

What the Voting Rights Act Does—and Doesn't—Do

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Bob Driscoll (Washington) authored an article that was published in *The Dispatch* on January 17, 2022. The piece gives an overview of the Voting Rights Act's provisions and historical application and gives context to the current legislation being considered by Congress. Bob is co-chair of McGlinchey's [Government and Internal Investigations](#) team and former Deputy Assistant Attorney General of the U.S. Department of Justice (DOJ)'s Civil Rights Division.

However, the Voting Rights Act also contained “special provisions” that applied only to certain states and jurisdiction and were designed to do so only temporarily, as they contained a sunset clause terminating the provisions in five years. These are the so-called “preclearance” provisions of the Voting Rights Act. They were adopted in 1965 to address recalcitrant states that, in response to lawsuits enforcing voting rights, would pass a different discriminatory law and force a new lawsuit. For example, imagine a poll tax is struck down and replaced with a literacy test, necessitating new litigation. This made voting rights enforcement akin to game of “whack a mole,” with the federal government always behind the curve in stamping out new discriminatory laws. Thus Section 5 of the Voting Rights Act was designed to “freeze” the voting practices and procedures in place in these jurisdictions to prevent continued litigation. So-called “covered jurisdictions” had to submit any proposed changes to voting practices (from redistricting maps to and changes in voting procedure to any change in polling location for a local election) to the Department of Justice Civil Rights Division for approval. A state or jurisdiction can file suit to “bail out” of coverage in certain circumstance and there is a provision to use federal litigation to “bail in” a state that is not covered if it has a repeated history of discrimination.

The John Lewis Voting Rights Act seeks to resurrect this “preclearance” process and dictate “covered jurisdictions” not by voter registration or turnout numbers but by the number of “violations” of voting rights over time, counting any consent decrees, settlements, and other court enforced resolution against a state or jurisdiction. Of course, the Justice Department had, and will have, a heavy hand in influencing which jurisdictions get sued and rack up the requisite numbers to be “covered.” One only needs to consider that the Biden DOJ sued Georgia for changes to its generous early voting standards (as the Obama DOJ did with North Carolina) while ignoring Democratic states (New York among them) that have far fewer early voting opportunities to see what a rigged game this could become when partisan operators at the Justice Department can sue to put states it doesn't agree with politically under federal supervision, with the ability to block any voting law they don't like without going to court. It also includes provisions that federalize local elections and measures that counter what some view as unfavorable Supreme Court precedent on matters such as vote dilution and vote denial cases.

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