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A Fool's Errand: Why Congress Should Amend the Voting Rights Act but Not Section 4's Coverage Formula

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NOTES

A Fool's Errand

WHY CONGRESS SHOULD AMEND THE VOTING RIGHTS ACT BUT NOT SECTION 4'S COVERAGE FORMULA

INTRODUCTION

The Supreme Court has taken a scalpel to the Voting Rights Act (VRA) and what remains is a ghost of the landmark legislation passed in 1965. Specifically, *Shelby County v. Holder* found the coverage formula of Section 4 of the VRA¹ unconstitutional.² This ruling spells the end for the preclearance regime of the VRA, under which certain state and local governments, determined by Section 4's coverage formula, were required to seek Department of Justice (DOJ) approval of any changes to their voting laws or procedures.³ In doing so, the Court restricted Congress's power to make determinations of how best to protect minority voters under the Fifteenth Amendment.

The VRA, at its enactment, was a remarkable exercise of Congressional power because of its prophylactic nature. By requiring jurisdictions with a track record of discriminatory voting laws to seek DOJ approval before implementing new voting laws and procedures, the VRA placed the burden on state and local governments to prove "that such qualification, prerequisite, standard, practice, or procedure neither has the *purpose* nor will have the *effect* of denying or abridging the right to vote on account of race."⁴ In the aftermath of *Shelby County*,

¹ 42 U.S.C. § 1973b(b) (2012).

² *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

³ *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing before the S. Judiciary Comm.*, 113th Cong. 1-2 (2013) (testimony of Wendy R. Weiser, Brennan Ctr. for Justice at N.Y.U. Sch. of Law), available at http://www.brennancenter.org/sites/default/files/analysis/VRA_Testimony_071713.pdf.

⁴ 42 U.S.C. § 1973c(a) (emphasis added).

however, the preclearance mechanism is an empty vessel. What remains, then, to protect minority voting rights is litigation brought under the VRA. Section 2 of the VRA provides the DOJ and citizens a cause of action against state and local acts or procedures that adversely impact minority voters.⁵ Litigation, however, is a poor substitute for preclearance. Section 2 suits, typically, will only be resolved *after* potentially discriminatory voting practices take effect.⁶ Such an after-the-fact remedy leaves minority voters vulnerable to illegal voting schemes—where discriminatory instruments that are later found unconstitutional were in place for at least one election cycle.⁷ If states and localities still seek to disenfranchise or burden minority populations,⁸ Congress must provide a statutory mechanism to avoid the irreparable harm suffered by minority populations from an illegal election, however remote the possibility.

This note will argue that the Court's request for Congress to amend the preclearance formula of Section 4 is a fool's errand. By preserving Section 5, the provision that grants the DOJ and courts the power to pre-clear voting changes, and striking down Section 4's coverage formula, the Court has given the illusion that its opinion is one of judicial minimalism.⁹ Cloaked in language of restraint, the *Shelby County* decision is actually a radical departure from how the Court reviews Congress's power to enforce the Fifteenth Amendment. It is not clear, then, that reviving Section 4's formula is a constitutionally viable avenue. Accordingly, Congress must focus on a more tangible solution, like lowering the burden of proof on plaintiffs seeking preliminary injunctions in voting-rights litigation. Part I explains the doctrinal history of the VRA and why *Shelby County's* new doctrine of "equal sovereignty" acts as a trigger for the Court to review any proposed coverage formulas under some form of heightened scrutiny. As any formula that treats States differently necessarily burdens the equal sovereignty of the states, any new formula will be subjected to heightened scrutiny. Part II will examine various proposed amendments to the coverage formula to show that there is no new formula Congress can develop that will comport with the Constitutional tests for Congressional power under the Fifteenth Amendment.

⁵ *Id.* § 1973.

⁶ *See infra* Part I.E.

⁷ *Shelby Cnty.*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting).

⁸ *See, e.g., id.* at 2639-40.

⁹ *See generally* Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713 (2014).

Because the possibility of devising a new formula that survives constitutional scrutiny is remote, Part III proposes guiding principles for a statutory scheme that strengthens the Court's ability to grant preliminary equitable remedies in VRA litigation that is similar to recent proposals made in Congress. Such a remedy is necessary to prevent the constitutionally repugnant outcome of an illegal voting scheme while accepting the reality that a Section 2, litigation-based strategy is, at present, the most pragmatic avenue for enforcing what remains of the VRA.

I. THE ORIGINS OF THE VOTING RIGHTS ACT AND THE LANDSCAPE AFTER *SHELBY COUNTY*

The *Shelby County* decision is, at the very least, a departure from the Court's demonstrated deference to Congress to defend voting rights under its Fifteenth Amendment power.¹⁰ What results is a new constitutional landscape for state and local governments as well as for advocates of minority voters. This section will explain the decision and its implications, namely what I term the new heightened scrutiny of the Court's equal sovereignty standard. I will then argue that the VRA is still necessary to protect minority voters, particularly in regard to the potential for irreparable harm to minority populations by illegal voting schemes.

A. *The Voting Rights Act and Shelby County's Impact*

The novel approach in the VRA to voter protection is its preclearance mechanism. Because of difficulties with jurisdictions circumventing remedial Congressional actions to protect voting rights and the general inefficiency of targeting specific discriminatory voting laws, Congress instituted the preclearance regime.¹¹ Section 5 of the VRA¹² requires certain jurisdictions to submit proposed changes to their voting laws to the DOJ, a process called "preclearance."¹³ The DOJ then has 60 days to respond.¹⁴ If the DOJ objects to the change and blocks its implementation, then the jurisdiction has recourse to a three-judge panel of the D.C. District Court.¹⁵ In order to be subject to Section 5's preclearance

¹⁰ *Shelby Cnty.*, 133 S. Ct. at 2637-38.

¹¹ *Id.* at 2633-34.

¹² 42 U.S.C. § 1973c(a) (2012).

¹³ *Shelby Cnty.*, 133 S. Ct. at 2634.

¹⁴ *Id.*

¹⁵ *Id.*

requirements, a jurisdiction must fall under the criteria laid out in the coverage formula of Section 4.¹⁶ That formula captures:

any State or . . . any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.¹⁷

Congress later updated the formula to capture jurisdictions that met the same criteria—the presence of “tests or devices” and low minority turnout—in 1972.¹⁸ Congress did not intend for Section 5, which covered primarily Southern states, to be permanent but rather for the nation to take stock of the progress made in minority voter participation when, the Act expired.¹⁹ The VRA continued to be renewed and is still on the books today. After *Shelby County*, however, no jurisdiction can be captured by Section 4’s coverage formula, rendering Section 5 effectively useless.²⁰

Though many complaints have been lodged at the Court’s decision in *Shelby County*, it cannot be said that it came as a surprise.²¹ The Court’s 2009 decision in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*) foreshadowed the outcome of *Shelby County* when it called into question the continued constitutionality of Section 5 and thus of the preclearance regime.²² In dictum, the Court noted that “[the VRA] imposes current burdens and must be justified by current needs”²³ and that “[t]here is also a ‘fundamental principle of equal sovereignty’ among the States”²⁴ that is burdened by the application of Section 4. While

¹⁶ 42 U.S.C. § 1973b(b).

¹⁷ *Id.*

¹⁸ *Id.* “Test or device” is defined in the statute to identify voting barriers, like character or literacy tests. *See id.* § 1973b(c).

¹⁹ Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 177 (2007).

²⁰ The one exception is for jurisdictions that are subject to preclearance by the courts pursuant to Section 3(c), also known as the “bail-in” mechanism. *See generally* Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 *YALE L.J.* 992 (2010).

²¹ *Id.* at 1994; Zachary S. Price, *NAMUDNO’s Non-Existent Principle of State Equality*, 88 *N.Y.U. L. REV. ONLINE* 24, 24 (2013).

²² *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) [hereinafter *NAMUDNO*]; Crum, *supra* note 20, at 1994.

²³ *NAMUDNO*, 557 U.S. at 203.

²⁴ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *NAMUDNO*, 557 U.S. at 203).

not explicitly stated, the Court signaled to Congress that Sections 4 and 5, without amendment, would not withstand constitutional scrutiny in perpetuity.²⁵

Chief Justice Roberts' opinion in *Shelby County* picks up where *NAMUDNO* left off. Noting "parity" in minority turnout rates and voter registration, increased minority representation in elected office, and a general change in circumstances from the racial conditions of 1965,²⁶ Chief Justice Roberts, on behalf of the Court's five-justice majority, found the coverage formula unconstitutional.²⁷ The Court declared that the formula had outlived its utility, and was no longer "sufficiently related" to the current conditions of minority voting discrimination.²⁸ The Court left observers to make sense of the constitutional implications of its decision on the future of Congressional power to prevent voter discrimination.

B. *VRA Jurisprudence Prior to Shelby County*

Until *Shelby County*, the Court's standard of review for Congress's power to institute preclearance pursuant to the Fifteenth Amendment was laid out in *South Carolina v. Katzenbach*, which established that, "As against the reserved powers of the States, Congress may use any *rational* means to effectuate the constitutional prohibition of racial discrimination in voting."²⁹ *NAMUDNO* both called into doubt and left open the question of what standard of review the Court *should* use in determining the constitutionality of Congress's Fifteenth Amendment power.³⁰ Specifically, the Court openly queried whether the "congruent and proportional" standard of *City of Boerne v. Flores* ("*Boerne*"), a limiting doctrine on prophylactic Congressional enforcement power under the Fourteenth Amendment, applied to Congress's enforcement power under

²⁵ Crum, *supra* note 20, at 1996; *see also Shelby Cnty.*, 133 S. Ct. at 2631 ("Congress could have updated the coverage formula . . . but did not do so").

²⁶ *Shelby Cnty.*, 133 S. Ct. at 2625 (citing *NAMUDNO*, 557 U.S. at 202).

²⁷ *Id.* at 2631.

²⁸ *Id.* at 2630 (quoting *NAMUDNO*, 557 U.S. at 203).

²⁹ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (emphasis added); *see also* U.S. CONST. amend. XV, § 2; *Shelby Cnty.*, 133 S. Ct. at 2637-38 (Ginsburg, J., dissenting) (emphasis added).

³⁰ Richard L. Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), <http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/>.

the Fifteenth Amendment.³¹ Besides *NAMUDNO*, though, the precedent of *Katzenbach* was clear: the Court would use a deferential standard of review of Congressional power to pass the VRA under the rational basis test.³²

After *NAMUDNO*, it was not clear whether the Court's decision to curb Congress's Fourteenth Amendment enforcement power³³ would similarly apply to Congress's Fifteenth Amendment power.³⁴ When Congress renewed the VRA in 2006, it was concerned with the impact of *Boerne*, which established the congruence and proportionality test of Fourteenth Amendment enforcement power after the VRA's 1981 reauthorization, on the future constitutionality of the VRA. *Boerne's* congruence and proportionality test requires that Congress must show congruence between the means it uses and the ends it targets, as well as the appropriateness of the remedy it chooses, when a law it passes pursuant to the Fourteenth Amendment burdens state sovereignty.³⁵ The *Boerne* standard, though, does not delineate what evidence specifically would be relevant to the Court's decision of whether a Congressional action was congruent and proportional to a constitutional harm. Congress erred on the side of caution and elected to keep the coverage formula, with its old criteria as it was, because the formula had survived scrutiny under *Boerne* in the past.³⁶

C. *The Standard of Review in Shelby County*

Boerne, however, is not cited in the majority's opinion in *Shelby County*.³⁷ Despite ample briefing by the parties and significant time dedicated to the issue at oral argument, the Supreme Court failed to address which standard of review it would use in reviewing the preclearance formula of Section 4.³⁸ In the absence of a clearly articulated standard—both the language used by the majority and the depth in which the

³¹ *Id.* The “congruent and proportional” standard is discussed more in detail later in this section.

³² *Id.*

³³ *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

³⁴ Hasen, *supra* note 30 (Professor Hasen speculates a tangential but interesting idea that a future case about Fifteenth Amendment power may cite to *NAMUDNO* and *Shelby County's* first footnote to establish that the “congruence and proportionality” test also applies to the Fifteenth Amendment).

³⁵ *City of Boerne*, 521 U.S. at 530-34.

³⁶ Persily, *supra* note 19, at 194.

³⁷ Hasen, *supra* note 30; *see generally* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

³⁸ Hasen, *supra* note 9, at 727.

formula is analyzed—it is clear that the Court has adopted a new standard of some form of heightened-scrutiny in the context of the VRA.

The *Shelby County* opinion is now cited for “the principle that all States enjoy equal sovereignty.”³⁹ Although Justice Ginsburg laments the majority’s failure to identify a standard of review,⁴⁰ one can make the argument that the majority functionally adopted the principle that a law burdening the equal sovereignty of the states will be reviewed under heightened scrutiny. While ample criticism has been leveled at the pedigree of this new doctrine,⁴¹ the doctrine itself remains and its implication is clear: the equal sovereignty doctrine is a restriction on Congressional enforcement power.

This realization is troubling to legislators charged with the task of drafting a new formula that comports with the Supreme Court’s jurisprudence. While the *Shelby County* opinion may employ language that suggests it reviewed the 2006 reauthorization of the VRA under a rational basis framework, the “equal sovereignty” principle at the heart of the majority’s opinion is, functionally, a trigger for heightened scrutiny. I use heightened scrutiny to indicate a level of scrutiny beyond rational basis, not necessarily to indicate a specific level of the tiers of scrutiny. Whether intermediate⁴² or heightened scrutiny,⁴³ the Court undertakes an exacting examination of the decisions Congress makes when it singles out a suspect class. In that sense, the opinion can be read to mean that when Congress distinguishes between states in a way that burdens their sovereignty, statehood will be treated as a suspect classification.

The language of the *Shelby County* opinion, despite its conspicuous silence, points to a standard of review beyond rational basis. Revealingly, the opinion borrows language germane to heightened scrutiny review. Though the majority cites *South Carolina v. Katzenbach*,⁴⁴ the case that established the more deferential, rational basis review of Congress’s power

³⁹ *Shelby Cnty.* 133 S. Ct. at 2618.

⁴⁰ *Id.* at 2644 (Ginsburg, J., dissenting).

⁴¹ *Id.* at 2649; Hon. Richard A. Posner, *The Voting Rights Ruling Is About the Conservative Imagination*, SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html.

⁴² See, e.g., *Craig v. Boren*, 429 U.S. 190, 218 (1976).

⁴³ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

⁴⁴ *South Carolina v. Katzenbach*, 333 U.S. 301 (1966).

to enact the VRA under the Fifteenth Amendment,⁴⁵ it simultaneously describes the preclearance remedy in terms of how it is “tailored” to resolve a constitutional harm.⁴⁶ The tailored language suggests a new, more exacting standard of review than that of *Katzenbach*, drawing from the Constitutional lexicon of the heightened scrutiny doctrine that examines the extent to which Congress’s acts are narrowly tailored to its ends.⁴⁷

Similarly, the majority continued to impute heightened scrutiny language into *Katzenbach*’s rational basis standard. The Court adopted NAMUDNO’s language that “a statute’s ‘disparate geographic coverage’ . . . be ‘sufficiently related to the problem that it targets,’”⁴⁸ clearly employing heightened scrutiny review. The Court then concludes with an explicit reference to the rational basis test, writing that “[i]t would have been *irrational* for Congress to distinguish between States” if the Act had been newly passed, as opposed to reauthorized, based on the data it used in 2006.⁴⁹ Despite the Court’s oscillation between the tiers of scrutiny and the resulting confusion for policymakers and advocates,⁵⁰ the Court continually relies on heightened scrutiny as the basis for its finding that the coverage formula is unconstitutional.

That the Court could not have found the coverage formula unconstitutional under rational basis review is noted by the dissent. Justice Ginsburg makes clear that under the rational basis test of *Katzenbach*, there is no question that the Section 4 formula in its current form would pass constitutional muster.⁵¹ “So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end.”⁵² The Court, tellingly, undergoes a meticulous investigation into the means Congress chose to enforce the Fifteenth Amendment. The investigation itself, then, goes beyond merely determining whether Congress thought the formula to be appropriate, a departure from a rational basis examination.

⁴⁵ See Hasen, *supra* note 9, at 716.

⁴⁶ *Shelby Cnty.*, 133 S. Ct. at 2627.

⁴⁷ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

⁴⁸ *Shelby Cnty.*, 133 S. Ct. at 2627 (quoting *NAMUDNO v. Holder*, 557 U.S. 193, 203 (2009)).

⁴⁹ *Id.* at 2630-31 (emphasis added).

⁵⁰ *Id.* at 2637-38 (Ginsburg, J., dissenting).

⁵¹ *Id.*

⁵² *Id.* at 2637.

Another limitation on Congress's enforcement power, indicative of some form of heightened scrutiny, is *Shelby County's* "current conditions" standard. As part of the Court's holding, it requires that, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past."⁵³ The "current conditions" requirement will limit the evidence that Congress can use to show it has a legitimate interest in enacting prophylactic measures under the Fifteenth Amendment because it adds an additional qualification that did not exist under *Katzenbach*—that the evidence must be current. The Court is taking the question of when evidence of voter discrimination is relevant away from Congress. That is a departure from the deference of rational basis. The nebulous standard of "current conditions" gives courts the power to answer that question, though it is not clear if it is a factual or legal issue. Unfortunately, the Court fails to articulate what evidence, if any, would meet its new standards.

Consequently, after *Shelby County*, an act of Congress that burdens the equal sovereignty of the States will trigger heightened scrutiny. This is essentially what the *NAMUDNO* decision called for in the absence of a revised coverage formula.⁵⁴ If the question after *Shelby County* is whether Congress's remedy is "sufficiently related" to a constitutional harm,⁵⁵ then the implications may be dire. As Justice Ginsburg notes in her dissent, many federal programs treat states differently, for instance, in regards to gambling, EPA regulations, Nevada's Yucca Mountain nuclear waste site, and allocation of aid to rural drug enforcement.⁵⁶ In a Court resistant to expand the tiers of scrutiny, the sovereignty of states may have found itself among race and gender as classifications that require the Court's heightened scrutiny.⁵⁷

⁵³ *Id.* at 2629 (majority opinion).

⁵⁴ Price, *supra* note 21, at 26.

⁵⁵ *Shelby Cnty.*, 133 S. Ct. at 2627 (quoting *NAMUDNO v. Holder*, 557 U.S. 193, 203 (2009)).

⁵⁶ *Id.* at 2649 (Ginsburg, J., dissenting).

⁵⁷ The equal sovereignty doctrine is, at best, judicial invention. It is doctrinally dishonest inasmuch as it asserts dicta in *NAMUDNO* as settled law. *See id.* ("In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*."). In addition, the underpinnings of the equal sovereignty doctrine fails to support its application in *Shelby County* in two ways. First, it misappropriates the equal footing doctrine that provides the constitutional purchase for the majority's argument. Prior to the *Shelby County* decision, the equal sovereignty doctrine solely applied to "the admission of new States." *Id.* at 2649. Second, it ignores the historical reality of the

Congress's Fifteenth Amendment enforcement power may be further limited by the congruence and proportionality test. The Court has previously analogized Congressional enforcement power under the Fourteenth and Fifteenth Amendments.⁵⁸ Accordingly, *Boerne's* limits may soon apply to the VRA.⁵⁹ Professor Hasen describes how a future Court could "cite to *NAMUDNO* and *Shelby County* fn. 1 for the proposition that the Court has held that the Fourteenth and Fifteenth [A]mendment standards are the same, and then bootstrap[]the *Boerne* standard into a Fifteenth Amendment case."⁶⁰ That would mean that to enforce the Fifteenth Amendment, Congress would have to find evidence of "intentional unconstitutional discrimination by the states."⁶¹ As such, the congruence and proportionality concerns of *Boerne* cannot be divorced from Congress considering its Fifteenth Amendment enforcement power in the future and whatever amendments, if any, it can make to the VRA.

What follows is a landscape nearly impossible for Congress to navigate. The dual requirement that a formula for preclearance that burdens the "equal sovereignty" of the states must be justified by "current conditions" that warrant proportional remedies may preclude Congress from ever divining a formula at all.⁶² In this sense, the Court has sent Congress on a fool's errand; no formula exists that comports with the Court's constitutional mandate in *Shelby County*.

D. *The Continued Need for VRA Protections*

That the VRA has outlived its utility is far from settled. Congress undertook an extensive investigation in 2006 that made clear that current conditions justified the continued need

Reconstruction Amendments like the Fifteenth Amendment: that the Amendments were targeted at specific states, burdening their sovereignty, to remedy specific problems of voter discrimination. For a comprehensive and truly enlightening survey of the historical context surrounding the passage of the Fifteenth Amendment and how that informed the preclearance system under the VRA, see generally Akhil Reed Amar, *The Lawfulness of Section 5 – and Thus of Section 5*, 126 HARV. L. REV. F. 109 (2013).

⁵⁸ Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 178-79 (2005) (citing *Bd. of Trs. v. Garrett*, 531 U.S. 356, 373 n.8 (2001)).

⁵⁹ Hasen, *supra* note 30.

⁶⁰ *Id.*

⁶¹ Hasen, *supra* note 58, at 179.

⁶² Hasen, *supra* note 9, at 737.

for the VRA.⁶³ The congressional record amassed during the reauthorization was an unparalleled legislative body of evidence of minority voter discrimination.⁶⁴ While the majority found that current conditions in the Congressional record did not justify the extraordinary measures of preclearance, there is ample evidence of contemporary racial discrimination to support the continued need for the VRA.

Up until the Court's decision in *Shelby County*, the DOJ continued to use the VRA's Section 5 preclearance power to block discriminatory voting practices. Between 1982 and 2006, the DOJ objected to over 700 proposed voting changes.⁶⁵ Though overall DOJ objections under Section 5 to state and local acts have decreased since the mid-1990s,⁶⁶ the threat of voter discrimination persists. The data reveal evidence of the continued concerns of voter discrimination facing minority populations. For instance, "in the Deep South . . . African Americans make up 35% of the population," yet constitute "only 20.7% of seats in state legislatures—with even less" success for minorities in statewide office.⁶⁷ More specifically, Justice Ginsburg, in her dissent, singles out a few anecdotes in Congressional findings that demonstrate continuing efforts in the last twenty years to marginalize minority participation in elections. Some examples include Mississippi seeking to "reenact a dual voter registration system" that had previously been used to "disenfranchise Black voters"; voter dilution in redistricting plans in the City of Albany, Georgia and in Texas; purging of voter rolls of black voters in Alabama; and an all-white Town Board in Mississippi "abruptly cancel[ing] the town's election after an 'unprecedented number' of African-American candidates announced they were running for office."⁶⁸ These troubling facts point to the continued need for strong protections for minority voters in previously covered jurisdictions, especially because these acts were taken despite the threat of federal preclearance.

It is hard to quantify the success of the VRA because of its deterrent effect on jurisdictions that, if not for the threat of

⁶³ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2632 (2013) (Ginsburg, J., dissenting); see generally Persily, *supra* note 19, at 174.

⁶⁴ *Shelby Cnty.*, 133 S. Ct. at 2652.

⁶⁵ *Id.* at 2639.

⁶⁶ Persily, *supra* note 19, at 199.

⁶⁷ *Id.* at 198. The Deep South refers to Georgia, Alabama, Mississippi, Louisiana, South Carolina, and North Carolina. *Id.*

⁶⁸ *Shelby Cnty.*, 133 S. Ct. at 2640-41 (internal quotations omitted).

preclearance, would have enacted discriminatory voting laws.⁶⁹ Along similar lines, the DOJ had the ability to use a preclearance objection as an ex-ante bargaining chip.⁷⁰ Previously, the DOJ could request additional information from a jurisdiction that had proposed a potentially discriminatory change to its election procedures. By doing so the DOJ elicited concessions including the modification or withdrawal of proposed discriminatory measures by states and localities before the proposal took effect.⁷¹ For instance, “more than 800 proposed changes were altered or withdrawn since the last reauthorization [of the VRA] in 1982” after the DOJ had requested more information from states and localities.⁷² In fact, during the 2006 reauthorization of the VRA, Congress was concerned that it would be hard to quantify Section 5’s deterrent effect in establishing the factual record.⁷³ With Section 5 rendered inoperative, previously covered jurisdictions have a greater ability to enact discriminatory election laws putting minority voters at risk.

In the current political climate, states and localities also have greater incentives to discriminate against minority voters. Since the most recent party realignment following the civil rights era, there is more racial polarization in the two major political parties, where “most African American voters are Democrats and most white conservative voters are Republicans.”⁷⁴ Republican incumbents, accordingly, have an incentive to disenfranchise minorities under the guise of partisan politics.⁷⁵ Without the DOJ to object, it is reasonable to expect state and local governments to enact partisan-infused restrictive voting measures that target voters based on their race.

In the months following the *Shelby County* decision, some policymakers have done just that. Since 2010, 22 states have introduced voting restriction measures, including voter identification laws (Voter ID), purging of voter rolls, and ballot

⁶⁹ Persily, *supra* note 19, at 200-01.

⁷⁰ *Id.*

⁷¹ *Shelby Cnty.*, 133 S. Ct. at 2639; Persily, *supra* note 19 at 200.

⁷² *Shelby Cnty.*, 133 S. Ct. at 2639; *see also* Persily, *supra* note 19 at 200.

⁷³ Persily, *supra* note 19 at 193-94 (“To prove the law was necessary, the best evidence would be data concerning the extent of voting rights violations in the covered jurisdictions However, if the Act was working well, then few such examples should exist.”).

⁷⁴ Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 61 (2014).

⁷⁵ *Id.* at 62.

access measures.⁷⁶ In 2014, residents of 15 of those states faced the new wave of restrictive voting measures for the first time in a federal election.⁷⁷ This is in no small part because the Supreme Court was quick to implement its *Shelby County* decision to pending voting rights cases. Just two days after its decision in *Shelby County*, the Court vacated the D.C. District Court's finding, after an appeal from an objection by the DOJ under preclearance, that a Texas re-districting plan violated the VRA because it had a retrogressive effect on the minority makeup of voting districts.⁷⁸ The new post-*Shelby* landscape is clear. Recent state enactments from previously covered jurisdictions, like the restrictive Voter ID laws passed in Texas and North Carolina,⁷⁹ signal that the threat to minority voting rights is still real and the issue is likely to be before the Court soon. The current fallout from *Shelby County* may be the most convincing proof of Section 5's continued need.

E. *The Danger of Illegal Voting Schemes*

Section 2 litigation is an inadequate substitute for preclearance because it exposes minority voters to illegal voting schemes. Illegal voting schemes are policies enacted by state or local jurisdictions that are found unconstitutional only after the occurrence of an election cycle. Justice Ginsburg highlighted this problem in her *Shelby County* dissent.

Congress also received evidence that litigation under § 2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. An illegal scheme

⁷⁶ ERIN FERNS LEE, PROJECT VOTE, ELECTION LEGISLATION 2013: LEGISLATIVE THREATS AND OPPORTUNITIES 1-12 (2013), available at <http://www.projectvote.org/images/publications/Threats%20and%20Opportunities/September%202013/ELECTION-LEGISLATION-2013-Threats-and-Opportunities-September-2013.pdf>; WENDY WEISER & ERIK OPSAL, BRENNAN CTR. FOR JUSTICE, THE STATE OF VOTING IN 2014 1 (2014), available at http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf.

⁷⁷ WEISER, *supra* note 76, at 1.

⁷⁸ *Texas v. United States*, 887 F. Supp. 2d 133, 138 (D.D.C. 2012), vacated, 133 S. Ct. 2885 (2013).

⁷⁹ Lyle Denniston, *Texas Moves to Protect Voter ID Law*, SCOTUSBLOG (Aug. 8, 2013, 7:01 PM), <http://www.scotusblog.com/2013/08/texas-moves-to-protect-voter-id-law/>; Richard L. Hasen, *North Carolina's New Voter Suppression Law Shows Why the Voting Rights Act Is Still Necessary*, SLATE (Aug. 19, 2013, 12:08 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/north_carolina_s_speedy_vote_suppression_tactics_show_exactly_why_the_voting.html.

might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it.⁸⁰

Post-facto litigation presents obstacles to disenfranchised minority voters seeking recourse through the courts. The slow pace of litigation⁸¹ and the reluctance of courts to grant preliminary injunctions in Section 2 cases,⁸² mean that an illegal voting scheme, one that would have faced a preclearance objection by the DOJ, may cause irreparable harm to minority voters *even if* a lawsuit challenging the scheme as unconstitutional is eventually successful. The evidentiary hurdle that Justice Ginsburg describes is also substantial because the burden of proof falls to the voter rather than the jurisdiction. There are scenarios where the harm to minority voters, while difficult to prove, is very much real. It is possible, for instance, that “a plaintiff will be unable to satisfy its burden under Section 2 even though, on the same facts, a jurisdiction would have been unable to meet *its* burden under Section 5.”⁸³

Section 2 litigation, because of its complexity, takes much longer to litigate than in other areas of the law. This is another reason why Section 2 litigation is a poor substitute for preclearance and why illegal voting schemes may proliferate after the *Shelby County* decision. In a rare moment of consensus, both the majority and the dissent in *Shelby County* discuss the slow and costly nature of litigating VRA claims.⁸⁴ This was also of concern to the majority in *Katzenbach*, who wrote, “Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow.”⁸⁵ Thus, the temporal aspect of Section 2 litigation presents its own problems as an effective remedy for minority voters.

More importantly, the harm faced by minority voters by illegal voting schemes is irreparable.⁸⁶ Incumbents elected

⁸⁰ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2640 (2013) (Ginsburg, J., dissenting) (citation omitted).

⁸¹ *Id.* at 2633-34.

⁸² See *infra* Part III.A.

⁸³ Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 57-58 (2013).

⁸⁴ *Shelby Cnty.*, 133 S. Ct. at 2619 (noting that “slow and expensive” litigation was the impetus for the passing of the VRA); *id.* at 2633-34 (Ginsburg, J., dissenting).

⁸⁵ *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (citation omitted).

⁸⁶ *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing before the S. Judiciary Comm.*, 113th Cong. 108 (2013) (testimony of Justin Levitt, Professor of Law, Loyola Law School, Los Angeles, in response to questions submitted by Sen. Al Franken), *available at*

under unconstitutional conditions have the power to enact policies that entrench their own power such as passing additional discriminatory voting mechanisms.⁸⁷ The repercussions, then, of a discriminatory election law cannot be remedied by invalidating the law itself. A preventative remedy is necessary to avert such harms.

There are some examples of illegal voting schemes in practice. Because preclearance prevented instances of illegal voting schemes in covered jurisdictions, the only examples of these schemes are in jurisdictions not covered by the coverage formula in the 2006 reauthorization. In one case, a redistricting plan was enjoined in 2004 because it was found unconstitutional, despite that a complaint was filed in 2002.⁸⁸ During that two-year gap, an election cycle occurred under unconstitutional conditions and incumbents ran in the 2004 elections.⁸⁹ Another example is a redistricting plan in South Dakota. A complaint was filed in December 2001 alleging the plan to be unconstitutional, the plan was found unconstitutional in September 2004, and a remedial plan was not imposed until 2005.⁹⁰ As the case was litigated, the discriminatory plan was in effect for elections in 2002 and 2004.⁹¹ It is likely that these instances will expand to previously covered jurisdictions where emboldened state and local governments may undertake brash measures to enact voting restrictions without the threat of preclearance objection. For instance, the Supreme Court upheld the Fifth Circuit's stay of a permanent injunction against Texas's Voter ID law granted by a district court in Texas after finding that the law violated Section 2 of the VRA.⁹² Minority voters, as a result, faced election procedures in November 2014 that had already been found unconstitutional by a federal court. Unfortunately, the problem posed to minority voters after *Shelby County* is much easier to identify than its solution.

<http://www.gpo.gov/fdsys/pkg/CHRG-113shrg88717/pdf/CHRG-113shrg88717.pdf> [hereinafter Levitt Testimony].

⁸⁷ *Id.*

⁸⁸ *Id.* at 106.

⁸⁹ *Id.*

⁹⁰ *Id.* at 106-07.

⁹¹ *Id.*

⁹² *Veasey v. Perry*, Nos. 14A393, 14A402 and 14A404, slip op. at 1, 4 (U.S. Oct. 18, 2014) (Ginsburg, J., dissenting).

II. THE DIFFICULTIES IN DEVISING A NEW SECTION 4 FORMULA

Even in 2006, Congress was uncertain that it could devise a formula that would withstand a challenge under *Boerne's* congruence and proportionality test.⁹³ With *Shelby County's* more stringent constitutional guidelines for acceptable coverage formulas, legislators face even more uncertainty. *Shelby County* requires that legislators discern which facts constitute proof of current conditions of minority voter discrimination.⁹⁴ “Subtler second-generation” voting barriers, though, render the original metrics of the VRA’s coverage formula, such as voter registration rates, inadequate to address minority disenfranchisement in its current form.⁹⁵ Evidence shows that minority voter registration and turnout is not as telling of discrimination as it was in 1965.⁹⁶ While some members of Congress have proposed a bill to revive the coverage formula of the VRA,⁹⁷ there has been little more than that.⁹⁸ Through analyzing the proposed Voting Rights Amendment Act (“VRAA”) as well as an alternative method proposed by two academics that captures state and local jurisdictions whose constituents harbor racist attitudes, it is evident that no coverage formula can survive the heightened scrutiny review of *Shelby County's* equal sovereignty doctrine. That is, a new coverage formula must not burden the equal sovereignty of the states, but if it does, it must be justified by current conditions.⁹⁹

The characterization, then, of Congress’s task of updating the formula to reflect current conditions as an easy fix¹⁰⁰ is misguided. First, I will examine the elements of the

⁹³ See *supra* Part I.B.

⁹⁴ Persily, *supra* note 19, at 193-94.

⁹⁵ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2642 (2013) (Ginsburg, J., dissenting).

⁹⁶ Persily, *supra* note 19, at 196-97.

⁹⁷ Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. (2014) available at <https://beta.congress.gov/113/bills/s1945/BILLS-113s1945is.pdf>; Carrie Johnson, *Lawmakers Roll Out Voting Rights Act Fix*, NPR.ORG (Jan. 16, 2014, 3:52 PM), <http://www.npr.org/blogs/itsallpolitics/2014/01/16/263113258/lawmakers-roll-out-voting-rights-act-fix>.

⁹⁸ Kate Nocera, *Judiciary Chairman in No Rush to Move on Voting Rights Act Bill*, BUZZFEEDNEWS (June 26, 2014, 4:01 PM), <http://www.buzzfeed.com/katenocera/judiciary-chairman-in-no-rush-to-move-on-voting-rights-act-r#3ufaag3>.

⁹⁹ *Shelby Cnty.*, 133 S. Ct. at 2631.

¹⁰⁰ See Joshua Thompson, *Shelby County v. Holder: Forget the Coverage Formula, What About the Effects Test?* SCOTUSBLOG (Feb. 12, 2013, 1:29 PM), <http://www.scotusblog.com/2013/02/shelby-county-v-holderforget-the-coverage-formula-what-about-the-effects-test/>.

VRAA with specific attention to its proposed coverage formula. Second, I will look at a novel academic approach to a new Section 4 formula that captures jurisdictions where large amounts of voters express racist beliefs.¹⁰¹ Though both answer the Court's call to base a new formula on current conditions of voter discrimination, they both face serious concerns after *Shelby County* that raise questions about the constitutional vitality of any future Section 4 formula.

A. *The Proposals in the VRAA*

The VRAA, proposed in January 2014, aims to fortify what remains of the VRA's power to protect minority voters from discrimination. There are four main proposals relevant to answering the problem of illegal elections.¹⁰² First, the VRAA expands the power to "bail-in" jurisdictions under Section 3(c) of the VRA.¹⁰³ Second, to update the VRA's formula to capture state and local jurisdictions.¹⁰⁴ Third, to create a requirement for state and local jurisdictions to notify voters of changes within 180 days of federal elections, changes in polling resources related to federal elections, and changes in voting districts, like redistricting, in federal, state, and local elections.¹⁰⁵ Fourth, to expand the power of courts to grant preliminary injunctive relief in VRA litigation.¹⁰⁶ While some of the proposals above present good working alternatives to the world without an effective preclearance regime, the inclusion of a new coverage formula that burdens the equal sovereignty of states will hamper the effort to pass the VRAA.

B. *The Coverage Formula in the VRAA is Unconstitutional*

The proposed coverage formula in the VRAA seeks to capture States and political subdivisions whose practices reflect current conditions of race-based voter discrimination.¹⁰⁷ States would be subject to pre-clearance if, in the last 15 years, a state

¹⁰¹ See generally Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance after Shelby County*, 102 CALIF. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2262954>.

¹⁰² See S. 1945.

¹⁰³ *Id.* at § 2. "Bail-in" is discussed in detail later, *infra* Part II.D.

¹⁰⁴ S. 1945 § 3.

¹⁰⁵ *Id.* at § 4.

¹⁰⁶ *Id.* at § 6.

¹⁰⁷ *Id.* at § 4.

or a political subdivision within it committed five voting violations and at least one of the violations was committed by the state itself.¹⁰⁸ A political subdivision, on the other hand, would be subject to preclearance if, in the last 15 years, either it committed three voting violations or, if the political subdivision has “persistent and extremely low minority voter turnout,” it commits only one violation.¹⁰⁹ If captured, a jurisdiction would be subject to preclearance for 10 years, unless prior to then it obtains a “bail-out” under Section 4(a) of the VRA.¹¹⁰

The details of what constitutes voting rights’ violations and low minority turnout are further explicated in the language of the proposed amendment. Voting rights violations include findings of Fourteenth or Fifteenth Amendment violations or federal voting laws, a “failure or denial of preclearance by a court under Section 5 or 3(c) of the VRA,” or the same “failure or denial of pre-clearance by the Attorney General.”¹¹¹ However, there are *explicit exemptions* in the statute for voting rights violations based on Voter ID laws.¹¹² Furthermore, “persistent, extremely low minority turnout” is determined based on the relation of minority turnout in the political subdivision to minority and non-minority turnout rates over the past 15 years in the country, state, and same political subdivision, as well as if “the average minority turnout rate across all such elections in the political subdivision was more than 10 percentage points below the average nonminority turnout rate for the entire Nation.”¹¹³

Regardless of the efficacy of the legislation or good intent of its drafters, the coverage formula poses problems under the new doctrine of *Shelby County* and, if challenged, would not survive the Court’s heightened scrutiny. It necessarily burdens the equal sovereignty of states because, if

¹⁰⁸ Press Release, Office of Sen. Patrick Leahy, Voting Rights Amendment Act of 2014 Section by Section Description of VRA Draft Legislation (Jan. 16, 2014) available at http://www.leahy.senate.gov/download/1-16-14-section-by-section_for-press [hereinafter VRAA Press Release].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See S. 1945; see also William Yeomans, *Introduction: An Overview of the Voting Rights Amendment Act of 2014*, in AM. CONSTITUTION SOC’Y FOR LAW & POLICY, THE VOTING RIGHTS AMENDMENT ACT OF 2014: A CONSTITUTIONAL RESPONSE TO *SHELBY COUNTY* 2 (2014), available at https://www.acslaw.org/sites/default/files/Yeomans_Stephanopoulos_Chin_Bagenstos_and_Daniels_-_VRAA_1.pdf. Because voting identification laws are the central battle ground of second-generation voting barriers, one wonders if this clause renders the whole effort moot. See *supra* Part I.D.

¹¹³ S. 1945 § 3; see also VRAA Press Release, *supra* note 108.

enacted, certain jurisdictions, and not others, would be subject to preclearance. But to burden the equal sovereignty of the states is permissible so long as it is justified by current conditions.¹¹⁴ The criteria outlined in the VRAA, however, do not capture current conditions of racial discrimination because its metrics are arbitrary indicators of minority disenfranchisement.

A finding that a subdivision violated the Fourteenth or Fifteenth Amendment or Section 2 of the VRA, considered a voting violation under the VRAA's coverage formula, is not a good indicator of conditions of voter discrimination. Before *Shelby County*, preclearance lessened the need for the DOJ or advocates to file voting rights complaints in previously covered jurisdictions, so evidence of successful litigation is a poor data set to reflect current conditions of race discrimination. Additionally, the success of equality based litigation is arbitrary, as it is based on a variety of factors that are not necessarily reflective of current conditions of race discrimination.¹¹⁵ For instance, success may "vary . . . depending on the relative risk aversions of plaintiffs and defendants, available legal resources," as well as the possibility of settlement rather than a decision on the merits.¹¹⁶ Furthermore, federal courts are moving away from equality claims under the Fourteenth Amendment as a vehicle to protect minority groups.¹¹⁷ What results is a formula that may underwhelm voting rights advocates and, more importantly, a formula that is underinclusive because litigation would have to be filed against a jurisdiction in order for a discriminatory practice to ever come to light. Therefore, the VRAA's coverage formula is constitutionally fatal in the new heightened scrutiny of the equal sovereignty doctrine.

The Court may also find fault with Congress's line drawing, defining current conditions as events and violations over the prior 15 years. It is not clear, moreover, how the drafters, in developing the VRAA's new criteria, came to five voting violations by states and three by political subdivisions as the thresholds beyond which jurisdictions would be subject to preclearance. Arbitrary line drawing is a generally acceptable tool for Congress and one that would survive a rational-basis review by the Court. Without specific findings, however, as to why the time-frame and number of violations in

¹¹⁴ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

¹¹⁵ Elmendorf, *supra* note 101 (manuscript at 10-11).

¹¹⁶ *Id.*

¹¹⁷ See generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

the statute's formula are ideal indicators of current conditions of minority voter disenfranchisement, the proposed formula may not survive Constitutional review. Especially, in light of a Court that is openly hostile to the idea of any legislation that draws distinctions based on race,¹¹⁸ and specifically to preclearance review of election changes,¹¹⁹ it is not likely that the Justices will give Congress the benefit of the doubt. The arbitrary metrics proposed in the VRAA do not constitutionally justify the burden on state sovereignty that results from the revival of the preclearance regime.

C. *Preclearance Formula Based on Racist Attitudes of Jurisdiction*

An interesting proposal is to base the coverage formula on data of racist views held by voters in a state or local jurisdiction. Christopher Elmendorf and Douglas Spencer, who proposed such a formula, define voter discrimination as “expressions of preference—with respect to candidates, political parties, or policies—which would violate the Constitution’s race discrimination norms if the voter were a state actor and the expression a state action.”¹²⁰ It follows that a formula that measures high concentrations of voters with discriminatory voter preferences provides Congress with current conditions of the potential for minority disenfranchisement that bear a “logical” relationship to a preclearance remedy.¹²¹ Voter discrimination would be determined by a survey that discerns racial animus based on stereotyping by respondents.¹²²

This formula presents an interesting contrast to the VRAA. Rather than looking to more concrete metrics like minority voter turnout or Section 2 violations, Elmendorf and Spencer’s proposal seeks to show that the voters, and thus the politicians they elect, *intend* to disenfranchise minority voters. In this respect, the proposal reads the Court’s current conditions requirement literally: racism is the best measure of current conditions of minority discrimination and this is what racism in America looks like. Moreover, it solves one of the key

¹¹⁸ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

¹¹⁹ *Shelby Cnty.*, 133 S. Ct. at 2631-32 (Thomas, J., concurring).

¹²⁰ Elmendorf, *supra* note 101 (manuscript at 13).

¹²¹ *Id.*

¹²² *Id.* (manuscript at 17).

problems of the VRAA, which is its arbitrary line drawing. The scientific methodology of a Section 4 formula based on the racist attitudes of voters involves less Congressional subjectivity and more objective measures in terms of both the time frame and actual racial animus.¹²³

The authors look to data aggregated in two large sample surveys conducted in 2008: the National Annenberg Election Survey (NAES) and the Cooperative Campaign Analysis Project (CCAP).¹²⁴ The surveys asked about 50,000 respondents a series of questions to gauge racial attitudes. For instance, the NAES asked respondents to rate “the work ethic, trustworthiness, and intelligence” of their self-identifying ethnic group, and then asked for general attitudes on “blacks.”¹²⁵ “The CCAP posed similar questions,” asking respondents to rate on a scale of one to seven the “intelligence and work effort” of various ethnic groups.¹²⁶ Important to the reliability of the data, the surveys were conducted anonymously and online, where respondents would be more candid.¹²⁷ Social scientists consider these models to be valid gauges of racial prejudice.¹²⁸ For the sake of argument, I assume that the methodology is effective in making a statistically accurate representation of racist attitudes.

The authors propose that racial animus and inaccurate conclusions made due to stereotypes of minority candidates serve as the basis for determining voter discrimination.¹²⁹ The data results would be aggregated to reflect, in a sense, the most racist states.¹³⁰ The author’s policy recommendation is twofold:

First, Congress should enact a *default* coverage formula using our ranking of the states by anti-black stereotyping The new coverage formula could take into account of other factors as well, such as racially polarized voting and minority population size, but worse-than-ordinary racial stereotyping would be a necessary condition for coverage. Second, Congress should give the Department of Justice or an independent commission authority to update the coverage formula prospectively.¹³¹

¹²³ Cf. *supra* Part II.B. (describing why the coverage formula in VRAA is too subjective).

¹²⁴ Elmendorf, *supra* note 101 (manuscript at 22).

¹²⁵ *Id.* (manuscript at 22-23).

¹²⁶ *Id.* (manuscript at 23).

¹²⁷ *Id.* (manuscript at 24-25).

¹²⁸ *Id.* (manuscript at 23).

¹²⁹ *Id.* (manuscript at 17).

¹³⁰ *Id.* (manuscript at 37-39).

¹³¹ *Id.* (manuscript at 51).

Such a Congressional act, however, would not survive the Court's new *Shelby County* doctrine. The formula would subject certain states to differential treatment—preclearance for some and not others—triggering the equal sovereignty test. A formula that targets jurisdictions based on the racist attitudes of its constituents, moreover, is not sufficiently related to current conditions of race-based voter discrimination. This proposal, in contrast to the VRAA, is focused on showing conditions of discriminatory *intent*, rather than capturing discrimination in effect.¹³² But without an instance of actual discrimination a formula will likely fail constitutional scrutiny. The underlying premise of the formula is that it is evidence of a heightened risk of minority disenfranchisement, only a potentiality, rather than discrimination-in-fact. A potentiality does not reach the threshold of constitutional harm that would be considered a current condition of voter discrimination. Arguably, despite the intent of the authors, it would still be difficult to prove, in litigation or Congressional hearings, a causal link between the racist attitudes of a jurisdiction and intentionally discriminatory policies enacted by lawmakers. In other words, just because voters are racist does not mean that the laws enacted restrict the right of minorities to vote. A formula based on the degree of racism of voters in a jurisdiction, therefore, is not sufficiently tailored to a constitutional harm, or more specifically, tailored to remedy current conditions of actual discrimination.

D. Section 2 Litigation and Section 3(c)'s Bail-In Approach

One alternative approach to crafting a preclearance formula is the bail-in approach pursuant to Section 3(c) of the VRA.¹³³ Section 3(c) provides a mechanism for federal courts to “bail-in” a jurisdiction, that is, to bring a state or local jurisdiction under the preclearance supervision of the court.¹³⁴ In order to bail-in a jurisdiction, a plaintiff must make a showing that a jurisdiction violated the Fourteenth or Fifteenth Amendment of the Constitution¹³⁵ or Section 2 of the VRA. Both carry a difficult burden for plaintiffs to meet.¹³⁶

¹³² *Id.* (manuscript at 14-15, 19).

¹³³ See Crum, *supra* note 20, at 1997.

¹³⁴ 42 U.S.C. § 1973a(c) (2012).

¹³⁵ Michael Ellement, *Preclearance Without Statutory Change: Bail-In Suits Post-Shelby County*, YALE L. & POL'Y REV. INTER ALIA 4 (Sept. 7, 2013, 11:45 AM),

Section 3(c) of the VRA provides the option for a court to retain jurisdiction of a suit brought by the Attorney General and implement the equivalent of the preclearance requirements of Section 5.¹³⁷ As such, observers have pointed to Section 3(c) as a saving grace for a post-*Shelby County* preclearance regime.¹³⁸ More importantly, the DOJ requested Section 3(c) relief in its most recent filing against Texas's Voter ID law,¹³⁹ which suggests, absent Congressional amendment to the VRA, that this is the last bulwark of prophylactic voter protection offered by the VRA.

The bail-in approach, however, is inferior to Section 5 in that, in order for a jurisdiction to be bailed-in, a plaintiff must make a showing that an election change was motivated by discriminatory intent rather than simply capturing a jurisdiction for preclearance with Section 4's coverage formula.¹⁴⁰ While the discriminatory intent standard is a higher bar to meet, it "is not insurmountable."¹⁴¹ Some jurisdictions have been successfully bailed-in after a showing—or admission—of discriminatory intent.¹⁴²

Still, bail-in is not sufficient to allay legitimate concerns regarding illegal voting schemes. Litigants filing a complaint under Section 2, as a matter of common sense, will always ask for bail-in as a possible form of relief.¹⁴³ It is still, however, a post-facto remedy that can leave minority voters vulnerable to disenfranchisement and the problem of illegal voting schemes would still persist. Despite the promise of bail-in, it is ancillary

http://ylpr.yale.edu/inter_alia/preclearance-without-statutory-change-bail-suits-post-shelby-county (click "DOWNLOAD PDF").

¹³⁶ Crum, *supra* note 20, at 2009 (citing *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion)).

¹³⁷ 42 U.S.C. § 1973a(c).

¹³⁸ See, e.g., Bruce E. Cain, *Moving Past Section 5: More Fingers or a New Dike?*, 12 ELECTION L. J. 338 (2013). In addition, many pointed to bail-in before *Shelby*, anticipating that Section 5 would be found unconstitutional. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131 (2013).

¹³⁹ Complaint at 14, *United States v. Texas*, No. 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013), available at <http://apps.washingtonpost.com/g/page/politics/justice-department-complaint-in-texas-voter-id-lawsuit/414/>.

¹⁴⁰ See Crum, *supra* note 20, at 2009.

¹⁴¹ *Id.*

¹⁴² *Id.* at 2010-15. Crum points to success in "two states, six counties, and one city: the State of Arkansas; State of New Mexico; Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and the city of Chattanooga, Tennessee." *Id.* at 2010 (footnotes omitted).

¹⁴³ Ellement, *supra* note 135, at 6.

to a more a long-term solution. In this sense, preliminary injunctive relief will still be necessary to guard against illegal voting schemes while advocates mount a legal challenge to bail-in a jurisdiction that discriminates against minority voters. Request for a preliminary injunction, moreover, may even be a necessary component of Section 2 litigation. In its brief asking the Court to uphold the Fifth Circuit's stay of Texas's Voter ID law, the State of Texas admonished plaintiffs for failing to request a preliminary injunction in August 2013 when the suit was filed.¹⁴⁴ The Court then agreed with the Fifth Circuit's concerns of changing election procedures in close proximity to the election and stayed the district court's permanent injunction of Texas' Voter ID law.¹⁴⁵ This concern could have easily been avoided had advocates requested preliminary equitable relief earlier. Given that litigation may be the only option for aggrieved voters, Congress must act to strengthen the litigation approach to voter protection and ensure that no citizen suffers the harm of an illegal voting scheme.

III. PROPOSED STATUTORY REMEDY

A. *Preliminary Injunctions as a Means to Prevent Illegal Voting Schemes from Taking Effect*

The most startling problem of a Section 2, litigation-based approach, in the wake of *Shelby County*, is the harm posed by illegal voting schemes.¹⁴⁶ Even if a policy, through Section 2 litigation, is proven to be unconstitutional, the harm to disenfranchised voters has been done and incumbents will have been voted into office under constitutionally troubling circumstances.¹⁴⁷ The courts, however, have the equitable power to prevent such a voting scheme from going into place until a decision is made on its merits through the grant of a preliminary injunction at the plaintiff's request.

Because of Section 5's prophylactic nature, there has been no need to examine in depth the efficacy of preliminary relief in Section 2 cases. But this remedy was not lost on the Supreme Court in oral argument where Solicitor General Verrilli reported

¹⁴⁴ Brief for Respondent at 57, *Veasey v. Perry*, Nos. 14A393, 14A402 and 14A404 (U.S. Oct. 18, 2014).

¹⁴⁵ Adam Liptak, *Supreme Court Allows Texas to Use Strict Voter ID Law in Coming Election*, N.Y. TIMES (Oct. 18, 2014), <http://www.nytimes.com/2014/10/19/us/supreme-court-upholds-texas-voter-id->

¹⁴⁶ See *supra* Part I.E.

¹⁴⁷ Stephanopoulos, *supra* note 83, at 68.

that preliminary injunctions were granted in “fewer than one-quarter of ultimately successful Section 2 suits.”¹⁴⁸ Other lawyers and academics placed the number as low as “less than 5%”¹⁴⁹ of all Section 2 cases or even “10 to 15” cases in total since 1982.¹⁵⁰ Moreover, preliminary relief is only available after extensive motion practice or discovery.¹⁵¹ Accordingly, injunctive relief in VRA cases, as it stands, is not sufficient to address concerns of illegal voting schemes.

Besides the scarcity of preliminary relief presently available to Section 2 litigants, many other problems will vex the DOJ, civilians, and civic groups who seek to challenge discriminatory voting schemes with litigation. The time and cost of litigation will stifle the number of schemes that will ever be challenged in court.¹⁵² Additionally, in Section 2 litigation the burden of proof falls on the challengers as opposed to it falling on state or local governments subject to Section 5.¹⁵³

If the equal sovereignty doctrine constitutionally precludes a viable Section 4 formula,¹⁵⁴ then Congress must fortify litigation-based remedies to challenge discriminatory election changes. Specifically, it must compensate for litigation’s central shortcoming: the possibility of illegal voting schemes. In regards to litigation, Congress must act to lower the standard for judges to grant preliminary injunctions and create an expedited schedule for the hearing of VRA cases.¹⁵⁵ The VRAA proposes such a change.¹⁵⁶ This is a practical, palatable, and constitutional reform. Moreover, such a reform does not have to be undertaken at the expense of attempting to

¹⁴⁸ *Id.* at 67 (quoting Transcript of Oral Argument at 38, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96)).

¹⁴⁹ *Id.* at 68 (quoting J. Gerald Hebert & Armand Defner, *More Observations on Shelby County, Alabama and the Supreme Court*, THE CAMPAIGN LEGAL CENTER (Mar. 1, 2013, 6:01 PM), http://www.clcblog.org/~clcblog1/index.php?view=article&id=506%3Amore-observations-on-shelby-county-alabama-and-the-supreme-court-&format=phocapdf&option=com_content (click for PDF)).

¹⁵⁰ *Id.* at 68 (quoting *Voting Rights Act after the Supreme Court’s Decision in Shelby County: Hearing before the Subcomm. on the Constitution & Civil Justice of the Comm. on the Judiciary*, 113th Cong. (July 18, 2013) (testimony of Robert A. Kengle), available at http://judiciary.house.gov/_files/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf).

¹⁵¹ Levitt Testimony, *supra* note 86, at 105.

¹⁵² Stephanopoulos, *supra* note 83, at 68-69.

¹⁵³ *Id.* at 64 (“There necessarily exist circumstances in which a plaintiff is unable to satisfy its burden under Section 2 and, on the same facts, a jurisdiction is unable to meet *its* burden under Section 5.”).

¹⁵⁴ See *supra* Part II.

¹⁵⁵ For a similar proposal that does not include an expedited court schedule, see Stephanopoulos, *supra* note 83, at 122-25.

¹⁵⁶ See S. 1945, 113th Cong. § 6 (2014).

revive preclearance, but it should be tackled separately from noble but quixotic efforts to contrive a new constitutional coverage formula.

B. *Standard for Granting Preliminary Injunctions*

The equitable power to grant a preliminary injunction (or temporary restraining order) is drawn from the Federal Rules of Civil Procedure.¹⁵⁷ While there is no uniform federal standard for the issuance of a preliminary injunction, several circuits use a four-part standard in reviewing a district court's discretion to grant a preliminary injunction.¹⁵⁸ The standard is

- (1) whether the plaintiff will probably succeed on the merits; (2) whether irreparable harm to the plaintiff would result if the injunction is not granted; (3) the balance of harms between the plaintiff and defendant if the injunction is allowed; and (4) whether the injunction will have an impact on the public interest.¹⁵⁹

This standard, though, is not set in stone. “[T]he Supreme Court has recognized that Congress has the power to override such equitable principles.”¹⁶⁰

C. *The Use of Preliminary Injunctions in Voting Discrimination Cases and Analogous Uses*

In two cases decided since the *Shelby County* decision, as examples, both judges denied motions by voting rights advocates for a preliminary injunction of a state's Voter ID law.¹⁶¹ First was a case in the Eastern District of Virginia¹⁶² involving a computer program which challenged what it found to be duplicate registrants on the voting rolls.¹⁶³ The second

¹⁵⁷ FED. R. CIV. P. 65.

¹⁵⁸ *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *see also* U.S. Magistrate Judge Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 497 (2003).

¹⁵⁹ Denlow, *supra* note 158, at 497-98.

¹⁶⁰ Samuel Bagenstos, *The Preliminary Injunction Provision*, in AM. CONSTITUTION SOC'Y FOR LAW & POLICY, *supra* note 12, at 12, 13.

¹⁶¹ Because the passing of and legal challenge to state Voter ID laws is a new and rapidly changing landscape, this note does not purport to treat this issue comprehensively. These are just examples that are illustrative of gaps in the current VRA scheme for successful legal challenges that do not subject minority voters to illegal voting schemes.

¹⁶² Memorandum Opinion and Order, *The Democratic Party of Va. v. Va. State Bd. Of Elections*, No. 1:13-cv-1218 (E.D. Va. Oct. 21, 2013).

¹⁶³ Matt Zapotosky, *Virginia's Democratic Party Loses Challenge Against Purge of 38,000 Voters from Rolls*, THE WASHINGTON POST.COM (Oct. 18, 2013),

instance involved a challenge to North Carolina's Voter ID law, which is still ongoing despite the Judge's recent denial of minority voters' request for a preliminary injunction.¹⁶⁴ One central problem in both rulings is both the difficulty of proving concretely that the policy had discriminatory intent and that individuals would actually be disenfranchised.

Courts have, however, used their discretion to grant a preliminary injunction based on potential rather than concrete harm to minority votes. In the lead-up to the 2008 Presidential election, a Pennsylvania District Court found that Pennsylvania's election procedures, namely its long lines at polling stations on election day, posed an undue burden on individuals' right to vote and granted a preliminary injunction.¹⁶⁵ This was based on the potential harm to the individuals' right to vote on Election Day.¹⁶⁶ Preliminary injunctions, then, can be a remedy to prospective constitutional burdens on voting rights. However, it can be improved with a statutory fix that lessens the merits requirement for the grant of preliminary injunctions to allow the potentiality of harm to minority voters to be of larger consideration in the court's determination.

Injunctive relief has been a successful remedy for other policy areas where the irreparable harm to vulnerable populations would be too great a cost to bear. For instance, environmental law is an area where Congress's broad statutory grants of authority enabled courts to expand preliminary equitable relief.¹⁶⁷ Harm done to the environment can be irreparable and, as a result, courts have greater power to use preliminary injunctive relief where necessary.¹⁶⁸ In *TVA v. Hill*, the Court held that the Endangered Species Act (ESA) required courts to exercise their equitable powers liberally when an endangered habitat's vitality is threatened.¹⁶⁹ "[W]hen a court

http://www.washingtonpost.com/local/virginia-politics/federal-judge-rejects-democratic-challenge-to-virginia-voter-roll-purge/2013/10/18/26235068-3809-11e3-8a0e-4e2cf80831fc_story.html.

¹⁶⁴ Memorandum Opinion and Order, *N. C. NAACP v. McCrory*, Case No. 1:13-cv-658 (2014), available at <http://electionlawblog.org/wp-content/uploads/nc-prelim-ruling.pdf>.

¹⁶⁵ *NAACP State Conference of Pa. v. Cortes*, 591 F. Supp. 2d 757, 765, 767 (E.D. Pa. 2008).

¹⁶⁶ For a comprehensive study of the legal issues surrounding challenging election lines before Election Day, see Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens* 9 ELECTION L. J. 19 (2010).

¹⁶⁷ Eric R. Glitzenstein, *Citizen Suits*, in *ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES* 260, 274 (Donald C. Baur & Wm. Robert Irvin eds., 2d ed. 2010).

¹⁶⁸ See, e.g., *Mfg. Chemists Ass'n v. Costle*, 451 F. Supp. 902, 906 (W.D. La. 1978).

¹⁶⁹ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

discerns a likely violation of the ESA that poses the potential for irreparable harm to a listed species, preliminary injunctive relief will ordinarily be forthcoming.”¹⁷⁰ Additionally, Congress also created an automatic preliminary injunction with its stay-put provision in the Individuals with Disabilities Education Act (“IDEA”), where a school district cannot change a disabled student’s individual education plan unilaterally “while due process proceedings are pending.”¹⁷¹ In both situations, Congress has used its legislative power to give courts *more* discretion to grant preliminary injunctions. The common theme in both is relaxing the success on the merits prong so courts can focus on the potential irreparable harm posed. If drafting a new coverage formula will prove constitutionally suspect, alternative statutory amendments may be the best course of action for the legislature.

D. *The Preliminary Injunction Provision of the VRAA*

The VRAA includes a provision that allows a court, in voting rights cases, to “grant [preliminary injunctive relief] if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship that would be imposed upon the plaintiff if the relief were not granted.”¹⁷² In other words, the courts do not have to look into the merits of a voting rights claim, per se, but rather the potential hardships to the litigants when deciding whether or not to grant a preliminary injunction.¹⁷³ Such relief can only be granted when there is a change in voting practice, not when a complaint is filed against an existing election procedure.¹⁷⁴ This provision alone is a viable option for voting rights advocates to use to combat discriminatory voting laws. Its attachment to reviving a preclearance formula, though, is both politically impalpable and constitutionally questionable.

E. *Statutory Proposal*

If Congress cannot draft a constitutionally viable formula, then it must pass new legislation to avoid the problems posed by illegal voting schemes. In the aftermath of *Shelby*

¹⁷⁰ Glitzenstein, *supra* note 167, at 275.

¹⁷¹ Bagenstos, *supra* note 160, at 13 (citation omitted).

¹⁷² S. 1945, 113th Cong. § 6(b) (2014).

¹⁷³ Bagenstos, *supra* note 160, at 12-13.

¹⁷⁴ *Id.*

County, litigation will be the primary vehicle for protecting minority voting rights. Though there may still be hope that a preclearance regime can be resuscitated by the bail-in approach under Section 3(c), the future of preclearance itself is constitutionally murky.¹⁷⁵ Bail-in, additionally, still leaves minority voting populations vulnerable to illegal voting schemes while litigation is pending. Therefore, to avoid the irreparable harm caused by illegal voting schemes, Congress must craft a twofold statute that: 1) lowers the threshold for plaintiffs to make a showing for the issuance of a preliminary injunction; and 2) creates a statutory schedule to expedite the hearing of VRA cases prior to an election with a contested procedure.

First, Congress should adopt the VRAA Section 6, which focuses more on a balance of the hardships analysis in voting rights cases and moves away from the plaintiff's burden to show a likelihood of success on the merits. This would restore the pre-*Shelby County* idea that jurisdictions, and not at-risk minority voters, should bear the cost in challenging election procedures by delaying the implementation of a potentially discriminatory practice or procedure. Unlike a new coverage formula, moreover, VRAA Section 6 does not face the constitutional death knell of the equal sovereignty doctrine. It is uniform in application across the states, thus heightened scrutiny would not apply.

Second, Congress should require courts to expedite the hearing of VRA cases when in close proximity to an election. Such provisions would be triggered when the state or locality enacts a policy less than 180 days prior to an election.¹⁷⁶ The expedited schedule would also be triggered when a decision on the merits of a Section 2 case regarding a voting scheme has not been made before the occurrence of an election cycle, allowing for, at the very least, a hearing on the issue of the preliminary injunction. This gives courts the incentive to resolve Section 2 cases expeditiously, but does not cause irreparable harm to plaintiffs if the courts fail to do so. It also encourages all jurisdictions to make necessary changes to their election laws, rather than ones that promise shortsighted political gain or are racially motivated. Policymakers will be wary of prolonged litigation for a policy whose implementation will be delayed beyond an election cycle.

¹⁷⁵ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2632 (2013) (Thomas, J., concurring).

¹⁷⁶ This time frame is similar to the notification requirements for states and political subdivisions in the new draft of the VRAA. See *supra* Part II.B.

This amendment, moreover, should be made separate from any proposal to amend Section 4's coverage formula. Not only is a new formula constitutionally suspect, but a proposal that brings back preclearance would be less popular than an act that is uniform in application and simply allows for due process to take its course. Moreover, the Court has expressed doubt that Section 5, the preclearance provision of the VRA, is unconstitutional itself.¹⁷⁷ So, for voting rights advocates, amending the preliminary injunction standard in voting rights cases is a better investment, of their political capital in the long term. If Congress can revive the overwhelming support of the 2006 reauthorization, with near unanimity in both houses,¹⁷⁸ passing statutory amendments to improve voter protection is not impossible.

CONCLUSION

Congress should not waste its efforts drafting a new formula as the courts are likely to strike it down. The new equal sovereignty doctrine is a departure from the rational basis examination the Court uses to review Congress's power to enact the VRA. In future cases, a coverage formula that burdens the equal sovereignty of the states will be subject to some form of heightened scrutiny where the Court will examine how a formula is tailored to current conditions of voter discrimination. This standard is not only burdensome, but likely fatal to the vitality of any new formula.

If the task of drafting a new coverage formula is in fact a fool's errand, then the search for a substitute for preclearance will be in vain. Civil rights advocates must adjust to the idea that preclearance is a vestige of the twentieth century and that alternative legislative remedies will never be quite the same. With that in mind, advocates ought to turn to constitutionally viable and effective statutory amendments that seek to solve the dire problem presented by illegal voting schemes. Congress should look to the VRAA Section 6 as a model and lower the threshold for plaintiffs to make a showing for preliminary injunctive relief and provide for an expedited schedule to hear VRA cases. Congress should also note in any amendment that the intent of its new language is to avoid the irreparable harm of illegal voting schemes.

¹⁷⁷ See *supra* Part II.B.

¹⁷⁸ *Shelby Cnty.* 133 S. Ct. at 2632.

While the bail-in approach of Section 3(c) may be the preferred method of the DOJ and civil rights advocates, it still has many shortcomings. Bail-in still exposes minority populations to irreparable harm through illegal voting schemes. With a legislative scheme that makes preliminary injunctions more available to plaintiffs, advocates can pursue legal challenges to bail-in jurisdictions into preclearance without voters bearing the cost of discrimination in illegal voting schemes. A more viable, litigation-based approach that is bolstered by amendment's to the VRA goes beyond the pre-*Shelby County* VRA in preventing illegal voting schemes because it would protect minority voters in all jurisdictions, not simply in ones previously covered by Section 4. Absent a constitutional amendment or a drastic change in the composition of the Supreme Court, this is the best avenue for VRA proponents hoping to shield minority voters from irreparable harm.

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