Devising a Standard for Section 3: Post-*Shelby County* Voting Rights Litigation

Roseann R. Romano[*]

ABSTRACT: In response to the Supreme Court's decision in Shelby County v. Holder*, which dismantled the modern voting rights enforcement regime by declaring section 4(b) of the Voting Rights Act ("VRA") unconstitutional, plaintiffs in voting rights lawsuits have sought protection from a little-used provision of the VRA: section 3(c). Section 3(c) allows courts to require jurisdictions whose voting practices violate the Fourteenth or Fifteenth Amendment to submit future voting changes to a preclearance process. However, in light of little legislative history and only one instance of judicial interpretation of the provision, courts face a challenge in determining when a jurisdiction's behavior triggers the section 3(c) remedy. Accordingly, this Note examines section 3(c) and the legal standards applied to find Fourteenth or Fifteenth Amendment violations in voting rights cases. This Note then proposes an invidious discrimination standard for determining when a jurisdiction's voting practices trigger section 3(c). By applying this standard to two ongoing voting rights cases, this Note argues that a less burdensome standard than the intentional discrimination standard does not dramatically depart from past voting rights jurisprudence and is necessary to strengthen the voting rights enforcement regime.*

* J.D. Candidate, The University of Iowa College of Law, 2015; B.A., American University, 2012. I would like to thank Professor Dan Tokaji at The Ohio State University Moritz College of Law for inspiring me to write on this topic and for his advice throughout the writing process. In addition, thank you to the staff of Volumes 99 and 100 of the *Iowa Law Review* who were instrumental in improving this Note, particularly Luke Dawson, Amanda Beggs, and Michelle Wallace. Finally, a very special thank you to my family and friends for their unending love and support—I couldn't have done it without you!

I. INTRODUCTION

For nearly 50 years, the federal voting rights enforcement regime centered on section 5 of the Voting Rights Act of 1965 (the "VRA").[1] Under this provision, the government monitored certain jurisdictions with a history of voting rights violations by requiring them to seek preapproval from the federal government for any changes in their voting practices.[2] In 2013, however, the Court's decision in *Shelby County v. Holder* effectively dismantled this "preclearance" element of the enforcement regime when it struck down section 4(b) of the VRA, which provided the formula for determining which jurisdictions had to seek approval for voting changes under section 5.[3] In other words, without section 4(b), no jurisdictions are bound by section 5's preclearance requirements.

In light of the *Shelby County* ruling, voting rights plaintiffs and activists have turned to section 3(c) of the VRA. This provision enables courts to require jurisdictions to seek approval for future voting changes as a remedy for previous voting rights violations.[4] Accordingly, this Note examines section 3(c) as a solution to the voting rights enforcement problems that the Court's ruling in *Shelby County* created. Part II discusses four major provisions of the VRA and the Court's decision in *Shelby County*, followed by a discussion of the Court's Fourteenth and Fifteenth Amendment jurisprudence in the context of voting rights. Part III examines the standard that other courts have applied in determining when jurisdictions' behavior triggers the section 3(c) remedy. Part IV argues that an intentional discrimination standard is too demanding, and considering the Supreme Court's past case law and Congress's intent, recommends an alternative standard. Finally, Part V concludes by arguing that courts should look beyond evidence of intentional discrimination to determine when jurisdictions' behavior triggers section 3(c).

II. THE VOTING RIGHTS ACT AND THE CONSTITUTION

In the wake of *Shelby County*, commentators offered several ways to potentially reinvigorate the voting rights enforcement regime.[5] First, it is

1. *See* DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 35 (5th ed. 2012).

2. *See* 42 U.S.C. § 1973c (2012).

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

4. *See* 42 U.S.C. § 1973a(c).

5. *See, e.g.*, Bruce E. Cain, *Moving Past Section 5: More Fingers or a New Dike?*, 12 ELECTION L.J. 338, 338–40 (2013) (pointing to several options to remedy the problems created by the Court's *Shelby County* decision); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-*Shelby County *Contingency Strategy*, 123 YALE L.J. ONLINE 131, 135 (June 7, 2013) (arguing, several weeks before the *Shelby County* decision, that "institutional intermediaries" should play an important role in the future fight to protect voting rights); Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1997–98 (2010) (advocating, in the wake of Northwest Austin Municipal Utility District No. One v. Holder ("*NAMUDNO*"), for using section 3 of the VRA to remedy the Court's discomfort with section 5).

important to point out that in holding section 4(b) unconstitutional, the Court left intact section 5.[6] As a result, Congress has the option to "draft another formula based on current conditions"[7] to simply reactivate section 5. Second, rather than wait for Congress to act, several commentators contend that nongovernmental organizations have the capacity and motivation to fulfill the monitoring and information-gathering functions of section 5.[8] However, relying on these organizations alone to monitor jurisdictions would require substantial litigation to remedy VRA and constitutional violations on a case-by-case basis. Thus, a final solution, and as this Note argues perhaps the most promising, is to monitor jurisdictions that behave unlawfully through the preclearance remedy contained in section 3 of the VRA.[9]

This Part briefly introduces the provisions of the VRA that are central to this Note, followed by a discussion of the Court's decision in *Shelby County*. Finally, this Part examines the legal standards applied in voting rights cases to determine if and when Fourteenth or Fifteenth Amendment violations have occurred.

A. THE VOTING RIGHTS ACT: RELEVANT PROVISIONS AND HISTORY

Despite the ratification of the Fifteenth Amendment following the Civil War, African Americans, particularly in the South, continued to face significant barriers to exercising their right to vote long into the 20th century.[10] On March 15, 1965, in response to the "systematic and ingenious discrimination" that African Americans faced at the ballot box, President Lyndon Johnson delivered a speech before Congress calling for "[e]very American citizen [to] have an equal right to vote."[11] He introduced a bill intended to "ensure the right to vote when local officials are determined to

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6. *Shelby Cnty.*, 133 S. Ct. at 2631.

7. *Id.*; *see also* Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After* Shelby County, 102 CALIF. L. REV. (forthcoming 2014), *available at* http://ssrn.com/sol3/papers.cfm?abstract_id=2262954 (proposing a new coverage formula based on rates of negative racial stereotyping among the states, while taking into account racially-polarized voting and the size of the minority population).

8. Charles & Fuentes-Rohwer, *supra* note 5, at 142; *see also* Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 90 (Guy-Uriel E. Charles et al. eds., 2011) (proposing a "process-oriented solution[] . . . [based on] the development of nonjudicial institutions" to reform election law generally).

9. *See generally* Crum, *supra* note 5. Crum's Note concludes that expanded use of section 3 would survive constitutional scrutiny by more effectively targeting jurisdictions that require a remedy for discriminatory voting practices. *Id.* at 1998.

10. *See Introduction to Federal Voting Rights Law: The Effect of the Voting Rights Act*, U.S. DEP'T JUST., CIV. RTS. DIV., VOTING SEC., http://epic.org/privacy/voting/register/intro_c.html (last visited Sept. 25, 2014) (providing data from early 1965 that shows a gap in registration rates between blacks and whites of up to 63%).

11. President Lyndon B. Johnson, Remarks of the President to a Joint Session of Congress 2 (Mar. 15, 1965).

deny it."[12] In the following months, Congress considered this bill, known today as the Voting Rights Act of 1965, and on August 6, 1965, President Johnson recognized "a victory for the freedom of the American nation" when he signed the VRA into law.[13]

Among the major provisions of the law, section 5 initially had the most significant impact on preventing discriminatory voting practices. Section 5 required certain jurisdictions "to submit changes in 'any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting' to either the attorney general or to the U.S. District Court for the District of Columbia for 'preclearance.'"[14] Section 4(b) of the VRA provided a formula based on registration and turnout rates in the 1964 General Election that determined which jurisdictions were "covered" or required to follow the preclearance procedures established by section 5.[15] Jurisdictions covered under the section 4(b) formula were required to show that any change in their voting practices did not have the purpose or effect of discriminating on the basis of race.[16] In the event that a covered jurisdiction showed over a period of time that it was no longer discriminating on the basis of race, section 4(a) provides "bail-out" procedures to enable jurisdictions to petition for exemption from the preclearance requirements.[17] Congress initially designated sections 4 and 5 of the VRA as temporary provisions, set to expire in 1970.[18] However, Congress extended the preclearance provisions and made other amendments to the VRA four times, protecting against discriminatory voting procedures well into the 21st century.[19] The 2006 reauthorization of the VRA, which extended the temporary provisions for 25

12. *Id.*

13. President Lyndon B. Johnson, Remarks of the President at the Signing Ceremony of the Voting Rights Bill 5 (Aug. 6, 1965).

14. LOWENSTEIN ET AL., *supra* note 1, at 35 (quoting 42 U.S.C. § 1973c (2012)); *see also About Section 5 of the Voting Rights Act*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Sept. 19, 2014).

15. 42 U.S.C. § 1973b(b) (2012).

16. *About Section 5 of the Voting Rights Act*, *supra* note 14.

17. 42 U.S.C. § 1973b(a).

18. LOWENSTEIN ET AL., *supra* note 1, at 35.

19. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (reauthorizing the section 4(b) formula and eliminating the provision for federal examiners); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (reauthorizing the section 4(b) formula, liberalizing the bailout provisions, and eliminating the discriminatory purpose standard to establish a violation under section 2); Voting Rights Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975) (updating the coverage formula with data from the 1974 General Election and providing protections for language minority groups); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (updating the coverage formula with data from the 1968 General Election and banning literacy tests nationwide).

years, but left the preclearance formula unchanged since 1975, garnered nearly unanimous support from both the House and the Senate.[20]

A second important tool within the VRA, especially in more recent decades, is section 2.[21] This provision, which is permanent and applies to all jurisdictions, outlaws voting practices that "deny or abridge the right of any citizen of the United States to vote on account of race or color."[22] Section 2 provides the basis for individuals and the Department of Justice ("DOJ") to file suit against any jurisdiction engaged in discriminatory behavior.[23] To establish a section 2 violation, plaintiffs must show that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[24] Section 2 claims are evaluated by a "totality of circumstances" test.[25]

A final provision significant to this Note and increasingly important in voting rights enforcement is section 3.[26] As a whole, section 3 "makes additional remedies available to deal with denials or abridgements of the right

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20. *Bush Signs Voting Rights Act Extension*, NBC NEWS (July 27, 2006, 11:27 PM), http://www.nbcnews.com/id/14059113/ns/politics/t/bush-signs-voting-rights-act-extension/#.Ulb6GlA3uSp (reporting that the reauthorization "passed the Senate by a vote of 98-0 and the House 390-33").

21. *See* 42 U.S.C. § 1973.

22. *Id.*

23. *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last visited Sept. 19, 2014).

24. 42 U.S.C. § 1973(a).

25. *Id.* § 1973(b) (codifying the totality of the circumstances test and noting specific circumstances that may be considered).

26. Section 3 provides, in relevant part:

> If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment 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 [the minority language provisions] 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.

Id. § 1973a(c).

to vote in . . . areas outside the [s]tates and political subdivisions" that were covered by section 5.[27] Specifically, section 3(c) gives courts the authority to keep a state or local jurisdiction that violated the Fourteenth or Fifteenth Amendment under their jurisdiction for a period of time.[28] In doing so, courts can require jurisdictions to submit to preclearance procedures similar to those set forth in section 5.[29] Congress intended the judicial oversight function of section 3(c) to prevent "the erection of new and onerous discriminatory voting barriers" in jurisdictions not covered by section 5.[30] Thus, just as the section 4(a) bailout provision protects against the overinclusiveness of the section 4(b) coverage formula,[31] section 3(c) allows courts to bail-in jurisdictions to protect against the formula's underinclusiveness. However, unlike sections 4 and 5, there is little commentary or scholarship examining section 3,[32] and fewer than a dozen courts have applied the section 3(c) remedy.[33]

B. SHELBY COUNTY V. HOLDER*: THE DEMISE OF SECTION 5*

An essential event contributing to the rise of section 3(c)'s role in voting rights litigation, and the impetus for this Note, is the Supreme Court's 2013 decision in *Shelby County v. Holder*.[34] In 2010, officials in Shelby County, Alabama, a "covered" jurisdiction pursuant to section 4(b), filed suit against Attorney General Eric Holder in the District Court for the District of Columbia.[35] The County asked the court to issue a declaratory judgment holding sections 4(b) and 5 of the VRA facially unconstitutional and requested a permanent injunction against enforcement of sections 4(b) and

27. H.R. REP. NO. 89-439, at 23 (1965).

28. *Id.* at 23–24. The original version of this provision stipulated that courts could apply the remedy for violations of the Fifteenth Amendment. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (1965); *see also* H.R. REP. NO. 89-439, at 23 (noting, in 1965, that the provision was intended to provide relief when a court found Fifteenth Amendment violations). In 1975, Congress amended section 3(c) "by striking out '[F]ifteenth [A]mendment' each time it appears and inserting in lieu thereof '[F]ourteenth or [F]ifteenth [A]mendment." Voting Rights Act of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).

29. 42 U.S.C. § 1973a(c) (2012); *see* 28 C.F.R. § 51.8 (2013) (establishing that, where jurisdictions covered by section 3(c) choose to submit proposed voting changes to the Attorney General for preclearance, the Attorney General will follow the same preclearance procedures as those set forth for jurisdictions covered by section 5).

30. H.R. REP. NO. 89-439, at 23.

31. *See* 42 U.S.C. § 1973b(a) (allowing covered jurisdictions that meet a series of conditions establishing a trend of nondiscriminatory behavior to apply to the U.S. District Court for the District of Columbia to be released from section 5 preclearance requirements).

32. *But see* Crum, *supra* note 5.

33. *See infra* Part III (noting several courts that have applied section 3(c) in consent decrees and examining in-depth *Jeffers v. Clinton*, in which an Arkansas district court devised a standard for triggering section 3(c)).

34. Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

35. Complaint at 1, Shelby Cnty. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011) (No. 1:10-cv-00651) (internal quotation marks omitted).

5.[36] In light of the Supreme Court's decision in 2009's *Northwest Austin Municipal Utility District Number One v. Holder*, which cast doubt on section 5's constitutionality,[37] many in the voting rights field doubted section 5 would survive this new challenge.[38]

Yet, in considering Shelby County's claims, both lower courts deferred to Congress's conclusion that sections 4(b) and 5 continue to be necessary tools for enforcing the Fourteenth and Fifteenth Amendments because "serious and widespread intentional discrimination persisted in covered jurisdictions."[39] On appeal, however, a sharply divided Supreme Court concluded that section 4(b)'s preclearance formula had out-lived its usefulness, declaring the provision unconstitutional.[40] In so holding, the Court noted that the congressional record lacked evidence demonstrating recent disparities in voting registration and political representation rates between white and minority citizens in covered jurisdictions.[41] Despite attributing these recent improvements to the "immensely successful" VRA, the Court expressed concern that Congress "ha[d] not eased the restrictions in [section] 5 or narrowed the scope of the coverage formula in [section] 4(b) along the way."[42] The Court ultimately found that the coverage formula, which was "based on decades-old data and eradicated practices,"[43] no longer had a "logical relation to the present day."[44]

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36. *Id.* at 20.

37. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder ("*NAMUDNO*"), 557 U.S. 193 (2009). In *NAMUDNO*, a municipal utility district in Texas challenged a district court's determination that it was not eligible to opt out of section 5 coverage under the "bailout" provision. *Id.* at 197. The district argued that if it could not opt-out, then section 5 must be declared unconstitutional. *Id.* at 200–01. In response, the Court reaffirmed that any political subdivision covered under section 5 is "eligible to file a bailout suit." *Id.* at 211. In doing so, the 8–1 majority avoided the question on constitutionality, but noted that the United States is "a very different Nation" than it was when the VRA was first enacted by Congress and upheld by the Court. *Id.* Justice Thomas's separate opinion took up the constitutionality question. *Id.* at 212 (Thomas, J., concurring and dissenting in part). He concluded that section 5 is unconstitutional because "the violence, intimidation, and subterfuge that led Congress to pass [section] 5 and this Court to uphold it no longer remain[]." *Id.* at 229 (Thomas, J., concurring and dissenting in part).

38. *See, e.g.*, Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 201 (2010) (offering an alternative framework for preclearance in light of emerging constitutional concerns); Nathaniel Persily, *Drawing Lines in Shifting Sands: The DOJ, the VRA, and the 2011 Redistricting Process*, 23 STAN. L. & POL'Y REV. 345, 371 (2012) (examining "the conceptual and practical challenges" of enforcing section 5); Crum, *supra* note 5, at 1994 (evaluating a solution to prepare for another inevitable challenge to section 5).

39. Shelby Cnty. v. Holder, 679 F.3d 848, 872 (D.C. Cir. 2012); *see also* Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 465 (D.D.C. 2011) (finding that the 2006 reauthorization of sections 4(b) and 5 were supported by evidence that the "history and pattern of unconstitutional conduct by covered jurisdictions" had not been eliminated).

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

41. *Id.* at 2626.

42. *Id.*

43. *Id.* at 2627.

44. *Id.* at 2629.

C. FINDING CONSTITUTIONAL VIOLATIONS IN VOTING RIGHTS CASES

In the absence of a constitutionally acceptable formula for triggering the oversight procedures of section 5 of the VRA, section 3(c) presents a solution to enable the federal government to monitor voting practices in jurisdictions that need oversight most. As discussed above, in order to apply section 3(c), a "court [must] find[] . . . violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief."[45] Thus, the basic constitutional questions underlying the application of section 3(c) are by no means novel. The Supreme Court has frequently weighed in on Fourteenth Amendment,[46] and to a lesser extent Fifteenth Amendment,[47] questions since the states ratified the amendments following the Civil War. This Subpart discusses the Court's interpretation of the Fourteenth and Fifteenth Amendments in the context of protecting the right to vote, followed by a brief consideration of three significant voting rights cases in which the Court found Fourteenth or Fifteenth Amendment violations.

1. Fourteenth and Fifteenth Amendment Standards in Voting Rights

The long-held principle that voting is a fundamental right shapes the Court's Fourteenth and Fifteenth Amendment jurisprudence.[48] In early voting rights cases, the Court was reluctant to apply the Fourteenth Amendment in response to claims of racially discriminatory voting practices, relying instead on the language of the Fifteenth Amendment.[49] Accordingly, "[w]hen a legislature . . . single[d] out a readily isolated segment of a racial minority for special discriminatory treatment, it violate[d] the Fifteenth

45. 42 U.S.C. § 1973a(a) (2012).

46. The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

47. The Fifteenth Amendment provides, in relevant part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

48. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[Voting] is regarded as a fundamental political right, because [it is] preservative of all rights.").

49. *See* Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring) ("It seems to me that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution.").

Amendment."[50] The Court has interpreted the language of the Amendment to prohibit only intentional discrimination.[51]

Later, the Court embraced the more general protections of the Fourteenth Amendment in the voting rights context.[52] As interpreted by the Court, the Fourteenth Amendment's Equal Protection Clause forbids "'invidious' distinctions . . . [which] depend on the nature of the classification and on the nature of the benefit . . . that is contingent on the classification."[53] For instance, classifications based on race call for strict scrutiny.[54] Thus, laws that classify people on the basis of race "will be struck down [under the Fourteenth Amendment] unless [they are] shown to be 'narrowly tailored' to promote a 'compelling state interest.'"[55] In addition, the Fourteenth Amendment's protections extend beyond race-based classifications to burdens on fundamental rights, such as the right to vote, which is also subject to strict scrutiny.[56] In applying strict scrutiny in the voting rights context, the Court has not clearly indicated whether "invidious discrimination" is equivalent to the Fifteenth Amendment's "intentional discrimination" standard.

2. Precedent for Constitutional Violations in Voting Rights

Although the Court has been relatively clear that a jurisdiction must intentionally discriminate to violate the Fifteenth Amendment, the Court's interpretation of the scope of the Fourteenth Amendment does not conclusively suggest that intentional discrimination is required for a jurisdiction to violate the Fourteenth Amendment. Certainly, the Court has confronted clear cases of intentional discrimination and accordingly held that

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50. *Id.* at 346 (majority opinion).

51. *See* Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion) (arguing "that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"). Although Congress's 1982 amendments to the VRA superseded the *Mobile* Court's interpretation of section 2, the statement regarding the Fifteenth Amendment remains persuasive, at the very least.

52. *See id.* at 67 (plurality opinion) (noting that the Fourteenth Amendment's Equal Protection Clause "applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination").

53. LOWENSTEIN ET AL., *supra* note 1, at 44.

54. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, . . . which may call for a . . . more searching judicial inquiry.").

55. LOWENSTEIN ET AL., *supra* note 1, at 44; *see also* Miller v. Johnson, 515 U.S. 900, 920 (1995) (noting that a "[s]tate must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest"); Shaw v. Reno, 509 U.S. 630, 658 (1993) (remanding the case to "determine whether the [redistricting] plan is narrowly tailored to further a compelling governmental interest").

56. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (requiring burdens on voting to "be closely scrutinized and carefully confined").

the law or practice violated the Fourteenth Amendment.[57] However, as this Subpart shows, the Court has also found violations of the Fourteenth Amendment in voting-related cases by declaring certain classifications "invidious" without confronting the intentional discrimination question.

First, in *Reynolds v. Sims*, the Court considered whether the Constitution required the Alabama state legislature to reapportion its legislative districts to reflect current population distribution.[58] By failing to reapportion the legislative districts for 50 years, Alabama voters living in low-population areas had a greater impact on the outcome of elections than voters living in high-population areas.[59] The Court noted that this vote dilution denied citizens the right to "vote just as effectively as by wholly prohibiting the free exercise of the franchise."[60] Accordingly, the Court held "that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."[61] In this case, discrimination based on place of residence amounted to a violation of the Fourteenth Amendment to the same extent as if the discrimination was based on race.[62] However, as the dissent noted, the Court's determination that such discrimination was "invidious" was not based on a finding of intentional or purposeful state action.[63] Rather, the Court viewed Alabama's failure to redistrict, which had the effect of affording its citizens' votes unequal weight, as inherently contrary to the Constitution.

Less than two years later in 1966, in *Harper v. Virginia Board of Elections*, the Court considered whether Virginia's use of a poll tax in state elections violated the Constitution.[64] Recognizing that the right to vote is a "fundamental right[]," the Court noted that "classifications which might invade or restrain [such rights] must be closely scrutinized and carefully confined."[65] The Court held "that a [s]tate violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."[66] Notably, the Court did not require the plaintiff to show that Virginia's poll tax intentionally

57. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 627 (1982) (holding unconstitutional an at-large voting system being maintained for a discriminatory purpose).

58. Reynolds v. Sims, 377 U.S. 533, 540 (1964).

59. *See id.* at 563 ("Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically.").

60. *Id.* at 555.

61. *Id.* at 566.

62. *Id.*

63. *See id.* at 590 (Harlan, J., dissenting) ("[T]he Court's argument [that vote dilution is invidious discrimination] boils down to . . . an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that 'equal' means 'equal.'").

64. Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).

65. *Id.* at 670.

66. *Id.* at 666.

discriminated against a protected class.[67] Rather, it recognized that "as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause."[68] Thus, as in *Reynolds v. Sims*, the Court held that Virginia's poll tax, which favored wealthy citizens, inherently violated the Constitution.

A final example in which the Court found a constitutional violation in the absence of intentional discrimination is *Bush v. Gore*.[69] In this case, the Court considered whether election administration practices implicated the Fourteenth Amendment's protections.[70] As a result of the slim margin of votes between presidential candidates George W. Bush and Al Gore, the Court reviewed a Florida Supreme Court decision calling for uniform standards to be implemented to govern the recount process.[71] In addressing this issue, the Court noted that "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise."[72] Accordingly, recount procedures must include "the minimum procedures necessary to protect the fundamental right of each voter."[73] The Court concluded that without such minimum safeguards, the Florida recount violated the Equal Protection Clause.[74] Here, too, the Court failed to consider whether the discrimination was intentional. However, unlike the *Reynolds* and *Harper* Courts, the *Gore* Court declined to explicitly adopt the invidious discrimination standard in the election administration context. In light of the majority's failure to articulate a clear constitutional standard, one dissenter went so far as to suggest that Florida's conduct did not even "rise[] to the level of a constitutional violation."[75] Yet, the majority concluded that Florida's failure to institute reliable procedures for the recount, which had the effect of treating voted ballots differently, violated the Constitution.

As the *Reynolds*, *Harper*, and *Gore* dissents indicate, the Supreme Court's standard for finding unconstitutional discrimination does not require a finding of intentional discrimination. This precedent plays a significant role in determining when courts can apply section 3(c) to impose the preclearance requirement on defendant jurisdictions. Indeed, in contrast to cases in which the Court has demanded that plaintiffs prove intentional

67. *See id.* at 668 (asserting that wealth is "a capricious or irrelevant factor" in voting, and as such, "[t]he degree of the discrimination is irrelevant"); *see also id.* at 673 (Black, J., dissenting) (arguing that the majority erred by finding the poll tax law unconstitutional without applying any recognized standard of Fourteenth Amendment analysis).

68. *Id.* at 668 (citation omitted).

69. Bush v. Gore, 531 U.S. 98, 103 (2000).

70. *Id.*

71. *Id.*

72. *Id.* at 104.

73. *Id.* at 109.

74. *Id.* at 110.

75. *Id.* at 124 (Stevens, J., dissenting).

discrimination to establish a constitutional violation, the aforementioned cases leave open the possibility that courts can apply a less burdensome standard focused on invidious discrimination in certain circumstances.

III. *JEFFERS V. CLINTON*: ONE COURT'S APPROACH TO SECTION 3(C)

Amid both the fanfare and displeasure that greeted the Court's decision in *Shelby County*, several previously covered jurisdictions moved to enforce or enact laws that the DOJ or the U.S. District Court for the District of Columbia had previously denied preclearance or laws that likely would not have survived the preclearance process.[76] In response, plaintiffs groups and the DOJ brought lawsuits against these jurisdictions, claiming unlawful discrimination under section 2 of the VRA, as well as the Fourteenth and Fifteenth Amendments.[77] In each of these cases, the plaintiffs requested that the court impose the section 3(c) preclearance remedy.[78] In considering these claims, courts will look to section 3(c) precedent. Accordingly, this Part will consider past applications of section 3(c), including settlements in which jurisdictions agreed to section 3(c) coverage and an in-depth discussion of *Jeffers v. Clinton*, the only case in which a court considered the legal standard for applying section 3(c).

Since 1965, courts have subjected only two states, six counties, and one municipality to the section 3(c) preclearance remedy.[79] Among these jurisdictions, all but one agreed to section 3(c) preclearance as part of

76. *See, e.g.*, Tyler Cleveland, *Mississippi to Require Voter ID by 2014*, JACKSON FREE PRESS (June 28, 2013, 10:50 PM), http://www.jacksonfreepress.com/weblogs/politics-blog/2013/jun/28/mississippi-to-require-voter-id-by-2014/ (discussing Mississippi's push to enforce a voter identification law "[n]ow that the [VRA] is null and void"); Harvey Rice, *Galveston County May Run Afoul of Voting Rights Act*, HOUS. CHRON. (Aug. 20, 2013), http://www.houstonchronicle.com/news/houston-texas/houston/article/Galveston-County-may-run-afoul-of-Voting-Rights-4747681.php (reporting on the county's decision to move forward with a redistricting plan similar to one previously blocked by the DOJ); Matt Vasilogambros, *That Was Quick: Texas Moves Forward with Voter ID Law After Supreme Court Ruling*, NAT'L J. (June 25, 2013), http://www.nationaljournal.com/politics/that-was-quick-texas-moves-forward-with-voter-id-law-after-supreme-court-ruling-20130625 (quoting Texas Attorney General Greg Abbott: "With today's decision [in *Shelby County*], the state's voter ID law will take effect immediately" (internal quotation marks omitted)).

77. *See, e.g.*, Complaint at 1, United States v. Texas, No. 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013) (requesting relief from Texas's voter identification law under section 2 of the VRA); Complaint at 1–2, League of Women Voters of N.C. v. Howard, No. 1:13-CV-00660 (M.D.N.C. Aug. 12, 2013) (requesting relief from a North Carolina law instituting several voting changes).

78. *See* Complaint, United States v. Texas, *supra* note 77, at 14; Complaint, League of Women Voters of North Carolina v. Howard, *supra* note 77, at 26.

79. *See* NATHANIEL PERSILY & THOMAS MANN, GOVERNANCE STUDIES AT BROOKINGS, *SHELBY COUNTY V. HOLDER* AND THE FUTURE OF THE VOTING RIGHTS ACT 7 (2013), *available at* http://www.brookings.edu/~/media/research/files/papers/2013/08/09%20shelby%20v%20holder%20policy%20mann/persily_mann_shelby%20county%20v%20holder%20policy%20brief_v9.pdf. The jurisdictions are: Arkansas; New Mexico; Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and Chattanooga, Tennessee. *Id.*; *see also* Crum, *supra* note 5, at 2010–15 (examining in greater depth the previous applications of section 3(c)).

consent decrees or other court-ordered settlements.[80] As a result, although plaintiffs may allege that a jurisdiction engaged in intentional discrimination in violation of the Fourteenth and Fifteenth Amendments, the consent decree allows the court to resolve the controversy without making any finding of discrimination.[81] Furthermore, decrees imposing section 3(c)'s preclearance remedy lack precedential value.[82]

The only instance where a court has applied section 3(c) to remedy a finding of constitutional violations occurred in *Jeffers v. Clinton*.[83] The U.S. District Court for the Eastern District of Arkansas's decision triggering section 3(c) coverage of Arkansas emerged from a lawsuit in which voters sought to invalidate Arkansas's reapportionment plan following the 1980 Census.[84] In 1989, the district court determined that "the plan adopted by the State Board of Apportionment in 1981 . . . diluted the votes of black citizens in violation of section 2 of the [VRA]."[85] The court ordered Arkansas to create a new reapportionment plan for the 1990 elections.[86] Then, in 1990, the court considered the reapportionment plan and several other discrimination claims to determine "whether [Arkansas] had also violated the Constitution, and whether, if so, the remedy of preclearance under section 3(c) . . . should be applied."[87]

In confronting these questions, the court in *Jeffers* first "decide[d] what legal standard applies to the question whether constitutional violations have occurred."[88] The court determined that violations of the Equal Protection Clause of the Fourteenth Amendment require a showing of "intentional racial discrimination."[89] In considering the standard for finding violations of the Fifteenth Amendment, the court noted that plaintiffs claimed that only a

80. *See* Crum, *supra* note 5, at 2010–11 nn.100–08 (indicating that all of the bailed-in jurisdictions, except Arkansas, were subjected to the section 3(c) preclearance remedy by consent decree or other stipulated court order).

81. *See* Kirkie v. Buffalo Cnty., No. 03-CV-3011, 2004 U.S. Dist. LEXIS 30960, at *1 (D.S.D. 2004) (issuing a consent decree in a lawsuit "brought by three Native American voters" alleging Fourteenth and Fifteenth Amendment violations on the grounds that malapportioned districts had been "maintained for a discriminatory purpose"). In *Kirkie*, the parties agreed to a finding that the redistricting "plan was malapportioned in violation of the one-person-one-vote standard of the Fourteenth Amendment." *Id.* at *4. Subsequently, the court "retain[ed] jurisdiction of th[e] action pursuant to [s]ection 3(c) . . . until January 1, 2013." *Id.* at *7.

82. *See* Jeffers v. Clinton, 740 F. Supp. 585, 600 (E.D. Ark. 1990).

83. *See generally id.*

84. *See id.* at 586.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 587.

89. *Id.* at 587, 589. The court did not provide a basis for requiring a showing of intent as an element of an Equal Protection violation, at least in part, because the parties agreed to this standard. *See id.* at 587.

showing of "discriminatory impact on black voters" was necessary.[90] Engaging in a textual analysis of the Fifteenth Amendment and prior case law, the court determined "that the same proof of conscious racial discrimination" is required for both Fourteenth and Fifteenth Amendment violations.[91] However, the court noted this standard does not require "direct proof" of intentional discrimination.[92] Rather, evidence that a voting law or practice "has a disparate impact, and that State officials knew that it would" maybe sufficient to establish the requisite proof of intentional discrimination to establish a constitutional violation.[93]

The court then turned to the specific allegations against Arkansas.[94] First, plaintiffs claimed that Arkansas intentionally discriminated against minority voters in creating the 1981 apportionment plan by ignoring minority concerns and failing to ensure the creation of majority-black districts.[95] The court, finding that Arkansas's behavior did not amount to "an affirmative intention to harm black voting rights," concluded that the apportionment plan did not violate the Fourteenth or Fifteenth Amendments.[96]

Next, plaintiffs claimed that majority-vote requirements[97] in local elections "reduc[e] minority political opportunity" and "discourag[e] black political activity."[98] In a majority-vote system, a candidate wins by controlling a majority of the votes and, where no candidate garners a majority of the votes in the initial election, the top two vote-getters are subject to a run-off election. In assessing this claim, the court recounted the gradual shift from the traditional plurality-vote systems[99] to majority-vote requirements in response to the success of black candidates.[100] In contrast to a majority-vote system, in

90. *Id.*

91. *Id.* at 587–89 (explaining the court's approach to determining the standard for finding violations of the Fifteenth Amendment). In arriving at its conclusion, the court noted that its textual analysis was not conclusive and recent Fifteenth Amendment case law provided "uncertain guidance." *Id.* at 588.

92. *See id.* at 589.

93. *Id.*

94. *See id.*

95. *See id.* at 589–90.

96. *Id.* at 591. The plaintiffs asserted that intentional indifference "is the legal equivalent of intentional discrimination." *Id.* In response, the court noted that evidence of the state's indifference to minority voters did not amount to the "kind of evidence that can support an ultimate finding of intentional discrimination." *Id.*

97. Under the local majority-vote requirements, nonpartisan general election candidates must receive a majority of the votes to be declared the winner. *See id.* at 594. Where a single candidate does not receive a majority of the votes, the top two candidates participate in a run-off election. *See id.* Where voting is racially polarized, it is difficult if not impossible for a minority candidate to win under a majority-vote requirement.

98. *Id.* at 593.

99. In plurality-vote systems, the candidate who receives the most votes in the general election is the winner, regardless of whether he or she commands a majority of the vote. *See id.* at 594.

100. *See id.*

a plurality-vote system, a candidate wins by controlling the most votes, regardless of whether he or she claims a majority of the votes. The court concluded that using the majority-vote requirement to foreclose the possibility "of black political victory" in the plurality-vote system was "plainly unconstitutional."[101]

Finally, plaintiffs asserted claims alleging that local officials in 12 counties had intentionally discriminated against black voters and candidates.[102] The court found no constitutional violations in any of the counties, with the exception of Ashley County.[103] There, white citizens changed a voter assistance law in one polling place to prevent black voters from receiving otherwise lawful assistance,[104] such as having a friend or family member read or fill out the ballot.

Having found constitutional violations in Arkansas's use of majority-vote requirements in local elections and in Ashley County's disruption of elections in a majority-black polling place, the court turned to the applicability of the section 3(c) remedy.[105] At the outset, the court interpreted section 3(c) to require "more than one violation" of the Fourteenth or Fifteenth Amendment that might be committed by any state or local official "within the territory of the [s]tate."[106] The court also noted that a consent decree triggering section 3(c) coverage in New Mexico targeted only redistricting plans, "indicat[ing] that preclearance . . . need not be an all-or-nothing proposition."[107] Rather, courts could target remedies to discriminatory voting changes that the jurisdiction was most likely to commit. Based on these factors, the court retained jurisdiction under section 3(c) for all changes relating to majority-vote requirements, as well as any challenges that might emerge during the redistricting process after the 1990 Census.[108]

While *Jeffers* provides the most in-depth discussion of section 3(c) by any court, the court's analysis does not foreclose other interpretations of the provision. Most significantly, the court's assertion that intentional discrimination is required to establish violations of both the Fourteenth and Fifteenth Amendment is not conclusively supported by Supreme Court precedent.[109] Moreover, the *Jeffers* court's ruling has little precedential value.

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101. *Id.* at 595.

102. *See id.* at 595–99.

103. *Id.*

104. *See id.* at 599.

105. *See id.*

106. *Id.* at 600 (emphasis omitted) (internal quotation marks omitted).

107. *Id.* The court also recognized that a consent decree does not carry the same precedential weight as court rulings. *Id.*

108. *Id.* at 601–02.

109. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 103 (2000) (per curiam); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966); Reynolds v. Sims, 377 U.S. 533, 568–69 (1964); *see also supra* Part II.C.2 (examining at greater length Supreme Court cases in which constitutional violations exist in the absence of evidence of intentional discrimination).

In light of the fact that past Supreme Court cases leave some room for argument as to when proof of intentional discrimination is required, Part IV suggests that the Supreme Court's "invidious discrimination" standard for establishing Fourteenth Amendment violations is more appropriate for applying section 3(c).

IV. DEVISING A STANDARD FOR TRIGGERING SECTION 3(C)

As plaintiffs increasingly seek the section 3(c) remedy,[110] it is essential for courts to determine the proper legal standard that will trigger preclearance under section 3(c). In defining this standard, courts must not only be true to the text of section 3(c),[111] but also recognize the important role the preclearance remedy now plays in the overall voting rights enforcement scheme following the Court's decision in *Shelby County*.[112] Furthermore, courts must understand Fourteenth and Fifteenth Amendment jurisprudence in a way that enables section 3(c) to function as an effective remedy without unnecessarily imposing preclearance on jurisdictions involved in litigation. The most practical way to explore how courts should apply section 3(c) coverage is to examine several active lawsuits where plaintiffs requested the remedy. Accordingly, this Part first points out where the *Jeffers* court erred in its analysis and application of the section 3(c) remedy. Second, this Part analyzes the standard that courts should apply in determining whether they should impose section 3(c) preclearance. Finally, this Part then discusses two ongoing voting rights lawsuits and attempts to apply the proposed standard to the pending lawsuits.

A. *WHERE* JEFFERS *WENT WRONG*

As courts begin to consider discrimination claims brought against previously covered jurisdictions, they must carefully consider the appropriate standard for applying the section 3(c) remedy. With little legislative history or judicial precedent to guide them, the courts will likely mimic the reasoning applied in *Jeffers* and adopt an intentional discrimination standard.[113] However, the *Jeffers* standard did not adequately consider Supreme Court precedent that suggests a less burdensome standard is appropriate in some circumstances.[114] The *Jeffers* court arrived at its intentional discrimination standard after recognizing that it did so "[i]n the face of . . . uncertain

110. *See, e.g.*, Complaint at 2, Page v. Va. State Bd. of Elections, No. 3:13-cv-00678 (E.D. Va. Oct. 2, 2013); Complaint at 3, Petteway v. Galveston Cnty., No. 3:13-cv-00308 (S.D. Tex. Aug. 26, 2013); Complaint, United States v. Texas, *supra* note 77, at 14; Complaint, *Howard*, *supra* note 77, at 26; *see also supra* Part IV.C.

111. *See* 42 U.S.C. § 1973a(c) (2012).

112. *See supra* Part II.B (discussing the *Shelby County v. Holder* decision).

113. *See supra* Part III (examining the U.S. District Court's rationale and findings in *Jeffers*).

114. *See supra* Part III.

guidance" from the Supreme Court.[115] Thus, by applying this higher standard, the *Jeffers* court demanded that plaintiffs provide evidence of intent where the Supreme Court may not have required such evidence.

Moreover, even the *Jeffers* court found the intentional discrimination standard difficult to apply, relying on "circumstantial evidence" to draw an inference as to Arkansas's intent.[116] Such evidence is more akin to the invidious discrimination standard applied by the Supreme Court in *Reynolds*, *Harper*, and perhaps implicitly in *Gore*.[117] Indeed, the dissenting judge in *Jeffers* argues that the majority misapplied the intentional discrimination standard by "unconsciously leaning over backward in their sincere effort to help those believed to be the victims of racial discrimination."[118] Thus, by conflating the arguably distinct standards, the *Jeffers* court did not provide clear guidance to plaintiffs seeking section 3(c) coverage or defendant jurisdictions seeking to avoid such coverage.

B. INVIDIOUS DISCRIMINATION: DEVISING THE PROPER STANDARD

In contrast to the *Jeffers* standard, the courts need not tie section 3(c) so rigidly to findings of discriminatory intent. Rather, courts should apply section 3(c) where they find evidence of general "invidious" discrimination. Under an invidious discrimination standard, a court could conclude that a jurisdiction engaged in "invidious" discrimination by burdening the right to vote for a particular group without requiring conclusive evidence of intentional or purposeful conduct. This standard lowers the burden on plaintiffs by removing the intent requirement. Moreover, because the standard relies upon previous Fourteenth Amendment jurisprudence,[119] this standard will likely be acceptable to courts reluctant to step away from Supreme Court precedent.

While the Court has provided little guidance on what conduct qualifies as "invidious" discrimination, *Reynolds*, *Harper*, and *Gore* (at least implicitly) suggest that it is not necessarily limited to intentional conduct.[120] Black's Law Dictionary defines "invidious discrimination" as "[d]iscrimination that is offensive or objectionable, [especially] because it involves prejudice or

115. Jeffers v. Clinton, 740 F. Supp. 585, 588 (E.D. Ark. 1990).

116. *Id.* at 589.

117. *See supra* Part II.C.2.

118. *Jeffers*, 740 F. Supp. at 602 (Eisele, C.J., dissenting).

119. *See supra* Part II.C (discussing the Supreme Court's standards for finding Fourteenth and Fifteenth Amendment violations and specific applications of the Court's invidious discrimination standard).

120. *But see* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 288 (1997) ("[T]he Court often uses the term 'invidious discrimination' as a synonym for intentional discrimination, though 'invidious' adds no significant meaning other than signalling [sic] that when discrimination is defined as 'invidious' it will also be labeled unlawful.").

stereotyping."[121] *Reynolds*, *Harper*, and *Gore* provide additional guidance as to what might constitute invidious discrimination by holding, respectively, that failing to redistrict for 60 years, that requiring payment of poll taxes in state elections, and that conducting standardless ballot recounts are impermissible under the Constitution.[122] A standard for triggering section 3(c) based on such precedent would likely enable courts to apply section 3(c) to jurisdictions that discriminate as a result of the law's effect on minority communities.

Considering the plain meaning of "invidious discrimination" and past applications, an invidious discrimination standard would be malleable and practical in the section 3(c) context. It would enable courts to examine a wider array of evidence, including past VRA violations and social and political discrimination, to facilitate oversight of those jurisdictions that need it most. Furthermore, this standard does not permit courts to bail-in jurisdictions at-will. The persuasiveness of the evidence needed to support a finding of invidious discrimination is significant, although perhaps not quite as steep as for intentional discrimination. For instance, although individual violations of voting rights statutes would not be sufficient to prove a constitutional violation, courts should view an ongoing trend of statutory violations as compelling evidence of constitutionally impermissible invidious discrimination.

C. APPLYING THE INVIDIOUS DISCRIMINATION STANDARD

In the months following the Supreme Court's decision in *Shelby County*, several previously covered or partially covered jurisdictions under section 5 moved forward with plans to enforce recently enacted voting laws.[123] In at least two instances, the DOJ has intervened in lawsuits asking courts to declare that the laws violate section 2 of the VRA and are unconstitutional under the Fourteenth and Fifteenth Amendments.[124] In both of the lawsuits, the United States and the plaintiff groups requested that courts impose section 3(c) as part of the remedy.[125] This Subpart briefly examines these lawsuits and applies the invidious discrimination standard for triggering section 3(c) proposed above.

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121. BLACK'S LAW DICTIONARY 566 (10th ed. 2014).

122. Bush v. Gore, 531 U.S. 98, 108 (2000); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966); Reynolds v. Sims, 377 U.S. 533, 566 (1964).

123. *See supra* note 76 and accompanying text.

124. Complaint, United States v. Texas, *supra* note 77, at 1; Complaint, *Howard*, *supra* note 77, at 1.

125. Complaint, United States v. Texas, *supra* note 77, at 13; Complaint, *Howard*, *supra* note 77, at 28.

1. The Allegations Against Texas and North Carolina

On August 22, 2013, less than two months after the Court's decision in *Shelby County*, the United States intervened in a suit against Texas in the U.S. District Court for the Southern District of Texas.[126] The Complaint alleges that the state's voter identification law (S.B. 14) is motivated by discriminatory intent.[127] To support this claim, the Complaint points to the special procedures the Texas Legislature utilized to swiftly approve the legislation and evidence that minority voters "disproportionately lack the forms of photo ID required by [the law]."[128] In addition, the Complaint argues that enforcing the law will result in disenfranchising Hispanic and African American voters at a higher rate than white voters.[129] Significantly, both the DOJ and the U.S. District Court for the District of Columbia previously denied the law preclearance under section 5 of the VRA.[130] In both instances, Texas failed to prove that the law would not have a discriminatory impact on minority voters.[131] The Complaint further alleges that, "[w]ithin hours after the *Shelby County* decision, the State of Texas announced its intention to begin enforcing [its previously unenforceable] voter ID requirements."[132]

Just over a month later on September 30, 2013, the United States intervened in a suit brought by the League of Women Voters of North Carolina against North Carolina in the U.S. District Court for the Middle District of North Carolina.[133] The Complaint alleges that the state's far-reaching election law (H.B. 589) is motivated by discriminatory intent and will have a discriminatory effect.[134] Similar to the case in Texas, this Complaint

126. *See* Complaint, United States v. Texas, *supra* note 77.

127. *Id.* at 6–7.

128. *Id.* at 5–6.

129. *Id.* at 7.

130. *See id.* at 8–12.

131. *See id.*; *see also* Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012); Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elections, Office of the Tex. Sec'y of State (Mar. 12, 2012), *available at* http://s3.amazonaws.com/static.texastribune.org/media/documents/2011-2775_ltr.pdf (notifying the State of Texas that its request for preclearance of its voter identification law had been denied).

132. Complaint, United States v. Texas, *supra* note 77, at 12; *see also* Vasilogambros, *supra* note 76. On October 9, 2014, the district court held that the voter identification law "imposes a poll tax in violation of the 24th and 14th Amendments." Veasey v. Perry, No. 2:13-CV-00193, slip op. at 141 (S.D. Tex. Oct. 9, 2014). The court reserved the question of applying section 3(c) for a later hearing. *Id.* at 143.

133. *See* Complaint, United States v. North Carolina, No. 1:13-cv-00861 (M.D.N.C. Sept. 26, 2013). On August 8, 2014, the district court issued an order denying motions for a preliminary injunction and summary judgment in this case. *Howard*, No. 1:13-cv-0060 (M.D.N.C. Aug. 8, 2014), *appeal docketed*, No. 14-1856 (4th Cir. Aug. 18, 2014).

134. *See id.* at 21, 25–26. The law:

> reduc[es] the number of early voting days available to voters, eliminate[es] same-day voter registration during the early voting period, and prohibit[s] the counting of provisional ballots cast by voters who attempt to vote in their county, but outside

suggests, as evidence of discriminatory intent, that the law "lay dormant for several months while" the Supreme Court considered *Shelby County*, and was quickly approved after the Court declared section 4(b) unconstitutional.[135] Furthermore, statistical data shows that African American voters are disproportionately more likely to be adversely affected by the early voting, same-day registration, and photo identification provisions in the law.[136] The Complaint also points to North Carolina's long history of discriminatory voting practices and the "dramatic increase in the [s]tate's African-American voter turnout" in recent elections.[137]

Based on these allegations, the Complaints in both cases ask the courts to find that the laws violate section 2 of the VRA and that the laws are unconstitutional under the Fourteenth and Fifteenth Amendments.[138] Moreover, the Complaints request that the courts retain jurisdiction under section 3(c) to prevent both states from continuing to enact discriminatory voting measures.[139]

2. Triggering Section 3(c) Under the Invidious Discrimination Standard

Considering the allegations in the Complaints filed by the United States against Texas and North Carolina, the cases provide straightforward examples for testing the proposed invidious discrimination standard to trigger section 3(c). Due to the inherently one-sided nature of complaints, the United States appears to have an easy case: the plaintiffs have provided substantial anecdotal and statistical evidence that Texas and North Carolina passed laws with the purpose and effect of disenfranchising minority voters. However, the mechanics of proving that Texas and North Carolina violated the Constitution under the intentional discrimination standard applied in *Jeffers* makes the plaintiffs' task much more difficult.[140] Moreover, even if the plaintiffs in these two particular cases could provide enough evidence for a court to find

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> their home precinct . . . [and] imposes a new photo identification requirement for in-person voters.

Id. at 6.

135. *Id.* at 27.

136. *Id.* at 7–10, 11–12, 16.

137. *Id.* at 25.

138. *Id.* at 30–31; Complaint, United States v. Texas, *supra* note 77, at 14.

139. *See* Complaint, United States v. North Carolina, *supra* note 133, at 28 ("North Carolina will continue to violate the [VRA] and the voting guarantees of the Fourteenth and Fifteenth Amendments in the future."); Complaint, United States v. Texas, *supra* note 77, at 13 ("[T]here is a danger that Texas will continue to violate the [VRA] and the voting guarantees of the Fourteenth and Fifteenth Amendments in the future.").

140. *Cf.* Thornburg v. Gingles, 478 U.S. 30, 44 (1986) (discussing Congress's rationale for eliminating the intentional discrimination standard in section 2 cases as too "divisive because it involves charges of racism on the part of individual officials or entire communities" and the burden placed on plaintiffs as "inordinately difficult" (citation omitted) (internal quotation marks omitted)).

intentional discrimination, the standard sets the bar too high for future plaintiffs. Thus, the proposed invidious discrimination standard would enable courts to grant plaintiffs the protection of section 3(c), without unnecessarily burdening jurisdictions with preclearance coverage resulting from unfounded claims of discrimination or significantly diluting the language and purpose of section 3(c).

Under the invidious discrimination standard, the plaintiffs would have to prove that Texas and North Carolina treated a particular group of voters in an "offensive or objectionable" manner.[141] Because this standard is far more malleable than the intentional discrimination standard, it allows courts to evaluate a wider range of circumstances in cases involving constitutional claims that could trigger section 3(c) coverage (rather than just those cases subject to the totality of circumstances test proscribed by section 2). For instance, the fact that both administrative and judicial decrees blocked the enforcement of the Texas voter identification law supports the conclusion that Texas behaved in an objectionable or invidiously discriminatory manner by enforcing the law after *Shelby County*. Similarly, statistical evidence that North Carolina's election law would substantially reduce turnout among minority voters shows that the legislature acted in a prejudicial manner. Moreover, the voter identification laws in both Texas and North Carolina are analogous to Virginia's poll tax that the Court found to be invidiously discriminatory in *Harper*, in that the ability to obtain the proper identification "is not germane to one's ability to participate intelligently in the electoral process."[142] In this way, the court need not address the intentional discrimination question because, under the standard proposed here, a finding of invidious discrimination is sufficient to establish a Fourteenth or Fifteenth Amendment violation and trigger section 3(c) of the VRA.

Under the invidious discrimination standard of analysis, Texas and North Carolina are not precluded from rebutting the plaintiffs' allegations. Moreover, the jurisdictions can request the court to tailor the application of section 3(c) to only require preclearance for specific voting changes. For example, if Texas's voter identification law triggers section 3(c), the court should require the state to seek preclearance of future changes in voter identification rules and practices for a set period of time (say, ten years). Thus, while section 3(c) may be easier to trigger, it does not unnecessarily burden jurisdictions and allows courts to retain jurisdiction only where an enforcement gap truly exists.

D. ALTERNATIVES TO THE INVIDIOUS DISCRIMINATION STANDARD

Although judicial interpretation and application of section 3(c) provides the most direct solution to the problem section 5's impotence causes, it may

141. *See* BLACK'S LAW DICTIONARY 566 (10th ed. 2014).

142. Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966).

not be the most reliable way to confront these issues. Lack of precedent for applying section 3(c) may lead courts down wildly different paths of interpretation, of course, not limited to the standards discussed in this Note. As such, courts, members of Congress, and voting rights advocates should not overlook other methods of adapting section 3(c) to establish an effective shield against discrimination.

Most notably, the Voting Rights Amendment Act of 2014 ("VRAA") introduced by a bipartisan group of representatives on January 16, 2014, directly addresses this question. In addition to proposing a new coverage formula to reactivate section 5, the bill would make "any violation of the VRA or federal voting rights law—whether intentional or not— . . . grounds for a bail-in" under section 3(c).[143] Like the invidious discrimination standard proposed here, the proposed changes to the language of section 3(c) would lower the burden for plaintiffs and clarify protections for jurisdictions.[144]

Beyond this proposed legislation, Congress has several other options for revising section 3(c) to guide courts toward the correct standard for triggering section 3(c). For example, Congress could amend section 3(c) to mirror the language of section 2's totality of the circumstances test.[145] Unlike the proposed amendment, this would avoid directly linking section 3(c) to other voting statutes (and their precedential case law) in order to allow courts more flexibility in interpreting the remedy. In addition, Congress and the DOJ could create incentives to encourage jurisdictions to agree to section 3(c) preclearance as an element of the settlement process. Although the incentive to settle in order to avoid costly litigation is already a significant factor for many jurisdictions, improving the administrative preclearance process and targeting specific voting changes would ease the burden of preclearance on jurisdictions. Any of these alternative solutions would, of course, require lawmakers and voting rights advocates to overcome the substantial barriers established by current political and institutional realities.[146]

143. Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, NATION (Jan. 16, 2014, 12:53 PM), http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act#.

144. *See* JIM SENSENBRENNER, VOTING RIGHTS AMENDMENT ACT OF 2014: SECTION BY SECTION DESCRIPTION OF VRA DRAFT LEGISLATION (2014), *available at* http://sensenbrenner.house.gov/uploadedfiles/vra_section-by-section.pdf.

145. *See supra* Part II.A. Unlike the *Jeffers* intentional discrimination standard, the section 2 standard is satisfied by a finding of discriminatory purpose or effect. *See* 42 U.S.C. § 1973 (2012).

146. Jaime Fuller, *How Has Voting Changed Since* Shelby County v. Holder*?*, WASH. POST (July 7, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/ (reporting that the VRAA "is stuck in legislative purgatory," while the DOJ and voting rights activists mount legal challenges to laws throughout the country).

V. CONCLUSION

Congress designed section 3(c) as a remedy to prevent jurisdictions outside the coverage of section 5 from engaging in discriminatory behavior. Only one court has interpreted the statute and found that it requires intentional discrimination. In the wake of the Court's invalidation of section 4(b) in *Shelby County v. Holder*, however, plaintiffs' requests for the section 3(c) judicial preclearance remedy have increased in frequency. Textual evidence and Fourteenth and Fifteenth Amendment jurisprudence suggest that intentional discrimination is not required to trigger the section 3(c) remedy. Thus, to ensure that minority citizens are protected from discrimination, courts should apply a less-burdensome invidious discrimination standard to trigger section 3(c) coverage.