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The Voting Rights Playbook

Why Courts Matter Post-*Shelby County v. Holder*

By Joshua Field January 2014

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Introduction and summary

Voting is more than simply deciding which candidate to support; it is an experience. Depending on where you live, the laws of your state, your ease of access to transportation, and the ways your county administers elections, this experience—from registration to actually casting a ballot—differs greatly between counties and is largely dependent on the actions and laws passed by local officials.

Unsurprisingly, those in power seek to maintain the status quo because that is what put them into power in the first place. Lawmakers can use their power to create laws crafted to their self-preserving advantage and make it harder for new populations—who are often viewed as threats to the status quo—to participate in the democratic process. Often termed "the tyranny of the majority," our nation's founders grappled with this problem of protecting the status quo,[1] which could be used to limit the power that new demographic populations have to participate in our democracy.

Our nation is currently experiencing a demographic sea change.[2] Starting in 2012 through 2016, the number of Hispanic citizens eligible to vote is projected to rise nationwide by 17 percent—or by more than 4 million new voters.[3] From 1996 to 2008, the number of Asian American citizens eligible to vote increased by 128 percent; Asian Americans were 3 percent of the electorate in 2012.[4] While Asian Americans and Hispanics make up an increasingly larger proportion of the electorate, the proportion of eligible white voters has decreased.[5] The increasingly diverse pool of eligible voters is overturning the status quo and traditional voting blocs in our nation.

In response to new voting populations, nervous leaders have enacted a slew of new procedural hurdles that make it more difficult to register to vote, harder to prove one's residency, and significantly reduce voting opportunities. These actions are often taken under the guise of combatting voter fraud and ensuring election integrity.[6] Unsurprisingly, as a *Washington Post* article recently pointed out, "the more that minorities and lower-income individuals in a state voted, the more likely" a state was to propose such restrictions.[7]

Although the voter fraud that these leaders claim they are guarding against is virtually nonexistent,[8] the effects of voting law restrictions dramatically impact the ability of citizens to participate in the democratic process.[9] Again, unsurprisingly, these restrictive measures have been found to have a disproportionate effect on people of color, those for whom English is a second language, young people, the indigent, and the elderly.[10]

With the vast majority of voting-related laws and administration implemented at the state and local level, federal law has played a large role in protecting against state and local voting-related discrimination. One piece of federal legislation, the landmark Voting Rights Act of 1965, or VRA, is widely hailed as the nation's most effective civil rights law. The combination of Sections 4(b) and 5 of the VRA provided the strongest protections against discriminatory state action by requiring states and localities with a history of voting discrimination to "preclear" changes in voting-related laws to ensure that they did not have a discriminatory effect.[11] While our federal courts played a role in enforcing these protections, a great deal of preclearance-related enforcement occurred within the administrative structure of the Department of Justice, or DOJ.

In 2013, however, the U.S. Supreme Court struck down Section 4(b) of the VRA with its *Shelby County v. Holder* ruling.[12] The Court, in a 5–4 decision, declared that the formula stipulated in Section 4(b) to determine which states were subject to "preclearance" was unconstitutional. The ruling effectively gutted Section 5 of the law, which actively protected voters from purposeful vote dilution, overly restrictive voting procedures, and voter intimidation, among other acts of discrimination.[13]

The largest consequence of *Shelby County* was the effective end of preclearance and, as President Obama noted in his 2014 State of the Union Address, a "weakened" Voting Rights Act.[14] Now, instead of offending states having to prove that changes to voting law are not discriminatory, ordinary citizens and advocacy groups—often with the help of the Department of Justice—are left with the expensive and time-consuming burden of proving via Sections 2 and 3 of the VRA that state action discriminates against minority voters. Instead of efficient DOJ administrative enforcement that was available via Section 5, those claiming discrimination now have the burden of filing suit in our nation's federal district courts.

The burden switch that resulted from *Shelby County* was not lost on state lawmakers seeking to implement restrictive voting-related laws. Knowing that the burden is no longer on the states to prove that their laws do not discriminate, in the wake of *Shelby County,* many states have been busy making changes to voting laws that the Department of Justice argues will have discriminatory effects on the voting population and would not have survived Section 5 preclearance scrutiny.[15] In the case of Texas, these changes came within hours of the ruling.

So what protection is left for voters? Moreover, what must advocates, litigators, and lawmakers do to ensure that new, organized attempts to make it harder for some citizens to freely cast their ballot are properly countered? How should Democrats and Republicans in Congress meet President Obama's call to "stand up for everyone's right to vote" by "working together to strengthen" the Voting Rights Act?[16]

In addition to addressing the aggressive tactics that states have taken post-*Shelby County*, this report will detail the following:

- The importance and power of Section 5 preclearance.
- The tools that remain to combat voting-related discrimination.
- The significant role our nation's federal courts and judges will play in defining which protections the VRA will now provide.
- Suggestions on what Congress can do to strengthen to the VRA, given the recent bipartisan proposal to legislatively revive Section 5 of the VRA.[17]

Why we need federal voting protections

Most Americans are familiar with the fact that suffrage in the United States has been far from universal. In 1870, the 15th Amendment was ratified, prohibiting the government from denying the right to vote because of "race, color, or previous condition of servitude."[18] Fifty years later, after a hard-fought battle for voting equality, women were enfranchised with the enactment of the 19th Amendment. In 1971, the 26th Amendment extended voting rights to any citizen 18 years or older.

Alongside positive expansions of suffrage, however, our nation is plagued with a history of governmental action that makes it harder for individuals to vote. Often, procedural barriers and legal hurdles to simply cast one's vote have been directed at, and found to disproportionately affect, racial minorities and, in some instances, voters who speak foreign languages as their first languages. While a law may not explicitly *say* that African Americans or language minority voters cannot cast their ballots, state and local governments have found ways to create hurdles that *just happen* to make it harder for certain demographics of citizens to vote or dilute the power of their vote.

In the Jim Crow era, state and local lawmakers imposed procedural barriers such as the so-called grandfather clauses, poll taxes, and poll tests that made it impossible for African American citizens, many of them indigent and uneducated, to exercise their right to vote.[19] During the 1960s, when the eyes of the world were on the South, it was not uncommon for cameras to capture whites harassing black citizens in line to vote while law enforcement looked the other way. Many of these same black voters had to "hand their ballots directly to white election officials for inspection,"[20] the very same officials who imposed the harsh restrictions.

Voting-related discrimination continues today. Polling stations often deny citizens whose first language is not English election materials in their native tongues.[21] Voting districts have been gerrymandered in ways that diffuses the voting power of minority populations.[22] Outside groups, such as the Tea Party-associated group True the Vote, implemented a practice of descending on largely minority precincts

and searching for the slightest errors in the voting rolls to challenge voters.[23] As ThinkProgress reported shortly after the 2012 election, although "almost every [True the Vote] challenge is baseless, the arguments and delays frustrate those in line and reduce turnout."[24]

The framers of the Constitution knew that Congress had to be empowered to ensure that our representative democracy properly reflected the will of the people and that minority populations were not shut out of the process. Thus, the Constitution gives Congress broad power to regulate and protect against voting discrimination in elections.[25] As Supreme Court justice Ruth Bader Ginsberg notes, "The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens" and has a "special role … in protecting the integrity of the democratic process in federal elections."[26]

On several occasions, Congress has exercised this power to help ensure vote equality and to prevent those in power from discriminating against demographic minorities, most effectively with the passage of the Voting Rights Act of 1965.[27]

Voting Rights Act of 1965

In response to state and local government action that discriminated against minority voters and stifled their democratic muscle, Congress passed the Voting Rights Act of 1965, or VRA. This landmark legislation was structured in a manner that gave the Department of Justice, third-party nongovernmental organizations, and individual voters a procedural structure to challenge state and local voting laws that discriminated against racial minorities. This protection was extended to language minorities when the VRA was reauthorized in 1975.[28]

Protecting the voting rights of minority populations has not historically been a Democratic or Republican issue. While we may have become accustomed to hyper-partisanship, the VRA received broad bipartisan support during its nearly 50-year lifespan; Congress reauthorized it four times, most recently in 2006.[29] That year, Republican President George W. Bush signed the reauthorization, which the House passed by a vote of 390–33 and the Senate by a vote of 98–0.[30]

The most often utilized section of the VRA is Section 5, a provision that requires states and localities with a history of racial discrimination in voting laws to preclear any voting-related state action or law through the Department of Justice or a federal court.[31] Since 1982, the DOJ has used the VRA to reject more than 1,000 discriminatory voting procedure changes from being implemented, including more than 30 since 2006.[32] Between 1982 and 2006, 656 voting changes were withdrawn and 198 were superseded by altered submissions after the DOJ requested more information.[33] Since January 2012, Section 5 has blocked discriminatory voting changes in Florida, Georgia, Mississippi, North Carolina, and Texas, and it required South Carolina to adjust its voter ID law to make it substantially more flexible.[34]

Section 5 of the VRA is unique because it puts the burden on states and localities with a history of discrimination to show that their voting-related laws are not discriminatory. With a fully functioning Section 5, individual citizens and groups did not have to bring expensive lawsuits alleging discrimination, and covered jurisdic-

tions had the option to go through an administrative process, rather than a judicial process, to get voting law changes approved.[35]

Further, Section 5 also had a notice/disclosure effect, meaning covered jurisdictions knew the government would scrutinize changes to voting laws to ensure that they did not have discriminatory effects.[36] Similar to securities, anti-trust, environmental, and campaign finance-related regulatory structures, Section 5-covered jurisdictions were required to research and disclose to the federal government how a proposed voting change would affect racial and language minorities.[37] As a consequence, state actors in covered jurisdictions were unlikely to impose discriminatory practices or laws because they knew that their actions would be reviewed and discriminatory practices would likely be caught.[38] Without this disclosure requirement, state-based actions are more likely to fly under the radar.[39]

Despite the effectiveness and unique nature of Section 5, the section was gutted in 2013 when the Supreme Court held in *Shelby County v. Holder* that the formula detailed in Section 4(b) of the VRA—the section that used a formula to identify which jurisdictions were subject to Section 5 preclearance—was unconstitutional.[40] This extraordinary ruling rendered the VRA's most effective section toothless.

In *Shelby County,* the Court held that Section 4(b)'s preclearance formula did not directly address the "current need" to protect against voting discrimination because the formula relied on factors that were deemed important in the 1960s.[41] In making its ruling, the Court singled out the formula's "reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s." The Court ruled that the formula was no longer applicable because literacy tests have been banned for more than 40 years and "voter registration and turnout numbers in the covered States have risen dramatically" from the time that the preclearance formula was first implemented.[42]

The *Shelby County* decision was extraordinary because, despite the Roberts Court's "stated commitment to judicial minimalism,"[43] it dismantled a law that two co-equal branches of government—the legislative and the executive—had supported merely seven years prior. Many legal experts have criticized the legal reasoning behind the Court's *Shelby County* decision, which failed to squarely address the deference the Court owes to Congress acting under its constitutional powers.[44]

Shelby County created a new "equal sovereignty" principle that requires Congress to treat all states similarly unless it has a compelling reason. In support of this new principle, the Court in its *Shelby County* ruling pointed to the 10th Amendment's mandate that any powers not delegated to the federal government are reserved by the states. What the Court conveniently failed to address, however, is the fact that the 15th Amendment *does* delegate Congress the power to enact laws that protect against state actions that abridge the right to vote based on race—exactly what the VRA was created to address. Even conservative legal scholar Michael McConnell disagreed with *Shelby's* equal sovereignty principle, calling it "made up." "There's no requirement in the Constitution to treat all states the same," McConnell stated, "It might be an attractive principle, but it doesn't seem to be in the Constitution."[45] As Justice Ginsburg noted in dissent, "Hubris is a fit word for today's demolition of the VRA."[46]

Although the Court did not explicitly strike down Section 5, its shallow discussion about what Congress must do to meet the Court's new equal sovereignty principle leaves many questions about a potential legislative fix for *Shelby County* unanswered. Indeed, Justice Clarence Thomas may have been the most honest voice of the majority when he stated in his concurrence that while the majority opinion does not overtly strike down Section 5, "its own opinion compellingly demonstrates that Congress has failed to justify 'current burdens' with a record demonstrating 'current needs.' By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of [Section 5]."[47]

Have things changed dramatically?

Although in its *Shelby County* ruling, the Court wrote that "Nearly 50 years [after the passage of the VRA], things have changed dramatically,"[48] the practice of enacting voting barriers and diluting the democratic power of a demographic population seems to be cyclical in the United States.

Even with a fully functioning VRA, election administration is largely left to individual states and local jurisdictions. According to the Center for Voting and Democracy, "the result is a 'patchwork voting system' run independently by 50 states, and over 3,000 counties and 13,000 voting districts, 'all separate and all unequal.'"[49] This deference to thousands of different counties—and thus these counties' budgets, regulations, laws, and leaders—creates a great deal of wiggle room for state and local officials to impact who votes and how they vote. From the time that Jim Crow laws overtly made it more difficult for African Americans to vote, burdens put on voting in the United States have historically fallen into two categories: vote dilution and vote denial.

Vote dilution injuries arise when a minority group's political influence is diminished and the members of that group have fewer opportunities "to secure representation relative to the opportunity the minority community otherwise would have enjoyed," as noted in a *University of Pennsylvania Law Review* article.[50] Vote dilution practices have included at-large elections and gerrymandered voting districts, which intentionally spread the voting power of a minority group so thin that the voting bloc means little or concentrates a voting bloc to limit its geographic reach.[51] By spreading a population's vote over a large geographic area—or, conversely, by concentrating it into one district thus reducing the number of elected officials who can be elected—that group's democratic voice is diffused, creating an unjust level of representation.

"Vote denial," as noted in the *South Carolina Law Review*, "refers to practices that prevent people from voting or having their votes counted."[52] Past examples of vote denial include literacy tests, poll taxes, all-white primaries, and English-only

ballots. When the VRA was passed in 1965, it primarily combatted vote denial efforts. Subsequent generations of VRA enforcement, beginning in earnest in the 1980s, focused mainly on vote dilution.[53] Experts have recently witnessed a shift back to vote denial tactics in some states. According to the *South Carolina Law Review*, "Like those early cases … the new vote denial cases involve practices that disproportionately exclude minority voters from participating in the electoral process at all."[54]

The Brennan Center for Justice, a public policy and law institute, reports that in 2013 alone, 31 states introduced at least 80 restrictive voting bills—including laws that require photo ID, demand proof of citizenship, make it more difficult for students to register, and reduce early voting opportunities.[55] Many of these laws are "likely to have a disproportionate impact upon minority citizens, the elderly, students, and indigent citizens."[56] A Massachusetts Institute of Technology, or MIT, study of the 2008 presidential election found that 4 million to 5 million voters did not cast a ballot because they encountered procedural problems related to voter registration and absentee balloting.[57] An additional 2 million to 4 million registered voters were "discouraged" from voting due to administrative hassles such as long lines and voter identification requirements.[58]

Since the *Shelby County* decision was issued, states have been busy working to implement new voting restrictions that many argue would not have survived Section 5 scrutiny.[59] Although not all of the following states were subject to Section 5 preclearance, the following state-based actions were taken within five months of the *Shelby County* decision:

Alabama

A former Section 5 preclearance state,[60] Alabama passed a law in 2011 that would require voters to present a photo identification before voting, creating new hurdles for voters seeking to cast their ballots.[61] Because Alabama planned to implement the law in 2014, it did not seek preclearance from the DOJ prior to *Shelby County* to determine whether the law is discriminatory. Similar to other jurisdictions, this voter ID law affects those who do not have the travel-related and financial resources to take the steps needed to secure the identification needed to vote.[62]

Florida

Florida, counties of which were previously subject to Section 5 preclearance,[63] took dramatic post-*Shelby County* steps. Less than two months after *Shelby County, The New York Times* reported that Florida Republican Gov. Rick Scott "ordered state officials to resume a fiercely contested effort to remove noncitizens from voting rolls."[64] Opponents of the statewide voter purge argue that the list, which at one time contained 90 percent nonwhite voters,[65] leaves too much discretion to government officials to determine who should and should not be on the list, relies on unreliable data, and disproportionately impacts minority voters.[66] Although officials are attempting to scrub noncitizens from the voter lists, Florida has not released the criteria it will use to make these determinations, and Florida has one of the highest rates of naturalization in the country. Hence, as *The American Prospect* rightly pointed out, "someone who was not a citizen last year may be a citizen this year."[67]

Mississippi

Another formerly covered jurisdiction,[68] Mississippi also seems poised to move ahead with a voter ID law it passed in 2012, which had been awaiting preclearance from the federal government. The law could require voters to start showing a photo ID this year.[69]

North Carolina

Less than two months after the *Shelby County* ruling in North Carolina, where many counties were subject to preclearance,[70] Republican Gov. Pat McCrory signed HB 589 into law. According to *The American Prospect*, HB 589 would "turn the state with the South's most progressive voting laws, and the region's highest turnout in the last two presidential elections, into a state with perhaps the most restrictive voting laws in the nation."[71] The law cuts a full week of early voting days, stiffens voter identification requirements, ends same-day registration, and kills a state-sponsored voter registration drive that encourages young people to pre-register.[72]

The law also prohibits certain kinds of voter-registration drives, which tend to register low-income and minority voters, and allows any registered voter to challenge the eligibility of another voter at the polls—which encourages voter intimidation.[73] Perhaps most alarmingly, polling stations would no longer remain open to accommodate long lines on election nights. Those individuals still in line when a polling station is schedule to close may be unable to vote.[74]

The effects of these changes are verified by North Carolina's own data that shows that minority voters are 12 percent more likely to lack IDs than their white counterparts and are also more likely to take advantage of early voting.[75] On a partisan level, North Carolina Democrats were 15 percent more likely to not have a state-issued ID compared to all other registered voters.[76]

Texas

Within hours of the *Shelby County* decision, state officials in Texas, which Section 5 previously covered,[77] moved forward in implementing voter ID and redistricting laws that were previously found by a court to discriminate against minorities.[78]

The Texas voter ID law, SB 14, is considered the strictest in the nation and requires voters to prove citizenship and residency in the state. To meet this requirement, a passport, which costs a minimum of $55, or a copy of a birth certificate is needed.[79] To obtain the mandated government-issued photo ID needed to vote would require that some people drive 176 miles round trip on a weekday.[80] A court previously held that the law would likely have a retrogressive effect on Hispanic and black voters. According to the court:

This conclusion flows from three basic facts: (1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty.[81]

Virginia

As another state previously subject to preclearance,[82] Virginia has passed new voting-related laws that implement strict voter identification standards and voter roll purges that are set to take effect in 2014.[83] Because the laws are not subject to Section 5 post-*Shelby County*, they are likely to go into effect.

Arizona and Kansas

Arizona—previously subject to Section 5 preclearance[84]—and Kansas are moving forward with a unique two-tier system that creates two different classes of voters. Individuals who provide proof of citizenship when they register to vote will be able to vote in all local, state, and federal elections. Those persons who do not provide proof of citizenship when they register will only be allowed to vote in federal contests and not in state or local elections.[85]

These laws were passed in response to a different Supreme Court ruling in *Arizona v. Inter Tribal Council* that upheld the federal government's right to mandate the use of federal registration forms and standards in federal elections and barring states from requiring proof of citizenship for federal elections.[86] Rather than simply relying on the standards promulgated by the federal government, Arizona and Kansas decided to implement a double standard: one for federal elections and another for state and local elections. In order to vote in both elections, Arizona and Kansas voters must take the extra step of providing proof of citizenship, a hurdle that has financial and travel burdens associated with it that disproportionately impact minority voters and the poor.[87]

In Arizona, this two-tier system will exclude about 1,400 Arizona voters from 2014 state elections because they merely affirmed their citizenship on the federal registration form but did not provide an additional proof of citizenship, such as a driver's license or naturalization certificate. According to *The Tucson Sentinel,* "Native Americans and Latino Americans are more likely than other voters not to have easy access to the required documents to prove their citizenship, making them more likely to become second-class voters under Arizona's new system."[88] Furthermore, most of the voters who would be disenfranchised would be concentrated in and around the urban Democratic strongholds of Tucson and Phoenix.[89]

How the VRA can combat voter discrimination post-*Shelby County*

Although *Shelby County* dramatically affected the VRA's impact, the law does have mechanisms other than Section 5 preclearance that allow the government, aggrieved voters, and impacted nongovernmental organizations to challenge discriminatory state law. Section 5 put the burden on states with a history of discrimination to prove that changes to their voting laws were not discriminatory. Now that formerly covered states do not have to worry about a federal government check on their voting-related laws, the burden has shifted to the government and nongovernmental third parties, such as public-interest groups, advocacy organizations, political parties, and political committees, to show that a state action is unconstitutional or in violation Sections 2 or 3 of the VRA.[90]

Absent a rapid passage of legislation that revives Section 5, the agility of third party groups and the DOJ to make Section 2 and 3 challenges to discriminatory state action—and how federal courts interpret the reach of Sections 2 and 3—will determine the strength of the VRA moving forward. Because Section 5 administrative activity and litigation has dominated voting rights law since the passage of the VRA in 1965, Sections 2 and 3 are relatively undeveloped and untested in the law. Many unanswered questions remain.

Section 2

In a speech to the NAACP in July 2013, after the *Shelby County* decision gutted what his Civil Rights Division used almost exclusively to combat VRA violations, U.S. Attorney General Eric Holder announced that the DOJ would shift resources to enforce civil rights provisions that were not affected by *Shelby County*. These included "Section 2, which prohibits against voting discrimination based on race, color or language."[91] This shift in resources was dramatic because it indicated that the DOJ was going to participate in what was mostly uncharted territory. Given the historic success of Section 5 protections, how far would Section 2 go? Did the DOJ have the resources to combat the shift in burden from the states to the government? And, how does Section 2 work in the context of vote denial cases?

The answers to those questions: nobody really knows.

Because Section 5 was so broadly used as an enforcement mechanism, the breath of Section 2's application will be a defining issue in the post-*Shelby County* world. The relevant questions that surround Section 2 involve: what a Section 2 vote denial plaintiff must prove; the breadth of voting discrimination that Section 2 can be used to battle; and what evidence can plaintiffs successfully use to prove discrimination.

When interpreting a statute, courts look to the plain meaning of the statute's text. Section 2's text is broad, simply prohibiting "standard[s], practice[s], or procedure[s]" that "deny or abridge the right of any citizen of the United States to vote on account of race or color."[92] In 1975, Congress extended Section 2 protections to members of language minority groups[93] and required some jurisdictions to provide election materials in foreign languages. Unlike Section 5 of the Voting Rights Act that applies only to "covered" jurisdictions, Section 2 of the VRA applies to all states and political subdivisions. Individuals, nongovernmental organizations, and the attorney general can file civil actions seeking injunctive, preventive, and permanent relief from Section 2 violations.[94] As one prominent social activist put it, "Section 2 is an individualistic, case-by-case approach to fighting pervasive discrimination."[95]

Unlike Section 5, which placed the burden on the state to prove that a voting law change was not discriminatory, states are defendants in Section 2 litigation, meaning that individuals, nongovernmental organizations, and the DOJ have the burden of proving that a state voting-related action is discriminatory. This creates a dynamic where states and counties can take action that has discriminatory effect as long as they don't get caught or potential plaintiffs lack the resources to challenge them. Some characterize Section 2 as "the legal equivalent of 'whack-a-mole;'" that is to say, as soon as one vote denial tactic is challenged, new ones pop up to replace them.[96]

Before *Shelby County* and the DOJ's resource change, Section 2 suits have generally combatted vote dilution cases that either disperse or concentrate a specific racial population in a way that dilutes that population's voting strength.[97] Based on the broadness of Section 2's text and the VRA's legislative history, however, legal experts generally believe that Section 2 can be used as a tool to combat vote denial injuries such as registration, voter intimidation, long lines, and improper election law administration problems as well.[98] The question that remains, however, is what standard our nation's federal courts will apply to evaluate whether a Section 2 vote denial violation has occurred.

Courts typically use "tests" to determine whether constitutional violations have occurred. Because there have been few Section 2 vote denial cases, the success of future Section 2 litigation will depend on how strict the burden is to prove discrimination and what factors courts will consider when determining whether a state or county has discriminated against a minority racial or language population. Many are curious whether courts will require that Section 2 vote denial plaintiffs must still prove that an alleged discriminatory action also has vote dilution effects.

Unlike vote denial cases, Section 2 vote dilution standards are fairly well developed in the courts. In Section 2 vote dilution cases, plaintiffs are required to first pass the *Gingles* test—from the case *Thornburg v. Gingles*[99]—then an effects test."The *Gingles* test is very specific and strongly tied to redistricting: The plaintiff must prove that he or she is (a) part of a majority-minority racial community that (b) lives in a geographically compact, potential single-member election district that would (c) tend to support a different candidate than their white counterparts.[100] In other words, a member of a minority population needs to prove that her vote is diluted given the current voting district boundaries by proving that had the boundaries being drawn differently, that minority population would have the voting power to elect a candidate of its choice.

While the factors of the *Gingles* test are fairly specific, if a plaintiff does satisfy that threshold of the test, the second effects test inquiry is much broader. Plaintiffs simply have to prove that "based on the totality of the circumstances," a state voting-related action makes it harder for racial or language minorities to participate in the political process and to elect representatives of their choice.[101]

Using the *Gingles* test courts look to a broad range of factors when determining whether a state law or procedure has a discriminatory effect, including:

> *The history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group … the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.*[102]

While the combination of the *Gingles* and effects tests are well-established standards for evaluating vote dilution cases, courts have not agreed upon a uniform test for Section 2 vote denial cases.[103] Do Section 2 vote denial plaintiffs have to go through the fairly technical process of passing the *Gingles* test or do they need to simply prove the broad effects test? What evidence can plaintiffs point to when making their case?

Regarding the plaintiff's burden of proof, which are the standards a Section 2 vote denial plaintiff must meet, the courts are split and the Supreme Court has yet to issue a controlling opinion on the issue. Many federal courts have held that vote denial plaintiffs "need show only that the challenged action or requirement has a discriminatory effect on members of a protected groups"[104] and do not have to also prove that their vote is diluted.[105] Some courts, however, have held that plaintiffs must go further and prove that the participation barriers impair a minority community's opportunity to elect a larger number of its preferred representatives.[106] Further complicating matters, the Supreme Court—in language that does not have controlling legal affect—suggests that a plaintiff must satisfy both tests.[107]

Election law expert Professor Christopher Elmendorf from University of California, Davis School of Law, points to VRA reauthorization legislative history as evidence that the drafters did not intend to impose "inordinate" burdens on plaintiffs[108] and argues that in vote denial cases, Section 2 provides "a cause of action against electoral arrangements that unnecessarily induce or sustain race-biased voting, regardless of its impact on the minority community's ability to elect a suitable number of its candidates of choice."[109] Based on its recent Section 2 litigation and Attorney General Holder's statements, the DOJ seems to agree with Elmendorf that Section 2 broadly "prohibits voting discrimination based on race, color, or language" and that plaintiffs do not have to jump through *Gingles*-like tests.[110]

The success of Section 2 vote denial litigation will rely greatly upon the standards that the federal courts impose on plaintiffs and the breath of evidence that a court will consider when determining whether a plaintiff has met his or her burden. While many point to Section 2 litigation as the primary vehicle for post-*Shelby County* litigation, Section 3 also provides a cause of action to combat state action that makes it harder for minority populations to exercise their right to vote.

Section 3

While Section 2 litigation has been described as "whack-a-mole" enforcement, Section 3 application has the potential to dramatically combat voter discrimination because it incorporates preclearance elements similar to those that were gutted via *Shelby County*. Unlike Section 5 but similar to Section 2, however, the burden is on individuals, nongovernmental organizations, and the federal government to prove that state action is discriminatory. On top of that, unlike Section 2 that merely requires a plaintiff to prove discriminatory *effect*, Section 3 requires plaintiffs prove discriminatory *intent*, a much more difficult task.[111]

Section 3 of the Voting Rights Act empowers district courts to compel states or political subdivisions to be "bailed in" to a preclearance regime similar to that which Section 5 provided if the court "finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision."[112] Additionally, Section 3 requires the suspension of discriminatory tests and devices[113] and provides for the appointment of federal election examiners.[114] If plaintiffs meet the burden of triggering preclearance, the district court has the discretion to determine how long the jurisdiction will be bailed in and gives the district court jurisdiction to determine "whether future voting changes have a discriminatory purpose and effect."[115] This gives the district court a great deal of power to determine the scope of what state actions a federal court must first review.

Section 3 has been applied sparingly and, as with Section 2, often in the context of vote dilution cases.[116] According to legal scholar Travis Crum:

> *During the VRA's first decade, no jurisdiction was bailed in via the pocket trigger. Since 1975, Section 3 has bailed in two states, six counties, and one city: the State of Arkansas; the State of New Mexico; Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and the city of Chattanooga, Tennessee.*[117]

Legal scholars have also rarely reviewed Section 3,[118] likely because the bail-in remedy was so rarely used in the pre-*Shelby County* era. To prove a Section 3 violation, the court must find that a jurisdiction "*intentionally* denied or abridged a citizen's right to vote on account of race, under either a Fifteenth Amendment ballot access standard or a Fourteenth Amendment vote dilution standard."[119]

Intentional discrimination is often hard to prove because, as Kareem Crayton, a law professor at the University of North Carolina School of Law accurately states, "there isn't usually the kind of traditional 'we don't like those people' kinds of language in the record these days."[120]

Similar to Section 2, Section 3 litigation is relatively undeveloped. In response to post-*Shelby County* state action to impose new voting hurdles, the DOJ has evoked both Sections 2 and 3 in several recent lawsuits that allege discrimination in state voting laws.

Sections 2 and 3 applied post-*Shelby County*

In the wake of *Shelby County*, previously covered states moved quickly to implement voting-related legislation that would previously have been subject to Section 5's preclearance regime. The DOJ moved quickly as well, shifting resources from Section 5 enforcement to the VRA mechanisms that remained at the government's disposal to combat vote denial cases in the states: Sections 2 and 3 federal lawsuits.[121] Within months of the *Shelby County* decision, the DOJ initiated or joined lawsuits in Texas and North Carolina alleging that their new voting laws discriminated against minority populations.[122] The DOJ strategy in both Texas and North Carolina is similar; the briefings argue that the states' new voting-related laws were passed with discriminatory intent and will have discriminatory affect and ask for relief under both Section 2 and Section 3 of the VRA.[123]

In Texas, the DOJ joined two suits—both a vote denial case and a vote dilution/redistricting case—that individual citizens and nongovernmental organizations originally brought against the State of Texas.[124] In the Southern District of Texas, the DOJ alleges that the voter ID law SB 14 was motivated by discriminatory intent and that its implementation will have a discriminatory result.[125] The federal government requests that the court find that the law violates both Sections 2 and 3 of the VRA, enjoin Texas official from implementing the law, appoint federal observers, and bail-in Texas to preclearance requirements similar to those that it was subject to prior to *Shelby County*.[126]

In the Western District of Texas, the DOJ brought a vote dilution case, alleging that both the state of Texas's 2011 congressional delegation and State House redistricting plans violate VRA Sections 2 and 3 because they were created with discriminatory intent and would have discriminatory effects.[127] Similar to the

Southern District case, the DOJ asks to bail-in the state of Texas into the Section 3 preclearance regime and for the district court to retain jurisdiction over the action for a period of 10 years.[128]

In North Carolina, the DOJ filed suit against the state alleging that North Carolina's HB 589 was motivated by a discriminatory purpose and that its implementation would have discriminatory results.[129] Claiming Section 2 and 3 violations, the DOJ requests that the court enjoin state officials from enforcing specific provisions of HB 589, authorize the appointment of federal observers, and bail-in North Carolina into the preclearance regime.[130]

In all of the actions, the DOJ relies heavily on U.S. Census and American Community Survey demographic statistics to show that minority populations were more likely than whites in their respective states to live in poverty, earn less money, be unemployed, and lack access to transportation.[131]

In its attempt to prove Section 2 violations, the DOJ briefs argue that the laws had discriminatory effects on minority populations because the burdens associated with obtaining ID will weigh most heavily on the poor and racial minorities who are disproportionately more likely to live in poverty.[132] The DOJ points to the confluence of two factors: minority voters are more likely to lack access to the forms of identification that would be required under the new law than whites; and the barriers to obtain such forms of identification—including processing costs, proximity to centers where the documents may be obtained, and access to transportation—affect minority populations more than whites.[133]

In its North Carolina brief, the DOJ pointed to additional effects-based evidence: the fact that HB 589's cuts to same-day registration, out-of-precinct provisional ballots, and early voting were more likely to affect African Americans than whites.[134]

In its attempts to trigger Section 3 preclearance, the DOJ argued that discriminatory intent was behind the laws by detailing both Texas and North Carolina's histories of racial discrimination, evidence of racially polarized voting, and the need for federal intervention in both states to combat voting-related discrimination.[135]

The DOJ also alleged intentional discrimination by arguing that the North Carolina and Texas legislatures knew—or should have known—that the laws they were considering would disproportionately affect minority populations but took

no steps or ignored attempts to mitigate the negative effects and implemented unordinary procedural departures to limit debate, analysis, public input, and minority participation.[136] It also argued that the many policy reasons to enact the changes were "tenuous" and unsupported in the legislative record, implying that the legitimate governmental interest was weak.[137] In the Texas redistricting case, the DOJ noted that despite the fact that 89.2 percent of Texas's population growth was attributable to the state's minority population, the Texas congressional plan "did not create any additional congressional districts in which minority voters would have the opportunity to elect candidates of choice."[138]

Because Section 2 and 3 vote denial case law is relatively undeveloped, we don't know if the DOJ will enjoy the same level of success in their Texas and North Carolina litigation as they did under the Section 5 preclearance regime. Indeed, many have argued that Section 2 and 3 litigation cannot adequately replace the power of Section 5.

Are Sections 2 and 3 enough?

In 1965, when Congress first passed the VRA, it "found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."[139] Congress therefore "decide[d] to shift the advantage of time and inertia from the perpetrators of the evil to its victims" and implement the protective Section 5 preclearance regime.[140]

Section 5 was the most frequently utilized section of the VRA before *Shelby County* because it was cost effective and put the burden on states with a history of discrimination to provide notice when they wanted to make changes to their voting laws and disclose the effects that voting law changes could have on minority populations.

Without Section 5, the burden of holding states and jurisdictions responsible for potentially discriminatory voting laws and actions falls to individual citizens and nongovernmental organizations. This also shifts the extraordinarily expensive litigation costs and time consumption to these private parties. As University of Baltimore Law School Professor Gilda Daniels notes, "there are not enough lawyers in the country to replace Section 5" with Sections 2 or 3.[141] Under Section 5, officials knew that their actions would be scrutinized before they could go into effect. Now state officials are more likely to roll the dice and see whether they can get away with making dramatic voting-related law changes. Because the minority populations that are the subject of discriminatory laws are disproportionately poor, experts worry that they are less likely to have the financial resources to mount expensive litigation battles and be able to combat the actions taken by those in power.[142]

Section 5 also contained a regulatory mechanism that required jurisdictions to notify the federal government when voting-related changes are going to occur in their state and to provide data that allowed the government and nongovernmental

organizations to evaluate the potential effects of the planned changes.[143] George Washington University Law School Professor Spencer Overton believes that this notice/disclosure function served several purposes: alerting interested parties that a change is going to occur; discouraging discrimination by shining "sunlight" on potentially bad acts; and requiring that state and local governments impact statements similar to what are required in regulated fields such as securities, antitrust, campaign finance, and the environment.[144]

Sections 2 and 3 pose evidentiary problems because the burden shifted from states having to prove that their state action is *not* discriminatory to plaintiffs having to prove that the state action *is* discriminatory. From attorney hours, to research costs, to expert analysis, proving discrimination is extremely expensive and time consuming, and ironically, plaintiffs often have to rely on data provided by the offender state itself.[145] Because this type of litigation is so specialized, Thomas Saenz, president and general counsel of the Mexican American Legal Defense and Educational Fund, believes that a time-consuming effort must be made "to build up expertise in both the attorney pool and among experts" if more Section 2 and 3 litigation will be successful.[146]

While the remaining bail-in procedure that Section 3 provides is similar to Section 5, the procedural hurdles to evoke Section 3's preclearance regime are very high. As discussed above, a plaintiff must make a showing of intentional discrimination, a significant burden in a world when politicians are unlikely to telegraph the potentially discriminatory motivation behind their policies. University of California, Irvine, Law Professor Rick Hasen, author of *The Voting Wars*, posed the "Bull Connor is Dead" problem: in an era in which the most blatantly racist officials in the South and elsewhere have died or left office … what kind of evidence would it take to convince a conservative Supreme Court extremely protective of states' rights and skeptical of race-based solutions" that the intentional discrimination standard was met?[147]

While Section 2 and 3 litigation has increased post-*Shelby County*, it is clear that it will be unable to replace the strength of Section 5 in holding jurisdictions accountable for laws that may discriminate against minority populations. The recent bipartisan proposal to legislatively revive Section 5 of the VRA[148] is a positive sign that a legislative fix is possible. Where we go from here, however, will depend greatly on the willingness of both Democrats and Republicans to find common ground on measures that protect the rights of minority voters and shift the burden back to the states to prove that changes to their laws do not discriminate.

Where do we go from here?

From 1965 up until its most recent congressional reauthorization in 2006, the Voting Rights Act has long received strong bipartisan support. Even in our current era of partisan gridlock, the House and Senate began holding hearings on how to restore the VRA less than one month after the *Shelby County* decision. Influential Republicans, including Reps. James Sensenbrenner (WI) and Eric Cantor (VA) have indicated that they believe a congressional fix of the *Shelby County* mess is possible.[149] Indeed, a bipartisan bill to rewrite the preclearance formula that gave Section 5 its teeth and otherwise strengthen the VRA was introduced less than seven months after the *Shelby County* decision came down,[150] an impressive turnaround considering Congress' traditionally sluggish pace. While Congress must act thoughtfully, it is essential that legislation updating the Voting Rights Act be enacted quickly to ensure that minority voters are protected. The process should be bipartisan, consensus driven, and a model for how successful legislation is developed.

It is clear that although Sections 2 and 3 are being used to protect against voting discrimination, the VRA must be strengthened beyond what currently exists and aim to reinstate the positive protections that Section 5 provided prior to the *Shelby County* ruling. While policymakers should not shy away from passing comprehensive legislation that revives the Section 4(b) formula that fueled Section 5's powerful preclearance regime, they should also consider other fixes that replicate the individual protections and safeguards that made the Voting Rights Act the most successful civil rights law in history.

Congress should seek to do the following:

- Reinstate a robust preclearance regime by satisfying *Shelby County's* standards legislatively and reducing Section 3's burden of proof.

- Implement robust state-based disclosure and data-collection standards and make it easier to implement federal election observers.

- Discourage state discrimination by making it easier for citizens to challenge discriminatory action.

- Utilize the Elections Clause of the Constitution to enact legislation that codifies high standards for federal elections and ensures that eligible voters are unhampered by local attempts to restrict voting.

Reinstate a robust preclearance regime

The Court's shallow discussion about how to satisfy *Shelby County's* new "current need/equal sovereignty" principle does not provide much guidance for how to craft a legislative fix that would reinstate Section 5's preclearance formula and withstand future judicial scrutiny. While there is no distinct roadmap for how Congress should craft a new preclearance formula, lawmakers should seek to find ways to shift the burden back to states and localities to show that their voting laws do not discriminate against minority populations.

Because the Court in *Shelby* argued that subjecting jurisdictions "with a recent history of voting tests and low voter registration and turnout" to preclearance was not sufficiently tied to the federal intrusion,[151] drafters considering drafting a new preclearance formula must identify new factors to consider. To meet the Court's ambiguous standard these factors should be flexible and be able to adjust to new data and changing demographics. Some have argued that the new formula should automatically include any jurisdictions with recent voting rights violations and provide a mechanism to add additional jurisdictions that commit violations in the future.[152] Social scientists have reasoned that factors such as "racial stereotyping, racially polarized voting, and minority population size" can be used to produce a coverage formula that identifies states and political subdivisions that should be subject to preclearance.[153]

Others have suggested that Congress could avoid the "equal sovereignty" issue all together by subjecting every state to preclearance.[154] While this tactic may avoid treating one state differently than another, it would beg the question about whether the government has a strong enough interest to justify such broad inclusion.

In addition to attempting to rewrite the Section 4(b) formula, Congress should make Section 3's preclearance bail-in structure easier to apply by lowering the legal standard from a showing of intentional discrimination to a showing of

discriminatory effect, similar to the burden of proof in Section 2. Section 3 expert Crum argues that a Section 3 effects test rather than intent test "would significantly lessen the burden on the DOJ and civil rights groups in [Section 3 suits] and would likely result in many more jurisdictions covered."[155] Others argue that Section 3's bail in-provision should be triggered by jurisdictions that violate other federal statutes that protect the right to vote such as the Help America Vote Act, or HAVA, and the National Voter Registration Act.[156]

The initial details about the proposed VRA legislative fix seem promising on both the Section 5 formula and strengthening Section 3 fronts. The proposed coverage formula would require Section 5 preclearance based on a strike system. According to Ari Berman from *The Nation*, "[s]tates with five violations of federal law to their voting changes over the past fifteen years will have to submit future election changes for federal approval."[157] While this would not include many states that were subject to Section 5 preclearance pre-*Shelby County*, it is a formula that could expand preclearance to new states that violate existing voting laws. By making Section 5 preclearance dependent on the strikes a jurisdiction receives, the proposed formula also increases the significance of Section 2 and 3 because violations found under these sections would be considered strikes that lead to the imposition of preclearance.

The proposal also makes Section 3 bail-in suits easier to win, lowering the burden from requiring a finding of intentional discrimination to that of a finding of discriminatory effects, mimicking Section 2's burden. Again according to Berman, "any violation of the VRA or federal voting rights law—whether intentional or not—can be grounds for a bail-in, which will make it far easier to cover new states."[158]

Implement robust state-based disclosure and data-collection standards

As discussed above, simply knowing about states' changes to voting-related laws and requiring that states consider the impact that those changes may have on the electorate serves as a powerful check on potential discrimination.

Conversely, without Section 5, the burden falls to plaintiffs to prove that a state action is undertaken with discriminatory intent or will have a discriminatory effect on minority populations. Plaintiffs need good evidence to prove their

Section 2 and 4 cases, making the quality of, and access to, voting-related data that much more important.

Without Section 5's notice and disclosure requirements, the disclosure of voting-related data to the federal government is limited to that delegated to the Election Assistance Commission, or EAC, by HAVA. The data that the EAC collects, however, is limited to data points on metrics such as voter registration levels, absentee and provisional ballot counts, and voting equipment details.[159] Further, the extent and quality of the data collected often varies from state to state and county to county, providing uneven comparisons.[160] This makes it difficult for plaintiffs to bring strong evidence-based Section 2 and 3 challenges.

Daniel Tokaji, Ohio State University Moritz College of Law professor, is an advocate of requiring states to inform the federal government when they plan to change election law and submit analyses of the impact those changes would have on the electorate.[161] George Washington University's Professor Overton goes further and advocates for modern methods of state disclosure via online portals that are open to public review.[162] Overton argues that the increased public transparency would put pressure on the states to comply with the VRA because they know their actions would be scrutinized and "would help federal officials and voting rights groups detect trends, devise non-litigation solutions where appropriate, and concentrate finite litigation resources on the most significant problems."[163]

Congress should consider disclosure and notice provisions that can be included in legislation and require that states submit county-level data that goes above and beyond HAVA's current disclosure requirements. Data should be readily available, submitted regularly, and provide insight into how well the states are administering elections and whether state laws and actions have a discriminatory effect on minority group members. Further, Congress should consider adding methods to get additional data about election law practices by making it easier for courts to order federal election observers when federal voting violations are alleged.

Again, the proposed legislative VRA fix is promising. According to Berman, the legislation requires jurisdictions nationwide to "provide notice in the local media and online of any election procedures related to redistricting changes within 180 days of a federal election and the moving of a polling place," as well as "reaffirms that the attorney general can send federal observers to monitor elections in states subject to Section 4 and expands the AG's authority to send observers to jurisdictions with a history of discriminating against language minority groups."[164]

Discourage state discrimination

In addition to strengthening the preclearance regime, Congress should explore procedural ways to exert greater pressure on states not discriminate. One approach is to lower the barriers for citizens and nongovernmental organizations to sue states over laws that have discriminatory effects.

Many criticize Sections 2 and 3 because they are reactive rather than proactive, meaning that often the damage has been already done to a group of voters by a state that cannot be remedied after a voting-related deadline, or an election, has passed. The ability to remedy discriminatory state action before an election was further limited when *Shelby* County gutted Section 5's preclearance regime.

The VRA itself and other laws of civil procedure largely govern the procedures that allow individuals and nongovernmental organizations to bring Section 2 and 3 litigation and the flexibility of courts to take action when a discriminatory action is alleged. A preliminary injunction is a procedural legal tool that is sought to stop a party from taking action that could result in irreparable damage despite the fact that the underlying lawsuit has not been fully litigated. Because preliminary injunctions are issued before the parties have had the opportunity to make complete presentations of evidence, they are typically hard to get. In the context of voting rights, proponents often ask judges to stop the implementation of a particular state action that could infringe on a voter's ability to cast his or her vote or extend opportunities for citizens to participate in the election process.

Overton argues that Congress should update the voting rights litigation process, including easing the standards to obtain a court orders to stop state discriminatory state action in the context of an election.[165] Penda Hair, a co-director of the Advancement Project, encourages judges to exercise their discretion to issue preliminary injunctions as a substitute for the DOJ's Section 5 preclearance strategy "and not wait and see whether voters are turned away."[166]

A relatively minor procedural fix—such as lowering the standards for plaintiffs to receive and giving judges more discretion to issue—preliminary injunctions could go a long way to ensure that Section 2 and 3 litigation can protect against discrimination in a timely manner before the damage is done.

The proposed legislation addresses this issue as well. According to Berman, the VRA fix would include a provision that makes it easier for plaintiffs to seek a preliminary injunction to stop a potentially discriminatory law from going into effect. "Plaintiffs will now only have to show that the hardship to them outweighs the hardship to the state if a law is blocked in court pending a full trial," which lowers the current standard that plaintiffs must satisfy.

Use the Elections Clause

The VRA is used to combat discrimination against minority populations because it is tied to the Reconstruction Amendments that give Congress the power to enforce such protections via appropriate legislation. Article I, Section 4 of the Constitution, however, contains a clause that gives Congress the power to regulate the "times, places, and manner" of federal elections, regardless of whether the regulation is used to combat discrimination or not. The Court has interpreted the Election Clause's enumerated delegation of power broadly, writing that Congress's power under it is "paramount, and may be exercised at any time, and to any extent which [Congress] deems expedient."[167]

Jesse Wegman, *New York Times* editorial board member, argues that, in the light of *Shelby County*, the Elections Clause could play an important role in the future of voting-related legislation and give the federal government more flexibility to regulate many negative effects of voting law. He writes:

Strong federal laws enacted under the clause could help ensure voting fairness to all voters, especially when a state law appears neutral but has serious partisan or racially discriminatory effects. For instance, a state's voter ID law might put up hurdles for poor or young voters, who may be disproportionately minority and Democratic, or for elderly voters, who lean Republican. The elections clause allows Congress to set rules only for federal elections, but those laws almost always guide state election practices, too. For instance, congressional legislation could pre-empt voter ID laws like Arizona's or changes to early-voting laws like those attempted in Florida last year.[168]

Wegman, Tokaji, and others point to the fact that the scope of the Elections Clause is expansive and could be used by Congress to set federal standards that address issues that make it harder for citizens to vote.[169] Given that Congress could point to a rational relationship between legislation and regulating the time,

place, and manner of federal elections, the options are virtually unlimited—from mandating procedures that cut down on voting-line times, to expanding voter registration, to mandating the number of early voting days, or creating a notice and disclosure program as discussed.

NYU School of Law Professor Samuel Issacharoff argues that Elections Clause-tied legislation is superior to that tied to the Reconstruction Amendments because they are not restricted to combating racial discrimination—although that could certainly be an objective. Further, because the federal government has established the standards rather than the states, preclearance would be unnecessary as any state deviation from federal standards would be subject to challenge and potential court injunction. If the federal government were to impose a disclosure and report system, the DOJ, individuals, and nongovernmental organizations would have easy access to determine whether states and localities were successfully following the federal guidelines, "not only easing the burden on private enforcement but create a corresponding deterrent effect on wayward state officials."[170]

Legislative action under the Elections Clause would enter new territory that is not currently being considered by those currently offering legislative fixes—empowered by the Reconstruction Amendments—to the VRA. Fixing the VRA seems like a good starting point and should be a priority. Creating national standards, independent of protecting against racial discrimination, may, however, be an interesting alternative after the push for a VRA fix is over.

Conclusion

The Voting Rights Act of 1965 has played a pivotal role in protecting against state and local actions that discriminate against minority voters. The Supreme Court ruling in *Shelby County*, however, turned the implementation of the VRA on its head. While there are more questions than answers when it comes to how the VRA will be used post-*Shelby County*, legal action taken by the DOJ and advocacy groups using still-intact Sections 2 and 3 is a positive sign, yet such action cannot match the power of a fully functioning Section 5. Therefore, the bipartisan attempts to revive Section 5 to protect against discriminatory voting laws are encouraging, and Democrats and Republicans should embrace and pass them with urgency.

Until Section 5 is fixed, to protect against restrictive state action that disproportionately affects minority populations, we must aggressively play the cards that we currently have. Instead of the burden being placed on the state to prove that voting-related actions do not discriminate, the burden is on the DOJ and third parties to prove that state action discriminates. The rulings our federal courts make in current cases will largely shape the strength and scope of Sections 2 and 3.

Because the *Shelby County* ruling also gutted the notice and disclosure requirements of covered jurisdictions, data gathering and research to uncover evidence of discrimination is vital. Therefore, third parties and the government must devote resources to analyzing available data sources and diligently uncovering unreported abuses. The Center for American Progress Action Fund has started to do so with a county-by-county analysis of election administration using Election Assistance Commission data.[171] The Pew Charitable Trusts performed a similar state-level analysis.[172] Current Section 2 and 3 litigants have pointed to state-based demographic data indicating that voting restrictions are most likely to affect minority populations because these populations are more likely to have limited access to transportation and resources to meet the harsh new standards being imposed. While analysis of existing data is a good start, it simply is not enough. States and

localities must know that discriminatory voting laws will not be tolerated. New data must be sought from states and localities, and state advocates must be on the lookout for discriminatory action and have the resources to fight against it.

Perhaps the most important lesson to be learned, however, is how effective Section 5 was and how hard it is to replace. Leaders of both parties should rise above the extreme partisanship that we have come to know in Washington and come up with a legislative solution that fixes Section 4(b), puts the burden back on offender states and jurisdictions, and gives the Department of Justice the tools it needs to effectively combat voting discrimination that still exists today. While advocates from both the left and the right will likely argue that the proposed legislation is not perfect, it is a strong effort to help combat discrimination in our country's voting laws.

Section 5 existed to protect against state and local laws that had a discriminatory effect on the right of minority populations to exercise their right to vote. This was not a partisan issue for decades, and it should not be now.

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Field's legal experience includes nearly three years of courtroom work as a public defender in Washington State and appellate practice at the Innocence Project Northwest Clinic. Field received his bachelor's degree in political communication from George Washington University and his law degree from the University of Washington School of Law.

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