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## A New Preclearance Coverage Formula: Renewing the Promise of the Voting Rights Act

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## A New Preclearance Coverage Formula: Renewing the Promise of the Voting Rights Act

Oluoma Kas-Osoka \*

The Voting Rights Act of 1965<sup>1</sup> (VRA) sought to break the grip of state disenfranchisement experienced by African American voters.<sup>2</sup> Congress determined that existing federal laws against discrimination were not comprehensive enough to prevent state officials from employing illegal practices during elections.<sup>3</sup> The VRA provided targeted reforms to the electoral process on both the national and state levels.<sup>4</sup> For example, Section 4(b) of the VRA outlined a coverage formula that targeted certain jurisdictions that had a previous history of voting discrimination.<sup>5</sup>

This Note examines the numerous legal challenges to the VRA subsequent to its enactment that have effectively disassembled the protections provided by the Act. Along with these challenges, it also examines the impact of barriers to voting (specifically voter identification laws) and Congress's attempt to put the pieces of the

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\* B.A., Human Biology (2010), Stanford University; J.D. (2014), Washington University School of Law in St. Louis. Sincerest thanks to Professor Greg Magarian for his guidance. Thanks for the support and encouragement from family and friends, especially my significant other Johnathan Barnes. All errors are my own.

1. 42 U.S.C. § 1973 (2006) [hereinafter "VRA"].

2. *The Voting Rights Act of 1965*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/intro/intro\\_b.php](http://www.justice.gov/crt/about/vot/intro/intro_b.php) (last visited Feb. 1, 2014) (providing information about enforcement of the VRA by the Voting Section of the Civil Rights Division of the Department of Justice).

3. "Congress determined that the existing federal anti-discrimination laws were not sufficient to overcome the resistance by state officials to enforcement of [federal laws]. The legislative hearings showed that the Department of Justice's efforts to eliminate discriminatory election practices by litigation on a case-by-case basis had been unsuccessful in opening up the registration process; as soon as one discriminatory practice or procedure was proven to be unconstitutional and enjoined, a new one would be substituted in its place and litigation would have to commence anew." *Id.*

4. *Id.*

5. *See infra* note 27.

puzzle back together again to secure and ensure the right to vote for minority citizens. I argue that the amendment to the VRA, proposed on January 16, 2014, does not do enough to protect minority voters, and I advocate for a new coverage formula to effectuate the overall purpose of the VRA.

Part I of this Note provides the history behind the significance of the VRA and describes the main provisions of the statute that intersect with Section 4(b). This section also examines the significant constitutional challenges to the VRA, specifically Section 4(b). In doing so, it will highlight four decisions handed down by the Supreme Court with regard to the scope of the statute's protections for voters and voting rights; this section will focus on the recent Supreme Court decision, *Shelby County, Alabama v. Holder*,<sup>6</sup> that declared Section 4(b) of the VRA unconstitutional. Part III examines the modern barriers that prevent voters from fully exercising their right to vote, and Congress's first attempt at reconstructing a coverage formula to provide proper protection for vulnerable voters. Finally, Part IV of this Note, provides an analysis of the proposed fix to the VRA in light of the recent challenges to voters' rights.

## I. HISTORY

### A. Purpose and Provisions of the Voting Rights Act of 1965

The VRA "codifies and effectuates the Fifteenth Amendment's permanent guarantee that, throughout the nation, no person shall be denied the right to vote on account of race or color."<sup>7</sup> According to the Department of Justice, the Act is generally considered the most successful piece of civil rights legislation passed by Congress.<sup>8</sup> The VRA consists of a comprehensive set of complex, interlocking mechanisms designed to protect the vote of African-Americans<sup>9</sup> who

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

7. *Introduction to Federal Voting Rights Laws*, U.S. DEP'T OF JUSTICE, [www.justice.gov/crt/about/vot/intro/intro.php](http://www.justice.gov/crt/about/vot/intro/intro.php) (last visited Feb. 1, 2014).

8. *Id.*

9. U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE'S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS 1 (2006).

have historically been disenfranchised. The passage of the VRA was a hard fought victory to secure the right to vote and the right to equality under the Constitution.<sup>10</sup> In order to ensure that this victory against disenfranchisement remained in place and effective, Congress incorporated various provisions within the statute to apply to certain jurisdictions.<sup>11</sup>

Initially, the primary focus of the VRA was to ensure that African Americans could register and vote in Southern states where substantial disenfranchisement occurred.<sup>12</sup> As a result of formal and informal mechanisms of disenfranchisement, “black voter registration and turnout were virtually eliminated by the early twentieth century.”<sup>13</sup> In order to diminish vote denial<sup>14</sup> and vote dilution,<sup>15</sup> the VRA contained multiple permanent nationwide provisions and several temporary provisions that only applied to certain covered

10. STEVEN ANDREW LIGHT, *THE LAW IS GOOD: THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS* 53 (2010).

11. “Congress clearly intended the VRA to close whatever loopholes in the Civil War amendments that southern voter registrars and other officials had used to perpetuate black disenfranchisement. Toward that end, the VRA spelled out a number of legally and politically innovative, as well as controversial and contestable, mechanisms to bring federal power to bear on state and local officials.” *Id.*

12. *Id.*

13. *Id.*

14. Vote denial occurs when certain “election standards, practices, procedures, and forms of government that have the purpose or effect of preventing a person of color from casting a vote.” *Id.* at 54.

15. Additional protections were necessary to shield voters from electoral system practices that diminished the relative weight of minority votes. After the law was adopted, African Americans began to elect their own candidates for office. Because they could no longer pass laws or intimidate black voters at the ballot box, some southern communities introduced policies designed to dilute minority voting strength. Many cities changed their elections from separate multimember districts to at-large elections. Though the laws did not prohibit or prevent blacks from voting, they significantly diminished the chances that a single black candidate would win the election. COLIN D. MOORE, *EXTENSIONS OF THE VOTING RIGHTS ACT, THE VOTING RIGHTS ACT: SECURING THE BALLOT* 98 (Richard M. Valelley ed., 2006). When African Americans attempted to run for elected positions, discriminatory administration of neutral laws resulted in “abolition of office, extension of the term of the white incumbent; substitution of appointment for election; increase in filing fees; raising of requirements for independent candidates; increase in property qualifications; withholding nominating petitions.” GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 81 (1993).

jurisdictions.<sup>16</sup> These temporary provisions were reauthorized most recently in 2006 and are currently set to expire in 2031.<sup>17</sup>

Section 2,<sup>18</sup> a permanent provision of the VRA, is the main legal enforcement mechanism for the law. This provision provides a permanent nationwide ban on voter prerequisites that would stifle the right to vote based on race, color, or, as of the 1982 amendment, “language minority” status.<sup>19</sup> Section 2 also allows a large class of potential litigants to bring suit against jurisdictions who have allegedly violated voter’s civil rights.<sup>20</sup> This encourages jurisdictions

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16. LIGHT, *supra* note 10, at 54. These temporary provisions are periodically reauthorized by Congress as per statute.

17. *Voting Rights Act*, THE LEADERSHIP CONFERENCE, <http://www.civilrights.org/voting-rights/vra/> (last visited Feb. 5, 2014) (“Congress has reauthorized the VRA four times, most recently in 2006, when both the House and the Senate approved the measure overwhelmingly in a bipartisan manner. Congress conducted more than twenty hearings, heard from more than 90 expert witnesses, and collected more than 15,000 pages of testimony documenting the continuing need for and constitutionality of the statute.”). *See also infra* note 74.

18. Section 2 provides, in pertinent part:

(a) No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . .

42 U.S.C. § 1973(a) (2006). A political subdivision is defined as “as any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” 42 U.S.C. § 19731(c)(2) (2006).

19. *See infra* note 25. The 1982 amendment to Section 2 provided protection against denial of voting rights based on “language minority” status. The language minority provisions are contained in Sections 203 and Section 4(f)(4) of the VRA. Sections 203 and 4(f)(4) require that when a covered state of political subdivision “provides any registration or voting notices, forms, instructions, assistance, or other materials of information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.” 42 U.S.C. § 1973b (f)(4) (2006). *See also About Language Minority Voting Rights*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_203/activ\\_203.php](http://www.justice.gov/crt/about/vot/sec_203/activ_203.php) (last visited Feb. 7, 2014) (“The requirements of the law are straightforward: all election information that is available in English must also be available in the minority language so that all citizens will an effective opportunity to register, learn the details of the elections, and cast a free and effective ballot.”).

20. LIGHT, *supra* note 10, at 55. Section 2, as amended in 1982, grants the Attorney General and private individuals who are aggrieved (or similarly situated to those aggrieved) the right to challenge in federal court any voting practice or standard that has a racially discriminatory intent or effect. *Id.* For litigants, it is now no longer required to prove to a reviewing court that a jurisdiction intended to discriminate. *Id.* Instead, a discriminatory effect on the ability of minority voters to elect their candidates of choice would be sufficient to demonstrate a violation of Section 2. *Id.*

nationwide to promote preemptive mechanisms to avoid vote dilution litigation.<sup>21</sup> These optional measures developed and adopted by local districts include switching to a “single-member district-based system and creat[ing] districts in which voters of color constitute a substantial enough majority to overcome racially polarized voting patterns.”<sup>22</sup>

Section 5,<sup>23</sup> a temporary provision of the VRA that must be reauthorized by Congress, is the statute’s key administrative enforcement mechanism. Only certain jurisdictions, as outlined in Section 4, are subject to this preclearance provision.<sup>24</sup> In order to avoid case-by-case litigation, the provision halted all changes to voting procedures or practices that are not approved through federal authorization.<sup>25</sup> Federal authorization is provided by the Attorney General or a three-judge panel of the United States District Court for

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21. *Id.*

22. *Id.*

23. Section 5 of the VRA states:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure. [The] procedure may be enforced without such proceeding if [it] has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission [...] Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

42 U.S.C. § 1973c(a) (2006).

24. *See infra* note 27.

25. Congress reauthorized Section 5 in 1970, 1975, 1982, and 2006. The reauthorization in 1975 expanded Section 5 coverage to include “language minority citizens” with limited command of the English language, including Hispanic Americans, American Indians, Asian Americans, and Alaskan Natives. The 2006 reauthorization extended the provision for the next twenty-five years. U.S. DEP’T OF JUSTICE, *supra* note 2.

the District of Columbia.<sup>26</sup> After the jurisdiction obtains proper authorization of the proposed change, its political officials may implement the proposal.<sup>27</sup>

Section 4<sup>28</sup> contained a triggering formula that determined which jurisdictions were subject to preclearance under Section 5. Section 4(b) established the coverage formula that subjected certain states to review by the Department of Justice. Another targeted solution

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26. *Judicial Review of Voting Changes*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/about.php](http://www.justice.gov/crt/about/vot/sec_5/about.php) (last visited Dec. 24, 2014). Additionally, the Attorney General could assign a federal examiner to a covered jurisdiction to review the qualifications of potential voters. *About Federal Observers and Election Monitoring*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/examine/activ\\_exam.php#observers](http://www.justice.gov/crt/about/vot/examine/activ_exam.php#observers) (last visited Dec. 24, 2014). Moreover, in these counties where a federal examiner was assigned, the Attorney General could request monitoring of polling place activities by federal observers. *Id.*

27. LIGHT, *supra* note 10, at 57. "Preclearance" refers to the permission to implement a covered jurisdiction's proposed change after federal review and approval. After an administrative or judicial finding that the change proposed by the covered jurisdiction has "neither the purpose nor effect of denying or abridging the right to vote as a result of race, color, or language minority status, nor does it worsen the existing status of minority voters' ability to elect their own candidates of choice in relation to white voters," the jurisdiction can proceed to institute the proposal. *Id.* The change becomes legally enforceable by the covered jurisdiction. *Id.*

28. Section 4 provides in pertinent part:

(a) [N]o citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964.

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973b(a)(1) (2006)). Before the coverage formula was repealed by a recent Supreme Court decision, Section 4 covered nine states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) in their entirety, and parts of six others (California, Florida, Michigan, New York, North Carolina, South Dakota). *See infra* note 30.

prohibited use of any “test or device,”<sup>29</sup> to deny the right to vote. This provision also provided the Attorney General with the authority to appoint federal observers and examiners to certain specified jurisdictions to ensure compliance with federal law.<sup>30</sup>

To trigger the coverage formula under Section 4 of the VRA, two elements must be satisfied. The first requirement is satisfied if on November 1, 1964, the state or political subdivision of the state maintained a test or device restricting the opportunity for citizens to vote.<sup>31</sup> The second requirement to establish preclearance is met if the Director of the Census Bureau determined that less than 50 percent of persons of voting age were registered to vote on November 1, 1964, or that less than 50 percent of persons of voting age voted in the presidential election of November 1964.<sup>32</sup>

Section 4 also provides a mechanism for states to terminate coverage under the preclearance provisions.<sup>33</sup> This process, known as the “bailout” provision, was originally enacted in 1965 as pathway to remedy any possible overreaching resulting from the application of

29. “Test or device” is defined in Section 4(c) of the VRA to refer to: “any requirement that person as a prerequisite for voting or registration for voting (1) demonstrates the ability to read, write, understand, or interpret any matter, (2) demonstrates any educational achievement of his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualification by the voucher of registered voters or members of any other class.” Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973b(c) (2006)).

Examples of these devices include literacy tests and poll taxes. *See infra* note 43; Rebecca Onion, *Take the Impossible “Literacy” Test Louisiana Gave Black Voters in the 1960s*, SLATE (June 28, 2013), [http://www.slate.com/blogs/the\\_vault/2013/06/28/voting\\_rights\\_and\\_the\\_supreme\\_court\\_the\\_impossible\\_literacy\\_test\\_louisiana.html](http://www.slate.com/blogs/the_vault/2013/06/28/voting_rights_and_the_supreme_court_the_impossible_literacy_test_louisiana.html).

30. According to the Department of Justice, the examiners would prepare and forward lists of people who had the qualifications to vote in these jurisdictions. The federal observers were provided to the jurisdictions that were certified by the Attorney General for these federal examiners. *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php](http://www.justice.gov/crt/about/vot/misc/sec_4.php) (last visited Feb. 6, 2014).

31. 42 U.S.C. § 1973b (2006).

32. *Id.* This resulted in these entire states becoming covered jurisdictions: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. Smaller political subdivisions were covered in Arizona, Hawaii, Idaho, and North Carolina. In fully covered states, the state as whole (including any political subdivisions of the state) is subject to the preclearance requirement. In states only partially covered, the special provisions only apply to the identified counties. U.S. DEP’T OF JUSTICE, *supra* note 30.

33. 42 U.S.C. § 1973b(a)(1) (2006). *See infra* note 35.



the preclearance formula.<sup>34</sup> A jurisdiction attempting to “bailout” must seek a declaratory judgment from a three-judge panel in the United States District Court for the District of Columbia.<sup>35</sup> The Attorney General may also consent to an entry of judgment granting the bailout petition prior to filing with the three-judge panel of the District of Columbia court.<sup>36</sup> Before the jurisdiction will obtain a consent decree from the Attorney General accepting any provisional bailout procedures, it must (1) eliminate voting procedures that restrict access to the electoral process; (2) demonstrate constructive effort to eliminate harassment and intimidation of persons seeking to register to vote; (3) expand opportunities for voter participation; and (4) present evidence of minority electoral participation.<sup>37</sup>

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34. U.S. DEP’T OF JUSTICE, *supra* note 30 (“Terminating coverage under the act’s special provisions”).

35. In *Northwest Austin Municipal Utility District Number One v. Holder*, the Court held that any jurisdiction currently subject to the Section 5 preclearance requirement may obtain “bailout” from coverage by the three-judge panel if during the past ten years and while the action is pending:

- (a) no test or device has been used within the jurisdiction for the purpose or with the effect of voting discrimination;
- (b) all changes affecting voting have been reviewed under Section 5 prior to their implementation;
- (c) no change affecting voting has been the subject of an objection by the Attorney General or the denial of a Section 5 declaratory judgment from the District of Columbia district court;
- (d) there have been no adverse judgments in lawsuits alleging voting discrimination;
- (e) there have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice;
- (f) there are no pending lawsuits that allege voting discrimination and federal examiners have not been assigned
- (g) there have been no violations of the Constitution or federal, state, or local laws with respect to voting discrimination unless the jurisdiction establishes that such violations were trivial, were promptly corrected, and were not repeated.

557 U.S. at 199; *see also supra* note 30 (“Terminating coverage under the act’s special provisions”).

36. *See supra* note 30.

37. *Id.* These requirements apply to “all governmental units within the geographical boundaries of the jurisdiction.” *Id.* Therefore, the criteria for bailout of the state must be established for every school district, town, city, or county within its boundaries. *Id.*

Any jurisdiction seeking “bailout” must inform the public, and any aggrieved party has the ability to intervene in the litigation. *Id.* After the court grants relief from preclearance, there is a

### B. Section 4 in the Courts

When the VRA was enacted in 1965, the Supreme Court immediately faced direct challenges to its constitutionality. In *South Carolina v. Katzenbach*,<sup>38</sup> the Court upheld the constitutionality of the VRA in its entirety.<sup>39</sup> The text of the coverage formula was defined in Section 4(b) of the Act. The Court explained that Congress used “reliable evidence of actual voting discrimination”<sup>40</sup> to determine the States and subdivisions that would be most affected by the remedies in the provision.<sup>41</sup>

The Court discussed how Congress determined which geographic areas had substantial evidence of voting discrimination in order to delineate the boundary between covered and uncovered jurisdictions.<sup>42</sup> By utilizing evidence of voting impropriety from the Department of Justice and the Civil Rights Commission, two characteristics were found that were later incorporated into the formula: “the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average.”<sup>43</sup> The Court determined that the coverage

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ten year “recapture” period. *Id.* For the duration of this period, the district court could reopen proceedings should the jurisdiction engage in any prohibited conduct. *Id.* The district court will review the evidence and determine whether to reinstate coverage. *Id.*

38. 383 U.S. 301 (1966).

39. *Id.* at 337.

40. *Id.* at 329.

41. *Id.* Under the enumerated powers of the Fifteenth Amendment, Congress has the ability to remedy the problem of voting discrimination. *Ex Parte Virginia*, 100 U.S. 339, 345–46. (“Whatever legislation is appropriate, that is, adapted to carry out the objects of the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.”).

42. 383 U.S. at 329.

43. *Id.* at 330. The Court outlined why these devices were important to the continued execution of the “evil” of voting discrimination: “Tests and devices are relevant to voting discrimination because of their long history as a tool of perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.” *Id.*

There were various configurations of tests and devices utilized by the legislatures in Southern states. MICHAEL J. KLARMAN, *THE SUPREME COURT AND BLACK DISENFRANCHISEMENT, THE VOTING RIGHTS ACT: SECURING THE BALLOT*, *supra* note 15, at 37–38. Disenfranchisement of African American voters took the form of complicated

formula was a permissible use of Congress' power because it was specific to and encompassed only those localities where egregious violations of voters' rights occurred.<sup>44</sup>

In *City of Rome v. United States*, the Court reaffirmed the use of the coverage formula.<sup>45</sup> The case arose when Rome, Georgia, was denied "bailout" under Section 4. The Court concluded that the entire state of Georgia must satisfy the requirements of Section 4 before the city could be removed from the preclearance requirement.<sup>46</sup> After recognizing the serious federalism implications of the VRA,<sup>47</sup> the Court allowed Congress's intrusion on the condition that the preclearance requirement was imposed only in response to some perceived harm.<sup>48</sup> It found this condition satisfied, in that the coverage formula placed only the jurisdictions with the most grievous track record of disenfranchisement of voters<sup>49</sup> under Department of Justice supervision.

The Court reaffirmed the use of the coverage formula's remedial mechanism in *Lopez v. Monterey County, California*.<sup>50</sup> Five Hispanic voters sued Monterey County alleging violation of Section 5 by

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registration requirements that allowed voting registrars, who were predominantly white, broad discretion. *Id.* These requirements also "disadvantaged illiterate[ ]" voters who were presumed to be predominantly black. *Id.* Secret-ballot laws forced voters to read and mark election ballots themselves, essentially functioning as literacy tests. *Id.*

Literacy tests were overwhelmingly adopted by most Southern states. These tests "disproportionately disqualified blacks even if applied fairly because of blacks' higher rates of illiteracy. But no one expected registrars appointed by white supremacist Democrats to impartially administer the tests." *Id.* Also, most of the tests included "understanding clauses" that allowed registrars to "enroll (white) illiterates who could understand a constitutional provision read to them." *Id.* Grandfather clauses exempted people who were eligible to vote before 1867 and their descendants from literacy tests. *Id.* Moreover, poll taxes employed by every Southern state disparately affected poor African Americans. *Id.* The Democratic all-white primaries excluded African Americans from the only significant Southern elections after 1890. *Id.*

44. 383 U.S. at 331.

45. 446 U.S. 156 (1980).

46. *Id.* at 200-01.

47. *Id.* at 201. Federalism becomes a concern when discussing disparate treatment of the states. Under the Constitution, each state is an equal sovereign that should be treated the same by the federal government. Therefore, a law treating one state differently than another will be strictly scrutinized to ensure it is narrowly tailored to meet its goal.

48. *Id.* at 202.

49. *Id.*

50. 525 U.S. 266 (1999).

failing to obtain federal preclearance before consolidation of the judicial district. The Court recognized that the VRA’s purpose was to subject continuous violators of voting rights to federal scrutiny and shift the burden of proof of proper behavior to the state legislature, otherwise known as the “perpetrators of the evil.”<sup>51</sup> The Court found the bailout provision significant<sup>52</sup> because it limited the extent of the Department of Justice’s control over the affairs of the states that had successfully complied with the preclearance requirement.<sup>53</sup> The Court determined that in order to remedy the consequences of intentional racial discrimination, Congress must properly define the wrongs committed.<sup>54</sup>

### C. Coverage Formula Repealed

The most recent Supreme Court decision concerning the VRA involved a challenge in 2013 to the statute’s constitutionality arising in Shelby County, Alabama, a covered jurisdiction. Instead of seeking bailout to implement proposed voting changes, the county sued the Attorney General in the District Court of the District of Columbia “seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional.”<sup>55</sup> The county also sought a permanent injunction against the enforcement of these provisions.<sup>56</sup> The district court, ruling against the county, found that the “evidence before Congress in 2006 was sufficient to justify reauthorizing [Section] 5 and continuing the [Section] 4(b) coverage formula.”<sup>57</sup>

The Court of Appeals for the D.C. Circuit affirmed the decision of the district court.<sup>58</sup> The court analyzed the constitutionality of Section 4(b) by assessing evidence of successful Section 2 litigation with the

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51. *Id.* at 291.

52. *Id.* at 284.

53. *Id.*

54. *Id.* at 294–95 (“Essential to our holdings in *Katzenbach* and *City of Rome* was our conclusion that Congress was remedying the effects of prior *intentional* racial discrimination. In both cases, we required Congress to have some evidence that the jurisdiction burdened with preclearance obligations had actually engaged in such intentional discrimination.”).

55. *Shelby Cnty v. Holder*, 133 S. Ct. 2612, 2621–22 (2013).

56. *Id.*

57. *Id.* at 2622.

58. *Shelby Cnty, Alabama v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

effect of Section 5. The court concluded that the statute continued “to single out jurisdictions in which discrimination is concentrated.”<sup>59</sup> Ultimately, the Court of Appeals for the D.C. Circuit held that the coverage formula was constitutional.<sup>60</sup>

The Supreme Court granted certiorari, and instead of the deferential treatment toward the findings developed by Congress in relation to the bill, the majority, led by Chief Justice John Roberts, disparaged the continued reliance on the existing formula to determine the covered jurisdictions subject to the preclearance requirement. The Supreme Court granted certiorari<sup>61</sup> and did not show deference toward the original Congressional findings. Instead, the majority, led by Chief Justice John Roberts, disparaged the continued reliance on the existing formula to determine the covered jurisdictions subject to the preclearance requirement.<sup>62</sup> The Court held that in light of the disparate treatment of certain states under Section 5 and the improving conditions for minority voting and voters in the South, the burdens that the Act imposes were not justified by the current needs.<sup>63</sup> The majority insisted that the South had changed measurably because voter turnout and registration rates approach parity today. As such, they argued that blatant discriminatory violation of federal law is highly unlikely, and used the fact that minority candidates hold more political offices today than ever before to buttress their position.<sup>64</sup> In order to ground Section 4(b)’s coverage formula in current conditions, the Court

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59. *Id.* at 883.

60. *Id.* at 884.

61. *Shelby Cnty.*, 133 S. Ct. 2612.

62. Chief Justice Roberts stated, “Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.” *Id.* at 2629 (citing *Katzenbach*, 383 U.S. at 308, 315, 331; *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 201, 129 S. Ct. 2504 (2009)). The majority was concerned that a more fundamental problem still remained: “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.” *Id.*

63. *Id.* at 2622 (“Departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”) (quoting *Northwest Austin*, 557 U.S. at 203).

64. *Id.* at 2631 (citing *Northwest Austin*, 557 U.S. at 203).

reasoned that current statistics updated with information from the last forty years must be used to establish which jurisdictions could be added or removed from the statute.<sup>65</sup>

In a forceful dissent, Justice Ruth Bader Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, argued that though the country has made gains in the fight against discrimination, Congress determined in 2006 that the preclearance formula remains justifiable today.<sup>66</sup> The dissent explained that terminating the preclearance formula would be a disservice to the struggle for voter protection.<sup>67</sup>

The dissent focused on the success of the coverage formula in eliminating barriers to voting and argued that these barriers could quickly resurface if the preclearance remedy is eliminated.<sup>68</sup> This argument is supported by the fact that covered jurisdictions subject to the preclearance requirement continue to submit changes to voting laws that are subsequently declined by the Attorney General.<sup>69</sup> The dissent explained that because minority voting numbers have increased, dilution of minority voting strength is an ever-present threat.<sup>70</sup> These efforts to reduce the impact of minority votes are described as “second-generation” barriers to minority voting.<sup>71</sup> These

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65. “There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly would not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40 year old data, when today’s statistics tell an entirely different story.” *Id.* at 2630–31.

66. 133 S. Ct. at 2632. According to the dissent, Congress’s overwhelming findings in the record supported the conclusion that preclearance provisions should continue in force. *Id.* (“Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated.”)

67. *Id.* at 2633 (“[T]he Court today terminates the remedy that proved to be best suited to block [voting] discrimination. The [VRA] has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA’s requirement of federal preclearance for all changes to voting law in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.”)

68. *Id.* at 2634 (“[T]he Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens.”)

69. *Id.*

70. “It soon became apparent that guaranteeing equal access to the polls would not suffice to root out the other racially discriminatory practices such as voting dilution.” *Id.* at 2634. Justice Ginsburg explained that when voting dilution is adopted with a discriminatory purpose, this severs the right to vote as exactly as the denial of access to the ballot box. *Id.*

71. *Id.* at 2635. Voter dilution is the most serious problem, as second generation discriminatory practices intended to marginalize minority voters are no longer as blatant. *Id.*

“second-generation” barriers include, but are not limited to voter identification laws,<sup>72</sup> at-large voting in cities with a sizable black minority,<sup>73</sup> and discriminatory annexation.<sup>74</sup>

Justice Ginsburg also described Congress’s enormous task to reauthorize the VRA’s temporary provisions in 2006.<sup>75</sup> The record compiled by Congress revealed evidence of continued discrimination, which lead Congress to conclude that oversight by the federal government was still needed to protect vulnerable populations of minority voters.<sup>76</sup> The dissent objected to the majority’s lack of deference to Congress’s judgment in exercising its power to enforce the constitutional guarantees of equal protection under the law and equal access to the ballot.<sup>77</sup> This evidence compiled by Congress, the dissent explained, supported “its decision to reauthorize the coverage formula in [section] 4(b).”<sup>78</sup> A study conducted by Ellen Katz,<sup>79</sup> in

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72. See *infra* notes 83, 84.

73. At-large voting (as opposed to a system of district-by-district voting) in a city with a large amount of minorities would dilute minority votes because the overall majority would control the election of each member of the city council, effectively eliminating the potency of concentrated minority votes. *Id.* In an at-large election system, voters throughout an entire political jurisdiction can vote for all seats up for election. In this system, only a small majority of the voters can control 100 percent of the seats. LIGHT, *supra* note 10, at 55 (“Assuming whites are in the majority, and racial bloc voting exists—in which white voters usually vote as a bloc to defeat candidates of color—black votes in an at-large system continually will be submerged by white votes.”).

74. 133 S. Ct. at 2635. Annexations have the potential to seriously impact voting in two ways. First, annexations change boundary lines of a city, enlarging the number of eligible voters inside the city and leaving other voters outside. These annexations can lead to inclusion of whites or exclusion of minorities from voting. Second, annexations dilute the weight of the votes of individuals who lived within boundaries of the city prior to the annexation. Consequently, if the property annexed has a sizeable white population, the annexation will result in a dilution of minority votes. Amanda K. Baumle, Mark Fossett & Warren Waren, *Strategic Annexation Under the Voting Rights Act: Racial Dimensions of Annexation Practices*, 24 HARV. BLACKLETTER L.J. 82 (2008).

75. 133 S. Ct. at 2635. The reauthorization process started in October 2005 and continued until July 2006. *Id.* The House and the Senate held extensive hearings to consider various amendments to the VRA. *Id.* The reauthorization was passed in the House by a vote of 390 yeas to 33 nays. *Id.* The bill was subsequently read and debated in the Senate where it passed by a vote of 98 to 0. *Id.* President Bush signed the bill a week after it was passed, “recognizing the need for ‘further work . . . in the fight against injustice,’ and calling the reauthorization ‘an example of our continued commitment to a united America where every person is valued and treated with dignity and respect.’” *Id.* (citations omitted).

76. *Id.* at 2636.

77. *Id.*

78. *Id.* at 2642.

particular, helped Congress learn of the continuing need for preclearance coverage for jurisdictions previously subject to the requirement.<sup>80</sup> The study analyzed the judicial decisions under Section 2 of the VRA and showed that though covered jurisdictions account for less than one-quarter of the nation's population, they account for 56 percent of successful Section 2 litigation.<sup>81</sup> The dissent urged that in order for the VRA to continue to be effective, Section 4 protections must remain in place.<sup>82</sup>

## II. UPDATING THE PRECLEARANCE COVERAGE FORMULA

### A. *Aftermath of Shelby County*

After the Court struck down Section 4(b) of the VRA in *Shelby County*, various states that previously constituted covered jurisdictions under Section 4 attempted to immediately implement radical changes to their voting laws. Policy changes, such as voter identification laws, movement and fluctuation in the number of polling places, and reduction in the number of days or hours people can vote, represent new second generation barriers to voting that threaten to diminish the power of minority voters.<sup>83</sup>

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79. Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2005). This report examined the Section 2 suits between 1982 and 2004. Justice Ginsburg explained Congress's approach to the study was to compare the Section 2 lawsuits in covered and uncovered jurisdictions to provide an "appropriate yardstick for measuring differences between" the two types of jurisdictions. 133 S. Ct. at 2642. The rate of successful Section 2 lawsuits should be the same in both covered and uncovered jurisdictions if the difference in the risk of voting discrimination had disappeared. However, the Katz study found that racial discrimination still remained concentrated in the jurisdictions subject to the preclearance requirement. *Id.*

80. 133 S. Ct. at 2643. "Because preclearance occurs only in covered jurisdictions and can be expected to stop the most obviously objectionable measures, one would expect a *lower* rate of successful [section] 2 lawsuits in those jurisdictions if the risk of voting discrimination there were the same as elsewhere in the country." *Id.* at 2643 n.6.

81. Spencer Overton, *Shelby County v. Holder: Voting discrimination remains concentrated in covered states*, SCOTUSBLOG (Feb. 14, 2013), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-voting-discrimination-remains-concentrated-in-covered-states/>

82. 133 S. Ct. at 2651.

83. Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), <http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html>.



Within twenty-four hours after the decision was handed down by the Court, five of the nine covered states moved forward with voter identification laws.<sup>84</sup> Less than two hours after the decision, Texas's voter identification law immediately took effect.<sup>85</sup> Considered the most restrictive in the country, the Texas voter identification law requires proof of citizenship and residency in the state in order to cast a ballot.<sup>86</sup> To qualify to vote, a citizen has the option of presenting one of the seven forms of identification outlined in the statute.<sup>87</sup> Voters who are unable to provide proper identification cast provisional ballots and must return to the polling place within six days of the date of the election to provide photo identification.<sup>88</sup>

Supporters of voter identification laws state that the laws are needed to combat potential voter fraud.<sup>89</sup> Opponents of the law contend that voter fraud is extremely rare, and the laws, passed primarily by predominantly Republican state legislatures, were intended to suppress the Democratic turnout, since those most likely to be without state-approved photo identification are members of

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84. Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, PBS FRONTLINE (June 26, 2013), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/with-voting-rights-act-out-states-push-voter-id-laws/>. The states that were previously subject to section 4(b) preclearance requirements include Texas, South Carolina, Alabama, Virginia, and Mississippi. *Id.*

85. *Statement by Texas Attorney General Greg Abbott*, TEX. ATT'Y GEN. (June 25, 2013), <https://www.oag.state.tx.us/oagnews/release.php?id=4435>. Before the *Shelby County* decision, the three-judge panel in the District Court for the District of Columbia unanimously agreed to block the law in August of 2012. The court ruled that Texas had "failed to show that the statute would not harm the voting rights of minorities in the state" and that the "cost of obtaining a photo ID would fall most heavily on African American and Hispanic voters." The panel determined that "among residents who lack other forms of acceptable identification, the burden of obtaining a state voter [identification] certificate would weigh disproportionately on minorities living in poverty, with many having to travel as much as 200 to 250 miles round trip." Sari Horowitz, *Texas voter-ID law is blocked*, WASH. POST (Aug. 30, 2012), [http://www.washingtonpost.com/world/national-security/texas-voter-id-law-struck-down/2012/08/30/4a07e270-f2ad-11e1-adc6-87dfa8eff430\\_story.html](http://www.washingtonpost.com/world/national-security/texas-voter-id-law-struck-down/2012/08/30/4a07e270-f2ad-11e1-adc6-87dfa8eff430_story.html).

86. TEX. ELEC. CODE ANN. § 63.0101 (West 2011).

87. *Id.*

88. TEX. ELEC. CODE ANN. § 65.0541 (West 2011). This is inconvenient and burdensome for voters who have already taken time off of work to come to their polling place to vote and may not realistically have time to return there within six the proper form of identification.

89. Rick Lyman, *Pennsylvania Voter ID Law Struck Down as Judge Cites Burden on Citizens*, N.Y. TIMES (Jan. 17, 2014), [www.nytimes.com/2014/01/18/us/politics/pennsylvania-voter-id-law-struck-down.html?\\_r=0](http://www.nytimes.com/2014/01/18/us/politics/pennsylvania-voter-id-law-struck-down.html?_r=0).

groups that traditionally vote Democratic.<sup>90</sup> These forms of ID are often expensive and difficult to obtain for low-income Americans.<sup>91</sup>

Research from University of Massachusetts at Boston sociologist Keith Bentele and political scientist Erin O'Brien<sup>92</sup> “shows that tougher voter ID laws continue to crop up in GOP-led states where minority and lower-income voter turnout has increased.”<sup>93</sup> The new study asserts that the stricter laws associated with photo identification, proof of citizenship requirements, registration restrictions, absentee ballot voting restrictions, and reductions in early voting are “part of a GOP strategy aimed at keeping minority and low-income voters away from the polls, despite the fact that widespread voter impersonation is virtually nonexistent.”<sup>94</sup> These are “uncomfortable truth[s] with potentially uncomfortable consequences that should rattle anyone who cares about voting participation and fairness.”<sup>95</sup>

### *B. Congressional Response*

On January 16, 2014, three members of the House of Representatives proposed the first bipartisan legislation to attempt to update the coverage formula repealed by the Supreme Court.<sup>96</sup> The Sesenbrenner-Conyers-Leahy Bill,<sup>97</sup> or the “Voting Rights

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90. *Id.*

91. Childress, *supra* note 84 (“It requires a passport—the cheapest of which is \$55—or a copy of your birth certificate, which not all Americans, particularly older ones, have.”).

92. See Keith Bentele & Erin O'Brien, *States with higher black turnout are more likely to restrict voting*, WASH. POST (Dec. 17, 2013, 2:59 PM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/12/17/states-with-higher-black-turnout-are-more-likely-to-restrict-voting/> (“Ultimately, recently enacted restrictions on voter access have not only a predictable partisan pattern but also an uncomfortable relationship to the political activism of blacks and the poor.”).

93. *Voter ID study confirms what we already feared*, DALL. MORNING NEWS (Jan. 3, 2014), <http://www.dallasnews.com/opinion/editorials/20140102-editorial-voter-id-laws-remain-troublesome.ece>.

94. *Id.*

95. *Id.*

96. This discussion focuses solely on the provisions of the proposed amendment that update Section 4, the preclearance coverage formula. This note does not focus on the other updates to Section 3 and Section 5 provided in the proposed bill.

97. Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014).

Amendment Act of 2014,” provides a new pathway to determine which jurisdictions are subject to the preclearance requirements of the VRA.

First, in Section 4(b)(1), the bill separates the application of the coverage formula into statewide requirements for coverage and political subdivision requirements for coverage.<sup>98</sup> A state will become a covered jurisdiction if during the previous fifteen years there were five or more voting rights violations, where at least one violation was committed by the state itself.<sup>99</sup> The preclearance requirement will apply to a political subdivision if either (1) three or more violations occurred in the subdivision in the last fifteen years; or (2) at least one violation occurred in that time frame coupled with “persistent, extremely low”<sup>100</sup> minority voting turnout. If Section 4(1) applies, the coverage formula would be in effect for that jurisdiction for a period of ten years.<sup>101</sup>

The bill also outlined the effects of declaratory judgment relief provided by the courts.<sup>102</sup> If the state or political subdivision obtains a valid and final judgment through this mechanism, the preclearance requirement will no longer apply.<sup>103</sup> This provides another form of the bailout provisions provided in the current form of the VRA. However, coverage will still apply to the jurisdiction if a voting rights violation occurs after the declaratory judgment is issued.<sup>104</sup>

The proposed amendment also provides guidelines to determine whether a “voting rights violation” occurred.<sup>105</sup> A “voting rights violation” occurs when in a final judgment which has not been reversed on appeal, any court of the United States determines a denial or abridgement of any right of any citizen to vote occurred. A violation also occurs when declaratory judgment relief is denied

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98. *Id.* § 3.

99. *Id.*

100. *Id.* “Persistent, extremely low minority turnout” is defined in section 4(4) of the proposed bill. Section 4(4) outlines criteria to determine the applicability the preclearance requirement for both the general and federal elections. *Id.* § 4(4).

101. *Id.* § 4(2)(A).

102. *Id.* § 4(2)(B).

103. *Id.*

104. *Id.*

105. *Id.* § 4(3).

under the preclearance requirement by the District Court of the District of Columbia or the Attorney General successfully objects to the declaratory judgment proceeding.

This provision also provides that the fourth potential “voting rights violation,” the Attorney General’s interposed objection, must not be based on a voting procedure requiring voters to produce identification before they can cast their ballot.<sup>106</sup> The proposed bill attempts to not penalize the states based on the Attorney General’s potential challenges to certain state voter identification laws. The “measure would not allow Department of Justice objections to a voter ID law to count as one of the five violations against a state.”<sup>107</sup>

### III. MEETING THE GOALS OF THE VOTING RIGHTS ACT

#### A. *Dealing with Second Generation Barriers*

The dissent in *Shelby County* correctly argued for the continued need for covered jurisdictions under section 4(b) of the VRA. By repealing Section 4(b), the Court has shifted the burden back to the Department of Justice to prosecute each potential voting violation individually under Section 2.<sup>108</sup> If left unchecked, second generation barriers to minority voting, will dilute the power of these votes. The laws passed and implemented by previously covered jurisdictions mere hours after the decision was made are clear indications of the ever-present threat of minority voter suppression. In particular, the federal government has already found that the laws in Texas and Mississippi have had the effect of limiting voting rights of minority voters.<sup>109</sup>

Laws imposing stricter requirements on voters produce unnecessary hardship and delay for voters, which ultimately

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106. *Id.*

107. *A much-needed fix for the Voting Rights Act*, DALL. MORNING NEWS (Jan. 24, 2014), <http://www.dallasnews.com/opinion/editorials/20140124-editorial-a-much-needed-fix-for-the-voting-rights-act.ece>.

108. *See supra* note 18.

109. Horowitz, *supra* note 85; Emily Le Coz, *Mississippi Voter ID Law Put On Hold For Election Following Federal Review*, REUTERS (Oct. 2, 2012), [http://www.huffingtonpost.com/2012/10/03/mississippi-voter-id-law\\_n\\_1934121.html](http://www.huffingtonpost.com/2012/10/03/mississippi-voter-id-law_n_1934121.html).

decreases voter turnout and participation. In Texas's law, for example, though no voter will be turned away from the polls if the identification provided does not match the voter database, she will either need to sign an affidavit at the polling location attesting to her identity or cast a provisional ballot.<sup>110</sup> In Dallas, Texas alone, there are 195,000 people who potentially faced difficulty at the polls as a result of having names that were not updated in the voter registration database for the 2014 elections.<sup>111</sup> Therefore, on election day, each of these voters faced increased wait times in already long lines to vote, or they were forced to cast provisional ballots and asked to return to the polling place within six days to verify their identity.<sup>112</sup> If they did not return, their votes were not be counted.<sup>113</sup> These procedures only reduce voter access to the ballot box and create more problems than they solve.<sup>114</sup>

### *B. The Proposed Amendment*

The proposed "Voting Rights Act Amendment of 2014" provides a meaningful framework to develop a new coverage formula that will revive protections for potentially vulnerable populations of voters.

The proposed amendment attempts to find the proper balance between covered and uncovered jurisdictions, and the new formula provides boundaries to deduce which areas had substantial evidence of voting discrimination by using evidence of impropriety obtained by the Department of Justice. This perspective was specifically

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110. Manny Fernandez, *Party Predictions Differ in Texas on Impact of Voter ID Law*, N.Y. TIMES (Feb. 5, 2014), [http://www.nytimes.com/2014/02/06/us/party-predictions-differ-in-texas-on-impact-of-new-voter-id-law.html?\\_r=0](http://www.nytimes.com/2014/02/06/us/party-predictions-differ-in-texas-on-impact-of-new-voter-id-law.html?_r=0).

111. Tom Benning, *Fallout from voter ID law continues in Dallas County*, DALL. MORNING NEWS (Feb. 1, 2014), <http://www.dallasnews.com/news/metro/20140201-fallout-from-voter-id-law-continues-at-dallas-county.ece>.

112. Fernandez, *supra* note 110.

113. Manny Fernandez, *Texas ID Law Keeps Hundreds of Ballots From Being Counted*, N.Y. TIMES (Nov. 18, 2014), <http://www.nytimes.com/politics/first-draft/2014/11/18/texas-id-law-keeps-hundreds-of-ballots-from-being-counted/>.

114. "While not perfect, the old system in Texas was built upon the proper premise that voter laws should encourage voter turnout—not discourage entire segments of would-be voters. Until the passage of the new voter photo ID law, Texans could show, among other documents, a utility bill as proof of identity allowing them to cast a ballot." DALL. MORNING NEWS, *supra* note 93.

advocated for by the Supreme Court in *Katzenbach*.<sup>115</sup> The proposed law would only place specific jurisdictions that committed five or more voting violations in the last fifteen years under the purview of the preclearance requirement. The remedy can be properly applied because the wrongs committed are clearly outlined in the sections of the proposed provision that define “violations” and “low voter turnout.”<sup>116</sup>

If the new formula were to be legally challenged, it would also meet the requirements for constitutionality outlined in *City of Rome* and *Lopez*.<sup>117</sup> First, with the new formulation, the preclearance requirement would be imposed in response to the perceived harm of voting violations. Second, it would only subject states with five or more voting rights violations to the preclearance requirements. Finally, it would provide a “bailout” provision to assist states in limiting the control that the Department of Justice has over their affairs.

In accordance with the Court’s recommendations in *Shelby County*, the proposed Amendment to the Act would impose burdens that are justified by the current needs. Current statistics were used to determine which jurisdictions would be added or removed from preclearance coverage.<sup>118</sup> With the new formula, only Georgia, Louisiana, Mississippi, and Texas would be placed back on the preclearance requirement. This points to the strength of the specifically tailored provision. The decreased number of covered jurisdictions reflects the improving conditions for minority voting and voters in the South described by Chief Justice Roberts and the majority in *Shelby County*.

However, the proposed amendment still does not resolve the heart of the problem. Even with these measures, the Department of Justice will have to continue to devote numerous man-hours and will have to expend taxpayer money to effectively prosecute each new violation

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115. See *supra* note 44.

116. According to the Court in *Shelby County*, Section 4(b) is unconstitutional because the ends no longer justify the means. The formula is no longer narrowly tailored enough to justify disparate treatment of states. However, the formulations proposed in the amendment have a higher chance of meeting this requirement because of their specificity in application.

117. See *supra* notes 48, 54.

118. See *supra* note 65.

by formerly covered jurisdictions. Justice Ginsburg's dissent in *Shelby County* recounts the history of suppression of minority voters. Each time the Department of Justice combats a new form of voting restriction, states find different forms to replace it. This was the essential function of the VRA: it provided the Department of Justice with an efficient means to provide protection for minority voters.

Another problematic feature of the proposed amendment is the number of violations a state or political subdivision must commit in order to become subject to the preclearance requirement. A reduction to the number of violations required from five violations to three violations for states would be more in line with the legislative intent of the VRA, because three violations is enough to show a consistent pattern of disenfranchisement of voters. Three violations should be enough to prove the jurisdiction's intent to suppress the power of the minority vote.

The proposed amendment also fails to address the second-generation barriers that threaten minority voting rights. The provision defining "voting rights violations" must include the voter identification bills introduced in multiple states. More subtle restrictions, such as reductions in the number of polling places, restrictions on absentee ballots, and proof of citizenship requirements, must also be addressed in order to fully protect the "electoral access among the socially marginalized."<sup>119</sup>

Finally, the proposed formula does not cover enough jurisdictions to provide an effective remedy for voting rights violations. A better formula would account for changes that have occurred over the last forty years that the VRA has been in place, while still recognizing that the previous formula stopped much of the egregious behavior by covered states. Resting the new coverage formula on the number of violations within the previous fifteen-year period does little to acknowledge the success of Section 4(b). Therefore, Congress needs an alternate strategy to resolve the problem left by the Supreme Court in *Shelby County*.

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119. Bentele and O'Brien, *supra* note 92, at 1103.

### C. A New Coverage Formula

Congress must structure the new preclearance formula around the number of successful Section 5 objection determinations interposed by the Department of Justice over a twenty-year period<sup>120</sup> plus the number of dismissals of voting changes by the District Court of the District of Columbia.<sup>121</sup> To become a covered jurisdiction, the state or political subdivision should be required to have three or more of the objections and dismissals over the twenty-year period.<sup>122</sup> Three violations demonstrate a pattern to intentional disenfranchise of minority voters. The successful objections by the Attorney General and the dismissals by the District Court of the District of Columbia effectively show that a jurisdiction's proposed change to their voting laws would negatively impact minority voters.

This formula would better protect voters than the one contained in the recently proposed amendment for three key reasons. First, jurisdictions must establish that the proposed voting change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group].”<sup>123</sup> This formula has the built-in benefit of already screening for a discriminatory purpose in voting practices. It would effectively subject only those states with the most egregious numbers of violations to the preclearance requirement.

Second, increasing the effective date to twenty years and decreasing the number of allowable rejections and dismissals from five to four, would include more of the previously covered

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120. The twenty-year period would extend from 1984–2014. This extends the period advocated in the proposed bill by five years. The Department of Justice provides data describing objections, continuances, and withdrawals on its website. *Section 5 Objection Letters*, U.S. DEP'T OF JUSTICE, [www.justice.gov/crt/records/vot/obj\\_letters/index.php](http://www.justice.gov/crt/records/vot/obj_letters/index.php)

121. The judicial determinations by the three-judge panel in the District Court of the District of Columbia are also provided on the Justice Department website. *Section 5 Declaratory Judgment Actions*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/caselist\\_ddc.pdf](http://www.justice.gov/crt/about/vot/sec_5/caselist_ddc.pdf).

122. Political subdivisions and states should be required to have the same number of violations because the impact on the minority voters is the same whether the election takes place on the state or local level.

123. *Judicial Review of Voting Changes in About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/about.php](http://www.justice.gov/crt/about/vot/sec_5/about.php).



jurisdictions<sup>124</sup> and is therefore more in line with Congress's intent when they reauthorized the VRA in 2006 for another twenty-five year period. As supported by the study by Ellen Katz,<sup>125</sup> jurisdictions that were subject to the previous preclearance formula committed more voting rights violations than those that were not.<sup>126</sup> A jurisdiction will not always be subject to preclearance as there will be an opportunity to bailout of the preclearance requirement.

Third, this formula would ground the coverage formula in "current conditions" to meet current needs, as required by the Court in *Shelby County*.<sup>127</sup> This would shift the burden back to the offending states and political subdivisions to prove the law is not racially discriminatory, and it would provide protection against second-generation barriers in jurisdictions where minority voters need it most.

#### IV. CONCLUSION

The recent push by previously covered jurisdictions to implement restrictive voting laws in the wake of the *Shelby County* decision should press Congress to mend the broken VRA. Restrictive voting laws systematically restrict the ability of minority voters to cast their ballot. Though the proposed amendment provided by a bipartisan group of members of the House of Representatives provides a good starting point, it does not go far enough to fix the problem. The formula must include a larger number of previously covered jurisdictions and better address second-generation barriers to voting. While it may be a step in the right direction, stronger measures are needed in order to effectuate the overall intent of the VRA—to protect socially marginalized voters from disenfranchisement.

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124. Under the new formula proposed, Texas, Virginia, South Carolina, Mississippi, Louisiana, Georgia, Arizona, Alabama, and parts of North Carolina and New York would be subject to preclearance coverage based on the Justice Department objections alone.

125. *See Shelby Cnty Ala.*, 113 S. Ct. at 2642.

126. *Id.*

127. *Id.* at 2631.