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A NEWSLETTER ABOUT LAW AND DIVERSITY

## Is the American Dream Still Alive for Immigrants?

by Cheryl Baisden

**History books are full of stories detailing America's immigrant roots, from the Jamestown settlement and the Plymouth Pilgrims to the massive waves of single men, women and families from around the globe pouring through Ellis Island in search of the American dream in the late 19th and early 20th centuries.**

Immigration rules have been in place for much of that time, and have evolved as the country's attitudes and economic conditions have changed. But while comprehensive immigration policies and procedures have been on the books for well over a century, they have not always been followed by those entering the country. Today, that fact holds true for an estimated 11 million illegal immigrants scattered across the U.S.

"People who have been in this country for a few generations or more often believe their parents or grandparents came here with all of their paperwork in order, but that wasn't necessarily true," said Daniel Weiss, a Freehold attorney who practices immigration law. "Many of them may have misrepresented things on their papers in order to get here, or they may have managed to slip through without any documentation at all. But no matter how they arrived here, the reason was the same—they were looking for a better life."

Those points are important to keep in mind as the United States struggles with the volatile issue of immigration reform in connection with the estimated 11 million "out-of-status" immigrants living in the country and how to control the influx of even more people across the borders,

according to Weiss. While immigration reform is a hotly debated concern between Republicans and Democrats today, both sides acknowledge that they appear to be at an impasse on the issue. In the meantime, noted Weiss, the nation's immigration crisis continues to impact families and the U.S. economy.

### A complicated condition

Several factors come into play when it comes to today's illegal immigrant population. Some crossed the borders without *>continued on page 6*

## Protecting Voting Rights for All of "We the People"

by Cheryl Baisden

**The right to vote is a tricky concept when it comes to the U.S. Constitution. In 1870, Congress ratified the 15th Amendment, granting black men the right to cast ballots; in 1920, women were given the same right under the 19th Amendment; and in 1971, the 26th Amendment gave voting rights to 18-year-olds. On the surface it would seem as though the issue of who can vote was pretty much settled. But the reality is that while the Constitution provides for voting rights, it doesn't establish the laws that govern how those rights are actually enforced. That part of the equation is left to each individual state, as long as the state's laws don't violate the basic rights set down in the U.S. Constitution.**

How individual states enforced voting laws varied widely over the years. When a state or other voting jurisdiction instituted a practice that appeared to violate constitutional voting rights the injured party could file a complaint, but the rulings were often handed down after the election was over, making the legal action, which was expensive, ineffective.

In the South in 1964, the issue took a particularly violent turn, culminating in the murder of civil rights *>continued on page 4*

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## Can College Diversity Be Achieved Without Considering Race?

by Barbara Sheehan

**The U.S. Supreme Court is examining the subject of race in college admissions for the second time in two years. The latest case is raising new questions about affirmative action policies and what role, if any, race should play in the student selection process**

According to recent surveys, the majority of Americans don't think race should be considered in college admissions. A July 2013 Gallup poll revealed "two-thirds of Americans believe college applicants should be admitted solely based on merit, even if that results in few minorities being admitted." A *Washington Post*-ABC News poll in June 2013 stated that 76 percent of the nation "opposes allowing universities to consider race when selecting students." And, an NBC-*Wall Street Journal* poll revealed that only 45 percent of Americans (the lowest polling percentage since 1991) "believe affirmative action programs are still needed to counteract the effects of discrimination against minorities."

### Should race matter?

If you're working hard to get good grades so you can get into the college of your choice, you may be wondering why race should matter. Shouldn't college opportunities go to the students who have proven their qualifications through hard work and achievement? While academic performance definitely counts, there's another force driving many college admissions decisions—diversity.

On the topic of race-based admissions, Janet Lavin Rapelye, dean of admission at Princeton University, provided *The Legal Eagle* with the following statement:

"All admission decisions are the product of a careful, individualized admission process. While the Admission Office looks to grades and test scores, it also considers other criteria that are important to our educational objectives. Among other things, consideration is given to the ways in which admitting a specific applicant might serve to further the University's mission, an essential aspect of which is providing the educational benefits of a diverse student body. To this end, the Admission Office reviews each candidate's

entire application file in order to assess his or her talents, achievements, experiences, and potential to contribute to learning at Princeton.

As several universities, including Princeton, noted in an amicus brief submitted to the Supreme Court in 2012, 'a diverse student body adds significantly to the rigor and depth of students' educational experience. Diversity encourages students to question their own assumptions, to test received truths, and to appreciate the spectacular complexity of the modern world. This larger understanding prepares [our] graduates to be active and engaged citizens wrestling with the pressing challenges of the day, to pursue innovation in every field of discovery, and to expand humanity's learning and accomplishment.'"

### Achieving a diverse student body

Legal precedent on race-based college admissions centers around a landmark 1978 U.S. Supreme Court case brought by a white student named Allan Bakke. In that case, Bakke challenged the admissions policy at the medical school of the University of California at Davis, which reserved a designated number of spots for minority students. Twice, Bakke was denied admission, while minority students with lower test scores were admitted.

In his challenge, Bakke claimed that the university's policy violated Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment's Equal Protection Clause. In deciding that case, the Court said that racial quotas were in violation of the equal protection clause, which says, "no state shall deny to any person within its jurisdiction the equal protection of the laws." But the Court also said that race could be considered as one of many admission factors to achieve a diverse student body. This set the standard that still shapes many college policies today.

Since *Bakke*, there have been other legal challenges regarding race in admissions, including two U.S. Supreme Court cases involving the University of Michigan, both decided in 2003. In *Grutter v. Bollinger*, the Court ruled it was okay for the university's law school admissions team to consider race as a "potential 'plus' factor" in

assessing a candidate. In *Gratz v. Bollinger*, the Court concluded that an undergraduate admissions policy that awarded points to certain candidates based on their minority status was unconstitutional because it was not narrowly tailored enough to withstand strict scrutiny.

### Back to Michigan

More than a decade since those University of Michigan rulings, the U.S. Supreme Court is heading back to that state (so to speak) to consider the latest case concerning race in college admissions. *Schuette v. Coalition to Defend Affirmative Action* concerns a 2006 voter referendum (Proposal 2) passed in Michigan, which bans the consideration of race or gender in public university admissions decisions. A reported 58 percent of Michigan residents voted for the ban, which was enacted as a constitutional amendment.

In March 2008, a district court in Michigan ruled the amendment was constitutional; however, in 2011 the Sixth Circuit U.S. Court of Appeals **reversed** that decision, ruling the amendment was unconstitutional because it violated the political-restructuring doctrine, a 40-year-old legal precedent that allows courts to invalidate a law if it impedes the access of minorities to the political system.

According to a summary of the case written by Cornell University Law School's Legal Information Institute, detractors of Proposal 2 argue that it "unfairly disadvantages groups that attempt to enact legislation in their favor, and thereby violates the political-restructuring doctrine and the equal protection clause." On the other hand, supporters of Proposal 2 "argue that overturning [it] threatens the right of the people to govern themselves. Because voters enacted Proposal 2 and because the government cannot disregard the will of its citizens, the Court must respect Proposal 2 and the wishes of Michigan voters."

Washington, D.C. attorney Thomas Goldstein, publisher of SCOTUSblog.com, a website that covers the U.S. Supreme Court, told CNN, "The question before the

Supreme Court is whether you can have a constitutional amendment enacted by the people of a state that prevents the legislature from adopting affirmative action. Is that a form of discrimination against minorities, or is it actually an implementation of a colorblind Constitution that itself ends discrimination?"

The Court's ruling, which was handed down on April 22, 2014, sided with Michigan voters. The 6-2 decision reaches beyond Michigan, as seven other states—California, Florida, Washington, Arizona, Nebraska, Oklahoma and New Hampshire—have similar bans.

In the Court's opinion, Justice Kennedy wrote, "This case is not about how the



debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the judiciary to set aside Michigan laws that commit this policy determination to the voters."

### More scrutiny of admissions policies

The Michigan case comes on the heels of another U.S. Supreme Court case, *Fisher v. University of Texas*, decided in June 2013, which many viewed as a strike against affirmative action policies in college admissions. Abigail Fisher, a white student who was denied admission to the University of Texas (UT) while minority students with lesser academic performance were accepted, brought the lawsuit claiming she was discriminated against based on her race.

Most of the students who attend UT are admitted under a statewide provision that guarantees a top percentage of Texas high school graduates a spot in any state university. Fisher missed the cutoff for that program and was among the remainder of applicants selected through an admissions process. UT considers students' race as

one factor in that process. Fisher has since graduated from Louisiana State University.

The Court's 7-1 decision did not declare UT's admissions policy unconstitutional. The Court **vacated** the decision of the lower court, **remanding** the case back to the Fifth Circuit U.S. Court of Appeals, which had previously upheld the University's use of race. The Court said the lower court did not hold UT to "the demanding burden of strict scrutiny" required by the earlier *Bakke* and *Grutter* cases.

In the Court's majority opinion Justice Anthony Kennedy stated that courts reviewing affirmative action programs must "verify that it is necessary for a university to use race to achieve the educational benefits of diversity" and that requires "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."

In the Court's lone dissent, Justice Ruth Bader Ginsburg, who would have sided with UT, wrote that universities "need not blind themselves to the still lingering, everyday evident effects of centuries of law-sanctioned inequality."

The Fifth Circuit U.S. Court of Appeals reheard the *Fisher* case in November 2013. At press time, no ruling in the case had been announced.

### Finding another way

New Jersey lawyer Jeffrey Steinfeld, who serves as president of the Pascack Valley Regional High School District Board of Education, sees the Court's decision in the *Fisher* case as a sign that the Supreme Court is becoming more skeptical about the idea of affirmative action in college admissions.

"[The Court is saying] we don't want to end this or shut it down, but we're suspicious of how this works. You need to be able to prove to us there's a real reason," Steinfeld said.

This, he contends, may make it more difficult for colleges and universities to implement policies that consider race because they don't [>continued on page 5](#)

## “We the People” *continued from page 1*

activists James Chaney, Andrew Goodman and Michael Schwerner in Mississippi and the violent attack by state troopers on peaceful protesters in Alabama, known as Bloody Sunday. As a result of the escalating violence, in 1965 the federal government took steps to protect the constitutional rights of voters by passing the Voting Rights Act (VRA), which reinforced the voting rights granted in the U.S. Constitution by mandating that states may not employ certain practices—such as literacy tests, specific kinds of identification requirements, poll taxes and changing voting districts in ways that disenfranchised voters—designed to limit voting rights. It also established a process for contesting questionable voting laws.

In supporting the legislation, President Lyndon Johnson told Congress “we cannot have government for all the people until we first make certain it is a government of and by all the people.”

As an added protection, Section 5 of the VRA required that certain states, counties and other jurisdictions must obtain preclearance from the U.S. attorney general or a three-judge U.S. District Court panel before implementing any proposed voting-related changes.

“The states and regions included under Section 5 of the Voting Rights Act were those where voter registration was very low—which were mainly the southern states, where non-whites were often prevented from registering,” explained Professor Frank Askin, director of the Constitutional Litigation Clinic at Rutgers School of Law—Newark.

Section 5 was originally set to expire after five years, but was extended by Congress on four occasions—1970 for five additional years, 1975 for seven years, 1982 for 25 years, and 2006 for 25 years. At first, it applied to states and localities that used criteria like literacy testing to restrict voting or where fewer than 50 percent of the people old enough to vote were registered in 1964 or voted in the presidential election that year. When the act was extended in 1975, Congress expanded the protections to cover members of “language minority groups” as well, applying to places that used only English on ballots although a substantial number of voters spoke another language.

Challenged in the U.S. Supreme Court in 1966 as a violation of state **sovereignty**, the Court ruled the VRA was an appropriate response to “an **insidious** and **pervasive** evil, which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” As a result, the Court said Congress could “limit its attention to the geographic areas where immediate action seemed necessary.”

For more than three decades the formula used to determine which states or counties were required to obtain preclearance was based on data gathered in 1975. This past summer, the fact that preclearance jurisdictions were selected based on the 38-year-old

formula (covered in Section 4 of the VRA) became Section 5’s undoing. On June 25, 2013, in a 5-4 vote, the U.S. Supreme Court declared the formula used in Section 4 of the VRA unconstitutional, which rendered Section 5 of the VRA unenforceable. Technically, the Court kept Section 5 intact; however, without a formula to apply to the jurisdictions, it is useless.

### What racism?

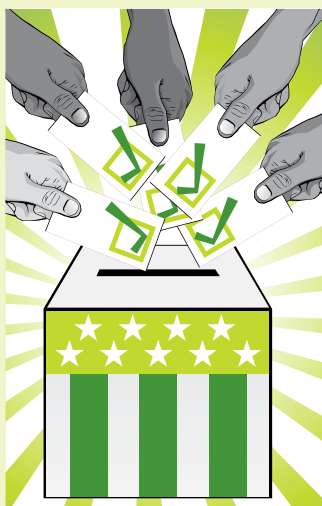
In *Shelby County v. Holder*, an Alabama county claimed Section 5 violated the U.S. Constitution by denying certain states their sovereign authority to make laws, and that federal oversight was no longer needed. Shelby County’s lawyers argued that since the VRA had been in effect federal objections to proposed voting laws had plummeted. They also argued that the formula Congress used to identify Section 5 districts was outdated, and suggested Section 5 be eliminated, leaving voting laws in those jurisdictions to be policed through after-the-fact lawsuits, the same as the rest of the country.

“The America that elected and re-elected Barack Obama...is far different than when the Voting Rights Act was first enacted in 1965,” Edward Blum, director of the Project on Fair Representation, a nonprofit legal defense fund based in Virginia that brought the suit on the county’s behalf, told *The Washington Post*. “Congress unwisely reauthorized a bill that is stuck in a Jim Crow-era time warp.”

Supporters of Section 5 agreed there has been progress but argued Congress renewed the law in 2006 based on recent attempts to pass discriminatory voting laws. They explained Section 5 jurisdictions could request to be removed from the list following a decade of good behavior. In fact, close to 250 of the identified 12,000 Section 5 jurisdictions had petitioned for and received approval to be removed from the pre-certification list, and thousands more were probably eligible to be dropped if they applied. Jurisdictions still subject to preclearance include the entire states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia, Alaska and Arizona, as well as certain counties or municipalities in seven other states, which included three New York counties.

When the case was argued before the Court in February 2013, Chief Justice John Roberts cited statistics suggesting the formula no longer made sense. Massachusetts, which is not a Section 5 state, “has the worst ratio of white voter turnout to African-American voter turnout,” he said, while Mississippi, which is covered under Section 5, has the best ratio.

Supporters of the pre-certification provision countered that Section 5 states were responsible for a disproportionate share of federal voting-rights violations. In fact, the California Institute of Technology spent four years researching voting rights incidents and found that “five-sixths or more of the cases of proven election



discrimination from 1957 through 2013 took place in jurisdictions subject to Section 5 oversight.”

Alabama Attorney General Luther Strange, in a brief to the Court, argued that Alabama and other Section 5 jurisdictions had done their time. “It’s time for Alabama and the other covered jurisdictions to resume their roles as equal and sovereign parts of these United States.” Proof of the state’s success, he noted, could be found in the state Legislature, one of the few in the nation where the number of black lawmakers is almost equal to the state’s black population. “Alabama, as I say often and as we say in our brief, we’re not perfect,” Strange told *The Washington Post*. “We haven’t solved all our racial problems. But we’re not any different from any other state dealing with the same issues.”

Alabama State Representative John Knight, who is black and filed his own brief with the Court, viewed things differently and urged the Court to preserve Section 5. “There are so many different ways to discourage minorities from voting, and they’ve all been tried here in Alabama,” he told *The Washington Post*. “There’s no question that had it not been for Section 5, had it not been for the Justice Department that was going to make sure the state was going to comply with the Voting Rights Act, we wouldn’t have the number of black officials we have, we wouldn’t have the number of black people voting we have.”

### Warning ignored

*Shelby v. Holder* marks the second time the U.S. Supreme Court considered the constitutionality of the 2006 extension. In 2009, in

*Northwest Austin Municipal Utility District Number One v. Holder*, rather than strike down Section 5 of the VRA, the Court simply ruled that the Texas utility district might be eligible to “bail out” from being covered by the act. At that time the Court also suggested Congress update the coverage formula using newer data.

In the 8-1 ruling, Justice Anthony Kennedy wrote, “No one questions the validity, the urgency, the essentiality of the Voting Rights Act. The question is whether or not it should be continued with this differentiation between the states. And that is for Congress to show.”

The Court clearly encouraged Congress to reconsider the formula, but lawmakers never acted on the suggestion, which Chief Justice Roberts pointed out in the 2013 *Shelby* decision. “Congress could have updated the coverage formula at that time, but did not do so,” Chief Justice Roberts wrote. “Its failure to act leaves us today with no choice but to declare [the formula] unconstitutional.”

With *Shelby*, the Court ruled that Congress needed to update the formula if it wanted to continue imposing federal oversight on certain jurisdictions. “Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions,” wrote Chief Justice Roberts. “Congress—if it is to divide the states—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot simply rely on the past.”

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## College Diversity *continued from page 3*<

want to be the subject of lawsuits.

Given the vibe coming from the U.S. Supreme Court, some colleges and universities may look for alternative ways to achieve diversity. One example of an alternative that appears to be working is the aforementioned “Top 10 Percent” rule in Texas, which guarantees top-performing high school students admission into state universities. According to enrollment statistics at UT-Austin, since the law was passed in 1997, total admissions of Latinos went from 14 percent in 1996 to 24 percent in 2012.

In addition, *The Hechinger Report*, a nonprofit news organization that produces in-depth coverage of educational issues, reported on a policy at the University of Colorado-Boulder that found some success with a class-based admissions policy, which considers things like parents’ income and education level, as well as students’ performance in standardized tests.

### A complex issue

Steinfeld noted that the topic of race in college admissions is complicated and gets into a number of fundamental issues. For example, how do we address economic factors and other issues that put some students at a disadvantage? And, how far have we come as a society in overcoming the racism that led to the affirmative action policies we have today?

Daniel M. Levy, director for law and policy at the Michigan Department of Civil Rights, believes that courts are confusing affirmative action and diversity. In an editorial about *Schuette v. Coalition to Defend Affirmative Action* published by DiversityInc (before the Court’s decision was issued), Levy wrote, “The Michigan law before the Court prohibits ‘affirmative action’ and race-based ‘preferential treatment,’ both of which the Court said in *Gratz* are unconstitutional. Whatever its



intent, the wording used in the Michigan referendum merely requires Michigan to do what the Court already ruled that federal law requires. Before it evaluates the constitutionality of the Michigan law, the Court must determine whether the law will somehow be read to also prohibit universities from pursuing the broad student diversity that serves all students.”

Levy also wrote, “In *Grutter*, the Supreme Court explicitly recognized the benefits diversity provides to all students. It must now explicitly recognize what it implicitly recognized 10 years ago by deciding *Grutter* and *Gratz* on the same day: There is a difference between affirmative action’s preference for the interests of one race over another and diversity’s *raison d’être* [reason] that every group benefits from the inclusion of all others.” ■

documentation in search of jobs or to escape hunger or violence in their homelands. In some cases they came alone and their spouses and children followed later; in some instances they traveled together to the U.S. Others came to the country legally, with the proper temporary visas to work or study in the U.S., and for any number of reasons chose to remain when their documents expired.

"It's not a simple thing in most cases. In fact, I've had thousands of stories come through my office," said Weiss. "Take, for example, a person here on a temporary visa who meets someone and starts a family, and then they can't bring themselves to abandon them, so they stay, without the proper paperwork. What's worse, they can't legally get a job; they can't get a driver's license.

Even those who apply for legal status through their spouse may wait 15 or 20 years in some cases for the process to be complete. In the meantime, they live in fear of being discovered and deported."

The U.S. economy suffers too, missing out on the income taxes and fees they would be paying if they could hold legal jobs, drive, own property and start their own businesses, he added.

President Barack Obama made clear in a June 2013 speech that he believed illegal immigrants deserve an opportunity to gain legal status. "Yes, they broke the rules," he said. "They should wait their turn. They shouldn't be let off easily. But the vast majority of these individuals are not looking for trouble. They're just wanting to provide for their families, contribute to their communities. They're our neighbors; we know their kids."

### No simple solution

Over the past 30 years, comprehensive immigration reform has been attempted numerous times, but so far none of the efforts have adequately addressed the issue.

In 1986, President Ronald Reagan signed a plan into law that was intended to resolve the nation's illegal immigrant problem. The Immigration Reform and Control Act (IRCA) tackled the issue from three vantage points:

- Undocumented immigrants who came to the U.S. before 1982 would be granted **amnesty** if they paid a fine and back taxes, and could later receive a green card to remain in the U.S. after demonstrating some basic knowledge of U.S. history and English language skills.
- Economic sanctions would be imposed on employers who hired undocumented workers.
- The southern border would be secured by increasing patrol sizes and employing advanced technology.

While an estimated 3 million illegal immigrants from 93 countries gained legal status as a result of the law, the IRCA didn't address how more-recent immigrants could become legalized. "Everyone assumed they would just leave, that the new employer restrictions would push them out," Doris Meissner of the Migration Policy

Institute, a Washington D.C.-based think tank, told *The Washington Post*. Instead, they remained in the country illegally, and since the employer restrictions said workers merely had to show paperwork that "reasonably appears on its face to be genuine," they could easily sidestep the requirement. To make matters worse, the border plan was seriously underfunded, allowing for a continued flow of undocumented immigrants into the country.

In the IRCA's wake, the thriving U.S. economy of the 1990s drove even higher numbers of immigrants to illegally cross the border or remain in the country without proper documentation, and employers, particularly those in agriculture, began experiencing an

increasing need for undocumented workers they could hire for low pay. With the undocumented population on the rise, anti-immigrant sentiment escalated, and President George W. Bush began discussing his own plans for comprehensive immigration reform.

### Shifting focus

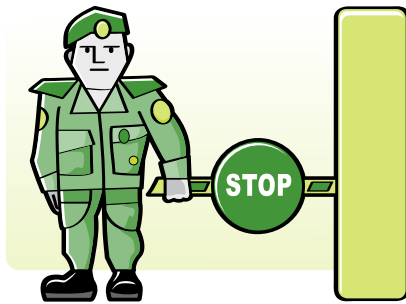
The terrorist attacks of Sept. 11, 2001, pushed things into overdrive, but shifted the focus to protecting the nation from potential terrorists entering or living in the country illegally. As a result, President Bush created the Department of Homeland Security and charged it with, among other things, securing the nation's borders and monitoring immigrant activity.

According to a blog published on Reuters.com, written by Meissner, "The U.S. now spends more on immigration enforcement than on all its other principal criminal federal law enforcement agencies combined."

When Barack Obama won the presidency with strong support from the Latino community, he vowed one of the first issues on his agenda would be immigration reform, including "a path to citizenship" for out-of-status immigrants. So far, that promise has proven impossible to keep for a number of reasons, including the dynamics of immigrant culture in the U.S. today, according to Weiss.

"Times have changed since the Reagan years, when people tried hard to integrate themselves into the U.S.," Weiss explained. "Immigrants are much more comfortable as themselves today. Many have been here for decades and do not speak English. They have established comfortable communities and plenty of support, and they see themselves reflected in the culture through cable TV channels that speak their language. They don't feel they need to assimilate in order to fit in, which can make some people feel uncomfortable."

With more than 60 percent of out-of-status immigrants reportedly being in the U.S. for more than 10 years, this lack of assimilation is part of what is fueling today's backlash against the growing immigrant population, he added.



## A legislative impasse

An early attempt at reform under the Obama Administration came in late 2010, when the Dream Act, designed to create a pathway to citizenship for young people who were brought to the country illegally as children, passed in the House of Representatives but failed in the Senate by five votes.

The second effort was launched in April 2013, when a bipartisan group of senators introduced legislation that would allow undocumented immigrants who arrived before Dec. 31, 2011, and remained in the country since that time, to apply for “provisional” legal status. Illegal immigrants would face a 10-year wait to apply for permanent legal status, while the government secured the borders and enforced existing immigration laws. They could seek U.S. citizenship three years later, if they paid fines and taxes, enrolled in an English class and didn’t commit any crimes. After five days of debates, the Senate Judiciary Committee voted to release the bill to the full Senate in May for a vote.

“The dysfunction in our current immigration system affects all of us and it is long past time for reform,” said Committee Chair Patrick Leahy, a Democrat, when the committee approved the measure. “We need an immigration system that lives up to American values and helps write the next great chapter in American history by reinvigorating our economy and enriching our communities,” Senator Leahy told *The Washington Post*.

In order to get the bill through committee, and ultimately passed by the Democratic-controlled Senate, Senator Leahy compromised by withdrawing a proposed amendment that would have allowed Americans to apply for permanent resident status for their same-sex partners.

Rather than take up the Senate bill, in January 2014, Republican congressional leaders proposed their own plan for immigration reform, which required heightened border security and immigration enforcement be in place before immigrants would be offered any legal options to remain in the country. Rather than offering a path to citizenship, the plan would eventually let illegal immigrants apply for work permits if they “admit their culpability, pass rigorous background checks, pay significant fines and back taxes, develop proficiency in English and American civics,” and are “able to support themselves and their families (without access to public benefits).”

Shortly after the proposal was made public, Republican House Speaker John Boehner announced he would not bring the bill to a vote this year because his party didn’t trust the president to implement border security measures. Statistics offer a different picture, noted Weiss, with deportations during the Obama Administration heading toward a record two million, which the White House has pointed to as proof the president is serious about border protection.

## Between a rock and a hard place

As a result of Congress’s failure to address immigration reform, President Obama finds himself in a difficult situation, explained Weiss, unable to enact legislative changes to immigration law on his own, yet facing increasing pressure from reform supporters to stop deporting individuals whose only crime is living in the U.S. without documentation.

Caught between a rock and a hard place, President Obama announced a review of his administration’s deportation policies in March, directing the Department of Homeland Security to “do an inventory of the Department’s current practices to see how it can conduct enforcement more humanely within the confines of the law.” The statement added: “The President emphasized his deep concern about the pain too many families feel from the separation that comes from our broken immigration system.”

The move marks his second effort to act on immigration reform without legislative guidance.

In June 2012, following the demise of the Dream Act,

Obama reacted to planned civil disobedience demonstrations led by young immigrants who were brought to the U.S. as children by announcing a deferred deportation program for young illegal immigrants who file a request for a two-year reprieve, which would allow them to gain work permits and study in the country, but does not provide a pathway to citizenship.

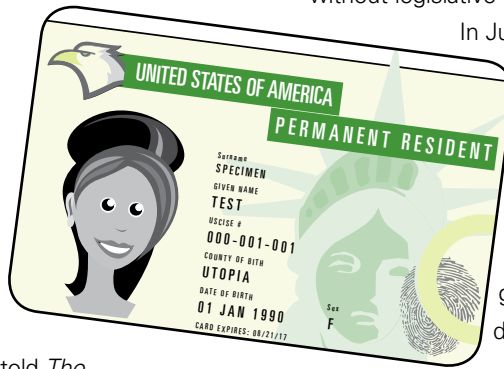
“We’ve all been living in fear, every day, but now people are finally starting to realize that every

family like mine is part of this society and part of the fabric,” Justino Mora, a student at the University of California, who was approved under the plan, told *The New York Times*. “Every family that comes here comes here with courage. We want the sense of security that comes with knowing we will not have to be separated.”

Following the announcement that the Department of Homeland Security would review deportation procedures, Boehner’s office announced that the authority to implement immigration reform rests with Congress, not the president. “There’s no doubt we have an immigration system that is failing families and our economy, but until it is reformed through the democratic process, the president is obligated to enforce the laws we have,” Boehner spokesman Brendan Buck told *The New York Times*.

So far, neither side has made any real headway in resolving their differences.

“The sticking point is actually really clear,” said Weiss. “It’s the issue of citizenship. One side is determined to push for it and the other is determined to deny it because they don’t want the ‘legals’ to be able to vote and possibly elect representatives who will make it easier for them to petition to bring their relatives here. The thing is, this isn’t a fight most of the immigrants actually care about. They aren’t asking to be citizens. They are asking to be able to live and work here legally, and to be able to travel home and then return to the U.S. legally. I’ve never had a client say they want me to help them get the right to vote; they want the right to live.” ■



In her **dissenting opinion**, Justice Ruth Bader Ginsburg cited a statistic that the Justice Department blocked more than 700 voting changes on discriminatory grounds just between 1982 and 2006 alone.

“The Court holds Section 4 invalid on the ground that it is ‘irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time.’ But the Court disregards what Congress set about to do in enacting the VRA,” Justice Ginsburg wrote. “That extraordinary legislation scarcely stopped at the particular tests and devices that happened to exist in 1965. The grand aim of the Act is to secure to all in our **polity** equal citizenship stature, a voice in our democracy undiluted by race. As the record for the 2006 reauthorization makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted substitutes for the first-generation barriers that originally triggered preclearance in those jurisdictions. The sad irony of today’s decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA’s success in eliminating the specific devices extant [present] in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself....In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.”

#### A new formula?

In January 2014, a bipartisan group of legislators introduced the Voting Rights Amendment Act of 2014, which includes a revolving preclearance formula that would require that jurisdictions with recent, **egregious** voting records receive preapproval on proposed voting changes. The bill would also improve the ability of plaintiffs to get preliminary injunctive relief for some voting changes, and require public notice of proposed changes.

So far no action has been taken on the measure, and the likelihood of its successful passage depends on whom you ask. The fact that the reauthorization of Section 5 in 2006 was approved by an overwhelming majority—the House of Representatives voted 390-33 in favor of the measure and the Senate voted 98-0 in favor, including two conservative senators from Alabama—can be viewed in two ways.

To Pastor Kenneth Dukes, a Shelby County resident who was represented by the American Civil Liberties Union in the recent Supreme Court case, the vote indicates a desire to maintain government oversight of voting rights. “I know that Democrats and Republicans have supported preclearance over and over again and know that they will again,” he said in an ACLU press statement. “In 2006, you had Republicans and Democrats—who never agree on anything—agree on that.”

But Alabama Solicitor General John Neiman Jr. sees it differently. “There’s a very easy explanation for that,” Neiman told *The Washington Post*. “A person who voted against Section 5 of the Voting Rights Act would be called in the press and in the public debate someone who voted against voting rights. The path of least resistance for Congress was simply to re-up for another 25 years.”

#### Burden shifts without the VRA

In the meantime, with Section 5 unenforceable and the proposed Voting Rights Amendment Act in limbo, jurisdictions once under the pre-certification mandate have been actively enacting voting laws. Hours after the *Shelby* ruling was handed down, Texas announced a voter identification law that had been blocked by the federal government would go into effect immediately.

U.S. Attorney General Eric Holder Jr. advised he would ask a federal judge to require that Texas submit all voting law changes for federal approval because of the state’s history of discrimination. In a statement, Holder said the Justice Department plans to “fully utilize the law’s remaining sections to subject states to preclearance as necessary.” In a statement after the ruling was announced, Holder also stated, “We will not hesitate to take swift enforcement action, using every legal tool that remains available to us, against any jurisdiction that seeks to take advantage of the Supreme Court’s ruling by hindering eligible citizens’ full and free exercise of the franchise.”

In the meantime, there is still recourse for individuals or groups who feel a proposed voting law violates their constitutional rights. “Opponents of discriminatory laws can still go to court and challenge them,” said Professor Askin, “but the burden of proof is now on the opponents to prove discrimination rather than on the states to demonstrate why the laws are necessary and not discriminatory.” ■

## Glossary

**amnesty** — an act of pardon by a government that forgives offenders. **disenfranchised** — to deprive of a privilege or right (i.e., the right to vote). **dissenting opinion** — a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues. **egregious** — unusually or obviously bad. **insidious** — doing or engineering harm. **pervasive** — common or widespread. **polity** — the form of government of a nation or state. **remand** — to send a case back to a lower court. **reverse** — to void or change a decision by a lower court. **sovereignty** — the ultimate supreme power in a state or nation. **vacate** — to set aside or invalidate.