



Shelby County v. Holder General Q and A

1. Why does Section 5 of the Voting Rights Act apply to some areas and not others?

- Section 5 is the heart of the Voting Rights Act. Under this provision, states and localities that have a demonstrated a chronic record of racial discrimination in voting (“covered areas”) must secure federal approval before making any voting changes.
- In 2006, Congress reauthorized Section 5 by an overwhelming bi-partisan vote of 390-33 in the House and 98-0 in the Senate. Before taking this significant step, however, Congress carefully studied the evidence of continuing discrimination in the covered areas in a process that lasted 10 months, including 21 hearings and over 90 witnesses, and produced a record of over 15,000 pages. During the course of the 2006 reauthorization, Congress considered whether to extend Section 5 to other states. But it ultimately declined to do so because of insufficient evidence of the same kind of voting discrimination that it found in the covered states.

2. Are there as many problems with voting discrimination in non-covered jurisdictions, as in covered ones?

- No. It is true that we have seen discriminatory and suppressive voting laws across the country this year, including many in states that are not covered by Section 5 (such as voter ID measures in Wisconsin and Pennsylvania, which were stopped without Section 5). However, that does not mean that Section 5 is no longer required in the covered states where racial discrimination is demonstrably worse and different in its pattern.
- Areas covered by Section 5 have demonstrated voting discrimination that is repetitive, persistent, and often specifically intended to circumvent judicial remedies that were adopted following case-by-case litigation. In other words, voting discrimination in these places is a chronic problem, and involves more than the relatively isolated and recent discrimination in other non-covered states. Accordingly, it requires a more stringent response that is consistent with its recurrent nature.

3. How does a law crafted in a Jim Crow era prevent discrimination in the present day?

- Section 5 covers those states and localities that have historically had, and to this day *continue to have*, many of the worst records with respect to discrimination in voting.
- When Congress passed the Voting Rights Act in 1965, it established a rule that states would initially be subject to federal oversight under Section 5 if they (1) had lower than 50% voter turnout or voter registration in the 1964 Presidential election, and (2) used a voting test or device (such as a so-called literacy test, or grandfather clause). This rule

effectively targeted states and areas that were known to have particularly bad records of racial discrimination in voting. Although times have changed, these areas are still the most chronic offenders, as Congress determined during its last reauthorization in 2006. The areas covered by Section 5 today remain the most obdurate places with respect to discrimination in voting.

- During each reauthorization, Congress has reexamined Section 5's geographic reach and has made periodic adjustments accordingly.
 - In 1970, Congress added additional grounds for coverage, which used criteria identical to that of the initial 1965 law, but substituted "1968" for "1964." As a result of the additional criteria, parts of ten new states became covered.
 - In 1975, Congress adjusted the scope more fundamentally, adding protections for voters with limited English proficiency, considering registration rates from 1972, and including English-only ballots a "test or device" for Section 5 purposes when used in a place where a significant portion of voting aged citizens all speak a single other language. This reauthorization brought all of Texas, Alaska, Arizona, and portions of other states, into Section 5's coverage.
 - In 1982 and 2006, Congress maintained the same scope as in 1975. (During the 1982 reauthorization, Congress modified the "bail out" provision, as discussed below.)
- In addition to Congress's periodic reexamination and readjustments, the Voting Rights Act includes another section that allows covered areas with a record of no recent voting discrimination to get out (or to "bail out") of the law's requirements. The Act also has a "bail in" mechanism for bringing non-covered jurisdictions that develop records of persistent voting discrimination falling within Section 5's reach.
- Congress's decision to reauthorize Section 5 in 2006 was based on a voluminous legislative record that conclusively demonstrated ongoing problems of discrimination covered states and localities. The evidence showed that between 1982 and reauthorization in 2006:
 - The Department of Justice blocked over 700 discriminatory changes to voting laws (over two-thirds of which were found to be at least partially motivated by intentional discrimination);
 - Plaintiffs challenging discrimination were successful in 653 voting discrimination lawsuits under Section 2 of the VRA, although covered localities consistently sought to evade judicial remedies imposed under this case-by-case litigation;
 - States and localities ignored or tried to evade federal preclearance requirements 105 times (i.e., Section 5 enforcement actions);

- Discriminatory acts required the deployment of tens of thousands of federal elections observers.
- Section 5 also contains a provision that allows requires Congress to revisit the scope of Section 5's coverage fifteen (15) years after reauthorization. Congress can use this option to determine whether existing coverage is still appropriate in light of the evidence before it.

4. What will happen if Section 5 is declared unconstitutional?

- First, we should appreciate that this would be a radical outcome in light of the Supreme Court's four previous decisions to uphold the constitutionality of this core provision, which is the heart of the Voting Rights Act. If the Court took this extraordinary step, it would seriously threaten the voting rights of African Americans and other minority voters throughout covered jurisdictions. It also could erode Congress's power to remedy other kinds of discrimination.
- From a practical standpoint, the loss of Section 5 would mean that voters of color and our allies would need to rely upon case-by-case litigation under Section 2 of the Voting Rights Act, as well as whatever protections may be available under various state laws and state constitutions, to safeguard the rights of all voters.
- The reason why Section 2 is much less effective than Section 5, however, is that Section 5 blocks discriminatory laws *before* they take effect and, therefore, *before* they can illegally harm minority voters. Without Section 5, individuals must find lawyers and the extensive resources that would be required to challenge discriminatory laws. One thing we know for certain is that those in power know how to manipulate the rules to their advantage.

5. Why is Section 2 an inadequate way to tackle ongoing problems of voting discrimination?

- Timing. Unlike Section 2, Section 5 blocks discriminatory voting laws *before* they are enacted. Most civil rights statutes only permit challenges to discriminatory laws after such laws go into effect. In the case of elections, ordinary legal remedies would come in too late, as they would permit an election to be held under a discriminatory regime. When it comes to voting specifically, the harm caused by discriminatory election is far reaching, as it could implicate the franchise of thousands of citizens, and sometimes even the legitimacy of an election itself.
- Repeated acts of discrimination. States and localities covered by Section 5 have proven time and again to repeat violations of voting rights. For example, every single one of Texas's initial state legislative redistricting plans has been rejected as discriminatory

since 1980—put differently, Texas has persisted in enacting discriminatory statewide redistricting plans for over *thirty years*, and in the most recent example of such, was found to have done so purposefully. In areas where discrimination in voting has proven to be a persistent, repetitive problem, minority citizens should not be forced to continuously invest in Section 2 lawsuits simply to participate in our democracy.

- Burden of proof. Intent can be difficult to prove, particularly as those who would discriminate have grown more sophisticated. Of course, there are some obvious examples of overt discrimination—for example, as recently as the 1990s, behind closed doors, members of the Mississippi state legislature referred to a redistricting plan favored by African Americans as the “nigger plan.” But generally speaking, discrimination has grown more subtle. Thus, Section 5 shifts the burden of proof to the states and localities themselves to prove that their voting laws are free from discriminatory purpose or effect. This is fair because it requires those with a proven record of discrimination—rather than the voters themselves—to bear the initial burden.
- Cost. Section 2 litigation is among the most costly types of litigation. Voters and their communities simply cannot shoulder the financial burden of these lawsuits every time a discriminatory voting change is enacted. Section 2 cases can cost tens of thousands of dollars, or more, from start to finish. Although attorneys’ fees are sometimes available at the completion of these cases, even when they are awarded, they generally cannot account for the fees that must be invested up front when initiating a case, and sometimes are not awarded at all, even if plaintiffs are successful.

5. How many jurisdictions have bailed out since *MUD*?

- In 1982, Congress substantially rewrote the coverage provision to enable jurisdictions to bail out if they had complied fully with the VRA and had not engaged in voting discrimination during the most recent ten years.
- In 2009, the Supreme Court’s decision in *MUD* made it easier for jurisdictions without recent or current evidence of voting discrimination to apply for a “bail out” from their responsibilities under Section 5.
- A total of 23 bailouts from Section 5 coverage, which includes hundreds of jurisdictions, have been approved since *MUD*.

6. How many jurisdictions are still covered by Section 5?

- All or part of 15 states are covered by Section 5
 - Fully covered (9): Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia

- Partially-covered (6): California, Florida, Michigan, New York, North Carolina, South Dakota.

7. Aren't most of the proposed voting changes submitted for approval precleared?

- Yes, which is strong evidence of Section 5's effectiveness. Covered jurisdictions must affirmatively consider whether proposed voting changes would comply with the requirements of Section 5 before submitting them for preclearance. Legislative records show that elected officials take Section 5 into account when adopting voting measures. Therefore, changes that are submitted are often precleared.
- That said, the DOJ interposed objections to more than 700 Section 5 submissions by covered jurisdictions from 1982 through 2005—a substantial number of which were based on evidence of discriminatory purpose.
- By their very nature, virtually all voting changes affect large numbers of people. Each blocked law has a far-reaching effect in ensuring greater equality.
- Moreover, the DOJ issues more information requests (MIRs) to jurisdictions after they have submitted plans for preclearance. Often, the request for information causes jurisdictions to either withdraw their requests in whole, or to amend their requests. In fact, between 1982 and 2003, at least 205 proposed voting changes were withdrawn by covered jurisdictions after their receipt of an MIR. These letters are important because they identify some potential problems with proposed voting laws, short of a formal objection, and give submitting jurisdictions an opportunity to address concerns or potential evidence of discrimination.

8. What were the major statewide discriminatory voting laws that Section 5 blocked in the past year?

- In the past year alone, Section 5 blocked discriminatory voting laws in South Carolina, Florida, and twice in Texas.
 - Texas – Section 5 blocked Texas's discriminatory voter ID law—one of the strictest in the nation—after finding that the proposed law imposed “strict, unforgiving burdens on the poor,” and after considering evidence that the state legislature had rejected many ameliorative changes that would have made the law easier for poor voters and voters of color to satisfy.
 - Texas (redistricting) – Section 5 blocked three of Texas's post-2010 statewide redistricting plans, finding that two were enacted with discriminatory purpose, and that the third may also have been. That court (which included two judges appointed by George W. Bush) unanimously found “unchallenged evidence” that the redistricting plans were “enacted with discriminatory intent.”

- South Carolina – In response to Section 5 scrutiny and litigation, South Carolina opted to carve out an exception in its voter ID law for anyone with a “reasonable impediment” to obtaining government-issued photo ID. A judge (also appointed by George W. Bush) sitting on the panel that considered that voter ID law noted that “The Section 5 process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of [the voter identification law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes.”

9. What are some examples of discriminatory voting changes that Section 5 blocked that Congress considered during reauthorization in 2006?

- Mississippi (1990) – During the 1990 redistricting cycle, members of the Mississippi state legislature referred to a redistricting plan favored by African Americans as the “nigger plan.” During the 1980 redistricting cycle, the chair of Georgia’s redistricting committee referred to majority-Black districts as “nigger districts.”
- Waller County, TX (2004) – Waller County attempted to reduce early voting at polling places near a historically Black university and threatened to criminally prosecute students for “illegal voting,” after two Black students announced their intent to run for office.
- Charleston, SC (2003) – After African Americans were elected as the majority of the County school board for the first time in history, the State responded by trying to eliminate the school board’s powers in favor of a statewide body. A court also found “significant evidence of intimidation and harassment” over several decades of African-American voters by poll managers.
- Kilmichael, MS (2001) - After the 2000 Census indicated that Black candidates could be elected for the first time, and an unprecedented number of Black candidates registered for election, white officials attempted to cancel local elections.
- North Harris Montgomery Community College District, TX (2006) – The jurisdiction proposed to reduce the number of its polling places from 84 to 12, where one polling place, which had the lowest proportion of voters of color, would serve 6,500 voters, while the polling place with the highest proportion of voters of color (80% Black and Latino) would serve over 67,000 voters.
- Northampton County, VA (2001-03) – After three of its six districts single-member districts became majority-minority, the County sought to redraw the districts into three dual-member districts, each of which would be majority-white,

and gave inaccurate justifications for the change. The Department of Justice had to object three times to block the plan.

- Washington Parish, LA (1993) – According to DOJ, the Parish attempted to reduce the impact of a new majority-African American district by “creat[ing] a new at-large seat to ensure that no white incumbent would lose his seat.”
- Selma, AL (the birthplace of the VRA) (1991) – After the 1990 Census revealed that Selma’s Black population had grown to 58%, the City enacted a redistricting plan that packed Black voters into four of nine council districts (three over 90% Black), which DOJ found was “motivated by the desire to . . . ensure a continuation of the current white majority on the council.”
- Augusta, GA (1987) – August utilized a racial quota system “requiring that each time a black residential area [was] annexed into the city, a corresponding number of white residents [would] be annexed in order to avoid increasing the city’s black population percentage.” It then relied on door-to-door surveys to identify white residential areas for annexation.
- Bladen County, NC (1987) – The Bladen County Board of Commissioners sought to change its method of election to district voting. After a committee worked for months to develop a compromised plan that was acceptable to white and African American communities in the county, the Board rejected the proposal. The DOJ found discriminatory intent, and that “the responsible public officials desired to adopt a plan which would maintain white political control to the maximum extent possible and thereby minimize the opportunity for effective political participation by black citizens.” According to the objection letter, “it appear[ed] that the board undertook extraordinary measures to adopt an election plan which minimizes minority voting strength.”

10. What jurisdictions have bailed out since Nw. Austin?

- City of Kings Mountain, North Carolina - October 22, 2010
- City of Sandy Springs, Georgia - October 26, 2010
- Jefferson County Drainage District Number Seven, TX - June 6, 2011
- Alta Irrigation District, CA - July 15, 2011
- City of Manassas Park, VA - August 3, 2011
- Rappahannock County, VA, including the Rappahannock County School Board and the Town of Washington - August 9, 2011

- Bedford County, VA, including the Bedford County School Board - August 30, 2011
- City of Bedford, VA - August 31, 2011
- Culpeper County, VA, including the Culpeper County School Board and the Town of Culpeper - October 3, 2011
- James City County, VA - November 9, 2011
- City of Williamsburg, VA, including the Williamsburg-James City County School Board - November 28, 2011
- King George County, VA, including the King George County School Board - April 5, 2012
- Prince William County, VA, including the Prince William County School Board and the Towns of Dumfries, Haymarket, Occoquan, and Quantico - April 10, 2012
- City of Pinson, AL - April 20, 2012
- Wythe County, VA, including the County School Board and the Towns of Rural Retreat and Wytheville - June 18, 2012
- Grayson County, VA, including the County School Board and the Towns of Independence, Fries and Troutdale - July 20, 2012
- Merced County, CA, - August 31, 2012
- Craig County, VA, including the Craig County School District and the Town of New Castle - November 29, 2012
- Carroll County, VA, including the Carroll County School District and the Town of Hillsville - November 30, 2012
- Browns Valley Irrigation District in Yuba County, CA - February 4, 2013
- Towns of Antrim, Benton, Boscawen, Millsfield, Newington, Pinkham's Grant, Rindge, Stewartstown, Stratford, and Unity, NH - March 1, 2013
- City of Wheatland in Yuba County, CA - April 25, 2013

- City of Falls Church, VA and the Falls Church City Public School District - May 29, 2013