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# A New Voting Rights Act for a New Century

## HOW LIBERALIZING THE VOTING RIGHTS ACT'S BAILOUT PROVISIONS CAN HELP PASS THE VOTING RIGHTS ADVANCEMENT ACT OF 2017

### INTRODUCTION

The Voting Rights Act of 1965 (VRA)<sup>1</sup> opened avenues for Rosanell Eaton's political voice that had previously been closed by Jim Crow laws. In 2013, Rosanell Eaton was a ninety-two-year old African American woman living in her hometown of Louisburg, North Carolina.<sup>2</sup> Despite growing up in a segregated town, Eaton graduated as valedictorian of her class, overcame literacy test requirements to register to vote, voted regularly in North Carolina elections, and helped other members of her community register and vote.<sup>3</sup> For her civic activism, Eaton experienced racist acts such as having small crosses burned in her front yard and even having bullets shot at her house.<sup>4</sup> She nevertheless remained an active voter.<sup>5</sup> Despite her leadership, Eaton fell under threat of losing her vote after North Carolina passed its voting law in 2013, H.B. 589, which reduced days for early voting, instituted voter identification requirements, eliminated same-day registration, and restricted out-of-precinct provisional ballots.<sup>6</sup>

Though the United States Court of Appeals for the Fourth Circuit struck H.B. 589 down in 2016, the law prevented North Carolinians, like Eaton, from voting for three years.<sup>7</sup> H.B.

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<sup>1</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 (2012 & Supp. II 2015)).

<sup>2</sup> Complaint at 7, N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (No. 1:13-CV-00658), ECF No. 1.

<sup>3</sup> *Id.* at 7–9.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 8–9; *see also* H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), Voter Information Verification Act, 2013 N.C. SESS. LAWS 2013-381, pt. 2 (detailing Part 2 of H.B. 589 in which the law required the use of photo identification for voting in person).

<sup>7</sup> N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 241–42 (4th Cir. 2016); Editorial, *North Carolina's Voting Law Goes on Trial*, N.Y. TIMES (July 15, 2015),

589 was able to go into effect, because, earlier in 2013, the United States Supreme Court in *Shelby County v. Holder* invalidated the VRA's coverage formula,<sup>8</sup> which was used to prevent select jurisdictions from passing voting laws without federal oversight.<sup>9</sup> Writing for the majority, Chief Justice Roberts argued that the VRA's coverage formula was unconstitutional due to (1) its use of outdated data to identify which jurisdictions fell under the preclearance provision; and (2) its violation of the "fundamental principle of equal sovereignty" among the States.<sup>10</sup> Chief Justice Roberts then stated that if Congress still intended to "divide the States" to enforce the Fifteenth Amendment, it must identify the targeted jurisdictions based on "current conditions."<sup>11</sup> By nullifying the coverage formula, the Supreme Court severely limited the VRA's power to challenge discriminatory voting laws.<sup>12</sup> Congress subsequently took on the challenge of drafting a new coverage formula to fit such "current conditions."<sup>13</sup>

In response to the Supreme Court's ruling, members of the House and Senate introduced identical bills called the Voting Rights Advancement Act (VRAA) of 2017.<sup>14</sup> Congress drafted the VRAA with the purpose of updating the VRA's coverage formula.<sup>15</sup> Republicans have not supported the VRAA, however, giving the bill little to no chance of passage.<sup>16</sup> Though the VRAA

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<https://www.nytimes.com/2015/07/15/opinion/north-carolinas-voting-law-goes-on-trial.html> [<https://perma.cc/LG7J-JNTD>].

<sup>8</sup> 52 U.S.C. § 10303(b) (2012 & Supp. II 2015). The coverage formula of the VRA set forth two elements to determine if a state should be put under federal jurisdiction for approval of any new voting laws. The first element was whether the state or a political subdivision of the state had in place "a test or device" in place on November 1, 1964. If so, the federal government moved to the second element to determine if 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. If both elements were satisfied, then the state would be placed under the rules of Section 5 of the Voting Rights Act. *Section 4 of the Voting Rights Act: The Formula for Coverage Under Section 4 of the Voting Rights Act*, U.S. DEPT OF JUSTICE (Dec. 21, 2017), <https://www.justice.gov/crt/section-4-voting-rights-act#formula> [<https://perma.cc/7V38-WYAV>] [hereinafter DOJ Section 4].

<sup>9</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

<sup>10</sup> *Id.* at 551, 554–57.

<sup>11</sup> *Id.* at 553.

<sup>12</sup> See *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP LEGAL DEF. FUND <http://www.naacpldf.org/document/cost-time-money-and-burden-section-2-voting-rights-act-litigation> [<https://perma.cc/W9LN-QB85>] [hereinafter NAACP LDF].

<sup>13</sup> *Shelby Cty.*, 570 U.S. at 553.

<sup>14</sup> H.R. 2978, 115th Cong. § 1 (2017); S. 1419, 115th Cong. § 1 (2017).

<sup>15</sup> H.R. 2978; S., 1419.

<sup>16</sup> Katanga Johnson, *House Democrats Seek Voting Rights Act Improvements*, U.S. NEWS & WORLD REP. (June 22, 2017, 5:34 PM), <https://www.usnews.com/news/national-news/articles/2017-06-22/house-democrats-move-to-restore-key-provisions-of-the-voting-rights-act> [<https://perma.cc/4RZB-5X7X>] (reporting Representative Sewell

updates the coverage formula, it fails to address concerns about equal sovereignty among the states. Congress could do so by updating the bailout provisions of the VRA.<sup>17</sup> Congress included the bailout provisions in the VRA to tailor the coverage formula for jurisdictions that passed discriminatory voting laws.<sup>18</sup> To address the concerns of Congressional Republicans and the Supreme Court, this note argues that Congress should amend the bailout provisions to complement the VRAA of 2017. With a new coverage formula and amended bailout provisions, the VRA will not only protect the right to vote, it will also actively encourage more Americans to register and cast their ballots, creating more representative governments on the local, state, and federal levels.

This note proceeds in five parts. Part I explains the need for the VRA and its successful defense against the initial constitutional challenge of *South Carolina v. Katzenbach*. Part II describes the VRA's subsequent uses by Congress, and the Supreme Court's growing suspicions of the VRA's constitutionality in *Northwest Austin v. Holder*. Part III discusses the *Shelby County* decision and the avenues it left open for Section 4(b)'s coverage formula. Part IV examines Congress's attempt to restore the VRA by way of the VRAA. Part V proposes amendments to the bailout provisions of the VRA to increase the likelihood of the VRAA's passage.

## I. THE ORIGIN OF THE VOTING RIGHTS ACT OF 1965

Before passage of the VRA of 1965, federal prosecutors litigated voting rights violations, such as literacy tests and poll taxes, on a case-by-case basis in controversies such as *Guinn v. United States* and *Smith v. Allwright*.<sup>19</sup> Prosecutors had little

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as saying that “no Republicans were willing to support the [bill]”); *H.R. 2978 (115<sup>th</sup>): Voting Rights Advancement Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr2978> [<https://perma.cc/M464-RFG3>]; *S. 1419 (115<sup>th</sup>): Voting Rights Advancement Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s1419> [<https://perma.cc/7HY4-G3QJ>].

<sup>17</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 438–39 (codified as amended at 52 U.S.C. § 10303(a)(1) (2012 & Supp. II 2015)) (describing the bailout provisions which are practices a jurisdiction must end, procedures that must be deemed no longer necessary, such as the use of federal examiners, and measures that may be enacted, such as making voter registration more convenient, in order to receive a declaratory judgment from the United States District Court for the District of Columbia).

<sup>18</sup> J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 257 (Ana Henderson ed., 2007).

<sup>19</sup> *Introduction to Federal Voting Rights Laws: Before the Voting Rights Act*, U.S. DEP'T OF JUSTICE (Aug. 16, 2018), <https://www.justice.gov/crt/introduction-federal>.

success following this strategy, and black voter registration rates remained well below the rates of white voters.<sup>20</sup> To remedy the problem of case-by-case litigation, Congress passed the VRA.<sup>21</sup> With the enactment of the VRA, Congress required the Department of Justice (DOJ) and the United States District Court for the District of Columbia to challenge and review proposed voting laws in certain jurisdictions before the laws were implemented.<sup>22</sup>

#### A. *The Voting Rights Act Explained*

The VRA was designed to protect all eligible U.S. voters from having their vote “denied or abridged on account of race or color . . . in any Federal, State or local election . . . or in any political subdivision of such State.”<sup>23</sup> Through 52 U.S.C. § 10302 (Section 2), the Attorney General or a private citizen can challenge electoral practices implemented with a racially discriminatory purpose.<sup>24</sup> Section 2 applies to all states;<sup>25</sup> 52 U.S.C. § 10303 (Section 4)<sup>26</sup> and 52 U.S.C. § 10304 (Section 5),<sup>27</sup> on the other hand, applied only to states and political subdivisions falling under Section 4(b)’s coverage formula<sup>28</sup> and allowed the DOJ or the District Court for the District of Columbia to challenge a proposed voting law before implementation.<sup>29</sup> Congress brought states under the coverage formula if they had (1) maintained a “test or device”<sup>30</sup> restricting registration or the

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voting-rights-laws [https://perma.cc/7LFP-VLAC]; see also *Smith v. Allwright*, 321 U.S. 649, 650–52 (1944); *Guinn v. United States*, 238 U.S. 347, 354 (1915).

<sup>20</sup> *Id.*

<sup>21</sup> KEVIN J. COLEMAN, CONG. RESEARCH SERV., R43626, *THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW* 12 (2015).

<sup>22</sup> *History of Federal Voting Rights Laws: The Voting Rights Act of 1965*, U.S. DEP’T OF JUSTICE (July 28, 2017), https://www.justice.gov/crt/history-federal-voting-rights-laws [https://perma.cc/3B5P-J62W]; see also *Voting Rights Act of 1965*, Pub. L. No. 89-110, 79 Stat. 437, 452 (codified as amended at 52 U.S.C. § 10304(a) (2012 & Supp. II 2015)).

<sup>23</sup> *Voting Rights Act of 1965*, Pub. L. No. 89-110, 79 Stat. 437, 438 (codified as amended at 52 U.S.C. § 10303(a)(1) (2012 & Supp. II 2015)).

<sup>24</sup> COLEMAN, *supra* note 21, at 14; *Voting Rights Act of 1965*, Pub. L. No. 89-110, 79 Stat. 437, 446–47 (codified as amended at 52 U.S.C. § 10302(a) (2012 & Supp. II 2015)).

<sup>25</sup> 52 U.S.C. § 10302(a); COLEMAN, *supra* note 21, at 13.

<sup>26</sup> *Id.* 52 U.S.C. § 10303.

<sup>27</sup> *Id.* § 10304.

<sup>28</sup> *Id.* § 10303(a)(1); COLEMAN, *supra* note 21, at 16 (showing that Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, thirty-nine counties in North Carolina, and select counties in Arizona and Hawaii were covered under Section 4(b)’s formula).

<sup>29</sup> *About Section 5 of the Voting Rights Act: Coverage Under the Special Provisions of the Voting Rights Act*, U.S. DEP’T OF JUSTICE (Dec. 4, 2017) [hereinafter DOJ Section 5], https://www.justice.gov/crt/about-section-5-voting-rights-act [https://perma.cc/2F3B-T9WE].

<sup>30</sup> 52 U.S.C. § 10303(c) defines a “test or device” as:

act of voting on November 1, 1964; and (2) less than 50 percent of eligible voters were registered to vote on November 1, 1964 or less than 50 percent of eligible voters actually voted in the November 1964 presidential election.<sup>31</sup> Congress mandated states falling under Section 4(b)'s formula to meet the preclearance requirements of Section 5 to make any changes to their electoral process.<sup>32</sup>

Under the preclearance regime, covered jurisdictions applied to the DOJ or the District Court for the District of Columbia for permission to implement proposed voting laws.<sup>33</sup> Unlike Section 2, Sections 4 and 5 shifted the burden of proof from the plaintiff to the challenged jurisdiction.<sup>34</sup> Covered jurisdictions therefore submitted evidence to show that the proposed laws did not racially discriminate against voters.<sup>35</sup> The DOJ and the District Court for the District of Columbia used these provisions to protect and enforce voting rights in an unprecedented manner after the failure of case-by-case litigation.<sup>36</sup> As the coverage formula risked covering an excessive number of jurisdictions, Congress included a bailout provision for jurisdictions that had not discriminated against voters within a specified time frame.<sup>37</sup>

A jurisdiction could be released from the coverage formula and the preclearance regime by obtaining a bailout;<sup>38</sup> to do so, a jurisdiction appealed to a three-judge panel of the District Court for the District of Columbia for a declaratory judgment.<sup>39</sup> The appealing jurisdiction had the burden of proving that it had not racially discriminated, by purpose or effect,

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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.

52 U.S.C. § 10303(c) (2012 & Supp. II 2015).

<sup>31</sup> DOJ Section 4, *supra* note 8; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 448 (codified as amended at 52 U.S.C. § 10303(b) (2012 & Supp. II 2015)).

<sup>32</sup> COLEMAN, *supra* note 21, at 16–17; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 452 (codified as amended at 52 U.S.C. § 10304(a) (2012 & Supp. II 2015)).

<sup>33</sup> DOJ Section 5, *supra* note 29.

<sup>34</sup> See COLEMAN, *supra* note 21, at 17.

<sup>35</sup> See DOJ Section 5, *supra* note 29.

<sup>36</sup> *Introduction to Federal Voting Rights Laws: Before the Voting Rights Act*, *supra* note 19.

<sup>37</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 447–48 (codified as amended at 52 U.S.C. § 10303(a) (2012 & Supp. II 2015)).

<sup>38</sup> Hebert, *supra* note 18, at 259.

<sup>39</sup> *Id.*

against voters of color.<sup>40</sup> Before a full year passed, the VRA faced its first legal challenge which included challenges to the coverage formula, preclearance regime, and bailout provisions.<sup>41</sup>

*B. South Carolina v. Katzenbach Presents the First Legal Challenge to the Voting Rights Act*

In *South Carolina v. Katzenbach*, South Carolina attempted to enjoin the federal government's efforts at enforcing the VRA.<sup>42</sup> Among its many contentions, South Carolina argued that the coverage formula and the preclearance provisions of the VRA were beyond Congress's delegated powers and violated "the principle of the equality of States."<sup>43</sup> Additionally, South Carolina asserted that the responsibility of making and applying specific remedies to Fifteenth Amendment violations should be left entirely to the purview of the courts.<sup>44</sup>

The Supreme Court, however, noted that the federal government had previously attempted to litigate voting rights violations after they had occurred rather than demanding that certain states alert the federal government of the proposed changes before they were enacted.<sup>45</sup> The Court also acknowledged that some states under the coverage formula had previously created new rules for the "sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees."<sup>46</sup> After noting that the preclearance regime was an "uncommon exercise of congressional power,"<sup>47</sup> the Court reasoned that "exceptional conditions can justify legislative measures not otherwise appropriate."<sup>48</sup> After validating the coverage formula and preclearance provisions, the Court ruled on the VRA's bailout provisions.

The Supreme Court examined the bailout provisions of the VRA,<sup>49</sup> which, at the time, could be used after five years of not enacting any discriminatory voting laws or policies.<sup>50</sup> Against the

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<sup>40</sup> *Id.* at 259–60.

<sup>41</sup> *See Katzenbach*, 383 U.S. at 307; *see also* Hebert, *supra* note 18, at 259.

<sup>42</sup> *Katzenbach*, 383 U.S. at 307.

<sup>43</sup> *Id.* at 323.

<sup>44</sup> *See id.* at 327.

<sup>45</sup> *Id.* at 328.

<sup>46</sup> *Id.* at 335.

<sup>47</sup> *Id.* at 334.

<sup>48</sup> *Id.* (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Wilson v. New*, 243 U.S. 332 (1917)).

<sup>49</sup> 52 U.S.C. § 10303(a)(1) (2012 & Supp. II 2015).

<sup>50</sup> *Katzenbach*, 383 U.S. at 331. Congress amended the Voting Rights Act in 1970 and required states to be free of VRA violations for ten years before gaining eligibility to use the bailout provisions. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 3, § 4(a), 84 Stat. 314, 315 (1970).

contention that the provisions placed “an impossible burden of proof upon States,” the Court opined that the burden of submitting affidavits to (1) prove that a state had not discriminated against racial minorities for five years; and (2) rebut any evidence to the contrary offered by the federal government was a “quite bearable” burden of proof, because states and political subdivisions had specific knowledge about facts concerning the conduct of voting officials.<sup>51</sup> The Court therefore upheld the VRA even though the preclearance measure presented an unprecedented level of federal involvement in affairs delegated to states.<sup>52</sup> The VRA thus properly enforces the Fifteenth Amendment<sup>53</sup> and makes racial discrimination in voting unconstitutional.<sup>54</sup> Indeed, the VRA, throughout its history, successfully prevented discrimination in voting.<sup>55</sup>

## II. THE VOTING RIGHTS ACT IN ACTION

### A. *Immediate Effects of the Voting Rights Act*

After being signed into law, the VRA took immediate effect by sending federal examiners into jurisdictions to register black voters.<sup>56</sup> Black voters in southern states began seeing sharp increases in their registration rates.<sup>57</sup> Black voters were then able to translate their increased registration rates into increased political representation.<sup>58</sup> Furthermore, black southerners were able to leverage their political power to gain

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<sup>51</sup> *Id.* at 332.

<sup>52</sup> *Id.* at 337.

<sup>53</sup> U.S. CONST. amend. XV.

<sup>54</sup> *Katzenbach*, 383 U.S. at 337.

<sup>55</sup> See COLEMAN, *supra* note 21, at 12.

<sup>56</sup> 52 U.S.C. § 10302(a) (2012 & Supp. II 2015); *Introduction to Federal Voting Rights Laws, The Effect of the Voting Rights Act*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0> [<https://perma.cc/EZ62-XTG2>].

<sup>57</sup> *Introduction to Federal Voting Rights Laws, The Effect of the Voting Rights Act*, *supra* note 56. Almost one million black Americans registered to vote within four years of the Voting Rights Act’s passage. COLEMAN, *supra* note 21, at 12. Mississippi went from having only 5% of its black voting population registered to vote in 1956 to 32.9% in 1966. *Id.* at 13. After just two more years, nearly 60% of black Mississippi voters were registered. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 212 (rev. ed. 2009); WALDMAN, *THE FIGHT TO VOTE* 159 (2016). By 1998, 71% of black Mississippi voters were registered to vote. WALDMAN, *supra* note 57, at 159. In Alabama, the black voting population registered to vote at a rate of 11% in 1956 and increased its voter registration rate to 57% in 1968. COLEMAN, *supra* note 21, at 13; KEYSSAR, *supra* note 57, at 212. The black voting age population in North Carolina experienced an increase in registration rates going from 24% in 1956 to 51% in 1966. COLEMAN, *supra* note 21, at 13. Most dramatically, black voters in Tennessee saw their registration rate increase from 27% in 1956 to 71.7% in 1966. *Id.*

<sup>58</sup> “[T]he number of black elected officials in the South [increased] from [seventy-two] to 159, after the 1966 elections.” COLEMAN, *supra* note 21, at 12.

economic opportunities.<sup>59</sup> Minority voters, as a whole, also witnessed increased legal protections stemming from the preclearance regime.<sup>60</sup>

The VRA brought new jurisdictions under its preclearance coverage through its Section 4(b) formula.<sup>61</sup> Texas, Arizona, and Alaska were covered in their entirety in 1975.<sup>62</sup> The VRA brought smaller jurisdictions such as two townships in Michigan and counties in South Dakota, California, New York, Florida, and North Carolina under the preclearance regime by 1976 as well.<sup>63</sup> Regarding voting laws actually challenged and blocked under Section 5, the DOJ received over one thousand submissions of challenged laws with each submission possibly containing multiple allegedly discriminatory laws.<sup>64</sup> The DOJ ultimately issued over three thousand objections.<sup>65</sup> States and their political subdivisions took notice of these enforcement actions and adjusted their electoral practices accordingly.<sup>66</sup> Between 2000 and 2012, the DOJ received over two hundred thousand submissions yet issued only seventy-six objections.<sup>67</sup> Five years after the VRA was passed, covered jurisdictions, believing they had ceased using discriminatory tests and devices, applied for a bailout.<sup>68</sup>

Jurisdictions applied for declaratory judgments to release them from the preclearance regime in 1970 and continued to do so

<sup>59</sup> Black southerners experienced an increase in public and private sector employment as well as an “increase in . . . state transfer payments.” See James C. Cobb, *The Voting Rights Act at 50: How It Changed the World*, TIME (Aug. 6, 2015), <http://time.com/3985479/voting-rights-act-1965-results/> [<https://perma.cc/5ZW2-XV6K>].

<sup>60</sup> COLEMAN, *supra* note 21, at 12 (showing that the DOJ reviewed “[over] half a million voting changes submitted under Section 5”).

<sup>61</sup> 52 U.S.C. § 10303(b) (2012 & Supp. II 2015).

<sup>62</sup> *Jurisdictions Previously Covered by Section 5*, U.S. DEP’T OF JUSTICE (Aug. 6, 2015), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [<https://perma.cc/CLS5-C9UP>]. The Voting Rights Act also began protecting language minorities in 1975 by demanding that jurisdictions with large enough “limited English proficiency” populations produce “bilingual ballots, translated voting materials, and oral language assistance.” Glenn D. Magpantay, *Sound Barriers Ver. 2.0: The Second Generation of Enforcement of the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 80 BROOK. L. REV. 63, 67–68 (2014); see also Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, sec. 203, § 4, 89 Stat. 400, 401–02 (1975).

<sup>63</sup> *Jurisdictions Previously Covered by Section 5*, *supra* note 62.

<sup>64</sup> According to data compiled by the Justice Department, approximately 1,102 submissions were filed, the vast majority of which related to issues of vote dilution. Mark A. Posner, *The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, As Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL’Y 79, 102–04 (2006).

<sup>65</sup> *Id.* at 102. According to the Justice Department, approximately 3,126 objections were made. *Id.*

<sup>66</sup> *Id.* at 103.

<sup>67</sup> Rick Pildes & Dan Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality*, ELECTION L. BLOG (Aug. 19, 2013, 4:39 AM), <https://electionlawblog.org/?p=54521> [<https://perma.cc/HMX3-KNXZ>].

<sup>68</sup> Hebert, *supra* note 18, at 259–60.

through 1984.<sup>69</sup> By 1970, Alaska and counties in Arizona, Idaho, and North Carolina had obtained bailouts in the initial round of applications.<sup>70</sup> By 1975, New York had obtained approval to be bailed out of the preclearance regime.<sup>71</sup> Alaska obtained a bailout once again after some of its counties were covered after 1970.<sup>72</sup> By 1982, jurisdictions in Maine, Oklahoma, and New Mexico had obtained bailouts.<sup>73</sup> Members of Congress who approved extensions of the VRA's preclearance regime looked favorably upon such bailouts as evidence that jurisdictions would not be perpetually punished once they began complying with federal voting laws.<sup>74</sup>

Since the initial passage of the VRA, Congress has amended and extended the law several times.<sup>75</sup> Through these amendments, Congress also made changes to the bailout provisions.<sup>76</sup> By adding the bailout provisions to the original VRA,

<sup>69</sup> *Id.* at 260–61.

<sup>70</sup> *Id.* at 260. Gaston and Nash counties in North Carolina failed to obtain bailouts. *Id.*

<sup>71</sup> *Id.* The Voting Rights Act, however, covered counties in New York again in 1974. *Id.* Virginia also failed to satisfy the bailout provisions. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 261.

<sup>74</sup> See Timothy G. O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 766–67 (1983).

<sup>75</sup> Congress amended the Voting Rights Act in 1970, 1975, 1982, 1992, and 2006. COLEMAN, *supra* note 21, at 19. The *Katzenbach* Court noted that the use of Section 5 was “an uncommon exercise of congressional power” addressing “exceptional conditions.” *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Congress, therefore, set time limits on the VRA and extended its application only after reviewing voting conditions. Robert A. Kengle & Marcia Johnson-Blanco, *What Is Next for Section 5 of the Voting Rights Act?*, 39 AM. BAR. ASS'N: HUM. RTS. MAG. (Oct. 23, 2012), [https://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/2012\\_vol\\_39\\_winter\\_2012\\_-\\_vote/what\\_is\\_next\\_forsection5ofthevotingrightsact/](https://www.americanbar.org/publications/human_rights_magazine_home/2012_vol_39_winter_2012_-_vote/what_is_next_forsection5ofthevotingrightsact/) [https://perma.cc/M3WE-3FSB]. The 1970 amendments extended the prohibitions on literacy tests, ended durational residency requirements for presidential elections, extended Section 5's preclearance coverage to jurisdictions in northern and western states such as New York, California, and Alaska, lowered the voting age to eighteen, and more. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 314–19 (1970); COLEMAN, *supra* note 21, at 19–20. In the 1975 amendments, Congress extended the Voting Rights Act for seven more years. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); COLEMAN, *supra* note 21, at 20. Congress also permanently banned the use of literacy tests, expanded Section 5 and Section 8's protections to language minorities, and permitted individuals to (1) bring a suit against a jurisdiction to bring it within preclearance coverage and (2) request the use of federal examiners in a jurisdiction, along with other policies. COLEMAN, *supra* note 21, at 20–21. In the 1982 and 1992 amendments, Congress extended the requirements and protections for bilingual elections. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (1982); Voting Rights Act Amendments of 1992, Pub. L. No. 102-344, 106 Stat. 921, 921–22 (1992); COLEMAN, *supra* note 21, at 21–22. In the 1982 amendments specifically, Congress amended Section 2 of the Voting Rights Act to allow plaintiffs to establish a violation by showing that a voting law discriminatorily impacted racial or language minorities regardless of the legislator's intent. COLEMAN, *supra* note 21, at 22.

<sup>76</sup> Congress amended the Voting Rights Act's bailout provisions in 1970, 1975, and 1982. Hebert, *supra* note 18, at 260–61. The bailout provision of the Voting Rights Act allows a jurisdiction covered by Section 5 to apply for a declaratory judgment from

Congress reasoned that the coverage formula of Section 4(b) would be imprecise and that unfairly covered jurisdictions would need a vehicle to exit the preclearance regime.<sup>77</sup> The bailout provision also survived judicial scrutiny from the Supreme Court in *South Carolina v. Katzenbach*.<sup>78</sup> When representatives from Virginia attempted to weaken the bailout provisions during the 1975 debates to amend the provisions, other members of the House rejected the proposed amendments.<sup>79</sup> Representative Abner Mikva specifically argued that the amendments should be rejected on the ground that they attempted to weaken the VRA by removing preclearance coverage.<sup>80</sup> Subsequently, Congress passed the bailout provisions with even more stringent requirements, declaring that a state had to show that it had not used a discriminatory “test or device” in seventeen years.<sup>81</sup> Though the bailout provision and the VRA as a whole continued to garner approval from Congress, jurisdictions under Section 5 coverage still challenged the law’s legality when denied an opportunity to bailout of coverage.<sup>82</sup>

*B. City of Rome v. United States Clarifies Which Jurisdictions Are Eligible for the Bailout Provisions*

The U.S. Attorney General brought Georgia under the VRA’s preclearance regime in 1965, bringing the city of Rome,

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the District Court for the District of Columbia if it can show that during ten consecutive years before petitioning for declaratory judgment it has (A) not used a racially discriminatory test or device denying or abridging the right to vote; (B) not received a final judgment from a United States court that it used a racially discriminatory test or device to deny or abridge the right to vote; (C) not been assigned any federal examiners or observers; (D) brought all governmental units within its jurisdiction into compliance with the Voting Rights Act; (E) repealed any changes that the Attorney General successfully objected to or to which the District Court for the District of Columbia denied a declaratory judgment; and (F) eliminated voting measures which “inhibit or dilute” access to the ballot and engaged in efforts to expand opportunities for registration and voting. Even after receiving a declaratory judgment, the jurisdiction remains under the District Court for the District of Columbia’s jurisdiction for ten years, and if any subsequent violations occur, the jurisdiction will be placed on the preclearance regime again. 52 U.S.C. § 10303(a)(1)(A)–(F) (2012 & Supp. II 2015). If no violations occur within those ten years, however, the court will release the jurisdiction from both the court’s jurisdiction and the preclearance regime. *Id.* § 10303(a)(5). The bailout provisions originally required states to prove non-discriminatory behavior for five years, but Congress extended the amount of time to ten years during the 1970 amendments. Voting Rights Act Amendments of 1970, Pub. L. No. 91-284, 84 Stat. 314, 315 (1970); Hebert, *supra* note 18, at 262.

<sup>77</sup> O’Rourke, *supra* note 74, at 773.

<sup>78</sup> *Id.* at 773–74 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 332 (1966)).

<sup>79</sup> *See id.* at 779–81.

<sup>80</sup> 121 CONG. REC. 16,767–68 (1975) (statement of Rep. Mikva).

<sup>81</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, sec. 101, § 4(a), 89 Stat. 400, 400 (1975); Hebert, *supra* note 18, at 260.

<sup>82</sup> *See, e.g., City of Rome v. United States*, 446 U.S. 156, 162 (1980).

Georgia under Section 5 coverage as well.<sup>83</sup> Rome attempted to make several changes to its electoral system in 1966 following electoral changes made that same year by the state of Georgia.<sup>84</sup> In addition to its electoral changes, Rome annexed surrounding land sixty times between November 1, 1964 and February 10, 1975.<sup>85</sup> Under the VRA, annexations “constitute[d] a change in a ‘standard, practice, or procedure with respect to voting.’”<sup>86</sup> Therefore, Rome was required to report each annexation to the Department of Justice for approval.<sup>87</sup> After Rome sought to gain preclearance for an annexation in 1974, “[t]he Attorney General discovered that [additional] annexations had occurred” and requested additional information.<sup>88</sup> After reviewing the annexations and the 1966 electoral changes, the Attorney General denied preclearance to Rome’s electoral changes as well as thirteen of the city’s sixty annexations.<sup>89</sup> Rome then filed an action in court “based on a variety of claims.”<sup>90</sup> Among the claims to reach the Supreme Court, Rome argued that it should be bailed out of Section 5 coverage as a city in compliance with the VRA.<sup>91</sup> The Court, contrary to Rome’s pleadings, ruled that cities as “political units of a covered jurisdiction” could not independently apply for a bailout.<sup>92</sup>

Rome asserted that under the ruling of *United States v. Board of Commissioners of Sheffield, Ala.* it qualified as either a “political subdivision” or a “State” for Section 4(a) bailout purposes, but the Supreme Court disagreed.<sup>93</sup> Instead, the Court agreed with the district court below in ruling that Section 4(a)’s bailout

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<sup>83</sup> *Id.* at 160–61 (citing 30 Fed. Reg. 9,897 (Aug. 7, 1965); *United States v. Bd. of Comm’rs*, 435 U.S. 110 (1978)).

<sup>84</sup> *Id.* at 160–61.

<sup>85</sup> *Id.* at 161.

<sup>86</sup> *Id.* (quoting *Perkins v. Mathews*, 400 U.S. 379, 381 (1971)).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 162.

<sup>91</sup> *Id.* The City of Rome also argued before the Court that: (1) the VRA only vitiated voting laws that had a discriminatory intent rather than solely a discriminatory effect, *id.* at 172; (2) that, the VRA was unconstitutional if it did, indeed, invalidate voting laws that were discriminatory only in effect, *id.* at 173; (3) that the VRA “violate[d] principles of federalism.” *Id.* at 178; and (4) that the VRA’s preclearance requirement had outlasted its usefulness by 1975. *Id.* at 180. The Court, however, held that (1) based on Congressional intent, the VRA did vitiate voting laws that had a discriminatory effect without discriminatory intent, *id.* at 172; (2) that § 2 of the Fifteenth Amendment empowered Congress to pass a law invalidating voting laws with only a discriminatory effect, *id.* at 173; (3) that “appropriate legislation” passed to enforce the Civil War Amendments overrode principles of federalism, *id.* at 179; and (4) that Congress had made a “considered determination” to extend the preclearance regime from 1975 to 1982. *Id.* at 172–73, 179, 182.

<sup>92</sup> *Id.* at 167.

<sup>93</sup> *Id.* at 168.

provision applied only to states and political subdivisions covered within an uncovered state rather than to political subdivisions within a covered state.<sup>94</sup> Furthermore, the Court opined that under Section 4(a), a municipality did not fall under the definition of a “political subdivision” or a “State.”<sup>95</sup> Therefore, the VRA survived the legal challenge asserted by Rome, which subsequently denied the city its ability to use the bailout provision.<sup>96</sup> Afterwards, Congress made additional changes to the bailout provision.<sup>97</sup>

“Congress enacted two major revisions to the bailout provisions” in 1982.<sup>98</sup> Political subdivisions were allowed to bail out separately from their states through the first revision.<sup>99</sup> The bailout provision was also revised to “recognize and reward” jurisdictions complying with the law as opposed to simply “requir[ing] them to await an expiration date which is fixed regardless of the actual record.”<sup>100</sup> Speaking as a co-sponsor of the then bill of amendments, Senator William V. Roth, Jr. stated that “the principle [the bill] embrace[d]” was “that every citizen has the right to cast an effective vote and is entitled to all the protections that are necessary to insure this right.”<sup>101</sup> Senator Roth later stated that, “S. 1992 incorporates bipartisan compromises that reflect input from many of varied ideologies. These compromises represent the consensus that there was a need for an incentive and reward for those jurisdictions that were diligent in their abidance to the act.”<sup>102</sup> After the 1982 revisions, twelve jurisdictions, all of which were in Virginia, bailed out of Section 5 coverage.<sup>103</sup> Following the 1982 revisions<sup>104</sup> to the bailout provision and the 2006 extension of the VRA,<sup>105</sup> the VRA received its most difficult challenge in 2009.<sup>106</sup>

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<sup>94</sup> *Id.* at 167–69.

<sup>95</sup> *Id.* at 168.

<sup>96</sup> *Id.* 169.

<sup>97</sup> Hebert, *supra* note 18, at 262–63 (explaining how the 1982 amendments allowed political subdivisions such as cities to bailout of Section 4(b) coverage even if the state remained covered and allowed jurisdictions to apply for a bailout if they believed they had a ten-year record of non-discrimination rather than wait for a set deadline to pass).

<sup>98</sup> *Id.* at 262.

<sup>99</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 131–34 (1982); Hebert, *supra* note 18, at 262.

<sup>100</sup> Hebert, *supra* note 18, at 262.

<sup>101</sup> 128 CONG. REC. 14,310 (1982) (statement of Sen. Roth).

<sup>102</sup> *Id.*

<sup>103</sup> Hebert, *supra* note 18, at 266.

<sup>104</sup> Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131.

<sup>105</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577.

<sup>106</sup> *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 193 (2009).

C. *The Supreme Court Gives a Warning Shot on the Voting Rights Act's Constitutionality in Northwest Austin*

“Northwest Austin Municipal Utility District Number One (NAMUDNO) was created in 1987 . . . [from] a portion of Travis County, Texas” to provide city services to its residents.<sup>107</sup> Though it was “responsible for its own elections,” it did not register voters nor run the elections.<sup>108</sup> Section 5 covered NAMUDNO as if the district was a municipality of Texas, a covered state, though the municipality itself had no record of racial discrimination in its electoral practices.<sup>109</sup> In *Northwest Austin v. Holder*, NAMUDNO filed for a bailout but argued that if it failed to meet the bailout requirements, then Section 5 of the VRA was unconstitutional.<sup>110</sup> The District Court interpreted the term “political subdivision” to “include[] only ‘counties, parishes, and voter-registering subunits.’”<sup>111</sup> A political subdivision like NAMUDNO that did not register its voters, by definition, could not be bailed out as a “political subdivision.”<sup>112</sup> The Supreme Court, however, began to express skepticism for the continued need of Section 5 because of its “federalism costs.”<sup>113</sup>

The Court noted that voter registration rates and voter turnout rates between white and black Americans were reaching parity, distinguishing the conditions of NAMUDNO’s claim from the conditions of previous voting rights claims in which the VRA remained unaltered.<sup>114</sup> Though the VRA deserved credit for the improved circumstances, Chief Justice Roberts wrote that, “[p]ast success alone, however, is not adequate justification to retain the preclearance requirements.”<sup>115</sup> The Chief Justice continued by expressing concern over the VRA’s continued violation of the “equal sovereignty” of the states after the improvements in voter turnout and registration rates.<sup>116</sup> He further conveyed apprehension over the fact that disparities in voter turnout and registration were becoming wider in uncovered

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<sup>107</sup> *Id.* at 200.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 200–01.

<sup>111</sup> *Id.* at 201. (quoting *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 232 (2008)).

<sup>112</sup> *Id.* at 197.

<sup>113</sup> *Id.* at 202. Specifically, Chief Justice Roberts expressed concern at the continuing broad powers of the VRA, stating, “Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by the federal authorities in Washington, D.C.” *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 203.

jurisdictions than they were in covered jurisdictions.<sup>117</sup> Moreover, the Court noted that there was not a settled answer regarding which standard to apply to determine if Section 5 of the VRA remained constitutional.<sup>118</sup> Despite these concerns, the Court withheld judgment on the constitutionality of the VRA as the Chief Justice wrote that doing so is “the gravest and most delicate duty that this Court is called on to perform.”<sup>119</sup> Instead of ruling on the constitutionality of the VRA, the Court limited its review to the bailout provision.<sup>120</sup> With such a ruling, the Court allowed the preclearance regime to remain in play but also signaled to Congress its need to revise preclearance requirements and the coverage formula.<sup>121</sup>

Addressing the bailout provisions, the Chief Justice took aim at the statutory meaning of “political subdivision,” noting how “the statutory definition . . . [did] not apply to every use of the term” in the VRA.<sup>122</sup> Building on its statutory interpretation, the Court considered Congress’s 1982 amendments to the bailout provision noting that the amendments “embraced piecemeal bailout” and permitted political subdivisions within a covered state to independently apply for bailout.<sup>123</sup> The Court concluded its analysis by reading the bailout and preclearance provisions of Section 5 as being “governed by a principle of symmetry.”<sup>124</sup> The Court then ruled that all political units were to be treated as political subdivisions for preclearance purposes, and they would also be treated as such for bailout purposes.<sup>125</sup> Thus, the Supreme Court held, in contrast to *Rome v. United States*,<sup>126</sup> that all political subdivisions, including municipalities, were eligible to independently file a bailout suit.<sup>127</sup>

The Supreme Court served a “warning to Congress” through its ruling in *Northwest Austin*.<sup>128</sup> Consequently, the Court immediately expanded the scope of the bailout provision, allowing

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<sup>117</sup> *Id.* at 203–04.

<sup>118</sup> *Id.* at 204.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 205–06.

<sup>121</sup> See Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1996 (2010).

<sup>122</sup> *Nw. Austin*, 557 U.S. at 206–07.

<sup>123</sup> *Id.* at 209–10.

<sup>124</sup> *Id.* at 210.

<sup>125</sup> *Id.*

<sup>126</sup> *City of Rome v. United States*, 446 U.S. 156, 168–69 (1980) (denying cities such as Rome the ability to identify as a “political subdivision” and apply for a bailout).

<sup>127</sup> *Nw. Austin*, 557 U.S. at 211.

<sup>128</sup> Crum, *supra* note 121, at 1995–96.

more covered jurisdictions to apply for a bailout.<sup>129</sup> More significantly, the Court called into question Section 5's constitutionality.<sup>130</sup> Specifically, the Court found that Section 5 violated principles of federalism<sup>131</sup> and required an adjusted coverage formula.<sup>132</sup> After the Court's ruling, scholars and practitioners debated whether the bailout provision was, indeed, effective and could save Section 5 from being ruled unconstitutional.<sup>133</sup>

Presenting skepticism towards the use of the bailout provision, Hans von Spakovsky of the Heritage Foundation argued that the bailout provision was not sufficient to make Section 5 constitutional, because Section 5 coverage failed to adapt to more contemporary voting conditions.<sup>134</sup> The practices that Section 5 was originally created to stop were now, von Spakovsky argued, "fad[ing] into history," causing Section 4(b)'s coverage formula to become an arbitrary measure of which states were violating the right to vote based on race.<sup>135</sup> According to von Spakovsky, the coverage formula was, from its outset, an imprecise measure of racially discriminatory behavior since it used proxies such as voter registration rates and voter turnout rates, but, as registration and turnout rates gained parity, the formula's imprecision grew into arbitrariness.<sup>136</sup> Congress could then only be understood to have passed the VRA due to political pressures.<sup>137</sup> Though von Spakovsky correctly noted that black and white voter registration and turnout rates were reaching parity, Congress's findings that "second generation" voting

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<sup>129</sup> Jason J. Kelley, Comment, *Section 5 of the Voting Rights Act is No Longer Tailored to Remedy Current Patterns of Voting Discrimination: The State of Section 5 After Northwest Austin Utility District No. 1 v. Holder*, 48 DUQ. L. REV. 67, 82 (2010).

<sup>130</sup> Randall T. Adams, Recent Development, *Northwest Austin Utility District Number One v. Holder*, 45 HARV. C.R.-C.L. L. REV. 135, 146 (2010); Crum, *supra* note 121, at 1995–96 (2010); Kelley, *supra* note 129, at 82.

<sup>131</sup> Adams, *supra* note 130, at 144.

<sup>132</sup> Kelley, *supra* note 129, at 82.

<sup>133</sup> CLC Staff, *New Hampshire Becomes First State to Bailout from Voting Rights Act Preclearance Requirements*, CAMPAIGN LEGAL CTR. (Mar. 3, 2013), <http://www.campaignlegalcenter.org/news/press-releases/new-hampshire-becomes-first-state-bailout-voting-rights-act-preclearance> [https://perma.cc/82KD-WGZH]; Hans von Spakovsky, *The Bailout Bait and Switch: DOJ's Last Ditch Attempt to Rescue Section 5 of the Voting Rights Act*, HERITAGE FOUND. (Apr. 18, 2011), <http://www.heritage.org/report/the-bailout-bait-and-switch-doj-s-last-ditch-attempt-rescue-section-5-the-voting-rights-act> [https://perma.cc/CR4N-Y33M].

<sup>134</sup> von Spakovsky, *supra* note 133. Similar to Chief Justice Roberts, von Spakovsky was concerned that Section 5 of the VRA did not use more recent data regarding voter registration and voter turnout rates to determine if states needed to remain under federal oversight. *See id.* ("Indeed, as the Supreme Court recently observed, 'the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites.'").

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

barriers justified extending the coverage formula and preclearance requirements would seem to belie the claim that Congress only extended the VRA because of political pressures.<sup>138</sup>

Von Spakovsky also argued that bailouts were rarely used and rarely granted because of the provision's "demanding" standards, the "political risks" of attempting to secure a bailout, such as being labeled as racist by opposing civil rights organizations, and the "hostility" of the DOJ's Voting Section within its Civil Rights Division.<sup>139</sup> With the bailout provisions, the DOJ and civil rights activists would be able to force covered jurisdictions to "acced[e] to their political demands" which are outside the scope of the VRA.<sup>140</sup> Yet, when lawyers or scholars asked jurisdictions why they had not applied for a bailout or did not apply earlier, jurisdictions named lack of knowledge about the bailout provisions and "belie[f that] the bailout process was too complicated, time consuming, or costly" as the reasons rather than fear of being labeled as racist.<sup>141</sup> When jurisdictions applied for bailout provisions, they found such worries to be unfounded.<sup>142</sup> Though von Spakovsky asserted that the bailout provisions were difficult to achieve, in contrast, J. Gerald Hebert, Senior Director of Voting Rights and Redistricting at The Campaign Legal Center,<sup>143</sup> argued that, in practice, jurisdictions did not actually face such difficulties in their bailout applications.<sup>144</sup>

The Campaign Legal Center viewed the bailout provision to be a measure demonstrating the appropriateness of Section 5's preclearance coverage.<sup>145</sup> The Campaign Legal Center hailed New Hampshire as a model of a successful bailout of Section 5 coverage.<sup>146</sup> J. Gerald Hebert, who represented New Hampshire, remarked that the successful bailout demonstrated how "the coverage formula self-tailors" and "adjusts to current needs" and that the bailout provisions were, indeed, workable.<sup>147</sup> Hebert had,

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<sup>138</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b), 120 Stat. 577, 577 (2006); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691-92 (2006) (listing "practices such as felon disenfranchisement, voting machines, and voter [identification] laws" as "second generation" voting barriers).

<sup>139</sup> von Spakovsky, *supra* note 133.

<sup>140</sup> *Id.*

<sup>141</sup> Hebert, *supra* note 18, at 271.

<sup>142</sup> *Id.* at 271-72.

<sup>143</sup> J. Gerald Hebert, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/staff/j-gerald-hebert> [<https://perma.cc/3RG8-BU9U>]

<sup>144</sup> Hebert, *supra* note 18, at 270.

<sup>145</sup> CLC Staff, *supra* note 133.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

himself, argued in favor of the bailout provisions prior to the *Northwest Austin* ruling.<sup>148</sup> He argued that the bailout provisions and coverage formula worked together to allow jurisdictions to publicly prove that their elections were no longer discriminatory.<sup>149</sup> After a jurisdiction was bailed out, Hebert claimed the bailout provisions and coverage formula limited the costs of voting rights litigation and eased the ability of jurisdictions to change their electoral laws.<sup>150</sup> Despite the decision in *Northwest Austin* and the subsequent debates, Congress, much to the chagrin of the Supreme Court, made no changes to the VRA.<sup>151</sup> The next major challenge to the VRA came in 2013 from Shelby County, Alabama.<sup>152</sup>

### III. THE SUPREME COURT STRIKES DOWN THE COVERAGE FORMULA IN *SHELBY COUNTY V. HOLDER*

#### A. *The Coverage Formula is Ruled Unconstitutional*

Shelby County, Alabama sued the DOJ after the department challenged and blocked a referendum election that had not been precleared.<sup>153</sup> The county argued that Section 4(b), which defined the coverage formula, and Section 5 of the VRA were unconstitutional and merited a permanent injunction against their enforcement.<sup>154</sup> The District Court ruled against Shelby County, noting that Congress used sufficient evidence to justify reauthorizing Sections 4(b) and 5.<sup>155</sup> Shelby County appealed to the United States Court of Appeals for the District of Columbia Circuit, which also ruled against the county.<sup>156</sup> The court reasoned that there was sufficient evidence to conclude that litigation under Section 2 of the VRA was “inadequate . . . to protect the rights of minority voters” in jurisdictions covered by Section 5.<sup>157</sup> The court also opined that Section 4 worked in tandem with Section 5 “to single out the jurisdictions in which

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<sup>148</sup> Hebert, *supra* note 18, at 271.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 548–50 (2013) (remarking upon Congress’ broadening of Sections 4 and 5 in 2006 though the electoral conditions in the covered districts showed increased compliance with the VRA. The Court specifically noted the election of African-American mayors in Philadelphia, MS and Selma, AL almost fifty years after both cities experienced infamous incidents of racist violence by individuals seeking to prevent black Americans from voting).

<sup>152</sup> *Id.* at 535–36.

<sup>153</sup> Complaint at 1, 14–15, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96), ECF No. 1.

<sup>154</sup> *Shelby Cty.*, 570 U.S. at 540–41.

<sup>155</sup> *Id.* at 541.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

discrimination is concentrated,” allowing Section 4 to be judged as constitutional as well.<sup>158</sup> The Supreme Court, however, did not believe Section 4(b)’s formula to be justified any longer, nor did it believe the bailout provisions to be a sufficient safety valve in case the formula was overinclusive.<sup>159</sup>

Writing for the majority of the Supreme Court, Chief Justice Roberts returned to *Northwest Austin*’s reasoning concerning the “‘fundamental principle of equal sovereignty’ among the States.”<sup>160</sup> Though previous Supreme Court cases since the *South Carolina v. Katzenbach* decision found the problem of racial discrimination in voting constituted a legitimate reason to treat states differently, the Chief Justice in *Shelby County* found that “[n]early 50 years later, things have changed dramatically.”<sup>161</sup> The Court once again noted the parity in voter registration and turnout rates between black and white Americans, the increase in minority representatives, and the length of time that racially discriminatory “tests and devices” had been outlawed.<sup>162</sup> Armed with this data, the Court took aim at Section 4 to determine whether it remained “constitutional in light of current conditions.”<sup>163</sup>

Chief Justice Roberts, unlike in *Northwest Austin*, was not persuaded that the coverage formula and preclearance requirements were justified, for the coverage formula used outdated information to select the covered states.<sup>164</sup> The Court also took issue with the fact that though Congress used a wealth of evidence to make its decision to extend the VRA, it left the coverage formula unchanged rather than updating it.<sup>165</sup> In its final analysis of Section 4, the Court concluded, “Congress could have updated the coverage formula at that time, but did not do so.”<sup>166</sup> Its failure to act leaves us today with no choice but to declare

<sup>158</sup> *Id.* (quoting *Shelby Cty. v. Holder*, 679 F.3d 848, 883 (D.C. Cir. 2012)).

<sup>159</sup> *Id.* at 556–57.

<sup>160</sup> *Id.* at 544 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

<sup>161</sup> *Id.* at 547.

<sup>162</sup> *Id.* at 547–48.

<sup>163</sup> *Id.* at 550.

<sup>164</sup> *Compare id.* at 551 (stating that though the coverage formula was valid in 1965, it was no longer valid in the then present time), *with Nw. Austin*, 557 U.S. at 204–06 (raising the concern that the coverage formula “raise[d] serious constitutional questions” but ultimately only addressed the statutory claim).

<sup>165</sup> *Id.* at 554.

<sup>166</sup> Congress, when making the 2006 amendments, wrote,

[V]estiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process. The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language

§ 4(b) unconstitutional.”<sup>167</sup> Though the Court made no ruling on the bailout provision, by rendering the coverage formula inoperable, the Court essentially nullified the bailout provision.<sup>168</sup> The *Shelby County* decision spurred immediate debate focusing on which sections of the VRA could make up for the loss of preclearance coverage.<sup>169</sup>

Bruce E. Cain, a professor of political science,<sup>170</sup> identified the VRA’s vulnerability to a decision such as *Shelby County* as stemming from the coverage formula’s imprecision in a system centered around states rather than a national system.<sup>171</sup> While the VRA worked well to combat first-generation voting discrimination such as literacy tests, poll taxes, and redistricting, especially when the focus was solely on disparities between black and white voters, the act was ill-equipped to combat more recent tools of voter discrimination. As old tools fell by the wayside, states implemented techniques such as “voter caging, harsh voter [identification] laws, [and] registration restrictions”;<sup>172</sup> moreover,

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minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(2)–(3), 120 Stat. 577, 577. Congress listed the number of objections filed to the DOJ, the number of enforcement actions filed by the DOJ, the number of declaratory judgments denied by the U.S. District Court for the District of Columbia, the number of Section 2 cases filed against covered jurisdictions, and the continued litigation by the DOJ on behalf of language minorities since 1982 as evidence for the continued need of the coverage formula as defined by the VRA of 1965. *Id.* § 2(b)(4), 120 Stat. at 577–78.

<sup>167</sup> *Shelby Cty.*, 570 U.S. at 557.

<sup>168</sup> Ryan J. Reilly, *The Last Voting Rights Act Bailout Ever Went to Hanover County, VA.*, HUFFINGTON POST (June 25, 2013, 7:00 PM), [https://www.huffingtonpost.com/2013/06/25/voting-rights-bailout\\_n\\_3498927.html](https://www.huffingtonpost.com/2013/06/25/voting-rights-bailout_n_3498927.html) [<https://perma.cc/9T4J-86GM>].

<sup>169</sup> Bruce E. Cain, *Moving Past Section 5: More Fingers or a New Dike?*, 12 ELECTION L.J. 338, 338 (2013); Edward B. Foley, *If Congress Won't Act, the Nonprofit Community Can*, 12 ELECTION L.J. 343, 343 (2013); Nicholas Stephanopoulos, *The Future of the Voting Rights Act*, SLATE (Oct. 23, 2013, 4:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/10/section\\_2\\_of\\_the\\_voting\\_rights\\_act\\_is\\_more\\_effective\\_than\\_expected\\_new\\_research.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/section_2_of_the_voting_rights_act_is_more_effective_than_expected_new_research.html) [<https://perma.cc/H866-D7NF>].

<sup>170</sup> Cain, *supra* note 169, at 340.

<sup>171</sup> *Id.* at 338.

<sup>172</sup> *Id.* at 339; The Brennan Center for Justice provides the following definition for voter caging:

Voter caging is the practice of sending mail to addresses on the voter rolls, compiling a list of the mail that is returned undelivered, and using that list to purge or challenge voters’ registrations on the grounds that the voters on the list do not legally reside at their registered addresses.

Justin Levitt & Andrew Allison, *A Guide to Voter Caging*, BRENNAN CTR. FOR JUST. (June 29, 2007), <https://www.brennancenter.org/analysis/guide-voter-caging> [<https://perma.cc/J97R-CL5Z>]. States with harsher voter identification laws include Arizona, Georgia, Indiana, and Ohio. Wendy Underhill, *Voter Identification Requirements—Voter ID Laws*, NAT’L CONF. OF ST. LEGISLATURES (Oct. 31, 2018) <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/4PFQ-EKTF>]. As of May 2017, twenty-

“new minorit[y]” voters, such as Asian American and Latinx American<sup>173</sup> voters, increased the country’s ethnic diversity.<sup>174</sup> Cain argued that standardizing voting processes on a national level was “[t]he best long-term solution” but was unlikely to be put into place in the near future.<sup>175</sup> Increased use of Section 3 and Section 2 litigation were, then, the best solutions in the short-term. Some scholars, such as Edward B. Foley, proposed purely private solutions.<sup>176</sup> On the ground, however, the Justice Department decided to pursue the strategy of increasing Section 2 litigation.<sup>177</sup>

### B. *States and the DOJ Respond to the Shelby County Ruling*

After *Shelby County*, several states previously covered under Section 5, such as Texas and North Carolina, passed restrictive voter ID laws such as H.B. 589.<sup>178</sup> The DOJ responded by bringing Section 2 lawsuits.<sup>179</sup> Though Section 2 litigation was

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two states had introduced thirty-three bills to restrict voter registration since the year 2010. BRENNAN CTR. FOR JUST., <http://www.brennancenter.org/analysis/voting-laws-roundup-2017> (May 10, 2017) [<https://perma.cc/VW6V-ZBY5>]. A specific example of a restrictive voter registration system is Georgia’s “exact-match” system in which a Georgia resident’s voter status is suspended if the information on their voter registration form is not exactly the same as the information on their driver’s license and social security records. Brentin Mock, *How Dismantling the Voting Rights Act Helped Georgia Discriminate Again*, CITYLAB (Oct. 15, 2018), <https://www.citylab.com/equity/2018/10/how-dismantling-voting-rights-act-helped-georgia-discriminate-again/572899/> [<https://perma.cc/BMB5-XDXL>]. Several civil rights organizations have challenged Georgia’s “exact-match” program through the case *Georgia Coalition for the People’s Agenda v. Kemp*. CAMPAIGN LEGAL CTR., <https://campaignlegal.org/cases-actions/georgia-coalition-peoples-agenda-v-kemp> [<https://perma.cc/QT9M-Z4TL>].

<sup>173</sup> I use “Latinx” as a gender non-specific term “for people of Latin American descent.” MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/word-history-latinx> [<https://perma.cc/3U6P-GESL>].

<sup>174</sup> Cain, *supra* note 169, at 340.

<sup>175</sup> *Id.*

<sup>176</sup> Edward B. Foley proposed that the non-profit community create “a bipartisan, blue-ribbon Voting Rights Advisory Board [(VRAB)].” Foley, *supra* note 169, at 343. Though it would not have legal authority, if staffed by reputable researchers and investigators, the VRAB could label proposed voting laws as “retrogressive” which could influence a court’s ruling in Section 2 and Section 3 litigation. *Id.* at 343–44. Through posting the progress of its investigations on its website, the VRAB would also be able to serve as a source of transparency for proposed voting laws nationwide. *Id.* at 343–44.

<sup>177</sup> See Stephanopoulos, *supra* note 169.

<sup>178</sup> See, e.g., Voter Information Verification Act, 2013 N.C. SESS. LAWS 2013-381; Jasmine C. Lee, *How States Moved Toward Stricter Voter ID Laws*, N.Y. TIMES (Nov. 3, 2016), <https://www.nytimes.com/interactive/2016/11/03/us/elections/how-states-moved-toward-stricter-voter-id-laws.html> [<https://perma.cc/Q9EA-RM7W>]. (explaining that while in 2012 only four states required photo identification to vote, by 2016 seven states required a photo ID, and thirty-two states required a form of identification though not necessarily with a photograph). Previously covered states such as Georgia, Mississippi, Tennessee, and Virginia also passed strict voter ID laws, and previously covered states such as Georgia, Tennessee, and North Carolina also reduced early voting days and hours. The Fourth Circuit, however, struck down North Carolina’s law. *Id.*

<sup>179</sup> Stephanopoulos, *supra* note 169.

not as effective at stopping discriminatory voting laws from being enacted, it was more successful than expected.<sup>180</sup> Yet, despite the unexpected victories of Section 2 litigation, a need for a stronger voting law remained.

In the year following *Shelby County*, the Brennan Center for Justice found that (1) Section 5 no longer prevented discriminatory voting changes before they even came into effect; (2) “challenging discriminatory laws” became increasingly “difficult, expensive, and time-consuming;” and (3) transparency was lost to the public as jurisdictions no longer had to disclose information about proposed laws under Section 5.<sup>181</sup> Without the preclearance regime in effect, states previously covered under Section 5 began passing laws that had already been blocked or would likely have been blocked.

Starting after the *Shelby County* decision and going through to the 2014 midterms, “fifteen states passed or implemented” restrictive voting laws “rang[ing] from strict photo ID requirements to early voting cutbacks to registration restrictions.”<sup>182</sup> Texas, in particular, was able to pass a law that had previously been blocked by Section 5.<sup>183</sup> While the laws in states like Texas<sup>184</sup> and North Carolina<sup>185</sup> were challenged soon after they were implemented, the cases continued through 2018 and 2017, respectively.<sup>186</sup> These cases demonstrated the challenges that Section 2 litigation presented in the aftermath of *Shelby County*.<sup>187</sup>

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<sup>180</sup> *Id.* In his study, Stephanopoulos determined that Section 2 suits since 1982 had a fifty percent success rate, ten percentage points higher than the win rate of all Section 2 suits filed since the VRA’s enactment. *Id.*

<sup>181</sup> Tomas Lopez, ‘*Shelby County*’: *One Year Later*, BRENNAN CTR. FOR JUST. (June 24, 2014), <https://www.brennancenter.org/analysis/shelby-county-one-year-later> [<https://perma.cc/82T2-HQ7G>].

<sup>182</sup> Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J. F. 799, 800 (2018); *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Oct. 22, 2018), <https://www.brennancenter.org/sites/default/files/analysis/New%20Voting%20Restrictions.pdf> [<https://perma.cc/3QEQ-FFX6>]. By 2018, “24 states have put in place new restrictions since [the 2010 election].” *New Voting Restrictions in America*, *supra* note 182.

<sup>183</sup> Lopez, *supra* note 181.

<sup>184</sup> *Texas NAACP v. Steen (consolidated with Veasey v. Abbott)*, BRENNAN CTR. FOR JUST. (Sept. 21, 2018), <https://www.brennancenter.org/legal-work/naacp-v-steen> [<https://perma.cc/RQ8T-3J76>].

<sup>185</sup> *League of Women Voters of North Carolina, Et Al. v. North Carolina*, ACLU (May 15, 2017), <https://www.aclu.org/cases/league-women-voters-north-carolina-et-al-v-north-carolina> [<https://perma.cc/C7YM-CGHQ>].

<sup>186</sup> *See supra* notes 184–185; Naila Awan, *Voting Rights Challenges in the Wake of Shelby County*, DEMOS: POLICYSHOP (Feb. 4, 2016), <http://www.demos.org/blog/2/4/16/voting-rights-challenges-wake-shelby-county> [<https://perma.cc/BY72-99FB>].

<sup>187</sup> NAACP LDF, *supra* note 12 (explaining that Section 2 litigation requires more time and money than Section 5 litigation and places the burden of proof on the plaintiff rather than the defending jurisdiction).

Section 2 litigation presented stark contrasts to Section 5 litigation.<sup>188</sup> Section 2 proved to be far more resource-intensive by placing the burden of proof primarily on plaintiffs, requiring knowledge few lawyers possessed, requiring resources beyond the capacities of most impact-litigation organizations, and demanding the voluminous production of documents as well as expert witnesses.<sup>189</sup> Section 2 litigation could also cost up to hundreds of thousands or even millions of dollars, much of which were paid by public funds.<sup>190</sup> Section 2 litigation also lasted, on average, “between two to five years.”<sup>191</sup> One or more national elections could therefore occur with potentially discriminatory voting laws in place. Along with the inability to block potentially discriminatory legislation, the costs borne by Section 2 litigation, the loss of transparency, the loss of the coverage formula, and voter registration challenges produced a decrease in voter registration numbers.<sup>192</sup>

North Carolina presented a particularly egregious example of how the loss of the coverage formula worked in tandem with a failure to comply with the National Voter Registration Act (NVRA).<sup>193</sup> Through the NVRA, states are required to offer voter registration at public assistance agencies and motor vehicle offices.<sup>194</sup> Due to its noncompliance with the NVRA, North Carolina experienced a “shocking decrease” in submitted voter registration applications.<sup>195</sup> Congress attempted to address the needs of voters with the VRAA of 2015, but the bill ultimately failed to pass.<sup>196</sup>

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 2.

<sup>190</sup> *Id.* at 3.

<sup>191</sup> *Id.* at 4–5.

<sup>192</sup> Awan, *supra* note 186.

<sup>193</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511 (2012 & Supp. II 2015)); Awan, *supra* note 186.

<sup>194</sup> 52 U.S.C. §§ 20503–20504 (2012 & Supp. II 2015) (requiring states to establish procedures for voter registration for federal elections, in part, by offering registration applications simultaneously with an application for a driver’s license); *id.* § 20506 (requiring states to designate agencies, such as offices providing public assistance, as voter registration agencies); Awan, *supra* note 186.

<sup>195</sup> Awan, *supra* note 186.

<sup>196</sup> H.R. 885, 114th Cong. (2015); H.R. 2867, 114th Cong. (2015). The Voting Rights Amendment Act of 2015 would have placed a State under the preclearance regime if the State had “[five] or more voting rights violations occur[] in the State during the previous [fifteen] calendar years, at least one of which was committed by the State itself.” H.R. 885, § 3(b)(1)(A). A political subdivision would have been placed under the preclearance regime if it had “[three] or more voting rights violations occur[] in the subdivision during the previous [fifteen] calendar years; or [one] or more voting rights violations occur[] in the subdivision during the previous [fifteen] calendar years and the subdivision had persistent, extremely low minority turnout during the previous [fifteen] calendar years.” H.R. 885, § 3(1)(b)(1)(B)(i)–(ii). The Voting Rights Advancement Act of 2015, on the other hand, would have placed a State under the preclearance regime if the

## IV. VOTING RIGHTS ADVANCEMENT ACT OF 2017

The VRAA of 2015 attempted to update the coverage formula, continue protections for language minorities, include protections for voters with disabilities, and increase transparency.<sup>197</sup> Under a new coverage formula, the VRAA of 2015 would have covered Alabama, Arkansas, Arizona, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, Texas, and Virginia.<sup>198</sup> Further, the VRAA of 2015 would have lifted coverage of any jurisdiction that had not violated the law within ten years.<sup>199</sup> The VRAA of 2015 also required jurisdictions to publicly post all changes to their voting laws that occurred within 180 days of an election.<sup>200</sup> The proposed act empowered the Attorney General to send federal observers to polls during early voting and Election Day to monitor any possible racial discrimination.<sup>201</sup> Additionally, the VRAA of 2015 provided protections for Native Americans and Alaska Natives by increasing language access and access to registration and polls “on and off of Indian reservations.”<sup>202</sup> The bill, however, “died” in Congress.<sup>203</sup> Congress moved again in 2017 to restore the VRA.

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State had “[fifteen] or more voting rights violations occur[] in the State during the previous [twenty-five] calendar years; or [ten] or more voting rights violations occur[] in the State during the previous [twenty-five] calendar years, at least one of which was committed by the State itself.” Voting Rights Advancement Act of 2015, H.R. 2867 § 4(b)(1)(A)(i)–(ii). A political subdivision would have been placed under the preclearance regime if it had “[three] or more voting rights violations occur[] in the subdivision during the previous [twenty-five] calendar years.” H.R. 2867 § 4(b)(1)(B). The Voting Rights Advancement Act of 2015 also included provisions to protect voting on Indian Lands. H.R. 2867 § 2; *see also* Jim Sensenbrenner, *Without a Modernized Voting Rights Act, There’s No Such Thing as an Honest Election*, WASH. POST (Nov. 2, 2016), [https://www.washingtonpost.com/opinions/without-a-modernized-voting-rights-act-there-s-no-such-thing-as-an-honest-election/2016/11/02/ba1cb138-a06b-11e6-8832-23a007c77b4\\_story.html?noredirect=on&utm\\_term=.b4e36495b201](https://www.washingtonpost.com/opinions/without-a-modernized-voting-rights-act-there-s-no-such-thing-as-an-honest-election/2016/11/02/ba1cb138-a06b-11e6-8832-23a007c77b4_story.html?noredirect=on&utm_term=.b4e36495b201) [<https://perma.cc/J4LS-SBRY>].

<sup>197</sup> *Fact Sheet: Voting Rights Advancement Act of 2015*, LAW. COMM. FOR CIVIL RIGHTS UNDER LAW 1 (June 24, 2015) [hereinafter LAW. COMM.], <http://lawyerscommittee.org/wp-content/uploads/2015/07/VRAA-Fact-Sheet-2015.pdf> [<https://perma.cc/79VC-MY8A>]; *Voting Rights Act for Today: Moving Voting Rights Forward*, LEADERSHIP CONF. 1 (July 17, 2015) [hereinafter LEADERSHIP CONF.], [https://www.aclu.org/sites/default/files/field\\_document/advancement\\_act\\_fact\\_sheet.pdf](https://www.aclu.org/sites/default/files/field_document/advancement_act_fact_sheet.pdf) [<https://perma.cc/KB36-HG6A>].

<sup>198</sup> *See* LAW. COMM. *supra* note 197, at 1.

<sup>199</sup> *See* LAW. COMM. *supra* note 197, at 1; LEADERSHIP CONF. *supra* note 197, at 1.

<sup>200</sup> *See* LAW. COMM. *supra* note 197, at 2; LEADERSHIP CONF. *supra* note 197, at 1.

<sup>201</sup> *See* LAW. COMM. *supra* note 197, at 1; LEADERSHIP CONF. *supra* note 197, at 2.

<sup>202</sup> *See* LAW. COMM. *supra* note 197, at 1; LEADERSHIP CONF. *supra* note 197, at 2.

<sup>203</sup> *See Voting Rights Advancement Act of 2015 (2015; 114th Congress H.R. 2867)*, GOVTRACK <https://www.govtrack.us/congress/bills/114/hr2867> [<https://perma.cc/9TWM-MDQW>].

Despite its earlier setbacks, Congress reintroduced the VRAA in 2017.<sup>204</sup> The bill, if it was enacted, would have put the same thirteen states under the coverage formula as the proposed VRAA of 2015<sup>205</sup> and would have examined the actions of covered states from the years 1990 to 2015.<sup>206</sup> The bill would have also increased judicial scrutiny of voter identification laws and laws that “reduce multilingual voting materials.”<sup>207</sup> House Republicans, however, have not supported the bill.<sup>208</sup> Congress should therefore liberalize the bailout provisions through another round of amendments to increase the chances of passing the VRAA into law.<sup>209</sup>

To effectuate such a liberalization, Congress should follow the lead of the 1982 amendments and “recognize and reward” good conduct.<sup>210</sup> The exemptions to the NVRA provide such an example. Along with requiring states to designate public offices as places that offer voter registration, the NVRA also “required . . . state[s] to accept and use . . . mail voter registration application form[s].”<sup>211</sup> Six states, however, were able to gain exemptions from the NVRA’s requirements due to their voter registration practices.<sup>212</sup> North Dakota received an exemption as it did not have voter registration requirements.<sup>213</sup> Minnesota, Wisconsin, and Wyoming qualified for the exemption for having registration available at polling places statewide during Election Day, and New Hampshire and Idaho were exempted for adding Election Day registration after the NVRA’s original date but before the NVRA was amended to take effect in 1993.<sup>214</sup>

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<sup>204</sup> H.R. 2978, 115th Cong. (2017); S. 1419, 115th Cong. (2017).

<sup>205</sup> See Johnson, *supra* note 16; LAW. COMM. *supra* note 197, at 1.

<sup>206</sup> See Johnson, *supra* note 16; LAW. COMM. *supra* note 197, at 1.

<sup>207</sup> See Johnson, *supra* note 16; LAW. COMM. *supra* note 197, at 1.

<sup>208</sup> Johnson, *supra* note 16.

<sup>209</sup> Democrats won a majority of House seats in the 2018 midterm elections. Molly Ball, *Democrats Win the House, But Fall Short of Decisive Rebuke of Trump*, TIME (Nov. 7, 2018), <http://time.com/5447422/midterm-elections-2018-democrats/> [<https://perma.cc/8YE2-RYL7>]. Though House Democrats could pass the VRAA without House Republican support, Democrats can obtain a more stable base to uphold the bill if they gain Republican support through amending the bailout provisions.

<sup>210</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified as amended at 52 U.S.C. § 10303 (2012 & Supp. II 2015)); Hebert, *supra* note 18, at 262.

<sup>211</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77, 79 (codified as amended at 52 U.S.C. § 20505(a)); ROYCE CROCKER, CONG. RESEARCH SERV., R40609, THE NATIONAL VOTER REGISTRATION ACT OF 1993: HISTORY, IMPLEMENTATION, AND EFFECTS 4–5 (2013).

<sup>212</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77, 78 (codified as amended at 52 U.S.C. § 20503(b) (2012 & Supp. II 2015)); CROCKER, *supra* note 211, at 3.

<sup>213</sup> CROCKER, *supra* note 211, at 3.

<sup>214</sup> *Id.*

Following the example of the NVRA, the amendments to the bailout provision should affirmatively, rather than punitively, encourage states under Section 5 coverage to achieve parity in voting. As Chief Justice Roberts stated in *Shelby County*, “[t]he [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future.”<sup>215</sup> Liberalized bailout provisions in combination with the VRAA’s new coverage formula will ensure a better future for equitable and affirmative voting procedures in the United States.

#### V. BAILOUT PROVISION AMENDMENTS FOR THE VRAA OF 2017

In the VRAA of 2017, states and their political subdivisions can be subjected to federal oversight for ten years if they have either (1) committed fifteen or more voting rights violations during the past twenty-five years; or (2) committed ten or more voting rights violations during the past twenty-five years and at least one of those violations was committed by the state itself.<sup>216</sup> In the previous VRA, a state could request a bailout from Section 5 of the VRA if it could prove that it had no longer engaged in voting discrimination for at least ten years.<sup>217</sup> If its bailout request was approved, the state would receive a declaratory judgment from the D.C. Circuit Court.<sup>218</sup> One of the factors considered by the court is whether a state “engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights” to vote regardless of race or color.<sup>219</sup> The court also considered whether a state “engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.”<sup>220</sup> Even after receiving a favorable declaratory judgment, the state would remain under the court’s supervision for ten years and could be recalled under Section 5 if the state subsequently engaged in voter discrimination.<sup>221</sup> Southern representatives have complained that such bailout

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<sup>215</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 553 (2013).

<sup>216</sup> H.R. 2978, 15th Cong. § 4(b)(1)(A) (2017).

<sup>217</sup> 52 U.S.C. § 10303(a)(1) (2012 & Supp. II 2015).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* § 10303(a)(1)(F)(ii).

<sup>220</sup> *Id.* § 10303(a)(1)(F)(iii).

<sup>221</sup> 52 U.S.C. § 10303(a)(5) (2012 & Supp. II 2015); *Introduction to Federal Voting Rights Laws: Before the Voting Rights Act*, *supra* note 19; COLEMAN, *supra* note 21, at 18.

standards are impossible to achieve.<sup>222</sup> Congressional supporters of the VRAA must amend the bailout provisions in order to gain the bipartisan support necessary to pass the VRAA.

Southern members of Congress as well as members from newly covered states such as Florida would likely be quite hostile to such a bailout provision.<sup>223</sup> To assuage concerns that the bailout provision may be too onerous for covered jurisdictions, supporters of the VRAA should propose amendments for the bailout based on the Butler amendments that were offered, though ultimately rejected in 1975,<sup>224</sup> and on the original bailout provisions. Representative M. Caldwell Butler of Virginia proposed amending the bailout provisions in the following ways: a jurisdiction would be permitted

to escape coverage . . . if: (1) sixty percent of minority citizens were registered and had voted “in the most recent general election for President or Members of Congress”; (2) no objections had been made under section 5 during the two years preceding the action; (3) during the previous five years the jurisdiction had not had a final judgment issued against it for violating the voting rights of minorities, had not used a “test or device,” and had made all required submissions; and (4) “an affirmative legislative program” had been undertaken to eliminate legal and procedural barriers to full and effective minority political participation.<sup>225</sup>

Members of Congress and the Supreme Court would likely be receptive to an “affirmative legislative program” to make the bailout provisions affirmative rather than punitive. According to Representative Butler’s proposal, an “affirmative legislative program” needed to offer:

(a) citizens eligible to vote an opportunity to register during evenings on a reasonable number of days each month and on a reasonable number of Saturdays and Sundays of each month; (b) reasonable public notice of the opportunity to register; (c) a place of registration and a place for voting at a location with access to and not an unreasonable distance from the place of residence of every eligible citizen of voting age residing within such State or political subdivisions; (d) reasonable provision for minority representation among election officials at polling places where minorities are registered to vote; (e) apportionment plans

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<sup>222</sup> Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 27 (2010) (quoting Rep. M. Caldwell Butler saying that the 1982 bailout amendment made “a mockery of the idea of reasonable bailout by crafting legislation which would establish requirements impossible to achieve” (quoting H.R. REP. NO. 97-227, at 64 (1981))).

<sup>223</sup> Corey Dade, *Is The Voting Rights Act Outdated*, NPR (Dec. 1, 2012, 10:19 PM ET), <https://www.npr.org/2012/12/01/166226641/is-the-voting-rights-act-outdated> [<https://perma.cc/MW8W-QPJU>].

<sup>224</sup> See 121 CONG. REC. 16,764–65 (1975) (statement by Rep. Butler); O’Rourke, *supra* note 74, at 780–81.

<sup>225</sup> O’Rourke, *supra* note 74, at 780.

which assure equal voter representation; (f) apportionment plans which avoid submergence of cognizable racial or minority groups; (g) removal of all unreasonable financial or other barriers to candidacy; and (h) adequate opportunity for minority representation in all local governing bodies where eligible minority citizens of voting age exceed twenty five per centum of the eligible citizens of voting age residing within such political subdivisions.<sup>226</sup>

Though the second section of Representative Butler's amendment would have allowed jurisdictions to apply for a bailout if they had not received any Section 5 objections in the two years preceding the bailout petition, the 1965 bailout provisions required a showing of five years,<sup>227</sup> a far less stringent requirement than the 1982 bailout provisions.<sup>228</sup> Therefore, the bailout provisions for the VRAA could have a five-year baseline for both receiving Section 5 objections as well as for using any discriminatory tests or devices. Using the Butler amendments and the 1965 bailout provisions as bases for new amendments, Congress could enact new bailout provisions which would help usher the VRAA into law.

In continuing with the trend of recent enactments and Supreme Court opinions, Congress should propose amended bailout provisions for the VRAA which would reward states that not only stop passing discriminatory voting laws but also take "constructive efforts" to end voter intimidation and harassment and expand registration and voting by implementing "affirmative legislative programs."<sup>229</sup> Congress could draft the amendments as follows: a jurisdiction covered by Section 5 may apply for a declaratory judgment from the U.S. District Court for the District of Columbia to be released from preclearance requirements if it can show that (1) the registration and voting rates of minority and non-minority voters have a gap of no more than five percentage points (e.g., 65 percent minority registration to 70 percent non-minority registration); (2) no objections have been made in the five years preceding the application; (3) during the previous five years the jurisdiction had not had a final judgment issued against

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<sup>226</sup> *Id.* at 780 n.80 (citing 121 CONG. REC. 16,764–65 (1975) (amendment to H.R. 6219, offered by Rep. Butler)).

<sup>227</sup> 121 CONG. REC. 16,764 (1975) (statement by Rep. Butler) (allowing covered jurisdictions to apply for declaratory judgment in Section (2)(A) of the amendment if in the two years before filing for such judgment the Attorney General made no objections and the District Court for the District of Columbia made no denials of a declaratory judgment request); Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (1965).

<sup>228</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 2, § 4(a), 96 Stat. 131, 131; Hebert, *supra* note 18, at 261 (explaining that the 1982 "bailout standard" was extended from seventeen years to nineteen years).

<sup>229</sup> 52 U.S.C. § 10303 (a)(1)(F)(ii)–(iii) (2012 & Supp. II 2015); O'Rourke, *supra* note 74, at 780.

it for violating the voting rights of minorities, had not used a test or device, and had made all required submissions; (4) the jurisdiction has not been assigned any federal examiners or observers within the preceding five years; and (5) an affirmative legislative program had been undertaken to eliminate legal and procedural barriers to full and effective minority political participation.<sup>230</sup> Further, the affirmative legislative program must be submitted in writing to the U.S. District Court for the District of Columbia to be determined whether it will indeed increase minority civic participation.

A jurisdiction should be allowed to submit a combination of any of the following as part of its affirmative program; additionally, the list should not be exhaustive as to further encourage innovation and experimentation among the states: (1) opportunities for eligible citizens to register to vote on evenings and weekends; (2) opportunities for eligible citizens to vote outside of Election Day; (3) reasonable public notice of the opportunity to register; (4) a place to register and a place to vote accessible to every eligible citizen from their place of residence; (5) reasonable provision for minority representation among election officials at polling places where minorities are registered to vote; (6) apportionment plans which assure equal voter representation; (7) apportionment plans which avoid the submergence of cognizable racial or minority groups; (8) removal of all financial or other barriers to candidacy; and (9) adequate opportunity for minority representation in all local governing bodies where minorities exceed 25 percent of citizens eligible to vote.<sup>231</sup> Using these amended bailout provisions, Congress is more likely to pass the VRAA as the provisions are partially based on amendments previously offered by a southern Republican who saw the preclearance regime as a stigma upon southern states.<sup>232</sup> The amended provisions will also allow states to create their own affirmative solutions to voter discrimination and disparities and aid individual members as well as their political party in successfully competing for new voters.

A. *The Amended Bailout Provisions Would Gain Congressional Republican Support for the VRAA*

Republicans, especially those from states covered by the preclearance regime, have viewed Section 5 as putting a “scarlet

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<sup>230</sup> See 121 CONG. REC. 16,764–65 (1975) (statement by Rep. Butler).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

letter” on southern states.<sup>233</sup> They have also viewed the bailout provisions as being impossible to attain.<sup>234</sup> Congressional Republicans would thus be highly skeptical of a VRAA in which not only the updated coverage formula but also the amended bailout provisions were written primarily, if not solely, by Democrats and even more by Democrats from northern and western states.

Congressional Republicans would, on the other hand, be much more likely to support bailout provisions based largely on the Butler amendments proposed in 1975 for the following reasons. First, under these proposed amendments, states will gain the ability to innovate and experiment with their election laws to fully include the political participation of minority voters. Judges, politicians, and academics have leveled critiques at the federal government for “commandeering” states to adopt policies favored by the federal government.<sup>235</sup> The amended bailout provisions avoid such a critique by offering a list of possible policy solutions to racial disparities in voting by allowing the states to choose which policies would work best for them or to implement policies not included on the list. By adopting such an approach, Congress would allow states to, quite literally, operate as “laboratories of democracy.”<sup>236</sup> Though supporters of robust enforcement of federal voting laws may voice concerns about a more decentralized approach allowing some states to lag behind and repeat the “all deliberate speed” pace of reforms as was seen during school desegregation,<sup>237</sup>

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<sup>233</sup> Adam Clark Estes, *What’s at Stake in the Voting Rights Battle*, ATLANTIC (Feb. 26, 2013), <https://www.theatlantic.com/politics/archive/2013/02/whats-stake-voting-rights-act-battle/317940/> [<https://perma.cc/EHF2-KXQY>]; Jeffrey Toobin, *Voter, Beware*, NEW YORKER (Mar. 2, 2009), <https://www.newyorker.com/magazine/2009/03/02/voter-beware> [<https://perma.cc/D72H-R22Q>] (quoting Rep. Lynn Westmoreland of Georgia as saying, “Congress is declaring from on high that states with voting problems forty years ago can simply never be forgiven—that Georgians must eternally wear the scarlet letter because of the actions of their grandparents and great-grandparents.”).

<sup>234</sup> See Seaman, *supra* note 222, at 20.

<sup>235</sup> See Simon Lazarus, *The Temptations of the Court*, SLATE (Mar. 27, 2012, 11:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/03/republican\\_governors\\_claim\\_obamacare\\_is\\_a\\_violation\\_of\\_states\\_rights\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/republican_governors_claim_obamacare_is_a_violation_of_states_rights_.html) [<https://perma.cc/T46C-H28S>]; Ilya Somin, *Federalism, the Constitution, and Sanctuary Cities*, WASH. POST: VOLOKH CONSPIRACY (Nov. 26, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities/?utm\\_term=.e5d5026442c6](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities/?utm_term=.e5d5026442c6) [<https://perma.cc/M6ZY-ML66>].

<sup>236</sup> See Edmund Andrews, *Steven Callander: How to Make States “Laboratories of Democracy”*, INSIGHTS BY STAN. BUS. (May 19, 2015), <https://www.gsb.stanford.edu/insights/steven-callander-how-make-states-laboratories-democracy> [<https://perma.cc/JA8B-UE7H>].

<sup>237</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955); Pedro Noguera & Robert Cohen, *The Legacy of ‘All Deliberate Speed’*, EDUC. WK. (May 19, 2004), <https://www.edweek.org/ew/articles/2004/05/19/37noguera.h23.html> [<https://perma.cc/87QP-CVNM>].

congressional supporters of the VRAA could emphasize that when put together with the new coverage formula, the bailout amendments would encourage states to promote the full political participation of minorities while complying with federal laws through the preclearance regime. Minority voters will have amassed enough organized political power through the affirmative efforts of the state to hold states accountable once the state has been bailed out of Section 5. Members of Congress will also be more accountable to their constituents through the amended bailout provisions.

Second, through their use of affirmative measures to politically empower minority voters, representatives and senators seen as supporting such policies will be able to use their record to gain the votes of newly registered voters. Supporters of the VRAA would then be able to counteract the current set of incentives used to dilute the power of minority voters. At present, politicians can enact discriminatory redistricting measures to guarantee their seat in Congress.<sup>238</sup> Under a regime of the VRAA's coverage formula and the proposed bailout provision amendments, members of Congress will instead be encouraged to promote fair apportionments of voters in districts to gain a bailout. With a bailout on record, a member of Congress can then tout both the bailout and the increased political participation as reasons for voters to support the member of Congress. Moreover, if able to gain passage, supporters of the VRAA could rest assured that the VRAA would survive judicial scrutiny from the Roberts Court. The amended bailout provisions would address the Court's concern about states retaining sovereignty and equal treatment from the federal government through less stringent and more contemporary bailout criteria along with a state-based affirmative program.

*B. The Amended Bailout Provisions Would Pass Judicial Scrutiny*

The VRAA addresses the Supreme Court's concern of punishing states based on outdated data, so the amended bailout provisions must assuage the Court's worry about maintaining the

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<sup>238</sup> LAUREN BOYDEN & MICHAEL LI, BRENNAN CTR. FOR JUS., *EXTREME MAPS 3* (2017), <https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf> [<https://perma.cc/KL8W-CR3R>]; Christopher Ingraham, *This Is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST: WONKBLOG (Mar. 1, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/?noredirect=on&utm\\_term=.3c6c65d2e3e2](https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/?noredirect=on&utm_term=.3c6c65d2e3e2) [<https://perma.cc/EQM9-TBX2>].

equal sovereignty of states. The VRAA with the amended bailout provisions would survive the Court's analysis for three reasons. First, the new coverage formula itself only brings states with recent records of discrimination in voting under the preclearance regime.<sup>239</sup> Second, states under the preclearance regime would undergo an identical process to obtain a bailout. Congress would establish such an identical process by maintaining the requirement for covered states to petition the U.S. District Court for the District of Columbia for a declaratory judgment as opposed to petitioning their local district courts.

Each state seeking a bailout must go before the U.S. District Court for the District of Columbia to receive a declaratory judgment<sup>240</sup> and would thus receive a similar analysis from three-judge panels that may contain some of the same judges. Southern states have initially viewed being assigned to the U.S. District Court for the District of Columbia as disadvantageous as the judges were viewed as more "cosmopolitan" by Congress.<sup>241</sup> States would, however, likely have complaints about unequal treatment if they instead appealed to district courts within their own jurisdiction. Though states may believe that remaining in their jurisdiction with judges likely hailing from their state would provide a sort of home field advantage, decisions from the United States Court of Appeals for the Fourth Circuit show that states are not more likely to win their case just by appealing to an in-state or regional court.<sup>242</sup> Indeed, an in-state or regional federal court may even write an opinion with phrases easily quoted by national media outlets leading to further stigmatization of the state.<sup>243</sup> States may then contend that the federal courts in their

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<sup>239</sup> H.R. 2978, 115th Cong. (2017); S. 1419, 115th Cong. (2017).

<sup>240</sup> Hebert, *supra* note 18, at 259.

<sup>241</sup> Crum, *supra* note 121, at 2008–09.

<sup>242</sup> See Anne Blythe, *4th U.S. Circuit Judges Overturn North Carolina's Voter ID Law*, NEWS & OBSERVER (July 30, 2016, 6:12 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article92593512.html> [<https://perma.cc/9FTB-MFW8>]; see also Vann R. Newkirk II, *Texas Keeps Failing to Convince Federal Courts Its Voting Laws Aren't Racist*, ATLANTIC (Apr. 21, 2017), <https://www.theatlantic.com/politics/archive/2017/04/texas-loses-another-voting-rights-case/523905/> [<https://perma.cc/LL77-SSFB>] (noting how Texas lost its initial defense of its voting identification law in a Texas federal district court).

<sup>243</sup> See Robert Barnes & Ann E. Marimow, *Appeals Court Strikes Down North Carolina's Voter-ID Law*, WASH. POST (July 29, 2016), [https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583\\_story.html?utm\\_term=.c9aa8391c809](https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html?utm_term=.c9aa8391c809) [<https://perma.cc/SC75-835Z>] (quoting the Fourth Circuit court's opinion where it stated that North Carolina "target[ed] African Americans with . . . surgical precision."); Camila Domonoske, *U.S. Appeals Court Strikes Down North Carolina's Voter ID Law*, NPR (July 29, 2016, 2:04 PM ET), <https://www.npr.org/sections/thetwo-way/2016/07/29/487935700/u-s-appeals-court-strikes-down-north-carolinas-voter-id-law> [<https://perma.cc/M55U-PXXU>]; (same); Michael Wines & Alan Blinder, *Federal Appeals Court Strikes Down*

jurisdiction are applying a more stringent standard than federal courts in other jurisdictions that have granted more bailout requests. States can charge no such claim when each state must approach the same court for a bailout.

Further, to remain in compliance with *Northwest Austin*, Congress must now allow counties, cities, and townships to apply for bailouts independent of the state.<sup>244</sup> Covered states with large cities, such as Nashville, Charlotte, and Atlanta, known for more liberal politics and larger minority populations, have clashed with those cities regarding legislative agendas.<sup>245</sup> States may then accuse local district courts of favoritism if it seems cities are obtaining bailouts at a higher rate than states. Such complaints of favoritism would be multiplied when judging courts in other states as well. States, cities, and townships would thus all greatly benefit from petitioning only the U.S. District Court for the District of Columbia for bailout requests despite the inconvenience of litigating their case outside of their state. Critics of maintaining federal oversight through district courts or the DOJ have also proposed the possibility of using independent agencies to enforce federal voting laws.<sup>246</sup>

An independent agency available to review applications to be bailed out of the preclearance regime would also pass the test of providing an identical process to each jurisdiction that would come before it. Agencies, however, may actually lessen the chances of passage for the VRAA. The objective and disinterested nature of independent agencies is constantly in question.<sup>247</sup> Members of Congress hesitant to support the VRAA may be dissuaded by the possibility of going before an agency vulnerable to “regulatory capture.”<sup>248</sup> District court judges, on the other hand,

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*North Carolina Voter ID Requirement*, N.Y. TIMES (July 29, 2016), <https://www.nytimes.com/2016/07/30/us/federal-appeals-court-strikes-down-north-carolina-voter-id-provision.html?mtrref=www.google.com> [<https://perma.cc/D6KB-T3QJ>] (same).

<sup>244</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009).

<sup>245</sup> See K.W., *How Conservative States and Liberal Cities Vie for Control*, ECONOMIST (Oct. 9, 2017), <https://www.economist.com/blogs/economist-explains/2017/10/economist-explains-0> [<https://perma.cc/BT3C-288C>].

<sup>246</sup> Brittany C. Armour, Note, *After Shelby County v. Holder, Can Independent Commissions Take the Place of Section 5 of the Voting Rights Act?*, 53 WASH. U. J. L. & POL'Y 269, 288–90 (2017) (proposing the use of independent commissions in vote denial cases as some states have used independent redistricting commissions in gerrymandering and vote dilution cases); Foley, *supra* note 169, at 343–44 (proposing the use of a Voting Rights Advisory Board that would review any change to voting rights laws brought to it by local communities and label such laws as “retrogressive” or not, though such labeling would not carry the force of law).

<sup>247</sup> See e.g., Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 37 DUKE L.J. 252, 252–53 (1988).

<sup>248</sup> Will Baude, *Regulatory and Academic Capture*, WASH. POST: THE VOLOKH CONSPIRACY (May 18, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/18/regulatory-and-academic-capture/?utm\\_term=.93c2e80d8051](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/18/regulatory-and-academic-capture/?utm_term=.93c2e80d8051) [<https://>

have not had their independence and objectivity questioned to such a degree.<sup>249</sup> As the sole court to oversee bailout applications, the District Court for the District of Columbia has also developed an expertise regarding such matters.<sup>250</sup> A new agency would have to begin building anew its knowledge base of both the process and substance of adjudicating bailout proceedings. Thus, for both procedural and substantive reasons, members of Congress will be more likely to support the VRAA that maintains the U.S. District Court for the District of Columbia as the judicial forum for bailout proceedings rather than moving them to an independent agency. Jurisdictions applying for bailout would also maintain equal sovereignty as the bailout requirements would be much more similar to the requirements at the time of *South Carolina v. Katzenbach* than the requirements at the time of *Shelby County*.<sup>251</sup>

Third, the amended bailout provisions revert to requirements like those upheld in *South Carolina v. Katzenbach*. By adopting the Butler amendments, however, Congress will have made the bailout provisions more affirmative rather than punitive. The *Shelby County* Court wrote that the Fifteenth Amendment was intended to look towards the future rather than to the past.<sup>252</sup> With bailout provisions similar to those accepted by the *Katzenbach* Court and measures to allow states to be rewarded for increasing voter registration and civic participation,

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perma.cc/YN29-MUQS]; Steven Davidoff Solomon, *The Government's Elite and Regulatory Capture*, N.Y. TIMES: DEALBOOK (June 11, 2010, 2:00 PM), <https://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/> [https://perma.cc/QL3C-2NCF] (describing how “social capture” and “ideological capture” operate and cause regulators to rule in the interest of the industry they regulate rather than rule in the public interest); James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INDUSTRY INFLUENCE AND HOW TO LIMIT IT 71, 78–80 (Daniel Carpenter & David A. Moss eds., Cambridge Univ. Press 2014) <http://www.tobinproject.org/sites/tobinproject.org/files/assets/Kwak%20-%20Cultural%20Capture%20and%20the%20Financial%20Crisis.pdf> <https://perma.cc/XEW4-4KXS>] (explaining how “cultural capture,” through the mechanisms of group identification, status, and relationship networks, cause regulators to work in favor of industry interests over public interests).

<sup>249</sup> See John Cassidy, *In Praise of Independent Judges, from Learned Hand to Richard J. Leon*, NEW YORKER (Dec. 17, 2013), <https://www.newyorker.com/news/john-cassidy/in-praise-of-independent-judges-from-learned-hand-to-richard-j-leon> [https://perma.cc/VC4C-VD89]; Dahlia Lithwick & Steve Vladeck, *Resisting the Myth of the Judicial Resistance*, SLATE (Jan. 25, 2018, 4:44 PM), <https://slate.com/news-and-politics/2018/01/the-judges-who-ruled-against-trump-arent-part-of-some-judicial-resistance.html> [https://perma.cc/XP26-BJVY].

<sup>250</sup> See Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599, 1604 (2015).

<sup>251</sup> Compare *Shelby Cty. v. Holder*, 570 U.S. 529, 539 (2012) (writing that the Voting Rights Act Amendments of 1982 allowed states and political subdivisions to apply for a bailout after ten years), with *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966) (writing that Congress made the bailout provisions available to states and political subdivisions that had not committed voter discrimination in five years).

<sup>252</sup> *Shelby Cty.*, 570 U.S. at 553.

the bailout amendments will address the Court's concern about the VRA punishing certain states for past acts. The Court will also likely look favorably upon the affirmative measures of the bailout provisions as the states are able to choose independently whether to adopt those measures, create their own measures not thought of by Congress, or some combination of the two. With states having the independence to choose their own affirmative measures, the Roberts Court will likely see the amended bailout provisions as increasing the amount of sovereignty states enjoy in administering their voting laws as compared to the amount of sovereignty states were granted by the preclearance regime reviewed by the Court in *Shelby County*.

By creating a new coverage formula, providing the same judicial forum for all jurisdictions applying for a bailout, reducing the amount of time required to prove that discriminatory tests and devices have ceased, and allowing states to choose their own affirmative measures to encourage voter registration and civic participation, the VRAA with amended bailout provisions will satisfy the Supreme Court's requirement that the principle of equal sovereignty among the states not be violated. And if the principle has been violated, Congress had violated the principle in a manner that rewards jurisdictions for future good acts rather than punishing them for prior bad acts. The VRAA would then survive judicial scrutiny by meeting the updated coverage formula and equal sovereignty tests set by *Shelby County v. Holder*.

## CONCLUSION

Americans have long regarded voting to be a core component of citizenship. Though the Fifteenth Amendment promised equal status and treatment as voters to all Americans, Congress needed to pass the Voting Right Act one hundred years after the amendment was passed to fulfill that promise. In fact, the VRA fulfilled the promise so successfully that the U.S. Supreme Court ruled one of its most innovative protections—the coverage formula—as antiquated and unconstitutional. Despite the Court's ruling, states formerly covered by the VRA as well as states not covered by the VRA subsequently passed restrictive voting laws which disproportionately affected voters of color. A new law protecting the voting rights of all Americans is needed to fulfill the purpose of the VRA and strengthen the U.S. electoral system.

Congress has already addressed the need for a modernized coverage formula through the VRAA. Congress is not likely to pass the bill, however, without amending the bill in

ways to appeal to Republicans. Supporters of the VRAA can gain those needed votes by liberalizing the bailout provisions of the VRA. The amended bailout provisions will provide states with a clear and affirmative path to leave the preclearance regime. In the process, minority voters will regain the ability to hold their jurisdictions accountable for discriminatory voting practices as well as gain political power and organization through the implementation of affirmative legislative programs. States and their political subdivisions will thus be rewarded and emerge from preclearance coverage as more “small-d” democratic jurisdictions.<sup>253</sup> More importantly, voters like Rosanell Eaton will, once again, be rewarded for their political participation and civic engagement.

*Mario Q. Fitzgerald†*

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<sup>253</sup> Geoffrey Nunberg, *The Case for Democracy*, GEOFFREY NUNBERG (Jan. 19, 2005), <http://people.ischool.berkeley.edu/~nunberg/democrats.html> [<https://perma.cc/R7CC-GFNC>] (defining a small-d democrat as “someone who advocates for democracy”).

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