



5-1985

The Voting Rights Amendment Act of 2014: A Constitutional Response to Shelby County

Gilda R. Daniels

University of Baltimore School of Law, gdaniels@ubalt.edu

William Yeomans

American University Washington College of Law, wyeomans@wcl.american.edu

Nicholas Stephanopoulos

The University of Chicago School of Law, nsteph@uchicago.edu

Gabriel J. Chin

University of California-Davis School of Law, gjchin@ucdavis.edu

Samuel Bagenstos

The University of Michigan Law School, sambagen@umich.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac

 Part of the [Civil Rights and Discrimination Commons](#), [Election Law Commons](#), [Law and Politics Commons](#), [Law and Race Commons](#), and the [Legislation Commons](#)

Recommended Citation

William Yeomans, Nicholas Stephanopoulos, Gabriel J. Chin, Samuel Bagenstos, & Gilda R. Daniels, *The Voting Rights Amendment Act of 2014: A Constitutional Response to Shelby County*, American Constitution Society for Law & Policy (May 2014), https://www.acslaw.org/sites/default/files/Yeomans_Stephanopoulos_Chin_Bagenstos_and_Daniels_-_VRAA_1.pdf.

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

The Voting Rights Amendment Act of 2014: A Constitutional Response to *Shelby County*

**By William Yeomans, Nicholas Stephanopoulos,
Gabriel J. Chin, Samuel Bagenstos, and Gilda R. Daniels**

May 2014

All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

**The Voting Rights Amendment Act of 2014:
A Constitutional Response to *Shelby County***

**William Yeomans, Nicholas Stephanopoulos, Gabriel J. Chin,
Samuel Bagenstos, and Gilda R. Daniels**

Table of Contents

Introduction: An Overview of the Voting Rights Amendment Act of 20141
William Yeomans

The Coverage Formula5
Nicholas Stephanopoulos

The Expansion of the Section 3 Bail-In Remedy.....9
Gabriel J. Chin

The Preliminary Injunction Provision.....12
Samuel Bagenstos

Notice and Transparency16
Gilda R. Daniels

Introduction: An Overview of the Voting Rights Amendment Act of 2014 **William Yeomans***

The Voting Rights Act of 1965 (“VRA”) has been described as “the most effective civil rights law in the history of the United States.”¹ No provision of the VRA has been more effective than the preclearance requirement of Section 5.² Prior to the Supreme Court’s 2013 decision in *Shelby County v. Holder*,³ a formula in Section 4 of the VRA⁴ identified nine states and jurisdictions in six more (collectively “covered jurisdictions”)⁵ with a pervasive history of racial discrimination in voting. As covered jurisdictions, they were required to prove to the United States Attorney General or a three-judge court in the District of Columbia that any proposed voting change did not have the purpose and would not have the effect of discriminating on the basis of race or language minority status. If the Attorney General objected within 60 days, the change could not go into effect. If he remained silent or the jurisdiction obtained a declaratory judgment, the change could proceed. The preclearance provisions proved so successful that Congress reauthorized them four times since 1965, most recently in 2006.

In *Shelby County*, the Supreme Court, in a 5-4 decision, held the Section 4 coverage formula unconstitutional, asserting that it was not adequately grounded in “current conditions.”⁶ It did so even though Congress, when it reauthorized the VRA in 2006 by votes of 390 to 33 in the House and 98 to 0 in the Senate, compiled over 15,000 pages of evidence showing the persistence of racial discrimination in voting in the covered jurisdictions.⁷ The Court left in place Section 5, which contains the preclearance requirement, and invited Congress to craft a new coverage formula, which would, in turn, bring Section 5 back to life. Representatives James Sensenbrenner (R-WI) and John Conyers (D-MI) have done just that, introducing the bipartisan Voting Rights Amendments Act of 2014 (“VRAA”).⁸ Senator Patrick Leahy has introduced identical legislation in the Senate.⁹

The VRAA attempts to fill the hole *Shelby County* opened in four ways. It would: 1) create a new coverage formula that would be based on recent violations of voting rights laws and would update coverage determinations annually; 2) expand judicial bail-in to allow courts to order preclearance as a remedy for proven violations of voting laws prohibiting racial and language discrimination; 3) create a new standard for preliminary relief to prevent use of potentially discriminatory voting changes until they can be reviewed by a court; and 4) increase the transparency of voting changes to allow for identification of problematic provisions.

* Fellow in Law and Government, American University Washington College of Law.

¹ Richard L. Engstrom, *Race and Southern Politics*, 10 ELECTION L.J. 53, 53 (2011).

² See 42 U.S.C. § 1973c (2012).

³ 133 S. Ct. 2612 (2013).

⁴ 42 U.S.C. 1973b (2012).

⁵ See *Jurisdictions previously covered by Section 5*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 7, 2014).

⁶ *Shelby Cnty.*, 133 S. Ct. at 2629.

⁷ *Id.* at 2635-36 (Ginsburg, J., dissenting).

⁸ H.R. 3899, 113th Cong. (2014) [hereinafter “VRAA”].

⁹ S. 1945, 113th Cong. (2014).

This Issue Brief, a collaborative effort of five authors, analyzes the major aspects of the VRAA and their constitutionality. The section below provides an overview of the legislation. The four sections that follow contain analyses of the constitutionality of each of the bill's four key provisions. These analyses conclude that the relevant provisions of the VRAA are constitutional exercises of congressional power and should be upheld if challenged in court.

A. The Coverage Formula

Section 3 of the VRAA would create a new “rolling trigger” coverage formula.¹⁰ Under the new formula, each year, the Attorney General would look back fifteen years to determine whether, within that time frame, five voting rights violations had occurred within any given state, including one violation committed by the state itself, and whether three voting rights violations had occurred within any local jurisdiction. If so, the state or jurisdiction would be required to preclear voting changes for ten years from the date of the most recent violation. In addition, if a single violation had occurred in a local jurisdiction combined with extremely low minority turnout, as defined in the bill, for the preceding fifteen years, that jurisdiction too would be subject to preclearance. Voting rights violations counted in the formula would include final judgments finding violations of the Fourteenth and Fifteenth Amendments or Section 2 of the VRA, objections by the Attorney General pursuant to Section 5, and denials of declaratory judgments granting preclearance pursuant to Section 5.

Although it is impossible to identify with certainty the jurisdictions that would be covered until the Attorney General makes the annual determination of extremely low minority turnout, if implemented today, the formula likely would capture Georgia, Louisiana, Mississippi, Texas, and a few jurisdictions outside those states. The rolling trigger ameliorates concern that the bill's initial coverage is too limited by ensuring that future violations can trigger the extension of coverage. This feature also obviates the need for periodic reauthorization.

The bill states that an Attorney General's preclearance objection to the imposition of a “photo identification” requirement for voting will not count in calculating coverage. As a three-judge court held in denying preclearance of a photo identification law enacted by Texas and as a district court recently held in striking down a Wisconsin photo identification law, such laws can indeed disproportionately burden minority voters.¹¹ Their special treatment in the coverage formula appears to be part of the price required to initiate bipartisan legislation, a bargain that should be revisited during consideration of the bill. The exemption likely would not affect the initial coverage determinations, but could affect coverage in future years.

B. Judicial Bail-In

Section 3 of the Voting Rights Act authorizes a court to impose preclearance as part of the remedy for a finding of a violation of the Fourteenth or Fifteenth Amendment.¹² This rarely used provision has taken on increased significance after *Shelby County*, both because it remains

¹⁰ See VRAA § 3.

¹¹ See *Frank v. Walker*, Nos. 11-CV-01128, 12-CV-00185, 2014 WL 1775432, at *33 (E.D. Wis. Apr. 29, 2014); *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013).

¹² See 42 U.S.C. § 1973a(c) (2012).

the sole means of extending preclearance until a new formula is enacted and because it offers an indisputably constitutional means of doing so. Section 3 answers the Court’s requirement that preclearance coverage reflect current conditions by basing coverage on a finding of a recent constitutional violation. It also allows a court to shape the preclearance requirement to fit the violation and authorizes the court to determine whether it or the Attorney General will conduct preclearance reviews.

Currently, however, Section 3 requires a showing of intentional discrimination, which can be a high hurdle in voting cases where intentions can be complex, multi-faceted, hidden, and difficult to prove. For that reason, Congress amended Section 2 of the VRA in 1982 to clarify that a showing of a discriminatory result was sufficient to establish a violation of that section. Because Section 2 has become the principal litigation tool for vindicating rights under the VRA, there is typically no need to find a constitutional violation, which means there is rarely a basis to invoke the bail-in remedy.

The VRAA, therefore, would amend Section 3 of the VRA to allow a violation of Section 2 of the VRA or “any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group” to serve as a predicate for judicial imposition of preclearance.¹³ This amendment responds directly to *Shelby County* by recognizing that a more limited formula such as the VRAA’s may leave problematic jurisdictions uncovered, and bases the imposition of preclearance in those instances on a judicial finding of a current condition that violates federal law.

Unfortunately, the strengthening of Section 3 is marred by a provision that states that a violation of Section 2 that is based on “the imposition of a requirement that an individual provide a photo identification” cannot serve as a predicate for imposing preclearance.¹⁴ As with the similar carve-out in the coverage formula, removing this exception would improve the legislation.

C. Preliminary Relief

Preclearance was so effective because it ensured that potentially discriminatory voting changes would be reviewed *before* they could impose harm. The alternative—attempting to undo a tainted election after the fact—can be difficult or impossible. The contracted scope of preclearance, therefore, makes it essential to provide a fast and effective means for blocking, in advance of an election, the implementation of voting changes that may be discriminatory.

Section 6 of the VRAA addresses this need by reducing the traditional four-factor standard for preliminary relief¹⁵ to a single inquiry. In a departure from the traditional test, the bill does not require the complaining party to make a showing on the merits of its claim, but instead authorizes a preliminary injunction if “the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which

¹³ VRAA § 2(a).

¹⁴ *Id.*

¹⁵ See *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

would be imposed upon the plaintiff if the relief were not granted.”¹⁶ The bill also offers a series of factors that a court must consider in balancing the harms, including whether the challenged change would replace a practice that was implemented because of prior voting rights litigation, whether the change was adopted within 180 days of an election, and whether the jurisdiction has failed to provide timely or complete notice of the change.¹⁷ Presumably, a finding that any of these factors is present should tilt the balance in favor of the party challenging the change.

D. Notice and Transparency

Prior to *Shelby County*, covered jurisdictions were required to submit every voting change to the Attorney General or a three-judge court. That reporting requirement guaranteed that problematic changes would reach the attention of federal officials and voting rights advocates. The VRAA recognizes that compensating for that lost reporting is essential to ensuring the protection of voting rights. It does so by imposing new transparency measures.

Section 4 of the VRAA would require jurisdictions to publicize and describe, within forty-eight hours, any voting change affecting a federal election that occurs within 180 days of the election.¹⁸ It would also require that jurisdictions report, prior to thirty days before an election for federal office, on the polling place resources in use for the election, including the location of polling places, the voting age population identified by demographic group, the number of registered voters served broken down by demographic group, the number of voting machines and poll workers assigned, and the dates and hours of operation of polling places.¹⁹

Significantly, the bill would also mandate reporting of changes in “the constituency that will participate in an election for Federal, State, or local office or the boundaries of a voting unit or electoral district” for such an election.²⁰ The bill would require detailed reporting of demographic data, as well as voting data for the previous five years, for any county or parish, municipality with a population greater than 10,000, and school district with a population over 10,000. This provision recognizes the historic and continuing sensitivity of redistricting and changes between at-large and district-based methods of election.

* * *

The requirement that jurisdictions with a history of discrimination in voting preclear voting changes has been an indispensable tool in overcoming attempts to block access to the ballot and dilute the strength of minority votes. Yet the persistence—and disturbing proliferation—of such attempts in the aftermath of *Shelby County*²¹ makes it clear that a modern, effective VRA is still needed today.

¹⁶ VRAA § 6(b).

¹⁷ *See id.*

¹⁸ *See id.* § 4(a).

¹⁹ *See id.*

²⁰ *Id.*

²¹ *See, e.g., How Formerly Covered States and Localities are Responding to the Supreme Court’s Voting Rights Act Decision*, NAACP LEGAL DEF. & EDUC. FUND, <http://www.naacpldf.org/document/states-responses-shelby-decision> (last updated Apr. 24, 2014).

The VRAA addresses the significant gaps in the protection of voting rights created by *Shelby County*. Because it represents a bipartisan effort to create legislation that can move, it does not do so perfectly. Some will argue that the new formula for preclearance is underinclusive, although the rolling trigger provides a mechanism for drawing in jurisdictions that misbehave. Additionally, the bill's two provisions providing special treatment for photo identification laws will inspire debate and test the limits of compromise.

The difficulties faced by the current Congress in dealing with major legislation signal that the path to enactment will not be easy. Congress should, however, rouse itself to respond to the Supreme Court's ruling. It should revive the concern for the voting rights of all people that animated the enactment and repeated reauthorization of the VRA, and pass the Voting Rights Amendment Act of 2014.

The Coverage Formula Nicholas Stephanopoulos*

The *Shelby County* Court's main criticism of the coverage formula that Congress adopted when it reauthorized Section 5 in 2006 was that the formula was irrational because it relied on obsolete data. In a key passage, the Court observed, "Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s."¹ The Court also emphasized that the disparities in registration and turnout that had existed in that era subsequently had vanished.² These features rendered the formula unreasonable and hence unconstitutional in the Court's eyes: "If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data[.]"³

The new coverage formula clearly does not fall victim to this critique. First, its reliance on *recent* voting rights violations means that it indeed is "based on current conditions."⁴ As noted earlier, only violations that occurred in the last fifteen years count toward the preclearance determination. Violations that occurred earlier are not taken into account, and the preclearance assessment is made anew each year, dropping older violations from consideration and adding newer ones. Although the fifteen-year window reaches into the past to some degree, this is inevitable with any formula that makes use of events that already have transpired. And the new formula's fifteen-year reach is eminently defensible given that the prior formula was upheld by the Court in 1980 when it extended sixteen years into the past,⁵ and in 1999 when it extended backward by thirty-five years.⁶

The new formula not only relies on current data; it also does so *reasonably* to distinguish between jurisdictions with greater and lesser levels of racial discrimination in voting. Racial

* Assistant Professor of Law, The University of Chicago Law School.

¹ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2627 (2013).

² *See id.* at 2618-19, 2625-26.

³ *Id.* at 2630-31.

⁴ *Id.* at 2631.

⁵ *See City of Rome v. United States*, 446 U.S. 156 (1980).

⁶ *See Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999).

discrimination in voting, of course, is not easy to observe or prove. Government officials almost never admit to engaging in discrimination, and at least as a constitutional matter, discriminatory intent (not merely effect) must be established. Given these constraints, past voting rights violations are a sensible—indeed, obvious—proxy for levels of racial discrimination in voting. If a constitutional violation has occurred, then a jurisdiction necessarily has engaged in precisely the conduct that the VRA aims to prevent. If a violation of Section 2 has taken place, then a jurisdiction has employed (or tried to employ) a policy that “results in a denial or abridgement of the right . . . to vote on account of race or color.”⁷ This formulation is tightly interwoven with the constitutional standard, especially since discriminatory results typically are the best available evidence of discriminatory intent. And if a violation of Section 5 has transpired, then a jurisdiction attempted to adopt a policy with either the “purpose” or “effect” of “denying or abridging the right to vote on account of race or color.”⁸ This language is even closer to the constitutional test since it explicitly refers to discriminatory purpose.

Of course, there is no obvious reason why the preclearance line has to be drawn at five violations (for a state) or three violations (for a political subdivision). But every statutory line has to be drawn somewhere, and the VRAA’s choices are quite defensible. Notably, over the twenty-five year period between the 1982 amendments to Section 2 and the 2006 reauthorization of Section 5, federal courts found approximately five Section 2 violations per year.⁹ Over this period, the Department of Justice also objected annually to approximately twenty-five policy changes under Section 5 (though these objections necessarily were limited to formerly covered areas).¹⁰ That at least five or three violations have occurred in a state or subdivision during the preceding fifteen years therefore means that a jurisdiction has accounted for a vastly disproportionate share of all voting rights violations over this period. It does not mean that a jurisdiction is clearly worse than a peer with four or two violations in the relevant timespan, but such precision is never expected for statutory distinctions.

Accordingly, the new coverage formula is constitutional if it is assessed according to *Shelby County’s* requirements that it be based on current data and distinguish reasonably between jurisdictions with greater and lesser levels of racial discrimination in voting. The fifteen-year window for voting rights violations is *more* current than was the prior formula when it was upheld in 1980 and 1999. And jurisdictions with at least five or three violations during the previous fifteen years are egregious as a group, and certainly more objectionable than jurisdictions that lack such poor records.

While this concludes the analysis based on *Shelby County’s* actual holding, it is also important to consider certain dicta suggesting that preclearance itself may no longer be a permissible remedy in the Court’s view. The Court commented that states subject to preclearance “must beseech the Federal Government for permission to implement laws that they

⁷ 42 U.S.C. § 1973(a) (2012).

⁸ *Id.* § 1973c(a).

⁹ Specifically, there were 123 published findings of Section 2 liability over this period. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 655 (2006), available at <http://sitemaker.umich.edu/votingrights/files/finalreport.pdf>.

¹⁰ See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2639 (2013) (Ginsburg, J., dissenting) (noting that there were 626 preclearance denials over this period).

would otherwise have the right to enact and execute on their own.”¹¹ The Court also stressed that “things have changed dramatically” with respect to voting rights due to increases in minority turnout, fewer evasions of court decrees, and greater numbers of minority candidates holding office.¹² According to the Court, these improvements mean that the claim that sufficiently “exceptional” conditions to justify preclearance no longer exist has “a good deal of force.”¹³

For several reasons, the Court should not embrace these dicta. First, for the Court to hold that preclearance is now intrinsically invalid would be inconsistent with its explicit invitation to Congress to “draft another formula based on current conditions.”¹⁴ There would be no point to drafting another formula, of course, if any such formula would be deemed unconstitutional. Second, while improvements have occurred over the last few decades, serious racial discrimination in voting continues to plague parts of the country. As Congress found in 2006, shocking instances of first-generation discrimination—the prosecution of minority candidates, the intimidation of minority voters, the cancelation of elections that minorities are expected to win—still take place with some frequency.¹⁵ Second-generation offenses, in particular the use of at-large electoral systems and discriminatory district plans, are even more common.¹⁶ Such violations resulted in more than 600 denials of preclearance over the 1982-2006 period, more than 800 policies being withdrawn or modified after the Department of Justice requested more information, and more than 600 successful Section 2 suits in formerly covered areas.¹⁷ These conditions seem no less “exceptional” than those faced by the Court when it last upheld the preclearance requirement in 1999.¹⁸

Finally, and perhaps most importantly, the question of whether preclearance is still necessary is not one for the Court to answer in the first instance. The Court repeatedly invoked the language of “rationality” in *Shelby County*,¹⁹ and Justice Ginsburg emphasized (without being corrected) that “[t]oday’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed ‘rational means.’”²⁰ Accordingly, the relevant test is not whether *the Court* believes that preclearance is still required, or even whether preclearance is a “congruent and proportional” response to ongoing constitutional violations.²¹ Instead, the issue is whether *Congress* chose rational means to achieve a legitimate end. And on

¹¹ *Id.* at 2624 (majority opinion).

¹² *Id.* at 2625.

¹³ *Id.* at 2625, 2631.

¹⁴ *Id.* at 2631.

¹⁵ *See id.* at 2640-41 (Ginsburg, J., dissenting) (recounting some of the congressional findings).

¹⁶ *See id.* at 2634-35 (discussing some of these barriers).

¹⁷ *See Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 872 (D.C. Cir. 2012), *rev’d*, 133 S. Ct. 2612 (2013) [hereinafter *Shelby Cnty. I*].

¹⁸ *See Lopez v. Monterey Cnty.*, 525 U.S. 266, 282-85 (1999).

¹⁹ *See Shelby Cnty.*, 133 S. Ct. at 2625, 2627, 2628, 2629, 2630, 2631.

²⁰ *Id.* at 2638 (Ginsburg, J., dissenting).

²¹ *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (setting forth “congruence and proportionality” standard for exercises of congressional power under *Fourteenth* Amendment). The VRA, of course, was enacted under Congress’s *Fifteenth* Amendment powers as well. Moreover, even if the *Boerne* standard applies, the preclearance requirement satisfies it. As described above, racial discrimination in voting continues to be a serious problem in parts of the country, which justifies a potent congressional response. For its part, preclearance is *not* a particularly onerous requirement (especially for jurisdictions that have complied with it for decades), and it is quite effective at identifying and blocking instances of discrimination.

this point, no one doubts that ending racial discrimination in voting is a valid aim, and it is equally clear that preclearance is at least *rationally* related to this goal. Because it is more difficult for jurisdictions to enact discriminatory policies if these policies must first be approved by a federal body, preclearance has at least some tendency to reduce discrimination. The Court's own language thus foreshadows what the result should be in a frontal challenge to preclearance: It should be upheld because it cannot possibly be deemed irrational.

A. Potential Areas for Improvement

While the VRAA's coverage formula is constitutional in its current form, it could be improved by incorporating metrics beyond judicial judgments and preclearance denials. To begin with, even if one believes that court actions are an excellent proxy for levels of racial discrimination in voting, judicial *judgments* are not synonymous with all judicial *activity*. In particular, courts often approve settlements between parties rather than themselves deciding cases on the merits. And at least with respect to Section 2, the gap between judicial judgments and all judicial activity is quite large. Between 1982 and 2006, there were 68 published Section 2 findings of liability in covered areas, and 123 published Section 2 findings of liability nationwide.²² But, including unpublished dispositions (primarily court-approved settlements), there were 653 successful Section 2 suits over this period in covered areas alone.²³ The published findings of liability thus are only the tip of the Section 2 iceberg. To capture properly the full set of Section 2 violations, it would be advisable for the new formula to take into account all Section 2 activity, not just Section 2 judgments.

Which jurisdictions would be subject to preclearance if all Section 2 activity was considered? The answer depends on the exact details of the formula, but some clues can be found in the D.C. Circuit's *Shelby County* decision. As the court noted, if the threshold for preclearance were set at five successful Section 2 suits per million residents over the 1982-2006 period (including settlements), then Alabama, Arkansas, Georgia, Mississippi, Montana, North Carolina, South Carolina, South Dakota, and Texas would be covered.²⁴ All of the states covered by the VRAA's formula would be covered by this test as well, except for Louisiana, which would fall right below the threshold.²⁵ Covered as well would be Alabama, Arkansas, Montana, North Carolina, South Carolina, and South Dakota, all of which (except Montana) were covered in part or in full by the prior formula or were bailed in under Section 3.

The new formula also could be improved by recognizing that successes in court are an imperfect proxy for levels of racial discrimination in voting. Suits are not brought against many potentially discriminatory policies, and even suits that *are* brought may fail for reasons unrelated to the claims' merits—e.g., insufficient resources, difficulties developing evidence, unreceptive judges, etc. Fortunately, there do exist indicia of discrimination that are unaffected by the vagaries of litigation. Probably the most prominent of these is racial polarization in voting, that is, the extent to which minorities and non-minorities diverge in their electoral preferences. As Justice Ginsburg observed in *Shelby County*, racial polarization “increases the vulnerability of

²² See Katz et al., *supra* note 9, at 655-56.

²³ See *Shelby Cnty. I*, 679 F.3d at 868.

²⁴ See *id.* at 875-76.

²⁵ See *id.*

racial minorities to discriminatory changes in voting law” by magnifying the electoral payoff of such changes.²⁶ In the 2008 presidential election, then, the nine states in which white and black voters differed by at least sixty percentage points in their vote shares for Barack Obama were Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas.²⁷ All of these states except Tennessee were covered by the prior formula or were bailed in.

Another promising metric is the prevalence of racially discriminatory attitudes among white voters. Such attitudes may make de jure discrimination more likely, and they are conducive as well to a finding of discriminatory purpose, which is required for there to be a constitutional violation. According to cutting-edge survey research, the six states that have the highest proportions of whites whose views of blacks’ intelligence and work ethic are more negative than the national median are Alabama, Louisiana, Mississippi, South Carolina, Texas, and Wyoming.²⁸ All of these states except Wyoming previously were covered jurisdictions.

The point of this discussion is *not* that the new formula must take into account Section 2 settlements, racial polarization in voting, or the prevalence of racially discriminatory attitudes in order to pass constitutional muster. Section 2 judgments, judgments of constitutional violations, and denials of preclearance are, in combination, a reasonable proxy for levels of racial discrimination in voting, and that is all that is necessary for the new formula to be upheld. The point, rather, is that the formula could be *strengthened*, for both legal and policy purposes, by incorporating these additional metrics. The additional metrics provide valuable further evidence about where racial discrimination in voting is concentrated in contemporary America. Such evidence would be helpful legally, because it would confirm that the formula is distinguishing accurately between jurisdictions with greater and lesser levels of discrimination. And it would be helpful as a matter of policy too, because it would ensure that the formula is targeted at (and only at) the country’s most problematic jurisdictions.

The Expansion of the Section 3 Bail-In Remedy **Gabriel J. Chin***

Since enactment, Section 3 of the Voting Rights Act has provided for “bail-in,” sometimes called the “pocket trigger,” allowing courts to require preclearance of future voting changes in jurisdictions found to have denied voting rights but not previously covered by Section 5. The VRAA revises and expands Section 3 in a manner attentive to and respectful of the Supreme Court’s concerns in *Shelby County*.

The existing version of Section 3 provides that a court finding a violation of the Fourteenth or Fifteenth Amendments warranting equitable relief, in addition to all other forms of

²⁶ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2643 (2013) (Ginsburg, J., dissenting).

²⁷ Exit poll data from 2008 is available at *Election Center 2008 – Results*, CNNPOLITICS.COM, <http://www.cnn.com/ELECTION/2008/results/polls.main> (last visited May 7, 2014). Unfortunately, 2012 exit poll data is not available for all states.

²⁸ See Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CAL. L. REV. (forthcoming 2014) (manuscript at 38, available at <http://www.law.uchicago.edu/files/files/The%20Geography%20of%20Racial%20Stereotyping.pdf>).

* Professor of Law, University of California-Davis School of Law.

relief, “shall retain jurisdiction for such period as it may deem appropriate.”¹ While jurisdiction is retained, “no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”² Alternatively, the jurisdiction’s proposed change can go into effect if submitted to the Attorney General and the Attorney General fails to object.

Section 3, then, provides for case-by-case imposition of a preclearance requirement. Although bail-in under Section 3 has effects quite similar to being deemed a “covered jurisdiction” under Section 4, one difference is that the U.S. district court with jurisdiction to approve any change and to end preclearance is the one hearing the underlying lawsuit, not the U.S. District Court for the District of Columbia. Also, bail-in provides considerably more flexibility than Section 4 coverage. Jurisdiction is not to be retained forever, but only for “such period as [the district court] may deem appropriate.” As courts have interpreted Section 3, imposition of bail-in as a remedy is discretionary, and a court may, in its discretion, impose preclearance on only certain types of electoral changes.³ Arkansas, New Mexico, counties in California, Florida, Nebraska, and South Dakota, and the City of Chattanooga, Tennessee have been bailed in under Section 3.⁴ Many of these jurisdictions were bailed in based on consent decrees. This means that the jurisprudence of Section 3 is relatively undeveloped compared to other provisions of the Act. This is an advantage in the sense that the Court will have the opportunity to construe the Section in ways that it deems constitutional.

In its existing version, Section 3 might serve to mitigate some of the effects of *Shelby County*.⁵ Indeed, the Department of Justice is currently seeking to bail-in North Carolina⁶ and Texas⁷ under the current version of Section 3. However, because bail-in is limited to cases in which a court finds a constitutional violation, the availability of the remedy is limited. Accordingly, the VRAA would extend Section 3 by providing that a jurisdiction may be bailed in not only based on violations of the Fourteenth and Fifteenth Amendments, but also for violations of the Voting Rights Act itself or “any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group.”⁸ It excepts, however,

¹ 42 U.S.C. § 1973a(c) (2012).

² *Id.*

³ See Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2007-08 (2010).

⁴ *Id.* at 2010.

⁵ Michael Ellement, *Preclearance Without Statutory Change: Bail-in Suits Post-Shelby County*, 32 YALE L. & POL’Y REV. INTER ALIA 1, 6 (Sept. 7, 2013, 11:45 AM), http://ylpr.yale.edu/inter_alia/preclearance-without-statutory-change-bail-suits-post-shelby-county.

⁶ *United States v. North Carolina*, No. 1:13CV861 (M.D.N.C.); see also Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Justice Department to File Lawsuit Against the State of North Carolina to Stop Discriminatory Changes to Voting Law (Sept. 30, 2013), <http://www.justice.gov/opa/pr/2013/September/13-crt-1096.html>.

⁷ *United States v. Texas*, No. 2:13CV263 (S.D. Tex.); see also Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law (Aug. 22, 2013), <http://www.justice.gov/opa/pr/2013/August/13-ag-952.html>.

⁸ See VRAA § 2(a).

violations of Section 2 of the Voting Rights Act that are based on unlawful imposition of a photo identification requirement; such a violation cannot be the predicate for bail-in.

The basic constitutionality of Section 3 was not questioned in *Shelby County*, and indeed, bail-in does not implicate many of the concerns of the Court in *Shelby County*.⁹ First, coverage is based on a finding of specific, current misconduct by the jurisdiction to be covered. As Justice Thomas explained, “discriminatory intent does tend to persist through time[;]”¹⁰ accordingly, the Court is likely to find a recent violation to be a sufficient predicate for the imposition of preclearance. Historical conditions and events from generations ago, which the Court found insufficient in *Shelby County*, are not relevant. Second, coverage is imposed on a case-by-case basis by a local court, which is likely to be aware of conditions and circumstances in the area. For both of these reasons, the Court is likely to find Section 3 bail-in more justifiable than the formula at issue in *Shelby County*; it implies no punishment for decades-old misconduct or lack of equal state sovereignty. Also, while Section 5 was always nominally temporary, it was subject to repeated extensions, and a majority of the Court feared that it might be practically permanent. By contrast, Section 3, while a permanent provision, contemplates temporary and targeted relief.

One aspect of the revised Section 3 likely to be challenged in court is its availability as a remedy based on findings of non-constitutional violations, in particular, violations of Section 2 of the Voting Rights Act. Section 2 prohibits state voting policies and procedures, under some circumstances, when they have a discriminatory result, even if the policies do not violate the Constitution per se.¹¹ Some have argued that Section 2 is unconstitutional to the extent that it goes beyond constitutional violations.¹² To be sure, if Section 2 is itself invalid, then imposing any remedies based on its violation would also be unconstitutional. Similarly, the Court’s interpretation of Section 2 would automatically affect the scope of a revised Section 3. But taking the *Shelby County* majority at its word suggests that Section 2, and therefore Section 3, is on firm constitutional ground. The Court emphasized that its “decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.”¹³ To the extent that Section 2 is valid, so too are various reasonable methods of enforcing it.

The Court might well have written favorably of Section 2 because, in operation, it has not been construed to apply to actions which merely have a discriminatory effect. Rather, courts applying Section 2 look at the “totality of the circumstances” to determine whether racial

⁹ Since *Shelby County*, courts have continued to treat Section 3 as valid. See *Allen v. City of Evergreen*, No. 13-CV-0107-CG-M, slip op. at 2-5 (S.D. Ala. Jan. 13, 2014) (granting plaintiffs’ unopposed motion to “bail in” City of Evergreen, Alabama, with respect to two types of voting changes, noting that “Section 3’s provisions have long applied equally to all states and localities, and have been imposed in numerous cases”). See also *Ala. Legislative Black Caucus v. Alabama*, No. 2:12-CV-691, 2013 WL 6925681, at *106 n.38 (M.D. Ala. Dec. 20, 2013) (three-judge court) (Thompson J., dissenting) (“A jurisdiction may still be required to obtain preclearance of redistricting plans, even after *Shelby County*, under the ‘bail-in’ provision of § 3 of the VRA.”).

¹⁰ *United States v. Fordice*, 505 U.S. 717, 747 (1992) (Thomas J., concurring) (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-10, n.15 (1977)).

¹¹ See 42 U.S.C. § 1973(a) (2012).

¹² Roger Clegg & Hans A. von Spakovsky, “*Disparate Impact*” and Section 2 of the Voting Rights Act (Mar. 17, 2014), <http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act>.

¹³ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

discrimination in voting has occurred.¹⁴ As Professor Justin Levitt has explained, while discriminatory impact is a necessary part of a Section 2 claim, there also must be “danger signs demonstrating enhanced risk of perpetuating past or present misconduct.”¹⁵ Professor Christopher Elmendorf has similarly explained that Section 2 can be understood as smoking out unconstitutionally discriminatory action which is otherwise not remediable.¹⁶ As such, “calling section 2’s test a ‘results test’ is something of a misnomer” given that it has long been understood to require more than “mere disproportionality in electoral results.”¹⁷

The United States has a long tradition, ranging from strong reluctance to absolute prohibition, disfavoring putting legislators in the witness box under oath to find out the real reasons for enactment of a particular law. The Court’s clear statement that Section 2 was not called into question should be understood as recognizing that some proxy methods of evaluating legislative intent are therefore necessary. The alternative is that significant unconstitutionally-motivated actions will too easily survive judicial challenge.

Understanding Section 2 as a method of finding otherwise irremediable constitutional violations makes violation of Section 2 a reasonable basis for bail-in. This is particularly so because Section 3 will be applied to a state, municipality, or other governmental entity on a case by case basis, after a court has evaluated the nature of the Section 2 violation and other relevant facts, such as the presence or absence of other recent misconduct. Moreover, any bail-in order will be individually tailored as to duration and as to the types of covered electoral changes. For these reasons, the VRAA’s expansion of the availability of the bail-in remedy is a constitutional means of remedying racial discrimination in voting.

The Preliminary Injunction Provision **Samuel Bagenstos***

Section 6 of the VRAA would make preliminary injunctive relief available in voting rights cases based purely on an assessment of the balance of hardships, without any inquiry into the merits.¹ Section 6 provides that a court addressing a request for a preliminary injunction in a voting rights case “shall grant the relief if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted.”² The provision goes on to

¹⁴ 42 U.S.C. § 1973(b) (2006).

¹⁵ *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 5 (2013) (questions for the record submitted by Sen. Al Franken for Justin Levitt), available at <http://redistricting.ils.edu/files/%20Levitt%20responses%20to%20Franken%20QFRs.pdf>. Such “danger signs” include, but are not limited to, seven potential indicia of discrimination identified in a 1982 Senate Judiciary Committee Report. *Id.* at 6 (citing S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205-06).

¹⁶ See Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012).

¹⁷ *United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 909 (9th Cir. 2004).

* Professor of Law, The University of Michigan Law School.

¹ As currently drafted, Section 6’s text would appear to make both preliminary *and* permanent relief in voting rights cases depend solely on the balance of hardships. But the plain intent of the provision is to apply to requests for preliminary injunctions only, and the text will presumably be changed to make that intent clear.

² VRAA § 6(b).

state that when a plaintiff seeks a preliminary injunction against a *change* in a voting practice, the balance-of-hardships analysis should consider whether the former voting practice was adopted as a remedy in, or as part of a settlement of, previous voting rights litigation.³

Section 6 would represent a departure from the usual federal court preliminary injunction standards under which a court can grant preliminary relief only after an inquiry into not just the balance of hardships but also the chances of success on the merits, whether the plaintiff will suffer irreparable harm in the absence of relief, and the public interest.⁴ There is nothing about these usual standards that is constitutionally required, however. To the contrary, the Supreme Court has recognized that Congress has the power to override such equitable principles.⁵ As the Court has explained, “when district courts are properly acting as courts of equity, they have discretion *unless a statute clearly provides otherwise*.”⁶ “Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.”⁷

Although it is unusual for Congress to depart from the standard criteria for granting preliminary relief, it is hardly unprecedented. For example, the stay-put provision of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1415(j), prohibits school districts from unilaterally changing a disabled student’s educational placement while due-process proceedings are pending. Numerous courts have held that this provision directs courts to impose “an ‘automatic’ preliminary injunction, meaning that the moving party need not show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief.”⁸ Rather, “[t]he statute substitutes an absolute rule in favor of the status quo for the court’s discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships.”⁹ Congress itself balanced the relevant equitable factors and determined that the harm entailed by disruption of a disabled child’s educational environment categorically outweighs any countervailing benefits and justifies preliminary relief to leave the child where she is while a dispute is pending.¹⁰

³ *See id.*

⁴ *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). The courts of appeals after *Winter* are divided regarding whether a plaintiff seeking a preliminary injunction under the ordinary test must always show that he or she is *likely* to succeed on the merits, or whether, instead, a plaintiff who makes a sufficiently strong showing of irreparable harm can obtain preliminary relief based merely on identifying serious questions going to the merits. *See* Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011).

⁵ *See, e.g., Miller v. French*, 530 U.S. 327 (2000) (Congress had power, in the Prison Litigation Reform Act, to require district courts to grant automatic stays in certain cases involving prison conditions); *TVA v. Hill*, 437 U.S. 153, 194 (1978) (in Endangered Species Act, Congress displaced courts’ equitable discretion and determined that balance of equities favored preserving endangered species). *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“Of course, Congress may intervene and guide or control the exercise of the courts’ discretion[.]”).

⁶ *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 496 (2001) (emphasis added).

⁷ *Id.* at 497.

⁸ *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1037 (9th Cir. 2009) (quoting *Drinker ex rel. Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996)).

⁹ *Zvi D. ex rel. Shirley D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982).

¹⁰ *See R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 756 (E.D. Pa. 2010) (“The stay-put provision represents Congress’s policy choice that the danger of excluding a handicapped child entitled to an educational placement from that placement was much greater than the harm of allowing a child not entitled to an educational placement to remain in that placement during the pendency of judicial proceedings.”) (internal quotation marks omitted), *aff’d*, 532 F. App’x 136 (3d Cir. 2013).

Section 6 of the VRAA would represent a more moderate exercise of the same power. By adopting Section 6, Congress would be determining that the disenfranchising effect of a new voting law would necessarily cause sufficient irreparable harm to justify freezing the status quo in place, so long as the party challenging the law can show that the balance of hardships tips in its favor. By requiring the court to engage in an inquiry into the balance of hardships—something the IDEA does not even *permit*—the VRAA’s preliminary-injunction provision reflects less of a break from traditional equity practice, and thus rests on even firmer ground than does the stay-put provision.¹¹ Section 6 thus fits comfortably within the pattern of Congress’s previous exercises of its power to balance the relevant considerations and alter the standards for preliminary relief in particular contexts.

Section 6 is also a valid exercise of Congress’s power to enforce the Fourteenth and Fifteenth Amendments. Because Section 6 applies uniformly across all of the states, it does not implicate the “equal sovereignty” principle that led the Court to invalidate the Voting Rights Act’s coverage formula in *Shelby County*. Nor does Section 6 impermissibly seek “to decree the substance of the Fourteenth Amendment’s [and Fifteenth Amendment’s] restrictions on the States.”¹² Even Justice Scalia, who takes the narrowest view on the Court of the power to enforce the Reconstruction Amendments, has endorsed Congress’s authority to adopt “measures that do not restrict the States’ substantive scope of action but impose requirements directly related to the facilitation of ‘enforcement’—for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified.”¹³ In its unanimous opinion in *United States v. Georgia*,¹⁴ the Court held that, *at the least*, Congress has enforcement power in the circumstances Justice Scalia identified.

Fully consistent with Justice Scalia’s test, Section 6 does not impose any new substantive standard on the states. To the contrary, it merely adopts a remedial rule that serves to facilitate enforcement of the underlying rights secured by the Constitution and the voting rights laws. Federal courts have repeatedly recognized that the harms caused by holding an election under procedures that are later held unlawful cannot be fully undone after the election is held.¹⁵ When a court concludes, after an election, that the state held the election under procedures that violated

¹¹ Other statutes relax the preliminary injunction standard without eliminating the success-on-the-merits prong. The Petroleum Marketing Practices Act (“PMPA”), 15 U.S.C. § 2805(b)(2), for example, authorizes a preliminary injunction if the plaintiff’s franchise has been terminated, the plaintiff has shown “sufficiently serious questions going to the merits to make such questions a fair ground for litigation,” and the balance of hardships tips in the plaintiff’s favor. *See Mac’s Shell Serv., Inc. v. Shell Oil Products Co., LLC*, 559 U.S. 175, 193 n.12 (2010). If Congress were to amend the VRAA to include a “serious questions going to the merits” requirement, such a step would place Section 6 on still firmer ground.

¹² *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹³ *Tennessee v. Lane*, 541 U.S. 509, 560 (2004) (Scalia, J., dissenting).

¹⁴ 546 U.S. 151, 158-59 (2006).

¹⁵ *See, e.g., Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) (“If the plaintiffs lack an adequate opportunity to gain placement on the ballot in this year’s election, this infringement on their rights cannot be alleviated after the election.”); *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 537 (S.D. Ohio 2004) (granting preliminary injunction, shortly before an election, against allowing challengers into polling places on election day). *See also United States v. Berks Cnty., Pa.*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) (“Federal courts have recognized that the holding of an upcoming election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters.”).

federal law, the court is forced to choose between two deeply problematic options: (1) waiting until the next election to provide relief, thus forcing the successful plaintiffs to wait years for redress of the violations of law; or (2) requiring the state to run the election over again, thus imposing great burden and expense, “disrupt[ing] the state’s interest in assuring the finality of the election results,”¹⁶ and likely forcing the election to be held at an unusual and inconvenient time that affects the composition of the electorate. Although courts have the *power* to void elections held under unlawful procedures,¹⁷ they are understandably hesitant to do so. Section 6 would reflect a congressional determination that, given the harms of re-running elections, the preferable course where the balance of hardships tips toward the plaintiff is to freeze prior voting practices in place until a court can determine whether new practices violate federal law. Under the remedial theory of congressional power adopted in *Georgia*, that determination is valid and need not be subjected to the “congruence and proportionality” analysis that applies when Congress seeks to impose more searching prophylactic *substantive* requirements on states.¹⁸

Even if a court were to hold that the “congruence and proportionality” test *does* apply to Section 6, the provision would still be constitutional. Unlike any of the provisions the Supreme Court has struck down under that test, Section 6 imposes no new substantive requirement on states.¹⁹ Nor does it even alter the remedies that a court may award on a finding of liability. Section 6 simply changes the process for granting preliminary relief while the litigation proceeds. The minimal impact of that provision, when measured against the extensive history and pattern of state deprivations of constitutional rights in the voting area—a pattern that, as the Supreme Court itself recognized, extends across the Nation²⁰—makes it fully congruent and proportional to the underlying Fourteenth and Fifteenth Amendment rights.

To be sure, a state might argue that Section 6 violates its sovereignty by preventing it from putting into effect a change to voting procedures in the absence of a finding that the change violates federal law. But the suspension will be only temporary. And the temporary suspension authorized by Section 6 promotes the core purpose of preliminary relief in federal courts—to ensure that the plaintiff does not experience irreparable harm before the court has the opportunity to decide whether the defendant’s action violates federal law.²¹ Finally, any harm to the state will be mitigated by two factors. First, Section 6 authorizes a preliminary injunction only when

¹⁶ *Doe v. Walker*, 746 F. Supp. 2d 667, 682 (D. Md. 2010).

¹⁷ *See Pope v. Cnty. of Albany*, 687 F.3d 565, 570 (2d Cir. 2012).

¹⁸ *See Georgia*, 546 U.S. at 158-59; *Lane*, 541 U.S. at 558-59 (Scalia, J., dissenting).

¹⁹ *Cf. Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1334-1337 (2012) (opinion of Kennedy, J., announcing judgment of the Court) (Family and Medical Leave Act’s self-care provision gave individuals substantive rights that went well beyond the rights recognized in the Court’s Fourteenth Amendment cases); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-373 (2001) (same for Americans with Disabilities Act’s employment provisions); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86 (2000) (Age Discrimination in Employment Act “prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 643 (1999) (Patent Remedy Act provided a remedy for states’ acts of patent infringement, without more, but “a State’s infringement of a patent, though interfering with a patent owner’s right to exclude others, does not by itself violate the Constitution”); *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997) (Religious Freedom Restoration Act gave individuals substantive rights that went well beyond the rights recognized in the Court’s Free Exercise Clause cases).

²⁰ *See Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

²¹ *See John Leubsdorf*, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 565 (1978).

“the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted.”²² Where a court determines that the harm to the state of issuing a preliminary injunction will outweigh the benefit to the plaintiffs, Section 6 will not authorize a preliminary injunction. Second, after issuing a preliminary injunction that suspends the operation of a state voting law, a court can be expected to expedite its consideration of the merits. By following that procedure, the court can ensure that any suspension of a state voting practice lasts only so long as is necessary to avoid harm to voters while determining, once and for all, whether that practice violates federal law.

For all of these reasons, the VRAA’s preliminary injunction provision would be a valid exercise of Congress’s power to enforce the Fourteenth and Fifteenth Amendments. That provision would make a change to the preliminary injunction standards that, while unusual, is far from unprecedented. And it would fit comfortably within the congressional authority that the Supreme Court has recognized.

Notice and Transparency **Gilda R. Daniels***

Congress and the courts have consistently recognized the importance of notice and transparency to foster public confidence in elections and to protect voting rights. For example, the National Voter Registration Act (“NVRA”) requires states to make records pertaining to voter registration activities available for public inspection and photocopying.¹ The Fourth Circuit noted that this requirement “promotes transparency in the voting process” and “the integrity of federal elections.”² Further, the court held that the provision “embodies Congress’s conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies.”³

To that end, the VRAA contains provisions designed to increase notice and transparency of elections and to restore some, but not all, of the benefits of the prior preclearance regime. An often-overlooked aspect of preclearance was that it required robust disclosure of changes to voting laws by covered jurisdictions.⁴ To obtain preclearance, covered jurisdictions had to provide the Department of Justice (“DOJ”) with information explaining proposed voting changes, including the differences between the prior procedure and the new one, the reasons for the change, and the anticipated effect on members of racial or language minority groups.⁵ In complex changes such as redistricting and annexation, DOJ often received additional information, such as demographic data, maps, and election returns data.⁶ The information was kept on file with DOJ and was made available to civil rights groups and other interested parties

²² VRAA § 6(b).

* Associate Professor, University of Baltimore School of Law.

¹ 42 U.S.C. § 1973gg-6(i)(1) (2012).

² *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 339–40 (4th Cir. 2012).

³ *Id.* at 334–35.

⁴ See Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 955-56 (2011).

⁵ See 28 C.F.R. § 51.27.

⁶ See *id.* §§ 51.27(q); 51.28.

upon request.⁷ DOJ also provided interested individuals and groups with regular notices of new submissions, and posted weekly information online.⁸ This enabled the public to serve as a partner with the federal government to prevent discrimination in voting.

Shelby County thus leaves a significant gap in the public's ability to monitor the practices of those jurisdictions, especially at the local level, where voting changes are difficult to monitor and may receive scant media attention. Unsurprisingly, then, since *Shelby County*, many jurisdictions have moved forward with previously challenged or blocked voting changes.⁹ For example, jurisdictions in Georgia have implemented or sought to implement a number of changes, such as the redistricting of the Fulton County Commission, which decreased the size of majority-minority districts,¹⁰ and a proposal in Athens, Georgia to close almost half of its twenty-four polling places and replace them with two early voting facilities located in police stations—closures that would force some voters to travel three hours to reach the new polling places.¹¹ In Greene County, Georgia, the County Board of Commissioners revised its redistricting plan decreasing the percentage of African American voters in a majority-minority district to less than fifty-one percent.¹² Augusta-Richmond, Georgia has moved its county elections from November to the summertime, when African-American turnout is usually lower.¹³

A striking example of local “chicanery” has taken place in Beaumont, Texas. Whites in Beaumont had sought since 2011 to eliminate a four-person African-American majority school board by changing the board from seven single-member districts to five single-member districts and two at-large seats—a change that would in all likelihood reduce African American representation.¹⁴ When this change was blocked by Section 5, supporters of the change sought to circumvent Section 5—and the democratic process—by having three white candidates submit candidacy papers for the seats of three incumbent African-American board members immediately before the filing deadline for the 2013 election, even though their terms were not due to expire until 2015. When the school district rejected the filings, the challengers sued, claiming based on a novel interpretation of state law that the seats should have been up for re-election, and that since the filing deadline had passed, they were entitled to the seats

⁷ See *id.* § 51.50.

⁸ See *id.* § 51.32; *Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/vot/notices/noticepg.php> (last visited May 7, 2014).

⁹ See, e.g., *How Formerly Covered States and Localities are Responding to the Supreme Court's Voting Rights Act Decision*, NAACP LEGAL DEF. & EDUC. FUND, available at <http://www.naacpldf.org/document/states-responses-shelby-decision> (last updated Apr. 24, 2014); Sarah Childress, *After Shelby, Voting-Law Changes Come One Town at a Time*, FRONTLINE, Aug. 8, 2013, <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/after-shelby-voting-law-changes-come-one-town-at-a-time>.

¹⁰ See *Election may change Fulton commission makeup, priorities*, ATLANTA JOURNAL-CONSTITUTION, Mar. 13, 2014; David Wickert, *Fulton Redistricting*, ATLANTA JOURNAL-CONSTITUTION, May 19, 2013, at B1.

¹¹ See Spencer Woodman, *Voting Rights at Risk in Georgia*, ROLLING STONE, Nov. 4, 2013, <http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104>.

¹² See *id.*; Billy W. Hobbs, *Rhodes addresses injustice concerning redistricting map in Greene County*, LAKE OCONEE NEWS, Aug. 15, 2013, http://www.msgr.com/lake_oconee_news/news/article_84967866-05da-11e3-801e-0019bb2963f4.html.

¹³ Officials originally sought to move the Augusta elections to July. See *Court ruling revives effort to move Augusta elections to July*, AUGUSTA CHRON., June 29, 2013. Ultimately, they were moved to May, with any runoff elections to be held in July. See *Governor Deal Signs Bill Moving Elections to May*, AUGUSTA CHRON., Jan. 22, 2014.

¹⁴ See Zachary Roth, *Breaking Black: The Right-Wing Plot to Split a School Board*, MSNBC.COM, Oct. 17, 2013, updated Jan. 30, 2014, <http://www.msnbc.com/msnbc/blacks-texas-town-fear-return-old-days>.

unopposed.¹⁵ After *Shelby County*, a state court has allowed Beaumont’s redistricting plan to proceed, although it denied the white candidates’ attempts to be seated unopposed. The Beaumont case underscores both that adequate notice regarding the composition of districts, changes in redistricting schemes, and candidate qualification information is essential, and that racial discrimination in voting is still an unfortunate reality.

In an effort to restore some of the benefits of Section 5, the VRAA would require states and political subdivisions to publicize certain information pertaining to voting changes. First, states and localities would be required to publicize, within 48 hours, any changes to voting practices and procedures that occur 180 days before a federal election.¹⁶ Second, no later than 31 days before a federal election, states and localities would have to publicize detailed information about polling place resources, including the number of voting machines and poll workers assigned to each precinct or polling place.¹⁷ Finally, for federal, state, or local elections, states and jurisdictions would have to publicize any changes to the constituency that will participate in the election or to the boundaries of electoral districts within ten days of making such changes.¹⁸ Notice would be provided within the affected jurisdictions and on the internet. If a jurisdiction did not comply, the VRAA would prohibit it from denying or abridging a citizen the right to vote based on the individual’s failure to comply with the change.¹⁹

A. Congressional Authority to Require Notice in Elections

In addition to Congress’s Fourteenth and Fifteenth Amendment authority to address racial discrimination in voting, the Constitution’s Elections Clause serves as a viable and important tool in Congress’ ability to regulate federal elections. The Elections Clause requires states to prescribe “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives,” but mandates that “Congress may at any time by Law make or alter such Regulations[.]”²⁰

Recently, the Supreme Court, in an opinion by Justice Scalia, strongly affirmed Congress’s authority to regulate federal elections, noting that “[t]he [Elections] Clause’s substantive scope is broad[.]” and that Congress may, if it desires, “alter [state] regulations [for federal elections] or supplant them altogether.”²¹ The Court emphasized that congressional

¹⁵ All three of the challengers had lost to the three African-American incumbents in a previous election. The last-minute nature of their filing made it clear that they had no interest in putting the incumbents on notice of their interpretation until after the 2013 filing deadline had passed. The incumbents understandably had not filed re-election papers by the 2013 deadline since their terms were not due to expire until 2015.

¹⁶ See VRAA § 4(a) (proposed VRA § 6(a)).

¹⁷ See VRAA § 4(a) (proposed VRA § 6(b)). Any changes to polling place resources after the deadline of 31 days prior to the election must be publicized within 48 hours. See *id.*

¹⁸ See VRAA § 4(a) (proposed VRA § 6(c)).

¹⁹ See VRAA § 4(a) (proposed VRA § 6(e)).

²⁰ U.S. CONST. Art. I, § 4, cl. 1. The only exception to Congress’s authority to “make or alter such Regulations” is that Congress may not change “the Places of chusing Senators.” This has no real-world implications today given that under the Seventeenth Amendment, Senators are chosen by popular vote and on the same ballots as congressional elections, rather than by state legislatures.

²¹ *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2253 (2013); see also *Foster v. Love*, 522 U.S. 67, 69 (1997) (finding Congress’ Elections Clause authority “well settled . . . to override state regulations” involving federal election administration matters) (internal citation omitted).

authority to “make or alter” the “Times, Places, and Manner” of federal elections is grounded in “comprehensive words” that “embrace authority to provide a complete code for congressional elections[.]”²² Such authority applies “not only as to times and places, but in relation to *notices*, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”²³ Thus, the phrase “manner of holding elections” grants Congress authority to regulate the entire federal election process, including voter registration and ballot counting. Congress has previously used this authority with the enactment of the NVRA and the Help America Vote Act (“HAVA”).

The Elections Clause clearly provides Congress with authority to require the type of notice in the VRAA pertaining to federal elections. The Court has explicitly embraced congressional authority over “notices” pertaining to federal elections.²⁴ And if Congress may actively “alter” or “supplant” state laws governing federal elections, then surely it may require that states merely inform the public, in a timely fashion, of any changes to such laws and procedures. Finally, the VRAA’s notice requirements apply nationwide and therefore do not implicate the “equal sovereignty” concerns in *Shelby County*. Thus, all of the VRAA’s notice provisions regarding federal elections are squarely within Congress’s Elections Clause power.

As to the VRAA’s provision requiring notice of changes to electoral constituencies and election boundaries for state and local elections in addition to federal ones, the primary authority for this requirement is likely Congress’ power to enact “appropriate legislation” to enforce the Fifteenth Amendment’s prohibition on racial discrimination in voting.²⁵ For several reasons, this provision is an appropriate exercise of Fifteenth Amendment power, whether this power is subject to the “rationality” standard used by the Court in *Shelby County*²⁶ or even the stricter “congruence and proportionality” test the Court has invoked in Fourteenth Amendment cases.²⁷ First, it is well-documented that processes such as redistricting, reapportionment, and manipulation of “at-large” elections have been used for racially discriminatory purposes.²⁸ Indeed, less than two years ago, a federal court found Texas’s congressional and state Senate redistricting plans to have been enacted with a discriminatory purpose,²⁹ and post-*Shelby* developments such as those described above confirm that these processes continue to serve as vehicles for racial discrimination. Moreover, public notice is a minimal intrusion on state sovereignty. Unlike preclearance, notice requirements do not delay or prevent the enactment of state or local laws. Nor do they establish new rights or abrogate states’ sovereign immunity—

²² *Id.* (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

²³ *Smiley*, 285 U.S. at 366 (emphasis added).

²⁴ *Id.*

²⁵ U.S. CONST. amend. XV, § 2.

²⁶ *See Shelby Cnty.*, 133 S. Ct. at 2625, 2627-31.

²⁷ *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

²⁸ *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.”) (internal citations omitted); *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (describing how at-large elections can dilute minority votes); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (finding that a racially gerrymandered district violated the Fifteenth Amendment).

²⁹ *Texas v. United States*, 887 F. Supp. 2d 133, 161, 166 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013).

measures that the Supreme Court has sometimes found exceed congressional authority if they are not adequately tailored to remedying state discrimination.³⁰ Rather, the VRAA merely requires states and jurisdictions to provide the public with information about certain voting changes. Such a requirement is a reasonable and appropriately-tailored response to the history of discrimination associated with these types of voting changes.

B. Taking Notice a Step Further: The Voter Impact Statement

While the VRAA is a good first step, notice does not begin to replace the strength of Section 5. The legislation's enforcement provision should be clarified and strengthened.³¹ Moreover, a stronger approach would be for jurisdictions to provide "Voter Impact Statements" ("VIS") to function as a notice mechanism and provide affected voters an opportunity to comment *prior* to implementation.³² The concept of a VIS is modeled after Environmental Impact Statements ("EIS"), which have been required since 1969 under the National Environmental Policy Act ("NEPA"). NEPA requires federal agencies to conduct an assessment of the environmental effects of their activities when they plan to undertake major actions that could "significantly affect the quality of the human environment."³³ EIS's fill the information void and provide notice and transparency in environmentally affected areas before the government undertakes the project at issue.

A VIS would differ from the VRAA notice requirement because it would not only require a jurisdiction to publicize a proposed change, but also to demonstrate that it has vetted the proposal to ensure that it does not adversely impact the voting rights of any group. If an adverse impact would occur, the VIS proposal would require the jurisdiction to publicize the alternatives it considered, in contrast with the VRAA, under which a jurisdiction's notice requirements are met once it publicizes the change. While the VRAA would be a welcome start, Congress should use all means within its authority to ensure that the public can assess voting changes prior to execution to guarantee that the fundamental right to vote is not overly burdensome for the most vulnerable voters.

³⁰ See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); *City of Boerne*, 521 U. S. at 532.

³¹ The VRAA states that "the right to vote of any person shall not be denied or abridged because the person failed to comply with any change made by a State or political subdivision" if the state or jurisdiction failed to provide proper notice. VRAA § 4(a) (proposed VRA § 6(e)). While this language appears to bar jurisdictions from enforcing consequential voting changes if notice is not given, it should be clarified to make it explicit that states may not implement voting changes absent the required notice.

³² See generally Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57 (2008).

³³ 42 U.S.C. § 4332(2)(C) (2012).