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# Who Should Be Afforded More Protection in Voting – the People or the States? The States, According to the Supreme Court in *Shelby County v. Holder*

Tara M. Darling

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**WHO SHOULD BE AFFORDED MORE PROTECTION IN  
VOTING—THE PEOPLE OR THE STATES? THE STATES,  
ACCORDING TO THE SUPREME COURT IN *SHELBY COUNTY  
V. HOLDER***

*Tara M. Darling\**

**ABSTRACT**

In June 2013, the Supreme Court struck down the heart of the Voting Rights Act of 1965 when it held Section 4(b) unconstitutional. The issue has now become whether there is a sufficient replacement for Section 4(b) to ensure that states do not discriminate against minority voters. Section 3 may be a sufficient replacement although it places a high burden on the plaintiff seeking to prove discrimination. In January 2014, Congress presented the Sensenbrenner-Conyers-Leahy Bill. The bill will not be enacted as is because it is too strict—it imposes greater requirements on the states than any voting rights legislation has before.

Congress needs to gather voting discrimination statistics from the past five years to draft a coverage formula that will require only the states with a recent history of discrimination to obtain federal approval before instituting voting changes. Voter identification laws, which are argued to be modern-day disenfranchisement techniques against minority voters, are likely to be struck down under the newly drafted coverage formula. Under the new formula, the federal district courts and the Attorney General will have the ability to review proposed voter identification laws and determine whether they will have

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\* Touro Law J.D. Candidate (2015). The author is currently in her final year of law school at Touro Law Center located in Central Islip, New York. In 2012, she graduated magna cum laude from Manhattan College with a degree in Business Marketing and a minor in Sociology. She greatly appreciates and thanks Professor Jeffrey Morris for sharing his knowledge of constitutional law and for guiding her throughout this process. She also appreciates the love and support that her family continuously provides.

a negative effect on minority voters; if they do, they will not be enacted. The Supreme Court will not strike down the new coverage formula because it will apply current data to current times, unlike Section 4(b) and the proposed Sensenbrenner Bill.

## I. INTRODUCTION

Although the Fourteenth and Fifteenth Amendments were ratified in the latter part of the 1800s,<sup>1</sup> African Americans continued to face grotesque discrimination until the mid 1960s.<sup>2</sup> In 1965, the Voting Rights Act (hereinafter “VRA”) was passed.<sup>3</sup> The VRA was enacted to combat the inefficient and unsuccessful litigation that resulted under Fifteenth Amendment claims.<sup>4</sup> Before the VRA, the courts looked at discrimination on a case-by-case basis long after it occurred.<sup>5</sup> The VRA prevented discrimination from happening in the first place because it placed jurisdictions with a history of voting discrimination under federal preclearance.<sup>6</sup> Federal preclearance required the state or jurisdiction to obtain prior federal approval before altering its voting laws.<sup>7</sup> Almost immediately following the VRA’s enactment, discrimination in voting significantly diminished.<sup>8</sup> Although the VRA remained a key piece of legislation throughout the

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<sup>1</sup> U.S. CONST. amend. XIV. The Fourteenth Amendment was ratified in 1868. U.S. CONST. amend. XV. The Fifteenth Amendment was ratified in 1870.

<sup>2</sup> *Timeline: History of the Voting Rights Act*, ACLU, <https://www.aclu.org/timeline-history-voting-rights-act> (last visited Apr. 14, 2015). The major turning point for racial discrimination in voting occurred when the Voting Rights Act of 1965 was passed.

<sup>3</sup> 42 U.S.C. § 1973 (1965). The House vote took place on July 9, 1965 at the 89th Congress; 78% of voting Democrats in the House voted in favor; 83% of Voting Republicans in the House voted in favor. All Alabama, Mississippi, North Carolina, and South Carolina representatives voted against it. All but one Virginia representative voted in favor of it; *see To Pass H.R. 6400, The 1965 Voting Rights Act, available at* <https://www.govtrack.us/congress/votes/89-1965/h87> (last visited Apr. 14, 2015).

<sup>4</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966).

<sup>5</sup> *Id.*

<sup>6</sup> 42 U.S.C. § 1973b (1965). This section is known as Section 4(b) of the VRA. It sets forth the coverage formula.

<sup>7</sup> 42 U.S.C. § 1973c (1965). This section is known as Section 5 of the VRA. It remains constitutional in 2014.

<sup>8</sup> *Timeline: History of The Voting Rights Act*, *supra* note 2. By the end of 1965, an additional 250,000 African Americans were registered to vote. “The Justice Department estimated that in the five years after [the VRA’s] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before.” *See* CHANDLER DAVIDSON, *The Voting Rights Act: A Brief History in Controversies in Minority Voting*, 21 (B. Grofman & C. Davidson eds. 1992).

rest of the century, it did not go without multiple constitutional challenges.<sup>9</sup> Courts continuously upheld the constitutionality of the VRA because there were opportunities to decrease discrimination even further.<sup>10</sup> Congress also recognized the need for the VRA and reauthorized it four times following its original enactment.<sup>11</sup> In 2006, Congress reauthorized the VRA for the fourth time.<sup>12</sup> This reenactment was to extend the VRA for another twenty-five years, ending in 2031.<sup>13</sup>

In 2010, despite Congress's recent reauthorization, the County of Shelby in Alabama brought an action against Attorney General Eric Holder questioning the constitutionality of the VRA.<sup>14</sup> Shelby County requested that the United States District Court for the District of Columbia order a declaratory judgment that deemed Sections 4(b) and 5 of the VRA unconstitutional.<sup>15</sup> The basis of Shelby's argument was that Congress's power, under the Constitution, no longer extended so far as to allow the federal government to enact stringent voting policies upon the states through the VRA.<sup>16</sup> Shelby also argued that

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<sup>9</sup> Katzenbach, 383 U.S. 301 (1966), *reversed by* Shelby County, Ala. v. Holder (*Shelby I*), 133 S. Ct. 2612 (2013); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Rome v. United States, 446 U.S. 156 (1980), *reversed by* Shelby II; Northwest Austin Mun. Utility District No. One v. Holder, 557 U.S. 193 (2009).

<sup>10</sup> Katzenbach, 383 U.S. 301; Allen, 393 U.S. 544; Rome, 446 U.S. 156; Northwest Austin, 557 U.S. 193.

<sup>11</sup> 42 U.S.C. § 1973.

<sup>12</sup> The Voting Rights Act, Pub. L. No. 109-246 (2006). The 2006 reauthorization was approved by the House on July 13, 2006 at 5:38pm. The Senate passed it on July 20, 2006 at 4:28pm. The Bill was enacted after it was signed by the President on July 27, 2006. It is known as the "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006."

<sup>13</sup> *Id.*

<sup>14</sup> Shelby County, Ala. v. Holder (*Shelby I*), 811 F. Supp. 2d 424 (D.D.C. 2011). In May 2012, the D.C. Circuit affirmed the district court's decision. 679 F.3d 848 (D.C. Cir. 2012). Subsequently, the United States Supreme Court reversed the D.C. Circuit's judgment.

<sup>15</sup> *Id.* at 427.

<sup>16</sup> *Shelby II*, 133 S. Ct. at 2618, *distinguished by* BBL, Inc. v. City of Angola, No. 1:13-CV-76-RLM, 2014 WL 26093 (N.D. Ind. Jan. 2, 2014) (the plaintiffs brought into question the Common Council's reliance on a combination of both old and new data to apply to current times). In *BBL*, the United States District Court for the Northern District of Indiana held that "[A] court isn't required to re-weigh the evidence considered by a legislative body and doesn't have the authority to substitute its judgment as to whether a regulation is the best option for a city." *BBL, Inc.*, 2014 WL 26093, at \*18. So long as the legislative body relied on evidence that was reasonably believed to be relevant to the problem addressed, the data could be used. *Id.* (citing *G.M. Enters., Inc. v. Town of Ste. Joseph, Wis.*, 350 F.3d 631, 639-40 (7th Cir. 2003)).

all states enjoy equal sovereignty and the formula set forth in Section 4(b) only applied to some states while exempting others.<sup>17</sup> After Congress carefully considered voting discrimination into the twenty-first century, it found that discrimination remained and minority voters still needed the protections of the VRA.<sup>18</sup>

Subsequently, the United States District Court for the District of Columbia held that it would uphold Congress's findings from its 2006 reauthorization.<sup>19</sup> However, in 2013, the United States Supreme Court, in a 5-4 decision, held that the coverage formula found in Section 4(b) of the VRA was unconstitutional.<sup>20</sup> The Court held that Section 4(b), although once necessary, had become outdated.<sup>21</sup> This decision meant that a state that previously discriminated against African American voters no longer needed to obtain federal approval before changing its voting laws.<sup>22</sup> The Supreme Court held that recent data showed that the jurisdictions that were subject to federal preclearance had not discriminated against voters in decades,<sup>23</sup> and also had higher African American voter registration than jurisdictions that were not subject to federal preclearance.<sup>24</sup> The biggest fear of the dissenters in *Shelby*, who were proponents of the VRA, was that states that were once covered would now institute discriminatory laws.<sup>25</sup> They argued that this would result in a regression of the notable achievements that were realized through the VRA.<sup>26</sup>

This Comment examines voting discrimination against African Americans in the United States prior to the enactment of the VRA of 1965. Section II will show that the Fourteenth and Fifteenth Amendments did not prevent voting discrimination, thus the need for a more comprehensive regulation was required. Section III will explain the specific coverage formula under the VRA and why only certain jurisdictions are subject to it. Section IV will address the Supreme Court's 2013 decision in *Shelby*, analyzing both the majority

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<sup>17</sup> *Shelby II*, 133 S. Ct. at 2618.

<sup>18</sup> *Id.* at 2628-29.

<sup>19</sup> *Shelby I*, 811 F. Supp. 2d at 508.

<sup>20</sup> *Shelby II*, 133 S. Ct. at 2628-29.

<sup>21</sup> *Id.* at 2630-31.

<sup>22</sup> *Id.* at 2631.

<sup>23</sup> *Id.* at 2622, 2625.

<sup>24</sup> *Id.*

<sup>25</sup> *Shelby II*, 133 S. Ct. at 2642 (Ginsburg, J., dissenting).

<sup>26</sup> *Id.*

and dissenting opinions. Lastly, Section V will analyze how discrimination can be prevented by the VRA without Sections 4(b) and 5. In addition, Section V will also show that the Sensenbrenner Bill as proposed will not pass and a new bill with less stringent requirements is needed. Finally, Section V will address whether plaintiffs should bring their claims against recently enacted voter identification laws under their state constitutions rather than the United States constitution.

## II. PRIOR TO THE VOTING RIGHTS ACT OF 1965

Following the end of the Civil War, the Military Reconstruction Act agreed to readmit states to the Union if they extended the right of male suffrage to African Americans within the United States.<sup>27</sup> Then, in 1868, to create equality among individuals within the United States, the Fourteenth Amendment was ratified.<sup>28</sup> It provided that no state was able to make or enforce any law that would “abridge the privileges or immunities of citizens of the United States” and no state can “deprive any persons of life, liberty and property, without due process of law.”<sup>29</sup> The Fourteenth Amendment afforded all male citizens of the United States equal protection under the Constitution.<sup>30</sup>

Two years later, the Fifteenth Amendment was ratified, stating that the right of citizens to vote “shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”<sup>31</sup> The Fifteenth Amendment gave Congress the power to enforce voting rights, overriding states’ power.<sup>32</sup> Although the Tenth Amendment reserves to the states all powers not specifically granted to the federal government,<sup>33</sup> including the power to regulate elections, the federal government can intervene

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<sup>27</sup> *Before the Voting Rights Act: Reconstruction and the Civil War Amendments*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/crt/about/vot/intro/intro\\_a.php](http://www.justice.gov/crt/about/vot/intro/intro_a.php) (last visited Apr. 14, 2015).

<sup>28</sup> U.S. CONST. amend. XIV.

<sup>29</sup> U.S. CONST. amend. XIV, § 1.

<sup>30</sup> *Id.*

<sup>31</sup> U.S. CONST. amend. XV, § 1.

<sup>32</sup> U.S. CONST. amend. XV, § 2.

<sup>33</sup> U.S. CONST. amend. X.

with states' powers where an "exceptional condition" exists.<sup>34</sup> If an "exceptional condition" exists, Congress is able to legislate where it would not otherwise be appropriate.<sup>35</sup> Voting discrimination against African Americans was recognized as an "exceptional condition" thus Congress had the authority to legislate pursuant to voting discrimination.<sup>36</sup> Under Section V of the Fourteenth Amendment and Section II of the Fifteenth Amendment, Congress was granted the power to enforce the Amendments "by appropriate legislation."<sup>37</sup> Although the Fifteenth Amendment was ratified to resolve the discrimination epidemic, it was ignored for almost a century.<sup>38</sup>

### A. Disenfranchisement Techniques and Successful Litigation

Beginning in 1890, six southern states enacted disenfranchisement techniques that were specifically designed to prevent African Americans from voting.<sup>39</sup> "Disenfranchisement" is defined as preventing a person or a group of people from having the right to vote.<sup>40</sup> This technique is often grouped into two categories—direct and indirect.<sup>41</sup> Three of the most prominent forms of disenfranchisement techniques used in the South included grandfather clauses, the White Primary, and poll taxes.<sup>42</sup>

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<sup>34</sup> *Katzenbach*, 383 U.S. at 334.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 334-35.

<sup>37</sup> U.S. CONST. amend. XIV; U.S. CONST. amend. XV, § 2.

<sup>38</sup> G. Jeffrey MacDonald, *Former Judge Worked For Voting Rights*, BOSTON GLOBE (Jan. 20, 2013), available at <http://www.bostonglobe.com/metro/regionals/west/2013/01/20/former-judge-recalls-working-for-voting-rights-south/IKDPHI6Hrehok0XSApVaeP/story.html> (recounting the experience of Judge Gordon Martin, Jr.).

<sup>39</sup> Among these states were Alabama, Georgia, Louisiana, Mississippi, North Carolina, and Virginia. See *Race, Voting Rights, and Segregation, Rise and Fall of the Black Voter*, UNIV. MICH. <http://www.umich.edu/~lawrace/votetour6.htm> (last visited Apr. 14, 2015).

<sup>40</sup> Disenfranchise Definition, MERRIAM WEBSTER DICTIONARY, available at <http://www.merriam-webster.com/dictionary/disenfranchise>.

<sup>41</sup> Direct disenfranchisement refers to actions that explicitly prevent people from voting of having their votes counted. Indirect disenfranchisement involves techniques that prevent African American votes from having an impact on political outcomes. See *Race, Voting Rights, and Segregation, Direct Disenfranchisement, Techniques of Direct Disenfranchisement*, UNIV. MICH., <http://www.umich.edu/~lawrace/disenfranchise1.htm> (last visited Apr. 14, 2015).

<sup>42</sup> *Grandfather Clauses, Literacy Tests, and the White Primary*, USLEGAL, INC., <http://civilrights.uslegal.com/voting-rights/grandfather-clauses-literacy-tests-and-the-white->

### 1. *Grandfather Clauses*

Grandfather clauses were enacted by seven southern states in the late 1800s and early 1900s.<sup>43</sup> In 1898, Louisiana adopted the first grandfather clause.<sup>44</sup> The clause provided that only males whose fathers and grandfathers were able to vote prior to 1867 did not need to complete written exams and pay taxes as a condition to place their vote.<sup>45</sup> However, those whose fathers and grandfathers were ineligible to vote prior to 1867 were required to pass a written examination and pay a tax before they could exercise their right to vote.<sup>46</sup> This technique, in practice, only applied to African Americans because their fathers and grandfathers were enslaved in 1866 and thus it was impossible for them to vote.<sup>47</sup> Six other states enacted similar statutes in the early 1900s.<sup>48</sup> In 1915, the Supreme Court, in *Guinn v. United States*,<sup>49</sup> invalidated all grandfather clauses, holding that they were “repugnant to the Fifteenth Amendment.”<sup>50</sup> The holding in

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primary/ (last visited Apr. 14, 2015).

<sup>43</sup> *The Grandfather Clause*, BLACKPAST.ORG, <http://www.blackpast.org/aah/grandfather-clause-1898-1915>. (last visited Apr. 14, 2015). States that adopted grandfather clauses included Louisiana, North Carolina, Alabama, Georgia, Maryland, Oklahoma, and Virginia. *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Guinn v. United States*, 238 U.S. 347, 356-57 (1915).

<sup>48</sup> Among these states were North Carolina, Alabama, Georgia, Maryland, Oklahoma, and Virginia. *Id.* See also *Grandfather Clauses, Literacy Tests, and the White Primary*, *supra* note 42.

<sup>49</sup> 238 U.S. 347 (1915).

<sup>50</sup> *Id.* at 361, 368. In *Guinn*, Oklahoma instituted a “radical change” in its voting laws that prevented African Americans from voting. See *Guinn*, 238 U.S. at 355. Oklahoma adopted a grandfather clause that required writing and reading requirements as a condition for African Americans to exercise their right to vote. *Id.* at 356. However, Oklahoma allowed those whose grandfathers had been eligible to vote prior to January 1, 1866 to exercise their right to vote without meeting the same conditions. *Id.* at 357. The Supreme Court held that the substance and effect of the provision was an “open repudiation of the [Fifteenth] Amendment . . .” because the grandfather clause “re-creat[e] and perpetuat[e] the very conditions which the Amendment was intended to destroy.” *Id.* at 358, 360. The Fifteenth Amendment expressly prohibited a state from denying a United States’ citizen the right to vote based on “race, color, or previous condition of servitude.” See U.S. CONST. amend. XV, § 1. Oklahoma intentionally chose the 1866 date because it knew that African Americans’ fathers and grandfathers were enslaved at this time and therefore no African American would ever be able to vote under this law. *Guinn*, 238 U.S. at 357.



*Guinn* invalidated grandfather clauses in the six other states that adopted them.<sup>51</sup>

## 2. *The White Primary*

The second prominent form of disenfranchisement was the White Primary. This was a device employed by white southern Democrats to prevent African Americans from exercising their right to vote.<sup>52</sup> Historically, a one party system existed in the South until the late 1960s.<sup>53</sup> Republicans did not run in the southern states because they knew that Democrats would prevail in every election.<sup>54</sup> By employing the White Primary, the state legislatures and Democrats worked together to prevent African Americans from registering as Democrats and the primary elections were closed to everyone except those who were registered as Democrats.<sup>55</sup> In 1927, litigation to declare the White Primary unconstitutional began.<sup>56</sup> In 1944, in

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<sup>51</sup> See *Guinn*, 238 U.S. at 363-64.

<sup>52</sup> See *White Primary*, ENCYCLOPEDIA.COM, [http://www.encyclopedia.com/topic/white\\_primary.aspx](http://www.encyclopedia.com/topic/white_primary.aspx) (last visited Apr. 14, 2015).

<sup>53</sup> See *Democrats in Decline*, TEXAS POLITICS, available at [http://www.laits.utexas.edu/txp\\_media/html/part/0401.html](http://www.laits.utexas.edu/txp_media/html/part/0401.html) (last visited Apr. 14, 2015).

<sup>54</sup> However, the White Primary provided eligibility for all white males to participate in the Democratic Party. See *Smith v. Allright*, 321 U.S. 649, 656-57 (1944).

<sup>55</sup> See *Surveying Party Politics in Texas History*, TEXAS POLITICS, available at [http://www.laits.utexas.edu/txp\\_media/html/part/0203.html](http://www.laits.utexas.edu/txp_media/html/part/0203.html) (last visited Apr. 14, 2015). Poor whites were also prevented from voting because they could not afford the poll tax either.

<sup>56</sup> See *Nixon v. Herndon*, 273 U.S. 536 (1927). In *Nixon*, an African American resident of El Paso, Texas challenged a state statute that barred African Americans from participating in any Democratic Party primary election held within the state. *Id.* at 539-40. Justice Holmes, writing for the Supreme Court, held that it was “hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment].” *Id.* at 541. The Fourteenth Amendment requires equal protection—Texas’s statute applied solely to African Americans. *Id.* However, *Herndon* was “severely limited in its implication” because Texas was the only state with a statute that explicitly excluded African Americans from joining the Democratic Party. See Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 58 (2001). In 1932, the Supreme Court, in *Nixon v. Condon*, decided the constitutionality of the amended Texas statute that was invalidated in *Herndon*. 286 U.S. 73, 82 (1932). Following the 1927 decision, Texas repealed its statute and the Texas Democratic party enacted a statute that allowed a political party to determine the qualifications voters must meet in order to become a member of that party. *Id.* at 82. The same plaintiff as in *Herndon* was again denied his right to vote. *Id.* at 81. The Supreme Court held that it would not decide whether the Democratic Party was able to require certain qualifications because a “political party is merely a voluntary association . . . [and] has inherent power like voluntary associations generally to determine its own mem-

*Smith v. Allwright*,<sup>57</sup> the Supreme Court outlawed the White Primary across the nation, holding that it prevented African Americans from exercising their right to vote based on discrimination on account of race.<sup>58</sup> In *Smith*, the plaintiff was an African American man who was denied a ballot to cast his vote in the Texas primary election for the nomination of Democratic candidates for the United States Senate and House of Representatives.<sup>59</sup> The Supreme Court held that although Texas was free to conduct its elections in the manner which it chose, Texas could not act contrary to the Fourteenth Amendment by enacting laws that denied citizens the right to vote based on their color.<sup>60</sup> The Texas statute reserved membership in the Democratic Party to whites only.<sup>61</sup> Therefore, the Supreme Court had no difficulty holding that a statute, which barred African Americans from participating in the Democratic Party, denied African Americans of their Fourteenth Amendment right guaranteed by the Constitution.<sup>62</sup>

### 3. Poll Taxes

After grandfather clauses and White Primaries were declared unconstitutional, southern states began employing poll taxes—the third most common form of disenfranchisement. Citizens were required to pay a one to two dollar annual tax as a prerequisite to cast their vote.<sup>63</sup> The states did not prosecute whites that failed to pay the tax; therefore, it was recognized as a discriminatory means to prevent African Americans, and also poor whites, from voting because they could not afford to pay.<sup>64</sup> Of the few African Americans that could

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bership . . .” *Id.* at 83. Following the Supreme Court’s decision, the Texas Democratic Party passed a resolution that barred African Americans from party membership. *Id.* at 82. In 1935, the Supreme Court in *Grovey v. Townsend* was faced with deciding the unresolved issue from *Condon*. 295 U.S. 45 (1935). The Supreme Court held that a White Primary, when adopted by a political party rather than a state, is constitutional because political parties “arise from the exercise of free will and liberty of citizens composing them . . . and are not the creatures of the state . . .” *Id.* at 52.

<sup>57</sup> 321 U.S. 649 (1944).

<sup>58</sup> *Smith*, 321 U.S. at 651, 664-66.

<sup>59</sup> *Id.* at 650-51.

<sup>60</sup> *Id.* at 657.

<sup>61</sup> *Id.* at 656-57.

<sup>62</sup> *Id.* at 664.

<sup>63</sup> *Race, Voting Rights, and Segregation, Direct Disenfranchisement, Techniques of Direct Disenfranchisement*, *supra* note 41.

<sup>64</sup> *Id.*

afford the tax, many never bothered to pay it because they knew that there was a significant chance their name would never be placed on voter registries.<sup>65</sup> Southern officials had full discretion to administer poll taxes.<sup>66</sup> The officials would refuse to accept poll taxes from African Americans that attempted to pay them or withheld poll tax exemption certifications from otherwise-qualified African American applicants.<sup>67</sup> Once the VRA was enacted, poll taxes were declared unconstitutional,<sup>68</sup> however, the Supreme Court reiterated this law in *Harper v. Virginia State Board of Elections*<sup>69</sup> in 1966.<sup>70</sup>

### B. Continued Hardships on African American Voters

Even after overcoming these three disenfranchisement hurdles, African Americans faced other barriers that denied them of their Fourteenth and Fifteenth Amendment rights.<sup>71</sup> In 1957, in an attempt to register African American voters, President Eisenhower passed the Civil Rights Act (hereafter the “ ‘57 Act”).<sup>72</sup> The ‘57 Act “established the Civil Rights Section of the Justice Department and empowered federal prosecutors to obtain court injunctions against interference with the right to vote.”<sup>73</sup> The ‘57 Act was extremely weak

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<sup>65</sup> H.R. Rep. No. 89-439 at 2446-47.

<sup>66</sup> *Id.* at 2451.

<sup>67</sup> *Id.* at 2452. For example, before the VRA’s enactment, Forrest County, Mississippi had a mere 12 out of 7,500 African American residents registered to vote.

<sup>68</sup> 42 U.S.C. § 1973h(a).

<sup>69</sup> 383 U.S. 663 (1966).

<sup>70</sup> The Court held that payment of a poll tax has no relation to voter qualification because wealth has nothing to do with one’s right to vote and therefore could not be upheld under the Fourteenth Amendment. *Harper*, 383 U.S. at 666. The purpose of the Fourteenth Amendment is to ensure that citizens would not be denied their right to vote based on a characteristic that had no correlation with one’s ability to exercise their right to vote. The Court invalidated poll taxes, holding that “the right to vote is too precious, too fundamental to be so burdened or conditioned” by such a tax. *Id.* at 670.

<sup>71</sup> Often when favorable decisions were finally obtained, some of the states “merely switched to discriminatory devices not covered by the federal decrees or . . . enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.” See *Katzenbach*, 383 U.S. at 314 (citing dissenting opinion in *United States v. Mississippi*, 229 F. Supp. 925, 966-67 (S.D. Miss. 1964)).

<sup>72</sup> *Civil Rights Act of 1957*, CIVIL RIGHTS DIGITAL LIBR., available at [http://crdl.usg.edu/events/civil\\_rights\\_act\\_1957/?Welcome](http://crdl.usg.edu/events/civil_rights_act_1957/?Welcome) (last visited Apr. 15, 2014).

<sup>73</sup> *Civil Rights Act of 1957*, EISENHOWER PRESIDENTIAL LIBR., available at [http://www.eisenhower.archives.gov/research/online\\_documents/civil\\_rights\\_act.html](http://www.eisenhower.archives.gov/research/online_documents/civil_rights_act.html) (last visited Apr. 14, 2015).

because of the lack of support by Democrats.<sup>74</sup> Therefore, three years later, President Eisenhower passed the Civil Rights Act of 1960 (hereafter the “ ‘60 Act”).<sup>75</sup> The ‘60 Act introduced penalties on anyone “who obstructed someone’s right to vote or someone’s attempt to actually vote.”<sup>76</sup> Similar to the ‘57 Act, the ‘60 Act was weak; it added only 3% of African American voters to the roll for the 1960 election.<sup>77</sup> Under the ‘57 and ‘60 Acts, voting discrimination challenges were decided on a case-by-case basis where the plaintiff had to prove that a pattern-or-practice of discrimination existed in the state’s law.<sup>78</sup> These suits took up to 6,000 hours to prepare; therefore, it was difficult for African Americans to find private attorneys to represent them.<sup>79</sup> Luckily, the Justice Department was actively involved.<sup>80</sup>

Under the Kennedy administration, some progress materialized. President Kennedy’s brother, Attorney General Robert Kennedy, appointed Burke Marshall and John Doar to serve in the Civil Rights Division of the Department of Justice.<sup>81</sup> During their tenure, they worked vigorously toward a comprehensive federal regulation that would not require going into each county and proving a pattern-or-practice of discrimination, which often took years to litigate.<sup>82</sup> Shortly thereafter, the political climate throughout the United States drastically changed.<sup>83</sup> By 1965, much of the nation was ready for a

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<sup>74</sup> *Id.*

<sup>75</sup> *Civil Rights Act of 1960 Signed*, AFRICAN AMERICAN REGISTRY, [http://www.aaregistry.org/historic\\_events/view/civil-rights-act-1960-signed](http://www.aaregistry.org/historic_events/view/civil-rights-act-1960-signed) (last visited Apr. 14, 2015).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Katzenbach*, 383 U.S. at 312-14.

<sup>79</sup> *Id.*; *Justice Scalia, Voting Rights, and Racial Entitlement*, NOTES ON A THEORY, available at <http://notesontheory.wordpress.com/2013/02/27/scalia-and-racial-entitlement/> (last visited Apr. 14, 2015).

<sup>80</sup> *Katzenbach*, 383 U.S. at 313.

<sup>81</sup> Brett Hoover, *John Doar*, THE IVY LEAGUE, available at [http://www.ivyleaguesports.com/history/blackhistory/2005-06/princeton/john\\_doar](http://www.ivyleaguesports.com/history/blackhistory/2005-06/princeton/john_doar) (last visited Apr. 14, 2015).

<sup>82</sup> *Katzenbach*, 383 U.S. at 312.

<sup>83</sup> Dr. Martin Luther King, Jr. was arrested in the spring of 1963 after leading a mass protest in Birmingham, Alabama, which King referred to as the most segregated city in America. See *Civil Rights Movement, Martin Luther King, Jr., Bull Connor, and the Demonstrations in Birmingham*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, available at <http://www.jfklibrary.org/JFK/JFK-in-History/Civil-Rights-Movement.aspx?p=2> (last visited Apr. 14, 2015). Following his arrest, Dr. King wrote his infamous “Letter from Birmingham Jail.” In response, President Kennedy sped up the drafting of a comprehensive civil rights bill. *Id.* The bill was not passed until after President Kennedy’s assassination on No-

comprehensive law that would prevent discrimination going forward. Between May and July of 1965, the Senate and the House of Representatives passed the bill.<sup>84</sup> The following month, the VRA of 1965 was signed into law.<sup>85</sup> Unlike the '57 and '60 Acts, the VRA was a law that could be applied uniformly across the nation rather than on a case-by-case basis.

### III. THE SUBSTANCE OF THE VOTING RIGHTS ACT OF 1965

The VRA, although desperately needed, was a drastic measure taken by the federal government in that it required the states to obtain federal approval to implement laws that the states previously had the right to enact on their own.<sup>86</sup> It has long been recognized that states have broad autonomy to determine the conditions under which the right of suffrage may be exercised.<sup>87</sup> One of the most controversial aspects of the VRA was its disparity in treatment of the states.<sup>88</sup> The allocation of powers between the state and federal governments preserves the “integrity, dignity, and residual sovereignty of the States.”<sup>89</sup> Almost all of the Voting Rights litigation arises under Section 4(b) or Section 5 of the VRA.<sup>90</sup>

#### A. Section 4(b) Coverage Formula

Disenfranchisement was most prevalent in the deep southern states.<sup>91</sup> In an attempt to control the states with the most severe discrimination, the VRA provided a specific coverage formula.<sup>92</sup> Sec-

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vember 22, 1963. *Id.*

<sup>84</sup> President Lyndon B. Johnson, We Shall Overcome Speech to Congress (Mar. 15, 1965) available at <http://www.historyplace.com/speeches/johnson.htm> (last visited Apr. 14, 2015).

<sup>85</sup> *Id.*

<sup>86</sup> *Shelby II*, 133 S. Ct. at 2618.

<sup>87</sup> *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

<sup>88</sup> *Shelby II*, 133 S. Ct. at 2624.

<sup>89</sup> *Bond v. U.S.*, 131 S. Ct. 2355, 2634 (2011).

<sup>90</sup> 42 U.S.C. § 1973b(b). Section 4(b) does not require the plaintiff to show that the voting law was enacted with a discriminatory purpose; typically, these challenges are easier to prove because the plaintiff does not need to show intent.

<sup>91</sup> *Katzenbach*, 383 U.S. at 310-11.

<sup>92</sup> Section 4(c)'s first requirement was that the Attorney General determine on November 1, 1964, that the state maintained a “test” or “device” restricting the right to vote. Under the first element a “test” or “device” included four categories:

- (1) Demonstrate the ability to read, write, understand, or interpret any

tion 4(b) was recognized as a drastic measure because it treated the states unequally.<sup>93</sup> If the state satisfied Section 4(b)'s two-element coverage formula, the state was then subject to Section 5.<sup>94</sup> Section 4(b) is a two-part test that requires both parts to be satisfied in order for the jurisdiction to be subject to Section 5.<sup>95</sup> Before the VRA was drafted, Congress found that the use of tests or devices and low voter turnout combined tended to show that a "strong probability [existed] that low registration and voting [were] a result of racial discrimination in the use of such tests."<sup>96</sup>

Section 4(b) also allowed for the placement of federal examiners in covered jurisdictions when the Attorney General had (1) "received meritorious written complaints from at least twenty residents alleging that they [had] been disenfranchised under color of law because of their race, or (2) that the appointment of federal examiners [was] otherwise necessary to effectuate the guarantees of the Fifteenth Amendment."<sup>97</sup> In determining whether a federal examiner was necessary, the Attorney General considered several factors.<sup>98</sup> Upon review, if a federal examiner was required, his job was to place all that were qualified to vote on the eligible voter list.<sup>99</sup> Each month, the list was given to state or local officials who placed the eligible voters on the official voting rolls.<sup>100</sup>

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matter, (2) demonstrate any education achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. § 1973b(b). Section 4(b)'s second requirement was that the Director of Census determine that less than 50% of the state's voting-age residents were registered on November 1, 1964 or voted in the presidential election of November 1964. *Id.*

<sup>93</sup> *Katzenbach*, 383 U.S. at 309.

<sup>94</sup> The jurisdictions originally covered under Section 4(b) were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of North Carolina and Arizona. *See Shelby I*, 811 F. Supp. 2d at 432.

<sup>95</sup> 42 U.S.C. § 1973b(b).

<sup>96</sup> *Shelby I*, 811 F. Supp. 2d at 432.

<sup>97</sup> *Katzenbach*, 383 U.S. at 320.

<sup>98</sup> *Id.* at 320-21. First, whether the ratio of whites to non-whites registered seems reasonably caused by racial discrimination; and second, whether there was "substantial evidence" that good-faith efforts to comply with the Fifteenth Amendment were made.

<sup>99</sup> *Id.* at 321.

<sup>100</sup> *Id.*

## B. Section 5 of the Voting Rights Act

Congress, “not underestimating the ingenuity of those bent on preventing [African Americans] from voting,”<sup>101</sup> carefully crafted Section 5 to encompass areas with the worst record in voting discrimination.<sup>102</sup> This section has a “bail out” provision to exempt jurisdictions that can show they did not discriminate and should not be subject to federal review before enacting voting changes.<sup>103</sup> The VRA also has a “bail in” provision that places jurisdictions under preclearance that may have violated the Constitution’s prohibition on voting discrimination but that Section 4(b) failed to include.<sup>104</sup>

### 1. Preclearance Review

States that satisfied both elements under 4(b) were then subject to Section 5. If a state as a whole was exempt from Section 4(b), a political subdivision that satisfied both of 4(b)’s requirements could still be subject to Section 5.<sup>105</sup> Section 5 bars covered jurisdictions from changing their voting practices and procedures until a three-judge federal district court in Washington or the Attorney General reviews the changes.<sup>106</sup> These two independent review processes are known as “preclearance.”<sup>107</sup> The general idea of preclearance is that a state or political subdivision must obtain prior federal approval before implementing voting changes.

If the covered jurisdiction submits its proposed change to the United States Attorney General, the covered jurisdiction bears the burden of proving: (1) there is no discriminatory purpose for the proposed change; and (2) if the change is implemented, it will not adversely affect the voting rights of minority voters.<sup>108</sup> The Attorney

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<sup>101</sup> *Allen*, 393 U.S. at 548.

<sup>102</sup> *Shelby II*, 133 S. Ct. at 2625.

<sup>103</sup> 42 U.S.C. § 1973b(a).

<sup>104</sup> 42 U.S.C. § 1973b(a)(3).

<sup>105</sup> *United States v. Bd. of Comm’rs of Sheffield Ala.*, 435 U.S. 110, 112-13 (1978).

<sup>106</sup> *The Voting Rights Act of 1965*, UNITED STATES DEPARTMENT OF JUSTICE, available at [http://www.justice.gov/crt/about/vot/intro/intro\\_b.php](http://www.justice.gov/crt/about/vot/intro/intro_b.php) (last visited Apr. 14, 2015).

<sup>107</sup> Review by the federal district court is known as “judicial preclearance”; whereas review by the Attorney General is known as “administrative preclearance.” *Id.*

<sup>108</sup> Brian L. Porto, Annotation, *What Changes in Voting Practices or Procedures Must be Precleared Under § 5 of Voting Rights Act of 1965 (42 U.S.C.A. § 1973c)—Supreme Court Cases*, 146 A.L.R. FED. 619 (1998).

General has sixty days to respond to the covered jurisdiction's proposal.<sup>109</sup> If he fails to respond, the change may be implemented as proposed; if he denies the proposal, the covered jurisdiction may not implement the change—his decision is not subject to judicial review.<sup>110</sup> If the covered jurisdiction fails to obtain preclearance and institutes the change, a private party who is injured by the change can bring an action for a declaratory judgment to determine that the change is subject to preclearance.<sup>111</sup>

The second method of obtaining preclearance is to file a petition for a declaratory judgment in the United States District Court for the District of Columbia.<sup>112</sup> A three-judge panel reviews the proposed change *de novo* and determines whether the change would be racially discriminatory in either purpose or effect.<sup>113</sup> If the covered jurisdiction does not prevail, it may appeal to the United States Supreme Court.<sup>114</sup>

## 2. “Bailing Out” and “Bailing In”

Jurisdictions that were originally subject to Sections 4(b) and 5 have the ability to “bail out” of coverage if they can satisfy various requirements.<sup>115</sup> The applicant, who is either a state or political subdivision of the state, must prove that six specific violations did not occur in the past ten years from the date of the “bail out” application.<sup>116</sup> If the applicant makes a successful showing, the covered ju-

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<sup>109</sup> *Allen*, 393 U.S. at 549.

<sup>110</sup> 42 U.S.C. § 1973c(a).

<sup>111</sup> *Allen*, 393 U.S. at 549-50.

<sup>112</sup> *Lopez v. Monterey Cnty.*, 519 U.S. 9, 12 (1996).

<sup>113</sup> *Cnty. Council of Sumter Cnty., S.C. v. United States*, 555 F. Supp. 694, 706 (D.D.C. 1983).

<sup>114</sup> *Id.* at 696.

<sup>115</sup> 42 U.S.C. § 1973b(a).

<sup>116</sup> 42 U.S.C. § 1973b(a)(1)(A)-(F). The first violation is that no test or device was used for the purpose of denying or abridging the right to vote on account of race or color. *Id.* at § (A). Second, there was no final judgment in any part of the state that determined that there was a denial or abridgement of the right to vote on the account of race or color. *Id.* at § (B). Third, no federal examiner was assigned within the state. *Id.* at § (C). Fourth, the state and all of its political subdivisions, including governmental units complied with Section 5. *Id.* at § (D). Fifth, the Attorney General did not interpose any objection and no declaratory judgment was denied; and there are no declaratory judgments pending. 42 U.S.C. § 1973b(a)(1)(E). Finally, the sixth is that the state has: (1) eliminated voting procedures and methods that dilute equal access to the electoral process; (2) have engaged in constructive efforts to eliminate intimidation and harassment of people who are protected under the Act;



jurisdiction is no longer subject to Section 5 coverage and does not need federal approval before it implements voting changes.<sup>117</sup> The “bail out” mechanism was included in the VRA because Congress realized that Section 4(b)’s formula could be over-inclusive by placing jurisdictions that had no voting discrimination under preclearance.<sup>118</sup>

Congress also realized that Section 4(b)’s formula could be under-inclusive, so it created the “bail in” mechanism.<sup>119</sup> “Bailing in,” also referred to as the “pocket trigger,” authorizes federal district courts to place states and political subdivisions that have violated the Fourteenth or Fifteenth Amendments under Section 4(b).<sup>120</sup> The “pocket trigger” is found in Section 3 of the VRA.<sup>121</sup> It finds “pockets of discrimination”<sup>122</sup> that were not originally covered by Section 4(b).<sup>123</sup> For example, if a state that is not subject to federal preclearance intentionally discriminates by enacting a voting law, the district court has the authority to place the state under Section 4(b), requiring that any voting change going forward must comply with the federal preclearance process.<sup>124</sup> Under Section 3, “district court[s] [have] the discretion to determine how long the jurisdiction will remain bailed-in.”<sup>125</sup>

### 3. *Private Right to Institute Suit*

Under Section 5 of the VRA, the Attorney General has the authority to institute an action against the state or political subdivision when it changes its voting laws without federal preclearance.<sup>126</sup> Congress feared that the “laudable goal” of the VRA could be “severely hampered” if African Americans who were harmed had to wait

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and (3) have engaged in other constructive efforts, such as convenience to expand the opportunity for registration of all people who are of voting age and entitled to vote and have appointed minority persons as election officials. *Id.* at § (F).

<sup>117</sup> 42 U.S.C. § 1973b(a)(1)(A)-(F).

<sup>118</sup> *Id.*

<sup>119</sup> 42 U.S.C. § 1973a(c) (2006).

<sup>120</sup> Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1997 (2010).

<sup>121</sup> 42 U.S.C. § 1973a(c).

<sup>122</sup> Crum, *supra* note 120, at 1997.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2017.

<sup>125</sup> *Id.* at 2008.

<sup>126</sup> *Allen v. State Bd. of Elections*, 393 U.S. 554, 556-57 (1969).

until the Attorney General brought an action in order to secure relief.<sup>127</sup> Therefore, the Supreme Court held in *Allen v. State Board of Elections*<sup>128</sup> that the holding in *J.I. Case Co. v. Borak*<sup>129</sup> should extend to this case.<sup>130</sup> In *Borak*, the Supreme Court was asked to decide whether the Securities Exchange Act of 1934 allowed private citizens to bring a cause of action.<sup>131</sup> The Supreme Court held that the ‘34 Act “while . . . [making] no specific reference to a private right of action, among its chief purposes [was] the ‘protection of investors’ which certainly [implied] the availability of judicial relief where necessary to achieve that result.”<sup>132</sup> The Supreme Court held that a similar analysis was applicable in *Allen* because Section 5 “might well prove an empty promise unless private citizens were allowed to seek judicial enforcement of the prohibition.”<sup>133</sup> The Supreme Court further held in *Allen* that the private right to sue under the VRA only applied to declaratory judgment actions.<sup>134</sup> This meant that the only remedy available for a private individual was for the court to declare the state’s new law invalid because the state failed to obtain prior federal approval.

#### 4. *The Constitutionality of the Voting Rights Act Questioned after Congress’s Reauthorizations of the Act*

In 1966, just one year after the VRA was passed, South Carolina questioned Congress’s authority to enact such a statute.<sup>135</sup> In *Katzenbach*, South Carolina argued that Congress only had the authority to forbid Fifteenth Amendment violations in general terms, not through the use of specific remedies.<sup>136</sup> The Court disagreed and held that Congress’s power “is complete in itself, [and] may be exercised to its utmost extent, and acknowledges no limitations, other

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 544.

<sup>129</sup> 377 U.S. 426 (1964).

<sup>130</sup> *Allen*, 393 U.S. at 558.

<sup>131</sup> *Borak*, 377 U.S. at 430-31.

<sup>132</sup> *Id.* at 432.

<sup>133</sup> *Allen*, 393 U.S. at 557.

<sup>134</sup> *Id.* at 559.

<sup>135</sup> *Katzenbach*, 383 U.S. at 307.

<sup>136</sup> *Id.* at 327.

than are prescribed in the constitution.”<sup>137</sup> Applying Congress’s power to the coverage formula set forth in Section 4(b), the Court found that all of the jurisdictions were appropriately subjected to the VRA because there was evidence of recent voting discrimination.<sup>138</sup> Despite its constitutional challenges, Congress reauthorized and amended the VRA four times after its institution in 1965.<sup>139</sup> Originally, it was intended to be a temporary solution to voting discrimination and was designed to last for only five years.<sup>140</sup> However, Congress recognized that the VRA was still necessary after the initial five-year period and it reauthorized it for the first time in 1970.<sup>141</sup> In 1975, it was reauthorized again, this time for seven years.<sup>142</sup>

Following the 1975 reauthorization, the city of Rome located in the state of Georgia challenged the constitutionality of the VRA.<sup>143</sup> Georgia, as well as its political subdivisions, were covered jurisdictions under the VRA and were therefore required to obtain federal preclearance;<sup>144</sup> however, the City of Rome failed to do so.<sup>145</sup> Rome argued that Section 5 went beyond Congress’s power under the Fifteenth Amendment because Section 5 also prohibited *unintentional* discrimination in voting.<sup>146</sup> The Supreme Court disagreed with Rome’s argument and “held that Congress reasonably concluded that it was appropriate to prohibit changes that had a discriminatory effect,”<sup>147</sup> even if the purpose of the voting change was not discriminatory. Rome also challenged the VRA when it argued that Section 5

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<sup>137</sup> *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

<sup>138</sup> *Katzenbach*, 383 U.S. at 329-30.

<sup>139</sup> *The Voting Rights Act*, *supra* note 99.

<sup>140</sup> Voting Rights Act of 1965, Pub. L. 89-110 (79 Stat.) 438 (1965).

<sup>141</sup> Voting Rights Act Amendments of 1970, Pub. L. 91-285 (84 Stat.) 314 (1970).

<sup>142</sup> Voting Rights Act Amendments of 1975, Pub. L. 94-73 (89 Stat. 400) (1975). The 1970 and 1975 reauthorizations amended Section 5 coverage to include political subdivisions of states that were not originally covered, including Alaska, Arizona, Texas, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota. See *Shelby II*, 133 S. Ct. at 2620. The 1975 reauthorization also amended the definition of “test” or “device” to include the practice of providing bilingual reading materials in jurisdictions where over 5% of the voting-age citizens spoke a language other than English. *Id.*

<sup>143</sup> *City of Rome v. United States*, 446 U.S. 156, 159 (1980).

<sup>144</sup> *Id.* at 161.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 173.

<sup>147</sup> Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 48 HARV. C.R.-C.L. L. REV. 386, 397 (2008).

outlived its usefulness.<sup>148</sup> The Supreme Court also rejected this claim—it held that the Court was to grant extreme deference to Congress’s findings when it reauthorized the VRA in 1975.<sup>149</sup> The Supreme Court further held that “only a dramatic change of factual circumstances in the covered jurisdictions would warrant a rejection of Congress’s choice to renew and extend the preclearance provision.”<sup>150</sup>

In 1982, the VRA was reauthorized for an additional twenty-five years.<sup>151</sup> The 1982 reauthorization created a “bail out” option where covered jurisdictions, through various showings, could terminate their coverage under Section 4(b).<sup>152</sup> Also in 1982, Congress removed the requirement that a plaintiff needed to prove a “discriminatory purpose.”<sup>153</sup> This meant that the plaintiff would prevail if he could prove that there was no intent to discriminate, but that the voting change had a discriminatory effect.<sup>154</sup>

The last reauthorization, in 2006, extended the VRA for an additional twenty-five years, to end in 2031.<sup>155</sup> In 2003, the Supreme Court decided *Georgia v. Ashcroft*.<sup>156</sup> According to *Ashcroft*, prior to the 2006 reauthorization, Congress’s method for assessing whether a voting change violated Section 5 was whether the ability of minority groups to participate in the political process and to elect their candidate of choice to office was diminished.<sup>157</sup> The Supreme Court’s holding in *Ashcroft* eliminated the method that looked at the diminished ability of minority voters to participate in the political process

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<sup>148</sup> *City of Rome*, 446 U.S. at 180-81.

<sup>149</sup> Clarke, *supra* note 147, at 397-398.

<sup>150</sup> Clarke, *supra* note 147, at 398.

<sup>151</sup> The Voting Rights Act Amendments of 1982, Pub. L. 97-205 § 1 (96 Stat. 131, 133) (1982).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 131-32.

<sup>154</sup> *Id.*

<sup>155</sup> *Shelby II*, 133 S. Ct. at 2621.

<sup>156</sup> *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003).

<sup>157</sup> In *Ashcroft*, Georgia sought to redistrict its State Senate Plan. *Id.* at 465. Georgia was considered a covered jurisdiction and was thus subject to preclearance. *Id.* at 466. Georgia had the burden to show that the proposed change was non-retrogressive. *Id.* at 468 (citing *Johnson v Miller*, 929 F. Supp 1529, 1539-40 (1996)). Georgia submitted a detailed plan that included the population in each district, “the total black population, the black voting age population, the percentage of black registered voters, and the overall percentage of Democratic votes.” *Ashcroft*, 539 U.S. at 472. The government argued that the proposed change diminished the ability of black voters to elect candidates of their choice. *Id.*

and instituted a new method.<sup>158</sup> The new method was a less rigid totality of the circumstances approach that examined retrogressive effects by looking at all relevant circumstances.<sup>159</sup> Ultimately, the Supreme Court made it clear that Georgia satisfied its burden by proving that the proposed changes had no retrogressive effect on minority voters, but remanded the case to the district court so that it could reweigh the facts.<sup>160</sup>

When the VRA was being considered for reauthorization in 2006, Congress considered the recent test set out in *Ashcroft* and found the test to be ambiguous.<sup>161</sup> Upon its determination, Congress added language stating that all voting changes that diminished the ability of minorities to elect their preferred candidates of choice should be denied under preclearance pursuant to Section 5.<sup>162</sup> Overall, Congress found that the congressional records demonstrated that “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”<sup>163</sup> Thus, Congress extended the VRA until 2031.<sup>164</sup>

#### IV. THE CONSTITUTIONALITY OF THE VOTING RIGHTS ACT REVISITED

Following Congress’s fourth reauthorization of the VRA in 2006, Congress’s authority to enforce the VRA was almost immediately challenged as unconstitutional.<sup>165</sup> The Supreme Court strongly suggested that Section 5 was unconstitutional in *Northwest Austin Municipal Utility District No. One v. Holder*,<sup>166</sup> but did not ultimately

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<sup>158</sup> *Id.* at 479.

<sup>159</sup> *Id.* at 479-80. Relevant circumstances included the ability of minority groups to elect their candidate of choice, the feasibility of a non-retrogressive plan, and the extent of the minority group’s opportunity to participate in the political process. *Id.*

<sup>160</sup> *Ashcroft*, 539 U.S. at 490.

<sup>161</sup> *Shelby I*, 811 F. Supp. 2d at 437-38.

<sup>162</sup> Fannie Lou Hamer, Rosa Parks, Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246 § 1, (120 Stat. 577, 580-81) (2006).

<sup>163</sup> *Id.* at 578.

<sup>164</sup> *Shelby II*, 133 S. Ct. at 2621.

<sup>165</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 196 (2009).

<sup>166</sup> The plaintiff in *Northwest Austin* was a small utility district located in Texas; Texas was a covered jurisdiction. *Id.* at 196. The utility district sought to “bail out” from preclear-

reach that position until 2013 in *Shelby County v. Holder*<sup>167</sup> when it struck down Section 4(b), which in turn rendered Section 5 useless.<sup>168</sup>

### A. *Shelby County v. Holder*: Section 4(b) of the Voting Rights Act was Held Unconstitutional in 2013

Although the Supreme Court previously chose not to decide whether the VRA remained constitutional in the twenty-first century, the Supreme Court could no longer avoid addressing this difficult question when it granted certiorari to hear *Shelby County v. Holder* in 2013.<sup>169</sup> In its decision, the Supreme Court issued the holding that many VRA proponents feared—Section 4(b) of the VRA was unconstitutional.<sup>170</sup> For those who felt like this result was a long time coming, they were satisfied that the Supreme Court declined to continue the application of decade-old data to current times.

#### 1. *Procedural History in Shelby*

The petitioner in *Shelby* was Shelby County located in the covered jurisdiction of Alabama.<sup>171</sup> In 2010, Shelby County sought a

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ance because it had no history of voting discrimination. *Id.* at 197. The district court found that Section 5 was constitutional because Congress rationally concluded that it was necessary to protect minorities in voting and because “the 2006 Amendment qualifie[d] as a congruent and proportional response to the continuing problem of racial discrimination in voting that Congress sought to remedy.” *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 283 (2008). The Supreme Court, when it determined whether Section 5 was still constitutional, noted that the registration gap between African Americans and whites in covered jurisdictions was in the single digits and some covered jurisdictions had higher voter registration rates for African Americans than for whites. *See Nw. Austin*, 557 U.S. at 201. Furthermore, the Supreme Court questioned whether legislation that was more than thirty-five years old could be applied to current times. *Id.* at 203. Although the Supreme Court did not deem Section 5 unconstitutional, it provided the necessary requirement to justify disparate treatment of the states. *Id.* To justify a departure from the fundamental principle of equal sovereignty among the states, Congress must demonstrate that the “statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” *Id.* Furthermore, the Supreme Court recognized, for the first time, that smaller districts had the ability to “bail out” and no longer be subject to preclearance requirements. *Id.* at 211.

<sup>167</sup> 133 S. Ct. 2612 (2013).

<sup>168</sup> Adam Liptak, *Supreme Court Invalidates Key Part of the Voting Rights Act*, N.Y. TIMES (June 25, 2013) available at <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all>.

<sup>169</sup> 133 S. Ct. 2612 (2013).

<sup>170</sup> *Id.* at 2631.

<sup>171</sup> *Id.* at 2621. Alabama was a covered jurisdiction since the VRA’s original enactment. *See Shelby I*, 811 F. Supp. 2d at 432.

declaratory judgment and permanent injunction that Sections 4(b) and 5 of the VRA are unconstitutional.<sup>172</sup> The district court upheld the VRA because it found that Congress had sufficient evidence to reauthorize the VRA in 2006.<sup>173</sup> In affirming, the Court of Appeals held that Congress documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions.<sup>174</sup> Shortly after, Shelby County filed a petition for a writ of certiorari to the United States Supreme Court requesting that the Court declare Sections 4(b) and 5 of the VRA unconstitutional.<sup>175</sup>

## 2. Majority Opinion in *Shelby*

During the hearings for the 2006 VRA reauthorization, the statistics Congress relied on ignored current developments and kept “the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”<sup>176</sup> The majority criticized Congress’s conclusion that the VRA was still necessary in 2006 and questioned the reauthorization on various bases. First, current statistics showed that voter discrimination had been significantly improved since 1965.<sup>177</sup> When the VRA was passed in 1965, it was in response to intentional discrimination. However, in 2013, “[b]latantly discriminatory evasions of federal decrees [were] rare.”<sup>178</sup> When the VRA was first enacted, “the States could be divided into two groups: those with a recent history of voting tests and lower

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<sup>172</sup> *Shelby II*, 133 S.Ct. at 2621-22.

<sup>173</sup> *Id.* at 2622.

<sup>174</sup> *Shelby I*, 811 F. Supp. 2d at 492.

<sup>175</sup> *Shelby II*, 133 S. Ct. at 2621-22.

<sup>176</sup> *Id.* at 2629.

<sup>177</sup> *Id.* at 2626. Current data demonstrated that African American voter turnout exceeded white voter turnout in five of the six states originally covered by Section 5 and the gap in the sixth state was less than one half of one percent. *Id.*; see also *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States*, U.S. CENSUS BUREAU (Nov. 2012) (Table 4b), available at <https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (last visited Apr. 14, 2015). Prior to the VRA’s enactment in 1965, white voter registration exceeded black voter registration, ranging from 22.8% in Virginia to 63.2% in Mississippi. *Shelby II*, 133 S. Ct. at 2626. White voter registration exceeded black voter registration in the following States: South Carolina = 38.4%, Georgia = 35.2%, Louisiana = 48.9%, and Alabama = 49.9%. *Id.* In 2006, the gap between white and black voter registration was down to 12% in Virginia and black voter registration exceeded white voter registration in Mississippi by 3.8%. *Id.* South Carolina = 3.3%, Georgia = -0.7%, Louisiana = 4.0%, and Alabama = 0.9%. *Id.*

<sup>178</sup> *Id.* at 2621.

voter registration and turnout, and those [States] without those characteristics.”<sup>179</sup> The majority held that the VRA continued to treat covered jurisdictions as if the division amongst the states still existed, when it had not for over forty years.<sup>180</sup>

The majority also criticized the VRA’s lengthened extension.<sup>181</sup> During the first reauthorization, the VRA was only extended for five years.<sup>182</sup> In 2006, Congress reauthorized it for twenty-five years.<sup>183</sup> The VRA has always been recognized as a piece of legislation that was “far from ordinary.”<sup>184</sup> It is only appropriate to keep an extraordinary piece of legislation when “exceptional”<sup>185</sup> and “unique”<sup>186</sup> conditions that called for the legislation continue to exist. Therefore, extending the VRA for an additional 25 years ran the risk of it becoming unconstitutional because the unusual circumstance could cease to exist long before the statute’s expiration date.

Lastly, the majority criticized Congress’s decision to expand the definition of voting changes that required preclearance.<sup>187</sup> In 2006, the VRA was amended to include “any voting law ‘that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States,’ on account of race, color, or language minority status, ‘to elect their preferred candidates of choice.’ ”<sup>188</sup> This last issue troubled the majority of the Supreme Court because the previous interpretation of the VRA was whether the proposed change would have the “purpose or effect of worsening the position of minority groups,” while the new test covered any voting change.<sup>189</sup> In light of the significant improvements across the country, “the bar that covered jurisdictions must clear [had] been raised even as the conditions justifying that requirement [were] dramatically improved.”<sup>190</sup>

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<sup>179</sup> *Shelby II*, 133 S. Ct. at 2628.

<sup>180</sup> *Id.* at 2630-31.

<sup>181</sup> *Id.* at 2618.

<sup>182</sup> *Id.* at 2620.

<sup>183</sup> Fannie Lou Hamer Amendment, Pub. L. 109-246 § 1, 120 Stat. 577; *Shelby II*, 133 S. Ct. at 2621.

<sup>184</sup> *Shelby II*, 133 S. Ct. at 2630.

<sup>185</sup> *Katzenbach*, 383 U.S. at 334-35.

<sup>186</sup> *Id.*

<sup>187</sup> *Shelby II*, 133 S. Ct. at 2627.

<sup>188</sup> *Id.*; 42 U.S.C. § 1973c.

<sup>189</sup> *Shelby II*, 133 S. Ct. at 2626.

<sup>190</sup> *Id.* at 2627.



Considering all of these factors, the Supreme Court held that Congress ignored the covered jurisdictions' improvements when it reauthorized the VRA until 2031.<sup>191</sup> Furthermore, it was inappropriate for Congress to single out jurisdictions based on forty-year old facts that had "no logical relation to the present day."<sup>192</sup> The Supreme Court held that Congress could have updated the coverage formula in 2006 to make it constitutional for the times; however, Congress failed to exercise this right and therefore the VRA was unconstitutional in 2013.<sup>193</sup>

### 3. *Justice Ginsburg's Dissent in Shelby*

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan dissented in a lengthy opinion.<sup>194</sup> Justice Ginsburg stated that it was not the job of the Supreme Court, but rather the job of Congress, to determine whether the VRA remained a necessary piece of legislation to prevent voting discrimination against minorities.<sup>195</sup> She recognized that Congress made two findings when it determined that the VRA should be reauthorized in 2006.<sup>196</sup> First, reauthorizing the VRA would help complete the process of decreased discrimination.<sup>197</sup> Second, reauthorizing the VRA would prevent "backsliding."<sup>198</sup>

#### a. **First and Second-Generation Barriers to Voting**

Although first-generation barriers were significantly diminished following the passage of the VRA, second generation barriers

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<sup>191</sup> *Id.* at 2629.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 2631.

<sup>194</sup> *Shelby II*, 133 S. Ct. at 2632-52 (Ginsburg, J., dissenting).

<sup>195</sup> *Id.* at 2632-33.

<sup>196</sup> *Id.* at 2632.

<sup>197</sup> *Id.* The essence of Justice Ginsburg's dissent is that the VRA should have remained a key piece of legislation until "all vestiges of discrimination against" minority voters disappeared. *Id.* at 2634. She stated that the majority dismissed the debate when it "[struck] at the heart of the Nation's signal piece of civil-rights legislation." *Shelby II*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting).

<sup>198</sup> *Id.* at 2632. Justice Ginsburg and the other dissenting justices believed that without the VRA, the states would employ voting devices and barriers that would cause discrimination to become rampant once again. *Id.* at 2632-33. In order to prevent this so-called "backsliding," they believed the VRA was still necessary. *Id.*

were a vestige of discrimination that still existed. First-generation barriers are defined as “direct attempts to block access to the ballot.”<sup>199</sup> These tactics were most often used prior to the enactment of the VRA.<sup>200</sup> Second-generation barriers, like first-generation barriers, come in different forms. However, second-generation barriers are “[e]fforts to reduce the impact of minority votes,”<sup>201</sup> which typically occur indirectly.<sup>202</sup> One example of a second-generation barrier is racial gerrymandering – defined as the “redrawing of legislative districts in an effort to segregate the races for purposes of voting.”<sup>203</sup>

In July 2011, the state of Texas filed a complaint in the United States District Court for the District of Columbia, seeking a declaratory judgment that its redistricting plan complied with Section 5 of the VRA.<sup>204</sup> The United States District Court, in *Texas v. United States*,<sup>205</sup> considered the effect of the new redistricting plan on minority voters and found that the plan violated Section 5 of the VRA.<sup>206</sup> This was a quintessential example of the second-generation barrier known as racial gerrymandering.<sup>207</sup> Considering the facts, the District Court held that the redistricting plan had the purpose or “effect

<sup>199</sup> *Id.* at 2634.

<sup>200</sup> *Shelby II*, 133 S. Ct. at 2625 (majority opinion). Examples of first-generation barriers include grandfather clauses, the White Primary, and poll taxes.

<sup>201</sup> *Id.* at 2634 (Ginsburg, J., dissenting).

<sup>202</sup> *Id.* at 2635 (quoting *Shaw v. Reno*, 509 U.S. 630, 642 (1993)).

<sup>203</sup> *Id.*

<sup>204</sup> *Texas v. United States*, 887 F. Supp. 2d 133, 138 (2012).

<sup>205</sup> *Id.* at 139 (denying Texas preclearance).

<sup>206</sup> *Id.* at 153.

<sup>207</sup> Liptak, *supra* note 168. In *Texas*, the jurisdictions affected by the new redistricting plan were voting districts known as crossover districts and coalition districts. A crossover district is where “a minority group ‘is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate.’” See *Texas*, 887 F. Supp. 2d at 147 (quoting *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009)). A coalition district is where “two minority groups form a coalition to elect the candidate of the coalition’s choice.” *Bartlett*, 556 U.S. at 13. African American and Hispanic voters in the crossover and coalition districts made up 39.3% of the Citizen Voting Age Population (“CVAP”) in Texas when the case was decided. *Texas*, 887 F. Supp. 2d. at 158. Between the years 2000-2010, Texas gained 4.3 million new residents. See also Ari Berman, *Federal Court Blocks Discriminatory Texas Redistricting Plan*, THE NATION (Aug. 28, 2012, 4:46 PM), <http://www.thenation.com/blog/169602/federal-court-blocks-discriminatory-texas-redistricting-plan#>. Approximately 90% of the new citizens were minorities. *Id.* 65% were Hispanic; 13% African American; and 10% Asian. *Id.* As a result of this increase in population, Texas gained four new Congressional seats. *Id.* However, under the new redistricting plan, minorities were blocked from obtaining 3 out of the four new seats available. *Id.*

of abridging minority voting rights . . .”<sup>208</sup> The case was appealed to the United States Supreme Court.<sup>209</sup> On June 27, 2013, it was vacated and remanded to the United States District Court for the District of Columbia because of the Supreme Court’s 2013 decision in *Shelby*.<sup>210</sup> The dissenting Justices in *Shelby* feared that without Section 4(b) of the VRA, racial gerrymandering, and the minority voter dilution that was prevented in *Texas*, would become rampant once again.<sup>211</sup> The dissent also wrote that the VRA had enormous success in significantly diminishing first-generation barriers to voting; however, second-generation barriers “constructed to prevent minority voters from fully participating in the electoral process”<sup>212</sup> still existed.

**b. Congress’s Findings Show the Continued Need for the Voting Rights Act**

Not only did the dissent note that second-generation barriers continued to exist at the time of the Supreme Court’s decision, but the dissent also recognized that the majority writing for the Court failed to acknowledge that under the Fourteenth and Fifteenth Amendments, the Court is required to grant “substantial deference”<sup>213</sup> to Congress’s findings.<sup>214</sup> Therefore, the dissent disagreed with the majority of the Court when the majority failed to grant substantial deference to Congress’s findings that constitutional text and precedent required.<sup>215</sup> The dissent wrote that the majority failed to grant

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<sup>208</sup> *Texas*, 887 F. Supp. 2d at 166.

<sup>209</sup> *Texas v. United States*, 133 S. Ct. 2885 (2013).

<sup>210</sup> *Id.* at 2885.

<sup>211</sup> *Shelby II*, 133 S. Ct. at 2642 (Ginsburg, J., dissenting).

<sup>212</sup> *Id.* at 2636.

<sup>213</sup> *Id.*

<sup>214</sup> The explicit language of the Fifteenth Amendment states that Congress has the power to enforce the Amendment “by appropriate legislation.” See U.S. CONST. amend. XV, § 2. “By appropriate legislation” meant that Congress could use “all means which [were] appropriate, which [were] plainly adapted to that end, which [were] not prohibited, but consist with the letter and spirit of the constitution.” See *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

<sup>215</sup> *Shelby II*, 133 S. Ct. at 2636-37 (Ginsburg, J., dissenting). When granting the substantial deference that is appropriate, the Supreme Court looks at “whether Congress has rationally selected means appropriate to a legitimate end.” *Id.* at 2637. Congress, when employing the legislation it found appropriate, needed only to believe that there was some basis for it to “resolve the conflict as it did.” *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966).

Congress the appropriate deference because the majority replaced its own judgment for that of Congress.<sup>216</sup>

**c. Recent Case Law Showed the Continued Need for the Voting Rights Act**

Justice Ginsburg also criticized the majority's opinion when it held that the Section 4 coverage formula was not justified by current needs, even in a place like Alabama, where the litigation occurred.<sup>217</sup> The Supreme Court "confronted purposeful racial discrimination in Alabama" between the 1982 and 2006 reauthorizations.<sup>218</sup> The first case, *Hunter v. Underwood*,<sup>219</sup> was decided in 1985.<sup>220</sup> Two years later, the second case, *Pleasant Grove v. United States*,<sup>221</sup> was decided. Both *Hunter* and *Pleasant Grove* involved actions where political subdivisions of Alabama intentionally made voting changes with the purpose of discriminating against African Americans to minimize their voting strength.<sup>222</sup>

In 2011, the United States District Court for the Northern Division of Alabama decided *United States v. McGregor*.<sup>223</sup> This case involved state legislators who cooperated with the FBI by wearing

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<sup>216</sup> *Shelby II*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting). When the VRA was up for its fourth reauthorization in 2006, Congress considered "empirical data from studies, personal accounts provided by citizens, findings of discrimination presented by litigations, and analysis presented by scholars." See also Clarke, *supra* note 147 at 432. The House Committee, which considered the evidence to determine if the VRA should be reauthorized, found that "despite substantial progress that [was] made, the evidence before the Committee [resembled] the evidence before Congress in 1965 and the evidence that was present again in 1970, 1975, 1983, and 1992." See H.R. REP. NO. 109-478, at 6 (2006) (Conf. Rep.). "In 2006, the Committee [found] abundant evidentiary support for reauthorization of the VRA's temporary provisions." *Id.* The dissent stated that so long as Congress believed the VRA was still necessary, it should be upheld. See also *Shelby II*, 133 S. Ct. at 2638, 2645.

<sup>217</sup> *Shelby II*, 133 S. Ct. at 2646 (Ginsburg, J., dissenting).

<sup>218</sup> *Id.*

<sup>219</sup> 471 U.S. 222 (1985).

<sup>220</sup> *Id.*

<sup>221</sup> 479 U.S. 462 (1987).

<sup>222</sup> *Shelby II*, 133 S. Ct. at 2646 (Ginsburg, J., dissenting). In *Hunter*, the Supreme Court struck down a provision of the Alabama constitution that barred people from voting within the state if they were convicted of crimes of moral turpitude. *Hunter*, 471 U.S. at 223, 233. In *Pleasant Grove*, the Supreme Court held that the annexation of additional acreage to a voting district, with a long history of discrimination, was not allowed because the change would have a discriminatory effect on black voters in the district. 479 U.S. at 471-72.

<sup>223</sup> 824 F. Supp. 2d 1339 (M.D. Ala. 2011).

recording devices.<sup>224</sup> The recordings caught state legislators and other politicians discussing their plan to quash a referendum that would have increased African American voter turnout in Alabama.<sup>225</sup> The conversations also revealed members of the state legislature using derogatory terms to refer to African American voters.<sup>226</sup> The dissent, looking at the recent Alabama decisions in *Hunter*, *Pleasant Grove*, and *McGregor* could not agree with the majority when it held that the VRA was unconstitutional as applied to Alabama,<sup>227</sup> a state where “racist sentiments . . . [remained] regrettably entrenched in the high echelons of state government.”<sup>228</sup>

## V. THE FUTURE OF THE VOTING RIGHTS ACT

In *Shelby*, the Supreme Court struck down Section 4(b) of the VRA because it unconstitutionally subjected states and political subdivisions to federal preclearance.<sup>229</sup> However, the majority of the Court recognized there was a continued need for voting rights legislation, specifically one that was based on current data and appropriate for the current times.<sup>230</sup> Therefore, the majority held that Congress could draft a new coverage formula.<sup>231</sup> The Supreme Court also held that Congress could have redrafted the VRA when it was reauthorized in 2006; however, because Congress failed to do so, the Supreme Court was left “with no [other] choice [than] to declare Section 4(b) unconstitutional.”<sup>232</sup> The Supreme Court did not strike down the other parts of the VRA.<sup>233</sup> As a result, Section 5 is inapplicable because in order for a state or political subdivision to be subject to Section 5, it must first be shown that it is subject to Section 4(b)—without Section 4(b), this progression is impossible.<sup>234</sup> Following the Supreme Court’s decision, many political commentators stated that

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<sup>224</sup> *Id.* at 1344.

<sup>225</sup> *Id.* at 1345-46.

<sup>226</sup> *Id.*

<sup>227</sup> *Shelby II*, 133 S. Ct. at 2647-48 (Ginsburg, J., dissenting).

<sup>228</sup> *McGregor*, 824 F. Supp. 2d at 1347.

<sup>229</sup> *Shelby II*, 133 S. Ct. at 2631.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Liptak, *supra* note 168.

Section 3, a portion of the VRA that remains constitutional, provided an alternative place where injured plaintiffs could bring their claims.<sup>235</sup>

**A. Congress's Proposed Sensenbrenner-Conyers-Leahy Bill to Replace Section 4(b) of the Voting Rights Act**

Between 1996 and 2006, there were nine states in whole and six other states in part that were covered jurisdictions subject to preclearance.<sup>236</sup> Of these fifteen states, two suffered no denials of declaratory judgments from the government during this time period.<sup>237</sup> However, both were still required to obtain federal preclearance before making voting changes.<sup>238</sup> Between 2006 and the *Shelby* decision in June 2013, six states were granted declaratory judgments yet were still required to obtain federal preclearance as well.<sup>239</sup> Therefore, between 1996 and 2013, eight states were required to obtain federal preclearance when they had no history of voting discrimination for over fifteen years.<sup>240</sup> In 2013, the VRA was held unconstitutional as applied to these states.<sup>241</sup>

Discrimination did not subside in all covered states between

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<sup>235</sup> See Jeffrey Rosen, *Eric Holder's Suit Against Texas Gives the Supreme Court a Chance to Gut Even More of the Voting Rights Act*, NEW REPUBLIC (Sept. 1, 2013), <http://www.newrepublic.com/article/114524/eric-holder-texas-suit-supreme-court-might-gut-more-voting-rights>.

<sup>236</sup> See *Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php](http://www.justice.gov/crt/about/vot/misc/sec_4.php) (last visited Apr. 14, 2015). Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were covered in whole; parts of California, Florida, New York, North Carolina, South Dakota, and Michigan were covered. *Id.*

<sup>237</sup> Alaska and Michigan did not suffer any denials of declaratory judgments from the government. *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Alaska, Arizona, Virginia, California, Florida, and New York were granted declaratory judgments yet still required to obtain federal preclearance. *Id.*

<sup>240</sup> See U.S. DEP'T OF JUSTICE, *supra* note 236.

<sup>241</sup> See *Shelby II*, 133 S. Ct. at 2629 (holding that the coverage formula Congress utilizes must apply current data to current times). Following Congress's 2006 reauthorization, approximately thirty-one towns, cities, and counties in Virginia successfully bailed out of coverage. *Id.* Four districts in California, two districts in Texas, one city in North Carolina, and one city in Alabama also successfully bailed out of coverage when they were able to show that they proposed no voting changes that would have a retrogressive effect on the ability of minority voters. See U.S. DEP'T OF JUSTICE, *supra* note 236.

1996 and 2013.<sup>242</sup> Between 1996 and 2006, the government denied fifteen of Louisiana's proposed voting changes, eleven of South Carolina's, and eight of Texas's, to name a few with the most government objections.<sup>243</sup> Following the 2006 reauthorization, up until to the decision in *Shelby*, the government denied eleven proposed changes in Texas, six proposed changes in Georgia, and four proposed changes in Mississippi.<sup>244</sup> This evidence is sufficient to show that these states should still be required to obtain federal preclearance before enacting voting changes. Section 4(b) did not recognize that some states had clean records for a period of over fifteen years; instead, Section 4(b) still subjected these states to the VRA. Section 4(b) could not constitutionally subject all of these States to the federal preclearance requirement.<sup>245</sup> The holding in *Shelby* left open the option to redraft a constitutional formula that would apply to the states with continued records of discrimination. In response, Congress proposed the five-part Sensenbrenner-Conyers-Leahy Bill.<sup>246</sup>

The first part of the bill creates a new Section 4 formula. Under the proposal, the entire state would be required to obtain federal preclearance if there were five or more violations in the past fifteen years, with at least one violation being made by the state.<sup>247</sup> This formula is unlikely to stand a constitutional challenge because it does not take into consideration the progress that a state may have made as a whole over the past fifteen years.<sup>248</sup> Thus, this formula is likely to

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<sup>242</sup> *Shelby II*, 133 S. Ct. at 2619.

<sup>243</sup> See U.S. DEP'T OF JUSTICE, *supra* note 236. The government also denied proposed changes in Alabama, Arizona, Georgia, Mississippi, Virginia, California, Florida, New York, North Carolina, and South Dakota.

<sup>244</sup> *Id.* The government also denied proposed changes in Alabama, Louisiana, South Carolina, Texas, North Carolina, South Dakota, and Michigan.

<sup>245</sup> *Shelby II*, 133 S.Ct. at 2618-31. The majority of the Supreme Court held that Congress no longer had the power to subject states with no recent history of discrimination under federal preclearance. *Id.*

<sup>246</sup> Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2nd Sess. 2014). This Act is commonly known as the Sensenbrenner-Conyers-Leahy Bill or sometimes just the Sensenbrenner-Conyers Bill [hereinafter *Sensenbrenner Bill*].

<sup>247</sup> *Id.* A political subdivision of the state would be required to obtain federal preclearance if: (a) there was three or more voting rights violations in the subdivision over the past fifteen years; or (b) one or more voting rights violations occurred in the subdivision and the subdivision had "persistent, extremely low minority turnout during the previous [15] calendar years." *Id.*

<sup>248</sup> If one area within the state has a history of voting discrimination, every political subdivision of the state would be required to obtain federal preclearance before enacting any voting changes—even those who have no history of voting discrimination. See *Voting*

be struck down for the same reasons the Supreme Court struck down Section 4(b) in *Shelby*.

Second, the bill would require all fifty states, regardless of whether or not they have a history of discrimination within the past fifteen years, to provide notice in both local media outlets and online of “any change in any prerequisite to voting . . . in any election for Federal office that will result in the prerequisite standard, practice, or procedure being different from that which was in effect as of 180 days before the date of the election.”<sup>249</sup> The purpose of this provision is to promote transparency to allow voters to “identify potentially harmful voting changes in the forty-six states not subject to sections 4 and 5.”<sup>250</sup> This requirement is counterproductive because the forty-six states that have not discriminated against minority voters are unlikely to begin discriminating simply because Section 4(b) no longer stands; it is more likely that they will continue to act as they have been.<sup>251</sup> Furthermore, of the four states that would be covered under the new proposed coverage formula, the online publication of any voting change is likely to confuse voters because voters are unlikely to scroll through thousands of pages in order to determine whether a voting change may be discriminatory. The Supreme Court would likely strike down this proposal as well because every county, city, and town in every state would be required to publish any voting change. This requirement is overly broad because a voting change may have absolutely nothing to do with a covered class, yet still requires publication in newspapers and online.

Third, the bill proposes that the Attorney General could use his judgment to send federal observers to states with a history of discriminating against language minority groups, which would include

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*Rights Rewind*, WALL ST. J. (Feb. 28, 2014, 12:36 PM), <http://online.wsj.com/news/articles/SB10001424052702304757004579334914053577606>. For example, “Demerits against four counties in Texas would land a state with 250 counties and more than a thousand cities, including diverse metropolitan areas . . . back in the penalty box.” *Id.*

<sup>249</sup> *Sensenbrenner Bill*, *supra* note 246 at SECTION 4 (emphasis added). The bill would further require the state to provide a “concise description” of the change to certain media outlets. *Id.*

<sup>250</sup> Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, THE NATION (Jan. 16, 2014, 12:53 PM), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act>.

<sup>251</sup> *See generally Voting Rights Rewind*, *supra* note 248. Therefore, they will not be publishing any information related to discriminatory voting changes because they simply are not proposing discriminatory voting changes. *Id.*



twenty-five states.<sup>252</sup> The 2006 reauthorization of the VRA required that the Attorney General consider various factors<sup>253</sup> to determine whether he thought observers were necessary. Under the proposed Sensenbrenner Bill, it is unclear what factors the Attorney General must take into consideration when making this determination.<sup>254</sup> Similar to the other provisions of the proposed bill, the Supreme Court would likely strike this provision down because the Attorney General has the ability to place federal observers in jurisdictions that are not covered by the VRA.<sup>255</sup>

Fourth, the bill would eliminate the plaintiff's burden under Section 4 in order to obtain a preliminary injunction.<sup>256</sup> Under the proposal, the court would apply a balancing test to determine whether "the hardship imposed on the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted."<sup>257</sup> If the burden on the plaintiff is greater, the preliminary injunction will be granted.<sup>258</sup>

Lastly, the bill would change Section 3 of the VRA. Currently under Section 3, a plaintiff must show that the state's proposed voting change was a result of intentional discrimination.<sup>259</sup> If the plaintiff is able to show that the state intentionally discriminated, the state is "bailed in" and required to obtain federal preclearance before making any voting changes.<sup>260</sup> Under the Sensenbrenner Bill, Section 3 would "bail in" a state regardless of whether the state intentionally discriminated; any violation of the VRA would require the state to obtain federal preclearance before instituting voting chang-

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<sup>252</sup> *Sensenbrenner Bill*, *supra* note 246, at SECTION 5.

<sup>253</sup> Fannie Lou Hamer Amendment, *supra* note 183, at SECTION 3. The attorney general would consider the ratio of nonwhite persons to white persons registered to vote, and whether or not the state has made bona fide efforts to comply with the Fourteenth and Fifteenth Amendments. *Id.*

<sup>254</sup> *Sensenbrenner Bill*, *supra* note 246, at SECTION 5.

<sup>255</sup> It is possible, although unclear how likely, that a state may have no history of discrimination, proposed no voting changes, but the Attorney General felt as though federal observers should be placed within the state. The bill gives the Attorney General full authority to do this. *See Sensenbrenner Bill*, *supra* note 246, at SECTION 5.

<sup>256</sup> *Sensenbrenner Bill*, *supra* note 246, at SECTION 6.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> 42 U.S.C. § 1973a(c) (2012).

<sup>260</sup> *Sensenbrenner Bill*, *supra* note 246, at SECTION 7.

es.<sup>261</sup> The proposed bill expands the definition of a “voting rights violation” to include a proposal by the state to change its voting procedures followed by a denial by the government to approve the proposed change.<sup>262</sup> Following the decision in *Shelby*, Section 3 remained constitutional.<sup>263</sup> The proposed changes to Section 3 are unlikely to survive a constitutional challenge because no state would ever propose a voting change out of fear that the proposal would be denied. The government’s denial of the declaratory judgment would then be counted toward the number of violations a state may have under the proposed Section 4 formula.<sup>264</sup>

### B. Section 3 Litigation

Although the proposed amendment to Section 3 in the Sensenbrenner Bill may not stand a constitutional challenge, Section 3, in its current form, may allow plaintiffs to obtain favorable judgments.<sup>265</sup> If Section 3 is properly interpreted and applied by the courts, it may be a sufficient replacement for Section 4.<sup>266</sup> Successful

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at SECTION 3(b)(3)(C).

<sup>263</sup> *Shelby II*, 133 S. Ct. at 2631. *Voting Rights Act After the Supreme Court’s Decision in Shelby County*, <http://www.gpo.gov/fdsys/pkg/CHRG-113hhr81983/pdf/CHRG-113hhr81983.pdf> (last visited Apr. 14, 2015).

<sup>264</sup> Berman, *supra* note 250.

<sup>265</sup> In January 2014, the United States District Court for the Southern Division of Alabama struck down an Alabama redistricting plan under Section 3 in *Allen v. City of Evergreen*, No. 13-107-CG-M, 2013 WL 1163886 (S.D. Ala. Mar. 20, 2013). The district court relied on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Arlington* held that when a plaintiff challenges a state law, the plaintiff does not need to prove that racial discrimination was the legislature’s “ ‘dominant’ or ‘primary’ ” purpose in enacting the law; but rather, racial discrimination was a motivating factor. To determine the legislature’s purpose in enacting the law, the court will look at legislative history. *Id.* at 268. In *Arlington*, the court held that the plaintiffs failed to prove that a discriminatory purpose was a motivating factor in enacting the law and thus upheld the law. *Id.* at 270. In *Allen*, the court extended *Arlington*’s holding to apply to Section 3 challenges to voting laws. *Allen*, 2013 WL 1163886, at \*1. In *Allen*, the district court held that the redistricting plan was evidence of gerrymandering to keep whites as the majority of the council in a city that was 62% black. *Id.* The district court further held that the City would be required to obtain federal preclearance before making changes to its voting laws. *See also* Richard Winger, *U.S. District Court in Alabama Makes Rare Use of Section 3 of the Voting Rights Act*, BALLOT ACCESS NEWS (Jan 15, 2014), <http://www.ballot-access.org/2014/01/u-s-district-court-in-alabama-makes-rare-use-of-section-3-of-the-voting-rights-act/>. The district court further held that the City would be required to obtain federal preclearance before making changes to its voting laws.

<sup>266</sup> There is a question whether the evidence in *Allen* supports the district court’s finding.

Section 3 challenges would allow the court to place jurisdictions that have intentionally discriminated against minority voters back on the preclearance list.<sup>267</sup> This avoids all of the problems that the majority in *Shelby* found with Section 4.<sup>268</sup> Section 3 has not been widely used since its enactment, but it has been proven successful.<sup>269</sup> It is likely that as Section 3 challenges become more voluminous, the courts will lax the burden on plaintiffs since Sections 4 safeguards no longer exist.<sup>270</sup>

Under Section 5 litigation, the legislature has been called upon to determine what percentage of challenges involved laws that were enacted with a discriminatory purpose or discriminatory intent

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Section 3 explicitly requires that the court find that the legislature intentionally discriminated in order to require the jurisdiction to obtain federal preclearance. 42 U.S.C. 1973a(c). The district court in *Allen* cited no facts to show that the legislature adopted the redistricting plan with the purpose of discriminating against minorities. *Allen*, 2013 WL 1163886. Although the redistricting plan moved minority voters into fewer districts, there was no evidence in the court's opinion that showed that the purpose of the plan was to intentionally discriminate. *Id.* at \*1. It is possible that the redistricting plan was adopted with the purpose of intentionally discriminating against minority voters, but Section 3 requires more than a mere possibility that the law was adopted with a discriminatory purpose or has a discriminatory effect.

<sup>267</sup> Crum, *supra* note 120, at 2006.

<sup>268</sup> The majority struck down Section 4 for three main reasons. *Shelby II*, 133 S. Ct. at 2619-28. First, statistics showed that voter discrimination had been significantly improved since the VRA was adopted in 1965. *Id.* at 2619. Second, the VRA was initially enacted as a temporary solution and was not meant to be extended. *Id.* at 2620. Lastly, the VRA was expanded to require federal preclearance for any voting law rather than discriminatory voting laws. *Id.* at 2627. Under Section 3, the only jurisdictions that will be required to obtain preclearance are those jurisdictions that continue to discriminate against their minority voters. *See* 42 U.S.C. 1973a(c). The majority's concern will be rectified regarding its concern that Section 4 was over-inclusive because it subjected states with no recent history of voting discrimination under federal preclearance. Section 3 will also resolve the majority's concern that Section 4 could be extended indefinitely because Section 3 preclearance allows covered jurisdiction to bail out. Section 3 diminishes, although does not completely eradicate, the majority's concern that the formula set forth in Section 4 required all voting changes to be precleared. Under Section 3, if a plaintiff proves that a jurisdiction intentionally discriminated, all changes to its voting laws will require preclearance. However, only those jurisdictions that have a continued pattern of discrimination need to obtain preclearance under Section 3. Therefore, states that have refrained from discriminating may pass any voting law without obtaining federal preclearance. It is only once that law is challenged because of its discriminatory purpose and effect that the jurisdiction needs to obtain preclearance going forward.

<sup>269</sup> *See* Crum, *supra* note 120, at 1997-99 for an analysis on jurisdictions that were bailed in utilizing Section 3 of the VRA.

<sup>270</sup> Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, THE AM. PROSPECT (Aug. 19, 2013), available at <http://prospect.org/article/get-know-section-3-voting-rights-act>. There is evidence that this has already begun, as seen in *Allen*.

or a combination of the two.<sup>271</sup> The legislature found that as of the 1990s, 43% of all Section 5 objections were based on intent alone and an additional 31% were based on intent and effect.<sup>272</sup> The dissenting Justices in *Shelby* were concerned that jurisdictions that continued to discriminate against minority voters would now be free to pass any voting law they wished because federal preclearance was no longer required.<sup>273</sup> However, Justice Ginsburg relied on cases whose laws would be unconstitutional under Section 3.<sup>274</sup> For example, in *United States v. McGregor*,<sup>275</sup> Alabama state legislators and politicians had recorded discussions about their intent to prevent increased African-American voter turnout by passing a new law.<sup>276</sup> These conversations would certainly satisfy Section 3's requirement that the law had a discriminatory purpose and effect.

### C. Voter Identification Laws

Some have argued that voter identification laws are the modern day tool of disenfranchisement.<sup>277</sup> Although Section 3 appears to be the most effective alternative to Section 4 litigation, plaintiffs may also consider bringing their claims under their state constitutions post-*Shelby*. Voters have already challenged newly enacted voter identification requirements under their state constitutions.<sup>278</sup> A complicating factor in bringing a claim under the state constitution is that state constitutions vary and “the relevance of [a] ruling to other voter ID challenges is somewhat limited . . . [and] the findings on implementation are state specific and don't really carry over to other states.”<sup>279</sup>

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<sup>271</sup> *Mukasey*, 573 F. Supp. 2d at 252.

<sup>272</sup> *Id.*

<sup>273</sup> *Shelby*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting).

<sup>274</sup> *Id.* at 2640-41.

<sup>275</sup> 824 F. Supp. 2d 1339 (M.D. Ala. 2011).

<sup>276</sup> *Id.* at 1345-46.

<sup>277</sup> *The Real Cost of Voter ID Laws*, VOTING RIGHTS INST., <http://www.democrats.org/the-real-cost-of-photo-id-laws> (last visited Apr. 14, 2015).

<sup>278</sup> See *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2013 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); see also *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).

<sup>279</sup> Sari Horwitz, *Pennsylvania Judge Strikes Down Voter ID Law*, WASH. POST (Jan. 17, 2014), [http://www.washingtonpost.com/world/national-security/pennsylvania-judge-strikes-down-voter-id-law/2014/01/17/472d620e-7fa2-11e3-93c1-0e888170b723\\_story.html](http://www.washingtonpost.com/world/national-security/pennsylvania-judge-strikes-down-voter-id-law/2014/01/17/472d620e-7fa2-11e3-93c1-0e888170b723_story.html) (quot-

### 1. Background

Two classifications for voter identification laws exist.<sup>280</sup> The first is “strict v. non-strict.”<sup>281</sup> A strict classification is one that does not allow a voter to cast a “ballot without first presenting” identification.<sup>282</sup> If the voter does not have a valid ID, he may fill out a provisional ballot.<sup>283</sup> These ballots are kept separate from the regular ballots.<sup>284</sup> The provisional ballot is only counted if the voter subsequently provides an acceptable ID to election officials, usually within a few days after the election; if he fails to do so, his vote is not counted.<sup>285</sup> A non-strict classification is simply one that does not require identification as a condition to cast a ballot.<sup>286</sup> Currently, five states have *strict* photo identification laws in effect.<sup>287</sup>

The second classification of voter identification is “photo v. non-photo.”<sup>288</sup> A photo identification requirement requires the voter to present a valid photo identification that must meet certain requirements each state sets.<sup>289</sup> A photo identification requirement may be either non-strict or strict.<sup>290</sup> A non-strict photo identification requirement provides voters with other options for casting a regular ballot.<sup>291</sup> For example, the voter may sign an affidavit that he is who he says he is.<sup>292</sup> Some states even allow poll officials to vouch for the individual if he knows him.<sup>293</sup> A strict photo identification requirement means that the voter must fill out a provisional ballot and

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ing election-law expert at University of California at Irvine, Richard L. Hasen).

<sup>280</sup> *Voter Identification Requirements*, NCSL (Oct. 17, 2013), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Voter Identification Requirements*, *supra* note 280.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* These states are Georgia, Indiana, Kansas, Tennessee, and Texas. Six more states have passed strict photo identification laws that are not yet in effect—Arkansas, Mississippi, North Carolina, Pennsylvania, Virginia, and Wisconsin. Arizona, Ohio, and Virginia currently have strict non-photo identifications in effect.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Voter Identification Requirements*, *supra* note 280.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

his vote will only be counted if he returns with valid photo identification within a few days.<sup>294</sup> Currently, seven states have *photo* identification laws in effect.<sup>295</sup>

## 2. Challenges

Recently, voters have challenged voter identification laws that thirty-four states throughout the country have either enacted or proposed, which will soon go into effect.<sup>296</sup> Challenges are being brought under the state constitution in which the voter identification law has been enacted.<sup>297</sup> In January 2014, the Pennsylvania Supreme Court struck down a voter identification law, in *Applewhite v. Commonwealth*, because it did not “ensure liberal access”<sup>298</sup> to the polls. Under the Pennsylvania Constitution, the right of suffrage is fundamental.<sup>299</sup> Where a fundamental right is involved, a compelling “state interest must be demonstrated.”<sup>300</sup> If the state shows that it has a compelling interest, the regulation must still be reasonable under the circumstances.<sup>301</sup> To determine reasonableness, the Pennsylvania court asked whether the law “unnecessarily burden[ed] the franchise by requiring compliant photo ID.”<sup>302</sup> The court held that Pennsylvania did not have a compelling state interest because there was no evidence that the photo identification requirement was passed in response to in-person voter fraud.<sup>303</sup> Although there was no compelling state interest, the court still inquired as to whether the law was narrowly tailored.<sup>304</sup> When determining whether the law was narrowly tailored, the court looked to the reasonableness of the regulation.<sup>305</sup>

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<sup>294</sup> *Id.* Currently, seven states have photo identification laws in effect. This category includes, Florida, Hawaii, Idaho, Louisiana, Michigan, New Hampshire, and South Dakota. Alabama passed a photo identification law that is not yet in effect.

<sup>295</sup> *Voter Identification Requirements*, *supra* note 280.

<sup>296</sup> *Id.*

<sup>297</sup> *See Applewhite v. Commonwealth*, 2013 WL 184988; *see also City of Memphis v. Hargett*, 414 S.W.3d 88 (2013).

<sup>298</sup> *Applewhite*, 2014 WL 184988, at \*12.

<sup>299</sup> *Id.* at \*19 (citing *In re Nader*, 858 A.2d 1167, 1181 (2004)).

<sup>300</sup> *In re Nader*, 858 A.2d 1167, 1181 (2004).

<sup>301</sup> *Applewhite*, 2014 WL 184988, at \*21, 22.

<sup>302</sup> *Id.* at \*19.

<sup>303</sup> *Id.* at \*20-21.

<sup>304</sup> *Id.* at \*21

<sup>305</sup> *Id.* at \*22.

The court held that the law was not reasonable and therefore was not narrowly tailored to the governmental interest.<sup>306</sup> The court looked to the statute and found that the law excluded certain forms of non-photo identification, such as bus passes, to obtain valid photo identification.<sup>307</sup> The statute also failed to provide an “indigent exception” to those who were unable to afford valid photo identification.<sup>308</sup> Without such an exception, the law could not stand. Therefore, the court struck down the law because there was no compelling state interest and the law was not narrowly tailored.<sup>309</sup>

Four months after the Supreme Court’s decision in *Shelby*, the Tennessee Supreme Court, in *City of Memphis v. Hargett*,<sup>310</sup> upheld the constitutionality of a photo identification law.<sup>311</sup> The plaintiffs did not have valid photo identification and were unable to cast their ballots.<sup>312</sup> They brought their claim under the Tennessee State Constitution.<sup>313</sup> The plaintiffs argued that the law placed “an undue burden on their right to vote” and it violated equal protection law.<sup>314</sup> The court applied a strict scrutiny standard to determine if the law placed an undue burden on the right to vote.<sup>315</sup> Under strict scrutiny, the defendant must prove that any burden on the individual’s right to vote is “justified by a compelling state interest.”<sup>316</sup> The defendant must also show that the regulation was “narrowly tailored to achieve the com-

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<sup>306</sup> *Applewhite*, 2014 WL 184988, at \*21.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at \*23-24.

<sup>309</sup> The petitioners also brought an equal protection claim that the court ultimately rejected. *Id.* at \*26. Under Pennsylvania law, an equal protection claim will prevail if the plaintiff can “show that a class of individuals received treatment different from other similarly-situated individuals, and that disparate treatment is because of membership in a particular class.” *Id.* at \*24. The court here found that the statute was facially neutral because it applied to those who needed photo identification equally. *Applewhite*, 2014 WL 184988, at \*25. The court further held that although the voter identification law may have a disproportionate impact on particular groups (namely those who lived far from photo identification centers, those who had to use public transportation to get to the centers, and those who could not visit the centers during their limited open office hours) the impact could not be traced to purposeful discrimination; as a result, the equal protection claim failed. *Id.*

<sup>310</sup> *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).

<sup>311</sup> *Id.* at 111.

<sup>312</sup> *Id.* at 93-94.

<sup>313</sup> *Id.* at 94-95.

<sup>314</sup> *Id.* at 101.

<sup>315</sup> *Memphis*, 414 S.W.3d at 102-03.

<sup>316</sup> *Id.* at 102.

elling state interest.”<sup>317</sup> The court held that the state’s compelling interest was to protect the “integrity of the election process.”<sup>318</sup> The court further held that the law was narrowly tailored because “requiring a person to provide a government-issued photo ID is a practical, narrowly tailored means for the state to guard against the risk of voter impersonation by ensuring that voters are who they say they are.”<sup>319</sup>

The court distinguished Tennessee’s law from other states’ laws, stating that the law in question had an exception for indigent voters.<sup>320</sup> The Tennessee law allowed a voter who could not afford the proper identification to sign an affidavit that exempted him from compliance.<sup>321</sup> Considering the compelling state interest and the indigent exception, the court found that the law was narrowly tailored to protect the integrity of the election process.<sup>322</sup>

As voter identification litigation continues, each state will have the burden of showing that it has a compelling state interest in adopting the identification law. The state will then be required to show that the law is narrowly tailored to the compelling state interest. The courts will consider the reasonableness of the legislation and whether less discriminatory alternatives could have been adopted to achieve the same purpose. Voter identification litigation brought under state constitutions will be decided on a case-by-case, state-by-state basis. As seen in *Applewhite* and *Hargett*, the validity of the identification law may turn on whether there are exceptions for indigent voters.<sup>323</sup> The constitutionality may also depend on the interest the state claims to have.<sup>324</sup> Regardless of how the issue is framed,

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 103.

<sup>319</sup> *Id.* at 105-06.

<sup>320</sup> *Memphis*, 414 S.W.3d at 106.

<sup>321</sup> *Id.*

<sup>322</sup> There was also an equal protection claim involved in *Hargett*. The Tennessee Supreme Court found that the plaintiff’s equal protection claim did not meet the threshold inquiry of whether the classes were similarly situated within the meaning of the clause. *See Hargett*, 414 S.W.3d at 110-11. The court held that in-person voters and absentee voters were not similarly situated. *Id.* The court recognized a heightened need to adhere to legislative conditions for absentee voters because election officials cannot compare voters to their identification cards—in-person voters did not pose the same risk. *Id.* The court ultimately held that the plaintiff failed to show that absentee voters and in-person voters are similarly situated and denied the equal protection claim. *Id.* at 111.

<sup>323</sup> *Applewhite*, 2014 WL 184988, at \*23-24; *Hargett*, 414 S.W.3d at 110-11.

<sup>324</sup> Preventing voter fraud may be legitimate in some instances. *See Memphis*, 414 S.W.3d at 103-04 (holding that the state does not have to show that actual voter fraud existed



voter identification laws will be hard to block now that Section 4 no longer exists. Voter identification laws may also be harder to overturn if some state courts are more willing to recognize a compelling state interest and find that the law is narrowly tailored to that interest. As the litigation continues, plaintiffs may find that voter identification claims are better off being brought in federal court under Section 3 of the VRA.<sup>325</sup> These claims will only be successful if the plaintiff can demonstrate that the state legislature enacted the law with a discriminatory purpose and the law has a discriminatory effect.<sup>326</sup>

## VI. CONCLUSION

The perceived loss of protection due to the elimination of Section 4(b) can be brought under the protections covered by Section 3. Successful Section 3 challenges will place jurisdictions that intentionally discriminated back under federal preclearance before instituting voting changes going forward. Section 3 avoids the problems that Section 4(b) faced when the Supreme Court struck it down. In applying Section 3, the courts must ensure that they require plaintiffs to satisfy the high burden that the statute requires. Section 3 requires the plaintiff to prove intentional discrimination. However, there is already case law that requires the plaintiff to show less than intent to discriminate. If the courts continue to hold that the jurisdiction intentionally discriminated when there is not sufficient evidence to support that allegation, the Supreme Court may strike Section 3 down.

Another option is for Congress to draft a new coverage formula to replace Section 4(b). However, the Sensenbrenner Bill as proposed will not stand a constitutional challenge. The Bill is stricter than Section 4(b) and places many new requirements on the states. Congress must draft a bill that uses data from the previous five years and place only those jurisdictions that have discriminated during that time period under federal preclearance. The Supreme Court is not likely to uphold a formula that was as over-inclusive as Section 4(b) was in 2013.

Plaintiffs challenging their states voter identification laws may consider bringing their claims under their state constitutions. In

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in order to enact laws that “protect the integrity of the election process”).

<sup>325</sup> The non-binding nature of state-to-state litigation may lead to too much uncertainty.

<sup>326</sup> 42 U.S.C. § 1973a(c) (2006).

2014, a Pennsylvania state court struck down a voter identification law because it failed to provide an exception for indigent voters. Other similar statutes may be struck down for the same reason. The litigation thus far shows that plaintiffs will prevail when their states' law does not make an exception for indigent voters. State constitutional challenges are not ideal because a successful suit in one state is not binding upon any other state.

Although the VRA was once a key piece of legislation necessary to prevent voting discrimination and disenfranchisement against African Americans, it had outrun its usefulness by 2013. It could not be said that an "exceptional condition" still existed to justify Congress' authority to legislate pursuant to voting discrimination because many of the covered jurisdictions had not engaged in voting discrimination in decades. Jurisdictions which recently or currently discriminate against their voters should be required to submit proposed plans to Congress before enacting voting changes that will disenfranchise their voters; however, it is neither necessary nor appropriate to subject jurisdictions that do not discriminate to obtain federal preclearance before enacting voting changes.