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ANALYSIS

If Section 5 Falls: New Voting Implications

By Myrna Pérez and Vishal Agraharkar

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EXECUTIVE SUMMARY

For nearly five decades, Section 5 of the Voting Rights Act of 1965 (“VRA”) has been one of the nation’s most effective tools to eradicate racial discrimination in voting. Section 5 prohibits certain states and jurisdictions with histories of voting discrimination from enforcing changes to their election procedures until the changes have been reviewed by the U.S. Department of Justice (“DOJ”) or a federal court through a process called “preclearance.”¹ This critical tool stops discriminatory election changes before they can harm voters by requiring jurisdictions covered by Section 5 to demonstrate that their proposed voting changes do not have a racially discriminatory intent or effect.

Section 5 has been challenged as unconstitutional in *Shelby County v. Holder*, now pending before the U.S. Supreme Court.² The Court upheld Section 5 in four previous cases,³ and we believe it ought to do so again. The U.S. Constitution specifically gives Congress the authority to adopt legislation to combat racial discrimination in voting. Lawmakers considered a vast amount of evidence showing ongoing racial voting discrimination in the Section 5 covered states before voting nearly unanimously in 2006 to continue the provision through 2031.⁴

The decision in the *Shelby County* case could have significant consequences. Should the Court eliminate or weaken Section 5, minority voting rights could be threatened on a number of fronts by jurisdictions attempting to:

- re-enact discriminatory voting changes that have been formally blocked by Section 5 (31 proposals were blocked by DOJ alone since the VRA was reauthorized in 2006);
- adopt discriminatory voting changes that previously were deterred by Section 5 (for example, between 1999 and 2005, 153 changes were withdrawn when DOJ asked questions about them);
- implement discriminatory voting changes that have lain dormant while awaiting Section 5 review;
- adopt new restrictive changes; or
- implement discriminatory voting changes that have been blocked from going into effect, but technically still remain on the books.

I. BACKGROUND

Leaders from both parties have called the Voting Rights Act of 1965 the country's most successful piece of civil rights legislation.⁵ Federal anti-discrimination laws prior to 1965 were insufficient to secure the rights promised to minority citizens by the Constitution.⁶ Case-by-case litigation did little to curb widespread discriminatory election practices. Even when DOJ or private plaintiffs succeeded in obtaining an injunction against a discriminatory practice, the defendants frequently adopted a different discriminatory procedure that would have to be challenged in another round of litigation. DOJ and civil rights groups lacked the resources or time to combat constantly shifting acts of voting discrimination.⁷ This was especially damaging because once a discriminatory practice has been used in an election, it has harmed the fundamental rights of citizens and cannot be undone.

Section 5 successfully addressed these problems by freezing changes to election procedures in jurisdictions with a history of voting discrimination until DOJ or the federal district court in Washington, D.C. has reviewed them to ensure they do not harm minority voters.⁸ This preclearance process is uniquely effective in stopping a wide range of voting discrimination before it can harm voters. When Congress first passed the VRA, 11 states were covered in whole or in part by Section 5, meaning they had to undertake the preclearance process before implementing an election change.⁹ Today, Section 5 applies to nine states in their entirety, plus certain counties and townships in six partially-covered states.¹⁰

II. PROBLEMS LIKELY TO RESULT FROM ANY DECISION STRIKING DOWN SECTION 5

Any decision by the Supreme Court striking down Section 5 would prompt a strong public outcry and demand for Congress to pass new legislation in response. If previously-covered jurisdictions attempt to take advantage of the period before Congress acts to implement discriminatory voting changes, voting rights advocates and DOJ can be expected to block them under other legal provisions. There is no guarantee, however, that other existing laws can substitute for Section 5. If the changes are adopted close to an election, there may be little or no practical recourse for voters. Moreover, case-by-case litigation is expensive and time-consuming, and the number of lawsuits required to combat problematic changes could easily become difficult to maintain. In other words, there is no tool in the law right now as powerful as Section 5 in stopping voting discrimination.

Accordingly, in the immediate aftermath of a Supreme Court decision striking down Section 5,¹¹ minority voting rights could be imperiled in a number of ways. Although the precise effect would hinge on the Court's ruling and rationale, the following analysis identifies some of the issues that could emerge after such a decision.

A. JURISDICTIONS MAY ATTEMPT TO REVIVE BLOCKED DISCRIMINATORY CHANGES

If Section 5 is no longer operational, jurisdictions may try to re-propose and re-enact previously-blocked discriminatory election changes. In the past 15 years, DOJ has blocked 86 state and local submissions of election changes.¹² Forty-three of those objections occurred in the last decade.¹³ Thirty-one occurred since the 2006 reauthorization of Section 5.¹⁴ But these numbers understate the actual number of changes blocked because Section 5 submissions often include multiple changes.¹⁵

Federal courts have also blocked a number of very recent discriminatory election changes. In 2012, for example, a court blocked Texas's statewide redistricting maps, finding the state enacted certain maps with the intent to racially discriminate against African-American and Latino voters.¹⁶ Since the 2006 reauthorization of Section 5, federal courts have denied preclearance to states' proposed election changes in at least three instances.¹⁷

Blocked voting changes range from statewide voter registration procedures that would make it harder to register, especially for minorities, to localized changes to methods of election that would dilute minority voting strength, among others. In many cases, Section 5 has blocked repeated attempts to dilute minority voting rights by the same jurisdiction¹⁸ — the type of gamesmanship Section 5 was intentionally designed to combat.¹⁹ Some examples of proposed changes blocked in recent years include:

- In 2001, the white mayor and the all-white Board of Aldermen for the small town of Kilmichael, Mississippi attempted to cancel an election shortly after black citizens became a majority of the registered voters.²⁰ DOJ objected, finding the cancelation was designed to weaken African Americans' voting strength.²¹ The town refused to reschedule the election until DOJ required it to hold one in 2003, when the town's first African-American mayor and three African-American aldermen were elected.²²
- In 2002, DOJ objected to a proposal by the city of Freeport, Texas to abandon its single-member districts in favor of an at-large election system.²³ While minority voters had been able to elect candidates under the single-member district method, DOJ found a shift to at-large elections would make it harder for minority voters to exercise their right to vote.²⁴
- In 2012, DOJ objected to a Texas law that would have required voters to show photo identification before casting a ballot.²⁵ DOJ found hundreds of thousands of registered voters did not have the necessary identification, and of those, a disproportionate number were Latino.²⁶ Later that year, the reviewing federal district court agreed, finding the law would disproportionately burden African Americans and Latinos.²⁷
- In 2012, Section 5 prevented implementation of two changes to the method of electing trustees of the Beaumont Independent School District in Beaumont, Texas. The first change replaced two single-member districts of the school district with at-large districts, from which it was highly unlikely that African Americans could successfully elect their candidates of choice.²⁸ Just a few months later, Section 5 prevented other election changes that would have shortened, without notice, the terms of the three incumbent minority candidates, and treated the candidate qualification period as closed such that the incumbents would not have been able to run for re-election in their own districts.²⁹

If Section 5 is struck down, jurisdictions may seek to revive these and other previously-blocked election changes. Of particular concern are those election changes that could be resuscitated with little delay and little public notice. Some changes, for example, usually do not require legislation, including changes to polling place locations, changes to procedures to assist limited-English-proficiency voters, and changes affecting the date of elections. Examples of these types of changes blocked in recent years include:

- In 2006, DOJ objected to a decision by a Houston-area community college district to no longer conduct joint elections with several coextensive school districts.³⁰ As a result, voters would have had to travel to two separate polling places in order to cast their ballots.³¹ The change also reduced the number of polling places from 84 to 12, which covered an area greater than 1,000 square miles and served more than 540,000 voters.³² In its letter objecting to the shift, DOJ noted the assignment of voters was “remarkably uneven,” as one polling site for the school board election with the smallest proportion of minority voters would serve 6,500 voters, while the most heavily minority site would serve more than 67,000 voters, 80 percent of whom were black or Latino.³³
- In 2003, Bexar County, Texas announced plans to eliminate the five polling places for early voting that served the predominantly-Latino West Side of San Antonio, leaving the area with no early voting polling places.³⁴ The county did not, however, secure preclearance for the proposed change, leading to an enforcement action that blocked the closures.³⁵

Without a system of preclearance, the public might not even know about such changes sufficiently in advance of an election to seek relief from the courts.

B. JURISDICTIONS MAY TRY TO PUSH FORWARD ON DISCRIMINATORY VOTING CHANGES THAT WERE DETERRED BY SECTION 5

If Section 5 is struck down or no longer operational, we may see jurisdictions attempt to move forward with discriminatory voting changes that were abandoned, or never finally adopted, because the jurisdictions realized such changes would likely draw a Section 5 objection.³⁶

It is not possible to quantify the number of problematic changes that have been deterred by Section 5, but there is ample evidence of its effectiveness. Deterrence is strongly suggested in situations where:

- i. A proposed change has either been withdrawn or altered after DOJ issues a letter requesting the jurisdiction provide more information about the proposed change. These requests are sent when DOJ cannot determine, on the basis of the material submitted for preclearance, whether the proposed change was enacted with a discriminatory intent or would have a discriminatory effect.
- ii. A contemplated change is either revised or abandoned in light of concerns that it would not survive Section 5 scrutiny.

The numbers demonstrate these circumstances are plentiful. One analysis found that just between 1999 and 2005, 153 voting changes were withdrawn and 109 were superseded by altered submissions³⁷ after DOJ requested more information.³⁸ Some examples include:

- In 2012, the city of Decatur, Alabama submitted a change to the structure of its government that would have eliminated two city council districts and diluted the only majority-minority district in the city.³⁹ After DOJ responded with a request for more information, the city abandoned the plan.⁴⁰ City officials said they assumed DOJ would reject the new government structure because of its negative effect on minority voters.⁴¹ Decatur then revised its plan, retaining the city council districts, and DOJ approved.⁴² In March 2013, the city once again contemplated resubmitting the original plan, although the city council narrowly voted down the measure.⁴³ After the vote, a challenger to the incumbent mayor noted the “pre-clearance issue that has been the point of contention” may soon go away if the Supreme Court strikes down Section 5.⁴⁴
- In 2003, Monterey County, California sought to reduce the number of polling places from 190 to 86 for a special gubernatorial recall election.⁴⁵ Such a dramatic reduction would have made it harder for minorities to travel to their local polling site. DOJ requested more information, resulting in the county withdrawing five of the proposed precinct consolidations.⁴⁶ DOJ then precleared the submission.⁴⁷

Additionally, deterrence has been apparent in the policy choices made by officials as they contemplate changes to their elections procedures. Below are some examples:

- During the 2012 trial over South Carolina’s photo identification law, several legislators stated that the preclearance process was at the top of their minds as they drafted the law,⁴⁸ including its reasonable impediment provision — which the court eventually concluded would prevent the law from discriminatorily disenfranchising voters.⁴⁹
- The city council of Fredericksburg, Virginia was preparing to adopt a redistricting plan in 2002 that would have dismantled its only majority black district. The council abandoned the idea when the city attorney warned that doing so would violate Section 5.⁵⁰
- In 2012, the city council of Roxboro, North Carolina was considering a proposal to change its body from having two-year non-staggered terms to having four-year staggered terms. This would have made it more difficult for minorities to elect candidates of their choice by reducing the number of people on the ballot at each election. But after local advocates suggested the proposal would not survive Section 5,⁵¹ the city abandoned it, instead adopting longer, but non-staggered terms.⁵²

These examples show only part of Section 5’s deterrent effect, but they are illustrative of the types of election changes that jurisdictions may feel emboldened to pursue in the absence of a robust Section 5.

C. JURISDICTIONS MAY ATTEMPT TO IMPLEMENT CHANGES THAT HAVE BEEN ENACTED BUT NOT YET REVIEWED UNDER SECTION 5

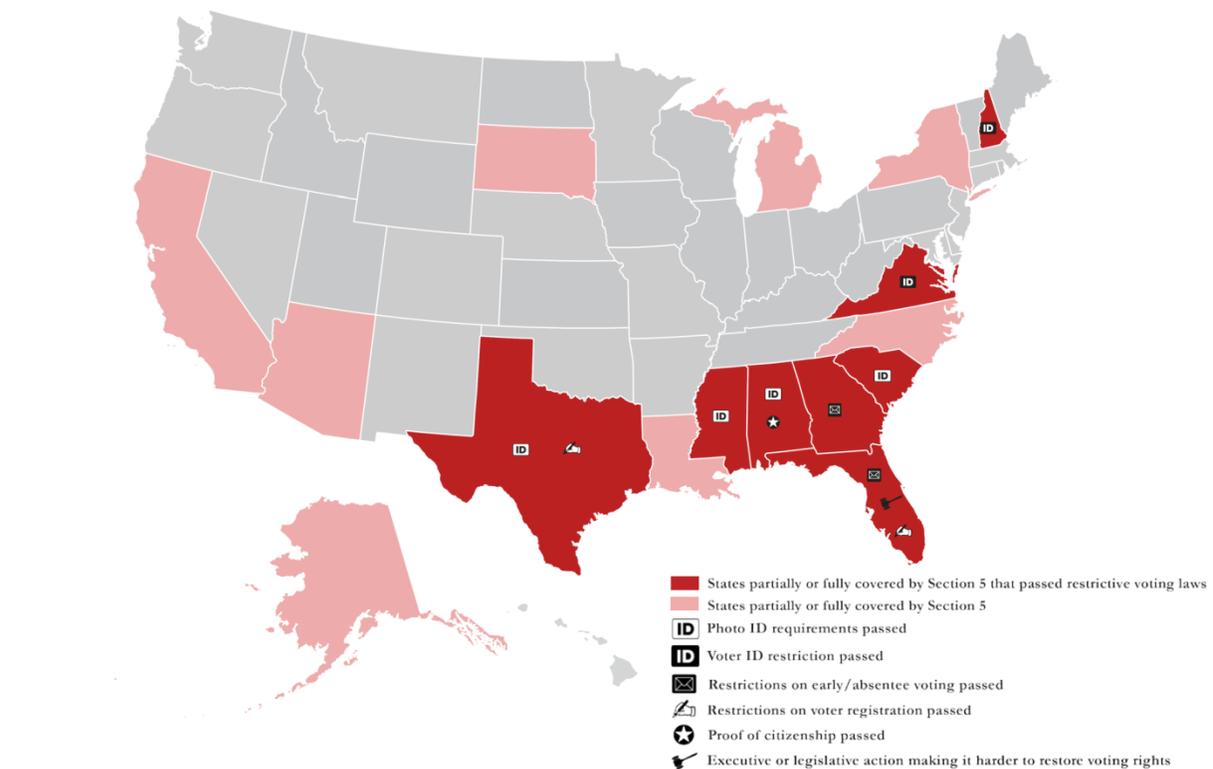
If Section 5 is struck down, jurisdictions may try to implement discriminatory voting changes that have been enacted but — for lack of Section 5 review and preclearance — have not been enforced. Voting rights experts are concerned that some jurisdictions are purposely delaying the preclearance process for their election changes in the hopes Section 5 will be struck down.⁵³ Because changes of this variety already have undergone the necessary state or local approval process, they are ready to be implemented in the absence of a functioning Section 5.

Alabama provides two examples. In the 2011 legislative session, the Alabama General Assembly passed a law requiring voters to present documentary proof of citizenship when registering to vote.⁵⁴ On April 23, 2012, Alabama submitted this law for preclearance.⁵⁵ Seven months later, DOJ sent a letter requesting more information.⁵⁶ On May 15, 2013, Alabama withdrew the law from the preclearance process.⁵⁷ Laughlin McDonald, a veteran voting rights attorney and leader of the ACLU's Voting Rights Project for approximately four decades, believes the withdrawal was motivated by a desire to avoid an objection in the short-term, and the hope that Section 5 would not function as a barrier.⁵⁸ Additionally, just days after Alabama passed the 2011 proof-of-citizenship requirement, the state legislature passed a strict photo identification law.⁵⁹ This law has not been implemented or submitted to DOJ for preclearance.⁶⁰

D. JURISDICTIONS MAY TRY TO PASS NEW RESTRICTIVE CHANGES

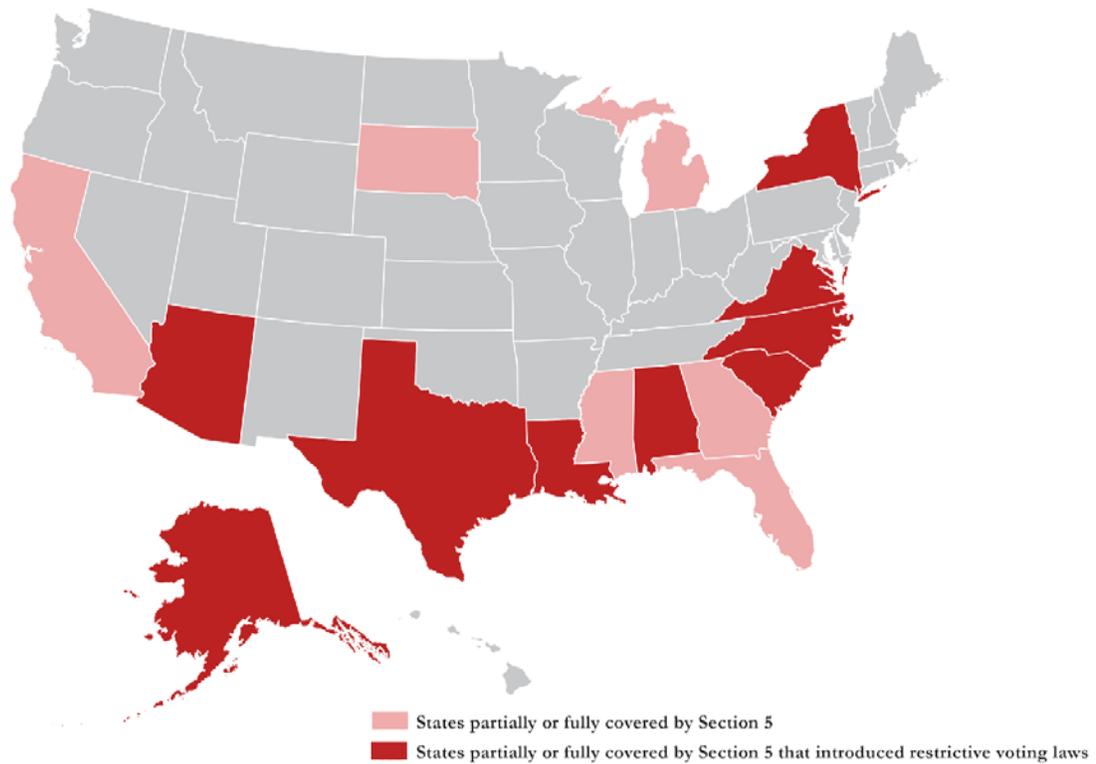
In the absence of a functioning Section 5, jurisdictions may seek to implement new forms of restrictive election changes. In the run-up to the 2012 election, state legislatures abruptly reversed America's long tradition of expanding voting access by pressing scores of new bills that would have made it harder for eligible Americans to vote. These new laws — which included onerous voter identification requirements, cutbacks to early voting, and restrictions on community-based registration drives — were adopted in 19 states.⁶¹ But citizens, the courts, and DOJ intervened, blocking many of these measures. Section 5 was instrumental in these successes, playing a major role in ameliorating the disenfranchising effect of restrictive laws in Texas,⁶² South Carolina,⁶³ and Florida.⁶⁴

States covered by Section 5 that passed restrictive voting laws for the 2012 election



In the most recent legislative session and as of April 29, 2013, 28 restrictive voting bills⁶⁵ were introduced in the states that are covered, wholly or in part, by Section 5. Two have already passed, and 17 are still pending as of June 10, 2013.⁶⁶ The bills introduced include, for example, a strict photo identification requirement in Virginia, restrictions on early voting and same-day registration in North Carolina, and a South Carolina bill requiring documentary proof of citizenship to register to vote.⁶⁷ Section 5 would require a detailed examination of these laws. Without it, any restrictive legislation — even if it were discriminatory — could be implemented unless or until a litigant challenged it.

States covered by Section 5 that introduced restrictive voting laws in 2013



E. JURISDICTIONS MAY TRY TO IMPLEMENT BLOCKED VOTING CHANGES THAT REMAIN ON THE BOOKS

If Section 5 is struck down, some jurisdictions may attempt to implement voting changes whose use is being blocked by Section 5 objections or judicial decisions. Under Section 5, election legislation passed in a covered state cannot be implemented until it has been precleared. In many cases blocked voting changes are repealed or made moot by subsequent actions, but in some instances, legislation blocked by Section 5 may remain on the books, even though it is not being enforced. If Section 5 is no longer operational, there may be attempts to put such changes into effect. Voting experts believe litigation may arise in such a scenario.⁶⁸ Two examples of voting changes that have been blocked in recent years but remain on the books include:

- A 2009 Mississippi law that imposed majority vote and runoff requirements for electing members of county boards of education and boards of trustees of certain school districts, which would have made it difficult for minorities to elect their candidates of choice.⁶⁹
- A 2007 Texas provision that limits eligibility for a position of supervisor of a water district to landowners that are registered to vote.⁷⁰

III. CONCLUSION

Section 5 has been an enormously successful tool in the fight to eradicate racial discrimination in voting. If the *Shelby County* decision eliminates or enfeebles Section 5, there is great cause for concern that the freeness and fairness of elections could be threatened in the immediate aftermath.

ENDNOTES

¹ Section 5 is codified in 42 U.S.C. § 1973c(a) (2006). The states covered as a whole are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. In some of these states, individual political subdivisions have bailed out of coverage even though the state remains covered as a whole. Certain counties and localities in California, Florida, Michigan, New York, North Carolina, and South Dakota are also covered. *See Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited June 3, 2013).

² *Shelby Cnty., Ala. v. Holder*, No. 12-96 (U.S. argued Feb. 27, 2013).

³ *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999); *City of Rome v. United States*, 446 U.S. 156, 177-78, 183 (1980); *Georgia v. United States*, 411 U.S. 526, 535 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

⁴ *See Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 428 (D.D.C. 2011) *cert. granted*, 133 S.Ct. 594 (2012) (describing a “virtually unprecedented legislative record” of 15,000 pages); *see also*, Brief of the Brennan Center for Justice at NYU School of Law as Amicus Curiae in Support of Respondents at 5, 23-24, *Shelby Cnty., Ala. v. Holder*, No. 12-96 (U.S. Feb. 1, 2013), 2013 WL 417738 (arguing that the Fifteenth Amendment was designed to give Congress the authority to protect against discrimination in voting rights, and Congress’s broad enforcement authority is entitled deference by the courts). The U.S. House of Representatives passed the bill 390-33 and the U.S. Senate passed the bill 98-0. *See* 152 CONG. REC. H5143-02 (daily ed. July 13, 2006); 152 CONG. REC. S7949-05 (daily ed. July 20, 2006).

⁵ *See* 152 CONG. REC. H5143-02 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner, R-Wis.) (calling the VRA “the most successful civil rights act that has ever been passed”); 152 CONG. REC. S7949-05 (daily ed. July 20, 2006) (statement of Sen. Feinstein, D-Cal.) (calling the VRA “the most important and successful civil rights law of the 20th century”).

⁶ *See* GARRINE P. LANEY, *THE VOTING RIGHTS ACT OF 1965: HISTORICAL BACKGROUND AND CURRENT ISSUES* 7-9 (2003) (describing the ineffectiveness of the Civil Rights Acts of 1957, 1960, and 1964 at securing the right to vote).

⁷ *See, e.g.*, S. COMM. ON THE JUDICIARY, 1982 VOTING RIGHTS ACT EXTENSION, S. COMM. S. REP. NO. 97-417, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 (noting that, prior to the Voting Rights Act, “case-by-case litigation proved wholly inadequate. . . . By the time a court enjoined one scheme, the election had often taken place, local officials had devised a new scheme, or both had occurred. The enforcement of the law could not keep up with the violations of the law.”).

⁸ 42 U.S.C. § 1973c(a) (2006).

⁹ The original fully-covered states were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and the original partially-covered states were Arizona, Hawaii, Idaho, and North Carolina. *See Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited June 3, 2013).

¹⁰ *See* SECTION 5 COVERED JURISDICTIONS, *supra* note 1.

¹¹ Section 4 of the VRA sets forth a formula for determining where preclearance is appropriate. 42 U.S.C. § 1973(b) (2006). Some commentators predict that, rather than striking down Section 5, the Court may strike down the specific coverage formula currently embodied in Section 4. *See* Andrew Cohen, *America Is One Step Closer to Neutering the Voting Rights Act*, THE ATLANTIC (Feb. 27, 2013, 2:40 PM), <http://www.theatlantic.com/national/archive/2013/02/america-is-one-step-closer-to-killing-the-voting-rights-act/273566/> (describing how the Court might instruct Congress to update its facts and statistics, rather than preclude all future preclearance rules); Adam Liptak, *Voting Rights Law Draws Skepticism From Justices*, N.Y. TIMES, Feb. 27, 2013, at A1 (noting that most of oral argument in *Shelby County v. Holder* concerned the coverage formula). The coverage formula includes all states or political subdivisions in which (as of November 1, 1964, 1968 or 1972) there was a test or device to restrict voting or registration to vote, fewer than 50% of voting-aged residents were registered to vote, or fewer than 50% of voting-aged persons voted in the presidential election of that year. *See* U.S. Dep't of

Justice, *The Formula for Coverage Under Section 4 of the Voting Rights Act*, SECTION 4 OF THE VOTING RIGHTS ACT, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited June 4, 2013). A decision in *Shelby County* striking down the existing coverage formula could also invite the kind of threats laid out in this analysis.

¹² This is the number of submissions of voting changes since 1998 to which DOJ has interposed an objection. In some cases, objections by DOJ were later withdrawn, or were superseded by a declaratory judgment action for court preclearance in the U.S. District Court for the District of Columbia. For state-by-state chronological listings of Section 5 objections, see *Section 5 Objection Determinations*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited June 3, 2013) (listing 86 objections since the beginning of 1998).

¹³ This is the number of submissions of voting changes since 2003 to which DOJ has interposed an objection. In some cases, objections by DOJ were later withdrawn, or were superseded by a declaratory judgment action for court preclearance in the U.S. District Court for the District of Columbia. *See id.* (listing 43 objections since the beginning of 2003).

¹⁴ This is the number of submissions of voting changes since July 2006 to which DOJ has interposed an objection. In some cases, objections by DOJ were later withdrawn, or were superseded by a declaratory judgment action for court preclearance in the U.S. District Court for the District of Columbia. *See id.* (listing 31 objections since July 2006).

¹⁵ *See, e.g.*, Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to James E. Trainer III, Counsel, Galveston Cnty., Tex. (Mar. 05, 2012), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_030512.pdf (objecting to three changes submitted by Galveston County, Texas, including the redistricting plan for the commissioners court, the redistricting plan for the justices of the peace and reductions in the number of justices of the peace from nine to five and the number of constables from eight to five); Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Robert T. Sonnenberg, In-house Counsel, Pitt County Schools, N.C. (Aug. 30, 2012), http://www.justice.gov/crt/about/vot/sec_5/ltr/1_043012_nc.php (objecting to three changes for the Pitt County School District in Pitt County, North Carolina, including a reduction in the number of school board members from twelve to seven, a change from a twelve-member board elected from six double-member districts to a seven-member board with one at-large member, and the implementation schedule for the submitted changes).

¹⁶ *Texas v. United States*, 887 F. Supp. 2d 133, 138 (D.D.C. 2012).

¹⁷ *Florida v. United States*, 885 F. Supp. 2d 299, 357 (D.D.C. 2012) (denying preclearance for reduction in early voting opportunities but granting preclearance for procedures for inter-county movers); *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) (denying preclearance for Texas voter photo ID law); *Texas v. United States*, 887 F. Supp. 2d 133, 178 (D.D.C. 2012) (denying preclearance for Texas's redistricting plans).

¹⁸ In Texas for example, 20 percent of jurisdictions (including counties and subjurisdictions) against whom Section 5 objections were filed between 1982 and 2012 were repeat offenders, based on a quantitative analysis of objections in the state. *See Section 5 Objection Determinations*, *supra* note 12 (listing objections in Texas).

¹⁹ Waller County, Texas, presents a recent illustrative example of this gamesmanship. In 2008, DOJ and Waller County entered into a consent decree after DOJ brought a complaint against the County for thwarting registration efforts by students at Prairie View A&M, a historically black college, without obtaining preclearance under Section 5. *See United States v. Waller County*, No. 4:08-cv-3022 (S.D. Tex. Oct. 17, 2008) (consent decree), *available at* http://www.justice.gov/crt/about/vot/sec_5/waller_cd.pdf. This was not the first time that the County had attempted to unlawfully restrict student voting. In 2003, the district attorney attempted to prevent students from voting by threatening to prosecute students who declared the school as their residence. *See Lianne Hart, D.A. Challenge of Student Voters Is a Civil Rights Lesson*, L.A. TIMES, Feb. 15, 2004, <http://articles.latimes.com/2004/feb/15/nation/na-prairie15>. A lawsuit filed by students and the local NAACP chapter against the district attorney ended in a settlement with the County that permitted the students to vote. *See Prairie View Chapter of NAACP v. Kitzman*, No. 4:04-cv-00459, at 1-2 (S.D. Tex. Oct. 21, 2004) (memorandum and order awarding attorneys' fees). A quarter century earlier, the United States Supreme Court affirmed that students have a constitutional right to register to vote at their college address in a case arising out of attempts to deny students the right to vote in Waller County itself. *Symm v. United States*, 439 U.S. 1105 (1979), *aff'g* *United States v. Texas*,

445 F. Supp. 1245 (S.D. Tex. 1978) (concluding actions designed to prevent students from voting at their college addresses because of a presumption of non-residency are unconstitutional).

²⁰ Letter from Ralph F. Boyd Jr., Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to J. Lane Greenlee, Counsel, Town of Kilmichael, Miss. (Dec. 11, 2001), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_121101.pdf.

²¹ *Id.*

²² H.R. REP. NO. 109-478, at 36-37 (2006), available at <http://www.gpo.gov/fdsys/pkg/CRPT-109hrpt478/pdf/CRPT-109hrpt478.pdf>.

²³ Letter from J. Michael Wiggins, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Wallace Shaw, Counsel, City of Freeport, Tex. (Aug. 12, 2002), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_081202.pdf.

²⁴ *Id.*

²⁵ Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Keith Ingram, Director of Elections, Office of the Tex. Sec'y of State (Mar. 12, 2012), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_031212.pdf.

²⁶ *Id.*

²⁷ Texas v. Holder, 888 F. Supp. 2d 113, 143-45 (D.D.C. 2012).

²⁸ See Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Melody Thomas Chappell, Counsel, Beaumont Indep. Sch. Dist., Jefferson Cnty., Tex. (Dec. 21, 2012), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_122112.pdf (objecting to proposed change from seven single-member districts to five single-members districts and two at-large districts).

²⁹ See Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Melody Thomas Chappell, Counsel, Beaumont Indep. Sch. Dist., Jefferson Cnty., Tex. (Apr. 8, 2013), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_040813.pdf (objecting to state court-adopted elections plan, and seeking more information regarding a redistricting plan).

³⁰ United States v. N. Harris Montgomery Cmty. Coll. Dist., No. 4:06-cv-02488, at 3 (S.D. Tex. Aug. 4, 2006), available at http://www.justice.gov/crt/about/vot/sec_5/nharrismont_cd.pdf.

³¹ Letter from Wan Kim, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Renee Smith Byas, Vice Chancellor & Gen. Counsel, N. Harris Montgomery Cmty. Coll. Dist. (May 5, 2006), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_050506.pdf.

³² *Id.*

³³ *Id.*

³⁴ Miguel Hernandez Chapter of the Am. GI Forum v. Bexar County, No. 5:03-cv-00816, at 2 (W.D. Tex. Aug. 28, 2003) (order granting temporary restraining order), available at http://www.clearinghouse.net/chDocs/not_public/VR-TX-0420-0002.pdf.

³⁵ *Id.* at 2, 6-7; Complaint at 5-7, Miguel Hernandez Chapter of the Am. GI Forum v. Bexar County, No. 5:03-cv-00816 (W.D. Tex. Aug. 26, 2003), available at http://www.clearinghouse.net/chDocs/not_public/VR-TX-0420-0001.pdf.

³⁶ *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 25-27 (2006) (statements of Juan Cartagena, Gen. Counsel, Cmty. Service Soc'y, N.Y., N.Y., and Robert McDuff, Att'y, Jackson, Miss.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28342/pdf/CHRG-109shrg28342.pdf>.

³⁷ See Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 47, 57-58 (Ana Henderson ed., 2006), available at http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf. By point of comparison, DOJ objected to 59 voting changes during this time period. *Id.*

³⁸ This assessment does not include a sizeable third category — 95 submissions that received more-information requests and were not responded to by a jurisdiction. Such voting changes could not have been lawfully implemented, and therefore could be reasonably presumed to have been abandoned by the jurisdiction in the face of the request for more information. Because we could not rule out non-compliance, however, such examples were not included in this analysis. Accordingly, this is a very conservative estimate of the deterrent effect of Section 5. *See id.*

³⁹ Eric Fleischauer, *What About the Council-Manager Referendum?*, DECATUR DAILY, Aug. 12, 2012, <http://www.decaturdaily.com/stories/What-about-the-council-manager-referendum,100348>.

⁴⁰ *Id.*; Tiffany Owens, *City to Reconsider Council Manager Submission March 4*, DECATUR DAILY, Feb. 12, 2013, <http://decaturdaily.com/stories/City-to-reconsider-council-manager-submission-March-4,113208>.

⁴¹ Owens, *supra* note 40.

⁴² Tiffany Owens, *Divided Council Rejects Plan*, DECATUR DAILY, Mar. 5, 2013, <http://www.decaturdaily.com/stories/Divided-council-rejects-plan,114752>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ H.R. REP. NO. 109-478, *supra* note 22, at 41.

⁴⁶ *Id.*; Letter from Joseph D. Rich, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Tony Anchundo, Cnty. Registrar of Voters, Monterey Cnty. (Sept. 4, 2003) <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/elections/richmont90403ltr2.pdf>.

⁴⁷ H.R. REP. NO. 109-478, *supra* note 22, at 41.

⁴⁸ During trial testimony, Speaker of the House Robert Harrell said, “I was very aware at the time that we were doing this that whatever we would have to do would have to be subject to the Voting Rights Act because that would be the basis for the Department of Justice preclearing the bill for us.” *South Carolina v. United States*, 898 F. Supp. 2d 30, 54 (D.D.C. 2012) (Bates, J., concurring) (quoting Trial Tr. 104:18–21 (Aug. 28, 2012)). He added, “[I] ask[ed] the staff who drafted the bill for me to please make sure that we are passing a bill that will withstand constitutional muster and get through DOJ or through this court.” *Id.* (quoting Trial Tr. 105:15–18 (Aug. 28, 2012)) (alteration in original). Senator Chip Campsen agreed that he was “interested in what voter ID legislation had been precleared” in drafting the bill, *id.* (quoting Trial Tr. 108:23–25 (Aug. 27, 2012)), and discussed senators’ statement that “[t]he responsible thing to do was to fix [the bill] so that it would not fail in the courts or get tripped up by the Voting Rights Act,” *id.* (quoting Trial Tr. 148:10–15 (Aug. 27, 2012)) (alteration in original). Senator Glenn F. McConnell discussed his efforts to pass a bill that “had a better chance of getting preclearance,” *id.* (quoting Trial Tr. 141:9–12 (Aug. 28, 2012)), and said that on the Senate floor “[t]here was discussion about” how “to craft a bill that would comply with the voting rights amendment,” *id.* (quoting Trial Tr. 182:18–20 (Aug. 28, 2012)). Based on these statements, Judge Robert Bates noted in his concurring opinion, “One cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been more restrictive.” *South Carolina v. United States*, 898 F. Supp. 2d 30, 53-54 (D.D.C. 2012) (Bates, J., concurring).

⁴⁹ *South Carolina v. United States*, 898 F. Supp. 2d 30, 35–36 (D.D.C. 2012) (accepting and adopting, as a condition of preclearance, the expansive interpretation of the reasonable impediment exception to the South Carolina photo ID law that was offered by the State during litigation).

⁵⁰ *Continued Need for Voting Rights Act: Hearing Before the Subcomm. on the Const., H. Comm. on the Judiciary*, 109th Cong. 92 (Mar. 8, 2006) (statement of Joe Rogers, Comm’r, Nat’l Comm’n on the Voting Rights Act and former Lt. Gov. of Colo.), available at http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0028.pdf.

⁵¹ Grey Pentecost, *City Council Favors Four-Year Non-Staggered Terms*, ROXBORO COURIER, July 11, 2012 (noting that after considering public comments that the change would likely violate Section 5 of the Voting Rights Act, a Councilman stated the city should look at the option of four-year non-staggered terms).

⁵² Pentecost, *supra* note 51.

⁵³ Telephone interview with J. Gerald Hebert, Exec. Dir. and Dir. of Litigation, Campaign Legal Center (June 3, 2013).

⁵⁴ *See* Act of June 9, 2011, No. 2011-535, 2011 Ala. Acts 2011-535 (codified as amended at ALA. CODE § 31-13-28 (1975)).

⁵⁵ *Notice of Preclearance Activity: The Voting Rights Act of 1965, As Amended*, U.S. DEP’T OF JUSTICE (May 1, 2012), <http://www.justice.gov/crt/about/vot/notices/vnote050112.php>.

⁵⁶ *See* Letter from T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Div., U.S. Dep’t of Justice, to Winfield J. Sinclair, Ass’t Att’y Gen., State of Ala. (Nov. 27, 2012), <http://www.scribd.com/doc/132848909/DOJ-Letter-re-AL-s-HB56-%C2%A7-29-and-%C2%A7-5-of-Voting-Rights-Act>.

⁵⁷ *Notice of Preclearance Activity: The Voting Rights Act of 1965, As Amended*, U.S. DEP’T OF JUSTICE (May 20, 2013), <http://www.justice.gov/crt/about/vot/notices/vnote052013.php>.

⁵⁸ E-mail from Laughlin McDonald, Dir., ACLU Voting Rights Project, to Vishal Agraharkar, Counsel, Brennan Ctr. for Justice (June 5, 2013, 4:30 pm EST) (on file with author).

⁵⁹ *See* Act of June 15, 2011, No. 2011-673, 2011 Ala. Acts 2011-673 (codified as amended at ALA. CODE § 17-9-30 (1975)).

⁶⁰ As of the date of this publication and according to all available sources, Alabama’s 2011 photo identification law has not been submitted to DOJ for preclearance.

⁶¹ *See* WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012 1 (2011), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf. This number, and the accompanying map, includes only statewide legislation of the type tracked by the Brennan Center as restrictive, and thus likely underestimates the number of states where there have been proposals that may be blocked by Section 5. It includes only bills introduced by state legislatures that propose any of the following restrictions on voting: (1) photo identification requirements; (2) documentary proof of citizenship requirements; (3) restrictions on early or in-person absentee voting; (4) restrictions on voter registration; (5) restrictions on restoring one’s right to vote after a felony conviction; (6) restrictions on student voting.

⁶² *See* *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012) (finding evidence that Texas’s new photo identification law “will likely have a retrogressive effect” on the position of racial minorities and therefore denying Texas’s request for preclearance).

⁶³ *See* *South Carolina v. United States*, 898 F. Supp. 2d 30, 50 (D.D.C. 2012) (refusing preclearance for South Carolina’s new photo identification law for the 2012 election because it could not be ensured in the short amount of time before the election that the law would not discriminate against African-Americans).

⁶⁴ *See* *Florida v. United States*, 885 F. Supp. 2d 299, 329 (D.D.C. 2012) (finding that Florida failed to show that its new restrictions on early voting would not have a negative effect on African-American voters in the covered counties).

⁶⁵ This number, and the accompanying map, includes only statewide legislation of the type tracked by the Brennan Center as restrictive, and thus likely underestimates the number of states where there have been proposals that may be blocked by Section 5. *See supra* note 61.

⁶⁶ *See* Brennan Center for Justice, *2013 Voting Law Changes: Legislation Making It Harder To Vote* (April 29, 2013), http://www.brennancenter.org/sites/default/files/analysis/Passed_Pending_Legislation.pdf.

⁶⁷ *Id.*; *see generally* Brennan Center for Justice, *Citizens without Proof* (Nov. 2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

⁶⁸ Telephone interview with J. Gerald Hebert, *supra* note 53.

⁶⁹ Act of Mar. 30, 2009, H.B. 877, 2009 Miss. Laws Ch. 470 (codified as amended at MISS. CODE ANN. § 37-5-9 (West 2012)). Although DOJ blocked the change, Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Margarete L. Meeks, Special Ass't Att'y Gen., Miss. (Mar. 24, 2010), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_032410.pdf, the Mississippi Code still contains the objectionable language as well as the old language, but the objectionable language is effective only "on effectuation . . . under § 5 of the Voting Rights Act of 1965." MISS. CODE ANN. § 37-5-9 (West 2012). It is not clear whether, if Section 5 ceases to exist, the objectionable language will thereby be "effectuated."

⁷⁰ The 2007 bill amended the Texas Water Code to require candidates for the position of supervisor of a fresh water supply district to own taxable property in the district, rather than be resident registered voters of the district. DOJ objected to the change, noting that some minority supervisors would not be able to run for reelection, and that there was a disparity in land ownership rates between Caucasians and minorities. *See* Letter from Grace Chung Becker, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Phil Wilson, Sec'y of State, State of Tex. (Aug. 21, 2008), http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_082108.pdf. However, the blocked change remains codified in the Texas Water Code. TEX. WATER CODE ANN. § 53.063 (West 2011).

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