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Section 5 of the Voting Rights Act and Its Place in "Post-Racial" America

Enbar Toledano

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SECTION 5 OF THE VOTING RIGHTS ACT AND ITS PLACE IN “POST-RACIAL” AMERICA

ABSTRACT

The Fifteenth Amendment purported to withdraw race and color from the calculus of suffrage. Instead, it gave rise to an era of creative exclusion in which Southern states erected one barrier after another and Congress floundered in its attempts to secure the black vote it had promised. After ninety-five years, progress at last seemed possible with the introduction of the Voting Rights Act of 1965 (VRA), an echo of the Fifteenth Amendment fitted with shiny, new teeth. Section 5 of the VRA reversed the inertia of discrimination by requiring states with a demonstrated history of employing disfranchising voting practices to obtain federal preclearance before implementing any changes to their voting laws.

The VRA has achieved tremendous success since its enactment, due in large part to the powers embedded in section 5. That provision, however, was a temporary measure, designed to remain in place only as long as it was needed. In light of modern developments in black suffrage and political representation, and with the election of President Obama symbolizing to many a post-racial America, increasingly more scholars and politicians argue that section 5 has run its course. This Comment disagrees and suggests that section 5's language and legislative history confirm it was intended to secure not only access to the vote for black Americans but also access to a meaningful vote for all minorities. In this respect, section 5 still has a significant role to play for the country's growing numbers of nonblack minorities and naturalized citizens.

INTRODUCTION	391
I. THE VOTING RIGHTS ACT OF 1965	392
A. <i>The VRA's Legislative History</i>	395
B. <i>The VRA's Judicial History</i>	397
1. <i>Scope of Section 5</i>	397
2. <i>"Retgression" and the Precise Meaning of Discriminatory "Purpose" and "Effect"</i>	399
3. <i>The Right to Vote Encompasses More than Access</i>	400
4. <i>Judicial Standards of Review: What Level of Scrutiny Applies to Preclearance Decisions?</i>	401
C. <i>The Voices of Dissension: Thernstrom and Issacharoff</i>	404
II. HAS SECTION 5 RUN ITS COURSE?	407
A. <i>The Nonblack Minority</i>	408
B. <i>The New Dilemma</i>	410
C. <i>Modern Disfranchisement in Arizona</i>	413
D. <i>Modern Disfranchisement in Georgia</i>	417
III. A NEW PROBLEM CALLS FOR A NEW SOLUTION	421
A. <i>Updating Section 5 Preclearance</i>	423
B. <i>Updating Section 5 Through Bailout</i>	426
C. <i>Updating Section 5 Through Bail-In</i>	430
CONCLUSION	432

INTRODUCTION

[T]he freedmen were not really free in 1865, nor are most of their descendants really free in 1965. Slavery was but one aspect of a race and color problem that is still far from solution here, or anywhere. In America particularly, the grapes of wrath have not yet yielded all their bitter vintage.

—Samuel Eliot Morison¹

Nearly a century after its ratification, the Fifteenth Amendment faced continued resistance from Southern states.² Poll taxes, literacy tests, and similar devices dotted the Southern political landscape well into the twentieth century, discouraging and, in some cases, precluding black voter registration and participation.³ Congress reacted to this crisis by enacting the Voting Rights Act of 1965⁴ (VRA). In addition to the VRA's general prohibition on disfranchising practices based on race or color,⁵ section 4 of the Act provided a formula to identify the major players in the persisting antisuffrage movement,⁶ and section 5 suspended those states' autonomy in the election law realm.⁷ A temporary provision subject to periodic renewal, section 5 required covered states to obtain federal preclearance for all proposed changes to voting laws.⁸

Against the backdrop of Obama's presidency and undeniable improvements in black voters' political status, many contemporary scholars and politicians argue that section 5 has run its course.⁹ Their narrow construction of the VRA's purpose, however, fails to consider the needs of nonblack minorities, whose already-tenuous political standing is further threatened by nativist and

¹ SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 524 (1965).

² Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 *GEO. J.L. & PUB. POL'Y* 41, 46–47 (2007) (suggesting that, by 1965, a number of Southern states had amassed “egregious histories of intentional Fifteenth Amendment violations”).

³ See *REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1959*, at 27–68 (1959) [hereinafter *CIVIL RIGHTS REPORT*]. Among the factors identified as hindrances to black enfranchisement were “complex voter-qualification laws, including tests of literacy, education, and ‘interpretation,’ . . . used arbitrarily to deny the right to vote to citizens of the United States.” *Id.* at 143.

⁴ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973aa-6 (2006)).

⁵ See *id.* § 2 (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”).

⁶ *Id.* § 4.

⁷ See *id.* § 5.

⁸ See *id.*

⁹ See discussion *infra* Part I.C.

partisan policy making.¹⁰ This Comment will demonstrate the significant role section 5 still has to play for those growing minority populations and propose modifications to the VRA that would better enable section 5 to identify and address modern forms of disfranchisement.

Part I of this Comment will trace the evolution of section 5, including a summary of its statutory and legislative history, judicial interpretations, and modern criticisms of its continued application. Part II will highlight the changing makeup of America's minority and immigrant populations and illustrate the types of discrimination they face today. Finally, Part III will suggest modifying three provisions of the VRA to reorient section 5 toward these new sources of disfranchisement.

I. THE VOTING RIGHTS ACT OF 1965

In 1959, the United States Commission on Civil Rights estimated that only 25% of eligible black southerners were registered to vote, as compared to 60% of the eligible white population.¹¹ Far from oblivious to the problem, Congress enacted the Civil Rights Acts of 1957,¹² 1960,¹³ and 1964,¹⁴ which authorized the Attorney General to prosecute cases of disfranchisement unilaterally.¹⁵ Rather than fortify the civil rights cause as intended, however, the acts gave rise to a cat-and-mouse game in which states could circumvent policy-specific injunctions by adopting endless variations on the same disfranchising practices.¹⁶ Because cessation of those variations would require new trials, this back-and-forth became a vicious cycle.¹⁷ As a result, aside from protests and marches to demonstrate their growing frustrations, black southerners were

¹⁰ See discussion *infra* Part II.B–D.

¹¹ CIVIL RIGHTS REPORT, *supra* note 3, at 40–41.

¹² Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 42 U.S.C.).

¹³ Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 42 U.S.C. §§ 1971, 1974–1974e (2006)).

¹⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

¹⁵ See 42 U.S.C. § 1971(c).

¹⁶ See RICHARD LAYMAN, AMERICAN DECADES 1960–1969, at 291 (1995) (“Preparation for a trial often required thousands of man-hours to comb voter registration records. In addition, even when the cases were carried to conclusion and the state lost, that did not necessarily solve the problem. Some states just resorted to new tests or different methods of racial discrimination not covered by the court decree, which was limited to the facts of the case before it.”).

¹⁷ See *id.*

forced to rely on inefficient—and ultimately ineffective—case-by-case challenges to these legal obstacles.¹⁸

In March 1965, civil rights workers gathered in Selma, Alabama, to rally in favor of stricter federal voting laws.¹⁹ Their efforts were met with extreme violence²⁰ in a display that attracted national attention and became a catalyst for reform.²¹ Quickly, President Johnson initiated hearings on the bill that would become the Voting Rights Act of 1965.²²

The VRA provided a federal framework for addressing and, in certain covered jurisdictions, preventing the disfranchisement of minorities.²³ Most instrumental in establishing and attaining these goals were sections 2, 4, and 5. Section 2 laid the foundation for the VRA, echoing the language of the Fifteenth Amendment in prohibiting the use of any “qualification or prerequisite . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”²⁴ Elaborating on section 2’s “qualification or prerequisite” language, section 4 prohibited the use of any “test or device” to deny a United States citizen the right to vote.²⁵ Section 4 also prescribed a two-part formula to determine which states would be subject to section 5 of the VRA. Covered jurisdictions were those in which (1) the Attorney General determined a test or device had been used to disfranchise certain voters as of November 1, 1964, and (2) less than 50% of the voting-age population had been registered or had participated in the 1964 presidential election.²⁶

¹⁸ See *South Carolina v. Katzenbach*, 383 U.S. 301, 313–15, 328 (1966) (finding the civil rights acts “ineffective” and the case-by-case litigation “inadequate” due to the “onerous” nature of trial preparation, local officials’ tendency to defy court orders, and states’ “merely switch[ing] to discriminatory devices not covered by the federal decrees”); LAYMAN, *supra* note 16, at 291.

¹⁹ See Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1411 (1995).

²⁰ See DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 75–76 (1978); Krotoszynski, *supra* note 19, at 1417 (“Using tactics ‘similar to those recommended for use by the United States Army to quell armed rioters in occupied countries,’ the state troopers attacked the marchers with clubs, tear gas, nausea gas, and canisters of smoke.”).

²¹ See Krotoszynski, *supra* note 19, at 1412 (“The social significance of the Selma march is well documented. By focusing national attention on the disenfranchisement of Southern blacks, it prompted Congress to pass one of the most sweeping civil rights laws in history: the Voting Rights Act of 1965.” (footnote omitted)).

²² See GARROW, *supra* note 20, at 93–94.

²³ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973aa-6 (2006)).

²⁴ *Id.* § 2.

²⁵ See *id.* § 4.

²⁶ See *id.* Congress had certain states in mind when drafting section 4 and worked backward to devise a coverage formula that would implicate specifically “Alabama, Georgia, Louisiana, Mississippi, South

Section 5 of the VRA provided the Act's teeth and is the subject of this Comment. A temporary provision originally set to expire in 1970,²⁷ section 5 introduced a federal preclearance requirement²⁸—a relatively aggressive alternative to the case-by-case challenges of the civil rights acts.²⁹ Under this section, jurisdictions covered by the section 4 formula were required to obtain either administrative preclearance from the Attorney General or judicial preclearance from the United States District Court for the District of Columbia before implementing “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964.”³⁰ Preclearance required a determination that the proposed change did not have the purpose or effect of “denying or abridging the right to vote on account of race or color.”³¹ In effect, section 5 froze voting procedures in covered states as of November 1, 1964; more significantly, it shifted the Attorney General's burden under the civil rights acts—to identify and challenge each disfranchising practice—to covered states, which then had to obtain approval before changing any voting-related procedures.

Although section 5 serves much the same function today as it did in 1965, it has undergone a substantial process of refinement through legislative amendments and judicial interpretation. The following sections of this Part will trace section 5's legislative and judicial history from its original enactment through its most recent renewal in 2006. The final section will address scholarly opposition to section 5's continued application in what is perceived as post-racial America.

Carolina, Virginia, and most counties in North Carolina.” See Thernstrom, *supra* note 2, at 49. For a discussion of amendments to section 4's coverage formula, see *infra* Part I.A.

²⁷ See BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 19 (1992).

²⁸ See Voting Rights Act of 1965 § 5.

²⁹ See LAYMAN, *supra* note 16, at 291.

³⁰ Voting Rights Act of 1965 § 5. Section 4 did provide states with a bailout provision, under which states covered by the formula could avoid the preclearance requirements if they could prove that no “test or device ha[d] been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color.” See *id.* § 4(a).

³¹ *Id.* § 5.

A. *The VRA's Legislative History*

Perhaps unsurprisingly, covered states were slow to adhere to the VRA's preclearance requirements.³² In fact, five of the seven states originally covered by the VRA brought legal challenges against it.³³ As a result—and over the Nixon Administration's objections³⁴—Congress renewed and expanded section 5 in 1970 for an additional five years.³⁵ Added provisions included an updated coverage formula, with November 1968 as the new date from which to examine minority election registration and participation,³⁶ heightened bailout requirements,³⁷ a five-year renewal of section 4's ban on the use of literacy tests,³⁸ and a prohibition against states imposing residency requirements beyond thirty days for federal elections.³⁹

Congress renewed section 5 again in 1975, this time for a period of seven years.⁴⁰ While the 1970 renewals were passed somewhat reluctantly,⁴¹ both political parties generally supported the 1975 renewals, in part because of increased attention from civil rights groups.⁴² The 1975 amendments evidenced the first consideration of language-minority groups like Asian-Americans and Native Americans,⁴³ and significant lobbying by Chicano and Hispanic populations.⁴⁴ These groups were found to have been “excluded from participating in the electoral process.”⁴⁵ Accordingly, Congress used the 1975 amendments to expand protection to language minorities (despite initial

³² See U.S. COMM'N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT . . . THE FIRST MONTHS* 23–39 (1965).

³³ See *id.* at 25.

³⁴ LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* 132 (2003) (“The Nixon administration advocated the outright repeal of Section 5 in 1970 . . .”).

³⁵ See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1973–1973bb-2 (2006)).

³⁶ See *id.* sec. 4.

³⁷ See *id.*; see also *supra* note 30 for a discussion of the previous bailout requirements.

³⁸ See Voting Rights Act Amendments of 1970 sec. 3. The Supreme Court upheld the constitutionality of the 1970 amendments' literacy-test ban in *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (plurality opinion). The 1970 amendments also lowered the voting age to eighteen for all elections. See Voting Rights Act Amendments of 1970 sec. 6, § 301. The Supreme Court held that lowering the voting age was beyond the scope of Congress's power as it related to state and local elections. See *Mitchell*, 400 U.S. at 134–35 (plurality opinion).

³⁹ Voting Rights Act Amendments of 1970 sec. 6, § 202.

⁴⁰ Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 42 U.S.C. §§ 1973–1973aa-5).

⁴¹ GROFMAN ET AL., *supra* note 27, at 19.

⁴² See *id.* at 20.

⁴³ Voting Rights Act Amendments of 1975 sec. 301, § 203.

⁴⁴ See *id.*

⁴⁵ *Id.*

opposition from some black civil rights groups who feared dilution of the VRA's purpose).⁴⁶ A new provision broadened the definition of "test or device" to include the use of English-only election materials in jurisdictions where at least 5% of the population belonged to a single language minority.⁴⁷ Thus, ten years after its original implementation, section 5 was not only upheld but was in fact expanded in response to the nation's changing racial and ethnic makeup. The 1975 amendments made clear that the VRA was intended to correct more than the immediate injustices of the Jim Crow South.⁴⁸

Section 5's 1982 and 2006 renewals were subject to considerable resistance from southerners and conservatives who felt that the paternalistic provision had served its purpose.⁴⁹ Indeed, the VRA had exceeded expectations in its first sixteen years. Just two years after its passage, progress was undeniable⁵⁰: black registration rates in Alabama had risen from 19% to 52%, while rates in Mississippi had jumped from 7% to 60%;⁵¹ white voters' advantage over black voters—estimated at almost four to one in 1964—had shrunk by more than half;⁵² and in the states originally covered by section 4, among which not one of the eighty-nine majority-black counties had a majority-black electorate prior to 1965, nearly 40% of majority-black counties had reached majority-black electorates by 1967 or 1968.⁵³ By 1990, 59% of eligible black Americans were registered to vote (as compared to 64% of eligible white Americans), and Virginia had elected the nation's first black governor.⁵⁴ Despite these advances

⁴⁶ GROFMAN ET AL., *supra* note 27, at 20.

⁴⁷ Voting Rights Act Amendments of 1975 sec. 301, § 203 (internal quotation marks omitted). Covered language-minority groups were "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." *Id.* sec. 403, § 207. This provision extended VRA coverage to all of Arizona, Alaska, and Texas, and to parts of Colorado, South Dakota, California, North Carolina, and Florida. GROFMAN ET AL., *supra* note 41, at 21.

⁴⁸ In the wake of *Oregon v. Mitchell's* upholding the constitutionality of prohibiting literacy tests, Congress also made the ban on literacy tests permanent. Voting Rights Act Amendments of 1975 § 102.

⁴⁹ See ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 105–15 (1987) (discussing political resistance to the 1982 VRA renewal); James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007) (discussing political resistance to the 2006 VRA renewal).

⁵⁰ See James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 351, 351 (Chandler Davidson & Bernard Grofman eds., 1994) ("Most observers agree that [the VRA's] purpose was accomplished within a remarkably short period.").

⁵¹ J. MORGAN KOUSSER, *The Voting Rights Act and the Two Reconstructions*, in COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 12, 55 (1999).

⁵² Alt, *supra* note 50, at 366.

⁵³ *Id.* at 368.

⁵⁴ KOUSSER, *supra* note 51, at 13.

in black suffrage, however, Congress found sufficient evidence among minorities generally to warrant continued commitment to section 5 and renewed it for twenty-five years in both 1982⁵⁵ and 2006.⁵⁶

B. *The VRA's Judicial History*

Congressional amendments and renewals significantly reshaped the VRA, but they constitute only one face of its evolution. A concurrent process of refinement carried the VRA forward not from the nation's capitol but from its courthouses. Almost immediately following the VRA's passage in 1965, the Supreme Court was called upon to determine the Act's constitutionality. In *South Carolina v. Katzenbach*, the Court upheld the VRA's coverage formula, prohibition on literacy tests, and preclearance requirements as valid exercises of Congress's power to enforce the Fifteenth Amendment.⁵⁷ With the VRA's legitimacy established, questions arose in the subsequent decades about section 5's scope, the precise meaning of discriminatory "purpose" and "effect," what was encompassed in the promise to a "right to vote," and the level of scrutiny to be applied to judicial preclearance determinations. The following sections discuss each of these issues in turn.

1. *Scope of Section 5*

The Supreme Court first considered the scope of section 5 in its 1969 decision, *Allen v. State Board of Elections*.⁵⁸ The case consolidated four cases arising from various statutory amendments in Mississippi and Virginia, both of which were subject to section 5.⁵⁹ Without first obtaining preclearance, the jurisdictions in question adopted regulations (1) enforcing at-large voting for certain positions previously elected by district, (2) eliminating the elective nature of other positions in favor of appointment, (3) altering candidacy

⁵⁵ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 2(b), 96 Stat. 131, 133 (codified as amended at 42 U.S.C. § 1973c (2006)). The 1982 Amendments revised the bailout provision, requiring interested states to have had a ten-year period free of the use of tests or devices "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" and to present evidence of their having undertaken "constructive efforts" to encourage minority voting. See *id.* sec. 2(b)(4).

⁵⁶ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, secs. 2, 5, 7, 120 Stat. 577, 577, 580-81 (codified at 42 U.S.C. §§ 1971, 1973, 1973c, 1973aa-1a(b)(1)) [hereinafter Voting Rights Act Amendments of 2006]; see also *infra* text accompanying notes 161-66 (providing examples of modern discrimination from Congress's 2006 reauthorization record).

⁵⁷ 383 U.S. 301, 308, 329-35 (1966).

⁵⁸ 393 U.S. 544, 550 (1969).

⁵⁹ *Id.* at 547, 550.

requirements for independent candidates, and (4) amending a portion of the state code that authorized voters to handwrite the names of write-in candidates on ballots.⁶⁰ All complaints were dismissed at the trial court level because the courts determined that the relevant statutes did not fall within the purview of section 4 or section 5,⁶¹ which pertain to changes “with respect to voting.”⁶² Reversing the district courts’ decisions, the Supreme Court rejected a narrow reading of section 5 that would limit its application to changes prescribing who may register to vote.⁶³ Favoring instead a broad reach for the preclearance requirements, the Court held that section 5 was intended to target “the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.”⁶⁴

In 1992, the Supreme Court more clearly defined section 5’s scope in *Presley v. Etowah County Commission*.⁶⁵ In that case, the Court limited the preclearance requirement to proposed changes that fall into one of four categories: (1) changes in “the manner of voting,” (2) changes in “candidacy requirements and qualifications,” (3) changes “in the composition of the electorate that may vote for candidates for a given office,” and (4) “the creation or abolition of an elected office.”⁶⁶ By refining the scope of section 5 in this way, the Court was able to provide a more concrete framework for future decisions without compromising the intended breadth of the VRA.

⁶⁰ *Id.* at 550–52. The voting changes implemented by Virginia and Mississippi were representative of the newer, subtler forms discrimination took in the years after the VRA.

⁶¹ See *Bunton v. Patterson*, 281 F. Supp. 918, 918 (S.D. Miss. 1967) (holding that the Mississippi measure did not fall under section 5), *rev’d sub nom. Allen*, 393 U.S. 544; *Fairley v. Patterson*, 282 F. Supp. 164, 165 (S.D. Miss. 1967) (holding that the Mississippi measure did not fall under section 5), *rev’d sub nom. Allen*, 393 U.S. 544; *Allen v. State Bd. of Elections*, 268 F. Supp. 218, 221 (E.D. Va. 1967) (holding that the Virginia measure did not fall under section 4), *vacated*, 393 U.S. 544.

⁶² Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (2006)).

⁶³ *Allen*, 393 U.S. at 564–65.

⁶⁴ *Id.* at 565.

⁶⁵ 502 U.S. 491, 500–03 (1992). When two Alabama counties passed similar resolutions redistributing power among the elected members of their county commission, three black commissioners filed suit against the counties alleging various constitutional and statutory violations. *Id.* at 493–500. One of the allegations faulted the counties for failing to obtain preclearance for the changes, despite being subject to the requirements of section 5. *Id.* at 500. While upholding the generally broad scope of section 5 established in *Allen*, the *Presley* Court ultimately held that the link between power shifts among elected officials and voting was too attenuated to fall within the scope of section 5 prohibitions. *Id.* at 510.

⁶⁶ *Id.* at 502–03.

2. “Retrogression” and the Precise Meaning of Discriminatory “Purpose” and “Effect”

With the scope of section 5 addressed by *Allen* and its progeny, courts were still left to grapple with the question of whether a voting change had the “purpose” or “effect” of “denying or abridging the right to vote on account of race or color.”⁶⁷ Were purpose and effect interchangeable terms?⁶⁸ Would any evidence of discrimination invalidate a proposed change?

In 1975, the Supreme Court articulated in *Beer v. United States* a standard of review for preclearance under section 5’s effect prong.⁶⁹ It asserted that section 5’s purpose was to “insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise.”⁷⁰ In other words, a procedural change’s discriminatory effects do not preclude its preclearance as long as the proposed change would not leave minorities worse off in their ability to exercise their right to vote than they were prior to its implementation.⁷¹

In *Reno v. Bossier Parish School Board*, the Court applied the retrogression test also to section 5’s purpose prong, limiting the provision’s prohibition on discriminatory purpose to a prohibition on retrogressive purpose.⁷² This decision relegated causes of action arising from discriminatory but nonretrogressive purpose from section 5 to the more general and permanent section 2 of the VRA.⁷³ The Court’s decision was problematic for two reasons. First, it suggested that a discriminatory purpose can be readily distinguished

⁶⁷ See Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c.

⁶⁸ See Thernstrom, *supra* note 2, at 53 (suggesting “purpose” and “effect” were nearly interchangeable terms because discriminatory effect was simply seen as circumstantial evidence of discriminatory purpose at a time that the South had not yet risen above suspicion).

⁶⁹ 425 U.S. 130, 141 (1976). Following the rejection of a New Orleans redistricting plan by the Attorney General, the city sought a declaratory judgment from the United States District Court for the District of Columbia. *Id.* at 134–36. The district court likewise rejected the proposed changes because the new plan was unlikely to yield an election of minority officials proportional to the minority voting population. *See id.* at 136–37. The Supreme Court vacated the judgment of the district court and remanded the case back to the district court, finding that the proposed redistricting would improve minority representation with respect to current levels, despite falling short of statistical representation. *See id.* at 141–43.

⁷⁰ *Id.* at 141 (emphasis added).

⁷¹ For an example of acceptance of this interpretation, see *Wilson v. Eu*, 823 P.2d 545, 564 (Cal. 1992) (in bank).

⁷² See 528 U.S. 320, 341 (2000), *superseded by statute*, Voting Rights Act Amendments of 2006, *supra* note 56. Prior to this decision, retrogression had only been tied to section 5’s effects prong. *See id.* at 328–29.

⁷³ *Id.* at 334–36. For a comparison of section 5 with section 2, see *infra* text accompanying notes 260–64.

from a retrogressive purpose; this is improbable. Second, by excluding instances of purposeful discrimination from analysis under section 5 in favor of section 2, *Bossier* withdrew the preclearance shield from victims of discrimination who instead had to rely on litigation for protection. In response, the 2006 amendments to the VRA added a definition of “purpose” that reads “any discriminatory purpose,” presumably restoring the pre-*Bossier* interpretation of section 5.⁷⁴ Thus, Congress demonstrated again its continued commitment to a strong section 5 over forty years after its conception.

3. *The Right to Vote Encompasses More than Access*

As the presumption of Southern racism weakened with time, Congress shifted its emphasis from discriminatory purpose—previously a foregone conclusion—to discriminatory effect.⁷⁵ One could assume that the inherent difficulties in divining true legislative purpose practically demanded such an inquiry, particularly when facially neutral policies were especially conducive to pretextual defense. Paralleling their sidestepping maneuvers under the civil rights acts,⁷⁶ Southern states quickly adapted to section 5 by adopting more subtle means of disfranchisement, replacing tell-tale comprehension tests and poll taxes with at-large voting⁷⁷ and redistricting.⁷⁸ Accordingly, the salient determination changed from whether minorities could vote to ascertaining whether their votes would count. This shift is best illustrated by the 2003 case *Georgia v. Ashcroft*.⁷⁹

An unusual case by section 5’s standards, *Ashcroft* involved a regulation designed to strengthen the black vote.⁸⁰ Following the 2000 census, Georgia

⁷⁴ Voting Rights Act Amendments of 2006, *supra* note 56, sec. 5.

⁷⁵ See *infra* text accompanying notes 313–19.

⁷⁶ See *supra* notes 12–16 and accompanying text.

⁷⁷ At-large voting refers to a system in which candidates run in more general elections, often citywide or statewide, rather than by district. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 550 (1969). Despite arguable advantages, at-large voting tends to diminish the probability of election for minority candidates who go from running solely in minority-populated districts to running alongside white candidates for votes from all districts. See *id.* at 569. In *Allen*, the Court addressed Mississippi and Virginia laws that replaced district voting with at-large voting and relegated some previously elected positions to appointed positions. *Id.* at 569–70.

⁷⁸ See J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in *MINORITY VOTE DILUTION* 27, 31–32 (Chandler Davidson ed., 1984) (“[I]t is improbable to expect a return to the days when widespread violence, intimidation, or fraud, literacy tests, or poll taxes could be reimposed to deny black voting rights altogether. Nevertheless, more sophisticated means of *abridging* black political power are presently in use . . .”).

⁷⁹ 539 U.S. 461 (2003), *superseded by statute*, Voting Rights Act Amendments of 2006, *supra* note 56.

⁸⁰ *Id.* at 469–70.

submitted a redistricting plan for preclearance, pursuant to section 5.⁸¹ The proposed plan “unpacked” jurisdictions in which black voters were the clear majority.⁸² In essence, the excess black population (i.e., the percentage of the population that was unnecessary to secure a black majority) was siphoned off into surrounding jurisdictions to create “influence districts” in which black voters were not a majority, but represented a sufficiently large percentage of the population to affect an election’s outcome.⁸³ Of some significance is that most black Georgians voted Democratic, that all black members elected to the General Assembly were Democrats, and that the proposal had been unanimously opposed by Georgian Republicans.⁸⁴

The United States District Court for the District of Columbia rejected preclearance because the plan diluted minorities’ votes in unpacked jurisdictions.⁸⁵ The Supreme Court, however, remanded the case for further consideration after positioning the “comparative ability of a minority group to elect a candidate of its choice” as only one nondispositive element of the retrogression analysis.⁸⁶ Like *Bossier*, however, *Ashcroft* was overturned by the 2006 amendments, which added a provision explicitly protecting minority voters’ ability to “elect their preferred candidates of choice.”⁸⁷ This language clearly embraces an interpretation of section 5 that assumes that the right to vote implicitly encompasses the right to a vote that carries some weight.

4. *Judicial Standards of Review: What Level of Scrutiny Applies to Preclearance Decisions?*

While Congress and the Supreme Court played a give-and-take game to advance their respective analyses under the VRA, case law regarding broader, constitutional aspects of voting rights continued to develop. It had long been established that “voting is of the most fundamental significance under our constitutional structure.”⁸⁸ Thus, the question remained: If voting constituted a fundamental right, would all procedures that burdened the right to vote be

⁸¹ *Id.* at 469, 471–72.

⁸² *Id.* at 470 (internal quotation marks omitted).

⁸³ *Id.* at 470–71.

⁸⁴ *See id.* at 469, 471.

⁸⁵ *Id.* at 474.

⁸⁶ *Id.* at 482, 490. The district court must also consider “the extent to which a new plan changes the minority group’s opportunity to participate in the political process.” *Id.* at 482.

⁸⁷ *See* Voting Rights Act Amendments of 2006, *supra* note 56, sec. 5.

⁸⁸ *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

subject to strict scrutiny?⁸⁹ Because most cases brought under section 5 also involve constitutional challenges to the procedures at issue, the standard of review established by the Supreme Court is important for both analyses.

In *Burdick v. Takushi*, the Supreme Court granted certiorari to determine whether a prohibition on write-in voting constituted an impermissible burden on the right to vote.⁹⁰ Although it acknowledged the fundamentality of voting rights and protections under the Constitution, the Court declined to subject all voting regulations to strict scrutiny.⁹¹ It adopted instead a balancing test in which courts weigh the severity of the burden on citizens' First and Fourteenth Amendment rights against the state's interests and the extent to which those interests necessitate a burden on the right to vote.⁹² To be found constitutionally valid, "severe" restrictions on the right to vote must advance a "compelling" state interest through narrowly tailored means.⁹³ "[R]easonable, nondiscriminatory restrictions," on the other hand, need only advance an "important" state interest to pass constitutional muster.⁹⁴ The *Burdick* test, or some variation, has been applied to a number of voting regulations,⁹⁵ of which the most relevant to this Comment are challenges to photo-identification requirements.⁹⁶

⁸⁹ The different levels of judicial scrutiny were laid out in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938). Constitutional law precedent mandates that courts approach state infringements upon individual liberties that are deemed "fundamental" with "strict scrutiny." See *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam). In other words, to survive a challenge, states must demonstrate a sufficiently compelling interest to justify such a violation of individuals' fundamental rights. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Roe v. Wade*, 410 U.S. 113, 155–56 (1973).

⁹⁰ 504 U.S. 428, 430–32 (1992). The Court ultimately held that the burden presented to Hawaiians was a reasonable one and, therefore, constitutional. *Id.* at 441.

⁹¹ See *id.* at 433.

⁹² See *id.* at 434. This more "flexible standard" combined those of two Supreme Court cases: *Norman v. Reed*, 502 U.S. 279, 289 (1992), which implemented a "compelling" state interest standard, and *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), which implemented an "important" state interest standard. See *Burdick*, 504 U.S. at 434.

⁹³ *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289) (internal quotation marks omitted).

⁹⁴ *Id.* (quoting *Anderson*, 460 U.S. at 788) (internal quotation marks omitted).

⁹⁵ See, e.g., *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108–09 (2d Cir. 2008) (applying *Burdick* to a suit challenging a state law prohibiting the use of absentee ballots in county elections); *Wood v. Meadows*, 207 F.3d 708, 714–15 (4th Cir. 2000) (applying *Burdick* to a suit challenging a state's filing requirements for independent candidates).

⁹⁶ See, e.g., *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354–55 (11th Cir. 2009) (holding that the burden imposed by a photo-identification requirement is "slight," requiring only legitimate state interests to survive a constitutional challenge).

In *Crawford v. Marion County Election Board*, an Indiana statute mandated that voters present government-issued photo identification to vote in person.⁹⁷ Petitioners, groups associated with the Democratic Party and other civil rights organizations, challenged the statute as being in violation of the Fourteenth Amendment and the VRA.⁹⁸ Because those burdened by the statute were believed to be primarily Democrats (in the form of elderly, poor, disabled, and minority voters whose limited mobility and purchasing power would impede their ability to obtain photo identification), petitioners anticipated disproportionate obstacles to the election of Democratic candidates.⁹⁹

Applying an equivalent of the *Burdick* test,¹⁰⁰ the Supreme Court considered the weight of the state's interests in modernizing election procedures, preventing voter fraud, and "safeguarding public confidence" in elections.¹⁰¹ The modernization of election procedures was largely fueled by the passage of two federal statutes,¹⁰² the National Voter Registration Act of 1993¹⁰³ (NVRA) and the Help America Vote Act of 2002¹⁰⁴ (HAVA). The court concluded that prevention of in-person voter fraud constituted a legitimate interest, despite an absence of such fraud in Indiana's history.¹⁰⁵ Finally, the state's interest in protecting public confidence in elections also passed muster because of the assumed relationship between the public's perception of the voting process and its likelihood to participate therein.¹⁰⁶ Accordingly, the statute was upheld.¹⁰⁷

⁹⁷ 553 U.S. 181, 185 (2008) (plurality opinion). The statute was supported unanimously by Republicans and opposed unanimously by Democrats. *Id.* at 203.

⁹⁸ *See id.* at 187.

⁹⁹ *See id.* at 186–88.

¹⁰⁰ *See id.* at 189–91 (drawing upon the standards laid out in *Norman v. Reed*, 502 U.S. 279, 289 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

¹⁰¹ *Id.* at 191.

¹⁰² *See id.* at 192.

¹⁰³ Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. §§ 1973gg–1973gg-10 (2006)). The NVRA makes a driver's license application serve as a voter-registration application and imposes certain restrictions on states removing names from registered voter lists. *See* 42 U.S.C. §§ 1973gg-3(a), 1973gg-6(d).

¹⁰⁴ Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.). HAVA requires states to develop and maintain a computerized list of registered voters, 42 U.S.C. § 15483(a)(1)(A), and to verify voter identities with either a driver's license number or the last four digits of a Social Security number, *id.* § 15483(a)(5)(A)(i).

¹⁰⁵ *See Crawford*, 553 U.S. at 194, 196 (plurality opinion).

¹⁰⁶ *See id.* at 197.

¹⁰⁷ *Id.* at 204. The Court also found the burden on voters relatively insignificant, due in large part to the following mitigating factors built into the statute: issuance of qualifying identification cards was free of cost, no photo identification was required to register to vote, and eligible voters who faced difficulties in obtaining

C. The Voices of Dissension: Thernstrom and Issacharoff

Despite the language of the VRA, which protects all citizens' right to vote against infringement "on account of race or color,"¹⁰⁸ section 5's purpose is often narrowly construed as securing the *black* vote.¹⁰⁹ With that goal essentially accomplished, and with President Obama's rise to office as a symbol for progress,¹¹⁰ scholars like Abigail Thernstrom and Samuel Issacharoff argue section 5 has no place in a perceived "post-racial" America.¹¹¹ "[R]epeatedly attacked as antisouthern, as an infringement on matters better left to state and local governments, [and] as unconstitutionally color-conscious,"¹¹² the VRA has always had its conservative critics.¹¹³ Increasingly, however, scholars from both ends of the political spectrum (like Thernstrom and Issacharoff) have suggested that section 5 has simply run its course. This section will outline the divergent analyses each scholar engages in to arrive at the shared conclusion that section 5's continued application is both unnecessary and inappropriate.

Initially a proponent of section 5, Thernstrom now raises the criticism that, after forty-five years of congressional and judicial give-and-take, it has been reduced from an initial "flawless[ness]" to a "murky mess."¹¹⁴ Rather than regard the statute's evolution as an ongoing customization to the nation's changing needs, she views its amendments—both statutory and judicial—as inappropriate departures from its original scheme.¹¹⁵ Accordingly, Thernstrom has followed section 5's development disapprovingly as Congress has renewed and expanded the statute at each term.¹¹⁶ She characterized the 2006 amendments, for example, as having been "rammed through with a minimum

their birth certificates could cast a provisional ballot on election day and execute an affidavit at the circuit court clerk's office. *Id.* at 186, 199.

¹⁰⁸ Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973).

¹⁰⁹ *See, e.g.,* THERNSTROM, *supra* note 49, at 3–4. Although Thernstrom does not oppose using the VRA to secure the Hispanic vote, she argues a more appropriate remedy would have been to ensure the provision of bilingual ballots, rather than to expand the preclearance regime to include protection of language minorities. *Id.* at 59.

¹¹⁰ *See supra* notes 50–54 and accompanying text.

¹¹¹ *See* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1730–31 (2004); Thernstrom, *supra* note 2, at 48.

¹¹² *See* KOUSSER, *supra* note 51, at 12.

¹¹³ *See* THERNSTROM, *supra* note 49, at 105–15 (discussing political resistance to the 1982 VRA renewal by conservative Senators Strom Thurmond and Orrin Hatch).

¹¹⁴ Thernstrom, *supra* note 2, at 41, 46.

¹¹⁵ *See id.* at 45–46.

¹¹⁶ *See id.* at 46–48.

of debate” by a “pessimis[ti]c” Congress against the backdrop of a “transformed racial landscape.”¹¹⁷

While Thernstrom’s opposition to section 5 has long been shared by fellow conservatives, even liberal commentators like Issacharoff have found common ground against the provision in recent years. In a 2004 article, he suggested that, “[i]n light of the tremendous political gains for minorities covered by section 5, particularly Southern blacks, it may be perverse to even question the need to extend section 5 after its current sunset in 2007.”¹¹⁸ Issacharoff’s article, written at the close of the 1982 renewal term, explores the circumstances surrounding the original enactment of section 5 to arrive at the conclusion that the statute has “served its purposes.”¹¹⁹ Issacharoff characterizes the South of 1965 as a region in which “the exclusion of black Americans from meaningful political participation” awakened a sense of “national urgency.”¹²⁰ Not only were black citizens largely denied the ability to vote, but also once suffrage was secured, the one-party South of the 1960s provided black voters no avenue for political representation.¹²¹ This environment, in his opinion, painted federal legislative action as the “noble” and “enlightened” savior for Southern political decision making.¹²² Today, in contrast, he argues that “the Southern political process is highly attuned to black political claims,” severely weakening the “presumption that Washington represents the only forum for safeguarding black political advancement.”¹²³

Like that of Issacharoff, Thernstrom’s perspective is based on evidence of considerable progress since the VRA’s passage.¹²⁴ Both scholars argue that the specific conditions giving rise to section 5 are no longer present to justify its continued existence. In Thernstrom’s view, those conditions “rest[ed] on a racism-everywhere vision, particularly, but not exclusively, in the South.”¹²⁵

¹¹⁷ *Id.* at 47–48.

¹¹⁸ Issacharoff, *supra* note 111, at 1712.

¹¹⁹ *Id.* at 1731.

¹²⁰ *Id.* at 1710.

¹²¹ *Id.* at 1713 (“So long as the Democratic Party remained unchallenged, . . . the political system would remain immune to the pressing claims of black citizens.”).

¹²² *Id.* at 1714. This perception comprises one of four factors Issacharoff identifies as crucial to section 5’s initial success: (1) “the urgency and extent of the harm to which Congress addressed itself,” (2) the statute’s “ease of administration,” (3) “the absence of political competition in the one-party covered jurisdictions,” and (4) “the lack of any incentive toward partisan manipulation of the preclearance powers exercised by the Department of Justice.” *Id.* at 1710, 1712–13.

¹²³ *Id.* at 1714.

¹²⁴ Thernstrom, *supra* note 2, at 44–46.

¹²⁵ *Id.* at 42.

Accordingly, Thernstrom avidly supported the original VRA, but struggles with Congress's and the Court's treatment of it in the decades since.¹²⁶ Specifically, she takes issue with Congress's post-*Ashcroft* assertion that the right to vote implicitly promises not only access to the ballot but also the ability to elect a voter's "preferred candidates of choice."¹²⁷ Thernstrom draws the line at this notion, arguing that section 5 has now been stretched too far beyond its intended purpose.¹²⁸

With the need for section 5 arguably waning, Thernstrom and Issacharoff also revive questions of federalism.¹²⁹ As evidenced by noncovered states' freedom to adopt and adjust voting procedures at will, such regulations are an area traditionally reserved to the states.¹³⁰ Section 5's preclearance requirement is, therefore, a federal intrusion on covered states' rights—a textbook separation-of-powers issue. Though always present in relation to the statute, such issues were placed on the back burner by *South Carolina v. Katzenbach*'s upholding of the constitutionality of section 5.¹³¹ In that case, the Supreme Court emphasized that federalism does not shield the states' infringement on individuals' constitutionally protected voting rights from federal intervention.¹³² Therefore, section 5 fell within Congress's responsibility to enforce the Fifteenth Amendment.¹³³

Thernstrom and Issacharoff suggest that the emergency conditions surrounding the original VRA's passage legitimized such an extreme usurpation of covered states' rights at the time.¹³⁴ In their opinions, however, if that emergency has subsided, then the question of section 5's constitutionality ought to be revisited and yield different results.¹³⁵ Both scholars premise this argument on *City of Boerne v. Flores*,¹³⁶ in which the Court invalidated the

¹²⁶ *Id.*

¹²⁷ See Voting Rights Act Amendments of 2006, *supra* note 56, sec. 5; THERNSTROM, *supra* note 49, at 4.

¹²⁸ See THERNSTROM, *supra* note 49, at 4.

¹²⁹ See Issacharoff, *supra* note 111, at 1714; Thernstrom, *supra* note 2, at 42.

¹³⁰ See U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .").

¹³¹ See 383 U.S. 301, 337 (1966).

¹³² See *id.* at 325. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Id.* (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)) (internal quotation marks omitted).

¹³³ See *id.* at 324–27.

¹³⁴ See Issacharoff, *supra* note 111, at 1719; Thernstrom, *supra* note 2, at 44.

¹³⁵ See Issacharoff, *supra* note 111, at 1719–20; Thernstrom, *supra* note 2, at 46.

¹³⁶ See Issacharoff, *supra* note 111, at 1714–15; Thernstrom, *supra* note 2, at 42.

Religious Freedom Restoration Act of 1993 (RFRA) as a “considerable congressional intrusion into the States’ traditional prerogatives.”¹³⁷ In exploring what constitutes an appropriate exercise of Congress’s enforcement power, the Court returned repeatedly to the VRA. Juxtaposing the country’s history and continued record of racial discrimination with a lack of modern examples of laws enacted because of religious discrimination, the Court illustrated the necessity of the VRA and the peripheral nature of RFRA.¹³⁸ Today, the same case that lauded section 5 as a worthy imposition is often quoted to signal its demise. Issacharoff and Thernstrom emphasize *Boerne*’s requirement¹³⁹ for “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁴⁰ They argue that section 5’s constitutionality teeters as it becomes a disproportionate remedy to the injury it addresses.¹⁴¹

II. HAS SECTION 5 RUN ITS COURSE?

Issacharoff suggests that a lack of modern examples of racial discrimination in the voting realm will undermine the constitutionality of section 5.¹⁴² A thorough examination of modern election law, however, casts doubt upon the belief that racial discrimination has been eradicated in the voting rights arena. Perhaps the problem is that today’s discrimination would be unrecognizable to someone still on the lookout for Jim Crow laws.¹⁴³ The metamorphosis of discrimination does not, however, signal its end. Simply put, minorities are no longer exclusively black, and discrimination is no longer exclusively Southern. This Part will examine the changing makeup of America’s minorities since 1965, discuss the problems they face in today’s society, and identify modern examples of racially discriminatory voting laws to demonstrate the continued need for section 5.

¹³⁷ 521 U.S. 507, 534 (1997).

¹³⁸ *Id.* at 530 (“RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.”). The problem with this method of analysis is, of course, that, if section 5 has been successful, there should be no modern examples of election laws passed because of racial discrimination.

¹³⁹ See Issacharoff, *supra* note 111, at 1715; Thernstrom, *supra* note 2, at 42.

¹⁴⁰ *City of Boerne*, 521 U.S. at 520.

¹⁴¹ See Issacharoff, *supra* note 111, at 1715; Thernstrom, *supra* note 2, at 42.

¹⁴² See Issacharoff, *supra* note 111, at 1715.

¹⁴³ See *supra* text accompanying notes 76–78.

A. *The Nonblack Minority*

The country has undoubtedly seen considerable advances in black participation in the electoral process since 1965. This does not mean, however, that section 5 is irrelevant; a careful reading of the VRA plainly reveals that section 5 protects not only black southerners but also minorities generally.¹⁴⁴ Congress's intention to bring other minority groups within the protection of section 5 seems logical in light of the growth of such groups and is evident from the 1975 amendments to the VRA, which added English-only ballots to the list of prohibited tests and devices if such ballots were administered in jurisdictions with over 5% language-minority populations.¹⁴⁵ And while the nation may largely have been viewed as black and white in 1965,¹⁴⁶ today's census paints a different picture. The table below illustrates the U.S. population as of 2010 broken down by race and, to some extent, ethnicity:

¹⁴⁴ See 42 U.S.C. § 1973c (2006) (broadly affecting voting practices that “diminish[] the ability of any citizen[] of the United States on account of race or color” and applying to “any discriminatory purpose”).

¹⁴⁵ Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, sec. 102, § 203, 89 Stat. 400, 403 (codified as amended at 42 U.S.C. § 1973aa-1a).

¹⁴⁶ See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* tbl.1 (U.S. Census Bureau, Working Paper Series No. 56, 2002) [hereinafter *Historical Census Statistics*], available at <http://www.census.gov/population/www/documentation/twps0056/twps0056.html> (follow hyperlink under “United States—Race and Hispanic Origin: 1790 to 1990”) (showing that the 1960 Census recognized fewer racial/ethnic categories).

**POPULATION BY RACE AND HISPANIC ORIGIN FOR THE
UNITED STATES: 2010**

RACE AND HISPANIC OR LATINO	NUMBER	PERCENT OF TOTAL POPULATION
<u>RACE</u>		
Total population	308,745,538	100.0
One race	299,736,465	97.1
White	223,553,265	72.4
Black or African- American	38,929,319	12.6
American-Indian and Alaska Native	2,932,248	0.9
Asian	14,674,252	4.8
Native Hawaiian and Other Pacific Islander	540,013	0.2
Some other race	19,107,368	6.2
Two or more races	9,009,073	2.9
<u>HISPANIC OR LATINO</u>		
Total population	308,745,538	100.0
Hispanic or Latino	50,477,594	16.3
Not Hispanic or Latino	258,267,944	83.7 ¹⁴⁷

Of no small significance is the fact that the Hispanic/Latino population surpassed the black population in terms of national composition, at 16.3% and 12.6%, respectively.¹⁴⁸ In contrast, the 1960 Census did not even provide a category for Hispanic/Latino self-identification.¹⁴⁹ And while the black population has stayed fairly constant since 1960, at which point 10.5% of the population was black,¹⁵⁰ the Asian population has jumped from 0.5% to 4.8%—rendering it the fastest-growing race group between 2000 and 2010.¹⁵¹

¹⁴⁷ KAREN R. HUMES ET AL., U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 tbl.1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

¹⁴⁸ *Id.*

¹⁴⁹ See *Historical Census Statistics*, *supra* note 146, tbl.1.

¹⁵⁰ *Id.*

¹⁵¹ See *id.*; see also HUMES ET AL., *supra* note 147, at 4 tbl.1, 4–5.

The U.S. Census Bureau noted upon publication of the 2000 Census data that “[t]he federal government considers race and Hispanic origin to be two separate and distinct concepts.”¹⁵² Accordingly, the 2000 Census was amended to include a separate opportunity for citizens to self-identify as Spanish, Hispanic, or Latino.¹⁵³ If the 16.3% of citizens who identified themselves as Hispanic or Latino in 2010 were subtracted from the white population, then only 56.1% of the United States population would have been white as of 2010,¹⁵⁴ as compared to 88.6% in 1960.¹⁵⁵

B. *The New Dilemma*

In a decade when the country was essentially black and white (at 10.5% and 88.6% of the population, respectively), section 5 was conceived as a means of forcing the Fifteenth Amendment’s suffrage guarantee upon the Jim Crow South. In contrast, as illustrated in the section above, the country’s ethnic makeup today is comprised of more groups, with more members in each group, shrinking the white population to only 56.1% and unseating black Americans from the dominant minority position.¹⁵⁶ Like their predecessors, today’s minorities face a number of structural, political, and economic obstacles that inhibit the exercise of their electoral rights. Accordingly, the improved registration and participation rates among black voters attributable to the VRA are yesterday’s successes. Modern outlets of discrimination may bear little resemblance to those of the 1960s on the surface,¹⁵⁷ but they further the same hegemonic ends and equally warrant redress.

The inherent difficulties in arriving late to the scene, so to speak, place Hispanic/Latino and Asian groups at a distinct disadvantage politically: these groups are underrepresented both as voters and as elected officials. In the 2008 presidential election, the U.S. Census Bureau reported “significantly lower” Asian and Hispanic voter-registration rates as compared to non-Hispanic white and black registration rates.¹⁵⁸ Likewise, only 60.5% of naturalized citizens

¹⁵² ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2000, at 1 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

¹⁵³ *Id.* at 1–2.

¹⁵⁴ See HUMES ET AL., *supra* note 147, at 4, tbl.1.

¹⁵⁵ See *Historical Census Statistics*, *supra* note 146, tbl.1.

¹⁵⁶ See *supra* notes 146–47 and accompanying text.

¹⁵⁷ See *supra* text accompanying notes 77–78.

¹⁵⁸ THOM FILE & SARAH CRISSEY, U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008, at 2–5 (2010), available at <http://www.census.gov/prod/>

were registered to vote, while 71.8% of native-born Americans were registered.¹⁵⁹ As of 2004, “[b]lack, Latino, and Asian Americans ma[de] up over a quarter of the national population, but . . . less than 5% of the nation’s elected officials.”¹⁶⁰

The record before Congress during section 5’s 2006 reauthorization period also provided “evidence of high levels of resistance from jurisdictions with growing minority populations.”¹⁶¹ For example, the white mayor and board of aldermen in a Mississippi jurisdiction cancelled a 2001 election to prevent the growing minority population from unseating them.¹⁶² Similarly, a Louisiana jurisdiction proposed a redistricting plan following the 2000 Census that wholly eliminated a majority-black district to encourage proportional representation of whites.¹⁶³ And in response to an “increasingly politically active and cohesive” Latino community, a 2003 Texas redistricting plan removed Latino voters from a congressional district to decrease their electoral opportunities.¹⁶⁴ The reauthorization record also contained evidence of discrimination against language minorities entitled to non-English election materials: NAACP attorney Kristen Clarke noted that, “of the 101 counties investigated, eighty percent were unable to produce voter registration forms, official ballots, provisional ballots, and their written voting instructions in a manner compliant with the language minority provisions of the Voting Rights Act.”¹⁶⁵

Exacerbating the structural inequalities facing nonblack minorities are the country’s reactions to recent political and economic hardship. The years since the terrorist attacks of September 11, 2001, have been characterized not only

2010pubs/p20-562.pdf (finding that 72.0% of whites, 69.7% of blacks, 55.3% of Asian-Americans, and 59.4% of Hispanics had registered to vote).

¹⁵⁹ *Id.* at 4 tbl.2.

¹⁶⁰ Zoltan Hajnal & Jessica Trounstine, *Transforming Votes into Victories: Turnout, Institutional Context, and Minority Representation in Local Politics*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 83, 84 (Ana Henderson ed., 2007) (citations omitted).

¹⁶¹ Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.–C.L. L. REV. 385, 406 (2008).

¹⁶² *See id.* at 407.

¹⁶³ *See id.* The same district had been denied preclearance for its proposals following the 1980 and 1990 Censuses as well. *See* DEBO P. ADEGBILE, RENEWTHEVRA.ORG, VOTING RIGHTS IN LOUISIANA 1982–2006, at 14–15 (2006), available at <http://www.protectcivilrights.org/pdf/voting/LouisianaVRA.pdf>.

¹⁶⁴ Clarke, *supra* note 161, at 408 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006)) (internal quotation mark omitted).

¹⁶⁵ *Id.* at 410–11.

by a growing solidarity among native-born Americans but also by a growing resentment and wariness of minority and immigrant populations. As an illustration of this nativist backlash, the FBI noted a sharp increase in hate crimes motivated by ethnicity and national origin in 2001—the rate of such crimes having doubled in just one year since 2000.¹⁶⁶ In the same year, anti-Islamic incidents rose from the second least reported to the second highest reported.¹⁶⁷ And while Muslims are the most visible targets of the post-9/11 era, that period has also engendered antipathy to immigrants and minorities more generally.¹⁶⁸ To be clear, the backlash described here is not solely—or even primarily—violent or overtly xenophobic; instead, it involves native-born Americans drawing what some consider to be a proverbial line in the sand. As an example, in 2006, for the first time in the country’s history, the Senate voted to establish English as the official national language of the United States.¹⁶⁹

The country’s reaction to 9/11 may seem isolated, but when placed in historical context, a distinct pattern emerges. “As more foreigners, different culturally and physically, moved to the United States, Americans feared that the immigrants invaded their territory, threatened their jobs, and changed their values.”¹⁷⁰ Out of context, this passage could easily describe the last ten years when, in fact, it refers to early-twentieth-century America and its fearful reaction to a surge in immigration.¹⁷¹ The resulting political climate led to anti-immigrant legislation like the Chinese Exclusion Act and the 1918 Alien Control Act, meant to stem the flow of undesirable immigration and to increase governmental scrutiny of immigrants already in the country.¹⁷² Later in the century, Japanese internment and establishment of the House Un-American Activities Committee sprang from the attack on Pearl Harbor and the Second Red Scare, respectively.¹⁷³ These examples are, perhaps, unrelated to voting

¹⁶⁶ UNIFORM CRIME REPORTING PROGRAM, FBI, HATE CRIME STATISTICS, 2001, at i (2002), available at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2001>.

¹⁶⁷ *Id.* It is worth noting that, regardless of other fluctuations, the most prevalent motivation for hate crimes has always been race. *Id.*

¹⁶⁸ See generally Jamie Winders, *Bringing Back the (B)order: Post-9/11 Politics of Immigration, Borders, and Belonging in the Contemporary US South*, 39 *ANTIPODE* 920, 920 (2007) (exploring the difficulties facing Latino immigrants in light of the “growing nativist sentiment across the US since 9/11”).

¹⁶⁹ See Carl Hulse, *Senate Passes a Bill that Favors English*, *N.Y. TIMES*, May 19, 2006, at A18.

¹⁷⁰ Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination As Seen Through the History of American Immigration Law*, 26 *T. JEFFERSON L. REV.* 203, 217 (2004).

¹⁷¹ *Id.*

¹⁷² See *id.* at 217–27.

¹⁷³ See John Ip, Response, *How Do the Abuses of Civil Liberties Under the George W. Bush Administration Compare to the Internments of Japanese Aliens and Japanese-Americans During World War II?*, 36 *WM. MITCHELL L. REV.* 5023 (2010) (comparing post-9/11 America to post-WWII America); G. L.

rights, but as professor Kevin Johnson noted, they “demonstrate how the hostility toward foreigners *outside* the nation influences hate for the ‘foreigner’ *inside* our borders.”¹⁷⁴

Despite the strong connection between these periods of intolerance and mass immigration or acts of war, political turmoil is not the sole trigger of intolerance. The socioeconomic model of ethnic-competition theory suggests that ethnic groups are constantly in competition with one another “for power, social control, territory, economic and social incentives, or social identity.”¹⁷⁵ Viewed through an ethnic-competition lens, American minorities and naturalized citizens have not only the lingering effects of 9/11 to contend with but also the economic recession. Ethnic-competition theory would suggest that, as the country’s resources become more limited, economic motives for anti-immigrant sentiments become stronger.¹⁷⁶ After years of alarming unemployment rates, it is not uncommon to hear concerns that immigrants are edging Americans out of jobs.¹⁷⁷ With government budgets tightened, people become more focused on the perceived strain illegal immigrants place on public benefits.¹⁷⁸ This environment not only tolerates but in fact nurtures racially discriminatory and anti-immigrant legislation.

C. *Modern Disfranchisement in Arizona*

In 2004, Arizona enacted Proposition 200, a state law that required first-time voters to provide proof of citizenship upon registration and all in-person voters to provide identification at the polls.¹⁷⁹ Acceptable proof of citizenship

Tyler, *House Un-American Activities Committee*, in 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 780 (Paul Finkelman ed., 2006).

¹⁷⁴ Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833, 837 (1997). Johnson referred to a somewhat different set of examples, but they illustrate much the same point. *See id.* In addition, his article was published in 1997, well before 9/11, which further suggests that the post-9/11 political climate was not only in line with this country’s history but also a predictable reaction. *See id.*

¹⁷⁵ *See* Károly Takács, *Models of Intergroup Conflict*, in THE ENCYCLOPEDIA OF THE MIND (forthcoming 2012), available at http://unibs.academia.edu/KárolyTakács/Papers/138827/Models_of_Intergroup_Conflict.

¹⁷⁶ *See id.*

¹⁷⁷ To illustrate this point, a Google search for the words “immigrants taking” on February 12, 2011, suggested the following ways to complete the phrase (in descending order): “immigrants taking American jobs,” “immigrants taking jobs,” “immigrants taking jobs from Americans,” “immigrants taking our jobs,” “immigrants taking over jobs,” and “immigrants taking jobs away from Americans.” GOOGLE, <http://www.google.com> (last visited Feb. 22, 2012) (type “immigrants taking” into the search bar).

¹⁷⁸ *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1541 (1995).

¹⁷⁹ ARIZ. REV. STAT. ANN. §§ 16-152, 16-166, 16-579 (2006).

included an Arizona driver's license number, a copy of a birth certificate or U.S. passport, and original naturalization documents or the number from a certificate of naturalization.¹⁸⁰ Arizona, subject to section 5, obtained preclearance with regard to Proposition 200 from the Attorney General in 2005.¹⁸¹

In 2006, Native Americans and community organizations joined various Arizona residents in *Gonzalez v. Arizona*, challenging Proposition 200.¹⁸² The following year, the U.S. Court of Appeals for the Ninth Circuit addressed the plaintiffs' challenges to Proposition 200, the most important of which were as follows: (1) the identification requirement constituted a poll tax in violation of the Twenty-Fourth Amendment, (2) the proposition imposed a severe burden on the fundamental right to vote, (3) the proposition imposed a disproportionate burden on naturalized citizens, and (4) the proposition's proof-of-citizenship requirement was inconsistent with the NVRA.¹⁸³ The Ninth Circuit found in the defendants' favor on each issue.¹⁸⁴ Because it is most intimately tied to analysis under the VRA, the plaintiffs' third claim warrants closer examination.¹⁸⁵

¹⁸⁰ *Id.* § 16-166(F).

¹⁸¹ *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006) (per curiam). The effects of Justice Department partisan bias in this and other arguably "wrongful" preclearance determinations are discussed in Part III.

¹⁸² Complaint for Declaratory and Injunctive Relief at 2–6, *Gonzalez v. Arizona*, 2006 WL 3627297, at *3 (D. Ariz. Sept. 11, 2006) (Nos. CV 06-1268-PHX, CV 06-1362-PHX, CV 06-1575-PHX). Plaintiffs also sought a preliminary injunction to suspend Proposition 200's effects until after the election period. *Id.* at 24. The preliminary injunction was denied at the district court level prior to the court issuing its findings of fact and conclusions of law. *See Purcell*, 549 U.S. at 3. Before those findings were made, the Ninth Circuit granted a separate injunction on an emergency basis (due to the very imminent election period) pending appeal of the original denial. *See id.* at 3. This decision was revisited by the Supreme Court and vacated. *See id.* at 5–6. The Court reasoned that an appellate decision made without a trial court's findings of fact and conclusions of law could not have given the trial court's discretion requisite deference. *See id.*

¹⁸³ *Gonzalez v. Arizona (Gonzalez I)*, 485 F.3d 1041, 1048–51 (9th Cir. 2007). The Ninth Circuit upheld the proof-of-citizenship requirement as consistent with the NVRA in 2007. *Id.* at 1050. In a 2010 appeal from the district court's subsequent grant of summary judgment, however, the Ninth Circuit declared the requirement inconsistent with the NVRA, which mandates that states "accept and use" the federal voter registration form without additional requirements. *Gonzalez v. Arizona (Gonzalez II)*, 624 F.3d 1162, 1183–84 (9th Cir. 2010), *reh'g en banc granted*, 649 F.3d 953 (9th Cir. 2011).

¹⁸⁴ *Gonzalez I*, 485 F.3d at 1048–51.

¹⁸⁵ *See id.* at 1050. Plaintiffs' second claim, that the proposition imposed a severe burden on the right to vote, was rejected by the court. *See id.* at 1049–50. Due, in part, to Proposition 200's facially neutral application and, in part, to the court's belief that most Arizona residents were in possession of at least one of the prescribed forms of identification, the court reasoned that the burden imposed by Proposition 200 was similar to other restrictions deemed to be "not severe." *Id.* (quoting *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002)) (internal quotation marks omitted). Thus, to survive plaintiffs' second challenge and justify its intrusion on voting rights, Arizona had only to advance an "important regulatory interest." *Id.* at 1049 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)) (internal quotation mark omitted). The state's

The plaintiffs' third claim, that Proposition 200 imposed a disproportionate burden on naturalized citizens,¹⁸⁶ struck closest to the heart of section 5. Unfortunately, this issue was not resolved in *Gonzalez I*.¹⁸⁷ The court declined to comment directly on this challenge because no naturalized citizens had submitted affidavits in support of the proposition.¹⁸⁸ In a subsequent appeal, *Gonzalez II*, the issue was rendered moot by the court invalidating Proposition 200's proof-of-citizenship requirement as inconsistent with the NVRA.¹⁸⁹ With the Ninth Circuit recently granting a rehearing en banc, the issue is not quite settled.¹⁹⁰

Without findings regarding the burden on naturalized citizens, *Gonzalez II* rested on a state's interest in "protecting the integrity of the electoral process" prevailing over a statute's potentially discriminatory effects.¹⁹¹ As this case stands, one would be hard-pressed to argue against an American citizen's right to an undiluted vote. After all, for nearly fifty years, American schoolchildren have memorized the now-famous principle derived from *Baker v. Carr*, "one person, one vote."¹⁹² However, the VRA's language and Issacharoff's claim that we lack modern examples of racially discriminatory voting laws¹⁹³ require an inquiry into more than Proposition 200's effects; they also demand an inquiry into its purpose.

In a case involving election law, injunctive relief may be granted with the court's consideration of any one of the following factors: the plaintiff's likelihood of success on the merits, the plaintiff's likelihood to be irreparably harmed by a denial of the injunction, the parties' respective hardships, or the injunction's ability to serve the public interest.¹⁹⁴ In *Gonzalez I*, the Ninth Circuit found the "balance of hardships tipped sharply in favor of [the state]" due in large part to Arizona's having "invested enormous resources in

"indisputably . . . compelling interest in preserving the integrity of its election process" prevailed. *Purcell*, 549 U.S. at 4 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)) (internal quotation mark omitted).

¹⁸⁶ *Gonzalez I*, 485 F.3d at 1050.

¹⁸⁷ *See id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Gonzalez II*, 624 F.3d at 1191. For a discussion of the NVRA, see *supra* note 103 and accompanying text.

¹⁹⁰ *Gonzalez v. Arizona*, 649 F.3d 953 (9th Cir. 2011).

¹⁹¹ *Gonzalez II*, 624 F.3d at 1078.

¹⁹² *See* 369 U.S. 186, 208 (1962).

¹⁹³ *See* Issacharoff, *supra* note 111, at 1716–20.

¹⁹⁴ *Gonzalez I*, 485 F.3d 1041, 1051 (9th Cir. 2007).

preparing to apply Proposition 200.”¹⁹⁵ Such an expenditure of resources might suggest that Proposition 200 was enacted to address a serious threat to Arizona’s voters when, in fact, the state presented evidence that, in ten years, it had identified only 232 noncitizens attempting to register to vote.¹⁹⁶ In 2000, Arizona’s population was estimated to be 5,130,632.¹⁹⁷ Of course, the 232 citizens whose votes were effectively cancelled out deserve redress, but they constituted only 0.0045% of Arizona’s population. Could there be another purpose behind “invest[ing] enormous resources” in Proposition 200?

Perhaps the answer lies in an examination of the law in context. Proposition 200, named the “Arizona Taxpayer and Citizen Protection Act,”¹⁹⁸ was cast by some as a reclamation of Arizona by its citizens.¹⁹⁹ The requirement for voters’ proof of citizenship was only one piece of the legislation; additional provisions conditioned access to public benefits on documentary proof of citizenship and criminalized state employees’ failures to report immigration violations to federal authorities.²⁰⁰ Section 2 of the Act stated, “[I]llegal immigration is causing economic hardship to this state.”²⁰¹ It further read, “[I]llegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that . . . conduct . . . demeans the value of citizenship.”²⁰²

Despite this language, it is possible to infer that Proposition 200 was not only aimed at illegal immigrants but also laced with anti-immigration sentiments more generally. Proposition 200 was advanced primarily by two groups: Protect Arizona Now (PAN) and the Federation for American Immigration Reform (FAIR).²⁰³ PAN’s national advisor, Virginia Abernethy,

¹⁹⁵ *Id.* (quoting *Gonzalez v. Arizona*, Nos. CV 06-1268-PHX, CV 06-1362-PHX, CV 06-1575-PHX, 2006 WL 3627297, at *9 (D. Ariz. Sept. 11, 2006)) (internal quotation marks omitted).

¹⁹⁶ *Id.* at 1048.

¹⁹⁷ *State & County QuickFacts: Arizona*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04000.html> (last revised Jan. 16, 2012).

¹⁹⁸ *See* ARIZ. REV. STAT. ANN. § 46-140.01 (2005).

¹⁹⁹ *See, e.g.*, Press Release, Fed’n for Am. Immigration Reform, Proposition 200: Cutting Through the Rhetoric and Getting to the Facts About the Protect Arizona Now Initiative (July 12, 2004), *available at* http://www.fairus.org/site/PageServer?pagename=media_media3658.

²⁰⁰ *See* § 46-140.01.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ NAT’L IMMIGRATION FORUM, 2004 ELECTION ANALYSIS: ARIZONA’S PROPOSITION 200, at 1 (2004), *available at* <http://www.immigrationforum.org/images/uploads/AZProp200Analysis.pdf>.

considers herself a “white separatist”²⁰⁴ and advocates a “catch-our-breath moratorium on *legal* immigration.”²⁰⁵ FAIR similarly describes itself as an organization dedicated to “promot[ing] immigration levels consistent with the national interest—more traditional rates of about 300,000 a year.”²⁰⁶

The justification for Proposition 200 as a voter-fraud-prevention measure is unconvincing. With virtually no evidence of such fraud in Arizona’s history—or, for that matter, in the country’s history²⁰⁷—the law appears to be a means of erecting barriers between the state’s native and immigrant populations.²⁰⁸ In this context, section 5 remains a necessary safeguard to ensure that legitimate efforts to enforce immigration policy are not carried out at the expense of a state’s minority residents and naturalized citizens.²⁰⁹

D. Modern Disfranchisement in Georgia

Arizona’s Proposition 200 is not an isolated illustration of modern racial discrimination in voting laws. In 2008, Georgia’s Office of the Secretary of State developed a citizenship-verification program²¹⁰ that cross-referenced Department of Driver Services databases against voter-registration data.²¹¹ The aim of this program was to identify and flag registered voters whose

²⁰⁴ See Heidi Beirich, *Racist Prof Latest to Join Group that Seeks White Rule in America*, S. POVERTY L. CENTER HATEWATCH BLOG (June 27, 2011), <http://www.splcenter.org/blog/2011/06/27/racist-emeritus-prof-latest-to-join-group-that-seeks-white-rule-in-america/> (internal quotation marks omitted).

²⁰⁵ Virginia Deane Abernethy, *Census Bureau Distortions Hide Immigration Crisis: Real Numbers Much Higher*, POPULATION-ENV’T BALANCE (2006), <http://www.balance.org/alerts/alert0610aa.html> (emphasis added).

²⁰⁶ See *About FAIR*, FED’N FOR AM. IMMIGR. REFORM, www.fairus.org/site/PageNavigator/about/ (last visited Feb. 22, 2012).

²⁰⁷ See Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.–C.L. L. REV. 1, 7 (2009) (“There is little empirical or systemic evidence to support the contention that voter-initiated fraud is widespread, be it ineligible voters seeking to vote or eligible voters casting multiple ballots in several locations.”).

²⁰⁸ See *supra* text accompanying notes 196–97.

²⁰⁹ This Comment is not intended to cast suspicion upon legislators or to paint particular state decisions in a negative light. Certainly, Arizona’s proximity to the Mexican border presents the state with unique challenges not shared by the country as a whole. However, those challenges must be met with means that do not disfranchise minority citizens.

²¹⁰ See Letter from Thurbert Baker, Ga. Att’y Gen., to Christopher Coates, Voting Section Chief, Dep’t of Justice Civil Rights Div. (Oct. 18, 2008), *available at* http://www.champaigncountyclerk.com/elections/docs/Georgia/10_14_2008_Georgia_expedited_review_request.pdf.

²¹¹ See Letter from Loretta King, Acting Assistant Att’y Gen., U.S. Dep’t of Justice Civil Rights Div., to Thurbert E. Baker, Ga. Att’y Gen. (May 29, 2009) [hereinafter Letter from Loretta King], *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/1_052909.php.

citizenship had not been verified between the two systems.²¹² Any such voters would be notified accordingly and required to take additional steps to verify their registration before being permitted to vote.²¹³

A Georgia resident and various minority organizations sued the state for administering this program prior to obtaining section 5 preclearance.²¹⁴ A district court issued a preliminary injunction in late October 2008, just in time to suspend the program's effects for the 2008 elections.²¹⁵ The court extended the injunction in 2010 but denied both parties' motions for summary judgment, in anticipation of the Justice Department's preclearance determination.²¹⁶

In fact, the Justice Department had already issued a conclusion regarding Georgia's citizenship-verification program. In May 2009, the Department addressed a letter to Georgia's attorney general objecting to preclearance for the program.²¹⁷ Georgia, the letter stated, had failed to sustain "its burden of showing that the proposed change 'neither has the purpose nor will have the effect' of denying or abridging the right to vote on account of race, color or membership in a language minority group."²¹⁸ The Department found not only that the additional requirements would pose considerable obstacles to flagged individuals but also that the system was inaccurate and overinclusive, having wrongly flagged thousands of Georgia citizens who were, in fact, eligible to vote.²¹⁹ More significantly, of those wrongly flagged, 45.7% were naturalized citizens.²²⁰ The Department further determined that Hispanic and Asian voters were "more than twice as likely to appear on the list" than white voters and that 60% more black voters were flagged than white voters, despite comparable registration numbers.²²¹

After reconsideration and a second denial by the Justice Department in February 2010,²²² Georgia filed suit in the U.S. District Court for the District

²¹² *See id.*

²¹³ *See id.*

²¹⁴ *See* Morales v. Handel, No. 1:08-CV-3172 (N.D. Ga. Oct. 27, 2008).

²¹⁵ *Id.* at 26–27.

²¹⁶ Morales v. Kemp, No. 1:08-CV-3172 (N.D. Ga. June 15, 2010).

²¹⁷ *See* Letter from Loretta King, *supra* note 211.

²¹⁸ *See id.*

²¹⁹ *See id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *See* Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Dennis R. Dunn, Ga. Deputy Att'y Gen. (Feb. 22, 2010) [hereinafter Letter from Thomas E. Perez], available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Georgia-Complaint-8-16-10e4.pdf>.

of Columbia to challenge the decision.²²³ The case was settled abruptly in August 2010 when the Justice Department precleared the citizenship-verification program and requested that the district court dismiss the case.²²⁴ Many speculated that the Department folded to avoid Georgia challenging not only the preclearance denial but also the constitutionality of section 5 itself.²²⁵

In the meantime, Georgia introduced Senate Bill 86 (SB 86) in 2009, a bill cut from the same cloth as Arizona's Proposition 200, requiring residents to provide proof of citizenship upon registering to vote.²²⁶ Like the citizenship-verification program discussed above, SB 86 was also implemented without having been submitted for preclearance.²²⁷ In the wake of two administrative preclearance denials by the Justice Department over the citizenship-verification program, Georgia proceeded directly to an action for judicial preclearance of SB 86 in the U.S. District Court for the District of Columbia.²²⁸ That case was dismissed in 2011 when the Justice Department granted Georgia preclearance for SB 86.²²⁹

Undoubtedly, Georgia will face further litigation over SB 86. Like Proposition 200, SB 86 has the potential to disproportionately burden minorities and the elderly. Furthermore, the lengthy preclearance process over Georgia's citizenship-verification program has brought the state's voting measures under intense scrutiny by minority organizations. Already, this issue has attracted the attention of high-profile groups, like the NAACP and the ACLU, in addition to local organizations, like the Georgia Association of Latino Elected Officials.²³⁰

²²³ See Aaron Gould Sheinin, *State Wins Voter ID Case*, ATLANTA J.-CONST., Aug. 24, 2010, at A1.

²²⁴ *Id.*

²²⁵ See *id.*; Ewa Kochanska, *Georgia Voter Citizenship Verification System Finally Approved by DOJ*, EXAMINER.COM (Aug. 24, 2010), <http://www.examiner.com/political-buzz-in-atlanta/georgia-voter-citizenship-verification-system-finally-approved-by-doj> ("The Administration most likely decided to approve the system because not doing so would have risked putting the whole Section 5 of the Voting Rights Act in jeopardy.").

²²⁶ S.B. 86, 2009 Gen. Assemb., Reg. Sess. (Ga. 2009); see also Letter from Thomas E. Perez, *supra* note 222. Because SB 86 was modeled after Proposition 200, similarities between the two measures render further discussion of SB 86's sociopolitical implications unnecessary.

²²⁷ See Letter from Thomas E. Perez, *supra* note 222.

²²⁸ See Press Release, Brian P. Kemp, Ga. Sec'y of State, Secretary of State Kemp Announces Intent to File Suit Against Obama Justice Department (Feb. 23, 2010), available at www.sos.ga.gov/pressrel/2010_releases/February/20100223Secretary%20of%20State%20Kemp%20Announces%20Intent%20to%20File%20Suit%20against%20Obama%20Justice%20Department.htm.

²²⁹ See Bill Rankin, *Citizenship Process Approved*, ATLANTA J.-CONST., Apr. 5, 2011, at B2.

²³⁰ See *Morales v. Kemp*, No. 1:08-CV-3172 (N.D. Ga. June 15, 2010) (order extending preliminary injunction and denying summary judgment); Sheinin, *supra* note 223.

Despite the situation's similarities to the *Gonzalez* litigation, however, it carries the potential for a notably different outcome. At the Ninth Circuit in *Gonzalez I*, the court neglected to rule on a vital challenge to Proposition 200—whether the measure disproportionately burdened naturalized citizens—because no affidavits had been filed by naturalized citizens.²³¹ Plaintiffs in this case are unlikely to make the same mistake. For one, Georgia's premature implementation of the contested voting procedures has allowed ample time for opponents to collect data regarding SB 86's effects on minorities. Also, legislation such as Arizona's more recent immigration bill²³² has likely cultivated heightened sensitivity to such issues since *Gonzalez II*. Without a firm precedent weighing in favor of such procedures against the burden they present for naturalized citizens, Georgia may find it difficult to overcome a comparable challenge to SB 86. And in the course of such a challenge, Georgia would also have to defeat the Justice Department's findings that its data-comparison system disproportionately burdens minorities and naturalized citizens at statistically significant rates.²³³

The resolution of the Georgia cases will be important on a number of levels. As section 5 case law stands, laws like Arizona's and Georgia's that target immigrant and minority populations are almost sure to fail the retrogression test. By injecting additional administrative steps in the way of minority and immigrant voters, these laws and others like them are in direct conflict with section 5's effect prong. Certainly, the Justice Department's statistical findings and continued opposition to the citizenship-verification program suggest the program's discriminatory effects. Furthermore, Proposition 200's context and sponsorship could support a finding not only of discriminatory effects but also of discriminatory purpose.

The Georgia and Arizona examples are not meant as exercises in whistle-blowing, however. Both states had legitimate motives for their laws; certainly, the states should be able to ensure that registered voters are citizens. Yet, presented with such abundant evidence that the chosen measures present unequal obstacles to minorities and naturalized citizens, it seems obvious that the interests of those populations are not currently a legislative priority. It is in

²³¹ 485 F.3d 1041, 1050 (9th Cir. 2007).

²³² S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (requiring Arizona state and local police to determine the citizenship status of individuals if there is a "reasonable suspicion" that they are illegal immigrants and to arrest those individuals who do not provide adequate documentation).

²³³ See Letter from Loretta King, *supra* note 211.

this capacity that section 5 has functioned and continues to function in its intended role.

III. A NEW PROBLEM CALLS FOR A NEW SOLUTION

In 2009, the Supreme Court narrowly avoided ruling on the constitutionality of section 5 in *Northwest Austin Municipal Utility District Number One v. Holder*²³⁴ (*NAMUDNO*). The *NAMUDNO* district challenged a bailout determination and, like Georgia in its case against the Justice Department, challenged the constitutionality of section 5 in the alternative.²³⁵ Opting to determine the bailout issue on statutory grounds, the Court explicitly reserved the question of section 5's constitutionality for another day.²³⁶ Justice Thomas noted in the Court's opinion, however, that the federalism costs associated with section 5 had caused members of the Court "to express serious misgivings about [its constitutionality]."²³⁷

The issue narrowly avoided judicial review again in January of 2012, when the Supreme Court heard the Texas redistricting case *Perry v. Perez*.²³⁸ In that case, the Texan government had responded to the 2010 Census data by redrawing its electoral maps in an allegedly discriminatory fashion.²³⁹ Recognizing that Texas could neither expect a preclearance decision in time for the 2012 elections nor use its pre-census boundaries, a panel of the U.S. District Court for the Western District of Texas devised interim plans.²⁴⁰ While the Supreme Court granted certiorari to determine whether the lower court had afforded the Texan government appropriate deference in its proposal,²⁴¹ many anticipated a further decision as to the constitutionality of section 5.²⁴² Likely due to the highly expedited nature of the case, the Texan government opted not to raise the contentious challenge. Still, the Court seized the opportunity to note once again the "serious constitutional questions" surrounding section 5.²⁴³ Indeed, Justice Thomas's brief concurrence suggested that Texas's failure to

²³⁴ 129 S. Ct. 2504 (2009).

²³⁵ *See id.* at 2508.

²³⁶ *See id.* at 2516–17.

²³⁷ *Id.* at 2511.

²³⁸ 132 S. Ct. 934 (2012) (per curiam).

²³⁹ *Id.* at 940.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 943.

²⁴² *See, e.g.*, Lyle Denniston, *Is Section 5 on the Line Right Now?*, SCOTUSBLOG (Jan. 3, 2012, 6:33 PM), <http://www.scotusblog.com/?p=135779>.

²⁴³ 132 S. Ct. at 942.

obtain preclearance for its maps presented no obstacle because section 5 is unconstitutional.²⁴⁴ Together, these cases illustrate that a decision is inevitable and that, in all likelihood, it will approach sooner, rather than later.

A challenge to section 5 requires a hard look at the function it serves in today's society. Thernstrom and Issacharoff argue that section 5's constitutionality teeters as it becomes a disproportionate remedy to the injury it addresses.²⁴⁵ To a large extent, they are correct—section 5 is no longer an adequate remedy for the harm it was designed to address. However, the 2006 reauthorization record and the Georgia and Arizona illustrations demonstrate that the country's minorities and naturalized citizens could face tremendous obstacles in section 5's absence. The reasonable solution is thus not to abolish section 5 but to rework the statute in light of the new problems it faces: specifically, the changing nature of discrimination,²⁴⁶ the increasing politicization of the preclearance process,²⁴⁷ and the lack of transparency in Justice Department determinations.²⁴⁸ The following sections provide examples of and solutions to the ways these problems manifest themselves in section 5 preclearance determinations, bailout procedures, and coverage. The first section will propose a private right to judicial review of preclearance decisions and a formalized documentation process for the Justice Department to issue opinions. The second section will propose a periodic bailout review that provides a more active role for concerned minorities. Finally, the third section will propose changing the standard under the VRA's "bail-in"

²⁴⁴ *Id.* at 945 (Thomas, J., concurring).

²⁴⁵ See Issacharoff, *supra* note 111, at 1715; Thernstrom, *supra* note 2, at 42.

²⁴⁶ See Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717, 718 (2006) [hereinafter Persily, *Options and Strategies*] ("The old barriers to minority empowerment, such as poll taxes, literacy tests, and grandfather clauses, are no longer with us, but different obstacles have been erected by both Democrats and Republicans under the banner of normal partisan politics."); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 197 (2007) [hereinafter Persily, *The Promise and Pitfalls*] ("[T]urnout statistics no longer capture the level of unconstitutional discrimination that may exist in the covered or noncovered jurisdictions.").

²⁴⁷ See MARK A. POSNER, AM. CONSTITUTION SOC'Y FOR LAW AND POLICY, *THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO?* 13 (2006) ("Recent revelations . . . strongly suggest that the historical pattern [of nonpartisan preclearance determinations] has been broken and that the inherent danger of political decisionmaking has indeed become a reality.").

²⁴⁸ See Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 832 (2006) ("The major problem with the current system . . . is that the current preclearance process lacks transparency and is subject to partisan manipulation by the political party holding the reins of DOJ.").

provision²⁴⁹ to afford private citizens and courts better opportunities to impose preclearance on offending jurisdictions.

A. *Updating Section 5 Preclearance*

As Issacharoff and other critics note, section 5 preclearance determinations are increasingly susceptible to partisan manipulation.²⁵⁰ In the VRA's early years, the South's one-party political structure provided no incentive for partisan decision making by the Justice Department.²⁵¹ Issacharoff posited, "Until the reemergence of the Republican Party in the South, intervention from Washington could alter the racial dimensions of political power, but not the partisan divide."²⁵² In contrast, preclearance determinations in today's bipartisan South²⁵³ can not only alter local politics but also carry nationwide implications for a party.²⁵⁴ A 2002 redistricting plan from Texas illustrates how instrumental voting changes today can be in carrying out political agendas (at the expense of minority voters) and how susceptible the preclearance process can be to partisan bias. The Republican-sponsored plan proposed mid-decade redistricting that would alter the composition of thirty-one of Texas's thirty-two congressional districts in the party's favor.²⁵⁵ Because it disadvantaged black and Latino voters, Justice Department staff unanimously opposed the plan.²⁵⁶ Nevertheless, then-Attorney General John Ashcroft, a Bush appointee, granted preclearance over the Department's objections.²⁵⁷

In some instances, partisan tensions between Washington and covered states help section 5 serve its purpose: the Justice Department's preclearance

²⁴⁹ The counterbalance to the bailout provision, the VRA's "bail-in" provision permits courts to impose preclearance requirements on noncovered jurisdictions that violate the Fourteenth or Fifteenth Amendments. See 42 U.S.C. § 1973a(c) (2006). "Courts" in this context refers to the U.S. District Court for the District of Columbia and, in the event of an appeal, the Supreme Court of the United States. See *id.* § 1971(g).

²⁵⁰ See Issacharoff, *supra* note 111, at 1713–14; *accord* Tokaji, *supra* note 248, at 788 ("The enormous power vested in the DOJ to grant or deny administrative preclearance *is* subject to partisan manipulation."); Edward Blum et al., *Who's Playing Politics?*, NAT'L REV. ONLINE (Jan. 24, 2006, 8:29 AM), <http://www.nationalreview.com/articles/216584/whos-playing-politics/edward-blum>.

²⁵¹ See Issacharoff, *supra* note 111, at 1713–14.

²⁵² *Id.* at 1713.

²⁵³ The term "South" is used here as shorthand for covered states under section 5 of the VRA.

²⁵⁴ See Sandhya Somashekhar & Aaron Blake, *Electoral Map Gets a GOP Tinge*, WASH. POST, Dec. 22, 2010, at A4. Locally, redistricting can affect the results for mayoral and gubernatorial elections, but it can also determine which party will occupy a state's congressional seats. See *id.* This figure, of course, corresponds with a state's electoral college votes in presidential elections. *Id.*

²⁵⁵ See Tokaji, *supra* note 248, at 809.

²⁵⁶ See *id.* at 810–11.

²⁵⁷ *Id.* at 811.

determination and the state's right to judicial review serve as checks on one another. In those cases, Washington keeps covered states from advancing their political agendas at the expense of minorities, and covered states can enlist court oversight to ensure the Justice Department has not wrongfully denied preclearance. The inverse scenario is more problematic. When the Justice Department and a state share political leanings, discriminatory proposals can be wrongfully precleared.²⁵⁸ In those situations, wronged minorities are currently unable to bring an action for judicial review under section 5.²⁵⁹ They may, and do, bring actions under section 2 but are disadvantaged by the burden of proof and standard of review necessary in section 2 cases.²⁶⁰ Whereas section 5 places the burden on the state to prove that its proposed measure is not retrogressive in effect or discriminatory in purpose, section 2 places the burden on plaintiffs to prove that a voting law has the effect of diluting minority votes.²⁶¹ Because of section 2's reversed burden and narrower scope, it is not an adequate substitute for section 5 review.

This Comment proposes allowing private citizens to petition for judicial review of preclearance decisions. Rather than adopt the burden-shifting model from section 2, the standard of review for these decisions would be substantially identical to the judicial review of preclearance denials currently available to states under section 5. Thus, minorities could add their own check on the preclearance process, guarding against partisan abuse from within the established framework of section 5.²⁶²

The benefits of using judicial review in this capacity are clear: allowing the judiciary to oversee preclearance decisions not only provides an impartial arbiter²⁶³ to right partisan wrongs but also encourages the Justice Department to make more defensible decisions in the first place.²⁶⁴ Weighing the costs and

²⁵⁸ The Texas redistricting plan is a prime example of this scenario. *See supra* text accompanying notes 255–60.

²⁵⁹ *See* Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 747 (2006) (“Preclearance grants . . . are not subject to judicial review.”).

²⁶⁰ *See* David Epstein & Sharyn O'Halloran, *A Strategic Dominance Argument for Retaining Section 5 of the VRA*, 5 ELECTION L.J. 283, 284–85 (2006).

²⁶¹ *See id.*

²⁶² Another benefit of this model is that it makes the preclearance process more adept at catching the various forms of discrimination. As the avenues for disfranchisement become more subtle and varied, they likely become more difficult to identify on paper in a limited timeframe. Who better to identify the latent sources of discrimination than their victims?

²⁶³ This Comment acknowledges the growing discourse positioning judges as political actors but suggests that judges are better insulated from political prodding than their executive counterparts.

²⁶⁴ *See* POSNER, *supra* note 247, at 15–16; Tokaji, *supra* note 248, at 820–21.

benefits of judicial review of agency action, Professor Cass Sunstein suggested that it acts as “an ex ante deterrent and as an ex post check against the domination of administrative processes by irrelevant or illegitimate considerations.”²⁶⁵ Thus, to some extent, the availability of judicial review might also alleviate the need for judicial review.

The expansion of judicial review to affirmative preclearance decisions has been suggested before,²⁶⁶ but it is an incomplete solution. Professor Nathaniel Persily suggests its primary shortcomings stem from the volume of submissions the Justice Department receives and the potential for abuse of the appeals process;²⁶⁷ in other words, with both grants and denials of preclearance subject to judicial review, appeals by aggrieved parties would become automatic and flood the courts. To prevent this outcome, a corresponding measure is required to minimize the number of appeals that would appear before the courts.

To ensure further legitimacy in preclearance determinations, this Comment suggests also requiring the Justice Department to issue formal and public documentation detailing the bases for its decisions. For its limited transparency, Professor Mark Posner likened the Justice Department’s decision-making process to a “black box.”²⁶⁸ Despite the composition and internal use of analytic memoranda, the Department does not currently disclose the legal or factual findings informing its decisions.²⁶⁹ When denying preclearance, the Department traditionally issues a letter that explains, in general terms, the basis for its denial.²⁷⁰ When granting preclearance, it provides less explanation still, typically issuing a form letter acknowledging its approval of a proposed change.²⁷¹

Currently, the DOJ already compiles data for proposed changes and drafts internal-recommendation memoranda based on that data.²⁷² With data

²⁶⁵ Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 525.

²⁶⁶ See, e.g., POSNER, *supra* note 247, at 16–18; Tokaji, *supra* note 248, at 830–32.

²⁶⁷ See Persily, *The Promise and Pitfalls*, *supra* note 246, at 215.

²⁶⁸ POSNER, *supra* note 247, at 9.

²⁶⁹ See *id.* at 9–10. Posner notes that these memoranda are considered confidential and are generally not shared publicly. *Id.* at 10.

²⁷⁰ See *id.* at 9–10.

²⁷¹ See *id.* at 10.

²⁷² See, e.g., Memorandum from Tim Mellett et al., Dep’t of Justice, on Section 5 Recommendation to file (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>. Justice Department staff composed a seventy-three-page memorandum detailing their opposition to the Texas

compilation and analysis completed, the remaining steps to issuing formal decisions are few. To conserve resources and facilitate easy access, the Justice Department should publish those decisions on its website.²⁷³ Here, too, the Department has already taken substantial steps toward simple publication of formal decisions by maintaining a well-organized website with a section devoted to preclearance requests; a page titled “Notices of Section 5 Activity” categorizes requests chronologically by state, listing the jurisdiction affected and the type of change proposed.²⁷⁴ By adding a hyperlink to each listing once a preclearance determination has been made, the Justice Department could publish decisions within its website’s existing organizational structure.

The Justice Department’s publishing of formal opinions and the availability of judicial review would increase the transparency and, in all likelihood, the legitimacy of preclearance determinations. Not only would the Department lose public confidence by issuing indefensible opinions, but it would also lose any advantage of partisan decision making if those decisions could be overturned. A final benefit of the formal-decision requirement is that it would provide courts with a better record for determining whether to hear an appeal. If the Justice Department’s decisions adhere to the section 5 standard of review—and they should, based on the Department’s desires to appear credible and avoid reversal—then the court need not grant an appeal. In this sense, the formal-decision requirement should stem the flow of appeals, and the availability of appeals should ensure the legitimacy of the formal decisions. Meanwhile, the preclearance process would become more resistant to partisan influence and afford minorities a more active role in the defense of their rights.

B. Updating Section 5 Through Bailout

In addition to the partisan tensions tainting preclearance administration, the changing nature of discrimination has rendered section 5, in its current form, ineffective at reflecting modern sources of discrimination accurately. A common criticism of section 5 is that its coverage is now both overinclusive

redistricting plan. See Dan Eggen, *Justice Staff Saw Texas Districting as Illegal*, WASH. POST, Dec. 2, 2005, at A1. This memo was leaked to the *Washington Post* and is now available online. *Id.*

²⁷³ This is in line with the new trend toward e-rulemaking, in which government agencies are using the Internet to document the rule-making process publicly and cheaply. See John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 975 (2006).

²⁷⁴ *Notices of Section 5 Activity Under Voting Rights Act of 1965, as Amended*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/vot/notices/noticepg.php> (last visited Feb. 22, 2012).

and underinclusive.²⁷⁵ Currently, section 5 extends coverage to any jurisdiction (1) that has used a “test or device” in the last ten years (including the use of English-only ballots in jurisdictions with large language-minority populations) and (2) where voter registration or participation in the 1972 presidential election was below fifty percent of the population eligible to vote.²⁷⁶ In *NAMUDNO*, the Court considered section 5’s “fail[ure] to account for current political conditions” suggestive of its inability to remedy the evil it was intended to address.²⁷⁷

Merely updating the coverage formula to reflect more recent elections has been considered.²⁷⁸ As previously discussed, however, discrimination is not so easily measured today: equality is no longer considered access to a vote alone but access to a vote of relative substance.²⁷⁹ Thus, updating the coverage formula to reflect more recent voter-registration rates or election turnouts would still provide unsatisfactory coverage. In a 2007 article, Professor Persily suggested a number of reasons for retaining the same coverage formula in the 2006 amendments, the most salient of which are the inherent difficulties in crafting a new formula and the Supreme Court having already upheld the current one.²⁸⁰ If updating the coverage formula is not a viable solution, then section 5’s shortcomings with respect to coverage must be resolved through its other provisions. This Comment suggests addressing the problem by modifying the bailout process, which allows a covered jurisdiction to petition the court for a determination that it no longer engages in disfranchising practices and can be released from its preclearance obligations.

To bail out from section 5, a jurisdiction must obtain a declaratory judgment from a three-judge panel of the District Court for the District of Columbia.²⁸¹ A jurisdiction seeking bailout has the burden of proving that it (1) has not used a discriminatory test or device in the last ten years,²⁸² (2) has not been denied preclearance for any proposed voting change in the last ten

²⁷⁵ Persily, *The Promise and Pitfalls*, *supra* note 246, at 208; *accord* *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009).

²⁷⁶ See 42 U.S.C. §§ 1973b(b)–(c) (2006).

²⁷⁷ 129 S. Ct. at 2512.

²⁷⁸ See, e.g., H.R. REP. NO. 109-554, at 3 (2006) (proposing an amendment to the Voting Rights Act of 1965 with an updated coverage formula, which was ultimately rejected).

²⁷⁹ See Voting Rights Act Amendments of 2006, *supra* note 56, sec. 5 (adding a provision protecting minority voters’ ability to “elect their preferred candidates of choice”).

²⁸⁰ Persily, *The Promise and Pitfalls*, *supra* note 246, at 211.

²⁸¹ See 42 U.S.C. §§ 1973b(a)(1), 1973c(a).

²⁸² *Id.* § 1973b(a)(1)(A).

years,²⁸³ (3) has not violated any other provisions of the VRA in the last ten years,²⁸⁴ and (4) has “engaged in constructive efforts to eliminate intimidation and harassment” of voters.²⁸⁵ The bailout provision anticipates the Justice Department’s involvement in bailout decisions and permits aggrieved parties to intervene.²⁸⁶ However, this Comment proposes guaranteeing concerned minority groups a fixed role in bailout proceedings by making representative organizations parties to such proceedings for the jurisdictions in which they reside.²⁸⁷

This level of involvement from interest groups would have a number of benefits. Not only would this increased involvement serve as an additional check on the Justice Department (whose recommendations are traditionally afforded great deference by the courts),²⁸⁸ but it would also give covered states every incentive to include minority groups in their decision-making processes. If minorities have an assured voice in bailout proceedings, states should strive to ensure that that voice weighs in favor of bailout. This measure would, therefore, encourage covered jurisdictions to communicate more openly with their minority residents prior to seeking bailout.²⁸⁹ Such a dialogue would increase transparency in local legislating and offer minorities more opportunities to voice their perspectives, with a higher likelihood of those views being taken into consideration.²⁹⁰ Involvement of interest groups could also assist jurisdictions seeking bailout with respect to the fourth requirement by evidencing the jurisdiction’s “constructive efforts” toward achieving equality in voting.²⁹¹

Though it would be a substantial step toward improving section 5 through the bailout provision, this adjustment alone would not facilitate the desired level of change. The incentives for improvement offered by this proposal are only present if a jurisdiction anticipates bailing out. Historically, the number of

²⁸³ *Id.* § 1973b(a)(1)(E).

²⁸⁴ *Id.* § 1973b(a)(1)(D).

²⁸⁵ *Id.* § 1973b(a)(1)(F)(ii).

²⁸⁶ *See id.* § 1973b(a)(9).

²⁸⁷ Professor Gerken notes that civil rights groups are well situated to handle this type of role because they are consistently up-to-date on proposed voting changes and their potential consequences, and frequently called upon to weigh in on preclearance decisions by the Justice Department. *See* Gerken, *supra* note 259, at 725–26.

²⁸⁸ *See* POSNER, *supra* note 247, at 6 (noting that the Justice Department enjoys a “high rate of success . . . in declaratory judgment actions”).

²⁸⁹ *See id.* at 729 (suggesting that the threat of judicial review would support a negotiation model of decision making between covered jurisdictions and minority groups).

²⁹⁰ *See id.*

²⁹¹ *See* 42 U.S.C. § 1973b(a)(1)(F)(ii).

jurisdictions seeking bailout has been very low.²⁹² To reap the benefits of the modified bailout process suggested above, this Comment suggests mandating a periodic bailout review of all covered jurisdictions. Professor Richard Hasen and Congressman Lynn Westmoreland advocated for the inclusion of a “proactive bailout measure” in the 2006 amendments to the VRA.²⁹³ Their proposal, however, was intended to achieve different ends. Specifically, Hasen and Westmoreland sought to make section 5 more defensible by offering an easier opt-out clause.²⁹⁴ Enhancing section 5’s responsiveness to improved conditions in covered jurisdictions would, indeed, be a benefit of periodic review. Also beneficial would be addressing the Court’s concern in *NAMUDNO* that section 5 “fails to account for current political conditions.”²⁹⁵ However, periodic review in the context of this Comment’s proposal could further more immediate goals.

Preclearance demands a relatively low showing of fairness: the retrogression standard requires only that a proposed change maintain the status quo.²⁹⁶ Bailout, on the other hand, requires that a jurisdiction not only comply with the VRA but also undertake affirmative steps to further equality.²⁹⁷ Some argue that the heightened standard for bailout explains the provision’s underuse.²⁹⁸ Bailout was, however, relatively common in the VRA’s early years.²⁹⁹ Professor Persily notes that “several jurisdictions successfully bailed out of the original VRA and the two subsequent reauthorizations, [but] only fourteen counties (all in Virginia) have successfully bailed out since 1982, and no others have attempted to do so.”³⁰⁰ If the problem were related to the stringency of the bailout standard, one would expect a consistently low figure, rather than a steady decline. This Comment suggests that the decline in bailouts instead corresponds with the growing view that section 5 is outdated and irrelevant.³⁰¹ Section 5 may once have imposed a stigma on covered

²⁹² Persily, *The Promise and Pitfalls*, *supra* note 246, at 212 (noting that only fourteen counties have successfully bailed out since 1982).

²⁹³ *Id.*; see also Rick Hasen, *Hasen: Drafting a Proactive Bailout Measure for VRA Reauthorization*, ELECTION L. BLOG (May 18, 2006, 9:37 AM), <http://electionlawblog.org/archives/005655.html>.

²⁹⁴ See Persily, *The Promise and Pitfalls*, *supra* note 246, at 212.

²⁹⁵ *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009).

²⁹⁶ See *Beer v. United States*, 425 U.S. 130, 141 (1976).

²⁹⁷ See 42 U.S.C. § 1973b(a)(1)(F) (2006).

²⁹⁸ See, e.g., Persily, *The Promise and Pitfalls*, *supra* note 246, at 213.

²⁹⁹ See *id.* at 212.

³⁰⁰ *Id.*

³⁰¹ See discussion *supra* Part I.C.

jurisdictions, from which they desired to redeem themselves by bailing out.³⁰² If section 5 is no longer perceived as legitimate, however, then it follows that the incentive to meet the higher bailout standard has waned.

In addition to the renewed life this Comment attempts to breathe into section 5 as a whole, the periodic-bailout proposal is intended to renew the trend toward bailing out and encourage covered jurisdictions to actively further equality in voting. A covered jurisdiction today could dismiss the stigma associated with its covered status as being residual of the original VRA, rather than a reflection of its current state. Periodic-bailout review would identify the jurisdictions for which this is true and release them of their preclearance obligations.³⁰³ In jurisdictions where this is not the case—where discrimination still poses a problem—periodic review would draw attention to their failures to progress. This would likely have the effect of reestablishing the stigma associated with section 5, for there is a considerable difference between having been identified as a suspect jurisdiction in 1965 and having been deemed suspect anew in 2011. The presence of a jurisdiction's minority organizations at the bailout proceedings should only further its need to appear credible and desirous of progress. Thus, the inclusion of minorities in the bailout process and a periodic review of bailout eligibility would address issues of partisanship and transparency, and would encourage efforts to combat the new sources of discrimination.

C. *Updating Section 5 Through Bail-In*

The bailout modifications suggested above address the overinclusiveness of section 5, but the problem of underinclusiveness remains. As modern discrimination sheds its resemblance to the Jim Crow South,³⁰⁴ section 5 needs to adapt in its ability to identify and remedy new sources of discrimination. Following the 2000 and 2004 election controversies in Florida and Ohio, many wondered how such flagrant abuses of the election process could spur national legislation, like the Help America Vote Act, but avoid triggering section 5

³⁰² This hypothesis is supported by the higher number of bailouts in the VRA's early years. See Persily, *The Promise and Pitfalls*, *supra* note 246, at 212–13.

³⁰³ It would also address other potential sources of low bailout rates, like the cost of hiring lawyers to prepare the bailout request and the hesitation to apply for a bailout while facing an uncertain outcome. See *id.* at 213.

³⁰⁴ See discussion *supra* Part II.B–D.

coverage.³⁰⁵ If updating the coverage formula is not feasible,³⁰⁶ then the solution must again lie in one of the VRA's other provisions.

The VRA currently offers a “bail-in” provision that brings noncovered jurisdictions under the preclearance umbrella, regardless of whether they meet the coverage formula's criteria.³⁰⁷ Referred to as the “pocket trigger,”³⁰⁸ this provision permits a court to impose preclearance requirements on a jurisdiction found to be in violation of the Fourteenth or Fifteenth Amendments “for such period as it may deem appropriate.”³⁰⁹ Despite the great potential this provision has to render the preclearance regime more responsive to modern forms of discrimination, it is largely underused in practice and seldom the topic of academic discussion.³¹⁰

A likely explanation for the bail-in provision's rare invocation is the onerous burden of proof attributed to it by courts.³¹¹ Not only is the burden of proof in section 2 cases on plaintiffs, but also the Supreme Court has held that bailing-in a jurisdiction requires proof that a challenged action was undertaken with discriminatory intent.³¹² Time and again, however, Congress has steered the VRA toward an emphasis on discriminatory effects over discriminatory purpose. In 1980, the Supreme Court held in *City of Mobile v. Bolden* that a plaintiff must prove a voting law was adopted or administered with discriminatory purpose to challenge it successfully under section 2.³¹³ Congress's 1982 amendments to the VRA reversed this standard in favor of

³⁰⁵ See, e.g., Persily, *The Promise and Pitfalls*, *supra* note 246, at 208 (“[I]t is difficult to defend a formula which, for example, covers counties in Michigan and New Hampshire, but does not cover the counties in Ohio and Florida with the most notorious voting rights violations in recent elections.” (footnote omitted)); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1209 (2005) (detailing the U.S. Commission on Civil Rights' finding that “blacks were far more likely than non-blacks to have their ballots rejected” in the 2000 election (quoting Allan J. Lichtman, *Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida*, in U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION app. VII, at 4 (2001)) (internal quotation marks omitted)).

³⁰⁶ See *supra* text accompanying notes 278–83.

³⁰⁷ See 42 U.S.C. § 1973a(c) (2006).

³⁰⁸ Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 992, 997 (2010).

³⁰⁹ 42 U.S.C. § 1973a(c).

³¹⁰ See Crum, *supra* note 308, at 997, 2010 (noting that, prior to his Note, the “obscure” pocket trigger provision had “never received full-length treatment from any book, article, note, or comment”).

³¹¹ See *id.* at 2009.

³¹² See *id.*

³¹³ See 446 U.S. 55, 62, 65 (1980) (plurality opinion), *superseded in part by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1973, 1973b, 1973c, 1973aa-1a, 1973aa-6).

one where a violation could be established instead with proof of discriminatory effects.³¹⁴ This tension resurfaced twenty years later with the Court's decision in *Bossier*, requiring a showing of retrogressive purpose to satisfy section 5's purpose prong.³¹⁵ Congress again responded in the 2006 amendments to the VRA by restoring the pre-*Bossier* standard of "any discriminatory purpose."³¹⁶

A review of the VRA's legislative history thus reveals that the Court's bail-in standard is no longer consistent with the Act's other provisions. This Comment proposes substituting the purpose-based inquiry under bail-in analysis with an effects-based inquiry to (1) keep this provision consistent with Congress's intentions for the VRA and (2) allow bail-in to become a more integral part of the preclearance regime.³¹⁷ The VRA's coverage formula represents a static standard that no longer accurately identifies the indicia of disfranchisement.³¹⁸ And as it stands, bail-in offers only a marginally better solution: requiring proof of discriminatory intent ultimately condones the enactment of laws that are known to disfranchise minorities (i.e., have discriminatory effects) but whose discriminatory implications are not viewed as problematic.³¹⁹ On the other hand, the amended bail-in provision proposed by this Comment would afford private citizens better opportunities to confront jurisdictions that engage in patterns of discrimination and would influence change within those jurisdictions. On a larger scale, it would offer section 5 a more flexible standard better equipped to identify contemporary sources of discrimination.

CONCLUSION

Section 5 was originally embraced because of the crisis it was intended to resolve. The widespread disfranchisement of black southerners was a concrete issue the country could readily tackle. Today's problems are more abstract: America's minorities are no longer exclusively black, and discrimination

³¹⁴ Voting Rights Act Amendments of 1982 sec. 2.

³¹⁵ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 332 (2000).

³¹⁶ Voting Rights Act Amendments of 2006, *supra* note 56, sec. 5.

³¹⁷ Congress's rationale for changing the 1982 amendments applies in this context as well: (1) the appropriate inquiry is whether minorities' votes are being diluted, not why; (2) accusing legislators of racism is "unnecessarily divisive"; and (3) proving discriminatory intent is too onerous a burden on plaintiffs. Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 *How. L.J.* 495, 497-98 (1985) (emphasis omitted) (quoting S. REP. NO. 97-417, at 36-37 (1982)) (internal quotation marks omitted).

³¹⁸ See *supra* text accompanying notes 278-83.

³¹⁹ Consider, for example, the Arizona and Georgia cases discussed in Part II.C-D.

against them is not exclusively Southern. As this Comment has demonstrated, however, the metamorphosis of discrimination does not signal its end. In addition to the structural inequalities minorities have always faced, they are increasingly the casualties of a tense political and economic environment, and of a raging partisan power struggle. America's minority population is growing, and with its growth rises the percentage of the population whose access to meaningful participation in the electoral process would be threatened by the abolition of section 5—the VRA's most important, and most endangered, provision.

Scholarly and judicial skepticism of the continued need for section 5 are based largely on an understanding of the provision as a product and solution confined to the Jim Crow South. This interpretation is not only oblivious to the modern sources and victims of disfranchisement but also directly in conflict with Congress's continued commitment to section 5. Congress has demonstrated its intentions with respect to section 5 by renewing and expanding the provision at each term, extending protection to "language minorit[ies]"³²⁰ and ensuring that access to a vote encompasses access to a meaningful vote.³²¹ In these respects, section 5's work is not done.

To some degree, section 5's critics are correct; despite congressional attempts to update the statute in light of demographic and political changes, the statute still does not adequately reflect the problems it was intended to resolve. Rather than abolish section 5, however, this Comment advocates reorienting the VRA's provisions to render section 5 more receptive to the needs of minorities and more resistant to partisan influence. As signaled by *NAMUDNO* and *Perry*, the resolution of this issue is imminent.³²² The approach suggested by this Comment would resolve both the practical and constitutional concerns

³²⁰ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 4, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973aa-1a (2006)).

³²¹ See Voting Rights Act Amendments of 2006, *supra* note 56, sec. 5 (prohibiting voting practices that diminish any U.S. citizen's right to "elect their preferred candidates of choice").

³²² See 129 S. Ct. 2504 (2009); *see also supra* notes 234–39 and accompanying text.

surrounding section 5 and reinvigorate the country's dedication to achieving equality in voting.

ENBAR TOLEDANO*

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