ARTICLE

CURRENTLY NOT CURRENT: HOW CURRENT NEEDS STILL JUSTIFY CURRENT BURDENS[1]

An Article Examining the Limitations of the Majority's Decision in Shelby County v. Holder

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1. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) ("The [Voting Rights] Act imposes current burdens and must be justified by current needs.").

* 2015 J.D. Candidate, University of Houston Law Center. The full version of this Article won the Susman Godfrey L.L.P. award for Most Outstanding Paper in the area of general litigation. I would first like to thank my parents Roger and Leslie, who have loved me and encouraged me every step of the way. Additionally, I would like to thank Katie Barrow for her love and support throughout law school. I would also like to thank the editors of the *Houston Law Review* for their time preparing this Article for publication. Finally, I am grateful to all of my educators, from elementary school to law school, for giving me the knowledge and skills to produce this Article.

I. INTRODUCTION

On Sunday, March 7, 1965, Americans watched 600 demonstrators march from Selma, Alabama to the state capital of Montgomery for voting rights equality, only to be beaten by state troopers with clubs, whips, pure muscle, and blinded by tear gas.[2] The events that transpired on "Bloody Sunday" inspired President Johnson to make voting rights legislation a priority.[3] Months later, the Voting Rights Act (the VRA or Act) was enacted as the "most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction."[4] The VRA is now considered a "sacred symbol of American democracy," unsurprisingly.[5] Congress overwhelmingly reauthorized the VRA in 2006.[6] If there was overwhelming support between both parties in Congress and the President for reauthorization of the VRA, what prompted the Supreme Court to hold one of the Act's enforcement sections to be unconstitutional in *Shelby County v. Holder*?[7] This Article will examine the limitations of the Court's ruling as well as offering an approach, post-Shelby County, to prevent race-based voter discrimination.

II. FACTS OF THE CASE

The VRA was enacted to combat race-based voter discrimination because the Fifteenth Amendment did not initially live up to its promise to end race-based voter discrimination.[8] There are three relevant sections of the VRA

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2. *See* ADAM FAIRCLOTH, MARTIN LUTHER KING, JR. 103 (1995) (stating these scenes were broadcasted on national television, and the day became known as "Bloody Sunday").

3. *See id.* at 104 (stating that President Johnson went before Congress and asked for voting rights legislation with "no delay, no hesitation, [and] no compromise").

4. THE FUTURE OF THE VOTING RIGHTS ACT xii (David L. Epstein et al. eds., 2006).

5. *Id.* at xi.

6. *See* 152 CONG. REC. H5207 (daily ed. July 13, 2006) (recording that the House passed reauthorization by a vote of 390 ayes to thirty-three noes); 152 CONG. REC. S8012 (daily ed. July 20, 2006) (recording that the Senate passed reauthorization by a vote of ninety-eight ayes and zero noes).

7. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (holding that Section 4(b) is unconstitutional because it relies on outdated data to determine covered jurisdictions).

8. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197 (2009)

discussed in *Shelby County*.[9] Under Section 2 of the VRA, any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color" is forbidden.[10] Section 4(b) provides a coverage formula that defines a covered jurisdiction as a state or any political subdivision that employed tests or devices as prerequisites to voting and that had low voter registration or turnout in the 1960s and 1970s.[11] If a jurisdiction is covered, under Section 5, the covered jurisdiction cannot change its voting procedures until federal authorities approve the proposed procedures.[12]

Since becoming a covered jurisdiction in 1965, Shelby County has submitted at least 682 voting changes to the Department of Justice.[13] The Department of Justice objected to five of the proposed changes, including a proposed redistricting plan by a city within Shelby County in 2008.[14] The county sued the Attorney General in 2010, seeking a declaratory judgment that Section 4(b) and Section 5 of the VRA were facially unconstitutional as well as seeking a permanent injunction against their enforcement.[15]

III. THE SUPREME COURT'S OPINION

A. Chief Justice Roberts's Majority Opinion

Chief Justice Roberts wrote *Shelby County*'s majority opinion, which held that the formula used in Section 4(b) of the VRA was unconstitutional because the outdated data used in the formula

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("[The] first century of congressional enforcement of the Amendment, however, can only be regarded as a failure."); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 94–102 (2000) (asserting that Fifteenth Amendment failed to *guarantee* a broader right to vote); Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 295 (1998) (arguing that the Fifteenth Amendment failed to "integrate former slaves into the political infrastructure of the country").

9. *See Shelby Cnty.*, 133 S. Ct. at 2619–20 (discussing Sections 2, 4, and 5).

10. 42 U.S.C. § 1973(a) (2012). This Section is nationwide, permanent, and not at issue in *Shelby County*. *See Shelby Cnty.*, 133 S. Ct. at 2631 (stating the Court only takes issue with the coverage formula).

11. 42 U.S.C. § 1973b(b). Section 4(b) was found to be unconstitutional by the Court in *Shelby County*. *Shelby Cnty.*, 133 S. Ct. 2627–31.

12. 42 U.S.C. § 1973c(a). This process is known as "preclearance." *Shelby Cnty.*, 133 S. Ct. at 2620.

13. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 442 (D.C. Cir. 2011), *aff'd*, 679 F.3d 848, 884 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612, 2631 (2013), *and vacated*, 541 F. App'x 1 (D.C. Cir. 2013).

14. *Id.*

15. *Id.* at 443–44; *Shelby Cnty.*, 133 S. Ct. at 2621–22.

did not address current needs sufficiently to subject jurisdictions to the current burdens of Section 5 preclearance.[16] The Court found no current needs by showing evidence that, in covered jurisdictions, voter turnout and registration rates approach parity, blatant voter discrimination and evasions of federal decrees are rare, discriminatory tests and devices have been outlawed for forty years, and minority candidates hold office at high levels.[17]

The majority concluded by reassuring that *Shelby County* has no effect on the permanent and nationwide ban on race-based voting discrimination under Section 2.[18] Further, the Court found no issue with Section 5 of the VRA, only the coverage formula from Section 4(b) used to trigger the preclearance requirements of Section 5.[19] Ultimately, the Court called upon Congress to draft another formula based on current conditions, stating that a formula is an "initial prerequisite to a determination that exceptional conditions still exist justifying such an 'extraordinary departure from the traditional course of relations between the States and the Federal Government.'"[20]

B. Justice Ginsburg's Dissenting Opinion

The dissent claimed the Court is relegating Section 5 to dormancy due to the fact that Section 5 has been a success in combating race-based voter discrimination.[21] The dissent recognized a "Catch-22."[22] If the VRA *was working*, then there would be less evidence of discrimination and, therefore, no further need for the VRA; on the other hand, if the VRA *was not working*, there would be an abundance of evidence of discrimination but no reason for reauthorization because the VRA would be inadequate to combat voter discrimination.[23]

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16. *Id.* at 2627–31.

17. *Shelby Cnty.*, 133 S. Ct. at 2625. Further, Congress shared these sentiments during reauthorization of the VRA, claiming "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters . . . ." *Id.* (quoting 120 Stat. 577). *But see* Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 65 (2009) (claiming that despite the success of President Obama's election, courts should make careful, case-by-case assessments, on racially polarized voting in covered jurisdictions).

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

19. *Id.*

20. *Id.* (quoting Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 500–01 (1992)).

21. *Id.* at 2632 (Ginsburg, J., dissenting). Without the coverage formula of Section 4(b), the preclearance requirement of Section 5 is dormant. *Id.* at 2649. *But see* Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 237 (2003) (asserting that Section 5 places heavy burdens on state and local governments, and that the section appears unconstitutional).

22. *Shelby Cnty.*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting)

23. *Id.*

IV. THE LIMITATIONS OF THE COURT'S DECISION

A. The Totality of Evidence Shows Current Needs Justify Current Burdens

The fundamental flaw in the Court's reasoning is that there are current needs in the covered jurisdictions that warrant the burdens of preclearance. A report, known as the Katz Study, illustrates the current need for the coverage formula through an examination of Section 2 suits between 1982 and 2004.[24] A survey of Section 2 litigation provides an accurate "yardstick for measuring differences between covered and noncovered jurisdictions" because Section 2 litigation is nationwide.[25] Thus, if the rate of successful Section 2 lawsuits were equal in covered jurisdictions and noncovered jurisdictions, it would bolster the Court's assertion that there is no current need to impose burdens on covered jurisdictions.[26] However, the Katz Study suggests that race-based voter discrimination remains concentrated in covered jurisdictions.[27] In the study, covered jurisdictions were responsible for 56% of successful Section 2 litigation, despite only representing of 25% of the country's population[28] or, after controlling for population, 4 times as many successful Section 2 lawsuits in covered jurisdictions as compared to noncovered jurisdictions.[29] Also, the study found that Section 2 lawsuits are more likely to succeed when they are filed in covered jurisdictions rather than a noncovered jurisdiction.[30] Relying, in part, on this study, Congress concluded there was still a current need for the coverage formula.[31] The *Shelby County* majority, however, did not consider the results of the study.[32]

Another limitation is that the Court did not adequately consider whether Section 5 preclearance actions are still successful in covered

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24. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative, University of Michigan Law School*, 29 U. MICH. J.L. REFORM 643, 654–60 (2006).

25. *Shelby Cnty.*, 133 S. Ct. at 2642 (Ginsburg, J., dissenting). *But see* Glen Kunkes, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J.L. & POL. 357, 383–84 (2012) (claiming Section 2 litigation is not an accurate measurement because half of the minority population lives in covered states, and, thus, those states produce a proportionate amount of Section 2 litigation).

26. *Shelby Cnty.*, 133 S. Ct. at 2642–43 (Ginsburg, J., dissenting).

27. *Id.*; Katz et al., *supra* note 24, at 654–57.

28. *Id.*

29. *Shelby Cnty.*, 133 S. Ct. at 2643 (Ginsburg, J., dissenting).

30. Katz et al., *supra* note 24, at 655.

31. *See Shelby Cnty.*, 133 S. Ct. at 2643 (Ginsburg, J., dissenting) ("Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.").

32. *Id.*

jurisdictions. The Court previously recognized the importance of evidence on whether preclearance is still effective in preventing discrimination when deciding the constitutionality of the VRA.[33] Indeed, the Court attempted to address this evidence by claiming the *percent* of objections to preclearance has steadily declined since enactment of the VRA.[34] However, even with a decline in the *percent* of Section 5 objections, covered jurisdictions continue to submit changes, a large number of which are objected to by the Department of Justice.[35] The dissent provides evidence that contradicts the majority by showing that there are more Department of Justice objections today than there were in the past.[36]

The difference between the two sides is the type of statistic used.[37] The Court claims that the *percentage* of objections is significantly lower now than when the VRA was first enacted.[38] However, the more telling number is what the dissent provides: that there are actually more Department of Justice objections in *total* within the last twenty years of the VRA than there were in the first twenty years of the VRA.[39] Percentages alone are not enough to show what is actually happening, which is that Section 5 is being used to combat race-based voter discrimination more frequently than when it was originally enacted.[40] Therefore, evidence cited by the Court claiming that things have "changed dramatically" does not accurately reflect that covered jurisdictions are still having their proposals rejected by the Department of

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33. *See* City of Rome v. United States, 446 U.S. 156, 181 (1980) (reasoning that a primary basis of upholding reauthorization of the VRA in 1975 was "information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General"). *But see* Kunkes, *supra* note 25, at 378 (arguing that preclearance objection statistics are problematic because they do not indicate the presence of intentional discrimination, claiming there may be nondiscriminatory reasons for Section 5 objections).

34. *See Shelby Cnty.*, 133 S. Ct. at 2626 ("The preclearance statistics are also illuminating. In the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes . . . . In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent.") (internal citations omitted).

35. *See id.* at 2639 (Ginsburg, J., dissenting) ("Congress found there were more DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490)." (citing *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 172 (2006) [hereinafter *Evidence of Continued Need*])).

36. *Id.*

37. *Compare id.* at 2626 (majority opinion) (using *percentages* to show a decline in the number of Section 5 objections), *with id.* at 2639 (Ginsburg, J., dissenting) (using *actual numbers* to show an increase in the number of Section 5 objections).

38. *Id.* at 2626 (majority opinion).

39. *Id.* at 2639 (Ginsburg, J., dissenting) (citing *Evidence of Continued Need*, *supra* note 35, at 172).

40. *See id.* at 2639–40.

Justice in large numbers.[41] Thus, contrary to the Court's opinion, it appears that there is a greater need for preclearance within covered jurisdictions because, during the last twenty years, the Department of Justice has objected to more changes than during the first twenty years of the VRA.[42]

B. The Use of the Bailout Procedure as a Means to Keep Section 4(b) Alive

The Court's call to Congress to reformulate Section 4(b) ignores previous changes made that allow the coverage formula to adapt to current needs. Congress conceded that the coverage formula could possibly be overbroad and "provide[d] for termination of coverage" when the "danger of substantial voting discrimination ha[d] not materialized."[43] This process is known as "bailout."[44] In order to bailout, a covered jurisdiction must show a three-judge panel of the D.C. Circuit that it has engaged in good behavior with respect to minority voting rights to the point where there is no longer a need for preclearance.[45] Congress considers the bailout provision a success, stating that it "illustrates that: (1) covered status is neither permanent nor [overbroad]; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so."[46] Although there is a laundry list of requirements that must be met to bailout, the Department of Justice has approved every bailout under the

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41. *Id.* at 2625, 2639.

42. *Id.* at 2639.

43. South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966) *abrogated by Shelby Cnty.*, 133 S. Ct. at 2631. Although abrogated, the termination method described by *Katzenbach* was the "bailout" provision of the VRA. 42 U.S.C. § 1973b(a)(1) (2012).

44. *See generally* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 206–12 (2009) (identifying the VRA's bailout provision and applying it to a Texas municipal utility district).

45. *See* 42 U.S.C. § 1973b(a)(1). In order to bailout, a jurisdiction must prove that in the last ten years: (a) no discriminatory test or device has been used; (b) no court has found the jurisdiction has denied or abridged the right to vote; (c) no federal election examiners have been assigned to the jurisdiction; (d) the subjurisdictions within the jurisdiction have complied with Section 5; (e) no Section 5 judgment has been issued by the D.C. District Court against the jurisdiction; (f) the jurisdiction has eliminated all discriminatory voting procedures, engaged in constructive efforts to eliminate intimidation and harassments of persons exercising the right to vote, and engaged in constructive efforts to provide opportunities for registration and participation by minority citizens. *Id.*

46. H.R. REP. NO. 109-478, at 25 (2006). *But see* Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 115 (2003) (suggesting that the bailout provision may not be as successful as Congress believes because only three out of one hundred political subdivisions have successfully bailed out).

current procedure.[47]

With the bailout procedure in mind, the Court could have relied on the bailout procedure to uphold the constitutionality of Section 4(b) because the procedure achieves the same result as Congress drafting a coverage formula based on current needs.[48] Both the bailout procedure and redrafting the coverage formula have the same result, which is to allow jurisdictions that no longer discriminate in voting to be free of the preclearance burdens.[49] Further, Shelby County itself provides an excellent example of why the bailout procedure is preferable to Congress reformulating Section 4(b).[50] Under the Court's opinion, Shelby County is no longer considered a covered jurisdiction.[51] However, looking at the record against Shelby County, the county would not have been eligible for a bailout due to the county's noncompliance with the Department of Justice.[52]

The benefit of the bailout procedure is that it benefits covered jurisdictions that truly should not be covered.[53] There is an incentive for these jurisdictions to eradicate voter discrimination in order to be relieved of the burdens of being a covered jurisdiction.[54] A jurisdiction exhibiting "good behavior" for a ten-year period could be statutorily entitled to a bailout.[55] However, under the Court's ruling, there is no incentive to act with good behavior because *every* jurisdiction is now a noncovered

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47. *See* Brief of Federal Respondent at 54, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 315242, at *54 (claiming that there have been 38 successful bailouts since 1984, including bailouts in jurisdictions in Alabama, Georgia and Texas).

48. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013). *But see* William S. Consovoy & Thomas R. McCarthy, Shelby County v. Holder*: The Restoration of Constitutional Order*, 2013 CATO SUP. CT. REV. 31, 60 (claiming the bailout procedure as a means of keeping Section 4(b) alive does not address the issue of whether the coverage formula is rational in theory).

49. *Compare Shelby Cnty.*, 133 S. Ct. at 2631 (reasoning that redrawing the coverage formula ensures the remedy "speaks to current condition"), *with* H.R. REP. NO. 109-478, at 25 (2006) (finding the policy behind the bailout procedure is to allow states with clean records to have the ability to leave the preclearance scheme).

50. *See infra* notes 53–58 and accompanying text (discussing why *Shelby County* shows that the bailout procedure is a better remedy than redrafting the coverage formula).

51. *See Shelby Cnty.*, 133 S. Ct. at 2631 (holding Congress' failure to act in redrafting the coverage formula makes Section 4(b) unconstitutional).

52. *See id.* at 2645–48 & n.7 (Ginsburg, J., dissenting) ("Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to § 5's preclearance requirement."); Sudeep Paul, *The Voting Right Act's Fight to Stay Rational:* Shelby County v. Holder, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 271, 275 (2013) (asserting that Shelby County likely would have been ineligible for a bailout given previous objections by the Attorney General).

53. *See* H.R. REP. NO. 109-478, at 25 (2006) ("[C]overed status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so.").

54. *See id.* If a covered jurisdiction desired a bailout it is within their power to bailout, so long as they meet all the requirements. *Id.*

55. *See* 42 U.S.C. § 1973b(a)(1) (2012) (requirements to bail out of Section 4(b)).

jurisdiction.[56] Thus, a county, like Shelby County, which would have been denied bailout status due to recent discriminatory actions, is no longer under Department of Justice oversight.[57] By continuing to allow the covered jurisdictions to bailout of preclearance, the Court could have accomplished the goal of freeing clean jurisdictions of the burdens of preclearance and, at the same time, protecting minorities in jurisdictions that should still be covered. [58] However, the Court's opinion fell short of accomplishing both goals because no jurisdiction is covered, leaving minority voters without protection from the Department of Justice.[59]

C. The Immediate Effect of Shelby County*: A Problem Down in Texas*

Perhaps nothing illustrates the negative impact of the *Shelby County* decision and the aftermath that will ensue quite like the new Texas voter-identification law. On the eve of *Shelby County*, the Texas legislature passed Senate Bill 14 (S.B. 14), which requires in-person voters to present photo identification (ID) when voting.[60] Because Texas was a covered jurisdiction pre-*Shelby County*, Texas was required to have the law precleared by the Department of Justice.[61] In the preclearance stage, a federal district court ruled that Texas failed to show that S.B. 14 would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," and, thus, the injunction was denied.[62] However, this ruling was vacated and remanded on appeal by Texas in light of the Court's

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56. *See Shelby Cnty.*, 133 S. Ct. at 2631 (finding that the coverage formula was unconstitutional necessarily causes no jurisdiction to be covered by the VRA). A covered jurisdiction need not take any actions now to be uncovered under the Court's ruling. *Id.*

57. *Id.* at 2645–48 & n.7 (Ginsburg, J., dissenting); s*ee generally* Paul, *supra* note 52, at 275 (explaining how Shelby County would likely not be eligible for a bailout).

58. *See id.* at 2632 ("[T]he Court today terminates the remedy that proved to be best suited to block that discrimination.").

59. *Id.*

60. S.B. 14, 2011 Leg., 82d Sess. (Tex. 2011) (codified, in part, at TEX. ELEC. CODE ANN. § 63.0101 (West 2012), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00014F.pdf. Acceptable identifications include: (1) a driver's license or personal ID card issued by the Texas Department of Public Safety (DPS); (2) a license to carry a concealed handgun, also issued by DPS; (3) a U.S. military ID card; (4) a U.S. citizenship certificate with photograph; and (5) a U.S. passport. *Id.*

61. *Compare* 42 U.S.C. § 1973c(a) (2012) (preclearance requirement), *with* 28 C.F.R. Pt. 51, App. (2013), *available at* http://www.gpo.gov/fdsys/pkg/CFR-2013-title28-vol2/pdf/CFR-2013-title28-vol2-part51-app-id190.pdf (showing that Texas became a covered jurisdiction in 1972).

62. Texas v. Holder, 888 F. Supp. 2d 113, 115 (D.C. Cir. 2012) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)), *vacated*, 133 S. Ct. 2886 (2013).

ruling in *Shelby County*.[63] Therefore, a bill that could not survive preclearance from a Department of Justice objection is currently law within Texas because of *Shelby County*.[64]

The situation in Texas is a likely and unintended consequence of the *Shelby County* decision.[65] The Court recognized that "[p]roblems remain in these States and others," and having a law enacted despite a Department of Justice objection and a federal court decree would likely constitute as a "problem."[66] The fear is that, in the wrong hands, these voter-ID laws could have a discriminatory effect on minorities.[67] The potential disparate impact on minority voting, coupled with the limitations on challenging these emerging laws through case-by-case litigation, displays the continued need for Section 4(b) preclearance.[68]

IV. REMEDIES AVAILABLE TO PREVENT VOTER DISCRIMINATION POST-*SHELBY COUNTY*

Shelby County ended the coverage formula, but it did not end race-based voter discrimination.[69] In fact, the Court stated "voting discrimination still exists; no one doubts that."[70] In order to curtail race-based voter discrimination, the Department of Justice and Congress can no longer rely on preclearance, and they must take a different approach.

The best way to curtail race-based voter discrimination post-

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63. Texas v. Holder, 133 S. Ct. 2886 (2013).

64. *Compare Texas*, 888 F. Supp. 2d at 115 (holding that the "[u]ndisputed record evidence" shows that racial minorities in Texas are disproportionally likely to live in poverty and that S.B. 14 will have a greater impact on the poor, thus the law would have a retrogressive effect), *with* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2623 (2013) (holding that the coverage formula is no longer constitutionally sound because current burdens are not justified by current needs).

65. *See Shelby Cnty.*, 133 S. Ct. at 2631 (holding that the court only takes issue with the data used for the coverage formula).

66. *Id.* at 2626. *But see* Crawford v. Marion Cnty. Election. Bd., 553 U.S. 181, 191–200 (2008) (holding that state interests such as detecting voter fraud, modernizing election process, and safeguarding voter confidence were sufficient to uphold an Indiana voter-ID law).

67. *See* Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 76 (2008) (claiming that the Help America Vote Act–a voter-ID law–erected additional voting barriers).

68. *Cf.* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 712 (2006) (finding that the disparate impact of voter identification laws have produced "sparse and unenlightening" case law).

69. *See generally* Brief of Amici Curiae Ellen D. Katz and the Voting Rights Initiative in Support of Respondent at 12–21, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 457386 (outlining the current need for the VRA to combat current voter discrimination).

70. *Shelby Cnty.*, 133 S. Ct. at 2619.

Shelby County would be to simply do what the Court asked: redraft the coverage formula.[71] The Court explicitly stated that it made no ruling on the preclearance requirement of Section 5.[72] The preclearance requirement has been a great success in eliminating first-generation barriers and curtailing second-generation barriers.[73] Thus, going forward, Section 5 preclearance should be the mechanism used to fight voter discrimination. If the Department of Justice wishes to continue the use of preclearance, then Congress will need to draft a new coverage formula, since that is what subjects jurisdictions to preclearance.[74]

Whatever data Congress uses, it must satisfy the standard from *Northwest Austin*—that the burdens imposed must meet "current needs."[75] In order to pass the Court's scrutiny, Congress should use the same factors that would *prevent* a jurisdiction from receiving a bailout of the VRA as the new requirements for determining whether a jurisdiction is covered under the redrawn formula.[76] In other words, if a covered jurisdiction was *ineligible* for bailout, then that jurisdiction would be a covered jurisdiction under the new formula. A jurisdiction will now be covered if in the last ten years:

(a). a discriminatory test or device has been used;

(b). a court found the jurisdiction has denied or abridged the right to vote;

(c). federal election examiners have been assigned to the jurisdiction;

(d). the subjurisdictions within the jurisdiction has not complied with Section 5;

(e). a Section 5 judgment has been issued against the jurisdiction; or

(f). the jurisdiction has not eliminated all discriminatory voting procedures, engaged in efforts to eliminate intimidation and harassments of persons exercising the right to vote, and engaged in efforts to provide opportunities for registration and participation by

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71. *See id.* at 2631 (holding that Congress may draft another formula based on current conditions).

72. *Id.* ("We issue no holding on [Section] 5 itself, only on the coverage formula.").

73. *Id.* at 2642 ("Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made.")

74. *Compare* 42 U.S.C. § 1973b(b) (2012) (coverage formula), *with Shelby Cnty.*, 133 S. Ct. at 2631 ("The [current coverage] formula . . . can no longer be used as a basis for subjecting jurisdictions to preclearance.").

75. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009).

76. 42 U.S.C. § 1973b(a)(1).

minority citizens.[77]

This formula should satisfy the "current needs" standard outlined by the Court because, if any of these categories are met, it shows that the jurisdiction still needs federal oversight due to recent voter discrimination.[78] This new formula brings in jurisdictions that have current needs because each requirement "directly addresses forms of discrimination."[79] The Court may not take issue to the above outlined criteria because, in *Shelby County*, the Court did not rule the bailout provision to be unconstitutional (only the covered jurisdiction formula).[80] Further, the Court has previously implied approval of the bailout procedure.[81]

Alternatively, the judiciary can use an already existing tool. Under Section 3(c) of the VRA, the judiciary has a remedy that allows it to retain a jurisdiction and impose preclearance on that jurisdiction.[82] This basically turns a noncovered jurisdiction into a covered jurisdiction.[83] This process is known as either the "pocket trigger" or "bail in" provision, and it can be used when any court finds intentional discrimination.[84] However, there are drawbacks to the pocket trigger because it is a time-intensive process because the pocket trigger is only used once there is a lawsuit.[85] Also, unless the Department of Justice intervenes, the pocket trigger will have negative aspects of case-by-case litigation, such as placing the financial burden on the plaintiffs and increasing the complexity of the cases, both of which are exacerbated by the limited number of attorneys who are qualified to litigate these cases.[86] Even with these drawbacks, the pocket trigger can serve as an important tool for

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77. *See id.* These are essentially the requirements to bail out of the VRA; however, each requirement would now be in the inverse. *Id.*

78. *See* Winke, *supra* note 46, at 115 ("[B]ailout requirements can be presumed to be a congruent and proportional response to the evil of widespread voting discrimination.").

79. *Id.*

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

81. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 207 (2009) (reasoning that the Court takes a broad view of the bailout procedure).

82. 42 U.S.C. § 1973a(c).

83. *See id.* (allowing a court to "retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced" unless a court finds that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color").

84. *See* Travis Crum, *The Voting Right Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1997, 2006–09 (2010).

85. *See* 42 U.S.C. § 1973a(c) ("[I]n *any proceeding* instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth and fifteenth amendment.").

86. Brief of Amicus Curiae the American Bar Association in Support of Respondent at 15–21, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 432970.

courts to force preclearance on jurisdictions until, and even after, a new coverage formula is drafted.

The Court is dismissive of second-generation barriers as a means for upholding Section 4(b) because the section does not speak of vote dilution, only test and devices.[87] Under a redrawn formula, Congress should include evidence that a jurisdiction has been involved in second-generation barriers. Including second-generation barriers in a new coverage formula is a necessity because first-generation barriers have been virtually eliminated because of the VRA.[88] The type of second-generation evidence that Congress should include, but not be limited to, is evidence of: annexation of White areas and non-annexation of minority areas; switches from single-member districts to at-large or multi-member districts; and discriminatory redistricting, also known as "gerrymandering."[89]

V. CONCLUSION

The Court admits that race-based voter discrimination still exists, and Texas' S.B. 14 illustrates the negative consequences of the Court's decision. Although the Court may have taken away the best method to combat race-based voter discrimination, going forward after *Shelby County*, the Department of Justice and Congress have tools they can employ to continue the "fight against injustice."[90]

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87. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013). Second-generation barriers are efforts to reduce the *impact* of minority votes. *See id.* at 2635 (Ginsburg, J., dissenting). This contrasts to first-generations barriers, which are direct attempts to block *access* to the ballot. *See id.* at 2625 (majority opinion).

88. *Id. Compare* Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151, 162 (2013) ("[It may be easier to] effectuate second-generation abridgment than it is to effectuate the first-generation, 1960s-era equivalent), *with* Consovoy and McCarthy, *supra* note 48, at 61–62 (claiming that including second-generation barriers in a new coverage formula would be difficult because second-generation barriers are "not as amenable to description by formula as voting tests and devices and low registration and voting rates").

89. This list of second-generation barriers is derived from Justice Ginsburg's dissent in *Shelby County*. *See generally Shelby Cnty.*, 133 S. Ct. at 2635, 2640–42.

90. 152 Cong. Rec. S8781 (daily ed. Aug. 3, 2006).