

2017

## Creating a More Perfect Union: How Congress Can Rebuild the Voting Rights Act

Andres A. Gonzalez

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### Recommended Citation

Andres A. Gonzalez, *Creating a More Perfect Union: How Congress Can Rebuild the Voting Rights Act*, 27 LA RAZA L.J. 65 (2017).  
Available at: <http://scholarship.law.berkeley.edu/blrlj/vol27/iss1/3>

### Link to publisher version (DOI)

<http://dx.doi.org/>

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# CREATING A MORE PERFECT UNION: HOW CONGRESS CAN REBUILD THE VOTING RIGHTS ACT

Andres A. Gonzalez\*

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DOI: <https://dx.doi.org/10.15779/Z38V40JZ4X>

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Democracy is not a state. It is an act, and each generation must do its part to move this nation toward a more perfect union. There is no power more fundamental to democracy than the right to vote.<sup>1</sup>

## INTRODUCTION

“Fifty years from ‘Bloody Sunday,’ our march is not yet finished.”<sup>2</sup> On the fifty-year anniversary of the Bloody Sunday march on Selma’s Edmund Pettus Bridge, President Barack Obama addressed the public.<sup>3</sup> He was a living symbol of the progress achieved by civil rights pioneers. While noting the significant improvements achieved in the last half-century, then-President Obama lamented how the Voting Rights Act of 1965 (“VRA”), was drastically weakened by the Supreme Court’s decision in *Shelby County v. Holder*.<sup>4</sup> He described how “the culmination of so much blood and sweat and tears, the product of so much sacrifice in the face of wanton violence,” was now subject to an increasingly polarized Congress.<sup>5</sup>

Since its passage, Congress continually reauthorized the VRA and its provisions to require states with a history of voter discrimination to obtain preclearance from the Department of Justice (“DOJ”) before enacting any law related to voting.<sup>6</sup> Under the coverage formula set forth in Section 4 of the VRA, several states that had employed discriminatory tests, and exhibited low voter turnout and registration were covered by Section 5.<sup>7</sup> Under the Section 5 enforcement mechanism, these “covered” states were then subject to DOJ preclearance.<sup>8</sup> Congress most recently reauthorized the VRA in 2006 after extensive hearings and reports indicated that “[systemic and] intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed.”<sup>9</sup> However, in *Shelby*, the Court held that the VRA’s Section 4 coverage formula was “based on decades-old data and eradicated practices” and no longer constitutional “in light of current conditions.”<sup>10</sup> Accordingly, without any jurisdictions covered by Section 4, the preclearance mechanism of Section 5 was effectively disabled.

Criticizing the Supreme Court’s reasoning, President Obama appealed to the

1. John Lewis & Patrick Leahy, *Restore Voting Rights*, L.A. TIMES (Aug. 6, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-john-lewis-voting-rights-act-20150807-story.html>.

2. Christie Parson, *Obama Marks ‘Bloody Sunday’ Anniversary: ‘Our March is Not Yet Finished’*, L.A. TIMES (Mar. 7, 2015), <http://www.latimes.com/nation/la-na-obama-selma-speech-20150307-story.html>.

3. “Bloody Sunday” refers to the events of March 7, 1965, where Alabama state troopers brutally assaulted civil rights marchers as they attempted to peacefully cross the Edmund Pettus Bridge in Selma, Alabama.

4. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding that the coverage formula in Section 4 of the VRA was unconstitutional under current conditions and “[could] no longer be used as a basis for subjecting jurisdictions to preclearance”).

5. Parson, *supra* note 2.

6. *Shelby*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting).

7. *Id.* at 2620.

8. *Id.* at 2634.

9. *Id.* at 2636 (Ginsburg, J., dissenting).

10. *Id.* at 2627.

democratic legitimacy of the VRA by noting how the law's continuity was a longstanding result of Republican and Democratic efforts.<sup>11</sup> *Shelby's* removal of the VRA's enforcement mechanism placed the burden on Congress to restore the necessary protections for minority voters.<sup>12</sup>

The VRA enabled progress to be made in minority voter participation and political representation.<sup>13</sup> For example, by 1970, "almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire country before 1965."<sup>14</sup> Additionally, there was significant progress in minority political participation, "including increased numbers of registered minority voters, minority voter turnout, and minority representation" for all levels of elected office.<sup>15</sup> As of 2009, "the racial gap in voter registration and turnout [was] lower in the states originally covered by § 5 than it [was] nationwide."<sup>16</sup> U.S. Census data shows "African-American voter turnout has come to exceed white voter turnout in five of the six [s]tates originally covered by § 5."<sup>17</sup>

Jurisdictions with Section 5 preclearance have experienced some of the critical outcomes contemplated by the VRA. Recent studies show that while African-American representation has increased nationwide, it dramatically increased in jurisdictions where Section 5 preclearance coverage applied.<sup>18</sup> For example, between 1981 and 2001, "the number of covered cities with at least one black elected councilor increased from 552 to 1,004, marking a nearly 200% increase; however, the number of uncovered cities with at least one black councilor increased less rapidly, then dropped precipitously in 2001."<sup>19</sup> In previously covered jurisdictions, there has been an increase in the total number of places with black representation on city councils.<sup>20</sup>

Notwithstanding this, an increase in state-level vote denial measures, such as voter ID laws and the Supreme Court's significant constriction of the disparate impact standard of Section 2 litigation, highlights the continued need for a strengthened VRA.<sup>21</sup> The VRA has come under assault "in part because of a misguided understanding of minority voter turnout and a failure to recognize that unlawful minority voter suppression tactics persist despite minority candidate success."<sup>22</sup>

11. Parson, *supra* note 2 (noting that President Obama recognized that President Ronald Reagan and President George W. Bush renewed the VRA during their tenure in office).

12. Part III of the Article will discuss *Shelby* in greater detail. Put simply, *Shelby* effectively eliminated the coverage provision of the VRA that required certain states to receive federal preclearance before enacting voting laws or procedures. Since then, previously covered jurisdictions have enacted strict voter ID laws that have imposed disproportionate burdens on minority voters.

13. Paru R. Shah, Melissa J. Marschall & Anirudh V. S. Ruhil, *Are We There Yet? The Voting Rights Act and Black Representation on City Councils, 1981–2006*, 75 J. POL. 995, 995–96 (2013).

14. *Shelby*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting) (alteration in original).

15. *Id.*

16. *Id.* at 2618–19 (quoting *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 203–04 (2009)) (alteration in original).

17. *Shelby*, 133 S. Ct. at 2619.

18. Shah, *supra* note 13, at 2.

19. *Id.*

20. *Id.*

21. Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 584–85 (2013). Section 2 of the VRA prohibits any practice or policy that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (2012). Part VI of the Article will discuss this remedy and the difficulties associated with Section 2 litigation.

22. Nelson, *supra* note 21, at 583.

Second-generation barriers, such as attempts at reducing the impact of minority votes through voter ID laws or racial gerrymandering, are vestiges of racial discrimination in voting.<sup>23</sup> In her dissent, Justice Ginsburg noted the 109th Congress's in-depth investigations into the presence of voter discrimination during the latest VRA reauthorization vote.<sup>24</sup> Congress found continued voter discrimination in the covered jurisdictions, as it had in the prior four reauthorization periods, and specifically determined that the preclearance mechanism, among other provisions, "remained an appropriate response to the problem of voting discrimination in covered jurisdictions."<sup>25</sup> Congress concluded that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."<sup>26</sup>

In light of *Shelby*'s invalidation of the Section 4 coverage formula and the dismantling of the voter protections provided by Section 5, the Article proposes three reforms Congress should implement to prevent the increase of vote denial policies and preserve the 50 years of progress achieved through the VRA. First, as proposed by Senator Patrick Leahy (D-VT), Congress should broaden the judiciary's authority to issue preliminary injunctions in Section 2 suits.<sup>27</sup> Such a reform would encourage plaintiffs to initiate Section 2 litigation with the expectation that a court could grant temporary injunctive relief throughout the duration of the case. Second, Congress should establish a federal commission dedicated to collecting empirical data on the impact of voter ID laws. This would subsequently equip plaintiffs with critical data necessary to qualify for preliminary injunctions and ultimately prevail in Section 2 litigation. Lastly, Congress should adopt a new three-prong Section 2 standard.<sup>28</sup> This proposed standard would require that plaintiffs prove (1) a disproportionate burden on minority voters and (2) that the burden can be linked to the challenged practice's interaction with social and historical conditions of the given jurisdiction.<sup>29</sup> If these two prongs are satisfied, the burden then would shift to the defending jurisdiction to show "by clear and convincing evidence that the burden on voting is outweighed by the state interests in the challenged" law.<sup>30</sup> This proposal would take state interests into account

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23. *Shelby*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting).

24. *Id.* Beginning in 1970, Congress has reauthorized the VRA on four separate occasions. Most recently, in 2007, both houses of Congress "held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions." *Id.* at 2636.

25. *Id.* at 2635. After the VRA reauthorization passed by a 98-0 Senate vote, President George W. Bush signed the bill, noting it was needed to "further [the] work in the fight against injustice" and lauded the bill as "an example of our continued commitment to a united America where everyone is treated with dignity and respect." *Id.*

26. *Id.* at 2636.

27. Daniel P. Tokaji, *Applying Section 2 to New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 473-74 (2015). Under Section 2 of the VRA, plaintiffs may bring suits for vote denial or vote dilution claims. Vote denial claims "concern[] impediments to voting and the counting of votes" while vote dilution claims typically relate to "practices that diminish a group's influence, thus implicating the value of representation." *Id.* at 442. Part VI of the Article discusses the problems associated with Section 2 litigation.

28. *Id.* at 463 (noting that "lower courts have struggled to come up with a workable framework for adjudicating § 2 claims in the relatively few cases alleging vote denial over the years" and the current two-prong test does not adequately address the disproportionate burdens on plaintiffs nor consider legitimate state interests in preserving a voter statute).

29. *Id.* at 474.

30. *Id.*

and add a layer of protection against any attempts to challenge its constitutionality.<sup>31</sup> These reforms, however, are only short term improvements. Ultimately, Congress should pass an updated coverage formula and reinstate Section 5 protections.

The Article proceeds in seven parts. Part I provides the historical context behind the VRA's enactment. Part II explores the various provisions of the VRA and the Supreme Court jurisprudence before *Shelby*. Specifically, this section unravels the Court's landmark decisions in *South Carolina v. Katzenbach* and *City of Rome v. United States*, and demonstrates the Court's reasoning behind its invalidation of the VRA's preclearance mechanism.<sup>32</sup> Part III discusses the holding in *Shelby* and its implication on legislatures of states previously subject to DOJ preclearance. Parts IV, V, and VI address voter ID laws—one of the more common pieces of legislation that has surfaced since *Shelby*. These sections delve into the myth of voter fraud, the impact of voter identification legislation on minorities living within these jurisdictions, and the limitations of Section 2 litigation—the only vehicle by which plaintiffs can currently challenge voter ID laws. Lastly, Part VII argues Congress should temporarily adopt the three proposed solutions to reinstate Section 5 protections until it can pass an updated coverage formula.

## I. THE EVOLUTION OF VOTING RIGHTS

The Fifteenth Amendment, ratified in 1870 during the Reconstruction period, prohibited state and federal governments from denying U.S. citizens the right to vote on the basis of “race, color, or previous condition of servitude.”<sup>33</sup> On a broader level, it subjected a power exclusively held by the states to congressional oversight. In other words, Congress could enforce voting rights on a state-by-state basis.<sup>34</sup> This key Reconstruction Amendment “cemented the right to vote into the Constitution and ushered in a new era, expanding the federal government’s role in defining democracy.”<sup>35</sup>

### A. Segregationist Resistance

Once ratified, the Fifteenth Amendment enfranchised 700,000 black Southerners, paving the way for an increase in black Southern legislators both in Congress and in state assemblies.<sup>36</sup> Despite this success, the black voters’ increased political capital and participation was met with hostility from Southern legislatures in “a brutal effort to suppress the black vote.”<sup>37</sup> Segregationists in the South developed “‘poll taxes, literacy tests, grandfather clauses, . . . property qualifications,’ [and]

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31. *Id.* at 485–86 (noting that potential constitutional challenges to Section 2 under a conservative Supreme Court could be tempered by requiring courts to consider substantial state interests when deciding on a vote denial claim).

32. *S.C. v. Katzenbach*, 383 U.S. 301 (1966); *City of Rome v. U.S.*, 446 U.S. 156 (1980).

33. U.S. CONST. amend. XV, § 1.

34. U.S. CONST. amend. XV, § 2.

35. Angelica Ronlong, *Access Denied: Why the Supreme Court’s Decision in Shelby County v. Holder May Disenfranchise Texas Minority Voters*, 46 TEX. TECH L. REV. 519, 523 (2014).

36. Jim Rutenberg, *A Dream Undone*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html>.

37. *Id.*

closed polls” to intimidate and drastically limit voting rights.<sup>38</sup> Moreover, the Ku Klux Klan, and other violent factions, “kept blacks from election polls at gunpoint and whipped or lynched many who resisted” to effectively strip these citizens of their right to vote.<sup>39</sup>

### B. Landmark Events that Paved the Way for the VRA

The unequivocal disregard for the civil rights enshrined in the Reconstruction Amendments prompted several landmark events in 1964 leading up to the passage of the VRA. First, the Twenty-Fourth Amendment banned the use of poll taxes,<sup>40</sup> a common tactic used by the Southern segregationists.<sup>41</sup> Second, President Lyndon B. Johnson, signed into law the Civil Rights Act of 1964, thus ending legal segregation and enacting a federal prohibition on discrimination based on race, color, or national origin.<sup>42</sup> With regard to voting rights, Title I “barred unequal application of voter registration requirements.” Yet, it did not provide a categorical ban on “the use of literacy tests as a qualification, so long as the test was administered to every individual and conducted in writing.”<sup>43</sup> While this represented significant progress in U.S. race relations, Congress nonetheless fell short of providing a comprehensive solution to securing voting rights for all citizens.

#### 1. Continued Southern Opposition

Despite the enactment of the Civil Rights Act of 1964 and related prohibitions on state voter legislation, local leaders were violently reluctant to submit to federal authority. For instance, Southern states continued to undermine federal law on the voting front by “water[ing] down its voting [practices], leaving the poll tax and the literacy test in place.”<sup>44</sup> Local law enforcement, Ku Klux Klan members, and actors in Mississippi, Alabama, and other Southern states continued to use intimidation and violence to prevent black citizens from exercising their constitutional right to vote.<sup>45</sup>

#### 2. Bloody Sunday

On Sunday, March 7, 1965, the violence, intimidation, and hostility of the Jim Crow South reached a boiling point in the American conscience.<sup>46</sup> In what is now infamously known as “Bloody Sunday,” 600 marchers began a peaceful protest to demand effective access to the ballot box.<sup>47</sup> The march, led by civil rights pioneers

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38. Ronlong, *supra* note 35, at 523 (quoting *Shelby Cty. v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012)).

39. Rutenberg, *supra* note 36.

40. U.S. CONST. amend. XXIV, § 1.

41. Ronlong, *supra* note 35.

42. *Id.*; see also Civil Rights Act of 1964, 42 U.S.C. § 21 (2012).

43. Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U. L. REV. 527, 534 (2014).

44. Rutenberg, *supra* note 36.

45. *Id.* Violence against black citizens included public beatings, church bombings, lynching, arrests, and disruptions of peaceful protests.

46. Ryan P. Haygood, *Hurricane SCOTUS: The Hubris of Striking Our Democracy’s Discrimination Checkpoint in Shelby County & the Resulting Thunderstorm Assault on Voting Rights*, 10 HARV. L. & POL. REV. 11, 13 (2015).

47. *Id.* at 15–16.

John Lewis, Hosea Williams, and Amelia Boynton, was intended to span the fifty-four miles between Selma and Montgomery, Alabama.<sup>48</sup> However, when the marchers reached Selma's Edmund Pettus Bridge, they were met by hundreds of state and local troopers armed with guns and tear gas.<sup>49</sup> Instead of resisting, the marchers responded by peacefully kneeling to pray. But "before the marchers could get to their knees, Alabama state troopers attacked, teargassing, clubbing, spitting on, and trampling the marchers with their horses."<sup>50</sup>

### 3. Public's Response and President Johnson's Renewed Push for the VRA

Soon thereafter, the brutal violence in the South gained national notoriety. This widespread attention placed tremendous political pressure on elected leaders to achieve a federal solution on the heels of the Civil Rights Act.<sup>51</sup> The events of Bloody Sunday provided President Johnson with the political capital and public support to lead a renewed push for voting rights legislation. Within days, President Johnson convened a special session of Congress and urged them to "pass legislation that would 'eliminate illegal barriers to the right to vote.'"<sup>52</sup>

Within a week, the House of Representatives had crafted a bill that eventually passed both chambers with overwhelming majorities.<sup>53</sup> The VRA was signed into law on August 6, 1965, and is widely considered "Congress's most successful effort to combat discrimination in voting."<sup>54</sup>

## II. THE VOTING RIGHTS ACT OF 1965

Congress passed the VRA "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of [the] country for nearly a century."<sup>55</sup> In practice, the two most critical enforcement provisions of the VRA are sections 2 and 5. Section 2 prohibits states from passing voting procedures that discriminate based on race, color, or language minority status.<sup>56</sup> It provides a litigation-based remedy whereby plaintiffs can raise vote dilution or vote denial claims. Section 5 acts as prophylactic remedy "designed to ensure that states can no longer stay one step ahead of the federal courts by enacting new discriminatory statutes while prior laws are being litigated."<sup>57</sup> Section 5 "requires any jurisdiction that falls within the coverage formula laid out in Section 4(b) of the Act to obtain federal 'preclearance' whenever they enact or seek to administer any voting qualification or prerequisite to

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48. *Id.*

49. *Id.* at 16.

50. *Id.* The "Bloody Sunday" attacks sent fifty marchers to the hospital and John Lewis, a prominent civil rights leader and Student Nonviolent Coordinating Committee ("SNCC") member, was repeatedly beaten with a club and suffered a skull fracture.

51. *Id.*

52. *Id.*; see also Ronlong, *supra* note 35, at 527.

53. Ronlong, *supra* note 35, at 528.

54. Cody Gray, *Savior Through Severance: A Litigation-Based Response to Shelby County v. Holder*, 50 HARV. C.R.-C.L. L. REV. 49, 57 (2015).

55. *S.C. v. Katzenbach*, 383 U.S. 301, 308 (1966).

56. 52 U.S.C. § 10304 (2012).

57. Gray, *supra* note 54, at 58.

voting, or standard, practice, or procedure with respect to voting.”<sup>58</sup> Meaning, any new voting procedures proposed within covered jurisdictions are not legally enforceable unless they receive federal preclearance.

Preclearance comes from either the Department of Justice (DOJ) or the United States District Court for the District of Columbia (DDC) within sixty days.<sup>59</sup> During this approval process, the state or municipality bears the burden of showing the law or policy “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or in contravention of the [language minority provisions of the Act].”<sup>60</sup> During this evaluation, the DOJ or the DDC must determine whether the proposed voting practice would “worsen the position of minority voters” relative to the status quo.<sup>61</sup> Section 5 provides an effective remedy against voter ID measures because the jurisdiction bears the burden of proof while the affected parties can present evidence of discriminatory effect and purpose.<sup>62</sup>

#### A. *The Interplay between Section 4(b) and Section 5*

The Section 4(b) coverage formula is a critical component to Section 5 preclearance. To identify areas where voting discrimination was most prevalent, Congress devised a coverage formula to subject certain states with a recent history of minority voting restrictions to the preclearance requirement.<sup>63</sup> At each reauthorization of the VRA, the coverage formula has either been expanded to satisfy current conditions or approved in its current state in light of current conditions of voter registration or participation.<sup>64</sup> Without this formula in place to cover a given jurisdiction, Section 5 preclearance cannot operate.

Section 5 preclearance is the “heart” of the VRA.<sup>65</sup> When “case-by-case litigation [proved] inadequate to combat voter discrimination,” the VRA’s drafters “bestowed upon the federal government the right to combat discriminatory practices.”<sup>66</sup> This reversed a key component of federalism: state and local enactments on electoral matters were no longer presumed legal and enforceable under the Constitution.<sup>67</sup> Voting measures from covered jurisdictions were now presumed unenforceable unless approved by the federal preclearance system. Akin to the

58. *Id.*

59. *Id.*; see also Ronlong, *supra* note 35, at 529 (noting that Section 5 provides jurisdiction with the option of either “submit[ing] changes to the Department of Justice or seek[ing a] declaratory judgment from a panel of three judges in the United States District of Columbia”).

60. Gray, *supra* note 54, at 58.

61. Kathleen Stoughton, *A New Approach to Voter ID Challenges: Section 2 of the Voting Right Act*, 81 G.W. L. REV. 292, 307 (2013). In contrast to Section 2, where the plaintiff bears the burden of showing the discriminatory effect in a vote dilution or vote denial case, Section 5 provides a more effective remedy for challenging a state’s voter ID law.

62. *Id.* at 306.

63. The specific criteria found in Section 4(b) coverage formula is discussed at length in Part IV. See 52 U.S.C. § 10303 (2012).

64. 52 U.S.C. § 10303 (2012). *Section 4 of the Voting Rights Act*, U.S. DEPT. OF JUSTICE (Mar. 19, 2017), <http://www.justice.gov/crt/section-4-voting-rights-act>.

65. Ronlong, *supra* note 35, at 528.

66. *Id.* at 528.

67. 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, 91 (2006).

Fourteenth, Nineteenth, and Twenty-Fourth Amendment, the Fifteenth Amendment affords Congress the power to enforce its provisions through appropriate legislation.<sup>68</sup>

In *South Carolina v. Katzenbach*, the Supreme Court clarified the proper standard of review for cases where Congress sought to prohibit racial discrimination in voting.<sup>69</sup> The Court applied a rational means standard and held that, upon review of the VRA's constitutionality, the Court must grant Congress substantial deference and ask "whether Congress has rationally selected means appropriate to" the legitimate end of prohibiting racial discrimination in voting.<sup>70</sup>

The Supreme Court emphasized its continued validation of the VRA in *City of Rome v. United States*. The Court upheld the preclearance provision of the VRA on the grounds that it was reasonably limited to states that had historically practiced voting discrimination.<sup>71</sup> It held that Section 5 was necessary, especially in light of Congress's own determination of current voting conditions in 1975.<sup>72</sup> Nearly twenty years later, in *Lopez v. Monterey County*, Section 5 was challenged on the grounds it violated principles of federalism.<sup>73</sup> There, the Court held that although Section 5 "imposed 'substantial federalism costs,' . . . Congress's enforcement power under the Reconstruction Amendments allowed the legislative branch to enact statutes to remedy constitutional violations perpetrated by the states."<sup>74</sup> Most recently, the Court questioned the constitutionality of Section 5 on the grounds that covered jurisdictions no longer participate in discriminatory voting practices.<sup>75</sup> However, the Court avoided ruling on the constitutionality of Section 5 preclearance and noted Congress's sizeable evidence of discriminatory electoral practices as a justification for its rational means determination.<sup>76</sup>

### B. *The Impact of the VRA*

Where case-by-case litigation before 1965 enabled piecemeal progress, the VRA provided a comprehensive solution.<sup>77</sup> Before the VRA, states often met the burdensome litigation process by "merely switch[ing] to discriminatory devices not covered by federal decrees" or enacting difficult new tests designed to stifle the

68. U.S. CONST. amend. XV.

69. *S.C. v. Katzenbach*, 383 U.S. 301, 324 (1966) (emphasis added).

70. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2637 (2013).

71. Ronlong, *supra* note 35, at 537–58.

72. *City of Rome v. U.S.*, 446 U.S. 156, 181–82 (1980) (noting that the Court would not "overrule Congress' judgment that the 1975 extension was warranted" and "plainly constitutional" because Congress found the extension was "necessary to preserve the 'limited and fragile achievements' of the Act").

73. *Lopez v. Monterey Cty.*, 525 U.S. 266, 284–85 (1999).

74. Ronlong, *supra* note 35, at 539 (quoting *Lopez*, 525 U.S. at 282–83).

75. *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 202 (2009).

76. *Id.* During the 2006 VRA reauthorization, Congress compiled an unprecedented legislative record "replete with examples of Section 5 blocking racially discriminatory changes, concentrated in covered states and political subdivisions." Haygood, *supra* note 46, at 23. For example, between 1982 and 2006, more than 600 discriminatory voting proposals were denied clearance under Section 5. *Id.*

77. Marcus Hauer, *Shelby County v. Holder: Why Section 5 of the Voting Rights Act is Constitutional and Remains Necessary to Protect Minority Voting Rights under the Fifteenth Amendment*, 38 VT. L. REV. 1027, 1032 (2014) (noting that the federal government's power to sue registrars and local officials for discriminatory practices prior to 1965 was not a viable solution because it "caused no change in result, only in methods").

registration prospects of black voters.<sup>78</sup> Since its passage, and continued validation under the Fifteenth Amendment and *Katzenbach*, the VRA has “provided voters of color dynamic protection” against discriminatory vote denial and vote dilution measures in covered jurisdictions.<sup>79</sup> But in *Shelby*, the Court retreated from its forty-eight-year-old precedent and held the current conditions of the nation’s voting laws no longer justified the burdens imposed on covered jurisdictions by the Section 4(b) coverage formula.<sup>80</sup>

### III. *SHELBY*: A BLOW TO THE HEART OF THE VRA

Pundits, politicians, and several Justices themselves have employed the term judicial activism as a common criticism of the liberal—or “left-leaning”—Justices on the Supreme Court. Judicial activism describes instances where judicial authority “counters the will of the people as expressed in state or federal legislation.”<sup>81</sup> Judicial restraint, on the other hand, is typically displayed when a judge defers to the intent or determinations of Congress or another branch of government when interpreting the law.<sup>82</sup> While such criticism of the left may hold weight, the Court’s decision in *Shelby* is an example of the right wing of the Court “exceed[ing] the left in its willingness to use judicial power to counter the will of the people as expressed in state or federal legislation.”<sup>83</sup>

In *Shelby*, the Court struck down the Section 4(b) coverage formula of the VRA and effectively disabled the preclearance mechanism provided in Section 5. In doing so, the Court undermined Congress’s nearly unanimous bipartisan reauthorization of the VRA in 2006, imposed its own determination that the formula was outdated under current conditions, and overrode the will of the electorate.<sup>84</sup> To better understand the facts and reasoning behind the Court’s decision, however, I will first explore the interaction between Section 4(b) and Section 5 of the VRA in greater detail and explain the most recent congressional reauthorization of the VRA.

Section 5 of the VRA requires certain states to receive federal permission before enacting any law pertaining to voting.<sup>85</sup> Section 4(b) provided a coverage formula that made certain states subject to the Section 5 preclearance provision.<sup>86</sup> This coverage formula identified jurisdictions where voting discrimination was most prevalent by examining several factors. Specifically, “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

78. *Id.*

79. Haygood, *supra* note 46, at 19.

80. *Shelby*, 133 S. Ct. at 2615–16.

81. *Those ‘activist’ judges*, THE ECONOMIST (June 8, 2015), <http://www.economist.com/blogs/democracyinamerica/2015/07/judicial-politics-0>.

82. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 520–21 (2012).

83. *Id.*

84. Haygood, *supra* note 46, at 13 (noting that “[t]he Court stepped into the shoes of Congress—who, after an in-depth check-up into the continued need for the VRA based on past and present voting discrimination, had prescribed a full course of medication—and ended the treatment prematurely.”).

85. Section 5 of the VRA is discussed at length in Part III of the Article. See 52 U.S.C. § 10304 (2012).

86. *Shelby*, 133 S. Ct. at 2618.

(3) states that had voting tests as of November 1, 1964.”<sup>87</sup> Under this formula, eleven states or subdivisions within those states were subject to preclearance, including Alabama, Georgia, Mississippi, and Virginia.<sup>88</sup> This preclearance process required states to demonstrate that their respective voting policies were not discriminatory or would not otherwise worsen the conditions of minority voters.<sup>89</sup> Accordingly, a state or locality’s new electoral law was frozen until it was submitted and approved by the DOJ or DDC.<sup>90</sup>

After the initial passage in 1965, Congress repeatedly reauthorized the Section 4 coverage formula in five-year increments with slight modifications. For example, in 1970, Congress amended Section 4(b) to set 1968 as the pertinent date when Congress would evaluate the presence of voting tests and minority voter participation in light of the continued need for such voter protections.<sup>91</sup> In 1975, Congress extended the provisions for another seven years and reformed the coverage formula based on tests or participation levels present in 1972. Further, Congress broadened the provision to prevent “English-only” ballots in states or subdivisions “where members of a single language minority constituted more than five percent of the citizens of voting age” in response to growing trends of language discrimination.<sup>92</sup> This trend of reauthorization continued through 1982 when the coverage formula was extended for twenty-five years.<sup>93</sup>

Most recently in 2006, the 109th Congress extended the coverage formula with a large bipartisan coalition.<sup>94</sup> In contrast to prior reauthorizations, Congress amassed an extensive legislative record that included twenty-one hearings and testimony from ninety witnesses.<sup>95</sup> At the conclusion of the hearing process, “the legislative record Congress compiled filled more than 15,000 pages.”<sup>96</sup> Ultimately, Congress determined that the legislative reports and testimony showed systematic evidence that “intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed.”<sup>97</sup> Elected officials in both houses of Congress reauthorized the VRA and its Section 4 coverage formula with nearly unanimous support.<sup>98</sup>

Fifty years after the passage of the VRA, the *Shelby* Court invalidated the Section 4 coverage formula because “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”<sup>99</sup> The Court held

87. Ronlong, *supra* note 35, at 530, n.112.

88. 52 U.S.C. § 10303 (2012). Section 4 of the Voting Rights Act, U.S. DEPT. OF JUSTICE (Mar. 19, 2017), <http://www.justice.gov/crt/section-4-voting-rights-act>.

89. 52 U.S.C. §§ 10303, 10304(a) (2012); *see also* Georgia v. Ashcroft, 539 U.S. 461, 461–62 (2003).

90. Ronlong, *supra* note 35, at 529.

91. 52 U.S.C. § 10303 (2012). Section 4 of the Voting Rights Act, U.S. DEPT. OF JUSTICE (Mar. 19, 2017), <http://www.justice.gov/crt/section-4-voting-rights-act>.

92. *Id.*

93. *Shelby*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting).

94. *Id.* (noting that the House of Representatives, after extensive hearings, reauthorized the VRA in a 390 to 33 vote while the Senate passed it unanimously in July 2006).

95. *Id.* at 2635–36.

96. *Id.* at 2636.

97. *Id.* (internal quotation marks omitted).

98. *Id.*

99. *Id.* at 2618.

the Act imposed burdens that no longer corresponded to current voting conditions in the covered states.<sup>100</sup> Despite repeated reauthorizations, the Court imposed its own determinations above the legislative finding that the preclearance mechanism remained an appropriate response to voter discrimination within the Section 5 jurisdictions. Strikingly, “Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490).”<sup>101</sup> Ultimately, between 1982 and 2006, the DOJ “blocked over 700 voting changes based on a determination that the changes were discriminatory.”<sup>102</sup> Nonetheless, the Court invalidated Section 4(b) because the burdens imposed by the coverage formula were deemed incompatible with the nation’s current needs.

*A. The Court’s Invalidation of the Section 4(b) Coverage Formula*

In 2010, Shelby County, Alabama sued U.S. Attorney General Eric Holder, challenging the constitutionality of Section 4(b) and Section 5 of the VRA.<sup>103</sup> The County sought a permanent injunction from VRA enforcement.<sup>104</sup> The Federal District Court in Washington D.C. upheld the VRA, and the D.C. Circuit Court of Appeals affirmed on the grounds that Congress relied on enough evidence to justify the 2006 reauthorization of both sections.<sup>105</sup> Specifically, the D.C. Circuit held that the recent number of preclearance denials and the inadequacy of Section 2 litigation intimated that Section 5 remained a necessary legislative remedy.<sup>106</sup> With regard to Section 4, the D.C. Circuit recognized evidence of discriminatory practices in covered jurisdictions was relatively less robust than prior years.<sup>107</sup> However, in light of the difficulties associated with Section 2 litigation and the evidence of more concentrated discrimination in covered jurisdictions, the D.C. Circuit “held that the [Section 4] coverage formula passed constitutional muster.”<sup>108</sup>

The Supreme Court began its review of *Shelby* by citing the equal sovereignty doctrine and the VRA’s exceptional departure from the United States’ federalist system. This doctrine holds states cannot be subject to differential treatment because they are “equal in power, dignity and authority.”<sup>109</sup> The Court relied on the doctrine to proclaim that laws with limited geographical scope must meet a higher legal standard to survive constitutional review.<sup>110</sup> Regarding Section 5, this meant the coverage formula had to be sufficiently related to current voter discrimination practices.<sup>111</sup> The Court, however, ignored the *Katzenbach* Court’s repudiation of this doctrine in the expansive voting rights context.<sup>112</sup> In *Katzenbach*, the Court unequivocally applied a rational means test for constitutional reviews of the VRA and established that “there’s

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100. *Id.*

101. *Id.* at 2639 (Ginsburg, J., dissenting).

102. *Id.*

103. *Id.* at 2621–22.

104. *Id.* at 2622.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 2623 (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

110. Haygood, *supra* note 46, at 30–31.

111. *Id.*

112. *Id.*

no requirement in the Constitution to treat all states the same.”<sup>113</sup>

While the Court did not dispute the validity of the VRA’s initial justification as appropriate legislation under the Fifteenth Amendment, it contrasted the blatant discrimination in 1965 with the “[s]ignificant progress [that] ha[d] been made in eliminating first generation barriers.”<sup>114</sup> The Court pointed to parity among voter turnout and registration rates in Shelby County and the absence of blatant discrimination as evidence that the unique circumstances justifying Congress’s “extraordinary and uncommon exercise” of its legislative power no longer existed.<sup>115</sup> Thus, the Court ruled that Section 4(b) could not satisfy the stricter “current burdens-current needs” test brought forth in *Northwest Austin Municipal Utility District v. Holder*.<sup>116</sup>

The *Shelby* Court relied on its 2009 decision in *Northwest Austin* as the primary basis for its ruling. In *Northwest Austin*, the Court held the statute’s current burdens on covered jurisdictions must be justified by current needs to survive constitutional muster.<sup>117</sup> The majority pointed to the absence of voting tests, low minority voter registration in covered states, and the 2006 reauthorization hearings as evidence the coverage formula was an outdated remedy.<sup>118</sup> After forty years of progress, the Court invalidated Section 4(b) because “the coverage formula that Congress reauthorized in 2006 ignores [the] developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”<sup>119</sup> Congress had determined the coverage formula was a rational means to prevent voter discrimination. Yet, the *Shelby* Court interfered with Congress’s broad enforcement power to “uproot all vestiges of unfreedom and inequality” and “enact appropriate legislation targeting state abuses.”<sup>120</sup>

Despite the settled precedent establishing Congress’s authority to legislate under the rational means test, the Court bypassed congressional findings on second-generation voting barriers, the disproportional amount of successful Section 2 litigation in covered jurisdictions, and increased racial polarization in those areas.<sup>121</sup> The Court overruled the will of Congress, gutted an effective preclearance provision, and “th[rew] away [an] umbrella in a rainstorm” simply because *covered* jurisdictions

113. *Id.* at 30 (quoting Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 733 (2014)).

114. *Shelby*, 133 S. Ct. at 2624–25 (internal quotation marks omitted); *see also* Ronlong, *supra* note 35, at 550 (explaining that first-generation barriers “are tactics used to exclude whole groups of minorities from accessing the vote” while second-generation barriers, such as redistricting or voter ID laws, are more subtle in diluting or suppressing the minority vote).

115. *Shelby*, 133 S. Ct. at 2624–25.

116. *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 203 (2009) (noting that Section 4(b) imposes current burdens on certain states that must be justified by the nation’s current political conditions and electoral landscape).

117. *Shelby*, 133 S. Ct. at 2616 (citing *Northwest*, 557 U.S. at 203).

118. *Id.* at 2627.

119. *Id.* at 2628–29.

120. *Id.* at 2637 (Ginsburg, J., dissenting) (internal quotation marks omitted).

121. *Id.* at 2637–38. Justice Ginsburg highlighted the continued need for Section 5 by noting how Alabama, “even while subject to the restraining effect of § 5, was found to have ‘denied or abridged’ voting rights ‘on account of race or color’ more frequently than nearly all other States in the Union.” *Id.* at 2645. Second-generation voting barriers pertain to more subtle efforts to dilute or suppress the minority vote. These barriers could include at-large elections, redistricting, and voter ID laws. *See* Ronlong, *supra* note 35, at 551.

were temporarily protected from blatant voter discrimination.<sup>122</sup>

*B. Post-Shelby Implications: The Reenactment of Discriminatory Voter Laws*

States immediately reacted to the Court's invalidation of Section 4(b) and de facto rejection of Section 5 preclearance.<sup>123</sup> Critics of *Shelby* predicted a retrogressive effect in the formerly covered jurisdictions. Several states immediately fulfilled that prophecy.<sup>124</sup> Within a matter of hours, Texas implemented a previously blocked voter ID law and other states followed shortly thereafter.<sup>125</sup> North Carolina, Alabama, Mississippi, and other former Section 5 states enacted voter ID laws that would have likely failed under the preclearance regime.<sup>126</sup> In 2013 and 2014, "at least 10 of the 15 states that had been covered in whole or in part by Section 5 introduced new restrictive legislation that would make it harder for minority voters to cast a ballot."<sup>127</sup>

Because more recent voter legislation has centered on voter ID laws, Parts IV and V will address the controversy surrounding this legislation, and Part VI will discuss how formerly covered states have attempted to enact vote denial measures in the post-*Shelby* era.

#### IV. THE MYTH OF VOTER FRAUD

Since *Shelby*, formerly covered jurisdictions enacted or attempted to enact voter ID measures despite overwhelming evidence against the presence of in-person voter fraud.<sup>128</sup> In 2012, a journalist consortium sponsored by the Carnegie-Knight Foundation found that out of a study of 2,068 alleged cases of in-person voter fraud since the year 2000, "there have been only ten cases of in-person voter fraud that could have been prevented by photo ID laws."<sup>129</sup> Out of 146 million registered voters nationwide, this produces a ratio of one case of in-person voter fraud for every 14.6 million voters.<sup>130</sup>

For example, during the 2012 presidential election, over fifteen million citizens voted in Texas, Pennsylvania, and South Carolina. Approximately five of those committed in-person voter fraud.<sup>131</sup> It must be noted that in-person voter fraud, as opposed to absentee ballot fraud, vote buying or coercion, the use of fake

122. *Shelby*, 133 S. Ct. at 2650.

123. Haygood, *supra* note 46, at 34. Within hours of the Court's decision in *Shelby*, "Texas's Attorney General announced the state's plan to implement a voter identification law that had previously been blocked by Section 5 and potentially redistricting maps as well." *Id.* Further, "Alabama, Mississippi, and North Carolina also adopted statewide discriminatory voting changes shortly after *Shelby*." *Id.*

124. Tomas Lopez, 'Shelby County': One Year Later, BRENNAN CENTER FOR JUSTICE (June 24, 2014), [http://www.brennancenter.org/analysis/shelby-county-one-year-later#\\_ednref6](http://www.brennancenter.org/analysis/shelby-county-one-year-later#_ednref6).

125. *Id.*

126. *Id.*; see also Haygood, *supra* note 46, at 35–49.

127. Lopez, *supra* note 124.

128. Haygood, *supra* note 46, at 35–49 (noting that Texas, North Carolina, Georgia, Alabama, and other jurisdictions have all implemented voter ID laws that have disproportionately burdened voters of color).

129. RICHARD SOBEL, THE HIGH COST OF 'FREE' PHOTO VOTER IDENTIFICATION CARDS 7 (CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, 2014).

130. *Id.*

131. *Id.* at 8.

registration forms, or other forms of voter fraud, should be the only relevant concern because it is the *only* type of fraud that voter ID laws can feasibly address. These barriers to voting can only be reasonably intended to prevent “people [from] showing up at the polls pretending to be somebody else in order to each cast one incremental fake ballot.”<sup>132</sup> Thus, in light of the ineffectiveness and impracticality of such a method, it comes as no surprise that this type of fraud hardly exists.

Another voter fraud study found a total of thirty-one credible allegations of in-person voter fraud among over one billion votes cast in general, primary, municipal, and special elections held from 2000 to 2014.<sup>133</sup> Researchers at the Brennan Center for Justice at New York University Law School concluded: “it is more likely that an individual will be struck by lightning than that he will impersonate another voter at the polls.”<sup>134</sup> Despite the absence of evidence of in-person voter fraud, state and federal courts throughout the country, in addressing Fourteenth Amendment claims, have held that photo ID laws are necessary to serve a state’s legitimate interest in maintaining the integrity of the election process without imposing an undue burden on minority voters.<sup>135</sup>

Despite repeated findings that voter impersonation fraud does not exist to any substantial degree, courts have relied on *Crawford v. Marion County Election Board* and related decisions to hold that the lack of evidence of any in-person voter fraud “d[oes] not negate the interest of [the state] in detecting and deterring voter fraud.”<sup>136</sup> Rather, courts have found that a general history of voter fraud and the mere risk that it could impact a close election are sufficient to justify a state’s legitimate interest.

Accordingly, under current jurisprudence, the presence or absence of in-person voter fraud evidence is not determinative under a Fourteenth Amendment or Section 2 analysis. Rather than relying on credible data illustrating the absence of in-person voter fraud, federal circuits have afforded too much deference to state legislatures and their seemingly hypothetical concerns that voter fraud exists. This trend currently indicates that the absence of empirical evidence is unlikely to influence a court’s decision as to whether a state’s interests in a voter ID law outweigh the burdens imposed on voters.

Because of this, Congress should assume the task of empirically understanding and informing the public (and presumably the Judiciary) about the disproportionate burdens voter restriction statutes impose on minority populations.<sup>137</sup>

132. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

133. *Id.*

134. Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CENTER FOR JUSTICE 1, 4 (2007), <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

135. See *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (stating that the absence of any documented instance of voter fraud alone did not indicate that the voter ID statute failed to serve a compelling interest under the strict scrutiny standard because (a) even if the *Crawford* majority wrongly decided the “additional benefits” of voter ID laws, as the political science research has suggested, *stare decisis* must be followed).

136. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009); see also *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

137. See Sari Horwitz, *Getting a Photo ID So You Can Vote is Easy. Unless You’re Poor, Black, Latino, or Elderly*, WASH. POST (May 23, 2016),

In the upcoming section, I will discuss the direct and quantifiable impact of voter ID statutes on minority populations.

## V. THE IMPACT OF VOTER ID LAWS: SECOND-GENERATION VOTING BARRIERS

One inquiry lies at the “heart of this debate”—whether voter ID requirements infringe on the right to vote.<sup>138</sup> At first glance, requiring a photo ID to vote appears fair. States and subdivisions routinely require their citizens to possess photo ID to avail themselves of a driver’s license, public benefits, etc. Further, states are required to provide free photo IDs to eligible voters who need them.<sup>139</sup> In 2008, the Supreme Court addressed a Fourteenth Amendment challenge to an Indiana statute conditioning the right to vote on the presentation of a government-issued photo identification.<sup>140</sup> In *Crawford v. Marion County Election Board*, the Court analyzed the constitutionality of the statute under the framework established by *Anderson v. Celebrezze*. It held that Indiana’s legitimate interests justified the minimal burdens imposed on registered voters without photo identification.<sup>141</sup> Specifically, the Court identified Indiana’s interests in “detering and detecting voter fraud,” modernizing its election procedures, and “safeguarding voter confidence.”<sup>142</sup> In light of the state interests and the absence of a “substantial burden on the right to vote, or even . . . a significant increase over the usual burdens of voting,” the Court concluded that Indiana’s voter identification statute was constitutional under the Fourteenth Amendment.<sup>143</sup>

The *Crawford* Court applied a novel form of scrutiny. The Court’s decision in *Crawford* was predicated on a sliding-scale balancing analysis. The Court weighed the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against “the precise interests put forward by the State as justifications for the burden imposed by [the] rule,” taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.<sup>144</sup> Additionally, the Court considered the estimated number of voters likely to be affected by the voter statute.<sup>145</sup> Thus, the legitimate state

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[https://www.washingtonpost.com/politics/courts\\_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972\\_story.html?utm\\_term=.14c3bb26d66e](https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?utm_term=.14c3bb26d66e) (noting that the costs associated with obtaining proper documentation to get a photo ID weigh disproportionately on minorities living in poverty).

138. SOBEL, *supra* note 129, at 1.

139. Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, THE BRENNAN CENTER FOR JUSTICE 1, 1 (2012), [http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge\\_of\\_Obtaining\\_Voter\\_ID.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf) (noting that, under *Crawford*, “legal precedent requires these states to provide free photo ID to eligible voters who do not have one”).

140. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205–06 (2008) (plaintiffs challenged Indiana’s voter identification statute as violative of the Fourteenth Amendment right to vote).

141. *Id.* at 189–91 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (stating that since “evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious,” the court “must identify and evaluate the interests put forth by the State as justifications for the burden imposed by its rule, and then make a ‘hard judgment’ that our adversary system demands”).

142. *Id.* at 191.

143. *Id.* at 198.

144. *Id.* at 210–11 (Souter, J., dissenting) (internal quotation marks omitted).

145. *Id.*

interest in preserving the integrity of its voting system, coupled with the “Free ID” safety valve provisions, served as sufficient justification for this burden on the right to vote.<sup>146</sup>

However, recent data has shown this reasoning misses the underlying problems caused particularly by the “Free ID” provisions in these voter statutes.<sup>147</sup> For example, “to apply for a free photo ID, eligible voters must travel to a designated government office. . . . [which] can be hard for many Americans who live and work in areas far from an ID-issuing office.”<sup>148</sup> To provide some perspective, 35 percent of Mississippi’s voting-age citizens and 32 percent of Alabama’s voting-age citizens live more than 10 miles from the nearest ID-issuing government office citizens.<sup>149</sup> Moreover, individuals applying for a Free ID would almost certainly not have a driver’s license and are therefore unlikely to own a vehicle to facilitate the necessary transportation.<sup>150</sup>

Moreover, “Free ID” provisions pose monetary costs because they require supporting documentation—namely, birth certificates or naturalization certificates.<sup>151</sup> These costs alone typically range from fifteen to thirty dollars. But this does not include aggregate costs. Aggregate costs, “especially for minority group and low-income voters[,] typically rang[e] from about \$75 to \$175.”<sup>152</sup> Despite this, courts have been reluctant to integrate this type of data into the balancing test between state and voter interests.

In *Crawford*, the Court noted “a State may not burden the right to vote merely by invoking abstract interests . . . but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed.”<sup>153</sup> But, as noted in Part IV of the Article, the lack of data supporting the legitimate existence of in-person voter fraud stifles the balancing test.

Moreover, the presumption of the practical, and often less apparent, burdens must be carefully considered.<sup>154</sup> In *Crawford*, the dissent carefully considered these burdens. Its analysis illustrated the additional burdens of Indiana’s law, such as travel costs, fees, and unpaid time off required to obtain a “free” government-issued photo ID constituted an economic burden on potential voters.<sup>155</sup> Further, the costs of obtaining a birth certificate or passport imposed a second financial hurdle that

146. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 201 (2008).

147. Justice Ginsburg, in the dissent, noted that “efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as second-generation barriers to minority voting.” *Shelby*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting).

148. Gaskins, *supra* note 139, at 3.

149. *Id.*

150. *Id.*

151. *Id.* at 14.

152. SOBEL, *supra* note 129, at 2. The author noted that “even adjusted for inflation, these figures represent substantially greater costs than the \$1.50 poll tax outlawed by the 24th Amendment in 1964.” *Id.*

153. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 210–211 (2008) (Souter, J., dissenting) (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)).

154. *Id.* (noting that “the rigorousness of [the Court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens the First and Fourteenth Amendment rights, upon an assessment of the character and magnitude of the asserted [threatened] injury and an estimate of the number of voters likely to be affected”) (internal quotation marks omitted).

155. *Id.* at 213–16.

disproportionately burdened the poor and senior citizens.<sup>156</sup> The dissent concluded that Indiana's uncorroborated concern about voter fraud could not outweigh the substantial economic burdens the new ID laws would impose on the nearly 43,000 potential Indiana voters lacking proper ID.<sup>157</sup>

Although the Article is concerned with the VRA, a Fourteenth Amendment analysis in this context provides insight into the disproportionate burdens that voter ID laws can impose on minority voters. Voter ID laws impose burdens associated with the money needed to obtain a birth certificate or related documents, costs of traveling to governmental agencies, and time spent navigating bureaucracies.<sup>158</sup> The strictest voter ID statutes contribute to "substantial drops in turnout for minorities" rather than acting as direct barriers on the right to vote.<sup>159</sup> By increasing the costs imposed on citizens who lack proper ID, these laws act as "second generation barriers" that pose a burden on the right to vote for many minorities. It is clear that Section 4(b) coverage remains necessary when taking into account the lack of empirical evidence of in-person voter fraud as well as recent research finding a correlation between the implementation of strict voter ID laws and decreased minority turnout.<sup>160</sup>

## VI. THE LIMITATIONS OF SECTION 2 LITIGATION IN THE POST-*SHELBY* ERA AND THE FULFILLMENT OF THE DOJ'S PROPHECY

In the wake of *Shelby*, a number of jurisdictions previously subject to Section 5 preclearance enacted voter legislation.<sup>161</sup> By eliminating the protections afforded by Section 5, the federal government could no longer prevent states from enacting discriminatory voter legislation. This federal check on state action was now relegated to individual legal challenges under Section 2 of the VRA.

Unlike the administrative adjudications under Section 5, Section 2 of the VRA shifts the burden onto plaintiffs to prove the challenged election law has a "racially disparate impact" and to "connect this impact to 'social and historical conditions.'"<sup>162</sup> Now, plaintiffs must show that the "totality of circumstances" surrounding an election law warrant a finding of liability.<sup>163</sup> Such "circumstances" may include "the defendant jurisdiction's history of discrimination, lingering effects of past de jure discrimination, racial appeals in political campaigns, racially polarized

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156. *Id.*

157. *Id.* at 236.

158. SOBEL, *supra* note 129, at 9.

159. Christopher Ingraham, *New evidence that Voter ID laws 'skew democracy' in favor of white Republicans*, WASH. POST (Feb. 6, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/?utm\\_term=.d8d25f555807](https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/?utm_term=.d8d25f555807) (noting that, according to a recent UCSD study, "strict photo identification laws have a differentially negative impact on the turnout of Hispanics, Blacks, and mixed-race Americans in primaries and general elections").

160. *Shelby*, 133 S. Ct at 2629 (stating that "second generation barriers" are not impediments to the casting of ballots and therefore cannot be considered when crafting a coverage formula based on access to the ballot and voting tests).

161. Haygood, *supra* note 46, at 35–48.

162. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2148 (2015).

163. *Id.* at 2155.

voting, [and] informal barriers to ballot access for minority candidates.”<sup>164</sup> To overcome their evidentiary burden, plaintiffs must conduct a costly and unpredictable fact-intensive inquiry.<sup>165</sup>

Section 2 states “no voting qualification or prerequisite to voting shall be imposed or applied by any State or subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”<sup>166</sup> In 1982, Congress added a totality of the circumstances test to Section 2 to more effectively determine whether a certain electoral law or practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”<sup>167</sup> To determine whether a denial or abridgment has occurred, courts look to the “Senate factors” to determine whether members of racial minority groups have “less opportunity than other members of the electorate to participate in the political process” and whether that burden is related to social and historical conditions that have or currently produce discrimination against members of a protected class.<sup>168</sup>

The sole availability of a Section 2 remedy is problematic because “the burden of proof falls on the party challenging the election law at issue rather than the party defending it.”<sup>169</sup> Now, “disputes are adjudicated in [a] judicial rather than administrative fora, [where] the legal standard for liability under Section 2 is murky.”<sup>170</sup> Unlike Section 5, where a state seeking preclearance carries the burden of showing the voting practice or procedure does not deny or abridge the right to vote on the basis of race, Section 2 places the burden on the plaintiff to prove that a voting practice or procedure has a discriminatory effect on minority voters.<sup>171</sup> Lastly, even if a plaintiff meets this burden of proof, the disparate impact standard has been narrowly applied in vote dilution cases.<sup>172</sup> Thus, there is uncertainty as to whether this disparate impact test will apply in forthcoming vote denial complaints.

Federal courts have most often adjudicated Section 2 claims in the context of racial gerrymandering allegations or similar vote dilution complaints.<sup>173</sup> However, in

164. *Id.* at 2156.

165. *Id.* (stating that the causation inquiry and expenses associated with assembling election data and hiring experts to testify about voting patterns contribute to high costs of Section 2 litigation).

166. 52 U.S.C. § 10301(a)–(b) (2012).

167. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

168. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (quoting 52 U.S.C. § 10301(b)); *see also* Haygood, *supra* note 46, at 6; S. Rep. No. 97-417, 97th Cong., 2d Sess., 28–29 (1982) (the Senate Committee Report noted that, among other factors, courts should consider the history of official voting-related discrimination in the state or subdivision, the extent to which voting is racially polarized, and the exclusion of members of the minority group from the candidate slating process.).

169. Elmendorf, *supra* note 162, at 2155.

170. *Id.*

171. *Thornburg v. Gingles*, 478 U.S. 30, 478 (1986) (holding that “the essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to *cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”); *see also* Elmendorf, *supra* note 162, at 2155–56 (noting that, under Section 2, plaintiffs must show that “(1) the election law at issue has a racially disparate impact and (2) that this impact can be chalked up to the law’s interaction with ‘social and historical conditions’”).

172. Nelson, *supra* note 21, at 593 (noting that the *Gingles* Court formulated a standard multi-pronged mechanism for Section 2 vote dilution claims based on “whether an electoral practice resulted in minority voters having less opportunity to elect a candidate of their choice on account of their race”).

173. *Frank v. Walker*, 768 F.3d 744, 752 (7th Cir. 2014); *see also, e.g., Gingles*, 478 U.S. at 47; *Chisom v. Roemer*, 501 U.S. 380 (1991).

the context of vote denial suits, there is a circuit split regarding the treatment of the disparate effects framework. For example, in *Frank v. Walker*, the Seventh Circuit held that Wisconsin's voter ID law did not violate Section 2 of the VRA.<sup>174</sup> Despite the fact that nearly 300,000 Wisconsin citizens lacked the required ID and that minority voters were significantly more likely to lack such ID, the court held that the voter ID law did not lessen the opportunity of minority voters to obtain the requisite photo ID.<sup>175</sup> The disparate impact on minority voters, coupled with the lack of evidence of in-person voter fraud and the tenuous nature of the voting requirement, was insufficient to invalidate the law as it extended to every Wisconsin citizen an equal opportunity to get a photo ID.<sup>176</sup> Thus, the court held Wisconsin did not "deny" the right to vote under Section 2.<sup>177</sup>

With only Section 2 as a remedy, previously covered jurisdictions took advantage of the decreased legal burdens to enact a series of strict voter ID laws over the last several years.<sup>178</sup> Anticipating the Supreme Court's ruling, Attorney General Eric Holder and the DOJ warned "immobilizing Section 5 would swiftly lead to a proliferation of racial discrimination in those places where it had been most intense, persistent, and adaptive."<sup>179</sup> In the wake of *Shelby*, this prophecy came to fruition as jurisdictions that had been previously subject to the Section 5 preclearance requirement passed voter laws that were either previously blocked or would have been blocked by the DOJ.

#### A. State Voting Laws after *Shelby*

The day the Court issued its decision in *Shelby*, Texas implemented a strict photo ID law (S.B. 14) that was previously blocked under Section 5 due to its likely disparate impact on racial minorities.<sup>180</sup> A year earlier, a federal court held that this voter ID law would have a negative impact on Latino and African-American voters because "(1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack[ed] photo ID; (2) the burdens associated with obtaining ID w[ould] weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty."<sup>181</sup> Moreover, the DOJ estimated between 600,000 and 800,000 registered voters in Texas lacked a driver's license or personal identification card and over 300,000 of them were Latino.<sup>182</sup> Relying on Texas' voter

174. *Frank*, 768 F.3d at 753.

175. *Id.* at 748–53.

176. *Id.* at 753–54.

177. *Id.* at 748 (holding that minority voters who did not possess a photo ID were not "denied" or "disenfranchised" because they did not lack the opportunity to obtain one; rather, these voters were simply "unwilling to invest the necessary time" to "scrounge up a birth certificate and stand in line at the office that issues drivers' licenses.").

178. Elmendorf, *supra* note 162, at 2145–46 (noting that a number of previously covered jurisdictions, including Texas, North Carolina, Alabama, and Virginia, "quickly adopted or implemented new, restrictive voting laws" immediately after *Shelby*).

179. Haygood, *supra* note 46, at 13.

180. Lopez, *supra* note 123.

181. *Tex. v. Holder*, 888 F. Supp. 2d 113, 138 (D.D.C. 2012).

182. Letter from Thomas E. Perez, Assistant Att'y Gen., to Keith Ingraham, Director of Elections, Office of the Texas Secretary of State (Mar. 12, 2012), [http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_120312.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120312.pdf).

registration data, the DOJ found that a Latino registered voter is “at least 46.5 percent, and potentially 120 percent, more likely than a non-Hispanic registered voter to lack such identification.”<sup>183</sup>

Recently, a federal district court enjoined S.B. 14’s implementation on grounds it violated Section 2 by impermissibly burdening the right to vote and imposing “detrimental effects on the African-American and Hispanic electorate.”<sup>184</sup> On appeal, affirming in part, the Fifth Circuit upheld only the finding of discriminatory effect, not purpose, and remanded the issue after determining that the injunction remedy was overly broad.<sup>185</sup> The Fifth Circuit remanded the plaintiff’s discriminatory purpose claim after finding that the trial court improperly applied the “multi-factor analysis for evaluating whether a facially neutral law was passed with a discriminatory purpose.”<sup>186</sup> Absent Section 5 preclearance, costly Section 2 litigation only yielded a partial victory without a definitive end in sight.

In North Carolina, Governor Pat McCrory signed into law “one of the nation’s most wide-ranging [V]oter ID laws.”<sup>187</sup> Like S.B. 14, this law requires voters to present government-issued identification. Second, it “reduces the amount of early-voting days, abolishes the state’s same-day registration program, and prohibits both provisional voting and pre-registration for underage youths.”<sup>188</sup> The reduction in early voting days will likely have an impact on African-American voter turnout.<sup>189</sup> To illustrate, 70 percent of African-American voters in North Carolina used early voting during the 2012 election.<sup>190</sup> With forty of North Carolina’s subdivisions previously subject to the Section 5 preclearance provisions, it is highly unlikely this law would have withstood scrutiny from the DOJ or DDC.<sup>191</sup>

In Mississippi, state officials tried to re-implement a 2012 voter ID law.<sup>192</sup> Before *Shelby*, Mississippi was awaiting DOJ clearance.<sup>193</sup> Mississippi’s immediate move to implement stricter requirements for voting was troubling because the state had been covered by the preclearance provisions since 1965. Since the passage of the VRA in 1965, “the federal government has objected to voting changes in Mississippi 173 times, 116 of them coming since the act was renewed in 1982.”<sup>194</sup> Mississippi

183. *Id.*

184. *Veasey v. Perry*, 71 F. Supp. 3d 627, 703 (S.D. Tex. 2014).

185. *Veasey v. Abbott*, 796 F.3d 487, 499, 518 (5th Cir. 2015) (finding that the plaintiffs’ “contemporary evidence” of intentional discrimination was scant and the evidence, therefore, failed to show legislators passed S.B. 14 with a discriminatory purpose).

186. *Id.* at 498.

187. McKenzie Wilson, *Piercing the Umbrella: The Dangerous Paradox of Shelby County v. Holder*, 39 SETON HALL LEGIS. J. 181, 196 (2015) (internal quotation marks omitted).

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

189. *Id.*

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

191. *Id.*

192. Lopez, *supra* note 123.

193. *Id.* (noting that “nearly 35% of the state’s voting age population lives more than 10 miles from the nearest office that will issue ID and, in 2012, 13 contiguous counties with sizable African-American populations lacked a single, full-time driver’s license office”).

194. Campbell Robertson, *A Divide on Voting Rights in a Town Where Blood Spilled*, N.Y.

Attorney General, Jim Hood, filed an amicus brief for the DOJ in *Shelby*, arguing that the application of Section 5 continues “to play a ‘vital role’ in the state’s progress.”<sup>195</sup> The DOJ was unlikely to grant clearance to the voter ID law in part because (a) 34.8 percent of the state’s voting-age citizens live more than 10 miles from the nearest state ID-issuing office, and (b) African-American and Latino citizens are less likely to have ID than the general population.<sup>196</sup> Once again, in the wake of *Shelby*, states quickly took advantage of their status outside the parameters of Section 5.

Lastly, Alabama also implemented a voter ID law. Aside from the common burdens that minority voters already face in possessing a photo ID, Alabama closed 31 DMV locations in the state.<sup>197</sup> Such action in “eight of the 10 counties with the highest concentration of black voters” would have undoubtedly been subject to federal approval.<sup>198</sup> However, after *Shelby*, “every single county in which blacks make up more than 75 percent of registered voters will see their driver license office closed” in the name of “cost-saving measures” for the state of Alabama.<sup>199</sup>

The brutal treatment of African-Americans and their supporters on Bloody Sunday in Selma, Alabama launched the movement that culminated in the passage of the VRA. Yet, Alabama continues to enact policies that overwhelmingly and disproportionately burden poor African-American voters.<sup>200</sup> Even if the state had a legitimate interest in cost-saving strategies, the closures would have been subject to Section 5 preclearance because they occurred in majority black counties. The closures are likely to have a substantially disproportionate impact on African-American voters. Without Section 5 protection, the NAACP Legal Defense Fund has recently filed a Section 2 suit in response to this state action.<sup>201</sup>

## VII. FINDING SOLUTIONS IN THE POST-SHELBY ERA

The passage of strict voter ID laws after *Shelby* reiterate the need to reinstate

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TIMES (Mar. 1, 2013), [http://www.nytimes.com/2013/03/02/us/politics/a-divide-on-voting-rights-where-blood-spilled.html?\\_r=0](http://www.nytimes.com/2013/03/02/us/politics/a-divide-on-voting-rights-where-blood-spilled.html?_r=0).

195. *Id.*

196. Gaskins, *supra* note 139.

197. Ari Berman, *Alabama, the Birthplace of the Voting Rights Act, is Once Again Gutting Voting Rights*, THE NATION (Oct. 1, 2015), <http://www.thenation.com/article/alabama-birthplace-of-voting-rights-act-once-again-gutting-voting-rights/>.

198. *Id.*

199. *Id.* While states have argued that partisan voting laws, which may have an incidental effect on minority voters, cannot be considered racial discrimination under the VRA, Section 5 preclearance would treat this essentially as a pretext in light of the *effect* certain practices would have on minority voters. Richard L. Hasen, *Voter Suppression’s New Pretext*, N.Y. TIMES (Nov. 15, 2013), [http://www.nytimes.com/2013/11/16/opinion/voter-suppressions-new-pretext.html?\\_r=0](http://www.nytimes.com/2013/11/16/opinion/voter-suppressions-new-pretext.html?_r=0).

200. *Id.*

201. Zachary Roth, *New Lawsuit Challenges Alabama Voter ID Law*, MSNBC (Dec. 2, 2015), <http://www.msnbc.com/msnbc/lawsuit-challenges-alabama-voter-id-law>. The NAACP’s recent Section 2 suit alleges that Alabama’s voter ID law and subsequent practices have “disenfranchise[d] thousands of African-American and Latino voters.” *Id.* In support of their Section 2 claim, the NAACP has gathered evidence of both vote dilution and vote denial. They point to evidence showing that in the 2014 midterm elections, “600 ballots, most of them absentee ballots, went uncounted because the voter didn’t provide photo ID.” *Id.* Moreover, they contend that the recent DMV closures, coupled with the lack of public transportation and distance to open DMVs, show the potential of the closures to be a vote denial measure. Inconsistencies in Section 2’s application to voter ID challenges or other vote denial measures will certainly pose significant challenges and costs to the NAACP that would have been avoidable through the Section 5 preclearance protections.

federal protections in formerly covered jurisdictions. The *Shelby* majority ignored the fact that fifty years of voter progress was achieved by *obligating* states with a history of prior voter discrimination to conform to the law.<sup>202</sup> The progress in minority voter participation and decreased first-generation barriers cannot compensate for the presence of second-generation barriers or other impediments to voter participation.

A possible solution is to pass a new or modified coverage formula. This would lessen the need for any reforms to Section 2 and reinstate a proven, efficient remedy against voter discrimination laws. The Voting Rights Advancement Act of 2015 (“VRAA”) seeks to, among other things, create a new coverage formula encompassing states with recent and repeated voting rights violations and allows federal courts to “bail-in” states under the coverage formula if the particular voter statute has a discriminatory effect on minorities.<sup>203</sup>

However, Congress’s polarized state, particularly in the aftermath of the 2016 U.S. presidential election, would certainly inhibit decisive action and consensus. The Supreme Court’s conciliatory reminder that “Congress may draft another formula based on current conditions” was undoubtedly naive at best—and insincere at worst.<sup>204</sup> The reality of Washington and its partisan divisions undoubtedly shows that the recommendation proposed in *Shelby* is a solution unlikely to come to fruition in the foreseeable future.

In light of this, I propose three solutions to temporarily address voter discrimination until Congress can pass a new coverage formula and reinstate Section 5 protections.

*A. Expand the Power of the Courts to Grant Preliminary Injunctions for Section 2 Claims*

As noted in Section VII, the high costs and burden of proof associated with Section 2 litigation inhibit plaintiffs from pursuing a preliminary injunction for Section 2 claims.<sup>205</sup> First, as discussed in Part VII, “litigation occurs only after the fact, when the illegal voting scheme has already been put in place” and after candidates have already been elected.”<sup>206</sup> Second, the heavy financial costs place a significant burden on the state or municipality tasked with defending against a Section 2 claim.<sup>207</sup> Thus, the high monetary costs adversely affect injured plaintiffs and deplete taxpayer dollars

202. *Shelby*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting) (noting that “the number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy”).

203. See Voting Rights Advancement Act of 2015, S. 1659, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1659> (explaining that states with 15 violations over the past 25 years, or 10 violations if one was statewide, must submit future electoral changes for federal approval under Section 5); Athena Jones, *Congressional Democrats file legislation to update the Voting Rights Act*, CNN (June 25, 2015), <http://www.cnn.com/2015/06/24/politics/voting-rights-act-democrats-file-bill/>.

204. *Shelby*, 133 S. Ct. at 2631.

205. *Id.* at 2640 (recognizing that Congress received evidence that Section 2 litigation was “an inadequate substitute for preclearance in the covered jurisdictions”).

206. *Id.*

207. Leah Aden, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP LEGAL DEFENSE FUND, [http://www.naacpldf.org/files/case\\_issue/Section%20of%20the%20Voting%20Act%20Litigation%20Costs%2010.16.16.pdf](http://www.naacpldf.org/files/case_issue/Section%20of%20the%20Voting%20Act%20Litigation%20Costs%2010.16.16.pdf).

used for the defense's legal fees.<sup>208</sup>

Moreover, "[t]he slow pace of litigation and reluctance of courts to grant preliminary injunctions in Section 2 cases, mean that an illegal voting scheme, one that would have faced preclearance by the DOJ, may cause irreparable harm to minority voters *even* if a lawsuit challenging the scheme as unconstitutional is eventually successful."<sup>209</sup> Therefore, lengthy Section 2 litigation is unlikely to provide an effective remedy once elections have occurred, candidates are elected, and more policies are enacted to serve the electoral interests of the incumbent. Without the protection of the Section 5 preclearance provision, a more preventative action is needed when state voting policies are challenged as discriminatory.

I propose that courts be vested with greater authority to grant preliminary injunctions as a pre-facto remedy to potentially discriminatory voting schemes. As outlined in Sen. Patrick Leahy's Senate Bill 1659, or the VRAA, Congress must lower the preliminary injunction standard for Section 2 suits against potentially discriminatory changes in a given voter statute.<sup>210</sup> During oral argument in *Shelby*, U.S. Solicitor General, Don Verrilli, stated that preliminary injunctions were granted in "fewer than one quarter of ultimately successful Section 2 suits."<sup>211</sup> The percentage could be as low as 5 to 10 percent.<sup>212</sup>

In contrast to Section 5, the plaintiff bears the burden of showing that a preliminary injunction is merited.<sup>213</sup> Traditionally, the preliminary injunction standard, found in Rule 65 of the Federal Rules of Civil Procedure, requires a court to consider four factors, including whether the plaintiff is likely to succeed on the merits and whether irreparable harm will be done to the plaintiff if the injunction were not granted.<sup>214</sup> Based on the inconsistencies in judicial application of the Section 2 disparate effect standard to vote denial suits, courts have often denied preliminary injunctions since the *Gingles* factors, which are commonly applied to gauge the merits of a vote dilution suit, require more evidentiary proof.<sup>215</sup>

Therefore, until courts widely accept the lower disparate effect standard for vote denial suits, Congress should lower the injunction standard to permit courts to more heavily weigh the potential irreparable harm to the plaintiff.<sup>216</sup> Specifically, as proposed in the VRAA, courts should grant a preliminary injunction if "the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship that would be imposed upon the plaintiff if

208. *Id.*

209. McClean Crighton, *A Fool's Errand: Why Congress Should Amend the Voting Rights Act but Not Section 4's Coverage Formula*, 80 BROOKLYN L. REV. 223, 236 (2014).

210. Voting Rights Advancement Act of 2015, S. 1659, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1659>.

211. *Crighton*, *supra* note 209, at 246–47 (citing Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 57–58 (2013)).

212. *Id.* (citing J. Gerald Hebert & Armand Defner, *More Observations on Shelby County, Alabama, and the Supreme Court*, THE CAMPAIGN LEGAL CENTER (Mar 1, 2013), <http://www.campaignlegalcenter.org/news/blog/more-observations-shelby-county-alabama-and-supreme-court>).

213. Elmendorf, *supra* note 162, at 2156–58.

214. *Crighton*, *supra* note 209, at 247.

215. Nelson, *supra* note 21.

216. *Id.* at 252; *see also* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) (noting that Section 2(b) does not condemn a voting practice just because it has a disparate effect on minorities).

the relief were not granted.”<sup>217</sup>

This hardship analysis, as opposed to the volatile probable success standard, would benefit plaintiffs. Current data trends indicate that voter ID laws, the most current form of vote denial, disproportionately impact minority voters.<sup>218</sup> For example, if a plaintiff were to show that minority voters in a given state or subdivision are three times more likely to lack an acceptable photo ID, she could show the proposed law will likely impose a hardship on minority voters.<sup>219</sup> Plaintiffs could, therefore, more readily satisfy this lower burden of proof and receive temporary injunctive relief while the litigation process ensues. Potentially discriminatory jurisdictions would subsequently bear some of the burdens of Section 2 litigation by being required to delay a voting policy rather than implementing it to the detriment of minority voters. Further, a plaintiff can more easily meet this burden since courts would be required to give “due weight to the fundamental right to cast an effective ballot.”<sup>220</sup>

Practically speaking, this proposed modification to the preliminary injunction standard would likely survive any opposition because of its tempered approach to a controversial matter, and the public narrative surrounding Section 2. First, an increase in preliminary injunctions would only prevent potentially harmful voting schemes from being put into place until a court rules on the merits of the case. This temporary relief to an already burdened plaintiff falls squarely within the “equitable power” of a court and only prejudices the jurisdiction pending final adjudication of the case.<sup>221</sup>

Second, proponents of this change to the preliminary injunction standard have a strong narrative on their side. Unlike the now-defunct Section 5, Section 2 does not provide a prophylactic remedy, so discriminatory voting practices can inflict considerable harm on voters even if the plaintiff ultimately prevails in a Section 2 suit.<sup>222</sup> “Even if a policy, through Section 2 litigation, is proven to be unconstitutional, the harm to disenfranchised voters has been done and incumbents will have been voted into office under constitutionally troubling circumstances.”<sup>223</sup> The costs and threats to the integrity of a state’s electoral process, coupled with the visible impact that a potentially unconstitutional law could have on minority voters, would certainly incentivize elected officials to support this equitable alteration to the preliminary injunction standard in Section 2 suits.

*B. Create a Federal Commission to Conduct Nationwide Empirical Studies on the Impact of Voter ID Laws on Racial Minorities*

Under a strict reading of Section 2, courts have imposed a high evidentiary

217. Crighton, *supra* note 209, at 250 (internal quotation marks omitted).

218. Emma Redden, *Changing Focus and Exposing a Solution: Using Section 2 of the Voting Rights Act to Defeat Tennessee’s Voter ID Law*, 44 U. MEM. L. REV. 229, 243–44 (2013) (citing several empirical studies indicating that African-American voters are particularly less likely to have government-issued ID’s and would thereby be disproportionately more burdened than white voters).

219. SOBEL, *supra* note 129, at 2; BRENNAN CENTER FOR JUSTICE, *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification* (2006), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf).

220. Voting Rights Advancement Act of 2015, S. 1659, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1659>.

221. Crighton, *supra* note 209, at 247.

222. *Id.* at 246.

223. *Id.*

bar in evaluating whether a plaintiff has presented sufficient evidence in support of a Section 2 vote denial claim. For example, in 2010, the Ninth Circuit ruled against the plaintiffs despite statistical evidence that minority groups were less likely to possess state-issued identifications needed to vote.<sup>224</sup> Similarly, in *Gonzalez v. Arizona*, the court held that Arizona's Proposition 200, which required voters to show identification at the polls, did not violate Section 2 because plaintiffs failed to show that Latinos were less likely to possess the required forms of identification.<sup>225</sup> Despite "evidence of Arizona's general history of discrimination against Latinos and the existence of racially polarized voting," the court found no evidence that "Latinos' ability or inability to obtain or possess identification for voting purposes . . . resulted in Latinos having less opportunity to participate in the political process and elect representatives of their choice."<sup>226</sup> With a more robust evidentiary arsenal, however, the plaintiffs may have prevailed in showing the voting practice was not "equally open to minority voters."<sup>227</sup>

In light of these judicial trends, Congress can strengthen Section 2 by funding a bipartisan commission to conduct robust empirical studies on the impact of voter ID laws on a given state's racial minority population. While Congress's initial focus could be on states previously covered under Section 5, the Commission could work with voter databases, non-profit organizations, and think tanks in every state to gather empirical evidence concerning, among other indicators, "the percentage of registered voters and percentage of voting-age citizens without an ID, broken down along racial lines."<sup>228</sup> Further, these studies could shed light on less prevalent data on voter information campaigns, access to public transportation, and proximity to voting stations, DMVs, and county recorder offices within minority communities. All of this data, in the aggregate, could subsequently help plaintiffs both qualify for a preliminary injunction and satisfy the high burden of proof required by Section 2.

*C. Amend Section 2 to Include a New Plaintiff-Friendly Three-Prong Disparate Effect Standard.*

As discussed in Part VI, circuit courts are split as to whether plaintiffs must prove that the challenged voting practice has a discriminatory effect on protected groups and that it limits the groups' opportunity to elect representatives. Courts are unclear as to whether Section 2 "broadly prohibits voting discrimination based on race, color, or language" or whether plaintiffs have to additionally prove the *Gingles* factors required in vote dilution claims.<sup>229</sup> Recently, lower courts in Ohio, North Carolina, and Texas "have suggested a two-part test that would require plaintiffs to demonstrate a disproportionate burden on racial minorities, and that the burden arises from the challenged practice's interaction with social and historical conditions linked to

224. *Gonzalez v. Ariz.*, 624 F.3d 1162, 1192–94 (9th Cir. 2010).

225. *Id.* at 1194.

226. *Id.*

227. Stoughton, *supra* note 61, at 316.

228. *Id.* at 324 (noting that "statistical data demonstrating that minorities are significantly less likely to possess an acceptable form of ID than their white counterparts reveal that the ID requirement will likely increase discrimination against minorities and disparately impact members of the minority group").

229. Joshua Field, THE VOTING RIGHTS PLAYBOOK: WHY COURTS MATTER POST-SHELBY COUNTY V. HOLDER, THE CENTER FOR AMERICAN PROGRESS 16 (2014), <https://www.americanprogress.org/wp-content/uploads/2014/02/VotingRightsPlaybookReport1.pdf>.

discrimination.”<sup>230</sup>

However, without more guidance on what a court should consider in assessing the disparate impact on minority voters, plaintiffs will continue to see the same evidentiary obstacles in Section 2 suits. Further, if this formulation takes hold without any consideration of state interests, it will likely face constitutional challenges by a conservative majority on the Supreme Court.<sup>231</sup> Accordingly, Congress should amend Section 2 to more effectively “balance the harm to minority voters against the state’s interests in the law.”<sup>232</sup>

First, a plaintiff would have to prove that the challenged law, such as a voter ID measure, has a disparate impact on minority voters “relative to other voters that could be avoided by some other practice.”<sup>233</sup> As opposed to a court focusing on voter turnout, this would require courts to consider, for example, whether the elimination of early voting or same-day registration has a disparate impact on African-American voters in North Carolina.<sup>234</sup>

By focusing on a disproportionate burden, evidence of the adverse effects of voter ID laws could be afforded greater weight. Whereas the court in *Frank v. Walker* discounted the fact that racial minorities more heavily bore the burden of the voter ID law, a court would now be required to adequately weigh these disparities.<sup>235</sup> Under this new approach, “it would be sufficient for plaintiffs to show that the challenged practice will eliminate opportunities that minorities disproportionately use, or impose a requirement that they disproportionately lack.”<sup>236</sup>

Second, a plaintiff would have to show that disparate impact can be linked to the challenged practice’s interaction with social and historical conditions of the given jurisdiction. This would now require courts to consider, among other things, “whether racial minorities bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process.”<sup>237</sup> This type of data would go beyond an inquiry into “the possible discriminatory motivations for the voting practice [and instead would] address [the] underlying social and historical conditions from which its disparate impact may arise.”<sup>238</sup> In the context of a voter ID challenge, this analysis would inform the court about the socioeconomic disparities among minority voters and shed light on the heightened costs associated with obtaining a “free” photo ID. As a result, a plaintiff’s odds of prevailing in a Section 2 suit would increase as courts would consider more meaningful indicators of a statute’s disproportionate burden on minority populations.

Third, if the plaintiff satisfies these two prongs, the burden would shift to the state or political subdivision to show “by clear and convincing evidence that their

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230. Tokaji, *supra* note 27, at 489.

231. *Id.*

232. Richard L. Hasen, *This is why the Voting Rights Act is on trial in North Carolina*, WASH. POST (July 31, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/31/this-is-why-the-voting-rights-act-is-on-trial-in-north-carolina/>.

233. Tokaji, *supra* note 27, at 474.

234. *Id.* at 475–76.

235. *Frank v. Walker*, 768 F.3d 744, 752 (7th Cir. 2014).

236. Tokaji, *supra* note 27, at 475.

237. *Id.* at 481–82.

238. *Id.* at 482.

interests outweigh the burden on voting.”<sup>239</sup> This standard would require states or subdivisions to convincingly demonstrate evidence of in-person voter ID fraud, for example. Within this same context, and in light of the overwhelming evidence showing the virtual absence of in-person fraud, states or subdivisions would be forced to develop legitimate justifications or risk a court’s invalidation of their law. More importantly, it could incentivize them to avoid pre-textual justifications for controversial voter laws. Not only would such an addition ensure that states must demonstrate legitimate, fact-driven reasons behind a new voter restriction, but it would also ensure that “state’s interests are given adequate consideration.”<sup>240</sup> In a political climate featuring critical proponents and opponents of *Shelby*, this modified standard would serve as an effective compromise and likely quell constitutional challenges against Section 2.

## CONCLUSION

“The Voting Rights Act is needed now like never before.”<sup>241</sup> Congressman John Lewis, one of the marchers beaten on that fateful Sunday in Selma, proclaimed these words one month after *Shelby*. The short-term solutions above would ease the burdens of Section 2 litigation and pave the way for more successful challenges to voter ID laws and related vote denial measures. However, to reinstate the full strength and protections originally afforded by the VRA, a new coverage formula must be passed so as to revive the Section 5 preclearance scheme. Acclaimed author and political journalist Ari Berman stated,

The need for Congress to Act is clear. The Justice Department blocked 1,116 discriminatory voting changes from taking effect under Section 5 from 1965 to 2004 and objected to thirty-seven electoral proposals after Congress reauthorized the law in 2006. Immediately following the decision, five Southern states rushed to implement new voter-ID laws that disproportionately affect young and minority voters. A sixth covered state, North Carolina, [passed] . . . a new voter ID law [shortly thereafter]. . . . Simply looking at what’s happened since the Court’s decision—not to mention the four overwhelming reauthorizations of the VRA in 1970, 1975, 1982 and 2006—should give Congress ample evidence on which to act.<sup>242</sup>

By implementing the proposed reforms and passing a VRA restoration bill, such as the Voting Rights Advancement Act of 2015, Congress can “protect the legacy of the previous generation who fought so hard five decades ago for these voting rights protections.”<sup>243</sup>

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239. *Id.* at 484.

240. *Id.* at 485.

241. Ari Berman, *Rep. John Lewis: ‘The Voting Rights Act is Needed Now Like Never Before’*, THE NATION (July 17, 2013), <https://www.thenation.com/article/rep-john-lewis-voting-rights-act-needed-now-never/>.

242. *Id.*

243. Jones, *supra* note 203.