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COMMENT

NAVIGATING THE POST-*SHELBY* LANDSCAPE: USING UNIVERSALISM TO AUGMENT THE REMAINING POWER OF THE VOTING RIGHTS ACT

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I. Introduction

In 1942, a twenty-one-year-old African-American woman named Rosanell Eaton accomplished what was impossible for most Black people in the Jim Crow South: she registered to vote.[1] It was not easy. Ms. Eaton had to take a two-hour mule ride to reach the registrar and, when she arrived, had to pass vigorous qualification tests, such as reciting the Preamble to the Constitution from memory and taking a hand-written literacy exam, before the registrar would allow her to join the voter rolls.[2] In the Jim Crow South, white registrars commonly implemented additional, difficult-if-not-impossible-to-fulfill requirements simply because a potential voter was African-American.[3] Based on her own experience, and that of many others like her, Ms. Eaton dedicated her life to voting rights activism and successfully advocated for nearly seventy years before experiencing a new kind of restrictive voting practice—stringent state voter identification (voter ID) laws.[4]

As a result of the requirements set out by North Carolina's strict voter ID law, Ms. Eaton was denied the right to vote in 2013.[5] In particular, she was not able to vote because the name on her voter registration card, "Rosanell Eaton," did not exactly match the name on her driver's license, "Rosa Johnson Eaton."[6] In 2015, Ms. Eaton, now ninety-four years old,

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1. Ari Berman, *The 94-Year-Old Civil-Rights Pioneer Who Is Now Challenging North Carolina's Voter-ID Law*, Nation (Jan. 25, 2016), http://www.thenation.com/article/the-92-year-old-civil-rights-pioneer-who-is-now-challenging-north-carolinas-voter-id-law [https://perma.cc/7G33-8QDG] [hereinafter Berman, *Pioneer*].

2. *Id.*

3. *See* Jim Rutenberg, *A Dream Undone*, N.Y. Times Mag. (July 29, 2015), http://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html?_r=0 [https://perma.cc/7DVQ-HHSV] (discussing the "arbitrary and obscure queries" imposed upon black registered voters).

4. Berman, *Pioneer*, *supra* note 2; *see* Matthew Burns et al., *Voting Changes Head to Governor*, WRAL (July 26, 2013), http://www.wral.com/voting-changes-head-to-governor/12703982 [https://perma.cc/N584-CXZW] (reporting on the debate surrounding North Carolina's HB 589, a strict voting law passed along party lines).

5. Berman, *Pioneer*, *supra* note 2.

6. *Id.*

"undertook a herculean effort . . . to comply with the law."[7] This effort involved eleven trips to various state agencies over the course of a month—requiring over 200 miles of driving and twenty hours of her time.[8] The process was difficult enough for Ms. Eaton, who had the "persistence, resources, and stamina" to satisfy the law's requirements, but the task is much more onerous for those not so fortunate.[9]

The right to vote is the fundamental principle upon which democracy is based.[10] Indeed, in an 1886 opinion, the Supreme Court declared the right to vote a fundamental right because it is "preservative of all rights."[11] However, early on in U.S. history certain groups of people, such as African-Americans, women, and Native Americans, were completely excluded from exercising this right.[12] In fact, even after the ratification of the Fifteenth Amendment, which guaranteed African-Americans the right to vote,[13] efforts to disenfranchise African-Americans persisted.[14] Additional attempts to protect voting rights, such as the Enforcement Acts of 1870 and 1871 and the Civil Rights Acts of 1950, 1957, and 1964, were either grossly ineffective or otherwise undermined by courts and state legislatures.[15] Ultimately, these experiences, in addi-

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7. *Id.*

8. *Id.*

9. *Id.*

10. Powell v. McCormack, 395 U.S. 486, 547 (1969); *see also Democracy*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/Democracy (last visited Feb. 2, 2017) [https://perma.cc/8H7H-ZD9M] (defining democracy as "a form of government in which people choose leaders by voting").

11. Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886).

12. *See* Steven Mintz, *Winning the Vote: A History of Voting Rights*, GILDER LEHRMAN INST. AM. HIST., https://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights (last visited Feb. 2, 2017) [https://perma.cc/6VSH-SKHL] (asserting that, with few exceptions, adult White men were the only people who could vote in the years following the formation of the United States).

13. U.S. CONST. amend. XV § 1; *see also Passage of the Fifteenth Amendment*, PBS, http://www.pbs.org/wgbh/americanexperience/features/general-article/grant-fifteenth (last visited Feb. 2, 2017) [https://perma.cc/MFB5–24CV] (emphasizing how White Southerners responded to the adoption of the Fifteenth Amendment by finding ways to prevent African-Americans from voting, including the use of violence).

14. *See* Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 84 (2008) (contending that, as African-American men began to exercise the right to vote in the wake of the Fifteenth Amendment's passage, a "counterrevolution began with the suppression of the African-American vote through force and fraud").

15. *See* South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) (discussing how the Enforcement Act of 1870, which Congress passed as an attempt to help implement the Fifteenth Amendment, ended up being ineffectual after the intensity of the racial equality debate waned and was eventually repealed), *abrogated by* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612 (2013); Hayley Trahan-Liptak, *Prohibiting Barriers to the Booth: The Case for Limited Nationwide Preclearance Under a Modified Voting Rights Act*, 34 B.C. J.L.

tion to mounting pressure from the Civil Rights Movement, led to the passage of a revolutionary federal law aimed at protecting minority voting rights: the Voting Rights Act of 1965 (VRA).[16]

Within a few years of its enactment, the VRA—especially the preclearance regime of sections 4(b) and 5—was enormously successful at curbing discriminatory voting laws and practices and increasing minority voter turn-out and representation.[17] The VRA continued to do so for nearly fifty years[18] before experiencing its death throes at the hands of a bitterly-divided Supreme Court in *Shelby County v. Holder* (*Shelby*).[19] That is, by striking down section 4's "coverage formula," the Court rendered the VRA's most effective tool—the preclearance regime—a nullity.[20] Without the VRA's preclearance regime, jurisdictions formerly subject to federal preclearance, such as Texas, Alabama, and parts of North Carolina, have *carte blanche* to implement restrictive voting laws with the purported aim of combatting "voter fraud" even though there is

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& SOC. JUST. 151, 159 (2014) (discussing how the Civil Rights Acts of 1957, 1960, and 1964 did little to alleviate the concern of minority disenfranchisement).

16. *See* Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 912 (2008) (stating the events of "Bloody Sunday" prompted President Johnson to ask for the toughest voting rights bill imaginable, which he received in the form of the VRA); Orville Vernon Burton, *Tempering Society's Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy*, 76 LA. L. REV. 1, 17 (2015) (referring to the VRA as "an essential component of the vision of the Civil Rights Movement").

17. *See* Conner Johnston, Comment, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post-Shelby County*, 62 UCLA L. REV. 236, 241 (2015) (referring to the preclearance requirements of section 4(b) and section 5 as "the heart of the VRA"); Brian F. Jordan, Note, *Finding Life in Hurricane Shelby: Reviving the Voting Rights Act by Reforming Section 3 Preclearance*, 75 OHIO ST. L.J. 969, 976–77 (2014) (highlighting section 5's "great success" in fighting minority disenfranchisement).

18. *The Effect of the Voting Rights Act*, EPIC.ORG, https://epic.org/privacy/voting/register/intro_c.html (last visited Feb. 5, 2017) [https://perma.cc/6CGF-SRPG]. *See generally* Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111 (1991) (examining the reasons for the dramatic increase in the number of African-American legislators in the South and concluding that such increase was the direct result of the VRA).

19. *See* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2631 (2013) (ruling in a 5–4 decision that Congress's failure to update section 4(b)'s coverage formula during the VRA's 2006 Reauthorization rendered the section unconstitutional because the data Congress used did not speak to "current conditions"); *see also* Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html [https://perma.cc/5K9Y-JWB3] (discussing the *Shelby* decision).

20. Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO L. REV. 99, 103 (2015).

no evidence such fraud exists.[21] The ruling in *Shelby*, coupled with the fact that, in the past, courts have upheld state voting laws passed with the purported aim of preventing voter fraud,[22] means those challenging such laws face an arduous task.[23]

The post-*Shelby* landscape is defined by the proliferation of restrictive voting laws passed in the name of preventing voter fraud—almost all of which have originated in Republican-controlled state legislatures.[24] Additionally, partisan gridlock prevents Congress from taking bipartisan measures to protect voting rights, such as passing a renewed VRA or updating section 4(b)'s coverage formula.[25] Meanwhile, utilizing the VRA provisions the *Shelby* decision left unaffected, sections 2 and 3, presents

21. *See, e.g.*, Jordan, *supra* note 17, at 989–91 (outlining the restrictive voting laws passed in Texas and North Carolina following the Court's *Shelby* decision); Brendan Nyhan, *Voter Fraud is Rare, but Myth is Widespread*, N.Y. TIMES (June 10, 2014), http://www.nytimes.com/2014/06/11/upshot/vote-fraud-is-rare-but-myth-is-widespread.html?_r=0 [https://perma.cc/49SK-UWD9] (claiming there is no evidence of widespread "in-person" voting fraud); JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, 4–11 (2007), https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf [https://perma.cc/LZG2-D3ZS] (concluding that allegations of widespread voter fraud have no basis in reality); *see also* Editorial Board, *Alabama Puts Up More Hurdles for Voters*, N.Y. TIMES (Oct. 8, 2015), http://www.nytimes.com/2015/10/08/opinion/alabama-puts-up-more-hurdles-for-voters.html?_r=0 [https://perma.cc/8773-5DVR] (stating Alabama officials announced their decision to enforce the state's stringent voter ID law on the day of the *Shelby* ruling).

22. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 181 (2008) (upholding an Indiana voter ID law in part because the Court considered preventing in-person voter fraud a legitimate state interest that justified a limited burden on voting rights); Frank v. Walker, 768 F.3d 744, 745 (7th Cir. 2014) (holding a Wisconsin voter ID law did not violate section 2 of the VRA or the Constitution).

23. *See* Emily DeRuy, *Will the Strictest Voter ID Law Survive a Battle with Civil Rights Advocates?*, FUSION (Apr. 28, 2015, 6:18 AM), http://fusion.net/story/127047/will-the-strictest-voter-id-law-survive-a-battle-with-civil-rights-advocates [https://perma.cc/V5WZ-3CNR] (referring to civil rights advocates' fight against strict voter ID laws as an "uphill battle" in the wake of the *Crawford* and *Shelby* decisions).

24. *See* Vincent Marinaccio, Comment, *Protecting Voters' Rights: The Aftermath of Shelby v. Holder*, 35 WHITTIER L. REV. 531, 542–43 (2014) (listing state voting laws passed in formerly covered jurisdictions after the *Shelby* decision); Kara Brandeisky et al., *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PRO PUBLICA (Nov. 4, 2014, 11:31 AM), http://www.propublica.org/article/voting-rights-by-state-map [https://perma.cc/9RXE-8HPA] (describing the numerous voting laws passed across the country in the wake of the *Shelby* decision).

25. *See* Marinaccio, *supra* note 24, at 547 (emphasizing "legal experts . . . have little hope that Republicans will approve any method of preserving [the VRA's preclearance regime]"); *see also* Ari Berman, *Congressional Democrats Launch a New Strategy to Restore the Voting Rights Act*, NATION (Nov. 3, 2015), http://www.thenation.com/article/congressional-democrats-launch-a-new-strategy-to-restore-the-voting-rights-act [https://perma.cc/4U4X-V5JX] (pointing out that, while a Democrat-backed bill aimed at restoring the VRA has one Republican co-sponsor, "few Republicans have followed").

difficulties of its own: the former requires taking on the inherent costs and limitations of case-by-case litigation[26] while the latter requires challengers to prove discriminatory intent on behalf of lawmakers, a near-impossible task.[27]

Thus, the tools voting rights advocates currently have at their disposal to combat restrictive post-*Shelby* voting laws are simply not enough to protect the franchise—the very foundation upon which our system of government is based. Instead of relying solely on the remaining provisions of the VRA, advocates should also adopt a universalist approach toward protecting voting rights. For example, they should push for automatic voter registration, online voting, and expanding early voting at the state level while pressuring Congress to use their Elections Clause power to make it easier to vote in federal elections.

Part II provides an overview of the history and "Hydra-like"[28] quality of discriminatory and suppressive voting laws and practices and the developments that led to the VRA's passage. Part III outlines the VRA's successes and the controversial path to its undoing in the Supreme Court's *Shelby* decision. Part IV analyzes the Supreme Court's disastrous ruling in *Shelby*. Part V provides an overview of the status quo, termed the "post-*Shelby* landscape." Part VI describes the tools voting rights advocates currently have at their disposal and argues that such tools alone are insufficient to protect the franchise in the post-*Shelby* landscape. Finally, Part VII makes the case for why advocates can strengthen their ability to protect the franchise by adopting universalism at the state and federal level.

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26. *See* Penda D. Hair, *Lawsuits Are Not Enough: Restore the Voting Rights Act*, HILL (July 9, 2015, 1:00 PM), http://thehill.com/blogs/congress-blog/civil-rights/247283-lawsuits-are-not-enough-restore-the-voting-rights-act [https://perma.cc/TWA7-TZ78] (contending section 2 litigation "requires vast amounts of resources, time, and constant vigilance"); Jim Sensenbrenner, *Sensenbrenner: Protect Our Right to Vote*, USA TODAY (Mar. 20, 2014, 5:52 PM), http://www.usatoday.com/story/opinion/2014/03/20/sensenbrenner-voting-rights-government-column/6490847 [https://perma.cc/SR6F-HRVU] (referring to section 2 litigation as "costly, difficult to prove," and often leaving "no remedy for a flawed election").

27. *See* Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, AM. PROSPECT (Aug. 19, 2013), http://prospect.org/article/get-know-section-3-voting-rights-act [https://perma.cc/UW54-AVE8] (explaining why proving section 3's discriminatory intent requirement makes successful claims difficult to pursue).

28. In her *Shelby* dissent, Justice Ginsburg likened the nature of voter suppression legislation to the Hydra, an infamous creature in Greek mythology. Shelby Ct. v. Holder, 570 U.S. _, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting). The Hydra infamously bore nine heads and would spawn two more heads every time the hero cut one off. *Hydra*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Hydra (last visited Jan. 31, 2017) [https://perma.cc/46QB-CN4F].

II. THE "HYDRA-LIKE" QUALITY OF DISCRIMINATORY VOTING LAWS AND THE DEVELOPMENTS LEADING TO THE VRA'S PASSAGE

After the Civil War, Congress amended the Constitution to allow for legislation protecting the civil and political rights of the newly-freed African-American population.[29] In particular, the Fifteenth Amendment, which provides that U.S. citizens' right to vote could not be "denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude,"[30] was immediately successful at protecting African-American suffrage and electing Black citizens to public office.[31] In parts of the South, for example, African-Americans began to hold high offices in state legislatures, and white Republican candidates sought the support of African-American voters.[32] Nevertheless, as Black citizens continued to exercise their newly-acquired voting rights, White Southerners, threatened by such an exercise of power, initiated a plan to suppress votes by using threats, violence, and fraud.[33] On a daily basis, White Southerners, especially the Ku Klux Klan, terrorized Black citizens, Black politicians, and any of their white supporters—assaulting or murdering countless citizens.[34] In addition, those opposed to African-American suffrage committed outright voting fraud by stealing ballot boxes and exchanging them with others, removing polls to unknown places, purging voter rolls, and making illegal arrests the day before elections.[35]

Congress responded to the violence, intimidation, and fraud used to suppress African-American's voting rights with the Enforcement Act of 1870.[36] The Enforcement Act of 1870 made it a crime for public officers and private individuals to obstruct the right of African-Americans to

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29. *See* Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928, 1935 (2013) ("The Civil War Amendments . . . grant[ed] Congress the authority to pass legislation that would preserve the right [of newly-freed African-Americans] to participate in the franchise."); *see also* Chin & Wagner, *supra* note 14, at 80 (discussing the advances formerly-enslaved African-Americans enjoyed immediately following the ratification of the Civil War Amendments).

30. U.S. CONST. amend. XV, § 1.

31. Trahan-Liptak, *supra* note 15, at 158.

32. Chin & Wagner, *supra* note 14, at 82–83.

33. *Id.* at 87–88; Anthony J. Gaughan, *Has the South Changed? Shelby County and the Expansion of the Voter ID Battlefield*, 19 TEX. J. ON C.L. & C.R. 109, 114 (2013); Trahan-Liptak, *supra* note 15, at 158.

34. Chin & Wagner, *supra* note 14, at 88.

35. *Id.* at 87–88.

36. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140 (1870); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2136–38 (1993).

vote.[37] However, despite such Congressional action, the Ku Klux Klan and other racist vigilante groups continued to terrorize African-American communities in the South.[38] Once again, Congress responded by passing legislation aimed at protecting African-American voting rights: the Enforcement Act of 1871 (also known as the Ku Klux Klan Act).[39] Unfortunately, toward the end of Reconstruction hope of African-American equality at the polls and enthusiasm for civil rights dwindled, making it even easier for the federalist-leaning Supreme Court to chip away at Congress's Reconstruction Era civil rights legislation.[40] What is more, not only did racist vigilante groups and a Supreme Court averse to the federal government effectively curtail African-American's voting rights, state legislatures also took subtle steps toward doing so.[41]

In the years following Reconstruction, Southern state legislatures began enacting measures drafted with the intent of passing constitutional muster while effectively disenfranchising African-Americans.[42] Such measures included poll taxes and literacy tests—the former passed knowing that most African-Americans could not afford to pay the tax[43] and the latter passed knowing that over two-thirds of the adult "Negroes" were illiterate at that time.[44] Simultaneously, Southern legislatures found ways to assure these measures would not disenfranchise poor or illiterate whites, including the use of grandfather clauses, property qualifications, and "good character" tests.[45]

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37. South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966), *abrogated by* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612 (2013).

38. Lawrence, *supra* note 36, at 2140–41.

39. *Id.*

40. *See* Katzenbach, 383 U.S. at 310 (discussing how the Enforcement Act of 1870 and its subsequent amendments, which Congress passed as an attempt to help implement the Fifteenth Amendment, ended up being ineffectual after the intensity of the racial equality debate waned and were eventually repealed for the most part); *see also* Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 541 (1985) (explaining how the Supreme Court undid much of the federal civil rights legislation passed during Reconstruction).

41. *See* Katzenbach, 383 U.S. at 310–11 (discussing post-Reconstruction Era attempts to disenfranchise African-Americans); *see also* UNIV. OF MICH., *Race, Voting Rights, and Segregation: Direct Disenfranchisement*, UMICH.EDU, http://www.umich.edu/~lawrace/disenfranchise1.htm (last visited Feb. 2, 2017) [https://perma.cc/6YC4-E8F7] (providing an overview of "direct" disenfranchisement techniques used in the late 19th and early 20th centuries).

42. Chin & Wagner, *supra* note 14, at 90.

43. UNIV. OF MICH., *supra* note 41.

44. Katzenbach, 383 U.S. at 311.

45. *Id.* "Grandfather clauses" allowed those who would otherwise be disqualified from voting by literacy tests, poll taxes, and other devices to do so if they were able to vote before the Civil War. Guinn v. United States, 238 U.S. 347, 356 (1915).

In the early 20th century, various civil rights groups challenged the constitutionality of the devices and tests state legislatures employed, achieving limited success.[46] Further, any success advocates enjoyed was often fleeting, as state legislatures drafted new methods of disenfranchising voters to get around adverse court rulings,[47] and the Supreme Court deferred to state legislatures regarding voting.[48] Subsequent attempts in the mid-20th century, such as the Civil Rights Acts of 1957 and 1960 fared no better. Despite providing the Attorney General with various tools to combat discriminatory voting laws and practices, the case-by-case litigation approach the federal government utilized was, in the words of the Supreme Court, "unusually onerous to prepare . . . sometimes requiring as many as 6,000 man-hours" to prepare and litigate.[49] Title I of the Civil Rights Act of 1964, which attempted to establish a three-judge panel to hear expedited voting cases and outlaw some racially discriminatory voting practices in federal elections, was ineffective for the same reasons.[50]

This pattern of state legislatures sprouting new laws to suppress minority voting, after acts of Congress or judicial rulings undermined prior attempts, led Justice Ruth Bader Ginsburg to proclaim that "[e]arly attempts to cope with this vile infection [of discriminatory voting laws

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46. *See* Nixon v. Herndon, 273 U.S. 536, 536 (1927) (holding a Texas law disallowing African-Americans from voting in the Texas Democratic Primary violated the Fourteenth Amendment); Guinn, 238 U.S. at 347 (1915) (striking down a grandfather clause in the Oklahoma constitution as a violation of the Fifteenth Amendment).

47. *See* Lane v. Wilson, 307 U.S. 268, 275 (1939) (striking down an Oklahoma statute passed to sidestep the Court's previous holding that Oklahoma's grandfather clause was unconstitutional); *Nixon v. Condon*, 286 U.S. 73 (1932) (holding that Texas's all-White Democratic primaries violated the Fourteenth Amendment despite Texas's efforts to circumvent the Supreme Court's previous decision by repealing the previous law and passing another that gave political parties the power to set their own rules); *see also* Gaughan, *supra* note 33, at 114–15 (providing an overview of efforts on behalf of Southern Whites to undermine any progress made in the realm of minority voting rights up until the passage of the VRA); Jordan, *supra* note 17, at 974 (describing how Southern states found ways to evade Congressional action on minority voting rights, including the adoption of literacy tests, poll taxes, or restricting access to voter registration).

48. *See, e.g.*, Lassiter v. Northampton Co. Bd. of Elections, 360 U.S. 45, 45 (1959) (upholding North Carolina county's literacy test requirement as a legitimate exercise of state power if it was applied without regard for race); Williams v. Mississippi, 170 U.S. 213, 213 (1898) (upholding Mississippi constitutional provisions relating to poll taxes and literacy tests because the requirements applied to all voters).

49. South Carolina v. Katzenbach, 383 U.S. 301, 313–14 (1966), *abrogated by* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612 (2013); *accord* Daniels, *supra* note 29, at 1936 n.36 (pointing out how the Civil Rights Acts of 1957 and 1960 were ineffective and lacked workable enforcement provisions); Trahan-Liptak, *supra* note 15, at 159 (discussing how the Civil Rights Acts of 1957, 1960, and 1964 did little to alleviate the concern of minority disenfranchisement).

50. Katzenbach, 383 U.S. at 313–14.

and practices] resembled battling the Hydra [because] [w]henever one form of voting discrimination was identified and prohibited, others sprang up in its place."[51]

In addition to previously ineffectual congressional action, judicial unwillingness to intervene in voting rights cases, and blatant disenfranchisement of Black voters,[52] the passage of the VRA was a direct result of the political pressure placed on Congress by the large and growing Civil Rights Movement.[53] Particularly galvanizing was the widely-televised atrocity known as "Bloody Sunday."[54] On that fateful day, Alabama state troopers brutalized civil rights advocates—most of whom were African-American—while they marched from Selma to Montgomery to protest the killing of a young African-American man who protected his mother from being beaten at an earlier voter registration march.[55] Within five months, President Lyndon Baines Johnson signed the VRA into law,[56] and would later describe the VRA as "a triumph for freedom as huge as any victory that has ever been won on any battlefield."[57]

III. The VRA's Success and the Controversial Path to its Demise in the Supreme Court's *Shelby* Decision

Although the VRA contained effective tools to combat discriminatory voting laws, such as banning the use of any test or device as a prerequisite

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51. Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting).

52. *See* Pitts, *supra* note 16, at 909 (asserting the VRA "represented the federal government's holistic response to Southern electoral atrocities"); Trahan-Liptak, *supra* note 15, at 159 (pointing out Congress passed the VRA as a response to States' continued efforts to disenfranchise African-American voters); *see also* Cody Gray, *Savior Through Severance: A Litigation-Based Response to Shelby County v. Holder*, 50 Harv. C.R.-C.L. L. Rev. 49, 57 (2015) (claiming the VRA "followed several unsuccessful attempts" to combat discrimination in voting).

53. *See* Burton, *supra* note 16 (referring to the VRA as "an essential component of the vision of the Civil Rights Movement"); Daniels, *supra* note 29, at 1936 (attributing the passage of the VRA to the Civil Rights Movement).

54. *See* Pitts, *supra* note 16, at 912 (stating the widespread telecast of "Bloody Sunday" prompted President Johnson to ask for the toughest voting rights bill imaginable, which he received in the form of the VRA); *see also* Burton, *supra* note 16, at 23–24 (highlighting the media's role in placing an impetus on Congress to take action to protect minority voting rights).

55. Terrye Conroy, *The Voting Rights Act of 1965 A Selected Annotated Bibliography*, 98 L. Libr. J. 663, 664 (2006).

56. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973 (2012)); Conroy, *supra* note 55.

57. Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), *in* Public Papers of the Presidents: Lyndon B. Johnson, Vol. II, entry 409, pp. 840–44.

for voting or voter registration[58] and authorizing federal examiners to oversee local elections,[59] its strongest weapon was the preclearance regime of sections 4(b) and 5.[60] Congress implemented the preclearance regime as a response to the "continual litigation" problem the Supreme Court expressed in *South Carolina v. Katzenbach*.[61] Preclearance worked as follows: section 4(b) provided the formula to determine which jurisdictions were subject to preclearance,[62] while section 5 prohibited such "covered" jurisdictions from enforcing voting laws without first obtaining preclearance from either the U.S. Attorney General or a three-judge panel from the Federal District Court for the District of Columbia.[63] A jurisdiction was considered "covered," and thus subject to preclearance requirements if: (1) it employed any test or device that limited a person's ability to register to vote on or before November 1, 1964; (2) less than 50% of the voting-age population was registered to vote on November 1, 1964; or (3) less than 50% of eligible voters participated in the November 1964 presidential election.[64] In the years immediately following the passage of the VRA, these preclearance provisions proved to be just as controversial[65] as they were enormously successful.[66] For instance, under the preclearance regime "African-American voter registration in Mississippi rose from 7% in 1964 to approximately 60% in 1966[67] and by an astounding 886% between 1964 and 1976."[68] Additionally, during the first ten years of the VRA's enforcement, 14.2% of the 1,542 voting changes sent to the Department of Justice (DOJ) for preclearance were struck down.[69]

Despite the fact that the VRA also provided "bail-out" procedures allowing covered jurisdictions to file for an exemption if certain require-

58. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973b (2012)).

59. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437, 440 (codified as amended at 42 U.S.C. §§ 1973b–c (2012)).

60. *See* Johnston, *supra* note 17 (referring to section 4 as "the heart of the VRA"); *see also* Gaughan, *supra* note 33, at 115 (stating that sections 4(b) and 5 were "[t]he cornerstone of the VRA").

61. South Carolina v. Katzenbach, 383 U.S. 301, 313–14 (1966), *abrogated by* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612 (2013); *accord* Trahan-Liptak, *supra* note 15, at 161 ("Congress responded to the problem of continual litigation with section 5.").

62. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437, 438–39 (codified as amended at 42 U.S.C. §§ 1973b–c (2012)).

63. *Id.*

64. *Id.*

65. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 670, 672 (2008).

66. *See* Gaughan, *supra* note 33, at 116 (outlining the VRA's immediate successes).

67. *Id.*

68. Trahan-Liptak, *supra* note 15, at 163.

69. *Id.* at 164.

ments were met,[70] the controversy surrounding the VRA centered on the preclearance regime's interference with a power traditionally relegated to the states—the enactment of voting laws.[71] Indeed, the first time the Supreme Court reviewed the constitutionality of the VRA, the main issue regarded whether Congress overstepped its constitutional authority to effectuate the Fifteenth Amendment by "appropriate" measures.[72] Claiming the preclearance provisions impermissibly violated the principle of equal sovereignty of the states, South Carolina urged the Court to enjoin the challenged sections.[73] Although South Carolina challenged multiple sections of the VRA, the Court zeroed in on the coverage formula because it was the provision to which South Carolina was actually subjected.[74] Ultimately, the Court resoundingly upheld the constitutionality of the challenged sections, stating:

> After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil [of voting discrimination], with authority in the Attorney General to employ them effectively. . . . We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the comments of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live.[75]

Any celebration on behalf of minority voting rights advocates was short-lived, however, as the VRA, particularly the preclearance regime of sections 4(b) and 5, continued to be extremely contentious in the decades that followed.[76]

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70. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437, 438–39 (codified as amended at 42 U.S.C. §§ 1973b–c (2012)). The covered states or jurisdictions had to demonstrate that they had complied with the VRA's requirements for at least ten years and that they had taken positive steps to broaden the electorate. *Id.* For a discussion of the "bail-out" provisions under sections 4(b) and 5, see *infra* Part III.

71. South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966), *abrogated by* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612 (2013).

72. *Id.* at 308.

73. *Id.* at 307, 323.

74. *Id.* at 317.

75. *Id.* at 337.

76. *See, e.g.*, Reno v. Bossier Parish Sch. Dist., 528 U.S. 320, 321 (2000) (holding section 5 of the VRA does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose); Lopez v. Monterey County, 519 U.S. 9, 10 (1996) (determining a district court may not issue an order authorizing a jurisdiction subject to section 5 of the VRA's preclearance requirements to conduct judicial elections under a plan which has not received federal preclearance); Beer v. United States, 425 U.S. 130, 130 (1976) (upholding a New Orleans reapportionment plan challenged under section

Section 5 was initially intended to expire after five years, but Congress reauthorized and extended it on several occasions: in 1970, 1975, 1982, and 2006.[77] Yet, while Congress amended section 4(b)'s coverage formula in 1970 and 1975, it failed to do so in 1982 and 2006.[78] Importantly, even though Congress did not update the coverage formula to reflect progress made resulting from the VRA, it found that the preclearance regime still had much work to do to protect minority voting rights.[79] Little did Congress know, its decision not to update the coverage formula during the 2006 Reauthorization would ultimately cause the downfall of the preclearance regime and, thus, the VRA itself.[80]

In addition to the VRA's controversial federal preclearance provisions, the 2008 election of President Barack Obama—a Democrat and the nation's first African-American president—served as a major catalyst in forcing VRA opponents to ramp up efforts to dismantle the landmark law.[81] Unquestionably, President Obama's election was due in large part to record minority turnout.[82] For instance, in the 2008 election, not only was there record minority voter turnout, but 95% of African-Americans, 67% of Latinos, and 62% of Asians voted for President Obama.[83] Record minority turnout also propelled Democrats to a majority in the

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5 of the VRA because the voting rights of African-Americans were found not to be abridged); Allen v. St. Bd. of Elections, 393 U.S. 544, 544 (1969) (concluding section 5 of the VRA authorized a private right of action to determine whether a voting change should be subjected to the VRA's preclearance requirements).

77. Gray, *supra* note 52, at 60.

78. *Id.*

79. Daniels, *supra* note 29, at 1940.

80. *See* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2631 (2013) (striking down section 4(b) as unconstitutional in part because Congress failed to update the coverage formula in 2006).

81. *See generally* Corey Dade, *Is the Voting Rights Act Endangered? A Legal Primer*, NPR (Feb. 28, 2012, 2:47 PM), http://www.npr.org/2012/02/28/147568469/is-the-voting-rights-act-endangered-a-legal-primer [https://perma.cc/3992-488N] (providing an overview of various lawsuits brought by VRA opponents after the 2008 election in an attempt to challenge the constitutionality of the VRA).

82. Trahan-Liptak, *supra* note 15, at 165; *see also* MARK HUGO LOPEZ & PAUL TAYLOR, DISSECTING THE 2008 ELECTORATE: MOST DIVERSE IN U.S. HISTORY, at i (2009), http://www.pewhispanic.org/files/reports/108.pdf [https://perma.cc/436W-3BP6] (proclaiming the 2008 electorate the most diverse in U.S. history and finding very high minority support for President Obama).

83. LOPEZ & TAYLOR, *supra* note 82. In contrast, during the 2004 presidential election, Democratic Presidential candidate John Kerry received 88% of the African-American vote, 53% of the Latino vote, and 56% of the Asian vote. *How Groups Voted in 2004*, ROPER CTR., http://ropercenter.cornell.edu/polls/us-elections/how-groups-voted/how-groups-voted-2004 (last visited Feb. 2, 2017) [https://perma.cc/M2DJ-VFU4].

House and increased their hold on the Senate.[84] Such a result led some political commentators to note that the 2008 election signaled Democrats could "dominate American politics for a generation or more."[85] Consequently, within two months of Obama's inauguration, Republican opponents of the VRA, including conservative legal foundations and Georgia's Republican Governor, argued "Obama's election heralds the emergence of a color-blind society in which the legal safeguards for minorities [like the VRA] are no longer required."[86]

Unsurprisingly, soon after Republican opponents of the VRA made their voices heard, the VRA was once again challenged before the Supreme Court in *Northwest Austin Utility District Number One v. Holder* (NAMUDNO).[87] This time around, a utility district in Travis County, Texas, which was subject to the VRA section 5 preclearance requirements because of how the county ran its elections, sought relief under the VRA's "bail-out" provisions.[88]

In order to "bail-out" of coverage, a jurisdiction must petition a three-judge panel from the District Court in Washington, D.C. to issue a declaratory judgment.[89] A declaratory judgment is not issued unless a jurisdiction or political subdivision proves: (1) it has not used any forbidden voting test within the past ten years; (2) it has not been found in violation of section 5; (3) it has not committed any other voting rights violations;[90] and (4) it engaged in efforts to eliminate voter harassment and intimidation.[91] In NAMUDNO, the utility district argued it was subject to section 5's requirements simply because it was located in Texas (which was itself subject to section 5 preclearance) and not because there was any evidence that it had ever engaged in racial discrimination.[92] As such, the utility district pleaded with the Court to declare it a "political subdivision," thus allowing it to "bail-out" of coverage of section 5 of the VRA.[93] The

84. Gary C. Jacobson, *The 2008 Presidential and Congressional Elections: Anti-Bush Referendum and Prospects for the Democratic Majority*, 124 POL. SCI. Q. 1, 1 (2009).

85. Lanny Davis, *2008: The Realignment Election*, HILL (Nov. 6, 2008, 9:11 AM), http://thehill.com/blogs/pundits-blog/presidential-campaign/31810-2008-the-realignment-election [https://perma.cc/3B38-BVU2].

86. Peter Wallsten & David G. Savage, *Voting Rights Act Opponents Point to Barack Obama's Election as a Reason to Scale Back Civil Rights Laws*, CHI. TRIB. (Mar. 15, 2009), http://articles.chicagotribune.com/2009-03-15/news/0903140356_1_civil-rights-laws-voting-rights-act-voting-districts [https://perma.cc/2786-CX5L].

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

88. *Id.* at 200.

89. *Id.* at 199.

90. *Id.*

91. *Id.*

92. *Id.* at 200.

93. *Id.* at 197.

Court not only agreed the utility district was a political subdivision but broadly interpreted the VRA, concluding that "all political subdivisions—not only those described in [the statute]—are eligible to file a bailout suit."[94]

On the other hand, the utility district argued that section 5 of the VRA unconstitutionally violated fundamental principles of federalism and equal sovereignty of the states.[95] Having sided with the utility district on the statutory interpretation issue, however, the Court invoked the constitutional avoidance doctrine to punt on the constitutional issue.[96] Nevertheless, in a 5–4 decision, Chief Justice John Roberts wrote at length regarding what the majority saw as the questionable constitutional grounds upon which section 5 rested—dedicating nearly half of the fourteen-page opinion to this discussion.[97] For example, he stressed that the preclearance provisions were meant to be temporary and quoted the *Katzenbach* Court as upholding the provisions simply because "exceptional conditions [could] justify legislative measures not otherwise appropriate."[98] In other words, Chief Justice Roberts claimed the continued constitutionality of the VRA depended on whether current conditions were such that they justified an unconstitutional intrusion into areas traditionally relegated to the states.[99] To compound this analysis, Chief Justice Roberts repeatedly stressed the "evils" section 5 was meant to alleviate may not exist to the extent they did when the VRA was initially passed and the coverage formula was based on decades-old data.[100] He also contended, "[t]hings have changed in the South[,] . . . [v]oter turnout and registration rates now approach parity[,] . . . [a]nd minority candidates hold office at unprecedented levels."[101] Most importantly, he claimed, while these results were undoubtedly due to the VRA itself, "[p]ast success alone . . . is not adequate justification to retain the preclearance requirements."[102] In so doing, Chief Justice Roberts foreshadowed the

94. *Id.* at 211–12.

95. *Id.* at 203.

96. *Id.* at 197. The constitutional avoidance doctrine is the well-established Supreme Court precedent that the Court will avoid deciding a constitutional question if there is another issue the Court can use to dispose of the case. *Id.* at 194 (quoting Escambia Co. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam)).

97. *Id.* at 199–206.

98. *Id.* at 199–200.

99. *See id.* at 203 ("[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.").

100. *Id.* at 203–04.

101. *Id.* at 202.

102. *Id.*

reasoning he would later use to invalidate the coverage formula and render the preclearance regime and the VRA largely toothless.[103]

For many, the Court's ruling in NAMUDNO was an implicit call on Congress to update the VRA's preclearance requirements, which it did not do.[104] As Justice Ginsberg noted in her *Shelby* dissent, this was most likely because, during consideration of the 2006 Reauthorization Bill, Congress held extensive hearings, amassed a substantial record, and found that, although the VRA was successful at increasing minority voter turnout and representation, evidence of continued discrimination still existed.[105] Further, the 2006 Reauthorization passed with an overwhelming majority of the House and a unanimous vote in the Senate.[106] Nevertheless, "[a]fter NAMUDNO . . . Republican state elected officials started arguing the [VRA] was unconstitutional and call[ed] for the Court to strike it down[.]"[107]

In the years following NAMUDNO, Republican-controlled state legislatures began passing restrictive voter ID laws.[108] The rapid proliferation of these laws, which disproportionately affect minority and low-income voters,[109] became a cause for concern for voting rights advocates and Democratic lawmakers alike.[110] Since the VRA was still in full effect and the 2012 general election was around the corner, many of these bills were temporarily stopped from going into effect or blocked altogether.[111] Consequently, in terms of minority voter turnout, the 2012 re-election of President Obama was a historic success—with Black voter turnout ex-

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103. *See* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2630–31 (2013) (holding the coverage formula, being based on decades-old data, was not sufficient to survive a constitutional challenge based on federalism principles).

104. Richard Hasen, *Online VRA Symposium: The Voting Rights Act, Congressional Silence, and the Political Polarization*, SCOTUSBLOG (Sept. 10, 2012, 11:45 AM), http://www.scotusblog.com/2012/09/online-vra-symposium-the-voting-rights-act-congressional-silence-and-the-political-polarization [https://perma.cc/6GS7-LLKB].

105. Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2635–36 (2013) (Ginsberg, J., dissenting).

106. *See* Hasen, *supra* note 104 (showing the 2006 amendments to the Voting Rights Act passed the Senate with a vote of 98–0 and passed the House with a vote of 390–33).

107. *Id.*

108. *See* Rutenberg, *supra* note 3 (stating Republican-controlled legislatures, in 2010, "rolled back early voting, eliminated same-day registration, disqualified ballots filed outside home precincts and created new demands for photo ID at polling places").

109. Josh Gerstein, *Holder: Voter ID Laws Hurt Minorities*, POLITICO (Dec. 13, 2011, 11:40 PM), http://www.politico.com/story/2011/12/holder-voter-id-laws-hurt-minorities-070400 [https://perma.cc/269A-HY62].

110. *See* Rutenberg, *supra* note 3 (stressing how a Democratic North Carolina Governor Bev Purdue vetoed her legislature's voter ID bill and how voting rights advocates felt that such laws were reminiscent of the Jim Crow era).

111. *Id.*

ceeding white voter turnout for the first time in U.S. history.[112] In fact, President Obama even increased his support from the Latino community, while his near unanimous support from African-Americans remained steady.[113] Noting that the 2012 re-election of President Obama was, in large part, due to such historic minority turnout, some commentators began soothsaying that the future of the VRA was all but doomed.[114] Sure enough, three days after Obama was declared the winner of the 2012 Presidential election, the Supreme Court agreed to hear yet another challenge to the VRA involving the preclearance regime.[115]

IV. *SHELBY COUNTY V. HOLDER*: A BITTERLY-DIVIDED SUPREME COURT EFFECTIVELY GUTS THE VRA

Shelby involved a direct constitutional challenge to the VRA's preclearance provisions.[116] Because Shelby County was situated in Alabama, which was a covered jurisdiction under the VRA, it too had to get its voting changes pre-cleared by federal government.[117] When Attorney General Eric Holder objected to Shelby County's proposed voting changes, the county sued him in federal district court seeking a declaratory judgment that the VRA's preclearance provisions were unconstitutional on their face and requesting a permanent injunction against enforcement of the provisions.[118] The district court ruled against Shelby County, finding Congress had sufficient evidence of discrimination during the 2006 Reauthorization to justify the preclearance provisions' continued existence.[119] The Court of Appeals for the D.C. Circuit agreed and affirmed the judgment.[120] The Supreme Court granted certiorari to determine whether the VRA's preclearance provisions violated the principle of equal sovereignty of the states; that is, whether the current need for

112. *Id.*

113. John M. Powers, Note, *Statistical Evidence of Racially Polarized Voting in the Obama Elections and Implications for Section 2 of the Voting Rights Act*, 102 GEO. L. J. 881, 882–83 (2014).

114. Nathaniel Persily, *Is the Voting Rights Act Doomed?*, N.Y. TIMES (Nov. 14, 2012, 8:48 PM), http://campaignstops.blogs.nytimes.com/2012/11/14/is-the-voting-rights-act-doomed/?_r=0 [https://perma.cc/WS8G-RXQV].

115. Rutenberg, *supra* note 3.

116. *See* Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2619 (2013) (asking whether or not the Act's mechanisms and resulting "disparate treatment of the States" still complies with constitutional requirements).

117. *Id.* at 2621.

118. *Id.* at 2621–22.

119. *Id.* at 2622.

120. *Id.*

such "extraordinary measures" justified the current burden the preclearance provisions placed on the states.[121]

Shelby County argued—and a slim majority of the Court agreed—that blatant discrimination at the ballot box was so rare, and minorities had made so much progress in the arena of voting rights, that the "extraordinary measures" Congress used to single out certain jurisdictions for preclearance no longer justified departing from the tradition of equal sovereignty.[122] In many ways, Chief Justice Roberts' majority decision mirrored his analysis in NAMUDNO. For example, he pointed to dicta in the *Katzenbach* decision to stress that the VRA was "not otherwise appropriate," but was justified by extraordinary conditions.[123] Further, he emphasized that Congress did not update the coverage formula during the 2006 Reauthorization[124] and that circumstances have changed dramatically, in terms of minority voter turnout and representation, since Congress originally enacted the VRA.[125]

With regard to federalism and equal sovereignty concerns, the Chief Justice argued not only did the Tenth Amendment guarantee states the right to regulate their own elections, but equal sovereignty applied both to when new states were admitted into the Union and "in assessing subsequent disparate treatment[.]"[126] As a result, the majority rejected the use of the rational basis test, which was applied to every VRA-related constitutional challenge previously, in favor of a higher level of scrutiny.[127]

Because the VRA's preclearance requirements gave the federal government the power to regulate state election laws before they went into effect, and because only certain states and jurisdictions were subjected to the preclearance requirements at any given time, the Chief Justice essentially viewed the VRA's preclearance requirements as presumptively unconstitutional.[128] For the Court's majority, the only way such a presumption could be rebutted was if Congress found and contemplated direct evidence of "pervasive," "flagrant," and "widespread" voter discrimination similar to "that faced by Congress in 1965[.]"[129] Concluding the VRA's 2006 Reauthorization coverage formula was "based on 40-year-old data, when today's statistics tell an entirely different story," the

121. *Id.* at 2619.
122. *Id.* at 2628–31.
123. *Id.* at 2624.
124. *Id.* at 2621.
125. *Id.* at 2625–26.
126. *Id.* at 2623–24.
127. Marinaccio, *supra* note 24, at 535–36.
128. Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2624 (2013).
129. *Id.* at 2629 (quoting South Carolina v. Katzenbach, 383 U.S. 301 (1966)) (internal quotations omitted).

majority struck it down as unconstitutional—leaving section 5's preclearance requirements untouched.[130] However, because section 5 cannot function without section 4(b)'s preclearance formula, it is useless until Congress drafts a coverage formula that speaks to "current conditions."[131]

In her dissenting opinion, Justice Ginsberg argued there was sufficient evidence before Congress during the 2006 Reauthorization to justify the continued enforcement of the VRA's preclearance provisions.[132] Further, she emphasized how such enforcement was necessary to complete the VRA's gains and to protect against backsliding, both of which were within their constitutional capacity.[133]

Justice Ginsburg also vehemently criticized the majority for failing to consider congressional findings regarding the continued existence and proliferation of "second-generation voting barriers" during the 2006 Reauthorization, which were sufficient to uphold the preclearance formula.[134] Chief Justice Roberts responded by stating that "second-generation barriers" do not impede one's ability to cast a vote, they simply dilute minority votes, and the coverage formula was based on "voting tests and devices, not vote dilution."[135] Justice Ginsburg, anticipating this argument, rebuffed the Chief Justice's claims and emphasized the Court "has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial to access to the ballot."[136]

Justice Ginsburg also rejected the majority's argument that the VRA was presumptively unconstitutional because it violated traditional notions of equal sovereignty.[137] That is, the majority unnecessarily raised the level of scrutiny placed on the federal government and completely disregarded the *Katzenbach* Court's holding that equal sovereignty applied only when states were admitted to the union and not to remedies promulgated by the federal government to cure local evils appearing after a state's admittance.[138] Justice Ginsburg stated, the majority used "pure dictum" in NAMUDNO to expand the breadth of the equal sovereignty

130. *Id.* at 2631.
131. *Id.* at 2631.2631, 2632, n.1. (Ginsburg, J., dissenting)
132. *Id.* at 2632.
133. *Id.* at 2632–33.
134. *Id.* at 2636.
135. *Id.* at 2629.
136. *Id.* at 2636.
137. *Id.* at 2649.
138. *Id.* at 2648–49.

principle in contradiction of both the *Katzenbach* holding and the role of *stare decisis*.[139]

As to the majority's stance that the preclearance provisions were no longer needed due to the progress made in the arena of minority voting rights since 1965, Justice Ginsburg famously opined: "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."[140]

Whatever the Court's reasoning, what is clear is that *Shelby* invited states to engage in precisely the kind of "backsliding" against which Justice Ginsburg warned.[141] For example, immediately after *Shelby*, state legislatures began to promulgate stringent voting laws with the purported aim of preventing voter fraud—all in spite of widespread evidence that such fraud is virtually non-existent.[142] As previously stated, voting rights advocates slammed these laws because they discriminate against and effectively disenfranchise minority and low-income voters.[143] As a result of *Shelby*, the Court not only destroyed the VRA's most effective means of combatting discriminatory voting laws, it opened the doors for the reinstitution of minority voter suppression.[144]

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139. *Id.* at 2649.

140. *Id.* at 2650.

141. *Id.* at 2649; *accord* Marinaccio, *supra* note 24, at 542–43 (listing state voting laws passed in formerly covered jurisdictions after the *Shelby* decision); Brandeisky et al., *supra* note 24 (describing numerous voting laws passed across the country in the wake of the *Shelby* decision).

142. *See* Mark Axelrod, *North Carolina House Bill 589; or, Politics in the New Third World*, HUFFINGTON POST (Aug. 19, 2013, 5:04 PM), http://www.huffingtonpost.com/mark-axelrod/north-carolina-house-bill_b_3769571.html [https://perma.cc/8YU3-GMFR] (deriding North Carolina's voting law and claiming the Governor's arguments for passing it to combat voting fraud were misleading); Burns et al., *supra* note 4 (reporting on the legislative debate surrounding North Carolina's HB 589, a voting law passed within weeks of the *Shelby* decision); *see also* LEVITT, *supra* note 21, at 3 (concluding allegations of widespread voter fraud have no basis in reality); Nyhan, *supra* note 21 (claiming there is no evidence of widespread "in-person" voting fraud).

143. *See* Brendan F. Friedman, Note, *The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment*, 42 HOFSTRA L. REV. 343, 376 (2013) (arguing that stringent voter identification laws disproportionately affect minority voters); Vandewalker & Bentele, *supra* note 20, at 123–24 (providing a statistical analysis of the passage of restrictive voting laws and increased minority participation in voting and concluding that the laws are driven, at least in part, by efforts to suppress minority voters).

144. *See* Trahan-Liptak, *supra* note 15, at 169 (noting how striking down the preclearance formula allows previously covered jurisdictions to freely pass voting laws that might not have passed preclearance).

V. THE POST-*SHELBY* LANDSCAPE

A. *Voting Rights Issues as an Amalgam of Partisan Politics and Race*

In defining the post-*Shelby* landscape, it is important to note at the outset how the issue of voting rights has historically been an amalgam of partisan politics and race.[145] To illustrate, when President Lincoln's Republican Party pushed the Fifteenth Amendment through and enfranchised millions of African-Americans, "the first wave of Black elected officials from the South were uniformly Republican[.]"[146] In response, Southern Democrats, who were fiercely opposed to such enfranchisement, promulgated stringent voting laws and practices aimed at consolidating white Democratic power.[147] A similar pattern emerged in the decades that followed: Southern white Democrats attempted to curtail Republican efforts to expand Black turnout and representation.[148]

In the early 20th century, something remarkable happened. As the Republican Party gained power, it "play[ed] on white fear and resentment over [B]lack political gains" to strengthen its power and began pushing Black voters away.[149] Simultaneously, the Northern, mostly urban, Democratic Party "proved more permeable to a new [B]lack political machine."[150] In addition to African-American discontent with Republican President Herbert Hoover's handling of the Great Depression, which adversely affected Blacks to a greater degree than others,[151] the new Democratic Party began to distance itself from its Dixiecrat[152] predecessors and reached out to the Black community.[153] These efforts included Demo-

145. *See* Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1392–93 (2015) (asserting minority voting rights and partisan politics have always been inextricably intertwined); Alex Altman & Maya Rhodan, *Blue States Make Voting Easier as Red States Add Restrictions*, TIME (Oct. 20, 2015), http://time.com/4080238/voting-rights-red-blue-states-2016 [https://perma.cc/HZ7V-4WSQ] (claiming access to voting has been a partisan issue "since the dawn of the Republic").

146. Issacharoff, *supra* note 145, at 1392.

147. *Id.*

148. *Id.* at 1392–93.

149. *Id.* at 1396.

150. *Id.*

151. *Party Realignment and the New Deal*, U.S. H. OF REPS., http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Party-Realignment-New-Deal/ (last visited Feb. 2, 2017) [https://perma.cc/3GKB-2LL5] [hereinafter *Party Realignment*].

152. The term "Dixiecrat" is generally used to denote Southern Democrats who opposed the expansion of civil rights to minorities during the mid-20th century. *Dixiecrat*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/Dixiecrat (last visited Feb. 2, 2017) [https://perma.cc/U5YD-PXXC].

153. *See* Issacharoff, *supra* note 145, at 1396 (noting substantial efforts taken by the new Democratic party to reinvigorate Black voters).

cratic President Harry Truman's decision to integrate the military, New Deal progressives' advancement of causes that benefited African-Americans, President John F. Kennedy's attacks on Jim Crow laws, and, of course, President Lyndon B. Johnson's Civil Rights and Great Society programs.[154] "Simply put, the [B]lack vote became the Democratic vote[.]"[155]

Not only did the 20th century party realignment result in African-Americans largely supporting the Democratic Party (with the party's new focus on protecting the civil, political, and economic rights of minorities), other important demographics—including Latinos, young people, and low-income voters—began to follow suit.[156] Riding this wave of support, Democrats were able to nominate, elect, and re-elect the first African-American President of the United States.[157] Nevertheless, "unlike the concerns of racial exclusion under Jim Crow, [current voting controversies] are likely motivated by partisan zeal and emerge in contested partisan environments."[158] This is likely for two reasons: (1) among political theorists and voting rights activists it is axiomatic that high voter turnout tends to favor Democrats;[159] and (2) the Democrats' coalition depends

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154. *Id.*; *see Party Realignment*, *supra* note 151 (explaining how the New Deal created a sense that issues important to African-Americans were being addressed, ultimately inspiring hope in the political process).

155. Issacharoff, *supra* note 145, at 1396.

156. *See* Jens Manuel Krogstad & Mark Hugo Lopez, *Hispanic Voters in the 2014 Election: Democratic Advantage Remains, but Republicans Improve Margins in Some States*, PEW RES. CTR. (Nov. 7, 2014), http://www.pewhispanic.org/2014/11/07/hispanic-voters-in-the-2014-election [https://perma.cc/U9F8-RHUN] (reporting on the Democratic Party's hold on Latino/Hispanic voters); Adam Nagourney & Megan Thee, *Young Americans Are Leaning Left, New Poll Finds*, N.Y. TIMES (June 27, 2007), http://www.nytimes.com/2007/06/27/washington/27poll.html?_r=0 [https://perma.cc/4AEJ-JKUC] (examining how young voters have generally moved towards supporting the Democratic Party); Derek Thompson, *The 47%: Who They Are, Where They Live, How They Vote, and Why They Matter*, ATLANTIC (Sept. 18, 2012), http://www.theatlantic.com/business/archive/2012/09/the-47-who-they-are-where-they-live-how-they-vote-and-why-they-matter/262506 [https://perma.cc/28UT-M6FM] (claiming "low income earners are much more likely to vote Democratic, even within Republican states").

157. Trahan-Liptak, *supra* note 15, at 165; *see also* LOPEZ & TAYLOR, *supra* note 82 (proclaiming the 2008 electorate the most diverse in U.S. history and finding high minority support for President Obama); Powers, *supra* note 113 (claiming Obama received 71% of the Hispanic vote and 93% of the African-American vote during his 2012 re-election).

158. Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100 (2013).

159. Michael D. Martinez & Jeff Gill, *The Effects of Turnout on Partisan Outcomes in U.S. Presidential Elections 1960–2000*, 67 J. POL. 1248, 1269 (2005); Rich Robinson, *Compulsory Voting Make Sense for Democrats*, SAN JOSE INSIDE (Mar. 23, 2015), http://www.sanjoseinside.com/2015/03/23/compulsory-voting-make-sense-for-democrats [https://perma.cc/27RA-PP9F].

largely on support from the poor, minorities, and the young.[160] Consequently, partisan politics plays an especially important role in the post-*Shelby* landscape, with some critics going so far as to assert, "the Republican Party . . . view[s] second-generation voting barriers, such as . . . voter identification requirements that disproportionately disenfranchise racial minorities, as key to its success."[161] Indeed, one need not look any further than the correlation between which party controls a given state legislature and how that legislature approaches the issue of voting rights. For example, while Democrat-controlled state legislatures have passed measures easing access to the ballot,[162] Republican-controlled state legislatures have passed laws restricting access.[163] Since the VRA, in many cases, would have prevented the implementation of many of these restrictive voting laws,[164] prominent politicians like Senator Bernie Sanders (I-VT) and others have characterized the Supreme Court's ruling in *Shelby* a historic disaster.[165]

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160. *See generally* PEW RESEARCH CTR., A DEEP DIVE INTO PARTY AFFILIATION: SHARP DIFFERENCES BY RACE, GENDER, GENERATION, EDUCATION (2015), http://www.people-press.org/files/2015/04/4-7-2015-Party-ID-release.pdf [https://perma.cc/9YND-4ZD3] (exploring the long-term trends in party identification).

161. M. Akram Faizer, *Reinforced Polarization: How the Roberts Court's Recent Decision to Invalidate the Voting Rights Act's Coverage Formula Will Exacerbate the Divisions that Bedevil U.S. Society*, 45 CUMB. L. REV. 303, 320 (2015).

162. *See, e.g.*, Ian Lovett, *California Law Will Automatically Register Drivers to Vote*, N.Y. TIMES (Oct. 10, 2015), https://www.nytimes.com/2015/10/11/us/california-law-will-automatically-register-drivers-to-vote.html [https://perma.cc/TT59-2Z8M] (detailing a new law providing for automatic registration of eligible state voters when they obtain a driver's license); Jeff Mapes, *Kate Brown Gets to Sign Her Own Bill, for Automatic Voter Registration in Oregon*, OREGONIAN (Mar. 16, 2015, 2:27 PM), http://www.oregonlive.com/mapes/index.ssf/2015/03/kate_brown_gets_to_sign_her_ow.html [https://perma.cc/L5YP-QWR9] (reporting on an Oregon law automatically registering people who obtain or renew their driver's license or photo identification card).

163. *See, e.g.*, Ari Berman, *North Carolina Passes the Country's Worst Voter Suppression Law*, NATION (July 26, 2013), http://www.thenation.com/article/north-carolina-passes-countrys-worst-voter-suppression-law [https://perma.cc/47CN-ZJ7V] [hereinafter Berman, *North Carolina*] (claiming that a North Carolina law "eliminates practically everything that encourages people to vote in North Carolina, replaced by unnecessary and burdensome new restrictions"); Zachary Roth, *Ohio Passes Restrictive Voting Bills, Dems Vow to Sue*, MSNBC (Feb. 20, 2014, 8:18 AM), http://www.msnbc.com/msnbc/ohio-restricts-the-right-vote [https://perma.cc/V59F-N5NX] (stating the voting bills passed by the Republican-controlled legislature shortening the early voting period, ending same-day registration, and effectively ending a mail-in absentee voting system would adversely affect minority voters).

164. *See* Trahan-Liptak, *supra* note 15, at 172–75 (examining the various state voter ID laws that failed VRA preclearance but that later went into effect after the *Shelby* decision).

165. *See Bernie Sanders United States Senator for Vermont, Sanders Backs Voting Rights Bill*, SANDERS.SENATE.GOV (June 24, 2015), https://www.sanders.senate.gov/newsroom/press-releases/sanders-backs-voting-rights-bill [https://perma.cc/DZ6W-5GTD] (re-

B. *The Latest Hydra Head of Voter Suppression: Proposing Strict Voter ID Laws in the Name of Combatting "Voter Fraud"*

After the 2000 election, Congress enacted the Help America Vote Act (HAVA) to improve the administration of elections.[166] HAVA required states to implement voter identification procedures, but such requirements only applied to registration by mail and did not include photo identification.[167] As such, most states have required some sort of photo identification to vote for a long time, but the strict requirement that such identification be government-issued is a recent development.[168] Other, less stringent forms of voter ID laws simply require registrars to ask voters for some kind of identification (which itself is not needed to vote) or require voters to show some acceptable identification like a voter registration card.[169]

Strict voter ID laws undoubtedly have a disparate impact on young people, minorities, and low-income voters.[170] Not only are African-Americans and students twice as likely than their white or middle-aged counterparts to lack the required government-issued ID, low-income voters face enormous hurdles in obtaining the source documents required to obtain the ID.[171] Often, the actual cost of obtaining these documents is compounded by how much time and resources it takes to transport oneself to the appropriate governmental offices.[172]

When challenged, Republican lawmakers simply assert that these strict voter ID laws are meant to prevent voter fraud.[173] The argument goes as follows: in order to protect the integrity of the electoral system, we have

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ferring to the Supreme Court's decision in *Shelby* as a "shameful step backward"); *see also* Faizer, *supra* note 161, at 345–46 (criticizing the Court's decision in *Shelby* as misguided and claiming that the decision allows state legislatures to pass discriminatory voting laws for partisan political advantage); L. Darnell Weeden, *The Supreme Court's Rejection of the Rational Basis Standard in* Shelby County v. Holder *Invites Voter Suppression*, 33 MISS. C. L. REV. 219, 222 (2014).

166. Friedman, *supra* note 143, at 350.

167. *Id.*

168. Kelly T. Brewer, *Disenfranchise This: State Voter ID Laws and Their Discontents, A Blueprint for Bringing Successful Equal Protection and Poll Tax Claims*, 42 VAL. U. L. REV. 191, 193–94 (2007).

169. Tracey B. Carter, *College Students and State Voter ID Laws: Can I Vote in the State Where I Attend College? I Have a Student ID Card*, 45 U. MEM. L. REV. 331, 338, 374 n.201 (2014).

170. *See* Denise Lieberman, *Emphasizing Voting Rights In and Out of the Classroom: A Service Learning Model Toward Achieving a Just Democracy*, 56 ST. LOUIS L.J. 801, 813–15 (2012) (discussing how voter ID laws affect minorities, young voters, and low-income voters).

171. *Id.* at 813.

172. *Id.* at 814.

173. Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879, 880 (2014).

to prevent "unworthy voters [from] undertak[ing] the effort to vote fraudulently through voter impersonation or related bad acts."[174] The purported goal of preventing voter fraud is undercut by the fact that elections very rarely turn on so close a margin that an individual's fraudulent impersonation of another voter would have any practical effect on the outcome.[175] Similarly, in-person voting fraud is a rarer occurrence than getting struck by lightning.[176] Moreover, the focus on in-person voting fraud is not only misplaced, but is merely an effort on behalf of Republican legislators to reframe the issue as a way of passing constitutional muster[177]—a tactic eerily similar to that used by Southern Democrats during the Jim Crow era.[178] Judge Richard Posner who penned the Seventh Circuit decision upholding Indiana's voter ID law, which the Supreme Court affirmed in *Crawford v. Marion Co. Election Bd.* (Crawford), later recanted his decision, stating: "I plead guilty to having written the majority opinion . . . upholding Indiana's requirement that prospective voters prove their identity with a photo ID—a law now widely regarded as a means of voter suppression rather than fraud prevention."[179]

Even though the nation's first strict voter ID law went into effect in 2005,[180] "[strict voter ID laws] received an enormous amount of attention in the media and the legislature after the 2010 election[.]"[181] Presumptively, this is due to the Supreme Court's upholding of such laws in *Crawford*, which allowed proponents of strict voter ID laws to proliferate them without fear of a constitutional challenge. However, if strict voter ID laws were promulgated in jurisdictions subject to the VRA's preclearance requirements, the VRA still stood as a bulwark against them.[182] For example, not only did the DOJ prevent Texas's strict voter ID law from

174. *Id.* at 899–900.

175. Issacharoff, *supra* note 145, at 1377.

176. LEVITT, *supra* note 21, at 6.

177. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 196, 209 (2008) (upholding an Indiana voter ID law because its requirements were rationally related to the state's interest in preventing voter fraud).

178. J. Gerald Hebert & Danielle Lang, *Courts Are Finally Pointing Out the Racism Behind Voter ID Laws*, WASH. POST (Aug. 3, 2016), https://www.washingtonpost.com/posteverything/wp/2016/08/03/courts-are-finally-pointing-out-the-racism-behind-voter-id-laws/?utm_term=.879735a76402 [https://perma.cc/7PFK-B59C].

179. John Nichols, *Judge Who Framed Voter ID Laws as Constitutional Says He Got It Wrong*, NATION (Oct. 15, 2013), http://www.thenation.com/article/judge-who-framed-voter-id-laws-constitutional-says-he-got-it-wrong [https://perma.cc/M43U-5327].

180. *See* Brewer, *supra* note 168, at 197 (providing that Indiana became the first state to require a government-issued photo ID in 2005).

181. Daniels, *supra* note 29, at 1947.

182. *See, e.g., id.* at 1949–50 (pointing out the Department of Justice denied Texas's strict voter ID law preclearance because Texas could not prove that the law did not have a retrogressive effect on minority voters).

going into effect, it also denied South Carolina preclearance for a nearly identical bill.[183]

Doubtless, strict voter ID remains the most problematic of the recent wave of restrictive voting laws; however, Republican-led state legislatures have also promulgated others, including implementing stricter voter registration requirements and shortening early voting opportunities.[184] In 2011, for instance, Florida passed laws changing voter registration requirements and reducing early voting.[185] Voting rights advocates sued Florida in federal court claiming the laws disproportionately affected and discriminated against minorities.[186] The court agreed and blocked enforcement of the laws, with the parties later reaching a settlement.[187]

Almost immediately after the *Shelby* decision, many restrictive voting laws, which the VRA's preclearance regime effectively curtailed, began to be re-implemented by Republican-led state legislatures.[188] Over fourteen states that were subject to VRA preclearance have promulgated restrictive voting laws.[189] To be sure, civil rights activists and legal scholars across the country decried such efforts, citing various studies finding that the voter fraud these laws were intended to prevent does not actually exist.[190] Nevertheless, without the protection of federal preclearance, states essentially have free reign to implement restrictive voting laws without fear of the federal government stepping in and blocking the enforcement of such laws.[191] In fact, Texas announced that its previously blocked strict voter ID law would immediately go into effect the same

183. McKenzie Wilson, Note, *Piercing the Umbrella: The Dangerous Paradox of Shelby County v. Holder*, 39 SETON HALL LEGIS. J. 181, 192–93, 199–200 (2015).

184. Issacharoff, *supra* note 145, at 1371. Beyond laws directly regulating the manner in which citizens cast their vote, some state legislatures have utilized other tools to game the system for partisan advantage, including racial gerrymandering. Faizer, *supra* note 161, at 325–26. Because this Comment discusses laws that regulate the act of voting itself, a discussion regarding gerrymandering is beyond its scope.

185. Trahan-Liptak, *supra* note 15, at 174–75.

186. *Id.* at 175.

187. *Id.*

188. *Id.* at 169.

189. *See, e.g.*, Marinaccio, *supra* note 24, at 542–43 (pointing out Texas, North Carolina, South Carolina, Florida, Virginia, Alabama, Arizona, Arkansas, Indiana, Iowa, Mississippi, Nebraska, North Dakota, and Tennessee have implemented laws restricting access to the ballot since *Shelby*).

190. *See* LEVITT, *supra* note 21, at 3 (concluding that allegations of widespread voter fraud have no basis in reality); Faizer, *supra* note 161, at 322 (emphasizing there is no evidence of the voter fraud that voter identification laws are meant to prevent); *see also* Nyhan, *supra* note 21 (claiming there is no evidence of widespread "in-person" voting fraud).

191. Weeden, *supra* note 165, at 227.

day the *Shelby* was decided.[192] Within weeks of *Shelby*, North Carolina, in large part previously subjected to VRA preclearance, passed the most restrictive voting law in the country.[193]

North Carolina's House Bill 589 (HB 589) abolished same-day voter registration, discarded a popular program aimed at pre-registering sixteen- and seventeen-year olds, drastically reduced the early voting period, implemented a strict voter ID requirement that bans the use of student and state worker ID cards, and eliminated straight-ticket party voting, among other things.[194] This is despite the fact that the state's own statistics show that 96,000 North Carolinians used same-day registration during the 2012 general election, 56% of North Carolinians voted early, and a staggering 318,000 registered voters would lack the appropriate ID under the new strict ID requirements.[195] What is more, although African-Americans make up just 23% of registered voters in North Carolina, in 2012 they made up 28% of early voters, 33% of those who used same-day registration, and 34% of those who would lack the state-issued ID.[196]

North Carolina's restrictive voting law is now at the forefront of the voting rights debate.[197] In a familiar refrain, proponents of HB 589 claim it will help alleviate concerns about voter fraud and will only adversely affect a very small number of people.[198] On the other hand, opponents argue the law disproportionately affects Black, Hispanic, young, and low-income voters, and emphasize there is absolutely no evidence of voter fraud in the state.[199] Indeed, the real aim of the law, opponents claim, is to suppress voters whose support leans Democratic.[200]

In response to claims of voter suppression, North Carolina lawmakers amended HB 589 to provide affected voters an opportunity to cast a pro-

192. Marinaccio, *supra* note 24, at 542.

193. Weeden, *supra* note 165, at 227–28; Berman, *North Carolina*, *supra* note 163.

194. Weeden, *supra* note 165, at 227–28; Berman, *North Carolina*, *supra* note 163.

195. Berman, *North Carolina*, *supra* note 163.

196. *Id.*

197. Robert Barnes, *N.C. Case Represents Pivotal Point of Voting Debate*, WASH. POST (July 30, 2015), https://www.washingtonpost.com/politics/courts_law/outcome-of-trial-on-nc-election-law-changes-will-have-national-effect/2015/07/30/00645094-35f4-11e5-b673-1df005a0fb28_story.html?utm_term=.744a7a6517a8 [https://perma.cc/34RG-4D6P].

198. Alan Blinder & Ken Otterbourg, *Arguments Over North Carolina Voter ID Law Begin in Federal Court*, N.Y. TIMES (Jan. 25, 2016), https://www.nytimes.com/2016/01/26/us/arguments-over-north-carolina-voter-id-law-begin-in-federal-court.html [https://perma.cc/8W3Z-YGG2].

199. Weeden, *supra* note 165, at 228; Blinder & Otterbourg, *supra* note 198; Jay Michaelson, *North Carolina GOP Brags Racist Coveter Suppression Is Working—and They're Right*, DAILY BEAST (Nov. 7, 2016, 11:16 AM), http://www.thedailybeast.com/articles/2016/11/07/north-carolina-s-racist-voter-suppression-is-working.html [https://perma.cc/8RKF-Z8SQ].

200. Weeden, *supra* note 165, at 228.

visional ballot if voters submit a "reasonable impediment declaration" explaining why they lacked the appropriate identification.[201] While that added another impediment toward casting a vote, legal experts believed the amendment would improve the law's chances of surviving a legal challenge.[202] If the VRA's preclearance provisions were still in full effect, "North Carolina would have to clear all of these changes with the federal government and prove they are not discriminatory—[a] practically herculean task given the facts."[203] That not being the case, opponents of North Carolina's voting law—and others like it emerging across the country—have challenged it using the Fifteenth Amendment and section 2 of the VRA.[204]

VI. The Remaining Sections of the VRA Provide Hope, but Are Not Enough to Protect the Right to Vote in the Post-*Shelby* Landscape

Although the *Shelby* Court rendered the VRA's preclearance regime inoperable, it issued no holding as to section 5 itself, leaving the option open for Congress to update the coverage formula.[205] However, due to the partisan nature of voting rights issues and the fact that our government is fractured along partisan lines, the prospects of Congress updating section 4(b)'s coverage formula are exceedingly dim.[206] Nevertheless, *Shelby* also left untouched sections 2 and 3 of the VRA, and opponents to restrictive voting laws can also challenge such laws on constitutional grounds.[207]

A. *Section 2 of the VRA*

Section 2 of the VRA prohibits discrimination in voting nationwide and allows for the DOJ or private individuals to initiate a cause of action challenging voting standards, practices, or procedures that discriminate

201. Blinder & Otterbourg, *supra* note 198.

202. *Id.*

203. Berman, *North Carolina*, *supra* note 163.

204. Blinder & Otterbourg, *supra* note 198; Hans von Spakovsky, *Election Reform in North Carolina and the Myth of Voter Suppression*, Heritage Found. (July 30, 2015), http://www.heritage.org/research/reports/2015/07/election-reform-in-north-carolina-and-the-myth-of-voter-suppression [https://perma.cc/8RKF-Z8SQ].

205. Shelby Cty. v. Holder, 570 U.S. __, 133 S. Ct. 2612, 2631 (2013).

206. *See* Issacharoff, *supra* note 145, at 1368 (exploring how both political parties and the electorate have become increasingly polarized in recent years); Marinaccio, *supra* note 24, at 546 (claiming the divisions in Congress are such that it is highly unlikely they could agree on something as important and divisive as voters' rights).

207. Wilson, *supra* note 183, at 188.

"on account of race or color."[208] In effect, section 2 is a codification of the Fifteenth Amendment and was "intended to be the bite to the Fifteenth Amendment's bark."[209] Additionally, Congress amended section 2 during the 1982 Reauthorization to extend protection to language minority groups.[210] To challenge a voting law successfully under section 2, a plaintiff need not show discriminatory intent but must prove that under the "totality of the circumstances of the local electoral process, the standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process."[211]

Section 2 challenges to post-*Shelby* voting laws initially appeared futile, but they picked up steam during the summer leading into the 2016 Presidential election.[212] As to its limitations, section 2 shifts the burden from the jurisdiction seeking to restrict access to the polls, which was the case under the VRA's preclearance regime, to the plaintiff.[213] Not only does such a burden come with the inherent costs and limitations of case-by-case-litigation, the lawsuits are generally initiated only *after* a given jurisdiction implements the discriminatory voting law being challenged.[214] Moreover, courts faced with vote denial challenges have consistently held that a mere showing of a disproportionate impact on a given racial minority is not sufficient to pass section 2's "results" test.[215]

In the leading case involving a section 2 challenge, *Frank v. Walker*,[216] the Seventh Circuit held a Wisconsin voter ID law was valid because the

208. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973a (2012)).

209. Marinaccio, *supra* note 24, at 551.

210. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973a (2012)); Leadership Conference, *History of the VRA*, CIVILRIGHTS.ORG, http://www.civilrights.org/voting-rights/vra/history.html (last visited Jan. 16, 2017) [https://perma.cc/2VY8-KRY3].

211. *Section 2 of the Voting Rights Act*, U.S. DEPT. OF JUST., https://www.justice.gov/crt/section-2-voting-rights-act (last updated Aug. 8, 2015) [https://perma.cc/4YMW-V9RK] (internal quotations omitted).

212. *See, e.g.*, N.C. St. Conf. of the NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016) (holding North Carolina's election law violates section 2 of the VRA as well as the Fourteenth Amendment); Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016) (holding Texas's Voter ID law could not withstand a section 2 challenge as having a racially discriminatory impact); *see also* Marinaccio, *supra* note 24, at 553 (discussing the limitations of section 2 challenges to voting laws).

213. Marinaccio, *supra* note 24, at 551.

214. Hair, *supra* note 26; *see* Vandewalker & Bentele, *supra* note 20, at 140 (stating discriminatory laws normally remain in effect when a lawsuit against such laws are pending).

215. Vandewalker & Bentele, *supra* note 20, at 129.

216. Frank v. Walker, 768 F.3d 744 (7th Cir. 2014).

law was rationally related to the legitimate governmental interest in preventing in-person voting fraud and, while there were impediments to getting the required identification, such inconvenience did not qualify as a "substantial burden . . . over the usual burdens of voting."[217]

Nevertheless, the summer of 2016 showed that section 2 challenges to discriminatory voting laws have much promise.[218] Indeed, in a span of two weeks, several federal courts faced with section 2 challenges struck down or limited the implementation of six different state voting laws.[219] For instance, federal courts have struck down or issued injunctions on strict voter ID laws in Texas, North Carolina, Wisconsin, and North Dakota.[220] Such decisions have some voting rights advocates feeling cautiously optimistic,[221] while others have claimed that federal judges are "fed up with being treated like dolts by Republican legislators who lie through their teeth about the intent of draconian voting restrictions."[222]

B. *Section 3 of the VRA*

Section 3 of the VRA allows challengers to voting laws to "bail-in" jurisdictions to section 5 federal preclearance if the challengers can prove discriminatory intent on behalf of lawmakers.[223] That is, if a court finds an intentional violation under the Fourteenth or Fifteenth Amendment or the VRA, and such violation "justifies equitable relief," it may require

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217. *Id.* at 745–46 (quoting Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 198 (2008)).

218. *See, e.g.*, Ari Berman, *6 Major GOP Voting Restrictions Have Been Blocked in 2 Weeks*, NATION (Aug. 1, 2016), https://www.thenation.com/article/5-major-gop-voting-restrictions-were-blocked-in-10-days [https://perma.cc/BY26-476G] [hereinafter Berman, *Voting Restrictions*] (reporting several courts struck down or significantly limited restrictive voting laws in Texas, Kansas, Wisconsin, North Carolina, Michigan, and North Dakota).

219. *Id.*

220. *Id.*; *see also* Matt Ford, *A Victory for Voting Rights in Texas*, ATLANTIC (July 20, 2016), http://www.theatlantic.com/news/archive/2016/07/texas-voter-id-ruling/492272 [https://perma.cc/SPU7-W8WA] (heralding the Fifth Circuit's decision to strike down Texas's voter ID law as "a major victory for voting-rights activists"); Michael Wines, *Federal Judge Bars North Dakota from Enforcing Restrictive Voter ID Law*, N.Y. TIMES (Aug. 1, 2016), http://www.nytimes.com/2016/08/02/us/north-dakota-voter-identification-law.html [https://perma.cc/UJ6G-4LSQ] (noting a federal judge issued an injunction to keep North Dakota's strict voter ID law from disenfranchising Native Americans).

221. *See* Berman, *Voting Restrictions*, *supra* note 218 (stating "seventeen states still have new voting restrictions in place" in time for the 2016 presidential election).

222. Mark Joseph Stern, *Voting Rights on the March*, SLATE (Aug. 1, 2016, 4:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/08/why_courts_are_striking_down_voting_rights_restrictions_right_now.html [https://perma.cc/UX26-PKYJ].

223. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. §§ 1973b–c (2012)).

the jurisdiction to have its proposed changes, and any future changes, reviewed by the court itself or by the DOJ.[224] Still, section 3 is limited because challengers have the burden of proving a high standard of intentional discrimination, which is exceedingly "difficult, costly, and time-consuming."[225] Furthermore, section 3 has rarely been used to combat discriminatory voting laws because of the heavy burden it places on plaintiffs.[226] To demonstrate, within the first four decades of the VRA's enactment, section 3 has only been utilized eighteen times.[227]

VII. UNIVERSALISM AS A CRITICAL TOOL IN THE FIGHT AGAINST POST-*SHELBY* VOTING LAWS

A. *What Is Universalism and How Does It Benefit Voting Rights Advocates?*

Universalism is a term coined by University of Michigan Law School Professor Samuel R. Bagenstos.[228] It is defined as an approach to civil rights law "that either guarantees a uniform floor of rights or benefits for all persons, or, at least, guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes (e.g., race, sex) highlighted by our antidiscrimination laws."[229]

First, universalism provides tactical advantages in that such an approach may have an easier time gaining political support and avoiding political backlash.[230] In the realm of workplace protection and social welfare policy, for example, researchers have found that broad-based, universalistic approaches often fare well politically because it "help[s] to overcome political resistance born of 'equality fatigue' and resistance to identity politics."[231] Moreover, evidence suggests judges and juries tend to interpret targeted civil rights laws narrowly while they tend to interpret and apply universalistic laws broadly.[232] This is partly because such judicial actors are wary of legislation that divides the population by race,

224. Vandewalker & Bentele, *supra* note 20, at 139–40; Paul M. Wiley, *Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. 2115, 2129–30 (2014).

225. Wilson, *supra* note 183, at 202.

226. *See* N.C. St. Conf. of the NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016) (stating the remedies available under Section 3 of the VRA are rarely used).

227. Rapoport, *supra* note 27.

228. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838, 2840 (2014).

229. *Id.* at 2842.

230. *Id.* at 2848.

231. *Id.* at 2848–49.

232. *Id.* at 2848.

class, and gender.[233] Additionally, judges and juries tend to define "discrimination" narrowly because, according to psychological literature, "people consistently think of discrimination as something that involves individual fault and discriminatory intent on part of the perpetrator."[234]

With regard to universalism's substantive advantages vis-à-vis voting rights, universalism may provide a more effective way to address discrimination because it provides for a uniform prohibition on certain discriminatory practices without requiring proof of discrimination.[235] As Professor Bagenstos put it:

> [T]he existence of persistent racially polarized voting makes it difficult as a practical matter to disentangle racial motivations for election-law changes from partisan or political motivations for those changes. As a result, many voting restrictions that are in fact motivated by race will predictably escape liability under a law that prohibits voting discrimination, because it will be difficult for a plaintiff to prove that race, rather than politics, was the true motivation.[236]

B. *Critiques of the Universalist Approach*

Like Professor Bagenstos, I believe civil rights advocates should refrain from adopting a purely universalistic approach and instead should adopt a mixture of universalistic and particularistic strategies.[237] This is because universalism is limited and presents difficulties of its own—namely that the arguments supporting its tactical and substantive advantages are ambiguous.[238] That is, universalism may work better in one context but may be counterintuitive in another.[239]

According to Professor Bagenstos, whether universalism's tactical advantages will be effective depends largely on a few factors: (1) the contentiousness of targeted approaches at a given time and place; (2) whether the universalist alternatives are not seen as over-burdensome on regulated entities; and (3) whether political and judicial actors do not understand them as mere replacements of targeted measures.[240]

On the other hand, whether universalism's substantive advantages materialize depends on whether: (1) the group-based discrimination in ques-

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233. *Id.* at 2849–50.
234. *Id.* at 2850.
235. *Id.* at 2857.
236. *Id.* at 2856 (emphasis omitted).
237. *See id.* at 2841 ("[A] mix of universalistic and particularistic approaches is likely to offer the most traction in addressing [voting rights] problems.").
238. *Id.* at 2862.
239. *Id.*
240. *Id.* at 2855.

tion is difficult to prove; (2) the structural background transcends the underlying discrimination; (3) the protections enjoyed by the beneficiaries of targeted laws are not diluted; and (4) they "entrench existing group-based inequalities."[241]

Notwithstanding Professor Bagenstos' critiques of universalism, such an approach provides obvious benefits for voting rights advocates. Although efforts to protect minority voting rights have shown promise in recent months, they are also limited, near impossible, or otherwise marred by "the particular legal and political freight of race."[242] As such, voting rights advocates should adopt sweeping, generalized reforms to ease access to the ballot in addition to utilizing the VRA.

C. *Automatic Voter Registration as a Universalist Approach to Expanding Suffrage*

A prime example of a universalist approach to expanding suffrage rights is the call for automatic voter registration both at the state and federal level. Although the idea is not exactly novel,[243] developments in Oregon and California represent a change in how advocates are approaching the issue of protecting voting rights.[244]

While Oregon was the first state to pass an automatic voter registration bill in the United States,[245] the issue has been given greater attention with the passage of California's Assembly Bill 1461 (AB 1461), which is modeled after Oregon's Bill.[246] In 2015 alone, twenty state legislatures

241. *Id.* at 2862.

242. Issacharoff, *supra* note 145, at 1409.

243. *See, e.g.*, Universal Voter Registration Act of 1977, S. 1072, 95th Cong. (1977) (proposing a universal voter registration program at the federal level).

244. *See* Damon L. Daniels, *More Than a Dozen States Eye Automatic Voter Registration*, AM. PROSPECT (Dec. 16, 2015), http://prospect.org/blog/checks/more-dozen-states-eye-automatic-voter-registration [https://perma.cc/H3DM-GUFE] ("The push for automatic registration comes at a time when voting rights advocates are contending with . . . a variety of barriers to the polls.").

245. Jeff Guo, *It's Official: New Oregon Law Will Automatically Register People to Vote*, WASH. POST (Mar. 17, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/17/its-official-new-oregon-law-will-automatically-register-people-to-vote [https://perma.cc/SA9V-RAN8].

246. *See* Press Release, California Secretary of State Alex Padilla, Governor Brown Signs New Motor Voter Act (June 24, 2015), http://admin.cdn.sos.ca.gov/press-releases/2015/pdf/ap15-075.pdf [https://perma.cc/58BW-UFQ2] (reporting on the law's passage); *see also* Melanie Mason, *Here's How California's New Voter Registration Law Will Work*, L.A. TIMES (Oct. 16, 2015, 3:00 AM), http://www.latimes.com/politics/la-me-pol-ca-motor-voter-law-20151016-html-htmlstory.html [https://perma.cc/2LAD-DYCH] ("California has received a lot of attention" due to the state's new automatic voter registration law).

and the District of Columbia introduced similar bills.[247] In fact, since Oregon and California have passed their automatic voter registration laws, Connecticut, Vermont, and West Virginia have followed suit.[248] Additionally, three automatic voter registration bills were introduced at the federal level since 2015.[249] The thrust of these laws is very similar: citizens who interact with their local Department of Motor Vehicles (DMV) office are automatically registered to vote unless they opt-out.[250] The same is true with the federal legislation, except the registration is applicable only to federal elections.[251] If voting rights advocates can pressure state legislatures to pass similar measures, the United States could soon join a majority of civilized democracies in the world in providing for automatic voter registration.[252] Actually, just over a year after Oregon passed its automatic voter registration law, the state now boasts

247. *Automatic Voter Registration*, BRENNAN CTR. FOR JUST. (Nov. 9, 2016), https://www.brennancenter.org/analysis/automatic-voter-registration [https://perma.cc/BWK4-79MD]. New Jersey was one of the states that proposed automatic voter registration in 2015, but Governor Chris Christie vetoed it. Samantha Lachman, *Chris Christie Vetoes Election Reform Bill in New Jersey*, HUFFINGTON POST (Nov. 9, 2015, 2:59 PM), http://www.huffingtonpost.com/entry/chris-christie-automatic-registration_us_5640d98ce4b0307f2cae3e5e [https://perma.cc/XUN6-MV26].

248. Jacquie Lee & Mercy Yang, *This Bill Could Automatically Register 50 Million People to Vote*, HUFFINGTON POST (July 15, 2016, 8:08 PM), http://www.huffingtonpost.com/entry/automatic-voter-registration-bill_us_5789563ae4b08608d334a58e [https://perma.cc/S645-4H6Y].

249. *See* Automatic Voter Registration Act of 2016, H.R. 5779, 114th Congress (2016) (outlining Pennsylvania Representative Robert Brady's House bill to require States to automatically register eligible voters to vote in elections for Federal office); Raising Enrollment with a Government Initiated System for Timely Electoral Registration (REGISTER) Act of 2015, S. 1970, 114th Congress (2015) (outlining Vermont Senator Bernie Sanders' Senate bill to establish a national procedure for automatic voter registration for elections for federal office); Automatic Voter Registration Act, H.R. 2694, 114th Cong. (2015) (laying out Rhode Island Representative David N. Cicilline's House bill to amend the VRA to require each State to ensure the automatic registration to vote in federal elections of any individual who provides identifying information to the State's motor vehicle authority).

250. *See* Guo, *supra* note 245 (stating voters will be automatically registered using information collected at the DMV); Mason, *supra* note 246 (stressing the "key difference" between the California and Oregon laws involves when potential voters can opt-out of automatic registration).

251. Automatic Voter Registration Act of 2016, H.R. 5779, 114th Congress § 2 (2016); Raising Enrollment with a Government Initiated System for Timely Electoral Registration (REGISTER) Act of 2015, S. 1970, 114th Congress §§ 2(a) and 8(b) (2015); Automatic Voter Registration Act, H.R.2694, 114th Cong. § 5(c) (2015).

252. *See* THOMAS LOPEZ, THE CASE FOR AUTOMATIC PERMANENT VOTER REGISTRATION 9 (2016), https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf [https://perma.cc/5SV3-UP7M] (claiming the United States is "one of only four [democratic countries in the world] that puts the responsibility for registering solely on the voter").

the highest voter registration rate in the country—having nearly quadrupled the rate from previous years.[253]

The benefits of an automatic voter registration system are many.[254] For example, universal registration adds millions of eligible voters to the rolls on a permanent basis, saves taxpayer money, increases accuracy, and reduces voter fraud.[255] Many current voter registration systems are outdated and are "plagued with errors, which creates needless barriers to voting, [voter] frustration, and long lines at the polls."[256] Automatic voter registration systems allow for more accurate and current voter rolls, which makes registration systems easier to maintain because they allow for "real-time" updating of voter rolls and reduce the possibility for human error.[257] Also, studies show that a paper-based registration system is substantially more expensive to run than using electronic means.[258]

Aside from automatic voter registration, in recent years the push to make voting easier has gained momentum.[259] Some voting rights advocates have made the case for online voting,[260] while others increased calls for the federal government to make Election Day a national holiday, so as to make it easier for people to get to the polls.[261]

253. Adam Gitlin & Daniel Nesbit, *Oregon Leading Nation in Voter Registration*, BRENNAN CTR. FOR JUST. (July 6, 2016), https://www.brennancenter.org/blog/oregon-leading-nation-voter-registration [https://perma.cc/ZM9E-CUWB].

254. *See, e.g.*, LOPEZ, *supra* note 252, at 1 (laying out the benefits of automatic voter registration).

255. *Id.*

256. *Id.* at 4.

257. *Id.* at 10.

258. *See id.* at 5 (referring to a Pew poll showing that Oregon's 2008 paper-based system cost taxpayers $4.11 per registered voter compared to Canada's electronic system, which cost 35 cents per active voter).

259. *E.g.*, Ari Berman, *How to Make Voting Easier*, NATION (May 20, 2013), http://www.thenation.com/article/how-make-voting-easier [https://perma.cc/QGK2-NK5G] (citing Colorado as a state actively working to make it easier to vote); Editorial Board, *Government Has to Make Voting Easier*, WASH. POST (Feb. 2, 2014), https://www.washingtonpost.com/opinions/government-has-to-make-voting-easier/2014/02/02/ae99345a-8875-11e3-916e-e01534b1e132_story.html [https://perma.cc/6XZ5-NK6C] (advocating for measures that would make the process of voting easier).

260. *E.g.*, Logan T. Mohs, *The Constitutionality and Legality of Internet Voting Post-Shelby County*, 13 DUKE L. & TECH. REV. 181, 186 (2015).

261. *E.g.*, Steven Rosenfeld, *Voting Rights Activists Launch Campaign to Pressure Obama to Declare Election Day 2016 a Federal Holiday*, ALTERNET (Nov. 6, 2015), http://www.alternet.org/civil-liberties/voting-rights-activists-launch-campaign-pressure-obama-declare-election-day-2016 [https://perma.cc/9XFK-VQK8].

VIII. Conclusion

The battle over voting rights has been around since the dawn of our Republic. There have always been, and probably always will be, portions of the citizenry whose goal it is to stop certain people from exercising their most fundamental of rights—whether for racial, social, or political reasons. There to meet them at every turn are the courageous souls who understand that our system of representative democracy and our pluralistic society run best when citizens of all stripes have the opportunity to make their voices heard. After decades of progress, blood, sweat, and tears, our federal government responded with the Voting Rights Act of 1965—one of the single most important pieces of legislation in our nation's history.

After opponents of the VRA ultimately succeeded in rendering the VRA's most powerful tool useless, the progress voting rights advocates have made thus far is being rolled back.[262] This problem is further exacerbated due to the intensely partisan nature of voting rights and the partisan-gridlock that plagues our government.[263] With little hope of seeing the VRA's coverage formula updated, and given the limitations of the remaining sections of the VRA in combatting restrictive voter ID laws, advocates are beginning to adopt universalist approaches toward making it easier to vote. While universalism has its limitations, voting rights advocates have no choice other than to take an "all of the above" approach in order to effectuate their goal of protecting voting rights in the post-*Shelby* landscape.

262. *See* Part IV *supra*.
263. *See* note 25 *supra*.