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## ***Shelby* and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After *Shelby County v. Holder***

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# *Shelby* and Section 3: Pulling the Voting Rights Act’s Pocket Trigger to Protect Voting Rights After *Shelby County v. Holder*

Paul M. Wiley\*

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### I. Introduction

“I have the opinion of the Court this morning in case 12-96, *Shelby County versus Holder*.”<sup>1</sup>

So began Chief Justice Roberts’s announcement<sup>2</sup> of the opinion in *Shelby County v. Holder*.<sup>3</sup> Over the next seven minutes and forty-two seconds, the Chief Justice summarized the rationale and reasoning of the majority opinion,<sup>4</sup> which had been joined by Justices Scalia, Kennedy, Thomas, and Alito.<sup>5</sup> The Chief Justice concluded his announcement with the Court’s ruling:

When taking such extraordinary steps as subjecting state legislation to preclearance in Washington and applying that regime only to some disfavored states, Congress must ensure that the legislation it passes speaks to current conditions. The coverage formula, unchanged for 40 years plainly does not do so and therefore we have no choice but to find that it violates the constitution.<sup>6</sup>

The dissent from Justice Ginsburg that followed the Chief Justice was the first voice in a chorus of criticism that rained down on the Court after its decision.<sup>7</sup> Some of the criticism highlighted factual errors in the Court’s understanding of the

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1. Opinion Announcement of Chief Justice Roberts at 0:00, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), *available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_12\\_96](http://www.oyez.org/cases/2010-2019/2012/2012_12_96) (last visited Sept. 24, 2014) [hereinafter Opinion Announcement].

2. *Id.*

3. 133 S. Ct. 2612 (2013).

4. *See* Opinion Announcement, *supra* note 1, at 0:06–7:42 (recounting the history of the Voting Rights Act (VRA) and the Court’s rulings concerning it).

5. *See Shelby Cnty.*, 133 S. Ct. at 2617 (listing the Justices who joined the majority opinion).

6. Opinion Announcement, *supra* note 1, at 7:48.

7. *See* Oral Dissent of Justice Ginsburg at 0:00–0:06, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), *available at* [http://www.oyez.org/cases/2010-2019/2012/2012\\_12\\_96](http://www.oyez.org/cases/2010-2019/2012/2012_12_96) (last visited Sept. 24, 2014) (noting that beyond two points of agreement, “the Court divides sharply”).

Voting Rights Act (VRA):<sup>8</sup> one observer criticized the majority for “[striking] down a statute that did not exist,”<sup>9</sup> while another wrote that “all three reasons *Shelby County* gives for the record’s inadequacy are deeply puzzling.”<sup>10</sup> Other criticisms focused on the ruling’s effects: President Obama expressed deep disappointment in the ruling, asserting that it “upset[] decades of well-established practices that help make sure voting is fair, especially in places where voting discrimination has been historically prevalent.”<sup>11</sup> Attorney General Eric Holder called *Shelby County* “a serious setback for voting rights.”<sup>12</sup> Nearly every critique of the Court’s ruling also looked to the future and how the federal government could use the undisturbed portions of the Voting Rights Act to continue protecting the franchise.<sup>13</sup> The need for continued federal protections became apparent within hours of the Court’s decision as states formerly covered by § 5 began to implement new voting-related legislation.<sup>14</sup>

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8. 42 U.S.C. § 1973 (2012).

9. Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG.COM (June 25, 2013, 10:39 PM), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences> (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

10. Ellen D. Katz, *What Was Wrong with the Record?*, 12 ELECTION L.J. 329, 331 (2013).

11. David Jackson, *Obama “Disappointed” in Court’s Voting Rights Decision*, USATODAY.COM, June 25, 2013, <http://www.usatoday.com/story/theoval/2013/06/25/obama-supreme-court-voting-rights-act/2455939> (last visited Sept. 24, 2014) (quoting President Obama’s written statement responding to the ruling) (on file with the Washington and Lee Law Review).

12. *Id.* (quoting Attorney General Holder).

13. *See id.* (quoting President Obama as saying that *Shelby County* “doesn’t represent the end of our efforts to end voting discrimination” and calling for legislative action); Eric Holder, Att’y Gen. of the United States, Remarks at the Nat’l Urban League Annual Conference (July 25, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html> (last visited Sept. 24, 2014) (announcing that the Justice Department would shift its focus “to the enforcement of a number of federal voting laws not affected by the Supreme Court’s decision”) (on file with the Washington and Lee Law Review).

14. *See* Associated Press, *For Republicans, No Easy Answers on Voting Rights Act*, CBS NEWS (July 5, 2013, 9:22 AM), <http://www.cbsnews.com/news/for-republicans-no-easy-answers-on-voting-rights-act> (last visited Sept. 24, 2014) (“GOP officials in Texas and Mississippi promised within hours of the decision to enforce new laws requiring voters to show identification at the polls.”) (on file with the Washington and Lee Law Review).

One of those portions of the Voting Rights Act that remained untouched by *Shelby County* is § 3(c)<sup>15</sup>—the “bail-in” or “pocket trigger” provision.<sup>16</sup> Section 3(c) authorizes a court presiding over a successful voting rights suit to impose a preclearance regime on the defendant jurisdiction, thus requiring the jurisdiction’s subsequent voting-related changes to be approved by the court before they can go into effect.<sup>17</sup> In the wake of *Shelby County*, Attorney General Holder specifically mentioned § 3(c) as one of the tools the Department of Justice would use to continue protecting voting rights.<sup>18</sup> Lawsuits filed in North Carolina and Texas have backed up the Attorney General’s promise, with the federal government invoking § 3(c) in its prayers for relief.<sup>19</sup> These decisions by federal authorities reflect the view of voting-rights scholars that the § 3(c) pocket trigger is one of the better immediate, short-term solutions to continuing to protect voting rights after *Shelby County*.<sup>20</sup>

But using § 3(c) more frequently poses several practical questions about its implementation. To date, only eighteen jurisdictions have been brought under § 3(c)’s provisions, almost all by consent decree.<sup>21</sup> This scant implementation, specifically in the adverse litigation context, provides little guidance about how courts should apply § 3(c)’s retention-of-jurisdiction provision. This Note addresses three major questions about implementing

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15. 42 U.S.C. § 1973a(c) (2012). Although the Voting Rights Act is codified in Title 42 of the United States Code, 42 U.S.C. § 1973, this Note will follow convention by referring to provisions by their respective section numbers in the original Act, Pub. L. No. 89-110, 79 Stat. 437 (1965).

16. See Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2006–09 (2010) (describing the mechanics of § 3(c)).

17. See *id.* (describing the mechanics of § 3(c)).

18. See Holder, *supra* note 13 (referring to provisions in the VRA to “bail in” jurisdictions “when intentional voting discrimination is found”).

19. See Complaint at 31, *United States v. North Carolina*, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013) (requesting the court retain jurisdiction under § 3(c)); Complaint at 14, *United States v. Texas*, No. 13-cv-00263 (S.D. Tex. Aug. 22, 2013) (same).

20. See Bruce E. Cain, *Moving Past Section 5: More Fingers or a New Dike?*, 12 ELECTION L.J. 338, 340 (2013) (identifying § 3(c) as one of “the best [strategies] that [can] be done for the foreseeable future”).

21. See *infra* notes 143–46 and accompanying text (describing the history of § 3(c) implementation).

§ 3(c) after *Shelby County*. First, which party bears, or should bear, the burden of proof on the element of discriminatory purpose for proposed voting changes subject to § 3(c) preclearance, and should there be a presumption of discriminatory purpose?<sup>22</sup> Second, how long can courts retain jurisdiction under § 3(c), should there be a default time period, and under what conditions should a covered jurisdiction be released?<sup>23</sup> And third, what is the standard for appellate review for § 3(c) relief, and does it change depending on whether the appellant is challenging the initial imposition or challenging later decisions by the court to disallow voting changes?<sup>24</sup>

This Note is organized as follows: Part II examines the structure of the Voting Rights Act and the history of preclearance litigation in the Supreme Court, from the early days of the Voting Rights Act through *Shelby County*.<sup>25</sup> Part III delves into the specifics of § 3(c) preclearance and the constitutional issues it poses, both before and after *Shelby County*.<sup>26</sup> Part IV answers the questions identified above.<sup>27</sup> Finally, Part V examines the proposed Voting Rights Amendment Act of 2014 (VRAA),<sup>28</sup> its changes to § 3(c) specifically, and its effect on § 3(c)'s role in the general scheme of federal voting-rights enforcement.<sup>29</sup>

## *II. A Brief Overview of the Voting Rights Act and § 5 Preclearance*

### *A. The Voting Rights Act's Basic Structure*

Originally enacted in 1965, the Voting Rights Act contains two “major substantive provisions”: §§ 2 and 5.<sup>30</sup> Section 2

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22. *Infra* Part IV.A.

23. *Infra* Part IV.B.

24. *Infra* Part IV.C.

25. *Infra* Part II.

26. *Infra* Part III.

27. *Infra* Part IV.

28. H.R. 3899, 113th Cong. (2014).

29. *Infra* Part V.

30. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 516 (4th ed. 2012). The Act also contains substantive and procedural provisions that are beyond the scope of this Note but worth mentioning to illustrate the breadth of

establishes “a nationwide prohibition against voting practices and procedures . . . that discriminate on the basis of race, color or membership in a language minority group.”<sup>31</sup> Section 2 can be enforced in litigation brought by the U.S. Department of Justice or by private plaintiffs.<sup>32</sup>

Section 5, the “preclearance” provision, requires states and local jurisdictions that meet certain criteria—laid out in the now-defunct coverage formula of § 4(b)<sup>33</sup>—to obtain approval from the Attorney General or a three-judge panel of the United States District Court for the District of Columbia for changes to their voting practices.<sup>34</sup> When the Supreme Court struck down § 4(b)’s preclearance coverage formula in *Shelby County*, it effectively released all the jurisdictions that had been subject to the § 5 preclearance regime and prevented any additional localities from being brought under § 5.<sup>35</sup>

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the Act’s protections. Congress added a requirement for bilingual election procedures in 1975. See Pub. L. No. 94-73, 89 Stat. 400 (1975) (codified as amended at 42 U.S.C. § 1973aa-1a (2012)) (requiring that voting materials be available in languages other than English in certain communities with high populations of non-English speakers). In 1984, it adopted provisions to ensure accessible voting facilities and procedures for persons with disabilities. See Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified as amended at 42 U.S.C. §§ 1973ee to 1973ee-6 (2012)) (requiring handicapped-accessible voting facilities and procedures). Sections 3(a) and 8 of the Act authorize the appointment of federal election observers in certain jurisdictions. See 42 U.S.C. § 1973a(a) (2012) (permitting the appointment of federal election observers); *id.* § 1973f (same); *South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1966) (outlining the structure of the Voting Rights Act and highlighting § 8’s provision for appointing federal poll watchers).

31. *Statutes Enforced by the Voting Section*, U.S. DEPT’ OF JUSTICE, <http://www.justice.gov/crt/about/vot/overview.php> (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

32. See Ilya Shapiro, *Shelby County v. Holder: Section 5 of the Voting Rights Act Conflicts with Section 2, Which Provides the Proper Remedy for Racial Discrimination in Voting*, SCOTUSBLOG (Feb. 14, 2013, 12:20 PM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-section-5-of-the-voting-rights-act-conflicts-with-section-2-which-provides-the-proper-remedy-for-racial-discrimination-in-voting/> (last visited Sept. 24, 2014) (recognizing that § 2 provides for a private right of action) (on file with the Washington and Lee Law Review); *Statutes Enforced by the Voting Section*, *supra* note 31 (listing § 2 among the sections of the VRA enforced by the Department of Justice).

33. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking down the coverage formula in § 4(b)).

34. *Statutes Enforced by the Voting Section*, *supra* note 31.

35. See Daniel P. Tokaji & Paul Gronke, *The Party Line: Shelby County*

*B. Section 5 and Its Development in the Supreme Court*

When President Lyndon Johnson signed the Voting Rights Act into law in 1965, he called it “one of the most monumental laws in the entire history of American freedom.”<sup>36</sup> When the Supreme Court first upheld the Act’s constitutionality in 1966, Chief Justice Warren wrote that § 5’s preclearance formula was “rational in both practice and theory.”<sup>37</sup> By 2009, however, the opinion of the Court was that preclearance “raises serious constitutional questions.”<sup>38</sup> And in 2013, when the Court finally struck down the coverage formula that triggered § 5 preclearance, Chief Justice Roberts described § 5 preclearance as “extraordinary and unprecedented.”<sup>39</sup>

The question for voting-rights enforcement after *Shelby County* is how to tailor a preclearance regime that will be broad enough and strong enough to meaningfully prevent disenfranchisement but narrow enough to survive scrutiny from a skeptical Supreme Court.<sup>40</sup> A close examination of the cases that led to *Shelby County*—and the rationale of the decision itself—reveals why § 3(c) preclearance just may be the tool that voting-rights advocates need.<sup>41</sup>

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*and Beyond*, 12 ELECTION L.J. 241, 241 (2013) (stating that *Shelby County* “nullified the Section 5 preclearance regime”).

36. Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 1965 PUB. PAPERS 840, 841 (Aug. 6, 1965).

37. *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966).

38. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 204 (2009).

39. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2626 (2013).

40. See, e.g., Bernard Grofman, *Devising a Sensible Trigger for Section 5 of the Voting Rights Act*, 12 ELECTION L.J. 332, 334–37 (2013) (proposing a new § 5 coverage formula); Cain, *supra* note 20, at 338 (saying “the voting rights discussion has shifted to whether and how Section 5 can be replaced”).

41. See Michael Ellement, *Preclearance Without Statutory Change: Bail-In Suits Post-Shelby County*, YALE L. & POL’Y REV. INTER ALIA (Sept. 7, 2013, 11:45 AM), [http://ylpr.yale.edu/inter\\_alia/preclearance-without-statutory-change-bail-suits-post-shelby-county](http://ylpr.yale.edu/inter_alia/preclearance-without-statutory-change-bail-suits-post-shelby-county) (last visited Sept. 24, 2014) (arguing that § 3(c) “satisfies the constitutional requirements laid out by the *Shelby County* Court” (on file with the Washington and Lee Law Review)).



*1. Katzenbach to Lopez: Upholding § 5*

South Carolina filed the first challenge to § 5 on September 29, 1965,<sup>42</sup> less than sixty days after President Johnson had signed the Voting Rights Act into law.<sup>43</sup> Twenty-six states weighed in as amicus curiae: five on the side of South Carolina, twenty-one supporting the Attorney General and the constitutionality of the Act.<sup>44</sup> After two days of argument in January 1966, Chief Justice Warren delivered the opinion of the Court: § 5 and the other challenged provisions were “an appropriate means for carrying out Congress’[s] constitutional responsibilities and [were] consonant with all other provisions of the Constitution.”<sup>45</sup>

In reaching its conclusion, the Court relied heavily on the history of voting discrimination<sup>46</sup> that post-dated enactment of the Fifteenth Amendment.<sup>47</sup> It emphasized the futility of other forms of enforcement<sup>48</sup> and the “onerous” burden of attacking discriminatory practices on a case-by-case basis.<sup>49</sup> Looking at federal review of new voting procedures, the Court recognized that many states were “contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination.”<sup>50</sup> Preventing such rules from taking effect, instead of fighting them after the fact, was a “permissibly decisive manner” by which Congress could enforce the Fifteenth Amendment.<sup>51</sup> The Court

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42. See Motion for Leave to File Complaint, Complaint, and Brief of Petitioner, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22, Original) (giving the filing date as Sept. 29, 1965).

43. See Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2012)) (giving an effective date of Aug. 6, 1965).

44. See *South Carolina v. Katzenbach*, 383 U.S. 301, 307 n.2 (listing the States that submitted amicus briefs and on which side they were submitted).

45. *Id.* at 308.

46. See *id.* (“The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”).

47. U.S. CONST. amend. XV.

48. See *Katzenbach*, 383 U.S. at 308–15 (summarizing the history of enforcement of the Fifteenth Amendment that had been compiled by Congress).

49. See *id.* at 314 (noting that some voting suits required “as many as 6,000 man-hours” to compile the necessary data).

50. *Id.* at 335.

51. *Id.*

also emphasized that if a covered state could show that it had not used an impermissible “test or device” in the preceding five years, it would be released from coverage under § 5.<sup>52</sup> This temporal limit, in the eyes of the Court, was a cure for “the possibility of overbreadth” in application of § 5 coverage.<sup>53</sup>

Despite the ruling in *Katzenbach*, States maintained their challenges to § 5’s continued application.<sup>54</sup> The Supreme Court heard challenges after the Voting Rights Act was amended in 1970 and 1975, and it upheld § 5 in both instances.<sup>55</sup> Both sets of amendments extended the duration of § 5’s preclearance provisions, for five years in 1970<sup>56</sup> and for seven in 1975.<sup>57</sup> Even as the Court developed a more stringent standard for finding a violation of the Fourteenth<sup>58</sup> or Fifteenth Amendment,<sup>59</sup> § 5 preclearance remained intact.

When Congress renewed the Voting Rights Act in 1982, it extended § 5’s coverage for the next twenty-five years.<sup>60</sup> Congress extended the coverage because of a lengthy record of findings that indicated covered jurisdictions were continuing to propose voting regulations to which the Department of Justice objected and—even worse—many covered jurisdictions were not complying with

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52. *See id.* at 331–32 (discussing how jurisdictions could terminate § 5 coverage).

53. *Id.*

54. *See* Crum, *supra* note 16, at 2001 (discussing the litigation history of § 5 reauthorizations).

55. *See* *City of Rome v. United States*, 446 U.S. 156, 180 (1980) (upholding § 5 after the 1975 amendments); *Georgia v. United States*, 411 U.S. 526, 533 (1973) (upholding § 5 after the 1970 amendments).

56. *See* Pub. L. No. 91-285, § 4, 84 Stat. 314, 315 (1970) (amending the coverage formula to extend an additional five years) (current version at 42 U.S.C. § 1973c (2012)).

57. *See* Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (1975) (amending the coverage formula to extend an additional seven years) (current version at 42 U.S.C. § 1973c (2012)).

58. U.S. CONST. amend. XIV.

59. *See* *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (requiring discriminatory intent to establish a Fourteenth or Fifteenth Amendment violation).

60. *See* Pub. L. No. 97-205, § 2(b)(6), 96 Stat. 131, 133 (1982) (setting the coverage formula to expire after twenty-five years) (current version at 42 U.S.C. § 1973c (2012)).

the strictures of § 5.<sup>61</sup> With each renewal and amendment, Congress stretched § 5's temporal limit, one of the rationales the Warren Court had used to uphold § 5 in *Katzenbach*.<sup>62</sup>

As late as 1999, the Court was continuing to uphold § 5 preclearance.<sup>63</sup> In *Lopez v. Monterey County*,<sup>64</sup> the Court enforced § 5 against a covered county (Monterey County) in a state that itself was not covered (California), even though the change at issue—a state law consolidating Monterey County's judicial districts<sup>65</sup>—was made at the state level and not by the county itself.<sup>66</sup> The Court in *Lopez* explicitly recognized that “the Voting Rights Act, by its nature, intrudes on state sovereignty,” but found that intrusion permissible under the Fifteenth Amendment.<sup>67</sup>

## 2. NAMUDNO: Questioning § 5

After the 1982 amendments, the temporary provisions of the Voting Rights Act, including § 5, were due to expire in 2007.<sup>68</sup> In 2006, following extensive hearings and testimony,<sup>69</sup> Congress again extended the preclearance formula for another twenty-five years.<sup>70</sup>

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61. See S. REP. NO. 97-417, at 9–14 (1982) (noting the frequency of objections and listing those jurisdictions that had failed to comply with § 5).

62. See *South Carolina v. Katzenbach*, 383 U.S. 301, 331–32 (1966) (discussing the “termination procedures” that would end preclearance within a set period of years).

63. See *Lopez v. Monterey Cnty.*, 525 U.S. 266, 284–85 (1999) (upholding § 5 preclearance).

64. 525 U.S. 266 (1999).

65. See *id.* at 271–75 (describing the series of consolidation ordinances that led to the instant litigation).

66. See *id.* at 283 (ruling that even though California was not a covered state, Monterey County had to comply with § 5's preclearance requirements).

67. *Id.* at 284–85.

68. See Rick Lyman, *Extension of Voting Rights Act Is Likely Despite Criticism*, N.Y. TIMES, Mar. 29, 2006, at A14 (discussing congressional debate over renewing the Voting Rights Act).

69. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2635–36 (2013) (Ginsburg, J., dissenting) (discussing the legislative history of the 2006 renewal and how congressional committees “held 21 hearings” and “heard from scores of witnesses”).

70. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting

But when a small utility district outside Austin, Texas, applied for bailout from § 5<sup>71</sup> and appealed the denial of its application,<sup>72</sup> the Supreme Court expressed “serious constitutional concerns” regarding § 5’s validity.<sup>73</sup> The Court in *Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO)*<sup>74</sup> did not shy away from *Katzenbach’s* recognition of the initial need for the Voting Rights Act and § 5 in particular.<sup>75</sup> It did not say that previous rulings upholding § 5 had been made in error, and it recognized that discriminatory conditions denying the franchise had existed after the Voting Rights Act’s enactment.<sup>76</sup> Nor did the Court deny that the Voting Rights Act had been successful in preventing many of the conditions that existed before it came into law.<sup>77</sup>

Instead, the Court in *NAMUDNO* focused on two aspects of § 5 that it saw as problematic: first, that it treated sister states with different levels of sovereignty,<sup>78</sup> and second, that the data on which preclearance coverage was determined was more than thirty-five years old.<sup>79</sup> The Court recognized the principle of equal sovereignty among the states and suggested that because § 5 subjected some states to federal preclearance but not others, § 5

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Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (replacing the 1982 amendments with the 2006 amendments to extend § 5 preclearance for an additional twenty-five years) (codified at 42 U.S.C. § 1973b(b) (2012)).

71. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 200–01 (2009) (detailing the litigation history that led to the case before the Court).

72. *Id.*

73. *Id.* at 204.

74. 557 U.S. 193 (2009).

75. See *id.* at 197–200 (acknowledging that pre-Voting Rights Act enforcement of the Fifteenth Amendment “can only be regarded as a failure”).

76. See *id.* at 199–200 (recognizing that “exceptional conditions” existed when Congress first passed the Voting Rights Act of 1965).

77. See *id.* at 201–02 (“The historic accomplishments of the Voting Rights Act are undeniable.”).

78. See *id.* at 203 (criticizing the Voting Rights Act because it “differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty”).

79. See *id.* (“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.”).

ran afoul of equal sovereignty.<sup>80</sup> The Court also questioned the weight and validity of the evidence Congress had amassed in renewing § 5 in 2006.<sup>81</sup> Ultimately, however, the Court avoided the constitutional issue by resolving the issue as a matter of statutory interpretation. The Court found that the covered jurisdiction was eligible for bailout—a statutory procedure by which a jurisdiction covered under § 4(b) could escape preclearance through a declaratory judgment by the United States District Court for the District of Columbia.<sup>82</sup> Justice Thomas, the lone dissenter, argued that the Court should not avoid the constitutional question of whether § 5 preclearance violated the Constitution because of how strongly § 5 intruded on state sovereignty and said he would strike down § 5.<sup>83</sup>

While the Court avoided the constitutional question and left § 5 intact, *NAMUDNO* sparked a flurry of debate about whether § 5 could survive if brought before the Court again.<sup>84</sup> Many saw the ruling as an invitation to Congress to revise the coverage formula—or viewed another way, as a threat to strike down § 5 if Congress did not revise it.<sup>85</sup> Less than one year later, on April 27,

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80. See *supra* note 78 and accompanying text (discussing the problem of disparate treatment among states). The Court in *NAMUDNO* cited *Katzenbach* as supporting its view that § 5 raised equal sovereignty concerns, 557 U.S. 193, 204 (2009), but the Court in *Katzenbach* explicitly rejected that argument on the grounds that the doctrine only applied to “the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.” *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966).

81. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 203–04 (2009) (pointing out factual differences between 1965 and 2006 that were included in Congress’s hearings before the 2006 reauthorization).

82. See 42 U.S.C. § 1973b(a) (2012) (detailing the bailout procedure); Christopher Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS UNIV. PUB. L. REV. 9, 26–29 (2010) (describing bailout after the 1982 amendments to the VRA); *infra* notes 179–89 (discussing the provisions of § 4 bailout).

83. See *NAMUDNO*, 557 U.S. at 212 (Thomas, J., dissenting) (stating that he would reach the constitutional question because there was no way to award the full relief sought without doing so).

84. See, e.g., Seaman, *supra* note 82, at 44–54 (discussing possible aftermath of the Court’s ruling in *NAMUDNO*); Crum, *supra* note 16, at 2010 (discussing § 3(c) preclearance as a substitute or replacement for § 5 after *NAMUDNO*).

85. See, e.g., Seaman, *supra* note 82, at 49 (“Ultimately, *NAMUDNO* issued a clear invitation to Congress to address Section 5’s coverage or risk it would be

2010, Shelby County, Alabama, filed its bailout paperwork<sup>86</sup> and set in motion litigation that led to the end of forty years of § 5 preclearance.

### 3. Shelby County: *Abrogating § 5*

When the Court granted certiorari to hear *Shelby County* only three years after deciding *NAMUDNO*, it signaled that it was ready to decide the constitutionality of the scope and requirement of preclearance.<sup>87</sup> When the decision came down in June, Chief Justice Roberts's opinion for the Court striking down the coverage formula was joined by Justices Scalia, Kennedy, Thomas, and Alito.<sup>88</sup> Justice Thomas wrote a separate concurrence arguing as he did in *NAMUDNO* that he would go further and strike down § 5, not just the coverage formula in § 4(b).<sup>89</sup>

The Chief Justice's opinion for the Court echoed *NAMUDNO*.<sup>90</sup> In fact, the entire opinion in *Shelby County* is cast in terms of two "basic principles"<sup>91</sup> quoted from *NAMUDNO*: "the

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held unconstitutional the next time the issue came before the Court.").

86. See Complaint at 1, *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011) (No. 10-0651) (requesting a declaratory judgment that § 5 is unconstitutional).

87. See Lyle Denniston, *Court to Rule on Voting Rights Law, DNA Case (FINAL UPDATE)*, SCOTUSBLOG (Nov. 9, 2012, 3:11 PM), <http://www.scotusblog.com/2012/11/court-to-rule-on-voting-rights-law-2> (last visited Sept. 24, 2014) (discussing the continuing controversy surrounding § 5 in the wake of *NAMUDNO*) (on file with the Washington and Lee Law Review); Amy Howe, *Court to Return to Constitutionality of Voting Rights Act: In Plain English*, SCOTUSBLOG (Feb. 25, 2013, 2:12 PM), <http://www.scotusblog.com/2013/02/court-to-return-to-constitutionality-of-voting-rights-act-in-plain-english> (last visited Sept. 24, 2014) (suggesting that "several Justices may be poised to strike down Section 5") (on file with the Washington and Lee Law Review).

88. *Supra* note 5 and accompanying text.

89. See *id.* at 2631 (Thomas, J., concurring) (arguing that any preclearance regime violates principles of federalism and would be unconstitutional).

90. See Jeffrey Harris, *The Court Meant What It Said in Northwest Austin*, SCOTUSBLOG (June 25, 2013, 5:47 PM), <http://www.scotusblog.com/2013/06/the-court-meant-what-it-said-in-northwest-austin> (last visited Sept. 24, 2014) (counting more than thirty citations to *NAMUDNO* in *Shelby County* and noting the similarity between the two decisions) (on file with the Washington and Lee Law Review).

91. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013).

[Voting Rights] Act imposes current burdens and must be justified by current needs;<sup>92</sup> and “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>93</sup> The Court never established what an acceptable coverage formula would look like, but did establish that § 4(b) had to fail because it applied too broadly, without differentiating for local conditions.<sup>94</sup> The Court also noted that § 4(b) did not do enough to reflect conditions in the here and now.<sup>95</sup>

The reaction to the opinion, both from supporters of the Voting Rights Act’s preclearance regime and its opponents, was strong and swift. Congressman John Lewis, a Civil Rights leader who led the march from Selma, Alabama in March 1965<sup>96</sup> that spurred passage of the Voting Rights Act just months later,<sup>97</sup> called the decision “a dagger in the very heart of the Voting Rights Act of 1965.”<sup>98</sup> States that had been subject to preclearance leapt at the chance to implement voting changes without federal oversight.<sup>99</sup> For legal analysts and voting-rights advocates, focus immediately turned to the implications of the

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

93. *Id.*

94. *See Shelby Cnty.*, 133 S. Ct. at 2627 (criticizing § 5 coverage for imposing a uniform standard, irrespective of conditions in covered states).

95. *See id.* at 2629 (saying Congress reauthorized § 5 coverage “based on 40-year-old facts having no logical relation to the present day”).

96. *Biography*, CONGRESSMAN JOHN LEWIS, <http://johnlewis.house.gov/johnlewis/biography> (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

97. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 30, at 516 (discussing how the violence displayed in Selma spurred passage of the Voting Rights Act in 1965).

98. Jeff Zeleny, *John Lewis: Court’s Decision Puts ‘Dagger in Heart of Voting Rights Act,’* ABC NEWS (Jun. 25, 2013, 12:16 PM), <http://abcnews.go.com/blogs/politics/2013/06/courts-decision-puts-dagger-in-heart-of-voting-rights-act/> (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

99. *See* Associated Press, *supra* note 14 (identifying states that proposed new voting-related changes after *Shelby County*).

Voting Rights Act without § 5 preclearance.<sup>100</sup> One of the places they turned was to the VRA itself and § 3(c).<sup>101</sup>

### *III. The Pocket Trigger of § 3(c)*

While § 2 of the VRA lays out the promise of equal voting rights, it is a promise without punch. Section 2 does not by itself explicitly provide for any remedy if a locality violates its terms.<sup>102</sup> Sections 3, 4, and 5 were written as the statutory muscle.<sup>103</sup> With the striking down of § 4 leading to a “toothless” § 5,<sup>104</sup> the only meaningful remedy that remains for preempting discriminatory voting procedures is § 3, specifically § 3(c).<sup>105</sup>

Section 3(c) works by allowing a federal district court where a voting-rights suit is brought to retain jurisdiction over a violating locality.<sup>106</sup> The court must find both that the locality’s

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100. See, e.g., Lyle Denniston, *Opinion Recap: Voting Law in Deep Peril*, SCOTUSBLOG (June 25, 2013, 12:42 PM), <http://www.scotusblog.com/2013/06/opinion-recap-voting-law-in-deep-peril/> (last visited Sept. 24, 2014) (saying *Shelby County* “struck down a key part of the . . . Voting Rights Act”) (on file with the Washington and Lee Law Review); Richard Pildes, *Shelby Commentary: What Does the Court’s Decision Mean?*, SCOTUSBLOG (June 25, 2013, 1:47 PM), <http://www.scotusblog.com/2013/06/shelby-commentary-what-does-the-courts-decision-mean/> (last visited Sept. 24, 2014) (questioning the future of federal voting-rights enforcement without the tool of § 5 preclearance) (on file with the Washington and Lee Law Review).

101. See Cain, *supra* note 20 (saying § 3(c) is one immediate substitute for § 5 preclearance).

102. See *South Carolina v. Katzenbach*, 383 U.S. 301, 315–16 (1966) (describing the “stringent remedies” of §§ 4 and 5 as “[t]he heart of the [Voting Rights] Act”). Courts have found implied rights of action to sue to enforce § 2. See *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (finding an implied right of action for citizens suing on the basis of § 2).

103. See *Katzenbach*, 383 U.S. at 315–16 (describing § 3 as “strengthen[ing] existing procedures for attacking voting discrimination by means of litigation”).

104. See Anna Fifield, *Supreme Court Strikes Down Key Part of Voting Rights Act*, FIN. TIMES (June 25, 2013, 5:25 PM), <http://www.ft.com/intl/cms/s/0/f6da3170-dd9d-11e2-892b-00144feab7de.html> (last visited Sept. 24, 2014) (describing § 5 without § 4(b) as “toothless”) (on file with the Washington and Lee Law Review).

105. See Ellement, *supra* note 41 (describing § 3(c) preclearance as “the remedial option closest to the previously utilized § 5 preclearance structure”).

106. See 42 U.S.C. § 1973a(c) (2012) (authorizing a federal district court to retain jurisdiction over a defendant locality that has enacted voting procedures in violation of the Fourteenth or Fifteenth Amendment); Crum, *supra* note 16,



voting procedures violate the Fourteenth or Fifteenth Amendment<sup>107</sup>—which in turn requires finding that the procedure has both discriminatory effects and was enacted with the intent to discriminate<sup>108</sup>—*and additionally* that the violation “justif[ies] equitable relief.”<sup>109</sup> Once the court makes that finding, it can require the locality to submit any subsequent voting changes to the court for approval.<sup>110</sup> No changes can take effect without the court’s sign-off for a period of time set down by the court.<sup>111</sup> The approval process can also go through the Department of Justice. If the locality submits its changes to the Attorney General and the Attorney General makes no objections within sixty days, the change can take effect.<sup>112</sup>

Section 3(c) has been part of the Voting Rights Act since its initial enactment in 1965.<sup>113</sup> The only major change in its provisions came in 1975, adding language to clarify that § 3(c) would apply to violations of either the Fourteenth or Fifteenth Amendment<sup>114</sup> and permitting suits by persons other than the Attorney General.<sup>115</sup>

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at 2009 (describing the mechanics of § 3(c)).

107. See Crum, *supra* note 16, at 2009 (explaining the discriminatory intent requirement in § 3(c)’s trigger).

108. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (noting that “action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose”); Crum, *supra* note 16, at 2009 (discussing *City of Mobile v. Bolden* and its implications for § 3(c)).

109. 42 U.S.C. § 1973a(c) (2012).

110. See *id.* (barring the implementation of new voting procedures “unless and until” the Court finds that the new procedures have neither discriminatory purpose nor effect).

111. See *id.* (permitting the court to retain jurisdiction for “such period as it may deem appropriate”).

112. See *id.* (providing for intervention by the Attorney General).

113. Pub. L. No. 89-110, § 3(c), 79 Stat. 437, 437–38 (1965).

114. See Pub. L. No. 94-73, § 205, 89 Stat. 400, 402 (1975) (striking out “fifteenth amendment” and substituting “fourteenth or fifteenth amendment”).

115. See Pub. L. No. 94-73, § 401, 89 Stat. 400, 404 (1975) (allowing suits by the Attorney General or “an aggrieved person”).

*A. Section 3(c)'s Constitutionality Before Shelby County*

The Supreme Court detailed the standard to which legislation enforcing the Fourteenth Amendment must conform in *City of Boerne v. Flores*.<sup>116</sup> For legislative schemes designed to remedy violations of the Fourteenth Amendment, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>117</sup> Preclearance—or at least § 5 preclearance—is such a remedial legislative scheme.<sup>118</sup> The Court cited *Boerne* in *NAMUDNO*, quoting its earlier language that “[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”<sup>119</sup> In fact the *Boerne* standard was one of the reasons the Court thought § 5’s “preclearance requirements and its coverage formula raise serious constitutional questions.”<sup>120</sup> The “extraordinary” nature of § 5 preclearance, predicated on a statutory violation only, gave the Court pause in *NAMUDNO*<sup>121</sup> and proved fatal to the coverage formula in *Shelby County*.<sup>122</sup>

The current structure of § 3(c) likely survives scrutiny under the *Boerne* standard.<sup>123</sup> While the preclearance remedy may be extraordinary in the eyes of the Court, it is congruent when targeted at a specific bad-actor jurisdiction for actions taken in close temporal proximity to the time of litigation.<sup>124</sup> It is also a

116. 521 U.S. 507 (1997).

117. *Id.* at 520.

118. *See id.* at 518–19 (discussing the history of the VRA in the Court’s Fourteenth Amendment jurisprudence (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980))).

119. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 225–26 (2009) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)).

120. *Id.* at 204.

121. *Id.* at 224 (quoting *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 500–01 (1992), and *United States v. Sheffield Bd. of Comm’rs*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting), both of which describe § 5 preclearance as “extraordinary”).

122. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (quoting the same passage from *Presley* regarding the “extraordinary” nature of § 5 as *NAMUDNO*).

123. *See Crum, supra* note 16, at 2021–27 (analyzing § 3(c) under a three-step *Boerne* analysis and concluding that it “stands a good chance of surviving constitutional scrutiny”).

124. *See id.* (emphasizing that § 3(c) preclearance is imposed close in time to

proportional remedy given that the plaintiff has to clear the high bar of proving intentional discrimination—it requires proof of a *constitutional* violation, not just a statutory one.<sup>125</sup> But while § 3(c) likely survives the Court’s analysis under *Boerne*, will it survive under *Shelby County*?

### B. Section 3(c)’s Constitutionality After *Shelby County*

In many ways, § 3(c) preclearance resembles the § 5 preclearance regime that was in place for more than forty years<sup>126</sup> and that the Court invalidated in *Shelby County*.<sup>127</sup> Both permit federal oversight of state and local election procedure.<sup>128</sup> Both have mechanisms by which either the Department of Justice or the federal judiciary can authorize a covered jurisdiction to implement a change to its voting procedure.<sup>129</sup> And both require the approving entity to look at the purpose and the effect of the proposed change.<sup>130</sup>

But § 3(c) is much more targeted than its now-defunct statutory cousin.<sup>131</sup> While § 5 applied to any jurisdiction that met a predetermined list of criteria articulated in § 4(b), § 3(c) only applies to a specific jurisdiction after specific conditions have been found.<sup>132</sup> The relevant court for § 5 preclearance was, in all cases, the United States District Court for the District of Columbia.<sup>133</sup> Section 3(c) puts the preclearance regime closer to

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proven violations).

125. *See id.* (discussing why § 3(c) is a proportional response).

126. *See id.* at 2008–09 (comparing § 5 preclearance and § 3(c) preclearance).

127. *See Shelby Cnty.*, 133 S. Ct. at 2631 (striking down the coverage formula).

128. *See Crum, supra* note 16, at 2008–09 (comparing § 5 preclearance and § 3(c) preclearance).

129. *See id.* (comparing § 5 preclearance and § 3(c) preclearance).

130. *See id.* (comparing § 5 preclearance and § 3(c) preclearance).

131. *See id.* at 2016 (describing how § 3(c) is more targeted than § 5).

132. *Compare* 42 U.S.C. § 1973c (2012) (relying on the coverage formula of § 4(b)), *with id.* § 1973a(c) (covering only the specific jurisdiction being sued).

133. *See id.* at § 1973c (reserving the power to issue declaratory judgments approving voting procedure changes to the United States District Court for the District of Columbia); *Crum, supra* note 16, at 2008–09 (describing the bailout and preclearance provisions of § 5).

the covered locality: the court overseeing the locality's changes will be the federal district court with proper jurisdiction and venue for the initial lawsuit.<sup>134</sup>

While *Shelby County* was an alarm bell for traditional Voting Rights Act enforcement through the § 5 framework,<sup>135</sup> the rationale of the opinion points toward favoring a more limited approach like § 3(c).<sup>136</sup> The Court only struck down § 4(b)'s coverage formula.<sup>137</sup> It did not go as far as Justice Thomas urged and strike down § 5's very concept of preclearance.<sup>138</sup> By focusing narrowly on the data used to justify preclearance, the Court seems to have accepted that preclearance can work as a constitutional remedy for unconstitutional state-election changes—just not as it was implemented by § 4(b).<sup>139</sup> Because § 3(c) requires evidence specific to a locality and sufficient to clear the high bar of proving discriminatory purpose, § 3(c) preclearance is more narrowly tailored.<sup>140</sup> By proving a case sufficient to justify § 3(c) relief, a plaintiff will demonstrate “current needs” sufficient to justify the “current burdens” of § 3(c) preclearance.<sup>141</sup>

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134. See Crum, *supra* note 16, at 2009 (“In pocket trigger litigation, however, the local district court retains jurisdiction and can receive preclearance requests.”).

135. See Tokaji & Gronke, *supra* note 35, at 241 (calling *Shelby County* “the end of an era in which barriers to racial minorities’ participation and representation were substantially weakened, if not entirely shattered”).

136. See Cain, *supra* note 20, at 340 (suggesting that expanding use of § 3(c) preclearance is one of the better tactics for voting-rights enforcement in the absence of legislative action).

137. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (“We issue no holding on § 5 itself, only on the coverage formula.”).

138. See *id.* at 2632 (Thomas, J., concurring) (arguing that the rationale of the Court’s opinion should have led it to strike down § 5).

139. See *id.* at 2631 (majority opinion) (“Congress may draft another [coverage] formula based on current conditions.”).

140. See *supra* notes 131–34 and accompanying text (comparing § 3(c) preclearance with § 5 preclearance).

141. See Crum, *supra* note 16, at 2021–36 (analyzing § 3(c) preclearance in a post-*NAMUDNO*, pre-*Shelby County* framework).

*IV. Section 3(c) Implementation in a Post-Shelby County World*

Section 3(c) to this point has been implemented primarily through acquiescence of the challenged locality.<sup>142</sup> In the nearly fifty intervening years since enactment of the Voting Rights Act, eighteen jurisdictions have been brought under § 3(c)'s purview.<sup>143</sup> More than half of those jurisdictions entered into consent decrees with the federal government.<sup>144</sup> Even the State of Arkansas, one of the jurisdictions that fully litigated its case before coming under § 3(c), withdrew its appeal to the Supreme Court<sup>145</sup> and has complied with the preclearance order.<sup>146</sup>

But voting procedures have become a political hot button, and settlement between states and local jurisdictions on one hand, and the federal government on the other, may no longer be politically tenable. For example, in both 2011 and 2012, more than thirty states considered legislation related to voter ID

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142. See *id.* at 2015–16 (emphasizing the use of consent decrees in § 3(c) implementation).

143. See Statement of Interest of the United States with Respect to § 3(c) of the Voting Rights Act, at 3, *Perez v. Texas*, No. 11-cv-360 (W.D. Tex. July 25, 2013) (saying there has been “coverage of two states . . . as well as twelve counties, two cities, and two school districts”).

144. See LETTER OF AGREEMENT BETWEEN CIBOLA COUNTY, NEW MEXICO AND THE UNITED STATES at 2 (2011) (acknowledging that Cibola County, New Mexico had “been under some form of ‘Consent Decree’ and federal court jurisdiction” since 1994); Order Granting Joint Motion for Entry of Limited Consent Decree at 14, *United States v. Sandoval Cnty.*, N.M., No. 88-cv-1457 (D.N.M. July 6, 2011) (retaining jurisdiction over Sandoval County, New Mexico); Consent Decree at 5–6, *United States v. Village of Port Chester*, No. 06-cv-15173 (S.D.N.Y. Dec. 22, 2009) (imposing preclearance over the Village of Port Chester, N.Y., for a period ending June 22, 2016, or after “three election cycles, whichever is longer”); Crum, *supra* note 16, at 2010–11 (identifying consent decrees establishing preclearance over New Mexico; Chattanooga, Tennessee; Los Angeles County, California; Thurston County, Nebraska; Bernalillo County, New Mexico; and Buffalo and Charles Mix Counties, South Dakota).

145. See *Clinton v. Jeffers*, 498 U.S. 1129, 1129 (1991) (acknowledging Arkansas's withdrawal of its appeal).

146. See *Jeffers v. Tucker*, 847 F. Supp. 655, 656–57 (E.D. Ark. 1994) (reporting that the Arkansas Board of Apportionment had submitted its post-1990 redistricting plan to the court and that the plan had been approved); *Notice of Preclearance Activity Under the Voting Rights Act of 1965, As Amended*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/vot/notices/vnote011802.php> (last visited Sept. 24, 2014) (listing two submissions from Arkansas to the Department of Justice for preclearance review) (on file with the Washington and Lee Law Review).

requirements.<sup>147</sup> In states where the requirements became stricter, proponents cited the specter of voter fraud as their prime motivator.<sup>148</sup> Parties opposing those changes have alleged that the new laws are invidious forms of voter suppression, motivated by partisan electoral aims and targeting poor and minority voters.<sup>149</sup> Attorney General Eric Holder went so far as to call the voter ID laws “poll taxes” because of the costs associated with obtaining photo ID that would satisfy new requirements.<sup>150</sup> The rhetoric from states facing challenges to their post-*Shelby County* voting changes is no less fiery. Governor Pat McCrory of North Carolina called the Department of Justice’s lawsuit in that state “an overreach and without merit.”<sup>151</sup> Texas Governor Rick Perry went even further, charging that the Justice Department’s suit in the Lone Star State was designed to “obstruct the will of the people of Texas” and pledging to “continue to defend the integrity of our elections against [the Obama] administration’s blatant disregard for the 10th Amendment.”<sup>152</sup> If jurisdictions fight § 3(c)

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147. *Voter Identification Requirements*, NAT’L COUNCIL OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [hereinafter *Voter Identification Requirements*] (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

148. See Ethan Bronner, *Legal Battles Erupt as Voters Fear Exclusion by Tough ID Laws*, N.Y. TIMES, July 20, 2012, at A1 (saying strict voter ID advocates are concerned with “ensuring the integrity of elections” and “preventing voter fraud”). Voter impersonation, the kind of voter fraud that voter ID laws seek to prevent, is exceedingly rare. See Amy Bingham, *Voter Fraud: Non-Existent Problem or Election-Threatening Epidemic?*, ABC NEWS (Sept. 12, 2012), <http://abcnews.go.com/Politics/OTUS/voter-fraud-real-rare/story?id=17213376> (last visited Sept. 24, 2014) (reporting that of 197 million votes cast in federal elections between 2002 and 2005, only 26 voters—or .0000013 percent—pled guilty to or were convicted of voter fraud) (on file with the Washington and Lee Law Review).

149. See Bronner, *supra* note 148, at A1 (noting that Democrats called proposed voter ID changes “voter suppression”). Those allegations gained credence when a Republican legislator in Pennsylvania said that the commonwealth’s new voter ID laws would “allow Governor Romney to win the state of Pennsylvania.” *Id.*

150. See *id.* (describing Holder’s comments).

151. *McCrory: Feds ‘Overreach’ in Voter Law Challenge*, WRAL (Sept. 30, 2013), <http://www.wral.com/government-sues-nc-over-voter-law/12939343> (last updated Oct. 1, 2013) (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

152. Rob Snyder, *Texas Officials React to New LawsUIT Filed by Department of Justice Against State of Texas Concerning Voter ID*, KFYO (Aug. 22, 2013),

preclearance tooth and nail, the suits lose the benefits of implementation through consent decree.<sup>153</sup>

Implementing an effective bail-in regime based on § 3(c) through adverse, politically charged litigation puts a premium on understanding the law's mechanics. This Part addresses three major considerations for § 3(c) after *Shelby County*: an evidentiary presumption that courts should implement for plaintiffs seeking § 3(c) relief;<sup>154</sup> a proposed new mechanism for the duration of § 3(c) preclearance regimes;<sup>155</sup> and the appropriate standard of appellate review for such a regime.<sup>156</sup> Taken together, these proposals should make § 3(c) coverage easier to obtain, more robust once in place, and more difficult to challenge on appeal.

#### A. Presuming Purpose

Proving discriminatory purpose is necessary to prove a violation of the Fourteenth or Fifteenth Amendment and possibly trigger § 3(c).<sup>157</sup> Unfortunately for voting-rights advocates, proving discriminatory purpose is also very hard and can be exorbitantly expensive.<sup>158</sup>

Under the language of § 3(c), that high bar of discriminatory purpose re-enters the equation even after the threshold finding triggering coverage. The court that retains jurisdiction disallows

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<http://www.kfy.com/texas-officials-react-to-new-lawsuit-filed-by-department-of-justice-against-state-of-texas-concerning-voter-id> (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

153. See Crum, *supra* note 16, at 2016 (“[B]ecause a jurisdiction waives the right to appeal, consent decrees end litigation and insulate section 3 suits from appellate review.”).

154. *Infra* Part IV.A.

155. *Infra* Part IV.B.

156. *Infra* Part IV.C.

157. See *City of Mobile v. Bolden*, 446 U.S. 55, 65–67 (1980) (requiring discriminatory purpose for a Fourteenth or Fifteenth Amendment violation); Crum, *supra* note 16, at 2009 (citing *City of Mobile v. Bolden* as requiring intentional discrimination to trigger § 3(c)).

158. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 736 (1998) (citing reports that the plaintiffs in *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982), incurred \$96,000 in attorneys' fees).

changes “unless and until” it finds that the proposed change “*does not have the purpose* and will not have the effect of denying or abridging the right to vote on account of race or color.”<sup>159</sup> This language can and should be construed as creating a presumption against the covered jurisdiction. The language of § 3(c) mirrors that of § 5, which permits a covered jurisdiction to seek a declaratory judgment that its proposed voting change “does not have the purpose and will not have the effect” of discriminating on the basis of race.<sup>160</sup> *Shelby County* may have invalidated the provision that gave § 5 any enforcement teeth, but it left the language and logic of § 5 intact.<sup>161</sup> Interpreting that identical language more than thirty years before, the Court established that the jurisdiction “bears the burden of proving *lack* of discriminatory purpose and effect.”<sup>162</sup>

Justice Marshall’s opinion for the Court in *City of Rome v. United States*<sup>163</sup> made the rationale for such a presumption crystal clear: “Congress could rationally have concluded that, because electoral changes by jurisdictions *with a demonstrable history of intentional racial discrimination in voting* create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.”<sup>164</sup> The evidence that demonstrates that “history of intentional racial discrimination in voting” is more closely tied to a § 3(c) jurisdiction because a court has to make an individualized finding to trigger coverage, whereas a § 5 jurisdiction was covered simply if it fell under the broad § 4(b) coverage formula.<sup>165</sup> But whatever the evidence, once a plaintiff satisfies the high bar of *City of Mobile v. Bolden*<sup>166</sup> and

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159. 42 U.S.C. § 1973a(c) (2012) (emphasis added).

160. *Id.* § 1973c.

161. *See* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (“We issue no holding on § 5 itself, only on the coverage formula.”).

162. *City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980) (emphasis added) (citing *Beer v. United States*, 425 U.S. 130, 140–41 (1976), *Georgia v. United States*, 411 U.S. 526, 538 (1973), and *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966)).

163. 446 U.S. 156 (1980).

164. *Id.* at 177 (emphasis added) (footnote omitted).

165. *See supra* notes 131–34 and accompanying text (describing how § 3(c) is more targeted than § 5).

166. 446 U.S. 55 (1980).



proves discriminatory purpose, *City of Rome* says the case does not have to be proved again and again.<sup>167</sup>

### *B. Duration of Preclearance*

Once a jurisdiction is bailed into § 3(c), the next question is how long the jurisdiction is subject to the court's supervision. The statutory language is silent on a ceiling for duration, stating only that it is limited to "such period as [the court] may deem appropriate."<sup>168</sup> Conceivably, this would allow a court to continue supervising and disallowing state procedural changes for as long as there is a court.<sup>169</sup> But part of what motivated the Supreme Court to strike down the preclearance formula of § 4(b) was its reliance on "decades-old data and eradicated practices."<sup>170</sup> The logical implication that follows is that a rational date for terminating a jurisdiction's § 3(c) preclearance regime is crucial to keeping that regime within constitutional bounds.<sup>171</sup>

Because most § 3(c) regimes have been implemented by consent decree, the parties have been able to negotiate a time period, yielding benefits to both sides.<sup>172</sup> The flexibility of the consent-decree approach is reflected in the variety of the terms: the City of Chattanooga settled on the Eastern District of Tennessee retaining jurisdiction only over the next municipal redistricting plan;<sup>173</sup> Thurston County, Nebraska, agreed to a five-year plan;<sup>174</sup> Buffalo County, South Dakota, and the State of

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167. See 446 U.S. at 183 n.18 (putting the burden of proving lack of discriminatory purpose and effect on the covered jurisdiction).

168. 42 U.S.C. § 1973a(c) (2012).

169. See Crum, *supra* note 16, at 2009 (noting that "the pocket trigger is permanent" once imposed).

170. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627 (2013).

171. See Crum, *supra* note 16, at 2024 (analyzing § 3(c) in the context of *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193 (2009), both of which were central to the Court's analysis in *Shelby County*).

172. See *id.* at 2016 (identifying numerous benefits to settlement of litigation through § 3(c) consent decrees).

173. See *Brown v. Bd. of Comm'rs*, No. C-1-87-388, slip op. ¶¶ 19–20 (E.D. Tenn. Jan. 11, 1990) (consenting to the court retaining jurisdiction over the next municipal redistricting plan).

174. See *United States v. Thurston Cnty.*, No. 78-0-380, slip op. at 3 (D. Neb.

New Mexico both consented to ten-year plans;<sup>175</sup> and Charles Mix County, South Dakota, agreed to a twenty-year plan.<sup>176</sup> The State of Arkansas—the only jurisdiction to have appealed the imposition of § 3(c) preclearance to the Supreme Court, albeit only briefly—faced the longest and most indefinite term of any of the § 3(c) jurisdictions: “until further order of” the issuing court.”<sup>177</sup>

Because § 3(c)’s language mirrors the preclearance language of § 5,<sup>178</sup> the provisions for terminating § 5 preclearance provide some useful guidance on how and when to terminate § 3(c) preclearance. Section 4, which provided the statutory trigger for § 5,<sup>179</sup> also provided an escape clause—the so-called “bailout” provision.<sup>180</sup> If a jurisdiction wanted to get out from under § 5 preclearance, it could apply for a declaratory judgment in the United States District Court for the District of Columbia that would terminate § 5 coverage.<sup>181</sup> The declaratory judgment, however, could only issue after a series of findings about voting procedures in the locality over the past ten years.<sup>182</sup> These findings include first, that the locality had not used any “test or device . . . for the purpose or with the effect” of voting

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May 9, 1979) (consenting to the court retaining jurisdiction for a five-year period).

175. See *Kirkie v. Buffalo Cnty.*, No. 03-CV-3011, 2004 U.S. Dist. LEXIS 30960, at \*7 (D.S.D. Feb. 12, 2004) (consenting to a ten-year period of court supervision); *Sanchez v. Anaya*, No. 82-0067M, slip op. ¶ 8 (D.N.M. Dec. 17, 1984) (consenting to ten years of retained jurisdiction).

176. See *Blackmoon v. Charles Mix Cnty.*, No. Civ. 05-4017, slip op. ¶ 2 (D.S.D. Dec. 4, 2007) (consenting to twenty years of preclearance). Charles Mix County’s preclearance term ended January 1, 2013. *Id.*

177. *Jeffers v. Clinton*, 740 F. Supp. 585, 627 (E.D. Ark. 1990).

178. *Supra* note 160.

179. See 42 U.S.C. § 1973b(b) (2012), *invalidated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (providing the test that brought jurisdictions under the requirements of § 5); *Shelby Cnty.* 133 S. Ct. at 2619–20 (describing the coverage formula).

180. See *Seaman*, *supra* note 82, at 18 (describing the bailout procedure).

181. See 42 U.S.C. § 1973b(a)(1) (2012) (permitting covered entities to apply for a declaratory judgment); *Seaman*, *supra* note 82, at 18 (discussing the bailout procedure in the original Voting Rights Act of 1965).

182. See 42 U.S.C. § 1973b(a)(1) (2012) (permitting the declaratory judgment “only if” the court determined the list of factors).

discrimination;<sup>183</sup> that the locality had not been found in other litigation to have committed a discriminatory voting violation;<sup>184</sup> that no federal election examiners had been assigned to the locality;<sup>185</sup> that the locality had not implemented changes without preclearing them;<sup>186</sup> that the Attorney General had not objected to proposed changes;<sup>187</sup> and that the locality had “engaged in other constructive efforts” to expand ease of voter registration and participation.<sup>188</sup>

From the earliest challenges to the Voting Rights Act’s preclearance provisions, the bailout provision has been an important rationale for why the Act is constitutionally permissible.<sup>189</sup> Using the structure of § 4(a)—looking backward to the past ten years—to fashion § 3(c) relief should insulate it from potential challenges and is the best approach for courts retaining jurisdiction under § 3(c). Ten years is already the middle of the range of durations consented to in prior § 3(c) cases.<sup>190</sup> A court that sets ten years as the “period it may deem appropriate”<sup>191</sup> would thus be in line with prior practice. Affirmatively imposing requirements similar to § 4(a) from the outset would give the court the power to hold bad actors under its jurisdiction for longer, effectively resetting the clock with each violation of the terms.

A § 3(c) preclearance order implementing § 4(a)’s structure—and adopting § 4(a)’s provisions for releasing a covered jurisdiction—could take the following form:

The Court finds that the voting standards, practices, and procedures of defendant State were enacted with the purpose and will have the effect of denying or abridging the

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183. *Id.* § 1973b(a)(1)(A).

184. *Id.* § 1973b(a)(1)(B).

185. *Id.* § 1973b(a)(1)(C).

186. *Id.* § 1973b(a)(1)(D).

187. *Id.* § 1973b(a)(1)(E).

188. *Id.* § 1973b(a)(1)(F).

189. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 331–32 (1966) (recognizing the bailout provision as a remedy for “the possibility of overbreadth” in the coverage formula).

190. *See supra* notes 173–77 (describing the terms of § 3(c) preclearance in previous cases).

191. 42 U.S.C. § 1973a(c) (2012).

right to vote on account of race or color.<sup>192</sup>

The Court finds that the voting standards, practices, and procedures of defendant State violate the Fourteenth or Fifteenth Amendments and justify equitable relief.<sup>193</sup>

Pursuant to 42 U.S.C. § 1973a(c), the Court retains jurisdiction until such time as defendant State demonstrates that, in the preceding ten years,<sup>194</sup> it has not:

(1) submitted for the Court's approval any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting that had the purpose and would have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in 42 U.S.C. § 1973b(f)(2);<sup>195</sup>

(2) had any final judgment entered against it in any action alleging that its voting standards, practices, or procedures have denied or abridged the right to vote on account of race or color or in contravention of the voting guarantees set forth in 42 U.S.C. § 1973b(f)(2), nor entered into any consent decree, settlement, or agreement terminating such an action;<sup>196</sup>

(3) had any Federal examiners or observers assigned to it under the provisions of 42 U.S.C. § 1973a(a);<sup>197</sup>

(4) implemented any change to its voting standards, practices, or procedures without first submitting them for this Court's approval,<sup>198</sup> or

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192. *Cf. id.* (using this language to establish the standard for when § 3(c) preclearance may be imposed).

193. *Cf. id.* (requiring both that the practice violates the Fourteenth or Fifteenth Amendment and that the violation “justify[] equitable relief”).

194. *Cf. id.* § 1973b(a)(1) (setting ten years as the look-back period for bailout determinations).

195. *Cf. id.* § 1973a(c) (providing for proposed changes the court must disallow).

196. *Cf. id.* § 1973b(a)(1)(B) (setting out one condition that would result in a jurisdiction's bailout petition being denied).

197. *Cf. id.* § 1973b(a)(1)(C) (providing that a bailout petition would be denied if federal election examiners or observers had been assigned to the jurisdiction).

198. *Cf. id.* § 1973b(a)(1)(D) (requiring jurisdictions seeking bailout to have complied with § 5 preclearance).

(5) had any proposed change to its voting standards, practices, or procedures objected to by the Attorney General if such objection was sustained by this Court.<sup>199</sup>

The bailout provision is both a remedy for over-inclusiveness<sup>200</sup> and an incentive for localities to conduct voting within the strictures of the Constitution and the Voting Rights Act.<sup>201</sup> Because § 3(c) already requires a finding of discrimination particular to the locality, the over-inclusiveness problem never arises.<sup>202</sup> But courts implementing § 3(c) can bring the good-actor incentive of bailout into § 3(c) preclearance by following the structure of § 4(a).

### *C. Standard of Appellate Review*

Before imposing a § 3(c) preclearance regime, a trial judge must answer two questions in the affirmative: (1) Has the challenged jurisdiction violated the Fourteenth or Fifteenth Amendment; and if so, (2) do those violations “justify[] equitable relief?”<sup>203</sup> Once the regime is imposed, the court is obliged to continue supervising the jurisdiction’s voting procedures, rejecting any change to such procedures that has the purpose and effect of race-based discrimination.<sup>204</sup> There are thus three central decisions on which a party defeated at the trial level may base its appeal: the initial determination of a constitutional violation, the court’s determination that the equitable remedy of retained jurisdiction is appropriate, and each subsequent determination that a voting change is intentionally

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199. *Cf. id.* § 1973b(a)(1)(E) (preventing bailout for jurisdictions that had objections interposed by the Attorney General).

200. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 331–32 (1966) (recognizing the bailout provision as a remedy for “the possibility of overbreadth” in the coverage formula).

201. *See* S. REP. NO. 97-417, at 14 (1982) (expressing the view of the Senate Judiciary Committee that the “revised bailout procedures” would provide an “added incentive to comply” with the Voting Rights Act).

202. *See supra* notes 131–33 and accompanying text (describing how § 3(c) is more targeted than § 5).

203. *See* *Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (posing these two questions as the court lays out its necessary inquiry).

204. *See* 42 U.S.C. § 1973a(c) (2012) (giving the court power to retain jurisdiction).

discriminatory. This Note addresses only the standard of appellate review for the latter two determinations, as the first is not unique to § 3(c).<sup>205</sup>

A court that retains jurisdiction under § 3(c) is exercising its equity powers.<sup>206</sup> Section 3(c) provides that after a finding of “violations of the fourteenth or fifteenth amendment *justifying equitable relief*,” the court “*shall* retain jurisdiction.”<sup>207</sup> The “shall” language implicates the *Hecht Co. v. Bowles*<sup>208</sup> approach that the word “shall” in a statutory command to a court permits—but does not require—a court to implement an equitable remedy.<sup>209</sup> Because the decision to retain jurisdiction and establish a preclearance regime are exercises of the district court’s equity powers, the proper standard of review by an appellate court should be the abuse-of-discretion standard by which other equitable remedies are reviewed.<sup>210</sup>

The ongoing determination by a court that proposed changes are discriminatory in purpose and effect is a factual finding and should stand unless clearly erroneous.<sup>211</sup> The Supreme Court has taken this view in previous reviews of allegedly discriminatory voting procedures.<sup>212</sup>

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205. See *City of Mobile v. Bolden*, 446 U.S. 55, 65–67 (1980) (plurality opinion) (establishing the standard for basic constitutional violations in voting procedures).

206. See *Jeffers*, 740 F. Supp. at 600–01 (analyzing the language of § 1973a(c) to measure “whatever relief is granted . . . against traditional equitable remedial principles”).

207. 42 U.S.C. § 1973a(c) (2012) (emphasis added).

208. 321 U.S. 321 (1944).

209. See *id.* at 328 (noting that “‘shall be granted’ is less mandatory than a literal reading might suggest”); *Jeffers v. Clinton*, 740 F. Supp. 585, 600–01 (E.D. Ark. 1990) (reading “shall,” in light of *Hecht Co. v. Bowles*, to be permissive but not mandatory).

210. See DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES AND CONTEMPT* 442 (2010) (“The court of appeals defers to the trial judge’s decisions on things like the details of an injunction *unless the trial judge has abused his discretion.*” (emphasis added)).

211. See FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); RENDLEMAN, *supra* note 210, at 442 (“In the federal system, the court of appeals will not reject a trial judge’s finding of fact unless it is clearly erroneous.”).

212. See *City of Rome v. United States*, 446 U.S. 156, 183 (1980) (“We are

These standards place extraordinary importance on getting things right at the trial level. The abuse-of-discretion standard has been described as “capacious,”<sup>213</sup> “highly deferential,”<sup>214</sup> and the standard that is “most deferential to trial court decisions.”<sup>215</sup> The clearly erroneous standard gives a reviewing court some additional power compared to the abuse-of-discretion standard, but it “is still very respectful of the trial court’s factual determinations.”<sup>216</sup> The more deferential the standard, the more difficult it becomes to overturn the trial court’s decision on appeal.<sup>217</sup>

But getting it right at the trial level will not be an easy task. Under the pre-*Shelby County* regime, a great deal of the assessment of voting procedures was done by a small number of judges because the United States District Court for the District of Columbia conducted all § 5 preclearance.<sup>218</sup> With *Shelby County*’s abrogation of the former preclearance regime, that assessment is left to the federal district court in which the action is brought.<sup>219</sup> Whatever expertise may have been concentrated in a single judicial district is now diluted among the ninety-four federal judicial districts around the country.<sup>220</sup> Understanding the extent

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mindful that the District Court’s findings of fact [as to the discriminatory effect of proposed changes] must be upheld unless they are clearly erroneous.”).

213. RENDLEMAN, *supra* note 210, at 442.

214. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 50 (2000).

215. Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 243 (2009).

216. *Id.* at 245.

217. See Raymond T. Elligett, Jr. & John M. Scheb, *Appellate Standards of Review—How Important Are They?*, 70 FLA. BAR J. 33, 34 (1996) (asserting that “[m]ost practitioners would consider the difficulty in obtaining a reversal as increasing as the standard moves” toward the more deferential standards).

218. See 42 U.S.C. § 1973c (2012) (reserving bail-out and review functions under § 5 to the United States District Court for the District of Columbia); *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 198 (2009) (recognizing that § 5 “suspended all changes in state election procedure until they were submitted to and approved by a three-judge Federal District Court in Washington, D.C.”).

219. See 42 U.S.C. § 1973a(c) (making no provision for removing § 3(c) suits to any specific division, district, or circuit of the federal judiciary).

220. See *District Courts*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx> (last visited Sept. 24, 2014) (identifying the number of federal judicial districts as ninety-four) (on file

to which a piece of proposed legislation will affect a given population requires analysis of complex statistical and social-science studies.<sup>221</sup> But the manner in which the *Shelby County* majority—and its predecessor in *NAMUDNO*—approached the social-science record dismayed a number of Court observers and voting-rights scholars.<sup>222</sup> If the highest Court in the land misread, failed to consider, or misapplied the quantitative data in *Shelby County*, it seems difficult to expect much more from district courts without experience in voting rights litigation.<sup>223</sup>

There is one additional peculiarity of voting-rights litigation that makes the trial-level proceedings especially important for the vitality of § 3(c). Redistricting cases must be tried in front of a three-judge district court panel.<sup>224</sup> Injunctions issued in an action that, by statute, must be heard by a three-judge panel may be appealed directly to the Supreme Court.<sup>225</sup> This route was how Arkansas appealed its § 3(c) preclearance regime before dropping the appeal.<sup>226</sup> Direct appeal to a Court that is already skeptical of federal courts playing a role in the implementation of state voting procedures<sup>227</sup>—and is less beholden to precedent than the circuit

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with the Washington and Lee Law Review).

221. See Doug Chapin, *Voting Rights After Shelby County: Bring On the Election Geeks*, 12 ELECTION L.J. 327, 327 (2013) (“[I]n the post-*Shelby* landscape, data—specifically, data about election administration—are more valuable and more likely to be more influential than ever before.”).

222. See, e.g., David C. Kimball, *Judges Are Not Social Scientists (Yet)*, 12 ELECTION L.J. 324, 324–25 (2013) (“[I]t is jarring how little the majority opinion . . . mentions any social science evidence. . . . [A] large body of evidence on race, ethnicity, and voting is excluded from the Court majority’s analysis . . . .”); Katz, *supra* note 10, at 331 (“[T]he Court’s dismissal of the second-generation evidence as off-topic is difficult to fathom.”).

223. See Kimball, *supra* note 222, at 326 (“There is room in the legal profession for a better understanding of what social science evidence does and does not show.”).

224. 28 U.S.C. § 2284 (2012).

225. *Id.* § 1253.

226. See Jurisdictional Statement for Petitioners at 1, *Clinton v. Jeffers*, No. 90-394 (U.S. Aug. 31, 1990) (asserting jurisdiction for direct appeal to the Supreme Court of the United States under 28 U.S.C. § 1253 (2012)).

227. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (calling the Voting Rights Act “an extraordinary departure from the traditional course of relations between the States and the Federal Government,” and “extraordinary legislation otherwise unfamiliar to our federal system” (citations and quotations omitted)).



courts<sup>228</sup>—could knock another leg out from under litigants seeking to enforce the protections of the Voting Rights Act.<sup>229</sup>

#### V. *The Voting Rights Amendments Act of 2014*

Given the universal uproar over the Court's decision in *Shelby County*<sup>230</sup>—and over the federal government's consequent reliance on extant provisions of the VRA<sup>231</sup>—it is no surprise that Congress has re-entered the voting-rights fray. On January 16, 2014, Representatives Jim Sensenbrenner and John Conyers introduced the Voting Rights Amendment Act of 2014;<sup>232</sup> Senator Patrick Leahy introduced identical legislation in the Senate.<sup>233</sup> The bills will “amend the Voting Rights Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act.”<sup>234</sup> In plain language, the Voting Rights Amendment Act (VRAA) rewrites the § 4(b) coverage formula struck down in *Shelby County* and revives § 5 preclearance.<sup>235</sup>

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228. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 10–13 (1994) (observing that “the Supreme Court can overrule precedents that it no longer believes are correctly decided,” while “[i]t is axiomatic that an inferior court must respect prior precedents created by its superior courts”).

229. See Crum, *supra* note 16, at 2016 (“[K]eeping [§ 3(c)] cases off the Supreme Court’s docket for several years may be in civil rights groups’ strategic interest.”).

230. See *supra* notes 7–13 and accompanying text (describing reactions to *Shelby County*).

231. See *supra* notes 151–52 and accompanying text (reporting on the reactions to federal lawsuits in Texas and North Carolina that are requesting § 3(c) relief).

232. H.R. 3899, 113th Congress (2014).

233. See Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, THE NATION (Jan. 16, 2014, 11:53 AM), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act> (last visited Sept. 24, 2014) (reporting on the legislation’s introduction and provisions) (on file with the Washington and Lee Law Review); Voting Rights Amendment Act of 2014, S. 1945, 113th Congress (2014).

234. H.R. 3899 § 1; S. 1945 § 1.

235. See Berman, *supra* note 233 (saying the VRAA would “reinstate the vital protections of the [Voting Rights Act] that the Supreme Court took away” in *Shelby County*).

But on top of setting out a new coverage formula, the VRAA also changes the trigger for § 3(c) preclearance.<sup>236</sup> No longer would § 3(c) preclearance be dependent on proving a violation of the Fourteenth or Fifteenth Amendment.<sup>237</sup> Instead, a voting-rights plaintiff would be entitled to § 3(c) relief if she could prove a violation of other provisions of the Voting Rights Act or “any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group.”<sup>238</sup> The constitutional trigger of Fourteenth or Fifteenth Amendment violations does not go away, but is instead augmented by statutory triggers.<sup>239</sup>

The VRAA puts into legislative language Travis Crum’s proposal from his 2010 Note on § 3(c) to “decouple section 3 from its constitutional trigger.”<sup>240</sup> But as Crum acknowledged, that decoupling raises its own questions of constitutionality.<sup>241</sup> Removing the requirement of constitutional injury, as the VRAA does,<sup>242</sup> could make the preclearance remedy disproportionate.<sup>243</sup> If a plaintiff seeking § 3(c) relief does not have to prove the discriminatory intent of the enacting legislature—as she would to prove a Fourteenth or Fifteenth Amendment violation under *City of Mobile v. Bolden*<sup>244</sup>—she does not have to prove the same level of injury or harm.<sup>245</sup> The

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236. See H.R. 3899 § 2(a) (allowing for § 3(c) to be applied for voting-rights violations beyond violations of the Fourteenth and Fifteenth Amendments).

237. See *id.* (expanding the violations for which § 3(c) can be applied).

238. *Id.*

239. See *id.* (retaining “violations of the 14th or 15th Amendment” as triggers in § 3(c) preclearance).

240. Crum, *supra* note 16, at 2010.

241. See *id.* at 2037 (recognizing that his proposed change could “make section 3 more vulnerable to constitutional attack”).

242. See *supra* notes 236–39 and accompanying text (outlining the changes to § 3(c) in the VRAA).

243. See Rick Hasen, *Initial Thoughts on the Proposed Amendments to the Voting Rights Act*, ELECTION L. BLOG (Jan. 16, 2014, 1:32 PM), <http://electionlawblog.org/?p=58021> (last visited Sept. 24, 2014) (emphasizing the distinction between statutory and constitutional violations, and predicting that the amended § 3(c) would be struck down) (on file with the Washington and Lee Law Review).

244. See *supra* Part IV.A (discussing the discriminatory intent element to trigger § 3(c) preclearance).

245. See Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 354–55 (2006) (discussing cases decided

“extraordinary,”<sup>246</sup> “strong measure”<sup>247</sup> of requiring federal approval for state legislative enactments, “appropriate to address”<sup>248</sup> a constitutional harm, “may be an unwarranted response to . . . lesser”<sup>249</sup> statutory violations.<sup>250</sup>

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after *Boerne* and the statutory violations for which the Court found the remedy to be disproportionate).

246. *Supra* notes 121–22.

247. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

248. *Id.*

249. *Id.*

250. *Contra* Brian F. Jordan, Note, *Finding Life in Hurricane Shelby: Reviving the Voting Rights Act by Reforming Section 3 Preclearance*, OHIO ST. L.J. (forthcoming 2014) (arguing that a results test for § 3(e) would not run afoul of *Boerne*). Jordan posits three responses to the *Boerne* issues raised above: first, that *Boerne* does not extend to legislation enforcing the Fifteenth Amendment and thus a § 3(e) results test would only have to satisfy a rational-basis review under *Katzenbach*; second—but related to the first point—that *Boerne*’s absence in *NAMUDNO* and *Shelby County* means *Boerne* cannot be extended to the Voting Rights Act; and third, that the Court’s composition could change, pointing specifically to the advanced ages of Justices Scalia and Kennedy. *Id.* at \*43–46. Each misses the mark. First, the Voting Rights Act is not monolithically cabined to the Fifteenth Amendment. *Boerne* itself recognized that the Voting Rights Act had been upheld under the enforcement provisions of both the Fourteenth and Fifteenth Amendments. *See Boerne*, 521 U.S. at 518 (“We have also concluded that other measures protecting voting rights are within Congress’ power to enforce the Fourteenth and Fifteenth Amendments . . .”). Moreover, there is no “*Katzenbach* standard” to apply anymore: *Shelby County* abrogated *Katzenbach* and its deferential stance toward the Voting Rights Act. Time and again, the Court went out of its way in *Shelby County* to differentiate modern conditions from those extant in the time of *Katzenbach*. *See, e.g., Shelby Cnty.*, 133 S. Ct. at 2629 (contrasting modern conditions with the conditions of the 1960s). The standard enunciated in *NAMUDNO* and *Shelby County* does not stop with finding a rational relation—as *Katzenbach* did—but instead requires also finding that “current burdens” are met by “current needs.” *Id.* at 2630 (citing *NAMUDNO*, 557 U.S. at 203). This also gets at Jordan’s second point. *Boerne* may not exist by name in either *NAMUDNO* or *Shelby County*, but the standard set out in those cases is little more than a rewording of the *Boerne* standard. Under *Boerne*, the legislation must be “congruent”; under *Shelby County*, it must be tied closely in time. *Compare Boerne*, 521 U.S. at 520 (requiring “congruence”), *with Shelby Cnty.*, 133 S. Ct. at 2630 (requiring “current needs”). Under *Boerne*, the legislation must be proportional; under *Shelby County*, its burdens must be justified. *Compare Boerne*, 521 U.S. at 520 (requiring “proportionality”), *with Shelby Cnty.*, 133 S. Ct. at 2630 (saying that burdens on state sovereignty “must be justified”). Finally, with regard to the possibility of a changing Court, it is important to remember who wrote the majority opinions in *NAMUDNO* and *Shelby County*: Chief Justice Roberts, not yet sixty years old. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED

Introducing constitutional infirmity to § 3(c) is an unfortunate incident to legislation that otherwise remedies many of the VRA's constitutional shortcomings.<sup>251</sup> The proposed new coverage formula updates automatically, snaring any state that has committed five or more voting-rights violations in the previous fifteen years and any "political subdivision" that has committed three or more violations, or one violation with "persistent, extremely low minority turnout," in the previous fifteen years.<sup>252</sup> This formula keeps the coverage determination tied to relatively recent conditions,<sup>253</sup> a sharp departure from the old § 4(b) that was "based on decades-old data and eradicated practices."<sup>254</sup> It accepts the Court's invitation in *Shelby County* to "draft another formula based on current conditions,"<sup>255</sup> and it adheres to the implicit requirement in *Boerne* that the violations being remedied be close in time to the remedy imposed.<sup>256</sup>

While the VRAA cures many of the ills that doomed the preceding coverage formula, it also introduces new issues.<sup>257</sup> The new coverage formula defines "voting rights violations" to include violations of § 2.<sup>258</sup> This exposes it to the same *Boerne* problem that the revised § 3(c) faces: because the violations are statutory

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STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review). Even if associate Justices come and go in the near future, the intellectual force behind *NAMUDNO* and *Shelby County* will almost certainly remain on the Court.

251. See Hasen, *supra* note 243 (describing the new coverage formula as "likely constitutional").

252. Voting Rights Amendment Act of 2014, H.R. 3899 § 3(a)(1), 113th Congress (2014).

253. See Hasen, *supra* note 243 (praising the VRAA's new coverage formula for being "tied to current conditions").

254. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627 (2013).

255. *Id.* at 2631.

256. See 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 History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 97–98 (2006) (discussing the temporal relation of voting-rights violations to § 5 preclearance in the context of *Boerne*'s congruence-and-proportionality test).

257. See Hasen, *supra* note 243 (highlighting a potential constitutional stumbling block).

258. See Voting Rights Amendment Act of 2014, H.R. 3899 § 3(a)(1), 113th Congress (2014) (including § 2 violations in the definition of voting-rights violations).

and not constitutional, the preclearance remedy may be disproportionate.<sup>259</sup> Unlike the amended § 3(c), the new coverage formula would require a pre-determined number of violations before preclearance could be imposed.<sup>260</sup> In one sense, this makes the coverage formula more congruent and proportional than amended § 3(c) because § 3(c) preclearance could conceivably be imposed for as few as two violations while § 5 preclearance would not be imposed until the state or political subdivision crosses a higher threshold.<sup>261</sup> But because the new coverage formula imposes the extraordinary remedy of preclearance as an administrative or regulatory formula, instead of as an equitable remedy at the conclusion of litigation particular to a given jurisdiction, it retains the potential for over-inclusiveness identified as far back as 1966.<sup>262</sup>

The VRAA misses the mark on policy fronts beyond its potential legal shortcomings.<sup>263</sup> It does not count Department of Justice objections to voter ID laws among the violations necessary to trigger preclearance in a given state.<sup>264</sup> Given the prominence of voter ID laws in the debate over modern voting rights,<sup>265</sup> their exclusion from the VRAA is grounds for criticism.<sup>266</sup> The coverage formula would encompass only four

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259. See *supra* notes 241–49 and accompanying text (discussing the *Boerne* standard and problems with the amended § 3(c)).

260. Compare H.R. 3899 § 3 (providing that five violations must occur before a state must seek preclearance, and three violations or one violation with “persistent, extremely low minority turnout” for political subdivisions), with H.R. 3899 § 2 (amending the language of § 3(c) to require “violations,” but not a given number).

261. See *supra* note 260 and accompanying text (comparing the language of the VRAA sections).

262. See *South Carolina v. Katzenbach*, 383 U.S. 301, 331–32 (1966) (acknowledging that preclearance may be administered too broadly); *supra* notes 126–34 (contrasting § 3(c)’s narrowness with § 5’s breadth).

263. See Berman, *supra* note 233 (noting that the VRAA “is certain to have its critics”).

264. See Voting Rights Amendment Act of 2014, H.R. 3899 §§ 2(a), 3(a), 113th Congress (2014) (exempting objections to photo identification requirements); Berman, *supra* note 233 (reporting that voter ID laws will not count as violations for § 3(c) or coverage formula calculations).

265. See *supra* notes 147–50 and accompanying text (describing voter ID disputes in voting rights litigation).

266. See Press Release, NAACP, *NAACP Statement on Proposed Voting Rights Act Update* (Jan. 16, 2014) [hereinafter NAACP Press Release], available

states: Georgia, Louisiana, Mississippi, and Texas.<sup>267</sup> Six states that were subject to § 5 preclearance would not be covered,<sup>268</sup> nor would northern states that have been at the forefront of enacting stringent new limits on the franchise.<sup>269</sup> This limited automatic coverage means voting-rights advocates will have to continue to rely on the “fire alarm” approach, sounding the bell through litigation after the voting fires are set instead of preventing the problematic policies in the first place.<sup>270</sup> But the perfect need not be the enemy of the good, especially in the face of ongoing, pervasive racial discrimination in voting.<sup>271</sup> Each of the VRAA’s problems could be addressed with amendments and markups before final passage.

Final passage, however, may never come.<sup>272</sup> Reviving a regulatory scheme long hated by those it covers,<sup>273</sup> sections of which were declared unconstitutional by the Supreme Court less than one year ago,<sup>274</sup> when its topic is a political lightning rod,<sup>275</sup> is no small task for a legislature. With the 113th Congress on

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at <http://www.naacp.org/press/entry/naacp-statement-on-proposed-voting-rights-act-update> (urging “revisions and amendments” to the VRAA, and objecting to the “exceptions for voter ID laws”).

267. See Berman, *supra* note 233 (listing the states covered by the new coverage formula).

268. See *id.* (identifying Alabama, Arizona, Florida, North Carolina, South Carolina, and Virginia as the six states).

269. See *id.* (singling out Ohio, Pennsylvania, and Wisconsin for their new laws); *Voter Identification Requirements*, *supra* note 147 (including those same three states among those with new voter ID laws).

270. See Cain, *supra* note 20, at 338 (describing the fire alarm approach); NAACP Press Release, *supra* note 266 (criticizing the “reliance on costly litigation”).

271. See MEX. AM. LEGAL DEF. FUND, NAT’L ASS’N OF LATINO ELECTED OFFICIALS, & NAT’L HISPANIC LEADERSHIP AGENDA, *LATINOS AND THE VRA: A MODERN FIX FOR MODERN-DAY DISCRIMINATION* (2014) (listing post-*Shelby* legislation that restricts the Latino vote, and calling for passage of the VRAA).

272. See Hasen, *supra* note 243 (saying he is “very pessimistic about the legislation passing out of the House”).

273. See *supra* pages 8–20 (recounting the litigation history of early challenges to the Voting Rights Act).

274. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (ruling that § 4(b) was unconstitutional).

275. See *supra* notes 147–52 and accompanying text (describing political opposition to voting rights enforcement).

pace to be the least productive in American history,<sup>276</sup> the ouster of the only member of House GOP leadership to support the VRAA,<sup>277</sup> and the legislative filibuster still in place in the Senate,<sup>278</sup> the VRAA may never become law.<sup>279</sup>

### VI. Conclusion

The future of the Voting Rights Act—and federal enforcement of voting rights more generally—remains up in the air following *Shelby County*.<sup>280</sup> Today’s voting-rights advocates will need to adopt the same spirit of pragmatic ingenuity of civil rights leaders in the 1960s that led to passage of the first Voting Rights Act.<sup>281</sup> One approach could be enacting new legislation and

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276. See David Welna, *Congress Is on Pace to Be the Least Productive Ever*, NPR (Dec. 24, 2013, 3:22 AM), <http://www.npr.org/2013/12/24/256696665/congress-is-on-pace-to-be-the-least-productive-ever> (last visited Sept. 24, 2014) (reporting that the first session of the 113th Congress passed only fifty-eight public laws) (on file with the Washington and Lee Law Review).

277. See Ari Berman, *Eric Cantor’s Defeat Is Bad News for the Voting Rights Act*, THE NATION (June 11, 2014, 9:58 AM), <http://www.thenation.com/blog/180194/eric-cantors-defeat-bad-news-voting-rights-act> (last visited Sept. 24, 2014) (saying the VRAA “was written specifically with Cantor in mind,” and “that Cantor planned to eventually announce his support for the bill”) (on file with the Washington and Lee Law Review).

278. See Hasen, *supra* note 243 (noting that the filibuster is “alive and well” in the Senate).

279. See Erika Eichelberger, *Here’s Another Crazy Consequence of Eric Cantor’s Loss*, MOTHER JONES (June 11, 2014, 2:00 PM), <http://www.motherjones.com/politics/2014/06/eric-cantor-voting-rights-amendment-act> (last visited Sept. 24, 2014) (calling Cantor’s defeat in the primary “terrible news for voting rights”) (on file with the Washington and Lee Law Review). *But see* Ron Christie, *Eric Cantor’s Last, Legacy-Burnishing Task: Update the VRA*, THE DAILY BEAST (June 16, 2014), <http://www.thedailybeast.com/articles/2014/06/16/eric-cantor-s-last-legacy-burnishing-task-update-the-vra.html> (last visited Sept. 24, 2014) (calling on Cantor to push through the VRAA before he leaves office) (on file with the Washington and Lee Law Review).

280. See JOSHUA FIELD, THE VOTING RIGHTS PLAYBOOK: WHY COURTS MATTER POST-SHELBY COUNTY V. HOLDER 3 (Ctr. for Am. Progress 2014) (asking “what must advocates, litigators, and lawmakers do to ensure that new, organized attempts to make it harder for some citizens to freely cast their ballot are properly countered?”).

281. See Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960–1990*, 5 U. PA. J. CONST. L. 665, 686 (2003) (calling § 5 preclearance “[t]he most novel feature of the [Voting Rights] Act”).

adding new tools to the federal enforcement arsenal.<sup>282</sup> But assaults on the franchise are occurring in the here and now,<sup>283</sup> and they must be confronted now without waiting on legislative action. Section 3(c) gives federal officials and private litigants a potent tool to confront and turn back those assaults. Implementing the strategies identified in this Note will protect the political participation of minority voters while passing constitutional muster.

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282. See Field, *supra* note 280, at 24–30 (suggesting legislative fixes to the Voting Rights Act).

283. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (acknowledging that “voting discrimination still exists; no one doubts that”); Holder, *supra* note 13 (discussing ongoing enforcement efforts and the procedures being implemented in states previously subject to § 5 preclearance).