ACCESS DENIED: WHY THE SUPREME COURT'S DECISION IN *SHELBY COUNTY V. HOLDER* MAY DISENFRANCHISE TEXAS MINORITY VOTERS

Comment*

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I. THE TALE OF SILVIA CITIZEN AND THE LOST VOTE

Alpine, Texas, located in rural West Texas, is the county seat of Brewster County, the largest county in Texas. Alpine has a population of about 6,000 people. This miniature town is located approximately four hours away from El Paso, two and a half hours from the nearest airport in Midland, and one hour away from the nearest Wal-Mart in Fort Stockton. Alpine has no public transportation and no taxicab companies. Those who do not own a car, walk.

Silvia Citizen is a resident of Alpine.[1] She is a cook for a small, but successful, "mom and pop" restaurant located a short five-minute walk from her home. With a modest salary, Silvia pays her bills on time. Her son, Joel Citizen, buys her groceries and attends to her medical care. Joel, however, is the main provider for his own family, and accordingly, maintains two full-time jobs. Although Silvia is not a college graduate, she is politically savvy. She reads the Alpine Avalanche and avidly tunes in to CNN en Español. Silvia does not own a passport, a driver's license, or an identification card. She does, however, own a student identification card because she attends a pottery class on Thursday nights at Sul Ross State University.

On Election Day, Silvia walked to the nearest polling station to cast her vote. When she reached the polling station, Silvia was greeted by one of her friends, Mary May, an election official. Silvia presented her voter registration card, an electricity bill, and her Sul Ross student identification card. Mary informed Silvia that she could not cast a vote that day because the state voter identification law had changed. When did this happen? Mary did not know, but explained that Silvia could cast a provisional ballot. Then, Silvia could go to the Department of Transportation (TXDOT), apply for a free identification card, and return within six days to ensure that her vote was counted. Silvia left the polling station disheartened.

The TXDOT office is located a mile or two outside of downtown Alpine. To obtain a free identification card, Silvia needed to miss a day of work. In

1. Silvia Citizen is a hypothetical character living in the real town of Alpine, Texas. She represents the 4.6% of voters in Texas who may be disenfranchised by § 5 of the Voting Rights Act as a result of the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

addition, she needed to obtain the necessary paperwork, including a birth certificate. Unfortunately, Silvia could not afford the $22 to pay for a copy of her birth certificate. After voting all of her life in Texas, Silvia was unable to exercise the most fundamental right given to her by the Constitution. How could Texas enact a statute that disqualified otherwise eligible voters?

Texas is no longer a "covered jurisdiction" under § 5 of the Voting Rights Act (VRA), and thus does not have to seek approval from the federal government before a new electoral law goes into effect.[2] In 2011, Texas enacted Senate Bill 14 (SB 14), a strict voter identification law.[3] At that time, Texas was required to seek "preclearance" before implementing enacted electoral laws.[4] When Texas submitted SB 14 for approval, the Department of Justice denied the petition, citing SB 14's retrogressive effects.[5] The United States District Court for the District of Columbia affirmed the Department of Justice's decision and Texas appealed the case to the Supreme Court, challenging the constitutionality of § 5's preclearance requirement.[6] On June 25, 2013, the Supreme Court, in *Shelby County v. Holder* (*Shelby County*), held § 4 of the VRA to be unconstitutional.[7] Subsequently, the Court revisited Texas's case, vacated the district court's judgment, and remanded the case back to the district court in light of its decision in *Shelby County*.[8] Hours after the Court's decision, Texas Attorney General Greg Abbott released a statement declaring that SB 14 had gone into effect.[9] Because SB 14 is now fully implemented, voters across the state could find themselves in a situation similar to Silvia's.

This Comment aims to address SB 14's faults, and the more important issue of the need for judicial or executive oversight for potential statutory electoral changes. Part II of this Comment introduces a historical perspective of the events that led to the VRA's enactment.[10] Part III introduces § 5 of the Voting Rights Act, the requirements of § 5, and the other sections in the statute relevant to this issue.[11] Part IV considers SB 14, its path through the Department of Justice and the United States District Court for the District of Columbia, and its eventual enactment.[12] Part V traces the history of the VRA's various reauthorizations and a judicial history of § 5, including the Court's historical affirmation of the measure's constitutionality.[13] Further, Part V introduces *Shelby County*, a case recently decided by the Supreme Court, which

2. *See* discussion *infra* Part IV.
3. *See* discussion *infra* Part IV.
4. *See* discussion *infra* Part III.
5. *See* discussion *infra* Part IV.
6. *See* discussion *infra* Part IV.
7. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013); *see* discussion *infra* Part IV.
8. *See* discussion *infra* Part IV.
9. *See* discussion *infra* Part IV.
10. *See* discussion *infra* Part II.
11. *See* discussion *infra* Part III.
12. *See* discussion *infra* Part IV.
13. *See* discussion *infra* Part V.

releases all "covered states" from the preclearance requirement.[14] In Part VI, this Comment analyzes *Shelby County* in light of the Court's previous Fifteenth Amendment constitutional analysis with respect to voting rights.[15] This Comment concludes that the Court ignored its precedent and the copious amount of evidence proffered in the Congressional Record for the VRA's 2006 reauthorization.[16] This Comment argues that, as a result of *Shelby County*, states such as Texas will advance retrogressive electoral laws, negatively affecting minorities' access to the franchise.[17]

Part VII provides a comparative analysis of SB 14 and Georgia's voter identification law, which has received preclearance.[18] As a result, Part VII recommends that Texas revisit SB 14 and remedy the statute's current problems by adopting Georgia's measures and by (1) providing free identification cards through multiple avenues easily accessible by citizens; (2) devising a comprehensive education program designed to reach citizens in the most remote areas and citizens in urban areas; and (3) providing exceptions for citizens who cannot obtain identification on their own.[19] Because it is unlikely that state legislators will revisit SB 14, Part VII also briefly discusses current litigation pending against the State of Texas, alleging that the state is in violation of § 2 of the VRA.[20] Additionally Part VII addresses the possibility of "bailing-in" Texas under § 3(a) of the VRA.[21]

II. OPENING THE DOOR: AN OVERVIEW OF THE CIVIL RIGHTS MOVEMENT

The Founding Fathers sought to create a federal government void of centralized power in a single group or entity.[22] As they drafted the Constitution, the Framers feared a strong federal government, but they did not fear strength of power for states.[23] Not surprisingly, the Constitution delegates few and limited powers to the federal government, yet reserves all powers not granted to the federal government to the states.[24] Thus, the Framers ensured that a state could maintain a strong relationship with its citizens and protect its citizens' liberties from the federal government.[25]

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14. *See* discussion *infra* Part V.
15. *See* discussion *infra* Part VI.
16. *See* discussion *infra* Part VIII.
17. *See* discussion *infra* Part VII.
18. *See* discussion *infra* Part VII.
19. *See* discussion *infra* Part VII.
20. *See* discussion *infra* Part VII.
21. *See* discussion *infra* Part VII.
22. See Shelby Cnty. v. Holder, 679 F.3d 848, 853 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).
23. *See id*.
24. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Shelby Cnty.*, 679 F.3d at 853 (quoting THE FEDERALIST NO. 45, at 137 (James Madison) (Roy P. Fairfield ed., 1966)).
25. *See Shelby Cnty.*, 679 F.3d at 853.

Later, however, history revealed that states could also threaten the liberty of their own citizens.[26] The enslavement of humans in the United States brought forth a great divide amongst the states and paired brother against brother in the American Civil War.[27] The war triggered Reconstruction Amendments, such as the Thirteenth and Fourteenth Amendments, which prohibited involuntary servitude and the deprivation "of life, liberty, or property, without due process of law."[28] Regardless, racial discrimination pervaded and "infected the electoral process."[29] One hundred years would go by after the passage of the Thirteenth Amendment before a comprehensive voting rights statute passed through Congress and into the hands of the President.[30] That period was comprised of major social campaigns sparked by the passage of the final Civil War Amendment: the Fifteenth Amendment.[31]

A. Overcoming the Violence: A Struggle for the Right to Vote

In 1870, twenty-eight states voted to ratify the Fifteenth Amendment, granting United States citizens a constitutional right to vote regardless of skin color or status as former slaves.[32] In its language, the Fifteenth Amendment specifically granted Congress the authority to enforce its provisions by appropriate legislation.[33] This landmark Amendment, which followed in the wake of the Reconstruction Act and the Fourteenth Amendment, cemented the right to vote into the Constitution and ushered in a new era, expanding the federal government's role in defining democracy.[34] The efforts, however, proved to be futile.[35] Segregationists, attempting to maintain social order, developed innovative methods such as gerrymandering, "poll taxes, literacy tests, grandfather clauses, . . . property qualifications," closed polls, and acts of

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26. *See id.*

27. *See* JAMES M. MCPHERSON, DRAWN WITH THE SWORD: REFLECTIONS ON THE AMERICAN CIVIL WAR 50–51 (1996).

28. *Shelby Cnty.*, 679 F.3d at 853 (quoting U.S. CONST. amend. XIV); *see* JOHN R. VILE, A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS 184–85 (4th ed. 2006).

29. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612 (2013).

30. *See* U.S. CONST. amend. XIII; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–1973bb-1 (2006)).

31. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 103–04 (2000).

32. U.S. CONST. amend. XV. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." *Id.*; *see* KEYSSAR, *supra* note 31, at 81–82.

33. U.S. CONST. amend. XV, § 2.

34. *See* KEYSSAR, *supra* note 31, at 104; Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 9 (Bernard Grofman & Chandler Davidson eds., 1992).

35. *See* Davidson, *supra* note 34, at 10.

violence to weaken African-Americans' voting power.[36] Those who managed to register to vote still faced limited access to the polls.[37] Consequently, the number of African-American voters registered in the South was negligible.[38] Although the states had ratified the Fifteenth Amendment, the momentous revision did not apply to the group of people it sought to assist in the first place.[39]

Fifty years later, the Supreme Court decided two important cases: *Smith v. Allwright* and *Brown v. Board of Education*.[40] The results of the two cases propelled the nation into one of the most important social movements of the twentieth century: the American Civil Rights Movement.[41] Led by organizations such as the National Association for the Advancement of Colored People (NAACP) and the Southern Christian Leadership Conference (SCLC), African-Americans pushed for an end to the historic caste system, demanded desegregation, and sought unobstructed access to the polls.[42]

The year 1964 was important and influential in the Civil Rights Movement. Many of the events that occurred that year motivated political leaders to introduce and enact the VRA the following year.[43] First, the states ratified the Twenty-Fourth Amendment, which banned the use of poll taxes.[44] As a result, African-American "registration in the South rose to more than 40 percent."[45] Then, in the wake of John F. Kennedy's assassination, President Lyndon B. Johnson signed the Civil Rights Act of 1964 as a response to the racial conflict in the South.[46] The statute's language prohibited discrimination

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36. Shelby Cnty. v. Holder, 679 F.3d 848, 853 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013) (citing Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 428 (D.D.C. 2011)); *see* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013); KEYSSAR, *supra* note 31, at 105.

37. *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 661–62, 666 (1944) (holding that all-white primary elections, which excluded African-American participation, were a violation of the Fifteenth Amendment).

38. *See, e.g.*, Williams v. Wallace, 240 F. Supp. 100, 109–10 (M.D. Ala. 1965) (issuing an injunction prohibiting Alabama officials from interfering with peaceful voter registration marches). In November 1964, the number of African-American citizens eligible to vote in Dallas County, Alabama, outnumbered the number of white citizens eligible to vote; however, only 2.2% of African-Americans of voting age were registered. *Id*. at 104.

39. *See* KEYSSAR, *supra* note 31, at 105–07.

40. *See* Brown v. Bd. of Educ., 349 U.S. 483, 495 (1954) (holding that segregation of children in public schools solely on the basis of race violated the Fourteenth Amendment); *Allwright*, 321 U.S. at 666.

41. DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965, at 6 (1978).

42. *See* Paula D. McClain et al., *Rebuilding Black Voting Rights Before the Voting Rights Act*, *in* THE VOTING RIGHTS ACT: SECURING THE BALLOT 57, 69 (Richard M. Valelly ed., 2006); Stephen Tuck, *Making the Voting Rights Act*, *in* THE VOTING RIGHTS ACT: SECURING THE BALLOT, *supra*, at 77.

43. *See infra* notes 44–56 and accompanying text.

44. U.S. CONST. amend. XXIV ("The right of citizens . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

45. KEYSSAR, *supra* note 31, at 262.

46. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); CHARLES S. BULLOCK III & RONALD KEITH GADDIE, THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH 10 (2009). The Kennedy and Johnson administrations drafted the bill that eventually

based on race, color, religion, or national origin.[47] Furthermore, the Civil Rights Act increased the federal government's power over private and public desegregation and expanded "rights of belonging in American history."[48]

Unfortunately, southern white supremacists' perpetual efforts to maintain the caste system and to disenfranchise African-American voters overshadowed these successes.[49] Using intimidation and coercion, segregationists interfered with civil rights activists' rights to "register to vote, peaceably assemble, remonstrate with governmental authorities and petition for redress of grievances."[50]

In June 1964, civil rights organizations such as the Student Nonviolent Coordinating Committee (SNCC) launched the Freedom Summer of 1964 in Mississippi.[51] Thousands of student volunteers from all over the United States descended upon the South in a massive effort to register African-American voters.[52] However, law enforcement officials and the Ku Klux Klan placed a dark cloud over the summer's events by perpetuating violence against the volunteers.[53] Day after day, the volunteers witnessed violence and brutality firsthand.[54] The summer ended and the data revealed that, in all, four project workers were killed, four people were critically wounded, eighty workers were beaten, one thousand volunteers were arrested, thirty-seven churches were bombed or burned, and thirty African-American homes or business were bombed or burned.[55] Dr. Martin Luther King Jr. and the SCLC doubted that

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passed and became known as the Civil Rights Act of 1964. *Id.* After John F. Kennedy's premature death, President Johnson passed the statute "as a tribute to the late president." KEYSSAR, *supra* note 31, at 263.

47. Civil Rights Act of 1964, 78 Stat. 241; *see* BULLOCK & GADDIE, *supra* note 46, at 10.

48. Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 957 (2005).

49. *E.g.*, Williams v. Wallace, 240 F. Supp. 100, 109 (M.D. Ala. 1965) (holding that the Governor of Alabama and other state officials could not interfere with civil rights activists' march from Selma to Montgomery); *see* McClain et al., *supra* note 42, at 68–70.

50. *Williams*, 240 F. Supp. at 105. In 1963, pictures of Alabama police officers attacking African-Americans with police dogs and fire hoses appeared all over newspapers and the evening news. BRUCE WATSON, FREEDOM SUMMER: THE SAVAGE SEASON OF 1964 THAT MADE MISSISSIPPI BURN AND MADE AMERICA A DEMOCRACY 16 (2010). Later in 1963, Americans gazed upon the tragic image of a child's body, pulled out of what was left of the bombed 16th Street Baptist Church in Birmingham. *Id.*

51. GARROW, *supra* note 41, at 20–21; WATSON, *supra* note 50, at 15.

52. GARROW, *supra* note 41, at 20–21; WATSON, *supra* note 50, at 15; *see also* DOUG MCADAM, FREEDOM SUMMER 38 (1990).

53. GARROW, *supra* note 41, at 20. After police arrested Andrew Goodman, James Chaney, and Michael Schwerner for a traffic violation, the local sheriff handed them over to Ku Klux Klan members who beat, shot, killed, and later buried the young men in a shallow grave. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 192 (2004); *see* WILLIAM BRADFORD HUIE, THREE LIVES FOR MISSISSIPPI 10 (2000).

54. GARROW, *supra* note 41, at 20–21; WATSON, *supra* note 50, at 15; *see also* MCADAM, *supra* note 52, at 38. One volunteer described the atrocities that he experienced firsthand, stating: "I cannot describe the real courage it takes to stay down here. I cannot describe the fears, the tensions and the uncertainties of living here. When I walk I am always looking at cars and people: if Negro, they are my friends; if white, I am frightened and walk faster." *Id.* at 97 (quoting MARY AICKIN ROTHSCHILD, A CASE OF BLACK AND WHITE: NORTHERN VOLUNTEERS AND THE SOUTHERN FREEDOM SUMMERS, 1964–1965, at 59 (1982)).

55. MCADAM, *supra* note 52, at 96.

the Johnson administration would follow through on a comprehensive voting rights bill;[56] secretly, President Lyndon B. Johnson thought the same.[57] America, however, was on the precipice of change.

B. A Change is Gonna Come[58]: The Nation Is Alerted of the Violence

In Selma, Alabama, activity began to brew.[59] According to scholars, "[i]n the long saga of southern blacks' efforts to win free and equal access to the ballot, no one event meant more than the voting rights campaign in Selma, Alabama, in the first three months of 1965."[60] Sheriff James G. Clark, a racist Selma official, was behind dozens of acts of violence directed at African-American marchers.[61] In one instance, Sheriff Clark and his deputies used clubs and electric cattle prods to beat and arrest 110 school teachers marching to the courthouse to register to vote.[62]

In light of the violence, the SNCC elicited the help of Dr. King and the SCLC to organize voting registration campaigns in Selma.[63] Together, the groups bravely assembled and participated in multiple marches.[64] When a peaceful march resulted in a protestor's death, the groups decided to assemble a march from Selma to Montgomery, the state capital.[65] On March 7, 1965, six hundred people gathered at Brown Chapel in Selma to begin a sixty-mile journey to Montgomery.[66] Marching for voter registration, the group peacefully walked through the city.[67] As the group reached the Edmund Pettus Bridge on the outskirts of Selma, a wall of Alabama state troopers waited.[68] The Alabama state troopers, unprovoked, released tear gas and charged the group.[69] Armed

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56. Tuck, *supra* note 42, at 77–78.

57. *See generally id.* at 77.

58. MARY C. TURCK, FREEDOM SONG: YOUNG VOICES AND THE STRUGGLE FOR CIVIL RIGHTS 97 (2009). Sam Cooke's "A Change Is Gonna Come" was written as a civil rights anthem to profess that society was about to undergo a change that was "a long time coming." *Id.*

59. *See* Tuck, *supra* note 42, at 78.

60. GARROW, *supra* note 41, at 1. Andrew Young, a civil rights activist, told a reporter, "Just as the 1964 civil rights bill was written in Birmingham[,] . . . we hope that the new federal voting legislation will be written [in Selma]." Tuck, *supra* note 42, at 78.

61. JAMES T. PATTERSON, THE EVE OF DESTRUCTION: HOW 1965 TRANSFORMED AMERICA 70 (2012).

62. *See id.*

63. REGGIE FINLAYSON, WE SHALL OVERCOME: THE HISTORY OF THE AMERICAN CIVIL RIGHTS MOVEMENT 68 (2003). Activists chose Selma as the movement's headquarters because of its low percentage of registered African-American voters. *Id.* Half of the city's population was African-American, yet African-Americans made up only one percent of the total number of people registered to vote. *Id.*

64. *Id.* at 68–69.

65. *Id.* at 68. Jim Jackson died from a fatal bullet wound when a state trooper shot him at point-blank range after Jackson tried to protect his mother from the state troopers' attacks. *Id.*

66. *Id.* at 69.

67. *Id.* at 68–69.

68. FINLAYSON, *supra* note 63, at 69; *see also* EDITORS OF BLACK ISSUES IN HIGHER EDUCATION, THE UNFINISHED AGENDA OF THE SELMA-MONTGOMERY VOTING RIGHTS MARCH 22 (2005) [hereinafter THE UNFINISHED AGENDA].

69. FINLAYSON, *supra* note 63, at 69.

with clubs and gas masks, the troopers savagely beat the marchers, sending fifty to the hospital.[70] Sheriff Clark was present and was the first to release the tear gas.[71] Others followed suit.[72] John Lewis, the SNCC's leader, suffered a fractured skull after being violently beaten with a club.[73] Then, he was arrested.[74] For the first time, the world witnessed southern brutality against African-Americans.[75] That day became forever known as "Bloody Sunday."[76]

The media depictions of the violence and terror occurring in Dallas County, Alabama, alerted the nation, including the courts, to the brutality perpetrated by the local authorities in Selma.[77] In the aftermath of the televised beatings, the VRA became more of a reality.[78] First, the White House woke up to several hundred picketers camping out and angrily protesting after the events that had transpired in Selma.[79] Facing pressure, President Johnson met with George Wallace in the Oval Office a couple of days later and reproached the Alabama governor for refusing to desegregate schools and increase African-American voter registration in his state.[80] Two days later, on March 15, 1965, President Johnson met with both chambers of Congress and delivered one of the most important speeches of his presidency, demanding that Congress do away with illegal obstacles to voting.[81] On March 21, 1965, civil rights leaders reorganized the march from Selma to Montgomery.[82] Four thousand marchers left Selma and reached Montgomery four days later, 25,000 strong.[83]

Violence, racism, and the massive disenfranchisement of African-Americans made the idea of a voting rights statute seem unachievable.[84] The events in Selma, however, set the stage for political triumph.[85] In turn, the Johnson administration and members of Congress

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70. THE UNFINISHED AGENDA, *supra* note 68, at 181.

71. STEWART BURNS, TO THE MOUNTAINTOP: MARTIN LUTHER KING JR.'S MISSION TO SAVE AMERICA 1955–1968, at 274 (2005).

72. *Id*.

73. THE UNFINISHED AGENDA, *supra* note 68, at 23.

74. *Id.*

75. *See id.* at 3.

76. *See* PATTERSON, *supra* note 61, at 65.

77. *See* THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE, 1954–1990, at 206 (Clayborne Carson et al. eds., 1991).

78. *See id.*

79. DENNIS W. JOHNSON, THE LAWS THAT SHAPED AMERICA: FIFTEEN ACTS OF CONGRESS AND THEIR LASTING IMPACT 322 (2009).

80. *Id.* at 322–23. President Johnson angrily stated, "Don't you shit me, George Wallace! . . . You had the power to keep the president of the United States off the [Alabama] ballot [in 1964]. Surely you have the power to tell a few poor county registrars what to do." *Id.* at 323 (internal quotation marks omitted).

81. *Id.* During his impassioned speech, President Johnson boomed, "It is wrong—deadly wrong—to deny any of your fellow Americans the right to vote in this country." GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 120 (2013).

82. THE UNFINISHED AGENDA, *supra* note 68, at 181.

83. *Id.*

84. *See supra* notes 22–83 and accompanying text.

85. *See infra* Part II.C.

formulated a mechanism to fight back against those opposing equal voting rights in the South.[86]

C. "I Want You to Write Me the God-Damndest, Toughest Voting Rights Act That You Can Devise."[87]

The effects of Bloody Sunday rippled through both chambers of Congress.[88] Less than a week after the incident, a bill was reported out of committee and arrived on the House floor.[89] On May 26, the Senate passed the bill with an overwhelming vote of 77–11.[90] Two months later, the House, too, passed the bill with a vote of 333–85.[91] President Johnson officially signed the landmark piece of legislation into law on August 6, 1965, declaring a win for Southern Democrats and, most importantly, minority voters across the United States.[92] The statute was a fighting mechanism to overcome voting barriers constructed by state and local officials.[93] Within this statute, the Legislature put into place one of the most controversial measures of our time—§ 5.[94]

III. KEEPING THE DOOR OPEN: SECTION 5'S PRECLEARANCE REQUIREMENT

Section 5 is the heart of the VRA.[95] Drafters observed that case-by-case litigation was inadequate to combat voter discrimination and bestowed upon the federal government the right to combat the discriminatory practices.[96] Legislators drafted § 5 to bar states from circumventing federal law by replacing old laws with new, and equally intolerable, electoral laws.[97] The statute read:

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86. *See infra* Part II.C.

87. JOHNSON, *supra* note 79, at 293 (following widespread demands for election-law reform, President Johnson made this command to Attorney General Nicholas Katzenbach).

88. *See* GARROW, *supra* note 41, at 161–63.

89. JOHNSON, *supra* note 79, at 324.

90. *Id.*

91. *Id.*

92. *Id.*; *see* KEYSSAR, *supra* note 31, at 211.

93. *See* PATTERSON, *supra* note 61, at 154.

94. S*ee* JOHNSON, *supra* note 79, at 324; 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, 646 (2006).

95. THE FUTURE OF THE VOTING RIGHTS ACT xii (David L. Epstein et al. eds., 2006).

96. Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 400 (1989).

97. Beer v. United States, 425 U.S. 130, 140 (1976) (quoting H.R. REP. NO. 94-196, at 57–58 (1975)). Before the enactment of § 5, defiant states attempted to stay one step ahead of the law. *Id.* Once adjudication revealed a statute's discriminatory purpose, the states would enact another equally intolerant practice as a replacement. *Id.*

> Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure *neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color* . . . .[98]

Under § 5, covered jurisdictions attempting to make changes to election procedures are required to submit such changes to the government for approval or preclearance.[99] Generally, covered jurisdictions are either states or counties.[100] Once a covered jurisdiction's lawmaking body passes a new electoral law, the law is frozen until it is submitted and approved.[101]

Section 5 allows jurisdictions to submit changes to the Department of Justice or seek declaratory judgment from a panel of three judges in the United States District Court for the District of Columbia.[102] When a covered jurisdiction seeks preclearance, it bears the burden of proving that the statutory change does not have a discriminatory purpose, and that the change will not have an adverse effect on minority voters.[103] Unless the state or county secures approval, the law cannot go into effect.[104] Furthermore, if a jurisdiction attempts to enforce a law without preclearance, the United States Attorney General (AG) may file a claim against the state or county in a local federal district court.[105] In general, states prefer to seek preclearance from the AG to avoid undertaking the expense of litigating a claim in federal court in Washington, D.C.[106]

From the time a state files its preclearance request, the AG has sixty days to render a decision.[107] Within the Justice Department's Civil Rights Division, the Voting Section reviews the information and makes a recommendation to the Assistant Attorney General (AAG)—the person who generally handles the majority of the cases.[108] States have a limited time to implement new laws

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98. 42 U.S.C. § 1973c(a) (2006) (emphasis added).

99. *Id.*

100. Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 231–32 (2003).

101. Heather K. Way, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1481 (1996).

102. 42 U.S.C. § 1973c(a); 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, 277 (2006).

103. 42. U.S.C. § 1973c(a); Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 79, 88 (2006) [hereinafter Posner, *The Real Story*].

104. Posner, *The Real Story*, *supra* note 103, at 86.

105. Pitts, *supra* note 100, at 236.

106. *Id.* at 233–34.

107. Posner, *The Real Story*, *supra* note 103, at 91–92.

108. McCrary et al., *supra* note 102, at 281.

before elections, and therefore, they have a strong interest in obtaining speedy decisions concerning proposed voting changes.[109] In some instances, however, the AG may toll the sixty-day period, but he is prohibited from doing so "to pursue any elaborate discovery, conduct a hearing, or simply to have additional time in which to decide close cases."[110]

Section 5's effectiveness relies upon § 4's existence.[111] The now-obsolete § 4 functioned in accordance with a formula, which contained select jurisdictions that employed discriminatory practices in "the 1964, 1968, or 1972 elections and," as a result, had low voter turnout.[112] A covered jurisdiction could elect to "bail-out" pursuant to § 4, provided that the jurisdiction could demonstrate that within the past decade (1) the jurisdiction had not used a prohibited voting test; (2) the Justice Department had not opposed a preclearance request; (3) the jurisdiction had not been found liable for any other instances of voter discrimination; and (4) the jurisdiction was actively involved in efforts to eradicate voter intimidation.[113]

If a jurisdiction is not "covered," an aggrieved individual may bring a discrimination claim under § 2.[114] Section 2 applies to all fifty states and prohibits any "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[115] Bringing a voter discrimination lawsuit under this provision, however, places the monetary burden of litigation on the complainant, rather than the State.[116] Litigation can take years, while the discriminatory practice remains installed and elections take place under its scheme.[117] Under § 3(c), litigants may also petition a federal court to have a jurisdiction face preclearance by establishing that the jurisdiction has violated the Fourteenth or Fifteenth Amendment.[118] If successful, the jurisdiction will be "bailed-in" and will have to face the requirements of § 5.[119] Since 1975,

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109. *See* Posner, *The Real Story*, *supra* note 103, at 91.

110. *Id.* at 92.

111. *See id.*

112. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013); Posner, *The Real Story*, *supra* note 103, at 92. Under § 4(b) of the VRA, covered jurisdictions were generally areas that in 1965 had (1) a history of discriminatory practices; (2) less than 50% of African-Americans of voting age who had participated in the 1964 election; or (3) states that had voting tests as of November 1, 1964. *See* JOHNSON, *supra* note 79, at 324. Before *Shelby County*, covered jurisdictions under § 4 were South Carolina, Georgia, Alabama, Louisiana, Mississippi, Texas, Virginia, twenty-six counties in North Carolina, two counties in Arizona, one county in Alaska, one county in Idaho, and one county in Hawaii. *Id.* at 325, 491 n.132.

113. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 199 (2009) (citing 42 U.S.C. §§ 1973b(a)(1), 1973c(a) (2006)).

114. 42 U.S.C. § 1973(a); Katz et al., *supra* note 94, at 648.

115. 42 U.S.C. § 1973(a).

116. *See generally Shelby Cnty.*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting) ("[L]itigation places a heavy financial burden on minority voters.").

117. *Id.*

118. *See id.* at 2644; Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1997 (2010).

119. *See* Crum, *supra* note 118, at 2006–08.

only "two states, six counties, and one city" have been successfully bailed-in.[120] Because no states are currently covered, § 2 litigation or § 3(c) litigation is the only avenue of redress for constituents facing discriminatory voting practices.[121] In the past, the number of Justice Department § 5 objections decreased significantly, but retrogressive laws, such as SB 14 from Texas, did not go undetected because § 4 was in place.[122] Without federal oversight, however, a state can implement laws negatively affecting its voters.

IV. RESTRICTING THE RIGHT OF ENTRY: STRICT VOTER IDENTIFICATION AND SENATE BILL 14

On January 24, 2011, Republican senators in Texas introduced SB 14 and referred it to committee.[123] That day, in a special message to members of both chambers of the Texas Legislature, Governor Rick Perry elevated SB 14 to emergency status.[124] Legislators authored the strict voter identification law to "ensure electoral integrity and deter ineligible voters from voting."[125] When the bill reached the floor, Democratic senators expressed stark opposition to SB 14's enactment.[126] The senate eventually passed the bill with a vote of 19–12.[127] When SB 14 reached the house, many important amendments to the bill were introduced, but were tabled.[128] On May 16, 2011, the house passed the bill with an overwhelming vote of 98–46.[129] Governor Perry officially signed the bill on May 27, 2011.[130] For the law to become effective at that point in time, however, the State of Texas still had to secure approval from the Department of Justice.[131]

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120. *Id.* at 2010. These include Arkansas; New Mexico; Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and the city of Chattanooga, Tennessee. *Id.*

121. *See supra* notes 112–20 and accompanying text.

122. *See* Texas v. Holder, 888 F. Supp. 2d 113, 117 (D.D.C. 2012), *vacated and remanded by* 133 S. Ct. 2886 (2013).

123. S.J. of Tex., 82d Leg., R.S. 53–54 (2011).

124. *Id.*

125. Letter from Thomas E. Perez, Assistant Att'y Gen., to Keith Ingram, Dir. of Elections (Mar. 12, 2012) [hereinafter Letter from Thomas E. Perez to Keith Ingram], *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_031212.php. Senate Bill 1, a bill concerning fiscal matters related to the Foundation School Program—a public school fund—was also introduced on January 24th. S.J. of Tex., 82d Leg., R.S. 54. The bill was not elevated to emergency status and was not enacted until July 2011. *Id.* at 1573.

126. S.J. of Tex., 82d Leg., R.S. 110 (statement of Senator Leticia Van de Putte). Speaking for the Democratic senators, Senator Leticia Van de Putte declared, "The Senate Democrats, including those who represent districts in which minority voters are electing candidates of their choice, and who also speak on behalf of minority voters in this state, have made clear their unanimous opposition to the voter ID legislation." *Id.*

127. S.J. of Tex., 82d Leg., R.S. 2084. All twelve "nays" were cast by Senate Democrats. *Id.*

128. *See* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

129. H.J. of Tex., 82d Leg., R.S. 4054 (2011).

130. Tex. S.B. 14, 82d Leg. R.S (2011).

131. Posner, *The Real Story*, *supra* note 103, at 79.

SB 14 differs greatly from its predecessor's voter identification requirements.[132] Texas's previous election code recognized eight broad categories of documents that were valid forms of identification.[133] This list included birth certificates, driver's licenses, U.S. passports, U.S. citizenship papers, utility bills, official mail from a government entity, any "form of identification containing the person's photograph that establishe[d] the person's identity," and "any other form of identification prescribed by the secretary of state."[134]

The new law, unlike the previous election statute, mandates a strict voter identification requirement to vote.[135] More specifically, voters must present photo identification in the form of a driver's license, a Texas identification card, a concealed handgun license, a military identification card, a passport, or a citizenship certificate with a photograph.[136] Under this new law, voters without proper identification will have to cast a provisional ballot and sign an affidavit stating that they are registered voters.[137] Further, voters using the provisional ballot must present identification within six days of the election date.[138] Voters over the age of sixty-five, the disabled, or those unable to be present on election day may choose to mail in the ballot.[139] In that case, no photo is necessary.[140] If potential voters are unable to secure a valid form of identification, they may obtain an Election Identification Certificate (EIC) (similar to a driver's license card) with the registrant's name and photograph.[141] The State purports to distribute the EICs free of charge.[142] Registrants, however, must first visit a driver's license office and present the proper documents to obtain the EIC.[143]

On July 25, 2011, Texas submitted SB 14 to the Justice Department.[144] The Office of the Attorney General requested additional data from Texas, tolling the sixty-day period for a decision.[145] Six months after the State's initial preclearance request, the AG received two conflicting sets of voter registration data.[146] One set was compiled from a voter registration database, while the

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132. *See supra* notes 112–20 and accompanying text.
133. TEX. ELEC. CODE ANN. § 63.0101 (West 2011).
134. *Id.*
135. *See* Tex. S.B. 14, 82d Leg., R.S.
136. *Id.*
137. *Id.*
138. *Id.*
139. Texas v. Holder, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated and remanded by* Shelby Cnty. v. Holder, 133 S. Ct. 2886 (2013).
140. *Id.*
141. *Id.*
142. *Id.* at 116.
143. *Id.*
144. *Id.* at 117.
145. *Id.*
146. *See* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

other was assembled from the Department of Public Safety's database.[147] The data contained substantial discrepancies regarding the total number of citizens who had a state-issued driver's license or ID and were registered to vote.[148] Texas dismissed the disparity, claiming that there were multiple reasons why the submitted data were not reliable statistics.[149] First, Texas argued that the two databases were constructed separately and their designers did not intend the two to be merged as one for statistical inquiries.[150] Second, there was the potential for a large disparity in names because Texas arbitrarily chose Hispanic surnames to conduct its search.[151] The State alleged that nicknames, shortened names, and initials created a problem of unreliability.[152]

On March 12, 2012, the Office of the Assistant Attorney General submitted its official objection, denying preclearance.[153] In a letter to Texas Elections Director Keith Ingram, Assistant Attorney General Thomas E. Perez stated that Texas had not sustained its burden under § 5 of the VRA.[154] The Office of the Attorney General reasoned that implementation of SB 14 would result in "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[155] Texas's data demonstrated that 6.2% of the state's registered voters did not have the valid identification required by SB 14.[156] Moreover, the data concluded that Hispanic voters were 46.5% more likely than non-Hispanic voters to lack the necessary identification.[157] Troubled by the fact that minorities comprised a large portion of citizens living below the poverty line, the Office of the Attorney General concluded that although the State intended to provide free EICs to those constituents without proper identification, the monetary burden of obtaining the cards would cause a disparate impact on registrants.[158] Moreover, Perez noted that Texas did not conduct any statistical analyses, nor did it provide any statistics concerning other minority races.[159] As a result, the Attorney General denied SB 14.[160]

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147. Texas v. Holder, 888 F. Supp. 2d 113, 117 (D.D.C. 2012), *vacated and remanded by* 133 S. Ct. 2886 (2013); *see* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125. Texas submitted two computer-generated lists of registered voters who did not have a driver's license or identification card from reports in September 2011 and January 2012, respectively. Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

148. Letter from Thomas E. Perez to Keith Ingram, *supra* note 125. There was a substantial difference between the percentage of voters in 2011 (4.7%) and the percentage of voters in 2012 (6.2%). *Id.*

149. *Texas v. Holder*, 888 F. Supp. 2d at 117.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*; Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

154. Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

155. *Id.* (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

156. *Id.*

157. *Id.*

158. *See id*.

159. *Id.*

160. *Id*.

Fifteen days after SB 14's denial, the District Court for the District of Columbia granted Texas's request for an expedited hearing.[161] In front of a three-judge panel, Texas appealed the Justice Department's denial, seeking declaratory judgment.[162] Texas advanced two arguments.[163] First, the State argued that the Justice Department erred both when it found SB 14 to have a retrogressive effect on minority voters and when it used that reasoning to deny the state preclearance.[164] Second, the State argued that voter identification laws were exempt from the VRA's retrogressive standard, and as such, the measures could be implemented absent empirical proof that they were enacted with discriminatory intent.[165]

The court dismissed both arguments and determined that under § 5, Texas failed to prove that SB 14 was not enacted with a discriminatory intent and would not cause detriment to minority voters in Texas.[166] The judges reasoned that Texas's affirmative evidence lacked credit and, at times, was incorrect.[167] Further, the panel determined that clear evidence existed to show that the cost of obtaining the proper identification to vote would burden minority voters.[168] Warning that its opinion applied narrowly to the facts of the case, the court indicated that not all voter identification laws would have retrogressive effects.[169] The court, however, found that in this situation, Texas had created a discriminatory law.[170]

Texas appealed the court's holding and filed a formal notice of appeal with the Supreme Court.[171] A case from Alabama (a then-covered state), however, received a writ of certiorari from the Court in November 2012.[172] On June 25, 2013, in *Shelby County*, the Court held that § 4 of the VRA was unconstitutional, thereby releasing all covered states (including Texas) from the

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161. Texas v. Holder, 888 F. Supp. 2d 113, 119 (D.D.C. 2012), *vacated and remanded by* 133 S. Ct. 2886 (2013). The court granted Texas's motion for an expedited hearing, but expressed its frustration with Texas's "failure to act with diligence or a proper sense of urgency." *Id*. According to the court, Texas repeatedly ignored or violated court orders designed to accelerate the discovery process. *Id.* at 120. As a result, Texas was unable to obtain the crucial federal data—passport, military ID, and citizenship certificate information—needed to present its case. *Id.*

162. *Id.* at 114.

163. *Id*. at 123.

164. *See id.*

165. *See id.* at 125.

166. *Id.* at 144.

167. *Id.* at 130.

168. *See id.* at 138.

169. *Id.* at 144.

170. *Id.* Declaring that SB 14 was the most "stringent [law] in the country," the court found that Texas legislators had defeated themselves by tabling the following key amendments: (1) reimbursements for traveling expenses relating to the EIC; (2) the ability to use student and Medicare identification card; (3) extended Department of Public Safety office hours; and (4) the provision allowing indigents to cast provisional ballots without photos. *Id.*

171. Lyle Denniston, *Speedy Appeal on Voter ID Law*, SCOTUSBLOG (Dec. 17, 2012, 11:38 PM), http://www.scotusblog.com/2012/12/speedy-appeal-on-voter-id-law/. This is the first step taken before appellate documents are filed. *Id.*

172. *See id.*; discussion *infra* Part V.G.

preclearance requirement.[173] The Court vacated the D.C. court's judgment in Texas's case and remanded the case in light of its decision in *Shelby County.*[174] On August 27, 2013, the United States District Court for the District of Columbia granted Texas's motion to dismiss, and the case was closed.[175] That day, Texas Attorney General Greg Abbott released a statement declaring that the Texas voter identification bill had gone into full effect.[176] The next day, Congressman Marc Veasey and a group of constituents filed suit in a federal district court in Corpus Christi, claiming that the voter identification law was unconstitutional and asking the court to block the law's implementation.[177] On August 22, 2013, the United States government filed a similar lawsuit against the State of Texas.[178] As of this date, litigation in both cases is still pending.[179]

V. KEEPING THE DOOR AJAR: A HISTORY OF SUPPORT FOR § 5

A. The First Challenge: South Carolina v. Katzenbach *(1966)*

Within months of the VRA's enactment, South Carolina challenged § 5's constitutionality in front of the Supreme Court.[180] In *South Carolina v. Katzenbach*, the Court dismissed South Carolina's challenge to the preclearance requirement, upholding § 5's constitutionality.[181] The Court affirmed Congress's power to enact remedial statutes under the Fifteenth Amendment.[182] The Court addressed the importance of the congressional reports, which documented a considerable number of discriminatory incidents.[183] Recognizing that Congress was "confronted by an insidious and

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173. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2652 (2013).

174. Texas v. Holder, 133 S. Ct. 2886, 2886 (2013).

175. Order Dismissing Case, Texas v. Holder, No. 12-cv-128 (D.D.C. Aug. 27, 2013).

176. Press Release, Greg Abbott, Att'y General of Texas, Statement by Texas Attorney General Greg Abbott (June 25, 2013), *available at* https://www.oag.state.tx.us/oagNews/release.php?id=4435.

177. *See* Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html?pagewanted=all. The claimants are a group of African-American and Hispanic constituents. *Id.* The plaintiffs include a veteran lacking appropriate identification, a woman whose name on the identification card does not match the name under which she registered to vote, and Congressman Veasey. *Id.*

178. *See* Plaintiff's Original Complaint, United States v. Texas, No: 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013); *see also* Press Release, Dep't of Justice: Office of Pub. Affairs, Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law (Aug. 22, 2013), *available at* http://www.justice.gov/opa/pr/2013/August/13-ag-952.html ("The complaint asks the court to prohibit Texas from enforcing the requirements of its law, and also requests that the court order bail-in relief under Section 3 of the Voting Rights Act. If granted, this would subject Texas to a new preclearance requirement.").

179. *See* Plaintiff's Original Complaint, United States v. Texas, *supra* note 178; Plaintiff's Original Complaint, Veasey v. Perry, No. 2:13-cv-00193 (S.D. Tex. June 26, 2013).

180. South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

181. *Id.* at 337.

182. *Id.* at 308. The Court reasoned that, although the Constitution reserves certain powers to the states (i.e., elections), "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324.

183. *Id.* at 309–10.

pervasive evil," the Court approved of the VRA as a means to curb states' intolerable practices.[184] The majority observed that previous statutory provisions had failed to address discriminatory election practices effectively because such statutes were either ignored or circumvented by equally intolerable statutes.[185]

The Court identified three important issues with respect to § 5.[186] First, the Court held that each jurisdiction was appropriately selected for coverage because of its history of discrimination.[187] Second, the Justices determined that where the Constitution reserves a certain power to the states, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[188] Lastly and most importantly, the Court rejected South Carolina's Fifteenth Amendment argument, reasoning that § 5's burden on the states was warranted given the acts perpetrated against African-Americans with respect to the franchise.[189] With this language, the Court legitimized the VRA, deeming Congress's statute as an appropriate remedy for the issue of voter discrimination.[190]

B. The Retrogressive Standard: Beer v. United States *(1976)*

By 1970, one million African-Americans were registered to vote in seven of the covered states; however, evidence demonstrated that officials had not relented in implementing racially discriminatory practices.[191] As a result, Congress amended and reauthorized the VRA twice during the 1970s.[192] Congress extended the VRA for five more years, banned the use of literacy

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184. *Id.* at 309.

185. *See id.* at 314. The Court was concerned that issues litigated under the statutes on a case-by-case basis caused the judicial process to be painstakingly slow, resulting in little justice for victims of discrimination. *Id.* at 328; Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S.C. L. REV. 827, 850 (2006).

186. Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 76 (2006) [hereinafter Posner, *Time is Still on Its Side*].

187. *Id.* at 76–77.

188. *Katzenbach*, 383 U.S. at 324.

189. Posner, *Time Is Still on Its Side*, *supra* note 186, at 76–77.

190. *See Katzenbach*, 383 U.S. at 324–26.

191. KEITH J. BYBEE, MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION 18 (1998). Devices used included:

> (1) Switching to at-large elections when black voting strength is concentrated in particular districts, (2) Extending the terms of incumbent white officials; (3) Making certain offices appointive rather than elective, (4) Changing the dates of elections suddenly, (5) Changing the qualifications of candidates, (6) Increasing the costs of a filing fee for election, and (7) Gerrymandering to dilute the nonwhite vote.

GARRINE P. LANEY, CONG. RESEARCH SERV., OC 95-896, THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES 14 (2008), *available at* http://fpc.state.gov/documents/organization/109556.pdf.

192. BYBEE, *supra* note 191, at 18.

tests in all states for five years, and lowered the voting age to eighteen.[193] Most importantly, legislators came down on the states by toughening the statute's bailout provision.[194]

In 1975, Congress renewed all provisions for seven years.[195] Congress extended coverage to language minorities, increased the bailout provision to seventeen years, and gave the AG and citizens standing to file claims against jurisdictions.[196] A year later, the City of New Orleans sued the federal government, challenging the standard used to assess preclearance denials.[197] The Court interpreted § 5 to read that preclearance was required only in situations in which a jurisdiction proposed to change voting procedures.[198] The Court held that the government could not object to the proposal unless the proposal "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[199] In other words, the AG cannot object to a proposed change if the jurisdiction has improved or maintained the status quo in a covered jurisdiction.[200] This retrogressive standard became the standard used by courts and the Justice Department to assess jurisdiction submissions.[201] In a 5–4 decision, the Supreme Court later discarded this approach, opting for a standard that analyzes multiple factors.[202] Congress, however, later re-installed the retrogressive standard when it reauthorized the VRA in 2006.[203]

C. Expanding Upon Katzenbach*:* City of Rome v. United States *(1980)*

In *City of Rome v. United States*, the Court expanded upon the determinations made in *Katzenbach* and once again upheld the constitutionality of the preclearance requirement.[204] Georgia officials challenged § 5, claiming in part that the measure was unconstitutional because it unfairly targeted

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193. *See* LANEY, *supra* note 191, at 14.

194. BYBEE, *supra* note 191, at 18. The statute was amended to incorporate jurisdictions that were not covered and required jurisdictions to demonstrate that no voter discrimination had occurred in the past ten years. *Id.*

195. *Id.*

196. *Id.* at 18–19.

197. Beer v. United States, 425 U.S. 130, 133 (1976).

198. *Id.* at 138.

199. *Id.* at 141.

200. 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, 949 (2011).

201. Posner, *Time Is Still on Its Side*, *supra* note 186, at 68.

202. *See id.* at 68–69; Abigail Thernstrom, *Redistricting in Today's Shifting Racial Landscape*, 23 STAN. L. & POL'Y REV. 373, 395 n.72 (2012).

203. 42 U.S.C. § 1973c(b)–(d) (2006); Posner, *Time Is Still on Its Side*, *supra* note 186, at 69.

204. *See* City of Rome v. United States, 446 U.S. 156, 162–63, 174 (1980), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013), *and superseded by statute as stated in* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (upholding a seven-year extension of the VRA's requirement that certain jurisdictions must seek preclearance before enacting any change to a "standard, practice, or procedure with respect to voting" (quoting 42 U.S.C. § 1971(2)(a) (2006)) (internal quotation marks omitted)).

electoral changes that had a discriminatory effect, but were not enacted with a discriminatory purpose.[205] The Court rejected the City of Rome's arguments, holding that the standard was appropriate as a means to prevent states from purposely engaging in discriminatory actions.[206] The *City of Rome* Court also supported § 5's scheme, stating that the preclearance requirement was limited to jurisdictions that had historically partaken in blatant voting discrimination.[207] Last, in finding that § 5 was still necessary, the Court also acknowledged Congress's diligence in assembling a strong record when it reauthorized the VRA.[208]

D. The Congruence and Proportionality Test, a Check on Congressional Powers: City of Boerne v. Flores *(1997)*

City of Boerne v. Flores (*Boerne*) did not speak to the VRA, yet the Supreme Court's determinations in that case transformed Fourteenth Amendment jurisprudence.[209] The *Boerne* Court established the "congruence and proportionality" test, limiting the scope of Congress's enforcement power under the Fourteenth Amendment.[210] Writing for the majority, Justice Kennedy reasoned that for Congress to enact prophylactic statutes, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[211] While the Court agreed that Congress has the power to enact appropriate legislation, it warned that legislation extending beyond a remedial purpose would be unconstitutional.[212] In other words, Congress may not impose the substance of the Fourteenth Amendment upon the states, but it may enforce the statute by appropriate legislation.[213] Consequently, the Court struck down the Religious Freedom Restoration Act, holding that Congress had exceeded its Fourteenth Amendment enforcement powers.[214]

The *Boerne* test comes in three parts.[215] First, a court must identify the injury Congress sought to prevent or remedy when it enacted the VRA.[216] Second, a court must determine if Congress has identified a record of unconstitutional acts committed by covered jurisdictions that justifies the

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205. *See id.* at 172; Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 393 (2008).

206. *See City of Rome*, 446 U.S. at 181–82.

207. *See* Clarke, *supra* note 205, at 397.

208. *See City of Rome*, 446 U.S. at 181; Clarke, *supra* note 205, at 397.

209. *See* Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 76 (2003).

210. City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id*. at 516.

215. *See* Posner, *Time Is Still on Its Side*, *supra* note 186, at 84–85.

216. *Id.*

enactment of a remedial statute.[217] Here, a court may also draw upon other relevant evidence to conclude that such a justification existed.[218] Last, the Court must determine if the Congressional solution is a congruent and proportional response to the systematic acts of discrimination.[219]

E. Addressing the Issue of Federalism: Lopez v. Monterey County *(1999)*

In 1982, Congress reauthorized the VRA for the third time.[220] Leading up to this reauthorization, members of Congress vehemently focused on the voter dilution problem in their debates and amended the statute to prohibit the practice.[221] Throughout the congressional debates, legislators laid out factors that they believed were indicative of dilution.[222] Congress ensured that the courts would distinguish between the standard for § 2 violations and the standard for Fifteenth Amendment violations.[223] Although the reauthorization made no change to § 5, Congress voted to extend the preclearance requirement and all other provisions for another twenty-five years.[224]

In *Lopez v. Monterey County*, the Court once again concluded that the VRA and § 5 were constitutional.[225] In that case, California argued that partially covered jurisdictions were not required to submit to § 5.[226] Further, California challenged § 5's constitutionality, asserting that the Act improperly infringed upon rights historically reserved to the states by the Constitution.[227] The Court dismissed this argument, recognizing once again that the statute imposed "substantial 'federalism costs,'" but Congress's enforcement power under the Reconstruction Amendments allowed the legislative branch to enact statutes to remedy constitutional violations perpetrated by the states.[228] The Court relied heavily on the decisions in *Katzenbach* and in *City of Rome*, in which it directly spoke to the issue of § 5's constitutionality.[229] Once more, the Court gave substantial deference to the actions of the legislative branch.[230]

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217. *Id.*
218. *Id.*
219. *Id.* at 85.
220. J. Gerald Hebert, *The Future of the Voting Rights Act*, 64 RUTGERS L. REV. 953, 959 (2012).
221. *See* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1265 (1989); Winke, *supra* note 209, at 93.
222. *See* McDonald, *supra* note 221, at 1265–66. Factors included a history of discrimination, racial-bloc voting, low numbers of minority employment, and low levels of minorities elected to public office. *Id.*
223. Winke, *supra* note 209, at 74.
224. 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 (2006).
225. Lopez v. Monterey Cnty., 525 U.S. 266, 283–84 (1999), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).
226. *Id.* at 284.
227. *Id.* at 282.
228. *Id.* at 282–83 (quoting Miller v. Johnson, 515 U.S. 900, 926 (1995)).
229. Pitts, *supra* note 100, at 270.
230. *Monterey Cnty.*, 525 U.S. at 282–83.

F. The Beginning of the End? Reauthorization and Northwest Austin Municipal Utility District v. Holder *(2009)*

From 1982 to 2006, outward acts of violence and intimidation at the polls decreased substantially, yet new barriers replaced the old barriers, resulting in the disenfranchisement of several minority groups.[231] The discriminatory devices used were subtle, but nonetheless effective.[232] In 2006, the VRA's expiration was soon approaching and Congress once again examined the data concerning minority voter registration and voter turnout.[233] Historically, the data focused on African-American voter registration; however, leaders of various minority communities came forward to proffer evidence revealing the successes of the bilingual provisions enacted in the 1975 Amendments.[234] The testimony also revealed that second-generation methods of voter discrimination were still common in covered jurisdictions.[235]

On July 27, 2006, President Bush signed the bill reauthorizing and amending the VRA.[236] As a result, Congress extended every provision of the VRA for another twenty-five years.[237] Almost immediately, the Court heard *Northwest Austin Municipal Utility District No. One v. Holder* (*Northwest Austin*), which was the first instance in which the majority expressed an explicit concern about § 5's constitutionality.[238] The petitioner, Northwest Austin Municipal Utility District Number One (Northwest Austin), was a district governed by a five-member board elected every four years by the district's citizens.[239] Because the district was in Texas, it had to comply with § 5's preclearance requirements.[240]

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231. *See supra* Part V.A–E for an analysis of second-generation barriers and the detriment caused to minority voters as a result of their implementation.

232. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2635, 2641–42 (Ginsburg, J., dissenting); *see generally* Katz et al., *supra* note 94, at 643 (documenting several subtle and not-so-subtle cases of discriminatory tactics used by officials at polls across the United States).

233. Glenn Kunkes, Note, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J.L. & POL. 357, 361 (2012).

234. LANEY, *supra* note 191, at 27. Members of the Hispanic, Asian-American, and Native-American communities came forward to express the difficulties of attaining the 5% (of the population of a county) requirement needed to obtain bilingual assistance. *Id.* at 27–30. Unequal access to the polls not only prevented minorities from registering and voting, but also prevented minority politicians from attaining the opportunity to be elected. *See, e.g.*, *id.* at 29 (describing Asian-Americans' limited success in electing political leaders because the Asian-American population had limited English proficiency, and thus, an extremely low number of registered voters).

235. *See id.* at 27–30.

236. Press Release, Office of the Press Sec'y, President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006 (July 27, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727.html.

237. Kunkes, *supra* note 233, at 361.

238. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009). The Court declared, "§ 5, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs.' These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of § 5." *Id.* at 202 (citation omitted) (internal quotation marks omitted).

239. *Id.* at 200.

240. *Id.*

Northwest Austin claimed that it was eligible for release under § 4 of the VRA, or in the alternative, the district petitioned the court to hold § 5 unconstitutional.[241] The Court began the analysis by calling into doubt the modern need for preclearance.[242] The Court expressed concern that covered jurisdictions were unfairly targeted and no longer parties to discriminatory practices.[243] The Court did not conduct an examination of the congressional record, but acknowledged that the record—as examined by the District Court for the District of Columbia—was sizeable and demonstrative of the numerous instances of discriminatory electoral processes.[244] Understanding the delicacy of the situation, the Court opted to exercise the doctrine of constitutional avoidance.[245]

In brief, the doctrine of constitutional avoidance is known as a canon of substantive interpretation.[246] This doctrine advances the idea that a court should adopt an interpretation of a statute from a range of interpretations rather than subjecting itself to a decision concerning a difficult constitutional question.[247] Scholars argue that the Roberts Court has used the avoidance canon, particularly in cases "involv[ing] tough questions of race relations whose resolution could harm the Court's legitimacy."[248] In *Northwest Austin*, the Court did precisely that, and applied the doctrine in order to refrain from deciding the constitutionality of § 5.[249] Subsequently, the Court found that all political subdivisions—including Northwest Austin—could seek a bailout per § 3 of the VRA.[250]

G. Farewell Section 4: Shelby County v. Holder *(2013)*

On July 10, 2000, Shelby County submitted 177 annexations and a redistricting proposal to the Office of the Attorney General for preclearance.[251] The Justice Department rejected the proposals, stating that Shelby County had not submitted "verifiable and legitimate" reasons for the changes.[252] To arrive

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241. *Id.* at 200–01.

242. *Id.* at 201. The Court emphasized that the atmosphere surrounding its decisions in *Katzenbach* and *City of Rome* had "unquestionably improved" and asserted that the South had changed. *Id.* at 202.

243. *See id.* at 202–03.

244. *Id.* at 203.

245. *See id.* at 205. "[I]t is . . . well established . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Id.* (quoting Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam)).

246. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184–85 (2009) [hereinafter Hasen, *Constitutional Avoidance*].

247. *Id.* at 181–82.

248. *Id.* at 183.

249. *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 194. See Hasen, *Constitutional Avoidance*, *supra* note 246, at 181–82, for an in-depth discussion of the avoidance canon and the *Northwest Austin* case.

250. *See Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 211.

251. Letter from Grace C. Becker, Acting Att'y Gen., to Dan Head (Mar. 12, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_082508.php.

252. *Id.*

at this decision, the Justice Department weighed several factors, including Shelby County's failure to supply reliable data.[253] Assistant Attorney General Grace Chung Becker noted that for thirteen years Shelby County had failed to submit its annexations for preclearance.[254] The Justice Department also pointed out that Shelby County had arbitrarily chosen a population estimate, a number that differed substantially from census data.[255] Ironically, the county used the 2000 Census data to determine that the percentage of African-American citizens in the county remained at 20%, even though it also claimed that the county had grown substantially.[256] Because of the inconsistencies and the errors in data collection, the Justice Department determined that Shelby County had not met its burden under § 5.[257]

Shelby County filed suit in the United States District Court for the District of Columbia, challenging the constitutionality of § 4 and § 5 of the VRA and seeking a permanent injunction to freeze the AG's authority to enforce the measures.[258] The district court rejected Shelby County's contentions, upheld the constitutionality of the measures, and granted the AG's motion for summary judgment.[259] On appeal in front of a three-judge panel, Shelby County argued that the congressional record used for the VRA's reauthorization lacked empirical proof of the kind of violence and evil that existed when the VRA was initially enacted.[260] The county asserted that the preclearance requirement imposed a substantial burden on states because the measures were no longer "congruent and proportional" remedies to the issue of voter discrimination.[261] Rejecting Shelby County's logic, the United States Court of Appeals for the District of Columbia affirmed the lower court's decision.[262] Shelby County appealed, and the Supreme Court granted a writ of certiorari to decide the issue of § 5's constitutionality.[263]

In *Shelby County*, the Supreme Court struck down the VRA's § 4 coverage formula, a key provision of the voting rights statute.[264] Circumventing the facial challenge to § 5's constitutionality, the Court held that § 4's coverage formula imposed substantial burdens that were not justified by the current conditions of the United States.[265] Relying heavily on the Court's opinion in *Northwest Austin*, Chief Justice Roberts, writing for the majority, further held that the geographic coverage formula was antiquated and was not "sufficiently

253. *Id.*
254. *Id*.
255. *Id.*
256. *Id.*
257. *Id.*
258. Shelby Cnty. v. Holder, 679 F.3d 848, 856–57 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).
259. *Id.* at 857.
260. *Id.* at 858.
261. *Id.*
262. *Id.*
263. *Id.* at 856.
264. Shelby Ctny. v. Holder, 133 S. Ct. 2612, 2631 (2013).
265. *Id.* at 2648, 2650.

related to the problem that it [purported to target]."[266] The Court made no decisions regarding the VRA's other sections.[267] Although § 5 survived the "demolition of the VRA" the Court eliminated § 5's enforcement power, gutting the most effective way to prevent discriminatory electoral laws.[268]

VI. SLAMMING THE DOOR SHUT: THE SUPREME COURT NEUTERS § 5

Determining the constitutionality of an act of Congress is a delicate issue.[269] In various cases concerning § 5, the Court has examined an extensive congressional record "explor[ing] with great care the problem of racial discrimination in voting."[270] On each of those occasions, the Court has legitimized the preclearance requirement.[271] Most importantly, the Court has reflected upon the voices of the Civil Rights Movement and the historical aspirations for access to the vote.[272] Voter discrimination still exists, and in *Shelby County*, the Court should have followed its long line of precedent.[273] Unfortunately, this was not the case.[274]

Shelby County brought a facial constitutional challenge to Congress's ability to reauthorize § 5 for twenty-five more years under the coverage formula enumerated in § 4.[275] To determine § 5's future, the *Shelby County* Court, to the shock of scholars, ignored the *Katzenbach* "rational means" test and the *Boerne* "congruen[ce] and proportional[ity]" test previously utilized by the Court in § 5 constitutionality analyses.[276] Instead, the Court dodged forty years of constitutional analyses and applied the test from *Northwest Austin*.[277] By intentionally failing to explicitly set a standard dictating how to scrutinize

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266. *Id.* at 2627 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 200 (2009)). The Court invited congressional leaders to revisit the statute and create an appropriate coverage formula. *Id.* at 2629.

267. *Id.* at 2627.

268. *Id.* at 2648, 2633 (Ginsburg, J., dissenting).

269. *See id.* at 2631 (majority opinion) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)).

270. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; *see* Lopez v. Monterey Cnty., 525 U.S. 266, 283–84 (1999), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612 (2013); City of Rome v. United States, 446 U.S. 156, 175 (1980), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; Beer v. United States, 425 U.S. 130, 141 (1976).

271. *Katzenbach*, 383 U.S. at 329–31.

272. *Id.* at 308.

273. *See supra* Part III.

274. *Shelby Ctny.*, 133 S. Ct. 2612.

275. Brief for Petitioner at 17, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96), 2012 WL 6755130, at *17.

276. *Shelby Cnty.*, 133 S. Ct. at 2638 (Ginsberg, J., dissenting); Richard L. Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (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/ [hereinafter Hasen, *The Curious Disappearance*].

277. Hasen, *The Curious Disappearance*, *supra* note 276; *see Shelby Cnty*., 133 S. Ct. at 2629. *But see* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) ("The parties do not agree on the standard to apply in deciding whether . . . Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. . . . That question has been extensively briefed in this case, but we need not resolve it."). Discussion about the VRA bailout or bail-in provision is also notably absent. *See id.*

voting rights issues and congressional enforcement power under the Fifteenth Amendment, the Court once again sidestepped the issue before it.[278]

The majority held that (1) § 4 encroaches upon the sovereignty of covered states and subdivisions; (2) voter turnout and registration rates have increased, demonstrating that conditions have dramatically improved since the VRA's inception; and (3) the congressional record in 2006 did not successfully demonstrate the existence of perpetual voter discrimination and gamesmanship similar to the past, and thus, § 4's coverage formula was not appropriate.[279] These assertions simply ignore problems that pervade our current electoral system and affect the most important right prescribed by the Constitution.[280] After the Fifteenth Amendment's ratification, ninety-five years passed before a comprehensive voting rights statute was enacted.[281] The supposition that in a mere forty-seven years the VRA has healed a deep wound rooted in hundreds of years of discrimination is premature and ignorant.

A. Sections 4 and 5 Do Not Encroach Upon the Sovereignty of the States

While a state has the power to oversee its local elections, this power is not absolute. Texas, Alabama, and other previously covered jurisdictions challenged § 4 and § 5's reauthorization, arguing that the statutes imposed a high cost on federalism by requiring jurisdictions with a long history of discrimination to explain why new electoral laws did not undermine minority voting rights.[282] When the Court examined the Civil War Amendments for the first time in *Katzenbach*, the Justices reasoned that the Constitution afforded Congress the authority to enact any appropriate legislation so long as the measure "enforce[d] submission to the prohibitions [the Amendments] contain, and [secured] to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion . . . ."[283] The Court in *Katzenbach* further held that the equal sovereignty principle was not a compelling argument against the effective use of differential treatment of jurisdictions.[284] In *Katzenbach* and later cases, the Court applied this reasoning to the VRA, recognizing that the statute allowed congressional intrusion into state sovereignty when sensitive state and local policymaking issues were involved.[285] The Court in *Shelby County* ignored *Katzenbach*, essentially

278. *See Shelby Cnty.*, 133 S. Ct. at 2629; Hasen, *The Curious Disappearance*, *supra* note 276.

279. *See Shelby Cnty.*, 133 S. Ct. at 2622–27, 2650.

280. *See supra* Part V.

281. U.S. CONST. amend. XV; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971–1973bb-1 (2006)).

282. Brief for Petitioner at 24, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96).

283. South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612 (echoing Justice Marshall's formulation in the famous case of *McCulloch v. Maryland*).

284. *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).

285. *Id.*; *see* Lopez v. Monterey Cnty., 525 U.S. 266, 282–83 (1999), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; City of Rome v. United States, 446 U.S. 156, 158 (1980), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612.

overruling the forty-eight-year-old case with dictum from *Northwest Austin*.[286] The Court failed to recognize that the answer to the federalism challenge remains the same as it did forty-eight years ago.[287]

For various reasons, § 4 and § 5 enforced the prohibition of voter discrimination perpetrated by a state and still protected citizens' enjoyment of their own civil rights.[288] First, the VRA's reauthorization did not alter the primary method of intrusion used from that which the Court approved almost fifty years ago in *Katzenbach*.[289] The sections' purposes were narrowly tailored to ensure that covered states did not enact voter laws that would act against the best interests of its minority voters.[290] Moreover, the Justice Department implemented a methodology to evaluate § 5 submissions in a manner consistent with the Constitution, Supreme Court decisions, and the statute itself.[291] The Office of the Attorney General still determines the adequacy of proposed electoral laws by ensuring that the laws "[do not have] the purpose [and will not] have the effect of denying or abridging the right to vote."[292] Moreover, the AG cannot object to a proposal that improves minority access to the vote or maintains access to the vote in identical form to existing law.[293]

Likewise, states had the ability to bailout by demonstrating compliance with the VRA's various prescriptions.[294] Congress eased the bailout, making it easier for jurisdictions to apply successfully.[295] This bailout provision ensured that covered jurisdictions had the opportunity to remove themselves from restrictions when the statute was no longer appropriate in that specific jurisdiction.[296] In fact, one could argue that the level of intrusion had already decreased because the number of Justice Department objections had declined in recent history.[297] In the alternative, covered jurisdictions could have sought a declaratory judgment from a three-judge panel in Washington, D.C.[298] Consequently, if the level of intrusion was unwarranted, the restrictions could have been lifted; otherwise, the facts speak for themselves.[299]

Second, the Court's arguments have no basis in the language or the historical interpretations of the Fifteenth Amendment.[300] The language of the VRA mimics the Fifteenth Amendment, a piece of the Constitution purposely

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286. *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).
287. Posner, *Time Is Still on Its Side*, *supra* note 186, at 90.
288. *Id.*
289. *Id.*
290. *Id*. at 67.
291. *Id.* at 91.
292. 42 U.S.C. § 1973c (2006), *invalidated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).
293. *See* Beer v. United States, 425 U.S. 130, 141 (1976).
294. 42 U.S.C. § 1973b (2006).
295. *See* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 26 (2007).
296. *Id.* at 26–27.
297. Posner, *Time is Still on Its Side*, *supra* note 186, at 90.
298. 42 U.S.C. § 1973b.
299. *See* Shelby Cnty. v. Holder, 133 U.S. 2612, 2646 (2013) (Ginsburg, J., dissenting).
300. *Id.* at 2636–37.

ratified to equip Congress with the power to enact legislation to curb pervasive discriminatory practices in elections.[301] Discriminatory practices are still carried out in various forms, as documented by an extensive congressional record.[302] Therefore, the federalism costs are justified by thousands of pages worth of evidence retrieved by the legislative branch.[303]

Lastly, under § 5, the VRA does not require jurisdictions to submit to mandatory federal input during the construction of a new electoral statute.[304] Officials are free to initiate the creation process, design the bill, and introduce the bill into the jurisdiction's respective lawmaking bodies.[305] Essentially, officials are at liberty to tailor laws to a jurisdiction's needs and do not have to limit the construction to a predetermined, one-size-fits-all requirement.[306] Covered jurisdictions had the opportunity to seek guidance from the Justice Department or use various resources prescribed by the government to ensure that their statutes would meet the government's requirements for submission.[307] Further, the VRA does not extend to the review of existing law.[308] Under § 4 and § 5, the Justice Department could not inquire about laws existing prior to the VRA's enactment, even if the laws were enacted and retained for discriminatory purposes.[309]

B. The Congressional Record Successfully Demonstrates the Existence of "Pervasive" Voter Discrimination in Previously Covered Jurisdictions

The VRA seeks to enforce the most fundamental constitutional right in our system of government.[310] In a democracy, the effective exercise of the vote is "preservative of all [other rights]."[311] Proponents and opponents alike acknowledge that § 5 is one of the most effective pieces of legislation for combating voter discrimination.[312] The United States, however, has not yet reached a victory.[313]

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301. *Compare* U.S. CONST. amend. XV, *with* 42 U.S.C. § 1973c (2006) (concerning citizens' voting rights).

302. *See infra* Part VI.B (concerning a constitutional right to vote).

303. *See infra* Part VI.B.

304. *See* Halberstam, *supra* note 200, at 948.

305. *Id.*

306. *Id.*

307. *See, e.g.*, 28 C.F.R. §§ 51.20–.25 (2006) (delineating the procedure for submission, the review process, and the factors considered by the Justice Department).

308. Halberstam, *supra* note 200, at 949.

309. *Id.* Jurisdictions' electoral laws, however, were still subject to § 2. 42 U.S.C. § 1973 (2006).

310. H.R. REP. NO. 109-478, at 6 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 620.

311. *Id.*; *see also* Joseph Fishkin, *Voting as a Positive Right*: *A Reply to Flanders*, 28 ALASKA L. REV. 29, 35 (2011) ("The existence of an unambiguously positive right at the center of our scheme of federal constitutional rights raises a number of significant issues. For one thing, because the right to vote is linked with other rights in ways that courts cannot help but recognize . . . .").

312. *See* H.R. REP. NO. 109-478, at 6. "These successes are the direct result of the extraordinary steps that Congress took in 1965 to enact the VRA and in reauthorizing the temporary provisions in 1970, 1975, 1982, and 1992." *Id.*; *see* Kunkes, *supra* note 233, at 357. "Due in significant part to the VRA's success, the

The Court argued that "no one can fairly say that [the record] shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that Congress faced in 1965."[314] The majority was essentially under the belief that covered states are no longer engaging in methodical actions aimed at disenfranchising citizens in the same way the defiant states acted when § 5 was enacted.[315] The Court did, however, affirm that voting discrimination has not been eradicated, arguing that the congressional record was insufficient to preserve § 4.[316] The Court alleged that Congress based its reauthorization on "40-year-old facts having no logical relation to the present day," and stated that it was not ignoring the voluminous congressional record; rather, the Court stated that the record "played no role in shaping [§ 4's] statutory formula."[317] Further, it emphasized that the social environment of the Reconstruction Era was surrounded with intentional discrimination in the form of violence and intimidation.[318] The majority recognized that in that period, jurisdictions would stay one step ahead of the federal government, designing and enacting new discriminatory laws each time an old law was struck down.[319] The Court acknowledged that after the successes of the Civil Rights Movement, jurisdictions still used several methods designed to deny African-Americans access to the franchise.[320] The majority, however, attacked the idea of "second-generation barriers," arguing that these barriers "are not impediments to the casting of ballots."[321]

The majority in *Shelby County* failed to see the copious amount of evidence gathered by Congress and ignored the purpose of the movement that led to the passage of the VRA.[322] The issue of disenfranchisement has been the reason behind hundreds of aggressive campaigns, protests, and demonstrations.[323] At the heart of the Civil Rights Movement was the right of access to the polls.[324] In the 1960s, the notion of access signified the right to

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South has made tremendous progress in terms of minority participation in the electoral process and increased minority representation in government." *Id.*

313. *See* H.R. REP. NO. 109-478, at 6; Clarke, *supra* note 205, at 403; Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 78 (2010).

314. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013).

315. *Id.* at 2628.

316. *Id.* at 2629.

317. *Id.*

318. *Id.* at 2619.

319. *Id.*

320. *Id.* at 2620–21.

321. *Id.* at 2629.

322. *Id.* at 2639–42.

323. *E.g.*, CAROL RUST NASH, THE FIGHT FOR WOMEN'S RIGHT TO VOTE IN AMERICAN HISTORY 33–41 (1998) (discussing the events revolving around the struggle to achieve women's rights in the United States, including the ratification of the Nineteenth Amendment); RORY RAVEN, THE DORR WAR: TREASON, REBELLION & THE FIGHT FOR REFORM IN RHODE ISLAND 20–28 (2010) (detailing the life of Thomas Dorr, the leader of the Dorr Rebellion, who sought to achieve access to the vote for non-landowners in the early nineteenth century); *see supra* Part II.

324. *See supra* Part II.

register to vote, the right to enter a polling place, the right to cast a ballot for the candidate of one's choice, and the right for the vote to be "meaningful"—all without obstacle.[325]

When Congress once again addressed reauthorization of the VRA in 2006, the House Judiciary's Subcommittee on the Constitution (the Subcommittee) received the oral and written testimony of forty-six witnesses representing an array of interests.[326] In all, the Committee accumulated over 12,000 pages of evidence, including appendices from over sixty entities.[327] The evidence revealed that within the last twenty-five years, there have been documented instances of voter discrimination against minority voters in all states previously subject to complete coverage.[328] This evidence validates the assertion that the

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325. Gerald A. Reynolds, *Voting Rights Enforcement & Reauthorization*, U.S. COMM'N ON CIVIL RIGHTS 92 (2006), http://www.usccr.gov/pubs/051006VRAStatReport.pdf; *see* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006)); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1094 (1991).

326. H.R. REP. NO. 109-478, at 11 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 618. People such as state officials, attorneys, scholars, members of the civil rights community, private citizens, the Justice Department, and various other organizations submitted oral and written testimony. *Id.* at 5. The Subcommittee also introduced into evidence two reports from expert NGOs concerning documented instances of voter discrimination. *Id.* Last, the Subcommittee held two additional legislative hearings, in which seven additional witnesses testified about the need for reauthorization and the impact reauthorization would have in the next twenty-five years. *Id.*

327. *Id.* at 5.

328. *Id.* In 2004, supporters of a Caucasian incumbent running against a Vietnamese-American in Bayou LaBatre, Alabama, harassed a group of Asian-Americans attempting to cast their votes in a primary election. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg27336/html/CHRG-109hhrg27336.htm (statement of Ms. Karen Narasaki, President and Executive Director, Asian-American Justice Center). Without provocation or reason, the supporters stopped the voters at the polls and alleged that the voters were illegal aliens and felons. *Id.* Members of the Committee received reports from organizations in Alaska stating that officials continued to employ discriminatory methods against Native Americans, which served as barriers to registration and led to the dilution of that community's vote. Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 80 (2007). In 2004, officials in Pima County, Arizona, failed to provide a sufficient number of bilingual ballots to limited English proficiency (LEP) voters, causing the voters to crowd around a translated "poster-sized board" listing the initiatives on the ballot. H.R. REP. NO. 109-478, at 52. In Long County, Georgia, a large group of voters with Spanish surnames were accused of being illegal immigrants based solely on their last names. *Id.* at 45; Robert A. Kengle, *Voting Rights in Georgia: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 367, 410 (2008). In 2001, the Louisiana State Legislature adopted a bill that allowed voters in St. Bernard Parish to reduce the size of the school board from eleven single-member districts to five single-member districts and two at-large seats. Debo P. Adegbile, *Voting Rights in Louisiana: 1982–2006,* 17 S. CAL. REV. L. & SOC. JUST. 413, 435 (2008). Under the new plan, an existing African-American majority would disappear. *Id*. at 435–37. The plan effectively diluted the minority vote. *Id.* at 437. Upon testifying at a hearing for the defendant school board, State Senator Lynn Dean was asked if he had heard the word "nigger" used in his parish. St. Bernard Citizens for Better Gov't v. St. Bernard Parish Sch. Bd., No. 02-2209, 2002 U.S. Dist. LEXIS 16540, at *33 (E.D. La. Aug. 26, 2002). The senator—the highest ranking official in St. Bernard Parish—replied that he used the term frequently. *Id*. Further, he stated that the term was not racially motivated and could be used in a joking manner. *Id.* In 2001, the ballot for local elections in Kilmichael, Mississippi, had various African-American candidates; however, three weeks before Election Day, the mayor and members of the city council (all Caucasian) cancelled the election and refused to reschedule. H.R. REP. NO. 109-478, at 36–37. After conducting its own investigation, the Justice Department concluded that the city

VRA's geographic coverage remains appropriate and sufficiently targets the problem of voter discrimination based on race or minority language.[329]

In Texas, a state previously entirely covered by the VRA, racial discrimination in elections remains prevalent.[330] Dozens of recent instances of voter discrimination have been documented throughout the state.[331] In one instance, an elderly Hispanic woman was not allowed to cast a provisional ballot in the 2004 presidential election when her name was not on the list of eligible voters.[332] Oddly, the woman and her family had lived in the area for more than twenty years, and she had voted at the same location throughout those years.[333] An election judge refused to provide a provisional ballot until an attorney for the Mexican American Legal Defense and Educational Fund arrived and negotiated with the official.[334]

In 2006, the Supreme Court struck down a redistricting plan promulgated by the Texas Legislature to protect the incumbency of Representative Henry Bonilla from the opposition votes of a predominantly Latino district.[335] The Court held that Texas had participated in voter dilution when it adopted a redistricting plan that divided Webb County, a "cohesive Latino community," into two separate congressional districts.[336] The plan itself shifted about 100,000 Hispanic citizens from District 23 into District 28.[337] The Court noted that before the new plan, District 23 was an incredibly powerful Latino community on the verge of ousting the then-incumbent, Bonilla.[338] Bonilla's popularity amongst the Latino community began to weaken in 1996; in the 2002 election, he failed to capture the Latino vote.[339] Bonilla's near loss to District 23's favored Latino candidate in 2002 raised a red flag.[340] By that point, the Latino community in Laredo had accepted the fact that Bonilla was not acting in its best interest; further, the community believed that the politician had become increasingly unresponsive to its needs and goals.[341] The Court

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leaders had cancelled the election after learning that census data showed the city's population was now primarily African-American. *Id.* at 36. In South Carolina, congressional leaders found a significant use of "white-bloc voting," a racially-polarized practice used by Caucasians to vote in favor of people of the same race when minorities are on the ballot. *Id.* at 35.

329. *See supra* note 32 and accompanying text.

330. *See* Nina Perales et al., *Voting Rights in Texas: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 713 (2008).

331. *See id.* at 714.

332. *Id.* at 748. This occurred even though Congress had recently passed the Help America Vote Act, which grants voters the opportunity to cast provisional ballots in situations such as this one. *Id.*

333. *Id.*

334. *Id.*

335. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 447 (2006).

336. *Id.* at 439.

337. *Id.*; *see also* Katz et al., *supra* note 94, at 732–33 (discussing the successes of the VRA and highlighting various cases of voter discrimination across the country).

338. *League of United Latin Am. Citizens*, 548 U.S. at 439.

339. *Id.* at 423–24.

340. *See id.* at 428.

341. *See id.* at 440.

held that, for the aforementioned reasons, the state legislature had purposely redrawn district lines to prevent the Latino majority from electing the community's favored candidate and ousting Representative Bonilla.[342]

The previous occurrences are examples of "pervasive" and "flagrant" discrimination infecting the State of Texas. In fact, these two instances make up a fraction of the evidence pertaining to Texas alone.[343] State and local officials in Texas have used tactics such as redistricting, relocating poll stations, modifying local election laws, and altering the manner of electing local officials.[344] The previous events are probative evidence indicating that covered states—including Texas—are still engaging in methodical actions aimed at disenfranchising minority and language-minority citizens; much like during the Reconstruction Era and the Civil Rights Movement, the government has ample evidence to prove intentional voter discrimination.[345]

1. New Obstacles: Second-Generation Barriers Pose a Threat to Democracy

The majority in *Shelby County* failed to comprehend that the use of second-generation barriers—such as those Texas employs—frustrates minority voters' ability to achieve significant political ambitions. First-generation barriers are tactics used to exclude whole groups of minorities from accessing the vote.[346] Second-generation barriers, however, are more subtle and complex than first-generation barriers.[347] Section 5 prohibits the use of both first and second-generation barriers.[348] State and local leaders, however, have shifted the focus from first-generation barriers to a second set of obstacles as a direct response to the VRA.[349] When Congress reauthorized the VRA in 1982, it recognized the swell of new tactics and attempted to stifle the reproduction of such strategies in covered jurisdictions.[350] Congress further recognized that the implementation of second-generation practices bore a close resemblance to

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342. *Id.* at 428–29.

343. Perales et al., *supra* note 330, at 714. Perales et al. report that there have been at least twenty-nine successful § 5 enforcement challenges, fifty-four § 5 withdrawals, and 206 successful § 2 discrimination cases in Texas alone. *Id.* Texas has had more § 5 violations and § 2 challenges than any other covered jurisdiction since 1982. *Id.*

344. *Id.*

345. *See supra* Part II.

346. Garrett, *supra* note 313, at 80.

347. *Id.*

348. *Id.*; *see* H.R. REP. NO. 109-478, at 2 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 618. "Significant progress has been made in eliminating first generation barriers experienced by minority voters . . . . However, vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." *Id.*

349. *See* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 581 (1973).

350. *See* H.R. REP. NO. 109-478, at 10–11.

states' historical attempts to evolve and to stay one step ahead of the federal government in the years prior to the VRA's oversight.[351]

Further, second-generation barriers obstruct democracy.[352] Currently, states employ methods such as at-large elections and appointed state officials (rather than elected officials) as a means of minority voter suppression.[353] A number of jurisdictions have attempted to utilize redistricting plans to influence the outcome of elections, negatively impacting the chances of success for minority candidates.[354] When the Justice Department assesses electoral changes such as redistricting, the government carefully weighs various elements.[355] In certain cases, the Justice Department has uncovered that a jurisdiction has purposely attempted to adopt a discriminatory redistricting plan when other non-discriminatory options are clearly available.[356] Some jurisdictions choose to ignore the alternative options outright and "vote[] along racial lines to adopt the proposed [discriminatory] plans."[357] Officials from other states have found creative ways to enact new legislation.[358] Second-

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351. *Id.* at 2.

352. Garrett, *supra* note 313, at 83.

353. *See* Gregory S. Coleman & Renea Hicks, *The Role of Section 5 of the Voting Rights Act in the Debate Over Elected Judges in Texas*, 53 THE ADVOC. ST. B. LITIG. SEC. REP. 59, 60 (2010), *available at* www.yettercoleman.com/news/gregs_article2.pdf.

354. Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947, 960 (2011). In 2012 alone, the Justice Department rejected fourteen separate redistricting plans, reasoning that the jurisdictions did not sustain their burdens under § 5. *See, e.g.*, Letter from Thomas E. Perez, Assistant Att'y Gen., to Melody Thomas Chappell (Dec. 21, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_122112.php (reasoning, among other things, that the new redistricting plan would have a retrogressive effect, and black-preferred candidates would therefore be unable to be successfully elected).

355. *See, e.g.*, Letter from Thomas E. Perez, Assistant Att'y Gen., to Joseph M. Nixon, Dalton L. Oldham, & James E. Trainor III (Mar. 5, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_020712.php (stating that the Justice Department examined "the impact of the action on minority groups; the historical background of the action; the sequence of events leading up to the action or decision; the legislative or administrative history regarding the action; departures from normal procedures; and evidence that the decision-maker ignored factors it has otherwise considered important or controlling in similar decisions" (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977))).

356. *See, e.g.*, Letter from Thomas E. Perez, Assistant Att'y Gen., to Walter G. Elliott (Nov. 30, 2009), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_113009.php (asserting that the potentially retrogressive effects of Lowndes County's redistricting plan for District 4 could have been avoided, had the county adopted a few changes to the existing plan). The proposed plan failed to maintain the pre-existing minority-voter strength and instead created two disproportionate districts, which diluted the minority vote. *See id.*

357. Letter from Thomas E. Perez, Assistant Att'y Gen., to Michael S. Green, Patrick O. Dollar & Cory O. Kirby (Apr. 13, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_041312.php (highlighting that minority leaders presented local officials with multiple acceptable redistricting plans and the officials rejected each plan).

358. *See* Laura Vozzella & Errin Haines, *Va. Republicans' Redistricting Maneuver Draws Criticism*, WASH. POST (Jan. 22, 2013), http://www.washingtonpost.com/local/va-politics/va-republicans-move-on-redistricting-draws-criticism/2013/01/22/f7645ee8-64b9-11e2-9e1b-07db1d2ccd5b_story.html. On Martin Luther King Jr. Day, Republican senators in Virginia called a surprise assembly to pass a proposed redistricting plan. *Id.* "The bill, approved 20 to 19, concentrate[d] minority voters in a new Southside district and change[d] most district lines." *Id.* Senate leaders waited for Inauguration Day, when Senator Henry L. Marsh III, an African-American and prominent civil rights lawyer, traveled to Washington, D.C. *Id.* Without his opposing vote, Republicans in the Senate were able to capture the majority vote needed to pass the bill.

generation barriers such as annexations, cancelled elections, and imposed electoral changes that have not been precleared have also been used to dilute the vote.[359]

Unfortunately, our society is still race-conscious, and the demographics of a particular district can determine the successes and failures of a particular candidate.[360] Post-racial era supporters point to the election and re-election of our nation's first African-American president as a strong indication that change has arrived.[361] In reality, President Obama's election was driven by race, despite his efforts to avoid racial imagery on the campaign trail.[362] In fact, race played more of a role in the 2008 election than in any other election in history.[363] Interestingly, President Obama failed to capture a win in any of the states in the Deep South, where most of the covered jurisdictions lie.[364] President Obama's election serves as a symbol of progress, but not a complete victory.

In *Shelby County*, the Supreme Court indicated that the United States had possibly reached the end of the voter discrimination era.[365] The congressional record, however, indicates otherwise.[366] There is substantial probative evidence that voter discrimination is pervasive in jurisdictions previously covered by § 4 and § 5.[367] And in the face of such an extensive record, the Court has never departed from its historical stance asserting that the burdens imposed by § 4 and § 5 are justified by current means.[368] In this case, deference to the

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Id. Indeed, the bill passed and the Senate adjourned for the day in memory of Stonewall Jackson, the Confederate general from West Virginia. Morgan Whitaker, *Virginia Republicans Celebrate Inauguration With Gerrymandering*, MSNBC (Jan. 22, 2013), http://tv.msnbc.com/2013/01/22/virginia-republicans-celebrate-inauguration-with-gerrymandering/.

359. *See, e.g.*, Marc Fisher, *With Obama*, *Not a Post-Racial Nation, but Something More Complex*, WASH. POST, Jan. 21, 2013, http://articles.washingtonpost.com/2013-01-21/national/36473165_1_barack-obama-white-house-first-black-president (discussing the complexities concerning President Obama's election and the notion of a post-racial America). *But see* Daniels, *supra* note 354, at 949 ("Should Hillary Clinton or Sarah Palin win election to America's highest office, would we then declare that the country has reached a post-gender state where sex has less significance? Feminists and others around the world would certainly celebrate the accomplishment, but surely they would consider it for what it represents: progress." (footnotes omitted)).

360. *See supra* Part VI.B.

361. *See, e.g.*, Jeffrey Toobin, *Voting Rights Act and the South on Trial*, CNN (Nov. 23, 2012), http://www.cnn.com/2012/11/23/opinion/toobin-voting-rights-act-scotus/index.html (arguing that, while the Obama Administration backs the VRA, the President's reelection is one of the strongest arguments against the law).

362. MICHAEL TESLER & DAVID O. SEARS, OBAMA'S RACE: THE 2008 ELECTION AND THE DREAM OF A POST-RACIAL AMERICA 6 (2010).

363. *Id.*

364. *See* Daniels, *supra* note 354, at 962–63.

365. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2625 (2013).

366. *See supra* notes 323–45 and accompanying text.

367. *See supra* notes 323–45 and accompanying text.

368. *See* Lopez v. Monterey Cnty., 525 U.S. 266, 283–84 (1999), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; City of Rome v. United States, 446 U.S. 156, 177–78 (1980), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; Beer v. United States, 425 U.S. 130, 143 (1976); Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969); South Carolina v. Katzenbach, 383 U.S. 301, 336–37 (1966), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612.

legislative branch was warranted. The United States has achieved many successes due to the aggressive nature of § 5.[369] The VRA continues to maintain its original promise to protect citizens from unlawful state action and provide access to the vote.[370] Because the Court prematurely rendered § 5 dormant, the risk of retrogression is now all too real.

2. The Court Ignores Congress's Enforcement Authority Under the Fourteenth and Fifteenth Amendments

The Fourteenth and Fifteenth Amendments empower Congress to enforce their mandates by "appropriate legislation."[371] When Congress reauthorized the VRA in 2006, the Legislative Branch explicitly invoked its broadest remedial power, which the legislators derived from the Constitution and the Court's previous decisions.[372] The Court in *Katzenbach* held that when Congress addressed powers reserved unto the states, the Constitution assigned full power to the legislative branch to identify and effectuate a rational remedy.[373] Thus, when Congress addresses states' electoral processes, it has the broad authority to redress the problem of voter discrimination through appropriate legislation.[374]

Congress, however, does not have unlimited power.[375] A statute's burden on the state must be justified by current conditions.[376] After closely examining the record, Congress has identified that there is still a risk that covered states have sought, or will seek, to administer retrogressive changes in their respective electoral processes.[377] This congressional evaluation, which is based on an extensive record, is entitled to substantial deference and is the link between the historical need for pre-§ 5 comprehensive legislation and the present day's need for § 4 coverage.[378]

VII. KEEPING THE DOOR OPEN: HOW TEXAS CAN GUARANTEE ACCESS TO THE BALLOT FOR MINORITY VOTERS

Before the 2012 presidential election, the United States experienced a wave of new voter identification laws.[379] Proponents of the laws argued that

369. *See* H.R. REP. NO. 109-478, at 54 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 654–55.
370. *See* PATTERSON, *supra* note 61, at 65.
371. U.S. CONST. amends. XIV–XV.
372. H.R. REP. NO. 109-478, at 54; *Katzenbach*, 383 U.S. at 308 (citations omitted).
373. *Katzenbach*, 383 U.S. at 325–27.
374. *Id.*
375. *See id.*
376. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2612 (2013).
377. H.R. REP. NO. 109-478, at 5.
378. *See* Posner, *Time Is Still on Its Side*, *supra* note 186, at 124.
379. *See* Bill Marsh, *Getting to Vote is Getting Harder*, N.Y. TIMES, Oct. 20, 2012, at SR7, *available at* http://www.nytimes.com/2012/10/21/sunday-review/getting-to-vote-is-getting-harder.html?_r=0 (describing

amendments to current election codes requiring stricter identification were necessary to combat voter fraud and to maintain the integrity of the electoral process.[380] Opponents argued that voter identification laws were solutions to nonexistent problems and just part of another Republican strategy to dilute the minority vote.[381] Unfortunately, there is no clear data to support either contention.[382] While the United States' history is riddled with cases of voter fraud, little research exists probing the extent of voter fraud in the past couple of decades.[383] In 2012, the movement induced new voter identification laws in thirteen states.[384] Six years prior, the Supreme Court had spoken to the issue of additional state legislation as a means for countering voter fraud.[385] The Court agreed, albeit in dicta, that a state's desire to bring "[c]onfidence in the integrity of our electoral processes" by enacting voter identification laws was an appropriate and compelling reason to enact the new legislation.[386] Texas also jumped on the bandwagon early in 2012 in hopes of establishing its new law before the presidential election.[387] Although both the Justice Department and the United States District Court for the District of Columbia agreed that SB 14 was discriminatory in nature and detrimental to voters in Texas, Texas implemented the law immediately following the *Shelby County* ruling.[388]

Texas's strict voter identification law has many shortcomings.[389] First, the law imposes a monetary burden on indigent voters.[390] Second, the vast distances between cities and the small number of Texas Department of

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the various changing of election laws across the country, including changes to early voting, voter registration, and voter identification laws).

380. Press Release, Office of the Att'y Gen. of Tex., Texas Files Suit Seeking Swift Enforcement of Its Voter Identification Law (Jan. 23, 2012), *available at* https://www.oag.state.tx.us/oagnews/release.php?id=3961; *see generally* JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (2004) (arguing that voter fraud is prevalent and our system of democracy has been compromised as a result).

381. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1058 (2009) (highlighting Justice David Souters's reservations concerning the validity of the plaintiff's allegations of voter fraud in his dissent in *Crawford v. Marion County Election Board*); *see* Amy Bingham, *Voter Fraud: Non-Existent Problem or Election-Threatening Epidemic?*, ABC NEWS (Sept. 12, 2012), http://abcnews.go.com/Politics/OTUS/voter-fraud-real-rare/story?id=17213376 ("Over the past decade Texas has convicted 51 people of voter fraud, according the state's Attorney General Greg Abbott. Only four of those cases were for voter impersonation, the only type of voter fraud that voter ID laws prevent.").

382. Samuel P. Langholz, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 737 (2008).

383. *Id.*

384. *See* Marsh, *supra* note 379.

385. *See* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) (holding that Arizona's voter identification statute was an appropriate means for maintaining the integrity of the electoral system).

386. *Id.*

387. *See* Texas v. Holder, 888 F. Supp. 2d 113, 119 (D.D.C. 2012), *vacated and remanded by* 133 S. Ct. 2886 (2013).

388. Press Release, Tex. Att'y Gen. Greg Abbott, Statement by Texas Attorney General Greg Abbott (June 25, 2013), *available at* https://www.oag.state.tx.us/oagnews/release.php?id=4435.

389. *See infra* text accompanying notes 390–92.

390. *See Holder*, 888 F. Supp. 2d at 128; Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

Transportation offices presents another one of SB 14's failings.[391] Last, Texas does not provide exemptions for those voters who cannot obtain EICs or other forms of identification.[392] The state should have sought guidance from other states' laws, such as Georgia's voter identification law, which received preclearance from the Justice Department in 2006.[393] Georgia's law presents solutions to shape a Texas law that would ensure that a share of minority voters would not become disenfranchised.

Georgia was a covered jurisdiction under § 4 of the VRA.[394] In 2006, Georgia enacted a voter identification statute requiring voters to present a government-issued photo identification card; the Justice Department ultimately precleared the statute.[395] A case challenging its constitutionality was later dismissed for lack of standing.[396] To vote in Georgia, citizens may present one of five forms of identification, including (1) a Georgia driver's license, which does not have to be current; (2) a valid federal, Georgia, or local government employee identification card; (3) a valid U.S. passport; (4) a valid U.S. military photo identification card; and (5) a valid tribal photo identification card.[397] If citizens are unable to obtain any of the preceding forms of identification, they can apply for a free voter identification card provided by the State of Georgia.[398] The benefit of this card is that indigent citizens are not burdened by the cost of obtaining additional documents, as is the case in Texas.[399] Moreover, citizens can obtain voter identification cards at the local county registrar's office or at a Department of Driver Services office.[400]

To obtain a free voter identification card, Georgians must provide (1) a photo identity document (a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth); (2) documentation showing the person's date of birth; (3) evidence that the person is registered to vote in the state; and (4) documentation showing the person's name and address of principal residence.[401] The card remains valid so long as the person continues to live at the address used to obtain the card and so long as the person is qualified to vote under Georgia law.[402] Further, students attending a university on the Georgia Secretary of State's approved list of colleges and

391. *See Holder*, 888 F. Supp. 2d at 128; Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

392. Tex. S.B. 14, 82d Leg., R.S. (2011). Texas does, however, provide exemptions for the elderly and the disabled. *Id.*

393. Common Cause/Georgia v. Billups, 554 F.3d 1340, 1347 (11th Cir. 2009).

394. 42 U.S.C. § 1973b (2006), *invalidated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

395. *Common Cause*, 554 F.3d at 1347; *see also* Michael J. Kasper, *Where Are Your Papers? Photo Identification As a Prerequisite to Voting*, 3 FLA. A & M U.L. REV. 1, 7 (2008) (describing the Georgia District Court decision regarding the 2006 Act).

396. *Common Cause*, 554 F.3d at 1347; *see also* Kasper, *supra* note 395, at 7.

397. *Georgia Voter Identification Requirements*, SECRETARY OF STATE BRIAN P. KEMP, http://www.sos.georgia.gov/gaphotoid/default.htm (last visited Sept. 11, 2013).

398. *Id.*

399. *Id.*; *see* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

400. *See* GA. CODE ANN. § 21-2-417.1(c) (West 2007).

401. *Id.* § 21-2-417.1(e).

402. *Id.* § 21-2-417.1(f).

universities may also use school identification cards to vote.[403] In addition, the State of Georgia installed an educational program to ensure that citizens are aware of photo requirements and are able to obtain the proper form of identification in time for the next election.[404] Citizens are encouraged to seek help from the local county registrar's office or the state's Elections Division if they experience issues obtaining the voter identification card.[405]

To create a successful bill, Texas should amend SB 14 to (1) provide free EICs through multiple avenues easily accessible by citizens; (2) devise a comprehensive education program designed to reach citizens in the most remote areas of the state; and (3) provide exceptions for citizens who cannot obtain identification on their own.[406] The Elections Administrator, the Tax Assessor-Collector, the District Clerk, or the County Clerk administers elections in each county in Texas.[407] Each of these respective offices is more or less located in a centralized location in the county seat in each of Texas's 254 counties.[408] In the Justice Department's preclearance denial letter addressed to the Election Director, Keith Ingram, the government called attention to the state's need for a program directed towards citizens with limited access to transportation.[409] The problem is especially critical because Texas is such a vast state.[410] Texas can tackle this issue by implementing a system whereby citizens can obtain free EICs from the entity responsible for the administration of elections in their respective county in conjunction with TXDOT. Moreover, the State can require county and TXDOT officials to maintain extended hours in the months leading up to major elections for citizens who have work responsibilities.[411]

One issue, however, is that citizens may still live in a town located far away from the county seat. Texas should amend Chapter 19 of the Election Code—entitled "Financing Voter Registration"—to authorize the disbursement

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403. *See Photo ID for Voting: Georgia Colleges and Universities*, SECRETARY OF STATE BRIAN P. KEMP, http://www.sos.ga.gov/ElectionConnection/acrobat/Photo%20ID%20-%20Acceptable%20Student%20ID%20Cards%20v%202%202010.pdf (last visited Sept. 10, 2013).

404. *See* Common Cause/Georgia v. Billups, 554 F.3d at 1347 (11th Cir. 2009). Georgia mailed letters to voters who did not have proper identification, informing constituents about the new identification requirements and the availability of free voter identification cards. *Id.* The Secretary of State also requested that each county registrar distribute letters to voters in the county advising its citizens of the photo identification changes. *Id.* The State reached out to community groups and leaders, as well as the media, as part of a campaign to educate Georgia voters. *See also* Kasper, *supra* note 395, at 7.

405. *See* Kasper, *supra* note 395, at 7.

406. *See* Langholz, *supra* note 382, at 789–90.

407. *Election Duties*, TEXAS SECRETARY OF STATE JOHN STEEN, http://www.sos.state.tx.us/elections/voter/county.shtml (last visited Aug. 26, 2013) (describing by county the entity responsible for administering elections); *see also* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125 ("This failure is particularly noteworthy given Texas's geography and demographics, which arguably make the necessity for mitigating measures greater than in other states.").

408. *See* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125; *see also Election Duties*, *supra* note 407.

409. *See* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

410. *See id*.

411. *Id.*

of funds to reimburse qualifying indigent citizens for transportation costs to and from the county seat.[412] Like Georgia, Texas could also utilize mobile photo-identification tours consisting of buses that travel to rural areas to issue identification cards to residents.[413] These "mobile identification stations" could not only serve as means for identification card distribution, but also as information centers for the thorough educational program that should be initiated soon after the new electoral law goes into effect.[414] As emphasized by the DOJ, Texas's voter registration and license database are not compatible, making it difficult for the State to obtain accurate data.[415] The State should also employ an accurate database so that it may target voters to ascertain where the most help is needed.[416]

SB 14, as enacted, orders voters to present the same documentation for the free voter identification as needed to obtain a State-issued identification card.[417] The system under Chapter 19 of the Election Code is complex and confusing.[418] In contrast, the Georgia law requires four easily accessible documents to obtain free voter identification cards, while still guaranteeing enough of a check on the potential voter to preserve the integrity of the electoral process and combat voter fraud.[419] Thus, Texas should move to adopt a less complex standard, similar to the standard employed in Georgia.[420] Texans should be able to present documentation such as student identification cards, electric bills, employment identification cards, previous voter identification cards, and old school records.[421] By employing such requirements, Texas can alleviate the monetary burden of obtaining costly records.

Next, Texas must adopt a comprehensive method for educating both voting officials and voters about the important changes to the Election Code. Currently, SB 14 mandates that Texas employ a statewide voter education program; however, the State did not adequately describe the plan's elements in its preclearance application.[422] As a result, the Justice Department used the

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412. TEX. ELEC. CODE. ANN. §§ 19.001–.006 (West 2012).

413. *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 676 (2007). Although Georgia's program had its shortcomings, Texas can develop a better strategy for targeting rural areas and can use social networks (Twitter and Facebook) to attract citizens. *See id.*

414. *See* Langholz, *supra* note 382, at 790.

415. *See* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

416. *Id*.

417. Tex. S.B. 14, 82d Leg., R.S. (2011).

418. *See Do You Have What It Takes to Drive in Texas?: Know What You Need to Get a Texas Driver License*, TEXAS DEPARTMENT OF PUBLIC SAFETY 2013, http://www.txdps.state.tx.us/internetforms/Forms/DL-57.pdf. Citizens can present one item from the list of "primary identity documents," two items from the list of "secondary identity documents," or one item from the list of "secondary identity documents" and two items from the list of "supporting identity documents." *Id.*

419. *See Georgia Voter Identification Requirements*, *supra* note 397.

420. *See* Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.

421. *Id.*

422. *Id.* Texas indicated that it would incorporate the additions into a general voter-education program, but it did not provide the Justice Department with specific standards. *Id.*

lack of specific methods of educational programs as grounds for the preclearance denial.[423] Texas should engage in an educational program similar to the campaign Georgia crafted in 2006.[424]

Along with current practices, the State can send personal letters to citizens appearing to lack the proper identification necessary to register.[425] In addition to the traditional methods of information distribution (pamphlets, posters at the courthouse, etc.), the Secretary of State should take advantage of its social media accounts and its "text message reminder" system to prompt voters to obtain the necessary identification before major elections.[426] In conjunction with local media outlets and local organizations, the State can ensure that voters are aware of changes before peak voter registration periods, and well before actual elections in 2014.[427] Most importantly, the State must create a uniform method for training election officials. The State could incorporate remote, computer-based training, as well as local, site-based training to ensure that officials are fully cooperating with state and federal laws during registration and voting periods.[428] This training would ensure that electoral processes are running as efficiently and effectively as possible.

Last, Texas legislators should amend SB 14 to provide exceptions for citizens who cannot obtain the proper identification.[429] Scholars suggest that states should accommodate voters by allowing those without a valid identification card to sign an affidavit, in the presence of the election official, attesting to the person's identity under penalty of perjury.[430] Indigents, older veterans, the chronically ill, and the elderly may have a difficult time acquiring EICs, even with less burdensome documentation requirements.[431] An affidavit policy could help alleviate this issue by providing an alternate means of assessing identification.[432]

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423. *See id.*

424. *See supra* note 404 and accompanying text.

425. *See* Langholz, *supra* note 382, at 790.

426. *See Remind Your Friends to Vote*, VOTETEXAS.GOV, http://www.votetexas.gov/remind. VoteTexas.Gov has a Twitter account, a Facebook account, and encourages Texans to remind their friends to vote by using computer-generated messages. *See id.*

427. *See* Langholz, *supra* note 382, at 790.

428. *See generally* KAREN LAWSON, NEW EMPLOYEE ORIENTATION TRAINING (highlighting several methodologies, including software-based training, to efficiently train new employees); Leora Friedberg, *The Impact of Technological Change on Older Workers: Evidence from Data on Computer Use*, 56 INDUS. & LAB. REL. REV. 511, 513 (2003) ("While computers have grown easier to use over time, both employers and individuals continue to devote substantial resources to computer training. For example, the University of Virginia has provided computer training to 2,000 – 3,000 staff per year . . . .")

429. Tex. S.B. 14, 82d Leg., R.S. (2011). SB 14 provides an exception for disabled citizens who have the proper documentation by requiring state elections officials to demarcate disabled status on voter registration certificates, which indicates to local officials that the citizens do not need to provide further identification. *Id.*

430. Overton, *supra* note 413, at 679; *see* Kasper, *supra* note 395, at 9.

431. Neil P. Kelly, Note, *Lessening Cumulative Burdens on the Right to Vote: A Legislative Response to* Crawford v. Marion County Election Board, 19 CORNELL J.L. & PUB. POL'Y 243, 252–53 (2009).

432. *See* Langholz, *supra* note 382, at 765–66.

The likelihood of a revision or an amendment to the current statute is highly improbable. As a result, the two lawsuits that are pending in the Southern District of Texas are Texas constituents' final chance to enjoin Texas and undo the retrogressive effects of SB 14.[433] Using the Justice Department's original preclearance denial and the District Court for the District of Columbia's original decision in *Texas v. Holder*, the claimants and the government may have a strong case for bail-in.[434] As of this date, however, litigation is pending in all cases.

VIII. CONCLUSION

The Supreme Court's decision in *Shelby County* deviated from its historical support of the disputed measure.[435] Moreover, the Court's decision did not leave the judicial or legislative systems with a sure standard of review for congressional enforcement of the Fourteenth Amendment in a voter rights case.[436] The Court has a long line of precedent in which it has upheld the reauthorization of § 4 and § 5 and granted substantial deference to Congress.[437] Because the congressional record in 2006 established modern instances of discriminatory acts in previously covered jurisdictions, § 4 and § 5 remain as current burdens justified by current needs.[438] As a result, the Court should not have disturbed its previous decisions and should have upheld § 4's constitutionality in *Shelby County*.

The Supreme Court's decision in *Shelby County* will create consequences for Texas voters, as well as voters in other formerly covered jurisdictions.[439] As a result of this decision, minority voters should expect to see the imposition of more second-generation barriers, especially on local levels where there is little oversight.[440] Because SB 14 is in full effect, citizens in Texas now face stricter voter identification laws.[441] Consequently, indigent citizens (a population primarily composed of minorities) will likely lose the opportunity to cast a meaningful vote.[442] Texas's congressional leaders should revisit and revise SB 14 to ensure that all constituents have an opportunity to cast a vote.[443] Fortunately, there are many ways that Texas can accomplish this feat without compromising the integrity of the vote; however, because this revision is

433. *See supra* notes 177–79 and accompanying text.
434. Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.
435. *See supra* Part VI.
436. *See supra* Part VI.
437. *See supra* Part III.
438. *See supra* Part V.A–E.
439. *See supra* Part VII.
440. *See supra* Part VI.A.1.
441. *See supra* Part IV.
442. *See* Texas v. Holder, 888 F. Supp. 2d 113, 128 (D.D.C. 2012), *vacated and remanded by* Shelby Cnty. v. Holder, 133 S. Ct. 2886 (2013); Letter from Thomas E. Perez to Keith Ingram, *supra* note 125.
443. *See supra* Part VII.

improbable, it is up to the federal courts to uphold constituents' petitions for § 2 violations or future petitions for a § 3 bail-in.[444]

444. *See supra* Part VII.