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## The Case For State Attorney General Enforcement of the Voting Rights Act Against Local Governments

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## THE CASE FOR STATE ATTORNEY GENERAL ENFORCEMENT OF THE VOTING RIGHTS ACT AGAINST LOCAL GOVERNMENTS

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Perry Grossman\*

### ABSTRACT

*The summer of 2016 showed that racial discrimination in voting is alive and well, as federal courts across the country struck down state statutes that disproportionately disenfranchise minority voters, including voter ID laws, restrictions on early voting, and racially gerrymandered legislative districts. However, at the local level, discriminatory practices in the nation's approximately 89,000 political subdivisions have gone largely uninvestigated and challenged.*

*Recent conflicts between communities of color and law enforcement have highlighted the failure of local governments in places like Ferguson, Missouri to adequately represent the interests of minority voters. These failures of representation, which occur in progressive states like California as well as in more conservative states, are due in part to local election laws and practices that dilute minority voting strength. Section 2 of the Voting Rights Act provides a cause of action against vote dilution, but such cases are unusually complicated, expensive, and time-consuming with no promise of damages and highly uncertain recovery of attorneys' fees to a prevailing plaintiff. As a result, few plaintiffs outside the federal Department of Justice and major civil rights groups have mustered the resources to prosecute cases under the federal Voting Rights Act. Although states could pass their own laws against vote dilution that would encourage more private plaintiffs to investigate and prosecute offending local governments, only California has passed such a law. The California Voting Rights Act (CVRA) addresses only a single discriminatory practice—the pervasive use of at-large methods of election in jurisdictions where racially polarized voting systematically defeats minority candidates. The CVRA has revealed that (1) vote dilution is widespread; (2) case-by-case litigation can have a deterrent effect under conditions that encourage private enforcement; and (3) more enforcement is needed to prevent local governments from evading scrutiny or backsliding.*

*But, because the CVRA's effectiveness is limited to only one class of practices in only one state, to increase the level of enforcement there is a need for new voting rights plaintiffs with the resources both to bring cases under Section 2 of the Voting*

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*Rights Act and to monitor compliance with judgments and settlements. State attorneys general can fill this need, and possess some advantages relative to both the United States Department of Justice (e.g., a narrower geographic focus and the ability to collect attorneys' fees under the Voting Rights Act) and private plaintiffs (e.g., an imprimatur of law enforcement, in-house investigatory resources, and a "bully pulpit"). With the election of Donald Trump and the confirmation of Jeff Sessions as Attorney General, the need to find more resources to combat discrimination in voting is imperative as the Department of Justice appears poised to abandon Obama Administration's enforcement efforts in favor of investigating groundless allegations of voter fraud.*

*To date, no state attorney general has ever brought a Section 2 claim against a political subdivision, but this Article makes the case that state attorneys general can, and should, enforce the federal Voting Rights Act against local governments to protect minority voters.*

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INTRODUCTION

The terrifying, disheartening, and ongoing tale of conflict between law enforcement and communities of color is the most public symptom of the failure to represent the interests of minority voters in local government. This failure is attributable in no small part to the inability of many communities of color to elect members of their groups to local elected offices. Neither the Constitution nor the Voting Rights Act creates an entitlement for any racial group to be represented proportionally in government. However, the Voting Rights Act does represent a fundamental recognition that “there is something inherently wrong with a system in which a large racial group is systematically outvoted and unrepresented by redistricting schemes that disadvantage them.”<sup>1</sup> That “inherent wrong” is borne out in the ways in which the key functions of local government—most visibly, policing, public education, and utilities (e.g., delivery of safe drinking water), but also public transportation, sanitation, and land use—have been executed in ways that lead to inferior outcomes for minorities and the erosion of minority communities’ confidence in those vital public institutions. The Voting Rights Act is directed at remedying this precise problem, but sufficient resources have never been committed to the task.

For most of the nearly 150 years during which the Constitution has prohibited racial discrimination in voting, minority voters and the federal government have borne the burden of investigating and prosecuting states and local jurisdictions engaged in discrimination on a case-by-case basis. But case-by-case litigation has proven ineffective because voting rights lawsuits are costly, time-consuming, and hard to win, offending jurisdictions are experts in evading adverse judgments, and the resources available to enforce voting rights protections are grossly insufficient to make meaningful progress toward improving minority political participation.<sup>2</sup> The frustration of case-by-case litigation has been aptly likened to a

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1. Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. 205, 209 (2013).

2. See *id.* at 208.

“game of Whac-A-Mole in which responsive litigation is never able to catch up with determined wrongdoers.”<sup>3</sup>

The Voting Rights Act changed the game and its outcome by “shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims.”<sup>4</sup> The Act’s “preclearance” solution—requiring jurisdictions with the worst histories of discrimination to prove that changes to the voting practices would not harm minorities, rather than requiring minority voters to prove that they would be harmed—created an enforcement scheme that could effectively curb efforts to disenfranchise minorities in covered jurisdictions without a massive increase in resources. In 1982, Congress amended the Voting Rights Act to provide a more powerful affirmative tool to eradicate discrimination—in particular, facially race-neutral vote dilution schemes—by requiring plaintiffs to prove only that a challenged practice has discriminatory effects without showing that the practice was adopted with a discriminatory purpose.<sup>5</sup> But even under this “effects” test, investigating and prosecuting vote dilution claims remained resource intensive and time-consuming; however, with the preclearance regime in place to preserve the gains of litigation and prevent backsliding, the Voting Rights Act was able to provide an enforcement scheme that amplified the effectiveness of the scarce resources available for affirmative litigation. In *Shelby County v. Holder*,<sup>6</sup> however, the Supreme Court struck down the coverage formula that determined which jurisdictions are subject to preclearance, thus leaving the preclearance scheme practically inoperable until Congress passes a new coverage formula.

In his majority opinion in *Shelby County*, Chief Justice Roberts wrote, “Voting discrimination still exists; no one doubts that.”<sup>7</sup> The Chief Justice did not acknowledge, however, that the extent of voting discrimination that still exists still overwhelms the enforcement capacity of the present case-by-case litigation scheme. After *Shelby County*, the resources of the nation’s most experienced and well-funded voting rights lawyers—those from the federal Department of Justice and national civil rights law firms—have been devoted to challenging the highest-impact vote suppression and vote dilution efforts in formerly covered jurisdictions. The result is an enforcement deficit both inside and outside formerly covered jurisdictions,

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3. Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151, 163 (2013).

4. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

5. *See United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1563–64 (11th Cir. 1984).

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

7. *Id.* at 2619.

particularly at the local level, which suffered from massive enforcement deficits even under preclearance. California's experience with local-level voting rights enforcement and the election of minority candidates for local office strongly indicates that there may be substantial undiagnosed and unchallenged vote dilution, both in that state and across the country.

The present case-by-case litigation enforcement scheme may prove as ineffective as the pre-Voting Rights Act scheme unless there is an influx of resources to bring enough cases to not only eradicate existing discriminatory practices, but to deter future discrimination. California's experience also shows that where plaintiffs can bring a critical mass of successful voting rights enforcement actions and win awards of attorneys' fees, local jurisdictions can be deterred from engaging in discriminatory practices. To increase the number of voting rights cases toward a critical mass, it is essential to lower the cost of investigating and prosecuting vote dilution cases and to increase the number of plaintiffs bringing voting rights cases.

State attorneys general offer an untapped well of resources that can contribute to both goals and amplify the efforts of the United States Department of Justice and the few private plaintiffs with the money, manpower, and expertise to bring voting rights cases. State attorneys general are well-equipped law enforcement agencies with the resources to bring a high volume of cases, and have the advantages of geographic proximity, local knowledge, and official imprimatur to investigate and prosecute cases efficiently and effectively. In addition, as likely repeat players, state attorneys general have an incentive to find ways to lower the cost of voting litigation. By developing and sharing ways to reduce the cost of voting suits, state attorneys general can help improve the state of voting rights enforcement even beyond their own borders. Finally, state attorneys general who take action to protect minority voting rights against local governments may be able to gain a net political advantage by sending a positive signal to minority voters statewide.

Making a meaningful impact will require addressing the widespread, but largely overlooked, problem of vote dilution in local elections. To address the challenge of local-level vote dilution, state attorneys general will likely have to bring cases under Section 2 of the Voting Rights Act. Although state constitutions provide for an express right to vote that can and should provide a right of action against any denial or dilution of the right to vote, courts have thus far not found those state constitutional rights to be so expansive. State legislatures could enact statutory protections to at least the

same extent of Section 2 of the federal Voting Rights Act, but so far only California provides any state law remedy for vote dilution.<sup>8</sup> The California law tackles a substantial problem in addressing the use of at-large election systems to deny representation to minorities in political subdivisions where there is racially polarized voting, but the law does not provide a right of action against district-based elections.<sup>9</sup> The result is that local governments in California have been switching en masse from at-large elections to district-based elections, which are safely outside the scrutiny of the strong California law.<sup>10</sup> Even in the most voting-rights protective state in the Union, protections for minority votes are incomplete.

The failure of nearly all states to enact their own legislative protections for minority voting rights may be disappointing, but it is hardly surprising. At the outset, as a matter of arithmetic, minorities have difficulty commanding legislative majorities.<sup>11</sup> And “when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects,” which will continue to dilute a minority group’s voting strength even as its population increases.<sup>12</sup> The result is that Section 2 of the Voting Rights Act provides the only established cause of action against a broad array of vote dilution practices in the United States.<sup>13</sup> The failure of state legislatures and governors to take action to protect minority voting rights should not interfere with the prerogative of an independently elected state attorney general to enforce federal law.

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8. CAL. ELEC. CODE § 14027 (West 2003).

9. See Paige A. Epstein, *Addressing Minority Vote Dilution Through State Voting Rights Acts* (U. Chi. Law Sch. Pub. L. & Legal Theory Working Papers, Working Paper No. 474, 2014), [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1918&context=public\\_law\\_and\\_legal\\_theory](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1918&context=public_law_and_legal_theory) (discussing California and Illinois state voting rights legislation and proposed efforts in Washington to enact state voting rights protections). In addition to California and Illinois, there have been substantial efforts to enact state voting rights legislation in Washington, but those efforts have stalled repeatedly. See Mike Faulk, *State Voting Rights Act Likely Dead Again this Year*, YAKIMA HERALD (Mar. 11, 2016), [http://www.yakimaherald.com/news/local/state-voting-rights-act-likely-dead-again-this-year/article\\_8220d6b4-e767-11e5-9ab4-47960757d656.html](http://www.yakimaherald.com/news/local/state-voting-rights-act-likely-dead-again-this-year/article_8220d6b4-e767-11e5-9ab4-47960757d656.html).

10. CAL. S. COMM. ON GOVERNANCE AND FIN., B. ANALYSIS, S.B. 493, 2015–2016 Reg. Sess., at 2 (2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0451-0500/sb\\_493\\_cfa\\_20150501\\_140528\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0451-0500/sb_493_cfa_20150501_140528_sen_comm.html) [hereinafter S.B. 493 BILL ANALYSIS] (noting that “over 130 local governments have switched from at-large to district-based elections since the enactment of the CVRA in 2002. While some jurisdictions did so in response to litigation or threats of litigation, other jurisdictions proactively changed election methods because they believed they could be susceptible to a legal challenge under the CVRA, and they wished to avoid the potential expense of litigation”).

11. Ansolabehere, Persily & Stewart, *supra* note 1, at 209.

12. *Id.*

13. See *id.*

The Voting Rights Act does not expressly provide standing for state attorneys general; however, this Article argues that state attorneys general should be able to establish standing as *parens patriae* under Section 2. Although federal courts have expressed distrust at state efforts to enforce the Voting Rights Act, that distrust does not warrant a categorical ban on all state efforts to contribute to an enforcement system that desperately needs their help. Instead, federal courts should be vigilant to ensure that state attorneys general, like other plaintiffs, are not attempting to use the Voting Rights Act to achieve a retrogressive end.

Part I provides a brief history of the legal protections for minority voting rights and the schemes used to enforce those laws. Part II investigates the extent of current potential local-level vote dilution claims. Part III examines the factors that are causing under-enforcement of Section 2 claims. Part IV considers why state attorneys general should join the effort to enforce the Voting Rights Act against local governments, and against local-level vote dilution in particular. Part V discusses why Section 2 of the Voting Rights Act presents the only established and effective right of action—state or federal—against vote dilution. Part VI argues that state attorneys general can establish constitutional and statutory standing to bring Section 2 actions, notwithstanding the law’s ambiguous standing provision and the federal courts’ historical distrust of state efforts to enforce the Voting Rights Act.

#### I. A BRIEF HISTORY OF LEGAL PROTECTIONS FOR MINORITY VOTING RIGHTS AND THEIR ENFORCEMENT SCHEMES

The modern struggle to craft an effective enforcement scheme against racial discrimination in voting began in earnest after state and local governments spent nearly a century ignoring or evading the guarantees embodied in the Fourteenth and Fifteenth Amendments.

The federal government made its first foray into voting rights enforcement since the immediate post-Reconstruction period with the Civil Rights Act of 1957.<sup>14</sup> The 1957 Act created the Civil Rights Division of the United States Department of Justice and authorized the Attorney General to bring lawsuits against state efforts to deny

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14. Drew S. Days, III, *Vindicating Civil Rights in Changing Times*, 93 YALE L.J. 990, 991 (1984).



minority voters access to the ballot through discriminatory application of voter qualifications.<sup>15</sup> But at its inception the Civil Rights Division had far too few resources to make any significant inroads towards eliminating discrimination in voting that had taken root in previous decades. As John Doar, a member of the Civil Rights Division in 1960 who would later become the Division's chief, wrote, "In 1960 the Division was small—very small. It consisted of about fifteen lawyers who (as if the Division did not have enough to do) had been assigned criminal and civil jurisdiction over election fraud and federal custody matters."<sup>16</sup> In general, the 1957 Act was "seen primarily as a symbolic measure with little enforcement," and as "[w]ell-intentioned as the bill surely was, it had few teeth and little impact: the Justice Department was sluggish in initiating suits, southern federal judges were sometimes unreceptive, and the entire strategy of relying on litigation inescapably meant that progress would be slow."<sup>17</sup>

The Civil Rights Acts of 1960 and 1964 provided some additional protections for voting rights, but continued to rely on case-by-case litigation without a concomitant increase in resources necessary to make meaningful progress.<sup>18</sup> Instead of dedicating adequate resources to enforce compliance, the 1957 and 1960 acts relied on voluntary compliance from state and local governments that had been recalcitrant and evasive.<sup>19</sup> Although the 1964 Act provides for sweeping and powerful protections against discrimination in public accommodations, "the voting rights provisions were the least controversial aspects of the bill."<sup>20</sup> The 1964 Act provided for several additional legislative protections against practices used to deny minorities access to the ballot,<sup>21</sup> but overall did little to improve the effectiveness of case-by-case enforcement. As the Supreme Court observed, "[v]oting suits are unusually onerous to prepare," sometimes requiring thousands of hours spent combing through records

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15. 52 U.S.C.A. § 10101 (West 1957).

16. John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 2 (1997).

17. Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 189 n.98 (2015) (quoting Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 58 (2008); ALEXANDER KEYSAR, *THE RIGHT TO VOTE* 18 (2d ed. 2009)).

18. Donald Campbell, *Partisanship, Politics, and the Voting Rights Act: The Curious Case of U.S. v. Ike Brown*, 29 HARV. J. RACIAL & ETHNIC JUST. 33, 43–44 (2013) (citing RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 189 (2004)).

19. *Id.*

20. *Id.*

21. *Id.*

to build.<sup>22</sup> On those occasions when minority voters were able to successfully investigate, challenge, and enjoin a discriminatory practice, or an official engaged in discrimination, offending jurisdictions would frequently simply shift to another discriminatory practice or replace the official subject to the injunction with a person not subject to the injunction.<sup>23</sup>

Ultimately, the federal government's experience attempting to enforce protections for black voting rights under the Civil Rights Acts of 1957, 1960, and 1964 revealed that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."<sup>24</sup> More importantly, case-by-case litigation under the 1957, 1960, and 1964 Civil Rights Acts made very little progress.<sup>25</sup>

The Voting Rights Act of 1965 became the most effective civil rights law in history by inverting the enforcement scheme "to shift the advantage of time and inertia from the perpetrators of the evil to its victims."<sup>26</sup> Section 5 of the Voting Rights Act became known as the "crown jewel"<sup>27</sup> of the civil rights movement because, rather than requiring plaintiffs to pursue recalcitrant and evasive jurisdictions ad infinitum through case-by-case litigation, the law required jurisdictions with the worst histories of discrimination to "preclear" changes to their election laws and practices with either the United States Department of Justice or the United States District Court for the District of Columbia.<sup>28</sup> To implement any proposed change, Section 5 required that a covered jurisdiction show that the change was non-retrogressive, i.e., that it would not make minority voters

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22. *Id.* at 45 (footnotes omitted).

23. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

24. *Id.* at 328 (citing S. Rep. No. 97-417 at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182).

25. *Id.* at 313 ("[R]egistration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.").

26. *Id.* at 328.

27. Heather Gerken, *Saying Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013, 3:50 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/06/supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_goodbye\\_to\\_section\\_5.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html).

28. 52 U.S.C. § 10304 (2012).

worse off.<sup>29</sup> Preclearance thus provided “a one-way ratchet for minority political gains,”<sup>30</sup> with Section 5 offering a “natural benchmark that preserves the political gains minority voters have achieved through political or legal action.”<sup>31</sup> While the extraordinary new preclearance regime created by Section 5 “engendered protracted disputes,” Section 2 of the Voting Rights Act, which provides a private right of action to eradicate discriminatory election practices on a nationwide basis, was considered “an uncontroversial provision.”<sup>32</sup> Section 2 “was originally designed to appease Southerners who felt that their constituencies were being singled out for extraordinary federal action,” and was a “little used” law that provided no effect beyond that of the Fifteenth Amendment until Congress made significant amendments to the private right of action in 1982.<sup>33</sup> But even without an enhanced private right of action, the new preclearance regime was able to generate extraordinary results, including massive increases in minority voter registration and the election of more minority candidates to office.<sup>34</sup>

This novel enforcement scheme also spurred the creativity of jurisdictions seeking to discriminate against minority voters.<sup>35</sup> The “first generation” of discriminatory barriers<sup>36</sup> to minority political participation directly impeded ballot access, including the literacy tests, poll taxes, and voter intimidation tactics discussed above. Although the Voting Rights Act effectively curtailed the use of many

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29. *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969) (citing 42 U.S.C. § 1973c (2012)).

30. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1711 (2004).

31. *Id.* (quoting Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 21 (2004)).

32. *Mobile v. Bolden*, 446 U.S. 55, 61 (1980).

33. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act*, 40 WASH. & LEE L. REV. 1347, 1352 & n.28 (1983).

34. CHANDLER DAVIDSON, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING* 7, 21 (B. Grofman & C. Davidson eds., 1992) (“The Justice Department estimated that in the five years after [the Voting Rights Act’s] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.”).

35. *Rome v. United States*, 446 U.S. 156, 181 (1980) (“As registration and voting of minority citizens increases [sic], other measures may be resorted to which would dilute increasing minority voting strength”) (quoting H.R. Rep. No. 94-196, at 15–16, 1975 U.S.C.A.N. 782–785); Allan J. Lichtman and J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 BERKELEY LA RAZA L. J. 1, 2 (1993) (“Although the Voting Rights Act quickly removed obstacles to registration and voting by individuals, discrimination continued in the more subtle form of electoral mechanisms that reduce opportunities to participate in the political process on an equal basis with white citizens and to elect candidates of their choice.”).

36. Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 80 (2010).

of these first-generation barriers,<sup>37</sup> discriminating jurisdictions shifted to more subtle and sophisticated “second-generation barriers,” which “allow formal access to the franchise but dilute minority voting strength by limiting the effect that minority votes could have on the political process.”<sup>38</sup> Second-generation barriers include electoral district plans that “submerg[e] minority voters within white-dominated single or multi-member districts and pack[ ] minorities into district beyond the level needed to achieve effective political control,”<sup>39</sup> or the use of at-large voting systems to accomplish the same ends.<sup>40</sup>

In general, the discriminatory effect of facially race-neutral second-generation barriers are harder to diagnose than first-generation barriers, and it is concomitantly harder to show that those barriers were enacted with discriminatory intent (as the Supreme Court required Section 2 plaintiffs to prove in *City of Mobile v. Bolden*<sup>41</sup>). Moreover, many of these schemes predated the adoption of the Voting Rights Act, thus removing them from the purview of Section 5.<sup>42</sup>

In response, Congress amended the Voting Rights Act in 1982 to permit plaintiffs to prove Section 2 violations through evidence that the challenged practice has discriminatory effects without a requirement that plaintiffs show that the law was motivated by a

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37. See *id.*; Lichtman & Hebert, *supra* note 35, at 1, 2.

38. Garrett, *supra* note 36, at 80 n.14 (citing Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) (“First generation barriers are direct impediments to electoral participation [and include] registration and voting barriers. Once first generation obstacles were surmounted . . . the focus shifted to second-generation, indirect structural barriers such as at large, vote-diluting elections.”) (brackets omitted)); see J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 685 (2008) (“To counteract the effect of the surge in black voter registration in 1965 and 1966, Mississippi had passed a phalanx of laws changing elective to appointive offices—moving from single-member districts to at-large elections, combining predominantly black with predominantly white counties to submerge the blacks in majority-white districts, and so on.”).

39. Lichtman & Hebert, *supra* note 35, at 2.

40. *Id.* at 7.

41. 446 U.S. 55, 61–62 (1980).

42. See 52 U.S.C. § 10304 (2012) (requiring jurisdictions to pre-clear only “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964”); Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 377 (2004) (“Packing has long been a form of racial vote dilution in the districting context. The practice predates the Voting Rights Act, and was a particularly effective dilutive device in the years before the Court articulated the one person, one vote principle.”).

discriminatory purpose.<sup>43</sup> However, proving that a challenged practice has discriminatory effects is a much more complex inquiry than merely showing that a minority group is unable to elect its preferred candidates in proportion to its representation.<sup>44</sup> Instead, a plaintiff must prove a Section 2 violation based on a complex, nine-factor “totality of the circumstances” test,<sup>45</sup> where the “extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered,”<sup>46</sup> but eight other factors are also relevant to the inquiry.<sup>47</sup>

When a Section 2 case under the 1982 amendments first reached the Court in *Thornburg v. Gingles*,<sup>48</sup> these nine factors—commonly referred to as the “Senate Factors” because they were first articulated in the Senate Judiciary Committee report on the 1982 amendments—became the foundation of modern claims for vote dilution. At the outset, *Gingles* set forth three “preconditions” for establishing a vote dilution claim: (1) the minority group at issue is “sufficiently large and geographically compact to constitute a majority in a single member district”; (2) the minority group is “politically cohesive”; and (3) the majority group “votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”<sup>49</sup> If those three preconditions are satisfied, the court then considers evidence related to the nine Senate factors to determine whether the “totality of the circumstances” weigh in favor of a

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43. 52 U.S.C. § 10301 (2012) (“[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”); *Thornburg v. Gingles*, 478 U.S. 30, 108 (1986) (“Under the ‘results test,’ plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose.”) (citing S. Rep., at 16, reprinted in 1982 U.S.C.C.A.N. 206).

44. Lichtman & Hebert, *supra* note 35, at 3–4.

45. 52 U.S.C.A. § 10301 (2012).

46. *Id.*

47. Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative*, University of Michigan Law School, 39 U. MICH. J.L. REFORM 643, 648 (2006) (citing S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982)). Those other factors include: (1) the history of official voting-related discrimination; (2) the extent of racially-polarized voting; (3) the use of voting practices that tend to enhance the opportunity for discrimination (e.g., unusually large election districts, majority-vote requirements, and prohibitions against bullet voting); (4) the exclusion of minorities from candidate slating processes; (5) the extent to which the minority group has suffered discrimination in areas that inhibit political participation, including education, employment, and health; (6) the use of racial appeals in political campaigns; (7) a lack of responsiveness on the part of elected officials to the particularized needs of the minority group; and (8) the tenuousness of the policy underlying the use of the challenged practice. *Id.*

48. 478 U.S. 30, 47 (1986).

49. *Id.*

finding that “members of a racial group have less opportunity than do other members of the electorate,” i.e., that the challenged practice has a racially discriminatory effect in violation of Section 2.<sup>50</sup>

The 1982 amendments to the Voting Rights Act turned Section 2 into a vital weapon for combatting innovative and facially race-neutral methods of voting discrimination (though maintaining the vitality of Section 2 has required plaintiffs find ways to meet the cumbersome demands of building of a case). An invigorated Section 2 was able to provide a meaningful complement to the Section 5 preclearance regime—case-by-case litigation alone had been ineffective at permanently eradicating discrimination because, as discussed above, offending jurisdictions would circumvent adverse judgments by adopting new discriminatory tactics. Section 5 preclearance could preserve the gains of litigation and prevent backsliding by blocking jurisdictions from adopting retrogressive practices. Contributing to a virtuous cycle, the effective cause of action provided by Section 2’s results test ensured that long-entrenched discrimination in voting could be rooted out, permitting the one-way ratchet of Section 5 to achieve its purpose of raising the benchmark of effective minority participation to new heights.<sup>51</sup>

Perhaps most important of all, Section 5 relieved a substantial amount of the affirmative monitoring and enforcement burden that would otherwise fall on minority voters. Between 2000 and 2009, jurisdictions covered by Section 5 proposed an average of more than 25,000 changes per year to their election laws and practices.<sup>52</sup> Under preclearance, covered jurisdictions were required to prepare submissions for the Justice Department demonstrating that these changes would not harm minority voting rights, including statements of anticipated impact and, in some cases, detailed demographic and mapping data.<sup>53</sup> Absent preclearance, and given the burdens of investigating and prosecuting voting rights suits, it

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50. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425–26 (2006).

51. Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1199 (2001) (“To be sure, the term ‘dilution’ was not used before 1969, but the practice predates the term, and even if it did not, the very purpose of the preclearance process is to block ‘new ways and means of discriminating’ implemented as old ‘contrivances’ are struck down.”) (quoting H.R. Rep. No. 89-439, at 10).

52. *Section 5 Changes by Type and Year*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, <https://www.justice.gov/crt/section-5-changes-type-and-year-0> (last updated Aug. 6, 2015) [hereinafter *Section 5 Changes*].

53. See Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.27 (2011) (listing required contents of submissions for preclearance under Section 5); 28 C.F.R. § 51.28 (2011) (listing supplemental contents for preclearance submissions).

would be all but impossible for voting rights plaintiffs to notice, let alone thoroughly review, each change promulgated by *covered* jurisdictions, much less *all* state and local jurisdictions regardless of coverage status, for discriminatory effect. In particular, the changes made by local jurisdictions, which constitute the overwhelming majority of all changes,<sup>54</sup> are the ones mostly likely to fall through the cracks, because they fail to attract the attention of the few national organizations with established voting rights practices and local plaintiffs generally lack the resources to investigate and challenge any new or existing discriminatory practices.<sup>55</sup> Section 2 plaintiffs have always been responsible for investigating and challenging potentially discriminatory voting changes in the thirty-four states that were not covered by Section 5, and for investigating any outstanding discriminatory practices that predated Section 5 or had been precleared as non-retrogressive, but were still potentially discriminatory.<sup>56</sup>

Even with preclearance in place, the resources available for Section 2 enforcement have been stretched too thin to take on much of the enormous task of eradicating discriminatory voting regulations on a nationwide basis. After *Shelby County*, with no sign that Congress will find enough political consensus to restore the operation of section 5,<sup>57</sup> the prospect of returning to an enforcement

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54. Thomas Lopez, *Shelby County: One Year Later*, BRENNAN CENTER FOR JUSTICE, (June 24, 2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later> (“Section 5’s loss will perhaps be most acutely felt at the local level. The great majority of voting law changes that were blocked as discriminatory under the Voting Rights Act were local: counties, municipalities, and other places that operate below the state level.”) (citing Section 5 Objection Letters, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/crt/records/vot/obj\\_letters/index.php](http://www.justice.gov/crt/records/vot/obj_letters/index.php) (last updated Aug. 7, 2015)).

55. *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14, 149 (2006) [hereinafter *Modern Enforcement*]; *Voting Rights Act: Section 5 of the Act – History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 48 (2005) [hereinafter *History, Scope, & Purpose*] (“In many ways, the greatest impact of Section 5 is seen in local communities and particularly in rural areas, where minority voters are finally having a voice on school boards, county commissions, city councils, water districts, and the like. Voters in these communities do not have access to the means to bring litigation under Section 2 of the [Voting Rights] Act, yet they are often the most vulnerable to discriminatory practices . . . .”) (written testimony of Anita S. Earls); *The Continuing Need for Section 5 Preclearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) [hereinafter, *Continuing Need*] (“When you get down to the local level, the national organizations often are not involved, they are not aware of what is going on.”) (testimony of Pamela S. Karlan); *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1620 (2005) (noting local communities’ “limited access to the expertise and resources of the handful of organizations and attorneys with VRA experience”).

56. 52 U.S.C.A. § 10304 (2012).

57. Jim Rutenberg, *Nine Years Ago, Republicans Favored Voting Rights. What Happened?*, N.Y. TIMES MAGAZINE, (Aug. 12, 2015), [http://www.nytimes.com/2015/08/12/magazine/nine-years-ago-republicans-favored-voting-rights-what-happened.html?\\_r=0](http://www.nytimes.com/2015/08/12/magazine/nine-years-ago-republicans-favored-voting-rights-what-happened.html?_r=0) (last visited July 10,

scheme that relies on case-by-case litigation with the existing set of resources raises the specter that the Voting Rights Act might become so under-enforced as to become ineffective.<sup>58</sup>

## II. THE CURRENT LANDSCAPE OF INFRINGEMENTS ON MINORITY VOTING RIGHTS

Even with Section 5 preclearance in place, the burden of investigating and prosecuting discrimination outside of covered jurisdictions remained substantial. Prior to *Shelby County*, Wisconsin,<sup>59</sup> Ohio,<sup>60</sup> North Dakota,<sup>61</sup> Kansas,<sup>62</sup> and Pennsylvania<sup>63</sup> each enacted voter identification laws and/or other restrictions that discriminated against minority voters. After *Shelby County*, the shameless immediacy with which formerly covered jurisdictions took advantage of the absence of Section 5 made clear that the burden of detecting and rooting out discrimination on minority voters and voting rights enforcers would be substantially increased.<sup>64</sup> Within days (in some cases, hours) of the decision that suspended their preclearance obligations, Texas, Alabama, Mississippi, and

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2016) (“As it happens, two bills introduced in the past two years would restore at least some of the act’s former strength, after the 2013 Supreme Court decision in *Shelby County v. Holder*, which significantly weakened it. And both are languishing, with no significant Republican support and no Republican leader willing to bring them to the floor for a vote. What was, less than a decade ago, an uncontroversial legislative no-brainer is now lost in the crevasse of our partisan divide.”).

58. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185 (2003) (“There are two ways a court might retrench on civil rights protections. . . [t]he . . . more insidious [approach], is for the court to leave the formal right in place, but to constrict the remedial machinery. At best, this will dilute the value of the right, since some violations will go unremedied. At worst, it may signal potential wrongdoers that they can infringe the right with impunity.”).

59. *One Wisconsin Institute v. Thomsen*, No. 15-cv-00324-jdp, 2016 WL 4059222, at \*4 (W.D. Wis. July 29, 2016) (finding 2011 Wisconsin Voter ID law and restrictions on in-person early voting unconstitutionally discriminatory).

60. *The Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686 (6th Cir. 2016) (awarding attorneys’ fees based on successful enforcement and extension of consent decree regarding 2006 Ohio Voter ID law and provisional ballot laws).

61. *Order Granting Plaintiffs’ Motion for Preliminary Injunction at 1, Brakebill v. Jaeger*, No. 1:16-cv-00008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016) (granting preliminary injunction against 2012 Voter ID law).

62. *Fish v. Kobach*, No. 16-c-02105-JAR-JPO, 2016 WL 2866195, at \*1–2, 6 (D. Kan. May 17, 2016) (granting in part request for preliminary injunction against 2011 law requirement proof of citizenship to register to vote).

63. Allie Malloy, *Judge strikes down Pennsylvania voter ID law, calls it burdensome*, CNN (Jan. 17, 2014), <http://www.cnn.com/2014/01/17/politics/pennsylvania-voter-id-law/> (discussing judicial treatment of Pennsylvania Voter ID law enacted in 2012).

64. Lopez, *supra* note 54.



North Carolina moved to enforce strict voter ID laws that had previously been blocked under Section 5.<sup>65</sup> Arizona proposed separate voter registration systems for state and federal elections and then proposed requiring anyone seeking to register in state elections to provide proof of citizenship.<sup>66</sup> Alabama also tried to require proof of citizenship to register to vote.<sup>67</sup> Georgia moved the date of municipal elections in two counties with large black populations away from the national Election Day to another date.<sup>68</sup> Both Georgia and North Carolina proposed significant cuts to early voting periods, and North Carolina also instituted an earlier deadline for registering to vote before an election.<sup>69</sup> The re-emergence of these vote suppression measures—the direct descendants of poll taxes and literacy tests—both inside and outside covered jurisdictions is deeply troubling. But, these measures also represent only the most high-profile, statewide changes that have taken place since the *Shelby County* decision in states previously covered by Section 5. The federal government and major civil rights groups have brought Section 2 challenges to many of these voter suppression efforts with some success.<sup>70</sup>

In the midst of these successful efforts to combat broad scale attempts to disenfranchise minority voters, there remains less visible but no less invidiously effective vote dilution measures at the local level, where so much of the governance with daily impact takes place.<sup>71</sup> Local governments “have been some of the most brazen violators of the Voting Rights Act,”<sup>72</sup> using a variety of tools to entrench the political power of the dominant group at the expense of

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See *supra* notes 58–62 and accompanying text; Editorial, *Voter power: Federal courts correctly protect voting rights*, PITTSBURGH POST-GAZETTE (Aug. 9, 2016), <http://www.post-gazette.com/opinion/editorials/2016/08/09/Voter-power-Federal-courts-correctly-protect-voting-rights/stories/201608310027> (noting successful challenges to voting restrictions in Texas, North Carolina, North Dakota, Ohio, Wisconsin, Kansas, and Arizona).

71. NAACP LEGAL DEFENSE FUND, *DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-Shelby County, Alabama v. Holder* 3 (Jun. 9, 2016), [http://www.naacpldf.org/files/publications/Democracy%20Diminished-State%20and%20Local%20Voting%20Changes%20Post-Shelby%20v.%20Holder\\_4.pdf](http://www.naacpldf.org/files/publications/Democracy%20Diminished-State%20and%20Local%20Voting%20Changes%20Post-Shelby%20v.%20Holder_4.pdf) (“Voting changes at the local level, such as moving a polling place or switching from district-based to at-large voting, have garnered less attention, but are no less problematic. In fact, more than 85% of preclearance work previously done under Section 5 was at the local level.”); Lopez, *supra* note 54.

72. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 427–28 (2014); see also Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2145–46 (2015) (“Local governments freed from preclearance also made some important changes.

minority voters. By cementing the underrepresentation of minority voters, racial vote dilution contributes to the alienation of communities of color from their local governments.<sup>73</sup>

The effects of that alienation have been reflected in recent headlines, as widespread protests have called attention to the distrust between local law enforcement and racial minorities. Ferguson, Missouri became emblematic of this distrust after the shooting death of Michael Brown, an unarmed black teen, by police officer Darren Wilson, which led to demonstrations and further conflict between the police and the black community.<sup>74</sup> In diagnosing the cause of the conflict between the black community and local enforcement, the underrepresentation of the black voters on local elected bodies stands out: “Blacks represent two-thirds of the city population, yet the mayor, five of the six City Council members, six of seven school board members and 50 of 53 police officers are not black.”<sup>75</sup> Investigations by the Department of Justice and the American Civil Liberties Union revealed a disconnect between local government and the black community that goes much deeper than police use of force against black men. The summary from the Department of Justice (DOJ) of its investigation into the Ferguson Police Department is unsparing:

Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson’s police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community. Further, Ferguson’s police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes. Ferguson’s own data establish

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The city of Pasadena, Texas, replaced two district council seats in predominately Latino neighborhoods with two at-large seats elected from the majority-white city. Galveston County, Texas, cut in half the number of constable and justice-of-the-peace districts, eliminating virtually all of the seats currently held by Latino and black incumbents. And the city of Macon, Georgia, moved the date of city elections from November to July, when black turnout has traditionally been low.” (footnotes omitted).

73. DOUGLAS J. AMY, REAL CHOICES, NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY 128 (2002).

74. Zoltan Hajnal, Opinion, *Ferguson: No peace without representation*, L.A. TIMES (Aug. 26, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-hajnal-minority-voters-elections-2014-0827-story.html>.

75. *Id.*

clear racial disparities that adversely impact African Americans. The evidence shows that discriminatory intent is part of the reason for these disparities. Over time, Ferguson's police and municipal court practices have sown deep mistrust between parts of the community and the police department, undermining law enforcement legitimacy among African Americans in particular.<sup>76</sup>

The ACLU's investigation focused on the local school district, the Ferguson-Florissant School District, and was equally unsparring:

The [school] board has taken no efforts to address a wide racial achievement gap in the district, and it has permitted severe racial disparities in school discipline to persist. Black students are suspended and referred to the police more often than white students, and, in recent years, have been the only students subjected to corporal punishment, which the school district was still practicing as recently as 2011.<sup>77</sup>

The ACLU also found that the disproportionately negative treatment of black students took place in a political environment in which black voters are grossly underrepresented, noting that “[w]hile 80 percent of students in the [Ferguson-Florissant] school district are Black, there were zero Black school board members as recently as 2014,” and as of January 2016 “just two out of seven board members are Black.”<sup>78</sup> The ACLU attributed the underrepresentation to a host of conditions that dilute minority voting strength, including the use of an at-large method of election in climate of racially-polarized voting, staggered terms (limiting the number of seats up for a vote in any election), and an election day in April rather than November, all of which tend to reduce minority turnout.<sup>79</sup> The ACLU filed a Section 2 complaint against the School District on behalf of the local chapter of the NAACP in December 2014 and the case went to trial in January 2016.<sup>80</sup>

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76. U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (MAR. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

77. Julie Ebenstein, *Ferguson School District on Trial*, AMERICAN CIVIL LIBERTIES UNION (Jan. 12, 2016), <https://www.aclu.org/blog/speak-freely/ferguson-school-district-trial>.

78. *Id.*

79. Missouri State Conference of the NAACP v. Ferguson-Florissant Sch. Dist, No. 4:14 CV 2077 RWS, 2016 WL 4429695, at \*1, \*56 (E.D. Mo. Dec. 18, 2014).

80. *Id.*

Ferguson is certainly the most famous recent case challenging local-level minority vote dilution, but the problems of underrepresentation observed in Ferguson are not isolated ones. According to research from Karen Shanton, “[t]he gap between Ferguson’s residents and the officials elected to represent them is part of a larger pattern of African American underrepresentation in local government in the United States,” observing that “[m]ore than 1.2 million African Americans in 175 communities across the country have councils that do not descriptively represent them.”<sup>81</sup> By comparison, Shanton found that “[u]nderrepresentation at this level is an experience shared by comparatively few whites in the United States.”<sup>82</sup> Although whites make up a much greater share of the population than African Americans, Shanton found that only around “500,000 whites live in communities in which their share of the population is not reflected in their share of seats on the local council.”<sup>83</sup> Professor Zoltan Hajnal reached a similar conclusion: “Across the nation, racial and ethnic minorities are grossly underrepresented in city government. African Americans make up roughly 12% of the national population, but only 4.3% of city councils and 2% of mayors. The figures for Latinos and Asian Americans are even worse.”<sup>84</sup>

As Shanton points out, the inability of minority communities to elect members of that community matters because, among other things, “[d]escriptive representation fosters engagement between residents and their representatives, forging connections that promote policies and practices that reflect the lived experience of residents and are viewed by the community as fair and sensible.”<sup>85</sup> Looking specifically at the connection between representation and engagement in the African American community, Shanton notes:

African Americans tend to be more engaged with the political process when they are descriptively represented. They pay closer attention to elections and vote at higher rates when they are represented by an African American official and are more likely to run for offices that are or have been held by an African American. In addition, African American officials tend to be more engaged with the African American communities

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81. KAREN SHANTON, DEMOS, THE PROBLEM OF AFRICAN AMERICAN UNDERREPRESENTATION ON LOCAL COUNCILS, 1 (2014), <http://www.demos.org/sites/default/files/publications/Underrepresentation.pdf>.

82. *Id.* at 2.

83. *Id.*

84. Hajnal, *supra* note 74.

85. Shanton, *supra* note 81, at 5.

they represent than their non-African American colleagues. Research suggests that African American legislators are more responsive to African American constituents than white lawmakers. They also advocate more forcefully for African American interests during the legislative process, proposing legislation and making speeches that promote African American interests at significantly higher rates than non-African American officials.<sup>86</sup>

Professor Hajnal's research shows that "[c]ities with higher turnout and greater minority representation tend to enact policies that are more in line with racial and ethnic minority preferences. In particular, higher turnout is associated with greater social welfare spending and greater hiring of minorities in city government."<sup>87</sup> More viscerally, the election of a candidate from a community of color signals that local government is attuned to "serving the entire community and making sure that [people of color] feel not only are they welcome but they're understood"; the election of minority candidates also signals to younger members of that group that they too can aspire to careers in elected government.<sup>88</sup>

Descriptive underrepresentation is due in part to the numerous measures that local governments like that in Ferguson have used to dilute minority voting strength, including "enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing . . . single member districts to at-large voting and implementing majority vote requirements."<sup>89</sup>

The enormous frequency with which these otherwise mundane acts of local government occur make it difficult to find the discriminatory needles in the haystack. Between 2000 and 2009, from the jurisdictions covered by Section 5 alone, i.e., jurisdictions within only sixteen states, the Justice Department received preclearance submissions for 40,715 annexations, 31,522 polling place changes, 15,781 changes to voting precincts, 5,951 changes to methods of election, 3,141 redistricting plans, and 792 plans to consolidate or

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86. *Id.*

87. Hajnal, *supra* note 74.

88. Joe Sneve, *Diversity gap: Minorities underrepresented at City Hall*, ARGUS-LEADER (June 22, 2016, 1:19 PM), <http://www.argusleader.com/story/news/city/2016/05/27/84295496/> (quoting Kenny Anderson, Jr., who is "among the only black leaders ever elected to office in Sioux Falls").

89. H.R. REP. NO. 109-478, at 36 (2006).

divide political units.<sup>90</sup> In the United States as a whole, there are over 90,000 local government units, including over 3,000 counties, nearly 20,000 municipalities, over 16,000 townships, more than 37,000 special service districts, and almost 13,000 independent school districts.<sup>91</sup> According to the most recent data (which has not been updated since 1992),<sup>92</sup> these local government units account for well over 500,000 local elected officials.<sup>93</sup>

There has always been an acute need for more oversight over this volume of local governments, but prior to *Shelby County* the application of Section 5 preclearance to a substantial fraction of those jurisdictions made the challenge more manageable.<sup>94</sup> Although Section 5 would not have blocked a number of vote dilution schemes that would violate Section 2,<sup>95</sup> the discriminatory changes that Section 5 did block left more resources available to confront the practices that could only be challenged through Section 2.

To demonstrate the need for greater oversight of the acts and practices of local governments on minority voting strength, consider the example of California. With fifty-eight counties, 485 incorporated cities, over 1,000 K-12 school districts (serving 6.2 million students), and more than 2,000 special service districts, the sheer magnitude of California's local election system makes investigation and prosecution of Voting Rights Act violations and private plaintiffs on a meaningful scale a daunting task.<sup>96</sup> While the state is well-known for its progressivism and diverse population, the lack of

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90. *Section 5 Changes*, *supra* note 52.

91. CARMA HOGUE, U.S. CENSUS BUREAU, GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012, 1 (2013), [http://www2.census.gov/govs/cog/g12\\_org.pdf](http://www2.census.gov/govs/cog/g12_org.pdf).

92. U.S. CENSUS BUREAU, LISTS & STRUCTURE OF GOVERNMENTS, [https://www.census.gov/govs/go/historical\\_data.html](https://www.census.gov/govs/go/historical_data.html) (last visited Feb. 15, 2017) (noting the 1992 Census of Governments is the "latest available" and that the report has been "discontinued").

93. *See* U.S. CENSUS BUREAU, 1992 CENSUS OF GOVERNMENTS, v (1995), [https://www.census.gov/prod/2/gov/gc/gc92\\_1\\_2.pdf](https://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf) ("The 85,006 governments in the United States in 1992 had 513,200 elected officials—approximately one elected official for every 485 inhabitants.").

94. *See* U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS, INDIVIDUAL STATE DESCRIPTIONS: 2012, 265 (2013), <http://www2.census.gov/govs/cog/2012isd.pdf> ("Texas ranks second among the states in number of local governments with 5,147 active as of June 30, 2012.").

95. *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 474 (1997) (holding that a covered jurisdiction's new voting practice need not be denied preclearance under Section 5 of the Voting Rights Act even if it violates Section 2).

96. Although California has nearly 1.5 times the population of Texas, the next most populous state, California has only the fourth most local government entities, surpassed by Illinois (6,963), Texas (5,147), and Pennsylvania (4,897). *Number of Local Governments by State*, GOVERNING, <http://www.governing.com/gov-data/number-of-governments-by-state.html> (last visited July 10, 2016). North Dakota has the most local governments per capita at 383.8 per 100,000 residents. *Id.* By contrast, California has only 11.6 local governments per 100,000 residents. *Id.*

minority candidates elected to local government offices in spite of the state's large and increasing minority populations indicates that vote dilution persists.

The text and legislative history of Section 2, and the experience of courts with vote dilution claims, demonstrate that the inability of minority communities to field qualified and successful minority candidates in proportion to the minority population may be an indication of vote dilution. Although the Voting Rights Act does not establish a right of minority groups to proportional representation in elected government, the law expressly provides that "the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in determining the existence of vote dilution.<sup>97</sup> Professor Ellen Katz's study of Section 2 litigation observed that courts have found that a lack of proportional representation of minority groups by minority candidates favors a finding of vote dilution.<sup>98</sup> The Katz Study also observed that some courts have "looked beyond electoral results to assess the number of minority candidates participating in given races" and have "considered the possibility that a dearth of minority candidates might itself stem from 'the very barriers to political participation that Congress has sought to remove' and weighed the small number of minority candidates in favor of" a finding of vote dilution.<sup>99</sup> Courts have also found that a jurisdiction's electoral history favors a finding of vote dilution where minority voters were able to participate in electoral majorities to elect white candidates but not minority candidates.<sup>100</sup> As Courts have observed in vote dilution cases, the Voting Rights Act's "guarantee of equal opportunity is not met when . . . 'candidates favored by blacks can win, but only if the candidates are white.'<sup>101</sup> Under these circumstances, minority voters are unable to elect their candidates of choice unless their preferred candidates are white, i.e., they are denied an "opportunity enjoyed by white

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97. 52 U.S.C. § 10301(b) (2012).

98. Katz, *supra* note 47, at 719–20 ("[S]ome courts have viewed proportional minority representation (or its absence) as informing the Factor 7 inquiry. Several courts deemed the absence of such representation to suggest a lack of minority electoral success under Factor 7, while others viewed evidence that minority officeholders approached or exceeded the proportion of minorities in the electorate as proof of minority electoral success.") (footnotes omitted).

99. *Id.* at 721.

100. ELLEN KATZ ET AL., DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982, 43 & n.502 (2005) [https://www.law.berkeley.edu/files/katz\\_discrimination\\_in\\_voting.pdf](https://www.law.berkeley.edu/files/katz_discrimination_in_voting.pdf) (citing cases).

101. *Id.* (quoting *Clarke v. Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994)) (quoting *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge panel)).

voters, namely, the opportunity to elect a candidate of their own race.”<sup>102</sup>

The glaring deficit between California’s large and growing minority population and the number of minority candidates elected to local government offices demands, at a minimum, greater investigation into the prevalence of vote dilution in the state’s counties, municipalities, and special service districts. A report on the state of voting rights in California, compiled in advance of the 2006 reauthorization of the federal Voting Rights Act, found the following:

Latinas/os in 2000 constituted about a third of the state’s population, yet in 2004, there were only 535 Latina/o elected officials, or 11% out of 4850 elected local school board members, and there were 357 Latinas/os or 14.2% out of 2507 elected officials serving on city councils. When focusing on elected county supervisors there are only a small number of Latina/o supervisors (fourteen) in counties containing more than a 20% Latina/o population.<sup>103</sup>

Since 2006, California has only become more diverse. As of March 2014, state demographers estimated that Latinas/os now constitute the state’s single largest ethnic group at thirty-nine percent of the population.<sup>104</sup> The population of non-Hispanic whites in California has declined as a percentage of the state’s population from over forty-six percent in 2000 to less than thirty-nine percent in 2014.<sup>105</sup> Nonetheless, massive deficits in descriptive representation for Latinas/os persist, particularly in local government, “where Latinos comprise around ten percent of county supervisors and almost fifteen percent of city council members.”<sup>106</sup> The deficit may be even greater on school boards. An October 2010 study from the Cesar E. Chavez Institute found that, of the 969 school districts in California

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102. *Id.* (quoting *Clarke*, 40 F.3d at 812); *see also* *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (“That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference [for a black candidate].”).

103. Joaquin G. Avila et al., *Voting Rights in California: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 131, 133 (2007).

104. Mark Hugo Lopez, *In 2014, Latinos will Surpass Whites as Largest Racial/Ethnic Group in California*, PEW RESEARCH CENTER (Jan. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/01/24/in-2014-latinos-will-surpass-whites-as-largest-raciaethnic-group-in-california>.

105. *Id.*

106. Melanie Mason, *Report Shows Latinos are Underrepresented in State, Local Government*, L.A. TIMES (July 9, 2015), <http://www.latimes.com/local/political/la-me-pc-latino-elected-officials-20150709-story.html>.



that had at least ten percent Latino enrollment, 67.2 percent had no Latino trustees.<sup>107</sup> In districts with a student body population that was half to two-thirds Latino, nearly fifty-four percent of those districts had no Latino trustee and only nineteen percent had more than one Latino trustee.<sup>108</sup> In short, “[s]tudents of Hispanic descent are already the largest subgroup in the state’s K-12 public school system, but the vast majority of school board members are white.”<sup>109</sup>

In spite of this evidence of potentially widespread local-level vote dilution, there is little evidence of recent investigation and prosecution of possible vote dilution claims in California outside of those within the purview of the state’s own highly-effective voting rights act. Setting aside actions against at-large jurisdictions under the California Voting Rights Act, there have been no more than a handful of efforts to challenge local-level vote dilution in the courts since 1992. For ten years after the 1982 amendments to the Voting Rights Act, there were robust efforts by private plaintiffs to enforce Section 2 against the use of at-large methods to dilute Latino voting strength.<sup>110</sup> However, private plaintiff enforcement of Section 2 in California came to a halt after plaintiffs lost two particularly long and costly challenges to at-large election systems in the El Centro School District and City of Santa Maria, and then faced efforts by the prevailing defendants to collect their litigation costs.<sup>111</sup> With the exception of two Section 2 lawsuits against local governments brought by the United States Department of Justice in 2000,<sup>112</sup> voting rights enforcement remained effectively dormant in California

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107. MAX NEIMAN ET AL., CESAR E. CHAVEZ INSTITUTE, EXAMINING LATINO REPRESENTATION ON CALIFORNIA’S SCHOOL BOARDS 10, 11 (Oct. 2010), <http://cci.sfsu.edu/sites/default/files/Examining%20Latino%20Representation%20on%20CA%20School%20Boards.pdf>.

108. *Id.*

109. Carol Brydolf, *Drawing the Lines*, CALIFORNIA SCHOOL BOARDS ASSOCIATION (Spring 2012), [https://www.csba.org/Newsroom/CASchoolsMagazine/2012/~media/Images/NewsMedia/Publications/CASchoolsMagazine/2012/CaliforniaSchools\\_spring2012.ashx](https://www.csba.org/Newsroom/CASchoolsMagazine/2012/~media/Images/NewsMedia/Publications/CASchoolsMagazine/2012/CaliforniaSchools_spring2012.ashx).

110. Avila et al., *supra* note 103, at 148.

111. *Id.* (citing *Ruiz v. Santa Maria*, Civ. Act. No. 92-4879 JMI (SHX) (C.D. Cal. 1992), *rev’d*, 160 F.3d 543 (9th Cir. 1988), *cert. denied*, 527 U.S. 1022 (1999); *Aldasoro v. Kennerson*, 922 F. Supp. 339 (S.D. Cal. 1995)).

112. *See* *United States v. Upper San Gabriel Valley Mun. Water Dist.*, No. CV007903 AHM BQRX, 2000 WL 33254228, at \*1 (C.D. Cal. Sept. 8, 2000) (denying motion for preliminary injunction, finding that “Plaintiff failed to meet its burden to show a probability of success”) (action mooted after defendant adopted a new districting plan); *United States v. City of Santa Paula*, No. 00-03691 (C.D. Cal. 2000) (resolving challenge to at-large method of election with settlement agreement whereby city held local ballot initiative for voters to choose between three district elections options); *see also* *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION (listing and describing DOJ’s Section 2 cases), <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0#santapaula> (last visited July 5, 2016). It bears noting that within that same timeframe, the Department of Justice has brought nine cases against local governments in California under Section 203 of the Voting Rights Act, which requires that jurisdictions that

until the passage of the California Voting Rights Act (CVRA) in 2002.

Since 2007, the CVRA has permitted robust enforcement against the discriminatory use of at-large elections in local government. Professor J. Morgan Kousser has found that the large numbers of successful CVRA suits, and of local governments that have switched pre-emptively to single member districts to avoid CVRA lawsuits, are evidence of the pervasiveness with which the combination of at-large elections and racially-polarized voting results in discriminatory effects in California and are likely indicative of significant unidentified discrimination across the country.<sup>113</sup> As Prof. Kousser writes:

California did not suddenly become more discriminatory after *Sanchez v. Modesto* [in which the California Court of Appeal upheld the CVRA as constitutional and after which lawyers began to bring CVRA suits]. Indeed, it is unquestionably less discriminatory than when in 1994 a majority of [California] voters favored Proposition 187, which sought to deny governmental services, including public schools, to undocumented persons. What actually happened was that the CVRA and the favorable decision in *Sanchez* gave attorneys the tools with which to expose existing discrimination and to cure it. If attorneys across the nation had similarly sharp tools, not instruments blunted or destroyed altogether by Supreme Court rulings since 1993, they might well uncover discriminatory electoral structures and restrictions on individual voting rights comparable to or, likely, at greater levels than those in California. Of 340 American cities where more than 20% of the population is black, African-Americans enjoy less representation on the city councils than their proportion in the population.<sup>114</sup>

Notwithstanding the CVRA's success against the discriminatory use of at-large methods of election, there has been little scrutiny of local governments in California that have either always run elections by district or converted to single-member districts to avoid CVRA lawsuits. In the past twenty years, only one vote dilution case

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meet a certain threshold population of citizens of a language minority group, among other criteria, provide bilingual election materials. *Id.*

113. J. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in Shelby County?*, *TRANSATLANTICA*, 2015, at 27-28 & figure 7, <http://transatlantica.revues.org/7462>.

114. *Id.* at 28 (citing Richard Fausset, *Mostly Black Cities, Mostly White City Halls*, *N.Y. TIMES* (Sept. 28, 2014)).

brought by a private plaintiff against a local jurisdiction in California has resulted in a reported decision—an unsuccessful challenge to the 2012 city council redistricting in Los Angeles.<sup>115</sup> Meanwhile, the United States Department of Justice has not filed a vote dilution case of any kind in California in over fifteen years and has filed only three Section 2 cases in the past twenty-five years.<sup>116</sup> The most recent case in which any plaintiff (private or government) won a reported judicial decision in a Section 2 vote dilution case against a local government in California was a challenge brought by Hispanic voters to the 1981 redistricting plan for the Los Angeles County Board of Supervisors.<sup>117</sup> The data available on cases that were filed but that did not reach a reported decision is less reliable than the number of reported cases;<sup>118</sup> however, that data does not suggest that there have been a substantial number of cases that have been filed against local jurisdictions but are ongoing or have resulted in successful non-judicial outcomes for plaintiffs.<sup>119</sup> Given the demographic trend towards greater diversity unaccompanied by a

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115. See *Lee v. Los Angeles*, 88 F. Supp. 3d 1140 (C.D. Cal. 2015); *Wooten v. Stockton*, No. CIV 5-06-2789 FCD EFB PS, 2008 U.S. Dist. LEXIS 9881, at \*13 (E.D. Cal. Feb. 11, 2008) (recommending summary judgment in favor of defendant on challenge to city's at-large method of election for city council districts), *report and recommendation adopted*, 2008 U.S. Dist. LEXIS 161196, at \*1 (E.D. Cal. March 3, 2008).

116. See *United States v. Upper San Gabriel Valley Mun. Water Dist.*, No. CV007903 AHM BQRX, 2000 WL 33254228, at \*1 (C.D. Cal. Sept. 8, 2000) (denying motion for preliminary injunction, finding "Plaintiff failed to meet its burden to show a probability of success") (action mooted after defendant adopted a new districting plan); *United States v. Santa Paula*, No. 00-03691-GHK (SHx) (C.D. Cal. Oct. 25, 2001), *available at* [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/santapaula\\_order.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/santapaula_order.pdf) (resolving challenge to at-large method of election with settlement agreement whereby city held local ballot initiative for voters to choose between three district elections options); see also *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0#santapaula> (last visited July 5, 2016) (listing and describing DOJ's Section 2 cases). It bears noting that within that same timeframe, the Department of Justice has brought nine cases against local governments in California under Section 203 of the Voting Rights Act, which requires that jurisdictions that meet a certain threshold population of citizens of a language minority group, among other criteria, provide bilingual election materials. *Id.*

117. See *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1303–04 (C.D. Cal. 1991).

118. The federal courts' electronic public access service—Public Access to Court Electronic Records (PACER)—permits users to conduct a search within a federal court's record of cases by "Nature of Suit." Among the different categories of cases available, there is one titled "Civil Rights (Voting)." A search for cases categorized under that code yields a substantial quantity of civil rights that are unrelated to voting for public office; however, a search under this code did yield cases alleging claims under the Voting Rights Act, including both Section 2 and Section 5.

119. A search on Westlaw for pleadings in federal district courts in California between 2002 and July 2016 containing in the disjunctive the U.S. Code citations for section 2 (42 U.S.C. 1973 or 52 U.S.C. 10101) as well as the phrase "Section 2" within the same paragraph as Voting Rights Act yields 6 results, only one of which contains claims a Section 2 claim. The complaint in *Luna v. County of Kern*, filed by the Mexican-American Legal Defense and

corresponding trend in the number of minority elected officials, the absence of Section 2 litigation is more likely a reflection of the difficulty in identifying and prosecuting violations than evidence that electoral discrimination against minorities in California has ended.

The next Part discusses the circumstances that have led to the substantial under-enforcement of protections for minority voting rights, including the massive burdens of Section 2 litigation, the unavailability of damage, the uncertainty of recovering attorneys' fees and costs, and the lack of lawyers with the expertise to prosecute these complex cases.

### III. THE NEED FOR ADDITIONAL RESOURCES TO SUPPORT VOTING RIGHTS ENFORCEMENT

The “slow, costly character” of voting suits is one of the key reasons why case-by-case litigation alone failed as an enforcement scheme and prompted the enactment of the Voting Rights Act’s preclearance scheme.<sup>120</sup> In the fifty years since the Supreme Court recognized in *Katzenbach* that “[v]oting suits are unusually onerous to prepare,”<sup>121</sup> those suits have only become more complex and resource-intensive as methods of discrimination have become more sophisticated, often requiring multiple expert witnesses whose substantial fees must be paid out-of-pocket.<sup>122</sup> To compound these

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Education Fund on behalf of Latino citizens “challenges the 2011 redistricting plan of the Kern County Board of Supervisors because it unlawfully discriminates against Plaintiffs in violation of the federal Voting Rights Act, 52 U.S.C. § 10301.” *Luna v. County of Kern*, No. 16-cv-00568-DAD-JLT, 2016 WL 1643027 (E.D. Cal. Apr. 22, 2016). A second complaint, *Haveriland v. City of Los Angeles*, does not expressly allege a Section 2 claim, but does allege that the challenged city council redistricting plan dilutes African-American voting strength in favor of increasing Latino voting strength. No. CV13-01410-SVW, 2013 WL 781088 (C.D. Cal. Feb. 26, 2013). A search on the PACER portals for cases assigned the “Nature of Suit” code “Civil Rights: Voting” from December 31, 2000 to July 6, 2016 yielded 35 results in the Northern District of California, of which only one case involved a Section 2 claim against a local government—a challenge to San Francisco’s instant runoff voting system; 29 results in the Eastern District of California, of which the Wooten case mentioned above and the recently filed *Luna* complaint were the only two involving Section 2 claims against local governments; 44 results in the Central District of California, however, none involving Section 2 claims against local governments (neither the *Haviland* or *Lee* cases described above (both coded “Civil Rights: Other” under “Nature of Suit” in PACER) contain express Section 2 claims; and 7 results in the Southern District of California, none of which involved Section 2 claims).

120. *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)).

121. *Katzenbach*, 383 U.S. at 314.

122. See *Westwego Citizens for Better Gov’t v. City of Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989) (quoting *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984) (noting

burdens, affirmative voting litigation also creates incentives for officials who benefit from discriminatory voting practices and can defend those practices at taxpayer expense to prolong litigation into a war of attrition with plaintiffs. With damages altogether unavailable to prevailing plaintiffs and the recovery of enormous fees and costs uncertain, the Voting Rights Act also offers relatively little in the way of recovery to incentivize private attorneys general to bring voting cases. The result is that there are relatively few attorneys willing to bring complex voting cases, and even fewer repeat players with the expertise to do these cases well.

Although there may be substantial social benefit to Voting Rights Act enforcement, the massive cost and absence of financial incentives for private plaintiffs to investigate and pursue cases leads to under-enforcement and under-deterrence relative to statutes that rely on private attorneys general.<sup>123</sup> Section 2 cases frequently demand minority voters and their lawyers to risk six- and seven-figure expenditures for expert witness fees and deposition costs for claims that do not promise damage awards.<sup>124</sup> These costs have only grown as the complexity of Section 2 litigation has increased. The Federal Judicial Center (FJC), which periodically ascribes a numerical weight to each type of case based on the time and resources required by each category of case, assigned a weight of 3.86 to voting cases, nearly four times the weight of the average case, and even more onerous than notoriously time-consuming and resource intensive antitrust cases.<sup>125</sup> In its 2005 study, the FJC found that voting case weights “increased significantly” from 1993 to 2004.<sup>126</sup> The FJC conducted a new case weight study that was approved for use by the

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that “the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns”) (internal citations omitted).

123. Margaret Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 706 (2011); *Continuing Need*, *supra* note 55, at 15 (testifying that few plaintiffs can afford the “huge amounts of resources” necessary to prosecute voting rights).

124. Lemos, *supra* note 123, at 706; *Continuing Need*, *supra* note 55, at 15 (testifying that few plaintiffs can afford the “huge amounts of resources” necessary to prosecute voting rights).

125. FEDERAL JUDICIAL CENTER, 2003-2004 DISTRICT COURT CASE-WEIGHTING STUDY: REPORT TO THE SUBCOMMITTEE ON JUDICIAL STATISTICS OF THE COMMITTEE ON JUDICIAL RESOURCES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Table I (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/\\$file/CaseWts0.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf) (concluding that voting cases consumed the sixth-most judicial resources out of sixty-three types of cases). The study assigned voting cases a weight of 3.86—meaning such cases take nearly four times the work of an average case. *Id.* In comparison, antitrust cases, well known for being time-consuming and resource intensive, were assigned a weight of 3.45. *Id.* See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (discussing the exceptional costs and burdens of federal antitrust litigation).

126. FEDERAL JUDICIAL CENTER, *supra* note 125, at app. Z, at 4 & attachment 2.

Judicial Conference of the United States in March 2016, which continued to weight voting cases comparable to antitrust cases and ranked voting cases the sixth most time-consuming and resource intensive in the federal court system.<sup>127</sup> Satisfying the *Gingles* preconditions and adducing evidence related to the Senate factors require not only rigorous investigation, but also extensive expert testimony. As Laughlin McDonald, then-director of the ACLU Voting Rights Project, testified during the 2006 reauthorization of the temporary provisions of the Voting Rights Act, in a typical vote dilution case a plaintiff “need[s] probably three experts: a demographer, to draw plans; a statistician, to analyze voting patterns; and a political scientist or historian, to talk about what . . . the present-day impact of race is in a jurisdiction.”<sup>128</sup> Testifying before a House subcommittee in 2006, former DOJ voting section chief J. Gerald Hebert “estimate[d] that the cost . . . to bring a vote dilution case through trial and appeal, runs close to a half a million dollars . . . .”<sup>129</sup> Moreover, these cases take years to resolve, during which time attorneys are not compensated for their time or out-of-pocket costs.<sup>130</sup>

Although the Voting Rights Act permits prevailing plaintiffs to recover attorneys’ fees and costs—including, since 2006, expert witness fees—whether and to what extent a plaintiff actually recovers those fees and costs is highly uncertain. Plaintiffs and counsel who

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127. E-mail from Lee Lipscomb, Fed. Judicial Center to Perry Grossman, attaching “District Court Case Weights Approved for Use by the Judicial Conference in March 2016,” (Aug. 29, 2016) (on file with U. MICH. J. L. REFORM.)

128. *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 69 (2005).

129. *Fannie Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization And Amendments Act Of 2006 (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 65 (2006).

130. See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 22–23 (2007) (illustrating that “[t]he cost of [voting rights] suits, however, is often prohibitive,” by noting that in *Mobile v. Bolden*, “the cost of proving what turned out to be a blatant series of constitutional violations was staggering. The plaintiffs’ lawyers ‘logged 5,525 hours and spent \$96,000 in out-of-pocket fees,’ and these figures do not include the expenses incurred by the Department of Justice after it intervened or the costs of hiring the expert witnesses”); see, e.g., Order at 11, *Moultrie v. Charleston County*, No. 2:01-cv-00562-PMD, ECF No. 206 (D.S.C. Aug. 8, 2005) (awarding \$712,027.71 in fees and costs after four and half years of litigation, inclusive of nearly 1800 hours from three attorneys) [hereinafter *Moultrie* Order]; *Harper v. City of Chicago Heights*, Nos. 87 C 5112, 88 C 9800, 2002 WL 31010819, at \*3 (N.D. Ill. Sept. 6, 2002 (awarding \$385,661.84 in fees after a decade of litigation); *Mississippi State Chapter Operation PUSH v. Mabus*, 788 F. Supp. 1406, 1407, 1414, 1423–24 (N.D. Miss 1992) (prevailing party recovered \$145,149 in fees and \$23,728 in costs more than seven years after litigation initiated, reduced from requests for \$933,633 in fees and \$92,264 in costs); *Major v. Treen*, 700 F. Supp. 1422, 1453 (E.D. La. 1988) (prevailing party recovered \$335,864 and \$28,288 in costs five years after a favorable judgment).

bring claims risk partial or total non-recovery,<sup>131</sup> and also risk the possibility that costs may be assessed against them, even when a plaintiff's case has merit.<sup>132</sup> Moreover, if a Section 2 plaintiff's goals are achieved, but without a court order, federal law does not allow the plaintiff to recover any attorneys' fees.<sup>133</sup> The result is that the costs of Section 2 litigation—in time, out-of-pocket expenditures, risk of non-recovery, and the political controversy that surrounds voting cases—make the prospect of such litigation “undesirable” to the private bar.<sup>134</sup>

The burden of Section 2 litigation can also be exacerbated by the perverse incentives that cause incumbent officials, who have the benefit of a taxpayer-funded defense, to prolong litigation to keep the challenged practice in place. Even if minority plaintiffs prevail in court, as Rep. Robert Scott observed, their victory could be “years down the road by the time you take into account the time frame for litigation, including appeals. By then, the winner of the illegal election is an incumbent, and we all know . . . that incumbency is a huge and, more often than not, dispositive advantage in an election.”<sup>135</sup> The consequence of an enforcement scheme that relies entirely upon Section 2 litigation—in which voters bear all the burdens of prosecution and officials receive all the benefits of inertia—

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131. See *History, Scope, & Purpose*, *supra* note 55, at 54 (“[A]lthough there [are] some attorney fees involved, you can never get back the money you put into Section 2 cases.”); see, e.g., *Dillard v. City of Greensboro*, 213 F.3d 1347, 1348, 1353 (11th Cir. 2000) (reducing fee award for “700 hours of lawyer time for nearly ten years of litigation” to \$61,969 from district court award of \$139,310.20, which already represented a substantial reduction from \$253,530 plaintiff's counsel requested because district court ruled that “while the plaintiffs prevailed in obtaining a swing district whose population had a higher percentage of blacks than Greensboro originally proposed, the swing district was not as black as they would have liked.”); Debra Tuomey, Case Comment, *Dillard v. City of Greensboro*, 30 *STETSON L. REV.* 1253, 1256 (2001) (“These are extreme statements by any court, but more so considering the ten-year struggle involving denial, foot dragging, and resistance by a local government confronting voters' persistent commitment to ‘a war of attrition.’ Obtaining relief for any minority interest is difficult, even when appearing before experienced judicial benches and special masters; but this circuit court ruling could have a negative affect on the number of attorneys willing to represent claimants demanding their voting rights under the new census.”) (analyzing *Dillard*, 213 F.3d 1347).

132. See *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1230 (S.D. Tex. 1997) (“Plaintiffs have raised valid concerns as to hindrances to Hispanic participation in the PISD political process.”), *aff'd*, 165 F.3d 368, 373 (5th Cir. 1999) (affirming district court's award of \$13,925.43 in costs to defendants); see also *Avila et al.*, *supra* note 103, at 148–50 (noting that efforts by jurisdictions to collect costs was a significant deterrent to bringing future voting rights litigation).

133. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603–07 (2001).

134. *Moultrie Order*, *supra* note 130, at 11.

135. *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4 (2005) [hereinafter, *Preclearance Standards*] (statement of Rep. Robert C. Scott).

is “a perverse incentive to pass illegal plans with no immediate recourse.”<sup>136</sup>

With substantial out-of-pocket costs, the risk of non-recovery or even liability for defendant’s costs, and the lack of any financial upside beyond an uncertain award of attorneys’ fees, Section 2 litigation has none of the incentives that typically draw lawyers to pursue cases. As Professor Pamela Karlan testified before the Senate Judiciary Committee in 2006: “[F]rom having litigated the cases and having litigated the attorneys’ fees issues after [Section 2] cases, this is not a way of getting rich. It is not even a way of making a living.”<sup>137</sup> Given the heavy burdens and light financial incentives to pursue frequent Section 2 litigation, it is not surprising that “[n]either the ‘small and underfinanced’ voting rights bar nor [ ] minority communities [are] in a position to bear the expense of frequent litigation under Section 2.”<sup>138</sup> Nonetheless, minority voters have relied, and continue to rely, overwhelmingly on the private voting rights bar to investigate and prosecute Section 2 cases. Between 1982 and 2006, the private bar handled over ninety-five percent of affirmative voting rights litigation in federal district courts.<sup>139</sup> In fact, the United States was a plaintiff in only 232 voting cases filed in federal district courts between 1982 and 2006, compared to 5040 cases brought by private plaintiffs during that time.<sup>140</sup> The share of the load handled by the private bar has not diminished since then. In 2015, out of 86 voting cases filed, the United States was a plaintiff in only four cases—again leaving ninety-five percent of cases to be handled by the private bar.<sup>141</sup>

This is not to suggest that the Voting Section at the Department of Justice, the only government body specifically tasked with prosecuting voting rights abuses, is not showing up to work, but that with a national focus, its scarce resources are allocated to the highest-impact Section 2 cases. As of April 2010—prior to a hiring freeze

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136. *Id.* at 4–5.

137. *Continuing Need*, *supra* note 55, at 15.

138. *LaRoque v. Holder*, 831 F. Supp. 2d 183, 208 (D.D.C. 2011), *vacated and remanded*, 679 F.3d 905 (D.C. Cir. 2012).

139. *Avila et al.*, *supra* note 103, at 149–152 (providing table of voting cases commenced in United States District Courts between 1977 and 2006).

140. *Id.*

141. *Table C-2—U.S. District Courts—Civil Judicial Business (September 30, 2015)*, UNITED STATES COURTS, <http://www.uscourts.gov/statistics/table/c-2/judicial-business/2015/09/30> (last visited Jan. 27, 2017).



that lasted three years<sup>142</sup>—the Voting Section had only forty-five attorneys<sup>143</sup> to carry out its mandate of enforcing on a nationwide basis numerous statutes enabling vote registration and protecting the rights of many classes of citizens, including uniformed and overseas voters, elderly and disabled voters, and language-minority voters, among others.<sup>144</sup> In spite of the uptick in voting rights abuses since the *Shelby County* case, as of December 16, 2016, the Voting Section’s legal staff has decreased to thirty-eight attorneys, supported by twenty-four non-legal staff members, including only two social scientists, one statistician, and zero demographers or historians.<sup>145</sup> Currently, the DOJ’s resources are focused on challenges to the voter suppression and vote dilution measures adopted in Texas and North Carolina immediately after *Shelby County*.<sup>146</sup> Those actions include not only Section 2 claims, but also requests for “bail-in” relief under Section 3(c), which would place those states back under the Section 5 preclearance regime even without an operable coverage formula.<sup>147</sup> If the DOJ is successful at bailing-in the states of North Carolina and Texas, that could result in a durable decrease in Section 2 litigation,<sup>148</sup> making the outcomes in those cases worth the substantial investment.

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142. Press Release, U.S. Dep’t of Justice, Attorney General Holder Announces Justice Department to Lift Hiring Freeze (Feb. 10, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-announces-justice-department-lift-hiring-freeze>.

143. U.S. DEP’T OF JUSTICE, CHOOSE JUSTICE: GUIDE TO THE U.S. DEPARTMENT OF JUSTICE FOR LAW STUDENTS AND EXPERIENCED ATTORNEYS, 20 (2010), <https://www.justice.gov/sites/default/files/careers/docs/legal-careers-brochure.pdf>.

144. The Voting Section enforces the protections of the Civil Rights Acts of 1870, 1957, 1960, and 1964; the Voting Rights Act of 1965, the Voting Accessibility for the Elderly and Handicapped Act of 1984; The Uniformed and Overseas Citizens Absentee Voting Act of 1986; The National Voting Registration Act of 1993; and The Help America Vote Act of 2002. U.S. DEP’T OF JUSTICE, *Statutes Enforced by the Voting Section*, <https://www.justice.gov/crt/statutes-enforced-voting-section> (last updated September 2, 2016).

145. Letter from Nelson D. Hermanilla, Chief, Freedom of Information/Privacy Acts Branch, Civil Rights Division, U.S. Dep’t of Justice, to Perry Grossman (Jan. 5, 2017) (on file with U. MICH. J. L. REFORM.).

146. Complaint, United States v. North Carolina, No. 13-cv-861, ECF No. 1 (M.D.N.C. Sept. 30, 2013); Complaint in Intervention, United States v. Texas, No. 5:11-cv-00360-OLG-JES-XR, ECF No. 907 (W.D. Tex. Sept. 25, 2013); Complaint, United States v. Texas, No. 2:13-cv-00263, ECF No. 1 (S.D. Tex. Aug. 22, 2013). See also *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0#perez> (last updated July 8, 2016).

147. Complaint, United States v. North Carolina, (M.D.N.C. Sept. 30, 2013) (No. 13-cv-861); Complaint, United States v. Texas, (W.D. Tex. Sept. 25, 2013) (No. 5:11-cv-00360-OLG-JES-XR); Complaint, United States v. Texas, (S.D. Tex. Aug. 22, 2013) (No. 2:13-cv-00263); See also *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0#perez> (last updated July 8, 2016).

148. See Anita S. Earls, Emily Wynes & LeeAnne Quatrucchi, *Voting Rights in North Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 577, 577 (2008) (“it is remarkable that although so

In addition to the DOJ, several national, non-profit civil rights law firms—including the NAACP Legal Defense and Education Fund, the ACLU, the Lawyers’ Committee for Civil Rights Under Law, and the Mexican American Legal Defense Fund—have consistently carried a substantial load of voting rights litigation.<sup>149</sup> However, their scarce resources are generally allocated to a small group of high-impact and high-visibility cases.<sup>150</sup> There is a small group of highly-experienced voting rights lawyers outside of these national firms at regional non-profits, small public interest firms, and solo practitioner offices,<sup>151</sup> but the size and cost of Section 2 cases often limit those lawyers to prosecuting only those cases where they can receive assistance from national law firms.<sup>152</sup>

Political parties have also been key actors in voting rights enforcement, whether the Republican Party in the nineteenth century<sup>153</sup> or the Democratic Party more recently.<sup>154</sup> However, political parties generally have neither the resources nor the incentive

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few of the state’s citizens are covered by Section 5, there have been forty-five objection letters issued since 1982 relating to an even greater number of changes in voting practices and procedures”); *id.* at app. B (listing Section 5 lawsuits under the Voting Rights Act in North Carolina); Nina Perales, Luis Figueroa, & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 714 (2008) (“Texas leads the nation in several categories of voting discrimination, including recent Section 5 violations and Section 2 challenges. Since 1982, there have been at least twenty-nine successful Section 5 enforcement actions in which the DOJ has participated.”).

149. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping A Post-Shelby County Contingency Strategy*, 123 YALE L.J. F. ONLINE 131, 132–33 (2013) (discussing a model of private voting rights action enforcement).

150. The American Civil Liberties Union’s Voting Rights Project, one of the most prolific and well-regarded voting rights law firms in the country, lists only three staff attorneys, one paralegal, and one administrative assistant in addition to its director and one special counsel. AMERICAN CIVIL LIBERTIES UNION, *About the Voting Rights Project*, <https://www.aclu.org/about-voting-rights-project> (last visited June 19, 2016). The NAACP Legal Defense and Education Fund lists only one attorney in its Political Participation group, in addition to its front office attorneys, who work on a variety of issues. NAACP LEGAL DEFENSE AND EDUCATION FUND, *Our Staff*, <http://www.naacpldf.org/staff> (last visited June 19, 2016). The Lawyers’ Committee for Civil Rights Under Law lists 5 lawyers, including a fellow, as well as a social scientist, and 2 co-directors as part of its Voting Rights Project, in addition to its Executive Director and Chief Counsel, who are both accomplished voting rights lawyers. LAWYER’S COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *Staff*, <https://lawyerscommittee.org/staff/> (last visited Aug. 21, 2016).

151. See Brief for Joaquin Avila et al. as Amicus Curiae Supporting Respondents at 28–30 & App’x. A, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

152. See Brief of Julius Chambers et al. as Amicus Curiae Supporting Appellees at 25–29, *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) (No. 08-322).

153. Richard M. Valelly, *The Reed Rules and Republican Party Building: A New Look*, 23 STUD. AM. POL. DEV. 115, 115–16 (2009).

154. Maggie Haberman & Amy Chozick, *Democrats Wage a National Fight Over Voter Rules*, N.Y. TIMES (June 3, 2015), [https://www.nytimes.com/2015/06/04/us/politics/democrats-voter-rights-lawsuit-hillary-clinton.html?\\_r=0](https://www.nytimes.com/2015/06/04/us/politics/democrats-voter-rights-lawsuit-hillary-clinton.html?_r=0).

to wage prolonged and costly battles over offices that are overwhelmingly non-partisan.<sup>155</sup> In California, for example, the state constitution requires that “all judicial, school, county, and city offices . . . shall be nonpartisan.”<sup>156</sup>

Voting rights abuses that take place in local jurisdictions often fail to attract any attention from national organizations, because information about their elections and political climate is not easily accessible.<sup>157</sup> The result is that only election laws and practices that affect voters on a very large scale in the most major elections receive the scrutiny of media, civil rights groups, and academics—for example, statewide redistricting, statewide voter identification, or statewide restrictions on early voting likely to impact the results of state legislative, federal legislative, or presidential elections.<sup>158</sup> Overlooked are the city councils, school boards, and special service districts that have primary agency over matters of daily importance including education, transportation, property taxes, police, fire, and sanitation.<sup>159</sup> These local offices are important not only because of the critical substantive services they provide to their constituents, but because school boards and city councils also function as a farm system for candidates for higher office.<sup>160</sup> If minority

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155. KHALILAH BROWN-DEAN ET AL., JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, 50 YEARS OF THE VOTING RIGHTS ACT: THE STATE OF RACE IN POLITICS 12 (2015), [http://jointcenter.org/sites/default/files/VRA%20report,%203.5.15%20\(1130%20am\).pdf](http://jointcenter.org/sites/default/files/VRA%20report,%203.5.15%20(1130%20am).pdf) (updated). pdf (“Most local offices are non-partisan, and political parties generally lack incentives to invest significant resources on turnout for local elections . . .”).

156. CAL. CONST. art. II, § 6.

157. Debo P. Adegbile, *Voting Rights in Louisiana: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 413, 445 (2008) (noting local communities’ “limited access to the expertise and resources of the handful of organizations and attorneys with VRA litigation expertise”). See *Continuing Need*, *supra* note 55, at 15 (statement of Prof. Pamela S. Karlan).

158. See Adegbile, *supra* note 157, at 445 (“[A]lthough the media and many academics train their focus on [the Voting Rights Act’s] impact on congressional elections because data about those races are easy to access”).

159. Samuel P. Tepperman-Gelfant, *Constitutional Conscience, Constitutional Capacity: The Role of Local Governments in Protecting Individual Rights*, 41 HARV. C.R.-C.L. L. REV. 219, 244 (2006) (“[L]ocal officials and local entities frequently stand at the intersection between government and individuals, policing the streets, monitoring the schools, and shaping land-use policy”); Press Release, Lawyers’ Comm. for Civil Rights Under Law, Lawyers’ Committee Files Major Lawsuit Against Gwinnett County, Georgia Alleging Violation of the Voting Rights Act (Aug. 8, 2016), <https://lawyerscommittee.org/press-release/lawyers-committee-files-major-lawsuit-gwinnett-county-georgia-alleging-violation-voting-rights-act/> (“The decisions of these boards impact the day-to-day lives of Gwinnett County residents in a myriad of ways . . .”) (statement of Jerry Gonzalez, Executive Director of the Georgia Association of Latino Elected Officials, regarding a Section 2 vote dilution suit against the Gwinnett County Board of Commissioners and the Gwinnett County Board of Education).

160. See Richard L. Fox & Jennifer L. Lawless, *To Run or Not to Run for Office: Explaining Nascent Political Ambition*, 49 AM. J. POL. SCI. 642, 649 (2005) (“Nearly 70% of respondents select a local office—school board, city council, or mayor—as the first office for which they might run, whereas only 10% consider entering the political arena at the federal level.”);

groups are less able to elect candidates to local offices, they are also likely to be less able to develop candidates who compete in elections for state and federal offices. The current and longstanding state of affairs is that there is only a “very small bar of people who do Section 2 litigation and who have the expertise to do it.”<sup>161</sup> And, in spite of the importance of local elections, minority plaintiffs have “limited access to . . . the handful of organizations and attorneys with [Voting Rights Act] litigation expertise” or the resources to prosecute local-level abuses.<sup>162</sup> As a result, there is a high likelihood that “many discriminatory changes may go unchallenged.”<sup>163</sup>

There is an acute need to expand the voting rights bar and to reduce the cost of Section 2 litigation to allow for sufficient enforcement against local-level infringements to create a credible deterrent to future abuse.<sup>164</sup> This requires new prosecutors who can bring to bear the resources to investigate and prosecute a meaningful quantity of cases and the local knowledge and authority to create a threat of future enforcement to build that credible deterrent. State attorneys general may be able to fill that need.

#### IV. STATE ATTORNEYS GENERAL ARE WELL-POSITIONED TO ENFORCE THE VOTING RIGHTS ACT AGAINST LOCAL GOVERNMENTS

The scope of the problem of potential local-level Voting Rights Act violations combined with the local-level enforcement vacuum makes intervention by state attorneys general an imperative. State attorneys general have a uniquely valuable combination of law enforcement authority, local resources, and local knowledge and perspective that makes them better positioned in many ways than federal enforcers to monitor, investigate, and prosecute Section 2 claims. As Professor Margaret Lemos points out:

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Melissa J. Marschall, *Minority Incorporation and Local School Boards*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* 173, 178 (William G. Howell ed., 2005) (“[O]ften the first rung on the political ladder for Hispanics is the school board, and it is there that they gain the expertise and experience to run for higher office.”).

161. *Continuing Need*, *supra* note 55, at 15.

162. Adegbile, *supra* note 157, at 445.

163. Karlan, *supra* note 130, at 23.

164. Professors Elmendorf and Spencer have proposed innovations that would amplify the quantity of Section 2 litigation through more cost-effective use of survey data and rebuttable presumptions that would permit burden shifting to defendants. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2147 (2015). By introducing more voting rights enforcers into the field, particularly enforcers with the stature to influence courts and other enforcement agencies, the likelihood of adoption and success of solutions like those proposed by Professors Elmendorf and Spencer increases.

State enforcers [ ] are likely to have a better understanding of local conditions than their federal counterparts, simply by virtue of living and working in the state rather than in Washington, D.C. States may have an investigatory or enforcement apparatus in place—a local police force, for example—that would be costly for the federal government to replicate. And state enforcers’ relative closeness to local citizens gives them access to information that federal enforcers may not have or lack the capacity to address.<sup>165</sup>

As the small number of Section 2 suits recently prosecuted by the Department of Justice suggests, federal enforcers may be stretched too thin to devote the attention and resources necessary to make a meaningful impact at the local level. On the other hand, state attorneys general can apply much of the same pressure and scrutiny as federal law enforcement, but can do so with greater intensity over a much more localized area than the federal Department of Justice with its national enforcement mandate. State attorneys general can also take advantage of a lever unavailable to the federal DOJ: attorneys’ fees. Although the Voting Rights Act specifically prohibits the United States from recovering attorneys’ fees, state attorneys general are under no such restriction.<sup>166</sup>

By virtue of its strong resource base and local focus, state attorneys general are likely to have the capacity to become effective repeat players who can build institutional competence in voting rights litigation, take advantage of economies of scale, and increase the efficiency of their actions over time.<sup>167</sup> For example, the substantial out-of-pocket costs for expert witness fees may cause state attorneys general to employ dedicated political scientists, demographers, and historians to take advantage of economies of scale and then work with those experts to develop innovative techniques or technology to reduce the resources necessary to generate expert analysis.<sup>168</sup> Over time, those state employees can gain an expertise over relevant longitudinal information regarding local demographics and political climates that will improve the office’s

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165. Lemos, *supra* note 123, at 721.

166. See 52 U.S.C. § 10310 (2012).

167. See generally Joel B. Grossman, Herbert M. Kritzer & Stewart Macaulay, *Do the “Haves” Still Come Out Ahead?*, 33 LAW & SOC’Y REV. 803 (1999) (citing Marc Galanter, *Why the “Haves” Come Out Ahead?: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97 (1974)).

168. *Id.* at 803.

efficiency and accuracy in screening the merits of possible enforcement actions.<sup>169</sup> The result is that a state attorney general will be able to bring more cases at a greater success rate, thus increasing the credibility of the threat of more enforcement actions, which in turn will result in a greater deterrent effect.<sup>170</sup>

State attorneys general can also serve as a “laboratory” to improve the system of Voting Rights Act enforcement by exploring ways to make litigation more efficient and cost-effective in a manner that only repeat players with an enforcement mandate constrained by state budgets and personnel resources can.<sup>171</sup> However, unlike the federal government and private actors, a state attorney general, as a state’s chief legal officer, has unique access to levers of public policy, including advising the governor and state legislature (in addition to pursuing their own policy agenda as a statewide official).<sup>172</sup> For example, the difficulty of obtaining election and demographic data in a format that is easily usable in the analysis of racially-polarized voting or in drawing alternative electoral maps may lead state attorneys general to work with secretaries of state and local election officials to collect and maintain better election data.<sup>173</sup> With each additional case, state attorneys general will gain further litigation and policy insights into the more efficient use of taxpayer resources to investigate and resolve cases.<sup>174</sup> Those insights and best practices can then be shared to amplify their impact beyond the state’s borders through organizations like the National Association of Attorneys General.<sup>175</sup>

State enforcement also ensures that protections for minority voters will not go ignored altogether by government actors at times when the federal Department of Justice makes those protections a

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169. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1257–58 (2012) (“[S]pecialized enforcers—whether repeat-play plaintiffs or a specialized plaintiffs’ bar—may prove to be more accurate screeners of case merits, ensuring that more meritorious cases get litigated and less meritorious ones do not by providing quality signals to courts or to counsel further down referral networks.”).

170. See *id.* at 157–159.

171. Lemos, *supra* note 123, at 751–52 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

172. Lainie Rutkow & Stephen P. Teret, *The Potential for State Attorneys General to Promote the Public’s Health: Theory, Evidence, and Practice*, 30 ST. LOUIS U. PUB. L. REV. 267, 276 (2011).

173. Toby Moore, *Assault on “Fort Liberalism:” Voting Rights Enforcement—and Voting Rights Enforcers—Under the Bush Administration*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 115, 122 (2008) (“Analysis of voting cases is difficult turf in the best of circumstances. Data from elections is notoriously poor in quality, particularly at the local level, where even reliable precinct maps can be difficult to obtain.”).

174. See Grossman, Kritzer & Macauley, *supra* note 167, at 803.

175. About NAAG, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, [http://www.naag.org/naag/about\\_naag.php](http://www.naag.org/naag/about_naag.php) (last visited Aug. 18, 2016).

lower priority objective.<sup>176</sup> Over the past half-century, civil rights enforcement priorities have shifted significantly each time the party in control of the executive branch has changed.<sup>177</sup> For example, the head of the Voting Section during the G.W. Bush administration noted “a clash between folks like me who really believe that the Voting Rights Act needs to be applied in a race-neutral manner and the folks who had been there a long time who saw it, frankly, as a way of helping only minority voters.”<sup>178</sup> The section thus turned its focus away from efforts to combat the disenfranchisement of minority voters and towards investigating the incidence of voter fraud.<sup>179</sup> The first few weeks of President Donald Trump’s administration also show a high likelihood that the United States Department of Justice will focus on investigating baseless claims of voter fraud over combatting the suppression and dilution of minority votes. President Trump himself has repeatedly made unsubstantiated claims of widespread voter fraud during the 2016 Election and threatened a “major investigation” into the issue.<sup>180</sup> During his confirmation hearings, President Trump’s Attorney General Jeff Sessions, who has a history of obstructing the work of voting rights activists, also made statements perpetuating these voter fraud fables while also failing to recognize the discriminatory intent and effect of voter identification laws that had been invalidated by federal courts.<sup>181</sup> Within days of President Trump’s inauguration, there were indications that the Department of Justice would be backing away from

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176. Lemos, *supra* note 123, at 756–57 (“Competition in public enforcement also reduces the likelihood that powerful offenders will be able to escape penalties for federal violations by exerting influence on a single responsible agency, and can spur both state and federal enforcers to act more forcefully and efficiently.”).

177. Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1440–41 (1998) (“Since the passage of the Civil Rights Acts in the 1960s, each shift in political party has brought significant change in civil rights enforcement.”).

178. Jim Rutenberg, *A Dream Undone*, N.Y. TIMES MAGAZINE (July 29, 2015), [http://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html?\\_r=1](http://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html?_r=1) (quoting the head of the DOJ Voting Section under President G.W. Bush, as observing with the Voting Section).

179. Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (Apr. 12, 2007), <http://www.nytimes.com/2007/04/12/washington/12fraud.html> (noting substantial focus of DOJ Voting Section on voter fraud during G.W. Bush administration).

180. Michael D. Shear and Peter Baker, *After His Claim of Voter Fraud, Trump Vows ‘Major Investigation’*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/trump-voting-fraud-false-claim-investigation.html>.

181. Ari Berman, *Jeff Sessions Claims to Be a Champion of Voting Rights, but His Record Suggests Otherwise*, THE NATION (Jan. 11, 2017), <https://www.thenation.com/article/jeff-sessions-claims-to-be-a-champion-of-voting-rights-but-his-record-suggests-otherwise/>.

the Obama Administration's major voting rights cases.<sup>182</sup> Under such challenging circumstances, state attorneys general can help ensure a continuity of vigilance concerning violations of minority voting rights when the federal government retreats from its responsibility to protect the rights of minority voters.

Enforcement by state attorneys general also provides an opportunity to both supplement and complement enforcement by private plaintiffs. In general, the government's efforts in civil rights enforcement are best directed at areas where private attorneys general have not adequately addressed the need for enforcement.<sup>183</sup> As discussed above, the costs of voting rights litigation, the absence of damages, and uncertainty of recovering fees creates disincentives to private enforcement. Incumbent officials have an incentive to preserve for as long as possible the system responsible for their own elections and the advantage of public funds to defend those systems.<sup>184</sup>

The disincentives for private attorneys generals to bring voting rights cases are less likely to negatively affect the willingness of state attorney generals, who are not under similarly immediate financial pressure. In addition, state attorneys general can apply to offending local governments the weight of statewide elected office, including bringing the public scrutiny and opprobrium that attends actions by law enforcement. Moreover, state attorneys general can also apply that pressure and scrutiny before or during the early stages of litigation by announcing their investigations publicly to leverage media coverage, participating in pre-complaint discussions with potential defendants, and coordinating efforts with private plaintiffs. Also, outside of major cities, plaintiffs may not be able to find attorneys with the expertise or resources to take voting cases, making any assistance from a state attorney general invaluable.<sup>185</sup> The generally non-partisan nature of local elections will blunt charges that the attorney general is merely engaged in voting rights enforcement for partisan advantage.<sup>186</sup> As a supplement and complement

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182. Charlie Savage and Eric Lichtblau, *Civil Rights Group Rebukes Trump Justice Dept. Over Case Delays*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/politics/civil-rights-trump-administration-sessions.html>.

183. Cf. Selmi, *supra* note 177, at 1457–58 (“[A]t a minimum, the government ought to redirect its resources to an area in which the private bar is less capable of prosecuting.”).

184. *Preclearance Standards*, *supra* note 135, 4–5 (statement of Rep. Scott).

185. See Adegbile, *supra* note 157, at 445; Brian Schaffner, Matthew Streb & Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q., 7, 7-8 (2001).

186. See Schaffner, Streb & Wright, *supra* note 185, at 7–8; see, e.g., Haberman and Chozick, *supra* note 154 (quoting Hans Von Spakovsky referring to certain voting rights litigation as a “campaign weapon”).



to private and federal plaintiffs, a state attorney general's attention is more likely to succeed than private or federal plaintiffs alone at causing local governments within its jurisdiction to pre-emptively reconsider their election practices and deterring future discrimination.

Finally, a state attorney general is unlikely to suffer adverse net electoral consequences for pursuing litigation to protect minority voting rights. Polling data suggests that minority voters' preference for action to protect minority voting rights remains strong and a majority of white voters continue to believe the Voting Rights Act remains necessary.<sup>187</sup> Although a Section 2 suit against a municipality may have some localized negative political consequences within the challenged jurisdiction, attorneys general run in statewide races and can promote their enforcement efforts to appeal to minority voters and pro-voting rights white voters on a statewide basis. Also, because the outcomes of local-level vote dilution cases do not affect the degree of influence that minority voters have on a statewide race and, as noted above, local offices are generally non-partisan, state attorneys general can resist attacks that their pro-voting rights agenda has a partisan motive.

#### V. THE INADEQUACY OF CURRENTLY AVAILABLE STATE LAW REMEDIES MAKES SECTION 2 THE BEST AVAILABLE OPTION—FOR NOW

In the long run, state law may prove a greater fount of protection for voting rights than federal law; at the moment, however, Section 2 is the only established vehicle for prosecuting local-level vote dilution. Although the federal constitution notoriously does not provide an individual right to vote, all fifty state constitutions grant the right to vote (either expressly or implicitly).<sup>188</sup> State constitutional protections for the right to vote have been used against the re-emergence of first-generation barriers to minority voting, such as

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187. *Public Opinion on the Voting Rights Act*, ROPER CENTER FOR PUBLIC OPINION RESEARCH, <http://ropercenter.cornell.edu/voting-rights-act/> (last visited Oct. 24, 2016) (according to 1988 survey, "ninety-two percent of blacks said that it was important that voting districts be drawn so that blacks can obtain a representation in elective office comparable to their numbers in the population"; according to 2015 survey, "while nearly all blacks and whites think the Voting Rights Act was needed in 1965, blacks are much more likely to say the law is still needed today (86%) than are whites (56%), although even among whites, a majority believe the Act remains necessary.").

188. Joshua Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–02 (2014).

state voter ID laws, with mixed success.<sup>189</sup> But, at present, only California has a statute authorizing an express right of action to prosecute discrimination against racial or language minorities in voting.<sup>190</sup> And, as discussed above, that right of action is limited to vote dilution claims in at-large districts.<sup>191</sup>

There are substantial shortcomings in Section 2 litigation that make enforcement challenging even if resources were not a concern. Notwithstanding the best efforts of Congress to create a broad and powerful right of action, the Supreme Court has limited Section 2's scope and effectiveness in several key ways. Most notably, a Section 2 challenge requires a plaintiff to show that the minority group at issue "is sufficiently large and geographically compact to constitute a majority in a single-member district."<sup>192</sup> The Supreme Court has held that this requirement means that where a minority group constitutes a substantial voting bloc within a district but its voting age population amounts to less than fifty percent of a district's population, diluting the minority group's voting strength in that district does not constitute a Section 2 violation.<sup>193</sup> The result is that the federal Voting Rights Act does not protect what are referred to as "crossover" districts—districts in which a minority group cannot, by itself, elect its candidate of choice, but can do so with help from some non-minority voters or other minority groups.<sup>194</sup> The Supreme Court has also held that Section 2 does not protect "influence districts," i.e., districts where the population of the minority group is sufficiently large that the minority group can

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189. See Michael Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. REV. EN BANC. 189, 194–96 (2014) (observing that state trial court decisions relying on state constitutional rights to vote have been reversed by state appellate courts).

190. See Epstein, *supra* note 9.

191. Note that Professor Douglas's article does not claim that state constitutional provisions cannot be read to prohibit vote dilution; however, his argument is limited to proposing that state constitutional rights to vote should impose a presumption of invalidity of laws that impose additional voter qualifications. Douglas, *supra* note 188, at 138–39. Prof. Douglas's article does not contradict the proposition that right to vote found in state constitutions can and should provide a remedy against vote dilution when read in conjunction with the Supreme Court's holding in *Reynolds v. Sims*, that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964). Thus far, however, state constitutional rights to vote have not been the source of an established private right of action against vote dilution. Although the development of scholarship and, eventually, jurisprudence establishing such a state constitutional right of action will hopefully come to pass, Section 2 provides a well-established tool that can be deployed right now by state attorneys general across the United States.

192. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

193. *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) ("Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters.").

194. See *id.*, at 14–16.

“influence” the outcome of the election, but not so large that the group can substantially determine the outcome (as in a majority-minority or “crossover” district).<sup>195</sup> In some cases, the requirement that a plaintiff be able to show a geographically-compact, majority-minority district could actually lead to functionally counterproductive Section 2 cases where crossover and influence districts are eliminated in favor of packing more minority voters into “majority minority” districts.<sup>196</sup> Given the narrow margins by which the cases circumscribing Section 2 have been decided, and changes in composition of the Supreme Court that will occur over the next decade, it is conceivable that in the intermediate term, Section 2 may become a broader and less cumbersome cause of action.<sup>197</sup> In the interim, however, Section 2 remains an imperfect instrument.

California has made efforts to make up for these shortcomings through state voting rights legislation, which has proven itself to be an effective deterrent to the limited set of practices covered by the law. The CVRA prohibits the use of at-large methods of election “in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class.”<sup>198</sup> In protecting “crossover” and “influence” districts, the CVRA permits a plaintiff to prove a vote dilution claim without satisfying the first *Gingles* precondition, i.e., that a plaintiff show that the minority group at issue can constitute a geographically compact majority in a single-member district.<sup>199</sup> The CVRA therefore opens the door to relief to a broader range of voting rights plaintiffs and eases their burden of proof while permitting courts access to remedies beyond the creation of majority-minority districts.<sup>200</sup>

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195. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006) (“[W]hile the presence of districts where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process is relevant to the § 5 analysis, the lack of such districts cannot establish a § 2 violation.”) (internal citations and quotation marks omitted).

196. Steven Hill, *How the Voting Rights Act Hurts Democrats and Minorities*, THE ATLANTIC (June 17, 2013), <http://www.theatlantic.com/politics/archive/2013/06/how-the-voting-rights-act-hurts-democrats-and-minorities/276893/>.

197. See Liz Kennedy & Seth Katsuya Endo, *The World According to, and After, McCutcheon v. FEC, and Why It Matters*, 49 VAL. U. L. REV. 533, 574–76 (2015) (describing instances in which the Supreme Court has reconsidered its stance on important social justice issues).

198. CAL. ELEC. CODE, California Voting Rights Act of 2001, § 14027 (2001).

199. CAL. ELEC. CODE § 14028(c) (2001) (“[T]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting.”).

200. Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 HARV. LATINO L. REV. 183 (2012).

California law also makes it much easier for prevailing plaintiffs to recover attorneys' fees and costs (including expert witness fees), which creates substantial incentives for private attorneys general to bring cases under the CVRA.<sup>201</sup> California law permits the recovery of attorneys' fees under the "catalyst theory," i.e., the theory that attorneys' fees may be recovered if a plaintiff's lawsuit "was a catalyst motivating defendants to provide the primary relief sought or when plaintiff vindicates an important right by activating defendants to modify their behavior."<sup>202</sup> By contrast, federal law only permits recovery of attorneys' fees when the litigation achieves a result with "the necessary judicial imprimatur," that is, "an adjudicated judgment on the merits or . . . a consent judgment that provides for some sort of fee award."<sup>203</sup> The greater likelihood of having to pay large awards of fees and costs to plaintiffs, as well as the relative ease of proving a violation, has made the CVRA effective at getting jurisdictions using at-large elections to reconsider the impact of their method of election on minority voting rights and, in some cases, to proactively move to elections by district.<sup>204</sup> A 2014 study "identified 140 jurisdictions that voluntarily sought to change from at-large to district-based elections between 2001 and 2013—most of them school districts."<sup>205</sup> While there has been no comprehensive study to date,<sup>206</sup> substantial anecdotal evidence indicates that the CVRA has been effective at increasing minority representation on local elected bodies.<sup>207</sup> The result is that although Section 2 has been all but a dead letter in the recent history of California, the CVRA has become an effective tool for combatting voting discrimination and a model for how case-by-case litigation can have a deterrent effect.<sup>208</sup>

But political subdivisions that run elections by district—even those previously found liable under the CVRA—escape the purview

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201. CAL. ELEC. CODE § 14031 (2001).

202. *Maria P. v. Riles*, 743 P.2d 932, 937 (Cal. 1987).

203. Karlan, *supra* note 58, at 207 (quoting *Buckhannon*, 532 U.S. at 604, 605).

204. See Kousser, *supra* note 113, at 27–28; Brydolf, *supra* note 109, at 38.

205. LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, VOTING RIGHTS BARRIERS & DISCRIMINATION IN TWENTY-FIRST CENTURY CALIFORNIA: 2000-2013, 7 (2014), <http://www.lccr.com/wp-content/uploads/Voting-Rights-Barriers-In-21st-Century-Cal-Update.pdf>

206. Jean Merl, *Voting Rights Act leading California cities to dump at-large elections*, L.A. TIMES (Sept. 14, 2013), <http://www.latimes.com/local/la-me-local-elections-20130915,0,295413.story#axzz2vUTulFm9>.

207. See Brydolf, *supra* note 109, at 38.

208. See S.B. 493 BILL ANALYSIS, *supra* note 10; Kousser, *supra* note 113, at 28.

of the state law entirely.<sup>209</sup> Although the California Legislature passed a bill, SB 1365,<sup>210</sup> to amend the CVRA to permit vote dilution claims against jurisdictions with elections by district, Governor Jerry Brown vetoed that bill in October 2014, asserting, without any evidence, that minority voters in California received adequate protection from existing federal laws.<sup>211</sup> A local government in California that pre-emptively switches from an at-large system to a system of elections by district can thus draw those districts in a way that protects incumbents that may well have been elected through a racially discriminatory system, but nonetheless avoid liability under the CVRA.<sup>212</sup>

While an expanded CVRA (or similar statute in other states) may offer a more effective solution for minority voters to combat discrimination, until state legislatures and governors act on such legislation,<sup>213</sup> Section 2 is the only law in forty-nine states that provides a cause of action against vote dilution of any kind, and the only law in all fifty states that provides a right of action against vote dilution in elections by district. But the failure or refusal of state legislatures and/or governors to pass protections against vote dilution does not preclude state attorneys general, who are directly and independently elected in forty-three states,<sup>214</sup> from enforcing the existing federal statute.

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209. Avila et al., *supra* note 103, at 152 (“Although the California Voting Rights Act is a significant improvement over Section 2, it only applies to at-large elections and does not apply to other methods of elections, redistrictings, or other voting changes.”).

210. California. Legislature. Senate An act to add the heading of Article 1 (commencing with Section 14025) and the heading of Article 2 (commencing with Section 14027) to, and to add Article 3 (commencing with Section 14040) to, Chapter 1.5 of Division 14 of the Elections Code, relating to elections. S.B. 1365, 2013-2014 Reg. Sess. (Aug. 15, 2014).

211. Bob Egelko, *Gov. Brown Vetoes Bill to Expand California’s Voting Rights Act*, S.F. CHRON. (Oct. 1 2014), <http://www.sfgate.com/news/article/Governor-vetoes-bill-to-expand-California-s-5794735.php>.

212. See S.B. 493 BILL ANALYSIS, *supra* note 10; BILL ANALYSIS, S. RULES COMMITTEE, SB 1365, 2013-2014 Reg. Sess. at 6 (Aug. 12, 2014), [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140SB1365](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB1365) (“Since 2003, over 140 cities, counties, school districts, and other municipal districts have sought to change from at-large to single-member district-based election systems, in part, to comply with the CVRA. However, where these jurisdictions draw new district lines in ways that dilute the votes of historically marginalized voters, such as African American, Asian American, Latina/o or Native American voters, California communities will undoubtedly continue to suffer from unlawful vote dilution. Currently, no remedy exists under California state law to cure vote dilution in single member district-based election systems. That a jurisdiction might draw districts that cause vote dilution after changing from an at-large system to a district-based election system renders the CVRA ineffective in achieving its primary goal; to safeguard equal protection and an equal right to vote under the California Constitution.”).

213. Kousser, *supra* note 113, at 29.

214. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L. J. 2446, 2448 n.3 (2006).

At best, the near universal failure of state legislatures to enact protections against vote dilution represents a judgment that the federal Voting Rights Act provides sufficient protection for minority voting rights.<sup>215</sup> At worst, local ordinances diluting minority voting strength and the failure of state legislatures to provide a right of action against those laws are paradigmatic examples of “malfunctions” in the “political market,” which are described by Professor John Hart Ely as

when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minorities out of a simple hostility or a prejudiced refusal to recognize commonalities of interest.<sup>216</sup>

Although Professor Ely discussed the need for the judiciary in particular to act as a bulwark against those malfunctions, independent state attorneys general may also be able to correct some of these malfunctions because they “may represent different constituencies than other elected state officials because of political differences, and they may ‘hear’ different citizen voices of the distinctive ways their offices are set up to gather and respond to citizen complaints.”<sup>217</sup> According to Professor Lemos, the result of this unique positioning is that “state attorneys general may pursue initiatives that the legislature and the governor either overlook or affirmatively reject. This is a virtue of the existing system, not a vice.”<sup>218</sup>

To date, no state attorney general has ever brought a case against a political subdivision to enforce compliance with Section 2 of the Voting Rights Act. The Voting Rights Act does not expressly provide standing for state enforcement agencies to bring suits against political subdivisions that fail to comply with federal law, but nor does it contain language that would bar them from doing so. The following Part discusses how Section 2 can provide standing for state attorneys general to prosecute claims against local governments.<sup>219</sup>

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215. See, e.g., Egelko, *supra* note 211.

216. J. Ely, DEMOCRACY AND DISTRUST 103 (1980).

217. Lemos, *supra* note 123, at 746–47.

218. *Id.*

219. State attorneys general can and do sue local governments under federal law, including over matters related to state elections. See, e.g., *People ex rel. Lockyer v. Cty. of Santa Cruz*, 416 F. Supp. 2d 797, 799 (N.D. Cal. 2006) (denying county’s motion to dismiss California

## VI. STATE STANDING TO BRING ACTIONS UNDER THE VOTING RIGHTS ACT

### A. Article III Standing

The initial and common hurdle that any state attorney general must overcome to bring a Section 2 action is establishing standing. Article III's case or controversy requirement is a "core component of" and the "irreducible constitutional minimum of standing."<sup>220</sup> Every litigant must present a sufficient interest in the outcome of litigation to establish a justiciable case or controversy.<sup>221</sup> A typical plaintiff satisfies the case or controversy requirement by demonstrating injury-in-fact, causation by the defendant, and that the injury may be redressed by a favorable court decision.<sup>222</sup> But "[s]tates are not normal litigants for the purposes of invoking federal jurisdiction."<sup>223</sup> A state may satisfy the case or controversy requirement by acting in its capacity as *parens patriae* to "prevent or repair harm to its 'quasi-sovereign' interests."<sup>224</sup> Modern *parens patriae* "creates an exception to the normal rules of standing applied to private citizens in recognition of the special role that a State plays in pursuing its quasi-sovereign interests in the well-being of its populace."<sup>225</sup>

The authority of a state to sue as *parens patriae* derives from the authority of the king at common law to intervene legally to prevent injury to those who could not act for themselves.<sup>226</sup> Except in the most general terms, the historical role of *parens patriae* "has relatively little to do with the concept of *parens patriae* standing that

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attorney general's *parens patriae* action under the Americans with Disabilities Act regarding the accessibility of county's polling places); New York *ex rel.* Spitzer v. Cty. of Delaware, 82 F. Supp. 2d 12, 14 (N.D.N.Y. 2000) (finding New York attorney general had standing to bring *parens patriae* action against county under the ADA regarding the accessibility of county's polling places); *see also, e.g.*, United States and California *ex rel.* California Reg'l Water Quality Control Bd. v. Los Angeles, No. CIV. 98-9039-RSWL, 2002 WL 31915814, at \*1 (C.D. Cal. Dec. 23, 2002) (granting partial summary judgment to plaintiffs, including State of California, against City of Los Angeles for Clean Water Act violations, *inter alia*).

220. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

221. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

222. *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Lujan*, 504 U.S. at 560.

223. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

224. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258 (1972); *see also In re Multidistrict Vehicle Air Pollution* M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973) ("[T]he federal government and the states, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances sue as *parens patriae* to vindicate interests of their citizens.").

225. *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 (1st Cir. 2000) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982)).

226. *Standard Oil*, 405 U.S. at 257.

has developed in American law.<sup>227</sup> But, like its historical antecedent, the modern *parens patriae* theory permits a state to seek redress where injuries to the public interest are concurrent with injuries to classes of citizens who may lack the means and/or the incentive to act for themselves.

*Parens patriae* standing requires a state to satisfy three criteria. First, the state must demonstrate a quasi-sovereign interest. Quasi-sovereign interests are those “independent of and behind the titles of its citizens.”<sup>228</sup> The precise boundaries of a “quasi-sovereign interest” do “not lend [themselves] to a simple or exact definition,” but at the very least they include a state’s interest in the “health and well-being—both physical and economic—of its residents,” which encompasses an interest in preventing discrimination.<sup>229</sup> Second, *parens patriae* standing requires the state to show that the alleged injury impacts a “sufficiently substantial” segment of the population. There are no bright-line “definitive limits on the proportion of residents that must be adversely affected.”<sup>230</sup> Courts construe the injury requirement broadly and consider the indirect effects, both economic and non-economic, of the harm.<sup>231</sup> Finally, a majority of courts require a showing that the state’s interest would not be properly protected if forced to rely exclusively on private litigation.<sup>232</sup> In the context of vote dilution claims brought under Section 2, a state attorney general satisfies all requirements of the *parens patriae* standing analysis.<sup>233</sup>

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227. *Snapp*, 458 U.S. at 600; *Massachusetts v. Bull HN Info. Sys., Inc.* 16 F. Supp. 2d 90, 96 (D. Mass. 1998) (“Over time, the meaning of the doctrine has evolved, and *parens patriae* has become a different and far broader sovereign power.”).

228. *Georgia v. Tennessee Copper Co.*, 206 U.S. 237 (1907).

229. *Snapp*, 458 U.S. at 607; *Bull HN*, 16 F. Supp. 2d at 96.

230. *Snapp*, 458 U.S. at 607.

231. *People v. Peter & John’s Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996).

232. *See, e.g., People v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982).

233. In *Graham v. Thornburgh*, the state attorney general of Kansas challenged the redistricting plan for the Kansas Legislature on grounds that the apportionment violated the one person, one vote requirement. 207 F. Supp. 2d 1280, 1283 (D. Kan. 2002) (three-judge court) (citing *Baker v. Carr*, 369 U.S. 186, 204–08 (1962)). The court acknowledged that “[a] state may, in some situations, pursue a *parens patriae* action when it can assert a ‘quasi-sovereign’ interest that is ‘more . . . than injury to an identifiable group of individual residents,’” including “‘where a state has sought to protect the health and well-being of its residents in general.’” *Id.* (quoting *Snapp*, 458 U.S. at 600–02). However, the court held that Kansas “assert[ed] no such interest in this case,” having asserted only “that the separation of Fort Riley and Junction City has caused the voters of that area such injury.” *Id.* Although intervenors raised the issue of whether the reapportionment would dilute minority votes, there is no evidence that the state attorney general asserted a Section 2 claim or that protecting state residents against discrimination could constitute a quasi-sovereign interest sufficient to establish *parens patriae* standing. *Id.* at 1293 & n.8 (“The Tribes, and, in vague terms, possibly the Junction City intervenors, appeared to raise a vote dilution argument in their initial pleadings. It appears their arguments have been abandoned.”).



## 1. Quasi-Sovereign Interest

The Supreme Court set out its most comprehensive treatment of the modern doctrine of *parens patriae* standing in *Snapp v. Puerto Rico*, in which it defined quasi-sovereign interests as those a state has in the “well-being of its populace.”<sup>234</sup> The concern with a state asserting standing under a *parens patriae* theory is that the state may try to use its power to bring suit to sue on behalf of a small group of private residents, when it in fact does not have its own genuine interest in the outcome.<sup>235</sup> So, a state “must be more than a nominal party,”<sup>236</sup> because without its own “sufficiently concrete” injury there is no actual case or “controversy between the State and the defendant,” which would raise Article III concerns.

Post-*Snapp*, determining which interests qualify as quasi-sovereign is a matter “for case-by-case development.”<sup>237</sup> But, at a minimum, certain interests are clearly quasi-sovereign. For example, states have a quasi-sovereign interest in preventing injuries to the health and well-being of their residents, which encompasses physical and economic harm.<sup>238</sup>

## 2. Encouraging Voter Participation and Protecting Against Discrimination as Quasi-Sovereign Interests

The state’s interest in the health and well-being of its residents encompasses an interest in guarding against “harmful effects of discrimination.”<sup>239</sup> In *Snapp*, Puerto Rico brought suit against Virginia apple growers alleging that the growers’ hiring practices violated a federal law that required them to give preference to U.S. laborers over foreign laborers.<sup>240</sup> Justice White emphasized the role states

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234. 458 U.S. at 602.

235. *Id.*; *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (citing *Snapp*, 458 U.S. at 607) (“In recognizing that a state may have standing by virtue of its quasi-sovereign interest in its citizens, the Supreme Court has been careful to note that a state’s interest must be in some way distinguishable from that of its citizens.”).

236. *Snapp*, 458 U.S. at 608.

237. *Id.* at 607.

238. *Id.*

239. *Id.* at 609; *Bull HN*, 16 F. Supp. 2d at 97 (“It seems indisputable that a state has a quasi-sovereign interest in preventing racial discrimination of its citizens”) (citations omitted); *Pennsylvania v. Glickman*, 370 F. Supp. 724, 728 (W.D. Pa. 1974) (finding “[r]acially discriminatory employment practices would unquestionably impair the welfare of Pennsylvania’s citizenry”); *cf. 11 Cornwell*, 695 F.2d at 39 (reasoning by analogy that the state had a quasi-sovereign interest in providing housing for its developmentally disabled residents because of its similarities to a state’s interest in prevention discrimination).

240. *Snapp*, 458 U.S. at 608–10.

play in protecting against discrimination when he wrote, “This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.”<sup>241</sup> Subsequent decisions identify a state’s interest in preventing discrimination on the basis of age,<sup>242</sup> race,<sup>243</sup> mental ability,<sup>244</sup> and medical status.<sup>245</sup>

Discrimination in the electoral process against racial and language minorities implicates precisely the quasi-sovereign state interest in “securing residents from the harmful effects of discrimination” that the Court identified in *Snapp*.<sup>246</sup> Discrimination based on race and national origin represents “a history of purposeful unequal treatment” and subjects citizens to “unique disabilities on the basis of stereo-typed characteristics not truly indicative of their abilities.”<sup>247</sup> Like Puerto Rico in *Snapp* or like New York in *Pump House*, California has an interest in protecting its citizens that is of a different type and character than the interests of any particular citizen in being free from discrimination. Therefore, the “political, social, and moral damage” of discrimination is “sufficiently concrete” to support Article III standing.<sup>248</sup>

The state interest in eradicating discrimination also extends into a quasi-sovereign interest in “preserving the overall integrity of the electoral process” and “increasing voter participation,”<sup>249</sup> an interest that is undermined when discriminatory voting practices infect

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241. *Id.* at 609 (“Just as we have long recognized that a State’s interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests, we recognize a similar state interest in securing residents from the harmful effects of discrimination.”)

242. *Bull HN*, 16 F. Supp. 2d at 90.

243. *People v. Peter & John’s Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996); *accord N.Y. by Schneiderman v. Utica City Sch. Dist.*, 177 F. Supp. 3d 739, 748 (N.D.N.Y. 2016) (“[C]ourts have recognized that a state’s interest in protecting its citizens from a broad range of discrimination is sufficiently quasi-sovereign in nature to confer *parens patriae* standing.”).

244. *11 Cornwell*, 695 F.2d at 39 (dealing with discrimination against those with mental disabilities).

245. *See Vacco v. Mid Hudson Med. Grp.*, 877 F. Supp. 143, 147 (S.D.N.Y. 1995) (dealing with discrimination against people with hearing impairments); *see Support Ministries For Pers. with AIDS Inc. v. Vill. of Waterford*, 799 F. Supp. 272, 277 (N.D.N.Y. 1992) (dealing with discrimination against those diagnosed with HIV/AIDS).

246. *Snapp*, 458 U.S. at 609.

247. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

248. *Snapp*, 458 U.S. at 602, 609.

249. *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124–25 (1981); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring) (“Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process.”).

the legitimacy of elections.<sup>250</sup> Recently, laws designed to suppress votes created a tension between the individual interest in voting and the state interest in protecting electoral legitimacy from fantastical threats of voter fraud.<sup>251</sup> But, the state's interest in preserving integrity and legitimacy of its elections is arguably *enhanced* by rooting out discrimination and increasing voter participation. The state's interest in "high overall levels of participation[,] [which] are instrumentally useful for promoting other democratic values such as civic engagement, accountability, or representativeness," is distinct from but consistent with the individual interest in casting an effective ballot because "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."<sup>252</sup> For the state, the interest is broader than merely collecting and counting every ballot, and includes ensuring fair elections in which voters are not denied the opportunity to elect candidates of their choice on account of their race.<sup>253</sup> Preserving public confidence that voters are able to cast effective ballots prevents "[l]oss of faith in the efficacy of the individual ballot [that] can also erode public confidence in the integrity of elections and the validity of their outcomes."<sup>254</sup>

Indeed, a state's interest in preventing discrimination carried out by a city or county is even stronger than the interest presented in *Snapp* because the state's direct relationship to the subdivision. In *Snapp*, Puerto Rico alleged discrimination on the part of Virginia apple growers against Puerto Rican residents.<sup>255</sup> The discriminatory conduct of Virginia residents cannot easily be attributed to the complicity of the government of Puerto Rico because the Commonwealth has no authority to regulate the conduct of Virginia residents outside its own borders. However, when a political subdivision—a creature of the state—engages in discriminatory behavior, the state that tolerates or otherwise fails to remedy the subdivision's discriminatory conduct can be colored as similarly discriminatory. A political subdivision's authority is "derivative," meaning it comes

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250. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.")

251. See Derrick Darby, *Uncovering the Voting Rights Act: The Racial Progress Argument in Shelby County*, 25 KAN. J.L. & PUB. POL'Y 329, 345 (2016) (noting that arguments designed to "sav[e] the VRA from further damage" should consider "the weighty substantive equality and dignity interests every individual citizen has in voting and having his or her vote counted, which has long been protected by the VRA, ha[ve] been afforded sufficient judicial protection by being duly balanced against competing state interests").

252. See Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1301, 1304 (2011) (quoting *Sims*, 377 U.S. at 567).

253. 52 U.S.C. § 10301 (2012).

254. *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004).

255. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 597–98 (1982).

from the state because of its relationship to the city or county.<sup>256</sup> To prevent a state from challenging the conduct of a component part would deny the very sovereignty that permits the state to delegate the administration of elections at all.

### 3. Economic Injuries

Discrimination also results in a separate economic harm to the state, which gives rise to a quasi-sovereign interest. In *11 Cornwell*, the Attorney General of New York sued property owners because the owners refused to sell their land once they learned the government planned to use it as a home for persons with mental retardation.<sup>257</sup> In upholding the state's *parens patriae* standing to enforce the civil rights laws, the Second Circuit called attention to the economic impact discrimination has on the state, finding the "cost and care for the mentally retarded and the savings through their rehabilitation" were proper economic concerns for the state and gave rise to a quasi-sovereign interest.<sup>258</sup>

*Snapp* also involved economic interests. Puerto Rico had sued because of discrimination in the workforce, and the Court held that "unemployment among Puerto Rican residents is surely a legitimate object of the Commonwealth's concern."<sup>259</sup> The Court further held that, just as Puerto Rico "may address that problem through its own legislation, it may also seek to assure its residents that they will have the full benefit of federal laws designed to address this problem."<sup>260</sup> The diffuse but significant impact of unemployment on a state and its residents is similar to the diffuse but significant economic impact of electoral discrimination in general (and vote dilution in particular). States rely on political subdivisions to distribute state funds for the benefit of their residents, including for use in many areas important to daily life including transportation, healthcare and

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256. See, e.g., *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) ("[Cities] cannot sue as *parens patriae* because their power is derivative and not sovereign."); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973).

257. See *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 37 (2d Cir. 1982), *vacated in part on other grounds sub nom. People of State of N.Y. by Abrams v. 11 Cornwell Co.*, 718 F.2d 22 (2d Cir. 1983).

258. *Id.* at 39; see also *Support Ministries For Pers. with AIDS Inc. v. Vill. of Waterford*, 799 F. Supp. 272, 278 (N.D.N.Y. 1992) (finding that the "untenable situation" of persons with AIDS "languishing in hospitals" "contribut[ed] to a considerable financial strain on hospitals and health care systems" because it was "obviously" "much less costly to the State" to place homeless persons with AIDS in residential care facilities than "in medical facilities").

259. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982).

260. *Id.*

education. States expect that these funds will be distributed for the benefit of all citizens, regardless of race, ethnicity, national origin, and language affiliation. But when discrimination taints the procedures through which representatives are elected, that same discrimination may spill over into the legislative choices those representatives carry out.<sup>261</sup> Additionally, when a discriminatory policy is successfully challenged, the cost of remedying the discrimination is ultimately borne by taxpayers. The economic cost to prevent an illegal voting procedure from being enforced is significantly less than the cost to remedy the discrimination that procedure causes if enforced. Thus, it is in a state's economic interest to challenge Section 2 violations to minimize the harm of inequitable distribution of state resources and the cost of remedying entrenched discrimination in the electoral process.

#### 4. Injury to a Sufficiently Substantial Segment of the Population

There is no quasi-sovereign interest at issue where a state “pursue[s] the interests of a private party”<sup>262</sup> exclusively for the sake of that party. To prevent an abuse of *parens patriae* of this kind, the state must show an injury that impacts the “general population” “in a substantial way.”<sup>263</sup> Recognizing the difficulty of parsing a state's interest from a private party's interest, the Supreme Court suggested that a “helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the state, if it could, would likely attempt to address through its sovereign lawmaking powers.”<sup>264</sup>

There is no quota or percentage of a state's residents that need to be impacted for an injury to be considered general.<sup>265</sup> *Parens patriae* permits states to bring suit on behalf of a small number of residents so long as the injury indirectly affects many. The idea that the attorney general can sue on behalf of a small group of citizens “is neither new nor objectionable and does not render him [or her] a nominal party.”<sup>266</sup> Indeed, courts routinely permit *parens patriae*

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261. Ely, *supra* note 216, at 102 (“Malfunction occurs when the process is undeserving of trust . . .”).

262. *Snapp*, 458 U.S. at 602.

263. *Maryland v. Louisiana*, 451 U.S. 725, 737 (1982).

264. *Snapp*, 458 U.S. at 607.

265. *Id.* at 609 (finding that there are no “definitive limits on the proportion of the population” required to sustain a quasi-sovereign interest).

266. *People v. Peter & John's Pump House*, 914 F. Supp. 809, 813 (N.D.N.Y. 1996) (citing *People by Vacco v. Mid Hudson Med. Grp.*, 877 F. Supp. 143, 147 (S.D.N.Y. 1995)).

standing even when the direct effect impacts only a handful of residents,<sup>267</sup> because the “substantial segment requirement” is broadly construed<sup>268</sup> and because courts consider the indirect effects of the injury.<sup>269</sup> Indirect effects are those evils that would result if the action were “to be tolerated and left without redress” considering economic and non-economic costs.

Economic injury includes the monetary cost of the offensive policy. When the state bears that cost, the injury is general.<sup>270</sup> The non-economic harms of discrimination necessarily impact the general population because discrimination “carr[ies] a universal sting.”<sup>271</sup> Discrimination against minority voters impairs the ability of every citizen to participate in an electoral process.

Using the test set out in *Snapp*, discrimination in voting injures a sufficient segment of the population because it is precisely the type of harm that states do seek to remedy through their own sovereign lawmaking powers. For example, California has used its sovereign lawmaking power to enact laws—including the CVRA, which expressly addresses discrimination in the electoral process<sup>272</sup>—designed to eliminate discrimination against its residents.<sup>273</sup> The proliferation of anti-discrimination laws suggests that the injuries of discrimination are general. Moreover, vote dilution is, by definition, an injury that affects the entire population of racial or language minority citizens whose votes are being diluted by practices that give improper emphasis to the political power of white voters.<sup>274</sup>

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267. See e.g., *People by Abrams v. 11 Cornwell Co*, 695 F.2d 34, 39 (proposed policy directly impacted 8–10 people); *Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford, N.Y.*, 799 F. Supp. 272, 277 (N.D.N.Y. 1992) (only fifteen people at a time could live in the house); *In re Hemingway*, 39 B.R. 619, 622 (N.D.N.Y. 1983) (six individual served as the named customers); *Pump House*, 914 F. Supp. at 813 (ten named plaintiffs).

268. *Id.* at 812.

269. *Id.*

270. *11 Cornwell*, 695 F.2d at 39 (“Preventing a residential facility also requires the State to bear the cost of keeping more people in institutions.”); *Puerto Rico v. Bramkamp*, 654 F. 2d 212, 215 (2d Cir. 1982) (“The general population need not be directly affected for even where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects.”).

271. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982); see also *Hemingway*, 39 B.R. at 622 (considering the litigation as “part of a much broader scheme of consumer protection”); see also *Support Ministries*, 799 F. Supp. at 277 (considering the discriminatory policy’s impact on “similar persons . . . in the months and years to come”); *11 Cornwell*, 695 F.2d at 39–40 (“Were this kind of incident to be tolerated and left without redress, countless others would be affected.”).

272. CAL. ELEC. CODE § 14025 (West 2003).

273. See, e.g., Fair Employment and Housing Act, Cal. Gov’t Code §§ 12900 (West 2011); Unruh Civil Rights Act, Cal. Civ. Code § 51 (West 2016).

274. See Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1337–38 (2005).

The economic harms of discrimination also favor a finding of *parens patriae* standing. As discussed above, a state bears a financial burden anytime discrimination threatens the voting procedures of a political subdivision. The state and its taxpayers are responsible for dismantling discriminatory policies as well as for developing and implementing non-discriminatory alternatives.

The “universal sting” of discrimination makes it a harm that is particularly susceptible to general injury.<sup>275</sup> Even if the alleged discrimination only impacts a small group in a rural county, enforcement of Section 2 in that instance is part of “a much broader scheme” of protecting residents from discrimination<sup>276</sup>. Those who directly face discrimination and those at risk for facing discrimination if the policy were allowed to continue are impacted. Were violations of Section 2 “to be tolerated and left without redress” as they have been, they could, and have, spread elsewhere, allowing “countless others [to] be affected.”<sup>277</sup> Even those supporting the discriminatory policy are impacted because they have lost the ability to participate in legitimate elections,<sup>278</sup> and may find themselves bearing the many costs that can result when illegal elections are invalidated.

### 5. Inability to Obtain Relief Through Private Suits

The Court in *Snapp* did not address whether a state needs to show that individual citizens cannot obtain relief by relying on private suits in order to establish *parens patriae* standing. Yet, lower courts read this requirement into the law as “consistent with” *Snapp*’s desire to prevent a state from bringing suit as a mere nominal party.<sup>279</sup> Thus, this third requirement of an inability to obtain relief through private suits ensures that the state seeking to invoke *parens patriae* satisfies the minimum constitutional standing requirements. However, this third requirement does not prevent a state from suing to enforce Section 2 because it cannot obtain complete relief of its Voting Rights Act claims by relying on private litigation.

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275. *Snapp*, 458 U.S. at 609.

276. *Hemingway*, 39 B.R. at 622.

277. 11 *Cornwell*, 695 F.2d at 39–40.

278. 11 *Cornwell*, 695 F.2d at 39 (“Both community retarded persons and community residents are deprived of being able to live in integrated communities. The analogy to racial discrimination is close indeed.”).

279. *E.g.* *Pump House*, 914 F. Supp. at 811 n.3 (“[I]f the state has no quasi-sovereign interest apart from the interests of private individuals, who can obtain complete relief through their own litigation, then no *parens patriae* standing exists.”).

At this stage of the inquiry, courts focus on the relief sought rather than on the harm alleged. As the analysis above shows, states cannot rely on private litigation to eradicate discrimination from their elections because, *inter alia*, the resource-intensive nature of Section 2 litigation, combined with the uncertainty of recovery, places the investigation and prosecution of many claims beyond what most private plaintiffs—even established regional and national organizations—can afford.<sup>280</sup> Even the most well-informed and committed plaintiffs may lack the “resources and stamina necessary for prolonged litigation,”<sup>281</sup> which can last years. “The vindication of [residents’ rights] to be free from discrimination . . . cannot be made dependent on the actions and potentially limited resources of private parties.”<sup>282</sup>

When a private plaintiff’s “resources and stamina” run out, they may abandon their efforts, leaving the district’s minority voters without a remedy or, even if they have already achieved some relief through litigation, the ability to maintain vigilant enforcement of the remedy.

### B. Statutory Standing

The “minimum constitutional requirements”<sup>283</sup> of Article III are only the beginning of a standing analysis, because plaintiffs must also satisfy prudential standing.<sup>284</sup> When a right derives from legislation, the prudential standing inquiry focuses on a subcategory called statutory standing.<sup>285</sup> Statutory standing asks “whether Congress has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.”<sup>286</sup> Answering this question begins

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280. See *infra* Part III.

281. *People by Vacco v. Mid Hudson Med. Grp.*, 877 F. Supp. 143, 149 (S.D.N.Y. 1995).

282. *Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford, N.Y.*, 799 F. Supp. 272, 278–79 (N.D.N.Y. 1992).

283. *LaRoque v. Holder*, 650 F.3d 777, 781 (D.C. Cir. 2011).

284. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief”); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036 (8th Cir. 2002) (“Prudential limits require a plaintiff to show the grievance arguably falls within the zone of interests protected or regulated by the statutory provision invoked in the suit.”).

285. See *In re Gordon Inc.*, 275 B.R. 555 (Bankr. E.D. Cal. 2002).

286. *Graden v. Conexant Systems Inc.*, 496 F.3d 291, 296 (3rd Cir. 2007) (emphasis in original).



with the statute's text.<sup>287</sup> However, statutes "rarely spell out in specific terms who does and does not have standing to sue."<sup>288</sup> Where the language is ambiguous, courts must therefore turn "to other indicia of congressional intent such as the legislative history" and purpose behind the law.<sup>289</sup>

Although the Voting Rights Act draws on Fourteenth and Fifteenth Amendment guarantees, the rights that Section 2 establishes are statutory in nature and subject to congressionally imposed standing requirements. On its face, the Voting Rights Act expressly confers standing on two groups, the U.S. Attorney General and "aggrieved person[s]," but does not limit standing to these categories (for example, by using words like "only," "exclusive," "exhaustive," or "sole").<sup>290</sup> The Voting Rights Act's silence regarding whether states have standing to sue under Section 2 has not been tested and does not present an absolute barrier to standing. Instead, the law's history and purpose suggest that state standing ought to be inferred.<sup>291</sup>

States often retain the power to enforce federal rights even when federal statutes are silent on the issue.<sup>292</sup> It happens "frequently."<sup>293</sup> The common link among statutes where the courts infer statutory standing is that the statutes contain "broad civil enforcement provisions" which "permit suit by any person that is injured or aggrieved."<sup>294</sup> For example, states have standing to sue under Title VII because the statute permits suits by "persons claiming to be aggrieved," which by a separate statutory definition includes "governments, government agencies, and political subdivisions."<sup>295</sup> Historically, permitting standing for states to sue "comport[ed] with the purposes of Title VII," which include the "eradicat[ion] of employment discrimination from the national economy."<sup>296</sup>

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287. *Id.*

288. *City of Sausalito*, 386 F.3d 1186, 1199 (9th Cir. 2004).

289. *Graden*, 496 F.3d at 296.

290. 52 U.S.C. § 10302 (2012).

291. *See infra* Part VI.B.1.

292. *See* *People by Vacco v. Mid Hudson Medical Group, P.C.*, 877 F. Supp. 143, 146 (S.D.N.Y. 1995) (collecting cases that permitted state standing under the ADA; Title VII; Wagner-Peyser Act; Immigration and Nationality Act; 42 U.S.C. §§ 1983, 1985; and Fair Housing Act).

293. *Vacco*, 877 F. Supp at 146; *see* *Connecticut v. Physicians Health Servs. of Ct., Inc.*, 103 F. Supp. 2d 495, 509 (D. Conn. 2000), *aff'd*, 287 F.3d 110 (2nd Cir. 2002). ("Each of these statutes, however, differs from ERISA in one significant respect: unlike ERISA, which expressly *limits* the class of persons entitled to bring suit, the federal statutes under which states have been granted *parens patriae* standing all contain broad civil enforcement provisions.")

294. *See Connecticut*, 103 F. Supp. 2d at 509.

295. *EEOC v. Federal Express Corp.*, 286 F. Supp. 2d 192, 197 (E.D.N.Y. 2003).

296. *Id.*

The Voting Rights Act is no different. It contains similarly “broad civil enforcement provisions” as other statutes that have been held to permit state enforcement including the Americans with Disabilities Act, Sections 1983 and 1985, and the Fair Housing Act.<sup>297</sup> Like Title VII, Congress enacted the Voting Rights Act to eradicate discrimination and as a result, its standing provisions ought to be “liberally interpreted” to allow for enforcement.<sup>298</sup>

Of course, the Voting Rights Act’s standing language cannot be isolated and interpreted apart from the rest of a statute. Canons of construction require that statutes be read so that no provision is rendered meaningless.<sup>299</sup> In cases where other portions of the statute expressly limit the power of the state to bring suit, courts will not interpret another section of the statute so as to circumvent those limitations.<sup>300</sup> However, this distinction does not threaten state standing under the Voting Rights Act because, taken as a whole, the statute does not limit a state’s right to file suit. The statute is silent, not contradictory.

No court has directly confronted the question of whether Section 2 preserves standing for a state attorney general seeking to enforce the law against a political subdivision. The text’s silence is ambiguous. Therefore, the determination of standing will turn on additional tools of statutory construction. The history and purpose of the Voting Rights Act make it clear the law “was designed by Congress to banish the blight of racial discrimination in voting,” and was enacted to protect minority voters against unfair election procedures.<sup>301</sup> The following analysis shows that granting state attorneys general standing to enforce protections for minority voting rights under the Voting Rights Act furthers this goal.

### 1. History and Purpose

The Voting Rights Act is a remedial statute that evinces “Congress’ firm intention to rid the country of racial discrimination in voting.”<sup>302</sup> Construing the standing provisions of the Voting Rights Act to grant standing to state attorneys general furthers this goal in

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297. *Connecticut*, 103 F. Supp. 2d at 509.

298. *EEOC*, 286 F. Supp. 2d at 198.

299. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338–39 (1979).

300. *See Clearing House Ass’n LLC v. Spitzer*, 394 F. Supp. 620, 629–30 (S.D.N.Y. 2005) (finding Congress did not intend to “in granting any aggrieved person a private right of action, to implicitly override section 484’s limitation on the powers of states to exercise visitatorial powers over national banks”).

301. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

302. *Id.*

light of the practical restrictions that limit the U.S. Attorney General and private plaintiffs from meaningfully enforcing Section 2.

History shows that courts interpret the Voting Rights Act's standing provisions broadly. As originally enacted, the Voting Rights Act only expressly authorized standing for the U.S. Attorney General. But as early as 1969, the Supreme Court recognized that provisions of the Voting Rights Act confer standing on groups not specifically enumerated. Looking at that text, the Supreme Court in *Allen v. State Bd. of Elections* ruled that Section 5 of the Voting Rights Act also authorized citizen suits.<sup>303</sup> Writing for the majority, Chief Justice Warren espoused the position that "[t]he Achievement of [the Voting Rights Act's] laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General," because "[t]he Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government."<sup>304</sup> *Allen* did not expand the Voting Rights Act; it only communicated what the act—as passed in 1965—had already established.

These same concerns animate questions over acknowledging a state attorney general's standing to sue. The U.S. Attorney General continues to face resource constraints addressed by the Court in *Allen*. Citizen suits alone are not enough to compensate. The financial realities of bringing and sustaining Section 2 suits demonstrate that the number of colorable claims far exceeds the resources of those affected. In light of this judicial history, context, and purpose of the Voting Rights Act, courts ought to recognize statutory standing permitting a state to bring suit.

## 2. Distinguishing *Roberts* and Its Progeny

The Voting Rights Act does not limit standing to the U.S. Attorney General or aggrieved persons by using language such as "exclusive," "sole," or "only."<sup>305</sup> Nevertheless, a handful of courts have held that the Voting Rights Act's standing provisions are exhaustive, and have dismissed claims brought by state and local

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303. *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969).

304. *Id.* at 556.

305. *See* 52 U.S.C. § 10302 (2012).

governments.<sup>306</sup> These decisions generally rely on the Eighth Circuit's opinion in *Roberts v. Wamser*.<sup>307</sup> However, the reasoning of *Roberts* and its progeny underscore why the Voting Rights Act should provide standing for state attorneys general who are suing to protect the rights of minority voters while denying standing to jurisdictions attempting to use the Voting Rights Act to immunize themselves from liability.

In refusing to permit *Roberts* to bring a Section 2 claim, the Eighth Circuit held that Congress would not have intended the Voting Rights Act to provide standing to unsuccessful candidates for office because “of the potential divergence between the interests of a candidate seeking office and citizens attempting to enforce their right to vote,” and because “state and local election contests are quintessential state and local matters.”<sup>308</sup> So, the court found that “to extend standing to an unsuccessful candidate to challenge his electoral defeat under the Voting Rights Act would violate principles of federalism in a radical way—an intention that we should not attribute to Congress except upon its unmistakably clear manifestation in the statutory language.”<sup>309</sup>

The cases citing to *Roberts* generally involve either plaintiffs who were unsuccessful candidates and were dissatisfied with the election results<sup>310</sup> or jurisdictions seeking to use the Voting Rights Act as a shield against minority voters.<sup>311</sup> Unlike the putative actions taken

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306. See, e.g., *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989); *Bone Shirt v. Hazeltine*, 444 F. Supp. 2d 992, 997 (D.S.D. 2005) (“[S]tanding to seek relief under the Voting Rights Act is limited to voters and the Attorney General”); *Oh v. Phila. Cty. Bd. of Elections*, No. 08-0081, 2008 WL 4787583, at \*7 (E.D. Pa. Oct. 31, 2008) (ruling that unsuccessful candidate for office lacked standing under Voting Rights Act to challenge Board of Elections handling of absentee ballots); *White-Battle v. Democratic Party*, 323 F. Supp. 2d 696, 696 (E.D. Va. 2004) (ruling that unsuccessful candidate for office lacked standing under Voting Rights Act to challenge Democratic Party candidate nominating process); *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1433 (E.D. Ark. 1994) (ruling that the school district did not have standing under the Voting Rights Act to seek a declaratory judgment that its at-large method of election was compliant with Section 2); *Illinois Legislative Redistricting Comm'n v. LaPaille*, 782 F. Supp. 1267, 1271 (N.D. Ill., 1991) (ruling redistricting commission lacked standing under the Voting Rights Act to seek declaratory judgment that its approved plan was compliant with the Act).

307. See 883 F.2d at 621.

308. *Id.* at 621

309. *Id.*

310. *Oh*, 2008 WL 4787583, at \*7 (ruling that unsuccessful candidate for office lacked standing under Voting Rights Act to challenge Board of Elections handling of absentee ballots); *White-Battle*, 323 F. Supp. 2d at 696, *aff'd*, 134 F. App'x 641, 641 (4th Cir. 2005) (ruling that unsuccessful candidate for office lacked standing under Voting Rights Act to challenge Democratic Party candidate nominating process).

311. See, e.g., *Bone Shirt*, 444 F. Supp. 2d at 997; *Conway Sch. Dist.*, 854 F. Supp. at 1433 (ruling that school district did not have standing under the Voting Rights Act to seek a declaratory judgment that its at-large method of election was compliant with Section 2); *Illinois*

by state attorneys general on behalf of minority voters proposed in this Article, the plaintiffs in *Roberts* and its progeny were not seeking to vindicate the rights of “aggrieved voters” in keeping with the core purpose of the Voting Rights Act. In *Bone Shirt*<sup>312</sup> and *Conway School District*,<sup>313</sup> jurisdictions attempted to use Section 5 and Section 2, respectively, to block actual or potential lawsuits by minority voters to remedy discrimination. In *Conway*, the school district sought a declaratory judgment that its at-large election district was compliant with the Voting Rights Act, so that the district could avoid a state-mandated switch to elections by district.<sup>314</sup> In ruling that the school district lacked standing under the Voting Rights Act, the district court noted that the school district “does not make any allegation that it is suing to protect the rights of aggrieved voters,” a position consistent with “[t]he purpose of the Voting Rights Act . . . to protect minority voters.”<sup>315</sup> Similarly, in *Bone Shirt*, after the district adopted a statewide legislative redistricting plan proposed by minority voters after successful Section 2 litigation against the state’s proposed plan, the state then attempted to require the remedial plan adopted by the district court to obtain Section 5 preclearance.<sup>316</sup> In addition to finding that the state failed to establish Article III standing due to a lack of injury-in-fact, the district court also found that the state lacked statutory standing because, like the *Conway* court noted, the Voting Rights Act was intended to protect voters, not state governments.<sup>317</sup> So, when state attorneys general act as *parens patriae* to vindicate the state’s interests in preventing discrimination and encouraging voter participation (rather than to immunize government action from litigation), their interests are concurrent with those of minority voters and establish Article III standing.

The cases brought by unsuccessful candidates offer another dimension of distinction from the enforcement actions proposed in this Article. Leaving aside their other infirmities, cases like *Roberts* involve a plaintiff with an interest that is separate from that of protecting minority voters from discrimination—that of their own

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*Legislative Redistricting Commission*, 782 F. Supp. at 1271 (N.D. Ill., 1991) (ruling redistricting commission lacked standing under the Voting Rights Act to seek declaratory judgment that its approved plan was compliant with the Act).

312. 444 F. Supp. 2d at 995.

313. 854 F. Supp. at 1431.

314. *Id.* at 1431–32.

315. *Id.*

316. 444 F. Supp. 2d at 994–95.

317. *Id.* at 997.

election.<sup>318</sup> In contrast, the state does not care which candidate is elected, so long as the election is conducted in accordance with the law and each vote is given equal value. The state's interest is not co-extensive with a particular citizen's interest. Rather, it is larger. The state's interest in preventing discrimination subsumes that of a particular voter and goes on to encompass more. Thus, its relationship to a particular voter is meaningfully different than a candidate's relationship to that same voter.

The federalism concerns raised in *Roberts* also do not apply to suits brought by states. The *Roberts* court was hesitant to permit an unsuccessful candidate in a local election to use the Voting Rights Act to sue because to do so would "violate the principles of federalism in a radical way" by throwing the federal government in the middle of what is otherwise an intimate state matter.<sup>319</sup> But, concerns of federal encroachment on state's rights are diminished when the state itself wields a federal statute.<sup>320</sup> As addressed in *Snapp*, a state may seek to assert its quasi-sovereign interests either by passing its own legislation or by enforcing federal law.<sup>321</sup>

The meaningful distinctions discussed above illustrate that the concerns that led the court in *Roberts* to disallow standing do not apply to suits brought by the state against a political subdivision. Instead, the history and purpose behind an ambiguous statute show that Section 2 of the Voting Rights Act should provide broad standing to all who satisfy the constitutional requirements, including individual states.

### C. Overcoming Federal Courts' Distrust of State Voting Rights Enforcement Actions

The federal courts' distrust of the state enforcement of the Voting Rights Act is not without foundation. States have frequently been the target of this litigation and the particular persistence of some states in enacting discriminatory voting practices constitutes a substantial part of the record undergirding the justification (and

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318. *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989) ("Here, Roberts is not an aggrieved voter suing to protect his right to vote. Nowhere in his complaint (or anywhere else) does Roberts claim that his right to vote has been infringed because of his race. Nor does Roberts allege that he is suing on behalf of persons who are unable to protect their own rights. The asserted personal injury for which Roberts seeks a remedy is not the denial of his right to vote, but rather the loss of the votes that he claims he would have received if not for the allegedly disproportionate difficulties of black voters in coping with punch-card voting.").

319. *Id.*

320. *Lemos*, *supra* note 123, 710–11.

321. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982).

continuing need) for the Section 5 preclearance regime.<sup>322</sup> And as in several cases discussed above, some states have even attempted to use the Voting Rights Act as a shield against liability as opposed to a weapon to vindicate minority voting rights.<sup>323</sup> But, categorical distrust of state law enforcement ignores that, in many other areas, states are competent enforcers of federal law (including federal civil rights law).<sup>324</sup> Moreover, if evidence of hostility towards the federal civil rights laws could disqualify an actor from enforcing the civil rights laws, there might be a case for disqualifying more than a few federal courts from hearing civil rights cases.<sup>325</sup>

Instead, as this Part has attempted to do, courts should distinguish between state efforts to enforce the Voting Rights Act that are consistent with the interest of minority voters and those efforts that conflict with or otherwise fail to vindicate interests concurrent with those of minority voters.

#### CONCLUSION

The 2016 election cycle made clear that racial discrimination in voting remains a pervasive problem more than fifty years after passage of the Voting Rights Act of 1965. The media, the federal Department of Justice, political parties, and major civil rights organizations have brought attention to voter suppression and vote dilution in statewide cases and in a handful of cases against local governments. Minority voters have been able to achieve some recent victories, but those cases hint at the likelihood that a significant number of Voting Rights Act violations are occurring out of public view—i.e., at the local level where most of the governing that affects the day-to-day lives of Americans take place. As Congress, the courts, and minority voters and their advocates have long known, voting rights cases are unusually time-consuming and resource-intensive, with the likelihood of recovering attorneys' fees and costs highly uncertain. Between private plaintiffs and the federal Department of Justice, there are not nearly enough resources

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322. See generally S. REP. NO. 109-295 (2006); H.R. REP. NO. 109-478 (2006).

323. See *supra* Part VI.B.2.

324. Lemos, *supra* note 123, at 710–11 (observing that courts have permitted states to sue as *parens patriae* to enforce the Americans with Disabilities Act, the Fair Housing Act, and Title VII of the Civil Rights Act of 1964).

325. See, e.g., STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, 272–73 (1999); Doar, *supra* note 16, at 10 (“I spend most of my time in fooling with lousy cases brought before me by your department in the civil rights field, and I do not intend to turn my docket over to your department for your political advancement.”) (quoting Letter from United States District Judge H. Cox to J. Doar).

to investigate and prosecute a meaningful number of the potential voting rights infringements that may be lurking in more than 89,000 local government entities across all fifty states. Combatting local-level vote discrimination effectively will require bringing new plaintiffs into the field, who can develop enough cases to start making litigation a meaningful deterrent to voting rights infringements.

State attorneys general can step into the breach as powerful new allies in the fight against minority disenfranchisement. State attorneys general can bring the expertise, capacity, and official weight of a law enforcement agency to bear on their home turf where they can take advantage of their local knowledge and relationships. Moreover, as potentially significant repeat players, state attorneys general can take advantage of economies of scale and otherwise serve as laboratories for developing more efficient and cost-effective litigation practices.

Although state laws may eventually prove more effective, the federal Voting Rights Act provides the only established cause of action against a significant portion of infringements on minority voting rights by local governments. State attorneys general have stepped in as *parens patriae* plaintiffs to protect the interests of their citizens by enforcing federal laws against various forms of discrimination (e.g., housing, employment, public accommodation), and they should protect their citizens against voting discrimination as well. In the past, federal courts have denied standing to states and local governments to use the Voting Rights Act as a shield against potential challenges from minority voters because such efforts were inconsistent with the fundamental purpose of the law. Should state attorneys general instead enforce the Voting Rights Act consistent with its purpose of preventing minority disenfranchisement, federal courts should be receptive to those suits.

Ultimately, there is no substitute for preclearance, and in the best possible world Congress would rediscover the overwhelming bipartisan consensus that existed only ten years ago to pass a new coverage formula for Section 5. Unfortunately, that prospect is remote for the foreseeable future. As a result, achieving greater gains with the operative legislative regime is an imperative and more hands on deck are desperately needed. State attorneys general are not a silver bullet for the present crisis in voting rights enforcement, but their involvement is needed now more than ever.