

**PIERCING THE UMBRELLA: THE DANGEROUS PARADOX OF SHELBY COUNTY V. HOLDER**

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## I. INTRODUCTION

The Voting Rights Act of 1965 (“VRA” or “the Act”) is widely considered the single most impactful piece of civil rights legislation in United States history and is credited with significant shifts in minority voting patterns over the last 50 years.<sup>1</sup> Even with the substantial success of the Act, “voting discrimination still exists; no one doubts that.”<sup>2</sup> This reality did not stop the Supreme Court in *Shelby County v. Holder*<sup>3</sup> from striking down Section 4 of the Act as an unconstitutional and outdated provision.<sup>4</sup> The result in *Shelby County* has left weak points in the armor of voting protections and has forced the Department of Justice (“DOJ”) to revert back to pre-VRA techniques to combat problematic legislation: specifically, piecemeal litigation. The swiftness of state reaction to the downfall of Section 4 demonstrates the continued presence of voting discrimination in modern America and the necessity for equally rapid congressional action. Congress should interpret the decision as a call to arms; while the previous coverage area appropriately focused on troubled jurisdictions, the formula should be expanded to incorporate increasingly surreptitious or unconscious means of voting discrimination. Unfortunately, the currently divided Congress will be unable—and unwilling—to respond to these demands with the swiftness required to properly maintain equality in the voting process.

This Note addresses the legal and social ramifications of the *Shelby County* decision and discusses the immediate and long-term difficulties stemming from its chokehold on Section 5 of the VRA. Part II discusses the historical context of the VRA’s enactment, assessing both congressional intentions and social catalysts that spurred its creation. Part II also delves into the reauthorization periods, focusing on the

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<sup>1</sup> See, e.g., CHANDLER DAVIDSON, THE VOTING RIGHTS ACT: A BRIEF HISTORY, IN CONTROVERSIES IN MINORITY VOTING 7 (Bernard Grofman & Chandler Davidson eds., 1992) (“[I]t secured for black Americans what the Fourteenth and Fifteenth Amendments . . . had not—the right to vote, the very bedrock of democracy.”); DAVID L. EPSTEIN, et. al., THE FUTURE OF THE VOTING RIGHTS ACT xi (2006) (“[T]he VRA is a sacred symbol of American democracy . . .”); J. GERALD HERBERT, *An Assessment of the Bailout Provisions of The Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 257 (Henderson ed., 2007) (describing the VRA as “the crown jewel of civil rights laws”); 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. 385, 386–87 (2008).

<sup>2</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013).

<sup>3</sup> *Id.* at 2618.

<sup>4</sup> *Id.* at 2631.

expansive congressional record set forth during the 2006 reauthorization discussions. Part III dissects the *Shelby County* opinion and analyzes the main issues with the majority's reasoning leading to the conclusion that voting protections are no longer necessary in the formerly covered jurisdictions. Part III also discusses why that outcome is damaging in the short and long term. Part IV reviews current changes in voting legislation in four formerly covered states—Texas, Mississippi, North Carolina and South Carolina—to demonstrate the continued necessity of executive oversight at the state and local levels. Finally, this Note concludes that the *Shelby County* decision has created a legal paradox: the quick reactions of state and local legislatures taking advantage of the decision reveal the faulty deductions of the opinion, while the political divisiveness in Congress will likely prevent necessary changes to the Act.

## II. THE VOTING RIGHTS ACT AND THE UNITED STATES SUPREME COURT

In *Shelby County*, the majority held that the VRA had accomplished its underlying mission in the previously covered jurisdictions, and so determined the established formula was no longer necessary to combat discriminatory measures.<sup>5</sup> This conclusion requires a careful analysis of the historical context surrounding the Act's enactment.

### A. Enacting the Voting Rights Act

Before the VRA, the Fifteenth Amendment was the main legal mechanism for combating racial discrimination in voting laws. Section 1 of the Fifteenth Amendment mandates that “[t]he right of citizens of the United States 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>6</sup> Section 2 gives Congress the authority to enact legislation that promotes the goals of Section 1.<sup>7</sup> The Amendment did have noticeable effects on African-American voter turnout.<sup>8</sup> Still, the Fifteenth Amendment did not have the independent power its creators intended, and therefore required legislative support to effectuate its provisions.<sup>9</sup> As

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<sup>5</sup> *Id.* at 2618.

<sup>6</sup> U.S. CONST. amend. XV, § 1.

<sup>7</sup> *Id.*

<sup>8</sup> J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 20 (Univ. of N. C. Press ed., 1999).

<sup>9</sup> See CHANDLER DAVIDSON, *supra* note 1, at 17.

a result, states remained in control of legislation concerning voting and elections within their boundaries.<sup>10</sup> The existing methods of overcoming resistance to enforcement of the Fifteenth Amendment and battling voting discrimination were unreliable and inefficient, as they often resulted in additional litigation.<sup>11</sup> Early efforts to deal with incidents of voting discrimination “resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place.”<sup>12</sup>

In the midst of growing racial tensions, increasingly violent manifestations of the clash of public sentiment motivated Congress to act.<sup>13</sup> This friction came to a head in March of 1965 during several civil rights marches in Alabama, which resulted in local law enforcement using tear gas, nausea bombs, guns, and clubs against non-violent demonstrators.<sup>14</sup> Evidence of the brutality exploded across national media, forcing the government to expedite the creation of new voting legislation.<sup>15</sup>

Congress, noting the difficulties with case-by-case litigation spawned from more tame civil rights acts, expected legislation with substantially more bite.<sup>16</sup> President Lyndon B. Johnson directed former Attorney General Nicholas Katzenbach to create the “goddamnedest toughest” voting bill possible, sending a clear message regarding the government’s position on the necessity of voting protections.<sup>17</sup> President Johnson subsequently signed the resulting legislation, VRA, into law on August 6, 1965.<sup>18</sup>

Section 5 of the VRA created a preclearance requirement, which gave the DOJ substantial oversight at the state and local levels and mandated that the DOJ approve changes to voting legislation prior to

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<sup>10</sup> DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW 96* (ABC-CLIO ed., 2004).

<sup>11</sup> U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, [www.JUSTICE.GOV, http://www.justice.gov/crt/about/vot/intro/intro\\_b.php](http://www.justice.gov/crt/about/vot/intro/intro_b.php) (last visited Jan. 31, 2014).

<sup>12</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting).

<sup>13</sup> See U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, *supra* note 11.

<sup>14</sup> STEPHENSON, JR., *supra* note 10, at 214–15. The author notes that television coverage of “Bloody Sunday” in particular forced citizens and public officials, alike to face grotesque imagery of racial tensions resulting in violence. STEPHENSON, JR., *supra* note 10, at 214–15.

<sup>15</sup> STEPHENSON, JR., *supra* note 10, at 215.

<sup>16</sup> See U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, *supra* note 11.

<sup>17</sup> STEPHENSON, JR., *supra* note 10, at 215.

<sup>18</sup> See U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, *supra* note 11.

enactment.<sup>19</sup> Under this still-existing section of the statute, the Attorney General can object to any portion of proposed changes to legislation within 60 days of receiving notice of the revisions.<sup>20</sup> Section 4 provided a formula for determining which states would be required to submit changes for approval. The original coverage elements included state maintenance of a “test or device” restricting registration and voting capabilities.<sup>21</sup>

Over the course of the VRA’s history, the DOJ broadly conceptualized its role under Section 5.<sup>22</sup> Instead of using preclearance objections as a means of combating overt displays of racial discrimination, the DOJ raised objections in an attempt to remove all barriers to complete political participation.<sup>23</sup> Objections often failed to specifically establish the racially discriminatory aspects of the legislation, instead relying on evidence that the changes would not further black political autonomy or would have a disparate impact on black voters.<sup>24</sup>

### *B. Congressional Reauthorization of the Voting Rights Act*

Congress has reauthorized the VRA several times, most recently in 2006. The discussion regarding reauthorization centered on the continuing necessity of several of the Act’s provisions, given the progress in minority voting participation.<sup>25</sup> Congress, due in part to the stakes involved in an analysis of a fundamental voting rights issue, amassed an atypically voluminous record to support the VRA’s reauthorization in 2006.<sup>26</sup> Opponents claimed evidence of continuing discrimination was lacking, and that the law “solve[d] a problem that [did] not exist.”<sup>27</sup>

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<sup>19</sup> Michael Halberstam, *The Myth of “Conquered Provinces:” Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 926 (2011).

<sup>20</sup> See U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, *supra* note 11.

<sup>21</sup> U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, *supra* note 11.

<sup>22</sup> EPSTEIN, *supra* note 1, at 54.

<sup>23</sup> EPSTEIN, *supra* note 1, at 54.

<sup>24</sup> EPSTEIN, *supra* note 1, at 53 (citing to a 1990 objection letter from Assistant Attorney General John Dunne to South Carolina’s Assistant Attorney General regarding a proposed requirement that potential candidates for Probate Judge in the State demonstrate they attended a university for four years, in which Dunne stated, “[w]hile we recognize the state’s interest in establishing reasonable qualifications for those who are to hold office, especially those of the nature here, it cannot do so in a manner which weighs disparately upon its black constituents . . .”).

<sup>25</sup> See Corey Dade, *Is the Voting Rights Act Outdated?*, NPR (Dec. 1, 2012, 10:19 PM), <http://www.npr.org/2012/12/01/166226641/is-the-voting-rights-act-outdated>.

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

<sup>27</sup> *Id.*

Advocates of the renewal, on the other hand, noted that, “[p]resentations regarding the successfulness of Section 5 were often balanced by the political realities facing those who regularly litigate and advocate on behalf of minority voters in the covered jurisdictions.”<sup>28</sup> The substantial evidence revealed that problems persisted beyond the more formal “first generation” means of racial discrimination in voting, leading Congress to conclude federal oversight was still necessary.<sup>29</sup> While discrimination during the enactment of the VRA involved readily detectable measures, such as literacy tests, that disparately restricted minority access to the polls, more subtle hurdles to minority registration remained intact.<sup>30</sup> The evolution of voting discrimination into “second-generation barriers,” such as the use of redistricting techniques, had prompted more nuanced litigation over changes in voting legislation.<sup>31</sup> Additionally, DOJ objections to state voting legislation changes had not slowed since Congress’s reauthorization in 1982—between 1982 and 2004, the DOJ had initiated 682 Section 5 objections.<sup>32</sup>

Ultimately, supporters of the continued enforcement of the Act recognized that one of its most important results was deterring covered jurisdictions from enacting discriminatory changes in the first place.<sup>33</sup> The reauthorization recognized that “it takes time to overcome the deep-seated patterns of behavior that have denied minorities full access to the ballot.”<sup>34</sup>

### III. THE SUPREME COURT WEIGHS IN

Section 5 of the VRA was initially viewed as a temporary complement to Section 2’s language minority provisions, and so Congress prescribed it a time limit.<sup>35</sup> That specified time period has sparked the discussion regarding Section 5 and its continued applicability in the modern landscape, prompting the question of whether the preclearance provision was meant to be a temporary solution for discriminatory voting practices.<sup>36</sup>

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<sup>28</sup> Clarke, *supra* note 1, at 401.

<sup>29</sup> 152 CONG. REC. S7949, \*5 (LexisNexis daily ed. July 20, 2006).

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> EPSTEIN, *supra* note 1, at xiv.

<sup>36</sup> EPSTEIN, *supra* note 1, at xiv.

A. *Shelby County v. Holder*

On June 25, 2013, the *Shelby* Court held Section 4(b) of the VRA did not properly reflect the modern voting landscape, and congressional measures were no longer a reasonable means to regulate state activity.<sup>37</sup> At the time of the decision, the VRA covered Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina and Virginia, as well as sections of other states, including North Carolina.<sup>38</sup>

In the majority opinion, Justice Roberts trumpeted principles of state sovereignty, citing the Tenth Amendment and emphasizing the necessity for equality in the government's treatment of the states.<sup>39</sup> Those ideological pillars informed the original approval of the VRA, where the Court considered the legislation an extraordinary measure under "exceptional circumstances."<sup>40</sup> Proponents of the majority's stance focus on the historical context, noting that the VRA was designed to address a targeted emergency that existed at the time of its enactment, and that only an emergency could warrant such an overt attack on the constitutional mandate under the Tenth Amendment.<sup>41</sup>

In her dissent, Justice Ginsburg expressed dissatisfaction with the majority's willingness to look past the extensive congressional record.<sup>42</sup> Justice Ginsburg cited numerous modern instances of voting discrimination in the previously covered states, particularly noting state legislative changes that were blocked leading up to the 2006 reauthorization of the Act.<sup>43</sup> These changes included attempts to purge voter rolls of black voters, proposed delays for an election in a majority-black district, and various redistricting plans.<sup>44</sup> Justice Ginsburg also emphasized the enormity of the congressional records amassed during the 2006 reauthorizations as substantial proof of the continued existence of voting discrimination in the jurisdictions at issue.<sup>45</sup>

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<sup>37</sup> See generally *Shelby County v. Holder*, 133 S. Ct. 2612, 2612 (2013).

<sup>38</sup> *Id.* at 2620.

<sup>39</sup> *Id.* at 2623.

<sup>40</sup> *Id.* at 2624 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966)).

<sup>41</sup> See J. Christian Adams, *In Shelby County v. Holder, Supreme Court Will Decide Integrity of Future Elections*, FORBES (June 13, 2013, 11:26 PM), <http://www.forbes.com/sites/realspin/2013/06/13/in-shelby-county-v-holder-supreme-court-will-decide-integrity-of-future-elections/>.

<sup>42</sup> *Shelby County*, 133 S. Ct. at 2632 (Ginsburg, J., dissenting).

<sup>43</sup> *Id.* at 2640–41.

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

<sup>45</sup> *Id.* at 2642–44.

*B. Damaging Outcomes of the Decision*

The majority's holding in *Shelby County* brings a new era of voting restrictions in the United States. While other sections of the VRA were not struck down by the opinion, it is exceptionally difficult for the government to comply with the evidentiary standards of Sections 2 and 3, which require the DOJ to prove that a state engaged in intentional voting discrimination through proposed legislation.<sup>46</sup> This is partly because voting restriction measures have changed slightly over time, moving away from voting tests and poll taxes to devices that are harder to detect, like gerrymandering of voting districts.<sup>47</sup>

The *Shelby County* holding places an extraordinary amount of pressure on the federal government to uphold the echoes of Section 5 by pursuing individual litigation, with the burden now falling on the DOJ and individual citizens to prove discriminatory behavior.<sup>48</sup> Additionally, voters must now wait for the DOJ to retroactively sue state and local governments, rather than receiving more immediate protection from the DOJ's preventative review process.<sup>49</sup>

Proponents of the Supreme Court's holding note that Section 5 is not the sum total of the Act.<sup>50</sup> Sections 2 and 3 remain untouched by the *Shelby County* ruling. Justice Roberts specifically noted that Section 2 is a permanent fixture in the national landscape of voting protections.<sup>51</sup> Section 3, on the other hand, is rarely used, but allows a court to force an uncovered state to submit future changes to the preclearance process, or "bail-in," after the court has observed a violation of the Act.<sup>52</sup> This

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<sup>46</sup> Charlie Savage, *Justice Department Poised to File Lawsuit Over Voter ID Law*, N.Y. TIMES, Sept. 30, 2013, [http://www.nytimes.com/2013/09/30/us/politics/justice-department-poised-to-file-lawsuit-over-voter-id-law-in-north-carolina.html?\\_r=2&](http://www.nytimes.com/2013/09/30/us/politics/justice-department-poised-to-file-lawsuit-over-voter-id-law-in-north-carolina.html?_r=2&).

<sup>47</sup> R.L. Nave, *Voting Rights: Was Chief Justice Roberts Wrong About Voting in Mississippi?*, JACKSON FREE PRESS, (July 10, 2013, 1:33 PM), <http://www.jacksonfreepress.com/news/2013/jul/10/voting-rights-was-chief-justice-roberts-wrong-abou/>.

<sup>48</sup> See The Rachel Maddow Show, *The Voting Rights Act Was Guttled, But It's Not Yet Dead*, MSNBC (July 8, 2013, 9:12 PM), <http://www.msnbc.com/rachel-maddow-show/the-voting-rights-act-was-guttled-it>.

<sup>49</sup> See Jerry H. Goldfeder & Myrna Perez, *After 'Shelby County' Ruling, Are Voting Rights Endangered?*, NEW YORK LAW JOURNAL (Sept. 23, 2013), <http://www.brennancenter.org/analysis/after-shelby-county-ruling-are-voting-rights-endangered>.

<sup>50</sup> Adams, *supra* note 41.

<sup>51</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013).

<sup>52</sup> Goldfeder & Perez, *supra* note 49.

section may have to serve as the primary tool for combating electoral discrimination before a sharply divided Congress can agree on a new Section 4 coverage formula.<sup>53</sup>

From a broader legal perspective, this ruling allows the judiciary to overrule the measured judgment of Congress. The decision's focus on changes in minority voter registration rates seems to confuse the true purpose of the Act, which "was to end the discrimination itself, not just the symptom of it."<sup>54</sup> The enormous congressional reauthorization records demonstrate that the VRA in its entirety is necessary to effectively combat discrimination itself, rather than the lower registration rates that only partly reflect that discrimination.<sup>55</sup> This decision demonstrates the Court's proclivity towards judicial activism, usurping Congress's role by replacing an extensive legislative record with legal rhetoric.<sup>56</sup>

#### IV. STATE AND LOCAL LEGISLATIVE RESPONSE

The state and local legislative response to the *Shelby County* decision has been immediate and overwhelming. The gap created by the Court's holding has allowed formerly covered states to institute devastating measures that were previously prohibited by the DOJ.<sup>57</sup> Essentially, the "[r]epublic-controlled states have rushed to impose new limits on voting."<sup>58</sup> The DOJ has now reverted back to plugging the holes left by weaknesses in the current VRA through individual litigation against the states.<sup>59</sup> The Supreme Court held that the Act's coverage formula was outdated because of the enormous progress of the states falling under its umbrella, but these recent actions have proven that the discriminatory impact of voting legislation is still an issue in those jurisdictions.

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<sup>53</sup> See Adam Serwer, *The Secret Weapon That Could Save the Voting Rights Act*, MSNBC (July 8, 2013, 12:36 PM), <http://www.msnbc.com/politics/nation/the-secret-weapon-could-save-the-voting>.

<sup>54</sup> Amanda Terkel, *Voting Rights Act: Congress Rejected Major Changes to Section 5 in 2006—But Not Without a Fight*, HUFFINGTON POST (Mar. 11, 2013, 7:37 AM), [http://www.huffingtonpost.com/2013/03/11/voting-rights-act-congress\\_n\\_2829246.html](http://www.huffingtonpost.com/2013/03/11/voting-rights-act-congress_n_2829246.html).

<sup>55</sup> See Dade, *supra* note 25.

<sup>56</sup> See Amy Davidson, *The Court Rejects the Voting Rights Act—And History*, THE NEW YORKER (June 25, 2013), <http://www.newyorker.com/online/blogs/cloread/2013/06/the-court-rejects-the-voting-rights-actand-history.html>.

<sup>57</sup> Goldfeder & Perez, *supra* note 49.

<sup>58</sup> Savage, *supra* note 46.

<sup>59</sup> Goldfeder & Perez, *supra* note 49.

President Barack H. Obama criticized the Court's decision and prompted "Congress to pass legislation to ensure every American has equal access to the polls."<sup>60</sup> Proponents of this call to arms have argued, however, that it will be a nearly impossible task for such a politically divided and bitterly combative Congress to construct a new formula, putting tremendous pressure on the DOJ and individual litigants to suppress current attempts to change voting legislation.<sup>61</sup> Attorney General Eric H. Holder, Jr. noted that the government "will not allow the Supreme Court's recent decision to be interpreted as open season for states to pursue measures that suppress voting rights."<sup>62</sup> Despite those intentions, however, formerly covered states that are presently beyond the reach of federal oversight as a result of the *Shelby County* holding have rushed to pass new voting restrictions.<sup>63</sup> These rapid changes reveal the weakness in the *Shelby County* majority's conclusion that voting discrimination is no longer a problem that requires the protection of the Section 4 coverage formula.<sup>64</sup>

#### A. Movement in Texas

Texas fell under the domain of Section 5 after Congress amended the coverage formula in 1975 to include states that had previously restricted election information to English in areas where a single language minority represented more than five percent of the eligible voting population.<sup>65</sup> This did not go unchallenged, as various legal actions in the

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<sup>60</sup> Press Release, The White House, Statement by the President on the Supreme Court Ruling on *Shelby County v. Holder* (June 25, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/25/statement-president-supreme-court-ruling-shelby-county-v-holder>.

<sup>61</sup> See Sari Horwitz, *Justice Department to Challenge States' Voting Laws*, WASH. POST (July 25, 2013), [http://www.washingtonpost.com/politics/justice-department-to-challenge-states-voting-rights-laws/2013/07/25/c26740b2-f49b-11e2-a2f1-a7acf9bd5d3a\\_story\\_1.html](http://www.washingtonpost.com/politics/justice-department-to-challenge-states-voting-rights-laws/2013/07/25/c26740b2-f49b-11e2-a2f1-a7acf9bd5d3a_story_1.html).

<sup>62</sup> Aaron Blake, *Justice Department Will Challenge Voter ID Law*, WASH. POST (Aug. 22, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/22/justice-department-will-challenge-texas-voter-id-law/>.

<sup>63</sup> Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, THE NATION (Jan. 16, 2014, 11:53 AM), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act#>.

<sup>64</sup> See Richard L. Hasen, *Supreme Error*, SLATE (Aug. 19, 2013, 12:08 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/08/north\\_carolina\\_s\\_speedy\\_vote\\_suppression\\_tactics\\_show\\_exactly\\_why\\_the\\_voting.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/north_carolina_s_speedy_vote_suppression_tactics_show_exactly_why_the_voting.html).

<sup>65</sup> U.S. Dep't of Justice, *Section 5 of the Voting Rights Act*, JUSTICE.GOV, [http://www.justice.gov/crt/about/vot/sec\\_5/about.php](http://www.justice.gov/crt/about/vot/sec_5/about.php) (last visited Jan. 31, 2014).

past few decades tested the strength of the VRA. In 2004, a Texas county threatened to bring charges against two black students who had announced their intention to run for political office.<sup>66</sup> The same county then worked to decrease early voting capabilities in specific polling locations close to a historically black university.<sup>67</sup>

Texas in particular has had a storied history with more modern forms of discrimination in voting practices. The challenge in unveiling discriminatory practices is particularly significant in the modern political era, where voting laws may seek to exclude Democrats from the polls.<sup>68</sup> These groups have historically been disproportionately voters of African American or Hispanic descent.<sup>69</sup> Texas alone gained close to 600,000 non-white eligible voters between 2010 and 2011, “a trend that has political analysts speculating that Texas will turn purple in the not-so-distant future.”<sup>70</sup> As a result, efforts to undercut party power at the polls tend to have a racially discriminatory impact.<sup>71</sup> Racial minorities are a continually expanding portion of the electorate.<sup>72</sup> Because of the tremendous growth in the minority population, these groups have increasingly become a target for political manipulation.<sup>73</sup> Texas legislators have tinkered with political maps numerous times, resulting in limitations on “the power of an increasingly diverse electorate.”<sup>74</sup>

In 2012, Texas attempted to pass a law requiring voters to present

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<sup>66</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2641 (2013) (Ginsburg, J., dissenting).

<sup>67</sup> *Id.*

<sup>68</sup> Matt Apuzzo, *Students Joining Battle to Upend Laws on Voter ID*, N.Y. TIMES, July 5, 2014, [http://www.nytimes.com/2014/07/06/us/college-students-claim-voter-id-laws-discriminate-based-on-age.html?\\_r=0](http://www.nytimes.com/2014/07/06/us/college-students-claim-voter-id-laws-discriminate-based-on-age.html?_r=0).

<sup>69</sup> Savage, *supra* note 46 (“[E]ven though many minority voters are Democrats, discrimination against Democrats cannot be the basis for these voting claims.”).

<sup>70</sup> Ari Berman, *Texas Redistricting Fight Shows Why Voting Rights Act Still Needed*, THE NATION (June 5, 2013, 10:44 AM), <http://www.thenation.com/blog/174652/texas-redistricting-fight-shows-why-voting-rights-act-still-needed>.

<sup>71</sup> Savage, *supra* note 46.

<sup>72</sup> Jonathan Chait, *2012 or Never*, N.Y. MAG. (Feb. 26, 2012), <http://nymag.com/news/features/gop-primary-chait-2012-3/>. This article notes that, “[e]very year, the nonwhite proportion of the electorate grows by about half a percentage point—meaning that in every presidential election, the minority share of the vote increases by 2 percent, a huge amount in a closely divided country . . . . By 2020 . . . nonwhite voters should rise from a quarter of the 2008 electorate to one third. In 20 years, nonwhites will outnumber whites.” *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Berman, *Texas Redistricting Fight Shows Why Voting Rights Act Still Needed*, *supra* note 70.

photo identification when attempting to vote in the state.<sup>75</sup> The Obama administration subsequently blocked the law, noting a disproportionately harmful effect on Hispanics.<sup>76</sup> The DOJ claimed that a large portion of the Hispanic population lacks the necessary driver's licenses and personal identification cards.<sup>77</sup> Voting laws often disproportionately affect African-Americans and Hispanics because of the financial burden of securing an official government identification document.<sup>78</sup> Critics of the DOJ's move, including Texas Governor Rick Perry, labeled it an overreach of federal authority.<sup>79</sup> At that time, Attorney General Holder stated "overt and subtle forms of discrimination remain all too common and have not yet been relegated to the pages of history."<sup>80</sup> The United States District Court for the District of Columbia intervened.<sup>81</sup> Based on the legal structure of the VRA, Texas was required to show that the proposed law would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise."<sup>82</sup> The court determined that the evidence Texas had submitted to demonstrate the law's neutral application was unavailing, and denied the law preclearance.<sup>83</sup>

In an exceedingly swift response to the *Shelby County* decision, Texas pushed through a law similar to the legislation rejected in 2012, which "sets strict requirements for the types of government-issued photo

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<sup>75</sup> Sari Horwitz, *Justice Department Bars Texas Voter ID Law*, WASH. POST, Mar. 12, 2012, [http://articles.washingtonpost.com/2012-03-12/politics/35450319\\_1\\_voter-id-laws-library-card-or-board-combat-voter-fraud](http://articles.washingtonpost.com/2012-03-12/politics/35450319_1_voter-id-laws-library-card-or-board-combat-voter-fraud).

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

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

<sup>78</sup> Zachary Roth, *In Texas Voter ID Trial, Witnesses Describe Burden of Getting ID*, MSNBC (Sept. 4, 2014), <http://www.msnbc.com/msnbc/texas-voter-id-trial-witnesses-describe-burden-getting-id>. The Brennan Center for Justice, an organization involved in current Texas litigation, estimates that "Hispanics in Texas are 2.4 times more likely than whites to lack ID, and African-Americans are 1.8 times more likely than whites." *Id.*

<sup>79</sup> Press Release, Office of the Governor Rick Perry, Statement by Governor Rick Perry on Justice Department Rejecting Texas' Voter ID Law (Mar. 12, 2012).

<sup>80</sup> *Id.*; Associated Press, *Record Number of Voting Rights Inquiries*, FOX NEWS (Jan. 26, 2012), <http://www.foxnews.com/us/2012/01/26/record-number-voting-rights-inquiries/>.

<sup>81</sup> Sari Horwitz, *Texas Voter-ID Law Is Blocked*, WASH. POST (Aug. 30, 2012), [http://www.washingtonpost.com/world/national-security/texas-voter-id-law-struck-down/2012/08/30/4a07e270-f2ad-11e1-adc6-87dfa8eff430\\_story.html](http://www.washingtonpost.com/world/national-security/texas-voter-id-law-struck-down/2012/08/30/4a07e270-f2ad-11e1-adc6-87dfa8eff430_story.html).

<sup>82</sup> *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012) (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)).

<sup>83</sup> See generally *Texas*, 888 F. Supp. 2d 113. This case was subsequently remanded in light of the *Shelby County* decision. *Id.*

ID that must be presented in polling places.”<sup>84</sup> This law would have been subject to preclearance procedures under Section 5 pre-*Shelby County*, but instead was enacted unscathed.<sup>85</sup> Proponents of the new legislation emphasized principles of state sovereignty and the ideological pillars of the Tenth Amendment, echoing Justice Robert’s opinion in *Shelby County*.<sup>86</sup>

The DOJ, in an effort to remain a watchdog for civil rights violations, supported a suit against Texas brought by black and Hispanic voters, which attempted to stop the implementation of the new law.<sup>87</sup> The DOJ relied on a relatively untouched provision of the Act, Section 3, which permits the DOJ to attempt to persuade a judge to order an individual jurisdiction to submit to preclearance.<sup>88</sup> Section 3 requires a finding of intentional discrimination, which is an exceedingly difficult burden in light of the entangling of political interests and racial effects in more modern voting adjustments.<sup>89</sup> The DOJ’s brief specifically cited four recent examples in which local jurisdictions in Texas failed to demonstrate that the proposed voting changes did not have a discriminatory purpose.<sup>90</sup>

The litigation may not be sufficient to stymy the discriminatory effects of the law. Section 3 has traditionally been used in redistricting cases, so it may be an ineffective tool to create a lasting challenge to the Texas voter identification law.<sup>91</sup> Attorney General Holder stated that the

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<sup>84</sup> See Holly Yeager, *Justice Department Sues Texas Over Voter ID Law*, WASH. POST (Aug. 22, 2013), [http://www.washingtonpost.com/politics/justice-department-sues-texas-over-voter-id-law/2013/08/22/ac654a68-0b4b-11e3-9941-6711ed662e71\\_story.html](http://www.washingtonpost.com/politics/justice-department-sues-texas-over-voter-id-law/2013/08/22/ac654a68-0b4b-11e3-9941-6711ed662e71_story.html).

<sup>85</sup> Serwer, *supra* note 53.

<sup>86</sup> Yeager, *supra* note 84 (Senator John Cornyn stated, “As Texans we reject the notion that the federal government knows what’s best for us.”).

<sup>87</sup> Editorial, *A New Defense of Voting Rights*, N.Y. TIMES, July 27, 2013, [http://www.nytimes.com/2013/07/28/opinion/sunday/a-new-defense-of-voting-rights.html?\\_r=0](http://www.nytimes.com/2013/07/28/opinion/sunday/a-new-defense-of-voting-rights.html?_r=0); Yeager, *supra* note 84.

<sup>88</sup> See Marcia Coyle & Todd Ruger, *DOJ Sues Texas Under Alternative Voting Rights Provision*, NAT’L L. J. (July 25, 2013); Yeager, *supra* note 84.

<sup>89</sup> See Spencer Overton, *Texas Shows Congress Must Update the Voting Rights Act*, HUFFINGTON POST (Aug. 1, 2013), [http://www.huffingtonpost.com/spencer-overton/texas-shows-congress-must\\_b\\_3692068.html](http://www.huffingtonpost.com/spencer-overton/texas-shows-congress-must_b_3692068.html).

<sup>90</sup> *A New Defense of Voting Rights*, *supra* note 87.

<sup>91</sup> See Yeager, *supra* note 84; see also Editorial, *The New World of Voter Suppression*, L.A. TIMES (Oct. 27, 2014), <http://www.latimes.com/opinion/editorials/la-ed-votingrights-20141027-story.html> (noting that the United States Supreme Court will allow the Texas law to remain in effect for the November 2014 election despite the District Judge’s decision invalidating the law).

“remaining tools are no substitute for legislation that must fill the void left by the Supreme Court’s decision.”<sup>92</sup> Such aggressive action by the DOJ may be a signal that Congress will either be unwilling or unable to act with sufficient speed to alter the coverage formula or attempt to amend the Act.<sup>93</sup>

Overall, litigation is not a sufficiently effective means of combating potentially damaging changes to voting legislation, as evidenced by the history surrounding the VRA’s implementation. Prior to 1965, any litigation that resulted in a positive outcome for champions of voting equality was quickly overshadowed by a new and clever means of instituting racial discrimination in voting that had not been touched by prior court decisions.<sup>94</sup> These inconsistencies and constant battles in the voting landscape were part of what prompted Congress to pass the VRA.<sup>95</sup> Current conditions in the post-*Shelby County* political reality are remarkably similar to those that existed before the VRA’s enactment and demonstrate the same need for immediate congressional intervention. High-profile litigation such as the Texas suit will force the Supreme Court to reconsider issues stemming from implementation of the Act.<sup>96</sup>

### *B. Mississippi Post-Shelby County*

Blacks were systematically excluded from electoral participation in Mississippi prior to the enactment of the VRA.<sup>97</sup> The lack of institutional methods to obtain voting power and equality forced minority groups to take independent steps through broad mobilization of their base and social efforts to effectuate change.<sup>98</sup>

Mississippi has a particularly inflammatory history with the Act. At first, the effects of the Act were undeniable in the state. Black voter registration rates in the state increased from under ten percent pre-enactment to almost sixty percent by 1968.<sup>99</sup> The federal government has noted objections to Mississippi voting changes 173 times in the Act’s nearly fifty-year history, with over three-fifths of those occurring after

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<sup>92</sup> See Coyle & Ruger, *supra* note 88.

<sup>93</sup> See Yeager, *supra* note 84.

<sup>94</sup> See U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, *supra* note 11.

<sup>95</sup> See U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, *supra* note 11.

<sup>96</sup> See generally Horwitz, *Texas Voter-ID Law Is Blocked*, *supra* note 81.

<sup>97</sup> CHANDLER DAVIDSON, *supra* note 1, at 137.

<sup>98</sup> CHANDLER DAVIDSON, *supra* note 1, at 137.

<sup>99</sup> Note, *Voter and Officeholder Qualifications*, 119 HARV. L. REV. 2230, 2240 (2006).

the 1982 reauthorization of the Act.<sup>100</sup>

Justice Ginsburg noted in the *Shelby County* dissent that, “[i]n 1995, Mississippi sought to reenact a dual voter registration system, ‘which was initially enacted in 1892 to disenfranchise black voters,’ and for that reason, was struck down by a federal court in 1987.”<sup>101</sup> The state has demonstrated some steps towards political equality since the inception of the VRA. Chief Justice Roberts’s majority opinion in *Shelby County* notes changes in voting participation between 1965 and 2004 in the southern states, emphasizing that the 2004 black voter registration rate surpassed the white registration rate.<sup>102</sup> Mississippi officials note that the state has a higher number of black elected officials than any other state in the union.<sup>103</sup>

These statistics partially obstruct reality. Majority-black districts elected most of the black political officials in the state.<sup>104</sup> Additionally, the state has not stopped its attempts to institute voting legislation with potential discriminatory results.<sup>105</sup> In 2012, the Mississippi state legislature passed a bill to enact a requirement that all voters show identification prior to casting a ballot, which was awaiting preclearance from the DOJ prior to the *Shelby County* ruling.<sup>106</sup>

The state leadership’s reaction to the *Shelby County* decision also demonstrates a need for preclearance review in Mississippi. In the hours following the *Shelby County* decision, Mississippi Secretary of State Delbert Hosemann released a statement declaring that he would immediately initiate the process for a new voter identification law in Mississippi.<sup>107</sup> At that time, Secretary Hosemann noted that he expected

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<sup>100</sup> See Campbell Robertson, *A Divide on Voting Rights in a Town Where Blood Spilled*, N.Y. TIMES, Mar. 1, 2013, [http://www.nytimes.com/2013/03/02/us/politics/a-divide-on-voting-rights-where-blood-spilled.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/02/us/politics/a-divide-on-voting-rights-where-blood-spilled.html?pagewanted=all&_r=0).

<sup>101</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2640 (2013) (Ginsburg, J., dissenting).

<sup>102</sup> *Id.* at 2639–41.

<sup>103</sup> Gene Dattel, Editorial, *Beyond Black and White in the Mississippi Delta*, N.Y. TIMES, Dec. 1, 2012, <http://www.nytimes.com/2012/12/02/opinion/sunday/beyond-black-and-white-in-the-mississippi-delta.html>.

<sup>104</sup> *Id.*

<sup>105</sup> See Associated Press, *Voting Rights Act Ruling Clears Path for Mississippi Voter ID Use in 2014*, GULFLIVE.COM (June 25, 2013), [http://blog.gulflive.com/mississippi-press-news/2013/06/voting\\_rights\\_act\\_ruling\\_clear.html](http://blog.gulflive.com/mississippi-press-news/2013/06/voting_rights_act_ruling_clear.html).

<sup>106</sup> *Id.*

<sup>107</sup> See Will Allen, *Mississippi Moves Ahead With Voter ID Law*, NAT’L REVIEW ONLINE (June 27, 2013), <http://www.nationalreview.com/corner/352233/mississippi-moves-ahead-voter-id-law-will-allen>; Martha Bergmark, *Mississippi’s Secretary of State Moves to Enforce Voter ID Law*, HUFFINGTON POST (July 10, 2013), <http://www.huffingtonpost.com/martha->

the law to take effect by mid-2014.<sup>108</sup> That law was implemented for the first time during the Mississippi primaries in June of 2014, where individuals were required to present government-issued photo identification prior to voting.<sup>109</sup> State officials touted the success of the law's implementation, pointing to a lack of complaints and the high rate of state residents utilizing the absentee voter process.<sup>110</sup> But the true impact of the law cannot be analyzed in a primary context, as primary voting has historically been concentrated in more affluent areas, with a relatively small turnout consisting of voters who often already have the proper identification.<sup>111</sup> Regardless, the immediate response of state officials undercuts the *Shelby County* majority's conclusion that the preclearance formula was outdated, and demonstrates the continued presence of discriminatory patterns of behavior from state legislatures.

### C. Voting Controversy in North Carolina

On August 12, 2013, North Carolina Governor Pat McCrory signed "into law one of the nation's most wide-ranging [V]oter ID laws."<sup>112</sup> The expansive law includes provisions that force voters to present government-issued identification at polling locations, reduce the amount of early-voting days, abolish the state's same-day registration program, and prohibit both provisional voting and pre-registration for underage youths.<sup>113</sup> While the law is exceedingly restrictive of voting in general, the limitation on early voting in particular will have a tremendous impact on African-American voters in the state.<sup>114</sup> Such a drastic provision would

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bergmark/voting-rights-act-shelby-county-v-holder\_b\_3575216.html.

<sup>108</sup> See Allen, *supra* note 107.

<sup>109</sup> Associated Press, *Mississippi to Use Its Voter ID Law Tuesday*, BOS. GLOBE (June 2, 2014), <http://www.bostonglobe.com/news/nation/2014/06/01/mississippi-use-its-voter-law-tuesday/Lh0apISt8KytpeptJF3JPI/story.html>.

<sup>110</sup> Jacqueline Alemany, *Mississippi Senate Race Muddles Voter ID Debate*, CBS NEWS (June 23, 2014), <http://www.cbsnews.com/news/mississippi-senate-race-muddles-voter-id-debate/>.

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

<sup>112</sup> See Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, WASH. POST (Aug. 12, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/>.

<sup>113</sup> *Id.*; Editorial Board, *North Carolina Law Takes War on Voting Rights to a New Low*, WASH. POST (Aug. 15, 2013), [http://www.washingtonpost.com/opinions/north-carolina-law-takes-war-on-voting-rights-to-a-new-low/2013/08/15/5b25a88c-0452-11e3-a07f-49ddc7417125\\_story.html](http://www.washingtonpost.com/opinions/north-carolina-law-takes-war-on-voting-rights-to-a-new-low/2013/08/15/5b25a88c-0452-11e3-a07f-49ddc7417125_story.html).

<sup>114</sup> Hasen, *supra* note 64 (The article states that early voting was used by up to 70 percent of African-American voters in North Carolina during the 2012 election.).

not have passed preclearance standards under Section 5.<sup>115</sup> Governor McCrory noted that the legislation, while far from controversial, brought the state up to par with more than three-fifths of states that currently have a voter identification law in place.<sup>116</sup>

Several Republican proponents of the law note the state's interest in ensuring integrity in the voting process.<sup>117</sup> Governor McCrory went as far as to state that “[p]rotecting the integrity of every vote is one of the most important duties I have as governor of [North Carolina].”<sup>118</sup> Voting fraud involves people registering under names of deceased citizens, double registering, or generally evading the legal channels of voting.<sup>119</sup> Additional cases of voting fraud have been reported to the state Board of Elections during each voting cycle.<sup>120</sup> Further, supporters of the voting law argue that citizens who wish to vote, but are unwilling to follow voting procedures, are voluntarily disenfranchising themselves.<sup>121</sup> They point to the lack of outcry surrounding the necessity for photo identification to travel and enter specific buildings.<sup>122</sup>

The inherent issue with states relying on that reasoning is that the same states that adamantly advocate for the laws also fail to properly help those who lack the required documentation.<sup>123</sup> If maintaining the integrity of the franchise is the actual intent of changes to legislation, it would be more logical and more effective to include positive measures to assist citizens in meeting the new requirements.<sup>124</sup> Citing popular support does not solve the issue either. A recent poll determined that 72.2 percent of North Carolina residents support a photo identification requirement for

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<sup>115</sup> Ariana de Vogue, *Justice Department to Sue N.C. Over Voting Law*, ABC NEWS (Sep. 30, 2013, 2:10 PM), <http://abcnews.go.com/blogs/politics/2013/09/justice-department-to-sue-n-c-over-voting-law/>.

<sup>116</sup> *Id.*

<sup>117</sup> See *North Carolina Law Takes War on Voting Rights to a New Low*, *supra* note 113.

<sup>118</sup> de Vogue, *supra* note 115.

<sup>119</sup> *Is Voter Fraud a Real Problem?*, U.S. NEWS, <http://www.usnews.com/debate-club/is-voter-fraud-a-real-problem> (last visited Oct. 1, 2014).

<sup>120</sup> Jake Seaton, *Widespread Voter Fraud Not an Issue in NC, Data Shows*, WNCN, (July 25, 2013, 4:31 PM), <http://www.wncn.com/story/22934120/widespread-voter-fraud-not-an-issue-in-nc-data-shows>. The vast majority of these reports, however, are deemed unfounded and are not referred to a district attorney.

<sup>121</sup> Chad Flanders, *How to Think About Voter Fraud (And Why)*, 41 CREIGHTON L. REV. 93, 137 (2007).

<sup>122</sup> *Id.*

<sup>123</sup> See *North Carolina Law Takes War on Voting Rights to a New Low*, *supra* note 113.

<sup>124</sup> See *North Carolina Law Takes War on Voting Rights to a New Low*, *supra* note 113.

voting, but national sentiment tells a slightly different story.<sup>125</sup> While Americans generally favor some form of voter identification law according to a recent *Washington Post* poll, they are more evenly divided when it comes to balancing the interest in stopping voting fraud with the goal of avoiding suppression of racial minorities in voting.<sup>126</sup>

Ultimately, voting laws like North Carolina's are troubling, in that they may suppress voting capabilities in an area with little physical evidence of voter fraud.<sup>127</sup> A 2006 study found a marked relationship between voter identification requirements and decreased turnout among registered voters with less than a high school degree.<sup>128</sup> Various additional studies by political scientists and theorists have confirmed that strict identification requirements have a negative effect on voter turnout among registered voters, and that low-income citizens and minorities are the groups least likely to have the necessary identification.<sup>129</sup>

Colin Powell, a self-identified Republican and former member of the Bush administration, has recently criticized this justification for voting legislation.<sup>130</sup> The former Secretary of State stated, "[y]ou can say what you like, but there is not voter fraud . . . . How can it be widespread and undetected?"<sup>131</sup> In North Carolina, where officials supporting the new voting restrictions have emphasized the prevention of fraud, voter fraud accounted for 0.00174 percent of the approximately seven million votes cast in the state during the 2012 general and primary elections.<sup>132</sup>

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<sup>125</sup> Seaton, *supra* note 120.

<sup>126</sup> See Michael Brandon & Jon Cohen, *Poll: Concerns about Voter Fraud Spur Broad Support for Voter ID Laws*, WASH. POST (Aug. 11, 2013), [http://articles.washingtonpost.com/2012-08-11/politics/35492005\\_1\\_voter-id-laws-voter-suppression-voter-fraud](http://articles.washingtonpost.com/2012-08-11/politics/35492005_1_voter-id-laws-voter-suppression-voter-fraud).

<sup>127</sup> See Blake, *supra* note 112.

<sup>128</sup> Jamelle Bouie, *Colin Powell Lashes Out at the GOP's Bogus Claims on Voter Fraud*, THE DAILY BEAST (Aug. 23, 2013), <http://www.thedailybeast.com/articles/2013/08/23/colin-powell-lashes-out-at-the-gop-s-bogus-claims-on-voter-fraud.html>.

<sup>129</sup> *Id.* ("In a 2006 survey from the Pew Research Center, 48 percent of 'registered but rare' voters (who are 23 percent of all voting-age Americans) say their voting is impeded by access—it's too difficult to get to the polls—and time—they're just too busy to vote. These voters are disproportionately black (29 percent), Latino (20 percent), and lower income—41 percent make less than \$30,000.").

<sup>130</sup> Jamelle Bouie, *Colin Powell Lashes Out at the GOP's Bogus Claims on Voter Fraud*, THE DAILY BEAST (Aug. 23, 2013), <http://www.thedailybeast.com/articles/2013/08/23/colin-powell-lashes-out-at-the-gop-s-bogus-claims-on-voter-fraud.html>.

<sup>131</sup> *Id.*

<sup>132</sup> Seaton, *supra* note 120 (The state Board of Elections stated that 121 alleged cases of voter fraud, out of the 6,947,317 ballots cast in the 2012 election, were referred to district attorney offices.).

Republican State House Speaker Thom Tillis admitted that the number of incidents were minimal, but maintained that voting restrictions are necessary to “restor[e] confidence in elections.”<sup>133</sup>

Ultimately, Holder filed suit against North Carolina, solidifying the DOJ’s litigious strategy.<sup>134</sup> The immediate and draconian response of the North Carolina legislature to the *Shelby County* decision reflects weaknesses in the Supreme Court’s conclusions that the preclearance formula was outmoded and covered states that no longer required general oversight.<sup>135</sup>

#### D. *Shifting Sentiments in South Carolina*

South Carolina was one of seven states that were covered in their entirety by Section 5 from the inception of the VRA coverage formula.<sup>136</sup> The DOJ’s preclearance denials in South Carolina substantially declined over the decades after the first denial in 1972.<sup>137</sup> While this drop could be explained by changes in the region’s socio-political values and the lack of new measures discriminating against minority groups, these dips could also be explained by the DOJ’s attempts to navigate around contemporary judicial opinions.<sup>138</sup> Supreme Court decisions like *Miller v. Johnson*,<sup>139</sup> in which the Court criticized the DOJ for attempting to affirmatively maximize majority-black districts through preclearance policies, forced the executive branch to narrow its implementation of the Act.<sup>140</sup>

In 2011, South Carolina’s legislature proposed a voter identification law that the DOJ quickly rejected.<sup>141</sup> The DOJ considered the law to be

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<sup>133</sup> Seaton, *supra* note 120 (State House Speaker Tillis went on to say that “there are a lot of people who are just concerned with the potential risk of fraud,” and that the new legislation “would make nearly three-fourths of the population more comfortable and more confident when they go to the polls.”).

<sup>134</sup> Carrie Johnson, *Justice Department Sues North Carolina Over Voter ID Law*, NPR (Sep. 30, 2013, 3:02 PM), <http://www.npr.org/blogs/thetwo-way/2013/09/30/227591062/justice-department-to-sue-north-carolina-over-voter-id-law>.

<sup>135</sup> Ari Berman, *North Carolina Shows Why the Voting Rights Act Is Still Needed*, THE NATION (Dec. 12, 2013, 4:41 PM), <http://www.thenation.com/blog/177577/north-carolina-shows-why-voting-rights-act-still-needed#>.

<sup>136</sup> U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, *supra* note 11.

<sup>137</sup> EPSTEIN, *supra* note 1, at 39–40.

<sup>138</sup> EPSTEIN, *supra* note 1, at 50.

<sup>139</sup> *Miller v. Johnson*, 515 U.S. 900 (1995).

<sup>140</sup> *See generally id.*

<sup>141</sup> Jerry Markon, *Justice Dept. Rejects South Carolina Voter ID Law, Calling It Discriminatory*, WASH. POST (Dec. 23, 2011), [http://articles.washingtonpost.com/2011-12-23/politics/35286469\\_1\\_voter-identification-law-voter-id-law-voter-fraud](http://articles.washingtonpost.com/2011-12-23/politics/35286469_1_voter-identification-law-voter-id-law-voter-fraud).

discriminatory, noting that registered minority voters in the state were almost 20 percent more likely than white constituents to lack the photo identification required by the new law.<sup>142</sup> That finding came from South Carolina state officials themselves, who had begun analyzing the potential disenfranchising effects of such voting laws in response to litigation stemming from preclearance review.<sup>143</sup>

The state subsequently initiated a lawsuit against the DOJ. Critics of the DOJ's response to the South Carolina law noted the legislation would not have the severe discriminatory impact the DOJ claimed and argued that Attorney General Holder took a hard stance on the law, solely to support a political agenda.<sup>144</sup> Conservative media argued that the Attorney General was trying to stimulate an apathetic black voting base for President Obama's 2012 reelection bid.<sup>145</sup> The law was eventually adjusted to lessen the potential impact on minority voters and was subsequently approved by a district court.<sup>146</sup> The process cost the state \$3.5 million in litigation fees.<sup>147</sup>

South Carolina Attorney General Alan Wilson supported the majority in *Shelby County*, noting the inherent unfairness in the unequal application of Section 5.<sup>148</sup> Now, as a result of the Supreme Court's decision, a previously passed photo identification law will go into effect without DOJ scrutiny.<sup>149</sup> Again, this instantaneous reaction of the legislature demonstrates the type of continuing hostility to DOJ oversights and the underpinnings of the VRA of several states formerly

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<sup>142</sup> Markon, *supra* note 141; Charlie Savage, *Justice Dept. Cites Race in Halting Law Over Voter ID*, N.Y. TIMES, Dec. 23, 2011, <http://www.nytimes.com/2011/12/24/us/justice-department-rejects-voter-id-law-in-south-carolina.html> (stating that Thomas E. Perez, the assistant attorney for civil rights at the time, cited data that 81,938 minority citizens already registered to vote lacked the required identification).

<sup>143</sup> Lorraine C. Minnite, *Voter Identification Laws: The Controversy over Voter Fraud*, in LAW AND ELECTION POLITICS: THE RULES OF THE GAME 88, 102–03 (Matthew J. Streb ed., 2013). As of the 2011 study, 81,938 of the 239,333 registered South Carolina voters without a driver's license or a non-driver's photo ID card were members of minority groups. *Id.*

<sup>144</sup> Adams, *supra* note 41.

<sup>145</sup> Adams, *supra* note 41.

<sup>146</sup> Adams, *supra* note 41.

<sup>147</sup> Adams, *supra* note 41.

<sup>148</sup> Derry London, *How Supreme Court Ruling Impacts South Carolina*, WLTX.COM (June 25, 2013, 9:48 AM), <http://www.wltx.com/news/article/240496/2/How-Supreme-Court-Ruling-Impacts-South-Carolina>.

<sup>149</sup> Scott Clement, *The Next Round of the Battle Over Voting Rights Has Begun*, WASH. POST (Aug. 14, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/14/n-c-voter-id-lawsuit-highlights-next-phase-of-voter-id-battle/>.

covered by Section 4.

*E. Dissecting the Recent Changes*

While the Supreme Court cited reduced numbers of state and local changes to voting laws in the covered jurisdictions, it did not exclude the possibility that the decline in changes was simply a result of the Act's effectiveness.<sup>150</sup> Dissenting, Justice Ginsburg wrote, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."<sup>151</sup> The successes of Section 5 show its status as an effective deterrent, which is strong support for the renewal of the coverage formula.<sup>152</sup> Before the Court determined that the strides in voting legislation reflected the coverage formula having played its course, the Court could have asked whether states would engage in discriminatory practices without the oversight of Section 5.<sup>153</sup>

The swift reactions of the formerly covered states seem to answer that hypothetical question, and demonstrate that improvements in the region could be a result of the Act's success, rather than an evolution of the region.<sup>154</sup> That extremely fact-sensitive inquiry is better suited for Congress, rather than a judicial tribunal. Congress had already addressed the concern of whether the coverage formula still accurately reflected the need for oversight, and answered affirmatively, by reauthorizing Section 4 of the VRA in 2006.<sup>155</sup> By ruling that the historic coverage formula no longer suited modern times, in spite of the abundant contrary congressional record, the Court opened the floodgates for state and local changes to voting laws.

Actions by the DOJ, individual residents, and civil rights groups will be insufficient over time to combat potentially damaging effects of state adjustments to voting legislation, as evidenced by both the historical motivations for passing the VRA and the current financial difficulties of raising a challenge to voting legislation under Section 2 of the VRA.<sup>156</sup> Additionally, Sections 2 and 3 do not represent sustainable methods of

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<sup>150</sup> EPSTEIN, *supra* note 1, at 88.

<sup>151</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting).

<sup>152</sup> EPSTEIN, *supra* note 1, at 88.

<sup>153</sup> EPSTEIN, *supra* note 1, at 88.

<sup>154</sup> Amy Davidson, *supra* note 56.

<sup>155</sup> *Shelby County*, 133 S. Ct. at 2652 (Ginsburg, J., dissenting).

<sup>156</sup> *See Overton*, *supra* note 89.

combating electoral discrimination.<sup>157</sup> The high standard of proof and the burden shifting involved in the process limit the effectiveness of Section 3, as proving intentional discrimination is difficult, costly, and time-consuming.<sup>158</sup> States and municipalities can easily provide superficially race-neutral reasons to avoid DOJ interference.<sup>159</sup>

The *Shelby County* decision essentially gave “Congress the task of coming up with a new, updated coverage formula.”<sup>160</sup> This presents Congress with an opportunity to expand the formula to include areas having no extensive history of voting discrimination, but still exhibit modern manifestations of inequality.<sup>161</sup> Uncovered areas such as Boston, Philadelphia, and Cleveland have experienced voting controversies.<sup>162</sup> In these cases, individual complainants and the DOJ have relied on Section 2 of the VRA to stop discriminatory legislation.<sup>163</sup> In 2008, the DOJ scrutinized New Jersey in *United States v. Salem County*.<sup>164</sup> The complaint in *Salem County* alleged that local governments had violated the VRA by failing to provide Spanish-language materials and generally engaging in disparate treatment against Latino voters.<sup>165</sup> While historical evidence of voting discrimination does demonstrate the pressing need for preclearance review in states such as North Carolina, Alabama, and Texas, this does not preclude consideration of voting rights discrimination as a nationwide problem.

Congress may be incapable of modernizing the coverage formula.<sup>166</sup> Justice Ginsburg recently stated that trouble arises “‘when you have a Congress that can’t react.’”<sup>167</sup> Crippling political divisiveness threatens Congress’ ability to provide a swift answer to the Supreme Court’s June

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<sup>157</sup> Serwer, *supra* note 53.

<sup>158</sup> Serwer, *supra* note 53.

<sup>159</sup> Serwer, *supra* note 53.

<sup>160</sup> See Robert B. Reich, *The Real Price of Congress’s Gridlock*, N.Y. TIMES, Aug. 13, 2013, <http://www.nytimes.com/2013/08/14/opinion/the-real-price-of-congresss-gridlock.html>.

<sup>161</sup> Amy Davidson, *supra* note 56.

<sup>162</sup> Adams, *supra* note 41.

<sup>163</sup> U.S. Dep’t of Justice, *Cases Raising Claims Under Section 2 of the Voting Rights Act*, WWW.JUSTICE.GOV, [http://www.justice.gov/crt/about/vot/litigation/recent\\_sec2.php](http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php) (last visited Jan. 31, 2014).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Adam Liptak, *Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24, 2013, <http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html?pagewanted=all>.

decision.<sup>168</sup> The October 2013 government shutdown was a physical manifestation of this inner tension and was particularly emblematic of Congress' prioritizing of financial issues.<sup>169</sup> The surviving preclearance requirements will not apply to any of the prior jurisdictions "unless and until Congress can enact a new formula to determine who it covers—a prospect that, given the current state of gridlock in Congress, might not happen for a while or even forever."<sup>170</sup> This political reality dampens the hope for a more expansive coverage formula.

Still, Congress has taken steps to discuss the future of voting rights in this country. Already, several bipartisan officials have joined forces to draft the Voting Rights Amendment Act of 2014, a bill that would breathe some life back into Section 5 by creating a revised preclearance formula.<sup>171</sup> The coverage formula would include states with five or more violations of federal law in proposed voting changes over the past fifteen years, which would bring Georgia, Mississippi, Louisiana, and Texas back under the oversight of Section 5.<sup>172</sup> This legislation, however, still misses the key to combating modern voting discrimination. On-the-record violations of the VRA are not the only measure of discriminatory sentiment in voting legislation. A coverage formula that focuses on violations in such a narrow period of time, during which states grew accustomed to the rigorous federal review standards, does not accurately reflect current needs. Particularly troublesome, under the proposed formula, North Carolina, the state with the most restrictive new legislation, would not be included in the states required to automatically submit proposed changes to the DOJ.<sup>173</sup>

This type of legislation cannot be separated from its history.<sup>174</sup> With

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<sup>168</sup> *Id.*

<sup>169</sup> See Richard Cown & Mark Felsenthal, *With Tensions Rising, Both Parties Focus on Debt Ceiling*, MSN (Oct. 7, 2013), <http://news.msn.com/us/with-tensions-rising-both-parties-focus-on-debt-ceiling>.

<sup>170</sup> Amy Howe, *We Gave You a Chance: Today's Shelby County Decision in Plain English*, SCOTUSBLOG (June 25, 2013), <http://www.scotusblog.com/2013/06/we-gave-you-a-chance-todays-shelby-county-decision-in-plain-english/>.

<sup>171</sup> Todd Ruger, *Legislation Would Restore Voting Rights Act*, THE NATIONAL LAW JOURNAL (Jan. 16, 2014, 5:27 PM), <http://www.delawarelawweekly.com/id=1202638832781/Legislation%20Would%20Restore%20Voting%20Rights%20Act?mcode=1202615518654&curindex=4>.

<sup>172</sup> Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, *supra* note 63.

<sup>173</sup> Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, *supra* note 63.

<sup>174</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2634 (2013) (Ginsburg, J., dissenting)

the *Shelby County* majority's conclusion that the coverage formula served its purpose, the Court effectively ignored the enormous congressional record of continuing patterns of discrimination in the formerly covered states.<sup>175</sup> The almost instantaneous reactions of state legislators in the wake of the decision signal the modern necessity for federal oversight, and demonstrate that the preclearance formula was not an overbroad relic of the past.

## V. CONCLUSION

The right to vote is the most fundamental and important right in our democratic arsenal. The *Shelby County* decision, while leaving an ill-advised and unfounded gap in voting protections, brings potential for a more expansive coverage formula better targeted towards “second-generation” voting barriers and more informal means of voting discrimination. This type of legislation is unrealistic, however, given the current state of Congress and the misconceptions regarding the purpose of the legislation itself.

Ultimately, the *Shelby County* majority illogically reasoned away the Section 4 coverage formula by discounting the history of voting discrimination in the United States. That analytical stance is dangerous when relevant history is so engrained in present societal constructs. Here, it led to the mistaken conclusion that true progress was made on the voting discrimination battleground—a conclusion that ignored the potential reality that state and local governments had merely conformed to the imposed legal standards. The swift reaction of state legislatures suggests that changes in voting patterns and decreases in VRA violations over time were at least in part attributable to a general compliance with the law, rather than any significant changes in attitudes about political autonomy.<sup>176</sup> The future of voting rights is now in limbo, as the DOJ struggles to patch the protective umbrella pierced by the *Shelby County* decision.

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(“Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination.”).

<sup>175</sup> *Id.* at 2636.

<sup>176</sup> Berman, *North Carolina Shows Why the Voting Rights Act Is Still Needed*, *supra* note 135.







