

Finding Life in Hurricane *Shelby*: Reviving the Voting Rights Act by Reforming Section 3 Preclearance

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I. INTRODUCTION

Alberta Currie, a seventy-eight-year-old African-American woman, has voted in every election since 1956 when she was just twenty-one years old.¹ Long ago, Alberta's grandmother instilled in her the importance of never missing a voting day.² Unfortunately, the 2012 general election may have been Alberta's last opportunity. Alberta does not possess a birth certificate because she was born at home to a midwife in the segregated South during the height of Jim Crow.³ For this reason, Alberta cannot obtain photo identification recognized under North Carolina law.⁴ In most states, Alberta's lack of photo identification would not prevent her from exercising her right to vote. But in North Carolina, Alberta may never vote again, due to the state's strict voter identification law enacted in the aftermath of the Supreme Court's decision in *Shelby County v. Holder*.⁵

Although *Shelby County*'s critics attacked the decision as the end of the Voting Rights Era,⁶ Alberta's circumstances demonstrate that a new war over the Voting Rights Act (the Act) has only just begun.⁷ At the heart of this

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¹ Alberta Currie is the lead plaintiff in the Southern Coalition for Justice's pending suit against the State of North Carolina for its controversial voter identification law enacted in 2013. For more information on Ms. Currie, see *Alberta Currie*, S. COALITION FOR SOC. JUST. (Nov. 18, 2013), <http://www.southerncoalition.org/alberta-currie/>, archived at <http://perma.cc/7FKH-C9WX> [hereinafter S. COALITION]. The North Carolina law is known as House Bill 589, or the Voter Information Verification Act. See 2013 N.C. Sess. Laws 381; see also *infra* Part IV.

² S. COALITION, *supra* note 1.

³ *Id.*

⁴ See *id.*

⁵ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). As will be explained, the Court's decision allowed states, formerly subject to federal preclearance requirements, to enact changes to voting laws without federal oversight. This cleared the way for North Carolina to enact a strict voter identification law that is likely to have a harmful effect on voters such as Alberta Currie and others. See *infra* Part IV.

⁶ Adam Winkler, *The Supreme Court's Ruling and the End of the Civil-Rights Era*, DAILY BEAST (June 25, 2013), <http://www.thedailybeast.com/articles/2013/06/25/the-supreme-court-s-ruling-and-the-end-of-the-civil-rights-era.html>, archived at <http://perma.cc/F8JW-AT6X>; see also Adam Cohen, *Viewpoint: Voting-Rights Decision Spells the End of Fair Elections*, TIME (June 25, 2013), <http://ideas.time.com/2013/06/25/voting-rights-decision-spells-the-end-of-fair-elections/>, archived at <http://perma.cc/H5RA-R2GY>.

⁷ See Complaint, *United States v. North Carolina*, No. 1:13-cv-00861-TDS-JEP (M.D. N.C. Sept. 30, 2013), available at <http://legaltimes.typepad.com/files/doj-nc-complaint.pdf>; Complaint, *United States v. Texas*, No. 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013), available at <http://www.justice.gov/iso/opa/resources/7472013822155117860058.pdf>.

controversy is Section 4 of the Act,⁸ which determines the jurisdictions that must submit voting law changes to the federal government before these changes go into effect⁹—a contentious requirement known as preclearance.¹⁰ Among other reasons, the Court struck down the Act’s preclearance formula because it relied on outdated statistics from the 1970s.¹¹ But the Court did not completely doom the future of the Voting Rights Act.¹² Instead, the Court acknowledged that Congress could salvage preclearance by updating its formula to incorporate data that accurately reflect modern voting practices.¹³

In the absence of congressional action, states are now free to enact changes to voting laws that may burden voters’ access to the polls without fear of federal oversight.¹⁴ In fact, North Carolina and Texas swiftly enacted controversial voter identification laws with stringent requirements following the Court’s decision in *Shelby County*.¹⁵ In response, the Justice Department filed civil suits against these states under Section 2 of the Act, which authorizes private actions against discriminatory voting laws.¹⁶ Moreover, the Department of Justice asked the courts to “bail in” these jurisdictions to preclearance under Section 3, which allows judges to submit jurisdictions to preclearance if intentional discrimination is shown.¹⁷

⁸ 42 U.S.C. § 1973(b) (2012).

⁹ *See id.*

¹⁰ *See Shelby Cnty.*, 133 S. Ct. at 2620.

¹¹ *Id.* at 2631. Before the Court’s decision in *Shelby County*, others raised concerns over the continued viability of the Voting Rights Act’s coverage formula. *See* Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 179 (2005) (“the road to preclearance renewal could be a rocky one”); Victor Andres Rodríguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CALIF. L. REV. 769, 812 (2003).

¹² *See Shelby Cnty.*, 133 S. Ct. at 2631. Specifically, the Court explained, “[w]e issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an ‘extraordinary departure from the traditional course of relations between the States and the Federal Government.’” *Id.* (quoting *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 500–01 (1992)).

¹³ *See Shelby Cnty.*, 133 S. Ct. at 2620.

¹⁴ *See id.* at 2650 (Ginsburg, J., dissenting) (internal citation omitted) (“Congress designed [§ 5 preclearance] both to catch discrimination before it causes harm, and to guard against return to old ways. Volumes of evidence supported Congress’[s 2006] determination that the prospect of retrogression was real. Throwing 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.”).

¹⁵ *See* Complaint, *United States v. North Carolina*, *supra* note 7, at 6; Complaint, *United States v. Texas*, *supra* note 7, at 3–5.

¹⁶ *See* 42 U.S.C. § 1973 (2012).

¹⁷ While Section 3 is relatively short, its language is dense and must be read closely to understand its intricacies, functions, and scope. The first part provides the Attorney General or an aggrieved party the ability to institute an action to “enforce the voting guarantees of the fourteenth and fifteenth amendment in any State or political subdivision” if the court finds

However, the problem with Section 3's preclearance mechanism is that its intentional discrimination requirement is overly burdensome for plaintiffs. In over forty years, only two states have been bailed in to Section 3.¹⁸ On the other hand, federal courts have almost never utilized Section 3 to submit jurisdictions to preclearance in the context of voter identification laws.¹⁹ While a great deal of scholarly focus has been devoted to analyzing the role of Sections 4 and 5 of the Act, Section 3 has received very little attention from election law scholars, members of Congress, and federal judges.²⁰ Accordingly, it is unclear how federal courts will respond to the Obama Administration's request to bail in these states to preclearance under Section 3.²¹

Thus, reform is greatly needed.²² This Note challenges conventional wisdom by arguing that Congress should abandon Section 5 preclearance by

intentional discrimination has occurred, which justifies "equitable relief." 42 U.S.C. § 1973a(c) (2012). In addition to this relief, the court "shall retain jurisdiction for such period as it may deem appropriate . . ." *Id.* During this period, the state or local jurisdiction cannot enact changes to its voting laws unless the court finds that such changes do not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth" under this title. *Id.* The jurisdiction's proposed voting law changes may be enforced if the jurisdictions "chief legal officer or appropriate official" submits these changes to the Attorney General, and the Attorney General does not object to these changes within sixty days after such submission. *Id.* Finally, Section 3 provides that, "neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of" the jurisdiction's proposed voting law changes. *Id.*

¹⁸ See *Jeffers v. Clinton*, 740 F. Supp. 585, 601–02 (E.D. Ark. 1990); see also Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 992, 2007 n.88 (2010) (citing *Sanchez v. Anaya*, No. 82-0067M, slip op. at 8 (D.N.M. Dec. 17, 1984) (consent decree)).

¹⁹ See Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, AM. PROSPECT (Aug. 19, 2013), <http://prospect.org/article/get-know-section-3-voting-rights-act>, archived at <http://perma.cc/6CN3-PFKN>.

²⁰ See Crum, *supra* note 18, at 2038. For information on Section 3's pocket trigger provision, see *infra* Part II.B.3. Moreover, Crum's Note is the only major scholarly piece devoted exclusively to analyzing Section 3(c) of the Voting Rights Act. Crum's piece was written prior to the Supreme Court's monumental decision in *Shelby County*.

²¹ See Rapoport, *supra* note 19.

²² See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 107–08 (2014) (arguing for a "Grand Election Bargain" that would appease both conservatives and liberals by enacting federal legislation expanding opportunities for voter registration, while requiring voter identification in federal elections). In effect, this proposal would provide consistent national election law rules and fill the void left by the Supreme Court after *Shelby County* by continuing to expand the electorate. See *id.* Others, including members of Congress who recently introduced legislation, have argued in favor of updating Section 4's preclearance formula based on Chief Justice Roberts's majority opinion in *Shelby County*. See Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CALIF. L. REV. (forthcoming 2014) (manuscript at 57), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262954. However, others have proposed more idiosyncratic changes that could be made in updating the Voting Rights Act.

amending Section 3. Part II provides a background on the Voting Rights Act of 1965 and the Act's most important mechanisms. Part III reviews how federal courts have interpreted the Act in numerous challenges brought against state and local voting laws. On the other hand, Part IV more closely examines the Supreme Court's analysis in *Shelby County*. Specifically, Part IV argues that, based on the high standards of proving violations under Section 3, recent suits brought by the Department of Justice are inadequate in combating discriminatory voter identification laws. Part V concludes by proposing several amendments to Section 3 that lower the standard of proof required to submit jurisdictions to preclearance, clarify Section 3's scope, and change its initial evidentiary burden.

II. A BACKGROUND ON THE VOTING RIGHTS ACT AND KEY PROVISIONS

Before addressing how federal courts have interpreted the Voting Rights Act, an understanding of the context that prompted Congress to pass this Act is necessary for comprehending the importance of the Court's recent decision in *Shelby County*. Aside from a background on the development of the Voting Rights Act, an overview of the Act's most important mechanisms for combating voting discrimination is also relevant to contemporary disputes over the Act's continued ability to protect voters such as Alberta Currie.

A. *The Development of the Voting Rights Act*

The origins of the Voting Rights Act began in the aftermath of Reconstruction.²³ With the ratification of the Fourteenth Amendment in 1868 and Fifteenth Amendment in 1870, the Constitution of the United States guaranteed African-American men the right to vote.²⁴ Many African-American men living in the South exercised this right for several years after the ratification of these amendments and Southern constituencies elected African-American political leaders.²⁵ Both of these Amendments, and the Thirteenth Amendment banning slavery, include enforcement provisions that grant

See Edward Blum, *Voting Rights and the Beneficiaries of Selma*, AMERICAN (Apr. 22, 2009), <http://www.american.com/archive/2009/june/voting-rights-and-the-beneficiaries-of-selma>, archived at <http://perma.cc/VS49-4TET> (arguing for an amendment to the Voting Rights Act that would trigger Section 3 each time a voting rights suit is filed, requiring preclearance of all changes during litigation).

²³ Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 790 (2006).

²⁴ *See* U.S. CONST. amends. XIV, XV.

²⁵ GARTH E. PAULEY, LBJ'S AMERICAN PROMISE: THE 1965 VOTING RIGHTS ADDRESS 30 (2007).

Congress the “power to enforce” the provisions of the Amendments by “appropriate legislation.”²⁶

Soon after, Congress utilized this enforcement power to pass the Enforcement Act of 1870, which made it a crime for public officials or private individuals to obstruct a person’s right to vote.²⁷ Over time, concern for racial equality waned and enforcement of the law became rare.²⁸ By 1894, Congress repealed most provisions of the Enforcement Act.²⁹ Accordingly, the Southern states that formerly comprised the Confederacy began finding ways to circumvent the Reconstruction amendments.³⁰ Many of these states adopted literacy tests, poll taxes, or restricted access to voter registration³¹ while preserving ways to allow whites to evade these heightened requirements.³² Thus, by the advent of the twentieth century, nearly all African-Americans were denied the right to vote across the southern United States and segregation persisted until the Civil Rights movement of the 1950s and 1960s.³³

During the height of the Civil Rights movement in March 1965, a few hundred civil rights activists decided to march from Selma, Alabama, for voting rights.³⁴ However, the police killed one individual and sent seventeen others to the hospital after attempting to stop the march.³⁵ As images of the police brutality in Selma swept across American televisions, a new conversation began

²⁶ U.S. CONST. amend. XV, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XIII, § 2; *see also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1809 (2010). These enforcement provisions were included to provide Congress with the power to enact laws that would preserve equal citizenship between African-Americans and Whites across the United States, especially when states sought to contravene the purposes of the Reconstruction Amendments by preventing African-Americans from voting. *Id.*

²⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See* Tokaji, *supra* note 23, at 790. In fact, Mississippi called a constitutional convention in 1890 solely for the purpose of disenfranchising African-Americans. GARRINE P. LANEY, *THE VOTING RIGHTS ACT OF 1965: HISTORICAL BACKGROUND AND CURRENT ISSUES* 3–4 (2003); *see also* Michael Ellement, Note, *The New Voter Suppression: Why the Voting Rights Act Still Matters*, 15 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 261, 266 (2013).

³¹ Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1711 (2004); *see also* DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 30–31 (5th ed. 2012) (providing an overview of secret ballots, poll taxes, literacy tests, and white primaries utilized by southern states to disenfranchise African-Americans living in the South after Reconstruction).

³² *See Katzenbach*, 383 U.S. at 311. Most of these states even adopted alternate tests such as grandfather clauses, property requirements, or “good character” tests to ensure that illiterate or poor Whites would not be deprived of the franchise. *Id.*

³³ Tokaji, *supra* note 23, at 790.

³⁴ J. Gerald Hebert, *The Future of the Voting Rights Act*, 64 RUTGERS L. REV. 953, 953 (2012). However, Alabama state troopers stopped those marching, began firing off rounds of tear gas, and beat the civil rights activists with billy clubs. *Id.*

³⁵ *Id.* at 953–54.

in Washington, D.C., about protecting the voting rights of African-Americans and ending the long period of state sanctioned discrimination.³⁶

Following Selma, President Lyndon B. Johnson urged Congress to pass comprehensive legislation that would aggressively protect African-American voting rights.³⁷ Acting under its enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, Congress responded to the national outcry for racial equality by passing the Voting Rights Act.³⁸ After much debate in Congress, President Johnson signed the Voting Rights Act into law on August 6, 1965.³⁹

B. *Important Provisions of the Voting Rights Act*

Although the historical context of the 1960s is important for grasping why Congress answered President Johnson's plea for voting rights reforms, the manner in which Congress responded demonstrates the innovative, yet controversial, mechanisms it created for ensuring racial equality at the ballot box. Many of these provisions raised concerns with the Act's skeptics by providing federal oversight in areas traditionally reserved for state governments.⁴⁰

1. *Section 2: Results Test*

One of the most important and uncontroversial parts of the Voting Rights Act is Section 2. When originally passed, Section 2 applied nationwide and

³⁶DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 78–81 (1978).

³⁷Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 912 (2008). In fact, President Johnson issued his now famous “We Shall Overcome” speech in which he passionately demanded that Congress pass voting rights protections for African-Americans in the United States. PAULEY, *supra* note 25, at 15. Martin Luther King, Jr. described Johnson's speech as, “the most moving, eloquent, unequivocal, and passionate plea for human rights ever made by a president of this nation.” *Id.*

³⁸Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973bb–1 (2012)); *see also* Tiffany C. Graham, *Rethinking Section Five: Deference, Direct Regulation, and Restoring Congressional Authority to Enforce the Fourteenth Amendment*, 65 RUTGERS L. REV. 667, 674 (2013).

³⁹Hebert, *supra* note 34, at 954. The Act was meant to prohibit the numerous practices used by Southern states to evade the purposes of the Fourteenth and Fifteenth Amendments by disenfranchising African-Americans. *Id.*

⁴⁰*See* Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 711 (2006). The Act's strong mechanisms were needed to address the prevailing ability of state governments to quickly enact changes to voting laws that could easily evade previous attempts to reign-in discriminatory voting practices. *See id.*; *see also* Chandler Davidson, *The Voting Rights Act: A Brief History, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 19–21 (Bernard Grofman & Chandler Davidson eds., 1992) (providing a detailed overview of the Act's most important provisions and its implications).

prohibited any “standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁴¹ In other words, Section 2 prohibits any practice or procedure that has the *effect* of denying equal access to the political process.⁴² Moreover, Section 2 prohibits drawing electoral districts that improperly dilute minorities’ voting power and applies to states, counties, cities, school districts, and any other governmental unit that holds elections.⁴³ Both the Department of Justice and private individuals may bring civil actions under Section 2 for diluting the voting power of minority groups.⁴⁴ The Act authorizes injunctive, preventative, and permanent relief for Section 2 violations.⁴⁵

2. Sections 4 and 5: Preclearance and Preclearance Formula

In contrast, the most controversial part of the Voting Rights Act is Section 5, which is known as the preclearance requirement.⁴⁶ Put simply, Section 5 requires certain states, localities, and other “covered jurisdictions” to submit all proposed changes to their voting laws to the United States Attorney General or United States District Court for the District of Columbia (D.C. District Court) for approval before the proposed changes go into effect.⁴⁷ This Section has also garnered controversy for providing the Department of Justice with expansive discretion⁴⁸ to approve or deny preclearance requests that could be based on partisanship rather than the merits of the proposed changes.⁴⁹

Overall, Section 5 has achieved great success in combating the disenfranchisement of African-Americans and other minorities across the

⁴¹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (internal quotation marks omitted).

⁴² See Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 729 (1983).

⁴³ 42 U.S.C. § 1973 (2012).

⁴⁴ See *id.*

⁴⁵ See 42 U.S.C. § 1973j(d) (2012).

⁴⁶ See Crum, *supra* note 18, at 1999.

⁴⁷ 42 U.S.C. § 1973c(a) (2012). Overall, the Supreme Court has interpreted Section 5 broadly and has required federal preclearance for almost all changes related to a jurisdiction’s voting laws. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569–70 (1969) (holding that when a jurisdiction makes changes relating to at-large districts, appointed positions, independent candidacy requirements, and write-in ballots, the jurisdiction is required to submit to preclearance).

⁴⁸ See Gerken, *supra* note 40, at 709. This Section has been called the “most powerful weapon in the civil rights arsenal” because it intrudes into state and local governments’ traditional authority to conduct elections by forcing these governments to ask the federal government for permission to enact changes to their voting laws no matter how trivial the changes may be in order for these changes to become effective. See *id.* at 709–11.

⁴⁹ See 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, 968 (2011).

United States.⁵⁰ Before Section 5's enactment, southern states could invent and adopt new voting mechanisms to disenfranchise African-Americans once courts declared current practices illegal.⁵¹ Thus, the preclearance requirement solved this persisting problem by "shift[ing] the burden of inertia, allowing the Department of Justice to get one step ahead of local officials by forbidding them to make any changes without its approval."⁵² Enacted as a temporary provision, Section 5 was reauthorized by Congress for an additional five years in 1970⁵³ and reauthorized by Congress for an additional seven years in 1975.⁵⁴ In 1982, Congress reauthorized Section 5 for an additional twenty-five years⁵⁵ and renewed this twenty-five year extension in 2006,⁵⁶ which was set to expire in 2031.⁵⁷

While Section 5 has generated the most debate, Section 4 bans literacy tests and similar prerequisites for voting and determines which states and local jurisdictions are subject to the Act's preclearance requirement under Section 5.⁵⁸ This Section contains the Act's formula for determining which jurisdictions

⁵⁰ See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 201 (2009). Since the beginning of the twenty-first century, the registration rates of African-American voters in many Southern states have been equal or nearly equal to those of white voters, and the number of African-American elected officials across the South has increased dramatically. *Id.*

⁵¹ Gerken, *supra* note 40, at 711.

⁵² *Id.* Moreover, Section 5 shifted the burden to state governments to demonstrate the merits of proposed changes rather than placing the burden on the federal government or aggrieved parties. See Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 313 (2006).

⁵³ See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1973b (2012)).

⁵⁴ See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400 (codified as amended at 42 U.S.C. § 1973b (2012)).

⁵⁵ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(B)(8), 96 Stat. 131, 133 (codified as amended at 42 U.S.C. § 1973b (2012)).

⁵⁶ For interesting pre-*Shelby County* commentary arguing that Section 5 is unnecessary because ethnic and racial minorities no longer face hurdles to ballot access in recent times at the level from the 1960s, see Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 607 (2005). Specifically, Pitts argues that while Section 5 continues to have a major success with respect to discriminatory practices enacted by local jurisdictions, scholars have placed too much emphasis on Section 5's effect on state and congressional elections in combating discriminatory voting laws. *Id.* at 610.

⁵⁷ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. §§ 1973-1973aa (2012)) ("Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.").

⁵⁸ Tokaji, *supra* note 23, at 792.

are subject to preclearance. Under Section 4(b), a state or political subdivision must submit to preclearance . . . if during the 1964, 1968, or 1972 presidential election, it maintained literacy tests or other requirements for voting *and* had voter turnout below fifty percent.⁵⁹ On the other hand, Section 4(a) contains the bailout provisions that allow a covered jurisdiction to bail out of preclearance by demonstrating that it has complied with the Act's requirements for the previous ten years.⁶⁰

Similar to Section 5, Congress intended for Section 4 to be temporary and first extended this provision for an additional five years in 1970.⁶¹ "In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972."⁶² Moreover, Congress amended Section 4 to protect language minorities by adding a new mechanism to trigger coverage.⁶³ The amendment triggered coverage of jurisdictions that provided registration and election materials exclusively in English by expanding the definition of "test or device."⁶⁴ Congress has not made any changes to Section 4's preclearance formula since the 1975 amendments.⁶⁵

⁵⁹ 42 U.S.C. § 1973b(b) (2012). Specifically, the formula's most recent language explained:

On and after August 6, 1975, . . . this section . . . shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

Id.

⁶⁰ 42 U.S.C. § 1973b(a). In addition, the covered states or political subdivisions must demonstrate that they have taken affirmative steps to widen ballot access and include minority officials in election administration. *Id.*

⁶¹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

⁶² *Id.*

⁶³ Michael James Burns, *Shelby County v. Holder and the Voting Rights Act: Getting the Right Answer with the Wrong Standard*, 62 CATH. U. L. REV. 227, 234 (2012); see also LOWENSTEIN ET AL., *supra* note 31, at 329–31 (providing an overview of the language assistance provisions of the Voting Rights Act).

⁶⁴ 42 U.S.C. § 1973b(f)(3).

⁶⁵ Burns, *supra* note 63, at 234; see also *Shelby Cnty.*, 133 S. Ct. at 2620–21 (explaining the Voting Rights amendment process and noting how Congress did not update Section 4's coverage formula when the Act was reauthorized by Congress in 1982 and 2006). Congress's failure to update the coverage formula was a key factor for the justices who comprised the majority in the Supreme Court's recent decision in *Shelby County*. See *id.* at 2631.

3. Section 3: The Pocket Trigger

Compared to the previous sections, Section 3 has maintained a much more obscure role in contemporary scholarship⁶⁶ and has been invoked by courts sparingly since the passage of the Voting Rights Act in 1965.⁶⁷ Known as the pocket trigger, Section 3 authorizes federal judges to submit states or other jurisdictions to preclearance if the court finds violations of the Fourteenth or Fifteenth Amendments.⁶⁸ In other words, the court must first find that the jurisdiction engaged in intentional discrimination,⁶⁹ which is a very difficult burden. If intentional discrimination is found, the court not only has discretion to submit the jurisdiction to preclearance, but also retains discretion to determine how long the jurisdiction will be subject to preclearance.⁷⁰ Moreover, courts have the flexibility to tailor the preclearance requirement to specific types of voting laws that the jurisdiction may attempt to change or amend.⁷¹

Overall, the preclearance language found in Section 3 is very similar to that found in Section 5, as both prohibit changes in a jurisdiction's voting laws without first being approved by federal officials.⁷² Unlike Section 5's preclearance language, Section 3 provides the Attorney General or a *local* federal district court with jurisdiction to hear preclearance requests—not the District Court for the District of Columbia.⁷³

Another important difference between Section 3 and Section 5 preclearance is what triggers preclearance under each standard. Under Section 5, a jurisdiction is subjected to preclearance if it has a history of discrimination as determined by Section 4's formula.⁷⁴ On the other hand, plaintiffs initiate

⁶⁶ Crum, *supra* note 18, at 1997. In fact, Crum's article specifically details the lack of scholarship related to Section 3 by election law scholars and others. *See id.* at 2006–15.

⁶⁷ *Id.* at 2010.

⁶⁸ 42 U.S.C. § 1973a(c) (2012).

⁶⁹ *Id.* While the Act's language itself does not expressly require a finding of intentional discrimination, this is inferred from requiring a violation of the Fourteenth or Fifteenth Amendment. *See id.*

⁷⁰ *Id.* (“[T]he court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate . . .”).

⁷¹ Richard Pildes, *One Easy, but Powerful, Way to Amend the VRA*, ELECTION L. BLOG, (June 28, 2013, 6:53 AM), <http://electionlawblog.org/?p=52349>, archived at <http://perma.cc/BJ3A-KQFX>. Hence, if the court finds that the jurisdiction only has a problem with voter identification laws, then the jurisdiction may only be required to pre-clear changes to its voter identification laws rather than having to submit all changes to its voting laws as required under Section 5. *Id.*

⁷² *See* Crum, *supra* note 18, at 2008.

⁷³ 42 U.S.C. § 1973a(c) (“[T]he court . . . shall retain jurisdiction . . . unless and until . . . [t]he court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . .” (emphasis added)).

⁷⁴ Crum, *supra* note 18, at 2009.

Section 3 preclearance by filing a suit under Section 2 or another section of the Act.⁷⁵

However, the court must find that the jurisdiction violated the Fourteenth or Fifteenth Amendment by engaging in intentional discrimination in order for a jurisdiction to be subject to preclearance under Section 3.⁷⁶ Although this standard is high, two states—Arkansas⁷⁷ and New Mexico⁷⁸—six counties,⁷⁹ and one city⁸⁰ have been bailed in to preclearance under Section 3.⁸¹ Nearly all of these Section 3 cases have occurred in the context of discriminatory redistricting claims.⁸² An additional difference between Section 5 preclearance and Section 3 preclearance is the fact that Congress intended for Section 3's preclearance regime to be permanent. Thus, Section 3 would not become subject to periodic constitutional scrutiny similar to when Congress was forced to reauthorize Section 5's temporary provisions.⁸³

⁷⁵ This is the approach the Obama Administration has chosen to pursue against states with restrictive voter identification laws following the *Shelby County* decision. *See, e.g.*, Complaint, United States v. North Carolina, *supra* note 7; Complaint, United States v. Texas, *supra* note 7.

⁷⁶ *See* 42 U.S.C. § 1973a(c). Unlike Section 2's lower standard that includes discriminatory results as amended by Congress in 1982, Section 3 demands a much higher burden of proof by requiring the plaintiff to prove the jurisdiction intentionally denied or abridged a citizen's right to vote on account of race. *See id.*

⁷⁷ *See* *Jeffers v. Clinton*, 740 F. Supp. 585, 601–02 (E.D. Ark. 1990).

⁷⁸ *See* *Crum*, *supra* note 18, at 2007 n.88 (citing *Sanchez v. Anaya*, No. 82-0067M, slip op. at 8 (D.N.M. Dec. 17, 1984) (consent decree)).

⁷⁹ *See id.* at 2010 n.102 (citing *Garza v. Cnty. of L.A.*, Nos. CV88-5143 KN, CV88-5435 KN, slip op. at 2 (C.D. Cal. Apr. 26, 1991) (Los Angeles County, California); *McMillan v. Escambia Cnty.*, No. 77-0432, slip op. at 3 (N.D. Fla. Dec. 3, 1979) (Escambia County, Florida); *United States v. Thurston Cnty.*, No. 78-0-380, slip op. at 3 (D. Neb. May 9, 1979) (Thurston County, Nebraska); *United States v. Bernalillo Cnty.*, No. CV-98-156, slip op. at 11 (D.N.M. Apr. 22, 1998) (Bernalillo County, New Mexico); *Kirkie v. Buffalo Cnty.*, No. 03-CV-3011, 2004 U.S. Dist. LEXIS 30960, at *7 (D.S.D. Feb. 12, 2004) (Buffalo County, South Dakota); *Blackmoon v. Charles Mix Cnty.*, No. Civ. 05-4017, slip op. at 2 (D.S.D. Dec. 4, 2007) (Charles Mix County, South Dakota)).

⁸⁰ *See id.* at 2010 n.103 (citing *Brown v. Bd. of Comm'rs*, No. C-1-87-388, slip op. at 20 (E.D. Tenn. Jan. 11, 1990) (City of Chattanooga, Tennessee)).

⁸¹ *Crum*, *supra* note 18, at 2010. Most of the jurisdictions submitted to preclearance under Section 3 have been required to pre-clear voting changes because the jurisdiction voluntarily submitted to Section 3 under a consent decree agreement. *See id.* at 2015. Overall, when a jurisdiction agrees to a consent decree, the jurisdiction admits that it engaged in unconstitutional conduct, which saves the parties from having to prove intentional discrimination under Section 3. *Id.* Besides the high burden of proof, intentional discrimination disputes are often costly to the parties involved and avoiding these disputes allows the Department of Justice to focus on other cases. *See id.* Of the jurisdictions submitted to Section 3 preclearance, only Arkansas and Escambia County, Florida have been covered involuntarily by disputing intentional discrimination claims alleged by plaintiffs. *Id.*

⁸² *See* Rapoport, *supra* note 19.

⁸³ *See* *Crum*, *supra* note 18, at 2009. Aside from these major provisions, Sections 6 through 8 of the Act provide for the assignment of federal examiners and observers to

III. THE VOTING RIGHTS ACT AS INTERPRETED BY FEDERAL COURTS

Generally, the Supreme Court has broadly interpreted congressional authority to enforce the Fifteenth Amendment by applying the rational means standard.⁸⁴ Accordingly, the Court has upheld the Voting Rights Act and its key provisions on numerous occasions in which plaintiffs brought direct constitutional challenges against the Act.⁸⁵ Moreover, these challenges created many opportunities for the Court to provide its commentary on the Act's viability and its effect on race relations in the United States.⁸⁶

A. Direct Constitutional Challenges to the Voting Rights Act

In 1966, South Carolina challenged the Voting Rights Act by asking the Supreme Court to enjoin the United States Attorney General from submitting the state to preclearance.⁸⁷ In *South Carolina v. Katzenbach*, the Court addressed whether Congress exceeded its enforcement authority under the Fifteenth Amendment by enacting Section 5's preclearance requirement.⁸⁸ While the Court recognized its precedent that affirmed state power to administer voting, the Court explained that the Fifteenth Amendment's protection of minority voting rights superseded exertions of state power.⁸⁹ The Court explained that despite powers reserved for the states, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."⁹⁰ Thus, the Court upheld the Act as a valid exercise of Congress's power under Section 2 of the Fifteenth Amendment by applying a deferential standard toward Congress's enforcement powers under this Amendment.⁹¹ Even after Congress reauthorized the Act in 1970, the Court

jurisdictions covered under preclearance or where otherwise needed to enforce the Fifteenth Amendment. At the time of the Act's enactment, the Supreme Court did not yet declare the poll tax unconstitutional and thus Section 10 granted the Attorney General the authority to file suits against states that still utilized this discriminatory practice. Tokaji, *supra* note 23, at 792.

⁸⁴ Burns, *supra* note 63, at 237 (explaining how the Court's application of the rational means standard has resulted in a broad interpretation of Congress's authority to enforce the guarantees of the Fifteenth Amendment by appropriate legislation and thus has led to the Court upholding the VRA and the targeted provisions on multiple occasions).

⁸⁵ See *infra* Part III.A.

⁸⁶ See *infra* Part III.B. For a more general background on how the Supreme Court and lower federal courts have interpreted and applied Section 5, see LOWENSTEIN ET AL., *supra* note 31, at 171–201.

⁸⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

⁸⁸ *Id.* at 323–24.

⁸⁹ *Id.* at 325–26.

⁹⁰ *Id.* at 324.

⁹¹ *Id.* at 328. In terms of whether the Act's coverage formula was a rational means of preventing discrimination, the Court found that the formula and the specific evidence that

continued to defer to Congress's power to enact the Voting Rights Act under the Fifteenth Amendment.⁹²

When Congress amended the Voting Rights Act in 1975, the Court again upheld Section 5 under a rational means standard.⁹³ In *City of Rome v. United States*, the Court expanded its analysis from *Katzenbach* by stating that Congress could use its authority under Section 2 of the Fifteenth Amendment by prohibiting voting practices with a discriminatory purpose *or* effect.⁹⁴ In the Court's view, Congress's authority under Section 2 of the Fifteenth Amendment was similar to its expansive powers under the Necessary and Proper Clause.⁹⁵

After Congress reauthorized the Voting Rights Act in 2006, a Texas utility district with an elected board brought an action claiming that it was entitled to a bailout under the Act.⁹⁶ Alternatively, the district argued that Section 5 was unconstitutional.⁹⁷ In *Northwest Austin v. Mukasey*, the Texas utility district was subject to preclearance because the state itself was subject to Section 5 preclearance.⁹⁸ The district court found that the Texas utility district was ineligible for a bailout because it failed to meet the requirements of a "political subdivision" but affirmed the Act's constitutionality under *Katzenbach*.⁹⁹ However, the Supreme Court disagreed. Based on statutory interpretation, the

jurisdictions were enacting new maneuvers to avoid enforcement provided Congress with sufficient evidence to enact Section 5's preclearance requirements. *See id.* at 330.

⁹²In *Georgia v. United States*, the Attorney General objected to Georgia's reapportionment plan for the state legislature and succeeded in prohibiting the State from implementing the plan. 411 U.S. 526, 535, 541 (1973). On appeal, Georgia argued that Section 5 preclearance did not apply to the reapportionment changes and that even if it did, the Act's preclearance requirement was unconstitutional. *Id.* at 531. The Court found that preclearance did apply and dismissed the constitutional challenge by deferring to the *Katzenbach* decision and reaffirming Congress's power under Section 2 of the Fifteenth Amendment. *Id.* at 535.

⁹³*See City of Rome v. United States*, 446 U.S. 156, 176–77 (1980); Burns, *supra* note 63, at 239.

⁹⁴*City of Rome*, 446 U.S. at 175. Remember that the original language of Section 2 of the Voting Rights Act prohibited those practices with a discriminatory purpose. The Act did not include a results test until Congress amended the Act in 1982. *See supra* note 76.

⁹⁵*City of Rome*, 446 U.S. at 175. Again in 1999, the Court deferred to Congress's power under the enforcement provision of the Fifteenth Amendment by holding that Monterey County, California was required to seek preclearance under Section 5 before implementing changes to electing county judges. *See Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–84 (1999). Although state law required these changes to judicial elections, the Court still dismissed the county's constitutional challenge by simply deferring to *Katzenbach* and *City of Rome*. *See id.* at 283–84.

⁹⁶*See Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 197 (2009).

⁹⁷*Id.* at 197.

⁹⁸Burns, *supra* note 63, at 240; *see also* LOWENSTEIN ET AL., *supra* note 31, at 200–01 (summarizing reactions to the *NAMUDNO* decision from election law commentators with differing viewpoints on the Court's important analysis and decision).

⁹⁹*See Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 233–34, 268 (D.D.C. 2008).

Court viewed the utility district as a “political subdivision” under the Act and thus the district qualified for a petition to bail out of the Act’s preclearance requirement.¹⁰⁰ Utilizing the constitutional avoidance doctrine, the Court did not reach the merits of the constitutional claims against Section 5 because the Court resolved the decision on statutory grounds.¹⁰¹

While the Court avoided the constitutional question altogether in *Northwest Austin*, the continued constitutionality of Section 5 remained uncertain.¹⁰² In reaching this conclusion, the Court articulated its concerns over deviating from important principles of federalism that risked Section 5’s continued vitality.¹⁰³

B. Other Important Decisions: Boerne and Shaw

Aside from the Court’s skepticism over the continued viability of Section 5 in *Northwest Austin*, an earlier decision signaled Section 5’s constitutional infirmities. In *City of Boerne v. Flores*, the Supreme Court limited Congress’s enforcement powers under the Fourteenth Amendment against the states.¹⁰⁴ Asserting its supremacy in interpreting the scope of Congress’s enforcement powers—rather than Congress itself—the Court declared that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁰⁵

Compared to *Katzenbach*’s deferential approach to congressional enforcement of the Reconstruction amendments, the Court in *Boerne* took a stance that heavily favored state sovereignty against federal intervention.¹⁰⁶ In many cases that followed, the Court struck down federal legislation that

¹⁰⁰ *NAMUDNO*, 557 U.S. at 211.

¹⁰¹ *Id.* at 204–06.

¹⁰² *Id.* at 210–11. The eight-justice majority explained:

More than 40 years ago, this Court concluded that exceptional conditions prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.

Id. at 211 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (internal quotation omitted)).

¹⁰³ *See id.* at 202–03.

¹⁰⁴ *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹⁰⁵ *Id.* at 520. In other words, Congress does not possess the authority to engage in independent constitutional interpretation and that its enforcement powers are “limited to remedying violations of constitutional rights as defined by the Court.” Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2362–63 (2003); see Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 479 (1999); Michael Paisner, Note, *Boerne Supremacy: Congressional Responses to City of Boerne v. Flores and the Scope of Congress’s Article I Powers*, 105 COLUM. L. REV. 537, 541 (2005).

¹⁰⁶ *See Katz, supra* note 105, at 2362–63.

intervened in the realm of state sovereignty when failing the congruence and proportionality test.¹⁰⁷ Thus, *Boerne* greatly circumscribed Congress's enforcement powers.¹⁰⁸ However, *Boerne* did not spell the imminent demise of Section 5 because the decision occurred in the context of laws passed under the Fourteenth Amendment—not the Fifteenth Amendment. In the cases that followed, the Court found that the Voting Rights Act served as a model of “congruent and proportional” legislation.¹⁰⁹

In another line of voting rights cases, the Court expressed skepticism over the continued viability of the Voting Rights Act because of fears that this legislation impermissibly injected race into American politics.¹¹⁰ In *Shaw v. Reno*, plaintiffs challenged North Carolina's redistricting plan as “unconstitutional racial gerrymander.”¹¹¹ The Court expressed concerns that the Voting Rights Act could potentially dissolve into a system of “racial spoils” and worried that the Act's protection of voting rights based on race could “entrench rather than undermine racial divisions” across the United States.¹¹²

Although the Supreme Court affirmed the constitutionality of the Voting Rights Act in numerous challenges brought after the Act's reauthorization,

¹⁰⁷ See *id.* at 2361–62.

¹⁰⁸ See *id.* at 2362–63. However, the Court has confirmed that Congress still maintains the power “to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent” *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

¹⁰⁹ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001). Although the Supreme Court dodged the constitutional challenge in *NAMUDNO*, the *Boerne* decision played an interesting role in the District Court's analysis. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241 (D.D.C. 2008). In examining the constitutional challenge to Section 5 of the Voting Rights Act in *Northwest Austin v. Mukasey*, the District Court held that *Katzenbach* rather than *Boerne* was the appropriate standard in the case. *Id.* The District Court judge explained that none of the *Boerne* line of cases dealt with statutes involving voting rights or racial discrimination. See *id.* at 242. Further, the court explained that these cases never declared that *Katzenbach* and *City of Rome* no longer govern challenges to statutes aimed at ending racial discrimination in voting. *Id.* In addition, the court explained that the Supreme Court had never applied the congruence and proportionality test outside the Fourteenth Amendment context. *Id.* at 243. The District Court upheld Section 5 of the Voting Rights Act under the *Katzenbach* standard and also upheld this Section as congruent and proportional under the *Boerne* line of cases. See *id.* at 278–79.

¹¹⁰ See Crum, *supra* note 18, at 2003; see also LOWENSTEIN ET AL., *supra* note 31, at 245–48 (providing a summary of the reactions to the *Shaw* decision from both critics and supporters).

¹¹¹ *Shaw v. Reno*, 509 U.S. 630, 633–34 (1993).

¹¹² Crum, *supra* note 18, at 2002 (quoting Gerken, *supra* note 40, at 745). This important case can be viewed as a foreshadowing of the Court's dismantling of Sections 4 and 5 of the Voting Rights Act in hopes of “bring[ing] us closer to the world of normal politics.” Gerken, *supra* note 40, at 745; see Steven A. Light, *Too (Color)blind to See: The Voting Rights Act of 1965 and the Rehnquist Court*, 8 GEO. MASON U. C.R. L.J. 1, 50 (1998); Justin Schwartz, Comment, *A Not Quite Color-Blind Constitution: Racial Discrimination and Racial Preference in Justice O'Connor's “Newest” Equal Protection Jurisprudence*, 58 OHIO ST. L.J. 1055, 1099 (1997).

Congress's failure to update Section 4's coverage formula in 1982 and 2006 raised concerns for the Court in considering whether the Act's deviation from key principles of federalism was still warranted.¹¹³

IV. HURRICANE *SHELBY*

Rarely does the Supreme Court of the United States issue a decision that amounts to a "political hurricane" in the context of voting rights. But *Shelby County* was just that—freeing jurisdictions formerly subject to the burdens of preclearance.¹¹⁴ Texas and North Carolina have moved forward in a post-*Shelby County* world by enacting strict voter identification laws that many argue will burden minority voting strength and prevent voters such as Alberta Currie from exercising their right to vote.¹¹⁵ Aside from these immediate consequences, the Court's decision spurred intense debate among election law scholars, some of whom believed the Court acted rationally because Section 4 relied on data that was half a century old.¹¹⁶ In contrast, many sharply criticized the Court's decision¹¹⁷ or argued that Section 5 is still desperately needed.¹¹⁸ Accordingly,

¹¹³ Congress's failure to update the Act's coverage formula in 2006 also raised concern that the reauthorization process had become too "backward looking" rather than focusing on new problems emerging in the struggle for racial equality at the ballot box. See DAVID L. EPSTEIN, ET AL., *THE FUTURE OF THE VOTING RIGHTS ACT 223* (2006). Furthermore, election law commentators engaged in intense debate during the Act's 2006 reauthorization process over whether the Supreme Court would continue to uphold the Act's validity. See Heather K. Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L.J. 1213, 1230–35 (2007).

¹¹⁴ Doug Chapin, *Voting Rights After Shelby County: Bring On the Election Geeks*, 12 ELECTION L.J. 327, 327–28 (2013) (explaining how states formerly blocked from enacting changes to voting laws can move forward with changes to voting laws and calling on election law "geeks" to compile data to update Section 4's coverage formula).

¹¹⁵ 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_preeedy_vote_suppression_tactics_show_exactly_why_the_voting.html, archived at <http://perma.cc/CZU5-4ZHN>.

¹¹⁶ See Mark Rush, *Shelby County v. Holder: A Case of Judicial Hubris or a Clash of Ancient Principles?*, 12 ELECTION L.J. 322, 322 (2013); William S. Consovoy & Thomas R. McCarthy, *Shelby County v. Holder: The Restoration of Constitutional Order*, CATO SUP. CT. REV., 2012–2013, at 31–32; Abigail Thernstrom, *A Vindication of the Voting Rights Act*, WALL ST. J. (June 26, 2013, 7:28 PM), <http://online.wsj.com/news/articles/SB10001424127887323873904578569453308090298>, archived at <http://perma.cc/SDH4-UMHV>.

¹¹⁷ See Daniel P. Tokaji & Paul Gronke, *The Party Line: Shelby County and Beyond*, 12 ELECTION L.J. 241, 241 (2013). The authors described the Court's decision as "the end of an era in which barriers to racial minorities' participation and representation were substantially weakened, if not entirely shattered." *Id.*

¹¹⁸ See David Schultz, *William Faulkner and the Dilemmas of Shelby County*, 12 ELECTION L.J. 341, 342 (2013) (explaining that "[t]he political changes that the VRA sought to secure will not be permanent until the South wants them to be permanent" and that "lacking this change in the South, the VRA is still needed, even though it may never be able to effect the cultural changes required to render the law unnecessary"); see also Heather

before proposing statutory changes to the Act, it is worth examining the principles articulated by the Court in *Shelby County* and the important implications that have already materialized in wake of this decision.

A. *Shelby County v. Holder: A Brief Background*

In 2010, Shelby County, Alabama, a covered jurisdiction under the Voting Rights Act, sued the United States Attorney General in the United States District Court for the District of Columbia seeking a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional and a permanent injunction against the enforcement of these sections.¹¹⁹

Shelby County argued that Section 4's coverage formula was no longer "relevant" in 2006 because it relied on data from 1972.¹²⁰ Moreover, Shelby County argued that the statutory coverage factors were tied to a citizen's ability to cast a ballot, whereas Section 5 in contemporary times had been linked to "second generation barriers to voting" rather than state interference with ballot access.¹²¹ Ruling against Shelby County, the district court explained that Congress found sufficient evidence in the Act's 2006 reauthorization that voting discrimination had continued in covered jurisdictions, which warranted Section 5's protections.¹²²

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court decision after carefully analyzing six categories of evidence related to the administration of preclearance under Section 5.¹²³ After analyzing this information, the appellate court accepted Congress's conclusion that Section 2 litigation remained generally ineffective to protect minority voters; thus Section 5 was still necessary.¹²⁴

Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013, 3:50 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html, archived at <http://perma.cc/TYP7-E7PH>.

¹¹⁹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2621 (2013).

¹²⁰ *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 505 (D.D.C. 2011).

¹²¹ *Id.*

¹²² *Id.* at 508. Thus, the court found that "Section 4(b)'s disparate geographic coverage remains 'sufficiently related' to the problem it targets" and is constitutionally valid. *Id.* at 507.

¹²³ *Shelby Cnty. v. Holder*, 679 F.3d 848, 862–63 (D.C. Cir. 2012). This evidence included (1) Attorney General objections to voting changes; (2) Attorney General requests for more information regarding voting changes; (3) successful Section 2 challenges in jurisdictions subject to preclearance; (4) the dispatching of federal observers to monitor elections in covered jurisdictions; (5) Section 5 preclearance suits involving covered jurisdictions; and (6) the overall deterrent effect of Section 5. *Id.*

¹²⁴ *Id.* at 873.

B. Principles Guiding the Supreme Court in Shelby County

In explaining the Court's 5-4 decision striking down Section 4's formula, Chief Justice Roberts began with the fundamental principle that a statute that departs from equal sovereignty between the states by placing a disparate impact on geographic regions must be sufficiently related to the problem the statute targets.¹²⁵ Roberts explained that states have historically been given wide latitude to regulate elections and draw congressional districts even though the federal government retains significant control over federal elections.¹²⁶ Moreover, the Court continued to emphasize that states enjoy equal sovereignty among each other and that this principle is especially important when legislation imposes disparate treatment of states.¹²⁷

Highlighting how the Voting Rights Act sharply deviated from these principles,¹²⁸ the Court explained that the Act's mechanisms were necessary in the immediate aftermath of intense racial discrimination because of the inadequacy of protecting voting rights through case-by-case litigation.¹²⁹ The Court stressed that the departure from these principles was due in part to the Act's temporary nature as it was originally set to expire after five years.¹³⁰ In terms of the Act's coverage formula, the Court explained that the formula made sense at the time of the Act's passage because Congress limited its attention to

¹²⁵ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013).

¹²⁶ *Id.* at 2623.

¹²⁷ *Id.*

¹²⁸ First, the Court explained that the coverage formula differentiated between the states and thus deviated from the longstanding principle that states enjoy equal sovereignty. *Id.* The Court explained that differentiation between the states required a showing that the statute's disparate impact on geographic regions is "sufficiently related to the problem that it targets." *Id.* at 2627. Because the Act's coverage formula was based on data from 1972, the Court worried that the problems targeted by Section 5 may be based on outdated criteria. *See id.* at 2626. Second, the Court criticized the blanket approach taken by the Act in requiring all changes to a jurisdiction's voting laws—no matter how big or small—be subjected to preclearance before approval. *See id.* at 2631. Finally, the Court expressed concern about the adequacy of the congressional findings on voting discrimination and when the Act would expire. *See id.* at 2624–25.

¹²⁹ *Id.* at 2624 ("Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States merely switched to discriminatory devices not covered by the federal decrees, enacted difficult new tests, or simply defied and evaded court orders." (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (internal quotation marks omitted))).

¹³⁰ *See id.* at 2625. Chief Justice Roberts placed a strong emphasis on how Congress intended the Act's strong mechanisms to be temporary. The Chief Justice explained, "[t]his was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution . . . reflecting the unprecedented nature of these measures, they were scheduled to expire after five years." *Id.* at 2618 (quoting *Katzenbach*, 383 U.S. at 309 (internal quotation marks omitted)).

geographic areas where participation fell far below the national average, thus indicating jurisdictions that had used devices to prevent racial minorities from exercising their right to vote.¹³¹

As the Court continued its analysis, one theme emerged in the majority's opinion: change. While the Voting Rights Act departed from fundamental principles of federalism, the Court stressed that conditions have changed dramatically since the Act's original enactment over fifty years ago.¹³² While the Court acknowledged that these changes have certainly occurred *because of* the Voting Rights Act, it found the lack of corresponding adjustments in Section 5's restrictions and unchanged scope of Section 4(b)'s coverage formula as problematic considering these developments.¹³³ The Court cited its precedent that warned Congress against any further expansion of Section 5 that could jeopardize its continued constitutionality, and thus emphasized that the broadening of this provision was very problematic.¹³⁴ However, the Court saved Section 5 from constitutional infirmity by turning its focus to Section 4's preclearance formula.

Comparing conditions from 1966 when the Court analyzed the Act's constitutionality in *Katzenbach*, and the dramatic changes since that decision in *Northwest Austin* in 2009, the Court stated: "a statute's current burdens must be justified by current needs, and any disparate geographic coverage must be 'sufficiently related to the problem that it targets. The coverage formula met that test in 1965, but no longer does so.'"¹³⁵ The Court further emphasized the change that had occurred since Congress originally devised the coverage formula in 1965 by explaining that at the time of the Act's enactment there were

¹³¹ See *Shelby Cnty.*, 133 S. Ct. at 2618–19.

¹³² Indeed, the majority cited evidence that registration and voting rates between African-Americans and whites in covered jurisdictions now reach parity and that blatant evasions of federal decrees banning discriminatory voting practices are now rare. See *id.* at 2625.

¹³³ See *id.* In fact, the majority argues that the Act's mechanisms have grown stronger over time such as the extension of time to twenty-five years rather than the original five-year extension. Moreover, the Court cited the fact that Congress expanded Section 5's prohibitions in 2006 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." *Id.* at 2627 (internal quotation marks omitted).

¹³⁴ See *id.* The Court's decision in *Northwest Austin* continued to command an important role in its decision in *Shelby County*. The majority sharply criticized Justice Ginsburg's dissenting opinion for minimizing the Court's equal state sovereignty analysis in *Northwest Austin*. See *id.* at 2630 ("[T]he dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin*'s emphasis on its significance.").

¹³⁵ *Id.* at 2627 (quoting *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 203 (2009) (internal quotation marks omitted)).

two groups of jurisdictions: those with a recent history of using discriminatory devices and those without such a history.¹³⁶

Although the government argued that Congress correctly extended the Act in 2006 based on a multitude of data indicating the Act's continued necessity, the Court responded by stating, "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."¹³⁷ The majority concluded by explaining how congressional data shows that the current problems facing minorities are barriers to voting such as vote dilution rather than ballot access, but that the Act's coverage formula still remains premised on targeting jurisdictions based on ballot access.¹³⁸ Thus, in the Court's view, the coverage formula had reached its point of demise.

C. Developments Following Shelby County—A New Battle Begins

After Chief Justice Roberts's announced the Court's decision and a media frenzy condemning the decision erupted,¹³⁹ it did not take long for states formerly subject to preclearance to capitalize on their new found freedom by moving ahead with changes to their voting laws. In Texas, state authorities announced their intention to move ahead with implementing Texas Senate Bill 14, which was passed and signed into law in 2011, but blocked under preclearance by the Department of Justice.¹⁴⁰

The Texas law requires nearly all in-person voters to present one of the following forms of government-issued photo identification in order to vote: (1) a driver's license, personal ID card, or election identification certificate (EIC); (2) a license to carry a concealed handgun; (3) a U.S. military ID card; (4) a U.S. citizenship certificate with photograph; or (5) a U.S. passport.¹⁴¹ For individuals who do not possess any of these forms of identification, the law allows Texans to apply for an election identification certificate at a Department

¹³⁶ *Id.* at 2628. Notably, the Court stressed that this distinction today between states no longer remains, but the Act wrongly treats states as if the distinction continues. *Id.*

¹³⁷ *Shelby Cnty.*, 133 S. Ct. at 2629.

¹³⁸ *Id.* at 2629–31 ("Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress.").

¹³⁹ *See, e.g.*, Gerken, *supra* note 118.

¹⁴⁰ *See* Scott Neuman, *Justice Files Voter Discrimination Suit Against Texas*, NPR (Aug. 22, 2013, 6:14 PM), <http://www.npr.org/blogs/thetwo-way/2013/08/22/214589956/justice-files-voter-discrimination-suit-against-texas>, archived at <http://perma.cc/YS2P-VWPJ>.

¹⁴¹ TEX. ELEC. CODE ANN. § 63.0101 (West 2012).

of Public Safety license bureau¹⁴²—which may force some individuals to travel up to 200 miles round trip in order to obtain this identification card.¹⁴³

In August 2013, the Department of Justice filed suit against Texas under Section 2 of the Voting Rights Act and asked the court to submit Texas to preclearance under Section 3.¹⁴⁴ The suit alleged that the Republican-controlled legislature passed the voter identification law to intentionally discriminate against the state's growing Hispanic and African-American populations.¹⁴⁵ The suit also cited Texas's long history of racial and ethnic discrimination in voting rights and the strong anti-immigrant rhetoric surrounding the passage of this voter identification law as evidence that Texas intentionally discriminated against minorities.¹⁴⁶

In September 2013, the Department of Justice followed its course of action against Texas by filing suit against the State of North Carolina for a similarly controversial voter identification law signed into law after *Shelby County*.¹⁴⁷ The governor signed the bill into law despite massive protests led by civil rights demonstrators and minority-allied groups.¹⁴⁸ Although the entire State of North

¹⁴² TEX. TRANSP. CODE ANN. § 521A.001 (West 2012).

¹⁴³ See Complaint, *United States v. Texas*, *supra* note 7, at 4. Moreover, in order to obtain an election identification certificate, the individual must possess an expired driver's license or personal identification card, an original copy of their birth certificate, or U.S. citizenship or naturalization papers. TRANSP. § 521A.001.

¹⁴⁴ See Complaint, *United States v. Texas*, *supra* note 7, at 14.

¹⁴⁵ *Id.* at 5–6.

¹⁴⁶ *Id.* Furthermore, the Department of Justice's Complaint notes how African-Americans and Hispanics disproportionately lack the types of identification required by the law compared to whites, which is likely to cause substantial burdens for these groups in exercising their rights to vote. *Id.* Overall, the Department of Justice claims these factors along with the law's strict requirements will cause the law to have a discriminatory result, which violates Section 2 of the Voting Rights Act. See *id.* at 14. Moreover, the Department of Justice's complaint argues that the law will result in Hispanic and African-American voters having still less opportunity than other members of the Texas electorate to participate in the political process and to elect representatives of their choice. *Id.* at 5. Accordingly, the Department of Justice has requested the Texas District Court to submit the State to preclearance under Section 3(c) of the Voting Rights Act and to prevent enforcement of the new voter identification law. See *id.* at 14.

¹⁴⁷ 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>, archived at <http://perma.cc/Q9ZR-99RM>. To be clear, voter identification laws are not constitutionally suspect. In fact, the Supreme Court upheld Indiana's voter identification law in 2008. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008). The Court found that Indiana's interests supporting its statute requiring government-issued photo identification to vote as sufficient to justify equal protection standards. *Id.* at 200. These valid state interests included: deterring and detecting voter fraud, participating in a nationwide effort to improve and modernize election procedures, and safeguarding voter confidence. See *id.* at 192–97.

¹⁴⁸ See Penda D. Hair, *The Top 5 Voting Rights Moments of 2013*, HUFFINGTON POST, http://www.huffingtonpost.com/penda-d-hair/voting-rights-2013_b_4498474.html (last updated Feb. 24, 2014, 5:59 AM), archived at <http://perma.cc/WE4L-T5HK>.

Carolina was not formerly subject to preclearance under Section 5 of the Act, forty-one of the state's one hundred counties were formerly subject to Section 5 and North Carolina endured a long history of racial discrimination.¹⁴⁹ The new voting law reduced the number of early voting days available to voters, eliminated same-day voter registration during the early voting period, and prohibited the counting of provisional ballots cast by voters who attempt to vote in their county, but outside their home precinct.¹⁵⁰

Importantly, the new law imposed strict photo identification requirements for those wishing to vote in-person in the State of North Carolina. The law requires voters to present a valid driver's license or non-operator photo identification, a U.S. passport, U.S. military card or veteran's card, or a driver's license issued by another state.¹⁵¹ Hence, the Department of Justice complaint argues that the North Carolina legislature was motivated by a discriminatory intent in passing this law with knowledge that it would impair and thus suppress minority turnout after high levels of African-American participation in the 2008 and 2012 presidential elections.¹⁵² The Department of Justice argued that the new law violates Section 2 of the Voting Rights Act and asked the court to bail in North Carolina under Section 3(c) of the Act for engaging in intentional discrimination.¹⁵³ The complaint warns that in the absence of preclearance under Section 3, North Carolina will continue to violate the Voting Rights Act and the guarantees of the Fourteenth and Fifteenth Amendments.¹⁵⁴

While these new legal disputes are not likely to be resolved soon, they reveal the steps the Department of Justice is willing to take to use federal measures to prevent states from enacting voting laws that impose selective criteria on how voters can exercise this critical right. In the aftermath of *Shelby County*, federal courts must now grapple with the Court's decision and the Department of Justice's request to use the Act's other sections to prevent voter discrimination based on race, ethnicity, or language.

V. WINNING THE NEW VOTING RIGHTS WAR: REFORMING SECTION 3 PRECLEARANCE

As the latest legal battles between the Department of Justice and states with restrictive voting laws unfold, the remaining sections of the Voting Rights Act will be tested. Many election law scholars believe that without Section 5

¹⁴⁹ Complaint, *United States v. North Carolina*, *supra* note 7, at 5.

¹⁵⁰ *Id.* at 6. However, the new law does not allow voters to use student IDs, public-employee IDs, or photo IDs issued by public assistance agencies—most of which are more common and easy to acquire. *See id.* at 13–15.

¹⁵¹ *Id.* at 13–15.

¹⁵² *Id.* at 26.

¹⁵³ *See id.* at 28.

¹⁵⁴ *Id.*

preclearance, the Act is effectively dead,¹⁵⁵ while others believe that the remaining sections may provide some hope for protecting voting rights.¹⁵⁶ Accordingly, Congress should update Section 3's preclearance mechanism by lowering its standard of proof for submitting jurisdictions and by amending Section 3 to clarify its scope. Moreover, Congress should amend Section 3 to equalize the burdens between parties by requiring jurisdictions to initially prove that it enacted the challenged voting law for non-discriminatory purposes. While the Department of Justice's current Section 2 claims against Texas and North Carolina may have merit, the likelihood of success is dim given the lack of proof in showing intentional racial discrimination under Section 3's current bail-in remedy. Without reform, Alberta Currie and other voters may never be able to vote again.

A. Reforming Section 3's Burden of Proof is the Proper Solution

Although the Department of Justice has already invoked Section 3 preclearance as the appropriate remedy in its suits against Texas and North Carolina, Section 3's potential benefits may never be realized because Section 3 demands proof of intentional discrimination.¹⁵⁷ Further, the contours of Section 3's scope remain unclear. For these reasons, Congress needs to amend Section 3 in numerous ways to lower the standard of proof for subjecting jurisdictions to preclearance and to prevent jurisdictions from enacting discriminatory laws under the guise of preventing voter fraud or preserving political incumbency.

First, Congress should revise Section 3's language to provide federal judges with discretion to submit jurisdictions to preclearance if plaintiffs can demonstrate that the jurisdiction's law results in discrimination.¹⁵⁸ The addition of this "results test" would have a powerful impact on plaintiffs' ability to bring claims against discriminatory voting laws by expanding the Act's coverage to plaintiffs that are harmed "as a result" of a jurisdiction's voting laws. Moreover, this amendment would create incentives for private plaintiffs to hold state and local jurisdictions accountable for their voting laws in the absence of federal

¹⁵⁵ See J. Christian Adams, *Supreme Court Buries Section 5 of Voting Rights Act*, PJ MEDIA (June 25, 2013, 9:04 AM), <http://pjmedia.com/jchristianadams/2013/06/25/supreme-court-buries-section-5-of-voting-rights-act/>, archived at <http://perma.cc/H3Q8-D6ML>; Robert Joyce, *Voting Rights Act Preclearance Is Dead: Practical Considerations*, COATES' CANONS: N.C. LOC. GOV'T L. (July 2, 2013), <http://canons.sog.unc.edu/?p=7193>, archived at <http://perma.cc/5XZ6-9KJZ>; Steven Seidenberg, *With the Supreme Court's OK, States Begin Imposing New Laws to Limit the Vote*, A.B.A. J. (Jan. 1, 2014, 11:19 AM), http://www.abajournal.com/magazine/article/with_the_supreme_courts_ok_states_begin_imposing_new_laws_to_limit_the_vote/, archived at <http://perma.cc/P25N-444U>.

¹⁵⁶ See Hasen, *supra* note 115.

¹⁵⁷ See 42 U.S.C. § 1973c (2012).

¹⁵⁸ This new revision mirrors Section 2's language by submitting a jurisdiction to Section 3 preclearance if the plaintiff can show that the mechanism "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." See *infra* Appendix.

supervision under Section 5 preclearance. While others may not readily support this approach,¹⁵⁹ the current standard that requires plaintiffs to demonstrate intentional discrimination is too burdensome in the absence of federal monitoring formerly provided by Section 5's unique preclearance regime. Furthermore, lowering this burden of proof would allow judges to submit more jurisdictions with discriminatory voting laws to Section 3 preclearance in cases where plaintiffs lack access to evidence of intentional discrimination. Although powerful, this revision would be relatively easy to make¹⁶⁰ and would provide the Department of Justice with a more potent weapon against states like Texas and North Carolina where voting will inevitably become more difficult for segments of the population, but where evidence of intentional discrimination by these jurisdictions is scarce.¹⁶¹

While critics of this approach may argue that expanding Section 3 preclearance to include a results test could render Section 3 constitutionally suspect on interfering with state sovereignty,¹⁶² such worries were likely alleviated by *Shelby County* because the Court did not strike down Section 5 as unconstitutional. By striking down Section 4's coverage formula as being outdated rather than striking down Section 5 preclearance itself, the Court in *Shelby County* implicitly signaled that preclearance was acceptable so long as the method of selecting which geographic jurisdictions were subject to this mechanism reflected current problems facing the nation rather than historical conditions. Thus, amending Section 3's preclearance standard of proof would escape constitutional suspicion under *Shelby County* so long as federal judges retain discretion to submit only those jurisdictions with recent problems of discriminatory voting laws and the requirements contain targeted preclearance and sunset dates.¹⁶³

¹⁵⁹ See Crum, *supra* note 18, at 2037. Crum is wary of a results type amendment to Section 3. But he relies more on the Court's political ideology itself rather than focusing on how the Court decided *Boerne* within the context of Congress's enforcement powers under Fourteenth Amendment and rather than on how *Katzenbach's* more deferential standard remains valid and applicable to the Voting Rights Act and other laws passed under the Fifteenth Amendment, despite the Court's decision in *NAMUDNO*. *See id.*

¹⁶⁰ Pildes, *supra* note 71. Pildes makes a similar recommendation for amending the Act, but this Note has not called for Section 3 to be amended to "include violations of the Voting Rights Act itself." *Id.* Pildes argues "Congress could also include significant violations of the other federal statutes to protect the right to vote that have been enacted since 1965, including the Motor Voter Registration Act and the Help America Vote Act." *Id.* Although these suggestions are similarly novel and are worth further investigation, this Note proposes amendments to Section 3 that lower the standard of proof based on Section 2's "results" language discussed *supra*. *See infra* Appendix.

¹⁶¹ For a discussion on how this change could be implemented into the current version of Section 3, see *infra* Appendix.

¹⁶² *See supra* note 159.

¹⁶³ For an examination of the main constitutional counterargument to this point, see *infra* Part V.B.

Another important reform that Congress should make to Section 3 is triggering this section's preclearance mechanism if federal courts find repeated violations of significant, ongoing voting discrimination rather than just single constitutional violations or a history of past discrimination.¹⁶⁴ Currently, it is unclear whether a single constitutional violation is sufficient to trigger preclearance and whether past discrimination may be considered.¹⁶⁵ In light of Chief Justice Roberts's majority opinion in *Shelby County*, which stressed the importance of the Voting Rights Act targeting current voting discrimination problems, Congress should clarify the current standard by ensuring that more evidence is needed to submit jurisdictions to Section 3 preclearance than a single instance of discrimination or evidence based on past voting discrimination alone.¹⁶⁶ This change would provide guidance and consistency to lower federal courts, which have varied over whether a single violation or repeated violations are necessary to submit a jurisdiction to preclearance.¹⁶⁷

An additional change that Congress should make to Section 3 is allowing the Department of Justice, civil rights groups, and other plaintiffs to bring Section 3 claims under the Voting Rights Act directly.¹⁶⁸ Currently, it is unclear from the statutory language whether plaintiffs can bring Section 3 claims on their own or whether Section 3 is appropriate only as a form of relief under Section 2 or other sections of the Act.¹⁶⁹ If Congress amended Section 3 to allow plaintiffs to bring these challenges directly rather than as a form of relief, then this could streamline the process of submitting a jurisdiction to preclearance under Section 3, resulting in greater efficiency for both courts and litigants. For instance, by allowing a plaintiff to prove a violation under Section 3 directly, this would avoid requiring the court to determine both (1) the merits of a Section 2 violation (or other Voting Rights Act violations) and (2) whether relief is proper under Section 3 because the jurisdiction engaged in intentional discrimination.¹⁷⁰ Most importantly, this change would allow aggrieved parties

¹⁶⁴ After the Court's decision in *Shelby County*, it is relatively clear that any mechanism for submitting a jurisdiction that mainly relies on a jurisdiction's history of discrimination may automatically be constitutionally doomed given the fate of Section 4's formula.

¹⁶⁵ Seidenberg, *supra* note 155.

¹⁶⁶ Updating Section 3 to include this clarification may help avoid implicating this Section as constitutionally suspect under *Shelby County* because it would force judges to determine whether the claims against jurisdiction included proof of voting discrimination that reflected current discriminatory practices rather than trends rooted in historical tradition.

¹⁶⁷ Pildes, *supra* note 71; *see infra* Appendix.

¹⁶⁸ This may generally avoid confusion over how groups and individuals can obtain Section 3 relief. Based on the statute itself, it is unclear how a group or individual would seek a remedy under Section 3 because this part of the statute does not provide a direct cause of action for plaintiff's seeking redress under Section 3's preclearance regime. *See infra* Appendix.

¹⁶⁹ *See* Pildes, *supra* note 71.

¹⁷⁰ A jurisdiction may even willingly submit to Section 3 preclearance to avoid litigating the dispute by signing a consent decree agreement. Such decrees have commonly avoided

to bring direct proceedings under Section 3 that ask the appropriate court to place a jurisdiction under preclearance because of recent discrimination found in previous cases where evidence of intentional discrimination did not exist.¹⁷¹ Again, this change would require very little of Congress, but would have a major effect on aggrieved plaintiffs' ability to receive redress for findings of discrimination in past cases when Section 3 was only available as a remedial mechanism.

While arguments can be made for clarifying or reigning-in judicial discretion under Section 3 in targeting preclearance requirements and determining sunset dates, this discretion is the likely reason these amendments to Section 3 would be insulated from constitutional challenges. Hence, Congress should not alter this aspect of Section 3. Because this discretion is vested with courts, it is likely that targeted preclearance requirements with sunset dates would not be subject to constitutional challenge for Congress imposing its own judgment on the scope of its own enforcement powers, as prohibited by *Boerne*, because these preclearance decisions ultimately rest with federal courts.¹⁷²

Finally, Congress should amend Section 3 by requiring a jurisdiction to initially demonstrate by clear and convincing evidence that it enacted the challenged law or provision for purposes other than discriminating against ethnic, racial, or language minorities.¹⁷³ In some cases, the jurisdiction may not be able to provide sufficient evidence underlying the enactment of a strict voter identification law to meet the clear and convincing standard. However, even if most jurisdictions can overcome this burden by presenting evidence such as the need to prevent voter fraud and maintain public confidence in the electoral process, it will force these jurisdictions to provide evidence that justifies the challenged provisions that goes beyond mere pretext. Moreover, a jurisdiction faced with this initial evidentiary burden may be deterred from claiming that it was motivated to enact the statute to preserve the status of incumbents because this justification would require it to admit overt partisan bias underlying its voter identification law.

Furthermore, this standard creates greater balance between parties, which remedies the numerous burdens placed on plaintiffs in the aftermath of *Shelby County*. Under this standard, the parties would share the burdens more equally because aggrieved plaintiffs must bear the costs associated with bringing the litigation while jurisdictions must meet the initial evidentiary burden by

the expense and time associated with litigation claims under the Voting Rights Act. See Crum, *supra* note 18, at 2014–15.

¹⁷¹ Pildes, *supra* note 71.

¹⁷² For example, if Congress allowed jurisdictions to bail out of Section 3 preclearance after a specific period of time similar to that of Section 5 preclearance, these provisions could be constitutionally suspect under *Boerne* for Congress exceeding its enforcement powers. Hence, this problem would be avoided by keeping Section 3's expansive discretion in the hands of the judiciary rather than the political branches. See *infra* Part V.C.

¹⁷³ See *infra* Appendix.

providing evidence demonstrating a non-discriminatory purpose justifying their challenged law. As a result of this clear and convincing burden, jurisdictions may be less inclined to press ahead with the high costs associated with the litigation process and more likely to agree to consent decrees that would facilitate greater cooperation between the parties, avoid protracted disputes, and prevent discriminatory voting laws altogether.¹⁷⁴

B. Addressing *Boerne* and Results Test Critics

Critics opposed to extending Section 3 preclearance to include a results test cite the Supreme Court's decision in *City of Boerne v. Flores* as a major constitutional hurdle.¹⁷⁵ Their basic premise is this: because *Boerne* held that laws passed by Congress under its Fourteenth Amendment enforcement powers must be "congruent and proportional" to the constitutional injury sought to be remedied, allowing Congress to burden states with Section 3 preclearance requirements under a results test—for less than a constitutional injury—exceeds Congress's enforcement power and thus violates *Boerne*'s "congruent and proportional" standard.¹⁷⁶

Although these critics' skepticism is understandable, it rests on a number of premature assumptions that inappropriately preclude careful consideration of the results test's true potential and forecloses meaningful discussion of this approach. First, these critics prematurely assume that the Supreme Court has already announced that *Boerne*'s heightened "congruent and proportional analysis" applies in the context of laws passed under Congress's Fifteenth Amendment enforcement powers. However, the Supreme Court has not decided this question and has not extended *Boerne* to laws passed under the Fifteenth Amendment.¹⁷⁷ As a result, *Katzenbach*'s more deferential standard applying rational means review to laws passed by Congress under the Fifteenth

¹⁷⁴Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 726 ("The consent decree is a promising form of negotiation and compromise which holds out the hope that parties may achieve justice through peaceful, voluntary collaboration. Settlement through consent decrees . . . avoids the time, expense and risk of trial.").

¹⁷⁵See Rick Hasen, *Initial Thoughts on Proposed Amendments to the Voting Rights Act*, ELECTION L. BLOG, (Jan. 16, 2014, 1:32 PM), <http://electionlawblog.org/?p=58021>, archived at <http://perma.cc/8VFM-FH5C>; Franita Tolson, *The Importance of Tunnel Vision in Fixing the VRA's Coverage Formula*, HUFFINGTON POST, http://www.huffingtonpost.com/franita-tolson/voting-rights-act-preclearance_b_4653095.html (last updated Mar. 25, 2014, 5:59 AM), archived at <http://perma.cc/989R-MYQR>.

¹⁷⁶See Hasen, *supra* note 175.

¹⁷⁷See *Nw. Austin Mun. Util. Dist. No. One v. Holder* (NAMUDNO), 557 U.S. 193, 205 (2009); Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUS BLOG (June 25, 2013, 7:10 PM), <http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/>, archived at <http://perma.cc/5JJN-6AXV>.

Amendment arguably still applies to an amended Section 3 with a results test.¹⁷⁸ Accordingly, under *Katzenbach*'s standard, an amended Section 3 preclearance would fulfill this more deferential standard of review given that Section 3—even with a lower standard of proof for submitting jurisdictions to preclearance—is rationally related to preventing jurisdictions from enacting voting laws discriminating against minorities.

Second, the Court's analysis in *Shelby County* did not even mention *Boerne*, and the Court did not cite this decision despite the fact that Shelby County argued in favor of extending *Boerne*'s heightened standard.¹⁷⁹ While those who believe that the Court is destined to extend *Boerne* to the Fifteenth Amendment point to a footnote in *Shelby County* that refers to the Fourteenth and Fifteenth Amendment standards together, the Court's reference is vague at best and even one critic admits that this footnote's meaning is impossible to discern.¹⁸⁰ In addition, the Court also declined to extend *Boerne*'s heightened standard to the Voting Rights Act and other laws passed under the Fifteenth Amendment in *Northwest Austin* even though this decision raised questions over *Katzenbach*'s viability.¹⁸¹

Still, with two major opportunities to extend *Boerne* to the Voting Rights Act, the Court's silence on *Boerne*'s scope may implicitly confirm that laws passed by Congress under the Fifteenth Amendment may be entitled to more deference under *Katzenbach*.¹⁸² In fact, examining *Shelby County* more closely shows that Justice Thomas may be less concerned with the level of deference given to Congress under the Fifteenth Amendment and more concerned with ensuring burdens imposed on the states are based on current conditions rather than historical practices.¹⁸³ In *Shelby County*, Chief Justice Roberts conceded that Congress amassed a sizeable record during its most recent reconsideration of the Voting Rights Act, which warranted its reauthorization in 2006.¹⁸⁴ Moreover, the Chief Justice explained that Congress could reactivate Section 5 preclearance—a much more extensive intrusion on state sovereignty than an amended Section 3.¹⁸⁵

¹⁷⁸ See *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966).

¹⁷⁹ See generally *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); see Hasen, *supra* note 177.

¹⁸⁰ Hasen, *supra* note 177.

¹⁸¹ *NAMUDNO*, 557 U.S. at 204–06.

¹⁸² Even Justice Scalia has stated, “Congress’s enforcement power is broadest when directed ‘to the goal of eliminating discrimination on account of race.’” *Tennessee v. Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970)); see also Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 98–99 (2006) (discussing how the Court may analyze *City of Boerne* in the context of Section 2 of the Voting Rights Act).

¹⁸³ *Shelby Cnty.*, 133 S. Ct. at 2631–33 (Thomas, J., concurring).

¹⁸⁴ See *id.* at 2629.

¹⁸⁵ See *id.* at 2631.

Finally, critics of the results test rest their arguments on “predictive judgments” on how the Roberts Court would decide this *Boerne* issue, when the issue itself has not even been decided.¹⁸⁶ Related to this point, critics’ assumptions rest on the notion that the Court’s composition will remain undisturbed forever. With Justices Scalia and Kennedy approaching eighty and the time it will take for a new Voting Rights Act challenge to reach the Court, critics automatically assume that *Boerne*’s extension to the Fifteenth Amendment context is imminent when in fact the Court’s ideological composure may change sooner rather than later. As a result, *Katzenbach*’s more deferential standard currently applicable to the Voting Rights Act should not be presumed as destined to fail. Although the Court may resolve whether *Boerne* extends to the Voting Rights Act in the near future, *Shelby County* still presents major questions over whether the Act’s remnants can continue to protect minorities at the ballot box.

C. *The Department of Justice Suits Inadequately Protect Minorities*

Perhaps the most profound change after *Shelby County* is the shifting of the burden to individual plaintiffs or the Department of Justice as the parties that must bring suits to enforce the Voting Rights Act. Moreover, these suits target laws that have already gone into effect rather than *preventing* them from going into effect as Section 5 preclearance once addressed. With considerable time and resources needed to challenge new voting laws, it is unlikely that individual plaintiffs will be able to challenge every possibly restrictive or discriminatory voting law. Thus, amending Section 3 by shifting the initial burden of proof to jurisdictions will restore greater balance between the parties when an aggrieved party challenges a jurisdiction’s voting laws.¹⁸⁷

In the suits against Texas and North Carolina, the Department of Justice has the burden of proving under Section 2 that minority voters generally have fewer opportunities than white voters to elect candidates of their choice.¹⁸⁸ The Department of Justice’s suits against both Texas and North Carolina demonstrate why the remaining sections of the Voting Rights Act inadequately protect minorities and are an unrealistic post-*Shelby County* strategy. In Texas, the Department of Justice claims that the state legislature violated the Act by discriminating against African-American and Hispanic minorities.¹⁸⁹ The Department relies on a Section 5 preclearance opinion by the D.C. District

¹⁸⁶ See Hasen, *supra* note 175.

¹⁸⁷ See *infra* Appendix.

¹⁸⁸ Richard L. Hasen, *Why 2014 Will Be a Pivotal Year for Judicial Decisions About Voting Rights*, SCHOLARS STRATEGY NETWORK (Dec. 2013), http://www.scholarsstrategy-network.org/sites/default/files/ssn_basic_facts_hasen_on_why_2014_will_be_a_key_year_f_or_judicial_protection_of_voting_rights.pdf.

¹⁸⁹ See Brief for Defendants at 1–2, *Perez v. Texas*, No. CV- SA-11-CA-360-OLG-JES-XR (W.D. Tex. Aug. 5, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/Texas-reply-on-Sec.-3-of-VRA-8-5-13.pdf>.

Court issued before *Shelby County* that denied Texas the right to implement its new voter identification law because Texas could not show that it would not have a discriminatory effect.¹⁹⁰

The problem with the Department of Justice's reliance on this decision is time. Because the D.C. District Court issued its decision before *Shelby County*, the court was forced to vacate its decision once the Supreme Court struck down Section 4's preclearance formula. Thus, the Department of Justice must acquire independent evidence that Texas discriminated against racial or ethnic minorities when creating its new voter identification law. Furthermore, the Department of Justice's Section 2 claims against Texas are unlikely to be successful because the state can legitimately claim it was motivated to change its voting laws for ensuring the integrity of the voting process or for preserving the incumbency of a political party.¹⁹¹

For instance, as long as the Texas state legislature targeted Democrats, rather than targeting blacks or Hispanics because they are predominantly Democrats, the Texas law is likely constitutional—even though it likely burdens minorities at the ballot box. While the partisan reasons justifying Texas's voter identification law seem tenuous, its likely success in this unfolding legal battle reveals why the Obama Justice Department's strategy in the post-*Shelby* world is an unrealistic approach to solving the nation's voting rights problems and why amending Section 3 is greatly needed.

Although North Carolina has simply denied the allegations of racial animus, North Carolina's Republican controlled legislature can similarly hide behind the pretext of discriminating against Democrats to preserve the incumbency of Republican office holders.¹⁹² The problem with this result is that the new voter

¹⁹⁰ *Id.*

¹⁹¹ This is exactly the State of Texas's response. After the Department of Justice filed its suit in federal court, the State of Texas stated:

[The] DOJ's accusations of racial discrimination are baseless. In 2011, both houses of the Texas Legislature were controlled by large Republican majorities, and their redistricting decisions were designed to increase the Republican Party's electoral prospects at the expense of the Democrats. It is perfectly constitutional for a Republican-controlled legislature to make partisan districting decisions, even if there are incidental effects on minority voters who support Democratic candidates.

Id. at 19.

¹⁹² In doing so, North Carolina can probably avoid a court ruling that would find the state in violation of Section 2 of the Act by relying on political justifications and the argument that the state needs to prevent in-person voter fraud. Hence, the Department of Justice's claim against North Carolina—in the absence of proof that Republican legislators passed the restrictive voting law with the aim of preventing racial minorities from voting—is likely to be unsuccessful in blocking the new provisions of the law. On another note, North Carolina claims it has a legitimate interest in preventing voter fraud, although it is likely that claim is yet another pretext for enacting this stringent voter identification law. See Tokaji, *supra* note 22, at 76–77.

identification law is still very likely to burden racial minorities and to make it more difficult for them to exercise their constitutional right to vote.¹⁹³

In terms of the Department of Justice's claim to have Texas and North Carolina bailed in to Section 3 preclearance under the Act, the standard of proof is even higher; thus these suits are more unlikely to succeed. As explained, the Department of Justice must prove that Texas and North Carolina intentionally discriminated against racial minorities when moving forward with voter identification laws. Although judicial findings of intentional discrimination under the Act are not unheard of,¹⁹⁴ this burden is exceedingly difficult to prove.¹⁹⁵ Given the lack of legislators admitting their desire to prevent minorities from voting, the Department of Justice's Section 3 claim is probably a move that is more symbolic than realistic.

Additionally, these suits demonstrate why questions about Section 3's scope need answering. Because federal courts have never used Section 3 to bail in a jurisdiction outside the context of redistricting, it is unclear how courts will grapple with Texas's strict voter identification law. Further, it is currently unsettled how much intentional discrimination must be shown to warrant Section 3 preclearance and whether single constitutional violations are sufficient to trigger this Section.¹⁹⁶ On the other hand, it is also unclear whether past discrimination by a jurisdiction can be considered or whether only current, widespread discrimination can be taken into account.¹⁹⁷ With these questions still unanswered and with Section 2 placing the burden on individual plaintiffs, Congress should take steps to update Section 3 by clarifying its scope and

¹⁹³ See Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 115 (2009) (explaining how a significant portion of the Indiana eligible electorate does not possess valid photo identification); M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statutes*, 36 AM. POL. RES. 555, 556–63 (2008) (finding that blacks and Hispanics are less likely to have photo identification); Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329, 348 (2009) (explaining how nearly 900 ballots in the 2008 Indiana general election were not counted due to lack of photo identification); see also Tokaji, *supra* note 22, at 107–08.

¹⁹⁴ See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 677 (2006).

¹⁹⁵ Usually, courts need rare “smoking gun” evidence such as secret recordings, emails, or specific statements that demonstrate that the jurisdiction intended to make it disproportionately harder and more burdensome for minorities to exercise their right to vote. Rapoport, *supra* note 19.

¹⁹⁶ See Seidenberg, *supra* note 155. For instance, it is unclear whether emails that indicate intentional discrimination by a government official could actually represent the views of the legislature itself and thus constitutes discriminatory intent or whether more extensive proof of intentional discrimination needs to be more widespread in order to be attributed to the intent of the legislature itself. See *id.*

¹⁹⁷ *Id.*

making it easier for the Department of Justice to submit jurisdictions to preclearance.

D. Congress Should Abandon Section 5 Preclearance

Although several members of Congress introduced legislation that would update Section 4's preclearance formula in January 2014,¹⁹⁸ this is an undesirable solution even if such legislation lowers the standard of proof under Section 3.¹⁹⁹ Instead, Congress should amend Section 3 by broadening its scope and thus "replacing" Section 5 with Section 3 preclearance altogether. This approach has a number of advantages.²⁰⁰

From a policy standpoint, Section 4's formula for targeting which jurisdictions must submit to preclearance under Section 5 is overly complex and

¹⁹⁸ See Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014). This proposed legislation would create a new coverage formula for Section 4, which would revive Section 5 preclearance.

States with five violations of federal law to their voting changes over the past fifteen years will have to submit future election changes for federal approval. This new formula would currently apply to Georgia, Louisiana, Mississippi and Texas. Local jurisdictions would be covered if they commit three or more violations.

Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, NATION (Jan. 16, 2014, 12:53 PM), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act#>, archived at <http://perma.cc/4A8P-A432>. However, as a compromise, objections by the Department of Justice against voter identification laws will not count as a new violation of the law, which would not provide a solution to the ongoing disputes in Texas and North Carolina. See *id.*; see also David Weigel, *The New Voting Rights Act Fix Would Protect Voter ID Laws, So Should Liberals Hate It?*, SLATE (Jan. 16, 2014, 2:20 PM), http://www.slate.com/blogs/weigel/2014/01/16/the_new_voting_rights_act_fix_would_protect_voter_id_laws_so_should_liberals.html, archived at <http://perma.cc/9NB6-754V>.

¹⁹⁹ The new legislation introduced by members of Congress does in fact lower the standard of proof for Section 3 preclearance. See H.R. 3899, § 3(b)(4). However, this Note argues that Section 3 should be the "new Section 5" as the replacement of this provision rather than updating both. For this principal reason and others, this Note differs from the legislation currently pending in Congress.

²⁰⁰ Among the advantages to updating Section 3 are: (1) Compiling the data needed to determine Section 4's preclearance formula is very burdensome and time consuming – especially if the formula requires periodic updating; (2) Section 3 is permanent provision of the Act and would not come under constitutional attack similar to each time Section 4 requires reauthorization; (3) Section 3 allows judges the flexibility and discretion in fashioning preclearance requirements to specific problems found in the jurisdiction; (4) the flexibility provided under Section 3 can avoid the burdens of preclearance that requires a jurisdiction to submit all changes to its voting laws; and (5) Section 3 provides local federal district courts the discretion to fashion preclearance requirements and avoid concerns over partisans in the Department of Justice abusing preclearance.

burdensome and could be avoided by updating Section 3 instead.²⁰¹ For instance, because Sections 4 and 5 are temporary, Congress would be forced to update Section 4's formula often enough for the Act to reflect modern voting practices in order for it remain constitutional under *Shelby County*. However, Section 3's preclearance provisions are permanent. Thus, broadening the scope of Section 3 would save Congress the burden of periodically worrying about refashioning Section 4's formula to remain constitutional.

Two interrelated points support broadening Section 3 while abandoning Section 5. First, Section 3 allows judges the flexibility and discretion in fashioning preclearance requirements to address specific problems found in the state or jurisdiction.²⁰² Second, Section 3 allows judges flexibility in determining how long the jurisdiction has to submit to preclearance based on the alleged violations of the Voting Rights Act.²⁰³ As a related benefit, the judge has the discretion to require the jurisdiction to only submit its voter identification laws for preclearance—not every single change made to the jurisdiction's election laws as Section 5 required.²⁰⁴ By relying on Section 3's targeted preclearance standards, jurisdictions would no longer be burdened with submitting all changes to federal officials in Washington, D.C., before these changes go into effect. Likewise, an amended Section 3 would force federal judges to focus on actual and recent instances of discrimination rather than a jurisdiction's history of discrimination as relied upon by Section 4's formula—an aspect sharply criticized by the majority in *Shelby County*.

On a different point, Section 3 preclearance remedies the Court's concerns raised in *Shelby County* about Section 5's intrusion into state and local government's sovereignty to enact voting law changes. In other words, Section 3 avoids concerns about Section 5's overinclusive requirements that jurisdictions submit *all* voting law changes for review by requiring a jurisdiction to submit only those voting laws in which it has a proven problem. Moreover, Section 3's flexibility provides federal judges with the discretion to determine how long jurisdictions must submit to preclearance.²⁰⁵ This aspect of Section 3 could prevent problems related to the length of time states or local

²⁰¹ See Pildes, *supra* note 71. Because the most recent formula originally passed in 1972 was premised on ballot access rather than second-generation barriers to voting, it is not immediately clear what criteria should be used to update Section 4's formula to replace the main requirements with a substitute that would adequately target jurisdictions that make it more difficult for minorities to vote rather than blocking access entirely. *See id.*

²⁰² *See id.*

²⁰³ For example, if the jurisdiction has a history of enacting restrictive voter identification laws, Section 3 allows judges the discretion to target the types of laws the jurisdiction must submit to preclearance and the time period in which the jurisdiction must do so. This aspect of Section 3's judicial remedy avoids burdening a jurisdiction with preclearance requirements for a period of time that may far exceed the actual need for federal monitoring and intervention. *See Crum, supra* note 18, at 2010–15.

²⁰⁴ *See id.* at 2007.

²⁰⁵ *See Crum supra* note 18, at 2013.

jurisdictions have to submit to preclearance under Section 5 before qualifying for a bailout.²⁰⁶

Finally, improving Section 3 is more advantageous than updating Section 4 because Section 3 provides local federal district courts the discretion to fashion preclearance requirements. Instead of a federal district court in Washington, D.C., or DOJ authorities deciding preclearance determinations as required under Section 5, pocket trigger preclearance places these determinations in the hands of local federal judges where the action is filed. Placing this discretion in the hands of local federal judges rather than officials in Washington, D.C., could alleviate concerns over federal officials deciding preclearance determinations based on the typical partisanship known to characterize the Department of Justice rather than the merits of the preclearance claims.²⁰⁷ Instead, Section 3 would prevent such abuse by placing the disputes in the hands of federal judges who are likely to assess the merits of claims and determine whether a jurisdiction should be submitted to preclearance more fairly and independently.²⁰⁸

VI. CONCLUSION

Shelby County is destined to become one of this decade's most polarizing and criticized decisions issued by the Supreme Court. As the Department of Justice's litigation against North Carolina and Texas continues to unfold, the high standard of proof currently required to submit these jurisdictions to Section 3 preclearance demonstrates the inadequacy of these suits in protecting voters such as Alberta Currie. Moreover, poll workers may be forced to turn away many others trying to exercise their right to vote for not providing satisfactory forms of photo identification. Other states across the South or other parts of the country may pass similar voter identification laws with stringent requirements.

However, resurrecting Section 5 preclearance by updating Section 4's coverage formula—while popular and currently proposed by members of Congress—is the improper solution. To avoid continual constitutional attack and partisan influence in the Department of Justice, Section 3 needs comprehensive reform to serve as a replacement to Section 5 preclearance.

²⁰⁶ Under Section 5 preclearance, jurisdictions could not bail out unless they could prove they complied with the Act for ten years, which resulted in jurisdictions submitting to preclearance for an amount of time that may have far extended the jurisdiction's tendencies to engage in discrimination over the same period of time. *See* 42 U.S.C. § 1973c (2012).

²⁰⁷ *See* Edward Blum et al., *Who's Playing Politics?*, NAT'L REV. (Jan. 24, 2006, 8:29 AM), <http://www.nationalreview.com/articles/216584/whos-playing-politics/edward-blum>, archived at <http://perma.cc/5CBQ-56RF> (describing how staffers in the Department of Justice have frequently utilized the Voting Rights Act for partisan ends).

²⁰⁸ Federal judges are required to recuse themselves if their impartiality could reasonably be questioned, which may result in the adjudication of Section 3 cases in a more impartial manner than currently handled by the Department of Justice. *See* M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 REV. LITIG. 653, 661 (2011) (citing 28 U.S.C. § 455(a) (2006)).

Amending Section 3's standard of proof to allow preclearance for both intentional and effects-based discrimination by including a results test is a step in the right direction in preventing *Shelby County* from denying access to the ballot box. Further, clarifying this Section's scope and changing its initial evidentiary burden will provide judges and litigants with greater clarity and will equalize the burdens shared by parties in these disputes. Without such comprehensive reforms, the threat to Alberta Currie and countless other voters is both real and pressing.

APPENDIX: MODEL AMENDMENTS TO SECTION 3 OF THE VOTING
RIGHTS ACT

Below is an amended version of Section 3 that reflects this Note's recommendations. The statute has been reorganized, and new language has been inserted. The new text is denoted in italics.

1. If in any proceeding instituted by the Attorney General or an aggrieved person under:

(a) any statute to enforce the voting guarantees of the fourteenth and fifteenth amendment in any State or political subdivision; *or*

(b) *this section directly*

2. The court finds:

(a) violations of the fourteenth or fifteenth amendment *by finding repeated violations of recent, significant discrimination; or*

(b) *the challenged law or provisions results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color; and*

3. *Such findings* justify equitable relief within the territory of such State or political subdivision, *then:*

4. The court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until:

(a) The court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in [the language minority provision] of this title: Provided,

(b) That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

5. For the purposes of this section, the jurisdiction has the initial burden of demonstrating by clear and convincing evidence that the challenged law or provision was enacted for a purpose or effect other than discriminating against a racial, ethnic, or language minority group. If the jurisdiction meets this burden, the plaintiff bears the burden of proof found in Part 2 of this section.

