SHELBY COUNTY V. HOLDER: OUT WITH THE OLD & IN WITH THE NEW, TIME FOR A NEW FORMULA

Anissa Paredes*

I. INTRODUCTION

On August 6, 1965, President Lyndon B. Johnson signed into law the *Voting Rights Act of 1965* to fight the evil of intentional systematic racial voting discrimination in the South.[1] The South has been predominately known for discriminating against minorities, specifically African Americans, even though the Fifteenth Amendment outlawed voting discrimination as a part of the Reconstruction Acts.[2] Section 1 reads, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[3] However, southern states found ways to implement discriminatory racial practices, procedures, and laws to keep African Americans from voting,[4] often resulting in attacks against African Americans when they showed up to the voting polls.[5]

Stopping the evil of denying African Americans their constitutionally

* I would like to thank all of my friends and family who helped bring this paper to life. A special thanks to my supervising professor, Andrew Spiropoulos, for helping me through this process and giving me the encouragement to step outside the box, I really do appreciate it. I would also like to give thanks to those who have inspired me to continue the work of fighting for justice, you know who you are.

1. HISTORY.COM EDITORS, The Voting Rights Act of 1965, https://history.com/topics/black-history/voting-rights-act [https://perma.cc/V2RU-UX2L] (last updated June 6, 2019).

2. U.S. CONST. amend. XV, § 1.

3. *Id.*

4. HISTORY.COM EDITORS, supra note 1 (discussing the injustice African Americans experienced leading up the Voting Rights Act of 1965).

5. *Id.*

guaranteed right to vote[6] resulted in one of the most extraordinary pieces of legislation in history, *The Voting Rights Act of 1965* ("*VRA*"). "It is extraordinary because Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment."[7] The *VRA* truly is an extraordinary piece of legislation because it provides federal oversight over the states on a matter that is historically and traditionally reserved for the states—the state would have to get permission from the federal government *before* changing *any* voting or election laws.[8] The *VRA* was structured in a way that would "strike down restrictions to voting in all elections, federal, state and local, which have been used to deny Negroes the right to vote."[9]

The main provisions of the Act include sections 2, 3, 4(a), and 5. Together, these sections give the federal government authoritative power over the States' sovereign authority to create its own voting laws.[10] The *VRA* "call[s] for direct, federal intervention to register eligible voters and impose[s] criminal penalties for voter interference."[11] This bill was introduced to help enforce the Fifteenth Amendment because States were using any means necessary to deny persons of color the right to vote, and that is why it is one of the most important pieces of legislation in American history.[12]

After the signing of the Act, many southern states began to file suits challenging the constitutionality of the Act, each resulting in the Supreme Court upholding the Act.[13] States continued to challenge the constitutionality of the Act, not only in its entirety, but also particular provisions of the Act, specifically sections 4(b) and 5.[14] Together, these two sections subjected states and/or political subdivisions to preclearance requirements, which meant that if a state was found to be covered under section 4(b), per section 5, it would have to ask the federal government for

6. *Id*.

7. *Shelby Cty. v. Holder*, 570 U.S. 529, 593 (2013) (5-4 decision) (Ginsberg, J., dissenting).

8. *Id*. at 634-35.

9. *Transcript of the Johnson Address on Voting Rights to Joint Session of Congress*, N.Y. TIMES, March 16, 1965, at 30.

10. *Shelby Cty*., 570 U.S. at 536-38.

11. KEVIN J.COLEMAN, CONG. RESEARCH SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 12 (2015).

12. N.Y. TIMES, *supra* note 9, at 30.

13. *E.g.*, *Shelby Cty*., 570 U.S. at 538.

14. *Id*. at 538-39.

permission *before* changing *any* of its election or voting laws.[15]

It was not until 2013, in the landmark case *Shelby County v. Holder*, that the Court declared section 4(b) unconstitutional,[16] leaving the southern states free to enact election and voting laws *without* obtaining permission from the federal government.[17] In essence, this left section 5 inoperable since it governs section 4, but it has never been declared unconstitutional by the Court.[18] Since declaring the coverage formula in section 4(b) unconstitutional, Congress has neither created a new formula nor said anything about creating a new formula. This has left a big question in the legal community about whether or not Congress will create a new formula. It has also given legal scholars plenty of time to contribute their own ideas of whether or not there should be a new formula and if so, what it should entail.

In this Note, I will be discussing the *VRA*, its effects, and the decision of *Shelby County*. First, I will discuss the history and events leading up to the enactment of the *Voting Rights Act of 1965*, its main provisions, and the reauthorizations. Next, I will discuss the pre-*Shelby County* cases, which all challenged the *VRA* either in whole or in part, and discuss *Shelby County* itself. I will also discuss how *Shelby County* affected the covered jurisdictions and the jurisdictions' reaction to the decision. As stated before, there is no new coverage formula, but many legal scholars have contributed proposals for the new formula. I will discuss the legal scholars' proposals for a new coverage formula, ending with my own proposal for a new formula.

My formula, unlike many of the other legal scholars', is a combination of factors and conditions already studied by scholars, which determines which states become a covered jurisdiction. The factors and conditions include whether the jurisdiction has abridged or denied the right to vote; if the jurisdiction meets the criteria for the "bail in" provision; whether the state is involved in any section 2 litigation; and if there is evidence of "anti-Black stereotyping" with respect to restrictive legislation. This operates as a balancing test—when more of the factors and conditions are present in any given state or political subdivision, it is more likely than not that state or political subdivision is engaging in voter discrimination.

15. *Id.* at 537.
16. *Id.* at 557.
17. *Id.* at 592-93 (Ginsburg, J., dissenting).
18. *Id*. at 557 (Thomas, J., concurring).

II. HISTORICAL BACKGROUND

1. Before There Was Change, There Was Bloodshed.

For more than a century, African Americans living in the South were subjected to discrimination, particularly systematic voting discrimination.[19] African Americans were not allowed to vote prior to the Civil War,[20] but soon received what would hopefully be a ray of hope. After the Civil War ended, what is known as the *Reconstruction Amendments*—the Thirteenth, Fourteenth, and Fifteenth Amendments—were enacted to help end the discrimination of African Americans. Both the Fourteenth and Fifteenth Amendments gave African Americans the right to vote without being discriminated against, but the Fifteenth Amendment addresses voting specifically.[21] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[22] Although the Fourteenth Amendment's language is not as direct on the subject, the Court has consistently held that it prohibits discrimination on the basis of race.[23]

Despite the Fifteenth Amendment's intended purpose, African Americans still faced racial discrimination in voting even though Congress tried its best to allow African Americans to exercise their right to vote.[24] Caucasian Americans began using force, such as intimidation, harassment, threats, and even murder, to keep African Americans from going to the voting polls.[25] "[S]tates employed a variety of schemes to continue to prevent minorities from voting, including poll taxes, literacy tests, property qualifications, grandfather clauses, [and] 'white primaries' . . . ."[26] This systematic racial discrimination was even more problematic because the Fifteenth Amendment was enacted to give

19. Jon Greenbaum et al., Shelby County v. Holder*: When the Rational Becomes Irrational*, 57 HOW. L. J. 811, 813 (2014).

20. *Id.* at 815.

21. *Id.* at 815-16.

22. U.S. CONST. amend. XV, § 1.

23. Rogers v. Lodge, 458 U.S. 613, 616 (1982) (citing Whitecomb v. Chavis, 403 U.S. 124, 149 (1971)).

24. Greenbaum et al., *supra* note 19, at 813.

25. *Id*. at 816-17.

26. Michael James Burns, Note, Shelby County v. Holder *and the Voting Rights Act: Getting the Right Answer with the Wrong Standard*, 62 CATH. U. L. REV. 227, 230 (2012).

African Americans the right to vote—a right that had been on the books for almost a century.[27] Yet, states used their police powers to blatantly disregard a guaranteed constitutional right in order to keep African Americans from voting.[28]

However, not all hope was lost. On the brink of the Civil Rights Movement, activists began to speak out more aggressively about the discrimination African Americans faced, especially when it came to voting.[29] Actions by activists from the Civil Rights Movement "combined with legislation and some legal victories began to break down this generational assault on the right to vote."[30] This was only the start to breaking down hundreds of years of systematic discrimination, but it wasn not until the events of *Bloody Sunday* that prompted immediate attention to this travesty of racial discrimination.[31]

On March 7, 1965, in Selma, Alabama, civil rights activists John Lewis and Hosea Williams led a march with approximately 600 activists from their church, Brown Chapel AME, from Selma to Montgomery.[32] This march was in response to bloodshed a month earlier in Marion, Alabama, which resulted in hundreds of protesters being beaten by State Troopers— ultimately leading to the death of a young man who was trying to protect his mother from being beaten.[33] As Lewis, Williams, and the rest of the activists marched across the Edmund Pettus Bridge, they were faced with State Troopers and local county deputies armed with clubs, gas masks, and other weapons; however, they kept marching and were soon faced with bloodshed.[34]

Dr. Martin Luther King Jr. had met with President Lyndon B. Johnson *two* days prior to *Bloody Sunday* to discuss racial discrimination, namely voting rights legislation.[35] No one knew what was to come in the next couple days, but no matter how horrific and gruesome *Bloody Sunday* was, it "finally provided the long-needed impetus for sweeping federal

27. *Id*. at 227.
28. *Id*. at 231.
29. *Id*. at 231.
30. Greenbaum et al., *supra* note 19, at 816-17.
31. HISTORY.COM EDITORS, *supra* note 1.
32. Christopher Klein, *Remembering Selma's "Bloody Sunday"*, HISTORY (Mar. 6, 2015, last updated Aug. 30, 2018), https://www.history.com/news/selmas-bloody-sunday-50-years-ago [https://perma.cc/JL26-G9YE].
33. *Id.*
34. *Id.*
35. *Id.*

legislation."[36] After *Bloody Sunday*, President Johnson announced to the Nation that he would be sending a bill to Congress that "will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote."[37] That piece of legislation came to fruition becoming what is known as the *Voting Rights Act of 1965*.

2. The Change: The Voting Rights Act of 1965

The *Voting Rights Act of 1965*, or *VRA*, is one of the most historic and compelling pieces of legislation in American history. This Act has provided an avenue for hundreds of thousands of African Americans to actively participate in the political process. The *VRA* had a two-prong approach to address voting discrimination.[38] The first prong was a permanent national standard that applied remedial measures if a state or other subdivision discriminated based on race.[39] Some of these measures include: (1) prohibitions on the use of voting rules to abridge the right to vote based on race; (2) procedures for challenging pool taxes; and (3) criminal and civil penalties for interfering with rights guaranteed by the Act.[40] It also allowed the federal government and/or private persons to bring suits based on voting techniques or procedures or the effects of such technique or procedure used to intentionally discriminate on the basis of race.[41] This prong outlaws any kind of purposeful or intentional mechanisms used to keep persons of color from exercising their right to vote.

The second prong contained several provisions specifically aimed at those states and/or political subdivisions who had "the worst records of voting discrimination,"[42] which would be later recognized as "covered jurisdictions."[43] These provisions required:

36. Greenbaum et al., *supra* note 19, at 813.

37. Lyndon B. Johnson, U.S. President, *Special Message to the Congress: The American Promise*, PUB. PAPERS 283 (March 15, 1965).

38. Burns, Note, *supra* note 26, at 227.

39. *Id.* at 227.

40. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2, 3, 4(e), 6(a), 10(a)-(c), 11, 12(a)-(d), 13(b), 79 STAT. 437, 442-45 (1965).

41. Greenbaum et al., *supra* note 19, at 817.

42. *Id.* at 813.

43. *Id.* at 818.

> prohibition on the use of tests or devices as requisites to registering to vote or voting[, a] preclearance by the Attorney General or the United States District Court for the District of Columbia of ***any*** changes to voting laws or regulations[,] and the ability to appoint federal examiners to oversee registration and election activities.[44]

Only those states and/or political subdivisions that qualified as a covered jurisdiction would be subjected to the rigorous standards of preclearance, but which states qualify?

3. Covered Jurisdictions Under Section 4(b) and Preclearance Standard Under Section 5

Sections 4 and 5 are at the heart of the *VRA*. The goal of section 4(a) was to annihilate techniques, procedures, and/or devices that caused voter discrimination amongst minorities, hindering active participation in the political process.[45] Under section 4(b) of the original *VRA*, a state and/or political subdivision was considered a covered jurisdiction if: (1) less than fifty percent of its voting age residents were registered as of November 1, 1964, or they voted in the 1964 presidential election according to the United States Census Bureau; and (2) the jurisdiction employed a *test* or device for voting.[46] A *test* or device is defined as:

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.[47]

Literacy tests, grandfather clauses, white primaries, and many others are examples of *tests* or devices that would be barred by section 4(c). The coverage formula is *the most* important section of the *VRA*, because it

44. Burns, Note, *supra* note 26, at 232. (citing Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4(a)-(d), 5, 6(b), 7, 9, 13(a), 79 STAT. 437, 438-44 (1965)).

45. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 STAT. 437, 438 (1965).

46. Voting Rights Act of 1965, § 4(b).

47. Voting Rights Act of 1965, § 4(c).

specifically outlines the criteria for which states and/or political subdivisions would have to ask permission before trying to change *any* voting or election laws—the state would have to get *preclearance* under section 5.[48]

Due to the majority of voter discrimination occurring in the southern states, Congress somewhat *reverse engineered* the formula.[49] To do this, Congress started with enough "reliable evidence of actual voting discrimination" in a majority of the states and political subdivisions that would fall under this section.[50] They knew the *evil* was predominately in the South and when the formula began to mature it would come to include other states and political subdivisions that were at risk of possessing "a significant danger of the evil."[51] At the time it was enacted, Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and several political subdivisions in North Carolina were the first states to be covered jurisdictions.[52]

Once a state or political subdivision was considered a covered jurisdiction, it was subject to *preclearance* under section 5.[53] The preclearance requirement of section 5 prevented states and political subdivisions covered under section 4 from creating any new voting practices, qualifications, prerequisites, or standards that were different from those effective November 1, 1964.[54] If a state wanted to change its laws, it would have to submit its changes to the voting process conducted by the U.S. District Court for the District of Columbia, or the Department of Justice, where they determine whether the change has a discriminatory effect or purpose.[55] This was the federal government's way of monitoring the states' voting policies in order to prevent them "from circumventing the goal of expanded black registration and voting by simply enacting new disenfranchisement practices and procedures . . . ."[56] However, "unless and

48. *Id*.
49. Greenbaum et al., *supra* note 19, at 819.
50. South Carolina v. Katzenbach, 383 U.S. 301, 329 (1966).
51. *Id*.
52. THE UNITED STATES DEPARTMENT OF JUSTICE, *Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, (Aug. 6, 2015), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 [https://perma.cc/Y72N-S6PX] (listing the States and Political Subdivisions covered under §4(b)).
53. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 STAT. 437, 439 (1965).
54. *Id*.
55. Coleman, *supra* note 11, at 16-17.
56. *Id*. at 17.

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."[57]

4. "Bail Out" & "Bail In" Provisions

Congress was aware of the evil that encompassed most of the southern states, intending that sections 4(b) and 5 would only be temporary to overcome the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the [Fifteenth Amendment]."[58] Little did Congress know, these provisions would not be temporary; in fact, they would be amended and extended another 50 years. While Congress was creating the formula to determine who would be covered, they were also cognizant of "over inclusion" and were concerned that the formula was an inadequate way for determining intentional discrimination.[59]

The *bail out* provision provides that a state or political subdivision may *bailout* or be exempt from the preclearance requirements if they filed for a declaratory judgment in the U.S. District Court for the District of Columbia showing "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."[60] Once a state or political subdivision has become a covered jurisdiction, it could become exempt if it adhered to the requirements. However, this does not mean that states that were not covered at the beginning could not become a covered jurisdiction later.

Thus, Congress provided a means for federal courts to *bail in* jurisdictions that were not originally covered under section 4(b).[61] Section 3(c) of the *VRA* states that if:

> any proceeding [is] instituted by the Attorney General under any statute to enforce the guarantees of the [F]ifteenth [A]mendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have

57. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 70 STAT. 437, 439 (1965).
58. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).
59. Burns, Note, *supra* note 26, at 235.
60. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 STAT. 437, 438 (1965).
61. Greenbaum et al., *supra* note 19, at 819.

> occurred within [that] State or political subdivision the court . . . shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification . . . with respect to voting different from that in force . . . shall be enforced . . . .[62]

The *bail in provision* requires states that were not previously covered under the coverage formula to be subject to federal oversight if *any* violation of the Fifteenth Amendment was found.[63] This meant that if any state later used any test, device, or any other kind of practices or qualifications to keep persons of color from voting, the state would now be under the supervision of the federal government. States and political subdivisions were on alert that Congress was serious about combating systematic racial voting discrimination and that it was time for changes to be made permanently.

5. Re-Authorization of 1970, '75, '82, & '06

In 1970, Congress amended and reauthorized sections 4 and 5 of the *VRA* for another five years.[64] Additionally, the reauthorization included jurisdictions that:

> [o]n and after August 6, 1970 . . . any State or any political subdivision of a State which [] the Attorney General determines maintained on November 1, 1968, any test or device, and . . . the Director of the Census determines that less than fifty percent of the persons voting age residing therein were registered on November 1, 1968, or less than fifty percent of such persons voted in the presidential election of November 1968.[65]

The reauthorization would now cover new political subdivisions in New York, such as Kings County, Bronx County, and New York County as well as Monterey County and Yuba County in California.[66]

In 1975, the *VRA* was amended and reauthorized for an additional

62. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 STAT. 437, 437 (1965).
63. *Id.*
64. Voting Rights Act of 1970, Pub. L. No. 91-285, §§ 4, 5, 84 STAT. 314, 315(1970).
65. Voting Rights Act of 1970, § 4.
66. THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 52 (chart showing Bronx, King and New York County and Monterey and Yuba County became covered jurisdictions on March 27, 1971).

seven years to make permanent the ban against voting prerequisites.[67] These reauthorizations added jurisdictions in which "less than fifty percent of voting age residents were registered as of November 1, 1972, or voted in the November 1972 Presidential Election according to the Census Bureau and had employed a voting test or device."[68] It also added a provision that would protect language minorities.[69] Some states and/or political subdivisions were administering registration and other election information in English only in areas where the majority of the population spoke a different language.[70] This was another way to keep not only African Americans from voting, but all minorities from voting. After the reauthorization, Alaska, Texas, Arizona, several counties in Florida, Michigan, and South Dakota all became covered jurisdictions.[71]

The Bilingual Election Requirement or section 203 reads as follows:

> [N]o State or political subdivision shall provide registration or voting notices, forms, instructions, assistance or materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines . . . more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and . . . the illiteracy rate of such persons as a group is higher than the national illiteracy rate . . . .[72]

After this new section was added, it would be the last time Congress would make any changes to both sections 4 and 5.[73] Congress would go on to reauthorize the *VRA* for another 25 years in 1982,[74] and another 25 years in 2006.[75]

When the *VRA* was enacted, it caused major tension and disruptions to the South because states could no longer institute and carry out practices

67. Voting Rights Act of 1975, Pub. L. No. 94-73, 89 STAT. 400 (1975).
68. Greenbaum et al., *supra* note 19, at 821.
69. Burns, Note, *supra* note 26, at 234.
70. *Id.* at 234.
71. THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 52 (chart showing dates when the States became covered).
72. Voting Rights Act of 1975, Pub. L. No. 94-73, § 203(b), 89 STAT. 400, 403 (1975).
73. Burns, Note, *supra* note 26, at 234.
74. Voting Rights Act of 1982, Pub. L. No. 97-205, 96 STAT. 131 (1982).
75. Fannie Lou Hammer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat 577 (2006).

and procedures that would intentionally abridge African Americans' and other minorities' right to vote. A great deal of litigation ensued in the court system because states felt Congress was encroaching upon their authority to govern their own elections.[76] In 1966, *South Carolina v. Katzenbach* was the first case to challenge sections 4 and 5 of the *VRA*.

III. PRE-*SHELBY COUNTY*: FIRST ATTEMPT AT DESTROYING THE VRA

South Carolina was one of the first states to become a covered jurisdiction.[77] In *South Carolina v. Katzenbach*, South Carolina filed a bill of complaint against the Attorney General seeking a declaration that certain provisions of the *VRA* violated the Federal Constitution and an injunction against enforcement of these provisions.[78] South Carolina contended: (1) Congress had exceeded its powers by encroaching upon a power that has been reserved to the States by the Constitution; (2) the coverage formula in section 4 violates the principle of equality of states; (3) the Act denies Due Process by using an invalid presumption and bars judicial review of administrative findings; (4) the Act constitutes a forbidden retainer; (5) the Act impairs the separation of powers; and (6) section 5 violates Article III by allowing the district courts to render advisory opinions.[79]

The Court rejected all these arguments except the first one. The Court held that a state cannot be considered a *person* in the context of the Due Process Clause of the Fifth Amendment and, by no reasonable means of statutory interpretation, has the Court ever considered a state a person,[80] and the Court was not going to start. "The United States is not a 'person' . . . under the Civil Rights Act."[81] The Court continues that the Bill of Attainder Clause and the Separation of Powers Doctrine act as protections for individual persons or group of persons who are vulnerable to non-judicial determinations of guiltiness.[82] A state also cannot invoke the doctrine of *parens patriae* to bring these constitutional claims against the

76. U.S. CONST. art. 1, § 4, cl.1. (gives States the power to control their own elections).
77. THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 52 (chart showing the date South Carolina became covered).
78. South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).
79. *Id.* at 323.
80. *Id.* at 323-24.
81. United States v. Jackson, 318 F.2d 1, 8 (5th Cir. 1963) (citing 28 U.S.C.A. §1343).
82. *Katzenbach*, 383 U.S. at 324 (citing United States v. Brown, 381 U.S. 437 (1965)).

Federal government.[83] "It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof [and] . . . it is no part of [the State's] duty or power to enforce their rights [against] the federal government."[84]

The real question at heart here is whether Congress properly exercised its power under the Fifteenth Amendment in a suitable relation to the states, particularly South Carolina.[85] The Fifteenth Amendment's purpose was to ensure the federal government and its sister states deprived no one of the right to vote based on race, color, or previous condition of servitude—giving *all* citizens the guaranteed constitutional right to vote.[86] The Amendment's intended purpose coupled with prior case law and the doctrines of constitutional interpretation, point towards a fundamental principle. With respect to the powers reserved by the States, "Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting."[87]

According to the Department of Justice, voter discrimination "was pursuant to a widespread 'pattern or practice.'"[88] The numbers proved that the number of Blacks who were of age to register to vote only rose slightly between the years of 1954-1965—in Alabama it went from 14.2% to 19.4%, Louisiana from 31.7% to 31.8%, and Mississippi from 4.4% to 6.4%, while white voter registration was 50 percentage points ahead.[89] In Selma, there had been several years of litigation by the Department of Justice, and the federal court found two incidents of voting discrimination.[90] During this period Black registration went from 156 to 383, despite there being more than 15,000 Blacks of voting age.[91] This empirical data substantiates the claim that voter discrimination was prevalent in the South and something needed to be done.

The prior year, the Court ruled in *Carrington v. Rush* that "[s]tates have . . . broad powers to determine the conditions under which the right

83. *Id*.
84. Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923).
85. *Katzenbach*, 383 U.S. at 324.
86. U.S. CONST. amend. XV, § 1.
87. *Katzenbach*, 383 U.S. at 324 (emphasis added).
88. *Id.* at 312 (internal citations omitted).
89. *Id.* at 313.
90. *Id.* at 314.
91. *Id.* at 314-15.

of the suffrage may be exercised."[92] Yet, states have the ultimate power over their voting and election laws, but Congress has the power to override that authority when states are violating the Constitution. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[93]

Even more directly on point is section 2 of the Fifteenth Amendment. "The Congress shall have [the] power to enforce this article by appropriate legislation."[94] Including this section indicates Congress has the authority to make sure this article is carried out appropriately, and if not, they have the authority to create legislation to effectuate its intended purpose. "Congress is authorized to *enforce* the prohibitions by appropriate legislation [and s]ome legislation is contemplated to make the [Reconstruction A]mendments fully effective."[95] In this case, it's the *VRA*.

It is Congress' job to ensure:

> Whatever legislation is appropriate, [such as the *VRA*] that is, adapted to carry out the objects the 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.[96]

As such, the Court ruled against South Carolina upholding the constitutionality of the *VRA* and its challenged provisions—"[a]ccordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[97] After *Katzenbach*, states and political subdivisions continued to bring suits to federal court despite Katzenbach's defeat.

92. Carrington v. Rash, 380 U.S. 89, 91 (1965) (quoting Lassiter v. Northampton Election Bd., 360 U.S. 45, 50, *superseded by statute*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 STAT. 437 (1965)).

93. Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

94. U.S. CONST. amend. XV, § 2.

95. *Ex parte* Virginia, 100 U.S. 339, 345 (1879) (emphasis in original).

96. *Id.* at 345-46.

97. South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

Allen v. State Board of Elections—a case that consolidated four claims, three from Mississippi and one from Virginia—involved the passing of new voting laws and regulations.[98] Under section 5, no state shall pass any voting qualification or prerequisite, standard or practice that would deprive a person of his or her right to vote unless the state complies with the requirements for approval.[99] All four of these claims sought declaratory judgment that the Amendments were not enforceable until the state complied with section 5 requirements.[100]

The first claim involved a 1966 amendment to the Mississippi Code of 1942, which would change the board of supervisors to be elected at large by qualified electors of the county, instead of each of the five districts electing one board member.[101] Two counties adopted the amendments but the others did not.[102] The second claim, another amendment to the Mississippi Code of 1942, proposed that in several specified counties the Superintendent of Education shall be appointed by the Board of Education.[103] Before the proposal of the new amendment, the Superintendent was either elected or appointed by the public.[104] The third claim, another amendment to the Mississippi Code of 1942, made several revisions to the requirements of candidates running in general elections.[105]

The revisions are summarized as follows: (1) no person that has voted in a primary election could afterwards be on the ballot as an independent candidate running in the general election; (2) instead of having 40 days to file a petition to run in general election, independent candidates now have 60 days; (3) the number of qualifying electors' signatures needed for the independent qualifying petition has substantially increased; and (4) the new provision would require each qualified elector who signs the independent qualifying petition must personally sign the petition including their polling precinct and county.[106] The Mississippi District Court dismissed all three cases ruling none of the amendments were within the scope of section 5.[107]

98. Allen v. State Bd. of Elections, 393 U.S. 544, 550 (1969).
99. *Id*. (internal citations omitted).
100. *Id.* at 551.
101. *Id.* at 550.
102. *Id.*
103. *Id.* at 551.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 552.

The fourth case, involving a bulletin that was issued by the Virginia Board of Elections, would change a provision of the Code of Virginia of 1950 to allow any voter to write on the ballot the name of the candidate in his own handwriting.[108] The Code provides exceptions for those with physical incapacities such as blindness and other disabilities, but it does not provide an exception for those who are illiterate.[109] Appellees in the Mississippi cases contended that the amendments did not fall within the scope of section 5 because that section only covered those enactments that said who may register to vote, but not rules about the qualifications of candidates or state decisions about which offices shall be elective.[110]

The Court rejected this argument based on precedent, on the legislative history of the *VRA*, and by applying a broad application of the meaning of section 5.[111] "[T]he Act . . . recognize[s] that voting includes 'all action necessary to make a vote effective' . . . [w]e are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the § 5 approval requirements."[112] The Court ultimately remanded the cases back to the lower courts to issue an opinion dictating that section 5 is applicable, and both Mississippi and Virginia must obtain section 5 approval requirements before enacting the amendments.

Similarly, in *Georgia v. United States*, the state submitted a reapportionment plan for Georgia's House of Representatives to the Attorney General who objected to the plan.[113] The plan changed the number of districts from 118 to 105 and increased the number of multimember districts from 47 to 49, causing the county lines to be crisscrossed—31 of 49 multimember districts and 21 of 56 single-member districts irregularly crossed county boundaries.[114] All of this caused a majority of the district boundaries to change, which altered the number of representatives per district.[115] When the state submitted this plan to the Attorney General, he determined that based on the change in the number of districts, county boundaries, and many other things, he was "unable to conclude that the plan does not have a discriminatory racial effect on

108. *Id.* (internal citations omitted).
109. *Id.* (internal citations omitted).
110. *Id.* at 564.
111. *Id.* at 566.
112. *Id.* at 566 (internal citations omitted).
113. *Georgia v. United States*, 411 U.S. 526, 527-29 (1973).
114. *Id.* at 528.
115. *Id*. at 528-29.

voting."[116]

The Legislature submitted another version of the reapportionment plan, but the Attorney General objected to it stating the plan did not correct the issues from the first submission and could not be approved.[117] The Legislature made clear it would not take action to enact a new plan, and the Attorney General filed suit.[118] The State argued that section 5 did not apply to the reapportionment plan because it did not fall within the scope of the section, and the "plan [did] not constitute [any] change[s] from procedures 'in force or effect on November 1, 1964.'"[119]

The Court rejected this argument contending that the real question in this case was whether the plan had potential for diluting the value of the African Americans' vote.[120] Using the *Allen* framework, "[t]he legislative history on the whole supports the view that Congress intended to reach any State enactment which altered the election law of a covered State in even a minor way."[121] With that rationale, the Court held that section 5 does apply to reapportionment plans and, before the plan could be enacted, it must be approved subject to the requirements of section 5.

Over the next several years, the Court continued to see cases challenging the provisions of section 5[122]—each time the Court would uphold section 5 and dismiss the case. The Court also saw states or political subdivisions challenging the constitutionality of the reauthorizations of the *VRA.*[123] The Court continued to see cases for the next 60 years, but in 2009 it saw one case unlike the ones it had seen before. This 2009 case involving a municipal utility district in Northwest Austin, Texas, was the first time the Court began to question the constitutionality of the *VRA.*

The municipal utility district located in Austin, Texas, had an elected board subjecting it to the requirements of section 5—they needed

116. *Id.* at 529-30.
117. *Id*. at 530.
118. *Id*.
119. *Id.* at 531 (internal quotations omitted).
120. *Id.* at 534.
121. Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969).
122. *See generally* Beer v. United States, 425 U.S. 130 (1976), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorizations and Amendments Act of 2006, Pub. L. No. 109-246, 120 STAT. 577 (2006); Reno v. Bossier Par. Sch. Bd., 520 U.S. 471 (1997).
123. *See generally* City of Rome v. United States, 446 U.S. 156 (1980), *superseded by statute*, Voting Rights Act of 1982, Pub. L. No. 97-205, 96 STAT. 131 (1982); Lopez v. Monterey Cty., 525 U.S. 266 (1999); Georgia v. United States, 411 U.S. 526 (1973).

preclearance before changing any laws regarding the elections.[124] The district was governed by a five-member board, elected for staggered terms serving four years.[125] They did not register their voters, but they were responsible for the elections; however, Travis County had the ultimate control.[126] The State of Texas was a covered jurisdiction,[127] making the district subject to the provisions of section 5, even though there had never been a trace of any evidence of racial discrimination pertaining to voting in the municipal district.[128] The district filed suit in the District Court for the District of Columbia, under the *bail out* provision of the *VRA* arguing that, if they were not qualified for bail out, then section 5 was unconstitutional.[129]

The District Court dismissed these claims under the statute that the municipal district was not considered a state or political subdivision because the district was not within the meaning of the terms[130] "counties, parishes and voting-registering subunits."[131] The District Court also stated that section 5 was constitutional because "Congress . . . rationally concluded that extending section 5 was necessary to protect minorities from continued racial discrimination in voting [and] the 2006 Amendment qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting."[132] The Court disagreed with this definition of state and political subdivision.

Looking at the general sense of the word, the district is a *political subdivision* because a political subdivision is defined as "[a] division of a state that exists primarily to discharge some function of [the] local government."[133] The district was created under Texas law and has the power of government involving utilities and natural resources.[134] Technically speaking, the district is a *political subdivision* of the state, but political subdivision has its own definition under the statute.[135]

124. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 196 (2009).
125. *Id*. at 200.
126. *Id*. at 199.
127. THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 52 (chart showing Texas as a covered jurisdiction).
128. *Holder*, 557 U.S. at 196.
129. *Id*. at 200-01.
130. *Id*. at 201.
131. Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F.Supp. 2d 221, 232 (2008).
132. *Id.* at 283.
133. *Political subdivision*, BLACK'S LAW DICTIONARY (10th ed. 2014).
134. *Holder*, 557 U.S. at 206.
135. *Id.*

"'[P]olitical subdivision' shall mean 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."[136] This definition would be the controlling definition because it is part of the statute; however, this case presents a different issue.

The *bail out* provision cannot be read in isolation from the rest of the statute because the scope and precedent of the *VRA* requires a wider reading of the provision.[137] The definition in section 14(c) of the *VRA* does not apply to every time *political subdivision* is used in the *VRA*.[138] "[O]nce a State has been designated for coverage, § 14(c)(2)'s definition of political subdivision has no 'operative significance in determining the reach of § 5.'"[139] Based on previous decisions, the statutory definition of *political subdivision* does not apply to the use of the term every time it is used in the *VRA*.[140] "[T]he statutory definition does not constrict the scope of preclearance required by § 5"[141]—the district is a political subdivision and is eligible to *bail out* of the preclearance requirement.[142]

The district's other issue in the case was the constitutionality of the *VRA*, but the Court did not reach a decision regarding that claim by deciding not to address it. However, Chief Justice Roberts, writing for the majority, expressed serious concerns about the constitutionality of the *VRA* and was doubtful about the need to have the stringent requirements of section 4.[143] Chief Justice Roberts spoke about how things have started to improve since the enactment of the *VRA*:

> Some of the conditions that we relied upon in upholding . . . *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South [such as v]oter turnout and registration rates now approach[ing] parity. Blatantly discriminatory evasions of federal decrees are rare. And minority

136. Voting Rights Act of 1965, Pub. L. No. 89-110, § 14(c)(2), 79 STAT. 437, 445 (1965).
137. *Holder*, 557 U.S. at 207.
138. *Id*.
139. Dougherty Cty., Ga. Bd. of Educ. v. White, 439 U.S. 32, 44 (1978) (quoting United States v. Board of Comm'rs of Sheffield, 435 U.S. 114, 126 (1978)).
140. *Holder*, 557 U.S. at 207.
141. *Id.* at 208.
142. *Id*. at 211.
143. *Id.* at 203-05.

candidates hold office at unprecedented levels.[144]

This language indicates that the *VRA* has done its job in helping to eliminate racial discrimination in the South and has helped elevate minorities to hold public office.

He goes on further to say that just because the *VRA* has done its job in helping improve the evil it was intended to combat, that alone is not enough to justify the continued need for the preclearance requirements.[145] "It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs."[146] This language is powerful and critical because perhaps Chief Justice Roberts is acknowledging that there is no longer a need for the requirements due to the improvements in the South. The burden the *VRA* places on those states or political subdivisions is heavy, so it must be justified by extenuating needs to prevent the fundamental principle of equal sovereignty.[147]

Chief Justice Roberts also emphasizes the fact that all states enjoy equal sovereignty,[148] but there are times when "[t]he doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared[; however,] a 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."[149] States enjoy the right to be free equally, yet the *VRA* subjects certain states and their political subdivisions to a statute, leaving other states free to change their voting and election laws as they may so choose. The *VRA*'s intended purpose was to combat systematic racial voting discrimination and to enforce the constitutionally guaranteed right to vote.

The *VRA* is criticized by Chief Justice Roberts that the evil that section 5 was meant to combat may no longer just be in those jurisdictions that were *singled out* to be precleared[150] before changing any of their voting laws.

The statute's coverage formula is based on data that is now more

144. *Id*. at 202. (citing H. R. REP. NO. 109-478, at 12-18).
145. *Id.*
146. *Id.* at 203.
147. *Id.*
148. *Id*. (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).
149. *Id*. (quoting South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966)).
150. *Id.*

> than 35 years old, and there is considerable evidence that it fails to account for current political conditions. . . . The racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide.[151]

This evidence supports Chief Justice Roberts' view that there may not be a need for the preclearance section anymore. This was the first time the Court expressed criticism and doubt about the need for the preclearance requirement and even suggested it was unconstitutional. After *Northwest Austin Municipal Utility*, the Court would again be faced with the question of the constitutionality of section 5, but this time the Court would answer the question in a different way causing a drastic and compelling change in history.

IV. THE CASE THAT CHANGED THE GAME

1. Shelby County v. Holder

Two years after *Northwest Austin Municipal Utility*, Shelby County, a county in Alabama, filed for declaratory judgment in the District Court of the District of Columbia, that both sections 4(b) and 5 of the *VRA* were unconstitutional and filed a permanent injunction against its enforcement.[152] The district court ruled against Shelby County, upholding the Act by ruling that Congress could have amended the provision prior to its reauthorization and finding adequate evidence to support reauthorizing sections 4(b) and 5. Shelby County appealed the decision.

When the Court of Appeals for the District of Columbia Circuit heard the case, they affirmed the district court's decision by reviewing the record extensively, considering all of the evidence in front of them.[153] The D.C. Circuit concluded that section 5 was still necessary,[154] but when it came to section 4, "the evidence for singling out the covered jurisdictions was 'less robust' and that the issue presented 'a close question.'"[155] However, looking at all the evidence of successful section 2 suits and the effects section 5 has had in deterring discrimination, the D.C. Circuit ruled that

151. *Id*. at 203-04.
152. Shelby Cty. v. Holder, 570 U.S. 529, 539 (2013).
153. Shelby Cty. v. Holder, 679 F.3d 848, 862-63 (D.C. Cir. 2012).
154. *Id.* at 873.
155. *Id.* at 879.

the statute "continue[d] to single out the jurisdictions in which discrimination is concentrated" making the sections valid.[156]

Several years prior in *Northwest Austin Municipal Utility*, Chief Justice Roberts expressed his doubt about the need for sections 4 and 5 and criticized the constitutionality of both sections; however, he denied considering the constitutional argument without addressing it. But when *Shelby County* filed for certiorari arguing that the sections were unconstitutional, the Court granted the writ.[157] This time the Justices were presented with the question of whether or not sections 4(b) and 5 of the *VRA* were unconstitutional. "Striking down an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform.'"[158] This was one of the reasons why the Court decided not to address the issue in *Northwest Austin Municipal Utility*, but this time the Court changed its mind.

Writing for the majority, Chief Justice Roberts begins by reiterating how much things have changed since the *VRA*'s enactment nearly 50 years ago.[159] When Congress was debating the 2006 reauthorization, it said "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices."[160] Furthermore,

> in some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters [and] there have been "significant increases in the number of African-Americans serving in elected offices" . . . approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.[161]

Congress was aware of the changes that resulted from sections 4(b) and 5 and the impact that those sections had made on the Nation thus far.

156. *Id.* at 883.
157. *Shelby Cty*., 570 U.S. at 542 (2013).
158. *Id*. at 556 (quoting Blodgett v. Holden, 275 U.S. 142, 147-48 (1927)).
159. *Id*. at 547.
160. Fannie Lou Hammer, Rosa Parks, and Coretta Scott King Voting Rights Act Amendments of 2006, Pub. L. No. 109-246, § 2(b)(1) 120 STAT. 577 (2006).
161. *Shelby Cty*., 570 U.S. at 547 (quoting H. R. REP. NO. 109-478, p. 12, 18 (2006)).

When looking at the data collected from the Census Bureau, it shows an increase in voter registration when comparing 1965 to 2004.[162] The Court has given credit to the changes the *VRA* has caused in the South, and it is fully aware that all the problems have not been cured and there are still some issues.[163] The question is whether or not the current coverage formula in section 4(b) is constitutional with respect to the current conditions of the nation.[164]

The statute's "'current burdens' must be justified by 'current needs' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'"[165] When the formula was first created, it did just that—it looked at the cause (discriminatory tests) and effects (low voter registration and turnout) and created a remedy that would solve the issue in those jurisdictions that exhibited both indicators.[166] Today, that is not the case because the formula is based on data that is over 50 years old and practices that have been abolished for several decades.[167] States could have been divided into two different groups in the 1960s: (1) those who had a recent history of voting tests, low voter registration and turnout; and (2) those who did not possess these characteristics.[168]

The formula was based on these two distinct groups, but targeted the group that showed signs of voting discrimination; however, the nation can no longer be divided into these two groups[169] due to the changes in the South and Congress' reauthorization in 2006. When looking at the current conditions and whether a preclearance was *still* needed, Congress ignored the significant changes that occurred from 1965 to 2006. Because of the *VRA*, voting tests were abolished, disparities in voter registration and turnout were almost non-existent, and African Americans were holding elected office positions at an all-time high rate.[170] Yet, Congress ignored this and reauthorized the *VRA*, focusing *only* on the data that related to problems from decades ago[171] instead of using the new data that was

162. *Id*. at 548 (2013).
163. *Id.* at 548-49.
164. *Id.* at 550-51.
165. *Id*. at 550-51 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).
166. *Id*. at 550.
167. *Id.* at 551.
168. *Id.*
169. *Id*.
170. *Id.* at 553.
171. *Id*.

produced by the Census Bureau.

This was the most fundamental problem created by Congress, the Court says, because it "did not use the record it compiled to shape a coverage formula grounded in current conditions. . . . instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."[172] The formula has no relationship to the current needs of the nation in regard to racial voter discrimination—the *current burdens* are not justified by the *current needs* and are not sufficiently related to the problem it targets. This piece of legislation is like no other, and the Court has long recognized the uniqueness the statute has to offer.[173] This is significant and probative because "the Act was 'uncommon' and 'not otherwise appropriate,' but was justified by 'exceptional' and 'unique' conditions."[174]

Those *exceptional* and *unique* conditions are no longer relevant because the *VRA* has been proven to eliminate some of the conditions that justified the initial need for the coverage formula—in *Northwest Austin Municipal Utility*, Chief Justice Roberts expressed his concerns about the constitutionality of the *VRA*, particularly section 4(b).[175] Congress had the opportunity, before the 2006 reauthorization, to assess if there was still a need for the formula, and if so, update the formula based on the current needs of the nation; however, it did not assess the need for the formula.[176] Due to Congress' "failure to act [it] leaves [the Court] with no choice but to declare § 4(b) unconstitutional [and t]he formula . . . can no longer be used as a basis for subjecting jurisdictions to preclearance."[177]

When the Court declared section 4(b) unconstitutional, it stated Congress could create a new formula based on the *current needs* of the Nation, but that it would only be a "prerequisite to a determination that exceptional conditions still exist [to] justify[]"[178] the need for the formula, and "an extraordinary departure from the traditional course of relations between the States and the Federal Government."[179] In ruling section 4(b) unconstitutional, the Court did not declare section 5 unconstitutional; in fact, it did not rule on section 5 at all, but by declaring section 4(b)

172. *Id.* at 554.
173. *Id.* at 555.
174. *Id*. (quoting South Carolina v. Katzenbach, 383 U.S. 301, 334-335 (1966)).
175. *Id*. at 556.
176. *Id.* at 557.
177. *Id*.
178. *Id*.
179. *Id*. (quoting Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 501-502 (1992)).

unconstitutional it made section 5 inoperable.[180] Without the covered jurisdiction, there is no application of section 5 needed. "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[181]

The *Voting Rights Act of 1965* is one of this Nation's most compelling and historic pieces of legislation to be passed, especially during a time in our country when hatred was embedded in almost every aspect of life. Almost 50 years later, the Roberts Court struck down the provision that helped ensure African Americans and other minorities carry out their constitutionally guaranteed right to vote. After the decision was rendered, things changed instantly—for some it was a victory, but for the majority, it was a loss that was hard to sustain.

2. The Aftermath

After *Shelby County* was decided, those states that were previously covered under section 4(b) began to enact laws that would not have been passed if the Court would not have declared section 4(b) unconstitutional. Things instantly started to change, and some states wasted no time enacting laws that were either objected to by the Attorney General or laws that did not stand a chance from the beginning.

Legal scholars debated the effects of *Shelby County* and how it could affect voting going forward. The decision could result "in a system that will less effectively adjudicate claims of discrimination and ensure that deserving jurisdictions can avoid federal oversight."[182] Sections 4(b) and 5 gave potential plaintiffs an avenue to properly challenge a state's or its political subdivisions' discriminatory practices. That avenue has been eliminated, forcing them to result to section 2 suits while the state, or those defending the law, continue to protect the law from the federal government's oversight, despite the increase in section 2 cases and *bail in* proceedings.[183] The purpose of section 2 is to "outlaw[] voting practices and procedures that have the effect of depriving voters of the equal ability to participate in the political process and elect candidate of choice."[184] This

180. *Id.* at 557.
181. *Id*.
182. Steven R. Morrison, *The Post*-Shelby County *Game*, 16 BERKELEY J AFR.-AM. L. & POL'Y 236, 246 (2014).
183. *Id.*
184. Michael R. Dimino, Shelby County, Alabama v. Holder*: Must Congress Update*

is the only protection left for voting rights.

This decision could lead to two dangerous *stocks*: more discrimination and oversight by the federal government.[185] If voting discrimination is occurring, the federal government could curtail it by overseeing procedures and practices to ensure it does not have a discriminatory effect. This oversight is necessary in the voting system, but there must be some balance in order to prevent it from leading to more discrimination.[186] It is possible to have "excessive discrimination and excessive oversight. . . . [The preclearance rule] . . . generally achieved correct results (discriminatory rules were rejected, other rules were accepted) . . . the pre-*Shelby County VRA* operated to balance discrimination against oversight."[187]

Some may call the effects of *Shelby County* a tragedy[188] or a catastrophe, but this is more of a setback than anything. The portions that were held to be unconstitutional were the

> most congruent and proportional to the reality of voting rights and minimized the law's impact on covered jurisdictions. . . . [resulting in] more instability, higher litigation costs . . . greater discrimination . . . excessive federal oversight, and ultimately, a new closer-fit *VRA* that will have to address both pre-*Shelby County* . . . and discrimination resulting from [its] decision.[189]

V. IS THERE A NEED FOR A NEW COVERAGE FORMULA?

1. Evidence of a New Formula

Chief Justice Roberts wrote in both *Northwest Austin Municipal Utility* and *Shelby County* that "'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'"[190] Since the formula

the Voting Rights Act Coverage Formula for Preclearance?, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 53, 55-56 (2013).

185. Morrison, *supra* note 182, at 246.

186. *Id.*

187. *Id*.

188. *Id.* at 250.

189. *Id*.

190. Shelby Cty. v. Holder, 570 U.S. 529, 550 (2013) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

has been declared unconstitutional, Congress has not created a new formula or even tried to revamp the old formula. "Congress may draft another formula based on current conditions [but it] is an initial prerequisite to a determination that exceptional conditions still exist justifying such an 'extraordinary departure from the traditional course of relations between the States and the Federal Government.'"[191] Thus the question remains: Is there a need for a new formula, and if so, what should it be?

After *Shelby County* came down, southern states wasted no time enacting voting laws that would not have passed pre-*Shelby County*. For example, in 2011, then-Governor of Texas Rick Perry signed into law SB 14, which greatly restricted the types of ID's that were acceptable in order to cast a ballot to vote.[192] Instead of presenting a valid form of ID, this new law would require voters to bring an unexpired picture ID from a list of seven acceptable forms—if you did not bring an acceptable form of ID, you were not allowed to cast a vote.[193] Texas filed suit under section 5 preclearance requirements in the District Court for the District of Columbia to get permission to enforce this law, but the Court objected to its enforcement because Texas was unable to prove the law would not discriminate against minority voters.[194]

The Court reasoned:

> [U]ncontested record evidence conclusively shows that the implicit costs of obtaining SB 14-qualifying ID will fall most heavily on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas live in poverty, [concluding the bill] is likely to lead to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[195]

191. *Id*. at 557 (quoting Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 500-501 (1992)).

192. *The Effects of* Shelby County v. Holder, BRENNAN CENTER FOR JUSTICE (Aug. 6, 2018), https://www.brennancenter.org/analysis/effects-shelby-county-v-holder [https://perma.cc/PR3F-JF9D] (explaining how Texas responded to the decision of *Shelby County*).

193. *Id.*

194. *Id.*

195. *Texas v. Holder*, Brennan Center for Justice (Mar. 12, 2012), http://www.brennancenter.org/legal-work/texas-v-holder [https://perma.cc/7RD6-H8BY]

Allowing the law to be enacted would suppress the minority vote and circumvent sections 4(b) and 5 of the *VRA*. Within hours of the *Shelby County* decision, the Attorney General of Texas stated that the "voter ID law will take effect immediately [and] redistricting maps passed by the Legislature may also take effect without approval from the federal government."[196] Texas was one of the first states to immediately implement laws that would have a *retrogressive effect*, but it was not the only one.

North Carolina, a state in which multiple political subdivisions were subject to sections 4(b) and 5, enacted one of the most restrictive bills since the ruling in *Shelby County*.[197] The bill would impose stricter ID requirements, eliminate same-day registration, reduce early voting, restrict pre-registration, end annual voter registration drives, and eliminate the authority of county boards of elections to keep the polls open for another hour past the closing time.[198] Ultimately, this bill was struck down and the Court concluded it violated section 2 of the *VRA* because the bill targeted "African Americans with almost surgical precision."[199] *Shelby County* did not have any effect on section 2 of the *VRA* because section 2 is applied nationally.

Georgia followed suit by enacting laws that would not have been passed pre-*Shelby County*. The County of Augusta wanted to change its local elections from November, when the general elections are held, to July.[200] Since Georgia was a covered jurisdiction, it had to comply with section 5, but it was denied by the Attorney General because changing the time of the local elections would have a "disproportionate effect on [African American] voters."[201] After the decision, it was reported that the bill was under consideration again, and within the next year, the county

(quoting Press Release by Gregg Abbott, Tex. Attorney Gen. (June 25, 2013).

196. BRENNAN CENTER FOR JUSTICE, *supra* note 192.

197. *Id.* (explaining how North Carolina changed its voting laws).

198. *Id.*

199. *Id.* (quoting N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied*, North Carolina v. N.C. State Conf. of NAACP, 137 S. Ct. 1399 (2017)).

200. Harry Baumgarten, Shelby County v. Holder's *Biggest and Most Harmful Impact May Be on Our Nation's Smallest Towns*, CAMPAIGN LEGAL CENTER (June 20, 2016), https://campaignlegal.org/update/shelby-county-v-holders-biggest-and-most-harmful-impact-may-be-our-nations-smallest-towns [https://perma.cc/CQ8L-LGLR] (explaining what happened in Augusta, Georgia).

201. *Id.*

board moved the local elections to July.[202] Before *Shelby County*, the county would not have been able to pass this law, as they tried and failed, but when the law went into effect, those who opposed it quickly filed suit. The suit was later dismissed because Georgia and others are no longer subject to the preclearance requirements—they do not need to receive permission from the federal government before acting.[203]

2. Proposals by Legal Scholars

The actions of southern states sparked debate among legal scholars about whether there should be a new formula, and if so, what should it be. One scholar suggests using the *bail out* provision as the new formula.[204] This provision is very beneficial because it operates to cover only those jurisdictions that should be covered and benefits those that should not be covered.[205] Congress has also expressed how successful this provision has been, stating the provision "illustrates that: (1) covered status is neither permanent nor [overbroad]; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so."[206] This provision essentially operates the exact same way as redrafting a new formula because it would allow jurisdictions that have exiled voter discrimination to be discharged of any preclearance requirements.[207]

Furthermore, the Court did not rule section 5 unconstitutional,[208] so it would be a great mechanism to help fight voter discrimination.[209] But there must be a coverage formula to use the preclearance requirement, thus the

202. *Id.*

203. Sandy Hodson, *City Wins Lawsuit Over Change in Election Date for Local Offices*, THE AUGUSTA CHRONICLE (May 13, 2014, 5:39 pm), https://www.augustachronicle.com/news/government/elections/2014-05-13/city-wins-lawsuit-over-change-election-date-local-offices [https://perma.cc/5XNJ-76BY] (explaining what happened in Augusta, Georgia, in regard to the voting laws).

204. Travis Huehlefeld, Article, *Currently Not Current: How Current Needs Still Justify Current Burdens*, 5 HOU. L. REV. 11, 18 (2014).

205. *Id.* (citing H.R. REP. NO. 109-478, at 25 (2006) (jurisdictions have complete control over whether or not they are covered and if they are, they have power to do so)).

206. H.R. REP. NO. 109-478, at 25 (2006).

207. Huehlefeld, Article, *supra* note 204, at 18.

208. Shelby Cty. v. Holder, 570 U.S. 529, 557 (2013) ("We issue no holding on § 5 itself, only on the coverage formula.").

209. Huehlefeld, Article, *supra* note 204, at 21.

bailout provision.[210] This provision would satisfy Chief Justice Roberts' *current burdens and must be justified by current needs*[211] because the factors to determine if a jurisdiction should be *bailed out* would also determine if a jurisdiction should be covered.[212] The factors are as follows:

> (a) a discriminatory test or device [was] used; (b) a court found the jurisdiction has denied or abridged the right to vote; (c) federal election examiners have been assigned to the jurisdiction; (d) the subjurisdictions within the jurisdiction has not complied with Section 5; (e) a Section 5 judgment has been issued against the jurisdiction; or (f) the jurisdiction has not eliminated all discriminatory voting procedures, engaged in efforts to eliminate intimidation and harassments of persons exercising the right to vote, and engaged in efforts to provide opportunities for registration and participation by minority citizens.[213]

Any jurisdiction satisfying these factors will meet the *current needs* methodology because it would show that the jurisdiction still embodies discriminatory practices and procedures in voting, justifying the need for federal oversight,[214] i.e., a coverage formula.

It has also been suggested that using the *bail in* provision as another new coverage formula is a way to retain a jurisdiction and make the jurisdiction subject to section 5.[215] However, it could be a bit problematic because the only time the *bail in* provision is triggered is when there is a lawsuit in which the court finds evidence of intentional discrimination.[216] Unless the Department of Justice intervenes, there could be negative features resulting on a case-by-case basis.[217] This could place a huge financial burden on plaintiffs and increase the complexity of the case, which worsens the plaintiff's position because there are a limited number

210. *Id.*
211. *Shelby Cty*., 570 U.S. at 550 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).
212. Huehlefeld, Article, *supra* note 204, at 21.
213. *Id.* at 21-22 (quoting Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(c), 79 STAT. 437, 438-39 (1965)).
214. *Id.* at 22.
215. *Id*.
216. Travis Crum, Note, *The Voting Rights Acts Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L. J. 1992, 1997 (2010).
217. Brief of Amicus Curiae the American Bar Ass'n in Support of Respondent at 15-21, Shelby Cty. v. Holder, 570 U.S. 529 (2013) (No. 12-96).

of attorneys who have the time and experience to litigate the case.[218] Despite the negatives, the *bail in* provision could serve as the new formula until Congress drafts another one, or it could be used to curtail the discrimination that still persists today.

Other scholars have suggested we use a number of *current conditions* to help determine which jurisdictions should be subject to section 5.[219] There are three main approaches to link coverage to geographic variation in: (1) section 2 litigation, using it "as a proxy for unconstitutional discrimination";[220] (2) "minority political incorporation, as measured by voter registration[,] turnout rates [and] election of minority candidates";[221] and (3) "minority population size and racially polarized voting."[222] Using these current conditions as a way to determine who is subject to section 5 is helpful because they each "directly addres[s] forms of discrimination."[223] Doubt has been expressed about whether these conditions pose a relationship to subjecting a jurisdiction to section 5.

Basing coverage on minority voter turnout-registration and elections would be unwise because these are cues of discriminatory results rather than intentional discrimination.[224] It could also be evidence of discriminatory intent, but the Court is critical of result based tests.[225] In order to use a result based test as a determinative factor of discriminatory intent, there must be some significant evidence showing a state is handling elections in an unusual and unjustified way.[226] This is difficult to show and most of the time these occurrences are very rare.[227] Using the history of a state's section 2 violations as a proxy could also cause issues because "there is no necessary or consistent relationship between the probability of litigant success and the frequency of legal violations."[228]

The success of section 2 cases varies depending on the number of

218. *Id.*
219. Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CALIF. L. REV. 1123, 1130 (2014).
220. *Id.* at 1130-31.
221. *Id.* at 1130-31.
222. *Id.*
223. Huehlefeld, Article, *supra* note 204, at 22.
224. Elmendorf & Spencer, *supra* note 219, at 1131.
225. *Id.* at 1131.
226. *Id*.
227. *Id*.
228. *Id*. at 1132-33 (citing Adam B. Cox & Thomas J. Miles, *Documenting Discrimination*?, 108 COLUM. L. REV. SIDEBAR 31 (2008)).

plaintiffs and defendants, the available legal resources, and political incentives for litigation and settlement claims.[229] Political parties and unions that are significantly invested in how a legislative district is designed depends on the *VRA* because it is their only remedy to challenge these districts.[230] This is problematic because these all are taken into account when bringing section 2 suits, making it difficult to use it as a proxy for discriminatory intent. Racially polarized voting and minority population size could be used as a basis for the new formula because there is some logical relationship to racial discrimination in voting.[231]

Basing coverage on demographics alone poses a sensitivity issue because some demographic majorities are satisfied with minorities having a substantial amount of power.[232] Adding racial polarization to the formula would only pose an issue when racial minorities and majorities differ on policy and/or partisan issues when the minority is big enough politically to have an impact and when the majority has strong political incentives to change the rules in order to curtail the minority vote.[233] This is also difficult to pinpoint because a challenger would have to establish motive to prove that what the states are doing is in fact racially discriminatory. These groups could circumvent the issue by saying the states are attacking their political view, which "does not transgress the Constitution's race discrimination norms" making this a weak causal connection.[234]

Similar to the *current condition* methodology, scholars have also suggested using *risk factors* or *anti-Black stereotyping*[235] as a way to be included in the coverage formula. In 2008, two nationwide surveys were

229. Elmendorf & Spencer, *supra* note 219, at 1133.

230. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630-645 (2002).

231. Elmendorf & Spencer, *supra* note 219, at 1134. *See generally* Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385 (2010); Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. FORUM 205 (2013); Morgan Kousser, *Gutting the Landmark Civil Rights Legislation*, REUTERS BLOG (June 26, 2013), http://blogs.reuters.com/great-debate/2013/06/26/gutting-the-landmark-civil-rights-legislation/ [https://perma.cc/J8DJ-VTNE].

232. Elmendorf & Spencer, *supra* note 219, at 1134.

233. *Id*.

234. *Id.* at 1135.

235. Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO. L. REV. 99, 112 (2015); Elmendorf & Spencer, *supra* note 219, at 1173 (anti-Black stereotyping correlates to increased proposal or passage of voter restrictions).

given consisting of questions about the work ethic, trustworthiness, and intelligence of various racial groups—this tested "the intensity of anti-Black stereotypes among non-Black respondents in each state."[236] "If a measure of racial attitudes is associated with more legislative activity in a state, that would bolster the case that racialized motives may be a contributing factor to the passage of restrictions."[237] In other words, racial attitudes that indicate anti-Black stereotypes are linked to those states that produce more restrictive legislative activity and vice versa.

3. My Own Proposal: A Mixture of Factors & Conditions

Each of these proposals present intellectual insight into what the new coverage formula should be and why it should be that way. The proposals also discuss the issues that could result from using one methodology over another. With this in mind, I suggest using a combination of the methodologies previously discussed as a new way to start determining which jurisdictions should be covered.

Chief Justice Roberts wrote in *Northwest Austin Municipal Utility*, the "coverage formula raise[d] serious constitutional" concerns[238] because it was "based on decades-old data and eradicated practices."[239] The new formula must also pass the "'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets'"[240] test. By mixing some of the factors outlined above, I believe it is a start to passing this heightened review.

Using the *bailout* provision is a great way to meet the *current burdens must be justified by current needs* test because the factors to determine if a jurisdiction should be *bailed out* would also determine if a jurisdiction should be covered.[241] However, some of the elements of the provision are irrelevant to the *current needs* of the nation. Discriminatory tests and devices have been abolished,[242] so there is no need for the element anymore. Instead, if a court found the jurisdiction has denied or abridged

236. Vandewalker & Bentele, *supra* note 235, at 112.
237. *Id.*
238. Northwest Austin Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009).
239. Shelby Cty. v. Holder, 570 U.S. 529, 551 (2013).
240. *Id.* at 551 (citing *Holder*, 557 U.S. at 204).
241. Huehlefeld, Article, *supra* note 204, at 21.
242. *Shelby Cty.*, 570 U.S. at 553.

the right to vote,[243] then a state could be subject to review. If a court has a substantial reason to believe that a jurisdiction has engaged in this discriminatory behavior, that could be used as a factor to indicate that the jurisdiction is in fact engaging in voter discrimination.[244]

As stated before, this could be problematic because the provision is only triggered when there is a lawsuit.[245] It could take years for a case to go to trial, and while a case is pending, the jurisdiction will more than likely continue to engage in discriminatory behavior. Some cases do not make it to the trial stage and are dismissed early, wasting time and resources, and the opportunity to defend the case is moot. However, the *bail in* and *bail out* provision, in pieces, can be highly indicative of intentional discriminatory voting practices and procedures.

It is argued that these provisions "have nothing to do with whether the formula is rational in theory," relating back to the *current needs* test.[246] The provisions do not need to be rational in theory, only in practice,[247] and using *pieces* from both of the provisions is a start to figuring out who is potentially engaging in voter discrimination. The other elements deal with whether a jurisdiction has complied with section 5 or had a section 5 judgment entered against them.[248] The Court made no ruling on section 5,[249] but without section 4(b), section 5 is inoperable and these elements are null until a new formula has been created.

I have discussed so far: (1) section 3(c) of the *bail in* provision which correlates with the second element of the *bail out* provision; and (2) the court's determination as to if a jurisdiction has denied or abridged the right to vote. This leads to the next factor to add to the list: using section 2 litigation cases as a prerequisite of racial voter discrimination in a jurisdiction and looking at minority population size and racially polarized voting. Earlier, I discussed the issues surrounding both of these factors, but they still have some force behind them. Since section 2 litigation shows some correlation to violations of the Fourteenth and Fifteenth Amendment,[250] it could be useful in determining racial voter

243. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(c), 79 STAT. 437, 437 (1965).
244. Huehlefeld, Article, *supra* note 204, at 21-22.
245. Crum, Note, *supra* note 216, at 1997.
246. William S. Consovoy & Thomas R. McCarthy, Shelby County v. Holder*: The Restoration of Constitutional Order*, 2013 CATO SUP. CT. REV. 31, 60 (2013).
247. *Id.* at 60.
248. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 STAT. 437, 437 (1965).
249. Shelby Cty. v. Holder, 570 U.S. 529, 557 (2013).
250. Elmendorf & Spencer, *supra* note 219, at 1132.

discrimination. The Fifteenth Amendment's entire purpose is to alleviate discrimination in voting, so if a jurisdiction has had a substantial amount of section 2 cases litigated, whether or not the court found discrimination, indicates the jurisdiction may still be engaging in voter discrimination.

Racially polarized voting and minority population size would be good indicators, but it would be superfluous to include these on the list because it is insensitive and weighs heavily on politics.[251] From a constitutional law perspective, "there is a plausible argument that such politically motivated discrimination with respect to voting is not 'race discrimination' within the meaning of the Fourteenth and Fifteenth Amendments"[252] leaving this condition useless. The last factor-condition, *anti-Black stereotyping* is great but presents its own issues as well. Racial attitudes that indicate anti-Black stereotypes, are linked to those states that produce more restrictive legislative activity; however, this activity could also be linked to numerous other factors.[253]

It is very possible "that restrictive legislative activity is simply a response to gains in turnout for the Democratic Party irrespective of the racial composition of the electorate [which could mean] restrictive legislation . . . [is] still motivated by a desire to suppress Democratic voters."[254] It could also be "argued that these motives are purely partisan in nature and not an attempt to suppress specifically minority or African-American voters."[255] The result of *anti-Black stereotyping* comes from a survey taken by non-Blacks expressing their real feelings about Blacks with respect to a set of categories.[256] If their racial attitudes are negative and that jurisdiction has a significant amount of restrictive legislation to mirror those attitudes, this evidence is highly probative of racial discrimination.[257]

So, what is this new formula and how does it determine which jurisdictions should be covered? The list in its final form suggests: (1) using section 3(c) of the *bail in* provision to determine if a jurisdiction is engaging in voter discrimination; (2) the court finding a jurisdiction denied or abridged the right to vote, or the *bail out* provision; (3) using section 2

251. *Id.* at 1135.
252. *Id.* at 1134.
253. Vandewalker & Bentele, *supra* note 235, at 112.
254. *Id*.
255. *Id.*
256. *Id.*
257. *Id.* (explaining that if the two correlate it could be a contributing factor to the restrictive legislation).

litigation as a prerequisite for racial voter discrimination; and (4) finding *anti-Black stereotyping* only if there is a correlation with restrictive legislation. Using these four factors is a start to figuring out which jurisdictions have "not eliminated all discriminatory voting procedures, engaged in efforts to eliminate intimidation and harassments of persons exercising the right to vote, and engaged in efforts to provide opportunities for registration and participation by minority citizens."[258] The list is imperfect, but it's a guiding tool to help Congress understand that no formula will be perfect and that we ***have*** to start somewhere, sooner rather than later.

VI. CONCLUSION

Over half a century after its enactment, the *VRA* still remains one of the most compelling pieces of legislation in American history, but more importantly African-American history. It solidified African Americans' constitutionally guaranteed right to vote and helped end racial voting discrimination. After it was enacted, the Court saw a mass of cases challenging the constitutionality of the statute, jurisdictions seeking to *bail out* from the *VRA*'s stringent requirements, and some jurisdiction *bailing in* because they were found to have discriminatory practices. This statute has exposed many states' most egregious racial biases and discrimination. There are a multitude of negative outcomes that could have happened without the *VRA*.

The landmark decision of *Shelby County v. Holder* has put the Nation in a place to imagine what would continue to happen without the protections afforded in the *VRA*.[259] Within hours of the decision, Texas instantly implemented voter ID laws that would not have been implemented under the *VRA*. Texas was not the only state to do something like this, a plethora of other states also started implementing laws they had originally asked to implement, but were denied by the Attorney General or laws they knew would have been rejected.[260] Since then, over 800 polling places have been shut down[261] and more will continue to shut

258. *Id*. (quoting Voting Rights Act of 1982, Pub. L. No. 97-205, §2(b)(4)(F)(i)-(iii), 96 STAT. 131, 132 (1982), modifying Voting Rights Act of 1965, Pub. L. No. 89-110, §4(a), 79 STAT. 437, 438 (1965)).

259. BRENNAN CENTER FOR JUSTICE, *supra* note 182.

260. *See id*.

261. Ari Berman, *There Are 868 Fewer Places to Vote in 2016 Because the Supreme Court Gutted the Voting Rights Act*, THE NATION (Nov. 4, 2016),

down.

When the Court declared section 4(b) unconstitutional, it stated that Congress could create a new formula; however, it has been six years and no new formula or discussion about the possibility of a new formula has been entertained. This prompted legal scholars to write about what the formula should be, giving pros and cons of why it would or would not work. Nothing is concrete, including what I have proposed, but it is a start to figuring out a new formula.

https://www.thenation.com/article/there-are-868-fewer-places-to-vote-in-2016-because-the-supreme-court-gutted-the-voting-rights-act/\ [https://perma.cc/WN5S-8SRH] (explaining how many places have been closed as a result of Shelby County).