

***SHELBY COUNTY v. HOLDER: WHY SECTION 5 OF THE
VOTING RIGHTS ACT IS CONSTITUTIONAL AND
REMAINS NECESSARY TO PROTECT MINORITY VOTING
RIGHTS UNDER THE FIFTEENTH AMENDMENT***

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INTRODUCTION

On February 27, 2013, The United States Supreme Court heard oral arguments on whether the 2006 reauthorization of Section 5 of the 1965 Voting Rights Act is constitutional.¹ Section 5 requires state and local governments with a history of discrimination to get permission from the federal government before changing voting procedures.² Shelby County, Alabama, brought the constitutional challenge.³ The County argued that the pattern of voter discrimination, which had previously justified the law's infringement on federalism, no longer existed, and that Section 2 of the Act provides adequate protection for minority voters.⁴ The federal government defended the law by arguing that there is a continuing need for protection from voter discrimination in the covered jurisdictions.⁵ The government further argued that Section 2 of the law, which is a nationwide ban on discriminatory voting procedures, is inadequate on its own due to the impracticality of case-by-case voter discrimination litigation.⁶

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1. Transcript of Oral Argument at 1, 3, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) [hereinafter Transcript], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf.

2. Voting Rights Act, 42 U.S.C. § 1973c (2006).

3. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011), vacated, 541 F. App'x 1 (D.C. Cir. 2013).

4. Brief for Petitioner at 18, 20 *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2012) (No. 12-96), 2012 WL 6755130 at *18, *20 [hereinafter *Shelby Cnty. Brief*], available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet.authcheckdam.pdf.

5. Brief for the Federal Respondent at 10, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2012) (No. 12-96), 2012 WL 315242 at *10 [hereinafter U.S. Brief], available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_resp.authcheckdam.pdf.

6. *Id.*

Congress intended the 1965 Voting Rights Act (Act) to provide southern African Americans with the equal opportunity to vote.⁷ Before the Act, many southern states had restricted minority voting through a litany of means, including literacy tests and poll taxes.⁸ To prevent voter discrimination, Section 5 requires that covered jurisdictions demonstrate to federal authorities that any change to voting practices or procedures “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”⁹ Since the passage of the Act, there have been dramatic improvements in African-American voter turnout, registration, and the election of minority candidates.¹⁰

Despite the Act’s success, Section 5 continues to face scrutiny.¹¹ The Supreme Court opened the door for a new Section 5 constitutional challenge in the case of *Northwest Austin Municipal Utility District No. 1 v. Holder*, where the Court strongly questioned the modern need for the preclearance requirement, without reaching the question of its constitutionality.¹² In *Northwest Austin*, the Court stated, “[t]hings have changed in the South,” with minority registration and voting rates approaching those of non-minorities.¹³ The Court also stated that although the Act is largely responsible for these improvements, that success alone “is not adequate justification to retain the preclearance requirements” due to the substantial “federalism costs” imposed by the Act.¹⁴

7. ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 11 (1987).

8. See STEVEN ANDREW LIGHT, “THE LAW IS GOOD”: THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS 34, 44–45 (2010) (describing how states enacted poll taxes and literacy tests in order to disenfranchise minorities, and noting that these practices persisted up to the Voting Rights Act of 1965).

9. 42 U.S.C. § 1973c(a).

10. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201–02 (2009). In the oral arguments of *Shelby County v. Holder*, Justice Samuel Alito stated: “There is no question that the Voting Rights Act has done enormous good. It’s one of the most successful statutes that Congress passed in the twentieth century and one could probably go farther than that.” Transcript, *supra* note 1, at 33. Though many have lauded the Voting Rights Act, some find great fault in its current application. One such critic argues that the law is now just a tool to “create favorable election outcomes for minority office-seekers. . . . [T]he [Voting Rights Act has] evolved into a means for engineering election outcomes in which minority voters elect minority candidates in proportion to their percentage of the population, free from the hassle of forming multiracial coalitions.” EDWARD BLUM, THE UNINTENDED CONSEQUENCES OF SECTION 5 OF THE VOTING RIGHTS ACT 7 (2007).

11. See *Nw. Austin*, 557 U.S. at 202.

12. *Id.* at 202–03, 205–06, 211.

13. *Id.* at 202.

14. *Id.* (quoting *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1998), *abrogated by Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)) (internal quotation marks omitted).

On November 9, 2012, the Court granted certiorari in the case of *Shelby County v. Holder*, which directly challenged the constitutionality of the Section 5 preclearance requirement.¹⁵ On June 25, 2013, by a 5-4 majority, the Court held that Section 4, which contains the coverage formula to determine which jurisdictions are covered by Section 5, was unconstitutional.¹⁶ However, the Court refrained from deciding Section 5's constitutionality, leaving that question for another day.¹⁷ But, because Section 4 has been found unconstitutional, there are currently no jurisdictions covered by Section 5, rendering the law toothless until Congress passes a new coverage formula.¹⁸ States previously covered by the preclearance requirement have been quick to take advantage of the void.¹⁹

Although the South has made great strides in the way of minority voting rights, there is a risk of regression while Section 5 effectively lays dormant. This risk would be even greater if Section 5 itself were ever found unconstitutional. Such a ruling would effectively eliminate the preclearance requirement, which has been a valuable tool for Congress to battle voter discrimination. This Article argues that Section 5 remains a constitutional exercise of congressional power and is necessary to protect minorities' Fifteenth Amendment rights. Part I of this Article explains why the 1965 Voting Rights Act was necessary, why the preclearance requirement of Section 5 was particularly important to its success, and discusses past constitutional challenges faced by Section 5 of the Act. Part II examines the Section 5 challenge that was before the Court in *Shelby County v. Holder* and the key arguments made by both sides. This Article concludes that Section 5 remains a vital and necessary portion of the Voting Rights Act, and is a constitutional exercise of congressional power to uphold the voting rights of minorities under the Fifteenth Amendment.²⁰

15. *Shelby Cnty. v. Holder*, 133 S. Ct. 594, 594 (2012) (granting certiorari).

16. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

17. *Id.* In his concurring opinion, Justice Clarence Thomas stated that he would find Section 5 unconstitutional as well. *Id.* (Thomas, J., concurring).

18. Benjy Sarlin, *Congress Can Fix the Voting Rights Act. Here's Why It Won't*, MSNBC, <http://www.msnbc.com/hardball/congress-can-fix-the-voting-rights-act> (last updated Sept. 13, 2013, 8:47 AM) (quoting Senator Patrick Leahy). Though Congress can pass a new coverage formula, again giving life to Section 5, there are those who argue that the passing of a new formula is not likely. *E.g.*, Rachel Weiner, *A New VRA Formula? Don't Hold Your Breath*, WASH. POST, June 25, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/25/a-new-vra-map-dont-hold-your-breath/>.

19. Adam Liptak, *Supreme Court Invalidates Key part of Voting Rights Act*, N.Y. TIMES, June 25, 2013, <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all>.

20. Section 4(a) of the Voting Rights Act details which jurisdictions fall under the Section 5 preclearance requirements. Voting Rights Act, 42 U.S.C. § 1973b(a) (2006). Section 4(a) is therefore

I. SECTION 5 OF THE 1965 VOTING RIGHTS ACT

A. Why the Voting Rights Act Was Necessary Despite the Fifteenth Amendment to the Constitution

Prior to the Civil War, principally only white male property owners over the age of twenty-one were allowed to vote.²¹ In 1867, Congress passed the First Reconstruction Act, which required each former confederate state to amend its constitution to guarantee the right of all males, of all races, to vote.²² But the Federal Constitution did not guarantee black voting rights until 1870, when the Fifteenth Amendment was ratified.²³ However, the Amendment did little to create equality at the polls, as the courts narrowly interpreted the Amendment to only forbid electoral practices with discriminatory purposes, not just those with discriminatory results.²⁴

The Fifteenth Amendment provided that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”²⁵ However, because the amendment did not “explicitly guarantee[] an unconditional right to vote, the Amendment left an interpretive gap that could be filled by southern officials intent on denying [minorities] the right to vote, as well as by the judges who examined the constitutionality of discretionary acts of race-based voter discrimination.”²⁶ In fact, “many

closely tied to the issue of Section 5’s constitutionality and raises its own constitutional issues. *See Shelby Cty.*, 133 S. Ct. at 2631–32 (Thomas, J., concurring). But for the purposes of this Article, the focus will primarily deal with the Section 5 preclearance requirement’s constitutionality on its own merits, to the extent that is possible.

21. GARRINE P. LANEY, *THE VOTING RIGHTS ACT OF 1965: HISTORICAL BACKGROUND AND CURRENT ISSUES* 1 (2003).

22. *Id.*

23. LIGHT, *supra* note 8, at 34. Challenges to laws that discriminate against minority voters can also be brought under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 39. However, in such a case, “the *plaintiff* must prove that the interests of the state achieved by the procedure are outweighed by the undue burdens on the right to vote.” Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292, 306 (2013) (emphasis in original) (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008)). Under Section 5, the jurisdiction has the burden to prove that the new procedure does not have the purpose or effect of denying the right to vote based on race. *Id.* at 306–07. Because Section 5 places the burden of proof on the jurisdiction, it “provides a more effective basis for voter [protection] than does the Constitution.” *Id.* at 306.

24. *See City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (“[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.”).

25. U.S. CONST. amend. XV, § 1.

26. LIGHT, *supra* note 8, at 34.

federal district court judges were at best reluctant and at worst antagonistic to the enforcement of the Fifteenth Amendment.”²⁷

Thus, despite the ratification of the Fifteenth Amendment in 1870, many southern states still found success discouraging and disqualifying minority voters through poll taxes, literacy tests, understanding tests,²⁸ property qualifications, and the “white primary.”²⁹ The “white primary” occurred when political parties banned minorities from voting in their party primaries.³⁰ Because the Democratic Party dominated southern politics, the Party’s move to begin banning non-whites from voting in its primaries in the 1910s effectively prevented black voters from influencing the general election, as the winner of the primary was the presumptive winner of the general election.³¹

The southern states also marginalized minority votes by moving away from district-based electoral systems to large elections encompassing the entire community.³² Beforehand, black candidates were elected from black-majority districts, but this was no longer possible in larger elections because white voters vastly outnumbered black voters.³³ Those who ran elections also used intimidation and violence to prevent black voters from exercising their constitutional right to vote.³⁴ These actions resulted in only 3% voter registration for southern African Americans of voting age as of 1940.³⁵

27. BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* 26 (2007).

28. See THERNSTROM, *supra* note 7, at 2, 15 (discussing literacy tests and other ways minorities were disenfranchised). These tests were not only discriminatory by design, but they were often carried out dishonestly as well. *Id.* at 15. Black voters who passed the tests were often told that they had failed, white voters who failed the test were said to have passed, and sometimes white voters were not tested at all. *Id.*

29. LIGHT, *supra* note 8, at 34, 38; THERNSTROM, *supra* note 7, at 2.

30. LIGHT, *supra* note 8, at 38–39.

31. *Id.* The Supreme Court found the “white primary” unconstitutional in 1944. *Smith v. Allwright*, 321 U.S. 649, 650–51, 656–57, 664–65 (1944). The Court found that though the political party conducted the primary, it was such an important part of choosing the elected official that it was tantamount to state action, and therefore violated the Fourteenth Amendment’s Equal Protection Clause. *Id.* at 664–65.

32. LIGHT, *supra* note 8, at 35–36.

33. *Id.* at 36.

34. THERNSTROM, *supra* note 7, at 2. Jerome Gray, a civil rights activist from Alabama, stated that before the Voting Rights Act, in parts of Alabama, “blacks had to get a written statement from a white businessman to say they were ‘a good Negro’” before they were allowed to vote. Adam Liptak, *Voting Rights Act is Challenged as Cure the South Has Outgrown*, N.Y. TIMES, Feb. 17, 2013, <http://www.nytimes.com/2013/02/18/us/politics/supreme-court-to-hear-alabama-countys-challenge-to-voting-rights-act.html?pagewanted=all> [hereinafter Liptack, *Act Challenged as Cure*] (internal quotation marks omitted). Even with the written statement, it was “up to the whim of a white sheriff” to determine whether the statement was “adequate.” *Id.*

35. THERNSTROM, *supra* note 7, at 2.

Though the situation improved over the next twenty-four years, less than 50% of minorities were registered to vote in all but two of the southern states by 1964.³⁶

B. How The Preclearance Provision of Section 5 Works and Why It Is Vital to the Success of the Voting Rights Act

In an attempt to address the continued issues of minority voting discrimination in the South, the 1957, 1960, and 1964 Civil Rights Acts expanded the federal government's power to sue registrars and other local officials who attempted to prevent minority voting.³⁷ But this case-by-case litigation was not a viable solution to the problem.³⁸ The litigation under these laws proved to be expensive and slow, and even when the federal government succeeded in a suit, "southern officials would often ignore court orders, 'close[] their registration offices to freeze the voting rolls,' or 'merely switch[] to discriminatory devices not covered by the federal decrees.'"³⁹ Congress found that this method of barring each discriminatory practice as it arose "caused no change in result, only in methods."⁴⁰ Congress was playing legislative whac-a-mole: barring one discriminatory voting method only led to new, more creative forms of voter discrimination.

Thus, when writing the Voting Rights Act of 1965, Congress included Section 5, which prevented jurisdictions with a history of voter discrimination from changing voting practices or procedures without federal approval.⁴¹ This was Congress's attempt to finally get a step ahead of southern lawmakers who were committed to disenfranchising minority voters through creative means. However, several key portions of the Act were not permanent measures, including the preclearance requirement.⁴² A permanent preclearance requirement—one that permanently gives the federal government control over voting rules "traditionally left in local

36. *Id.*

37. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637–38 (codified as amended 42 U.S.C. § 1971); Civil Rights Act of 1960, Pub. L. No. 86-449, § 601, 74 Stat. 86, 90–92 (codified as amended at 42 U.S.C. § 1971); Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241, 241–42 (codified as amended at 42 U.S.C. § 1971); *see also* THERNSTROM, *supra* note 7, at 11; *Shelby Cnty. v. Holder*, 811 F. Supp. 2d. 424, 430 (D.D.C. 2011), *vacated*, 541 F. App'x 1 (D.C. Cir. 2013).

38. THERNSTROM, *supra* note 7, at 12; *Shelby Cnty.*, 811 F. Supp. 2d. at 430.

39. *Shelby Cnty.*, 811 F. Supp. 2d. at 430 (alterations in original) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966)).

40. *Id.* at 430 (quoting H.R. Rep. No. 89-439, at 10 (1965)).

41. *Id.* at 427.

42. THERNSTROM, *supra* note 7, at 18.

hands”—would have been too controversial to pass.⁴³ The sponsor of the Act had pushed for a ten-year life for the preclearance requirement, but the opposition viewed that timeframe as “an unacceptably long time to permit such extraordinary federal control in much of the South over matters of suffrage.”⁴⁴ Eventually, both sides settled upon a five-year timeframe for Section 5.⁴⁵

The preclearance procedure has drawn strong criticism from those who feel that Section 5 overreaches into the sovereign realm of the states. Section 5 requires jurisdictions with a history of discrimination—which are referred to as “covered jurisdictions”—to gain approval from the Justice Department or a three-judge panel on the United States District Court for the District of Columbia before changing voting procedures.⁴⁶ Representative William Tuck from Virginia decried that southern states were forced “to prostrate [themselves] before a three-judge Federal court in a foreign jurisdiction and establish [their] innocence,” and that this was an insult to the “honorable judges” and people of the South.⁴⁷ And Senator Sam Ervin asked, “Do you think it is a fair system of justice which compels people to travel 250 or 1,000 or 3,000 miles in order to gain access to a court of justice?”⁴⁸ However, because the court system in the South was ineffectual in enforcing the previous legislative attempts to bring voter equality to the South, and therefore came to the argument with

43. *Id.*

44. *Id.* at 18–19.

45. *Id.* at 18. Although a five-year sunset provision was originally put in place for Section 5, the law has been reauthorized each time that it was about to lapse, most recently having been reauthorized in 2006 for an additional twenty-five-year term. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 200 (2009).

46. 42 U.S.C. § 1973c (2006); *see also* *South Carolina v. Katzenbach*, 383 U.S. 301, 319–20 (1966) (describing how Section 5 operates). Section 5 covered jurisdictions are any jurisdiction where as of November 1, 1964, any test or device was used to restrict the right to vote, and either less than half of the voting-age population was registered to vote or less than half of the registered voters cast ballots in the presidential election of November 1964. 42 U.S.C. § 1973b(b). Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered jurisdictions, while individual counties in California, Florida, New York, North Carolina, and South Dakota also fall under the jurisdiction of Section 5. *Section 5 Covered Jurisdiction*, U.S. DEPARTMENT OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Apr. 28, 2014). Two townships in Michigan are also currently covered by Section 5. *Id.*

47. THERNSTROM, *supra* note 7, at 19–20 (quoting H.R. REP. NO. 89-439, at 74 (1965)) (internal quotation marks omitted).

48. *Id.* at 20 (quoting *Voting Rights Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 43 (1965) (statement of Senator Sam Ervin)) (internal quotation marks omitted).

“exceedingly dirty hands,” the preclearance procedure passed as part of the Voting Rights Act.⁴⁹

Section 4(b) of the Voting Rights Act determined which jurisdictions would initially be subject to the preclearance requirement; however, the Act allowed for this to change over time. For example, the Act contains a “bailout” provision, which allows a covered jurisdiction to remove the preclearance burden if it “obtain[s] from a three-judge district court a declaratory judgment that in the previous five years (i.e., before they became subject to the Act) they had used no test or device ‘for the purpose or with the effect of denying or abridging the right to vote on account of race or color.’”⁵⁰ Congress included the bailout provision to account for the over-inclusive nature of Section 4(b)’s formula⁵¹ for determining which jurisdictions would be subject to Section 5’s preclearance requirements.⁵² Section 3(c) of the Act addressed the possible under-inclusive nature of Section 4(b), by “authoriz[ing] federal courts to require preclearance by any non-covered state or political subdivision found to have violated the Fourteenth or Fifteenth Amendments.”⁵³ When crafting the Section 4(b) formula, “[Congress] knew precisely which states it sought to cover and crafted the criteria to capture those jurisdictions.”⁵⁴

Although Sections 4(b) and 5 were originally set with a five-year sunset provision, both were renewed three times previous to the 2006 renewal.⁵⁵ The only significant change to these sections over this time was

49. *Id.*; see LANDSBERG, *supra* note 27 (“Not only did state and local officials resist racial neutrality, but many federal district court judges were at best reluctant and at worst antagonistic to the enforcement of the Fifteenth Amendment.”).

50. *Shelby Cnty v. Holder*, 679 F.3d 848, 855 (D.C. Cir. 2012) (quoting Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1971b(a)(1)(A))), *rev’d*, 133 S. Ct. 2612 (2013).

51. Section 4(b) applied Section 5’s preclearance requirements to any state or political subdivision of a state that maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 432 (D.D.C. 2011) (citing § 4(b), 79 Stat. at 438), *vacated*, 541 F. App’x 1 (D.C. Cir. 2013).

52. *Shelby Cnty.*, 679 F.3d at 855.

53. *Id.* (citing 42 U.S.C. § 1973a(c)).

54. *Id.*

55. *Id.* The sections were renewed in 1970 for five years, 1975 for seven years, and 1982 for twenty-five years. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (current version at 42 U.S.C. § 1973b(a)(8)); An Act to Amend the Voting Rights Act of 1965 to Extend Certain Provisions for an Additional Seven Years, to Make Permanent the Ban Against Certain Prerequisites to Voting, and for Other Purposes, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (1975) (current version at 42 U.S.C. § 1973b(a)(8)); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 2(b)(4), § 4(a)(8), 96 Stat. 131, 133 (current version at 42 U.S.C. § 1973b(a)(8)). The 2006 renewal extended the sections for an additional 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta

in 1975, when Congress amended section 4(b)'s definition of "test or device" to include "the practice of providing only English-language voting materials in jurisdictions with [large] non-English speaking populations."⁵⁶ In effect, the change was made to provide protection against voter discrimination towards "language minorities."⁵⁷ In 2006 Congress extended the Voting Rights Act for another twenty-five years, at which point its constitutionality "was immediately challenged."⁵⁸

C. Legal Challenges to Section 5

Section 5 is the most controversial portion of the Voting Rights Act.⁵⁹ Many see the preclearance requirement as an unprecedented attack on state sovereignty.⁶⁰ Justice Hugo Black wrote that the stipulation in Section 5 "that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless."⁶¹ Many southerners saw the preclearance requirement as "punitive legislation aimed at the South, without regard for the guilt or innocence of particular localities."⁶² However, as Chief Justice Earl Warren stated in his majority opinion upholding the preclearance requirement in the 1966 case of *South Carolina v. Katzenbach*, "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."⁶³

Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577, 581 (codified at 42 U.S.C. § 1973b(a)(8)).

56. *Shelby Cnty.*, 679 F.3d at 855 (quoting An Act to Amend the Voting Rights Act of 1965 to Extend Certain Provisions for an Additional Seven Years, to Make Permanent the Ban Against Certain Prerequisites to Voting, and for Other Purposes, Pub. L. No. 94-73, sec 203, § 4(f)(3), 89 Stat. 400, 401-02 (1975) (codified as amended at 42 U.S.C. § 1973b(f)(3)) (internal quotation marks omitted).

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

58. *Id.* at 856.

59. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 672 (2008); Joshua Thompson, *Online VRA symposium: It's Time for the Court to Review Section 5*, SCOTUSBLOG (Sep. 12, 2012, 11:26 AM), <http://www.scotusblog.com/2012/09/online-vra-symposium-its-time-for-the-court-to-review-section-5>.

60. See THERNSTROM, *supra* note 7, at 19 (providing examples of objections to the Voting Rights Act of 1965).

61. *South Carolina v. Katzenbach*, 383 U.S. 301, 358 (1966) (Black, J., concurring in part, dissenting in part).

62. THERNSTROM, *supra* note 7, at 19.

63. *Katzenbach*, 383 U.S. at 308.

In *South Carolina v. Katzenbach*, South Carolina challenged the constitutionality of Section 5.⁶⁴ Chief Justice Earl Warren wrote the majority opinion, in which he first described how historical experience inspired and justified Section 5.⁶⁵ He detailed the ample congressional record on the issue, which included nine days of Judiciary Committee hearings with sixty-seven witnesses, three days of House floor debate, and twenty-six days of Senate floor debate.⁶⁶ The Court concluded that “[t]wo points emerge vividly from the voluminous legislative history of the Act.”⁶⁷ First, that “Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”⁶⁸ Second, that the past remedies must “be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.”⁶⁹ These two points were key to the Court upholding Section 5 as a valid and necessary means of “carrying out the commands of the Fifteenth [sic] Amendment.”⁷⁰

But *South Carolina v. Katzenbach* was just the first of several Section 5 challenges heard by the Supreme Court. Section 5 was challenged after each reauthorization, and each time the Supreme Court upheld the law.⁷¹ In 2006, Congress reauthorized Section 5 by a unanimous vote in the Senate and by a 390-33 vote in the House of Representatives.⁷² Soon after the 2006 Section 5 reauthorization, a Texas municipal utility district challenged the constitutionality of Section 5.⁷³ The three-judge court unanimously found the preclearance obligation constitutional.⁷⁴ The plaintiff appealed the case to the Supreme Court, and the Court granted certiorari.⁷⁵

64. *Id.* at 307, 323.

65. *Id.* at 308-09.

66. *Id.*

67. *Id.* at 309.

68. *Id.*

69. *Id.*

70. *Id.* at 337.

71. See *Georgia v. United States*, 411 U.S. 526, 535 (1973) (affirming that the Voting Rights Act as permissible under the Fifteenth Amendment), *abrogated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *City of Rome v. United States*, 446 U.S. 156, 183 (1980) (reaffirming the holding in *Katzenbach*), *abrogated by* *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 287 (1999), *abrogated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

72. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 229 (D.D.C. 2008), *rev'd sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

73. *Id.* at 223, 229 (noting that the utility district filed its challenge “[j]ust days after the 2006 Amendments became effective”).

74. *Id.* at 224.

75. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

In 2009, the Court heard the Texas municipal utility district's challenge, but avoided the question of Section 5's constitutionality, instead ruling that the municipality was eligible to seek bailout from the preclearance requirement.⁷⁶ Chief Justice John Roberts, who wrote the opinion, stated that "[the Section 5] constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions."⁷⁷

Though the Court did not reach the question of Section 5's constitutionality, two key portions of Roberts' opinion suggested that the Court had strong doubts about the law's continued viability. Roberts wrote that "[s]ome of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome v. United States* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity."⁷⁸ He later added that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions."⁷⁹ This raised great hope for some. Those who wished to see Section 5 struck down believed that the next time a Section 5 challenge was placed squarely before the Court, Section 5 would be found unconstitutional.⁸⁰ The stage was now set for a small county in Alabama to bring its challenge before the Court.

II. A NEW SUPREME COURT CHALLENGE: *SHELBY COUNTY V. HOLDER*

"You may be the wrong party bringing this."⁸¹ This was Justice Sonia Sotomayor's response to Bert W. Rein, counsel for Shelby County, in regard to the Section 5 challenge that the county had brought before the Supreme Court.⁸² Shelby is a prosperous county, 90% of its population is white,⁸³ and it has a long history of racial discrimination in its voting laws.⁸⁴ Shelby County asked the Supreme Court to rid the books of a law

76. *Id.*

77. *Id.*

78. *Id.* at 202.

79. *Id.* at 204.

80. Thompson, *supra* note 59.

81. Transcript, *supra* note 1, at 4.

82. *Id.* at 3-4.

83. Liptak, *Act Challenged as Cure*, *supra* note 34.

84. Greg Stohr, *Racist Alabama Legacy Shadows High Court on Voting Rights*, BLOOMBERG.COM (Feb. 15, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-02-15/racist-alabama-legacy-shadows-high-court-on-voting-rights.html>. As stated by Justice Sotomayor during the

that has done an enormous amount to rid the South of voter discrimination.⁸⁵ The high-profile case has drawn a great deal of media attention,⁸⁶ and the high stakes involved were further made clear by the forty-six amicus briefs filed by those looking to tilt the Court's decision their way.⁸⁷

A. A Brief History of the Case

Shelby County filed its case to hold Section 5 of the Voting Rights Act unconstitutional in the D.C. District Court in 2010.⁸⁸ But the law was found valid, with the court holding that “Section 5 remains a ‘congruent and proportional remedy’ to the 21st century problem of voting discrimination in covered jurisdictions.”⁸⁹ In finding that Section 5 remained a constitutional exercise of Congress's power, the court was persuaded largely by both the law's “historical context” and the “extensive evidence of recent voting discrimination.”⁹⁰

After the District Court defeat, Shelby County appealed to the United States Court of Appeals for the D.C. Circuit.⁹¹ The three-judge panel upheld the preclearance law by a 2-1 vote.⁹² The court ruled that “Congress drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments, which entrust

Supreme Court oral arguments for this case, Shelby County has had “240 discriminatory voting laws that were blocked by Section 5 objections.” Transcript, *supra* note 1, at 4.

85. See Shelby Cnty. Brief, *supra* note 4, at 23 (arguing that improvements since the Voting Rights Act of 1965 have “foreclose[d]” the possibility of concluding that Section 5 is constitutional); Stohr, *supra* note 84. Shelby County has also had numerous discriminatory voting laws “remedied by Section 2 litigation.” Transcript, *supra* note 1, at 4.

86. See, e.g., *Special Feature: The Court and the Voting Rights Act*, SCOTUSBLOG, <http://www.scotusblog.com/category/special-features/the-court-and-the-voting-rights-act/> (last visited, Apr. 26, 2014) (listing various articles dealing with the Voting Rights Act and the courts); Liptak, *Act Challenged as Cure*, *supra* note 34 (discussing the *Shelby County v. Holder* case); Eric Posner & Nicholas Stephanopoulos, *Don't Worry About the Voting Rights Act*, SLATE.COM (Nov. 20, 2012, 3:35 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/11/supreme_court_and_section_5_of_the_voting_rights_act_it_s_ok_to_strike_it.html (discussing *Shelby County v. Holder*).

87. *Preview of United States Supreme Court Cases*, AM. BAR ASS'N., http://www.americanbar.org/publications/preview_home/12-96.html (last visited, Apr. 26, 2014).

88. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011), *vacated*, 541 F. App'x 1 (D.C. Cir. 2013).

89. *Id.* at 428. Here, the court cited the “standard of review articulated by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997).” *Id.*

90. *Id.*

91. *Shelby Cnty. v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012), *rev'd* 133 S. Ct. 2612 (2013).

92. *Id.*

Congress with ensuring that the right to vote . . . is not abridged on account of race.”⁹³ The court also gave great weight to the decision of Congress, adding that “[the court] owe[d] much deference to the considered judgment of the People’s elected representatives.”⁹⁴ After the circuit court defeat, Shelby County filed a petition for certiorari, which the Supreme Court granted.⁹⁵

*B. Modern Arguments for and Against Section 5’s Constitutionality:
Do Current Conditions Continue to Make Its Existence Necessary?*

With respect to the constitutionality of Section 5 today, the central issue is whether the preclearance provision is still necessary to protect the Fifteenth Amendment rights of minority voters.⁹⁶ As Chief Justice Roberts stated in *Northwest Austin*, “the Act imposes current burdens and must be justified by current needs.”⁹⁷ And though there is no doubt that “[t]hings have changed in the South,”⁹⁸ the question still remains whether things have changed *so much* as to render Section 5’s protections less valuable than the “substantial ‘federalism costs’” it imposes.⁹⁹

Exactly how much the South has changed—and exactly how great the risk is that gains in voting equality may be lost without Section 5—is up for fierce debate. Shelby County, quoting the House Report produced in connection with the 2006 reauthorization of the Act, argued that “many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Act] ha[d] been eliminated.”¹⁰⁰ And even in the *Northwest Austin* case, Justice Clarence Thomas had stated that he would have struck down Section 5, because “the lack of current evidence of intentional discrimination with respect to voting” meant Section 5 “can no

93. *Id.* at 884.

94. *Id.*

95. *Shelby Cnty. v. Holder*, 133 S. Ct. 594, 594 (2012) (granting certiorari).

96. Shelby County also argues that the law is unconstitutional because Congress did not “[d]ocument [c]urrent [c]onditions [j]ustifying Section 4(b)’s [u]nequal [t]reatment of [s]overeign [s]tates.” Shelby Cnty. Brief, *supra* note 4, at 40. Because this Article focuses on the constitutionality of the preclearance requirement itself, and not on the coverage formula used to determine which states are covered, this Article will not examine the argument made by Shelby County in detail.

97. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

98. *Id.* at 202.

99. *Id.* (quoting *Lopez v. Monterey Cnty.*, 266 U.S. 282, 282 (1998), *abrogated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)).

100. Shelby Cnty. Brief, *supra* note 4, at 10 (quoting H.R. Rep. No. 109-478, at 12 (2006)) (internal quotation marks omitted).

longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment.”¹⁰¹

But not everyone is convinced that the South has fully embraced voter equality or that the hard-fought gains in minority voting would last without Section 5’s protection. Justice Sotomayor was clearly skeptical during the Shelby County oral argument, stating that even if “some portions of the South have changed, [Shelby] [C]ounty pretty much hasn’t.”¹⁰² She then noted that Shelby County has had 240 discriminatory voting laws blocked by Section 5 objections.¹⁰³

Congress itself found that the law remains vital to preventing a backslide on minority voting rights. In its statutory findings, Congress found that “without the continuation of the [Act’s] protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”¹⁰⁴ Congress found that Section 5 was not only needed to prevent a backslide on minority voting rights, but also needed to address current issues which still remained—the “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”¹⁰⁵

Looking at the arguments made by each side, they may most easily and accurately be summarized as follows. Those hoping to strike down Section 5 argue that minority voter discrimination was once a problem, but now is not, so it can no longer justify the preclearance requirement’s infringement on the states’ rights. Those hoping to uphold Section 5 argue that the extent of minority voter discrimination has improved, but it is still a problem, and if Section 5 were struck down, voter discrimination in the South would again worsen. While either argument is extremely difficult to prove,¹⁰⁶ the problems with the former argument can be seen most clearly through an

101. *Nw. Austin*, 557 U.S. at 216 (Thomas, J., concurring in part and dissenting in part).

102. Transcript, *supra* note 1, at 3.

103. *Id.* at 4.

104. U.S. Brief, *supra* note 5, at 5 (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(9), 120 Stat. 577, 578) (internal quotation marks omitted).

105. *Id.* (quoting § 2(b)(2), 120 Stat. at 577) (internal quotation marks omitted).

106. Heather K. Gerken, *A Third Way: Section 5 and the Opt-In Approach*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, 227, 277 (David L. Epstein et al. eds. 2006). “Even experts on the act are deeply divided as to whether Congress should renew [S]ection 5. After a long period of relative unanimity, the academics who study the act and the lawyers who enforce it are at an impasse . . .” *Id.*

argument put forward by Chief Justice Roberts during the oral argument of the case.

Chief Justice Roberts cited a statistic during oral argument in what appeared to be an attempt to show that the preclearance requirement was outdated and no longer necessary.¹⁰⁷ Roberts stated that the state with the worst ratio of white voter turnout to African-American voter turnout was Massachusetts—an un-covered jurisdiction—while the best ratio was held by Mississippi—a covered jurisdiction.¹⁰⁸ Apparently, the statistics used by Roberts came from a 2004 Census Bureau poll, which showed that in Mississippi, 60.2% of whites voted and 66.8% of African Americans voted; but that in Massachusetts, 72% of whites voted and 46.5% of African Americans voted.¹⁰⁹ The Chief Justice appeared to be arguing that because Mississippi, a covered jurisdiction, leads the nation in the ratio of white voter turnout to African-American voter turnout, Section 5 has done its job and the preclearance requirement is no longer needed in the South.

Putting aside the questionable reliability of these statistics and assuming the numbers are accurate,¹¹⁰ there are two issues with the Chief Justice's reliance on this outcome. The first is that a comparison between Mississippi and Massachusetts, on its own, does little to show that the Act itself is no longer necessary or is being improperly applied.¹¹¹ Choosing and then comparing only two states, which happen to support your already held view, hardly shows a broader trend of covered jurisdictions having significantly better African-American voter turnout than non-covered states.¹¹² And in fact, “[c]herry picking the evidence in this way is [a] great[] statistical sin . . . since it involves making misleading rather than merely imprecise claims.”¹¹³ Without greater evidence showing that the comparison between Mississippi and Massachusetts is indicative of a

107. Transcript, *supra* note 1, at 32

108. *Id.*

109. Nate Silver, *In Supreme Court Debate on Voting Rights Act, A Dubious Use of Statistics*, N.Y. TIMES, March 7, 2013, <http://fivethirtyeight.blogs.nytimes.com/2013/03/07/in-supreme-court-debate-on-voting-rights-act-a-dubious-use-of-statistics/>.

110. See Nina Totenberg, *In Voting Rights Arguments, Chief Justice Misconstrued Census Data*, NPR (Mar. 1, 2013, 6:32 PM), <http://www.npr.org/blogs/itsallpolitics/2013/03/01/173276943/in-voting-rights-arguments-chief-justice-may-have-misconstrued-census-data> (“[T]he numbers are less than reliable, according to the Census Bureau itself.”).

111. Silver, *supra* note 109. “In fact, it would be dangerous to infer very much from Massachusetts and Mississippi. In 2004, for instance, while Mississippi was reported to have strong black turnout, black turnout was poor in Arizona and Virginia, which are also covered by Section 5.” *Id.*

112. *Id.*

113. *Id.*

broader national trend, the Chief Justice's argument is unpersuasive as to the outdated and unnecessary nature of Section 5.

The second issue with the Chief Justice's logic is that he appears to ignore the probability that Mississippi enjoys its current voter equality because of the discrimination protection provided by the preclearance requirement.¹¹⁴ Roberts' argument is tantamount to claiming that since automobile deaths have decreased since the advent of seatbelts in cars, that seatbelts are no longer necessary.¹¹⁵ And though it is difficult to know how responsible other voting laws and societal changes have been to gains in voter equality, at the heart of this issue is the question: "How many of the gains might be lost if the Section 5 requirements were dropped now?"¹¹⁶ But with the historical context taken into account, with Congress having found that "vestiges of discrimination in voting continue to exist," and with the right to vote holding such importance in our democracy, the argument that Section 5 is necessary to enforce the Fifteenth Amendment appears to remain valid.¹¹⁷

CONCLUSION

The Voting Rights Act of 1965 has been widely lauded as one of the most—if not the most—important pieces of legislation Congress has passed in the last century. Its success is unquestioned even by those who now attack its current constitutional validity. By protecting minorities' right to vote, the law has given a political voice to many who would otherwise not have one.

In fact, if the Supreme Court ever does strike down Section 5, it will most likely be due in large part to the law's incredible success. With minorities voting and holding office at unprecedented levels, those who wish to strike down Section 5 argue that the law is no longer necessary. They claim that minorities are now able to protect themselves politically without the added federalism costs that come from the Act's Section 5 preclearance requirement. This theory will be tested while Congress works to create a new Section 4 formula.

114. *See id.* ("The bigger potential flaw with Chief Justice Roberts's argument is not with the statistics he cites but with the conclusion he draws from them.")

115. *See id.* (making a similar analogy to strict airport security and airline safety).

116. *Id.*

117. U.S. Brief, *supra* note 5, at 5 (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(2), 120 Stat. 577, 577) (internal quotation marks omitted).

However, this short-term view neglects the vast history of voter discrimination in the South and the continued attempts by some jurisdictions to infringe on the voting rights of minorities. It also fails to acknowledge that the current equality seen in voting patterns of many southern states is likely due in large part to the continued existence of Section 5. To eliminate a law that has done so much for the voting rights of minorities because of its success would be unwise. Section 5 of the Voting Rights Act remains necessary to protect minorities' Fifteenth Amendment right to vote, and therefore the Act remains a constitutional means to that end. And now that Section 4 has been struck down, with Congress yet to implement a new formula in its place, we will get at least a glimpse at what a world free from Section 5 looks like.

