Hurricane SCOTUS: The Hubris of Striking our Democracy's Discrimination Checkpoint in *Shelby County* & the Resulting Thunderstorm Assault on Voting Rights

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INTRODUCTION

"They say they want you successful, but then they make it stressful. You start keeping pace, they start changing up the tempo."
– Mos Def[1]

"Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. . . . Hubris is a fit word for today's demolition . . . . Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."
– Justice Ruth Bader Ginsburg[2]

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I thank my former colleagues Leah Aden and Deuel Ross, LDF intern Pooja Shethji, and fellow Chris DeLaubenfels, for suggesting many important changes in this article. I am especially grateful to Leah for her invaluable running list of voting rights violations and substantive contributions, without which this Article simply could not tell the full story of voting rights at risk in the wake of *Shelby*. To stay abreast of continuing proposed voting changes in the places that Section 5 of the Voting Rights Act reached, visit STATEWIDE AND LOCAL RESPONSES TO THE SUPREME COURT'S VOTING RIGHTS ACT DECISION JUNE 25, 2013 – PRESENT, NAACP LDF, http://perma.cc/3TLZ-4KS9.

I am honored to have served beside such talented and creative lawyers, whose unwavering commitment to moving our country closer to its articulated ideals for Black people is equally inspiring and humbling.

[1] *Mr. Nigga*, *on* BLACK ON BOTH SIDES (Rawkus/Priority 1999).

[2] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2644, 2648, 2650 (2013) (Ginsburg, J., dissenting).

On March 7, 2015, I joined our nation's first and twice-elected Black President, Barack Obama, and civil rights legends in the fiftieth anniversary re-enactment of the iconic Bloody Sunday march over the Edmund Pettus Bridge in Selma, Alabama. After reaching the top of the bridge, Georgia Congressman and civil rights hero, John Lewis, led us in a moment of reflection and prayer, just as he did half a century earlier when he led the original march. During the prayer, I reflected on the way in which the march over this bridge, named after a Grand Wizard of the Alabama Ku Klux Klan,[3] gave birth to the Voting Rights Act of 1965 ("VRA").[4] Widely recognized as the crowning achievement of the civil rights movement, the VRA led directly to the election of a Black President within a generation of its passage.[5] (And President Obama's election led directly to the appointment of both the first Black Attorney General and the first Black female Attorney General.[6])

The VRA has provided vital protection for millions of voters of color by serving as our nation's voting discrimination checkpoint. The Section 5 provision, the core of the statute, required that all or part of fifteen jurisdictions covered under Section 4(b)—jurisdictions with a history of entrenched racial discrimination in voting—obtain federal approval *before* implementing any changes to voting laws or procedures.[7] The preclearance process under Section 5 acted as a strong antibiotic in those places where our democracy was most infected with racial discrimination, i.e., jurisdictions that serially proposed voting changes to limit the political power of voters of color.

And yet, on the Edmund Pettus Bridge, on the fiftieth anniversary of the passage of the VRA, we were forced to confront the reality that the Supreme Court had torn out the statute's heart on June 25, 2013, notwithstanding the undeniable progress made possible by it.[8] In the shameful *Shelby County, Alabama v. Holder*[9] decision, the Supreme Court struck down as

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[3] *See* SUSAN LAWRENCE DAVIS, AUTHENTIC HISTORY, KU KLUX KLAN, 1865–1877, 45–46 (1924).

[4] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–10702 (2012)).

[5] *Infra* note 62.

[6] *See* Athena Jones, *Loretta Lynch Makes History*, CNN (Apr. 27, 2015), http://perma.cc/6T58-4EVV.

[7] Section 5's preclearance provision requires covered states and political subdivisions to suspend "all changes in state election procedure until they [are] submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 198 (2009).

[8] *See* Louis Menand, *The Color of the Law: Voting Rights and the Southern Way of Life*, THE NEW YORKER (July 8, 2013), http://perma.cc/5R9Y-9XQV (noting that the VRA is generally regarded as the greatest legislative achievement of the civil rights movement).

[9] Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

unconstitutional Section 4(b) of the VRA,[10] thus immobilizing Section 5.[11] The Court stepped into the shoes of Congress—who, after an in-depth check-up into the continued need for the VRA based on past and present voting discrimination, had prescribed a full course of medication—and ended the treatment prematurely. With a 5–4 majority, the Supreme Court took the states under Section 5 preclearance off their antibiotics, leaving millions of voters susceptible to the infection of racial discrimination. The Court did so even though Congress had voted—nearly unanimously—to reauthorize Section 5 seven years ago in 2006,[12] after holding twenty hearings, receiving testimony from more than ninety witnesses, and evaluating a 15,000 page record.[13] Against the weight of this overwhelming evidence, the Court's *Shelby County* decision disregards not only the will of Congress, but also the will of the voters who elected those members of Congress to do the work of reauthorizing a vital federal protection.[14]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF"), the United States Department of Justice ("DOJ"), and other defenders of our democracy warned the Supreme Court that immobilizing Section 5 would swiftly lead to a proliferation of racial discrimination in those places where it had been most intense, persistent, and adaptive. This Article examines the accuracy of that prediction and the devastating consequences of the *Shelby County* decision. It also provides an important roadmap on how to restore the vital protection that was lost.

To understand the drastic departure from Supreme Court precedent that the Court took in *Shelby County*, Part I examines the circumstances that led to the passage of the Voting Rights Act of 1965 and describes the statute's provisions. Part I also surveys the significant effects of the VRA on racial equality and the nearly fifty years of Supreme Court jurisprudence that upheld the constitutionality of the VRA. Part II then delves into the substantial record of the continued need for the VRA that Congress documented when it renewed the VRA in 2006 and the evidence for continued need that advocacy groups, such as LDF, put before the Supreme Court in *Shelby County*. Part II additionally takes a close look at the significant continuing need for a fully strengthened VRA in Alabama, specifically.

Next, Part III examines the Supreme Court's impoverished rationale for ignoring the ongoing need for the VRA and describes how the *Shelby*

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[10] *See id*. at 2631.

[11] *See supra* note 7.

[12] *Shelby Cnty*., 133 S. Ct. at 2635 (Ginsburg, J., dissenting).

[13] Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 435 (D.D.C. 2011), *vacated*, Shelby Cnty. v. Holder, 541 F. App'x 1 (D.C. Cir. 2013) (mem.).

[14] *See Many Criticize Voting Rights Ruling; Partisan Splits on Gay Marriage Continue*, LANGER RESEARCH (July 3, 2013), http://perma.cc/JZH4-JFWX (finding that one-third of individuals surveyed approved of the *Shelby* decision).

County decision represents a radical act of judicial activism in which the Court, abrogating Congress's legislative role and significantly departing from its own precedent. Part III discusses how the Supreme Court, in striking Section 4(b), relied on the "equal sovereignty" doctrine.[15] This doctrine was explicitly rejected by the Supreme Court in the first constitutional challenge to the VRA[16] precisely because it arose from the disgraceful *Dred Scott v. Sandford*[17] case that denied citizenship to free Black people in the pre-Civil War era.[18] Ignoring that the Reconstruction Amendments "unambiguously overruled"[19] *Dred Scott* by shifting the balance of federal-state power, serving as "limitations of the power of the States and enlargements of the power of Congress,"[20] the Supreme Court accorded Congress no deference, ignored controlling precedent, and waved aside the voluminous record of contemporary voting discrimination that Congress appropriately relied upon when it reauthorized the VRA in 2006. In so doing, the Court essentially interpreted the Articles of Confederation as opposed to the Constitution.

Finally, in Part IV, this Article addresses the real world consequences of *Shelby County* and describes the proliferation of voting discrimination that has predictably taken root in its wake. Actions taken by many states, counties, and cities since *Shelby County* have highlighted the Court's disgraceful reasoning and the decision's devastating impact, particularly on millions of voters of color. Part IV discusses several discriminatory voting laws implemented by states. In Texas, for example, within hours of the *Shelby County* decision, the State—whose discriminatory photo ID law and intentionally discriminatory redistricting plans had been blocked by Section 5 of the VRA a year earlier—announced its intention to implement those measures immediately.[21] Texas is one of many formerly-covered states taking advantage of the immobilization of Section 5 to implement racially

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[15] *See Shelby Cnty.*, 133 S. Ct. at 2623–24.

[16] *See* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) ("The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[17] 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[18] *Id.* at 416–17; James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote* Shelby County v. Holder, 8 HARV. L. & POL'Y REV. 39, 43 (2014).

[19] McDonald v. City of Chicago, Ill., 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and in judgment).

[20] Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976) (quoting *Ex parte* Virginia, 100 U.S. 339, 345 (1880)) (internal quotation marks omitted).

[21] Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, July 5, 2013, http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html, http://perma.cc/6NJ6-UBYS.

discriminatory laws that had previously been, or would have been, rejected.[22] To conclude, Part IV provides a roadmap for the country for how to fight racially discriminatory voting practices across the United States and renew our commitment to protect and advance democracy.

I. THE ROOTS OF THE VOTING RIGHTS ACT OF 1965

A. Bloody Sunday and the Essential Nature of the Voting Rights Act

Alabama provides an important case study about the historic and current need for the protections afforded by the VRA. Alabama's relentless efforts to block the Black vote over time rendered Black voter registration virtually impossible.[23] For example, the state required Black people to recite from memory sections of the Constitution or answer obscure questions about state regulation—an impossible feat even for the most learned. Even some Black individuals holding doctoral degrees were unable to pass Alabama's so-called "literacy test."[24] To ensure that the disfranchisement was complete, Alabama further restricted opportunities to register to vote, cutting it to two days each month,[25] employed a voter identification requirement—whereby two (white) registered voters had to "vouch" for each new applicant[26]—and exacted a cumulative poll tax.[27] Nearly a century after the Fifteenth Amendment granted Black men the right to vote, the tactics employed by the state of Alabama had the desired result of creating a virtually non-existent registration rate among Black people. Indeed, in 1965—of the over 15,000 voting-age Black people in Dallas County, which encompasses Selma—a mere 335 were registered.[28] In neighboring Lowndes County, Alabama, which was eighty percent Black, *not a single* Black person was registered to vote.[29] But that would change.

On Sunday, March 7, 1965—which later became known as Bloody Sunday—600 marchers peacefully set out from Selma's Brown Chapel

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[22] *See infra* Part III.A (describing voting rights changes enacted by states and localities).

[23] *See* John Lewis, *Rep. John Lewis: An Oral History of Selma and the Struggle for the Voting Rights Act*, TIME (Dec. 25, 2014), http://perma.cc/93ZQ-D9DC.

[24] *See* John Lewis, *The Voting Rights Act: Ensuring Dignity and Democracy*, 32 HUM. RTS., no. 2, 2005, http://perma.cc/MR35-69R8.

[25] *See* Lewis, *supra* note 23.

[26] *See* PAYTON MCCRARY ET AL., *Alabama*, *in* QUIET REVOLUTION IN THE SOUTH 38, 38–39 (Chandler Davidson & Bernard Grofman eds., 1994); *see also* Deuel Ross, *Pouring Old Poison Into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 387–89 (2014).

[27] *See* Lewis, *supra* note 23.

[28] *See* Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1415 (1995).

[29] *See* RENATA ADLER, *The March for Non-Violence from Selma*, *in* AFTER THE TALL TIMBER 13, 21 (2015).

A.M.E. church.[30] They planned to march fifty-four miles from Selma to Montgomery to demand access to the right to vote. Led by John Lewis, Hosea Williams, Amelia Boynton, and, in absentia, Martin Luther King, Jr., the marchers made their way over the Edmund Pettus Bridge,[31] where their journey was halted. Hundreds of state troopers, volunteers, and sheriff officers, armed with tear gas and guns, waited for them.[32] The troopers and their local counterparts were present to enforce, at all costs, an order that was entered earlier that day by Governor George Wallace prohibiting the march.[33]

The marchers stopped and decided to kneel and pray. But before the marchers could get to their knees, Alabama state troopers attacked, tear-gassing, clubbing, spitting on, and trampling the marchers with their horses.[34] Fifty-eight marchers were treated for injuries, including Lewis, who suffered a fractured skull after a state trooper struck him with a nightstick.[35] That night, the vicious attacks captured the attention of the country as they were broadcasted on national television.[36]

In direct response to Bloody Sunday, President Lyndon B. Johnson addressed a special session of Congress:

> I speak tonight for the dignity of man and the destiny of democracy. . . . At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.[37]

President Johnson described "the right to choose your own leaders" as the most basic right and stated that "[e]very American citizen must have an equal right to vote."[38] The reality for too many Black people in this country, however, was that "[e]very device of which human ingenuity is capable [had] been used to deny [them] this right."[39] Determining that existing laws

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[30] *See Confrontations for Justice*, EYEWITNESS: AM. ORIGINALS NAT'L ARCHIVES, http://perma.cc/ERK9-RLDW.

[31] *See id.*

[32] *See* Lewis, *supra* note 23.

[33] *See Confrontations for Justice*, *supra* note 30.

[34] *See* DAVIS, *supra* note 3; *see also* Ari Berman, *John Lewis's Long Fight for Voting Rights*, THE NATION (June 5, 2013), http://perma.cc/M9UC-QVJN.

[35] *See Confrontations for Justice*, *supra* note 30.

[36] *See* SASHA TORRES, BLACK, WHITE, AND IN COLOR: TELEVISION AND BLACK CIVIL RIGHTS 32 (2003).

[37] Lyndon B. Johnson, *Special Message to the Congress: The American Promise* (Mar. 15, 1965), *in* THE AMERICAN PRESIDENCY PROJECT (John Wooley & Gerhard Peters eds.), http://perma.cc/CXT8-CLJ4.

[38] *Id.*

[39] *Id.*

were inadequate to protect that basic right, President Johnson pleaded with Congress to pass legislation that would "eliminate illegal barriers to the right to vote."[40]

B. The Content of the Voting Rights Act

Just five months after President Johnson's address, Congress enacted the Voting Rights Act of 1965[41] over opposition from Southern politicians.[42] Considered by many to be the greatest victory of the civil rights movement,[43] the VRA removed barriers—such as literacy tests—that had long kept Black people from voting.[44] Sections 2 and 5 of the VRA outline the two primary modes of enforcement against voting discrimination. Section 2 applies nationwide and prohibits qualifications, practices, or procedures that discriminate on the basis of race, color, or membership in a language minority group.[45] A party litigating a Section 2 vote dilution claim must first satisfy the three *Gingles* preconditions: 1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; 2) the minority group is "politically cohesive"; and 3) "the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate."[46] A party then marshals evidence to demonstrate that, based on the totality of the circumstances, a challenged voting law, practice, or device prevents voters of color from electing their preferred candidate of choice.[47] Case-by-case Section 2 litigation is among the most complex and expensive types of civil litigation.[48]

Section 5, the "heart and soul"[49] of the VRA, required all or part of 15 jurisdictions to obtain preclearance from the Department of Justice or a three-judge panel of the District Court for the District of Columbia before enacting voting changes.[50] Preclearance would be granted after it was demonstrated that voting changes for which approval was sought were not

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[40] *Id.*

[41] South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[42] "[The Southerners] rested their defense almost entirely on the right of the states . . . to determine their own qualifications for voting." E.W. Kenworthy, *Senate, 70 to 30, Invokes Closure on Voting Rights*, N.Y. TIMES, May 26, 1965, at 1, 25.

[43] *See* Menand, *supra* note 8 (noting the importance of the Voting Rights Act of 1965).

[44] *See Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://perma.cc/7UQH-F9JE (describing the provisions of Section 4).

[45] 52 U.S.C. § 10301(a) (2012).

[46] Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (internal citations omitted).

[47] *Id.* at 36 (listing factors).

[48] *See infra* note 185 and accompanying text.

[49] Berman, *supra* note 34.

[50] *Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://perma.cc/DFU6-B7GR.

discriminatory, or would not otherwise worsen the position of voters of color.[51] The extent of Section 5's application rests upon Section 4's coverage formula, which identifies the areas where voting discrimination has been most prevalent. Congress formed the initial coverage provision by examining the states or subdivisions that either had maintained a "test or device" (e.g., a literacy or moral character test) that restricted the access to vote, or where less than half of voting eligible persons were registered.[52] The VRA also includes provisions that require covered jurisdictions—determined by Census information on language minority populations—to provide election materials in languages of minority groups in addition to English.[53] Congress structured the preclearance provision to be a dynamic one: In addition to the reexamination of the list at each reauthorization, the VRA provides for "bail-outs" under Section 4 by which a jurisdiction can apply to be removed from coverage if it can demonstrate that it has been free of voting discrimination for the previous ten years;[54] Section 3(c) allows for courts to "bail-in" jurisdictions as a remedial measure where evidence of intentional discrimination in voting exists.[55]

After more than a century of fierce struggle for voting equality, the foot soldiers of the civil rights movement had achieved a major victory in the passage of the VRA. As this Article observes next, the VRA fundamentally altered the political participation of Black people in America's democracy.

C. The Work of the Voting Rights Act

It is difficult to overstate the profound effect that the VRA had directly on the political participation of Black voters.[56] The Black voter registration rate in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia nearly doubled from 33.8% in 1964 to 56.6% in 1968.[57] Additionally, the number of Black elected officials increased nearly fivefold between 1965 and 1970.[58] Since then, the number of Black elected

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[51] Georgia v. Ashcroft, 539 U.S. 461, 461–62 (2003).

[52] *Section 5 of the Voting Rights Act*, *supra* note 50.

[53] 52 U.S.C. § 10503 (2012). For a list of covered jurisdictions and their respective language minority groups, see Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602–07 (Oct. 13, 2011).

[54] *See Section 4 of the Voting Rights Act*, *supra* note 44 (listing aspects of a successful bailout application and bailed out jurisdictions).

[55] *See generally* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

[56] *See* RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 4 (2009).

[57] *Id.*

[58] THEODORE J. DAVIS, JR., BLACK POLITICS TODAY: THE ERA OF SOCIOECONOMIC TRANSITION 8 (2012) (noting an increase from 280 Black elected officials in 1965 to 1,189 in 1970).

officials has increased to its current figure of over 10,000,[59] forty-six of whom serve in Congress.[60] Most of these officials represent districts enabled by or protected under the Act in which voters of color form a majority of the voters.[61] Moreover, the VRA led directly, twice, to the election of a Black President of the United States.[62]

The VRA not only led to substantially higher Black voter turnout, but also protected voters of color from new forms of racially discriminatory voting procedures. The VRA, through its preclearance provision, "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims."[63] As Attorney General Nicholas Katzenbach later noted in 1975, the drafters of the VRA "recognized that increased black voting strength might encourage a shift in the tactics of discrimination. Once significant numbers of Blacks could vote, communities could still throw up obstacles to . . . make it difficult for a black to win elective office."[64] In response, Section 5's expansive approach provided voters of color dynamic protection from "old poison [poured] into new bottles."[65] The next section of this Article examines some of these racially discriminatory obstacles—such as gerrymandering and at-large elections—that states attempted to implement before being prevented by the VRA (with backing from the Supreme Court).

D. Early Challenges to the Voting Rights Act's Constitutionality

Less than two months after the enactment of the VRA, South Carolina filed a challenge to the statute's constitutionality.[66] In *South Carolina v.*

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[59] Richard Wolf, *Equality Still Elusive 50 Years After Civil Rights Act*, USA TODAY (Apr. 1, 2014), http://perma.cc/C59F-EMXK.

[60] Peter Sullivan, *Most Diverse Congress in History Poised to Take Power*, THE HILL (Jan. 5, 2015), http://perma.cc/5RPB-AWLF.

[61] *See* Thornburg v. Gingles, 478 U.S. 30 (1986) (establishing parameters for majority-minority districts under Section 2); DEWEY M. CLAYTON, THE PRESIDENTIAL CANDIDACY OF BARACK OBAMA 30–31 (2010) ("[M]uch of the Black electoral success has occurred in majority-minority districts.").

[62] Roger Runningen, *Obama Honors LBJ's Rights Legacy That Led to His Election*, BLOOMBERG (Apr. 10, 2014), http://perma.cc/H37S-EN94 (quoting Julian Zelizer, a presidential historian, who stated, "[w]ithout the Voting Rights Act, [many of the votes for Obama] would not be votes that existed, because African-Americans were disenfranchised").

[63] South Carolina v. Katzenbach, 383 U.S. 301, 327–28 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[64] *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 123–24. (1975) (statement of Nicholas Katzenbach, Attorney General of the United States).

[65] Reno v. Bossier Parish Sch. Bd. (Bossier II), 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part).

[66] Motion for Leave to File Complaint, Complaint, and Brief at 3, *Katzenbach*, 383 U.S. 301 (No. 22).

Katzenbach,[67] Chief Justice Warren rejected that challenge and affirmed Congress's power to enact the Act.[68] According to the *Katzenbach* Court, the "language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation" all lead to the conclusion that Congress may use "any rational means"[69] to enforce the right to vote free of racial discrimination as protected by the Fifteenth Amendment. And the addition of Section 2 of the Fifteenth Amendment, which grants Congress the authority to pass appropriate legislation, indicates that "*Congress* was to be chiefly responsible for implementing the rights."[70] Importantly, the Supreme Court expressly addressed the argument that Section 4(b) violated the equal sovereignty doctrine by subjecting only certain states to the preclearance requirement, stating:

> Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of the equality of States . . . does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.[71]

In rejecting that argument, the Court held that the coverage provision—crafted in response to "reliable evidence of actual voting discrimination"[72]—was rational and thereby constitutional.[73] The *Katzenbach* majority affirmed this holding in *City of Rome v. United States*,[74] further stating that the Civil War Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[75]

In response to increased Black political participation,[76] many states employed concerted efforts, as Attorney General Katzenbach had

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[67] 383 U.S. 301 (1966).

[68] *Id.* at 327, 337.

[69] The Court referred to the standard articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), to give meaning to the phrase "any rational means." *See id.* at 326 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (quoting *McCulloch*, 17 U.S. at 421) (internal quotation marks omitted)).

[70] *Id.* at 325–26 (emphasis added) (internal citation omitted).

[71] *Id.* at 328–29 (citations omitted).

[72] *Id.* at 329.

[73] *Id.* at 329–33.

[74] 446 U.S. 156 (1980), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[75] *Id.* at 179.

[76] *See supra* notes 56–58 and accompanying text.

anticipated in 1965, to weaken the strength of the Black vote.[77] Indeed, in 1970, Congress recognized that "as Negro voter registration has increased under the Voting Rights Act, several jurisdictions have undertaken new, unlawful ways to diminish the Negroes' franchise and to defeat Negro and Negro-supported candidates."[78] In the face of voting manipulations including "gerrymandering, annexations, adoption of at-large elections, and other structural changes to prevent newly-registered black voters from effectively using the ballot," Congress reauthorized Section 5 in 1970 for five more years.[79] Similar evidence compelled Congress to reauthorize Section 5 again in 1975 and 1982, for seven and twenty-five years, respectively.[80] Despite Congressional recognition of continued voting discrimination, resistance to the landmark statute brought three more cases before the Supreme Court in the twentieth century—in 1973,[81] 1980,[82] and 1999.[83] The Supreme Court, in an unbroken line of cases, upheld the constitutionality of the Voting Rights Act at each turn.

Indeed, even when the Court announced a more exacting test for legislation passed under the Fourteenth Amendment in *City of Boerne v. Flores*, requiring "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"[84] it nonetheless made clear that the VRA was a proper exercise of authority if subjected to it. The Court made this determination for four reasons. First, in passing the VRA, Congress had in front of it a record of modern instances of Fifteenth Amendment violations.[85] Second, both the coverage provision and preclearance requirements were congruent and proportional to the injury in question; the Act's "provisions were confined to those regions of the country where voting discrimination had been most flagrant" and affected only state voting laws.[86] Third, the bailout provision "reduce[d] the possibility of overbreadth."[87] Finally, the preclearance provision was proper because it allowed a state to avoid the requirement subject to certain

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[77] *See History of Federal Voting Rights Laws*, U.S. DEP'T OF JUSTICE, http://perma.cc/78UD-797Z.

[78] H.R. REP. NO. 91-397, at 7 (1969), *as reprinted in* 1970 U.S.C.C.A.N. 3277, 3283.

[79] *See Shelby Cnty.*, 133 S. Ct. at 2620.

[80] *Id.*

[81] Georgia v. United States, 411 U.S. 526, 535 (1973), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[82] City of Rome v. United States, 446 U.S. 156 (1980), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[83] Lopez v. Monterrey Cnty., 525 U.S. 266 (1999), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[84] 521 U.S. 507 (1997).

[85] *Id.* at 530.

[86] *Id.* at 532–33.

[87] *Id.* at 533.

conditions and is time limited.[88] According to the Court, while such legislation does not require "termination dates, geographic restrictions, or egregious predicates," "limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5 [of the Fourteenth Amendment]."[89]

In *Lopez v. Monterey County*,[90] the first Voting Rights Act challenge after the *City of Boerne* decision, the Court did not mention the congruence and proportionality test and cited *City of Boerne* simply for the proposition that Congress's enforcement power allows it to "intrude[] into legislative spheres of autonomy previously reserved to the States."[91] In upholding the preclearance provision, the Court relied instead on *Katzenbach* and *City of Rome* to dispense with Monterey County's federalism argument.[92] In later analysis, leading voting rights litigators argued that the "congruence and proportionality" test "is not the right test for evaluating the constitutionality of Section 5 [of the VRA], and that applying it would be wholly without precedent."[93] They contended that the congruence and proportionality test in *Boerne* is inappropriate because its primary purpose is to distinguish between the (permissible) exercise of Fourteenth Amendment remedial powers and (impermissible) substantive statutes that extend beyond Congress's enforcement power;[94] others argue that while the test may be proper when considering statutes passed under the fairly expansive Fourteenth Amendment, it should not apply to legislation enacted under the narrower Fifteenth Amendment, which focuses solely on voting rights.[95]

II. THE CONTINUED NEED FOR THE VOTING RIGHTS ACT

As the VRA entered the twenty-first century, it withstood constitutional challenges to each reauthorization, until the most recent. This Part describes the state of voting rights in the country in 2005, when Congress considered reauthorization once more. Part II.A looks at the extensive investigation of ongoing discrimination that Congress undertook to determine if there was a continued need. Part II.B focuses in particular on the state where Shelby

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[88] *Id.*

[89] *Id.*

[90] 525 U.S. 266 (1999), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[91] *Id.* at 283 (citation and internal quotation marks omitted).

[92] *Id.*

[93] Armand Derfner & Gerry Hebert, *The Voting Rights Act: Does the* City of Boerne *Case or the "Congruence and Proportionality" Test Have Anything to Do with the Voting Rights Act?*, CAMPAIGN LEGAL CTR. (June 12, 2013), http://perma.cc/2GV9-T8YK.

[94] *E.g.*, *id.*

[95] *See, e.g.*, Akhil Reed Amar, *The Lawfulness of Section 5—And Thus of Section 5*, 126 HARV. L. REV. F. 109, 119 (2013); Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1499–1500 (2014).

County is located—Alabama. Part II.C details how Congress determined the extent of preclearance coverage.

A. The Congressional Record of the 2006 Voting Rights Act Reauthorization

In 2005, as the twenty-five year mark since the 1982 VRA reauthorization approached, Congress began its reconsideration of the ongoing need for Section 5.[96] During this most recent review, Congress amassed a "virtually unprecedented"[97] and carefully detailed legislative record. Over ten months, Congress developed a more thorough record than it had during any of the previous reauthorizations,[98] holding twenty-one hearings and receiving testimony both for and against reauthorization from more than ninety witnesses, including state and federal officials, litigators, and scholars.[99] The resulting record spanned more than 15,000 pages.[100]

The record before Congress was replete with examples of Section 5 blocking racially discriminatory changes, concentrated in covered states and political subdivisions. During the reauthorization period (1982–2006), the Department of Justice or a three-judge district court panel blocked more than 600 discriminatory changes to voting laws under Section 5.[101] More than sixty percent of the proposed changes were based on purposeful discrimination.[102] One egregious—and recent—voting change blocked by Section 5, for example, involved an attempt by city officials to cancel an election. In 2001, a White mayor and an all-White Board of Aldermen in Kilmichael, Mississippi, which had never before elected a Black person to office, attempted to cancel city elections after the 2000 Census showed that Black voters had become a majority of the city and were poised to elect their candidate of choice for the first time in history.[103] In rejecting this proposed change under Section 5 of the VRA, the DOJ explained that it occurred precisely when Black voters were on the verge of electing their candidates

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[96] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting).

[97] Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 428 (D.D.C. 2011), *vacated*, Shelby Cnty. v. Holder, No. 11-5256, 2013 WL 5610095 (D.C. Cir. Oct. 2, 2013). Representative James Sensenbrenner, then the House Judiciary Committee Chair, described the record as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 ½ years" that he had served in Congress. 152 CONG. REC. H5143 (July 13, 2006).

[98] *See* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 423–32 (2008) (detailing records of prior reauthorizations).

[99] *Shelby Cnty.*, 811 F. Supp. 2d at 435.

[100] *Id.*

[101] Shelby Cnty. v. Holder, 679 F.3d 848, 866, 870–72 (D.C. Cir. 2012), *vacated*, Shelby Cnty. v. Holder, No. 11-5256, 2013 WL 5610095 (D.C. Cir. Oct. 2, 2013).

[102] *Id.* at 867.

[103] H.R. REP. NO. 109-478, at 36–37 (2006).

of choice.[104] The City was ultimately required to hold an election, in which Black voters elected several candidates of choice to office, including the first-ever Black mayor and three members to the city council.[105]

Section 5 also protected communities outside of the South from voting discrimination, such as the large indigenous group of Alaska Native voters.[106] In 2008, Alaska's plan to eliminate voting precincts in several Native villages was blocked by the VRA.[107] If Section 5 had not prevented the changes, voters would have had to travel more than seventy miles by air or sea to cast a ballot.[108]

These examples, drawn from the hundreds of discriminatory voting laws that were blocked by Section 5, demonstrate the clear, legitimate, and well-documented need for reauthorization of the VRA in 2006. The next section further examines the discriminatory voting practices that Alabama attempted to enact during the reauthorization period and observes that the VRA was the only weapon to combat racially discriminatory voting measures.

B. The Need for the Voting Rights Act in Alabama

1. Alabama Voting Discrimination During the Reauthorization Period

Alabama, for its part, "earned its spot" on the original coverage list[109] and subsequent ones. Section 5 objections and Section 2 litigation together blocked or remedied over 200 local and state voting practices during the reauthorization period.[110] Indeed, the state had the highest rate of successful

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[104] *Id.*

[105] *Id.*

[106] *See generally* NATALIE LANDRETH & MOIRA SMITH, PROTECT VOTING RIGHTS: RENEWTHEVRA.ORG, VOTING RIGHTS IN ALASKA 1982–2006 (2006), http://perma.cc/5MJW-2G9N (noting the "unique geographical place" and "unique political status" of Alaska Natives and describing a history of voting discrimination and the impact of the VRA).

[107] Brief of Alaska Federation of Natives et al. as Amicus Curiae in Support of Respondents at 35–37, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

[108] *Id.*

[109] *See* Brief of State of Alabama as Amicus Curiae in Support of Petitioner at 2, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

[110] *See* JAMES BLACKSHER ET AL., RENEWTHEVRA.ORG, VOTING RIGHTS IN ALABAMA 1982–2006, at 5–28 (2006) (identifying forty-six DOJ objections under Section 5 and various Section 2 litigation, including the *Dillard* litigation (described *infra* Subpart B.2) that resulted in over 170 county commissions, county boards of education, and municipalities altering their election methods), *reprinted in Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after* LULAC v. Perry*: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 365–402 (2006) [hereinafter July 13, 2006 Hearing]; *see also Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the*

Section 2 suits per resident in the country.[111]

A look at examples of Section 2 cases brought during the reauthorization provides a striking view of the racial animosity and discrimination against Black Alabamans that persists to this day. In one particularly egregious Section 2 litigation, white polling officials used racial epithets to describe Black voters in the presence of federal observers, including a poll worker who said: "[N]iggers don't have principle enough to vote and they shouldn't be allowed."[112] African Americans constitute over a quarter of Alabama's population, yet Alabama has never elected a Black person to statewide office.[113] Few Black elected officials represent districts in which Black voting-age persons do not constitute the majority of the voting age population,[114] suggesting racial polarization.

Moreover, during the reauthorization period, the Court twice found purposeful racial discrimination in the state. In 1987, in *City of Pleasant Grove v. United States*, the Court upheld the finding that Pleasant Grove—motivated by racial considerations—annexed areas that had or were likely to have white voters, while refusing to annex areas with Black voters.[115] This was consistent with Pleasant Grove's "unambiguous opposition to racial integration."[116] Two years earlier, the Supreme Court had invalidated a provision of the state constitution that barred citizens from voting for misdemeanors "involving moral turpitude," such as presenting a bad check.[117] In that case, the Court explained that the "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."[118]

Other courts also found intentional voting discrimination in Alabama during the same period, including the discriminatory enforcement of state voting laws, appointment of mostly white poll workers, and intentional discrimination by Alabama legislators against Black voters.[119] And

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Judiciary, 109th Cong. 251 tbl.5 (2006) [hereinafter March 8, 2006 Hearing] (identifying 192 successful Section 2 cases (reported and unreported) in Alabama during the relevant period).

[111] Brief For Respondent-Intervenors, Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, and William Walker at 13–14, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

[112] *Id.* (internal quotation marks omitted).

[113] Justice Kagan noted this fact during the *Shelby County* oral arguments. Transcript of Oral Argument at 5, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

[114] July 13, 2006 Hearing, *supra* note 110, at 388–89.

[115] 479 U.S. 462, 469 (1987).

[116] *Id.* at 465.

[117] Hunter v. Underwood, 471 U.S. 222, 224 (1985).

[118] *Id.* at 233.

[119] *See, e.g.*, Harris v. Siegelman, 695 F. Supp. 517, 525 & n.6 (M.D. Ala. 1988) (holding that Alabama state laws and Alabama's appointment of poll workers illegally discriminated against Blacks, and noting compelling evidence that "white poll officials continue to harass and intimidate black voters"); Brown v. Bd. of Sch. Comm'rs, 706 F.2d

purposeful discrimination by state lawmakers continued to persist after 2006. In 2011, for example, a federal court in *United States v. McGregor* found "compelling evidence that political exclusion through racism remains a real and enduring problem in [Alabama] . . . entrenched in the high echelons of state government."[120] The court found that several White state legislators whose testimony it rejected were motivated by "pure racial bias" in seeking to "reduc[e] African-American voter turnout"[121]; several were caught on tape comparing Black voters to "illiterate[s]" and "Aborigines."[122]

A look at Alabama voting procedures blocked by Section 5 during the reauthorization period reveals a similar pattern of discriminatory intent in Alabama. In 1991, the DOJ objected to Alabama's Congressional redistricting plan (as it had done during the previous redistricting cycle); Alabama had failed to provide a plausible nonracial explanation for "cracking" Black populations, with evidence indicating that the "underlying principle of the Congressional redistricting was a predisposition on the part of the state political leadership to limit Black voting potential to a single district."[123]

2. Circumvention and the Dillard *Litigation*

One of the most significant voting developments in Alabama during the reauthorization period, the *Dillard* litigation and the response to it, is a microcosm of the defiance that persists today. LDF and other allies brought the *Dillard* litigation to demonstrate that purposefully discriminatory at-large elections continued to operate throughout Alabama in the 1980s and "continue[d] . . . to have their intended racist effect."[124] In *Dillard v. Crenshaw County*, the District Court for the Middle District of Alabama agreed, recognizing that "[f]rom the late 1800's through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the

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1103, 1106–07 (11th Cir. 1983) (finding the Alabama legislature intentionally discriminated against Black voters in Mobile County).

[120] United States v. McGregor, 824 F. Supp. 2d 1339, 1347 (M.D. Ala. 2011).

[121] *Id.* at 1345.

[122] *Id.*

[123] Letter from John R. Dunne, Assistant Attorney Gen., to Jimmy Evans, Attorney Gen. (Mar. 27, 1992), http://perma.cc/X2VL-C7C7; *see also Voting Rights Act: Section 5 of the Act—History, Scope & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, Serial No. 109-75 (Oct. 25, 2005) [hereinafter October 25, 2005 (History) Hearing]; Letter from John R. Dunne, Assistant Attorney Gen., Dep't of Justice, to Dorman Walker (Jan. 25, 1991), http://perma.cc/2D9U-X9PK; Letter from John R. Dunne, Assistant Attorney Gen., Dep't of Justice, to Dorman Walker (Jan. 28, 1991), http://perma.cc/V46T-JRFY.

[124] Dillard v. Baldwin Cnty. Bd. of Educ., 686 F. Supp. 1459, 1468 (M.D. Ala. 1988).

state."[125] The barriers, which included vote dilution schemes,[126] became even more pervasive in the mid-twentieth century, when the counties adopted the at-large election systems with numbered posts that were intended to dilute Black voting strength.[127] Of the over 180 cities, counties, and school boards employing the racially-tainted election systems,[128] over 170 entered consent decrees agreeing to adopt new methods of election.[129]

Nevertheless, numerous jurisdictions attempted to circumvent these decrees over the next two decades. Shelby County's County Commission, for one, attempted to abandon its settlement agreement, but the court adopted a special master's recommendation approving it.[130] In 2008, the City of Calera in Shelby County attempted to circumvent *Dillard* as well, through a racially discriminatory voting procedure that eliminated the sole majority-Black district, but Section 5 prevented the City from doing so. At the same time, Calera also conceded that it had adopted 177 annexations without seeking preclearance—after the DOJ had already interposed an objection to the annexation plans.[131] Incredibly, the City disregarded the DOJ's objection and held an election based on the "objected-to district boundaries and electorate that included the objected-to annexations," leading to the defeat of the sole Black city council member.[132] Calera's circumvention was ultimately remedied by a DOJ Section 5 enforcement action, requiring an election under a fair redistricting plan in which voters re-elected the sole Black city council member.[133]

3. Selma Revisited

In separate litigation, the at-large election schemes in Dallas County (of which Selma is the seat) were found to violate Section 2.[134] Dallas County on several occasions attempted to circumvent the judicial rulings. In 1986,

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[125] 640 F. Supp. 1347, 1360 (M.D. Ala. 1986).

[126] *See id*. at 1358.

[127] *Id.* at 1356–57.

[128] July 13, 2006 Hearing, *supra* note 110, at 373; *see also Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. at 1461.

[129] July 13, 2006 Hearing, *supra* note 110, at 373–74.

[130] Dillard v. Crenshaw Cnty., 748 F. Supp. 819, 821–22 (M.D. Ala. 1990).

[131] Petitioner Appendix at 147a, Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) (No. 12-96).

[132] Complaint, United States v. City of Calera, No. CV-08-BE-1982-S (M.D. Ala. filed Oct. 24, 2008), http://perma.cc/BRH4-7SWM; Petitioner Appendix at 148a, Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) (No. 12-96). LDF represented five Black ministers from Shelby County and an elected official who represents the district eliminated and ultimately restored by virtue of Section 5.

[133] Petitioner Appendix at 148a, Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) (No. 12-96).

[134] United States v. Dallas Cnty. Comm'n, 850 F.2d 1433, 1435–37 (11th Cir. 1988) (referring to prior opinions).

the County promulgated a redistricting plan that fragmented cohesive Black populations and split an existing precinct; the DOJ objected, explaining, "the circumstances here suggest that the county commission's actions were motivated, at least in significant part, by racial considerations."[135] The County then attempted to implement a voter purge and re-identification program that would have disfranchised citizens "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so," had it not been blocked by Section 5.[136] The DOJ rejected the discriminatory purge.[137] After the 1990 Census, which revealed an increase in the County's Black population from 54.5% to 57.8% and an increase in the Black population of Selma from 52.1% to 58.4%, the County and City attempted to prevent Blacks from electing candidates of choice to the city council by imposing racial quotas.[138] The DOJ interposed five Section 5 objections to stop these quotas,[139] finding that the City was "motivated by the desire to confine black population concentrations into a predetermined number of districts, and thus ensure a continuation of the current white majority on the council."[140] These efforts to abridge the voting rights of African-Americans illustrate the intense voting discrimination that voters of color continue to face as they are poised to make inroads in elected bodies;[141] events in Alabama demonstrate that Section 5 was vital in the face of persisting threats to voters of color—not an anachronism.

C. Congress Determines That the Existing Coverage of Section 5 was Appropriate

In 2006, Congress found that Section 5's work was not done, as its continued existence safeguarded voters of color in covered jurisdictions from discriminatory voting laws. Congress arrived at its finding that the covered jurisdictions under Section 5 still required preclearance by evaluating voting conditions in jurisdictions not covered by Section 5.[142] After considering a study of Section 2 litigation in all jurisdictions, Congress found that racial discrimination in voting remains concentrated in covered

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[135] October 25, 2005 (History) Hearing, *supra* note 123, at 311; *see also id.* at 328 (noting an objection to the County Board of Education's redistricting plan that "concentrate[d]" Black voters into one supermajority-minority district to "minimize[] the opportunity for blacks to participate equally in the political process").

[136] *Id.* at 356.

[137] *Id.*

[138] July 13, 2006 Hearing, *supra* note 110, at 378–79.

[139] October 25, 2005 (History) Hearing, *supra* note 123, at 388–93, 397–405.

[140] *Id.* at 392.

[141] *See also* League of United Latin American Citizens v. Perry, 548 U.S. 399, 440 (2006); H.R. Rep. No. 109-478, *supra* note 103 (discussing Kilmichael, Mississippi).

[142] "Section 2 of the Voting Rights Act applies nationwide." Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2642 (Ginsburg, J., dissenting) (citation omitted).

jurisdictions where preclearance was required.[143] Jurisdictions covered by Section 5 account for more than eighty percent of all successful Section 2 litigation, even though they comprise less than a quarter of the country's overall population. On a per capita basis, there are twelve times as many Section 2 cases that result in a favorable outcome for voters of color occurring in the covered jurisdictions than in non-covered jurisdictions.[144] Additionally, the list of states that constitute the "top tier of Section 2 violators" is dominated by covered jurisdictions.[145]

The evidence in the congressional record demonstrated, through a consideration of both historical and current experiences, that the jurisdictions with the worst record of discrimination remained the worst actors. Just as Alabama had done, these jurisdictions simply shifted their tactics in order to employ discriminatory techniques, such as eliminating polling places in communities of color[146] and diluting the minority vote by cracking, packing, or stacking minority communities during the redistricting process.[147]

Although voting equality had improved across covered jurisdictions during the twenty-five year reauthorization period and the forty years since the VRA was enacted, evidence clarified that the VRA continued to act as a road block and deterrent for covered jurisdictions. My former LDF colleague and voting expert, Kristen Clarke, aptly summarizes Congress's conclusion that the need for Section 5 persisted:

> Section 5 was an effective prophylactic tool that helped block and deter discrimination and underscored the fact that occasional success stories should not be used as a reason to terminate Section 5. Ultimately, Congress was persuaded that Section 5's success was due to the statute's design, not because the need for it had expired.[148]

Congress accordingly concluded that Section 5 is still needed to protect voters of color from discrimination in voting, before such discrimination can take root. By a bipartisan vote of 390–33 in the House and 98–0 in the Senate,[149] Congress overwhelmingly determined that voting discrimination persists in the covered jurisdictions. The lawmakers concluded that, without

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[143] *Id.* at 2643.

[144] *See id.* (noting that Section 2 litigation in covered jurisdictions is four times more likely to succeed than that in non-covered jurisdictions).

[145] Brief of Ellen D. Katz and the Voting Rights Initiative as Amici Curiae in Support of Respondents at 31, Shelby Cnty. v. Holder, 541 F. App'x 1 (D.C. Cir. 2013) (No. 12-96).

[146] *See, e.g.*, *supra* note 108 and accompanying text.

[147] *See, e.g.*, *supra* note 131 and accompanying text.

[148] Clarke, *supra* note 98 at 403.

[149] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2635 (2013).

Section 5, "minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[150] With the reauthorization, Congress recognized that we continue to confront the same old poison, albeit in a new bottle. Given Supreme Court precedent, the expansive reauthorization record, and evidence of the continued protection Section 5 provided for the millions of voters of color in covered jurisdictions, one would have expected the Court to uphold the VRA.

III. *SHELBY COUNTY V. HOLDER*: SEVERAL STEPS BACK FOR VOTING RIGHTS

As mentioned above, when Congress reauthorized the VRA in 2006, the Supreme Court had held for over four decades that the statute was constitutional. This Part examines the Supreme Court's break from stare decisis and its flawed, outdated reasoning in doing so. This Part also discusses how the *Shelby County* decision displays the Court's disconnect from the persistent danger faced by Black voters and other voters of color absent the full-strength VRA.

The Supreme Court's first troublesome decision for advocates of voting equality came in the 2009 decision *Northwest Austin Municipal District Number One v. Holder*[151] ("*NAMUDNO*"). *NAMUDNO* signaled the Roberts Court's long game to attack the VRA. While the Court did not reach the issue of the constitutionality of the VRA,[152] it was clearly moving in that direction. Claiming that Section 5 may be overbroad and that "[t]hings have changed in the South," Justice Roberts wrote, "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions under either" the *Katzenbach* or *City of Boerne* standard.[153] The majority, moreover, cited to "our historic tradition that all the States enjoy 'equal sovereignty'" in expressing skepticism about the validity of the Act.[154] The decision paved the way for what followed: *Shelby County*'s departure from long-standing precedent and constitutional values.

In *Shelby County*, the Court invalidated the coverage formula under Section 4(b), which identified those places where Section 5 applied, on the basis that it violated the "principle that all States enjoy equal sovereignty."[155] The equal sovereignty principle, according to the Court,

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[150] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, § 2(b)(9), 120 Stat. 578.

[151] 557 U.S. 193 (2009).

[152] *Id.* at 205–06.

[153] *Id.* at 202.

[154] *Id.* at 203.

[155] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2618 (majority opinion).

requires that laws with a limited geographic scope, such as Section 5 of the VRA, satisfy a higher constitutional burden than laws that apply nationwide.[156] The Court, claiming that the 2006 coverage formula is "based on decades-old data and eradicated practices,"[157] found that Section 4(b) did not meet the higher standard, thereby making Section 5 inapplicable.[158]

The majority's opinion is deeply problematic for three reasons, each addressed in turn below: (1) the holding is not grounded in an asserted violation of a specific constitutional provision; (2) the equal sovereignty principle is derived from the infamous *Dred Scott v. Sandford* decision;[159] and (3) the decision reflects a failure to comprehend the reality of the harm that the VRA was enacted to proscribe.

A. The Decision Has No Grounding in the Constitution or Recent Precedent

Shelby County's holding is not based on a claim that Congress, in enacting the 2006 Voting Rights Act, exceeded its enforcement powers under Section 2 of the Fifteenth Amendment. Nor is it based on a violation of any specific provision of the Constitution at all. Instead, the majority holds that Section 4(b) of the Voting Rights Act is unconstitutional because, by requiring only some of the states to obtain federal preclearance before implementing changes to their policies and practices affecting voting, it violates the equal sovereignty principle or "our historic *tradition* that all the States enjoy equal sovereignty."[160] This reasoning, which "rests on air,"[161] was rejected in *Katzenbach*, as "[t]here's no requirement in the Constitution to treat all states the same."[162]

As recognized by LDF cooperating attorney Samuel Spital, the Court's *Shelby County* ruling conflates equality and sameness.[163] Equality dictates that similar states should be treated similarly; "equal sovereignty" does not

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[156] *See id.* at 2627 ("[A] statute's 'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'" (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

[157] *Id.*

[158] *Id.* at 2627–28.

[159] 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[160] *Shelby Cnty.*, 133 S. Ct. at 2621 (emphasis added).

[161] Richard A. Posner, *The Voting Rights Act Ruling Is About the Conservative Imagination*, SLATE (June 26, 2013), http://perma.cc/S735-TUXJ.

[162] Nina Totenberg, *Whose Term Was It? A Look Back at the Supreme Court*, NPR (July 5, 2013), http:// www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court, http://perma.cc/9YEE-4WF2 (quoting Michael McConnell), *cited in* Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 733 (2014).

[163] *See* Samuel Spital, *A Doctrine of Sameness, Not Federalism: How the Supreme Court's Application of the "Equal Sovereignty" Principle in* Shelby County v. Holder *Undermines Core Constitutional Values*, 34 N. ILL. U. L. REV. 561, 562 (2014).

mandate that a particular group of states that have the worst histories of racial discrimination in voting be treated the same as other, dissimilar states without that disease. Applying this logic to a different form of federal action, if Mississippi were struck by a hurricane and the Federal Emergency Management Agency ("FEMA") wanted to provide relief funds, equal sovereignty would require Missouri to also receive federal dollars so equal states were not treated differently. States are often treated differently based on their unique qualities, needs, and problems.[164] By limiting the application of antibiotics of a law like Section 5 to those parts of our democracy most infected with racial discrimination, Congress promotes healthy federalism. This "geographic targeting" should have weighed in favor of upholding the coverage formula—not as the basis for striking it.[165]

B. An Inappropriate Return to Equal Sovereignty[166]

The Court in *Shelby County* invoked the equal sovereignty principle in the context of the right to vote for the first time since *Dred Scott*, one of the most infamous cases in American history.[167] The *Dred Scott* majority held that Black people, regardless of whether they were enslaved or free, were not members of the sovereign people at the time the Constitution was adopted—and so were not citizens.[168] Recognizing Black people as citizens of the United States, Chief Justice Taney explained, would violate the equal sovereignty of the slave-holding states: "it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized."[169]

Article IV, Section 2 of the Constitution—the Privileges and Immunities Clause—provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[170] The *Dred Scott* Court stated that the clause incorporates all of the fundamental rights of citizenship, including the right to travel, liberty of speech, and potentially the right to vote.[171] Out of "respect" for the "large

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[164] For example, Nevada is the only state where sports gambling is legal and California is allowed to regulate its pollution under the Clean Air Act, while other states must follow the federal guidelines. *See* Michael Welsh, *Betting on State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act*, 55 B.C. L. REV. 1009, 1034 (2014).

[165] *Id.*

[166] *See generally* Blacksher & Guinier, *supra* note 18 (making this argument).

[167] *Id.* at 39.

[168] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406–16 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[169] *Id.* at 416.

[170] U.S. CONST. art. IV, § 2, cl. 1.

[171] *See Dred Scott*, 60 U.S. at 416–17.

slaveholding States" that surely would have objected to granting Black people the right to vote, for example, Taney concluded that citizenship could not have been intended to extend to Black people, even those who were free.[172] Whereas permitting a state to grant citizenship to free Black people would make Black people citizens across the country,[173] the Court's decision preserved the rights of states to use their discretion to restrict or grant rights to Black people as they wished. Thus, in *Dred Scott*, the Court elevated states' rights over the right of Black people to the privileges and immunities of citizenship, including the right to vote. The *Shelby County* Court echoed the language of Chief Justice Taney in its determination that the "equal sovereignty" of Alabama and other covered jurisdictions trumps "Congress's exercise of its explicit constitutional power to enforce the voting rights of the descendants of slaves."[174] Ultimately, the Roberts majority chose to value states' rights over the enforcement of the right to vote free of racial discrimination.

In her dissent, Justice Ginsburg aptly recognized that invoking the equal sovereignty principle to invalidate the coverage formula, the product of Congress's Fifteenth Amendment enforcement power, essentially overrules the Court's own precedent that expressly rejected the same argument.[175] According to the dissent, the Court should have merely addressed whether Congress had (1) acted within its power and (2) "rationally selected means appropriate to a legitimate end" when reauthorizing the VRA in 2006.[176] The answer should have been a simple "yes."

As Justice Ginsburg explained, "Congress approached the 2006 reauthorization of the VRA with great care and seriousness," and it was appropriate in light of persistent voting discrimination for Congress to maintain Section 5 coverage for Alabama and Shelby County.[177] Indeed, Alabama had the second-highest rate of successful Section 2 suits in the entire country from 1982 through 2005.[178] And, as recently as 2010, state legislators were recorded "refer[ring] to African-Americans as 'Aborigines' and talk[ing] openly of their aim to quash a particular gambling-related referendum because the referendum . . . might increase African-American voter turnout."[179] Had the Court applied the rational basis standard articulated in *Katzenbach*—that Congress may legislate by "all means which

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[172] *Id.*

[173] *See id.* at 417.

[174] Blacksher & Guinier, *supra* note 18, at 39.

[175] *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting); *see supra* notes 67–75 and accompanying text (discussing South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966)).

[176] *Shelby Cnty.*, 133 S. Ct. at 2636–37.

[177] *Id.* at 2643–44.

[178] *Id.* at 2645.

[179] *Id.* at 2647 (citation omitted).

are appropriate," "plainly adapted to that end," and "consist with the letter and spirit of the constitution"[180]—it would have been "implausible to suggest" that the 2006 reauthorization does not fully satisfy the test.[181]

C. The Supreme Court's Failure to Appreciate the Harms to Voters of Color

The *Shelby County* decision also reflects the Supreme Court's considerable distance from the harm that the Voting Rights Act was enacted to proscribe and its failure to grapple with the reality that Section 5—prior to *Shelby County*—was protecting voters from real, fierce, and persistent discrimination in the covered jurisdictions. The real world consequences of *Shelby County*, and what we have seen in its wake, have been predictably devastating. States, counties, and cities have unleashed an assault on voting rights since the *Shelby County* decision that is both historic in scope and intensity.

Within mere hours of the Court's decision, for example, Texas's Attorney General announced the state's plan to implement a voter identification law that had previously been blocked by Section 5 and potentially redistricting maps as well.[182] This is only one of many examples of formerly-covered states taking advantage of the gap in Section 5 protection by reverting back to laws that the Voting Rights Act previously blocked. Alabama, Mississippi, and North Carolina also adopted statewide discriminatory voting changes shortly after *Shelby County*.[183] Moreover, voters of color at the local level, where more than eighty-five percent of Section 5's work was done between 1982 and 2006,[184] are even more vulnerable to the enactment of discriminatory voting measures.

Since *Shelby County*, significant risks to voters of color in jurisdictions formerly covered by Section 5 arise from the fact that officials in those places can now change or enact new voting laws without providing notice, and that discriminatory voting changes will take effect before the measures can be challenged through costly and time consuming, case-by-case Section

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[180] South Carolina v. Katzenbach, 383 U.S. 301, 315, 326 (1966) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[181] *Shelby Cnty.*, 133 S. Ct. at 2639 (Ginsburg, J., dissenting).

[182] *See* Ryan J. Reilly, *Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Act Ruling*, HUFFINGTON POST (Apr. 7, 2014), http://perma.cc/72XR-4YZL.

[183] *See* Kim Chandler, *Alabama Photo Voter ID Law to be Used in 2014, State Officials Say*, AL.COM (June 26, 2013), http://perma.cc/D63X-KC7N; Laura Leslie, *NC Voter ID Bill Moving Ahead with Supreme Court Ruling*, WRAL.COM (June 25, 2013), http://perma.cc/T4V5-AHUN; Emily Wagster Pettus, *Primary Voting in Mississippi Will Occur Under New Identification Laws for Residents*, WASH. POST (June 1, 2014), http://perma.cc/63CA-C2NF.

[184] *See* Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151 (2013), http://perma.cc/8NRN-F4WR.

2 litigation.[185] Part IV delves into examples of discriminatory voting laws put in place by states and localities in response to *Shelby County*.

IV. VOTING DISCRIMINATION IN THE WAKE OF *SHELBY COUNTY*

This final section examines the fallout of the Supreme Court's inability to appreciate the harm to voters of color that Section 5 was preventing by drawing attention to the discriminatory state voting laws that were enacted soon after the Court immobilized Section 5. Finally, this Article discusses where to go from here—the battle to regain the safeguard of voting rights for Black voters and other voters of color.

A. New State and Local Laws in Response to Shelby County

In arguing *Shelby County*, LDF and its partners warned the Supreme Court that, without Section 5, formerly covered jurisdictions would implement discriminatory voting procedures.[186] That, unfortunately, proved to be true—within hours. This Subpart highlights laws in formerly covered jurisdictions—concluding with a look into discriminatory Alabama laws—that have been passed or considered since the Supreme Court immobilized Section 5 of the Voting Rights Act.

1. Texas

As noted above, within two hours of the Supreme Court's *Shelby* decision, the Texas government announced that the state's previously-blocked discriminatory voter identification law would "immediately" go into effect.[187] In a case that LDF litigated, a federal court recently struck down Texas's implementation of its photo ID law under Section 2 of the Voting Rights Act and the Constitution,[188] holding that it impermissibly burdens the

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[185] As stated in Congressional hearings in 2005, "2 to 5 years is a rough average" for the length of a Section 2 lawsuit. October 25, 2005 (History) Hearing, *supra* note 123, at 73 (statement of Anita Earls, Director of Advocacy, Center for Civil Rights). The estimated cost to bring a Section 2 "vote dilution case through trial and appeal runs close to a half a million dollars." *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 60 (2006) (statement of J. Gerald Herbert, former Acting Chief, Civil Rights Division, Department of Justice); *see generally* NAACP LDF, THE COST (IN TIME, MONEY, AND BURDEN) OF SECTION 2 OF THE VOTING RIGHTS ACT LITIGATION (2015), http://perma.cc/JY4C-4BY8.

[186] *See* Brief for Intervenors-Appellees Rodney and Nicole Lewis et al. at 47–53, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (No. 08-322), http://perma.cc/2RNJ-CVB4.

[187] Reilly, *supra* note 182.

[188] *See* Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014).

right to vote, has "detrimental effects on the African–American and Hispanic electorate,"[189] and was imposed with a discriminatory purpose, in addition to "impos[ing] a poll tax in violation of the 24th and 14th Amendments."[190] On the eve of the 50th anniversary of the VRA, a unanimous panel of the Fifth Circuit Court of Appeals affirmed the district court's finding that the discriminatory photo ID requirement, the strictest in the country, violated Section 2 of the Voting Rights Act.[191]

Unfortunately, the Supreme Court had permitted the law to remain in effect for the November 2014 elections,[192] even though more than 600,000 registered voters[193] and over one million eligible voters lacked the photo ID required to vote.[194] Although the Texas Department of Public Safety ("DPS") began to offer election identification certificates to Texas voters lacking other forms of ID, applying for one requires several costly underlying documents and hundreds of thousands of citizens would need to make a three-hour round trip to the nearest DPS office just to apply for an EIC.[195] This underscores the importance of the Section 5 preclearance provision, which would have prevented the law from taking effect in the first place, in ensuring full access to the ballot box, particularly for voters of color. With the case on remand, the district court will now conduct further fact finding on the discriminatory purpose of the law, and determine when to provide the remedy for the existing Section 2 violation it found.[196]

The state's attorney general also opened the door to other forms of discriminatory voting practices, stating that "[r]edistricting maps passed by the Legislature may also take effect without approval from the federal government"; tellingly, those same redistricting maps had recently been deemed intentionally discriminatory by a federal court.[197]

Changes also took place at the local level. Pasadena eliminated two district city council seats elected from predominantly Hispanic districts, replacing them with at-large seats elected from majority white districts.[198]

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[189] *Id.* at 703.

[190] *Id.* at 704.

[191] Veasey v. Perry, No. 14-41127, slip op. at 1 (5th Cir. Aug. 5, 2015).

[192] *See* Veasey v. Perry, 135 S. Ct. 9 (2014) (denying motion to stay).

[193] *Veasey*, 71 F. Supp. 3d at 650.

[194] *See* Editorial, *Voter ID on Trial in Texas*, N.Y. TIMES, (Sept. 7, 2014), http://www.nytimes.com/2014/09/08/opinion/voter-id-on-trial-in-texas.html, http://perma.cc/UT9X-YXK6.

[195] *See Veasey*, 135 S. Ct. at 11 (Ginsburg, J., dissenting).

[196] Veasey v. Perry, No. 14-41127, slip op. at 35–36 (5th Cir. Aug. 5, 2015).

[197] Matt Vasilogambros, *That Was Quick: Texas Moves Forward with Voter ID Law After Supreme Court Ruling*, NAT'L JOURNAL (June 25, 2013), http://perma.cc/5YAF-Y5KN (internal quotation marks omitted); *see also* Reilly, *supra* note 182.

[198] *See After* Shelby County, SCOTUSBLOG (Nov. 6, 2013), http://perma.cc/C3YB-P395; Ari Berman, *Voter Suppression Backfires in North Carolina, Spreads in Texas*, THE NATION (Nov. 7, 2013), http://perma.cc/RM9X-MQ8B.

Officials in Galveston County cut the number of the justice of the peace and constable districts from eight to four—a move previously rejected under Section 5.[199] This action will eliminate virtually all of the Black- and Latino-held positions on both boards; and the original configuration was put in place as a result of earlier litigation to remedy discrimination and provide electoral opportunity for voters of color.[200] In Beaumont, a state court has allowed a group of white legislators to implement a redistricting plan that changes the election method of certain seats on the then four-person Black majority school board. [201] Simultaneously, the state court effectively unseated the three Black board members in a conservative challenge to their candidacy; the three Black board members had been told that their seats were not up for re-election and so did not submit qualifying papers, while White candidates were not similarly led to believe the elections were not taking place and did submit the necessary papers.[202]

2. North Carolina

Immediately following the *Shelby County* decision, state legislators began to move ahead to pass a voter ID law[203] and end the state's early voting, Sunday voting, and same-day registration provisions.[204] Within two months of the Court's ruling, North Carolina Governor Pat McCrory signed an omnibus anti-voter bill, which includes numerous provisions that complicate voter access to the polls: a strict photo ID requirement, elimination of same-day voter registration, a decrease in the early voting period by seven days, and invalidation of provisional ballots cast at the wrong polling station.[205] The ballots of at least 454 North Carolina voters,

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[199] *See* Cindy Horswell, *Supreme Court Decision Prompts Houston Area Redistricting Fights*, HOUS. CHRONICLE, (Aug. 22, 2013), http://perma.cc/UKL5-TE33.

[200] *See generally* Petteway v. Henry, No. 11–511, 2011 WL 6148674 (S.D. Tex. Dec. 9, 2011); Jeff Balke, *Galveston Cuts Constable Districts in Half After Voting Rights Act Ruling*, HOUS. PRESS (Aug. 21, 2013), http://perma.cc/TSD4-D49T; Harvey Rice, *Galveston County May Run Afoul of Voting Rights Act*, HOUS. CHRON. (Aug. 20, 2013), http://www.houstonchronicle.com/news/houston-texas/houston/article/Galveston-County-may-run-afoulof-Voting-Rights-4747681.php, http://perma.cc/6AEE-8NHR.

[201] *See After* Shelby Co.*: An Odd Twist in the Beaumont ISD Redistricting Litigation*, TEX. REDISTRICTING & ELECTION LAW (July 16, 2013), http://perma.cc/KSM7-NG92; Zachary Roth, *Breaking Black: The Right-Wing Plot to Split a School Board*, MSNBC (Oct. 17, 2013), http://perma.cc/F8Q4-XWJV.

[202] *See* Emily DePrang, *After Voting Rights Decision, Texas Counties Revive Electoral Shenanigans*, TEX. OBSERVER (Oct. 10, 2013), http://perma.cc/8AKU-ZZ5Q; Roth, *supra* note 201.

[203] *See* Leslie, *supra* note 183.

[204] *See* Kara Brandeisky et al., *Everything That's Happened Since Supreme Court Ruled On Voting Rights Act*, PRO PUBLICA (Nov. 4, 2014), http://perma.cc/GKA7-5XXM.

[205] *See id.*; Colleen Jenkins, *North Carolina Voting Changes to Go on Trial in 2015*, REUTERS (Dec. 12, 2013), http://perma.cc/YJ8V-UTVR; Colleen Jenkins, *U.S. Judge Declines*

who are disproportionately people of color, went uncounted in the 2014 primary because of the changes.[206]

Local officials also moved to make changes. The Watauga County Board of Elections voted to eliminate an early voting site and election-day polling precinct on the Appalachian State University campus, and considered a plan to combine multiple polling precincts into one located a mile away from the University, along a campus road with no sidewalks.[207] The Pasquotank County Board of Elections initially barred—before the State Board of Elections reversed it—a senior at historically Black Elizabeth City State University from running for city council based on a determination that his on-campus address did not establish local residency. A Pasquotank county leader continues to express his intention to challenge the voter registrations of *more* students at the historically Black university in advance of upcoming elections.[208] In the wake of the *Shelby County* decision, County Commissioners in Benson are considering lifting limits on at-large voting under which—as a result of earlier Section 2 litigation—residents can only vote for one at-large seat every three years.[209] As Justice Ginsburg noted in her dissent, a change to an at-large voting system is a vote dilution method that facilitates majority "control [of] the election of each [representative], effectively eliminating the potency of the minority's votes."[210] Meanwhile, in Forsyth County, the Board of Elections considered, but tabled, proposals that would have placed security officers at the County's one-stop early voting site, and collected information from individuals or organizations returning voter registration forms;[211] the board chairman also considered closing an early voting site at Winston Salem State University, a historically

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to Stop North Carolina's Election Law Changes, REUTERS (Aug. 8, 2014), http://perma.cc/KP7R-XHAM; Michael C. Herron & Daniel A. Smith, Race, *Shelby County*, and the Voter Information Verification Act in North Carolina 11–12 (Feb. 12, 2014) (unpublished manuscript), *available at* http://perma.cc/P6DU-SM5P.

[206] *See* Ari Berman, *Hundreds of Voters Are Disenfranchised by North Carolina's New Voting Restrictions*, THE NATION (Sept. 10, 2014), http://perma.cc/G5M7-ZEXV; Liz Kennedy, *A Wild Week for Voting Rights*, DEMOS (Oct. 10, 2014), http://perma.cc/QD46-ZUTD. In 2008 and 2012, more than 250,000 voters in North Carolina relied on same day registration to cast their ballots; in 2012, 40% of the voters who relied upon same day voter registration were Black. *Id.*

[207] *See* Ari Berman, *North Carolina Republicans Escalate Attack on Student Voting*, THE NATION (Aug. 20, 2013), http://perma.cc/NEK2-V4SX.

[208] *See id.*; Matthew Burns, *NC Elections Board Gives College Voters Split Decision*, WRAL.COM (Sept. 3, 2013), http://perma.cc/KKC2-S4VB.

[209] *See* Sarah Childress, *After* Shelby, *Voting-Law Changes Come One Town at a Time*, FRONTLINE (Aug. 8, 2013), http://perma.cc/F37B-R4FR.

[210] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting).

[211] *See* Meghann Evans, *Elections Board Tables Vote on Security Officers at Polling Sites*, WINSTON-SALEM J. (Aug. 20, 2013), http://perma.cc/KP9Z-Z2AY.

Black institution.[212] In Shelby, North Carolina, officials are considering consolidating five voting precincts, which serve a substantial number of Black voters, into two precincts to save a mere $10,000 per election.[213] In Hoke County, the relocation of an early voting site has the potential to impact Black and other voters.[214] The relocation of polling places from schools to other locations in Rockingham County, meanwhile, has already affected voters of color.[215] And, in Guilford County, North Carolina, changes to school board districts have also negatively impacted Black voters.[216]

3. Florida

Following the *Shelby* decision, Florida Secretary of State Ken Detzner said "[w]e're free and clear to follow through with our [early voting] law now without any restriction by the Justice Department. . . . Last year I think we spent over a half a million dollars defending our pre-clearance cases. That cost will be eliminated in the future as a result of this opinion."[217] Detzner's statement, however, does not account for the significantly more expensive cost of defending discriminatory laws under Section 2 litigation, which would likely render the implementation of discriminatory voting laws more costly to taxpayers.[218] A federal court had rejected the early voting changes in August 2012 as harmful to the state's voters of color, and African-American Floridians in particular.[219] Governor Rick Scott also

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[212] Bertrand M. Gutierrez, *Chairman: Eliminate WSSU Early-Voting Site*, WINSTON-SALEM J. (Aug. 22, 2013), http://www.journalnow.com/news/elections/local/article_3da9300a-07a2-11e3-b6b3-001a4bcf6878.html, http://perma.cc/D24V-K6L5.

[213] Richard Fausset, *Mistrust in North Carolina over Plan to Reduce Precincts*, N.Y. TIMES (July 7, 2014), http://www.nytimes.com/2014/07/08/us/08northcarolina.html, http://perma.cc/X5R4-EK4X.

[214] *Id.*

[215] *Id.*

[216] *Id.*; *see also* Jordan Howse, *Wade's School Board Bill Stays Alive*, HIGH POINT ENTER (June 16, 2013), http://perma.cc/QND6-JMPY.

[217] *Reaction to Court Decision on Voting Rights Act*, ASSOCIATED PRESS (June 26, 2013), http://perma.cc/HZC3-W28M.

[218] *See* THE COST (IN TIME, MONEY, AND BURDEN) OF SECTION 2 OF THE VOTING RIGHTS ACT LITIGATION, *supra* note 185

[219] Press Release, NAACP LDF, Federal Court Rejects Florida's Early Voting Changes (Aug. 17, 2012), http://perma.cc/H5R4-JBFK. In 2008, over half of Black voters in Florida cast their ballots during the early voting period. During the 2012 elections, the wait to vote in some Florida locations was more than six hours. Luke Johnson, *Florida Voting Lines Discouraged 201,000 Voters Statewide: Report*, HUFFINGTON POST (Jan. 24, 2013), http://perma.cc/26SY-BLFD. More than 200,000 potential voters did not vote in 2012 because of long lines. *Id.* Further restrictions on early voting, as proposed by Secretary Detzner, would seriously restrict the ability of voters of color to exercise their right to vote.

sought to reinstitute a voter purge that he had attempted in 2012[220] before Section 5 blocked Florida election officials from using an error-prone list to purge purported "non-citizens" from the election rolls.[221] Meanwhile, a voter sued Florida's Secretary of State and Attorney General under the Fourteenth Amendment, claiming that the state's districting plan packed Black voters into the fifth congressional district.[222]

Multiple localities have been home to voting changes, as well. In Jacksonville, the Board of Elections has closed and relocated a polling place that served large numbers of Black voters in the City to a place that is inconvenient to reach by public transportation, among other burdens.[223] Hernando County adopted a plan to close polling places and consolidate the existing precincts into one precinct; the Black citizen voting-age population ("CVAP") of the affected area is nearly 22%, compared to the County's overall Black CVAP of 4.5% Black.[224]

4. Georgia

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[220] *See* Lizette Alvarez, *Florida Defends New Effort to Clean up Voter Rolls*, N.Y. TIMES, (Oct. 9, 2013), http://www.nytimes.com/2013/10/10/us/florida-defends-new-effort-to-clean-up-voter-rolls.html, http://perma.cc/R8UA-K4E7; Brandeisky et al., *supra* note 204; Steve Bousquet & Amy Sherman, *Florida Halts Purge of Noncitizens from Voter Rolls*, TAMPA BAY TIMES (Mar. 27, 2014), http://perma.cc/F5JY-US6Z; Steve Bousquet & Michael Van Sickler, *Renewed 'Scrub' of Florida Voter List Has Elections Officials on Edge*, TAMPA BAY TIMES (Aug. 3, 2013), http://perma.cc/932K-8SAS; Steve Bousquet, *Scott Administration Seeks Dismissal of Voter "Purge" Lawsuit*, TAMPA BAY TIMES (July 12, 2013), http://perma.cc/77L2-247C; Steve Bousquet, *U.S. Justice Department Says Florida's Voter Purge Violates Federal Law*, TAMPA BAY TIMES (July 31, 2012), http://perma.cc/9GCM-PXEP; Ashley Lopez, *Voting Rights Decision Could Mean Return of Florida's Voter Purge*, FLA. CTR. INVESTIGATIVE REPORTING (July 17, 2013), http://perma.cc/LJN5-9UUX.

[221] Mary Ellen Klas, *County Elections Officials to Halt Controversial Voter Purge*, TAMPA BAY TIMES (June 1, 2012), http://perma.cc/KC5Z-AK2U. The Eleventh Circuit found that another 2012 practice of systematically purging names from the voter rolls within ninety days of a federal election (in a purported effort to remove suspected non-citizens) violated a provision of the National Voter Registration Act. *See* Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1338 (11th Cir. 2014).

[222] Lizette Alvarez, *Florida G.O.P. Seeks Delay on New Districts*, N.Y. TIMES (July 15, 2014), http://www.nytimes.com/2014/07/16/us/politics/florida-gop-seeks-delay-on-new-districts.html, http://perma.cc/DX39-BDYT; Aaron Deslatte, *Judge 'Skeptical' He Can Delay Election with Unconstitutional Map*, ORLANDO SENTINEL (July 24, 2014), http://perma.cc/M69P-QS54; Kathleen McGrory & Mary Ellen Klas, *Judge Skeptical About Changes to Florida Congressional Districts Before Election*, MIAMI HERALD (July 24, 2014), http://perma.cc/5SPH-S66E.

[223] Deshayla Strachan, *Black Vote May Be Threatened in Jacksonville*, COURTHOUSE NEWS SERV. (Oct. 3, 2013), http://perma.cc/M47T-EKLX.

[224] Maryann Tobin, *Hernando Takes Mixed Approach to Voting Rights with Polling Location Changes*, EXAM'R (Aug. 25, 2013), https://perma.cc/3FYM-JXDK; *Advisory: Florida Latino Leaders Urge Congressional Delegation to Take Swift Action on the Voting Rights Amendment Act*, LEADERSHIP CONF. (May 30, 2014), http://perma.cc/ZW8G-B6G2. There are neither African Americans nor Latinos serving on the County Commission. *Id.*

Since *Shelby County*, Georgia lawmakers have proposed legislation that would cut early-voting periods for small, but not larger, consolidated cities to six days as a purported cost-saving measure.[225] A Georgia legislator suggested that he opposed new Sunday voting hours because Black and other voters of color take advantage of these voting opportunities disproportionately, explaining that he "prefer[s] more educated voters than a greater increase in the number of voters."[226] While the legislation was defeated, state lawmakers proposed an even more restrictive bill in the following legislative session that would reduce early voting by nine days across the state and would not mandate Sunday voting despite its proven popularity.[227] Additionally, recent reporting has demonstrated that Georgia may be purging voters from the rolls, many of whom are disproportionately voters of color, because these voters are suspected of voting in two or more states in the same election.[228]

Changes are being considered or have been implemented in counties across the state. In Fulton County, Georgia's most populous county, a new voting procedure creates, among other problems, a new overwhelmingly White district and reduces the sizes of majority-Black districts.[229] The city of Athens has considered eliminating nearly half of its twenty-four polling places and replacing them with only two early voting centers, both of which would be located inside police stations. Community members raised concerns that the location of the new centers would intimidate some voters of color and that the proposed closures would be harmful to voters of color and students, many of whom would need to travel on three-hour bus rides to reach the new polling places.[230] Greene County implemented a redistricting plan for its five-member County Board of Commissioners that would result in Black voters making up less than fifty-one percent of the population in all five districts;[231] the DOJ had blocked a different county redistricting plan in

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[225] Walter C. Jones, *Georgia Lawmaker Seeks Shorter Early-Voting Periods for Small Cities*, ATHENS BANNER-HERALD (Feb. 4, 2014), http://perma.cc/AD4A-V5AP.

[226] Hunter Schwarz, *Georgia State Senator Upset over Efforts to Increase Voter Turnout in Black, Democratic Area*, WASH. POST (Sept. 10, 2014), http://perma.cc/E9U7-WE9E.

[227] *See* Samantha Lachman, *Bill to Shorten Early Voting Period Advances in Georgia Legislature*, HUFFINGTON POST (Feb. 18, 2015), http://perma.cc/P4TJ-5PSX.

[228] *See* Greg Palast, *Jim Crow Returns*, AL JAZEERA AM. (Oct. 29, 2014), http://perma.cc/6GRT-6FRD.

[229] *See* David Wickert, *Voting Rights Decision Could Shake Up Fulton Politics*, ATLANTA JOURNAL-CONSTITUTION (June 26, 2013), http://perma.cc/28X2-YQBT; Michele Cohen Marill, *SCOTUS Ruling Forces a New Strategy for DeKalb Groups*, ATLANTA (June 26, 2013), http://perma.cc/BW83-2AC9.

[230] Spencer Woodman, *Voting Rights at Risk in Georgia*, ROLLING STONE (Nov. 4, 2013), http://perma.cc/9HK3-LX5Y.

[231] *Id.*; Jamelle Bouie, *Running Scared*, SLATE (Sept. 11, 2014), http://perma.cc/VPC6-YQMB; Billy W. Hobbs, *Rhodes Addresses Injustice Concerning Redistricting Map in Greene*

2012 and had been reviewing the above mentioned plan before the *Shelby County* decision.[232] Morgan County lawmakers eliminated more than a third of the County's polling places;[233] one city council member expressed concern that the closures would disfranchise low-income voters of color, many of whom lack cars.[234] Election officials in Baker County, a majority Black county with high poverty rates, considered eliminating four of its five polling places, requiring some voters to travel upwards of twenty miles to vote.[235] In Augusta-Richmond County, election officials reintroduced a plan to move County elections from November to over the summer, when Black voter turnout is typically lower—a change that the DOJ blocked in 2012.[236] A similar voting change was made in Macon-Bibb County, where officials decided to consolidate the city and county government and hold just one non-partisan municipal election in July, a time when Black voter turnout is low; this decision marks a stark change from the traditional schedule of having partisan elections with a primary election in July and a general election in November.[237] Further, the Macon-Bibb County Board of Elections is forming an advisory panel to consider reducing the number of polling places in the county from forty to twenty-six.[238] Among the possible polling locations to be eliminated is Macon Mall, which is served by public transportation.[239] Black households nationwide lack access to vehicles at a higher rate than white households, and Macon in particular has had a history of racial disparities in access to cars.[240]

County, LAKE OCONEE NEWS (Aug. 15, 2013), http://www.msgr.com/lake_oconee_news/news/article_84967866-05da-11e3-801e-0019bb2963f4.html, http://perma.cc/XV9J-8ABA.

[232] Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Michael S. Green et al. (Apr. 13, 2012), http://perma.cc/ERJ8-YBZ2.

[233] Bouie, *supra* note 231.

[234] Woodman, *supra* note 230.

[235] *In the Wake of Shelby County Ruling, Local Officials Fly Under the Radar with Discriminatory Changes to Voting Rules*, NAACP LDF, http://perma.cc/B2KP-VZQR.

[236] Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Dennis R. Dunn (Dec. 21, 2012), http://perma.cc/NDJ6-X42L.

[237] *See* Adam Ragusea, *Ga. Voters Surprised Macon Election Change Isn't Challenged*, NPR (Feb. 6, 2014), http://www.npr.org/2014/02/06/272359791/voting-rights-act-update, http://perma.cc/PQ8L-UALB.

[238] *See* Phillip Ramati, *Macon-Bibb Elections Board Postpones Vote on Plan to Cut Polling Stations*, THE TELEGRAPH (Jan. 29, 2015), http://perma.cc/7GQ6-5VE2.

[239] *Id.*

[240] *See* Alan Berube et al., *Socioeconomic Differences in Household Automobile Ownership Rates: Implications for Evacuation Policy*, *in* RISKING HOUSE AND HOME: DISASTERS, CITIES, AND PUBLIC POLICY 197, 198–89 (John M. Quigley & Larry A. Rosenthal eds., 2008); Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L.J. 1183, 1194–95 (2003) (describing a 1994 complaint filed with the Department of Transportation and noting that "more than 28% of Macon-Bibb's African Americans do not own cars, compared with only 6% of the city's whites").

5. Mississippi

Mississippi, following *Shelby County*, moved forward to implement a voter ID law for June 2014 primaries.[241] Since the law's implementation, a local special election was tied (177–177) and depended upon a lone voter returning to the polls within five business days with a valid photo ID (after voting provisionally by affidavit ballot) because the voter initially appeared to vote without an acceptable photo ID.[242] This clearly indicates that photo ID laws—and their disfranchising effect—can swing an entire election.

6. South Carolina

South Carolina Attorney General Alan Wilson praised the *Shelby County* ruling, stating:

> Today's decision means the voting rights of all citizens will continue to be protected under the Voting Rights Act without requiring a different formula for states wishing to implement reasonable election reforms, such as voter ID laws similar to South Carolina's. This is a victory for all voters as all states can now act equally without some having to ask for permission or being required to jump through the extraordinary hoops demanded by federal bureaucracy.[243]

Though Wilson deemed South Carolina's voter ID law a "reasonable election reform," a panel of federal judges who reviewed it in 2012 reasoned that the law raised concerns under the VRA.[244] The court, however, allowed the photo ID law to be implemented after the state reinterpreted the law's failsafe provision so as to permit people to vote with non-photo voter registration cards.[245]

At the local level, the City Council of Greenville considered moving

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[241] Brandeisky et al., *supra* note 204.

[242] Geoff Pender, *Tied Election Down to One Voter's ID or Drawing Straws*, CLARION-LEDGER (Sept. 10, 2014), http://perma.cc/CQJ8-5V7P.

[243] Brentin Mock, *State Attorney Generals Vow Immediate Voter ID Implementation*, COLORLINES (June 25, 2013), http://perma.cc/2EH7-Q3B8.

[244] South Carolina v. United States, 898 F. Supp. 2d 30, 40 (D.D.C. 2012) ("About 96% of whites and about 92-94% of African-Americans currently have one of the [required] photo IDs. That racial disparity, combined with the burdens of time and cost of transportation inherent in obtaining a new photo ID card, might have posed a problem for South Carolina's law under the strict effects test of Section 5 of the Voting Rights Act absent the reasonable impediment provision.").

[245] *Id.* at 34 ("Importantly for our purposes, [the photo ID law] still permits citizens to use their *non-photo* voter registration cards to vote, as they could under pre-existing South Carolina law.").

from partisan to non-partisan elections, drawing criticism from the Council's two minority representatives and others who contend that doing so would dilute the voting strength of the City's two majority-minority districts.[246] Critics of the non-partisan election plan contend that removing party affiliation from elections would make it harder for Black representatives to get elected, under the idea that party affiliation on ballots can encourage low-information voters to participate.

7. Virginia

Virginia implemented its new photo ID law in June 2014.[247] About 200,000 Virginian voters reportedly lack an acceptable photo ID under the law.[248] The State Board of Elections considered, but ultimately modified, a policy that would have allowed voters to present expired, but otherwise valid, forms of photo ID at the polls; the "compromise" policy allows voters to use an acceptable photo ID that has been expired no more than twelve months before election day.[249]

During the 2015 legislative session, state lawmakers passed a bill (under the guise of preventing purported—yet undocumented—voter fraud) that would require voters to submit a copy of their photo ID when they apply by mail to vote by absentee ballot,[250] whereas only people who apply for absentee ballots in person are required to present photo ID under existing law. In addition, in October 2014, a panel of three federal court judges determined that the Virginia General Assembly had unconstitutionally "packed" Black voters into a super majority-minority congressional district—raising the Black voting-age population in one district from 53.1% to 56.3%—to intentionally dilute Black voters' influence in other surrounding districts.[251]

A federal court recently dismissed a suit brought by the Democratic

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[246] Anna Lee, *No Party Council Elections May Hurt Minorities*, GREENVILLE NEWS (Mar. 11, 2014), http://perma.cc/9ZU8-6J92.

[247] Morgan Whitaker, *Virginia Governor Signs Strict Voter ID Law*, MSNBC (Oct. 2, 2013, 10:03 PM), http://perma.cc/N2UZ-6YJR; *see also* Jenna Portnoy, *Virginia Election Board Makes Voter ID Requirements More Stringent*, WASH. POST (Aug. 7, 2014), http://perma.cc/D382-AEBC.

[248] *See* Steve Benen, *Voter-ID Laws Continue to Wreak Havoc*, MSNBC (Sept. 26, 2014), http://perma.cc/LFU7-7TJM.

[249] *See* Markus Schmidt, *Va. Attorney General Warns Voter ID Definition May Be Unconstitutional*, RICHMOND TIMES-DISPATCH (Aug. 5, 2014), http://perma.cc/H47C-NBTB; Markus Schmidt, *Elections Board Will Not Allow IDs Expired More than 12 Months*, RICHMOND TIMES-DISPATCH (Aug. 6, 2014), http://perma.cc/8QPC-3ZF8.

[250] Jenna Portnoy, *Va. House Approves ID Requirement for Absentee Voting Requested by Mail*, WASH. POST (Feb. 9, 2015), http://perma.cc/SX3E-WEFW.

[251] Rachel Weiner et al., *Court Declares Virginia's Congressional Map Unconstitutional*, WASH. POST (Oct. 7, 2014), http://perma.cc/H25D-VX9J.

Party of Virginia against the State Board of Elections for removing up to 57,000 registered and qualified voters from voter registration lists;[252] the complaint alleged that the Board's purge process is error-ridden and that it has required county and city registrars to "use their 'best judgment'" in determining whether to purge voters, which has the potential to disfranchise voters of color, the elderly, and the poor.[253] Recent reporting indicates that Virginia may be purging voters from the rolls, many of whom are disproportionately voters of color, because they are suspected of being double voters.[254]

8. Arizona

In a 2014 lawsuit against the Election Assistance Commission ("EAC"), Arizona, along with Kansas, sought to require proof of citizenship (which is not required in federal elections) of its residents to vote in state and local elections.[255] Dual registration systems, like that which Arizona attempted to pursue, have a historical association with racial discrimination;[256] had the preclearance coverage been in effect, the proposed change would most certainly have garnered the DOJ's attention. Thankfully, the Tenth Circuit upheld the EAC's denial of Arizona's and Kansas's requests.[257] State lawmakers also passed voting provisions that allowed counties to purge people from a list that counties use to mail ballots to individuals before every election; it has since been repealed in response to public disapproval.[258]

At the local level, the Maricopa County Community College District

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[252] Democratic Party of Va. v. Va. State Bd. of Elections, No. 1:13-cv-1218, 2013 WL 5741486 (E.D. Va. Oct. 21, 2013).

[253] *See* Sophia Pearson, *Virginia Democrats Sue over State Voter Roll Purge*, BLOOMBERG (Oct. 3, 2013), http://perma.cc/XRM9-3EMT.

[254] *See* Palast, *supra* note 228.

[255] Ari Berman, *Separate and Unequal Voting in Arizona and Kansas*, THE NATION (Oct. 15, 2013), http://perma.cc/GBN7-GTYJ; Brandeisky et al., *supra* note 204. Arizona contends that the Supreme Court's recent *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), decision, which held that the state's proof of citizenship law for voter registration violated the National Voter Registration Act, only applies to federal elections. Berman, *supra*.

[256] *Id.* For example, in 1987, LDF successfully litigated a VRA case demonstrating the discriminatory effect of Mississippi's dual registration system on Black people. Kristen Clarke, *supra* note 98. In addition, in the 1990s, the Supreme Court and Section 5 of the VRA blocked Mississippi's similar attempt to circumvent the National Voter Registration Act by re-implementing an intentionally discriminatory dual registration scheme. *Id.*; *see also* Young v. Fordice, 520 U.S. 273 (1997).

[257] Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1196 (10th Cir. 2014).

[258] Jessica Boehm, *Committee Narrowly Endorses Bill on Purging Early Voter Lists*, CRONKITE NEWS (Feb. 5, 2013), http://perma.cc/LK5Y-ZBC9; *Gov. Brewer Signs Elections-Overhaul Repeal*, AZ CENTRAL (Feb. 27, 2014), http://perma.cc/KZR2-RDNE.

Board added two at-large electoral districts to its existing five-member Board, which is elected by districts; Section 5 previously put the plan on hold.[259] Historically, jurisdictions have used at-large voting to dilute the voting strength of communities of color.

9. Arkansas[260]

After *Shelby County*, Arkansas moved forward to implement a photo ID law.[261] After voters filed state constitutional challenges to stop the implementation of the photo ID law, one state court ruled that the law was "void and unenforceable."[262] Notwithstanding these decisions, appellate rulings permitted the photo ID law to be implemented in the May and June 2014 primary and runoff elections.[263] Data provided to LDF by the Arkansas Secretary of State showed that in these elections the photo ID law disfranchised over 1,000 people and that the state had issued only thirty three voter ID cards since the law went into effect.[264] LDF filed an amicus brief in support of those voters challenging the photo ID law's constitutionality and describing its discriminatory impact on Black voters and other vulnerable groups.[265] Subsequently, the Arkansas Supreme Court permanently struck down the photo ID law, finding that the law violated the state constitution by adding a new voter qualification.[266] Nonetheless, during the November 2014 elections, the Secretary of State reportedly requested voter IDs from voters who transferred their registration to a new county.[267]

10. Alabama

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[259] Mary Beth Faller, *Conservative Trio Prevails in Maricopa College Board Race*, AZ CENTRAL (Nov. 5, 2014), http://perma.cc/A3AL-YBF9; Al Macias, *Maricopa County Community College District Board to Add Two New Members*, KJZZ (Sept. 4, 2013), http://perma.cc/4VHU-QDQK.

[260] While Arkansas was not covered immediately before the *Shelby County* decision, it was formerly covered as a result of LDF's litigation efforts in *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990) ("bailing-in" Arkansas for pre-clearance under Section 3(c) of the VRA). LDF continues to work in that state to track racial discrimination in voting as it arises.

[261] Brandeisky et al., *supra* note 204.

[262] Ark. State Bd. of Election Comm'rs v. Pulaski Cnty. Election Comm'n, 437 S.W.3d 80, 84 (Ark. 2014). *Arkansas Judge Strikes Down Voter ID Law as Unconstitutional*, REUTERS (Apr. 24, 2014), http://perma.cc/77KJ-HYBX.

[263] *Group Asks Judge to Halt Enforcement of Arkansas Voter ID Law*, UALR PUB. RADIO (June 24, 2014), http://perma.cc/KY8D-GW7H.

[264] *See* Brief for NAACP Legal Defense & Educational Fund, Inc. et al. as Amici Curiae in Support of Appellees at 6–8, Martin v. Kohls, 444 S.W.3d 844 (Ark. 2014) (No. 14-462), *available at* http://perma.cc/CU5P-B9JU.

[265] *See generally id*.

[266] Martin v. Kohls, 444 S.W.3d 844, 852–53 (Ark. 2014).

[267] Max Brantley, *Secretary of State Invoking Voter ID for Certain Voters; Pulaski Protests*, ARKANSAS TIMES (Nov. 3, 2014), http://perma.cc/3ZUY-5AGK.

In *Shelby County*'s home state, Alabama Attorney General Luther Strange announced within days of the decision that the State's voter identification law would be implemented immediately.[268] The Alabama Secretary of State estimates that about 250,000 registered voters lack the required photo ID to vote.[269] LDF, on behalf of civil rights and pro-democracy groups, expressed particular concerns with—and urged the issuance of regulations governing—the "voucher" provision of the photo ID law, which enables two election officials to "vouch" for voters lacking photo ID and accordingly places substantial discretion in the hands of often White poll officials in potential violation of the VRA.[270] Before the VRA, strict voucher requirements were commonly used in Alabama and elsewhere to prevent African Americans from registering to vote.[271] LDF later determined that, in the June 2014 primary, nearly three hundred voters were disfranchised by the photo ID law, and that over forty percent of these voters were from counties with majority Black populations.[272] More than a hundred voters were then disfranchised in the November election.[273] In December 2014, Alabama also moved forward with a request to the EAC to impose a proof of citizenship requirement before registering to vote.[274] Proof of citizenship laws create significant hurdles for both elderly and young voters of color[275] who are much less likely than White people to possess proof of citizenship. In addition, a federal court in 2011 found "substantial evidence" that the Alabama law that enacted this proof of citizenship requirement is

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[268] *Ala. Officials Say Voter ID Law Can Take Effect*, ALA. PUB. RADIO (June 27, 2013), http://perma.cc/B5BM-Z6SZ.

[269] *See New Photo Voter IDs to be Available at County Registrars' Offices and from Traveling Van*, AL.COM (March 10, 2014), http://perma.cc/LV9U-PSPE.

[270] Press Release, NAACP LDF, Protecting Voting Rights in Alabama (Mar. 6, 2014), http://perma.cc/UTS8-ZFQC.

[271] Ross, *supra* note 27, at 387–89 (describing the discriminatory enforcement of voter identification and voucher requirements in various states in the 1960s); *see also* United States v. Logue, 344 F.2d 290, 291–92 (5th Cir. 1965) (declaring unconstitutional the voucher system used in Wilcox County, Alabama).

[272] Martin J. Reed, *Alabama's Voter ID Law Blamed for at Least 282 Ballots Uncounted in Primary*, AL.COM (Sept. 3, 2014), http://perma.cc/VV8H-D67P.

[273] Mike Cason, *Report Says 119 Jefferson County Absentee Ballots Not Counted Because of Alabama's Photo ID Law*, AL.COM (Dec. 5, 2014), http://perma.cc/FF5Z-GMWL.

[274] Brendan Kirby, *One of Last Vestiges of Gutted Immigration Law, Alabama Pushes for Citizenship Proof*, AL.COM (Dec. 23, 2014), http://perma.cc/94G8-B8ZA.

[275] For example, a comprehensive 1950 study found that, in total, 18.5% of nonwhite births and only 6% of white births went unrecorded in the United States. S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4:1 POPULATION STUD.: J. DEMOGRAPHY 86, 98–99 (1950). Because nonwhite births were more likely to go unrecorded, voters of color are less likely to own a birth certificate. *See also* Jon C. Rogowski & Cathy J. Cohen, *Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Electio*n 5, BLACK YOUTH PROJECT, http://perma.cc/ZQA9-ABA2.

intentionally discriminatory.[276]

Meanwhile, the Supreme Court ruled on two consolidated cases during the 2014 Term, *Alabama Legislative Black Caucus v. State of Alabama*[277] and *Alabama Democratic Conference v. Alabama*,[278] which arose from a challenge to a 2012 legislative map that the plaintiffs contended intentionally packed Black voters into a few supermajority-minority districts (on average sixty-four percent Black), thereby limiting their electoral influence and opportunity to elect candidates of choice in the Alabama legislature.[279]

Court supervision of local voting changes is vital after *Shelby County*, but a court must first obtain jurisdiction over, or bail-in, the locality. A federal district court bailed in Evergreen (in Conecuh County), for one, under Section 3 of the Voting Rights Act.[280] Under the terms of the bail-in, court-appointed observers will monitor Evergreen's elections, and Evergreen must submit voting changes related to the method of election for the city council, including any redistricting plan impacting the city council.[281] Evergreen must also submit any change to the standards for determining voter eligibility to participate in Evergreen's municipal elections, to either the federal court or the Department of Justice through December 2020.[282] Elsewhere in Alabama, a federal court retained jurisdiction over a challenge to Decatur's failure to implement the city manager form of government, which would have reduced the single-member districts from five to three with a fourth member and the mayor elected at-large.[283] While Decatur voters had selected this form of government in 2010,

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[276] Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1185–94 (M.D. Ala. 2011) ("[T]here is substantial evidence that race and national origin also played a role in the passage of [this legislation]."), *vacated*, Cent. Ala. Fair Hous. Ctr. v. Comm'r, No. 11-16114-CC, 2013 WL 2372303 (11th Cir. May 17, 2013).

[277] 135 S. Ct. 1257 (2015).

[278] *Id.*

[279] Brief for Appellants at 6–7 & nn.16, 17, Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) (No. 13-895).

[280] Allen v. City of Evergreen, No. 13-0107-CG-M, 2013 WL 1163886, at *3 (S.D. Ala. Jan. 13, 2014).

[281] *Id.* at *3–4.

[282] *Id.* at *4–5. In 2012, Section 5 blocked Evergreen from continuing to implement a non-precleared voter purge based on utility records that omitted eligible voters from a voter registration list, including nearly half of the Conecuh County registered voters who reside in districts heavily populated by Black people. *See* Partial Consent Agreement at *1–2, Allen v. City of Evergreen, 2013 WL 1163886 (S.D. Ala. Aug. 20, 2012), ECF No. 8. In the same year, Section 5 blocked a non-precleared municipal redistricting plan that packed Black voters into only two of the five districts when it was possible to establish a third majority-Black voting district, thereby diluting the voting strength of Black voters in Evergreen. *Id.*

[283] Order at 2, Voketz v. City of Decatur, No. 5:14-cv-00540-AKK (N.D. Ala. Aug. 19, 2014) (denying motion to remand) *available at* http://perma.cc/W7SW-ETXT; Eric Fleischauer, *Voketz Case to Stay in Federal Court*, DECATUR DAILY (Aug. 19, 2014),

the City has not implemented it because it believes that doing so would violate the Voting Rights Act through the elimination of the only majority-minority district.[284] Without Section 5's protection, it is significantly easier for localities to pass discriminatory voting practices such as shifts from district to at-large voting.

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The next, and final, Subpart examines next steps for fighting voter discrimination across the country following *Shelby County*.

B. Fighting Voting Discrimination in the Wake of Shelby County

Fifty years after the enactment of the VRA and the march in Selma that led to its passage, the fight for voter equality continues—notwithstanding the *Shelby County* decision. Although we lost a powerful weapon in *Shelby County*, the VRA contains several remaining tools, including Section 2, to challenge newly-arising discriminatory voting measures in jurisdictions formerly included in the coverage provision. Advocates must use existing avenues to fight discriminatory voting practices as well as explore new ways to promote voting equality. This Subpart identifies three ways to support voter equality in the Post-*Shelby* era: (1) promotion of the Voting Rights Advancement Act ("VRAA"), (2) advocating for new procedures that uphold the right to vote, and (3) remaining vigilant and responsive to newly implemented discriminatory voting practices across the nation. Focusing on these three issues will help provide voting advocates tools to combat the new wave of discriminatory voting practices rising across the nation, even as we recognize that none of them is a substitute for what we lost in *Shelby County.*

First, Congress must strengthen and pass the VRAA.[285] This critical legislation reflects recognition of the need to protect the millions of voters left vulnerable by *Shelby County*, which was "a dagger to the heart of the

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http://www.decaturdaily.com/news/local/article_5d1e81cc-27ba-11e4-9856-001a4bcf6878.html, http://perma.cc/3VEN-XNNU; Jack Madison, *Judge Rules on Venue for Case Against City of Decatur*, WAFF (Sept. 16, 2014), http://www.waff.com/story/26319866/judge-rules-on-venue-for-case-against-city-of-decatur, http://perma.cc/JR5H-HDYM.

[284] Fleischauer, *supra* note 283; Madison, *supra* note 283.

[285] *See generally* Jennifer Bendery, *Bill to Restore Voting Rights Act Gets Another Bipartisan Push*, HUFFINGTON POST (Feb. 18, 2015), http://perma.cc/KX73-MNWP (describing legislation).

Voting Rights Act of 1965."[286] It is important to note that in *Shelby County*, the Court did not rule the principle of preclearance unconstitutional, but instead ruled that the then-existing formula for determining what jurisdictions were covered was outdated.[287] The decision left open the option to pass an amendment to the Voting Rights Act to determine which places are covered by preclearance. In 2014 and 2015, a small group of Congress members introduced the VRAA, which sets forth a new formula for determining jurisdictions that are required to be precleared for any changes to voting procedures.[288]

The VRAA would subject certain jurisdictions to Section 5 preclearance, including those with a recent history of voting discrimination that have committed a certain number of statewide and local voting rights violations over the prior fifteen years.[289] If a jurisdiction is found to have a recent history of voting discrimination, it would be subject to preclearance for at least ten years.[290]

The VRAA provides a significant first step in combating racial discrimination in voting that has proliferated since *Shelby County*. The bill would enhance the ability of victims of voting discrimination to be shielded from discriminatory voting practices before they are set in place by requiring that any change to voting procedures or practices nationwide be made known to the public before being implemented.[291] If a jurisdiction does not notify the public of a new procedure within a specified period of time before an election, the provision would prohibit the state from denying a citizen the right to vote solely based on a failure to comply with the requirements of a change.[292] This legislation should be passed as a starting point. "The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today."[293]

Second, voting rights advocates can urge support for an affirmative voting rights strategy that promotes greater access to political participation for all individuals. There are several affirmative procedures and practices

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[286] Susan Ferrechio, *Leahy Aims to Void "Stunning" Supreme Court Decision on Voting Rights Act Through Legislation*, WASH. EXAMINER (June 25, 2013), http://perma.cc/S9L7-35JJ (quoting Representative John Lewis).

[287] *Cf.* Shelby Cnty. v. Holder, 133 S.Ct. 2612, 2632 (2013).

[288] Representatives Jim Sensenbrenner (R-Wis.) and John Conyers (D-Mich.) introduced the same legislation during both sessions. Bendery, *supra* note 285. For a detailed overview of the VRAA, see *The Voting Rights Amendment Act of 2014*, NAACP LDF, http://perma.cc/92M5-Z39H.

[289] *The Voting Rights Amendment Act of 2014*, *supra* note 288.

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) (citation and internal quotation marks omitted), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

that make voting more accessible to historically disfranchised populations, including working to ensure accountability from elected officials, extending early voting, extending poll station hours and accessibility, improving absentee ballot procedures, and reforming voting laws that disqualify or restrict voting for people with criminal convictions. It is important for advocates of voter equality to promote new and improved procedures to fortify the right to vote.

Third, without Section 5 and the advanced notice of voting changes that it provided, advocates and citizens will have to actively work to keep abreast of voting changes that may have a negative impact on minority communities. These changes may take the form of changes in polling places to locations that are more difficult for communities of color to access, changes from single-member districts to at-large voting, redistricting measures that reduce the number of majority-minority districts, reductions in the early voting period, limiting voter registration opportunities, or enacting new voter identification requirements. Equal participation in the political process cannot be ensured absent such awareness, information, and cooperation.

CONCLUSION

Though equal parts devastating and shameful, *Shelby County* was not fatal to the fight to ensure that every American has an equal right to participate in the political process. Indeed, as historian Alexander Keyssar has observed, democracy in America is, and always has been, contested.[294] It is characterized by periods of progress and retrenchment. Throughout our nation's history, the expansion of opportunity and participation has been met by reactionary measures intended to cut back on hard-won progress. *Shelby County*, and what resulted in its wake, was the latest chapter in that story, as the struggle to ensure that all Americans can participate equally in the political process continues.

The fiftieth anniversary of the VRA's passage is not merely an event to be commemorated, but also a reminder that democracy is not self-executing. It requires maintenance. And it requires that, particularly on this anniversary of the VRA and the historic march in Selma that led to its passage, Congress make restoring the statute to its full strength a top priority. At the same time, voters must remain vigilant in safeguarding against efforts to constrict democracy in state, local, and federal elections and beyond. A "more perfect union" depends upon it.

[294] *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).