

Shelby County v. Holder and the Demise of Section 5: What is Next for Voting Rights in Texas?

By: C. Robert Heath

BICKERSTAFF HEATH DELGADO ACOSTA, LLP
3711 South MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
(512) 472-8021

On June 25, 2013, in the last days of its 2012 term, the United States Supreme Court decided *Shelby County, Alabama v. Holder*, ____ U.S.____; 133 S.Ct. 2612 (2013), and effectively invalidated section 5 of the Voting Rights Act. Section 5 (52 U.S.C. § 10304), of course, is the provision of the 1965 Voting Rights Act that required covered jurisdictions, which includes the State of Texas and all of its political subdivisions, to obtain preclearance of any change in a voting practice, standard, or procedure before it could be implemented. The Court's decision did not directly address section 5. Rather, it determined that section 4, which contains the formula determining which jurisdictions are covered jurisdictions and, thus, were subject to section 5, was unconstitutional. Once the section 4 coverage formula fell, then section 5 was no longer effective even though the Court did not explicitly invalidate it.

I. Shelby County v. Holder and the End of Section 5

A. The Historical Context of the Enactment of the Voting Rights Act

To understand the Court's reasoning, it is helpful to look briefly to the historical context surrounding the enactment of the Voting Rights Act almost 50 years ago in 1965.

The Voting Rights Act of 1965 is one of the most important and effective pieces of federal legislation in American history. Congress passed the Act after demonstrations in Selma, Alabama highlighted the systematic disenfranchisement of Southern blacks, and television reports shocked the conscience of the nation by showing local Alabama law enforcement authorities' violent response to the demonstrators.

For persons under the age of fifty-five or sixty, it may be difficult to imagine the depth of the problem the Act addressed. While states may not have imposed overtly racial restrictions on voter registration, the fact was that it was at least difficult, and often impossible, for African-Americans to register to vote in many parts of the deep South. In 1965, there were counties in Mississippi and Alabama where blacks constituted a majority of the population, yet the number of African-Americans who were registered to vote could be counted on the fingers of one hand. Sometimes there were no blacks registered at all. For example, in Lowndes County, Alabama, blacks outnumbered whites by a margin of 4-1, yet not a single African-American was registered to vote. T. Branch, *At Canaan's Edge: America in the King Years 1965-68* (New York: Simon & Schuster 2006) 6, 101. In fact, no black had been on the registration rolls for at least 60 years, and it had been 20 years since one had even attempted to register. *Id.*

It is not surprising that no one made the attempt. A black person who sought to register could expect to be fired by his white employer or subjected to violence. Even if one could muster the physical courage and economic independence to make an application, the legal system was rigged to prevent black registration. Many states employed literacy tests that were either ridiculously easy or impossibly difficult depending on the race of the applicant. In Lowndes County, a prospective registrant was required to present an existing voter to vouch for his or her character. Of course, there were no black registrants, and no white voter could be expected to provide the necessary statement. *Id.* at 19.

The bottom line was that fully 100 years after the end of the Civil War and 95 years after the adoption of the 15th Amendment, which prohibited the states from denying any citizen the right to vote on the basis of race, blacks still were not permitted to participate in the political process in many areas of the South. Further, in the instances where progress had been made by the courts overturning specific barriers to black voter registration, the southern states simply devised different schemes that produced the same racially discriminatory result. As a practical matter, in many parts of the southern states, the franchise was the exclusive property of whites, and African-Americans were entirely excluded from the governmental process.

B. The 1965 Congressional Response: The Voting Rights Act Represents a Harsh Remedy to a Severe Problem—It Overrides State Sovereignty in Some States and Localities.

The passage of the Voting Rights Act of 1965 changed that. The legislation put the federal government firmly in the business of regulating elections—a field that previously had been the province of state and local government. The Act, however, does not regulate the right to vote generally. Subsequent laws enacted decades later would establish more comprehensive federal standards for voter registration and the mechanics of conducting elections. *E.g.*, The National Voter Registration Act (NVRA) (also known as the motor voter law), 52 U.S.C. § 20501, *et seq.*; Help America Vote Act (HAVA), 52 U.S.C. §§ 20901, *et seq.* While the NVRA and HAVA apply to all voters, the Voting Rights Act is targeted to discrimination in the electoral process on the basis of race. In 1975, the Act was expanded to extend its protections to persons who are in a language minority group as well as to persons experiencing racial discrimination in the electoral process. The Act applies to four language groups—Alaska natives, American Indians, persons of Spanish heritage, and Asian Americans. 52 U.S.C. §§ 10303(f), 10503.

While parts of the Act apply to the nation as a whole, section 5, 52 U.S.C. § 10304, which is the part of the Act that requires preclearance of voting changes, is limited to a specific geographic area. Initially, section 5 applied only to states in the deep South, but by 2013, it applied to Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia as well as various counties and townships in other states. Section 5 was enacted as a temporary provision and set to expire in five years. It has, however, been extended four times—in 1970, 1975, 1982, and most recently in 2006. Texas came under section 5 in 1975 with the coverage date retroactive to November 1, 1972.

Section 5 represents a significant federal encroachment on state sovereignty. In fact, one scholar likened the Act to putting the election systems in these areas into what was, in effect, a form of federal receivership. R. H. Pildes, *The Future of Voting Rights Policy: From Anti*

Discrimination to the Right to Vote, 49 HOWARD L. REV 741(2006). Before any change could be made in an election practice, standard, or procedure, a jurisdiction covered by section 5—as all governments in Texas were—was required to seek the approval of either the United States District Court in the District of Columbia or the Attorney General of the United States. The pre-approval or preclearance requirement was designed to avoid the practice of states staying one step ahead of the regulator where, in the past, every time a legal barrier to minority voting rights was removed, a state would come up with some new requirement that might be innocuous on its face but that was designed to produce the same discriminatory effect. The various states, counties, and townships to which section 5 applied were determined by a coverage formula set out in section 4 of the Act. The formula was based on the jurisdiction’s use of tests or devices during the 1960’s or 70’s that had the purpose or effect of denying or abridging the right to vote on account of race coupled with a low level of registration or voter turnout in the 1964 or 1972 presidential elections. 52 U.S.C. § 10303(b).

Shortly after the Act’s passage, the Supreme Court upheld the constitutionality of section 5 in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Again, in 1980, the Court found that section 5 was a permissible exercise of Congressional power under the Fifteenth Amendment. *City of Rome v. United States*, 446 U.S. 156, 172-83 (1980). More recently, the Supreme Court considered arguments that section 5 was unconstitutional in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009). While the *Northwest Austin* majority made it clear that it believed section 5 and its coverage formula raised “serious constitutional questions,” 557 U.S. at 205, the Court did not address the constitutional issue but instead decided the case on statutory grounds. Thus, while it was clear in dictum that the Court had constitutional concerns about the continued validity of section 5, the only holding of the Court on the constitutional issue was found in *Katzenbach* and *City of Rome*, both of which had found section 5 to be constitutional.

C. The *Shelby County* Decision

The Supreme Court in a 5-4 decision by Chief Justice Roberts found that section 4 of the Act, which set out the formula by which it is determined if a state or political subdivision is covered, is unconstitutional. The Court relied on the significant and unquestionable changes between the original enactment of the Voting Rights Act and today in the ability of minorities to register and to participate in the political process. The extreme and inherently unreasonable situation the Act was designed to address in 1965 is now only a memory. Justice Ginsburg wrote a vigorous and lengthy dissent that was joined by three other justices.

The *Shelby County* result was not a major surprise. In light of the growing trend of the Rehnquist and now the Roberts Courts to emphasize the federalism doctrine and to limit congressional authority in areas where previously the power of Congress to legislate was largely undoubted, there was always concern that the majority of the Court might have trouble affirming this very major restriction on the sovereignty of the states. In the *Northwest Austin* case, the Court noted what it characterized as serious constitutional concerns, but avoided them by basing its decision on a statutory interpretation that made it unnecessary to decide the constitutional issues. Further, when the reauthorization of the Act was being debated in 2006, legal scholars, concerned about the growing federalism emphasis of the court majority, urged the Congress to update the formula in order to avoid arguments that it was outdated or not relevant to the current facts. Congress, however, apparently found it easier simply to retain the existing formula rather

than to force members to make a determination that some members' constituencies require this special scrutiny of their electoral process while other members' districts do not.

Although the Court's decision invalidating section 4 and thus making section 5 ineffective was not entirely unexpected, Chief Justice Roberts' opinion was not without criticism. *See, e.g.*, Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 William and Mary Bill of Rights J. 713 (2014). Much of the criticism centered on the fact that Roberts relied largely on the *Northwest Austin* opinion as precedent even though the constitutional discussion in that case was at best dictum and did little more than identify constitutional concerns without deciding their validity. Indeed, the Roberts opinion notes that in *Northwest Austin*, in an opinion joined by two of the *Shelby County* dissenting justices, "the Court expressly stated that '[t]he Act's preclearance requirement and its coverage formula raise serious constitutional questions.'" *Shelby County*, at 2630, quoting, *Northwest Austin*, 557 U.S. at 204. Justice Ginsburg, who was one of the two persons who joined the *Northwest Austin* opinion but dissented in *Shelby County*, responded that "[a]cknowledging the existence of 'serious constitutional questions' [citation omitted] does not suggest how those questions should be answered." *Shelby County*, at 2637 n. 3 (Ginsburg, J., dissenting).

In addition to the dispute over the precedential effect of *Northwest Austin*, the majority and the dissent clashed over the fundamental question of the federal role in the election process. The majority emphasized that under the Tenth Amendment, the framers intended the states to keep for themselves the basic power to regulate elections. *Shelby County*, at 2623. The dissent, though, noted that the Constitution uses the term "right to vote" in five places—the 14th, 15th, 19th, 24th, and 26th Amendments—and in each case provided that Congress was authorized to enforce the right with "appropriate legislation." *Id.* at 2637, n. 2 (Ginsburg, J., dissenting).

A primary aspect of the Chief Justice's reasoning is that the Constitution embodies a "fundamental principle of *equal* sovereignty among the states." *Id.* at 2623. He primarily relies on dictum from *Northwest Austin*, apparently concluding that the dictum in that opinion overrode the holding in *Katzenbach* that the equal sovereignty doctrine was limited to the context of the admission of new states. *Id.* at 2623-24. The reliance on equal sovereignty has been strongly criticized. Judge Richard Posner of the Seventh Circuit, who is generally recognized as one of the leading conservative judges on the appellate bench, wrote in a popular forum that

The court's invocation of "equal sovereignty" is an indispensable prop of the decision. But...there is no doctrine of equal sovereignty. The opinion rests on air.

Richard A. Posner, *Supreme Court 2013: The Year in Review*, "The Voting Rights Act Ruling Is About the Conservative Imagination," SLATE (June 26, 2013) found at http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html. Another scholar, Joseph Fishkin, a University of Texas law professor, looked at the equal dignity rationale in a broader context and argued that it represented a failure to recognize the fundamental change in the relationship between the states and the nation resulting from the Civil War and Reconstruction. Joseph Fishkin, *The Dignity of the South*, 123 YALE L. J. ONLINE 175 (2013), <http://yalelawjournal.org/2013/06/08/fishkin.html>.

No matter what one thinks of the opinion's reasoning, it did command the support of the majority of the Supreme Court and represents the Court's holding. Further, no one can doubt that the situation that gave rise to the enactment of the Voting Rights Act in 1965, and in its earlier extensions, is no longer the case. While barriers to full minority participation in the electoral process may still exist, they do not approach the nature or severity of those that justified the initial enactment of the Voting Rights Act. Given that change, the Supreme Court determined that the section 4 coverage formula was no longer permissible, which means that section 5 is no longer effective. What, then, is the decision's impact on Texas political subdivisions?

II. Post Shelby County Questions

A. Continued Efficacy of Section 5

The Court determined that the failure to update the coverage formula when it enacted the 2006 reauthorization to reflect the current situation left it with no choice but to declare the section 4 unconstitutional and to rule that "[t]he formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County*, at 2631. Thus, jurisdictions previously subject to section 5 preclearance no longer have to submit changes in election practices, standards, and procedures to the Department of Justice or the District Court of the District of Columbia prior to implementing them. Once the jurisdiction adopts a changed practice, it may implement it.

B. Does the Court's Opinion Reinstate Changes that Were Subject to an Earlier Objection?

The language of the Court's opinion speaks in terms of no longer having to submit changes. It is silent as to the effect on earlier objections. The Court, though, was addressing the 2006 reauthorization legislation and the legitimacy of the coverage formula in the context of the current situation. It recognized that earlier versions of sections 4 and 5 had been upheld by the Supreme Court. Thus, the opinion should have no effect on previously imposed objections under prior versions of the Act.

A question, arguably, could arise about objections interposed under the 2006 reauthorization but before the opinion was issued on June 25, 2013. That question, though, is a moot one. The effect of the 2006 reauthorization was to extend protections of the Act that otherwise would have expired in 2007. There are no section 5 objections that were interposed in 2007 or later involving a Texas city. Thus, the issue involving objections during the window between the beginning of the 2006-authorized extension and the issuance of the *Shelby County* opinion should not arise.

C. Other Than Not Having to Make Preclearance Submissions, How Does *Shelby County* Affect My Client?

The most obvious and direct impact of the *Shelby County* opinion is the absence of any continuing requirement to preclear election changes. Thus, if a city calls a bond election or moves a polling place, there no longer will be a requirement to submit the change to the Department of Justice.

This means, though, that the enforcement focus of the Voting Rights Act will shift from section 5 to section 2. Section 5 acted as a substantial deterrent since jurisdictions knew that any change would be reviewed by the Department of Justice. Thus, there was a substantial incentive to ensure that any change complied with the Act. If it did not, there was the possibility that the Department of Justice would object. Now that process no longer exists.

The Department has indicated in public statements that it will increase its role in section 2 cases. Previously, section 2 cases have primarily been brought by private litigants. That likely will continue to be the case, but we can expect that the Department of Justice will look for appropriate cases and will bring the resources of the federal government to those cases. Additionally, since changes that previously would have been rejected or deterred by section 5 may now be implemented, it is likely that some of those will be subject to section 2 challenge.

It is difficult at this time to assess whether the demise of section 5 has resulted in a noticeable uptick in section 2 cases. It is reasonable to expect that the first cases will be brought against larger entities such as states. Also, as many states are now enacting legislation requiring certain types of identification cards for voters, restricting periods of early voting, making voter registration more difficult and other forms of what has been called voter suppression legislation (or voter fraud prevention legislation depending on your point of view and political affiliation), it is likely that this type of legislation will be the initial focus of section 2 litigation and, indeed, the Department of Justice is currently participating in the case challenging the Texas voter ID law.

It is most likely that section 2 cases will be filed in particularly important or what plaintiffs feel to be particularly egregious situations. For example, if a jurisdiction currently has single-member districts and decides to switch to an at-large election system or to a mixed system where only some of the seats are elected from single-member districts while the rest are elected at large, there is probably a very good chance that a section 2 case will be filed.

D. What Are the Implications of a Section 2 Case?

The good news for a jurisdiction facing a section 2 case is that the burden of proof is much more favorable than it is under section 5. In a section 5 submission, the burden is on the governmental body to establish that the election change did not have the purpose or effect of retrogressing. In section 2, by contrast, the burden is on the plaintiff to prove that the challenged election practice is discriminatory.

Other than the more favorable burden of proof for governmental entities, section 2 cases are much more intrusive and expensive than proceedings under section 5.

Like most major federal court litigation, section 2 cases are expensive. Although the precise requirements of a case will vary depending on the specific nature of the case, section 2 cases are typically dominated by expert testimony. The costs can and typically will go into the hundreds of thousands of dollars. Additionally, there can be an unquantifiable community cost, as the litigation may be perceived as pitting one racial or ethnic group against another.

Further, if the governmental entity is unsuccessful in defending a section 2 complaint, it will almost certainly be liable for the plaintiffs' attorneys' fees and expert fees. This can more than double the cost of defense as the government may end up paying the costs of both sides.

Section 5 provided a means of screening potential cases by either serving as a deterrent to enacting changes that might result in section 2 liability or in causing some of those changes to be avoided by a section 5 objection. In fact, a section 2 complaint challenging an election change was not ripe unless and until the change had gone through the preclearance process. Thus, the process served as a filter to prevent some potentially problematic changes from becoming the subject of a section 2 suit since they failed to survive the section 5 process. Now, those changes will be challenged, if at all, through section 2 cases.

E. What Are the Chances Congress Will Reauthorize Section 5?

The Court has left open the possibility that the Congress could amend section 4 to a new coverage formula based on current data rather than data from the 1960's and 1970's. Since the 2006 reauthorization passed by a vote of 390-33 in the House and 98-0 in the Senate, at first blush it would appear that the Congress might be eager to revise the Act to eliminate the constitutional problems. Given the current dysfunction of the Congress, though, it seems unlikely that a reauthorization bill would be adopted in the current atmosphere.

Although the 2006 reauthorization bill passed with a unanimous vote in the Senate and an overwhelming vote in the House, the actual support for the bill was not so strong as it appeared. As one scholar noted

The vote was remarkable in that almost all participants in the policy debate recognize that section 5 of the VRA represents a unique exception to the normal functioning of federalism and partisan politics; many Republicans consider it offensive to their notions of color-blindness and states' rights, and some Democrats see it as counter to their political interests. The vote was predictable, however, in that virtually no one wanted to be on record opposing the legislation. Republicans who may have disagreed with the legislation in principle nevertheless viewed it as largely serving their political interests. Most of them considered redistricting pursuant to aggressive enforcement of section 5 as creating inefficient Democratic districts. Moreover, the legislation appeared to be a relatively costless step toward thawing relationships with African Americans and maintaining gains among Hispanic supporters. On the other hand, most Democrats supported the reauthorization in principle, and those who did not consider opposition (or even amendment) to constitute political suicide.

Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L. J. 174, 180 (2007).

While at least one major Republican leader, Eric Cantor the then-House majority leader, called for legislation to revise and reauthorize section 5, it does not appear that legislation has sufficient Republican support to be passed today. In 2006, George W. Bush, the incumbent Republican President, strongly supported passage, which assisted in finding Republican votes in the Congress. Additionally, after negotiations with his caucus, then House Majority Leader John

Boehner, brought the bill to the floor under a rule that permitted four floor amendments, all of which supporters claimed would significantly weaken the bill. A majority of House Republicans voted in favor of three of the four amendments, but all were defeated with overwhelming Democratic support. The bill then passed with only thirty-three negative votes in the House.

Things are different today. The parties are more polarized than they were in 2006. In particular, the House Republican caucus is more conservative and less likely to compromise than in earlier years. Support for the bill from President Obama likely would have a negative impact on the House Republicans, while President Bush's 2006 support helped solidify Republican support. While many observers believe there may be ample support for the bill to pass the House with overwhelming Democratic support and some Republican support, the "Hastert Rule," which requires majority Republican support for a bill before the Republican majority will bring it to the floor, would, if utilized, likely prevent the leadership from bringing the bill to a vote in the House. Additionally, if the Congress is to address the problems set out by the Supreme Court, it would have to devise a new coverage formula based on more current data. That is a much more politically difficult task than simply ratifying what was done almost a half-century ago. Devising a new formula produces winners and losers, and forces legislators to vote on whether specific areas require oversight of their decisions because of an evidence-based perception that they cannot be trusted to avoid discriminating against racial and ethnic groups. Although there was some prominent Republican support for amending the section 4 formula in the last Congress, it did not result in a bill's making the floor. In the Congress that convened in 2015, the new chair of the House Judiciary Committee, Rep. Bob Goodlatte, R-VA, indicated that he thought changes to the Act were unnecessary. Since any legislation would need to pass through that committee, it is unlikely that this Congress can be expected to fix the Constitutional problems identified by the Supreme Court.

F. Is There an Opportunity for "Judicial Reauthorization?"

Obviously, the courts cannot reinstate section 5 unless the Supreme Court overturns *Shelby County*, which is, at best, highly unlikely.

There is, though, another provision of the Voting Rights Act that can operate through judicial action to subject jurisdictions to a section 5-like review process. Subsection (c) of section 3 of the Act, 52 U.S.C. § 10302(c), provides that in a proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments in a state or political subdivision, the court may, in addition to any relief it may grant, retain jurisdiction for whatever period it believes appropriate, and during such period, prevent any voting change from going into effect until the court finds it does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or language minority status. The section provides that as an alternative to review by the court, the jurisdiction may submit the change to the Attorney General of the United States and then implement the change if the Attorney General fails to interpose an objection within 60 days. In other words, if a court grants section 3 relief, then the state or jurisdiction will need to submit its election changes for preclearance before they can be implemented. Presumably, most jurisdictions subject to section 3 would choose the Department of Justice option since, as with section 5 preclearance review, it is likely to be the fastest and least expensive option. If judicial preclearance is selected, though, the reviewing court would be the local court rather than the District Court of the District of Columbia.

Currently, section 3 relief is being sought in the state redistricting case being tried before a three-judge court in San Antonio (*Perez v. State of Texas*, No. 11-CA-360-OLG-JES-XR) and in the Voter ID litigation before a single federal judge in Corpus Christi (*Veasey v. Perry*, No. 2:13-CV-00193). If section 3 relief is granted in one or both of those cases, presumably it would extend only to the state of Texas and not to its political subdivisions. Of course, if individual political subdivisions are sued, section 3 relief might be entered against those subdivisions. Since section 3 relief is available in actions to enforce constitutional rights, it will be necessary to show purposeful discrimination, which is a requirement in constitutional actions but not in section 2 cases.

Section 3 is a provision of the Voting Rights Act that has likely been unfamiliar to Texas practitioners. Presumably, it was designed to apply to areas that were not covered by section 5. In a section 5 jurisdiction, such as Texas, section 3 would have been redundant, as the Texas jurisdictions were already subject to section 5 so that relief under section 3 would simply duplicate what was already required. Only when section 5 became ineffective post-*Shelby County*, did section 3 become relevant to Texas. Now it provides a litigation pathway for imposing a section 5-type regime in individual cases.

III. Thoughts on Section 2 Now That the Demise of Section 5 Will Cause Section 2 to Become the Primary Option for Enforcing Voting Rights

Now that section 5 will no longer play its deterrent and filtering role in the enforcement of voting rights, we can expect plaintiffs to rely more heavily on section 2, which is the provision of the Act that permits an aggrieved party to challenge discriminatory voting practices. Thus, this paper will provide a few general thoughts about the issues that arise in section 2 litigation.

A. Sections 2 and 5 Have Different Standards and Scope

Section 5, of course, applied only to those jurisdictions that became covered jurisdictions under the formula set out in section 4. Texas and all of its political subdivisions were covered jurisdictions. Section 2, though, was nationwide in scope. Thus, in Texas we were always covered by both sections 2 and 5, while some areas were subject only to section 2.

Section 5 applied to changes in election practices, standards, and procedures. Thus, if a election practice had not changed, it was not subject to challenge under section 5. Section 2, on the other hand, does not require a change. An election practice that began long before the passage of the Voting Rights Act is subject to challenge under section 2.

The standard for enforcement under the two sections is different. Section 5, which relates only to changes, deals only with retrogression. Has the protected minority group's ability to participate in the political process and elect candidates of their choice been diminished by the election change? The section is designed to protect minorities from going backwards in electoral strength. If the change made things better for minorities or left them in the same position that existed prior to the change, there would generally be no section 5 violation *even if the practice had a discriminatory effect.*¹

¹ The 2006 amendments were designed, in part, to reach any discriminatory purpose. Thus, after the latest amendments, a discriminatory *purpose* behind an election change could result in a section 5 violation even if it was not retrogressive. It terms of effect, though, retrogression was the standard.

Under section 2, the standard for enforcement relates to discrimination. If an election practice discriminates against a protected minority group in making it more difficult for them than for the remainder of the electorate to participate in the electoral process and to elect candidates of their choice, then there would be a section 2 violation.

One of the major differences between sections 2 and 5 lies in the burden of proof. Under section 5, the burden is on the governmental entity to show that the election change is not retrogressive and was not adopted with a discriminatory purpose. Under section 2, though, the burden of proof lies with the plaintiff. Further, the burden of obtaining preclearance under section 5 was on the governmental subdivision. While a group opposing a change could submit its views to the Department of Justice or, in those rare instances where judicial preclearance in the District of Columbia District Court was sought, could intervene in the lawsuit, there was no necessity for it to do anything. Unless the governmental body sought and obtained preclearance, the election change could not be implemented. Under section 2, though, representatives of the protected minority group would typically be the ones initiating a suit to challenge the election practice. Thus, they would bear not only the burden of proof but also the significant financial burden of litigation. The statute does authorize the Attorney General of the United States to bring suit under section 2, but it is almost certain that the Attorney General will be involved in only a relatively small percentage of the suits brought under section 2.

B. The Threshold Requirements for a Section 2 Suit

In a suit brought under section 2 of the Voting Rights Act, 52 U.S.C. § 10301, the court must initially determine if the plaintiffs have met the three-part threshold test² set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986); specifically:

1. Whether the minority group of which the plaintiff is a member is sufficiently large and geographically compact to be able to constitute a citizen-voting-age population majority in a single-member district;
2. Whether the minority group is politically cohesive; and
3. Whether the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848, 372 (5th Cir. 1999).

If the plaintiff is able to satisfy all three parts of the threshold test, then the court must examine the totality of the circumstances to determine if “it is shown that the political processes leading to nomination or election...are not equally open to participation by members of a [racial

² Most section 2 suits involve some aspect of districting. Generally the suit will challenge the boundaries of a single-member district or will seek to convert an at-large election system to one with single-member districts. Thus, the threshold test is designed to address that type of case. If the suit relates to election practices that do not involve some form of districting, then the test may need to be modified. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 148 (1993).

or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” Voting Rights Act, § 2, 52 U.S.C. § 10301; *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994).

While some section 2 cases are ultimately decided on the totality of the circumstances analysis, the focus of most cases relates to the three elements of the threshold test. Failure to establish any one of the three threshold elements is fatal to the plaintiff’s case. *Campos v. City of Houston*, 113 F.3d 544, 547 (5th Cir. 1997). Thus, a defendant can prevail by winning on any one of the three elements.

C. In Texas, Most Section 2 Suits Are Brought by Hispanic Plaintiffs

In recent years, most section 2 suits brought in Texas have been brought by Hispanic plaintiffs. Hispanics represent by far the largest minority group, yet it is one where Hispanic electoral representation has often lagged behind the Hispanic share of the population. Asian-Americans represent a rapidly growing part of the population, but it seldom is sufficiently large or concentrated in a jurisdiction to satisfy the first part of the threshold test. African-Americans are often sufficiently numerous and geographically concentrated to permit districts to be drawn where African-Americans are likely to be elected. The group has been often been successful in the courtroom or in the legislature so that there are many districts where African-Americans have an electoral advantage. While African-Americans can and do continue to bring redistricting suits, the greatest opportunity for litigation success lies with Hispanics, so those are the primary types of suits we tend to see. Because most suits are brought to enforce Hispanic voting rights this often has an impact on the viability of the suit because of the demographic characteristics of the Hispanic population in Texas.

D. Demographic Issues That Are Often Present in Suits to Enforce Hispanic Voting Rights

In many suits brought by Hispanic plaintiffs, the key issue will involve the first prong of the *Gingles*-threshold test—*i.e.*, whether the plaintiff group is sufficiently large and geographically concentrated to be able to constitute a majority in a single-member district. In the Fifth Circuit, as well as other circuits to have considered the issue—the relevant population that is used to determine a majority is the citizen-voting-age population. *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997); *see also, Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999) (“this court has already determined what factors limit the relevant population in the district [when analyzing the first *Gingles* factor]: voting-age and citizenship”); *Perez v. Pasadena Ind. Sch. Dist.*, 165 F.3d 368, 372 (5th Cir. 1999) (“We have unequivocally held, however, that courts ‘must consider the *citizen* voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority.’ ...such a result is required by the plain language of Section 2.”).

The use of citizen-voting-age population (CVAP) to determine the first prong of the *Gingles* analysis poses two problems for Hispanic plaintiffs. First, the median age of the Hispanic population is typically lower than it is for the population generally because there is often a larger percentage of children in the Hispanic population. Thus, for example, if Hispanics make up 50 percent of an area’s total population, they may constitute only 45 percent of the voting-age population, if the Hispanic population contains a larger percentage of children than the non-Hispanic population. The second potential problem for Hispanic plaintiffs involves

citizenship—the other part of the CVAP measure. All racial and ethnic groups are likely to contain some number of non-citizens. In Texas, though, the rate of non-citizens among Hispanics can be particularly high, so that an area that has a very large Hispanic population may contain a much smaller Hispanic percentage if CVAP, rather than total population, is the measure.

A good example can be seen in the Dallas Independent School District, which faced a section 2 suit following the post-2000 Census redistricting. The Dallas school district was made up of three basic groups—Anglos (37.0% of the District's 2000 voting-age population), Hispanics (35.2%), and Blacks (24.5%). All other groups collectively constituted the remaining 3.3 percent. The 2000 Census reported that almost all of the Anglo and Black voting-age population were citizens—97.7 percent for each group. For Hispanics, however, only 39.7 percent of the voting-age population were citizens. Thus, while virtually every adult Anglo and Black was potentially an eligible voter in 2000, fully six out of every ten adult Hispanic residing in the school district were non-citizens and, thus, were ineligible to vote. To measure potential voting strength by looking only at population, rather than the subset of the population that is potentially eligible to vote, would give a distorted indication of a group's potential to elect.

In that case, the Hispanic plaintiffs complained that they were underrepresented by the way the nine single-member districts were drawn, since they were a dominant population group, but elected Hispanics in only two of the districts, as reflected by this table, showing the distribution of the school district population by voting-age population and the percentage of seats on the nine-member school board held by members of the various racial and ethnic groups.³

TABLE I
VOTING-AGE POPULATION ANALYSIS

	Anglo	Hispanic	Black	Other
VAP	37.0%	35.2%	24.5%	3.3%
Seats won	44.4%	22.2%	33.3%	0%

Citizen-voting-age population, however, is the legally required measure. Looking at CVAP, the impact of the roughly 40 percent Hispanic citizenship rate becomes dramatically clear.

³ The Voting Rights Act does not guarantee proportional representation. 52 U.S.C. § 10301(b) ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"). It may, however, be relevant evidence when considering whether an election system discriminates against a minority group.

TABLE II
CITIZEN-VOTING-AGE POPULATION ANALYSIS

	Anglo	Hispanic	Black	Other
CVAP	47.6%	18.3%	31.8%	2.3%
Seats won	44.4%	22.2%	33.3%	0%

Using citizen-voting-age population, rather than voting-age population, as the relevant measure cuts the Hispanic proportion of the potential electorate almost in half—a drop from 35.2 percent to 18.3 percent. This, in turn, causes the Anglo and Black percentages to go up substantially. In fact, using citizen-voting-age population as the measure showed that Hispanics were elected in slightly greater percentages than their numbers would suggest. Indeed, the existing plan reflected the percentages in the relevant population (*i.e.*, CVAP) almost perfectly. After receipt of a motion for summary judgment containing these tables, the plaintiff filed a stipulation of dismissal. Thus, citizenship percentages can, and generally will, become an important factor in analyzing or defending a section 2 claim.

Citizenship rates among the adult Hispanic population vary dramatically depending on location. As the following table demonstrates, the rates in these major Texas cities range from a high of 93 percent to a low of 46 percent. Rates along the border are relatively high, while in the larger cities (other than San Antonio), they are relatively low.

Texas City	Percent of Hispanic Adults Who Are Citizens
Lubbock	92.44%
San Angelo	89.35%
San Antonio	85.57%
El Paso	79.96%
Amarillo	76.20%
McAllen	71.28%
Austin	64.83%
Fort Worth	55.85%
Houston	51.89%
Dallas	45.92%
<i>2012 ACS 1 Year Survey Data U.S. Census Bureau</i>	

In the detailed analysis required when a section 2 suit is filed, it becomes apparent that rates not only fluctuate from city to city, but they will vary greatly from one area of the city to another. One cannot simply make assumptions about citizenship. It is necessary to look

carefully at the data. Further, developing the relevant numbers will often require not only locating the necessary data, but also manipulating it to get the precise information needed.

E. Data Source for Section 2 Demographic Analysis

In the 2000 and earlier censuses, all households would receive either short form or the long form of the census questionnaire. The short form was distributed to about 5/6 of America's households and requested information on each individual in the household with questions on gender, race, age, and Hispanic status. The long form contained all the short form questions, which made those areas of inquiry a 100 percent sample, but also asked questions about many other areas, one of which was citizenship. Thus, to obtain citizenship information, we relied on sample data, albeit from a massive sample of about one-sixth of the population. It was relatively easy to integrate data from the long form and the short form since they addressed the population on the same day—April 1 of years ending in 0.

Following the 2000 census, the Census Bureau replaced the long form with the American Community Survey (ACS), which goes to a much smaller sample, but is taken on a continuous basis. For areas with a population over 65,000, the Census Bureau will produce yearly estimates. US Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know* (October 2008) at 3. For smaller areas, the ACS bases its estimates on either a three- or five-year accumulation of data. The three-year sample is reported for areas of 20,000 or more. *Id.* To obtain data at the block group level, which is the geographic area for which citizenship information could be obtained using the long form, it is necessary to use the five-year sample. *Id.* The data necessary for redistricting or for analyzing potential liability in section 2 cases is that reported at the smallest unit of geography—in this case the block group level.

Using the ACS produces challenges. Although, the ACS produces the same basic information that was on the long form, it is not directly comparable. The most obvious example relates to age. Since the census represents a snapshot in time—April 1 of years divisible by 10—the age information was easy to work with because it was frozen in time. Continuous sampling, however, means that the data are always changing and more current. Persons who were thirteen and well below voting age at the beginning of the five-year sample period will be eighteen and eligible to vote at the end. It is equivalent in some respects to the difference between a photograph and a movie. The former may permit more detailed and careful analysis, but the latter gives a more dynamic picture of change.

While the ACS, like the long form in the 2000 and earlier censuses, is a sample, it is a much smaller sample, and it poses problems when using it in conjunction with the decennial census since it covers a different time period. Perhaps more significant, because it comes from a smaller sample of the population, it is less exact than long-form data, especially when used to measure sub-groups of the population residing in relatively small geographic areas. The long form went to roughly one in six households and measured population characteristics on a single day. By contrast, the ACS is a continuous sample that over the course of a year will reach perhaps one-tenth of the number of households included in the long-term sample. *Id.* (ACS conducts “nearly 2 million final interviews in a year compared to the 18 million housing units contained in the 2000 long-form sample). Accordingly, as a smaller sample, it is less precise and its numbers are reported with margins of error. Especially when the group measured becomes smaller, the margins of error are higher. When one examines the citizenship rate for specific

racial and ethnic group for small geographic areas, the margins of error can be dramatic. In order to analyze or defend section 2 cases, it is necessary to have an understanding of the demographic issues and the ability to work with the data.