

## MORE THAN “RARELY USED”: A POST–*SHELBY* JUDICIAL STANDARD FOR SECTION 3 PRECLEARANCE

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*Section 3(c) of the Voting Rights Act of 1965 provides a seldom-used path to federal preclearance of changes to state and local voting practices. It allows a federal judge, upon finding that a jurisdiction violated the Fourteenth or Fifteenth Amendment, to require that jurisdiction to submit for preapproval any “voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting.” Originally intended to supplement the expansive Section 5 preclearance regime, Section 3 was suddenly thrust into prominence by the Supreme Court’s decision in *Shelby County v. Holder*.*

*Section 3 preclearance is the last remaining conduit to mandate advance review of voting changes in jurisdictions with histories of intentional discrimination. However, recent decisions have summarily granted or rejected Section 3 relief without engaging in thorough analysis of its appropriateness. This Note analyzes these cases, using the historical justification for preclearance as a frame, and proposes a judicial framework for maximizing Section 3’s utility to guard against discriminatory voter suppression.*

### INTRODUCTION

Voting rights activists had a great summer in 2016. A string of favorable decisions threw out restrictive voting laws in Wisconsin,<sup>1</sup> Texas,<sup>2</sup> and North Carolina.<sup>3</sup> Advocates were particularly enthused by the Fourth Circuit’s decision in *North Carolina State Conference of the NAACP v. McCrory*,<sup>4</sup> which found that the North Carolina Legislature acted with discriminatory intent in passing House Bill 589<sup>5</sup> immediately after the

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1. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 964 (W.D. Wis. 2016).

2. *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc).

3. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 242 (4th Cir. 2016).

4. See, e.g., Jedediah Purdy, *A Voting-Rights Victory in North Carolina*, *New Yorker* (Aug. 2, 2016), <http://www.newyorker.com/news/news-desk/a-voting-rights-victory-in-north-carolina> [<http://perma.cc/8BV3-XWHZ>] (describing the *McCrory* decision as “a strong recognition that race continues to matter in the politics of voting”); Zachary Roth, *Appeals Court Rejects Strict North Carolina Voting Law*, *NBC News* (July 29, 2016), <http://www.nbcnews.com/news/us-news/appeals-court-strikes-down-strict-north-carolina-voting-law-n619836> [<http://perma.cc/NE78-BSXJ>] (quoting Dale Ho, Director of the ACLU’s Voting Rights Project, describing *McCrory* as “a major victory for North Carolina voters and for voting rights” (internal quotation marks omitted)).

5. *McCrory*, 831 F.3d at 233.

Supreme Court's decision in *Shelby County v. Holder*.<sup>6</sup> But largely overlooked<sup>7</sup> in the celebration around *McCrory* was the panel's rejection—with only two sentences of analysis—of the plaintiffs' request to bail North Carolina into preclearance under Section 3 of the Voting Rights Act of 1965 (VRA).<sup>8</sup>

Section 3 of the VRA is a seldom-used path to federal preclearance of state voting practice changes. It allows a federal judge, upon finding that a jurisdiction violated the Fourteenth or Fifteenth Amendment, to require that jurisdiction to obtain preapproval for any “voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting” prior to enactment.<sup>9</sup> Congress intended Section 3 to

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6. 133 S. Ct. 2612 (2013).

7. Some commentators noted the Fourth Circuit's refusal to bail North Carolina into preclearance under Section 3 but failed to consider the potential precedential ramifications of the decision. See, e.g., Ian Millhiser, Breaking: Federal Appeals Court Strikes Down Worst Voter Suppression Law in the Nation, ThinkProgress (July 29, 2016), <http://thinkprogress.org/breaking-federal-appeals-court-strikes-down-the-worst-voter-suppression-law-in-the-nation> [<http://perma.cc/4D3C-E3LP>] (lamenting how the Fourth Circuit's refusal to impose Section 3 relief “enabl[es] North Carolina lawmakers to enact more voter suppression laws in the future, provided that they behave more subtly,” without mentioning the impact of the decision on Section 3 jurisprudence as a whole).

8. *McCrory*, 831 F.3d at 241. Section 3(c) of the VRA, codified at 52 U.S.C. § 10302(c) (2012), reads as follows:

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the [F]ourteenth or [F]ifteenth [A]mendment in any State or political subdivision the court finds that violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure 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, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

See *infra* section I.B for an in-depth review of how jurisdictions can be “bailed in” to preclearance under Section 3(c) of the VRA. For the sake of simplicity, 52 U.S.C. § 10302(c) will be referred to as “Section 3” throughout this Note.

9. 52 U.S.C. § 10302(c).

supplement the broad preclearance under Sections 4 and 5, which required certain jurisdictions to obtain approval for changes to voting practices before enacting them<sup>10</sup> and ensure preclearance coverage for discrete “pockets of discrimination.”<sup>11</sup> However, Section 3 took on increased significance when the Supreme Court neutered Section 5 in *Shelby County v. Holder*.<sup>12</sup>

A few months after the *McCrory* decision, Donald Trump was elected the forty-fifth president of the United States, and the prevailing mood of voting rights activists shifted from celebratory to despondent. In the days and weeks after the election, numerous reports surfaced of voter suppression and voter intimidation across the country.<sup>13</sup> Many of these reports highlighted changes to voting practices that would likely have been prevented before *Shelby County v. Holder* effectively eliminated Section 5 preclearance.<sup>14</sup> This recent evidence of race-based voter suppression amplified concerns about whether the Fourth Circuit’s decision endangered the continuing viability of Section 3 preclearance as a pathway to require jurisdictions that discriminate to obtain preapproval before making changes to voting laws or procedures.<sup>15</sup>

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10. See *infra* section I.A for an overview of the structure of the VRA.

11. H.R. Rep. No. 89-439, at 13 (1965), as reprinted in 1965 U.S.C.C.A.N. 2437, 2444.

12. See *infra* Part II.

13. See, e.g., Ari Berman, Did Republicans Rig the Election?, *Nation* (Nov. 15, 2016), <http://www.thenation.com/article/did-republicans-rig-the-election/> [<http://perma.cc/Y49S-2FJ3>] (profiling instances of reduced access to voting in several swing states and the potential impact on the 2016 election); Jeffery Toobin, The Real Voting Scandal of 2016, *New Yorker* (Dec. 12, 2016), <http://www.newyorker.com/magazine/2016/12/12/the-real-voting-scandal-of-2016> (on file with the *Columbia Law Review*) (highlighting the effect of voter suppression after *Shelby County*); Vanessa Williamson, Voter Suppression, Not Fraud, Looms Large in U.S. Elections, *Brookings Inst.* (Nov. 8, 2016), <http://www.brookings.edu/blog/fixgov/2016/11/08/voter-suppression-in-u-s-elections/> [<http://perma.cc/T7AG-5PT6>] (detailing expansion of voter suppression laws).

14. See, e.g., Emily Bazelon, The Supreme Court Ruled That Voting Restrictions Were a Bygone Problem. Early Voting Results Suggest Otherwise., *N.Y. Times* (Nov. 7, 2016), [http://www.nytimes.com/2016/11/07/magazine/the-supreme-court-ruled-that-voting-restrictions-were-a-bygone-problem-early-voting-results-suggest-otherwise.html?\\_r=0](http://www.nytimes.com/2016/11/07/magazine/the-supreme-court-ruled-that-voting-restrictions-were-a-bygone-problem-early-voting-results-suggest-otherwise.html?_r=0) (on file with the *Columbia Law Review*) (explaining jurisdictions have been “testing how far they can go with voter suppression” after *Shelby County*); Eric Mount, Gutting of Voting Rights Act Allowed Multiple States to Impede Minority Votes, *Advocate-Messenger* (Nov. 17, 2016), <http://www.amnews.com/2016/11/17/gutting-of-voting-rights-act-allowed-multiple-states-to-impede-minority-votes/> [<http://perma.cc/Rp6S-4958>] (noting that 868 polling places were closed in states with records of voting discrimination between the *Shelby County* decision and the 2016 election); Editorial, The Voters Abandoned by the Court, *N.Y. Times* (Nov. 8, 2016), <http://www.nytimes.com/2016/11/09/opinion/the-voters-abandoned-by-the-court.html> (on file with the *Columbia Law Review*) (noting “a vast majority” of poll closings prior to the 2016 election “would have been blocked had the Voting Rights Act not been eviscerated by the Roberts Court”).

15. See Lyle Denniston, Constitution Check: Is Section 3 of the Voting Rights Act a Dead Letter?, *Nat’l Constitution Ctr.: Constitution Daily* (Aug. 9, 2016), <http://blog.constitutioncenter.org/2016/08/constitution-check-is-section-3-of-the-voting->

Then, weeks before Trump's inauguration, the Southern District of Texas imposed Section 3 preclearance on the city of Pasadena, Texas for impermissibly diluting the vote of Latino citizens.<sup>16</sup> The court held that because "Pasadena officials intentionally discriminated against Latinos in diluting their voting strength," the city would be required "to submit future changes to its electoral map and plan" for approval prior to implementation.<sup>17</sup>

*McCrary* and *Patino* reach opposite conclusions, but neither opinion engages in meaningful analysis of Section 3. Section 3 preclearance garnered little academic or judicial attention from the time it was enacted as part of the VRA until the Supreme Court's decision in *Shelby County v. Holder*,<sup>18</sup> and these opinions both missed a timely opportunity to shed some light on how Section 3 should be interpreted in a post-*Shelby County* world. Before the Supreme Court's decision in *Shelby County*, Section 3 preclearance was an afterthought, fertile ground for law professors to stump first-year students in their Constitutional Law classes. *Shelby County* transformed Section 3 from an essentially forgotten clause of the VRA—invoked fewer than twenty times in forty-eight years<sup>19</sup>—to the sole remaining conduit to require preapproval for changes to voting laws in jurisdictions with a history of discrimination.

Much of the limited scholarship surrounding Section 3 traverses a common path: First, articles lament how Section 3 requires a judicial finding of discriminatory intent,<sup>20</sup> and second, they suggest ways that

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rights-act-a-dead-letter/ [http://perma.cc/H9EC-G6TJ] (describing the potential limiting effect of *McCrary* on Section 3's power to protect against race-based voter suppression).

16. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 728 (S.D. Tex. 2017).

17. *Id.* at 729.

18. See, e.g., Travis Crum, Note, The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance, 119 Yale L.J. 1992, 1997 & n.23 (2010) (discussing the dearth of academic literature discussing Section 3). Since the *Shelby County* decision, Section 3 has received marginally more attention, primarily in student notes. See, e.g., Roseann R. Romano, Note, Devising A Standard for Section 3: Post-*Shelby County* Voting Rights Litigation, 100 Iowa L. Rev. 387, 404–05 (2014) (arguing Section 3 may be triggered by a violation of the Fourteenth Amendment under an invidious discrimination standard that is short of intentional discrimination); Paul M. Wiley, Note, *Shelby* and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After *Shelby County v. Holder*, 71 Wash. & Lee L. Rev. 2115, 2118–19 (2014) (exploring the possibility of Section 3 implementation post-*Shelby County*).

19. See *infra* section I.B.2.

20. See, e.g., Brian F. Jordan, Note, Finding Life in Hurricane *Shelby*: Reviving the Voting Rights Act by Reforming Section 3 Preclearance, 75 Ohio St. L.J. 969, 979 (2014) (noting that before imposing Section 3 preclearance, a "court must first find that the jurisdiction engaged in intentional discrimination, which is a very difficult burden" (footnote omitted)); Romano, *supra* note 18, at 404–05 (arguing Section 3 requires a court to find only "invidious discrimination" rather than the more burdensome "intentional discrimination"); Wiley, *supra* note 18, at 2136–37 (suggesting Section 3 be interpreted to presume discriminatory purpose and place a burden on the state or locality to disprove this presumption).

Congress may amend Section 3 to increase its effectiveness and scope.<sup>21</sup> While this may be a desirable solution, legislative reform strengthening the VRA is unlikely after the 2016 election.<sup>22</sup> While legislative reform of Section 3 is still a worthwhile goal, the obstacles facing such legislation make it imperative to make the best possible use of Section 3 as it is currently written.

This Note provides one option for maximizing the usefulness of Section 3 by articulating a reasonable judicial framework for imposing Section 3 preclearance, filling in the gap left by the *McCrorry* and *Patino* decisions. Part I examines the structure of the VRA and the origins and purposes of Section 5 preclearance. It also takes a closer look at preclearance under Section 3 of the VRA and reviews the limited case law interpreting Section 3 prior to *Shelby County*. Part II touches on voting rights cases since *Shelby County* that have asked for Section 3 preclearance as a remedy and analyzes *North Carolina State Conference of the NAACP v. McCrorry* and *Patino v. City of Pasadena*—the only decisions that have explicitly considered Section 3 preclearance. Finally, Part III suggests a judicial framework for imposing Section 3 preclearance and applies this framework to the facts of *McCrorry* and *Patino*.

#### I. OVERVIEW OF THE VOTING RIGHTS ACT AND A RENEWED LOOK AT SECTION 3 PRECLEARANCE

This Part reviews the basic structure of the VRA and how it prevented states from enacting discriminatory voting changes prior to *Shelby County*. Section I.A reviews the VRA's individual right of action and the pre-*Shelby County* preclearance mechanism. Section I.B introduces Section 3 preclearance and highlights its flexibility in comparison to the now-defunct Section 5 preclearance.

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21. See, e.g., Jordan, *supra* note 20, at 992 (“Congress should update Section 3’s preclearance mechanism by lowering its standard of proof for submitting jurisdictions and by amending Section 3 to clarify its scope.”); Romano, *supra* note 18, at 409 (discussing potential congressional reform of Section 3); Wiley, *supra* note 18, at 2147–48 (reviewing proposed changes to Section 3 that would remove the need for a constitutional violation).

22. See, e.g., Ari Berman, *Jeff Sessions Has Spent His Whole Career Opposing Voting Rights*, *Nation* (Jan. 10, 2017), <http://www.thenation.com/article/jeff-sessions-has-spent-his-whole-career-opposing-voting-rights/> [<http://perma.cc/38JX-R7VF>] [hereinafter Berman, Sessions] (“In 2013, Jeff Sessions, Donald Trump’s nominee for attorney general, cheered the gutting of the Voting Rights Act, calling it ‘good news . . . for the South.’”); see also Manny Fernandez & Eric Lichtblau, *Justice Dept. Drops a Key Objection to a Texas Voter ID Law*, *N.Y. Times* (Feb. 27, 2017), <http://www.nytimes.com/2017/02/27/us/justice-dept-will-drop-a-key-objection-to-a-texas-voter-id-law.html> (on file with the *Columbia Law Review*) (reporting the “complete 180-degree turn” taken by the Department of Justice under Sessions’s leadership (internal quotation marks omitted) (quoting Danielle Lang, a lawyer for the Campaign Legal Center)).

A. *Setting the Stage: An Overview of the Voting Rights Act*

Congress passed the VRA to “enforce the [F]ifteenth [A]mendment to the Constitution of the United States” after three previous legislative attempts to protect the right to vote for people of color proved ineffective.<sup>23</sup> The VRA was a comprehensive approach to achieving equality at the ballot box<sup>24</sup> and a monumental step toward racial equality in the United States,<sup>25</sup> of which Section 3 was one small part.

A brief review of the structure and function of the VRA is necessary to fully understand why Section 3 preclearance was “rarely used”<sup>26</sup> for nearly fifty years and how *Shelby County* thrust it into prominence. The full act has nineteen sections, but this section will review only Sections 2, 4(a), 4(b), and 5, which—along with Section 3 (discussed in depth in section I.B)—create the main structure for preventing jurisdictions from enacting discriminatory voting mechanisms.

1. *Section 2: Individual Action.* — Section 2 of the VRA—which prohibits states from applying any “qualification or prerequisite” that “den[ies] or abridge[s]” the right to vote on the basis of “race or color”<sup>27</sup>—is “a statutory form of the Fifteenth Amendment.”<sup>28</sup> It provides the opportunity for individuals (and the Attorney General) to enforce the Fifteenth Amendment through individual lawsuits.<sup>29</sup> Originally interpreted by the Supreme Court to apply only to instances of intentional discrimination,<sup>30</sup> Section 2 was amended by the Voting Rights Act

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23. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.). The VRA was passed after the Civil Rights Acts of 1957, 1960, and 1964. For a discussion of how those acts tried and failed to remedy and prevent race-based voter suppression, see Garrine P. Laney, Cong. Research Serv., No. 95-896, *The Voting Rights Act of 1965, As Amended: Its History and Current Issues* 6–7 (2008), [http://digital.library.unt.edu/ark:/67531/metadc26107/m1/1/high\\_res\\_d/95-896\\_2008Jun12.pdf](http://digital.library.unt.edu/ark:/67531/metadc26107/m1/1/high_res_d/95-896_2008Jun12.pdf) [<http://perma.cc/R85V-6KNQ>].

24. See Donald Campbell, *Partisanship, Politics, and the Voting Rights Act: The Curious Case of U.S. v. Ike Brown*, 29 Harv. J. Racial & Ethnic Just. 33, 44–46 (2013) (describing the VRA as a systematic response to the failure of the Civil Rights Acts of 1957, 1960, and 1964 to achieve Congress’s goals).

25. Cf. *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013) (describing the VRA as a congressional response to the civil rights movement after a century of failed enforcement of the Fifteenth Amendment).

26. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016) (internal quotation marks omitted) (quoting *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994)).

27. Voting Rights Act § 2.

28. Laney, *supra* note 23, at 12.

29. See *id.*; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 138 & n.198 (2010) (noting the Supreme Court has allowed “private enforcement” of Section 2 of the VRA even though the statute itself does not “expressly confer” a private “right of action”).

30. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (holding Section 2 merely restated the restrictions of the Fifteenth Amendment and therefore “add[ed] nothing to [a] . . . Fifteenth Amendment claim”); see also Frank R. Parker, *The “Results” Test of*

Amendments of 1982 to prohibit states and other political subdivisions from restricting access to the vote in any way that “result[ed] in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.”<sup>31</sup>

2. *Sections 4(a), 4(b), and 5: Preclearance and Who It Covers.* — Sections 4(a), 4(b), and 5 of the VRA are interdependent and best explained together. Section 5 requires certain jurisdictions to obtain preapproval from the Department of Justice (DOJ) before enacting new voting mechanisms; Section 4(b) articulates the jurisdictions to which Section 5 applies; and Section 4(a) allows covered jurisdictions to bail out of Section 5 preclearance upon meeting certain criteria.<sup>32</sup>

Section 5 preclearance was the VRA’s primary vehicle for eliminating race-based voter suppression. Section 5 required certain jurisdictions to seek preapproval from the DOJ or the United States District Court for the District of Columbia<sup>33</sup> prior to “enact[ing] . . . any . . . standard, practice, or procedure with respect to voting.”<sup>34</sup> Under Section 5, the state could change its voting practices only if the DOJ or D.C. District Court determined that the change would “not have the effect of denying or abridging the right to vote on account of race or color.”<sup>35</sup> In *Allen v. State Board of Elections*, the Supreme Court interpreted Section 5 to cover all changes to a covered state’s election law, both great and small.<sup>36</sup>

Section 4(b) limited the jurisdictions subject to Section 5 preclearance to those with a history of pervasive race-based voter suppression.<sup>37</sup> The Act of 1965 imposed preclearance on states and all political subdivisions therein that “maintained on November 1, 1964, any test or device” that Congress found to discriminatorily restrict the right to vote.<sup>38</sup> Also included in the coverage formula were jurisdictions where

Section 2 of the Voting Rights Act: Abandoning the Intent Standard, 69 Va. L. Rev. 715, 716 (1983) (explaining how *City of Mobile* imputed a requirement of intentional discrimination into Section 2).

31. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, §3, 96 Stat. 131, 134 (codified as amended in 52 U.S.C. § 10301 (Supp. II 2015)).

32. Voting Rights Act of 1965, §§ 4(a)–(b), 5.

33. For an analysis of the exclusive jurisdiction given to the D.C. District Court for Section 5 cases, see Michael E. Solimine, Rethinking District of Columbia Venue in Voting Rights Preclearance Actions, 103 Geo. L.J. Online 29, 31–33 (2014), <http://georgetownlawjournal.org/articles/171/rethinking-district-of-columbia/pdf> [<http://perma.cc/LZW7-6RKE>].

34. Voting Rights Act § 5.

35. *Id.*

36. 393 U.S. 544, 565–67 (1969) (“The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.”).

37. Voting Rights Act § 4(b).

38. *Id.* Section 4(c) of the VRA defined “test or device” as

any requirement that a person . . . (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational

less than fifty percent of the voting-age population was registered to vote on November 1, 1964, or voted in the presidential election of 1964.<sup>39</sup> Section 4(b) was subsequently amended in 1970 and 1975 to include states and jurisdictions that maintained a discriminatory test or device as of November 1 of 1964, 1968, or 1972, and those where less than half of the voting-age population was registered to vote or voted in the presidential elections of 1964, 1968, or 1972.<sup>40</sup>

Section 4(a) allowed a jurisdiction covered by Section 4(b) to be released from coverage if it could show it had not imposed a test or device “for the purpose or with the effect of denying or abridging the right to vote on account of race or color” in the previous five years.<sup>41</sup> The Voting Rights Amendment Act of 1970 extended the necessary period from five years to ten years.<sup>42</sup> The Voting Rights Amendment Act of 1975 extended the necessary period from ten years to seventeen years, but the Voting Rights Act Amendments of 1982 provided an alternative path for being released from coverage if the jurisdiction was able to meet certain criteria.<sup>43</sup>

Together, Sections 4(a), 4(b), and 5 of the VRA effectively prevented covered jurisdictions from enacting discriminatory voting laws for forty-eight years, from the passage of the VRA in 1965 until June 25, 2013,<sup>44</sup> when *Shelby County v. Holder* struck down Section 4(b) of the VRA as unconstitutional.<sup>45</sup> The Court held that Section 4(b), last updated in 1975, was outdated, and that it was impermissible to treat states differently based on data from 1964, 1968, and 1972.<sup>46</sup> By declaring Section 4(b) unconstitutional, the Court eliminated the DOJ’s primary source of

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achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Id. § 4(c).

39. Id. § 4(b).

40. 52 U.S.C. § 10303(b) (2012).

41. Voting Rights Act § 4(a).

42. Laney, *supra* note 23, at 14.

43. Id. at 17, 22. The Act of 1982 listed seven criteria that a jurisdiction must meet in order to be released from coverage. Id. at 22–23. Between 1965 and 2013, approximately 140 jurisdictions (mostly towns, counties, and school districts) bailed out of the coverage formula. Section 4 of the Voting Rights Act, U.S. Dep’t of Justice, <https://www.justice.gov/crt/section-4-voting-rights-act#bailout> [<http://perma.cc/M7GT-BPMS>] (last updated Aug. 8, 2015).

44. 133 S. Ct. 2612, 2634 (2013) (Ginsburg, J., dissenting).

45. Id. at 2631 (majority opinion).

46. Id. at 2627–28. For a more thorough account of the *Shelby County* decision, see generally John Schwartz, *Between the Lines of the Voting Rights Act Opinion*, N.Y. Times (June 25, 2013), <http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html> (on file with the *Columbia Law Review*).

authority to require jurisdictions to preclear changes to their voting laws and procedures.<sup>47</sup>

B. *A Closer Look at Section 3 Preclearance*

Section 3 of the VRA provides:

If . . . [a] court finds that violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief have occurred within . . . [a] State or political subdivision, [it] . . . shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless [it] . . . 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>48</sup>

Section 3 was included in the VRA to catch and bring into preclearance “discrete pockets of discrimination” that were not included in the coverage formula in Section 4(b).<sup>49</sup>

Section 3 is often referred to as the “bail-in” provision of the VRA because it allows courts to bring jurisdictions not covered by Section 4(b) into preclearance.<sup>50</sup> This section provides background on Section 3 preclearance and its imposition pre-*Shelby County*. Section I.B.1 compares Section 3 preclearance to Section 5 preclearance, highlighting Section 3’s greater flexibility in contrast to Section 5’s all-encompassing preclearance requirements. Section I.B.2 provides an overview of Section 3’s infrequent use between passage of the VRA and *Shelby County* and intro-

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47. *Shelby County*, 122 S. Ct at 2620, 2628. It may prove to be important that the Supreme Court’s decision in *Shelby County* did not directly decide on the constitutionality of Section 5 of the VRA; the Court struck down only the coverage formula in Section 4(b) as unconstitutional. *Id.* at 2631. Legislators have introduced bills in both houses of Congress to create a new coverage formula that passes constitutional muster and resurrects Section 5. See Edward Blum, *The Court After Scalia: The Future of Voting Rights*, SCOTUSblog (Aug. 30, 2016), <http://www.scotusblog.com/2016/08/the-court-after-scalia-the-future-of-voting-rights/> [http://perma.cc/8XCR-YN4E]. It is doubtful that either of these bills will gain much traction, however, and in the meantime, Section 5 is powerless without Section 4(b) to provide the scope of its coverage. See *supra* section I.A.2.

48. 52 U.S.C. § 10302(c) (2012). The current language is essentially unchanged from that included in the Act of 1965. The Voting Rights Act of 1965 referenced only the Fifteenth Amendment, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437–38, but the Voting Rights Amendment Act of 1975 amended the section to include violations of the Fourteenth Amendment, Pub. L. No. 94-73, Title II, § 205, 89 Stat. 400, 402.

49. H.R. Rep. No. 89-439, 89th Cong., at 13 (1965), as reprinted in 1965 U.S.C.C.A.N. 2437, 2444.

50. See Crum, *supra* note 18, at 1997.

duces *Jeffers v. Clinton*,<sup>51</sup> the first instance of judicially imposed Section 3 preclearance and a potential roadmap for future analysis.

1. *Comparing Preclearances: Section 3 vs. Section 5.* — Prior to *Shelby County*, preclearance under Section 5 of the VRA was a “[p]articularly effective” remedy to prevent voting discrimination.<sup>52</sup> While *Shelby County* did not rule on Section 5’s constitutionality, it was clearly uncomfortable with Section 5’s power to abrogate state sovereignty.<sup>53</sup> In order for Section 3 to mitigate the effects of *Shelby County*, Section 3 preclearance must be able to survive scrutiny from a Supreme Court that has been reluctant to allow this type of infringement on states’ rights.<sup>54</sup>

Even though the word “preclearance” is used to describe the pre-approval requirements in both Sections 3 and 5 of the VRA, Section 3 preclearance is different from Section 5 preclearance in several important ways, all of which make Section 3 preclearance a more narrowly tailored and flexible remedy than Section 5 preclearance.

First and most importantly, Section 3 preclearance directly responds to *Shelby County*’s argument that Section 4(b) was invalid because it was “based on decades-old data and eradicated practices.”<sup>55</sup> The Court held that in order to abrogate equal sovereignty principles, “any ‘disparate geographic coverage’ must be ‘sufficiently related to the problem that it targets.’”<sup>56</sup> Section 3 neatly addresses this concern by requiring a court to find that a jurisdiction acted with discriminatory purpose before imposing preclearance.<sup>57</sup> Because Section 3 preclearance can be imposed on a

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51. 740 F. Supp. 585, 601 (E.D. Ark. 1990).

52. *Shelby County*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting).

53. See *id.* at 2618 (majority opinion) (describing Section 5 as “a drastic departure from basic principles of federalism”); see also *id.* at 2331–32 (Thomas, J., concurring) (arguing the majority opinion “compellingly demonstrates” that Section 5 is also unconstitutional and should be struck down).

54. See, e.g., Crum, *supra* note 18, at 2024–27 (describing how Section 3 preclearance responds to the Supreme Court’s major concerns about the constitutionality of Section 5 preclearance).

55. *Shelby County*, 133 S. Ct. at 2627 (majority opinion); see also *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.”).

56. *Shelby County*, 133 S. Ct. at 2630 (quoting *Nw. Austin*, 557 U.S. at 203).

57. Section 3 preclearance is available to remedy only a violation of the Fourteenth or Fifteenth Amendments. 52 U.S.C. § 10302(c) (2012). Current Supreme Court jurisprudence requires a finding of intentional discrimination to establish a violation of either amendment. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (holding discriminatory purpose necessary to find a violation of the Fifteenth Amendment); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”). The requirement for a finding of discriminatory purpose also distinguishes Section 3 of the VRA from Section 2, which was amended by the Voting Rights Act Amendments of 1982 to cover both discriminatory purpose and effect. See *supra* section I.A.1. Some scholars have suggested responding to the *Shelby County* decision by amending the VRA so that Section 3 preclearance could be

jurisdiction only in response to a specific and current constitutional violation, it obviates the *Shelby County* Court's concern about using forty-year-old data to justify present-day disparate treatment of states.

Second, Section 3 preclearance allows for considerable durational flexibility. Prior to *Shelby County*, the only escape for a jurisdiction subject to Section 5 preclearance was to bail out of the coverage formula under Section 4(a).<sup>58</sup> However, the text of Section 3 provides the flexibility that Sections 4(a) and 4(b) lack by allowing a court to impose preclearance "for such period as it may deem appropriate."<sup>59</sup> Under Section 3, a court may impose preclearance for a predetermined amount of time.<sup>60</sup> Additionally, after setting a timeframe for preclearance, a court may later decide that preclearance is no longer necessary and lift the requirement ahead of schedule.<sup>61</sup>

Finally, courts may craft Section 3 relief to target only certain types of voting changes that must be approved prior to implementation. Section 5 preclearance covers all changes to any "standard, practice, or procedure with respect to voting,"<sup>62</sup> and the Supreme Court has repeatedly expressed its reservations about this arrangement.<sup>63</sup> Under Section 3, however, a court may tailor the preclearance requirement to specifically address the constitutional violation, leaving other, unrelated "standard[s], practice[s], or procedure[s] related to voting" unaffected.<sup>64</sup>

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imposed in response to a finding of discriminatory effects as well as discriminatory purpose. See supra note 21 (listing articles that recommend legislative reform of Section 3). However, given Donald Trump's victory in the 2016 presidential election, legislative remedies are increasingly unlikely. See, e.g., Berman, Sessions, supra note 22; Fernandez & Lichtblau, supra note 22.

58. See supra section I.A.2. The *Shelby County* Court also objected to the ever-increasing duration of the Section 5 preclearance requirement. See *Shelby County*, 133 S. Ct. at 2618 ("Nearly 50 years later, [Section 5 preclearance for states covered by Section 4(b) is] still in effect; indeed, [it has] been made more stringent, and [is] now scheduled to last until 2031.").

59. 52 U.S.C. § 10302(c).

60. See, e.g., *Sanchez v. Anaya*, No. 82-0067M, at 2–3 (D.N.M. Dec. 17, 1984) (on file with the *Columbia Law Review*) (imposing Section 3 preclearance to expire after ten years).

61. See 52 U.S.C. § 10302(c).

62. *Id.* § 10304(a); see also *Allen v. State Bd. of Elections*, 393 U.S. 544, 565–66 (1969) ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.").

63. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—[and] . . . applies broadly . . . to every political subdivision in a covered State, no matter how small." (citations omitted)); see also *Shelby County*, 133 S. Ct. at 2624 (reiterating and emphasizing concerns brought up by *Northwest Austin*).

64. 52 U.S.C. § 10302(c). For examples of how courts have tailored Section 3 preclearance, see *Jeffers v. Clinton*, 740 F. Supp. 585, 601–02 (E.D. Ark. 1990) (bailing Arkansas into preclearance only for changes to plurality-vote requirements in general

Section 3 preclearance is thus far more flexible and narrowly targeted than Section 5 preclearance, and as such, imposition of Section 3 preclearance is likely to survive judicial scrutiny under the Supreme Court's recent voting rights jurisprudence.

2. *Section 3 Preclearance Before Shelby County: Consent Decrees and Jeffers v. Clinton.* — Section 3 was largely forgotten between its enactment and *Shelby County*. Only eighteen jurisdictions were bailed into preclearance under Section 3 between the enactment of the VRA in 1965 and *Shelby County*.<sup>65</sup> For the sake of comparison, in the same time period, the DOJ issued 1,084 letters under Section 5 objecting to one or more election changes.<sup>66</sup> The exhaustive list of jurisdictions that were subjected to Section 3 preclearance prior to *Shelby County* includes the state of Arkansas;<sup>67</sup> the state of New Mexico and five counties within New Mexico;<sup>68</sup> one county in Nebraska;<sup>69</sup> one county and one school district in Florida;<sup>70</sup> one county in Illinois;<sup>71</sup> one city in Tennessee;<sup>72</sup> one school

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elections); *Sanchez*, No. 82-0067M, at 2–3 (imposing Section 3 preclearance only for state legislative redistricting plans).

65. See Brief for the Federal Respondent app. 1a–3a, *Shelby County*, 133 S. Ct. 2612 (No. 12-96), 2013 WL 315242.

66. The breakdown of objection letters issued by state is as follows: Alabama: 104, Alaska: 1, Arizona: 22, California: 6, Florida: 5, Georgia: 177, Louisiana: 148, Michigan: 1, Mississippi: 173, New Mexico: 1, New York: 13, North Carolina: 67, South Carolina: 122, South Dakota: 4, Texas: 207, Virginia: 33. See Section 5 Objection Letters, U.S. Dep't of Justice, <https://www.justice.gov/crt/section-5-objection-letters> [<http://perma.cc/BK29-U6AC>] (last updated Aug. 7, 2015). The data have been aggregated into a single spreadsheet. Section 5 Objection Letters (compiled Nov. 4, 2016) (unpublished data set) (on file with the *Columbia Law Review*).

67. *Jeffers*, 740 F. Supp. at 601.

68. See *United States v. McKinley County*, 941 F. Supp. 1062, 1064 (D.N.M. 1996) (referencing a 1986 consent decree under which “[t]he court retained oversight jurisdiction of the county’s electoral process for a period of five years”); Amended Joint Stipulation at 4, *United States v. Sandoval County*, No. 88-1457 (D.N.M. September 28, 2007) (on file with the *Columbia Law Review*) (describing a 1994 consent decree that “establish[ed] Voting Rights Act coverage for Sandoval County” under Section 3); Stipulation and Order at 8, *United States v. Cibola County*, No. 93-1134 (D.N.M. Apr. 21, 1994) (on file with the *Columbia Law Review*); Consent Agreement at 8, *United States v. Socorro County*, No. 93-1244 (D.N.M. Apr. 11, 1994) (on file with the *Columbia Law Review*); *Sanchez*, No. 82-0067M, at 2–3.

69. Consent Decree at 3, *United States v. Thurston County*, No. 78-0-380 (D. Neb. May 9, 1979) [hereinafter *Thurston Consent Decree*] (on file with the *Columbia Law Review*).

70. See *NAACP v. Gadsden Cty. Sch. Bd.*, 589 F. Supp. 953, 958–59 (N.D. Fla. 1984); Order at 3, *McMillan v. Escambia Cty.*, No. 77-0432 (N.D. Fla. Dec. 3, 1979) (on file with the *Columbia Law Review*).

71. See U.S. Comm’n on Civil Rights, Voting Rights Enforcement and Reauthorization: The Department of Justice’s Record of Enforcing the Temporary Voting Rights Act Provisions 12 (2006), <http://www.law.umaryland.edu/marshall/usccr/documents/051006VRASatReport.pdf> [<http://perma.cc/RPP4-WLJN>] (reporting that Alexander County in Illinois was covered under Section 3 between 1983 and 1988).

district in Colorado;<sup>73</sup> two counties in California;<sup>74</sup> two counties in South Dakota;<sup>75</sup> and one village in New York.<sup>76</sup> Two jurisdictions have been bailed into preclearance under Section 3 after *Shelby County*: Evergreen, Alabama and Pasadena, Texas.<sup>77</sup>

Eighteen of the twenty jurisdictions subjected to Section 3 preclearance consented to preclearance to settle a lawsuit. The first case to adversely impose Section 3 preclearance was *Jeffers v. Clinton*,<sup>78</sup> which bailed Arkansas into preclearance.<sup>79</sup> *Patino v. City of Pasadena* recently became the second case to adversely impose Section 3 preclearance, but the *Patino* opinion included only limited analysis of whether Section 3 relief was appropriate.<sup>80</sup>

Unlike *Patino*, the *Jeffers* court thoroughly analyzed whether Section 3 preclearance was an appropriate remedy. *Jeffers* held that the Arkansas legislature acted with discriminatory intent when it created a majority-vote requirement in response to the election of people of color to various public offices by a plurality vote.<sup>81</sup> After finding that the majority-vote statutes violated the Fourteenth and Fifteenth Amendments, the *Jeffers* court considered imposing Section 3 preclearance on Arkansas.<sup>82</sup> Unable to find prior cases interpreting Section 3, the court embarked on a detailed analysis of when preclearance under Section 3 may be

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72. Agreed Order at 3, *Brown v. Bd. of Comm'rs*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990) (on file with the *Columbia Law Review*).

73. See NAACP Legal Def. & Educ. Fund, A Primer on Sections 2 & 3(c) of the Voting Rights Act 3–4 & n.16 [http://www.naacpldf.org/files/case\\_issue/Sections%202%20and%203c%20primer%207.14.17%20%2800040994x9DDAC%29\\_0.pdf](http://www.naacpldf.org/files/case_issue/Sections%202%20and%203c%20primer%207.14.17%20%2800040994x9DDAC%29_0.pdf) [<http://perma.cc/8S2F-6HAG>] (last visited Sept. 26, 2017) (noting that the Montezuma-Cortez School District was bailed into Section 3 through a consent decree).

74. See U.S. Comm'n on Civil Rights, *supra* note 70, at 12 (noting Alameda County was covered under Section 3 from 1996 to 1998 and Los Angeles County was covered from 1991 to 2002).

75. Consent Decree at 2, *Blackmoon v. Charles Mix County*, No. 05-4017 (D.S.D. Dec. 4, 2007) (on file with the *Columbia Law Review*); Consent Decree at \*6–7, *Kirke v. Buffalo County*, No. 03-CV-3011 (D.S.D. Feb. 10, 2004), 2004 U.S. Dist. LEXIS 30960.

76. Consent Decree at 5, *United States v. Village of Port Chester*, No. 06-15173 (S.D.N.Y. Dec. 22, 2009) (on file with the *Columbia Law Review*).

77. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 729–30 (S.D. Tex. 2017); Order at 4, *Allen v. City of Evergreen*, No. 13-0107 (S.D. Ala. Jan. 13, 2014), 2014 WL 12607819 [hereinafter *Allen Order*].

78. 740 F. Supp. 585, 601 (E.D. Ark. 1990).

79. *Jeffers* bailed Arkansas into preclearance only for changes to plurality-vote requirements and for one upcoming redistricting decision. *Id.* at 601–02; see *supra* section I.B.1 for a discussion about the flexibility of Section 3 preclearance.

80. 230 F. Supp. 3d at 729 (stating Section 3 preclearance was an appropriate remedy because city officials “intentionally discriminated against Latinos”); see also *infra* sections II.C, III.C.2.

81. *Jeffers*, 740 F. Supp. at 594–95.

82. *Id.* at 599–600.

necessary.<sup>83</sup> The court first looked at the text of the statute, but proceeded to interpret the statutory text both narrowly<sup>84</sup> and broadly.<sup>85</sup>

The court then set a framework to guide its analysis of whether to impose Section 3 preclearance:

Have the violations been persistent and repeated? Are they recent or distant in time? Are they the kinds of violations that would likely be prevented, in the future, by preclearance? Have they already been remedied by judicial decree or otherwise? How likely are they to recur? Do political developments, independent of this litigation, make recurrence more or less likely?<sup>86</sup>

After considering these factors, but without explaining how each factor weighed in its decision, the court decided that limited preclearance was necessary.<sup>87</sup> The court carefully crafted its order of preclearance, tailoring it to the specific constitutional violation: “[A]ny further statutes, ordinances, regulations, practices, or standards imposing or relating to a majority-vote requirement in general elections in this State must be subjected to the preclearance process.”<sup>88</sup>

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83. *Id.* at 599–602.

84. *Id.* at 600 (“We also think that more than one violation must be shown. The statute uses the plural (‘violations,’) and it would be strange if a single infringement could subject a State to such strong medicine.”).

85. *Id.* (holding that use of the word “shall” does not mean that Section 3 preclearance is mandatory whenever constitutional violations are found). One may argue that *Jeffers* erred on this point, that the text of the statute does not allow a court any discretion and instead mandates imposition of Section 3 preclearance once a constitutional violation is found. See 52 U.S.C. § 10302(c) (2012) (“If . . . [the] court finds that violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief have occurred . . . the court . . . shall retain jurisdiction . . .”). The Supreme Court has recently held that the word “shall” eliminates judicial discretion. See, e.g., *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.”); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“The . . . instruction comes in terms of the mandatory ‘shall,’ which normally creates an obligation impervious to judicial discretion.”). But see *Hecht Co. v. Bowles*, 321 U.S. 321, 328–29 (1944) (rejecting an argument that the use of “shall” in a statute eliminated judicial discretion); see also Bryan A. Garner, *Shall We Abandon Shall?*, A.B.A. J.: Bryan Garner on Words (Aug. 1, 2012), [http://www.abajournal.com/magazine/article/shall\\_we\\_abandon\\_shall/](http://www.abajournal.com/magazine/article/shall_we_abandon_shall/) [<http://perma.cc/F5SR-ZSQQ>] (arguing the word “shall” is inherently ambiguous and can be interpreted as both mandatory and permissive).

86. *Jeffers*, 740 F. Supp. at 601.

87. *Id.* The court imposed Section 3 preclearance after stating that it “fully considered all of these factors in the light of the entire record,” but it didn’t describe how it considered each factor, so it is difficult to discern whether any factor carried more or less weight. *Id.*

88. *Id.* It is noteworthy that the court also considered—and dismissed—the state sovereignty considerations that motivated the *Shelby County* decision to declare Section 4(b) unconstitutional. “[W]e have in mind . . . the interest of the defendants in maintaining the sovereignty of the State, . . . [but] [t]he whole purpose of the Fourteenth and Fifteenth Amendments and of the Voting Rights Act is to override state action, and undue deference to state sovereignty cannot be permitted to thwart this purpose.” *Id.*

*Jeffers v. Clinton* garnered almost no attention from the legal academic community.<sup>89</sup> Along with Section 3 preclearance in general, *Jeffers* remained largely ignored until the Supreme Court handed down its opinion in *Shelby County v. Holder* and Section 3 morphed from an afterthought to the sole remaining pathway for requiring jurisdictions to preclear voting changes.

## II. SECTION 3 AFTER *SHELBY COUNTY*: NORTH CAROLINA STATE CONFERENCE OF THE NAACP *v. MCCRORY* AND *PATINO v. CITY OF PASADENA*

This Part reviews the aftermath of the *Shelby County* decision and evaluates the *North Carolina State Conference of the NAACP v. McCrory* and *Patino v. City of Pasadena* decisions. Section II.A explains how the *Shelby County* decision disempowered Section 5 preclearance and thrust Section 3 into the vanguard of the battle to protect voting rights. This section also provides background on post-*Shelby County* cases requesting Section 3 relief. Section II.B closely analyzes *North Carolina State Conference of the NAACP v. McCrory*, including the history of the challenged law, the district court's decision, and the Fourth Circuit's opinion finding intentional discrimination but opting not to impose Section 3 preclearance. Section II.C analyzes *Patino v. City of Pasadena*, which reached an opposite conclusion through similarly limited analysis. Section II.D discusses the potential consequences of the courts engaging in perfunctory analysis of plaintiffs' requests for Section 3 preclearance and considers how these opinions highlight the need for analytical clarity with respect to this now-critical section of the VRA.

### A. Section 3 Preclearance as a Possible Response to *Shelby County*

Voting rights advocates were distraught by the Court's *Shelby County* decision.<sup>90</sup> In the immediate aftermath of the decision, activists latched

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89. A Westlaw search conducted September 2, 2017, shows that thirty-five law review articles have cited *Jeffers* since it was decided over twenty-seven years ago. Westlaw, <http://1.next.westlaw.com> (search "740 F. Supp. 585"; then follow "citing references" hyperlink; then filter by "secondary sources"; then filter by "law reviews") (last visited Sept. 2, 2017). For the sake of comparison, Westlaw shows that 795 law review articles have cited *Shelby County* in just over four years since it was decided. Westlaw, <http://1.next.westlaw.com> (search "133 S. Ct. 2612"; then follow "citing references" hyperlink; then filter by "secondary sources"; then filter by "law reviews") (last visited Sept. 2, 2017). While it might seem unfair to compare a lone district court opinion to the Supreme Court opinion that upended fifty years of voting rights protection, the fact that *Jeffers* was not seen as a notable voting rights opinion is precisely the point.

90. See, e.g., Andrew Cohen, *On Voting Rights, a Decision as Lamentable as Plessy or Dred Scott*, Atlantic (June 25, 2013), <http://www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/> [<http://perma.cc/D75N-EBDZ>] (decrying the majority for deciding "that overt racial discrimination in the nation's voting practices is over and no longer needs all of the special federal protections it once did"); David Gans, *The Roberts Court v. the Constitution: Column*, USA Today (June 25, 2013), <http://www.usatoday.com/story/opinion/2013/06/25/supreme-court-justice-roberts->

onto Section 3 preclearance as a way to mitigate the consequences of Section 5's downfall.<sup>91</sup> Eric Holder, then the Attorney General, pledged that the DOJ would pursue Section 3 preclearance remedies to protect voters from discrimination after *Shelby County*.<sup>92</sup> Fulfilling this promise, the DOJ requested Section 3 preclearance as a remedy in lawsuits brought against Alaska, Texas, and North Carolina.<sup>93</sup>

The case in Alaska settled,<sup>94</sup> and the Fourth Circuit denied Section 3 relief in *McCrary*,<sup>95</sup> but Texas may still be bailed into Section 3 preclear-

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column/2456969/ [http://perma.cc/5BC2-XKBN] (last updated June 26, 2013) (describing the *Shelby County* decision as "a colossal failure").

91. See, e.g., Crum, *supra* note 18, at 1997–98 (pointing to Section 3 preclearance as a potential "secret weapon" in the event of Section 5 being declared unconstitutional); Adam Serwer, The Secret Weapon that Could Save the Voting Rights Act, MSNBC (July 8, 2013), <http://www.msnbc.com/politicsnation/the-secret-weapon-could-save-the-voting> [http://perma.cc/6MDN-8V FY] (last updated Oct. 2, 2013) (identifying Section 3 preclearance as "the primary tool for the Justice Department and voting rights activists seeking to patch the gaping hole left by the Supreme Court's verdict"). Proponents of the *Shelby County* decision also pointed to Section 3 preclearance as a way to minimize the effects of losing preclearance under Section 5. See Voting Rights Act After the Supreme Court's Decision in *Shelby County*: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. 42 (2013) (testimony of Hans A. von Spakovsky, Senior Legal Fellow, Heritage Foundation) (arguing that reinstating or updating Section 4 is unnecessary in light of Section 3).

92. See Eric Holder, U.S. Attorney Gen. of the U.S., Remarks at the National Urban League Annual Conference (July 25, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-at-national-urban-league-annual-conference> [http://perma.cc/4QLV-ZVQW] (stating the DOJ planned "to fully utilize the law's remaining sections to ensure that the voting rights of all American citizens are protected").

93. Separately, Evergreen, Alabama was bailed into Section 3 preclearance via consent decree in 2014. See Allen Order, *supra* note 77, at 1. This case involved a challenge to the city's proposed redistricting plan for the city council. The parties agreed to limited Section 3 preclearance for six years. *Id.*

94. In Alaska, the Native American Rights Fund filed a lawsuit against the state alleging that it had violated the VRA by "fail[ing] to provide oral language assistance to citizens whose first language is Yup'ik, the primary language of many Alaska natives." Press Release, Native Am. Rights Fund, Alaska Natives Sue Over Voting Rights Violations in Dillingham and Wade Hampton Regions (July 19, 2013), [http://narf.org/bloglinks/section\\_203\\_press\\_release.pdf](http://narf.org/bloglinks/section_203_press_release.pdf) [http://perma.cc/JS2X-YN24]. The plaintiffs requested for Alaska to be bailed into Section 3 preclearance for all future voting changes. Amended Complaint at 19, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska Sept. 30, 2015), 2014 WL 11152079 (requesting Section 3 preclearance for changes to any "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting"). After a two-week trial, the district court issued a partial order finding a violation of Section 2 and taking "under advisement [the] Plaintiffs' constitutional claim under the Fourteenth and Fifteenth Amendments." Stipulated Judgment and Order at 9, *Toyukak*, No. 3-13-cv-00137 (D. Alaska Sept. 30, 2015), 2015 WL 11120474. However, the request for Section 3 relief was dropped as part of the settlement agreement. *Id.* at 5 ("[I]n exchange for the terms of this Order, Plaintiffs agree to dismiss their claim under the Fourteenth and Fifteenth Amendments to the United States Constitution and their request for relief under Section 3(c) of the Voting Rights Act.").

95. See *infra* section II.B.

ance. In 2011, Texas passed Senate Bill (SB) 14, which created what would arguably be the nation's strictest voter ID requirements.<sup>96</sup> The bill's implementation was blocked by a D.C. District Court under Section 5 of the VRA, but was revived by the Texas legislature within hours of the *Shelby County* decision.<sup>97</sup> Voting rights groups, joined by the DOJ,<sup>98</sup> sued to block implementation of SB 14 under the VRA. They asked, inter alia, for Texas to be bailed back into preclearance under Section 3.<sup>99</sup> After a bench trial, the district court found that SB 14 had a discriminatory effect, was enacted with discriminatory purpose, and constituted a violation of the Fourteenth and Fifteenth Amendments.<sup>100</sup> The Fifth Circuit, sitting en banc, affirmed the district court's holding that the law violated Section 2 of the VRA (i.e., the law had a discriminatory effect) but reversed the district court's finding of discriminatory purpose and remanded the case for a redetermination of discriminatory intent.<sup>101</sup> On remand, the district court again found that Texas acted, "at least in part, with a discriminatory intent in violation of the Voting Rights Act . . ."<sup>102</sup> While the litigation was ongoing, Texas passed SB 5, a new version of the voter ID law.<sup>103</sup> However, the district court also blocked implementation of that law, holding in part that "the Texas Legislature's subsequent action in passing SB 5—after years of litigation to defend SB 14—does not govern a finding of [discriminatory] intent with respect to the previ-

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96. S.B. 14, 82d Leg., Reg. Sess. (Tex. 2011); see also *Texas NAACP v. Steen* (Consolidated with *Veasey v. Abbott*), Brennan Ctr. for Justice, <http://www.brennancenter.org/legal-work/naACP-v-steen> [<http://perma.cc/SR3U-9N56>] (last updated Sept. 1, 2017).

97. See Brennan Ctr. for Justice, *supra* note 96.

98. The DOJ has since changed its position. Under the direction of Attorney General Jeff Sessions, the DOJ now argues that it is unnecessary to bail Texas back into preclearance under Section 3. *Fernandez & Lichtblau*, *supra* note 22.

99. The plaintiffs made a general request for Section 3 relief rather than suggesting a tailored imposition of preclearance. *Veasey-LULAC Plaintiffs' Second Amended Complaint* at 32, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 2:13-cv-193), 2013 WL 11259532 (asking the court to "[r]etain jurisdiction and require Texas to obtain preclearance pursuant to Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c) with respect to its voting practices and procedures"); see *infra* note 192 (discussing whether a request for broad Section 3 preclearance is counterproductive).

100. *Veasey*, 71 F. Supp. 3d at 698–703.

101. *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc). This oversimplifies the procedural history a bit. After the district court's decision, the Fifth Circuit granted Texas's request to stay the injunction, *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014), and the Supreme Court denied the plaintiffs' motion to vacate the stay. *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.). The Fifth Circuit then granted plaintiffs' motion to rehear the case en banc, which resulted in the opinion cited here. For additional background on the Fifth Circuit's decision, see Jim Malewitz, *Texas Voter ID Law Violates Voting Rights Act*, *Court Rules*, *Tex. Trib.* (July 20, 2016), <http://www.texastribune.org/2016/07/20/appeals-court-rules-texas-voter-id/> [<http://perma.cc/4F77-NSE6>].

102. *Veasey v. Abbott*, No. 2:13-CV-193, 2017 WL 1315593, at \*1 (S.D. Tex. Apr. 10, 2017) (citation omitted).

103. See *Veasey v. Abbot*, No. 2:13-CV-193, 2017 WL 3620639, at \*2 n.6 (S.D. Tex. Aug. 23, 2017) (discussing SB 5), appeal docketed, No. 17-40884 (5th Cir. Aug. 24, 2017).

ous enactment.”<sup>104</sup> In the near future, the court will decide whether to impose Section 3 preclearance on Texas,<sup>105</sup> but at this point it is unclear what standard the court will use to determine whether to grant Section 3 relief.<sup>106</sup>

#### B. North Carolina State Conference of the NAACP v. McCrory

The lawsuit over Texas’s SB 14 exemplifies how Section 3, even though limited to cases involving discriminatory intent, can potentially play a significant role in protecting the right to vote after *Shelby County*. It is more important than ever to have an easily applied judicial standard for considering imposition of Section 3 preclearance. The following sections discuss in-depth two missed opportunities to create just such a standard: *North Carolina State Conference of the NAACP v. McCrory*<sup>107</sup> and *Patino v. City of Pasadena*.<sup>108</sup> This section analyzes *McCrory*, in which the Fourth Circuit declined to thoroughly engage with the question of Section 3 relief. Section II.B.1 reviews the background of the law at issue in the case, and section II.B.2 looks at the judicial treatment of the law by the district court and Fourth Circuit.

1. *Background of North Carolina HB 589*. — In 2010—for the first time in 112 years—Republicans won a majority of the seats in both houses of the North Carolina state legislature.<sup>109</sup> Two years later, Republican Governor Pat McCrory assumed office, giving Republicans hegemonic power in the state.<sup>110</sup> Shortly thereafter, legislative aides began requesting data breaking down the use of various voting practices by race.<sup>111</sup> The requests covered early voting and out-of-precinct voting

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104. *Id.* at \*2, \*11–12 (“Along with continued provisions that contribute to the discriminatory effects of the photo ID law, [the new law] on its face embodies some of the indicia of discriminatory purpose [of SB 14] . . .”); see also Paul J. Weber, Federal Judge Again Tosses Out Texas Voter ID Law, *Wash. Post* (Aug. 23, 2017), [http://www.washingtonpost.com/national/federal-judge-again-throws-out-texas-voter-id-law/2017/08/23/edcfb028-884d-11e7-96a7-d178cf3524eb\\_story.html](http://www.washingtonpost.com/national/federal-judge-again-throws-out-texas-voter-id-law/2017/08/23/edcfb028-884d-11e7-96a7-d178cf3524eb_story.html) (on file with the *Columbia Law Review*).

105. *Veasey v. Abbott*, No. 2:13-CV-193, at 2 (S.D. Tex. June 20, 2017) (on file with the *Columbia Law Review*).

106. *Cf. Veasey v. Abbott*, 71 F. Supp. 3d 627, 708 (S.D. Tex. 2014) (promising to schedule proceedings to “address the procedures to be followed for considering Plaintiffs’ request for relief under Section 3(c) of the Voting Rights Act”).

107. 831 F.3d 204 (4th Cir. 2017).

108. 230 F. Supp. 3d 667 (S.D. Tex. 2017).

109. William Wan, Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law, *Wash. Post* (Sept. 2, 2016) [http://www.washingtonpost.com/politics/courts\\_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc\\_story.html](http://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html) (on file with the *Columbia Law Review*) [hereinafter Wan, Monster Law] (detailing the initiation, adoption, and aftermath of North Carolina’s voting bill).

110. *Id.*

111. *Id.*

and also sought to determine the types of photo ID commonly held by people of different races.<sup>112</sup>

In early 2013, the North Carolina House of Representatives passed the first version of House Bill (HB) 589, which focused solely on voter IDs.<sup>113</sup> Three months later, the Supreme Court handed down its decision in *Shelby County*.<sup>114</sup> The very same day, Republican legislators indicated they would be introducing a more comprehensive version of HB 589.<sup>115</sup> The promised update was unveiled shortly thereafter: The new version eliminated same-day registration, out-of-precinct voting, and preregistration;<sup>116</sup> cut back on early voting; and detailed the specific types of photo ID to be accepted at polling stations.<sup>117</sup> In the span of five days—with only twenty minutes of public testimony—the bill was passed by both houses of the legislature and signed into law.<sup>118</sup>

2. *Judicial Analysis of the North Carolina Voting Bill.* — Voting rights advocacy groups, along with the DOJ, quickly challenged HB 589.<sup>119</sup> They alleged that HB 589 had discriminatory effects in violation of Section 2 of the VRA and that the North Carolina General Assembly passed the bill with a discriminatory purpose and therefore should be bailed back into preclearance under Section 3 of the VRA.<sup>120</sup>

The district court upheld the law in its entirety, finding that the law did not have a discriminatory result<sup>121</sup> and was not passed with discriminatory intent.<sup>122</sup> The Fourth Circuit disagreed: “[No] legislature in the Country [] has ever done so much, so fast, to restrict access to the franchise.”<sup>123</sup>

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Preregistration allowed “16- and 17-year-olds, when obtaining driver’s licenses or attending mandatory high school registration drives, to identify themselves and indicate their intent to vote[,]” which “allowed County Boards of Elections to verify eligibility and automatically register eligible citizens once they reached eighteen.” N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 217 (4th Cir. 2016) (citations omitted).

117. Wan, *Monster Law*, *supra* note 109.

118. H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

119. Wan, *Monster Law*, *supra* note 108.

120. First Amended Complaint at 38–39, N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320 (M.D.N.C. 2016) (No. 1:13-cv-658), 2013 WL 6253645; see also United States’ Opposition to Defendant’s Motion to Dismiss Voter Photo ID Claims at 5–8, *McCrory*, 182 F. Supp. 3d 320 (No. 1:13-CV-658), 2015 WL 4935020 (arguing that Section 3 relief should be granted because HB 589 was passed with discriminatory intent).

121. *McCrory*, 182 F. Supp. 3d at 486–88.

122. *Id.* at 488–503.

123. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 228 (4th Cir. 2016).

The Fourth Circuit's analysis of HB 589 focused on the "surgical precision" with which "the new provisions target African Americans."<sup>124</sup> In contrast to the district court's assertion that there was "little evidence of official discrimination [by the North Carolina General Assembly] since the 1980s,"<sup>125</sup> the Fourth Circuit gave significant weight to North Carolina's long history of discrimination and suppression of the minority vote, contrasted with the improved voter turnout among people of color when North Carolina was subject to Section 5 preclearance.<sup>126</sup>

The Fourth Circuit rejected as "clearly erroneous" the district court's finding that HB 589 was not passed with a discriminatory purpose.<sup>127</sup> The Fourth Circuit considered the same factors identified by the district court but objected to the district court's analysis for each finding.<sup>128</sup> The Fourth Circuit found that North Carolina had a long history of impermissible, race-based voter suppression (including numerous instances of attempted discrimination since the 1980s);<sup>129</sup> that the district court "refus[ed] to draw the obvious inference" from the "devastating . . . sequence of events" leading up to the passage of HB 589;<sup>130</sup> and that the district court erred in finding that North Carolina's decision to target voting mechanisms used disproportionately by minority voters did not "significantly favor a finding of discriminatory purpose."<sup>131</sup> The Fourth Circuit finally held that the North Carolina General Assembly acted with discriminatory intent by designing HB 589 to curtail only the voting practices disproportionately used by people of color, thus violating the Fourteenth and Fifteenth Amendments.<sup>132</sup>

The appellants asked the Fourth Circuit to declare the challenged provisions of HB 589 unconstitutional, to permanently enjoin said provisions, and to bail North Carolina into Section 3 preclearance.<sup>133</sup> The court granted the first two of these requests.<sup>134</sup>

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124. *Id.* at 214 ("[T]he legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.").

125. *McCrory*, 182 F. Supp. 3d at 497.

126. *McCrory*, 831 F.3d at 215, 223.

127. *Id.* at 223.

128. *Id.* at 223–33.

129. *Id.* at 223–25.

130. *Id.* at 227.

131. *Id.* at 230 (internal quotation marks omitted) (quoting N.C. State Conference of the NAACP v. *McCrory*, 182 F. Supp. 3d 320, 497 (M.D.N.C. 2016)).

132. *Id.* at 238.

133. Joint Brief of Plaintiffs-Appellants at \*76–77, *McCrory*, 831 F.3d 204 (No. 16-1468 (L)), 2016 WL 2942422.

134. *McCrory*, 831 F.3d at 241.

### C. Patino v. City of Pasadena

This section reviews *Patino v. City of Pasadena*, in which a district court found that Pasadena, Texas, intentionally discriminated against Latino citizens by diluting the Latino vote through redrawing the districts for city council elections. As a result, the court ordered preclearance for future changes to voting districts.<sup>135</sup>

Pasadena is segregated, a residual effect of “[r]estrictive housing covenants . . . in place until the 1940s.”<sup>136</sup> North Pasadena is “predominately Latino, older, and less prosperous,” and South Pasadena is “predominately Anglo, newer, and wealthier.”<sup>137</sup> Since 1992, the Pasadena City Council has comprised eight, single-member districts.<sup>138</sup> The council shares governing power with the mayor, who votes on issues before the council.<sup>139</sup> In the May 2013 city council election, the registered voters in four of eight districts were majority Latino, and a fifth district was forty-five percent Latino.<sup>140</sup> On June 27, 2013, two days after the Supreme Court’s *Shelby County* decision, Mayor Johnny Isbell called for the city council to form a committee to consider bond proposals, which he subsequently converted into a committee to consider redistricting.<sup>141</sup> He proposed several maps that combined single-member districts and at-large districts.<sup>142</sup> Mayor Isbell cast the tiebreaking vote in favor of holding a special election to convert the eight single-member city council districts into six single-member districts and two at-large districts.<sup>143</sup> Council members representing districts in North Pasadena cast the four votes against the proposal.<sup>144</sup>

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135. 230 F. Supp. 3d 667 (S.D. Tex. 2017). The court issued its order after “a seven-day bench trial, at which 16 witnesses testified and the court admitted 468 exhibits into evidence.” Id. at 674. For additional explanation of the circumstances surrounding *Patino*, see generally Mike Snyder, Judge’s Ruling in Voting Rights Case Not Kind to Pasadena’s Mayor, Hous. Chron. (Jan. 9, 2017), <http://www.houstonchronicle.com/news/columnists/greater-houston/article/Judge-s-ruling-in-voting-rights-case-not-kind-to-10845980.php> [<http://perma.cc/EFE4-M5L3>] (last updated Jan. 10, 2017).

136. *Patino*, 230 F. Supp. 3d at 684.

137. Id. at 678.

138. Id. at 681.

139. Id.

140. Id. at 690.

141. Id. at 681.

142. Id. Because at-large districts “allow 50 percent of voters to control 100 percent of seats, [they] . . . typically result in racially and politically homogenous elected bodies.” At-Large Election Systems, FairVote, <http://archive.fairvote.org/?page=766> [<http://perma.cc/88TS-A4H8>] (last updated Dec. 2009). Prior to *Shelby County*, the DOJ regularly blocked proposals to switch from single-member to at-large districts in Texas. *Patino*, 230 F. Supp. 3d at 697–98.

143. *Patino*, 230 F. Supp. 3d at 681–82. This vote was held even though the committee had decided against the redistricting proposal. Id. at 681.

144. Id. at 701.

The court found that the mayor and the city improperly used city resources to campaign for the redistricting proposal, including by directing city grants to neighborhoods in South Pasadena.<sup>145</sup> The court also found that the mayor and other Pasadena officials “used partisan terms as proxies for race or racial terms,” implying that the redistricting plan was necessary to prevent Pasadena from “fall[ing] under the power of Latinos, coded as ‘Democrats.’”<sup>146</sup> The redistricting proposal was approved after a “racially polarized” vote of 3,292 in favor and 3,213 against.<sup>147</sup>

The district court compared the probable results under the old, “all single-member” plan to the new “single-member plus at-large” plan and found that the new plan diluted the Latino vote in Pasadena.<sup>148</sup> After finding that the redistricting had a discriminatory effect, the court applied the *Arlington Heights* factors and found that the city had acted with discriminatory intent.<sup>149</sup>

D. *Two Decisions, Four Sentences of Analysis: Missed Opportunities to Set a New Standard for Section 3 Preclearance*

Although they reached opposite conclusions, neither the Fourth Circuit in *McCrorry* nor the district court in *Patino* wasted much ink in their respective analyses of the merits of Section 3 preclearance. The Fourth Circuit needed only two sentences to reject Section 3 relief: “[W]e decline to impose any of the discretionary additional relief available under § 3 of the Voting Rights Act, including imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements. Such remedies ‘[are] rarely used’ and are not necessary here in light of our injunction.”<sup>150</sup> The *Patino* court, on the other hand, needed only two sentences to *grant* Section 3 relief:

Because the court finds that Pasadena officials intentionally discriminated against Latinos in diluting their voting strength, the

145. *Id.* at 702–03 (reviewing use of city funds to campaign for the redistricting proposal and comparing the \$99,532.22 directed to South Pasadena during the campaign period to the \$776.23 directed to North Pasadena over the same time).

146. *Id.* at 703–04.

147. *Id.* at 704. “Latinos opposed the proposal with an estimated 99.6% of their votes.” *Id.* at 682.

148. *Id.* at 706–08, 718.

149. *Id.* at 721–26.

150. *N.C. State Conference of the NAACP v. McCrorry*, 831 F.3d 204, 241 (4th Cir. 2016) (alteration in original) (citation omitted) (quoting *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994)). The court plucked two words from *Conway School District v. Wilhoit* to make its case that Section 3 preclearance was an inappropriate remedy. The full sentence might support the opposite conclusion: “The preclearance remedy is rarely used, only being utilized in such a ‘systematic and deliberate’ case as *Jeffers*.” *Wilhoit*, 854 F. Supp. at 1442. Much of the court’s opinion in *McCrorry* is dedicated to showing how the North Carolina legislature systematically and deliberately tailored HB 589 to suppress the voting power of people of color. *McCrorry*, 831 F.3d at 223–26.

court grants the plaintiffs' request under § 3(c) to require Pasadena to submit future changes to its electoral map and plan to the Department of Justice for preclearance. The court also grants the request for an order under § 3(c) to retain jurisdiction to review, before it is enforced, any "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect" from the map and plan in use in the May 2013 election.<sup>151</sup>

The limited analyses in both *McCrory* and *Patino* leave future litigants and judges without guidance on the propriety and availability of Section 3 preclearance upon a finding of intentional discrimination. By declining to engage in meaningful analysis about whether to bail North Carolina into preclearance under Section 3, the Fourth Circuit missed a key opportunity to provide needed clarity on how to appropriately interpret a historically ignored statute that is likely to take on outsized importance in the coming years. The *Patino* opinion did little to rectify this omission; it does not provide proponents of Section 3 with guidelines on how to frame the argument for Section 3 preclearance, and its lack of justification for preclearance leaves it vulnerable to attack from parties opposing Section 3 relief.

Judicial opinions discussing Section 3 preclearance are rare, and future litigants will have no choice but to grapple with these two decisions granting and denying Section 3 relief. The perfunctory analyses of Section 3 within *McCrory* and *Patino* leave courts with no guidance on whether to impose Section 3 preclearance other than a single twenty-five-year-old district court opinion. Part III of this Note seeks to address this problem by filling in the gap and providing a workable judicial standard for considering Section 3 preclearance in the future.

### III. FILLING IN THE GAP: *MCCRORY*, *PATINO*, AND IMPOSING SECTION 3 PRECLEARANCE IN A POST-*SHELBY COUNTY* WORLD

The *McCrory* and *Patino* courts were the first to have the opportunity to create a new standard for analyzing claims for Section 3 relief in the post-*Shelby County* era, but they certainly will not be the last.<sup>152</sup> Section 3 has taken on increased significance as the only remaining conduit for bailing jurisdictions into preclearance, and these two cases represent a missed opportunity to introduce a reasonable, easily applied framework for considering Section 3 relief.

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151. *Patino*, 230 F. Supp. 3d at 729–30. Perhaps the court was persuaded by the mandatory language of Section 3 that it was required to impose preclearance upon a finding of discrimination, see *supra* note 85, but this was not explicitly stated in the opinion.

152. See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc) (remanding for new consideration of discriminatory purpose).

This Part seeks to fill in the gap left by the *McCrorry* and *Patino* opinions; it imagines what the missing analyses of the merits of Section 3 preclearance may have looked like and then it applies this framework to the facts of each case. Section III.A.1 argues that any judicial framework for imposing preclearance should be grounded in the Supreme Court's logic for upholding preclearance in *South Carolina v. Katzenbach*.<sup>153</sup> Section III.A.2 reexamines *Jeffers v. Clinton* and shows how that opinion—without actually citing *Katzenbach*—follows a nearly identical logical analysis of imposing preclearance. Section III.B proposes a three-pronged judicial standard for imposing Section 3 preclearance and discusses how it should be tailored. Section III.C returns to the facts of *McCrorry* and *Patino*, applies the three-pronged standard proposed in section III.B to each, and explains why Section 3 preclearance was appropriate in both cases. Section III.C also applies the proposed standard to the ongoing case of *Veasy v. Abbott*.

A. *Returning to What Works: How South Carolina v. Katzenbach Serves as a Guide for Imposing Section 3 Preclearance*

The obvious prerequisite for any preclearance framework is that it must survive scrutiny from a Supreme Court that has shown considerable skepticism of preclearance as a preemptive remedy for discriminatory voting mechanisms.<sup>154</sup> The Court in *Shelby County* was wary of the “substantial federalism costs” of Section 5 preclearance; the fact that Section 5 preclearance applied to only some of the states threatened the longstanding principle of “equal sovereignty” among the states.<sup>155</sup> However, even though the Court was concerned about the implications of Section 5 preclearance, it struck down only the coverage formula in Section 4(b) and left Section 5 intact.<sup>156</sup> The decision to refrain from also invalidating Section 5 serves as a tacit acknowledgement that preclearance may still be necessary in certain situations.<sup>157</sup> But any judicial framework for imposing preclearance under Section 3 must meet the *Shelby County* criterion: A court may impose preclearance only if the potential consequences of failing to do so outweigh preclearance's costs on principles of federalism and equal sovereignty.

One logical way to ensure that the proposed framework for Section 3 preclearance does not run afoul of the Supreme Court is to base it on the

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153. 383 U.S. 301 (1966), abrogated by *Shelby County v. Holder*, 133 S. Ct. 2612, 2627–28 (2013).

154. See, e.g., *Shelby County*, 133 S. Ct. at 2618 (describing Sections 4(b) and 5 of the VRA as “extraordinary measures” and “strong medicine”).

155. *Id.* at 2621 (internal quotation marks omitted) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202–03 (2009)).

156. *Id.* at 2631.

157. *Cf. id.* (explaining that “Congress may draft another formula” for requiring certain jurisdictions to preclear changes to voting mechanisms).

Court's own rationale, explained in *South Carolina v. Katzenbach*,<sup>158</sup> for upholding preclearance in the first place. Writing in 1966, the Court in *Katzenbach* found preclearance justifiable because:

Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and [black] registration.<sup>159</sup>

This rationale, that preclearance is “justified” when it “address[es] ‘voting discrimination where it persists on a pervasive scale,’” survived the *Shelby County* decision and forms the foundation of the framework proposed by this section.<sup>160</sup> Section III.A.1 examines the *Katzenbach* Court’s rationale for upholding preclearance. Section III.A.2 finds the spirit of *Katzenbach* within the *Jeffers* court’s rationale for bailing Arkansas into preclearance. Finally, section III.A.3 gleans from these two decisions a judicial standard for imposing Section 3 preclearance that may survive judicial scrutiny after *Shelby County*.

1. *South Carolina v. Katzenbach and the Justification for Preclearance.* — The Court in *Katzenbach* upheld the VRA’s preclearance requirement because it found that individual lawsuits against discriminatory voting mechanisms frequently had little success in stemming the tide of discrimination.<sup>161</sup> The Court observed many states following a pattern of changing tactics in response to unfavorable judicial decisions in order to perpetuate a status quo that prevented people of color from exercising their right to vote.<sup>162</sup> The Court noted that continuously challenging each new technique of voter suppression was time consuming and forced

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158. 383 U.S. at 314.

159. *Id.* Even though *Shelby County* abrogated *Katzenbach* inasmuch as it struck down the coverage formula that *Katzenbach* found acceptable, the majority opinion in *Shelby County* acknowledged that preclearance would still be valid if “exceptional conditions . . . exist justifying such an ‘extraordinary departure from the traditional course of relations between the States and the Federal Government.’” *Shelby County*, 133 S. Ct. at 2631 (quoting *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 500–01 (1992)).

160. *Shelby County*, 133 S. Ct. at 2620 (quoting *Katzenbach*, 383 U.S. at 308).

161. See *Katzenbach*, 383 U.S. at 328 (“Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting . . .”).

162. *Id.* at 310–11 (listing the numerous methods states employed to prevent people of color from voting); see also *id.* at 314 (“[W]hen favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees . . .”).

people of color to live under these discriminatory laws while they were being challenged.<sup>163</sup>

In light of these findings, the Court upheld the VRA, stating:

Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting [and] . . . [a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.<sup>164</sup>

Returning later to the specific requirement of preclearance, the Court acknowledged that requiring jurisdictions to preclear all changes to voting mechanisms was “an uncommon exercise of congressional power,”<sup>165</sup> but nonetheless found it to be appropriate because “Congress had reason to suppose that . . . States might try similar [discriminatory changes to voting mechanisms] in the future.”<sup>166</sup>

In sum, the Court in *Katzenbach* believed that preclearance was an appropriate remedy when individual lawsuits brought under Section 2 of the VRA could not easily address discriminatory changes to voting mechanisms and when there was reason to believe that, upon defeat, an intentionally discriminating jurisdiction would try again to prevent people of color from exercising the right to vote. The following section returns to *Jeffers v. Clinton* and explains how the court’s analysis in that case about whether to bail Arkansas into preclearance under Section 3 of the VRA neatly tracks the Supreme Court’s justification for preclearance as a remedy in *Katzenbach*.

2. *Jeffers on Katzenbach: Preclearance as a Response to the Inadequacy of Individual Lawsuits.* — Section I.B.2 touched upon the framework the court in *Jeffers v. Clinton* used to justify imposing Section 3 preclearance on Arkansas. Again, the factors considered in *Jeffers* were:

Have the violations been persistent and repeated? Are they recent or distant in time? Are they the kinds of violations that would likely be prevented, in the future, by preclearance? Have they already been remedied by judicial decree or otherwise? How likely are they to recur? Do political developments, independent of this litigation, make recurrence more or less likely?<sup>167</sup>

The court applied these factors to Arkansas’s decision to “enact[] new majority-vote requirements for municipal offices, in an effort to frus-

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163. See *id.* at 315 (discussing voting-discrimination litigation in Selma, Alabama that took four years to come to a conclusion).

164. *Id.* at 328.

165. *Id.* at 334.

166. *Id.* at 335.

167. *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990).

trate black political success in elections traditionally requiring only a plurality to win.”<sup>168</sup>

The *Jeffers* court did not specifically cite *South Carolina v. Katzenbach*, but the above factors trace the logic *Katzenbach* followed in upholding Section 5 preclearance. *Katzenbach* found preclearance necessary because offending jurisdictions persistently looked for ways to evade judicial decrees and continually infringed upon people of color’s voting rights.<sup>169</sup> *Jeffers* looked for substantively the same thing by asking if violations were repeated, if they were likely to recur, and if unrelated political developments made new violations more or less likely.<sup>170</sup> The *Katzenbach* Court believed that preclearance was necessary because individual litigation proved ineffective at fighting voter suppression.<sup>171</sup> *Jeffers* evidenced a similar concern by querying whether violations have already been remedied by judicial decree and whether similar violations would be prevented by preclearance.<sup>172</sup> Additionally, both opinions recognized that “substantial federalism costs”<sup>173</sup> were inevitable when forcing jurisdictions to preclear changes to voting mechanisms.<sup>174</sup> However, both decisions found that, given sufficiently severe violations of the Fifteenth Amendment, protecting the right to vote for people of color outweighed even significant concerns of infringing upon state sovereignty.<sup>175</sup>

Although *Jeffers* did not explicitly look to *Katzenbach* for guidance, there is little daylight between the two opinions in how they analyze whether preclearance is necessary. Therefore, this Note will follow their lead in proposing a judicial standard for imposing Section 3 preclearance. Section III.B, below, lays out a standard that the *McCrorry* and *Patino* courts could have used to determine the appropriateness of Section 3

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168. *Id.* at 586.

169. *Katzenbach*, 383 U.S. at 314 (“[W]hen favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees . . .”).

170. *Jeffers*, 740 F. Supp. at 601.

171. *Katzenbach*, 383 U.S. at 313 (“Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination[,] . . . [but] these new laws have done little to cure the problem of voting discrimination.”).

172. *Jeffers*, 740 F. Supp. at 602.

173. *Shelby County v. Holder*, 133 S. Ct. 2612, 2621 (2013) (internal quotation marks omitted) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

174. See *Katzenbach*, 383 U.S. at 334 (describing Section 5 of the VRA as “an uncommon exercise of congressional power”); *Jeffers*, 740 F. Supp. at 601 (“[W]e have in mind the strong . . . interest of the defendants in maintaining the sovereignty of the State . . .”).

175. *Katzenbach*, 383 U.S. at 334 (“[T]he Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate.”); *Jeffers*, 740 F. Supp. at 601 (“The whole purpose of the Fourteenth and Fifteenth Amendments and of the Voting Rights Act is to override state action, and undue deference to state sovereignty cannot be permitted to thwart this purpose.”).

preclearance. Section III.C then applies this standard to the facts of both cases.

B. *A Standard for Imposing Section 3 Preclearance*

This section proposes a practical judicial standard for imposing Section 3 preclearance, distilled from *Katzenbach* and *Jeffers* and adapted to ensure that imposition of Section 3 preclearance survives constitutional scrutiny. This standard looks at three factors. Section III.B.1 sets out an initial requirement that the violation be sufficiently severe to overcome federalism concerns. Section III.B.2 argues that a court should grant Section 3 relief when repeat violations are likely absent preclearance. Section III.B.3 discusses how a court should weigh the relative difficulty of correcting future violations through individual lawsuits under Section 2 of the VRA when considering Section 3 preclearance. Finally, section III.B.4 explains that when a court grants Section 3 relief, it should be appropriately tailored to respond to the violation at hand.

1. *The Violation Must Be Sufficiently Severe to Justify Infringing on State Sovereignty.* — A jurisdiction should not be bailed into preclearance absent a sufficiently severe infringement on the voting rights of a particular group. This factor is necessary given the Supreme Court's unease with the burdens preclearance places on the "fundamental principle of equal sovereignty" among the states.<sup>176</sup> Some level of severity may be presumed, however, because a court may consider imposing Section 3 preclearance only when it finds a jurisdiction intentionally discriminated against a protected class.<sup>177</sup> Preclearance in response to a specific constitutional violation is a far cry from preclearance based on a fifty-year-old coverage formula.<sup>178</sup> For these reasons, a constitutional violation should carry with it a presumption of sufficient severity; this factor serves as a shibboleth to weed out any obviously minor instances of intentional discrimination with regard to voting rights.

2. *Section 3 Preclearance Should Be Imposed if Future Constitutional Violations Are Likely.* — A court should bail a jurisdiction into preclearance if the court determines that the jurisdiction is likely to violate either the Fourteenth or Fifteenth Amendment again in the future.<sup>179</sup> This

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176. *Shelby County*, 133 S. Ct. at 2622 (internal quotation marks omitted) (quoting *Nw. Austin*, 557 U.S. at 203).

177. See *supra* section I.B.

178. See *supra* section I.A.2. Preclearance that is tailored to the specific constitutional violation found by the court further eases federalism concerns. See *supra* section I.B.1.

179. One might argue that once a court finds that a jurisdiction intentionally discriminated to limit certain groups' ability to vote, there should be a presumption that it will continue to act with that discriminatory intent in the future, since people who intentionally discriminate against people of color are unlikely to change their opinions just because a court told them that discrimination was wrong. One famous example of this is how, after the Supreme Court outlawed race-based preemptory strikes, *Batson v. Kentucky*, 476 U.S. 79 (1986), Philadelphia Assistant District Attorney Jack McMahon appeared in a training video

factor was given considerable weight by both *Katzenbach* and *Jeffers*.<sup>180</sup> The main purpose of preclearance is to prevent jurisdictions that have discriminated in the past from discriminating again in the future. Therefore, a finding that a jurisdiction is likely to commit new constitutional violations should weigh strongly in favor of imposing preclearance.

A jurisdiction with a long history of discrimination is more likely to commit future constitutional violations than a jurisdiction without such a history,<sup>181</sup> so a court should look at past instances of discrimination in a given jurisdiction.<sup>182</sup> The court should consider both constitutional violations and violations of Section 2 of the VRA.<sup>183</sup> The court should also give greater weight to more recent instances of discrimination and not rely too heavily on violations that occurred many years ago.<sup>184</sup> Clearly, a greater number of past violations will be more determinative than a lesser number, but any recent history of discrimination should tilt the balance toward imposing preclearance.<sup>185</sup>

A court may also look to whether circumstances surrounding the challenged violation have changed to such an extent that repeat vio-

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encouraging new district attorneys to continue to strike people of color from juries but to construct a nondiscriminatory façade to remain on the lawful side of *Batson*. See L. Stuart Ditzen, Linda Loyd & Mark Fazlollah, Avoid Poor Black Jurors, McMahon Said, Phila. Inquirer, Apr. 1, 1997, at A1 (on file with the *Columbia Law Review*). The full training video is available at Jack McMahon, DATV Productions, Jury Selection with Jack McMahon All 1 Hour and 1 Minute, <http://www.youtube.com/watch?v=Ag2IL3mqSQ> (on file with the *Columbia Law Review*) (last visited Aug. 8, 2017).

180. See *supra* notes 169–170 and accompanying text.

181. See *supra* note 179; see also *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (“[W]hen favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees . . .”).

182. If the jurisdiction in question was subject to Section 5 preclearance prior to the *Shelby County* decision, the court should also consider proposed voting changes that were rejected by the DOJ. See N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 224 (4th Cir. 2016) (noting the DOJ had issued over fifty objection letters to proposed voting changes in North Carolina between 1980 and 2013). Otherwise, many jurisdictions would erroneously appear to have no recent history of discrimination.

183. Even though Section 2 does not require discriminatory intent, see *supra* section I.A.1, voting laws that have discriminatory effects can be indicative of a tendency to discriminate and should also factor in the court’s analysis, especially if they are numerous.

184. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2628–29 (2013) (decrying Congress’s use of “decades-old data” to justify the VRA coverage formula); see also *Veasey v. Abbott*, 830 F.3d 216, 232 (5th Cir. 2016) (en banc) (“[U]nless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value.” (internal quotation marks omitted) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987))).

185. *Jeffers* disagrees, stating that “more than one violation must be shown” in order to impose preclearance. *Jeffers v. Clinton*, 740 F. Supp. 585, 600 (E.D. Ark. 1990). However, if the other factors of this standard weigh in favor of granting Section 3 relief, one serious attempt to disempower people of color should be enough to justify imposing preclearance.

lations are more or less likely.<sup>186</sup> If a jurisdiction chooses to intentionally discriminate against people of color, it is reasonable to assume that it may do so again absent changed circumstances or incentives that would make a new offense less likely.<sup>187</sup> This consideration sounds in *Jeffers*, which asked whether “political developments, independent of [the current] litigation, make recurrence more or less likely,”<sup>188</sup> and is also supported by *Katzenbach*, which noted that states sanctioned for discrimination could be reasonably expected to “try similar maneuvers in the future in order to evade . . . remedies for voting discrimination.”<sup>189</sup> But significant changes to the circumstances surrounding a discriminatory voting law may weigh against imposing Section 3 preclearance. If the proponents of a particular voting change lost a subsequent election, for example, future violations may be less likely, making Section 3 preclearance less necessary.

3. *Section 3 Preclearance Is Merited when Challenging Violations Through Individual Lawsuits Would Be “Onerous.”* — Third and finally, a court should favor imposing preclearance when future potential discriminatory actions would be difficult to overcome with individual lawsuits. This factor stems from *Katzenbach*’s concern with how the extended nature of litigation forced victims of discrimination to endure under discriminatory laws.<sup>190</sup> Consequently, a court should consider whether future violations would necessitate complex litigation. If so, this should weigh in favor of imposing preclearance. For example, a straightforward lawsuit against an individual official who is applying a facially nondiscriminatory law in a discriminatory way does not invite preclearance in the same way as a concerted legislative effort to dilute the voting power of people of color.<sup>191</sup>

4. *Section 3 Preclearance Should Be Appropriately Tailored.* — If a court considers the above factors and decides to impose Section 3 preclearance on a jurisdiction, the next step is to appropriately tailor the scope of preclearance to ensure that it effectively prevents future discrimination without incurring unnecessary federalism costs.<sup>192</sup> There are two primary

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186. As a starting point, the court should acknowledge that the *Shelby County* decision represents a change of circumstances that makes constitutional violations more likely in jurisdictions that had previously been subject to Section 5 preclearance.

187. See supra note 179; cf. Nat’l Research Council, *Measuring Racial Discrimination* 56 (Rebecca M. Blank et al. eds., 2004) (explaining that when people receive support for discriminatory actions they often continue to discriminate).

188. *Jeffers*, 740 F. Supp. at 601.

189. *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966).

190. *Id.* at 315.

191. When tailoring the scope of Section 3 preclearance to impose on Arkansas, *Jeffers* distinguished between “explicit elections laws or practices” and “individual actions by officials charged with administering laws and practices neutral on their face,” finding that preclearance was not appropriate for the latter. *Jeffers*, 740 F. Supp. at 601.

192. See supra section I.B for a review of Section 3’s flexibility and how it alleviates the federalism concerns expressed by the Supreme Court in *Shelby County*. The complaints for all three of the cases introduced in section II.A asked for broad application of Section 3;

aspects of Section 3's flexibility: the types of voting changes covered by preclearance and the duration of the preclearance requirement.

Under Section 3 (as opposed to Section 5), a court can tailor preclearance to cover only certain types of changes to voting laws or mechanisms. Both instances of adversely imposed Section 3 preclearance, *Jeffers* and *Patino*, limited preclearance to the type of law that gave rise to the constitutional violation.<sup>193</sup> This approach has the benefit of ensuring that the preclearance remedy is "sufficiently related to the problem that it targets."<sup>194</sup> However, imposing preclearance only for the type of violation at hand may inhibit Section 3 preclearance from meeting its primary goal: to prevent future instances of discrimination in a given jurisdiction. *Katzenbach* found Section 5 preclearance justified because it prevented jurisdictions from responding to unfavorable court decisions by "switch[ing] to discriminatory devices not covered by the federal decrees."<sup>195</sup> If courts require jurisdictions to preclear only changes similar to those that have already been declared unconstitutional, those jurisdictions may be able to avoid the brunt of preclearance simply by switching discriminatory strategies. Therefore, while a court should be careful to not impose overly broad preclearance under Section 3, it should also not default to imposing preclearance only for the type of discriminatory device in the case at hand.<sup>196</sup>

Section 3 also gives a court wide discretion regarding the duration of preclearance requirements.<sup>197</sup> In exercising this discretion, courts should be cautious of setting an excessively lengthy period during which a jurisdiction must preclear changes given *Shelby County's* insistence that preclearance be responsive to present-day needs.<sup>198</sup> In the past, courts

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they requested that the respective defendants be required to preclear *all* changes to voting mechanisms. See *supra* notes 92, 99, 120. While it is understandable that plaintiffs are loathe to preemptively limit the scope of their potential remedies, there is a strong argument that a court would be more willing to consider a narrowly tailored request, and one that directly responds to the alleged constitutional violation, to bail a jurisdiction into preclearance under Section 3.

193. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 730 (S.D. Tex. 2017) (ordering Pasadena to preclear future changes to its city council election map); *Jeffers*, 740 F. Supp. at 601–02 (limiting a preclearance order to future changes to plurality-vote laws).

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

195. 383 U.S. at 314.

196. The discussion in section III.C, *infra*, demonstrates how different scenarios merit different scopes of preclearance. The North Carolina legislature enacted sweeping changes to voting procedures, discriminating against people of color in several different ways. Pasadena discriminated against its Latino population only through redistricting. The former logically requires a more expansive preclearance remedy than the latter.

197. 52 U.S.C. § 10302(c) (2012) (granting courts the power to retain jurisdiction to "prevent commencement of new devices to deny or abridge the right to vote").

198. *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013) (noting the VRA "imposes current burdens and must be justified by current needs" (internal quotation marks omitted) (quoting *Nw. Austin*, 557 U.S. at 203)).

have ordered preclearance for between five and ten years.<sup>199</sup> Future courts should follow these examples, especially because the statute allows a court to revisit its preclearance order at a later time, either to extend the duration of preclearance or cut it short.<sup>200</sup>

The above sections propose one option for a judicial standard for analyzing whether Section 3 preclearance is an appropriate remedy when a court finds that a jurisdiction enacted a new law or voting mechanism with discriminatory purpose. Sections III.C.1 and III.C.2, below, apply this standard to the facts of *McCrorry* and *Patino*. Section III.C.3 briefly considers whether the court in *Veasey v. Abbott* should bail Texas into preclearance under Section 3.

### C. *Applying the Standard: Revisiting McCrorry and Patino*

1. *Should North Carolina Have Been Bailed in Under Section 3?*— This section uses the three-pronged standard described above to imagine what might have been if—instead of summarily dismissing the plaintiffs’ request for Section 3 relief—the Fourth Circuit had taken the opportunity to thoroughly consider bailing North Carolina into preclearance.

First, was North Carolina’s constitutional violation sufficiently severe to justify impinging on its sovereignty by bailing it into preclearance? Section III.B.1 argued for a presumption of severity in response to a constitutional violation, but that presumption is unnecessary here. The Fourth Circuit found that HB 589 “target[ed] African Americans with almost surgical precision”<sup>201</sup> and further stated that “[no] legislature in the Country [] has ever done so much, so fast, to restrict access to the franchise.”<sup>202</sup> Relying on this analysis, it is safe to assume that the constitutional violation found by the Fourth Circuit in *McCrorry* was sufficiently severe to outweigh the federalism costs of bailing North Carolina into preclearance.

Second, do the facts of *McCrorry* suggest that North Carolina is likely to enact more discriminatory laws in the future? The Fourth Circuit looked into North Carolina’s past and found a longstanding pattern of impermissible voter suppression, finding violations that were persistent, repeated, and recent, stretching from Jim Crow to the *Shelby County* deci-

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199. See, e.g., *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 730 (S.D. Tex. 2017) (suggesting a five-year period for preclearance); *Allen et al. v. City of Evergreen*, No. 13-0107, 2014 WL 12607819, at \*3 (S.D. Ala. Jan. 13, 2014) (imposing preclearance for six years); *Sanchez v. Anaya*, No. 82-0067M, at 2–3 (D.N.M. Dec. 17, 1984) (on file with the *Columbia Law Review*) (imposing preclearance for ten years); *Thurston Consent Decree*, supra note 69, at 3 (imposing Section 3 preclearance for five years).

200. See 52 U.S.C. § 10302(c) (granting courts the power to retain jurisdiction for preclearance orders under Section 3).

201. *N.C. State Conference of the NAACP v. McCrorry*, 831 F.3d 204, 214 (4th Cir. 2016).

202. *Id.* at 228.

sion.<sup>203</sup> Between 1980 and 2013, the DOJ objected under Section 5 of the VRA<sup>204</sup> to twenty-seven laws that either originated with or were officially approved by the North Carolina General Assembly.<sup>205</sup> The panel described these DOJ objection letters as “administrative finding[s] of discrimination.”<sup>206</sup> Additionally, “private plaintiffs brought fifty-five successful cases under § 2 of the Voting Rights Act.”<sup>207</sup> Finally, *McCrory* noted that a three-judge district court panel found—mere months before the *McCrory* decision—that the North Carolina General Assembly violated the Equal Protection Clause of the Fourteenth Amendment through impermissible racial gerrymandering of congressional districts.<sup>208</sup> This extensive history of discrimination, while not dispositive, weighs strongly in favor of imposing preclearance.<sup>209</sup>

Additionally, the North Carolina legislature’s incentives for passing HB 589 have not changed in light of their defeat in *McCrory*. People of color still tend to vote for Democratic candidates,<sup>210</sup> and the Republicans that passed HB 589 still want to win elections.<sup>211</sup> The North Carolina Republican Party made its feelings on this issue clear when, in the days leading up to the 2016 election, the Party issued a statement celebrating

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203. *Id.* at 223–25. Because much of North Carolina was covered by the now-defunct coverage formula in Section 4(b) of the VRA, the Fourth Circuit gave significant weight to the fact that the DOJ “issued over fifty objection letters to proposed election law changes in North Carolina . . . because the State had failed to prove the proposed changes would have no discriminatory purpose or effect.” *Id.* at 224.

204. See *supra* section I.A.2.

205. *McCrory*, 831 F.3d at 224.

206. *Id.* (internal quotation marks omitted) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978)).

207. *Id.* See *supra* section I.A.1 for an overview of Section 2 of the VRA.

208. *McCrory*, 831 F.3d at 225 (citing *Harris v. McCrory*, 159 F. Supp. 3d 600, 603–04 (M.D.N.C. 2016)).

209. Additionally, the fact that *Shelby County* now allows North Carolina to change voting laws and mechanisms without DOJ approval increases the likelihood of this type of violation recurring. See Wan, *Monster Law*, *supra* note 109 (reporting the chairman of the North Carolina Senate Rules Committee chose to move forward with the more comprehensive version of HB 589 only once the “legal headache” of Section 5 [was] out of the way” (quoting Tom Apodaca, Chairman of the North Carolina Senate Rules Committee)).

210. See Alec Tyson & Shiva Maniam, *Behind Trump’s Victory: Divisions by Race, Gender, Education*, Pew Research Ctr. (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education/> [http://perma.cc/PAB2-BMY6] (reporting black voters chose Hillary Clinton over Donald Trump by an 88% to 8% margin).

211. Cf. *McCrory*, 831 F.3d at 221–23. The Fourth Circuit considered how legitimate partisan purposes for changes to voting laws can be difficult to separate from illegitimate discriminatory purposes and concluded that “[u]sing race as a proxy for party may be an effective way to win an election[,] [b]ut intentionally targeting a particular race’s access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose,” and is therefore impermissible. *Id.* at 222.

low early voting turnout for people of color.<sup>212</sup> And although Pat McCrory—the Republican governor who signed HB 589 into law—lost the 2016 election to Roy Cooper,<sup>213</sup> Republicans kept veto-proof majorities in both houses of the North Carolina legislature.<sup>214</sup> Therefore, the election of a Democratic governor is not a “political development[, independent of [the current] litigation, [that] make[s] recurrence . . . less likely.”<sup>215</sup> Finally, there is evidence that the legislature is, in fact, writing a new law that may infringe upon the voting rights of people of color.<sup>216</sup> North Carolina’s long history of voter suppression and the legislature’s strong incentives to try again after the Fourth Circuit’s decision tip the second factor to weigh in favor of bailing North Carolina into preclearance under Section 3 of the VRA.<sup>217</sup>

The last factor considers whether future violations may be easily resolved through individual lawsuits absent preclearance.<sup>218</sup> In this case, the Fourth Circuit’s injunction, granted on July 29, 2016,<sup>219</sup> came nearly three years after the original complaint was filed<sup>220</sup> and after multiple stops at the district, appellate, and Supreme Court levels. It is likely that a lawsuit challenging a future attempt to suppress the voting rights of people of color would be similarly drawn out because the legislature has every reason to fight tooth and nail to prevent its law from being struck

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212. Press Release, N.C. Republican Party, NCGOP Sees Encouraging Early Voting, Obama/Clinton Coalition Tired, Fail to Resonate in North Carolina (Nov. 6, 2016), <http://us2.campaign-archive2.com/?u=f3100bc5464cbba2f472ddf2c&id=e4b9a8fb19> [<http://perma.cc/QM89-G5RB>] (touting the fact that “African American Early Voting is down 8.5%” when compared to 2012).

213. David A. Graham, *The North Carolina Governor’s Race Is Finally Over*, Atlantic (Dec. 5, 2016), <http://www.theatlantic.com/politics/archive/2016/12/north-carolina-governor-pat-mccrory-concedes-to-roy-cooper/509603/> [<http://perma.cc/7HBZ-A99C>].

214. Paul Woolverton, *Republicans Retain Veto-Proof Control of N.C. Legislature*, Fayetteville Observer (Nov. 9, 2016), <http://www.fayobserver.com/b91337dc-a63b-11e6-94b0-df0d1417c782.html> [<http://perma.cc/BGQ9-NBTH>].

215. *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990).

216. William Wan, *North Carolina’s Battle over Voting Rights Intensifies*, Wash. Post (May 29, 2017), [http://www.washingtonpost.com/national/north-carolinas-battle-over-voting-rights-intensifies/2017/05/29/a977a26c-43fd-11e7-a196-a1bb629f64cb\\_story.html](http://www.washingtonpost.com/national/north-carolinas-battle-over-voting-rights-intensifies/2017/05/29/a977a26c-43fd-11e7-a196-a1bb629f64cb_story.html) (on file with the *Columbia Law Review*) (reporting the North Carolina Republican Party is in the process of developing a new voting law).

217. Additionally, the nature of HB 589—how it was dramatically expanded after the *Shelby County* decision and passed with little deliberation or opportunity for public input—suggests that the North Carolina legislature was not appreciably concerned with the constitutionality of its actions. See *supra* section II.B.1.

218. Arguably, this is the only factor that the Fourth Circuit touched on in its opinion, holding that Section 3 preclearance was “not necessary . . . in light of our injunction.” *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016).

219. *Id.*

220. Complaint at 32, *N.C. State Conference of NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016) (No. 1:13-CV-658), 2013 WL 4053231.

down.<sup>221</sup> This is much different from the hypothetical discussed above,<sup>222</sup> where the state may disavow discriminatory application of a nondiscriminatory law by an individual state employee and therefore avoid multiyear litigation. Thus, this factor also weighs in favor of imposing Section 3 preclearance on North Carolina.

All three of the factors discussed in section III.B support bailing North Carolina into preclearance under Section 3 of the VRA. The next step, as discussed in section III.B.4, is to tailor the imposition of preclearance to ensure that it is “sufficiently related to the problem that it targets.”<sup>223</sup> First, HB 589 was a state law, and there was no reason to impose preclearance on localities within the state, so preclearance should have been imposed on state legislative actions only. Second, HB 589 warranted broad Section 3 preclearance, covering all changes to voting laws enacted by the General Assembly. HB 589 was a multifaceted bill that adopted several different measures to target people of color in North Carolina “with almost surgical precision.”<sup>224</sup> This is different from both *Jeffers*, in which Arkansas repeatedly passed one type of law in response to people of color being elected to various offices,<sup>225</sup> and *Patino*, in which a redistricting plan was the sole issue under consideration.<sup>226</sup> An expansive attempt to discriminate merits a proportionally expansive preclearance remedy. Finally, if the Fourth Circuit bailed North Carolina into preclearance, it should have been limited to five or ten years. This would be in line with previous cases and satisfy the Supreme Court’s requirement that preclearance be responsive to the current situation and not based on long-ago discriminatory actions.<sup>227</sup>

In sum, not only did the Fourth Circuit miss an excellent opportunity to bring clarity to a newly important section of the VRA, but it also likely should have bailed North Carolina into preclearance. While the Fourth Circuit’s injunction prevented the worst parts of HB 589 from being enacted, the North Carolina legislature is free to pass a new law that meets the same end but that lacks the explicit discriminatory purpose evident in its passage of HB 589.

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221. See *supra* notes 210–212 and accompanying text for a discussion of the General Assembly’s incentives for passing discriminatory voting laws. These incentives extend naturally to preventing said laws from being struck down.

222. See *supra* note 191 and accompanying text.

223. *Shelby County v. Holder*, 133 S. Ct. 2612, 2622 (2013) (internal quotation marks omitted) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

224. *McCrary*, 831 F.3d at 214.

225. *Jeffers v. Clinton*, 740 F. Supp. 585, 586 (E.D. Ark. 1990).

226. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 673 (S.D. Tex. 2017).

227. It is important to remember that the court imposing preclearance retains the authority to shorten or extend the duration of preclearance, as necessary. See *supra* section I.B.

2. *Was the Patino Court Justified in Requiring Pasadena to Preclear Future Changes to Redistricting?* — This section applies the three-pronged standard described in section III.B to *Patino* to determine if the district court was justified in requiring Pasadena to preclear any future changes to the city's electoral map.

First, there is a strong argument that the Supreme Court's concern about maintaining "equal sovereignty" among the states does not apply to a case involving a city within the state of Texas, as opposed to the state itself.<sup>228</sup> However, even assuming that the Supreme Court would view a preclearance requirement for a city or other local entity with the same opprobrium as "disparate treatment of [s]tates,"<sup>229</sup> intentional dilution of people of color's voting power is sufficiently severe to justify preclearance.<sup>230</sup>

The second factor considers whether future constitutional violations are likely by looking for recent and continued evidence of past discrimination within the jurisdiction and whether circumstances have changed such that future discrimination is less likely. The *Patino* court reviewed historical race-based discrimination in Pasadena, noting that, among other things, "Pasadena was the Texas headquarters of the Ku Klux Klan," the federal government successfully sued the Pasadena School District for race discrimination, and Latino citizens have had ongoing complaints of racial bias in policing.<sup>231</sup> The court found that "Texas in general and Pasadena in particular have a long history of discriminating against Latinos" and that "Pasadena's history of discrimination in voting and segregation in housing, education, and employment have left a legacy of fear, alienation and a lower participation in voting and other practices of democracy."<sup>232</sup> The court also noted that the mayor and city officials used "coded" language to disguise racial animus in the campaign to have the redistricting plan passed.<sup>233</sup> Finally, because the current city council was elected under the redistricting plan that the court

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228. Recent Supreme Court case law references a long-standing "tradition that *all the States* enjoy 'equal sovereignty.'" *Nw. Austin*, 557 U.S. at 203 (emphasis added) (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1959)). *Northwest Austin* did hold that a small utility district was eligible to bail out of the Section 5 preclearance, *id.* at 197, but this decision was based on a statutory interpretation of "political subdivision," *id.* at 211, and not based on the idea that political subdivisions also enjoy equal sovereignty. See *Shelby County*, 133 S. Ct. at 2624 ("[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of *States*." (emphasis added)).

229. *Shelby County*, 133 S. Ct. at 2624.

230. See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (finding vote dilution violates the VRA because it can "operate to minimize or cancel out the voting strength of racial minorities in the voting population" (internal quotation marks and brackets omitted) (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966))).

231. *Patino*, 230 F. Supp. 3d at 684.

232. *Id.* at 714 (quoting the bench trial transcript).

233. *Id.* at 704.

declared unconstitutional,<sup>234</sup> there has not been a change of circumstances that would make future discrimination less likely. Because of past and present discrimination against Latino citizens in Pasadena and the lack of circumstances making discrimination less likely, the second factor weighs in favor of imposing Section 3 preclearance.

The final factor considers whether future violations could be easily remedied under Section 2 absent preclearance. The original complaint in this case was filed on November 12, 2014.<sup>235</sup> After two years of discovery and motion practice, there was “a seven-day bench trial, at which 16 witnesses testified and the court admitted 468 exhibits into evidence.”<sup>236</sup> Moreover, redistricting litigation is often drawn out and expensive.<sup>237</sup> Under these circumstances, denying preclearance would force Latino citizens of Pasadena to repeatedly undertake complex and costly litigation to protect their voting rights. Additionally, during the challenge of the redistricting law, Pasadena held a city council election in which Latino voting power was diluted.<sup>238</sup> This “wrong to [Pasadena’s] citizens is too serious” to not impose preclearance.<sup>239</sup> Therefore, the third factor also weighs in favor of granting preclearance.

The district court appropriately tailored the Section 3 relief it granted in *Patino*. First, it limited preclearance to future changes to Pasadena’s electoral map.<sup>240</sup> This is both broad enough to cover different types of redistricting that may dilute Latino voting strength and narrow enough to avoid unnecessarily infringing on Pasadena’s political independence.<sup>241</sup> Second, it suggested that preclearance lasts for only five years, “likely enough time for demographic trends to overcome concerns about dilution from redistricting.”<sup>242</sup>

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234. *Id.* at 729–30.

235. Complaint at 12, *Patino*, 230 F. Supp. 3d 667 (No. 4:14-03241) (on file with the *Columbia Law Review*).

236. *Patino*, 230 F. Supp. 3d at 674.

237. See J. Gerald Hebert, Redistricting in the Post-2000 Era, 8 *Geo. Mason L. Rev.* 431, 433 (2000) (noting a “lack of clarity, coupled with a lack of consensus in the lower courts about how to interpret Supreme Court decisions and the Voting Rights Act, ensures that the post-2000 redistricting battles will be fought out in the courts in unprecedented fashion”).

238. *Patino*, 230 F. Supp. 3d at 682.

239. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) (quoting H.R. Rep. No. 439, 89th Cong., at 11 (1965)).

240. *Patino*, 230 F. Supp. 3d at 729–30.

241. This contrasts with section III.C.1, *supra*, which argued for requiring broad preclearance for future laws affecting voting rights in North Carolina. This difference highlights Section 3’s flexibility. North Carolina passed a massive voting bill that discriminated against people of color in numerous ways, see *supra* section II.B, while Pasadena’s discrimination was limited to redistricting, see *supra* section II.C. The difference in the magnitude and scope of the discriminatory actions in each case necessarily leads to different levels of Section 3 preclearance.

242. *Patino*, 230 F. Supp. 3d at 730.

In sum, the *Patino* court was justified in requiring Pasadena to pre-clear future changes to its electoral map, and it appropriately tailored the preclearance order. The court could have more thoroughly explained its rationale for granting Section 3 relief against Pasadena, but the relief itself was appropriate.

3. *Looking Forward: Should Texas Be Bailed into Preclearance Under Section 3?* — In the coming months, U.S. District Judge Nelva Gonzales Ramos will decide whether Section 3 preclearance is an appropriate remedy for the discriminatory laws passed by the Texas legislature.<sup>243</sup> This section briefly considers whether Texas should be bailed into Section 3 preclearance.

First, the violation found by the district court is sufficiently severe to merit infringing on Texas's sovereignty. The district court found that SB 14 could potentially affect over 600,000 eligible voters in Texas, with people of color comprising a disproportionate segment of that number.<sup>244</sup> Second, the litigation surrounding SB 14 demonstrates that the Texas legislature is likely to commit future constitutional violations. The district court noted in its original opinion finding discriminatory purpose that SB 14 was Texas's fourth attempt to pass voter ID legislation.<sup>245</sup> Additionally, when Texas responded to the court's second finding of discriminatory purpose by passing a new version of the law, the court found that the new law did not cure the discriminatory purpose or effect of SB 14.<sup>246</sup> The fact that the DOJ issued 207 Section 5 objection letters prior to *Shelby County* provides further evidence of the state's history of discrimination.<sup>247</sup> Finally, like HB 589 in North Carolina, any lawsuit challenging statewide discriminatory legislation is likely to necessitate burdensome and complex litigation.<sup>248</sup>

All three factors favor bailing Texas into preclearance under Section 3. Because the challenged provisions of Texas SB 14 focused solely on voter IDs,<sup>249</sup> Texas should only be required to pre-clear future voter ID laws.

Comparing the scope of preclearance this Note recommends for North Carolina and Texas provides a final, pellucid example of Section 3's adaptability. North Carolina passed an expansive bill that instituted several discriminatory changes to voting practices,<sup>250</sup> and, despite the effects on North Carolina's sovereignty, broad preclearance coverage is necessary to match the legislature's demonstrated innovation for voter

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243. See *supra* notes 96–106 and accompanying text.

244. *Veasey v. Perry*, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014) *aff'd in part, rev'd in part, vacated in part en banc sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

245. *Id.* at 645.

246. See *supra* note 104 and accompanying text.

247. See *supra* note 66.

248. See *supra* notes 210–212, 214 and accompanying text (explaining a legislature's incentives for vigorously defending its own legislation).

249. See *Perry*, 71 F. Supp. 3d. at 641.

250. See *supra* section II.B (describing the broad, multifaceted discriminatory nature of HB 589).

suppression. Texas, on the other hand, has repeatedly attempted to pass different versions of one type of discriminatory device: its voter ID law. Limited preclearance covering only voter ID laws will preserve most of Texas's sovereignty while also ensuring that if the Texas legislature passes a sixth voter ID law, it will not be implemented if it has a discriminatory effect. Section 3 allows courts to protect state sovereignty to the greatest extent possible while also preventing future discriminatory voting laws. This is precisely what Chief Justice John Roberts had in mind when he asked that the "current burdens" of preclearance be "justified by current needs."<sup>251</sup>

#### CONCLUSION

Dissenting in *Shelby County*, Justice Ginsburg stated the obvious: "[L]itigation under § 2 of the VRA [is] an inadequate substitute for preclearance" when it comes to protecting the right to vote,<sup>252</sup> a right "preservative of all rights."<sup>253</sup> With Section 5 preclearance eviscerated by *Shelby County*, strategic use of Section 3 preclearance is the last remaining bulwark against jurisdictions that habitually pass discriminatory voting laws.

A judicial framework based on the Supreme Court's reasoning in *South Carolina v. Katzenbach* is the most logical way to approach future requests for preclearance under Section 3. Neither the Fourth Circuit in *McCrorry* nor the district court in *Patino* engaged in a meaningful analysis of the merits of imposing preclearance. Instead, the decisions rejected and granted Section 3 preclearance in a few short sentences. In order to preserve the last functional conduit for requiring jurisdictions that intentionally suppress people of color's voting power, future courts—including the court presently considering whether to bail Texas into preclearance under Section 3—should fully consider the appropriateness of Section 3 preclearance, whether using the framework suggested in section III.B or another similar framework. If future courts do not seriously consider making use of the flexible and narrowly tailored remedy offered by Section 3 preclearance, it will not be long before "rarely used" becomes "never to be used again."

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

252. *Shelby County v. Holder*, 133 S. Ct. 2612, 2640 (2013) (Ginsburg, J., dissenting).

253. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

