

ESSAY

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PRESERVING THE ARK OF OUR SAFETY: HOW A STRONGER ADMINISTRATIVE APPROACH COULD SAVE SECTION 5 OF THE VOTING RIGHTS ACT

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In our system, the first right and most vital of all our rights is the right to vote. Jefferson described the elective franchise as “the ark of our safety.” It is from the exercise of this right that the guarantee of all our other rights flows.¹

—Lyndon B. Johnson

INTRODUCTION

On July 27, 2006, President George W. Bush signed into law the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization Act).² The twenty-five year extension of the Voting Rights Act of 1965 (VRA)³ included the controversial yet undeniably successful Section 5.⁴ The VRA identifies districts with the worst histories of voting discrimination and subjects those “covered jurisdictions” to the obligations of Section 5. Section 5 requires jurisdictions within its coverage to apply for and receive approval, or “preclearance,”⁵ from the Attorney General⁶

1. Special Message to the Congress on the Right to Vote, 1 PUB. PAPERS 288 (Mar. 15, 1965). In 1801, Thomas Jefferson wrote, “The elective franchise, if guarded as the ark of our safety, will peaceably dissipate all combinations to subvert a Constitution, dictated by the wisdom, and resting on the will of the people.” Letter from Thomas Jefferson to Benjamin Waring (Mar. 1801), in THE JEFFERSONIAN CYCLOPEDIA 841 (John P. Foley ed., 1900).

2. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; see Associated Press, *Bush Signs Voting Rights Act Extension Amid Midterm Election Season*, USA TODAY (July 27, 2006, 10:17 AM), http://www.usatoday.com/news/Washington/2006-07-27-bush-votingrights_x.htm.

3. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006)).

4. 42 U.S.C. § 1973c (2006).

5. 28 C.F.R. § 51.2 (2011).

6. The Attorney General has, for almost every circumstance, delegated this authority to the Assistant Attorney General for the Civil Rights Division. *Id.* § 51.3.

or the U.S. District Court for the District of Columbia before making *any* voting-related changes.⁷ It has been an effective means of dismantling and preventing barriers to minority participation in the political process.⁸ Despite this success, the current system, in which the Department of Justice (DOJ) is confined to a specific set of covered jurisdictions and relatively static procedures, lacks the adaptability necessary to effectively combat voting discrimination in an ever-changing society.

Section 5 covers any state or political subdivision that, for the presidential elections of 1964, 1968, or 1972, (1) used a “test or device”⁹ as a precursor for voting and (2) had voter registration or voter turnout below 50%.¹⁰ Despite appeals to modify Section 5’s coverage by updating the data used for this “coverage formula” in the 2006 Reauthorization Act,¹¹

7. See 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.10.

8. See *infra* Part I.A.2.

9. See 42 U.S.C. § 1973b(c) (defining this phrase). Congress concluded that tests and devices, such as literacy tests and proof of “understanding of constitutional provisions . . . or good moral character, as prerequisites to voting” were often used to deny minorities the right to vote. H.R. REP. NO. 89-439, at 11–12 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443. In *South Carolina v. Katzenbach*, the Supreme Court accepted this basis for Section 5 coverage, concluding that “[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil.” 383 U.S. 301, 330 (1966). Examples of this include requiring African-Americans to “interpret obscure sections of state constitutions” or answer questions such as “how many bubbles does a bar of soap contain” as a prerequisite for voter registration. Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J.L. & PUB. POL’Y 41, 44 (2007) (internal quotation marks omitted); see BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE* 18 (2007) (noting that in response to the concern “that black voters would begin to have a voice in Alabama politics,” the Alabama Democratic Party sponsored and successfully adopted the Boswell Amendment in 1946, which “required that an applicant be able to understand and explain any article of the constitution of the United States” (internal quotation marks omitted)). In 1975, Congress amended the term “test or device” to include the practice of providing voting material exclusively in English during the 1972 election in jurisdictions where over 5% of the voting age citizens were “members of a single language minority.” Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401–02 (codified as amended at 42 U.S.C. § 1973b(f)). Congress concluded that providing voting material only in English could effectively deny language minorities the right to vote. See *id.*

10. 42 U.S.C. § 1973b(b); see H.R. REP. NO. 89-439, at 13–14 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2444 (providing evidence and arguments that the presence of these two factors indicates the “strong probability” the tests or devices are being used to discriminate against minorities); see also 28 C.F.R. app. pt. 51 (listing the currently covered jurisdictions).

11. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 85 (2006) (statement of Ronald Keith Gaddie, Professor of Political Science, The University of Oklahoma); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once*

Congress chose to retain 1964, 1968, and 1972 as the baseline years. This failure to alter the coverage formula has created diverse criticism.¹² It has also fueled continuing concerns over the constitutionality of Section 5.

The constitutional foundation of Section 5 and the protection it affords may be on the verge of collapse.¹³ This is a worrisome prospect. Professor Cashin concludes that as long as “pronounced racial cleavages remain evident in party affiliation” there will be a significant risk of voting discrimination.¹⁴ Perhaps the single most effective and important tool in the battle against voting discrimination, the end of Section 5 would be a monumental blow to the civil rights movement.¹⁵ Further, it is unclear what, if any, phoenix would rise from the ashes of Section 5.¹⁶

and Future Remedy?, 81 DENV. U. L. REV. 225, 278–82 (2003).

12. See, e.g., S. REP. NO. 109-295, at 25–36 (2006) (additional views of Senators John Cornyn and Tom Coburn) (providing data that show significant improvement in African-American voter registration and turnout in the covered jurisdictions, and arguing that the “systematic, invidious practices that plagued our election system 40 years ago” no longer exist and, thus, an alternative or updated coverage formula should have been considered); Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J.L. & PUB. POL’Y 561, 581 (2007) (concluding that the coverage formula no longer has “any rhyme or reason” and that it must be updated so that the coverage reflects the current state of the country); Carol M. Swain, *Reauthorization of the Voting Rights Act: How Politics and Symbolism Failed America*, 5 GEO. J.L. & PUB. POL’Y 29, 29 (2007) (asserting that Congressional failure to update the coverage of Section 5 missed an opportunity to extend protection to areas that truly need it and continued coverage for some jurisdictions where the situation no longer requires it or even where there was never any history of discrimination).

13. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2512 (2009) (recognizing Section 5’s federalism costs and asserting, in dicta, that if voting discrimination is no longer concentrated in the covered jurisdictions, Section 5’s application may not be “sufficiently related to the problem that it targets” and, thus, Section 5 may be unconstitutional); see also Robert Barnes, *Voting Rights Provision in Peril*, WASH. POST, Feb. 10, 2012, at A2; *infra* notes 127–129 and accompanying text.

14. Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL’Y 71, 74 (2006).

15. Accord Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 102 (2007) (calling a potential challenge to Section 5 a “showdown for the ages, a clash of principles between 1960s liberalism and 1990s conservatism”); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 709 (2006) (describing Section 5 as the “most powerful weapon in the civil rights arsenal”). Section 5 directly confronted the serious problems of case-by-case adjudication, including the fact that once one practice was deemed illegal, “local officials would [simply] switch to another” discriminatory practice. *Id.* at 711. It thus solved the difficulties surrounding the enforcement of the right to vote by effectively preventing new discriminatory voting practices from ever being put into effect. See *id.*

16. This idiom finds its inception in a clever question posed by Adam Finkel and Jason Sullivan. See Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the*

Since Congress passed the VRA in 1965, the Supreme Court has upheld the constitutionality of Section 5 on numerous occasions.¹⁷ In so doing, the Court acknowledged the questionable constitutional standing of Section 5 but recognized that “exceptional conditions” and “unique circumstances” may “justify legislative measures not otherwise appropriate.”¹⁸ The debate over the current state of Section 5’s constitutionality thus focuses on whether those conditions and circumstances that justified Section 5 in the past, or their modern day equivalents, still exist. Ultimately, this question will be framed by the standard of review the Supreme Court uses to determine the constitutionality of Section 5¹⁹ and whether, under that standard, the legislative record is sufficient to justify the continuing need for Section 5’s prophylactic approach to voting discrimination.

“Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (*Ergonomics*) Again?, 63 ADMIN L. REV. 707, 709 (2011) (“What kind of phoenix, if any, is allowed to rise from the ashes of a dead regulation?”).

17. See, e.g., *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–84 (1999) (recognizing the federalism concerns with Section 5 but holding that the Fifteenth Amendment permits intrusion into “areas traditionally reserved to the States” and thus ruling that the Voting Rights Act (VRA) was a permissible exercise of Congressional authority); *Georgia v. United States*, 411 U.S. 526, 535 (1973) (reaffirming the reasoning of *Katzenbach* that Section 5 is “a permissible exercise of congressional power under § 2 of the Fifteenth Amendment”); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In *Katzenbach*, the Court recognized the enduring problem of voting discrimination, the ineffectiveness of past methods of enforcement, and that discrimination was concentrated in certain areas of the country, thus ruling that Section 5 was a “permissible method of dealing with the problem” of voting discrimination. *Id.* at 328–29.

18. *Katzenbach*, 383 U.S. at 334–35 (1966) (holding that the fact that the covered states were continuously developing and enacting new discriminatory rules with the clear purpose of evading unfavorable court rulings were “unique circumstances” and Section 5 was a reasonable congressional response); see also *NAMUDNO*, 129 S. Ct. at 2510 (stating that past decisions upheld the VRA since “circumstances continued to justify the provisions”); *id.* at 2525–26 (Thomas, J., concurring in the judgement in part and dissenting in part) (arguing the discrimination justifying the previous decisions no longer exists).

19. Compare *Katzenbach*, 383 U.S. at 324 (finding Section 5 constitutional by applying the rational means test) and *Nw. Austin Mun. Util. Dist. No. One v. Murkasey*, 573 F. Supp. 2d 221, 241–46 (D.D.C. 2008) (holding that the rational means test should still apply), *rev’d on statutory grounds*, *NAMUDNO*, 129 S. Ct. 2504, with *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 449 (D.D.C. 2011) (“*Boerne*’s congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach*, and hence provides the appropriate standard of review to assess Shelby County’s facial constitutional challenge to Section 5 and Section 4(b).”), and *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (ruling that statutes passed by Congress under § 5 of the Fourteenth Amendment will be reviewed using the “congruence and proportionality” test), and *Clegg & Chavez*, *supra* note 12, at 569–70 (predicting the Supreme Court will review Congress’s Fifteenth Amendment enforcement authority under the “congruence and proportionality” test outlined in *City of Boerne*).

This Essay argues that a stronger and more dynamic administrative approach, one that includes the authority to adjust the coverage and procedures of Section 5, can help ensure the continued constitutionality of Section 5 by better tailoring it to changing demographics and evolving needs. This would directly respond to the Supreme Court's concern that the current coverage may not be "sufficiently related to the problem that it targets"²⁰ by allowing coverage to be continuously adjusted to include the areas where problems exist. This Essay also maintains that an agency with authority to adjust both the procedures and coverage of Section 5 will be far more effective at combating modern-day voting discrimination on a national scale. Finally, this Essay posits that greater transparency in the preclearance process, along with specific reporting requirements and avenues to appeal grants of preclearance, will help reduce the risk of political abuse.

Part I of this Essay gives an overview of Section 5, the effect it has had in the covered jurisdictions, and the role of DOJ in its enforcement. Part II examines the constitutionality of Section 5, looking both at why it was constitutional in 1965 and why it remains constitutional today. Finally, Part III proposes that Congress amend the VRA to strengthen the reporting requirement for preclearance decisions, allow for the appeal of grants of preclearance, create a means by which jurisdictions may be added to Section 5 coverage, and establish a more efficient way for the removal of jurisdictions from coverage. This Essay is in no way meant to assert that Section 5, in its current form, is ineffective or unnecessary. It simply attempts to suggest reforms that would greatly strengthen the effectiveness and constitutional foundation of Section 5's protection now and in the future.

I. OVERVIEW

Congress passed the VRA in an attempt to remedy what it called the "painfully slow" progress in enforcement of the Fifteenth Amendment²¹ and the voting rights statutes in effect at the time.²² It attributed this slow progress to the "intransigence of State and local officials" and the prolonged and costly judicial process of a case-by-case enforcement approach.²³ While the VRA has other important remedial provisions,²⁴

20. *NAMUDNO*, 129 S. Ct. at 2512.

21. U.S. CONST. amend. XV (stating that the right to vote cannot be denied on the basis of race).

22. H.R. REP. NO. 89-439, at 9 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441.

23. *Id.* at 9-10 (stating that trial preparation for a voting rights case filed by the Justice Department involves an enormous amount of time and often, since new discriminatory

Section 5 is the primary focus of this Essay.

A. Section 5

Section 5 was included in the VRA as a temporary provision.²⁵ It was subsequently reauthorized and amended in 1970,²⁶ 1975,²⁷ and 1982;²⁸ in 2006 it was extended for an additional twenty-five years.²⁹ While technically temporary, Section 5 represents the central provision of Congress's solution to ineffective and costly case-by-case adjudication of the continuously evolving methods of voting discrimination.³⁰ Section 5

schemes are being continuously developed, causes “no change in result, only in methods”); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 177 (2007) [hereinafter Persily, *Promise and Pitfalls*] (“Such a remedy was necessary because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order.”).

24. There are other vitally important provisions of the VRA. Section 2 represents the statutory embodiment of the Fifteenth Amendment's right to vote. It bans any voting practice or procedure “which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.” 42 U.S.C. § 1973(a) (2006). Section 4 contains a provision that lists the requirements by which jurisdictions may bail out of Section 5 coverage, *see id.* § 1973b(a), the coverage formula, *see id.* § 1973b(b), and the statutory definitions of *test* and *device* used in the coverage formula, *see id.* § 1973b(c), (f)(3). Section 10 unequivocally bans the use of “poll taxes” as a prerequisite to the right to vote. *See id.* § 1973h. Finally, Section 203 requires that any jurisdiction where more than 5% or 10,000 citizens are “members of a single language minority and are limited-English proficient” must offer bilingual voting material. *Id.* § 1973aa-1a.

25. Technically the expiring provision is Section 4(a), codified in 42 U.S.C. § 1973b(a)(8), and applies only to Section 4, but since Section 5's coverage is specified in Section 4, the expiration of Section 4 would impliedly mean the end of Section 5. In addition to Section 4 and Section 5, the other temporary provision is Section 203, codified in 42 U.S.C. § 1973aa-1a.

26. Voting Rights Act Amendments of 1970, Pub. L. No. 91-284, 84 Stat. 314.

27. Pub. L. No. 94-73, 89 Stat. 400 (1975).

28. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

29. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577, 581.

30. *See* J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 680 (2008) (recognizing Section 5 as *the* remedy to the ineffective case-by-case approach to voter discrimination). Congress recognized that in addition to the fact that a case-by-case approach was both slow and costly, it also often “caused no change in result, only in methods,” as offenders would simply devise a new means by which to discriminate. H.R. REP. NO. 89-439, at 10 (1965), *reprinted in* 1965 U.S.C.A.N. 2437, 2441; *cf.* Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 692–93 (2009) (discussing the damages that stem from allowing a discriminatory voting law to be enforced while it is being

accomplishes its purpose by automatically requiring examination of any proposed change to voting practices in a covered jurisdiction and shifting the burden to the jurisdiction to prove that the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race.”³¹ Thus, covered jurisdictions are barred from enforcing any changes to voting practices without first meeting this burden of proof in the eyes of either the U.S. Attorney General or, alternatively, the U.S. District Court for the District of Columbia.³² This prophylactic approach to voting discrimination was unique and innovative,³³ but given certain states’ prior success thwarting Congress’s attempts to enforce the guarantees of the Fifteenth Amendment, it was exactly what was needed.

Even though Congress has not updated the coverage formula for Section 5 since the 1975 reauthorization,³⁴ coverage is not inherently static. There is a “bailout” provision in the VRA that provides covered jurisdictions with a means of ending coverage by seeking declaratory judgment from the District Court of the District of Columbia.³⁵ The provision requires the jurisdiction to prove conformity with specific factors for the preceding ten years to a three-judge panel.³⁶ Broadly, the requirements demand that the panel find a “record of nondiscriminatory voting practices and current efforts to expand minority participation in all aspects of the political

challenged in court and concluding “case-by-case adjudication through as-applied challenges is too slow to vindicate” the right to vote).

31. 42 U.S.C. § 1973c(a) (2006); see Kousser, *supra* note 30, at 680 (asserting that shifting the burden of proof to the jurisdiction, along with the scrutiny of every voting change, was necessary to combat the innovative means of discriminating continuously implemented by the South); see also 28 C.F.R. § 51.54(b) (2011) (stating that a discriminatory effect will be found if the proposed voting change results in retrogression of a minority group’s “effective exercise of the electoral franchise”).

32. See 42 U.S.C. § 1973c.

33. *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (calling the VRA an “inventive” exercise of Congress’s Fifteenth Amendment authority); Persily, *Promise and Pitfalls*, *supra* note 23, at 177, 216 (“The preclearance procedures in section 5 are completely unlike anything else in the U.S. Code, given their inversion of the normal federal–state relationship.”).

34. Pub. L. No. 94-73, sec. 202, 89 Stat. 400, 401 (1975) (adding data from the 1972 presidential election to the coverage formula).

35. See 42 U.S.C. § 1973b(a) (setting forth the evidentiary and procedural requirements for a successful bailout from Section 5 coverage); 28 C.F.R. § 51.5(b); see also Christopher B. Seaman, *An Uncertain Future For Section 5 of the Voting Rights Act: The Need for A Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 18 (2010) (“[B]ailout was designed as a ‘safety valve’ to release from coverage jurisdictions that could establish they had not discriminated against minority voters.”).

36. See 42 U.S.C. § 1973b(a)(1)(A)–(F), (a)(4)–(5).

process.”³⁷ Additionally, even if the plaintiff jurisdiction successfully meets its evidentiary burden, the court retains jurisdiction for the succeeding ten years and must reopen the proceedings upon a “motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods” preceding the bailout litigation, “would have precluded the issuance of a declaratory judgment” for the jurisdiction.³⁸ If the violating conduct is proven, the declaratory judgment is vacated and Section 5 coverage is reinstated.³⁹ Despite this mechanism allowing a jurisdiction to escape Section 5 coverage, as of 2009, only seventeen out of over twelve thousand covered jurisdictions had successfully utilized the provision.⁴⁰ The reason for this low number is unclear, but it implies the bailout mechanism may need reform.⁴¹

1. *The Department of Justice and the Opportunity for Political Abuse*

The DOJ is vital to the success of Section 5,⁴² yet its role is surprisingly limited. Congress restricted DOJ’s power by denying it meaningful regulatory authority over Section 5 and its coverage.⁴³ DOJ’s accountability for its decisions is also significantly curtailed since grants of preclearance are not judicially reviewable⁴⁴ and need not be explained or

37. J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 257, 262–63 (Ana Henderson ed., 2007) (restating the specific requirements).

38. 42 U.S.C. § 1973b(a)(5).

39. *Id.*

40. *NAMUDNO*, 129 S. Ct. 2504, 2519 & n.1 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

41. See Persily, *Promise and Pitfalls*, *supra* note 23, at 213–14 (advancing multiple possible theories as to why so few jurisdictions have bailed out); Pitts, *supra* note 11, at 284–85 (blaming the difficulty of the bailout provision for the low number of successful bailouts). *But see* Hebert, *supra* note 37, at 257 (“My experience indicates that the standards for establishing bailout eligibility that currently exist have proven to be both workable and practical.”). See the entire Hebert article for a description of the bailout provision, including its history, a discussion of its requirements and the process that successful jurisdictions have followed, and a convincing case for why the current procedures work and the burden on jurisdictions is reasonable.

42. See 42 U.S.C. § 1973c(a) (outlining the role of the Attorney General in the preclearance process).

43. Kousser, *supra* note 30, at 683 (recognizing that the Department of Justice (DOJ) is restricted to the issuance of guidelines or procedures instead of “rules,” and “its objection letters [do] not have precedential force”).

44. *Morris v. Gressette*, 432 U.S. 491, 500–07 (1977) (concluding that the VRA precludes judicial review of the Attorney General’s decision to grant preclearance); 28

rationalized.⁴⁵ There is potential for inconsistent results as the personnel—or political leanings—of the Executive Branch change.⁴⁶ After preclearance is granted, while parties can pursue legal action against the voting changes under Section 2 of the VRA⁴⁷ or another legal theory, the benefits of Section 5 are lost. This means the voting changes can be enforced, absent a court injunction, and the burden of proof is shifted away from the jurisdiction and onto the plaintiff alleging illegal voting discrimination.

Even before initial passage in 1965, some members of Congress raised concerns about the “multitude of opportunities for political manipulation by an Attorney General who is inclined to do so.”⁴⁸ Politics may very well have been the reason for the painfully slow implementation and enforcement of Section 5 after its enactment in 1965.⁴⁹ Since DOJ is an executive agency and the Attorney General is a member of the President’s Cabinet, an Attorney General may be receptive to the political motivations and considerations of the President’s party. Absent adequate safeguards, political manipulation is almost a certainty. Three recent examples deserve mention.

2001 Mississippi Redistricting Plan

Mississippi is covered by Section 5⁵⁰ and must obtain preclearance

C.F.R. § 51.49 (2011); see Gerken, *supra* note 15, at 718 (citing the increasing politicization of DOJ as reason to allow judicial reviewability of grants of preclearance).

45. 28 C.F.R. § 51.41 (requiring only notice of a decision not to object to a voting change).

46. Additionally, despite operating under the leadership of a President who has pledged a transparent government, it is difficult to describe the current DOJ as an agency open to public scrutiny. See *Justice Department Wins Rosemary Award For Worst Open Government Performance in 2011*, NAT’L SEC. ARCHIVE (Feb. 14, 2012), <http://www.gwu.edu/~nsarchiv/news/20120214/index.htm>; see also Al Kamen, *Justice Department Wins Secrecy Prize*, WASH. POST, Feb. 14, 2012, http://www.washingtonpost.com/politics/2012/02/14/gIQA9W6SER_story.html (calling the DOJ secrecy policies “in practical rebellion against President Obama’s 2009 open-government orders”).

47. See 42 U.S.C. § 1973 (barring any voting practice that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”). Even Section 2 litigation is not insulated from political ideology. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 21 (2008) (finding that judges appointed by Democratic presidents ruled for plaintiffs 36.2% of the time compared to 21.2% for Republican appointees).

48. H.R. REP. NO. 89-439, at 46 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2475.

49. See Kousser, *supra* note 30, at 684–85, 688 (noting the weak and inefficient early enforcement and the fact that the DOJ did not draft any guidelines until Congress pressured it to do so in 1971).

50. 28 C.F.R. app. pt. 51 (2011).

before implementing any new redistricting plan.⁵¹ While its 2001 proposal was still pending at DOJ, the Mississippi Republican Party convinced a federal judge to adopt a separate, Republican-favored redistricting plan if DOJ failed to grant preclearance within sixty days.⁵² After review, career staff unanimously found that the proposal did not negatively affect minority voters and recommended DOJ grant preclearance.⁵³ DOJ's Republican political staff rejected the recommendations and extended the review past the sixty-day window,⁵⁴ causing the federal court to implement the Republican-favored redistricting plan.⁵⁵ The reasoning for the delay was suspicious, and DOJ's inaction was widely condemned as being the product of political influence.⁵⁶

2003 Texas Redistricting Plan

Like Mississippi, Texas is covered by Section 5.⁵⁷ After submission to DOJ, career staff members analyzed the redistricting plan and produced a unanimous memorandum concluding that Texas had failed to prove that the “redistricting plan [would] not have a discriminatory effect.”⁵⁸ Thus,

51. 28 C.F.R. § 51.13(e).

52. See *Smith v. Clark*, 189 F. Supp. 2d 512, 512 (S.D. Miss. 2002); Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 83 (2009) (citing DOJ political staff's rejection of the agreed-upon plan as evidence of politicization among appointed officials).

53. Joseph D. Rich et al., *The Voting Section*, in *THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION* 32, 37 (William L. Taylor et al. eds., 2007) (describing how staff attorneys were overruled by appointees in the Assistant Attorney General's office).

54. The Republican Staff extended review by requesting more information from Mississippi. See 28 C.F.R. § 51.37 (allowing a request for more information which then resets the sixty-day preclearance decision requirement).

55. *Smith*, 189 F. Supp. 2d at 559 (ordering the Mississippi Secretary of State to use the congressional redistricting adopted by the court); see also Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211, 219 & n.34 (2008) (noting that political interference with Section 5 enforcement began at the very outset of the Bush presidency).

56. See Liu, *supra* note 52, at 82–83 (“[T]he political staff rejected the recommendation [of the career staff] and instead extended the review period to seek more information from the state on whether the fact that a state court, not a state legislature, had ordered the [redistricting] plan would affect preclearance, despite no legal basis to think it would.”); Rich et al., *supra* note 53, at 36–37 (finding the delay “highly irregular” since the requested information would not affect the ultimate preclearance decision and that it was “perhaps unprecedented for the Division's political staff to override a unanimous staff recommendation to preclear a submitted change”).

57. See 28 C.F.R. app. pt. 51.

58. Memorandum from the Dep't of Justice Voting Section on Section 5 Recommendation 66, 69 (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf> (finding that the plan also has the effect of diminishing, or retrogressing, the voting strength of minorities in the state).

they recommended that preclearance be denied.⁵⁹ The Attorney General ignored the staff's recommendations and granted preclearance six days later.⁶⁰ The decision by a Republican Attorney General in support of a redistricting plan that strongly favored Republicans was roundly criticized as representing political manipulation of the preclearance process.⁶¹ Since grants of preclearance need not be explained and are not reviewable,⁶² opponents had no real recourse.

2005 Georgia Voter Identification Law

The 2005 Georgia law required that voters show government-issued photo identification before voting.⁶³ After analysis, career staff at DOJ concluded Georgia had failed to prove the law would not have a discriminatory effect and recommended preclearance be denied.⁶⁴ The DOJ staff expressed concern that the facts indicated a drastically disproportionate number of African-Americans, as compared to whites, lacked the requisite identification.⁶⁵ Preclearance was granted the day after

59. *Id.* at 71.

60. See Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 811 (2006) (noting that the lack of transparency in the decisionmaking process makes the "reasoning behind the decision to preclear opaque," but that some outside the process have stated their opinion that politics played a hand in the outcome).

61. See Kennedy, *supra* note 55, at 219–20 & n.35 (noting that those responsible for the redistricting plan publically admitted that its sole purpose was to increase the political strength of Republicans in Texas); Mark Posner, *Evidence of Political Manipulation at the Justice Department: How Tom DeLay's Redistricting Plan Avoided Voting Rights Act Disapproval*, FINDLAW.COM (Dec. 6, 2005), http://writ.news.findlaw.com/commentary/20051206_posner.html (stating that in the past, both Democratic and Republican administrations have rarely overridden the recommendations of career staff members, and that the decision to preclear the redistricting plan was a marked deviation from that practice). *But see* Edward Blum et al., *Who's Playing Politics?*, AM. ENTERPRISE INST. FOR PUB. POLY RES. (Jan. 2006), http://www.aei.org/docLib/20060125_0219561OTIBlum_g.pdf (arguing that the Texas plan was justified and blaming the career staffers for engaging in partisan actions).

62. See *supra* notes 44–45 and accompanying text (explaining why grants of preclearance are not subject to judicial review and need not be explained).

63. See H.B. 244, 148th Gen. Assemb., Reg. Sess. § 59 (Ga. 2005), available at http://www1.legis.ga.gov/legis/2005_06/pdf/hb244.pdf.

64. Section 5 Recommendation Memorandum from Robert Berman et al., Dep't of Justice, Re. Act No. 53 (H.B. 244) (2005), at 51 (Aug. 25, 2005), available at <http://www.truthaboutfraud.org/pdf/08-25-05%20Georgia%20ID%20Preclearance%20Memo%20-%20DOJ%20Staff.pdf>.

65. See Tokaji, *supra* note 60, at 815 (noting that the DOJ staff memo, using Department of Transportation statistics, found the following: 14% of Georgia voters did not have a drivers license; African-Americans were four to five times more likely to not have access to a car; and the cost of procuring a photo ID would have a greater impact on those in poverty, a disproportionate number of whom are African-American); *cf.* MARK A.

the memorandum was issued⁶⁶ and this decision was decried as being the product of political abuse.⁶⁷ Interested parties subsequently challenged the Georgia law in federal court where a judge issued a preliminary injunction halting the enforcement of the law and citing the “severe restrictions” the law imposed on the right to vote.⁶⁸ While leaving open the question of the law’s standing under the VRA, the court tellingly noted that “the Photo ID requirement [was] most likely to prevent Georgia’s elderly, poor, and African-American voters from voting.”⁶⁹ Additionally, while the rationale of the law was to prevent voter fraud, it made absentee voting—historically much more fraught with fraud—easier.⁷⁰ Further, whites were found to be

POSNER, AM. CONST. SOC’Y FOR L. & POL’Y, THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO? 14 (2006), <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf> (advancing that photo-ID requirements “erect barriers to voting” that have a disparate impact on minority voters); Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, to C. Havird Jones, Jr., S.C. Assistant Deputy Attorney Gen. (Dec. 23, 2011), *available at* <http://s3.documentcloud.org/documents/279907/doj-south-carolina-voting.pdf> (denying preclearance to South Carolina’s voter ID law, noting that “minority registered voters were nearly 20% more likely to lack” the requisite identification and that while “non-white voters comprised 30.4% of the state’s registered voters, they constituted 34.2% of registered voters who did not” possess the mandated identification).

66. See Tokaji, *supra* note 60, at 816–17 (suggesting the appearance of political motivation created by granting preclearance apparently without even considering the prepared memorandum of the career staff); POSNER, *supra* note 65, at 15 (noting that, despite a longstanding practice, the memorandum was not even sent to the Assistant Attorney General before preclearance was granted).

67. See Kennedy, *supra* note 55, at 220 (observing that, of the investigation team, those who had recommended denying preclearance were reprimanded while the lone supporter of preclearance was financially rewarded); POSNER, *supra* note 65, at 13–15 (concluding that the lack of consideration given the recommendations of the career staff raises “questions about the DOJ’s commitment to nonpolitical decisionmaking”); see also Dan Eggen, *Staff Opinions Banned in Voting Rights Cases*, WASH. POST, Dec. 10, 2005, at A3 (discussing a new Justice Department policy of excluding the recommendations of staff members from preclearance decisions).

68. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1365 (N.D. Ga. 2005) (internal quotation marks omitted).

69. *Id.*

70. *Id.* at 1332–33 (citing a statement by Secretary Cox in which she noted that in the nine preceding years there had not been a “single case or complaint of a voter impersonating another voter at the polls,” while during the same period there had been consistent cases of fraud involving absentee voting); David H. Harris, Jr., *Georgia Photo ID Requirement: Proof Positive of the Need to Extend Section 5*, 28 N.C. CENT. L.J. 172, 185 (2006) (noting that under the new law, any voter could receive an absentee ballot without the need to provide any proof of identification).

significantly more likely to vote absentee than African-Americans.⁷¹ Subsequently, Georgia abandoned the law and amended it with a new statute in 2006.⁷²

The infiltration of politics into the decisionmaking process vitiates Section 5 and these examples of potential political abuse beg for reform to better ensure protection and insulation of the system from bias.

2. *The Effects of Section 5*

Section 5 has been tremendously successful. Since its passage in 1965, the covered jurisdictions have experienced massive gains in minority voter registration and turnout.⁷³ Enormous increases in the number of minority elected officials correspond with this growth in registration and turnout. In 1965 there were roughly 300 African-American elected officials nationally,⁷⁴ compared to over 9,100 in 2006.⁷⁵ Over 46% of these 9,100 officials hold office in covered jurisdictions.⁷⁶ While these numbers alone cannot show the entire picture, they suggest a transformation of the political system in the covered jurisdictions into something more in line with the ideals of the Fifteenth Amendment.

II. THE DEBATE ON SECTION 5'S CONSTITUTIONALITY

A. *Why It Was Constitutional*

When Congress passed the VRA in 1965, it did so by reference to section 2 of the Fifteenth Amendment, identifying the VRA as "appropriate legislation" to enforce the prohibitions against abridgments on the right to

71. *Common Cause/Georgia*, 406 F. Supp. 2d at 1353 (citing statistics from the 2004 Georgia elections showing that 12% of registered white women compared to 7% of registered African-American women voted absentee, and 11% of white men compared to 6% of African-American men voted absentee).

72. Harris, *supra* note 70, at 188.

73. See S. REP. NO. 109-295, at 11 (2006). Voter registration for African-Americans in all the covered states was over 50% in 2004 with seven states boasting rates higher than the national average of 64.3%. *Id.* There are also some notable examples of massive improvement, such as Mississippi's increase from a registration rate of 6.4% in 1965 to a registration rate of 76.1% in 2004, and Alabama's increase from a rate of 18.5% in 1965 to a rate of 72.9% in 2006. *Id.*

74. Charles S. Bullock, III & Ronald Keith Gaddie, *Good Intentions and Bad Social Science Meet in the Renewal of the Voting Rights Act*, 5 GEO. J.L. & PUB. POL'Y 1, 7 (2007).

75. S. REP. NO. 109-295, at 12 (noting that there are also roughly 6,000 Latino public officials nationally).

76. Bullock & Gaddie, *supra* note 74, at 7.

vote.⁷⁷ Almost immediately, South Carolina challenged the constitutionality of some key sections, including Section 5 and the coverage formula in Section 4(b).⁷⁸ While South Carolina asserted multiple objections to provisions of the VRA, the core question before the Court became whether “Congress exercised its powers under the *Fifteenth Amendment* in an appropriate manner with relation to the States.”⁷⁹ In determining the standard of review, the Court stated that when considered “against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting.”⁸⁰ The reasonable and vitally important implication is that the Fifteenth Amendment, and “appropriate legislation” passed in its enforcement, supersedes the constitutional rights of the states.⁸¹

In its analysis, the Supreme Court recognized that Section 5 may be an “uncommon exercise of congressional power” but it also stated that whether the legislation is appropriate depends on the conditions and circumstances facing Congress.⁸² The Court acknowledged that case-by-case litigation had been ineffective at dealing with voting discrimination,

77. See U.S. CONST. amend. XV, § 2 (granting Congress the authority to enforce the Fifteenth Amendment through “appropriate legislation”); see also H.R. REP. NO. 89-439, at 17–19 (1965) (arguing that given the situation of “persistent racial discrimination,” the VRA is “appropriate legislation” to enforce the right to vote). But see *id.* at 73–76 (views of Representative William M. Tuck) (stating that the coverage formula of the VRA is “arbitrary and indiscriminate” and that the Act is a “flagrant violation of the Constitution”).

78. *South Carolina v. Katzenbach*, 383 U.S. 301, 317 (1966).

79. *Id.* at 323–24 (emphasis added). The Court dismissed South Carolina’s contention that the coverage formula is a violation of due process, “constitute[d] a forbidden bill of attainder,” and infringed on the principle of separation of powers, ruling that these protections were only available to “individual persons and private groups” and were thus not applicable to States. See *id.*

80. *Id.* at 324–26 (emphasis added) (internal quotation marks omitted) (reaching this standard based on the fact that the Constitution supersedes state law, explicitly grants Congress power to enforce the right to vote “by appropriate legislation,” and prior precedent has granted Congress “full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting”). The Court quoted precedent concerning Congress’s power under the Civil War Amendments:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 327 (quoting *Ex parte Virginia*, 100 U.S. 339, 345–46 (1879)).

81. See *id.* at 325 (recognizing that “the Fifteenth Amendment supersedes contrary exertions of state power” and that Congress is granted express authority to enforce the guarantees of the Amendment).

82. See *id.* at 334.

noting for emphasis a suit in Dallas County that lasted over four years and had no marked effect on minority voter registration.⁸³ The Court then turned to the coverage formula and found that Congress had reliable information indicating most of the covered jurisdictions had engaged in voting discrimination.⁸⁴ The Court ultimately upheld Section 5 with its decision hinging on two key findings: first, Congress knew of the persistence and creativity of the methods of voting discrimination; and second, Congress had reason to believe the covered states “might try similar maneuvers in the future in order to evade the remedies” of the VRA.⁸⁵ Given these “exceptional conditions” and “unique circumstances,” the Court concluded that the VRA, including Section 5, was appropriate legislation under section 2 of the Fifteenth Amendment.⁸⁶

South Carolina also challenged the coverage formula by arguing voting discrimination did not exist in *all* of the covered jurisdictions. The Court was not swayed, holding instead that the formula “was relevant to the problem of voting discrimination,” and thus Congress could “infer a significant danger of the evil in [those] few remaining” covered jurisdictions.⁸⁷ By looking to aggregate inferences, the Court thereby indicated it would not require evidence of discrimination in every political subdivision that was brought under Section 5 coverage.

B. Section 5’s Continuing Constitutionality

The question of the present constitutionality of Section 5 is the subject of vigorous legal discussion. While this debate has persisted since the initial enactment of the VRA and Section 5, the ever-increasing age of the coverage formula and the clear advancements in racial equality have sharpened the disagreement. In particular, the dicta of the 2009 Supreme Court decision in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*)⁸⁸ greatly increased the probability of the Supreme Court

83. *See id.* at 314–15 (noting that at the end of the four years, only 383 of about 15,000 voting age African-Americans were registered to vote in Dallas County, indicating almost no improvement in voting equality as a result of the litigation). The Court noted that Congress viewed this as an example of the “ineffectiveness of existing legislation” and a clear indication of the need for new means of enforcing the constitutional guarantees of the Fifteenth Amendment. *Id.*

84. *See id.* at 329–30 (requiring nothing more than “reliable evidence” of voting discrimination and a coverage formula that is “relevant to the problem” to hold that coverage is constitutional).

85. *Id.* at 335.

86. *Id.* at 334–35.

87. *Id.* at 329.

88. 129 S. Ct. 2504 (2009).

overturning Section 5 in its current form.

1. *Concerns About the Coverage Formula*

A central issue in the debate on Section 5's constitutionality is the coverage formula. Congress set out an explicit formula in the VRA, and DOJ has no authority to modify it.⁸⁹ Despite calls by some prominent legal scholars to update the coverage of Section 5 in the 2006 Reauthorization Act,⁹⁰ Congress chose not to amend the formula.⁹¹ Considering the political issues involved with any attempt to reform the coverage of Section 5, this is not surprising.⁹² But this means that coverage continues to be based on the conditions of the country in 1964, 1968, and 1972.

One of the most common criticisms of the coverage formula is that the outdated formula results in coverage that is increasingly both over- and under-inclusive.⁹³ While any set coverage formula will inevitably be imperfect, those imperfections will be exacerbated as the underlying data age and demographics change. Congress did, however, amass an extensive record of evidence supporting the proposition that purposeful voting discrimination is still a significant problem in many of the covered jurisdictions.⁹⁴ Since the Supreme Court has never required Congress to

89. See 42 U.S.C. § 1973b(b) (2006) (basing coverage on a static set of data from the 1964, 1968, and 1972 elections).

90. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 10* (2006) (statement of Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School) (noting the inconsistency between the data on which Congress relied and the voter turnout today, and calling for a new coverage formula that better represents the location of current and future voting discrimination); Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717, 723–24, 727–30 (2006) [hereinafter Persily, *Options and Strategies*] (arguing that the currently covered jurisdictions may no longer represent the worst offenders of voting rights and advancing possible triggers based on patterns of legal violations or “some measure of partisan competition” within the jurisdiction); *supra* note 11 and accompanying text.

91. See Persily, *Promise and Pitfalls*, *supra* note 23, at 207.

92. See *id.* at 210–11 (discussing political obstacles to expanding the coverage of Section 5 including the fact that Congress was controlled by Republicans when many of the uncovered jurisdictions with significant and recent alleged voting discrimination were Republican-leaning districts).

93. See 152 CONG. REC. 14,273–74 (2006) (statement of Rep. Charlie Norwood) (arguing that the VRA has resolved the offenses that it targeted in 1964 and that the coverage formula should be updated to ensure protection for all areas needing it); Thornstrom, *supra* note 9, at 47, 72–76 (calling the current coverage “increasingly arbitrary” as demographics shift and race relations evolve); see also *supra* note 12 and accompanying text.

94. See, e.g., *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the*

prove the existence of voting discrimination in *all* the jurisdictions that ultimately fall under coverage, it is possible the Supreme Court may find this legislative record sufficient to justify the reauthorization of Section 5.⁹⁵ But beyond the Supreme Court's potential concerns, the over- and under-inclusiveness of the coverage formula raises issues of effectiveness and fairness. Congress confronted the problem of over-inclusiveness by implementing a bailout provision.⁹⁶ While this provision is not perfect,⁹⁷ it does provide covered jurisdictions with an avenue to remove coverage and thus, to some degree, allows coverage to adapt to advances in voting equality. Congress also confronted the issue of under-inclusiveness through Section 3(c), sometimes referred to as the "pocket trigger" or "bail-in mechanism,"⁹⁸ which allows a court, in granting relief in a voting rights proceeding, to "retain jurisdiction for such period as it may deem appropriate" and thus essentially require the jurisdiction seek preclearance from that court or from DOJ.⁹⁹ Despite their usefulness, these two provisions have been used sparingly and have not had much effect on Section 5's coverage.¹⁰⁰

While the over-inclusiveness of the coverage formula may pose a significant challenge to the constitutionality of Section 5, its under-inclusiveness will also be an important factor. Indeed, some of the most

Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) [hereinafter *Voting Rights Act: Evidence of Continued Need*] (consisting of a record of over four thousand pages supporting the continued need for coverage in many of the currently covered areas); *infra* note 105 and accompanying text.

95. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966) (finding the evidence that voting discrimination existed in a "great majority" of the covered jurisdictions sufficient).

96. *See* 42 U.S.C. § 1973b(a) (2006) (allowing jurisdictions to bail out of coverage if they prove a specific set of factors); *see supra* note 35–41 and accompanying text.

97. *See supra* note 41 and accompanying text.

98. Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 *YALE L.J.* 1992, 1997 (2010).

99. 42 U.S.C. § 1973a(c); 28 C.F.R. § 51.8 (2011).

100. *See NAMUDNO*, 129 S. Ct. 2504, 2519 & n.1 (2009) (Thomas, J., concurring in the judgement in part and dissenting in part) (noting that only seventeen jurisdictions have successfully bailed out of Section 5 coverage, and all were within the state of Virginia and represented by the same attorney); NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982–2005, at 34 (2006), available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/lccr2.pdf> (stating that Section 3(c), called the "pocket trigger," has been used sparingly but has "served as an important deterrent to discrimination where it has been used"); *cf. Jeffers v. Clinton*, 740 F. Supp. 585, 600 (E.D. Ark. 1990) (observing the scarcity of cases discussing Section 3(c) and noting that none clarify the situations under which Section 3(c) should be used). For a historical account of Section 3(c), see Crum, *supra* note 98, at 2010–15.

flagrant violations of voting rights occur in uncovered jurisdictions.¹⁰¹ It is unclear if any of these violations represent a systematic discriminatory approach, thus warranting possible Section 5 coverage. What is clear is that in analyzing Section 5's constitutionality, the Supreme Court will consider whether voting discrimination is "concentrated in the jurisdictions singled out for preclearance."¹⁰² In answering this question, both the over- and under-inclusiveness of the coverage will be carefully examined. Thus, any recommended reforms aimed at strengthening the constitutionality of Section 5 must confront both issues.

2. *Why Section 5 Remains a Constitutional Exercise of Congressional Power*

Congress created Section 5's coverage formula to single out those jurisdictions with the "longest and most egregious histories of entrenched voting discrimination."¹⁰³ Thus, evidence of voting discrimination in uncovered jurisdictions, standing alone, is insufficient to support a conclusion that Section 5 is no longer constitutional. To answer the question of constitutionality, it must be determined whether voting discrimination and the risk of future discrimination still exist in covered jurisdictions at sufficient levels to justify singling them out for coverage.¹⁰⁴ The record Congress amassed in support of the 2006 Reauthorization Act is enormous, numbering over 15,000 pages and including numerous hearings, statements, studies, and documented instances of

101. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 654–58 (2006) (discussing voting discrimination cases since 1982 and finding significant violations in both covered and uncovered jurisdictions); Persily, *Promise and Pitfalls*, *supra* note 23, at 208 (noting that Section 5 "does not cover counties in Ohio and Florida with the most notorious voting rights violations in recent elections"); Swain, *supra* note 12, at 32 (listing some of the voting rights violations that have occurred in uncovered states and advocating an expansion of coverage).

102. *NAMUDNO*, 129 S. Ct. at 2512 (majority opinion).

103. 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, 389 n.16 (2008) (noting that the coverage formula was never meant to cover *all* jurisdictions that engaged in voting discrimination and that other sections of the VRA provide remedies to voters in those uncovered jurisdictions); see also *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 506 (D.D.C. 2011) (recognizing that by not changing the coverage formula in the 2006 Reauthorization Act, "Congress ensured that Section 4(b) would continue to focus on those jurisdictions with the worst *historical* records of voting discrimination").

104. See *NAMUDNO*, 129 S. Ct. at 2510, 2512 (recognizing that Section 5 had been upheld in the past based on a determination that "circumstances continued to justify the provisions," and questioning whether coverage still accurately represented jurisdictions with a disproportionate tendency towards racial discrimination).

discrimination.¹⁰⁵ It provides convincing support for the continued need for Section 5.

Despite the undeniable improvement in overall race relations, strong evidence exists to support the assertion that voting discrimination is still entrenched in many of the covered jurisdictions.¹⁰⁶ Voting discrimination lawsuits filed under Section 2 of the VRA¹⁰⁷ provide a means for comparison between covered and uncovered jurisdictions. These lawsuits could support a finding that covered areas still warrant being singled out. In a comparison of 331 lawsuits involving alleged Section 2 violations since 1982, a study by the Voting Rights Initiative found that of the 123 that resulted in a successful outcome for the plaintiff, 68 (about 55%) came from covered jurisdictions.¹⁰⁸ This is especially significant considering that less than 25% of the national population resides in covered jurisdictions.¹⁰⁹

105. S. REP. NO. 109-295, at 10 (2006). Rep. Chabot noted that since October 2005, the Subcommittee on the Constitution alone “held 12 hearings, heard from 47 witnesses, and compiled over 12,000 pages on the Voting Rights Act.” 152 CONG. REC. 14,222 (2006) (statement of Rep. Chabot). Representative Sensenbrenner called the record “one of the most extensive considerations of any piece of legislation that the United States Congress [had] dealt with” during his twenty-seven years in Congress. *Id.* at 14,230 (statement of Rep. Sensenbrenner).

106. *See* H.R. REP. NO. 109-478, at 25–53 (2006) (outlining the committee’s findings of the continued existence of substantial discrimination in the covered areas). In a statement given on the floor of the Senate in support of the 2006 VRA reauthorization, Senator Kennedy recognized the “unimaginable” amount of progress that has been made since the VRA was first passed in 1965, but went on to note:

While we have made enormous progress, it takes time to overcome the deep-seated patterns of behavior that have denied minorities full access to the ballot. Indeed, the worst thing we could do would be to allow that progress to slip away because we ended the cure too soon. We know that the act is having an impact. We know that it is deterring discrimination. And we know that despite the act, racial bloc voting and other forms of discrimination continue to tilt the playing field for minority voters and candidates. We need to ensure that jurisdictions know that the act will be in force for a sufficiently long period that they cannot simply wait for its expiration, but must eliminate discrimination root and branch.

152 CONG. REC. 15,279 (2006) (statement by Sen. Kennedy).

107. 42 U.S.C. § 1973 (2006) (prohibiting any voting procedure or practice that “results in a denial or abridgement of the right . . . to vote on account of race” and applying this prohibition to all jurisdictions).

108. Katz *et al.*, *supra* note 101, at 654–56. This also translated into a higher success rate for plaintiffs in covered jurisdictions, who won 42.5% of their lawsuits compared to 32.2% for plaintiffs in uncovered jurisdictions. *See id.* at 656. This study only encompasses a fraction of the total Section 2 litigation since there are many factors such as settlement, failure to pursue a claim, or failure to publish an opinion, which make the total number unknown. *See id.* at 654.

109. *See id.* at 655. In the oral arguments for *NAMUDNO* before the Supreme Court, Neal Katyal, Counsel for the Department of Justice, cited this statistic in response to Justice

This disparity is even more substantial because the covered jurisdictions have what Professor Karlan has called the added “deterrent” and “blocking” effects of Section 5.¹¹⁰ Such studies support the assertion that voting discrimination has not been purged from the covered jurisdictions and is still present at a disproportionate level when compared to the uncovered jurisdictions.

Proposed voting changes and corresponding preclearance objections also provide evidence of continued entrenchment of racial discrimination in covered jurisdictions. In a study analyzing DOJ preclearance objections, discriminatory intent or purpose was a legal basis for 74% of objections handed down in the 1990s.¹¹¹ This further supports the contention that intentional voter discrimination is still present in the covered jurisdictions. Notably, between 1965 and 2005, not one Louisiana redistricting plan, in its initially submitted form, has received preclearance.¹¹² Louisiana is not

Kennedy’s question of whether the situation continued to justify the “differentiation between the States.” Transcript of Oral Arguments at 35, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf.

110. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 22 (2007) (describing Section 5 as having a “blocking function” that prevents the enactment of discriminatory changes through the denial of preclearance and a “deterrent function” that inhibits covered jurisdictions from even attempting to make a change they know will likely be denied); *see also* LAUGHLIN McDONALD & DANIEL LEVITAS, *THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT: VOTING RIGHTS LITIGATIONS, 1982–2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION* 4 (2006), http://www.aclu.org/files/votingrights/2005_report.pdf (stating that since 1982 there have been over 1,000 instances in which DOJ has denied preclearance for voting changes). It is important to note that preclearance objections have dropped off significantly since the mid 1990s. *See* Bullock & Gaddie, *supra* note 74, at 18 (citing a notable drop in Mississippi from a high of sixty-seven to a low of eleven from 1975 to 1984 and 1995 to 2005, respectively). This is due, at least in part, to the Supreme Court’s decision in *Reno v. Bossier Parish School Board*, where the Court limited the purpose prong of Section 5 to prohibit only those voting changes enacted with a retrogressive purpose, and not those enacted with merely a discriminatory purpose. 528 U.S. 320, 341 (2000). This was subsequently reversed in the 2006 reauthorization when Congress amended Section 5 to state, “The term ‘purpose’ . . . shall include any discriminatory purpose.” Fannie Lou Harris, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3), 120 Stat. 577, 581 (codified at 42 U.S.C. § 1973c(c)).

111. *See* Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 292–99 (2006) (compared to 47% of objections in the 1980s).

112. *See* *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16 (2005) (statement of Marc Morial, President and CEO, National Urban League) (“In other words, in the last 40 years, every single State House redistricting plan adopted immediately after the census and submitted for preclearance in Louisiana has been found both by Republican and

the only jurisdiction to have its redistricting proposals denied preclearance, and if not for Section 5 these redistricting plans might have significantly reduced the voting power of minorities in those jurisdictions.¹¹³ Considering that redistricting plans are often in effect for at least a decade, they can be an extremely effective means of marginalizing the voting power of minorities: in this regard, the importance of Section 5 cannot be overstated.¹¹⁴ Beyond examples of attempted voting discrimination, there is the additional deterrent effect of preclearance, which has likely prevented numerous discriminatory changes from ever being proposed—but this deterrent effect is so far impossible to measure.¹¹⁵

Unlike most situations where a court analyzes the constitutionality of a remedial statute, this is not a case where Congress promulgated the statute for the first time.¹¹⁶ In reauthorizing the VRA, Congress dealt with an existing statute, and courts should acknowledge that for the past forty-seven years Section 5 has been actively preventing the type of discrimination that initially justified it as a constitutional remedy.¹¹⁷ The very effectiveness of Section 5 will thus have an obvious and significant impact on the ability of Congress to amass evidence of continued need.¹¹⁸ While a court should not simply show obeisance to Congress and defer to its conclusions, it should

Democratic Attorneys General to abridge the right to vote on account of race or color or membership in language in a minority group.”).

113. In 2001, Texas proposed a redistricting plan that, despite increases in the Latino population, would have eliminated four Latino majority districts while adding only one such district. *See id.* at 19 (statement of Ann Marie Tallman, President and General Counsel, Mexican American Legal Defense and Educational Fund). A proposed 1982 Louisiana redistricting plan would have resulted in “one majority-African-American district and 4 majority-white districts in a ward that was 61% African American.” *Voting Rights Act: Evidence of Continued Need*, *supra* note 94, at 4532–33 (statement of Debo Adegbile, Associate Director of Litigation, NAACP Legal Defense Fund, Inc.).

114. *See Voting Rights Act: Evidence of Continued Need*, *supra* note 94, at 4534 (statement of Debo Adegbile, Associate Director of Litigation, NAACP Legal Defense Fund, Inc.) (“Section 5’s role in ensuring that minority political opportunities do not get trampled during redistricting has protected the rights of untold numbers of minority voters.”).

115. *See id.* at 4529 (reasoning that jurisdictions are less likely to enact discriminatory voting changes if they know they will have to seek preclearance and thus publically explain and defend those proposed changes); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 192 (2005).

116. Persily, *Promise and Pitfalls*, *supra* note 23, at 193 (“The new VRA was quite different from other laws either upheld or struck down post-*Boerne*: (1) the bill proposed renewal of existing legislation, not drafting a law from scratch; and (2) the law would not apply nationwide.” (footnotes omitted)).

117. *See id.* at 193–94; *supra* note 110 and accompanying text.

118. *See* Hasen, *supra* note 115, at 188; Persily, *Promise and Pitfalls*, *supra* note 23, at 207; Pitts; *supra* note 11, at 257–58.

judge the VRA accordingly by applying a slightly different measure than it would in the examination of a newly passed statute. It should place greater weight on evidence indicating possible deleterious effects of removing the statute,¹¹⁹ and correspondingly require less evidence of the egregious types of violations the statute was intended to prevent.

Congress enacted the VRA “to foster our transformation to a society that is no longer fixated on race.”¹²⁰ This has yet to be fully realized. While Section 5 has prevented the enforcement of discriminatory practices, it has yet to cure the behavior and mentality that is the root of the problem.¹²¹ Since case-by-case adjudication of voting discrimination remains as ineffective today as it was in 1965,¹²² and there is still a disproportionate risk of voting discrimination in the covered jurisdictions,¹²³ the circumstances continue to justify Section 5.¹²⁴ Section 5 therefore remains a constitutional exercise of Congress’s power.¹²⁵

119. See Persily, *Promise and Pitfalls*, *supra* note 23, at 194 & n.76 (“Evidence that a law is being complied with is not a reason to do away with it. If there were an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but rather that it is sufficiently serving its purpose. So long as the risk of pollution continues that law would need to be renewed.” (quoting *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 62 & n.34 (2006) (statement of Anita Earls, Director of Advocacy, University of North Carolina Law School Center for Civil Rights)); see also H.R. REP. NO. 109-478, at 57 (2006) (calling the advancement made by minorities in the covered jurisdictions “fragile”); Karlan, *supra* note 110, at 21–22 (arguing that there is a significant risk “that backsliding could occur in the absence of the Act’s substantive and procedural protections”); cf. Hasen, *supra* note 115, at 188 (“If Congress cannot point to actual incidents of discrimination, it might examine instead the hypothetical question whether covered jurisdictions would engage in intentionally discriminatory voting practices and procedures if Section Five were *not* renewed.”).

120. *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

121. See, e.g., Karlan, *supra* note 110, at 21–22; *supra* notes 106–15 and accompanying text.

122. If anything, it is less effective today. See Douglas, *supra* note 30 (discussing the effects of the Courts recent movement toward allowing only as-applied challenges to election laws).

123. See *supra* notes 106–115 and accompanying text.

124. *NAMUDNO*, 129 S. Ct. 2504, 2510 (2009).

125. See, e.g., *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011); A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 614–15 (2010) (arguing that the Constitution, and in this case the Reconstruction Amendments, gives Congress the discretion to choose what remedies are appropriate to combat unconstitutional behavior); Clarke, *supra* note 103, at 432–33 (noting the substantial legislative record that Congress amassed in support of the continued need for Section 5 protections, asserting that it is similar to the records supporting past reauthorizations, and concluding that courts will continue to hold Section 5 constitutional); Mark A. Posner, *Time is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation’s*

C. *What's Next?*

Since a Supreme Court decision on the constitutionality of Section 5 will likely come down to whether it deems the legislative findings adequate to support the need for Section 5, the outcome implicitly depends on “judicial attitudes and the Justices [sic] own views about the legislation under review.”¹²⁶ For those who support Section 5 and its continuation, the Supreme Court’s decision in *NAMUDNO* brought dark tidings. While technically avoiding the issue of constitutionality and instead reaching a decision based on statutory interpretation,¹²⁷ the Court included language that clearly indicates it has serious concerns about the constitutional muster of Section 5. One of these concerns centers on whether the coverage of Section 5 represents the “current political conditions,” given that the data used for the coverage formula is over thirty-five years old.¹²⁸ The Court recognized Section 5’s success, but made clear that “the Act imposes current burdens and must be justified by current needs.”¹²⁹ While the Court did not clarify whether it would apply the new “congruence and proportionality” standard established in *City of Boerne v. Flores*,¹³⁰ or the traditional, less demanding¹³¹ “rational means” test used in *South Carolina v. Katzenbach*,¹³² it recognized “serious constitutional questions under either

History of Discrimination in Voting, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 51, 87–105, 130–31 (2006) (providing an in-depth analysis of how the congruence and proportionality test applies to Section 5 and concluding that if the Court applies this standard correctly and gives proper deference to the legislative record, it should uphold the constitutionality of Section 5).

126. Fuentes-Rohwer, *supra* note 15, at 104, 130 (concluding that the question of the constitutionality of Section 5 will also come down to “whether the Court can muster the will to strike down the most effective civil rights statute in history”); see Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 701 (2009) (asserting that in the past the Court has deferred to Congress and refused to subject the VRA to serious scrutiny, thus making the future question of constitutionality simply a matter of whether the Court will continue this deference).

127. See *NAMUDNO*, 129 S. Ct. at 2516–17 (avoiding the constitutional question and instead ruling that “political subdivisions,” within the meaning of the VRA, includes the appellant and thus allows the appellant to apply for a bailout from coverage).

128. *Id.* at 2512.

129. *Id.*

130. 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”); see also *Shelby Cnty.*, 811 F. Supp. 2d at 461–62 (concluding that the congruence and proportionality test is the appropriate standard for reviewing Section 5).

131. See *Crum*, *supra* note 98, at 2002 & n.53.

132. 383 U.S. 301, 324 (1966) (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”); see also *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241 (D.D.C. 2008) (ruling that the rational means test governs the review of

test.”¹³³ Because the Court avoided the constitutional question, much of its discussion on this issue had nothing to do with the ultimate holding—which makes such dicta portentous. The *NAMUDNO* opinion seems to go out of its way to question the constitutional standing of Section 5 even while ultimately avoiding the issue, and this may be a not-so-thinly veiled warning of things to come.

Any defense of the constitutionality of Section 5 must center on its current need and the legislative record compiled during its passage. To justify the continued differential treatment of covered areas, Congress must not only show the subsistence of voting rights violations, but also that some “systematic *differences* exist between the currently covered and non-covered jurisdictions.”¹³⁴ In his testimony to Congress, Professor Pildes stressed that modern-day voter discrimination, which often involves vote dilution instead of outright violence, is different from the issues for which the VRA was originally created to target and is no longer “concentrated in any one discrete part of the country.”¹³⁵

Also important to the debate is the undeniable success of Section 5. This success has, in many cases, prevented discriminatory actions by covered jurisdictions from ever going into effect, either through deterrence or denial of preclearance, and has thus further diminished the evidence of purposeful discrimination in covered areas.¹³⁶ These factors have led some scholars to question seriously whether Section 5 will survive the Supreme Court’s test for constitutionality.¹³⁷

Despite the tone of the *NAMUDNO* decision, which is somewhat hostile to Section 5, the Supreme Court did not actually strike down Section 5. Scholars have advanced some possible explanations for this: first, and most hopeful for supporters of Section 5, is that there simply were not enough

Section 5), *rev'd on statutory grounds*, *NAMUDNO*, 129 S. Ct. 2504.

133. *NAMUDNO*, 129 S. Ct. at 2513.

134. *The Continuing Need For Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2006) (statement of Professor Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law).

135. *Id.* at 202.

136. See Hasen, *supra* note 115, at 188; Pitts, *supra* note 11, at 257–58.

137. See, e.g., Clegg & Chavez, *supra* note 12, at 564, 580–81 (arguing that the lack of an adequate legislative record, when combined with the violation of federalism, makes Section 5 an unconstitutional exercise of Congress’s authority); Hasen, *supra* note 115, at 206–07 (concluding that it is unclear whether Congress will be able to amass sufficient evidence to satisfy the congruence and proportionality test especially considering the increased weight the Court has put on federalism concerns in recent years); Pitts, *supra* note 11, at 249–68 (providing an in-depth discussion on this question and concluding that Section 5 will likely not meet the congruence and proportionality test).

votes;¹³⁸ and second, that the conservatives on the Supreme Court did not want the inevitable political firestorm that would have resulted had the Court struck down the VRA in what would likely have been a 5–4 decision.¹³⁹ This second explanation—undeniably implicating the politics of the Court—means that the future of Section 5 may hinge on the unpredictability of the Supreme Court’s tolerance for controversy and the willingness of the individual justices to dismantle “one of the crown jewels of the civil rights movement.”¹⁴⁰ A third possible explanation views *NAMUDNO* as a call on Congress to act and amend the VRA.¹⁴¹ One thing is certain: the constitutionality of Section 5 under the current Supreme Court is highly questionable at best.¹⁴² The following recommendations will bring Section 5’s scope and application more clearly

138. See Richard L. Engstrom, *NAMUDNO: A Curveball on Voting Rights*, 30 JUST. SYS. J. 351, 358 (2009); Linda Greenhouse, *There’s Always Another Day*, SLATE.COM (June 22, 2009, 1:39PM), http://www.slate.com/articles/life/the_breakfast_table/features/2009/the_supreme_court_breakfast_table/theres_always_another_day.html.

139. See Engstrom, *supra* note 138, at 358; E.J. Dionne, Jr., *Court Immunity?*, NEW REPUBLIC (July 1, 2009, 12:00 AM), <http://www.tnr.com/article/politics/court-immunity> (“What’s likely is that one or two conservative justices (probably Anthony Kennedy or possibly Samuel Alito) realized that overturning an act of Congress simply because a narrow court majority decided it was outdated would be rightly seen as an outrageous form of judicial activism.”).

140. Fuentes-Rohwer, *supra* note 15, at 130.

141. Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 999 (2009) (“The [*NAMUDNO*] Court structured its opinion to encourage, to prod, and—almost certainly—to require Congress to act.”).

142. Multiple cases concerning the constitutionality of Section 5 are making their way through the judicial system and it seems inevitable that at least one will make its way to the Supreme Court, possibly even before the 2012 presidential election. One such case, currently before the U.S. Court of Appeals for the District of Columbia Circuit, is *Shelby County v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011) (granting summary judgment for the Attorney General). In a second case, which involves Texas’s request for preclearance for a voter ID law and is currently before a three-judge panel of the District Court for the District of Columbia, Texas recently filed an amended complaint raising a direct challenge to Section 5’s constitutionality. See Tim Eaton, *State Tries to Force Challenge of U.S. Voting Law*, AUSTIN AM.-STATESMAN (Mar. 14, 2012, 10:50 P.M.), http://www.statesman.com/news/texas-politics/state-tries-to-force-challenge-of-u-s-2238744.html?cxttype=rss_texas-politics. Since a decision by the three-judge panel is appealable directly to the Supreme Court, and a denial of that appeal, unlike a denial of certiorari, is considered a “decision on the merits” and an affirmation of the lower court opinion, it is possible that this case will leapfrog *Shelby County* and could even be decided by the Supreme Court in 2012. See Richard L. Hasen, *Holder’s Voting Rights Gamble*, SLATE (Dec. 30, 2011, 1:09 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_obama_administration_s_risky_voter_id_move_threatens_the_voting_rights_act.html; Richard Hasen, *Texas Ups Ante in Its Voter ID Case, Says Voting Rights Act is Unconstitutional: Case Could Reach SCOTUS Before Election*, ELECTION L. BLOG (Mar. 14, 2012, 10:14 PM), <http://electionlawblog.org/?p=31583>.

within the Court's constitutional limits and thus help save this foundational measure of the Civil Rights movement.

III. RECOMMENDATIONS

The United States has made great strides toward equality since the passage of the Voting Rights Act.¹⁴³ Despite this, discrimination still poisons the voting system. While blatant acts of racism have decreased, there are still concerted and consistent efforts to discriminate against minority voters.¹⁴⁴ The coalescence of minorities toward a common political party¹⁴⁵ can transform discussions of institutionalized discrimination into a less polarized vocabulary as voting discrimination is more easily attributed to political motivations and biases.¹⁴⁶ Since case-by-case adjudication remains inefficient and ineffective,¹⁴⁷ Section 5 is an invaluable weapon in the enforcement of Fifteenth Amendment rights. Successful reforms must accomplish three things: first, they must reinforce the constitutionality of Section 5; second, they must increase its effectiveness at preventing voting discrimination; finally, they must help guard against political abuse in the enforcement of Section 5.

A. Reforms to Confront Political Bias

“A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.”¹⁴⁸ Accordingly, to confront the potential for political bias within the preclearance decisionmaking process, Congress should enact specific reporting requirements for Section 5 and allow limited appeals of grants of preclearance. This would add more transparency and accountability to the system, and would serve as a significant safeguard for ensuring the apolitical bases for preclearance decisions.

143. See *supra* notes 73–76 and accompanying text.

144. See *supra* Part II.B.2.

145. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 213 (rev. ed. 2009) (“By the late 1960s, all southern states contained a large bloc of black voters whose loyalty to the Democratic Party had been cemented by the events of the Kennedy and Johnson years At the same time, conservative white Southerners, joined by some migrants into the region, flocked to the Republican Party”).

146. See Cashin, *supra* note 14, at 92–103.

147. See *supra* note 122 and accompanying text.

148. Statement by the President upon Signing the “Freedom of Information Act,” 2 PUB. PAPERS 699 (July 4, 1966).

1. *Requirement for an Inclusive Administrative Record*

One such reporting requirement should be the creation of a public administrative record for every preclearance decision.¹⁴⁹ There already is a record requirement for all Section 5 submissions,¹⁵⁰ but it should be expanded and codified by statute.¹⁵¹ This requirement should be modeled after DOJ's own 1999 guidance document and include all "documents and materials which were before or available to the decision-making office at the time the decision was made."¹⁵² Additionally, to ensure transparency of the decisionmaking process, the record should also include "[d]ocuments that relate to both the substance and procedure of making the decision."¹⁵³ If preclearance is either denied or explicitly granted, the record should include an order laying out the evidence relied upon, the conclusions drawn from that evidence, and the reasoning behind the ultimate decision, including why any contradictory evidence was unconvincing.¹⁵⁴ There are also those situations in which DOJ simply does not respond to a request for preclearance within sixty days, thus effectively granting preclearance.¹⁵⁵ To confront this, any affected party¹⁵⁶ should be allowed to submit a request to DOJ demanding a reasoned explanation for a decision at any time up to

149. Cf. Daniel J. Rohlf, *Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N.U. L. REV. 575, 577 (2009) ("Agencies' administrative records serve as both the public's and reviewing courts' sole window on the actions and decisions of those agencies.").

150. See 28 C.F.R. § 51.50 (2011).

151. See generally James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301 (2008) (discussing ways in which agencies can limit the contents of an administrative record, thus frustrating judicial review and limiting the availability of the information, and examining possible solutions).

152. ENV'T & NATURAL RES. DIV., U.S. DEP'T OF JUSTICE, GUIDANCE TO FEDERAL AGENCIES ON COMPILING THE ADMINISTRATIVE RECORD 2 (1999) [hereinafter DOJ RECORD GUIDANCE], available at http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf.

153. Memorandum from Pete Raynor, Assistant Solicitor, Fish Wildlife & Envtl. Prot. Branch, U.S. Dept. of the Interior to Dir., U.S. Fish and Wildlife Serv., on Guidance on Compiling an Administrative Record (Jan. 7, 2000), http://www.fws.gov/habitatconservation/FERC_Policies.pdf; see also DOJ RECORD GUIDANCE, *supra* note 152, at 2 (requiring that an administrative record "include[] documents and materials relevant to the process of making the agency's decision").

154. A denial of preclearance must be explained, see 28 C.F.R. § 51.44, and so should a grant of preclearance.

155. 28 C.F.R. § 51.1(a)(2).

156. The exact meaning and limitations of this term should be subject to clarification through DOJ regulation.

fourteen days after the expiration of the initial sixty days. Once a request is submitted, the jurisdiction should not be allowed to enforce the change for which they are seeking preclearance until DOJ releases an official decision, complete with all the requirements mentioned above.

Requiring an inclusive record would better ensure the process is open to public and political scrutiny, creating additional pressure to make reasoned decisions based on the law as opposed to political bias. This may result in a heavier workload for DOJ, but it is a reasonable price to pay given the importance and lasting effect of preclearance decisions.

2. *Allow the Appeal of Grants of Preclearance*

A record would also serve a vital role during an appeal of DOJ preclearance decisions.¹⁵⁷ Currently, a DOJ denial of preclearance is not appealable, though the jurisdiction may subsequently request preclearance—called declaratory judgment in the VRA—from the District Court for the District of Columbia, essentially resulting in a new preclearance proceeding.¹⁵⁸ This would not change. The record would serve no inherent role in the preclearance process unless the parties choose to use it in their case, and even then it would be subject to no deference.

Congress should also allow appeals of granted preclearance¹⁵⁹ to be brought by qualifying persons¹⁶⁰ before the District Court for the District of Columbia, with a two-tier system of review. For decisions that concern redistricting or explicit preconditions to voting or registering to vote—such as identification requirements or good behavior prerequisites—the standard of review should be *de novo*. This standard represents the importance of

157. See 5 U.S.C. § 706 (2006); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971) (reversing and remanding based on the fact that the record before the court was not “the full administrative record that was before the Secretary at the time he made his decision”).

158. 28 C.F.R. § 51.11 (2011); see 42 U.S.C. § 1973c(a) (2006).

159. Gerken, *supra* note 15, at 718, 728 & n.65 (“[T]hose representing minority voters should have a chance to police the policer by challenging the DOJ’s decisions to preclear a change in court.”); Tokaji, *supra* note 60, at 830–32 (proposing allowing the appeal of grants of preclearance as one possible means of combating political manipulation of the Section 5 preclearance process); see Rohlf, *supra* note 149, at 577 (“With the rise of the modern administrative state and consequent influence of decisions by federal agencies over many aspects of daily life in the United States, protecting the courts’ role in reviewing the validity of federal agency decisions is crucial to safeguarding American democracy itself.”).

160. Not just anyone should be allowed to appeal a decision. One possibility is to limit it to those “who submitted letters to the DOJ when it was considering the preclearance submission.” Persily, *Options and Strategies*, *supra* note 90, at 732. At the very least, it should be limited to persons who are residents and eligible voters of the jurisdiction seeking preclearance.

decisions regarding redistricting and prerequisites to voting as well as these techniques' heightened ability to successfully discriminate against minority voters.¹⁶¹ For appeals of other voting changes, the court should analyze DOJ's decision under the *Chevron* doctrine and overturn it only if it is "arbitrary, capricious, or manifestly contrary to the statute."¹⁶² This deference would help prevent overloading the court with cases by allowing the quick dismissal of decisions reasonably supported by the record and the law. At the same time, it would help prevent politically biased preclearance decisions by permitting the court a means of overturning such cases.

B. Reform the Bailout Provision

It is not immediately clear why so few jurisdictions have utilized the current bailout provision,¹⁶³ but the fact that they have not raises serious concerns about its effectiveness. To remedy this, Congress should allow the creation of a tiered bailout system with each tier representing different classes of voting changes. Congress should mandate that the current bailout requirements remain for the top tier, which would include redistricting changes and imposition of explicit prerequisites to vote or register to vote, but should give DOJ the authority to decide, through notice-and-comment rulemaking,¹⁶⁴ the specifics of the remainder of the new bailout system.¹⁶⁵ This should include the types of voting-related

161. See Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947, 950 (2011) ("The minority voters' ability to elect representatives has historically been undermined through the use of the redistricting process to dilute votes from minority communities."); *supra* note 114 and accompanying text; *cf.* H.R. REP. NO. 89-439, at 11-12 (1965) (recognizing the prevalent use of tests and devices as prerequisites to voting in "violation of the 15th amendment"); Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 89 (2010) ("The number of redistricting plans designed to prevent minorities from exercising their voting strength is significant.").

162. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

163. Compare Hebert, *supra* note 37, at 272 (asserting that the bailout provision is "not too onerous, nor are the costs too high" and that the most likely reason so few jurisdictions have bailed out is that they simply do not know about the process), with Pitts, *supra* note 11, at 284-85 (charging that the difficulty of the bailout provision is the reason so few jurisdictions have utilized it).

164. See 5 U.S.C. § 553 (2006).

165. *Cf.* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 99 (1985) ("[D]elegation to administrators may become particularly attractive where the alternative preference orderings that would produce collective intransitivities are interpreted as conditional on alternative perceptions of states of the world. For in this situation it is possible that administrative research, fact-finding, or 'natural' experimentation with alternative policies will produce a unified view . . ." (citation omitted)). Given the importance and lasting effect of this reform, and the likely significant

changes comprising each tier and the applicable evidentiary requirements for a successful bailout at each level. A tiered system would allow a nondiscriminating jurisdiction, which may be discouraged by the cost and difficulty of meeting the evidentiary burden of the current bailout provision, to choose a less onerous bailout level and regain some independence over its voting system.¹⁶⁶

The reformed bailout provision should make clear that, like the current provision, any proven acts of voting discrimination within the succeeding ten years would result in reversion to complete coverage.¹⁶⁷ This reform strengthens the constitutionality of Section 5 by directly confronting the concern of the Supreme Court that the current provision may make it too difficult for jurisdictions with no history of discrimination to bailout.¹⁶⁸ Further, as more jurisdictions successfully utilize this bailout provision, DOJ's preclearance workload would be reduced, freeing up scarce resources and increasing the agency's effectiveness at enforcing the VRA and preventing voting discrimination.

disagreement between covered jurisdictions and minority stakeholders, DOJ should consider using consensual rulemaking and allow “[s]takeholders [to] participate directly in the development of rules rather than merely commenting on agency action.” Steven J. Balla & John R. Wright, *Consensual Rule Making and the Time It Takes to Develop Rules*, in *POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY* 187, 191 (George A. Krause & Kenneth J. Meier eds., 2003) (“Given their enhanced involvement and interaction, stakeholders have incentives to eschew extreme positions, prioritize their preferences, exchange information, and in general search for common ground that can provide the basis for mutually acceptable rules.” (citations omitted)).

166. Cf. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 223–24 (2006) [hereinafter *Introduction to the Expiring Provisions*] (statement of Professor Samuel Issacharoff, New York University School of Law) (arguing that the current bailout provision “appears unduly onerous”).

167. See 42 U.S.C. § 1973b(a)(5) (2006).

168. See *NAMUDNO*, 129 S. Ct. 2504, 2518–19 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that given the combination of both objective and subjective requirements, “Bailout eligibility is a distant prospect for most covered jurisdictions [and Congress’s] promise of a bailout opportunity has, in a great majority of cases, turned out to be no more than a mirage”); *Introduction to the Expiring Provisions*, *supra* note 166, at 223–24 (“A liberalized bailout provision . . . would alleviate some of the constitutional pressure on the most suspect of the Act’s current features: the extension of the original coverage formula.”); see also *id.* at 19 (statement of Prof. Richard Hasen, Loyola Law School) (“One thing that I think would go a long way toward helping the constitutional case and also take off some of the burden in a lot of these jurisdictions is to ease the bailout requirements.”).

C. *A Means to Add Jurisdictions to Coverage*

The relatively static structure of Section 5 means that coverage cannot be adapted to respond to changes and developments in demographics, motivations, or constitutional interpretation.¹⁶⁹ As seen with certain responsibilities, such as monetary policy, the slow-moving and politically shackled arms of Congress are often not a successful means of responding to new contingencies or shifting circumstances.¹⁷⁰

The complex responsibility of updating the coverage of Section 5 is better suited for an agency than it is for Congress. For all the congressional hearings and debates on the coverage formula during the 2006 reauthorization, changes never really stood a chance.¹⁷¹ This is not to say that DOJ should be able to completely scrap and replace the old coverage. There is a strong rationale behind the current coverage and it should not be easily dismissed.¹⁷² Congress should thus set the current coverage as the starting point, but give DOJ the ability to initiate legal proceedings by which jurisdictions may be added to Section 5 coverage.¹⁷³ This would

169. See *supra* note 89 and accompanying text.

170. Cf. Alberto Alesina & Guido Tabellini, *Bureaucrats or Politicians? Part I: A Single Policy Task*, 97 AM. ECON. REV. 169, 177 (2007) (“Bureaucrats want to signal their competence for career concerns, politicians for reelection purposes. . . . Politicians are preferable if ability is less important than effort or if there is little uncertainty about whether the policymaker has the required abilities; bureaucrats are preferable in the opposite case. This result is consistent with the observation that highly technical tasks (monetary policy, regulatory policies, public debt management) are typically delegated to high-level bureaucrats.”); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 777 (1999) (arguing that because of reelection concerns politicians “may neglect longer term social problems whose solutions require immediate sacrifices for delayed gains, problems that demand as much of the legislators’ attention, prudence, and political courage as they can muster”). Additionally, public participation at the agency level can mean better and more effective solutions and approaches. *Id.* at 781–83 (“[T]he agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address. Only the interested parties, reacting to specific agency proposals for rules or other actions, possess (or have the incentive to acquire) the information necessary to identify, explicate, quantify, and evaluate the real-world consequences of these and alternative proposals.”).

171. See Seaman, *supra* note 35, at 42–43 (“[A]ny dramatic change to Section 5’s scope—no matter how effective or well-intentioned—probably was politically unfeasible because it could have caused an unraveling of the bipartisan coalition that shepherded the bill to passage.”); *supra* note 92 and accompanying text. There was also the difficulty of finding a new “neutral” coverage formula that would have successfully extended coverage to the desired jurisdictions. Persily, *Promise and Pitfalls*, *supra* note 23, at 209.

172. See *supra* note 103 and accompanying text.

173. Cf. *supra* note 101 and accompanying text (recognizing flagrant voting rights violations in uncovered jurisdictions).

allow Section 5 coverage to be tailored to new and changing circumstances and expanded to areas where it is needed.

To add a jurisdiction to Section 5 coverage, Congress should require that DOJ prove, by a preponderance of the evidence and before a three-judge panel of the U.S. District Court for the District of Columbia, a consistent pattern of voting discrimination—either intentional, effectual, or both—and a strong likelihood of continuance into the future absent the requirement of preclearance. The intricacies of this evidentiary requirement should be deciphered in significantly greater detail through regulations promulgated by DOJ using notice-and-comment rulemaking.¹⁷⁴ This would greatly increase the effectiveness of Section 5 by ensuring that coverage represents, as closely as possible, the areas with the greatest propensity toward discrimination. This reform would also strengthen Section 5's constitutionality¹⁷⁵ by allowing DOJ to extend coverage to jurisdictions where discrimination exists and, when combined with a reformed bailout provision, to ensure that coverage more accurately represents the current state of the country.¹⁷⁶

CONCLUSION

Section 5 has been an extremely successful tool in the fight against voting discrimination.¹⁷⁷ It has helped produce remarkable increases in minority voter registration and minority representation at all levels of government.¹⁷⁸ The right to vote, the ark of our safety, is more secure today because of this essential provision. Despite this, voting discrimination still persists and the need for protection remains.¹⁷⁹ Section 5 must be reformed both to increase its effectiveness in a new, ever-changing society, and to ensure that

174. See 5 U.S.C. § 553 (2006).

175. The proposed approach would also alleviate the concern that any congressional change to the coverage formula might create additional constitutional infirmities to the entirety of Section 5. Persily, *Promise and Pitfalls*, *supra* note 23, at 194, 209. By having DOJ promulgate regulations specifying the evidentiary requirements needed to add a jurisdiction to Section 5's coverage, a court could find the regulations unconstitutional without endangering Section 5's statutory foundation. Additionally, a court would have an opportunity to review each individual attempt to add a jurisdiction to coverage and would thus rule on the legality and constitutionality of each, as opposed to the entire coverage formula.

176. See *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009) (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”).

177. See *supra* Part I.A.2.

178. See *id.*

179. See *supra* Part II.B.2.

it remains a constitutional assertion of congressional power. The apolitical goal of voting equality must guide this debate as well as inspire those in power to tackle this issue now.