State of Texas v. United States: Voting Rights and Texas’s Educational Standards

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I. INTRODUCTION

Free societies cherish the right to quality education for all its members. Texas, like any state, has a substantial interest in providing the highest standards of education to its children. The Texas Constitution states that it is “the duty of the Legislature . . . to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”¹ The Legislature has carried out this duty through the implementation of the Texas Education Code. The Code addresses the standards of education expected for the state’s children, the detailed methods for student achievement, the determination of accreditation status, and the imposition of administrative sanctions.² School boards, elected by voters from each particular district, govern the area schools.³ These

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²TEX. CONST. art. VII, § 1.
citizens' right to vote for their school board members, and the protection of voting quality, is the focus of this Note.

The State of Texas is a jurisdiction covered under section 5 of the Voting Rights Act of 1965. Congress created the Voting Rights Act to prevent states from using racially motivated legislation to dilute or remove voting power from minorities. Although states have the ultimate power to create voting rights, any new legislation or changes to existing laws must be evaluated by the federal government to ensure that states do not abuse their power. Before a state can make a change affecting voting, it may obtain a declaratory judgment from the United States District Court for the District of Columbia giving permission for the change. Seeking the District Court's permission to enact new legislation ensures that states will not discriminate against minority voters through biased voting regulations. Alternatively, the state may submit the legislation to the United States Attorney General for review. Once submitted to the Attorney General, if the Attorney General does not object, the state is free to enact the legislation without repercussion.

In 1995, Texas enacted provisions to the Education Code, specifically chapter 39, which allowed the Commissioner of Education to hold school districts accountable for student performance. These provisions permitted the Commissioner, in limited circumstances, to intervene in local governance and appoint a temporary management team to assume the duties of the elected school board. Texas attempted to have this legislation precleared by the office of the Attorney General of the United States pursuant to section 5 of the Voting Right Act. The Assistant Attorney General, however, declined to preclear the legislation in toto believing that the implementation of certain sections could result in future violations of section 5. Thus, Texas is now required to seek preclearance every time it attempts to implement chapter 39. The state filed suit in the

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7See id.
10See TEX. EDUC. CODE ANN. § 39.131(a)(9).
11See Texas, 118 S. Ct. at 1257-58 (Jurisdictional Statement for State Appellant at 45a).
12See id. at 1259. "The authority for determinations under Section 5 has been delegated to the Assistant Attorney General for the Civil Rights Division." See 28 C.F.R. § 51.3 (1998).
District Court for the District of Columbia under the Voting Rights Act, seeking a determination that the appointment of a management team would not constitute a prohibited change affecting voting rights. The district court dismissed the case on the grounds that it was not ripe for review because the state had not yet appointed a temporary management team to replace the elected school district officials. The Supreme Court granted certiorari and considered the case during the October 1997 term.

The Court held that Texas’s claim was not ripe under the standards set forth in *Abbott Laboratories v. Gardner*. Consequently, the Supreme Court never decided whether section 5 applied in this case. This Note explores three aspects of the Court’s decision and determines that although the Court dismissed the claim on ripeness grounds, Texas is correct that chapter 39 should not be subject to section 5 preclearance requirements. First, the legislative changes in the Education Code do not affect minority voting because the Commissioner only appoints a team when the board has exceeded its powers or the school fails to meet certain accreditation standards. Second, with its decision, the Court has effectively reduced the quality of education for minority children while only preventing the mere possibility of a diluted minority vote. Third, in declining to address the issue on its merits, the Court has inhibited speedy implementation of a valuable educational tool just when the state needs it the most: in emergencies. For these reasons, section 5 should not apply in this case.

II. HISTORY OF THE VOTING RIGHTS ACT

Courts have ardently protected the right to vote for almost two-hundred years. In fact, it is the cornerstone of a free democracy. This right, however, has never been absolute, even within the federal system.

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14See id. at *3.
19See, e.g., Reynolds v. Sims, 377 U.S. 533, 579 (1964) (recognizing the “one person, one vote” principle); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (recognizing the importance of voting rights).
government may condition a vote on factors such as registration, age, and residency in order to ensure that the vote provides the proper representation of the people’s will.\textsuperscript{21} Despite these limitations, however, the right to vote has been resolutely defended throughout our history. Protection of this right is of particular importance to minority voters and is entrenched in the Fifteenth Amendment.\textsuperscript{22} Yet, the Fifteenth Amendment only protects the right from facially discriminatory voting practices, as opposed to neutral legislation which creates a discriminatory effect.\textsuperscript{23} Therefore, efforts to protect minority voting have rested primarily on the Voting Rights Act of 1965.\textsuperscript{24}

The Voting Rights Act prohibits states from diluting votes through discriminatory legislation.\textsuperscript{25} Congress created the Act recognizing that states, particularly those in the South, tended to influence minority voting by enacting biased voting laws.\textsuperscript{26} These laws, although facially neutral, nevertheless created a negative impact on voting.\textsuperscript{27} Thus, the Voting Rights Act focuses on otherwise legal legislation that is applied in a discriminatory manner. For example, shortly after Congress ratified the Fifteenth Amendment, several states, including Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began enacting legislation to effectively prevent African-Americans from entering the voting booth.\textsuperscript{28} Typically, the Southern states allowed only voters who could read and write to exercise their voting rights.\textsuperscript{29} At that

\textsuperscript{21}See Carrington v. Rash, 380 U.S. 89, 91 (1965) (stating that states “have broad powers to determine the conditions under which the right of suffrage may be exercised.”).

\textsuperscript{22}See Lane v. Wilson, 307 U.S. 268, 275 (1939) (recognizing that discrimination in the voting process is nullified by the Fifteenth Amendment); see also Myers v. Anderson, 238 U.S. 368, 379-80 (1915) (holding that a state statute requiring discriminatory voter registration violated the Fifteenth Amendment).

\textsuperscript{23}See South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966). Facially discriminatory voting practices are apparent from the face of the legislation. In contrast, neutral legislation, although valid on its face, creates a discriminatory effect when it is applied. See id.


\textsuperscript{25}See Katzenbach, 383 U.S. at 308-09.

\textsuperscript{26}See id.

\textsuperscript{27}See id.

\textsuperscript{28}See id. at 310.

\textsuperscript{29}See id. at 311.
time, less than one-third of the African-American population was literate.\footnote{See id. at 311.} Therefore, facially legal literacy requirements could be used to discriminate against illiterate minority voters. Furthermore, not only did African-Americans have to take the tests, but, unlike the white applicants, they had to \textit{actually} pass the evaluations. For example, in Panola County, Mississippi, the registrar required African-Americans to interpret a section of the state constitution concerning the “rate of interest on the fund known as the ‘Chickasaw School Fund.’”\footnote{United States v. Duke, 332 F.2d 759, 764 n.6 (5th Cir. 1964).} In contrast, white men avoided literacy regulations through “grandfather clauses, property qualifications, and ‘good character’ tests.”\footnote{\textit{Katzenbach}, 383 U.S. at 311.} A white applicant in Louisiana registered by writing “FRDUM FOOF SPETGH” (freedom of speech) on his application,\footnote{See id.} while a white voter in Alabama successfully entered the voting booth after the registrar completed his form for him.\footnote{See United States v. Penton, 212 F. Supp. 193, 210-11 (D. Ala. 1962).} In the latter case, the applicant had not even finished the first grade.\footnote{See id. at 210.} Possessing an education, however, did not entitle an African-American to the right to vote. Some with Baccalaureate and Master of Arts degrees were prevented from voting simply because of the color of their skin.\footnote{See United States v. Lynd, 301 F.2d 818, 821 (5th Cir. 1962).} In short, Congress created the Voting Rights Act at a time when minority voters still faced real barriers due to the prejudicial use of state legislation.

Section 5 of the Act specifically addresses any change in electoral laws or practices.\footnote{See Presley v. Etowah County Comm’n, 502 U.S. 491, 501-02 (1992).} It mandates that whenever a state covered by the act “enact[s] or seek[s] to administer any voting qualification[,] . . . prerequisite[,] . . . standard, practice, or procedure with respect to voting[,] different from that in force or effect,” the state must obtain preclearance.\footnote{42 U.S.C. \textsection\textsection 1973c.} The purpose was to prevent a state from “denying or abridging [a citizen his] . . . right to vote on account of race or color, or [because he is a member of a language minority group].”\footnote{Id.; see also 42 U.S.C. \textsection\textsection 1973b(f)(2).} In effect, if the state wants to change its voting laws, it must first obtain a green light from the federal government. The preclearance requirement may be fulfilled by either a
determination from the District Court of the District of Columbia that the activity is not a change affecting voting, or by submitting the legislation to the Attorney General for preclearance and subsequently implementing it if the Attorney General declines to object.\textsuperscript{40} In effect, the provision halts the enactment of the legislation until the state proves to the federal government that its changes do not dilute the minority vote. Although section 5 preclearance is a burdensome requirement, the Court has recognized its necessity for preventing racially motivated amendments to voting laws.\textsuperscript{41}

A declaratory judgment from the district court constitutes "judicial preclearance," while the Attorney General's approval constitutes "administrative preclearance."\textsuperscript{42} States, however, are not required to seek the approval of the Attorney General.\textsuperscript{43} Although a state has the option to choose one method over the other, the court makes the final determination on whether legislation is precleared.\textsuperscript{44} A state may appeal the Attorney General's decision to the district court if it believes the pronouncement was made in error, while appeals from the District Court are made directly to the Supreme Court.\textsuperscript{45} Although the Attorney General's decision is not as binding as the District Court, it does serve an important function. Congress created the Attorney General's approval mechanism merely to "provide a rapid method of rendering a new state election law enforceable."\textsuperscript{46} Thus, a state desiring to have its legislation approved as quickly as possible would seek preclearance through this means instead of in the District Court. Despite this avenue for quick resolution, in \textit{Texas v. United States}, the Attorney General took a total of 90 days before rendering a decision.\textsuperscript{47} Thus, even with the alternative procedure, section 5 still presents a time-consuming barrier to the speedy implementation of certain state legislation.

\textsuperscript{42}See Clark, 500 U.S. at 648-49.
\textsuperscript{43}See id.
\textsuperscript{45}See id.; see also Allen v. State Bd. of Elections, 393 U.S. 544, 549 (1969).
\textsuperscript{46}Id.
III. JUDICIAL INTERPRETATION OF SECTION 5

Although the Voting Rights Act mandates preclearance for changes in voting, it does not spell out with particularity what type of legislation "den[ies] or abridg[es] the right to . . . vote" for section 5 purposes.\textsuperscript{48} Instead, the Supreme Court holdings limit the application of section 5 to discrete categories. For example, although the Court, in \textit{Allen v. State Board of Elections}, held that section 5 applied to all changes affecting voting, including both subtle changes and changes to the face of the statute,\textsuperscript{49} it has also recognized instances when decisions concerning elected offices do not affect voting.\textsuperscript{50} Thus, section 5 is not a blanket requirement that must be applied to every new law a state passes. Instead, as the Supreme Court has already recognized, application of section 5 should be limited in its scope.

The Supreme Court has specified that section 5 only applies to changes in voting which do not always occur when elected officials are replaced with appointed ones.\textsuperscript{51} For example, in \textit{Presley v. Etowah County Commission}, elected county commissioners voted to delegate much of their authority to appointed white commissioners.\textsuperscript{52} This decision occurred in the wake of an election which placed a minority member onto the board.\textsuperscript{53} The newly elected minority members sued the county for failure to seek section 5 preclearance for these changes.\textsuperscript{54} The Court, however, held that the redistribution of power did not constitute a change with respect to voting.\textsuperscript{55} Thus, state legislatures should retain the ability to make decisions concerning the powers of state officials.\textsuperscript{56}

The Court in \textit{Presley} based its rationale on the earlier \textit{Allen} decision which specifically limited the scope of section 5 to discrete categories.\textsuperscript{57}

\textsuperscript{49}393 U.S. at 566.
\textsuperscript{50}See, e.g., \textit{Presley v. Etowah County Comm'n}, 502 U.S. 491, 507 (1992) (stating that the replacement of an elected school board with an appointed one did not constitute a change in voting for section 5 preclearance); \textit{Texas v. United States}, 785 F. Supp. 201, 205 n.3 (D.D.C. 1992) (noting that a court-ordered plan must reflect a policy of submitting authority before preclearance is required).
\textsuperscript{51}See \textit{Presley}, 502 U.S. at 507.
\textsuperscript{52}Id. at 497.
\textsuperscript{53}See id. at 496.
\textsuperscript{54}See id. at 497.
\textsuperscript{55}See id. at 508.
\textsuperscript{56}See id. at 507.
\textsuperscript{57}Id. at 502-03; \textit{see also} \textit{Allen v. State Bd. of Elections}, 393 U.S. 544, 570-71 (1969).
Allen, the Court consolidated four cases on appeal and held that the facts in those cases demonstrated the primary instances when section 5 requires preclearance.\footnote{58} In all four cases, the states had passed new regulations concerning election procedures.

In the first case, Allen v. State Board of Elections, the Virginia Board of Elections issued a bulletin which permitted election judges to aid illiterate voters by writing a candidate's name on their ballots.\footnote{59} The voting laws in Virginia mandated that voters wishing to write-in candidates must do so in their own handwriting.\footnote{60} Illiterate voters desiring to use sticking labels rather than the assistance of election judges brought suit under section 4 of the Voting Rights Act.\footnote{61} The Court, however, elected to address the issue under section 5.\footnote{62}

The second case, Fairley v. Patterson, concerned a change in the method by which voters chose the county board of supervisors from members elected by districts to members elected at-large.\footnote{63} Minority voters claimed the change divested them of the right to have their districts fairly represented, while shifting the power to majority white voters throughout the county.\footnote{64} The minority voters filed suit under section 5 of the Voting Rights Act.\footnote{65}

The third case, Whitley v. Williams, addressed amendments to the Mississippi Code which changed the requirements for independent candidates running in general elections.\footnote{66} Potential candidates whose nominating ballots were rejected for failure to comply with the changes to the Mississippi Code filed suit because of the State's failure to seek preclearance under section 5.\footnote{67}

Finally, the fourth case, Bunton v. Patterson, concerned legislation that allowed the board of education to appoint the county superintendent.\footnote{68} Prior to the amendment, counties had the option of either electing or appointing their superintendent.\footnote{69} Potential candidates for the

\footnote{58}{See Presley, 502 U.S. at 502.} \footnote{59}{393 U.S. at 552.} \footnote{60}{See id. at 552-53.} \footnote{61}{See id.} \footnote{62}{See id. at 570.} \footnote{63}{Id. at 550.} \footnote{64}{See id. at 569.} \footnote{65}{See id. at 550.} \footnote{66}{Id. at 551.} \footnote{67}{See id.} \footnote{68}{Id. at 550-51.} \footnote{69}{See id. at 551.}
superintendent position sought a declaratory judgment that the amendment required section 5 preclearance.70

In all four cases, the Allen Court held that the legislative changes required section 5 preclearance.71 In Presley, the Court adopted these examples to limit the application of the preclearance requirement to the following discrete categories:72 (1) alterations in the manner of voting,73 (2) changes in the composition of the electorate,74 (3) modifications to candidacy requirements and qualifications,75 and (4) the creation or abolition of elected or appointed officials.76 The Court in Presley, however, also noted that under the Allen holding, circumstances may exist in which the re-allocation of powers to appointed officials constitutes a de facto replacement of elected officials.77 De facto replacement occurs when an elected school board is rendered so powerless it loses its reason for being.78 This replacement, like the discrimination in the Katzenbach case, is a subtle dilution of the minority vote.79 Even a facially valid law may violate the Voting Rights Act if its ultimate effect is to remove power from elected officials.80 Thus, courts will focus on the de facto replacement to prevent subtle vote dilution which would otherwise be legal.81 Preclearance may be required in those instances as well.82

70See id.
71Id. at 569-71.
73See id. at 502; see also Perkins v. Mathews, 400 U.S. 379, 394 (1971) (changing voting procedures from wards to at-large elections).
74See Presley, 502 U.S. at 502-03; see also City of Richmond v. United States, 422 U.S. 358 (1975) (changing from at-large to ward elections); Perkins, 400 U.S. at 394 (changing from ward to at-large elections).
75See Presley, 502 U.S. at 502; see also NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 170-71 (1985) (changing the filing deadline for candidacy); Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 34 (1978) (requiring candidates to take an unpaid leave of absence while campaigning); Hadnott v. Amos, 394 U.S. 358, 361-63 (1969) (requiring candidates to file certain "statements").
77Presley, 502 U.S. at 508.
78See id.
80See Presley, 502 U.S. at 508.
81See id.
82See id.
Importantly, the Court in *Presley* recognized that the changes at issue must have a direct effect on *voting* to trigger section 5 preclearance. The fact that the elected body’s *powers* may be affected does not automatically constitute a dilution of the minority vote for section 5 purposes. Thus, a distinction must be drawn between changes that affect *voting* and changes that affect *powers*. The latter changes do not require section 5 preclearance. Instead, section 5 requires a tangible display of *voting* dilution. Furthermore, the need for concrete standards with which to apply section 5 is crucial, “for in a real sense every decision taken by government implicates voting.” For example, a yearly re-calculation of an annual budget could affect the way a minority voter casts his ballot. A voter who chooses a candidate on the basis of his proposed budget would see that vote diluted when the budget changed. Yet, a state cannot halt budget changes simply because the changes might affect the minority vote. The Court in *Presley* noted “[i]f federalism is to operate as a practical system of governance and not a mere poetic ideal, the [s]tates must be allowed both predictability and efficiency in structuring their governments.” Therefore, the discrete categories set forth in *Allen* and recognized in *Presley* should set the stage for this section 5 analysis of chapter 39 of the Texas Education Code. Expanding the interpretation of section 5 to cover any hypothetical shift in voting power would broaden the application of the preclearance requirement to the point states could not function through legislative means. Instead, the Court should recognize that there are instances where new legislation does not affect minority votes, even when that legislation impacts the powers of elected officials.

IV. CHAPTER 39: SAVING GRACE FOR TEXAS’S SCHOOLS

Texas strives to ensure that students of all races receive the same quality education. In fact, the Texas Constitution has made it a duty for the Legislature to create and maintain a system of public schools. The state has over 1,000 independent school districts within its borders, and each district is governed by an elected school board whose electorate body

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83 *Presley*, 502 U.S. at 510.
84 See id. at 507.
85 See id.
86 See id. at 510.
87 Id. at 504.
88 Id. at 510.
89 TEX. CONST. art. VII, § 1.
resides within the school district’s boundaries.\textsuperscript{90} The Texas Education Code requires school boards to develop efficient methods so its schools can comply with standard state educational requirements.\textsuperscript{91} The State Board of Education develops curriculums and assesses student achievement to provide the highest level of education to all Texas children equally.\textsuperscript{92} The Texas Education Code charges the Commissioner of Education with enforcing educational standards and imposing sanctions on school districts that do not comply.\textsuperscript{93} In effect, the Code "seeks to measure the academic performance of Texas schoolchildren, to reward the schools and school districts that achieve the legislative goals, and to sanction those that fall short."\textsuperscript{94}

In 1993, the Texas Legislature reformed chapter 35 of the Education Code to establish a system of school district accountability.\textsuperscript{95} The Legislature intended to force school districts to comply with minimum educational standards and allow all children access to high quality education.\textsuperscript{96} Minority school districts had to meet the same educational levels that their white counterparts did. If unable to meet these standards, the Commissioner of Education could sanction the school district or withhold school funds.\textsuperscript{97} The court held in \textit{Edgewood Independent School District v. Meno} that the "accountability regime set forth in Chapter 35 . . . meets the Legislature’s constitutional obligation to provide for a general diffusion of knowledge statewide."\textsuperscript{98} Thus, chapter 35 passed judicial muster. Texas, however, did not submit the legislation for section 5 preclearance because the State did not believe the sanctions contained within the amendments constituted a change which diluted minority voting.\textsuperscript{99}

The Commissioner exercised his power in 1995, when he appointed a temporary team to oversee the operations of the Somerset Independent

\begin{itemize}
\item \textsuperscript{90}See \textit{Texas v. United States}, 118 S. Ct. 1257, 1258 (1998).
\item \textsuperscript{91}See \textit{TEX. EDUC. CODE ANN.} § 11.251(a) (Vernon 1996).
\item \textsuperscript{92}See \textit{id.} § 39.022.
\item \textsuperscript{93}See, e.g., \textit{id.} §§ 7.021, 7.024, 39.131.
\item \textsuperscript{94}\textit{Texas}, 118 S. Ct. at 1258.
\item \textsuperscript{95}See \textit{Edgewood Indep. Sch. Dist. v. Meno}, 917 S.W.2d 717, 728-29 (Tex. 1995).
\item \textsuperscript{96}See \textit{id.} at 729.
\item \textsuperscript{97}See \textit{id.}
\item \textsuperscript{98}\textit{Id.} at 730.
\item \textsuperscript{99}See \textit{Texas}, 118 S. Ct. at 1258.
\end{itemize}
School District. The Commissioner gave the team broad power, including the ability to veto decisions made by the elected school board. Both private plaintiffs and the United States independently challenged the appointment for failing to meet the preclearance requirement of section 5. In the resulting case, *Casias v. Moses*, a three-judge panel enjoined the state from implementing chapter 35. The panel expressed concern that the provisions constituted a de facto replacement of elected officials and, thus, required preclearance. If chapter 35 created the possibility of removing the elected school board’s powers and re-allocating it to appointed officials, the vote could be diluted. The Legislature immediately responded to *Casias* by amending section 39.131(e) to ensure that management team appointments would not implicate the Voting Rights Act. Yet, the new chapter 35 legislation was again challenged in *Texas v. United States*. Therefore, the Legislature modified the provisions a second time with a detailed scheme for accreditation status, standards, and penalties. The result was chapter 39.

Specifically, the new chapter 39 provisions provide for ten sanction options available to the Commissioner of Education in the event school districts fail to comply with educational standards. The Commissioner may impose sanctions for a variety of reasons. First, the sanctions may be imposed if a district violates federal laws or regulations concerning federally required or federally funded programs. Second, sanctions may be imposed where a school district violates the state’s accountability system. Finally, the Commissioner may impose sanctions based upon a lowered accreditation rating when an annual review indicates unacceptable

101 See Appellant’s Brief at 4-5, Texas (No. 97-29).
102 See id.
107 See id.; see also Tex. S.B. 1, 74th Leg., R.S. (1995).
109 See id. § 39.074(a).
110 See id. § 39.075.
performance standards.\footnote{See id. § 39.073.} In this final instance, students are evaluated on their academic skills through a state-wide standardized test.\footnote{See id. § 39.022.} The test results are then segregated by ethnicity of the student body, and minority scores are compared to non-minority scores.\footnote{See id. §§ 39.051, 39.073.} Each district is assigned a test rate which also may be compared to an educational minimum standard.\footnote{See id. § 39.072(a).} This process forces schools to increase the performance of student groups across the board. In short, minority students must perform as well as white students for school districts to avoid the Commissioner's sanctions. These sanctions ensure minority students are not denied a high-quality education simply because they may live in less affluent neighborhoods.

The ten sanctions provided to the Commissioner vary in their degree of intrusion on the existing elected board. Sanctions one through six include (1) submitting public notice to the school board that the district is deficient, (2) ordering the board to hold a hearing notifying the public of the deficiencies, the suggested remedies, and the possibility of future sanctions, (3) mandating that the board establish a student achievement plan to correct the deficiencies, submit the plan to the Commissioner, and on approval, implement the plan in the district, (4) ordering the board and the district superintendent to appear in a hearing before the Commissioner to explain the deficiencies and the plans for their remedies, (5) arranging an inspection of the district itself, and (6) appointing an agency monitor to continually evaluate the school board's performance.\footnote{See id. § 39.131(a)(1)-(6).} These six sanctions, although varying in severity, do not implicate section 5 of the Voting Rights Act because they do not affect the ability of the school board to make decisions concerning school governance. In fact, the Assistant Attorney General agreed with Texas that the six sanctions did not constitute a change affecting voting, and did not require preclearance for implementation.\footnote{See Texas v. United States, 118 S. Ct. 1257, 1259 (1998).} The remaining four sanctions, however, failed to withstand the scrutiny of the Assistant Attorney General.\footnote{See id.} These sanctions include (7) appointing a master to oversee the school board's duties, (8) appointing a temporary management team to do the same, (9) appointing a board of managers from the residents of the community to

\footnotesize{\textsuperscript{111}}See id. § 39.073.
\footnotesize{\textsuperscript{112}}See id. § 39.022.
\footnotesize{\textsuperscript{113}}See id. §§ 39.051, 39.073.
\footnotesize{\textsuperscript{114}}See id. § 39.072(a).
\footnotesize{\textsuperscript{115}}See id. § 39.131(a)(1)-(6).
\footnotesize{\textsuperscript{117}}See id.
V. SECTION 5 SHOULD NOT APPLY TO CHAPTER 39

A. Chapter 39 Does Not Constitutes a Change in Voting

The primary question at issue in this case is whether chapter 39 sanctions constitute the the type of replacement addressed in Allen.118 The Court in Allen recognized even facially valid legislation might rise to de facto replacement if the elected body was divested of its reason for being.119 Importantly, a de facto replacement dilutes the minority vote and requires preclearance under section 5.120 The Court, however, provides no clear indication of the difference between shifting power between officials,

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118 See TEX. EDUC. CODE ANN. §§ 39.131(a)(7)-(10).
120 See id. § 39.131(a).
122 See id.
123 See id.
124 See id.
126 See id. at 570.
127 See id. at 548; see also Presley v. Etowah County Comm'ns, 502 U.S. 491, 508 (1992).
which is permissible under Presley, and removing power from elected officials, which constitutes de facto replacement under Allen. Thus, the question remains: Does chapter 39 fall under Presley or Allen?

In Allen, the Court held that replacing elected officials with appointed ones constituted a change affecting voting, and thus, required preclearance. Allen, however, addressed the permanent replacement of the elected office instead of a mere temporary replacement of particular officials. In contrast, a chapter 39 temporary replacement is designed to re-vest power in the elected officials once educational standards begin to rise. Therefore, the authority of the temporary appointed board is limited, and the elected board will return to its duties once the crisis has passed.

The United States, however, argues that the appointment of a managerial team over elected school board officials constitutes a de facto abolition of the elected office as expressed in Allen. In effect, the replacement removes the elected school board’s reason for being. Under this theory, if the appointed managerial team will ever have the opportunity to override the elected school board’s decisions, the sanction requires preclearance. Once the elected officials relinquish the very power for which they were chosen, the vote has been diluted. In effect, the voters have lost the right to have their officials make decisions, which is the reason the voter cast his ballot for those particular persons. This argument, however, ignores an important point: the elected school board is not actually divested of its authority because it exceeded the limit of the power it possessed in the first place. In other words, preventing the board from acting outside the scope of its power is not an impermissible abridgment of the minority vote.

The only duties that the elected school board officials possess are those granted by the Legislature through the Texas Education Code. The Code requires that all students have “access to an education of high quality.” Because the Code is the Legislature’s response to the Texas Constitution, which mandates quality education for all children, the constitution

128 Allen, 393 U.S. at 569-70.
129 Id.
132 See id.
133 TEX. EDUC. CODE ANN. §§ 11.151-11.163.
134 Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 728 n.7 (Tex. 1995).
ultimately provides the basis for the school board’s power. It also, however, provides the limitations to that power. The district must meet minimum educational requirements as part of its basic duties under the Texas Constitution. The effect of this language is that the school board’s authority is only enabled when minimum standards are being met. As long as the board continues to uphold the basic educational requirements, there is no intervention by the Commissioner. Temporary management teams are not appointed until the students have failed to adequately meet the lowest permitted educational standards. Once performance falls below this level, the elected officials’ right to exercise their power may be suspended, and the appointed managerial team assumes them. The Texas Constitution only empowers the board to provide a quality education, and if the board fails to do so, it has exceeded the scope of its limited power.

For example, suppose voters in a district elect a school board member who has a drinking problem. Suppose further that this member, after a night of debauchery, is arrested for drunk driving and subsequently incarcerated. In this hypothetical, the member will be removed from his office because he is no longer able to perform the necessary functions of the job. This removal will occur even though he was elected by residents of the district. In this hypothetical, the official’s power as a member of society is limited by the drunk driving laws of the state. Once he attempts to exercise power outside the confines of the laws (by drinking and driving), he may be permissibly removed from his position and thrown in jail. Section 5 is not triggered when the individual exceeds the scope of his authority and is subsequently divested of it by the state. Instead, section 5 applies to instances where the state uses its position to strip power from individuals who still have the right to exercise it.

Imagine another hypothetical: voters elect a school board member who decides children do not need to learn how to read. On this basis, he enacts a curriculum based on simple math and communication through binary numbers. Even though he is an elected official, clearly this decision exceeds the scope of his power to determine the district’s curriculum. The Education Code, which sets forth the process for determining school curriculums, provides the limit for the official’s authority. Once he modifies the curriculum and fails to conform to the Education Code, he has

135 See TEX. CONST. art. VII, § 1.
137 See id. §§ 39.073(b), 39.131(a).
exceeded the scope of his power and may be removed from his office. In other words, the fact that an official is voted into his position does not give him unlimited authority concerning the district’s schools. Voters are not electing a “king or queen of schools” with unlimited power; they are simply choosing persons who will carry out the necessary functions of the job. Once a board or board member exceeds their authority, their power is divested and the state is free to step in and take over.

Likewise, in this case, the elected school board may not exceed its power by making decisions which cause student achievement to fall below educational minimums. Like the drunk driving laws and curriculum regulations discussed above, the Texas Education Code’s mandate concerning educational standards, and the Texas Constitution’s decree of quality education for all children, create the limit on school board officials’ power. In other words, school boards do not have the ability to decrease the quality of education for Texas schoolchildren. If a board begins to do so, it has exceeded the scope of its power and may be removed. The Code clearly lays out this limitation before the elected officials take office.¹⁴⁰ A school board may not exercise a power it does not have, and officials are not free to allow the quality of education to deteriorate. When student achievement begins to drop, the board begins to rise above the limit on its authority. At that point, the board is no longer performing the necessary functions of the job and its power may be divested. Thus, the appointment of a temporary management team is only the result of a limitation on the board’s powers. Minority voters cannot claim their votes have been diluted when the Commissioner divests elected officials of powers they have exceeded. Therefore, section 5 should not apply to chapter 39 legislation.

B. Chapter 39: An Educational Necessity

In support of the idea that a school district’s powers are limited, policy dictates that the need for prompt and immediate action by the state when student achievement begins to deteriorate outweighs the necessity to have every appointment individually scrutinized and subjected to preclearance review. Congress specifically designed section 5 to create a delay for enacting questionable legislation.¹⁴¹ The purpose behind section 5 is to halt the implementation of questionable legislation and to preserve the status quo long enough for the federal government to determine whether the laws

¹⁴⁰See id. §§ 39.073, 39.131.
dilute the minority vote.\textsuperscript{142} The extreme measures of sanctions under subsections (a)(7) and (a)(8), however, are only imposed in instances of dire need.\textsuperscript{143} Halting the implementation of certain laws just when the students need the laws the most would defeat the purposes behind the educational legislation.

Imagine this scenario: a minority school district with an elected school board is subjected to periodic evaluation and student assessment. Through test results, it becomes apparent that the students in the district are not achieving minimum educational goals. Following this discovery, the Commissioner of Education intervenes, and according to policy, imposes the gauntlet of sanctions beginning with sanction (1).\textsuperscript{144} The first six sanctions, however, fail to remedy the improper management of the district and the quality of the students’ education continues to deteriorate. Finally, the Commissioner decides to replace the elected school board with a temporary management team until the situation stabilizes. The Supreme Court, however, has failed to preclear this final sanction on its face. Thus, Texas must submit the intended implementation to the federal government for section 5 approval.\textsuperscript{145} Even if Texas elects to proceed under the expedient method of preclearance through the Attorney General, it will likely take months before it receives a decision.\textsuperscript{146} Who, in the mean time, will suffer the repercussions of this process? It certainly will not be the minority voter. Instead, the innocent children of less affluent school districts will watch months of quality education pass by while the Attorney General determines how this sanction affects the voting process. Essentially, the effect on the quality of the minority education does not matter. Clearly, the quality of minority education should not be discarded at the expense of the minority vote.

It is ironic that the very legislation Congress created to protect minority voters is now effectively strangling the state’s attempt to protect minority education. Even more ironic is the fact that Congress created the Voting Rights Act to prevent the type of subtle voting dilution discussed in the \textit{Katzenbach} case.\textsuperscript{147} There, state governments forced minorities from the voting booth through the use of valid legislation which discriminated

\textsuperscript{142}See \textit{id}.  
\textsuperscript{143}See TEX. EDUC. CODE ANN. \S 39.131(a)(7)-(8).  
\textsuperscript{144}See id. \S 39.131(a).  
\textsuperscript{146}See \textit{id}; see also 28 C.F.R. \S 51.9 (1998).  
\textsuperscript{147}383 U.S. 301, 308 (1966).
against people because of the varying levels of education.\textsuperscript{148} If a state denied minorities quality education, it could then turn around and further deny them the right to vote based on their illiteracy. Thus, the minority voter suffered a double injustice at the hands of its educational system. Yet, now the very law designed to prevent this discrimination is being used to foster it. The Voting Rights Act may be branded as a weapon against legislation which provides quality education to minorities. Even in light of its history, the effective result of the Voting Rights Act under the Attorney General’s decision in this case is a new mechanism to reduce the quality of minority education.

Furthermore, the discrimination in \textit{Katzenbach} is a far cry from the type of minority voting dilution suggested here. In actuality, Texas makes every effort to prevent racial inequality. In fact, that is the very reason the legislature created chapter 39.\textsuperscript{149} To suggest minority voters suffer discrimination as a result of chapter 39 cuts off the minority position’s nose to spite its face. The Texas Legislature enacted chapter 39 simply to ensure minority students receive the same education as white students. At what point does the quality of education for minorities become a protected right? Surely, it is unfair to tell an African-American child his father’s right to elect school board members is more important than his own right to learn how to read. The Supreme Court should recognize and appreciate the fine line the Texas Legislature is attempting to straddle. When the cost of electing a school board official is the quality of minority education, the intent and purpose of the Voting Rights Act is defeated.

Finally, the legislation at issue is not even a useful tool for purposeful minority discrimination. The appointment of the managerial team is only the final step in a comprehensive list of sanctions.\textsuperscript{150} Therefore, the Commissioner will pursue this remedy only after other less drastic measures have been explored.\textsuperscript{151} If the Texas Legislature wanted to keep minorities out of the voting booth, it would have enacted discriminatory laws concerning voting requirements. Simply demanding educational equality for whites and minorities alike is an awfully circumspect means of preventing minorities from voting. Even a minority voter would be hard pressed to argue that the state had enacted detailed educational statutes to

\textsuperscript{148}See \textit{id.} at 311, n.10.
\textsuperscript{149}See \textit{generally} United States Supreme Court Appellant Brief at 8 n.13, Texas v. United States, 118 S. Ct. 1257 (1998) (No. 97-29).
\textsuperscript{150}See \textit{TEX. EDUC. CODE ANN.} § 39.131(a) (Vernon 1996); \textit{see also} Texas v. United States, 118 S. Ct. 1257, 1259 (1998).
\textsuperscript{151}See \textit{TEX. EDUC. CODE ANN.} § 39.131(a); \textit{see also} Texas, 118 S. Ct. at 1259.
impair his right to vote. It would take some devious legislators indeed to bring such a theory to fruition.

On these bases, section 5 should not apply to chapter 39 legislation. In circumstances such as the one described above, the preclearance requirement defeats the underlying purpose of section 5. Here, delaying chapter 39’s application will defeat the entire purpose of Texas’s educationally valuable legislation in order to protect powers the board members do not even possess in the first place. Therefore, the Supreme Court should preclear the educational legislation and allow Texas to implement a valuable educational tool.

C. The Supreme Court’s Decision, and Its Impact on Future Legislation

The Supreme Court has declined to issue an opinion on the merits of this case, and, instead, has dismissed it on the ground that it is not ripe for review.152 The substantive issues in the case, however, will have an important impact on the implementation of both chapter 39 sanctions, as well as other types of emergency legislation.153 Here, requiring preclearance for each implementation of chapter 39 will prevent the expedient use of a valuable educational tool. Congress has already recognized the need for speedy implementation of state legislation.154 In fact, that was the purpose behind creating the alternative method for administrative preclearance through the Attorney General.155 This procedural requirement, however, still creates unnecessarily burdensome time constraints on chapter 39 applications. The Court intended to prevent this exact result by limiting the scope of section 5 to the precise circumstances listed in Presley.156 Unless the enactment rises to the extreme level of de facto replacement, preclearance should not be required. Here, chapter 39 is merely a limitation on school board power rather than a replacement procedure intended to dilute the vote. Therefore, section 5 should not apply.

152 See Texas, 118 S. Ct. at 1260.
154 See id.
VIII. CONCLUSION

Texas’s interest in providing the highest quality of education to its children is paramount in this instance. Section 5 preclearance should not be required in this case for three important reasons. First, the preclearance requirement is inapplicable in any event because the powers of the elected school board are not unlimited. Second, the cost to minority education for the sake of the mere possibility of minority vote dilution should not be borne by the children in the state. Finally, the educational necessity of speedy sanctions is of utmost importance. Upon balancing these factors against the minute impact to the Voting Act’s remedial powers, the logical decision in this case does not require case-by-case preclearance under section 5. Expanding the interpretation of section 5 to cover every de minimus change in the powers of elected officials would effectively freeze the state’s ability to make effective educational decisions. The Supreme Court has never before recognized such a broad interpretation. On the contrary, the Court has consistently upheld limited circumstances to which section 5 applies. Chapter 39 clearly falls outside the strictures of the Presley factors. yet, until the Supreme Court recognizes this fact, every new implementation of chapter 39 faces complete emasculation at the hands of section 5.

157 Id. at 502-03, 510.