racially discriminatory laws.

Despite the election and re-election of President Obama, race continues to be a profound issue when it comes to minority voting rights and electoral representation; therefore, Section 5 needs to be resurrected because of its role in protecting racial and language minority voting rights. Section 4(b) must be saved so that covered states return to having their voting rights and election laws reviewed and precleared under Section 5. This is necessary for at least two reasons: One, some of the newly minted laws are suspect regarding their racial intent and effect—but some are clearly geared towards undermining racial minority voting strength. In some previously covered jurisdictions, state legislators have dusted off earlier electoral changes that were denied preclearance by DOJ before *Shelby County* and began implementing them within days of the decision. Two, as the country's demographic characteristics are quickly shifting, and racial and language minorities, traditionally core voting blocs of the Democratic Party, are increasingly living in or moving to formerly covered states and political subdivisions, these voters are now without the protection of Section 5 in future elections.¹⁰

PART I. HISTORY OF THE VOTING RIGHTS ACT OF 1965

The significance of the 1965 Voting Rights Act cannot be understated. It single-handedly targeted the white power structure, which held onto its political, social and economic power through its massive efforts to disenfranchise Black voters.¹¹ The Fifteenth Amendment¹² was designed to secure the right to vote for Blacks, but securing the right to vote 95 years after its passage was still painfully slow; the VRA was designed to change that history.

The VRA “imposed measures drastic in scope and extraordinary in effect,”¹³ eliminating literacy tests and other tests and devices that southern states used to prevent Black citizens from registering to vote and casting a ballot in local, state and federal elections.¹⁴ Section 5 was specifically

¹⁰ ROBERT MCDUFF, *The Voting Rights Act and Mississippi: 1965-2006*, 17 S. CAL. REV. L. & SOC. JUST. 475, 499 (2008).

¹¹ ELLEN KATZ ET AL., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 691 (2006).

¹² U.S. CONST., amend. XV (the right to vote cannot be denied on the basis of race).

¹³ KATZ, *supra* note 11, at 644.

¹⁴ WAYNE ARDEN ET AL., *RACE AND REDISTRICTING IN THE 1990S*, at 85 (Bernard Grofman, ed., 1998); HEATHER K. WAY, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument*

designed as a safeguard to deter and challenge further state disenfranchisement efforts in states with a history of discrimination and as a preventive measure to target and prohibit political jurisdictions from creating, implementing and enforcing new racially prejudiced and discriminatory voting practices, procedures and rules designed to thwart implementing the Fifteenth Amendment.¹⁵ States political jurisdictions “covered” by the VRA had to first gain approval from DOJ or the D.C.D.C.,¹⁶ which was deliberate. The VRA was designed to “banish the blight of racial discrimination in voting”¹⁷ by responding to the “unremitting and ingenious defiance” of the Fifteenth Amendment in certain parts of the country.¹⁸ In an effort to protect voting rights once gained, Congress also incorporated measures into the VRA with the intent to prevent “backsliding” and the implementation of new discriminatory electoral practices and procedures.¹⁹ The problem that Congress attempted to address was the problem of the 20th Century—the problem of the color-line.²⁰ To reach this end, Congress called for an uncompromising response to the elaborate schemes and election measures passed by legislatures, particularly in the South, but outside of the South as well.

Although the color-line, an indisputable line that utilized extra-legal sanctions to preserve white supremacy and keep the races separate, is no longer maintained through *de jure* laws, it is still visible; political power remains in the hands of a limited few, with the occasional Black or Latino candidate breaking through to win state-wide or national office. Such tokenism does not lead to inclusive policies or politics for the larger minority community. Racial inequality and rampant segregation in cities and towns, school districts, religious congregations, and social settings does not lead to racial progress, collective rights, or integration; rather, minority voting rights have had to be protected through extensive measures, including the passage of the Fourteenth and Fifteenth Amendments, the Voting Rights Act of 1965, and decisions by the U.S. Supreme Court.²¹ Of these efforts, the Voting Rights Act of 1965 is the

for the Incorporation of Section 2, 74 TEX. L. REV. 1439; See 42 U.S.C. § 1973b (2000) as amended Pub. L. 94-73, tit. I, § 101, tit. II, §§ 201-203, 206.

¹⁵ U.S. CONST., amend. XV (the right to vote cannot be denied on the basis of race).

¹⁶ See 42 U.S.C. § 1973c.

¹⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

¹⁸ *Id.*, at 302; U.S. CONST., amend XV (the right to vote cannot be denied on the basis of race).

¹⁹ 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. 385-433 (2008).

²⁰ W.E.B. DU BOIS, *The Souls of Black Folk*, Cambridge, MA: University Press John Wilson and Son (1903).

²¹ *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (CHANDLER

most significant voting rights law passed in the 20th Century.²²

The VRA was extraordinary because it granted discretionary authority DOJ to preclear (accept) or deny any proposed changes in election instruments, voting rights, registration rules, polling places, district lines, and other election related procedures for local, state, and federal elections in jurisdictions covered by the Act. Section 5 required covered jurisdictions to obtain federal approval prior to implementing a change to procedures or rules of voting and election practices. This was a major point of contention as the federal government intruded into a policy domain previously controlled by state and local officials, but the federal intrusion was necessary due to the unwillingness of white elected officials to desegregate the voting booth.²³

Section 4 and Section 5: How They Work Together

Section 5 does not stand alone; rather, it works in tandem with Section 4.²⁴ Section 4 contains the coverage formula to identify jurisdictions that were to be “covered” by Section 5 and the bailout provision.²⁵ Section 4(a) reads, in part, as follows:

To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection 4(b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color.²⁶

Section 4(b), known as the “trigger mechanism,” sets the coverage formula to determine which states and/or political sub-jurisdictions must

DAVIDSON & BERNARD GROFMAN, eds., 1994); ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *The Supreme Court, Race and Civil Rights: From Marshall to Rehnquist* (1995).

²² FRANK P. PARKER, *Black Votes Count: Political Empowerment in Mississippi after 1965*, at 1 (1990); LAUGHLIN MCDONALD, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*. 51 TENN. L. REV. 1 (1983).

²³ See CLARKE, *supra* note 19; PARKER, *supra* note 22; MCDONALD, *supra* note 22.

²⁴ 42 U.S.C. § 1973b-c; MIDDLEMASS, *supra* note 1.

²⁵ 42 U.S.C. §1973b.

²⁶ 42 U.S.C. §1973b(a).

abide by Section 5. Section 4(b) reads as follows:

The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964.

If a state as a whole or a sub-jurisdiction within a state is captured by Section 4(b), the same criteria and standards are applied when submitting electoral changes for Section 5 review to DOJ or the D.C.D.C.²⁷ The VRA directed DOJ or the D.C.D.C. to look for any discriminatory purpose behind all new electoral changes and if the new changes would have a discriminatory effect once implemented. "A covered jurisdiction cannot implement the electoral change until the declaratory judgment action [D.C.D.C.] or administrative [DOJ] preclearance is obtained."²⁸

Constitutionality of the Voting Rights Act

Immediately after its passage, the Voting Rights Act of 1965, and in particular Section 5, was constitutionally tested and subjected to legal challenges.²⁹ The Section 5 provision of the VRA, mandating covered jurisdictions submit all electoral changes to the federal government prior to their implementation, was met with massive resistance from southern jurisdictions.³⁰ In view of the Act's controversial requirements, southern jurisdictions challenged Congress' exercise of power to pass a law to enforce the Fifteenth Amendment and prohibit states' rights to restrict and control access to the ballot.³¹ Southern states immediately challenged the constitutionality of the VRA, and the first challenge came in *South*

²⁷ MIDDLEMASS, *supra* note 1.

²⁸ *Id.*, *supra* note 1, at 96. See MARK POSNER, "Post-1990 Redistricting and the Preclearance Requirement of Section 5 of the Voting Rights Act" in *Race and Redistricting in the 1990s*, at 83 (BERNARD GROFMAN, ed., 1998). Covered jurisdictions could obtain a declaratory judgment for preclearance from the U.S. District Court for the District of Columbia or submit a preclearance request to DOJ.

²⁹ See AARON M. MOORE, *Preserving the Ark of Our Safety: How a Stronger Administrative Approach Could Save Section 5 of the Voting Rights Act*, 64 ADMIN. L. REV. 531-63 (2012).

³⁰ CLARKE, *supra* note 19, at 386. See also, MOORE, *supra* note 29, at 5. Jurisdictions captured by Section 4 must comply with Section 5 and obtain preclearance approval through the administrative process by submitting any changes to the Justice Department or judicially by means of a declaratory judgment from the U.S. District Court for the District of Columbia. Without preclearance, the voting or electoral change is deemed legally unenforceable.

³¹ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Carolina v. Katzenbach.³²

South Carolina argued that the VRA, and in particular Sections 4 and 5, violated the U.S. Constitution and mandated unnecessary intrusion by the federal government into the states' affairs. In an eight-to-one decision, the Supreme Court disagreed, and declared that the Voting Rights Act of 1965 was constitutional in all of the sections challenged, including most of Section 4 and all of Section 5.³³ In denying South Carolina's challenge and affirming the constitutionality of the VRA, the U.S. Supreme Court stated that the long history of discrimination in South Carolina (and the South in general) was evidence enough of the discriminatory practices carried out by the state, and nothing short of the federal government's continual administrative and political pressure would get elected state officials to act in a manner that was antithesis to their own political goals.³⁴ *Katzenbach* held that DOJ had the authority, by way of its principal, Congress, to intervene directly in local and state issues to ensure that the Fifteenth Amendment was enforced. This was made possible through the preclearance process, ensuring that racial discrimination in the electoral process would be deterred, and when found, challenged.³⁵

The *Katzenbach* decision was a major victory for civil rights activists. Moreover, the decision gave a broad reading of the legislative history, and congressional intentions and purpose behind the wording and institutional organization required to implement the VRA. The Court reasoned that "the Voting Rights Act reflects Congress's firm intention to rid the country of racial discrimination in voting"³⁶ and "was designed by Congress to banish the blight of racial discrimination in voting."³⁷ Once the Supreme Court declared the Act constitutional in *Katzenbach*, the legal challenges came in different forms.

Like South Carolina, the story of Mississippi's voting rights history is the story of racial strife, and resistance and defiance of federal intrusion on behalf of Black voters aspiring to attain their equal right to vote. In the wake of the passage of the VRA and its implications for Mississippi

³² *Id.*

³³ *Id.*, at 302.

³⁴ HOWARD BALL, DALE KRANE & THOMAS P. LAUTH, *Compromised Compliance: Implementation of the 1965 Voting Rights Act* 195 (1982).

³⁵ The legal history surrounding Section 5 makes abundantly clear that the covered jurisdiction bears the burden of proof. The placement of the burden of proof on covered jurisdictions is a significant focus of opposition to the Voting Rights Act. See also, *Georgia v. United States*, 411 U.S. 526 (1973), where the Supreme Court rejected a challenge in how DOJ interpreted and implemented the VRA.

³⁶ *Katzenbach*, 383 U.S. at 315.

³⁷ *Id.*, at 308.

politics, a political battle ensued over how best to maintain the status quo in Mississippi (e.g. white supremacy) in light of the VRA's constitutionality. In January 1966, the Mississippi State Legislature convened a session to craft and direct a "massive resistance" agenda.³⁸ The goal of the 1966 Mississippi legislative session was to nullify the VRA's influence in Mississippi and to ensure newly gained Black voting and political power was cancelled or greatly diminished. Approximately thirty bills addressing election laws, voting rights, and the political process were introduced in early January, signifying that the bills were drafted prior to the start of the legislative session.³⁹

The Mississippi legislature attempted to maintain silence about the racial motivation behind proposed legislation, so public hearings about the discriminatory effect of the new measures were avoided; although there were a few references to race and nullifying the Black vote, there was little floor debate that mentioned race as a motivating factor.⁴⁰ By the time the legislative session was over, the all-White Mississippi legislature and Governor enacted thirteen of the 30 proposed bills; although none of the bills denied the right to vote outright, they radically altered Mississippi's election laws by making it more difficult for Blacks to vote, access the polls, and elect candidates of their choice.⁴¹ Despite the state's attempt to be silent about its racial motivation, it was common knowledge that the thirteen new laws were purposely designed to nullify the Black vote; the actions carried out by the state were so blatantly discriminatory, it attracted the attention of the federal government.

In light of *Katzenbach*⁴² Mississippi's attempt to use its political powers to pass and implement racially discriminatory laws and policies was an attempt to challenge the VRA in a more oblique manner; instead of challenging the Act itself, state's like Mississippi changed their strategy and attacked different features of the Act like the types of electoral practices and procedures that were germane to the VRA and subject to Section 5 preclearance. Mississippi's actions were so deliberate, however, that it was just a matter of time before its resistance plan had to be addressed by the federal courts. Following Mississippi's 1966 legislative session, the U.S. Supreme Court heard three critical cases that demonstrated the need for covered jurisdictions to submit their electoral

³⁸ PARKER, *supra* note 22.

³⁹ *Id.*, at 36.

⁴⁰ *Id.*, at 48.

⁴¹ *Id.*

⁴² 383 U.S. 301 (1966).

changes for Section 5 preclearance; two of the cases came out of Mississippi: *Allen v. State Board of Elections*⁴³ and *Perkins v. Matthews*,⁴⁴ and the third case was *Georgia v. United States*.⁴⁵ In each of these three cases, the Court did not waver in its commitment to protecting the voting rights of Black citizens, and set in place standards about the types of electoral processes subject to Section 5.⁴⁶ As a result of Mississippi's patent attempt to undermine Black voting rights, the court cases generated key wins for the protection of voting rights, further reinforced the constitutionality of the VRA, and buttressed DOJ's role in reviewing electoral and voting changes in covered jurisdictions.⁴⁷

The White House, DOJ, and the federal courts played critical but different roles in how the national government responded to Mississippi's obvious efforts to derail minority political participation. The Nixon Administration was resistant to the VRA, and attempted to slow down the execution and implementation of the VRA by DOJ,⁴⁸ which is one example of the potential power the White House could have in shaping the direction of voting rights policy.⁴⁹ The Nixon Administration wanted to pre-define the parameters of how DOJ put into practice the VRA when it reviewed state election laws.⁵⁰ Yet, there was not much that the Nixon Administration could do: In the face of direct opposition from the White House, the federal courts aggressively involved themselves in voting rights issues, preventing the White House from exerting any long-term pressure,⁵¹ plus the involvement of the courts also ensured that the White House could not define how the VRA was going to be implemented.⁵²

*Allen v. State Board of Elections*⁵³ brought the state's massive resistance plan supported only by white Mississippians out into the open. In the case,

43 *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

44 *Perkins v. Matthews*, 400 U.S. 379 (1971).

45 *Georgia v. United States*, 411 U.S. 526 (1973).

46 See *Presley v. Etowah County Commission*, 502 U.S. 491, 502 (1992).

47 *Id.*; MIDDLEMASS, *supra* note 1 at 45; PARKER, *supra* note 22, at 35-7.

48 MIDDLEMASS, *supra* note 1.

49 *Id.* at 46-7; PARKER, *supra* note 22, at 184.

50 MIDDLEMASS, *supra* note 1, at 46-7; PARKER, *supra* note 22, at 184.

51 MIDDLEMASS, *supra* note 1, at 46.

52 *Id.*, *supra* note 1.

53 *Allen v. State Board of Elections*, 393 U.S. 544, 546 (1969) (discussing changes involving the manner of voting, where the Court was asked to address the following issues: can a private litigant bring suit to determine whether a voting change falls under Section Five; should private litigants bring suit in local courts or the U.S. District Court of the District of Columbia? Did Congress intend for such suits to be heard before three-judge district courts with direct appeal to the U.S. Supreme Court? What is meant by a "voting qualification or prerequisite for voting, or standard, practice or procedure with respect to voting" under Section Five?)

the Court did not decide whether or not Mississippi's statutes should be struck down as racially discriminatory, but rather had to decide whether or not the VRA required Mississippi to have its new laws precleared prior to their implementation to determine their possible discriminatory purpose or effect. The sole issue was one of interpretation: If the Court took a broad position, then *all* covered jurisdictions would be obligated to submit electoral and voting legislation to DOJ for preclearance, but if the Court read Section 5 narrowly, then *only* some changes would be subject to Section 5.⁵⁴

Black political participation hinged on the Supreme Court taking the former position, and broadly interpreting the VRA and Section 5 to apply to *all* electoral changes in covered jurisdictions,⁵⁵ but Mississippi officials argued for the latter; a narrow reading of the VRA would benefit the state's massive resistance plan. Mississippi lawyers first argued that the state's new statutes were not covered by Section 5, and then suggested to the Court that a broad reading of Section 5 would conflict with previous federal court decisions *and* create tension with DOJ's implementation of the VRA.

Lawyers representing Black Mississippi voters wanted the Court to broadly read into the VRA the type of electoral changes that had to be precleared. To counter the arguments put forth by Mississippi officials, the plaintiff's argued that the 1965 congressional hearings devoted to the passage of the VRA signaled that Congress intended for a broad interpretation of the Act and its Sections due to past discriminatory history and states' willful evasion of court decrees in other civil rights cases. The congressional record reveals what Congress intended when passing legislation, and in utilizing the congressional record in *Allen*, the plaintiff's also made clear to Congress' agent, DOJ, as well as other institutional actors, namely DOJ's other principals, the White House and the federal courts, the intent of the law.⁵⁶ The U.S. Supreme Court ruled in favor of the plaintiff's, holding that the state of Mississippi could not implement any electoral changes unless they were precleared under Section 5,⁵⁷ and directed DOJ to review the new laws implemented by Mississippi's State Board of Elections.⁵⁸

Allen was the first case that the Court used the language in *Katzenbach*

⁵⁴ MIDDLEMASS, *supra* note 1, at 47.

⁵⁵ *Id.*, at 47.

⁵⁶ *Id.* at 48; CLARKE, *supra* note 19, at 388.

⁵⁷ MCDUFF, *supra* note 10, at 475.

⁵⁸ MIDDLEMASS, *supra* note 1.

to address a number of key holdings brought by private plaintiffs from Mississippi and Virginia. In each individual challenge, local citizens brought suit to enjoin enforcement of uncleared voting changes. The state statutes in dispute revolved around several issues related to write-in ballots, changing an elected board to an appointed board, altering a district-based election system to an at-large voting scheme, and replacing the rules for candidates running in a general election. Drawing on the “one person, one vote” principle, the Court recognized in *Allen* that “[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.”⁵⁹ Again, the Court interpreted Section 5’s preclearance requirement broadly, and applied it to all electoral changes, including statutes affecting registration, voting, and candidate access to being placed on the ballot.⁶⁰ In *Allen*, the Supreme Court held: “Private litigants may invoke the jurisdiction of the district courts to obtain relief under § 5, to ensure the Act’s guarantee that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to that section.”⁶¹ The Court also held that suits brought by private litigants seeking a declaratory judgment regarding a new state statute are subject to Section 5’s requirements, and these actions may be brought in the local district courts.⁶²

The Court changed the nature of the federal-state relationship in *Allen*, and its effect was extraordinary; the Court determined that each of the challenged state statutes were subject to the approval requirements of Section 5⁶³ because the Act recognizes that voting includes “all action necessary to make a vote effective,” and that “any action [and disputes] under this section [5] shall be heard and determined by a court of three judges.”⁶⁴ The Court’s approval of the unique institutional arrangement of Section 5 was aimed at the subtle, as well as obvious, state regulations that could effectively deny citizens their right to vote because of race.⁶⁵

With the constitutionality of the Act decided in *Katzenbach*, *Allen* marked a clear victory in the continuation of an aggressive federal approach to protecting minority voting rights by answering several related questions, including:

⁵⁹ *Allen*, 393 U.S. at 569.

⁶⁰ MIDDLEMASS, *supra* note 1, at 100.

⁶¹ *Allen*, 393 U.S. at 555.

⁶² *Id.* at 559.

⁶³ *Id.* at 565.

⁶⁴ *Id.* at 561.

⁶⁵ *Id.* at 546, 565-66.

[W]hat kinds of voting-law changes are covered under Section Five? Were the preclearance procedures limited strictly to proposed changes in voter registration laws or balloting procedures? Or should the preclearance requirement be applied more broadly to cover all changes that might affect the impact of the vote?⁶⁶

When the Warren Court argued that the VRA should be given the broadest possible reach, *Allen* set in motion the legal framework for Section 5, and sent a clear sign that the federal courts, which were giving instructions to DOJ on what was permissible under Section 5, would provide critical support to uphold the VRA and Section 5.⁶⁷

The *Allen* decision created more work for DOJ: For instance, once the Court determined that all of the challenged Mississippi statutes were subject to Section 5 review, the Assistant Attorney General, Jerris Leonard, acting on behalf of the Attorney General, John Mitchell, lodged a Section 5 objection to all of the statutes challenged in *Allen*.⁶⁸ Mississippi submitted its 1966 statutes to DOJ for review in May 1969, and as soon as DOJ began to object to other southern electoral schemes following *Allen*, other comparable electoral laws and amendments proposed by covered jurisdictions were sent to DOJ for Section 5 review, increasing the work load of the Voting Rights Section. However, the increased work load and the number of Section 5 submissions indicated that DOJ was creating a deterrent effect;⁶⁹ instead of covered jurisdictions passing new legislation and then attempting to implement overtly discriminatory electoral changes, they began to submit changes in their voting procedures and practices, and in time the number of submissions passing muster with Section 5 review improved; covered jurisdictions had decided that by submitting their plans for preclearance and being in compliance with the VRA was less expensive than adopting discriminatory voting procedures and practices, and then fighting for their implementation in federal court.⁷⁰

Yet, Mississippi was obstinate; two years after *Allen*, in *Perkins v. Matthews*,⁷¹ a case from Canton, Mississippi, made its way to the U.S. Supreme Court. The case involved an at-large electoral system in the City of Canton. In 1962, the state passed a law requiring city aldermen to be

⁶⁶ PARKER, *supra* note 22, at 92.

⁶⁷ MIDDLEMASS, *supra* note 1, at 48.

⁶⁸ *Id.*, at 49.

⁶⁹ MIDDLEMASS, *supra* note 1.

⁷⁰ *Id.*; BALL ET AL., *supra* note 34; See PARKER, *supra* note 22, at 8.

⁷¹ *Perkins v. Matthews*, 400 U.S. 379, 387-95 (1971) (holding that changing locations of polling places, changing boundary lines through annexations, and changing from ward to at-large election of aldermen were changes in election procedure requiring federal approval).

elected at-large. “In violation of this state law, the City of Canton continued to elect individuals from single-member wards[, and i]n 1969, in an attempt to comply with the state law, the city implemented an at-large election system.”⁷² Local voters and candidates argued that the plan had to be precleared, while the City claimed it had no other choice than to comply with the 1962 state law. The lower court agreed with the City and did not provide relief; that decision was challenged, and was overturned by the U.S. Supreme Court, which held that the 1969 changes were a new procedure with respect to voting and one that was different from the procedure in place before its implementation, and therefore required preclearance.⁷³ The Court ruled that each of the changes to the electoral systems in Canton fell under the considerations of Section 5 as a “standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964,” and required prior submission.⁷⁴ *Perkins* ruled that the change from single-member districts to an at-large election system for aldermen had to be pre-cleared because the changes in boundary lines, mainly through annexations, determined who was eligible to vote; annexations tend to dilute the weight of votes for those who had the franchise prior to annexation.⁷⁵

In a third challenge to the VRA, *Georgia v. United States*,⁷⁶ the Court held that Georgia’s 1972 reapportionment changes had the potential to dilute the Black vote, and within the meaning of Section 5, as interpreted by *Allen*,⁷⁷ had to be pre-cleared.⁷⁸ Georgia’s original redistricting plan was rejected by the U.S. Attorney General, and therefore it was incumbent on the state to submit additional information in response to the rejection, including the racially discriminatory purpose or effect on minority voting rights; however, the state of Georgia failed to meet this burden.⁷⁹ Therefore, DOJ objected, and the state was required to have its redistricting plan reviewed by the D.C.D.C. for preclearance. Georgia objected, so the Supreme Court weighed in, holding that the DOJ and U.S. Attorney General’s regulations and review process were “wholly reasonable, and consistent with the Act.”⁸⁰ In essence, *Georgia* reinforced the notion that

⁷² MIDDLEMASS, *supra* note 1, at 103.

⁷³ *Id.*

⁷⁴ *Perkins v. Matthews*, 400 U.S. 379, 387-90 (1971); *Id.*

⁷⁵ *Perkins*, 400 U.S. 379 (1971).

⁷⁶ *Georgia v. United States*, 411 U.S. 526, 534 (1973).

⁷⁷ *Allen*, 393 U.S. 544 (1969).

⁷⁸ *Georgia*, 411 U.S. at 531-35.

⁷⁹ *Id.* at 536-39.

⁸⁰ *Id.* at 541.

all electoral changes in covered states required preclearance, that any changes that dealt with voting, access and representation could not be implemented without prior approval from DOJ or the D.C.D.C., and if covered states objected and refused, DOJ could object.

Allen and *Perkins*, both cases from Mississippi, and *Georgia*, were important for six main reasons. First, Mississippi's actions toward Black citizens helped secure the necessary votes in Congress to reauthorize Section 5 of the Act in 1970.⁸¹ Second, the earliest court cases and legal decisions establishing the principle of minority vote dilution in Supreme Court jurisprudence came out of the state of Mississippi.⁸² Third, Mississippi and other southern states massive resistance to changing the status quo helped strengthen Section 5's preclearance requirement; DOJ's role as the main enforcer of Section 5 was protected, and it alone was able to craft a set of practices and principles to determine if an electoral change or voting procedure was racially discriminatory.⁸³ DOJ and the federal courts served as the main federal institutions that protected the right of Black citizens to vote, and ensured that any "backsliding" would be ferreted out so that the right to vote would not be abridged on account of race.⁸⁴ Fourth, the Court made clear that Section 5 was constitutional, which meant that all laws in covered jurisdictions pertaining to voting had to be submitted to DOJ or the D.C.D.C. for preclearance. Fifth, the Court relied on the congressional record and legislative debates surrounding the passage of the VRA in 1965 to reinforce the purpose of the VRA in ensuing decisions.⁸⁵ Sixth, the U.S. Supreme Court established four typologies governing voting, the mechanisms or procedures of voting, and electorally substantive procedures subject to preclearance: (1) changes in the manner of voting; (2) changes in candidacy requirements and qualifications; (3) changes in the composition of the electorate that may vote for candidates for a given office; and (4) changes affecting the creation or abolition of an elective office.⁸⁶ In less than a decade after the passage of the VRA: it was deemed constitutional; Section 5 was affirmed and reaffirmed; the federal courts unflinchingly read the VRA broadly to

⁸¹ MIDDLEMASS, *supra* note 1.

⁸² C.E. TEASLEY, III, *Minority Vote Dilution: The Impact of Election System and Past Discrimination on Minority Representation*. STATE AND LOCAL GOV'T REV. 95-100 (1987).

⁸³ MIDDLEMASS, *supra* note 1.

⁸⁴ *Id.*, at 103; BALL ET AL., *supra* note 34.

⁸⁵ See SCOTT GLUCK, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337 (1996); CLARKE, *supra* note 19. The fact that the Court relied on the congressional record becomes important in *Shelby County* (2013).

⁸⁶ MIDDLEMASS, *supra* note 1.

interpret the types of electoral procedures and practices, subtle and obvious, minor and major that were subject to Section 5 review; and categories of election laws that dealt with substantive issues like representation was just as important as the voting procedures.⁸⁷

The *single* aim of the Voting Rights Act was Black enfranchisement in the South, and with the help of the federal courts, minority voting rights were protected and expanded exponentially under Section 5, undermining the massive campaign in the South to resist changing its politics around the issue of race.⁸⁸ It is strongly believed that progress in the area of Black civil rights and voting participation was obtained due to voting rights laws and litigation forcing covered jurisdictions to comply with the VRA.⁸⁹ This was accomplished only through forced compliance by DOJ and the D.C.D.C.; although the federal courts and DOJ did not work together, the two took cues from one another.⁹⁰ The Supreme Court's affirmation of the VRA provided DOJ (and D.C.D.C.) with needed direction, including the authority to preclear electoral changes and voting laws in covered jurisdictions, and more importantly the power to mandate federal compliance with the VRA.⁹¹ In turn, DOJ contributed to the development of a compliance process that reflected the policymaking and politics of voting rights in a federal system.⁹²

PART II. HISTORY OF PRECLEARANCE & SECTION 5

The implementation of the VRA into a local and state issue was not straightforward due to the unique nature of voting rights, racial politics, dispersed administrative power at the local and state levels, administrative and judicial review at the federal level, and the internal procedures of

⁸⁷ *Georgia*, 411 U.S. 526; The Supreme Court, again in 1980, reaffirmed the constitutionality of the VRA, Section 5, and a broad interpretation of which electoral changes were subject to Section 5 in *City of Rome v. U.S.* (446 U.S. 156, 1980). The Supreme Court, in 1980, reaffirmed the constitutionality of the VRA, Section 5, and a broad interpretation of which electoral changes were subject to Section 5 in *City of Rome v. U.S.* (446 U.S. 156, 1980).

⁸⁸ See J. MORGAN KOUSSER, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 53 (1999); J. MORGAN KOUSSER, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (1974); LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* (2003).

⁸⁹ MIDDLEMASS, *supra* note 1, at 76; MCDUFF, *supra* note 10, at 475; ARDEN ET AL., *supra* note 14; DAVIDSON & GROFMAN, *supra* note 21; DAVIS & GRAHAM, *supra* note 21; PARKER, *supra* note 22, at 11; MOORE, *supra* note 29; TEASLEY, *supra* note 82; BALL ET AL., *supra* note 34, at 195; McDONALD, *supra* note 88.

⁹⁰ McDONALD, *supra* note 88; BALL ET AL., *supra* note 34, at 195; MIDDLEMASS, *supra* note 1.

⁹¹ PARKER, *supra* note 22; BALL ET AL., *supra* note 34, at 195; MIDDLEMASS, *supra* note 1.

⁹² BALL ET AL., *supra* note 34, at 195; MIDDLEMASS, *supra* note 1.

DOJ.⁹³ Implementing and enforcing civil and voting rights laws required the committed assertion of the federal government because “[e]fforts to right past wrongs involved increasingly complex intrusion on state and local autonomy.”⁹⁴ The institutional nature and character embedded into the VRA reflected this reality, and was deemed necessary to counteract the invidious racial animosity towards Blacks and other minorities trying to vote in large swaths of the country.⁹⁵ As a result, “the radical character of voting rights policy directly contradicted the usual pattern of American federalism,”⁹⁶ and a complicated institutional arrangement was set up between DOJ voting rights lawyers and the politically elected officials in covered jurisdictions seeking Section 5 preclearance review.⁹⁷ One of the first major challenges to implement Section 5 in the late 1960s and early 1970s was the limited funds allocated to the Civil Rights Division and the Voting Section of DOJ; thus, because DOJ did not have the use of a “financial carrot” to lure or induce states and local jurisdictions into compliance,⁹⁸ DOJ operated under the short legislatively mandated 60-day window to review any submitted electoral changes and respond to a covered jurisdictions’ request for preclearance. Despite not having the necessary number of field operatives to conduct in-depth investigations and collect data from covered jurisdictions, DOJ used the language of the law to mandate compliance.⁹⁹ The national government’s dramatic assertion into the interests of a state’s and sub-jurisdictions’ area of authority made it clear that the national government was serious about addressing the long history of racial discrimination in the South, despite the strong political and public disagreements over the rightfulness and the substance of the VRA intruding into local affairs.¹⁰⁰

Initially, due to the political nature of the VRA, its implementation started slowly as DOJ primarily focused on increasing voting registration rates and removing barriers to the polls on election day while preclearance remained undefined.¹⁰¹ Although there is no direct evidence, it is safe to

⁹³ BALL ET AL., *supra* note 34, at 195; MIDDLEMASS, *supra* note 1.

⁹⁴ ALICE RIVLIN, *The Evolution of American Federalism* in CURRENT ISSUES IN PUBLIC ADMINISTRATION, at 82 (Frederick S. Lane ed., 5th ed. 1994).

⁹⁵ BALL ET AL., *supra* note 34; MIDDLEMASS, *supra* note 1. Referring to the two types of preclearance avenues covered jurisdictions could take – administrative via DOJ or through the D.C.D.C., with appeals going directly to the U.S. Supreme Court.

⁹⁶ BALL ET AL., *supra* note 34, at 115; MIDDLEMASS, *supra* note 1.

⁹⁷ *Id.*; MIDDLEMASS, *supra* note 1.

⁹⁸ BALL ET AL., *supra* note 34, at 195.

⁹⁹ *Id.*

¹⁰⁰ BALL ET AL., *supra* note 34, 195.

¹⁰¹ *Id.* (quoting MIDDLEMASS, *supra* note 1, at 33).

say that DOJ was waiting until the Supreme Court determined the Act's constitutionality, and then defined the types of electoral changes that were required under Section 5 before DOJ stepped into the politically controversial role of mandating Section 5 compliance.¹⁰² DOJ was also encouraged to act due to a convergence of politics, and several organizations and concerned citizens raising questions, such as the U.S. Commission on Civil Rights,¹⁰³ civil rights organizations, government attorneys, and congressional oversight; the actions of these groups compelled DOJ to take a more active role in enforcing all sections of the VRA, but in particular Section 5.¹⁰⁴ As soon as it became obvious that it was no longer politically feasible to remain inactive, DOJ created a compliance process that reflected the political reality of covered jurisdictions and the voting rights of Black citizens.¹⁰⁵ The goals of the VRA were to ensure jurisdictions' electoral changes were pre-approved via preclearance to ensure that electoral systems would not discriminate against Black voters.¹⁰⁶ All electoral changes submitted for judicial review to the D.C.D.C. or administrative review to DOJ had to demonstrate that the new electoral practices did "not have the purpose and will not have the effect of denying or abridging the right to vote based on race."¹⁰⁷

As seen in Part I, Section 5 was read broadly by the Court to include any voting procedures and practices, changes in the electoral system or qualifications for party or independent candidates, eligibility or registration requirements to vote, or changes in voting precincts due to redistricting, annexation, incorporation, or reapportionment.¹⁰⁸ The Voting Rights Section of DOJ devised guidelines to test whether or not any submitted electoral changes were discriminatory in nature, and focused on ameliorating the historical racial discriminatory practices used in southern

¹⁰² MIDDLEMASS, *supra* note 1.

¹⁰³ THE VOTING RIGHTS ACT, SUMMARY AND TEXT, United States Commission on Civil Rights, 4 (Clearinghouse Publication No. 32, September 1971), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr11032.pdf>.

¹⁰⁴ See Clarke, *supra* note 19, at 385; BALL ET AL., *supra* note 34 (quoting Middlemass, *supra* note 1, at 33).

¹⁰⁵ BALL ET AL., *supra* note 34 (quoting Middlemass, *supra* note 1, at 34); H.M. YOSTE, *Section 5: Growth or Demise of Statutory Voting Rights?*, 48 MISS. L.J. 818, 820 (1977).

¹⁰⁶ MIDDLEMASS, *supra* note 1, at 89-90; 42 U.S.C. § 1973c (2006); See POSNER, *supra* note 28.

¹⁰⁷ 42 U.S.C. § 1973c (2006). POSNER, *supra* note 28, at 33; Clarke, *supra* note 19, at 386.

¹⁰⁸ Early Section 5 submissions concerned: 1. voter registration procedures and other changes affecting the individual vote and if the changes hindered minority voters' access to the ballot; 2. vote dilution; 3. annexation or consolidation changes which decrease a locality's percent of minority voters; 4. polling place changes, and if the change in location were intimidating or inconvenient for minority voters; 5. at-large election systems in jurisdictions with racially polarized voting patterns; and 6. redistricting changes that led to over or under-populated minority districts, and if the changes were retrogressive (Middlemass, *supra* note 1). See Allen, Perkins, Georgia, and Katzenbach.

jurisdictions,¹⁰⁹ with three primary goals: 1) prevent the implementation of discriminatory voting changes through the preclearance process; 2) make sure that all electoral changes were submitted for preclearance review; and 3) facilitate the implementation of non-discriminatory voting changes in plans that did not achieve the required preclearance.¹¹⁰ However, the various political forces that influenced the implementation of the VRA, and the need for care in implementing a complex administrative national voting rights policy at the local level, created an environment in which negotiated settlements between DOJ and some covered jurisdictions were required.¹¹¹

The preclearance process that emerged was a form of “compromised compliance,”¹¹² as a broad range of possible responses and voting changes submitted by state and local officials in covered jurisdictions to DOJ would be acceptable and granted preclearance. In effect, DOJ created a “zone of acceptability” to have electoral changes pre-cleared.¹¹³ This was possible because the political institutions, Congress and the White House, did not set the parameters of the review process; therefore, DOJ crafted its own “set of rules” within the Court’s interpretation of Section 5.¹¹⁴ Because DOJ created an environment in which negotiation was an acceptable and viable route to achieve compliance, it ensured the effective implementation of the VRA, and brought local officials into the process rather than setting up an antagonistic relationship.¹¹⁵ From this balancing act emerged a reasonable approach of prevention and implementation between DOJ’s power to enforce the VRA and its use of techniques to “sting” covered jurisdictions.¹¹⁶ The enforcement of Section 5 reveals that the process was fluid due to political circumstances, federal court decisions, and Congress’ authority to amend the VRA¹¹⁷ to address current and/or on-going conditions and circumstances of voting rights in covered jurisdictions.¹¹⁸

VRA Amendments, 1970, 1975, 1982 & 2006: Extending Section 5

The Court decisions that followed *Katzenbach* demonstrated that a broad

¹⁰⁹ MIDDLEMASS, *supra* note 1.

¹¹⁰ *Id.* at 37 (quoting BALL ET AL., *supra* note 34); POSNER, *supra* note 28, at 80-1; DAVIDSON & GROFMAN, *supra* note 22.

¹¹¹ MIDDLEMASS, *supra* note 1, at 39.

¹¹² BALL ET AL., *supra* note 34 (quoting Middlemass, *supra* note 1, at 34).

¹¹³ BALL ET AL., *supra* note 34; MIDDLEMASS, *supra* note 1, at 35.

¹¹⁴ MIDDLEMASS, *supra* note 1, at 35.

¹¹⁵ BALL ET AL., *supra* note 34; MIDDLEMASS, *supra* note 1.

¹¹⁶ BALL ET AL., *supra* note 34 at 200; MIDDLEMASS, *supra* note 1.

¹¹⁷ *Id.*

¹¹⁸ Congress is granted the power to enforce constitutional amendments, including the Fifteenth Amendment, which supersedes state power. See *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

range of electoral procedures and practices were still in use in covered jurisdictions; the goal of eliminating discriminatory election practices was slow, as the Court had to rely on litigation brought on a case-by-case basis.¹¹⁹ It was determined by the Court and others that this process was unsuccessful at preventing, stopping and overturning racially discriminatory practices, and “was inadequate to combat wide-spread and persistent discrimination in voting because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.”¹²⁰ By 1970, Section 5 had withstood several constitutional challenges, and although the preclearance provision was originally meant to expire, the original goals of the VRA had not been achieved; therefore, Congress extended Section 5 for five additional years to 1975. When Section 5 was up for renewal in 1975, Congress again extended it, this time for seven years, to 1982; yet, southern legislators continued to resist efforts to comply with the VRA and desegregate the right to vote. Each year, new electoral tactics would emerge and achieve similar results as the procedures the Court had deemed unconstitutional. As a result of congressional investigations into the continued irregularities in voting practices in the South, and in other parts of the country, too, Congress extended the preclearance measure in Section 5 in 1982 for an additional 25 years.¹²¹

Congress recognized the continued need for preclearance based on extensive testimony about the use of electoral practices and procedures designed to prevent newly registered Black voters from voting; ¹²² amending the VRA in 1970 reaffirmed the Act’s original purpose, reiterated the national government’s commitment to achieving racial equality in the voting booth, and validated the Supreme Court’s broad scope of Section 5 despite some pushback from the Nixon Administration and the U.S. Attorney General, John Mitchell, who both wanted to abandon the coverage formula known as the “trigger mechanism” in Section 4(b) so that the VRA would apply nationwide.¹²³ The Nixon Administration felt that the “trigger mechanism” subjected southern states to arbitrary punishment that inhibited voting rights reforms.¹²⁴

¹¹⁹ MIDDLEMASS, *supra* note 1, at 107-108, 110.

¹²⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966).

¹²¹ MIDDLEMASS, *supra* note 1, at 105-112.

¹²² *History of Federal Voting Rights Laws*, THE UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited May 31, 2015).

¹²³ MIDDLEMASS, *supra* note 1. Recall, Section 4(b) determines the states and political subdivisions “covered” by the VRA and subject to preclearance.

¹²⁴ *Id.*, *supra* note 1; BALL ET AL., *supra* note 34.

Despite the Administration's disagreement with its counter-part, Congress adopted a new coverage formula, expanding Section 4(b) to include the November 1968 elections to determine which jurisdictions were to be covered by Section 5.¹²⁵ The new coverage formula included the original language from 1965 regarding whether or not covered jurisdictions used a test or device during the five preceding years to determine who was eligible to vote, as well as the requirement for covered jurisdictions to retain their voter registration rolls and data on electoral participation and turn out based on race; such evidence was used by DOJ and the D.C.D.C. during preclearance to determine if the states' actions had for the purpose or the effect of denying or abridging the right to vote on account of race or color.¹²⁶ The 1970 Amendments resulted in the partial coverage of ten additional states.¹²⁷

When Section 5 came up for renewal in 1975, Congress followed the same script as in 1970, holding a series of congressional hearings and collecting evidentiary testimony; these efforts exposed the discriminatory electoral practices used against other minority groups, including Latinos, Asians and Native American citizens, as well as language minorities.¹²⁸ With confirmation and verification that jurisdictions were discriminating widely against minority groups across the country, Congress amended the VRA and Section 4(b) to include language-minorities;¹²⁹ this Amendment covered the entire country. Consequently, covered and non-covered jurisdictions in which a single language minority was more than five percent of eligible voters or where the illiteracy rate within a single language minority was higher than the national average were required to conduct bilingual elections and registration campaigns.¹³⁰ Jurisdictions captured by the 1975 Amendments included numerous states and over 200 counties in several other states.¹³¹

¹²⁵ The previous coverage formula to determine which states were covered by the Act used voting turnout and registration data from the 1964 presidential election (Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, August 6, 1965).

¹²⁶ 42 U.S.C. §1973b(a).

¹²⁷ MIDDLEMASS, *supra* note 1; POSNER, *supra* note 28. The 1970 Amendments included: Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York, and Wyoming. Half of these states have since used the "bail out" provisions in Section Four – Connecticut, Idaho, Maine, Massachusetts, and Wyoming).

¹²⁸ H.R. 6219, 94th Cong. § 1973 (1975).

¹²⁹ 52 U.S.C. § 10310c(3) (2014) (defining 'language minorities' or 'language minority group' as persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage).

¹³⁰ MIDDLEMASS, *supra* note 1, at 105-107.

¹³¹ POSNER, *supra* note 28 (stating that states that were entirely covered by the 1975 language amendments included: Alaska, Arizona, and Texas; states that had counties covered by the 1975 language amendments include: California, Florida, Michigan, New York, North Carolina and South

In 1975, Congress updated the coverage formula and “trigger mechanism” in Section 4(b) to include the 1972 elections as the basis to determine covered states.¹³² The 1975 Amendments were extended for seven years, to 1982, in anticipation of the 1980 Census; it was expected that covered jurisdictions incorporate updated Census information concerning language minorities and other demographic changes into their redistricting plans and other electoral changes when submitting documents for preclearance.¹³³ The 1970 and 1975 Amendments refined the meaning of Section 5, and clarified Congress’ legislative intent for how the VRA was to be implemented going forward; Congress explicitly endorsed an expansive reading of Section 5 to continue to protect minority voters in covered jurisdictions in the South and language minorities in other areas of the country.¹³⁴

The debate surrounding the 1982 Amendments focused again on Sections 4(b) and 5; these two Sections were the most controversial aspects of the VRA, so debate raged on over whether or not the coverage formula and therefore Section 5 should be maintained and extended, or dismantled.¹³⁵ This was not a new debate: Each of the previous times that Section 5 came up for renewal, there was fiery and intense opposition against the continued use of the coverage formula and preclearance requirements; covered jurisdictions resented the federal intrusion and oversight, and always posed the same question about whether or not the requirements were still necessary.¹³⁶ Despite the on-going debate over racial inequality in the electoral process, the importance of voting rights in a democracy, and states’ rights in a federal system, Congress was able to overcome the political hurdles and extend Section 5; however, in 1982, a new dispute was inserted into the debate, and shifted the conversation in an attempt to address what the overall objective of the VRA was, guaranteed equal opportunity for voters or equal results in the outcome of elections?¹³⁷

President Reagan and his DOJ weighed in on the debate, arguing that the VRA had served its purpose and it was time to let the temporary provisions, Section 4(b) and Section 5, expire as they were originally intended in 1965; “however, political necessity ensured that the Act was

Dakota).

¹³² H.R. 6219, 94th Cong. § 1973 (1975).

¹³³ MIDDLEMASS, *supra* note 1; POSNER, *supra* note 28.

¹³⁴ POSNER, *supra* note at 28; MIDDLEMASS, *supra* note 1, at 105-107.

¹³⁵ *Id.*, *supra* note 1, at 107-109.

¹³⁶ MIDDLEMASS, *supra* note 1.

¹³⁷ *Id.*, *supra* note 1, at 108.

extended, as the House and Senate Judiciary Committees' review [of evidentiary material and testimony during congressional hearings] found a continued need for Section Five coverage."¹³⁸ Furthermore, "Congress determined that the existing federal anti-discrimination laws were [in]sufficient to [surmount the continued] resistance of [southern] state officials to enforce the Fifteenth Amendment."¹³⁹

Congressional committees noted that progress had been made regarding minority political representation and that racial discrimination at the polls was declining, but that minority voters continued to face and encounter problems when trying to vote in covered jurisdictions.¹⁴⁰ Accordingly, Congress retained the preclearance requirements, but extended Section 5 for an additional 25 years in 1982 to 2007. The Reagan Administration vigorously opposed the continuation of Section 5; however, experts argued that without preclearance or the ability to take a covered jurisdiction to federal court (e.g. D.C.D.C.), southern jurisdictions would enact new voting schemes to wipe out or slow down the progress made in minority voter turn-out and electoral representation since the passage of the VRA.¹⁴¹ However, one concession made to the Reagan Administration was that Congress did not change the "trigger mechanism" in Section 4(b); the 1972 election results and voter registration data remained as the basis to determine which states would be covered by Section 5, which was in line with Congress' intent in 1965 to eventually have the temporary measures expire.¹⁴² It was believed that if the 1976 or 1980 election results were incorporated into the 1982 Amendments, additional states would be captured, and that an extensive or national preclearance measure would be impractical and maybe even unconstitutional.¹⁴³ The other significant change in the 1982 Amendments was the bailout formula, which had previously applied to entire states but not covered sub-jurisdictions, such as counties.¹⁴⁴ The 1982 Amendments allowed sub-jurisdictions to bailout if it was able to meet all of the requirements regardless of the jurisdiction's original coverage or if it was in a state that was entirely covered.¹⁴⁵

¹³⁸ *Id.*, *supra* note 1, at 108; LISA ERICKSON, *The Impact of the Supreme Court's Criticism of the Justice Department in Miller v. Johnson*, 65 MISS. L.J. 409, 412 (1995).

¹³⁹ MIDDLEMASS, *supra* note 1, at 108.

¹⁴⁰ *Id.*, *supra* note 1, at 108.

¹⁴¹ *Id.*, *supra* note 1, at 110.

¹⁴² *Id.*, *supra* note 1, at 162.

¹⁴³ *Id.*, *supra* note 1, at 108; ERICKSON, *supra* note 138, at 412.

¹⁴⁴ MIDDLEMASS, *supra* note 1, at 108-109.

¹⁴⁵ *Id.*, *supra* note 1, at 108-09. See POSNER, *supra* note at 28. The first bailout action filed under the 1982 bailout standards was brought in 1997 by the City of Fairfax, Virginia. In Virginia, independent cities are the functional equivalent of counties, and possess the same authority over voter

In 2006, the VRA came up for debate prior to its 2007 expiration date, and despite political challenges, Congress renewed the Voting Rights Act “to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution.”¹⁴⁶ The temporary provision, Section 5, was part of the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, Cesar E. Chavez, Barbara Jordan, William Velazquez and Dr. Hector Garcia Voting Rights Act Reauthorization and Amendments Act.¹⁴⁷ Congress and experts argued that for five decades Section 5 has been: an effective tool to overcome Whites’ resistance to implementing the Fifteenth Amendment;¹⁴⁸ a valuable weapon against Jim Crow;¹⁴⁹ a successful instrument to eradicate racially discriminatory voting practices and electoral procedures;¹⁵⁰ and has been constructive at preventing the introduction of discriminatory voting practices and biased tests or devices from going into effect, which ensured continued minority participation at the polls.¹⁵¹ However, Congress documented hundreds of objections interposed by DOJ since 1982; increased numbers of declaratory judgments denied by the D.C.D.C.; and continued litigation pursued by DOJ under Section 2.¹⁵²

Despite significant progress being made to eliminate first generation barriers experienced by minority voters, and “this progress [being] the direct result of the Voting Rights Act of 1965,”¹⁵³ vestiges of

registration and elections as counties do in other parts of the South. DOJ consented to the declaratory judgment, which was entered on October 21, 1997, for the City of Fairfax. MIDDLEMASS, *supra* note 1, at 109, n. 88.

¹⁴⁶ Voting Rights Act Reauthorization and Amendments Act of 2006 at 2(a) (Congressional Purpose).

¹⁴⁷ U.S. Dep’t of Justice, Civil Rights Div., Voting Sec., *History of Federal Voting Rights Laws: The Voting Rights Act of 1965*, available at http://www.justice.gov/crt/about/vot/intro/intro_b.php. Signed into law by George W. Bush on July 27, 2006. *Id.*

¹⁴⁸ U.S. CONST. amendment XV (the right to vote cannot be denied on the basis of race); NETA LEVANON, *The Ascendancy of Associational Freedoms: Section 5 of the Voting Rights Act and Political Party Delegate Allocation*, 111 COLUM. L. REV. 848, 882 n. 180 (2011); JAMES THOMAS TUCKER, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 221 (2007); ENBAR TOLEDANO, *Section 5 of the Voting Rights Act and Its Place in “Post-Racial” America*, 61 EMORY L.J. 389, 391 (2012); TRAVIS CRUM, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2000 n. 32 (2010); MICHAEL J. PITTS, *Georgia v. Ashcroft: It’s the End of Section 5 As We Know It (and I Feel Fine)*, 32 PEPP. L. REV. 265, 266 (2005); MYRNA PEREZ & VISHAL AGRAHARKER, *If Section 5 Falls: New Voting Implications*, THE BRENNAN CENTER FOR JUSTICE ANALYSIS 1 (2013), available at http://www.brennancenter.org/sites/default/files/publications/Section_5_New_Voting_Implications.pdf.

¹⁴⁹ PARKER, *supra* note 22.

¹⁵⁰ PITTS, *supra* note 148, at 275.

¹⁵¹ MIDDLEMASS, *supra* note 1.

¹⁵² Voting Rights Act Reauthorization and Amendments Act of 2006 at 2(b)(4)(A-D) (Congressional Findings).

¹⁵³ *Id.* at 2(b)(1) (Congressional Findings).

discrimination embedded in second generation barriers were now preventing minority voters from participating in the electoral process; thus, racial and language minorities remain politically vulnerable and warranted continued protection under the VRA.¹⁵⁴ Therefore, Congress argued, the evidence overwhelmingly demonstrated the continued need for federal oversight in covered jurisdictions. Congress extended Section 5 for an additional 25 years, and kept in place the need for covered jurisdictions to submit their electoral changes to DOJ for preclearance or the D.C.D.C. before implementing any voting or electoral changes.¹⁵⁵

Although there was some muted dispute about extending Section 5, the 2006 Amendments were not controversial: “The extension of the temporary provisions of the 1965 Voting Rights Act sailed through Congress and was signed into law by President George W. Bush on July 27, 2006 without major turbulence.”¹⁵⁶ The 2006 Amendments and Reauthorization of the VRA was a welcoming event in comparison to the contentious past, which was probably due to a confluence of factors: Bipartisan support in the U.S. House and Senate; a strong push from the Bush Administration to get the Amendments done; the reality that demographic changes in the electorate made challenging the extension a political non-starter for many politicians;¹⁵⁷ and the fact that conservative opposition in covered jurisdictions was muted, as any political unrest arguing to dismantle Section 5 was muffled by leadership.¹⁵⁸

Each set of Amendments to the VRA were political statements about the importance of the Act’s original purpose, to protect and ensure minority political participation; when Congress had the opportunity to amend the VRA in response to the federal courts’ interpretation of the statutory language or political pressure from the White House or constituents, it choose to do so incrementally, as Congress could not (or was unwilling) to put together the needed legislative majorities to dismantle the temporary provisions, namely Sections 4(b) and 5. As a result, the Amendments to the Act were a response to and the product of the federal courts making important decisions about the constitutionality of the VRA and how it was to be interpreted; Congress then “approved” those decisions by reaffirming the Act by extending the most important, and controversial, provisions of

¹⁵⁴ *Id.* at 2(b)(3) (Congressional Findings).

¹⁵⁵ MOORE, *supra* note 29, at 106; 42 U.S.C. § 1973c; 28 C.F.R. §51.10 (2011).

¹⁵⁶ TUCKER, *supra* note 148, at 205 no. 2.

¹⁵⁷ *Id.*, *supra* note 148, at 206.

¹⁵⁸ *Id.*, *supra* note 148, at 206.

the VRA.¹⁵⁹ The analysis and description of the amendments to the VRA provides some insight in how Congress viewed the legislative intent of the 1965 Act, and reaffirms its continued importance in protecting minority voting rights.

Section 5 Comes Under Assault by the Federal Courts

Prior to the passage of the Voting Rights Act in 1965, the 1957 U.S. Commission on Civil Rights¹⁶⁰ gathered information on voting rights, discrimination in voting due to race, and the hostile environment in which Black voters found themselves; because previous laws proved to be ineffective and inadequate at protecting Black voting rights,¹⁶¹ the VRA and its extensive and extraordinary provisions were needed to protect the voting rights of all American citizens.¹⁶² Since, the political landscape has noticeably changed in terms of implementing the Fifteenth Amendment, providing racial and language minorities' unfettered access to the ballot, and expanding the opportunity for racial and ethnic minorities to run for and win political office.¹⁶³ This was only possible because the VRA was a radical departure from prior voting rights laws, was purposely enacted to eliminate discriminatory voting practices and procedures,¹⁶⁴ and because the extraordinary measures written into the Act were interpreted as constitutionally sound by the federal courts, extended by Congress, and implemented by DOJ.

Preclearance was considered the “front line defense against voting discrimination”¹⁶⁵ because it was designed to prevent, rather than just combat, the use of old voting procedures and the emergence of new

¹⁵⁹ MIDDLEMASS, *supra* note 1.

¹⁶⁰ UNITED STATES STATUTES AT LARGE, PL 85-315, September 9, 1957, 71 Stat. 634

¹⁶¹ H.R. REP. 109-478, 6-7, 2006 U.S.C.C.A.N. 618, 621, at 7 (noting that the Voting Rights Act of 1965 was prompted by the failure of 1957, 1960, and 1964 civil rights laws aimed at enforcing the Fifteenth Amendment).

¹⁶² Voting Rights Act of 1965, Pub L. 89-110; GARRINE P. LANEY, *The Voting Rights Act of 1965, As Amended: Its History and Current Issues*, CRS Report for Congress, available at <http://file.wikileaks.org/file/crs/95-896.txt>. (2008).

¹⁶³ SABINA JACOBS, *The Voting Rights Act: What Is the Basis for the Section 5 Baseline?*, 42 LOY. L.A. L. REV. 575, 575 (2009); CHRISTOPHER F. MORIARTY, *The Demise of the Voting Rights Act?: A Preview of Northwest Austin Municipal District Number One v. Holder*, 4 DUKE JOURNAL OF CONSTITUTIONAL LAW & PUBLIC POLICY SIDEBAR 459, 459 (2009), available at http://scholarship.law.duke.edu/djclpp_sidebar/52; ELLEN D. KATZ & ANNA BALDWIN, *Why Counting Votes Doesn't Add Up: A Response to Cox and Miles' Judging the Voting Rights Act*, 108 COLUM. L. REV. SIDEBAR 23, 23 (2008).

¹⁶⁴ JACOBS, *supra* note 163 at 575.

¹⁶⁵ CLARK, *supra* note 19, at 181; S. REP. 94-295, 1, 1975 U.S.C.C.A.N. 774, 774.

discriminatory voting practices.¹⁶⁶ But, supporters of the VRA began to worry about changes in the Court's composition, and the effects new personnel would have on questioning and challenging the VRA's constitutional validity and Congress' power to extend it. For instance, the overall effectiveness of the VRA since 1982 was undermined by Supreme Court decisions *Reno v. Bossier Parish II*¹⁶⁷ and *Georgia v. Ashcroft*,¹⁶⁸ which Members of Congress argued in the 2006 Reauthorization debate "have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by Section 5 of the Act."¹⁶⁹ The biggest change came when *Georgia v. Ashcroft* scaled back Congress' ability to exercise its broad latitude to do almost anything it wished when it came to civil and voting rights legislation.¹⁷⁰ These two cases were alarming; in the previous decade, Congress seemingly had limitless power to subject states and sub-political jurisdictions to a range of social and economic policies under the Commerce Clause and the Fourteenth Amendment,¹⁷¹ but the Court moved to constrain and reduce federal power and authority over the states.¹⁷² One troubling development was the Court's disposition to slow down the momentum of federal and congressional oversight of civil and voting rights.¹⁷³

Under Chief Justice Rehnquist in the 1990s, the Supreme Court showed

¹⁶⁶ JACOBS, *supra* note 163 at 577.

¹⁶⁷ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) ("*Bossier Parish II*"). The Court held that Section 5 language and *Beer*'s holding did not prohibit preclearance of a redistricting plan enacted with a discriminatory purpose - covered jurisdictions must establish that proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The covered jurisdiction bears the burden of persuasion on both points. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) ("*Bossier Parish I*").

¹⁶⁸ In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Supreme Court held that the U.S. District court did not consider all of the obligatory and relevant factors when reviewing Georgia's original redistricting plan that resulted in retrogression of Black voters' effective exercise of the right to vote. The Court thought that minority voters could cast an effective vote when minority voters are spread over a greater number of districts, creating more districts in which minority voters can have the opportunity, but not a certainty of electing a candidate of their choice. The Court rules that such a strategy would increase substantive representation, and undermine *Beer v. United States*, 425 U.S. 130 (1976).

¹⁶⁹ Voting Rights Act Reauthorization and Amendments Act of 2006 at 2(b)(5-6) (Congressional Findings).

¹⁷⁰ See PITTS, *supra* note 148; see GEOFFREY LANDWARD, Note and Comments, *Board of Trustees of the University of Alabama v. Garrett and the Equal Education Opportunity Act: Another Act Bites the Dust*, 2002 BYU EDUC. & L. J. 313.

¹⁷¹ See LANDWARD, *supra* note 170; JAMES LEONARD, *Symposium: The American with Disabilities Act: A Ten-Year Retrospective: The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 92 (Fall 2000).

¹⁷² See LEONARD, *supra* note 171; See also THEODORE W. RUGER, *Introduction: New Federalism*, 16 WASH. U. J.L. & POL'Y 89, 89 (2004).

¹⁷³ RUGER, *supra* note 172.

a strong willingness to defer to a states' right to determine its own civil and voting rights laws if it was able to demonstrate a compelling state interest that supported its actions.¹⁷⁴ Court decisions involved reducing congressional reach in areas associated with "conservative" substantive politics, where states' rights were invoked in the name of protecting state sovereignty.¹⁷⁵ As the Court became more conservative during George W. Bush's term in office (2001-2008),¹⁷⁶ limited federal authority and decentralized state decision making have been applied to a range of social and economic policies.¹⁷⁷ The Court hastened a debate over the proper role of the federal government and state sovereignty, and the political and legal arguments focused on re-calibrating the allocation of federal authority interfering in a state's power to govern its own electoral processes.

With regards to the right to vote, the question of national power and state sovereignty has altered since the Constitutional Convention; states began with all of the power over voting rights, even after the Civil War, until the passage of the Voting Rights Act in 1965.¹⁷⁸ The jurisdictional tensions developed because the right to vote is not an integral part of the original U.S. Constitution; it is protected by several constitutional amendments¹⁷⁹ and federal statutes that support the implementation of those Amendments,¹⁸⁰ but the right to vote is historically a state issue.¹⁸¹ Federal laws and

¹⁷⁴ See LANDWARD, *supra* note 170; See ERWIN CHERMERINSKY, *Forecasting the Future of Federalism*, TRIAL, July 2001, at 18.

¹⁷⁵ RUGER, *supra* note 172, at 91.

¹⁷⁶ e.g. *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court was tasked with deciding the winner and loser of the 2000 presidential election, and the certification of Florida's presidential election results. The 7-2 decision determined that the Florida Supreme Court's scheme to recount ballots was unconstitutional as different ballot standards were applied across ballots, precincts and counties, and there was not enough time for a "constitutionally sound" recount. Because of the procedural difficulties in implementing such a recount, the Court ruled 5-4 that the Supreme Court of Florida had violated the U.S. Constitution and that the recount was tainted by shifting methods of vote-counting, which violated the equal protection clause of the Fourteenth Amendment. The U.S. Supreme Court ordered the recount abandoned, and named George W. Bush the winner of Florida's electoral votes, and therefore the winner of the Electoral College. The decision seemed particularly partisan; the interests of the conservative candidate went against the traditional conservative principles of "states' rights." See RUGER, *supra* note 172; See JOHN BRIGHAM, *New Federalism: Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J.L. & POL'Y 195, 202 (2004).

¹⁷⁷ See RUGER, *supra* note 172; LANDWARD, *supra* note 170; PITTS, *supra* note 148.

¹⁷⁸ ALEXANDER KEYSSAR. 2000. *The Right to Vote: The Contested History of Democracy in the United States*. New York, NY: Basic Books; See MICHAEL PERMAN. 2001. *Struggle for Mastery: Disenfranchisement in the South, 1888-1908*. Chapel Hill: UNIV. OF NORTH CAROLINA PRESS; McDonald, *supra* note 84.

¹⁷⁹ U.S. CONST. amendment XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI; See also *The Voting Rights Act of 1965* (abolishing literacy tests); and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding that poll taxes were unconstitutional in federal, state and local elections);

¹⁸⁰ Voting Rights Act of 1965, 52 U.S.C. 10301 et seq.; National Voter Registration Act of 1993; 52 U.S.C. 20501 et seq.; Help America Vote Act of 2002; 52 U.S.C. 20901 et seq.

policies arose only when state actions were so egregious that the federal government could no longer stand by and watch (e.g. Civil War and the Civil Rights Movement).¹⁸² But, in the area of voting rights in a democracy, who regulates the right to vote is and has been problematic in the United States. Voting rights and the manifest of political power in the hands of local institutions, particularly in the South, was the result of slavery and its successors, Black Codes and Jim Crow, which used race to govern all social, economic and political interactions.¹⁸³ The color line in the South was the defining issue on who could access the ballot and voting rights,¹⁸⁴ which made the role of the U.S. Supreme Court paramount in protecting the right to vote by finding the VRA and its implementation constitutional.

In a system of government that is a mix of local, state, and national sovereignty, with multiple levels of government with different responsibilities that overlap over constitutional, political, social, economic and geographical jurisdictions and legal spaces on a continuous basis, questions of “power” are bound to be raised:¹⁸⁵ The allocation of federal and state power is an on-going political debate, and there may never be a “correct” allocation of power within one policy area that fits the political needs of each government within the American federal system.¹⁸⁶ Congress, pursuant to implementing the Fourteenth and Fifteenth Amendments, explicitly wrote provisions to ensure there would be no “backsliding” with regards to minority voting rights and the implementation of the Fifteenth Amendment; by 2006, these issues were no longer in dispute:¹⁸⁷ Section 5, from its passage and through its subsequent reauthorizations, was understood to force electoral compliance of states and

¹⁸¹ KEYSSAR, *supra* note 178.

¹⁸² BRIGHAM, *supra* note 176; *See also* LEONARD, *supra* note 171; LANDWARD, *supra* note 170.

¹⁸³ KEYSSAR, *supra* note 178; ROBERT LIEBERMAN. 2005. *Shaping Race Policy: The United States in Comparative Perspective*. PRINCETON, NJ: PRINCETON UNIVERSITY PRESS; PERMAN, *supra* note 178; PARKER, *supra* note 22.

¹⁸⁴ *See* HERBERT BLUMER. 1965. *The Future of the Color Line; The South in Continuity and Change*, edited by John McKinney & Edgar Thompson, 322-336. Durham, NC: DUKE UNIVERSITY PRESS; MICHAEL GOLDFIELD, 1991; *The Color of Politics in the United States: White Supremacy as the Main Explanation for the Peculiarities of American Politics from Colonial Times to the Present*, THE BOUNDS OF RACE: PERSPECTIVES ON HEGEMONY AND RESISTANCE, edited by DOMINICK LACAPRA, 104-133. Ithaca, NY: CORNELL UNIV. PRESS; Key, V. O., JR. 1949; *Southern Politics in State and Nation*. New York: Knopf.

¹⁸⁵ BRIGHAM, *supra* note 176, discussing the expansion of federal power in the policy areas of the death penalty, Commerce Clause, the environment, abortion rights, civil liberties, and civil rights.

¹⁸⁶ BRIGHAM, *supra* note 176.

¹⁸⁷ AKHIL REED AMAR, *The Lawfulness of Section 5 - and Thus of Section 5*, 126 HARV. L. REV. F. 109 (2013).

other covered jurisdictions to come into agreement with the VRA.¹⁸⁸ However, individuals still question what the “proper” role of the VRA and Section 5 are in reference to its original purpose and the current political climate; only the coverage formula in Section 4(b), which is used to apply Section 5, and the bailout provision have fundamentally changed since 1965.¹⁸⁹

In different eras, the Court has given states a lot of latitude to determine and decide what is “best” for its citizens, and an open question remains—what is the scope and proper role of federal and state authority? A related question revolves around which entity, the Court or Congress, is the proper arbiter for the boundaries of federal law when it concerns the right to vote. Recent court decisions concerning Section 5 suggest that the Court has deemed itself the proper institution to overrule Congress and reinterpret legislative history to tilt the federal-state balance of power back in the states’ direction, which effectively strips Congress of its role in passing voting rights legislation.¹⁹⁰ With the Court’s shift towards granting states more rights, it has undermined the federal role in protecting minority voting rights, and this is no more evident than in *Shelby County v. Holder*.

PART III: SHELBY COUNTY V. HOLDER

Shelby County arose because of an earlier court case challenging the 2006 Amendments and Reauthorization of the VRA; in August, 2006, a water district in Austin, Texas, filed a federal lawsuit challenging Congress’ authority to reauthorize Section 5 of the VRA. In *Northwest Austin Municipal Utility District No. 1 v. Holder*,¹⁹¹ the small utility district had an elected board that was subject to preclearance if any changes were made to its electoral system or election process. The utility district sought relief under the “bailout” provision in Section 4(a) of the VRA; the 1982 Amendments allowed political sub-jurisdictions to be released from Section 5 preclearance requirements if it met all of the conditions. The utility district argued that if it was ineligible for bailout under Section 4(a), then Section 5 was unconstitutional. The U.S. District Court rejected both

¹⁸⁸ JACOBS, *supra* note 163, at 577; MORIARTY, *supra* note 163.

¹⁸⁹ CRUM, *supra* note 148; Voting Rights Act Amendments of 1970, June 19, 1970, Pub. L. No. 91-285, 84 Stat. 314; PL 94-73 (HR 6219), PL 94-73, August 6, 1975, 89 Stat 400; PL 97-205 (HR 3112), PL 97-205, JUNE 29, 1982, 96 Stat 131; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, July 27, 2006, Pub. L. No. f 109-246, 120 Stat. 577.

¹⁹⁰ LANDWARD, *supra* note 170; See CHEMERINSKY, *supra* note 174; RUGER, *supra* note 172; PITTS, *supra* note 148.

¹⁹¹ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

claims, arguing that Section 4(a) only applies to counties, parishes or political subunits that register voters; therefore, because the utility district did not register its own voters it was not an eligible entity to “bailout” from preclearance. The District Court also concluded that the 2006 Amendments to the VRA extending Section 5 for 25 years were constitutional. *Northwest Austin Municipal Utility District No. 1* appealed the U.S. District Court decision, and when the U.S. Supreme Court heard the case, it held in an 8-1 decision that:¹⁹²

the historic accomplishments of the Voting Rights Act are undeniable, but the Act now raises serious constitutional concerns. The preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to our federal system. Some of the conditions that the Court relied upon in upholding this statutory scheme in *South Carolina v. Katzenbach*¹⁹³ and *City of Rome v. United States*¹⁹⁴ have unquestionably improved. Those improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success, but the Act imposes current burdens and must be justified by current needs. The Act also differentiates between the States in ways that may no longer be justified.¹⁹⁵

In *Northwest Austin*, the Supreme Court did not rule on the constitutionality of the VRA, arguing that “[o]ur usual practice is to avoid the unnecessary resolution of constitutional questions;”¹⁹⁶ however, the Supreme Court did find that the utility district was eligible under the VRA to seek bailout from Section 5,¹⁹⁷ reversing the District Court’s decision while not addressing the second question concerning the constitutionality of Section 5 and whether Congress’ 2006 extension of Section 5 was a valid exercise of congressional power. Supreme Court Justice Clarence Thomas, in a concurring judgment and dissent, argued that the Court should have addressed the constitutionality of Section 5 in *Northwest Austin*, criticizing the Court for not speaking to that issue. He went on to

¹⁹² *Id.*, Justice Thomas concurred in part and dissented in part: In his dissent, Thomas argued that even if the Court resolves the district’s statutory argument in its favor, the constitutional question must still be raised and answered. *Id.* at 212.

¹⁹³ 383 U.S. 301 (1966).

¹⁹⁴ 446 U.S. 156 (1980).

¹⁹⁵ *Northwest Austin*, 557 U.S. 193.

¹⁹⁶ *Id.* at 197.

¹⁹⁷ The Court reasoned that the language of Section 4(a) and the bailout provision did not constrict political subunits like the utility district from bailing out of Section 5 coverage. Moreover, the Court also argued that as only 17 of the 12,000 jurisdictions covered by Section 5 had bailed out suggested that Congress never intended the bailout measure to be so stringent and difficult for jurisdictions to bailout. *Id.* at 207.

argue that he thought that Congress exceeded its constitutional authority to enforce the Fifteenth Amendment when it extended Section 5 in 2006; Thomas' dissent set up a future judgment day to determine the constitutionality of the two most important provisions of the VRA, Section 4(b) and Section 5.

The significance of *Northwest Austin* is that the Court held that Section 5 and the coverage formula of the VRA “imposes substantial federalism costs” and “differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty,”¹⁹⁸ and that “things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”¹⁹⁹ In *Northwest Austin*, the Court questioned whether the problems that Section 5 was meant to address were still a concern in the jurisdictions singled out for preclearance.²⁰⁰ As a result of these questions, it was clear that Justices on the Supreme Court had “serious misgivings about the constitutionality of §5”²⁰¹ and suggested that “its coverage formula [in Section 4(b)] raise[s] serious constitutional questions.”²⁰² In *Northwest Austin*, the Court stated that it had resolved the utility districts' challenge on statutory grounds, granting the utility district “bailout” from Section 5, but expressed grave doubts about the VRA's continued constitutionality.²⁰³

The Justices' statements in *Northwest Austin* imply the Court was in the mood to find Section 5 unconstitutional, but was not given the appropriate circumstances to address that specific question.²⁰⁴ Instead, the Court made clear three specific issues: the coverage formula based on data that is more than 35 years old did not consider current political conditions, including significant changes in the South and the fact that voter turnout and registration rates now approach parity; Section 5 in 2009 goes beyond the implementation of the Fifteenth Amendment;²⁰⁵ and that although the VRA has been a monumental success, past successes are not adequate

¹⁹⁸ *Northwest Austin*, at 202-3.

¹⁹⁹ *Id.* at 203.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 202.

²⁰² *Id.* at 204.

²⁰³ See Justice Thomas' dissenting opinion in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193.

²⁰⁴ The Court cited *Northwest Austin* more than thirty times in *Shelby County*, and there were only a few new pages inserted in the majority opinion. Sections I and II of *Northwest Austin* are strikingly similar to Sections I, II and III in *Shelby County*. The new material specifically addressed the issues and arguments raised by *Shelby County*, Alabama, the government and the dissenting opinion.

²⁰⁵ *Id.* at 202.

justification to retain the preclearance requirements of Section 5.²⁰⁶

A year after *Northwest Austin*,²⁰⁷ the Court was given its chance when a largely white suburb of Birmingham, Alabama, filed suit in federal court seeking to have Section 5 declared unconstitutional. Taking up Justice Thomas' call to find Section 5 unconstitutional, Shelby County, Alabama, in 2010, claimed that Congress' extension of Section 5 in 2006 was unconstitutional because Congress did not have the authority to reauthorize Section 5 of the VRA. Shelby County, Alabama, went to federal court seeking a declaratory judgment concerning the constitutionality of Sections 4(b), the "trigger mechanism," and Section 5, preclearance.

At trial, the U.S. District Court upheld the constitutionality of Section 5, finding that Congress, in 2006, reviewed sufficient evidentiary material to justify reauthorization of Section 5 and the continuation of Section 4(b)'s coverage formula. The D.C.D.C. affirmed the decision, upholding the constitutionality of Section 5, and concluding that Congress acted appropriately in 2006 but that Section 2²⁰⁸ litigation remained an inadequate measure to protect minority voting rights. Therefore, Section 5 was still necessary, and that meant that the coverage formula in Section 4(b) passed constitutional muster, too. The U.S. Circuit Court of Appeals affirmed; after extensive review and analysis of the record,²⁰⁹ the Circuit Court of Appeals accepted Congress' conclusion that Section 2 remained inadequate and Section 5 was still necessary in covered jurisdictions to protect minority voters' voting rights.²¹⁰ Shelby County, Alabama, appealed, and the Supreme Court granted *certiorari*.²¹¹

In *Shelby County v. Holder*,²¹² the Court noted the historic importance of the VRA, and remarked that "exceptional conditions can justify legislative measures not otherwise appropriate,"²¹³ but the unprecedented nature of those measures were to expire after five years.²¹⁴ The Court continued, stating that "[n]early 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until

²⁰⁶ *Northwest Austin*, 557 U.S. 193; See SAMUEL ISSACHAROFF, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

²⁰⁷ 557 U.S. 193.

²⁰⁸ 52 U.S.C. §10301(a), bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color;" is a permanent provision of the VRA and is applied nationwide.

²⁰⁹ *Shelby Cnty.*, 133 S. Ct. 2612.

²¹⁰ *Id.* at 865-73.

²¹¹ *Shelby Cnty.*, 133 S.Ct. at 2612.

²¹² 133 S. Ct. 2612 (2013).

²¹³ *Id.* at 2618 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966)).

²¹⁴ *Id.* at 2615; Voting Rights Act of 1965, §4(a), Pub. L. 89-110, 79 Stat. 438.

2031.”²¹⁵ The Court was fixated on how Section 5 was initially a temporary provision set to expire after five years, in 1970, but that it had been reauthorized several times, the last being 2006 for an additional 25 years, so it had been operating as a permanent feature of the VRA. “There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”²¹⁶ The Court conceded that “voting discrimination still exists; no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, ‘the Act imposes current burdens and must be justified by current needs.’”²¹⁷

Most importantly, however, the Court narrowed in on how the coverage formula, Section 4(b), had not changed since 1982, and that it still relied on whether or not a jurisdiction used a voting test or device in the 1972 elections and if the same jurisdiction had low Black voter registration and/or turnout. The Court deemed that the 1982 Amendments, when Congress reauthorized Section 5 for 25 years but did not make any changes to the coverage formula in Section 4(b)²¹⁸ and amended the bailout provisions in Section 4(a) allowing political subdivisions of covered jurisdictions to bailout of Section 5 preclearance,²¹⁹ were constitutional.²²⁰ When referring to *Northwest Austin*, the Court argued that the “‘underlying constitutional concerns,’ among other things, ‘compelled a broader reading of the bailout provision,’ we construed the statute to allow the utility district to seek bailout,”²²¹ but that broader reading did not apply to the 2006 Amendments, the Court’s real focus in *Shelby County*.

The 2006 Amendments and the coverage formula that determined which states and sub-jurisdictions were subject to preclearance had not changed since 1982; the Court went on to state that when Congress reauthorized Section 5 in 2006 for an additional 25 years, without any changes to its coverage formula,²²² it was prohibiting more conduct than before,

²¹⁵ *Id.* at 2618.

²¹⁶ *Id.* at 2618.

²¹⁷ *Id.* at 2619 (citing *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. at 203 (2009)).

²¹⁸ Voting Rights Act Amendments, Pub. L. 97-205, 96 Stat. 131.

²¹⁹ 52 U.S.C. §10304(a) (allows jurisdictions to earn exemption from coverage by satisfying a three-judge panel of the United States District Court for the District of Columbia that, in the previous ten years, they have not used a test or device “for the purpose or with the effect of denying or abridging the right to vote on account of race or color”).

²²⁰ *Shelby Cnty.*, 133 S.Ct. at 2620.

²²¹ *Id.* (citing *Northwest Austin*, 557 U. S. at 207).

²²² *Id.* at 2616.

forbidding “voting changes with ‘any discriminatory purpose’ as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, ‘to elect their preferred candidates of choice.’”²²³

The Court noted that Congress and the country had witnessed significant progress in eliminating first generation voting rights barriers preventing minorities from accessing the ballot, that the changes included increased minority voter registration, voter turnout, and representation in Congress, state legislatures and local elected office,²²⁴ and reasoned that the progress and improvements in minority voting rights was “in large part *because* of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.”²²⁵ “Yet, the Act has neither eased the restrictions in §5 nor narrowed the scope of the coverage formula in §4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed.”²²⁶ “Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years.”²²⁷ Therefore, the Court argued, Section 4 of the VRA was unconstitutional due to the “age of the coverage formula” (e.g. 1972 election results), and that when Congress had the opportunity to update the coverage formula in 2006, it choose not to do so; therefore, the Supreme Court argued just because “. . . voting discrimination still exists; no one doubts that. The question is whether the VRA’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements.”²²⁸

While striking down an Act of Congress “is the gravest and most delicate duty that this Court is called on to perform,”²²⁹ the Court deemed that it was appropriate to do so in 2013 because Congress failed to update the coverage formula. This failure to act left the Court in the position of having no choice but to declare §4(b) unconstitutional; with these few words, the Court overturned the lower courts, holding that Section 4(b) of the Voting Rights Act was unconstitutional, declaring that Section 4(b) was

²²³ *Id.* at 2621. See 52 U.S.C. §10301(b)–(d).

²²⁴ *Shelby Cnty.*, at 14; See §2(b)(1), 120 Stat. 577; See the House Report on increased registration, voters and representation in H.R. Rep. No. 109–478, p. 12 (2006). See McDuff, *supra* note 10.

²²⁵ *Shelby Cnty.*, at 14. See §2(b)(1), 120 Stat. 577.

²²⁶ *Shelby Cnty.*, at 14.

²²⁷ *Id.*; See §6, 84 Stat. 315; §102, 89 Stat. 400.

²²⁸ *Shelby County v. Holder* 133 S. Ct. 2612 (2013).

²²⁹ *Blodgett v. Holden*, 275 U. S. 142, 148 (1927).

no longer valid because the statutory language did not take into account the political changes that have occurred in terms of racial politics since the provision was last been amended in 1975.²³⁰ The Court undermined Section 4(b), and chastised the inaction of Congress to fix the coverage formula in Section 4(b), noting that the current evidence about voting rights of minority voters was satisfactory to overturn §4(b). The Court declared that Congress had the power to draft another coverage formula based on current conditions, but that a determination of exceptional conditions must justify such an extraordinary departure from the traditional federal-state relationship.²³¹ Therefore, the Court determined that Section 4(b)'s "trigger mechanism" and coverage formula can no longer be used as a basis for determining and subjecting jurisdictions to Section 5 preclearance. The Court single-handedly concluded that covered jurisdictions no longer had to go to DOJ or the D.C.D.C. to preclear their voting and electoral changes because the nature of determining a covered jurisdiction was deemed unconstitutional.

In *Shelby County*, when the Court had an opportunity to review the constitutionality of the Act's main provision, Section 5, it passed. In a close 5-4 decision, the Court did not address the constitutionality of Section 5 itself but Justice Thomas, in his concurring dissent, did, arguing that the Court should have gone further and found §5 unconstitutional. Instead, the Court undermined Section 5 by attacking the "trigger mechanism" and coverage formula in Section 4(b). By finding the coverage formula unconstitutional, the Court was able to void Section 5 but without declaring it unconstitutional: If there is no coverage formula, there are no covered jurisdictions that are required to submit their electoral changes to DOJ or the D.C.D.C. Section 5 only exists in partnership with Section 4(b); thus, preclearance has no practical use or effect at this time, but it is interesting that the Court left the door open for Congress to amend Section 4(b) by leaving Section 5 intact. The result, however, is the same; formerly covered states and political jurisdictions within those states have begun changing their electoral laws, and because Section 5 is no longer there to prevent the passage and implementation of racially discriminatory voting laws from being enacted in states with a long history of discriminatory

²³⁰ In 1975, Congress reauthorized the Act for seven years, until 1982, and used voting turnout and registration in 1972 as the determinant to determine which jurisdictions were covered under Section 5. In 1982, and again in 2006, when the Act was reauthorized, Congress did not change the coverage formula, and continued to use the 1972 presidential election results as the indicator for preclearance. See Pub. L. 94-73, 89 Stat. 402 (1975).

²³¹ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); See *Presley*, 502 U. S., at 500-501.

practices, the new laws are the reason why Section 5 needs to be resurrected.

PART IV. POST-SHELBY COUNTY V. HOLDER

Historically, voting rights policy and its implementation involved institutions and political actors whose goals were not the same by relying on federal intervention and state compliance. Other national policy initiatives within a federal system as large as America's tend more towards policy centralization while relying heavily on sub-national governmental implementation.²³² With voting rights, however, the political dynamics created by the VRA generated an odd assortment of institutional actors and hierarchical relationships between national institutions and state jurisdictions, while giving the U.S. Supreme Court considerable power to enforce and interpret the VRA over the years.²³³ The institutional arrangements have had important consequences for the implementation of Section 5 by DOJ and the D.C.D.C. Prior to *Shelby County*, the Court was critical in preventing the continued implementation of hundreds of discriminatory electoral changes, and supported a broad reading of the VRA so that DOJ could use Section 5 and its preclearance power as a deterrent for covered jurisdictions, and it worked; some states never submitted their changes for preclearance because they knew the laws had the intent and purpose to discriminate and wanted to avoid having their electoral changes denied preclearance.²³⁴ This was the very purpose of Section 5, forcing covered jurisdictions to re-think about the types of voting laws and electoral processes they wanted to implement. DOJ and Section 5 achieved more than any one court decision in preventing the implementation of discriminatory voting practices and procedures. Although compelling states to comply with the law through a system of "forced compliance" aggravated an already politically unappealing situation for southern state legislators, the process was effective at protecting racial and language minorities' right to vote, which was the entire purpose of the VRA, and its subsequent amendments. But *Shelby County* changed all that.

In *Shelby County*, the Court conceded that voting discrimination exists, and that states have historically imposed disparate treatment on certain racial and ethnic minority groups with respect to voting rights and access to

²³² WALKER, DAVID B. *The Rebirth of Federalism: Slouching Toward Washington* (1995).

²³³ MIDDLEMASS, *supra* note 1.

²³⁴ *Id.*

the polls, and covered jurisdictions did not disappoint the Court; within days of the decision, some covered jurisdictions dusted off earlier electoral changes that were denied preclearance by DOJ before *Shelby County* and began implementing them. The Court undermined the very provisions that it acknowledged historically prevented the large scale implementation of laws that had a racially discriminate effect or intent.

Post-*Shelby County*, now that the Supreme Court has removed the preclearance provision designed to prevent “backsliding,” discriminatory political obstacles are now prevalent in previously covered jurisdictions, particularly in the South.²³⁵ Covered states are throwing caution to the wind and passing racially discriminatory laws almost every legislative session, including changing voter identification requirements, moving the location and changing the hours polling places are open, and reallocating resources (e.g. voting forms, registrars, and voting machines) to polling places in heavily populated areas so that fewer machines are accessible to a large number of people. The political motivation behind such legislation is to discourage minority voters from voting, and is the very type of racially discriminatory changes that Section 5’s preclearance provision was intended to prevent.²³⁶

Although *Shelby County* was decided in 2013, covered jurisdictions were moving in this direction prior to the actual decision. Since 2010, new voting laws that curtail voters’ ability to cast a ballot have been passed in 22 states,²³⁷ and in 2012, some jurisdictions’ decisions about polling places and voting booths forced voters to stand in line for hours waiting to access one of the few voting machines available in their precinct.²³⁸ But since *Shelby County*, conservative state legislatures outside of the South and states that supported Jim Crow have recently passed laws restricting voting rights; previously, these states were covered by Section 4(b) but knowing

²³⁵ KATZ & BALDWIN, *supra* note 163.

²³⁶ HIROSHI MOTOMURA. *Preclearance Under Section Five of the Voting Rights Act*. 61 NORTH CAROLINA LAW REVIEW 189 (1983).

²³⁷ JUSTIN LEVITT, *Analysis of Alleged Fraud in Briefs Supporting Crawford Respondents*, Brennan Center For Justice (Dec. 31, 2007). Available at: <http://www.brennancenter.org/sites/default/files/legacy/Democracy/Analysis%20of%20Crawford%20Allegations.pdf>.

²³⁸ Prior to *Shelby County*, and during the 2012 presidential election in Florida, national TV stations displayed pictures of voters in predominantly minority areas standing in line for 4-5 hours waiting for the right to cast a ballot to re-elect President Obama. Long lines were reported in Philadelphia, Charlotte, Atlanta, and other cities and counties; voting rights lawyers on the ground submitted petitions to local judges asking that the polling places remain open until after they were scheduled to close and/or to allow anyone in line by a certain time the right to vote, regardless of the time of night. *Shelby County* has now exacerbated this process, and voting rights lawyers set to monitor and report violations of voting rights can no longer challenge these laws under Section 5 post-election in an effort to reduce such racial disparity in future elections.

they no longer have to preclear election laws, they have been actively passing new laws with the intent and knowledge to disenfranchise voters. Some of the new laws are dubious about their racially discriminatory intent and effect, while some are clearly geared towards undermining racial minorities voting strength, but because these new plans no longer have to pass muster with DOJ or the D.C.D.C. conservative state legislators are emboldened to disenfranchise as many likely Democratic voters as possible.

The most prominent of these laws are new voting ID requirements, but the passage of new voting ID laws follow similar patterns from the past. Supporters of new voter ID laws, such as conservative state legislators in the North and Republicans in covered jurisdictions in the South, argue that new voter ID laws are necessary due to voter fraud at the polls; in response to the manufactured fear of widespread and rampant voter fraud, legislators have moved to pass new laws designed to counter the epidemic of voter fraud. In reality, voter fraud is a myth,²³⁹ and at best is an insignificant problem.²⁴⁰ Overwhelming objective evidence demonstrates that voter fraud at the polls is minimal, and most of the cases where evidence is found that voter fraud did take place are not prosecuted due to legitimate misunderstanding by voters about the shifting requirements about who is eligible to vote.²⁴¹ In an analysis of 400 million votes cast over a seven-year period, nine possible instances of fraudulently cast ballots were found.²⁴² The Bush Administration conducted a five-year investigation to find evidence of voter fraud; when evidence was found, it was of instances of voters mistakenly filling out voter registration forms or voting when they did not know they were ineligible to vote. None of these fraud cases involved a person voting as someone else.²⁴³ When there have been claims of voter fraud, U.S. District attorneys have found no evidence of such, and

²³⁹ JUSTIN LEVITT, *In-Person Voter Fraud Myth, Justin Levitt Before Senate Committee*, Brennan Center For Justice, (Mar. 12, 2008), Available at: http://www.brennancenter.org/analysis/person-voter-fraud-myth-justin-levitt-senate-committee#_edn2.

²⁴⁰ LEVITT, *supra* note 237 and *supra* note 239.

²⁴¹ JUSTIN LEVITT, *The Truth About Voter Fraud* (A Brennan Center Report demonstrates that the allegations of voter fraud are untrue: "There have been a handful of substantiated cases of individual ineligible voters attempting to defraud the election system. But by any measure, voter fraud is extraordinary rare" (page 7). Available at <http://www.brennancenter.org/publication/truth-about-voter-fraud>.

²⁴² LEVITT, *supra* note 241.

²⁴³ ERIC LIPTON and IAN URBINA, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. Times, Apr. 2, 2007, http://www.nytimes.com/2007/04/12/washington/12fraud.html?pagewanted=all&_r=0; See also, LORRAINE C. MINNITE, *Securing the Vote, voter fraud is very rare*, Demos: A Network for Ideas & Action, (2003), <http://www.demos.org/sites/default/files/publications/Analysis.pdf> (providing an overview of voter fraud history in the United States).

have not been able to confirm a case of in-person voter impersonation fraud.²⁴⁴ There are only a handful of cases in which someone has been found guilty of voting under false pretense; yet, many conservative politicians argue that voter fraud is a pervasive problem, while their opponents argue that there is no problem.²⁴⁵ Objective research demonstrates that in-person voting fraud is a statistical anomaly.²⁴⁶ But, because right wing politicians and conservative groups have pushed the idea that voting fraud is a major problem in U.S. elections, and that voter fraud is undermining the ability to have honest elections, they can justify the passage of new laws to protect the legitimacy of voting and election outcomes.

Even though there are few legitimate and authentic cases of voter fraud and in-person voter fraud, new state laws are wrapped in the language of fraud and legitimacy.²⁴⁷ For instance, prior to the 2012 presidential election, Pennsylvania legislators made a push to restrict access to the polls by limiting the number of acceptable types of voter identification in Pennsylvanians (Philadelphia was a covered city) could use. One prominent legislator, when the law was passed, praised his colleagues and declared that Republican presidential nominee, Mitt Romney, would win the state now that Pennsylvania had restricted the number of ways legitimate voters could vote. The ACLU in Pennsylvania challenged the new voter ID law due to the numerous obstacles it created; would-be eligible voters encountered numerous administrative hurdles and impediments when attempting to obtain the new state mandated identification from the Pennsylvania Department of Transportation. Although the law was only to apply to first-time voters, who had to show a state approved ID with their legal name, recent photo with expiration date (and not be expired), and that the identification must be issued by the United States government or the Commonwealth of Pennsylvania, voters had problems accessing the required information to validate their identity. The only acceptable alternative IDs had to be issued by a municipality of the Commonwealth to an employee of that municipality, an accredited Pennsylvania public or private institution of higher learning or a Pennsylvania care facility (e.g. long-term care or senior citizens' residence). Although a short list of alternative IDs was provided, the ACLU

²⁴⁴ LEVITT, *supra* note 237 and *supra* note 239.

²⁴⁵ LEVITT, *supra* note 241 and *supra* note 243.

²⁴⁶ *Id.*

²⁴⁷ *Voter ID Laws Target Rarely Occurring Voter Fraud*, Fox News Politics (Sept. 24, 2011), <http://www.foxnews.com/politics/2011/09/24/voter-id-laws-target-rarely-occurring-voter-fraud/>.

challenged the law based on its racial discriminatory intent; the ACLU was successful, as the court found that the new voter ID law was unconstitutional as it deprived eligible citizens of their fundamental right to vote.²⁴⁸ Some may argue that the new voter ID law was not about voter fraud, but about restricting the voting rights of largely Democratic voting groups.

In the immediate aftermath of *Shelby County*, Alabama's southern neighbors moved to pass and implement new voting laws that would have previously been denied preclearance by DOJ or the D.C.D.C. The states of the Old Confederacy, such as Texas, Georgia, and North Carolina, moved quickly in the days after *Shelby County* to make sure that new restrictive voting policies were in place prior to the 2014 congressional elections, and so that any legal challenges would not hurt the Republican presidential nominee in the 2016 presidential election. Without Section 5, state legislators can pass and implement laws that knowingly have a discriminatory intent or effect, and wait to see if such laws are challenged in court. For instance, previous attempts to pass restrictive voting ID laws in Texas were blocked by DOJ, but once the Court removed preclearance as an obstacle, Texas, on the day that *Shelby County* was decided, announced it would implement the state's strict photo identification law, which had previously been blocked; DOJ lawyers argued that the law was unconstitutional due to its racially discriminatory intent to restrict poor voters and language minorities' access to the franchise. U.S. District Judge Nelva Gonzales Ramos agreed, calling the law an unconstitutional burden that operated like a poll-tax to purposely discriminate against poor voters in Texas.²⁴⁹ However, with preclearance now a moot issue and with no impending legal challenge under Section 2 of the VRA, the 5th Circuit Court of Appeals in New Orleans reinstated Texas' racially discriminatory voter ID law for the November 2014 election, which was only possible because of *Shelby County*. At the time of Circuit Court's decision, DOJ lawyers argued that Texas' law was the most recent means to suppress minority voter registration and turnout, and it would not be the last. The Texas ID law is considered the toughest of its kind, and requires registered

²⁴⁸ See *Applewhite, et al. v. Commonwealth of Pennsylvania*, No. 330 M.D. 2012, 2012 WL 4497211, at *1 (Pa. Commw. Ct. Oct. 2, 2012) (holding that individuals and organizations were entitled to preliminary injunction prohibiting enforcement of provisions of the Voter ID Law which amended the provisional ballot procedures of the Election Code and caused disenfranchisement based on failure to present photo ID for in-person voting, but individuals and organizations were not entitled to preliminary injunction prohibiting all outreach and education efforts required by the Voter ID Law).

²⁴⁹ Tomas Lopez, '*Shelby County: One Year Later*', BRENNAN CENTER (June 24, 2014). Available at: <http://www.brennancenter.org/analysis/shelby-county-one-year-later>.

Texas voters to have one of seven kinds of photo identification to register and cast a ballot.²⁵⁰

In Georgia, the state's Supreme Court upheld a state law requiring voters to show identification before they cast ballots. The state's highest court dismissed objections from those who contended that the law creates an undue burden on poor, disabled and minority voters. The Georgia Supreme Court ruled that the new law was minimally intrusive, reasonable and nondiscriminatory, and that there was no constitutional issue because the Georgia Constitution grants that everyone has an "absolute right" to vote, as long as they meet the required qualifications. Georgia and Texas' laws are very similar to Indiana's ID law, which was found constitutional in an earlier case, and said to be the most restrictive ID law at the time in 2008.²⁵¹

In North Carolina, the state legislature passed a strict photo identification requirement, significantly reduced the number of early voting days, and condensed the window to register to vote.²⁵² Prior to *Shelby County*, the legislation would have had to be pre-cleared under Section 5; a study by the N.C. State Board of Elections identified more than 300,000 voters who lacked the appropriate state-issued identification but who were otherwise eligible to vote.²⁵³ North Carolina passed the law, but only announced its plan to implement it after *Shelby County*.²⁵⁴ Alabama followed suit, implementing a similar law that would have been required to be precleared, but was never submitted to DOJ because *Shelby County* made that process irrelevant.²⁵⁵ In the aftermath of *Shelby County*, mostly Republican legislators are passing restrictions on voting access, and southern states previously covered by Section 5 are adopting restrictive laws adopted in northern states not covered by the VRA. In effect, the VRA has been scaled back as its most effective tools to protect minority voting rights have

²⁵⁰ *Supreme Court Allows Texas To Use Voter ID Law In November*, NATIONAL PUBLIC RADIO (October 18, 2014, 6:15 AM), <http://www.npr.org/2014/10/18/357117516/supreme-court-allows-texas-to-use-voter-id-law-in-november>. College identification is not on the list, but concealed handgun licenses are acceptable. *Id.*

²⁵¹ *Crawford v. Marion Cnty Election Bd.*, 553 U.S. 181 (2008).

²⁵² LAURA LESLIE, NC Voter ID Bill Moving Ahead With Supreme Court Ruling, WRAL.COM (June 25, 2013), <http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/>.

²⁵³ North Carolina State Board of Elections, April 2013 SBOE-DMV ID Analysis 9, COATES' CANONS: NC LOCAL GOVERNMENT LAW (April 17, 2013), available at <http://canons.sog.unc.edu/wp-content/uploads/2013/12/St-Bd-voter-ID-report.pdf>.

²⁵⁴ KIM CHANDLER, Alabama Photo Voter ID Law to be Used in 2014, State Officials Say, AL.COM (June 26, 2013, 12:43 PM), Available at: http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html.

²⁵⁵ KIM CHANDLER, State Has Yet to Seek Preclearance of Photo Voter ID Law Approved in 2011, AL.COM (June 12, 2013, 7:30 AM), http://blog.al.com/wire/2013/06/photo_voter_id.html.

been defeated by conservative Justices on the Supreme Court.²⁵⁶

Although race relations have changed since the Act's passage in 1965, the last 50 years have not wiped clean racial animosity and discriminatory laws; racially polarized voting is still common in many parts of the country, particularly in the South, and many southern jurisdictions continue to manipulate election laws and voting rules to dilute the voting strength of minority voters.²⁵⁷ In the 21st Century, this is not just the Black/White racial divide of the 1960s; in the last three presidential elections (2004, 2008 and 2012), Latino and Asian American voters are increasing in many states such as Nevada, Arizona, New Mexico and Texas. Texas, a previously covered state, where some communities are composed of ninety percent Latino voters, majority white elected officials have implemented racially biased laws concerning bilingual poll workers.²⁵⁸ Prior to *Shelby County*, such a change would have been examined by DOJ or been reviewed by the D.C.D.C. to determine if it was racially motivated with the intent to block Latino voters from accessing their constitutional right to a fair ballot.²⁵⁹ As the voting demographics of the country change, minority language voters will no longer be protected by the 1975 Amendments, which incorporated language minorities and the right to bilingual election notices; without Section 5, bilingual ballots, registrars, and other remedies to ensure citizens the right to vote are undermined without Section 4(b)'s coverage formula.

When voting rights are attacked under the pretense of fraud or illegitimacy, the political rhetoric echoes the past, when primarily Black voters had to fight to the death for their voting rights under an umbrella that they were illegitimate voters based on their skin color. Other racial minorities, including Latinos, Asians, and Native Americans, have had to also fight for their right to vote due to invidious and offensive laws that denied them their citizenship right to vote. The current political climate around the right to vote and the implementation of restrictive voting rights laws harken back to DuBois' prophecy that the problem of the 20th Century would be the problem of the color line.²⁶⁰ To maintain the color line, white elites invested a tremendous amount of political effort in restricting access

²⁵⁶ SPENCER OVERTON. *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19 (2013).

²⁵⁷ OVERTON, *supra* note 246.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ William Edward Burghardt (W.E.B.) DuBois. 1900. *Address to the Nations of the World*. Speech to the First Pan-African Conference. London, England (July).

to the ballot in the first half of the 20th Century.²⁶¹ Now, the political and social messages that reverberate in the larger community harkens back to the color line, and echoes the past that Black people are not welcome in society, its political structures, and its power center; this attitude of white hegemony, when amplified by the media, is passed onto elected officials who write their ideology into voting rights law designed to restrict and institutionalize the language that Black skin is wrapped in a cloak of fraud and illegitimacy. The color line of the 20th Century was a defining issue in the fight for voting rights and access to the ballot²⁶² and that same fight is being played out in the early part of the 21st Century.

Section 5 previously required preclearance of any change to voting qualifications, standards, practices or procedures, which was of critical importance due to continued racial animus. Yet, Section 5 protected more than just racial minorities' right to vote; the provision also protected minority language voters. *Shelby County* removed those protections; without preclearance, local voting changes that are racially discriminatory no longer will be stopped and local jurisdictions will not be deterred from creating and implementing discriminatory election rules.²⁶³ Without Section 5, the floodgates have been opened, and formerly covered states have wasted no time in changing their electoral laws. Some of these laws have been successfully challenged in court, others were implemented in the 2014 election cycle, and still more will be enacted and implemented prior to the 2016 presidential election cycle. The challenged statutes will now have to be contested on a case-by-case basis under Section 2 of the VRA, which the Court has deemed in the past to be a costly, time-consuming, inefficient and inadequate method to root out discriminatory voting practices.²⁶⁴ Section 5 was designed to create an efficient process to prevent the need to rely on litigation alone in challenging the discriminatory intent or effect of voting laws,²⁶⁵ but when the Court declared Section 4(b) unconstitutional, it made Section 5 meaningless.

Section 5 is still on the books, but it is now dead law, and without the

²⁶¹ Herbert Blumer. 1965. *The Future of the Color Line; The South in Continuity and Change*, edited by John McKinney & Edgar Thompson, 322-336. Durham, NC: DUKE UNIVERSITY PRESS.

²⁶² See e.g., Blumer, *supra* note 301; Michael Goldfield, 1991; *The Color of Politics in the United States: White Supremacy as the Main Explanation for the Peculiarities of American Politics from Colonial Times to the Present*, "THE BOUNDS OF RACE: PERSPECTIVES ON HEGEMONY AND RESISTANCE", edited by Dominick LaCapra, 104-133. Ithaca, NY: CORNELL UNIV. PRESS; Key, V. O., Jr. 1949; *Southern Politics in State and Nation*. New York: Knopf.

²⁶³ *Id.*

²⁶⁴ See POSNER, *supra* note 28.

²⁶⁵ Section 2, which prohibits discriminatory voting practices and laws, is only good to challenge existing laws, and the burden of proof is on the plaintiff in Section 2 litigation.

formula coverage of Section 4(b) to prescribe which jurisdictions were covered by Section 5, it will remain dead law, as no states or political jurisdictions are currently covered by Section 5, and therefore are not required to submit their electoral and voting changes for preclearance. Without Section 5 and Section 4(b), the most effective deterrents against the implementation of harmful and discriminatory election laws have been removed.²⁶⁶ Only Congress can change the law and overturn *Shelby County* via new legislative language, but it is highly unlikely in the current political climate in which politicians continually denigrate President Obama.²⁶⁷ But instead of a post-racial society, newer forms of the ugly past have emerged; America has witnessed the passage of laws that harken back to the Black Codes, including placing more restrictions on otherwise eligible voters who are now required to purchase a specific state voter ID (e.g. Texas and Georgia), states' election boards purging voter-rolls of Black and Latino "sounding" names, and the U.S. Supreme Court overturning a key feature of the Voting Rights Act.

Despite voting being a fundamental right in a working democracy,²⁶⁸ in this current political climate, it is unlikely that Congress will amend the VRA and undue *Shelby County*; instead, *Shelby County* will remain in place as a landmark decision in 2013, and be known as the case that undid

²⁶⁶ TOMAS LOPEZ, '*Shelby County: One Year Later*', BRENNAN CENTER (June 24, 2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later>.

²⁶⁷ The tone and tenor of the personal attacks on President Obama, I believe, are grounded in racism; other presidents have had their politics, policies, and values attacked, but the depth and degree of verbal assaults and insults by current and former elected officials towards President Obama is different, as the attackers' words and actions are an explicit form of hostility wrapped in the language of fraud, corruption, and treason. It is the language of racism. Collectively, such behavior expresses whites' deep unease of Blacks' political rights, claims of citizenship, and access to the hallways of political power, which can be traced back to the founding of the country and the 1860s, when property (i.e. slaves) became citizens, and former slaves were granted the rights of citizenship, including the right to vote. Since, Black Americans have continually fought for legitimacy in the unrelenting face of oppression, and when overt racism raises its ugly head (e.g. the racially charged shooting of 9 parishioners at the Emmanuel African Methodist Episcopal Church in Charleston, South Carolina on June 17, 2015; and when white police officers act as judge, jury and executioner of black men and women and children, and if they are indicted are found "not guilty" because they feared for their lives), politicians and regular people come together to say that change is needed.

²⁶⁸ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Court, in a unanimous decision, ruled that a facially neutral statute concerning fire safety in laundries was administered and implemented in a racially discriminated manner and violated the Equal Protection Clause of the Fourteenth Amendment. Approximately 90% of the workers in laundries in San Francisco were of Chinese descent though not usually American citizens. The law was a blatant attempt to exclude Chinese workers from the laundry trade in San Francisco. Later, all of the Chinese laundry owners who were jailed were released and the charges against them were dismissed. The laundry owners' citizenship was not an issue concerning protection under the Fourteenth Amendment. *Yick Wo* was never applied to Black Codes or Jim Crow laws that were racially neutral but implemented in a racially discriminatory manner against Blacks. However, legislative and statutory classifications based on race in the 1950s, were challenged under *Yick Wo*, and its legacy became significant when the opinion was used to challenge sub-populations racially motivated attempts to deny Blacks the right to vote in the Deep South. *Id.*

more than 50 years of voting rights advancement. *Shelby County* is significant for its ability to alter the judicial and administrative landscape for voting rights; now, DOJ has fewer legal options and resources to have formerly covered states comply with the original goals of the VRA, which means conservative legislators can pass racially discriminatory election laws with few consequences. This is the unfolding controversy attached to *Shelby County*; the case single-handedly undermined Section 5, and has allowed the false narrative about “voter fraud” and the “integrity of voting” become the impetus for new restrictive voter ID laws and other laws that suppress minority voting rights. The attack on voting rights is not new; political parties in power pass laws to maintain their majorities, and in formerly covered states, the shifting race and ethnic demographic changes are challenging the ability of the Republican Party to maintain its political power. In one-party states dominated by the Republican Party (e.g. the former Confederacy), conservative legislators are passing laws that attack voting rights on a wide scale because it is the only way the party can hold on to its political power. By disenfranchising Democratic Party supporters, who’s growth outpace the Republican Party’s aging traditional voting base, Republicans can hold onto political power a little bit longer; however, demographic changes and generational replacement will continue unabated. The ideal situation would have Congress, in a show of bipartisanship, make the needed legislative changes to the VRA to resuscitate Section 4(b), which would resurrect Section 5 and allow DOJ and the D.C.D.C. to enforce preclearance and prevent the implementation of racially and ethnically discriminatory laws.

