

Savior Through Severance: A Litigation-Based Response to *Shelby County v. Holder*

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INTRODUCTION

The Voting Rights Act of 1965¹ (“VRA” or “Act”) is widely perceived to be the most successful civil rights statute ever passed by Congress.² First enacted five decades ago, the Act sought to combat nearly a century of systematic resistance to the Fifteenth Amendment by instituting an aggressive regulatory scheme designed to remedy minority disenfranchisement. The “crown jewel”³ of the Voting Rights Act is Section 5,⁴ which requires jurisdictions that fall within a coverage formula laid out in Section 4(b)⁵ to obtain federal “preclearance” whenever they “enact or seek to administer” a

¹ 42 U.S.C. §§ 1973 to 1973bb-I (2012).

² NAT’L COMM’N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982–2005 12 (2006) (“Forty years after its passage the Voting Rights Act is widely considered to be the most successful civil rights law in American history.”); Peyton McCrary et al., *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 276 n.1 (2005).

³ See Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013, 3:50 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html, archived at <http://perma.cc/5JVJG-EG5R>.

⁴ 42 U.S.C. § 1973c (2012).

⁵ *Id.* § 1973b(b), *invalidated by Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

change in any of their voting practices or procedures.⁶ In order to obtain preclearance, a jurisdiction must demonstrate that the change in its law does not have the purpose and will not have the effect of discriminating on the basis of race, color, or membership in a language minority group.⁷

Section 5 is strong medicine. It reverses one of the fundamental organizing principles of our model of government: namely, “that state and local enactments are presumed legal and enforceable under the Constitution and federal law unless and until a court determines that an enactment violates a standard or rule enacted by the national government, and prohibits its implementation.”⁸ Nevertheless, in 1965, Congress was justified in “shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims” in light of the widespread and persistent discrimination against African Americans in voting.⁹

The 1965 coverage formula that was used to subject jurisdictions to federal preclearance was “reverse-engineered” to capture the Southern states with the most egregious histories of racial discrimination in voting.¹⁰ To that end, coverage was triggered on the basis of two findings: (1) that a jurisdiction had employed a “test or device”¹¹ as a prerequisite to voting in 1964, and (2) that a jurisdiction had low voter registration or turnout in the 1964 presidential election.¹² In 1970 and 1975, Congress amended this provision to incorporate election data from 1968 and 1972, respectively, but it did not update the formula after that point.

Over the years, however, Congress did take steps to ease the federalism costs that the VRA imposed on the states. Specifically, in 1982, Congress made it easier to satisfy the “bailout” standard, which permits covered jurisdictions to obtain a declaratory judgment exempting themselves from the special remedial provisions of the Act — including federal preclearance — if they can demonstrate that they have had a clean record for the past ten years.¹³

On June 25, 2013, the Supreme Court issued its decision in *Shelby County v. Holder*,¹⁴ ruling that the coverage formula in Section 4(b) of the Voting Rights Act is unconstitutional and “can no longer be used as a basis for subjecting jurisdictions to preclearance” under Section 5 of the Act.¹⁵

⁶ *Id.* § 1973c(a).

⁷ See 28 C.F.R. § 51.54(a)–(b) (2014).

⁸ Mark A. Posner, *The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, As Intended By Congress*, 1 DUKE J. CONST. L. & PUB. POL’Y 79, 87 (2006).

⁹ See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (upholding the constitutionality of several provisions of the Voting Rights Act).

¹⁰ See *Shelby Cnty.*, 133 S. Ct. at 2628; Transcript of Oral Argument at 19, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96).

¹¹ See *infra* note 59.

¹² See 42 U.S.C. § 1973b(b) (2012).

¹³ See 42 U.S.C. § 1973b(a).

¹⁴ 133 S. Ct. 2612 (2013).

¹⁵ *Id.* at 2631.

The Court reasoned that by refusing to update the coverage formula, Congress had failed to account for “current conditions” of discrimination in covered jurisdictions and had denied states the “equal sovereignty” they deserve under the Tenth Amendment.¹⁶

Proponents contend that the decision was long overdue because “things have changed” in the South and preclearance is no longer warranted.¹⁷ Critics argue that voting discrimination is a present-day reality and that the decision to paralyze Section 5 was an unjustifiable setback for minority voting rights.¹⁸ The states, for their part, did not waste any time in responding to the decision. In the four months after *Shelby County* was decided, sixteen states enacted restrictions on voting that most Republicans believe will root out election fraud, but which most Democrats fear will disenfranchise minorities.¹⁹ Spurred to life by these developments, advocates for reform are now investigating responses to the Court’s decision, and scholars have suggested a number of ways that Congress might legislate to restore Section 5’s protections.²⁰

This Article offers a new pathway for responding to *Shelby County*. In particular, I suggest a litigation-based approach aimed at immediately restoring some of the safeguards that *Shelby County* threw into doubt, including the federal observer program in Section 8, the language minority requirements in Section 4(f)(4), and the “bailout” procedure in Section 4(a)(1) of the Voting Rights Act. A litigation-based approach would avoid the need for congressional action, which is important given the current political climate.²¹

¹⁶ *Id.* at 2629–30.

¹⁷ *Id.* at 2625. See also Abigail Thernstrom, Op-Ed., *A Vindication of the Voting Rights Act*, WALL ST. J. (June 26, 2013), <http://online.wsj.com/articles/SB10001424127887323873904578569453308090298>, archived at <http://perma.cc/V53U-Q2YJ>.

¹⁸ See, e.g., Att’y Gen. Eric Holder, Remarks on the Supreme Court Decision in *Shelby County v. Holder* (June 25, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130625.html>, archived at <http://perma.cc/U52H-FDAY>.

¹⁹ See Kara Brandeisky et al., *Everything That’s Happened Since Supreme Court Ruled on Voting Rights Act*, PRO PUBLICA (Nov. 1, 2013, 11:24 AM), <http://www.propublica.org/article/voting-rights-by-state-map>, archived at <http://perma.cc/EE3M-Y34W>; Evan Perez, *Justice Department Sues North Carolina Over Voting Law*, CNN (Sept. 30, 2013, 6:01 PM), <http://www.cnn.com/2013/09/30/us/north-carolina-voting-lawsuit>, archived at <http://perma.cc/SQM2-QBE4> (“Democrats said that [the ID law] . . . disproportionately would affect minority voters. . . . Conservatives have pushed such photo ID requirements in many states, saying they would prevent vote fraud.”).

²⁰ See, e.g., Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 122 (2013) (suggesting a new disclosure requirement that would be paired with a regime of ex post challenges under Section 2); Travis Crum, *An Effects-Test Pocket Trigger?*, ELECTION LAW BLOG (July 8, 2013, 8:36 AM), <http://electionlawblog.org/?p=52659>, archived at <http://perma.cc/NQ5M-TRKY> (suggesting Congress amend Section 3 to authorize bail-in for violations of the Section 2 results test); Rick Pildes, *One Easy, But Powerful, Way to Amend the VRA*, ELECTION LAW BLOG (June 28, 2013, 6:53 AM), <http://electionlawblog.org/?p=52349>, archived at <http://perma.cc/4ZPQ-VJFH> (suggesting Congress amend Section 3 to authorize bail-in for violations of the National Voter Registration (Motor Voter) Act, Help America Vote Act, or Section 2 of the VRA).

²¹ See Ed O’Keefe & Sean Sullivan, *Senate Abruptly Wraps Up, Capping Least Productive Congress in Modern History*, WASH. POST (Dec. 18, 2014), <http://www.washingtonpost.com/>

Restoring these provisions would also provide a check on discriminatory behavior at polling locations, which is all the more necessary in light of the recent proliferation of voting restrictions, including voter identification laws.²²

The federal observer program (Section 8), bilingual election materials requirement (Section 4(f)(4)), and bailout procedure (Section 4(a)(1)) each incorporate the coverage formula in some respect, but their invalidation does not necessarily follow from the reasoning of *Shelby County*. They do not impose anywhere near the federalism costs of Section 5, and the federal observer program in particular reasonably distinguishes between the states based upon contemporaneous evidence of voting discrimination. Further, none of these provisions were at issue in *Shelby County*. As a consequence, the Court never considered them, and the opinion does not expressly apply its ruling to, or even discuss, the other sections of the Voting Rights Act. And importantly, the Court “prefer[s] . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.”²³ Accordingly, courts could permissibly conclude that Section 4(b) is only unconstitutional as applied to Section 5, and that the Court’s holding in *Shelby County* should be narrowly interpreted to “leav[e] other applications in force.”²⁴

Notwithstanding arguments concerning the independent constitutionality of these provisions, this Article contends that the covered jurisdictions can be “re-covered” for the purpose of federal monitoring by severing the coverage formula from Section 8 of the VRA, thereby expanding the geographic scope of that program nationwide. Under Section 8, the Attorney General can dispatch federal observers to a particular polling location only after a two-part inquiry has been satisfied. First, the political subdivision must fall within the coverage formula in Section 4(b) of the Act. Second, the Attorney General must have either received “written meritorious complaints” that race-based voting discrimination is likely in that location, or

politics/another-republican-upends-the-senates-year-end-plans/2014/12/16/127292d8-8559-11e4-9534-f79a23c40e6c_story.html, archived at <http://perma.cc/4AN5-MCVR>.

²² See Issacharoff, *supra* note 20, at 103 (“[T]he issue of access to the franchise returned to the fore in recent years as part of a partisan effort to restrict that access in order to diminish the political impact of vulnerable constituencies.”); John G. Tamasitis, “*Things Have Changed in the South*”: How Preclearance of South Carolina’s Voter Photo ID Law Demonstrates that Section 5 of the Voting Rights Act Is No Longer a Constitutional Remedy, 64 S.C. L. REV. 959, 963 (2013) (“In 2012 alone, fourteen states sought to enact voter ID requirements where none had existed before, and ten states sought to strengthen laws already in place.”); Ari Berman, *Jim Crow II: A History of the Fight for Voting Rights and the Movement to Restrict Them Once Again*, THE NATION (Oct. 22, 2013), <http://www.thenation.com/article/176781/jim-crow-ii?page=0,2>, archived at <http://perma.cc/P2MS-W97X> (“From 2011 to 2012, 180 new voting restrictions were introduced by Republicans in forty-one states and passed in key battlegrounds like Ohio, Florida, Pennsylvania and Wisconsin . . .”).

²³ *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) (citations omitted).

²⁴ *Id.* at 329.

determined after investigation that federal observers are “necessary” to enforce the guarantees of the Fourteenth and Fifteenth Amendments. Even if the first part of the inquiry — the coverage formula — is severed from the two-part procedure, Section 8 continues to be valid because it would permit the Attorney General to dispatch federal observers only in a manner that *still* comports with constitutional demands — namely, after receiving evidence of “current need” in a particular political subdivision. Removing the coverage formula would also expand the federal observer program nationwide, thereby eliminating any concern about denying the states “equal sovereignty.” And there is good reason to believe that this result is exactly what Congress would want, which is the central determinant in severability analysis.

The statutory bailout mechanism in Section 4(a)(1) only survives if *Shelby County*’s invalidation of Section 4(b) does not extend to either Section 8 or 4(f)(4). This conclusion is based on the fact that litigants must have standing in a federal court before they may obtain a declaratory judgment entitling them to bailout under Section 4(a). Here, standing requires that the federal government be capable of imposing some burden on the jurisdiction — either federal observer coverage or the bilingual election material requirement — that a declaratory judgment under the bailout procedure would relieve. Thus, retaining the federal observer program would afford standing in a bailout proceeding to any jurisdiction subject to the possibility of federal monitoring. If the coverage formula were severed from Section 8, it would also need to be severed from the bailout procedure in Section 4(a)(1) in order to afford standing on a nationwide basis. But this result also would be consistent with congressional intent. The bailout procedure is a safety valve permitting exemption from the special remedial provisions of the VRA. Its scope is designed to mirror the scope of the federal observer program.

Finally, from a normative standpoint, courts *should* read *Shelby County* to retain the federal observer program and thus the bailout procedure. A nationwide federal observer program would be helpful in the post-*Shelby County* world in at least five ways: (1) federal observer reports would serve as an efficient source of credible evidence in litigation to enforce the Voting Rights Act and the Fourteenth and Fifteenth Amendments; (2) a nationwide federal observer program would, by definition, document the current conditions of discrimination throughout the country, which could then be used to help fashion a new coverage formula; (3) federal observers would help ensure that poll workers correctly administer applicable prerequisites to voting; (4) the presence of federal observers would deter discriminatory behavior by citizens and election officials; and (5) a nationwide federal observer program would strengthen the legitimacy of our federal election system and increase voter confidence in the accuracy of results.

Moreover, the bailout mechanism should be preserved so that jurisdictions continue to have an incentive to eliminate practices that deny or abridge minority political participation, and have the opportunity to distance

themselves from the stigma associated with subjection to the special remedial provisions.²⁵ Although the Voting Rights Act is largely focused on preventing backsliding, the bailout provision is different — it requires jurisdictions affirmatively to *improve* accessibility to the electoral process for minorities before they can receive the government’s commendation for their good behavior. And as the Court has stated, “the Voting Rights Act, as properly interpreted, should encourage the *transition* to a society where race no longer matters.”²⁶ Preserving the bailout procedure would directly advance that objective.

To be sure, the litigation strategy explored in this Article would not fully restore the safeguards of Section 5. Federal preclearance was largely used to curb redistricting plans and other practices that result in “vote dilution,”²⁷ whereas federal monitoring seeks to improve access to the polls, thereby remedying “vote denial.”²⁸ Federal preclearance was also a prophylactic remedy, a “command-and-control form of *ex ante* prohibitions” designed to anticipate and prohibit all deleterious changes.²⁹ The approach offered here — nationwide expansion of the federal observer program through severance of the coverage formula — is an *ex post* liability regime that utilizes private complaints as a basis for imposing federal monitors in locations where they can facilitate after-the-fact enforcement.³⁰ Notably, however, this approach may be more efficient than the preclearance regime, especially given that it relies on bottom-up reporting by private actors with direct knowledge of local conditions to surgically target after-the-fact en-

²⁵ See Issacharoff, *supra* note 20, at 101 (“The extraordinary feature of Section 5 was not just its administrative reach but its labeling of part of the country as being unremedied from its past — a stigma that attached to the South but not to the covered parts of New York or New Hampshire that were not implicated in the noxious legacy of Jim Crow.”).

²⁶ *Georgia v. Ashcroft*, 539 U.S. 461, 490–91 (2003) (emphasis added).

²⁷ See Rick Pildes & Dan Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality*, ELECTION LAW BLOG (Aug. 19, 2013, 4:39 AM), <http://electionlawblog.org/?p=54521>, archived at <http://perma.cc/M7BQ-2LYQ> (showing that thirty-nine of the seventy-six objections interposed under Section 5 between 2000 and 2012 concerned redistricting issues and that only five of the seventy-six objections addressed voter registration or eligibility issues). I note, however, that the deterrent effect of Section 5 could have been preventing the enactment of vote denial measures in the first place.

²⁸ See James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 230–33 (2007). Vote denial occurs when a person is prevented from casting their vote or from having their vote counted. Measures potentially falling into this category include literacy tests, moral character requirements, denial of voter registration materials, limited registration hours, slow registration processing, voter purges, threats, intimidation, violence, and social pressure against applicants, including loss of employment or eviction.

²⁹ Issacharoff, *supra* note 20, at 116, 118.

³⁰ After-the-fact enforcement refers to the use of federal observer reports to establish liability under other constitutional or statutory provisions, including Section 2 of the Voting Rights Act. The approach offered here is similar to preclearance in the sense that federal observers often have a deterrent effect. See Tucker, *supra* note 28, at 231.

forcement.³¹ And because of this efficiency, it can be applied more broadly than the preclearance regime, which was largely limited to the South.

Ultimately, the litigation strategy offered here could save a provision that affords crucial evidence in voting rights litigation, ensures proper administration of applicable election procedures, deters misbehavior at the polls, strengthens public confidence in the legitimacy of our election system, and provides information that could be used to fashion a new coverage formula for Section 5. It is also far more likely to provide short-term results and should therefore serve as an interim strategy designed to complement the legislative campaign.³²

In the remainder of this Article, I will assess the continued vitality of the federal observer program in Section 8, the language minority requirements in Section 4(f)(4), and the bailout mechanism in Section 4(a)(1) of the Voting Rights Act. Part I describes federal preclearance and places it within its historical context. Understanding preclearance is important because the validity of Sections 8 and 4(f)(4) is best assessed through juxtaposition with Section 5. Part I also provides background on the coverage formula, the statutory text in Sections 8, 4(f)(4), and 4(a)(1) of the VRA, and the cases leading up to *Shelby County*. Part II describes the Supreme Court's reasoning in *Shelby County*, which affords the doctrinal framework for evaluating the federal observer program and the language minority requirements in the Voting Rights Act. It then explores the scope of the Court's facial invalidation, the Supreme Court's preference for narrow constitutional holdings, and the severability of each provision. It concludes that the federal observer program and bailout procedure can be independently retained or severed, but that the language minority requirements in Section 4(f)(4) likely cannot survive. Part III explains why a covered jurisdiction might continue to desire bailout in light of the foregoing analysis. It also reviews the justiciability hurdles that would arise if neither Section 8 nor 4(f)(4) can be retained. Part IV argues that courts *should* interpret *Shelby County* to preserve the federal observer program and describes five advantages stemming from that result. Finally, Part V argues that courts *should* interpret *Shelby County* in a manner that preserves bailout so that jurisdictions continue to have an incentive to eliminate practices that deny or abridge minority political participation.

³¹ See Issacharoff, *supra* note 20, at 119 ("Liability is generally superior to ex ante regulation where harms do not fall into predictable patterns and will typically be more efficient where private parties have equal or superior knowledge about costs and risks as compared to third party regulators.").

³² A legislative campaign is underway: on January 16, 2014, Representatives James Sensenbrenner (R-WI) and John Conyers (D-MI) introduced H.R. 3899, the "Voting Rights Amendment Act of 2014," while Senator Patrick Leahy (D-VT) introduced companion legislation in the Senate. See *infra* note 237. The proposal has dim prospects given likely opposition in the newly minted Republican Congress.

I. BACKGROUND ON THE VOTING RIGHTS ACT

In order to evaluate the validity of Sections 8, 4(f)(4), and 4(a)(1), it will be important to understand the severity of Section 5 and the historical context leading to its enactment. Following this discussion, this Part will explain the coverage formula underlying the preclearance regime, the statutory framework in Sections 8, 4(f)(4), and 4(a)(1), and the cases leading up to *Shelby County*.

Although the Voting Rights Act of 1965 is widely considered to be Congress's most successful effort to combat discrimination in voting,³³ it followed several unsuccessful attempts. Congress first tried to cope with racial discrimination in voting by facilitating case-by-case litigation against the responsible jurisdictions. The Civil Rights Act of 1957,³⁴ for example, authorized the U.S. Attorney General to seek injunctions against public and private interference with the right to vote on account of race.³⁵ The Civil Rights Act of 1960³⁶ enabled the joinder of states as defendants, provided the Attorney General with access to local voting records, and authorized courts to register voters in areas of the country exhibiting systematic discrimination on account of race.³⁷ And "[t]he Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify [African Americans] from voting in federal elections."³⁸

These efforts proved to be largely ineffective. As the Supreme Court noted, "[v]oting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours . . . in preparation for trial."³⁹ As a consequence, litigation moved exceedingly slowly, providing ample time for states to "switch[] to discriminatory devices not covered by . . . federal decrees" or to enact "new tests designed to prolong the existing disparity between white and [black] registration numbers."⁴⁰ States were able to stay one step ahead of the federal courts because "each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory."⁴¹ Ultimately, black registration in Alabama only rose from 14.2% to 19.4% be-

³³ See *supra* note 2.

³⁴ Pub. L. 85-315, 71 Stat. 634 (1957) (codified as amended in scattered sections of 5, 28, and 42 U.S.C. (2012)).

³⁵ See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

³⁶ Pub. L. 86-449, 74 Stat. 86 (1960) (codified as amended in scattered sections of 18, 20, and 42 U.S.C. (2012)).

³⁷ See *Katzenbach*, 383 U.S. at 313.

³⁸ *Id.*

³⁹ *Id.* at 314.

⁴⁰ *Id.*

⁴¹ *Beer v. United States*, 425 U.S. 130, 140 (1976) (quoting H.R. REP. NO. 94-196, at 57-58 (1975)). Relatedly, some jurisdictions "simply closed their registration offices to freeze the voting rolls," thereby making it impossible for African Americans to register to vote. *Katzenbach*, 383 U.S. at 314.

tween 1958 and 1964.⁴² Similarly, in Louisiana, it moved from 31.7% to 31.8% between 1956 and 1965.⁴³ Finally, in Mississippi, it rose from an astonishingly low 4.4% to 6.4% between 1954 and 1964.⁴⁴

A. *Federal Preclearance*

In the face of such “unremitting and ingenious defiance of the Constitution,”⁴⁵ Congress enacted the Voting Rights Act of 1965. Through the federal preclearance provision, Congress sought “‘to shift the advantage of time and inertia from the perpetrators of the evil to its victim[s],’ by ‘freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.’”⁴⁶ Thus, Section 5 is a prophylactic remedy designed to ensure that states can no longer stay one step ahead of the federal courts by enacting new discriminatory statutes while prior laws are being litigated.

The mechanics of preclearance are as follows. Section 5 requires any jurisdiction that falls within the coverage formula laid out in Section 4(b) of the Act to obtain federal “preclearance” whenever they “enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”⁴⁷ Until preclearance is granted, the change is not legally enforceable.⁴⁸

Federal preclearance can be obtained through two avenues: (1) administrative review by the U.S. Attorney General; or (2) a declaratory judgment proceeding before a special three-judge panel of the United States District Court for the District of Columbia.⁴⁹ In either avenue, the submitting jurisdiction bears the burden of demonstrating that its proposed change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the [language minority provisions of the Act].”⁵⁰

Federal preclearance is uniquely severe as a remedial policy option for at least four reasons. First, it reverses one of the fundamental organizing principles of American federalism — that state and local enactments are presumed legal and enforceable unless and until a court concludes otherwise.⁵¹ Second, Section 5 reverses one of the fundamental organizing princi-

⁴² *Katzenbach*, 383 U.S. at 313. The figures refer to the number of registered African American voters as a percentage of the total African American voting age population in each jurisdiction. *See id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 309.

⁴⁶ *Beer*, 425 U.S. at 140 (quoting H.R. REP. NO. 94-196, at 57–58 (1975)).

⁴⁷ 42 U.S.C. § 1973c(a) (2012).

⁴⁸ *See* 28 C.F.R. § 51.1(a) (2014).

⁴⁹ *See id.*

⁵⁰ 42 U.S.C. § 1973c(a) (2012).

⁵¹ *See* Posner, *supra* note 8, at 87–88.

ples of American jurisprudence, that a party challenging an action taken by another bears the burden of proof in demonstrating that the action is unlawful.⁵² Third, Section 5 alters the typical allocation of authority among federal district courts by transferring the authority for deciding whether voting changes are discriminatory from the district courts located in the covered jurisdictions to federal officials in Washington.⁵³ Fourth, unlike other antidiscrimination statutes, Section 5 applies to a limited subset of states and local jurisdictions.⁵⁴

Armed with this background, the next section describes the coverage formula that was used to subject jurisdictions to Section 5.

B. *The Coverage Formula*

In order to understand the coverage formula, it will be useful to review the structure of the Voting Rights Act. The VRA contains both permanent and temporary provisions designed to protect the right to vote. Section 2, for example, reaffirms the Fifteenth Amendment through the enactment of a *permanent*, nationwide prohibition against voting practices or procedures that have a discriminatory purpose or effect.⁵⁵ Congress then built on this foundation by including special remedial provisions,⁵⁶ like Section 5, which *temporarily* impose additional burdens on certain states. In order to aim these special provisions “at areas where voting discrimination ha[d] been most flagrant[.]”⁵⁷ Congress decided to include a “coverage formula” in Section 4(b) of the Act.

In 1965, the primary method for effectuating intentional racial discrimination in voting involved the use of a test or device to prevent African Americans from registering to vote.⁵⁸ With this in mind, Congress decided that coverage under the special remedial provisions would be triggered on the basis of two findings: (1) that a jurisdiction maintained a “test or device”⁵⁹ as a prerequisite to voting on November 1, 1964; and (2) that less

⁵² *Id.* at 88.

⁵³ *Id.* at 89.

⁵⁴ *See id.* at 92. For examples of antidiscrimination statutes that apply nationally, see 20 U.S.C. § 1681 (2012) (discrimination on the basis of sex in federally assisted programs or activities); 29 U.S.C. § 1974 (2012) (discrimination on the basis of disability in federally assisted programs or activities); and 42 U.S.C. § 1971 (2012) (discrimination in voting).

⁵⁵ 42 U.S.C. § 1973 (2012).

⁵⁶ The special remedial provisions initially included the federal preclearance provision, a temporary suspension of literacy tests in covered jurisdictions, a provision authorizing the U.S. Attorney General to appoint federal examiners to register voters in covered jurisdictions, and a provision authorizing the Attorney General to appoint federal observers to monitor elections in covered jurisdictions. *See South Carolina v. Katzenbach*, 383 U.S. 301, 315–16 (1966).

⁵⁷ *Id.* at 315.

⁵⁸ *See, e.g., United States v. Mississippi*, 339 F.2d 679, 683–84 (5th Cir. 1964) (discriminatory test employed to deny African Americans an equal right to register); *Katzenbach*, 383 U.S. at 319 (discriminatory literacy test employed by South Carolina).

⁵⁹ The Voting Rights Act defines “test or device” as “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write,

than 50% of the voting-age citizens in a jurisdiction were registered to vote on November 1, 1964, or less than 50% of voting-age citizens in a jurisdiction actually voted in the November 1964 presidential election.⁶⁰ The initial formulation of the coverage formula brought seven full states — Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia — and several counties — twenty-six in North Carolina, three in Arizona, one in Hawaii, and one in Idaho — within its grasp.⁶¹

The coverage formula and preclearance requirement were initially scheduled to expire after five years, but Congress reauthorized the Voting Rights Act in 1970, 1975, 1982, and 2006, each time extending the length for which the temporary remedial provisions would remain in effect.⁶² In 1970 and 1975, Congress also amended the coverage formula to incorporate data from the November 1968 and November 1972 elections, respectively.⁶³ It did not update the coverage formula after that point. So when *Shelby County* was decided in 2013, certain jurisdictions were being covered under the special remedial provisions of the Voting Rights Act — including Section 5 — on the basis of conditions that had existed forty-one years earlier.⁶⁴

C. *Additional Provisions that Incorporate the Coverage Formula*

The coverage formula in Section 4(b) of the Act does not simply single out the jurisdictions that must comply with federal preclearance. Coverage under Section 4(b) also serves as a necessary condition enabling the Attorney General to certify political subdivisions for federal observer coverage under Section 8 and triggers the language minority requirements in Section 4(f)(4). The bailout procedure in Section 4(a)(1) permits jurisdictions that fall within the coverage formula to obtain a declaratory judgment exempting them from the special remedial provisions of the Act. I describe each of these provisions in turn.

understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.” 42 U.S.C. § 1973b(c) (2012). In 1975, the definition of “test or device” was expanded to include the use of English-only election materials in areas with substantial numbers of non-English speakers. *See id.* § 1973b(f)(3). This amendment brought Texas, Arizona, and several counties in California, Colorado, and South Dakota within the confines of Section 4(b). *See About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Dec. 5, 2013), archived at <http://perma.cc/4LUK-9K55>.

⁶⁰ *See* 42 U.S.C. § 1973b(b)(2) (2012).

⁶¹ *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Dec. 5, 2013), archived at <http://perma.cc/4LUK-9K55>.

⁶² *See Shelby Cnty.*, 133 S. Ct. at 2620–22.

⁶³ *See* Voting Rights Amendments of 1970, Pub. L. No. 91-285, §§ 3–4, 84 Stat. 314, 315 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101, 202, 89 Stat. 400, 401 (1975).

⁶⁴ *See Shelby Cnty.*, 133 S. Ct. at 2629.

1. Section 8: The Federal Observer Program.

Section 8 states that the Director of the Office of Personnel Management “shall assign” observers whenever the Attorney General certifies in “any political subdivision named in, or included within the scope of,” the coverage formula, that:

(A) [T]he Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the [language minority provisions] are likely to occur; or

(B) in the Attorney General’s judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment.⁶⁵

Federal observers may therefore be deployed where the Attorney General has made an administrative determination that there is contemporaneous evidence of voting discrimination in a particular political subdivision. To inform this determination, the Department’s investigatory procedures are as follows:

Department employees initially conduct telephone surveys of covered jurisdictions with significant minority populations to determine whether any minority candidates are running; a second telephone survey then is conducted of minority contacts in jurisdictions in which there are minority candidates or where there is information suggesting there may be Election Day problems; if there is sufficient evidence of potential problems, a Department attorney is dispatched to the jurisdiction to conduct an investigation and recommend whether observers should be dispatched; and the decision is then made whether to send observers.⁶⁶

⁶⁵ 42 U.S.C. § 1973f(a) (2012). The Attorney General’s determination to send federal observers under this provision is unreviewable. *See United States v. Louisiana*, 265 F. Supp. 703, 715 (E.D. La. 1966) (“[T]he appointment of observers is a matter of executive discretion and is not subject to judicial review.”), *aff’d*, 386 U.S. 270 (1967).

⁶⁶ Tucker, *supra* note 28, at 240. *See also* Barry H. Weinberg & Lyn Utrecht, *Problems in America’s Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 416–18 (2002).

Importantly, federal observers are *not* sent to every certified jurisdiction for every election. Rather, deployments turn on a jurisdiction's current conditions of discrimination. That is, federal observers are only dispatched to jurisdictions where it has recently "been determined that there is 'a substantial prospect of election day problems.'"⁶⁷

Federal observers are authorized to engage in two actions. First, they may enter election sites "for the purpose of observing whether persons who are entitled to vote are being permitted to vote."⁶⁸ Second, they may "enter and attend . . . any place for tabulating the votes cast at any election held" in the jurisdiction "for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated."⁶⁹ Federal observers are therefore trained by the Office of Personnel Management and the Justice Department "to watch, listen, and take careful notes of everything that happens inside the polling place during an election, and are also trained not to interfere with the election in any way."⁷⁰ They subsequently "prepare reports that may be filed in court, and they can serve as witnesses in court if the need arises."⁷¹

The Attorney General has certified 153 jurisdictions for federal observer coverage over the past forty-eight years. During that time, the provision has provided an effective and minimally intrusive way both to gather information on compliance with the Voting Rights Act and to discourage discriminatory behavior.⁷²

⁶⁷ Tucker, *supra* note 28, at 230 (quoting U.S. COMM'N ON CIVIL RIGHTS, A CITIZEN'S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 12 (1984)). Evidence bearing on this determination includes the existence of racial tension, racial appeals, or efforts to directly or indirectly suppress the voting rights of racial or ethnic minority citizens, the presence of racially heated white/black or Anglo/Latino races, the existence of an election in which minority voters are in a position to elect candidates of choice for the first time, or the existence of an election in which minority voters are in a position to gain a majority of seats on an elected body. *Id.* at 242.

⁶⁸ 42 U.S.C. § 1973f(d)(1) (2012). Federal observers document, for example, the opening and closing times of the polling place; the number of poll workers present at opening and closing; any problems opening or closing the polling place or with poll worker staffing; the number of voters waiting in line at opening or closing; signage and publicity showing the location of the polling place; the number, race, ethnicity, language abilities, position, and training of each poll worker; the configuration of the polling place; the location of the poll workers and the voting materials; the accessibility of the polling place for handicapped and elderly voters; the manner in which voters are treated inside and outside of the polling place; whether voters are offered provisional ballots if their names are not on the voter registration list; the availability of voting instructions and assistance using voting machines or casting paper ballots; compliance with Sections 203 and 208 of the Voting Rights Act; and compliance with the provisions of the Help America Vote Act. Tucker, *supra* note 28, at 243.

⁶⁹ 42 U.S.C. § 1973f(d)(2) (2012).

⁷⁰ *Frequently Asked Questions*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., <http://www.justice.gov/crt/about/vot/misc/faq.php#faq14> (last visited Nov. 29, 2013), archived at <http://perma.cc/Y2EC-9F3V>.

⁷¹ *Id.*

⁷² See H.R. REP. NO. 109-478, at 24–25 (2006); Tucker, *supra* note 28, at 230–31 ("Observers have played a critical role preventing and deterring 14th and 15th amendment violations by communicating to the Department of Justice any allegedly discriminatory conduct for further investigation."); Cody Gray, *The Voting Rights Act's Other "Secret Weapon": An Ex-*

2. *Section 4(f)(4): The Bilingual Election Materials Requirement.*

Section 4(f)(4) of the Voting Rights Act states:

Whenever any State or political subdivision [that falls within the coverage formula in Section 4(b)] provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language.⁷³

Section 4(f)(4) therefore incorporates the coverage formula in Section 4(b) as a trigger for the provision of bilingual election materials. Bear in mind that the 1975 amendments to the coverage formula incorporated data from the November 1972 election and expanded the definition of “test or device” to include the use of English-only election materials in areas with substantial numbers of non-English speakers.⁷⁴ Thus, the Justice Department’s regulations concerning the implementation of this provision hold that Section 4(f)(4) applies to any state or political subdivision in which:

- (1) Over five percent of the voting-age citizens were, on November 1, 1972, members of a single language minority group,
- (2) Registration and election materials were provided only in English on November 1, 1972, and
- (3) Fewer than 50 percent of the voting-age citizens were registered to vote or voted in the 1972 Presidential election.⁷⁵

Section 203 of the VRA also mandates the provision of bilingual election materials, but it employs a different coverage formula that uses census data from the most recent American Community Survey.⁷⁶ As a consequence, there are about 200 jurisdictions subject to the language minority provisions of Section 4(f)(4) that are not covered under the language minority provisions of Section 203.⁷⁷

amination of the Federal Observer Program (unpublished working paper) (on file with author).

⁷³ 42 U.S.C. § 1973b(f)(4) (2012).

⁷⁴ See *supra* note 59.

⁷⁵ 28 C.F.R. § 55.5(a) (2014). See also 28 C.F.R. pt. 55 app. (2014) (listing covered jurisdictions).

⁷⁶ See 42 U.S.C. § 1973aa-1a(b)(2)(A) (2012).

⁷⁷ Compare *Jurisdictions Previously Covered by Section 5*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Dec. 5, 2013), archived at <http://perma.cc/BSA9-RGXT> (listing jurisdictions covered by Section 4(b), which until *Shelby County* controlled the application of Section 4(f)(4)), with Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63, 602-07 (Oct. 13, 2011) (listing jurisdictions covered by Section 203).

3. *Section 4(a)(1): The Bailout Standard.*

Congress did not intend for jurisdictions to be subjected to the special remedial provisions of the Voting Rights Act forever. Rather, Section 4(a) contains a mechanism that permits a state or political subdivision to “bail out” from the special remedial provisions — which include the federal preclearance provision in Section 5, the federal observer provision in Section 8, and the language minority provision in Section 4(f)(4) — through an action for a declaratory judgment filed before the United States District Court for the District of Columbia.

To “bail out,” a jurisdiction must demonstrate fulfillment of the statutory conditions enumerated in Section 4(a) for the ten years preceding the filing of an action for a declaratory judgment, and throughout the pendency of the action.⁷⁸ Specifically, Section 4(a) requires that a jurisdiction demonstrate that it has: (1) not used a discriminatory test or device in the electoral process;⁷⁹ (2) not been found by a federal court to have discriminated against minorities in the electoral process⁸⁰ and not altered its election system to settle such litigation;⁸¹ (3) not required the presence of federal officials to register voters or observe elections;⁸² (4) complied fully with the preclearance requirements applicable to voting changes;⁸³ (5) taken positive steps to increase minority participation in the electoral process;⁸⁴ (6) presented evidence of its levels of minority group registration and voting and how those levels have changed over time;⁸⁵ and (7) publicized its intention to seek bailout in appropriate media.⁸⁶

Since 1984, when the current bailout procedure became effective, approximately 200 jurisdictions have successfully obtained declaratory judgments under Section 4(a) bailing them out of the special remedial provisions.⁸⁷

D. *The Lead-Up to Shelby County*

Congress enacted the Voting Rights Act pursuant to its authority to enforce the Fifteenth Amendment.⁸⁸ In the past, the Court upheld the Act as a proper exercise of this authority.

⁷⁸ 42 U.S.C. § 1973b(a) (2012).

⁷⁹ *Id.* § 1973b(a)(1)(A).

⁸⁰ *Id.* § 1973b(a)(3).

⁸¹ *Id.* § 1973b(a)(1)(B).

⁸² *Id.* § 1973b(a)(1)(C).

⁸³ *Id.* § 1973b(a)(1)(D)–(E).

⁸⁴ *Id.* § 1973b(a)(1)(F)(i)–(iii).

⁸⁵ *Id.* § 1973b(a)(2).

⁸⁶ *Id.* § 1973b(a)(4).

⁸⁷ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2644 (2013) (Ginsburg, J., dissenting).

⁸⁸ See U.S. CONST. amend. XV, § 2.

In *South Carolina v. Katzenbach*,⁸⁹ for example, the Supreme Court, applying minimum rationality review, held that Congress had the authority under the Fifteenth Amendment to enact the special remedial provisions of the Voting Rights Act, including Sections 4 and 5, in light of the entrenched racial discrimination in voting — “an insidious and pervasive evil which had been perpetuated in certain parts of our country.”⁹⁰ In *City of Rome v. United States*,⁹¹ the Court affirmed this conclusion, stating that federal preclearance “is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that Section 1 of the Amendment prohibits only intentional discrimination in voting.”⁹²

For some observers, the constitutionality of Section 5 was thrown into doubt after the Supreme Court’s decision in *City of Boerne v. Flores*.⁹³ There, the Court determined that when Congress enacts remedial or prophylactic legislation under the Fourteenth Amendment, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁹⁴ In other words, the “means” that Congress chooses to correct a constitutional violation must be proportional to the “end” it aims to reach, that is, the violations it aims to correct. Importantly, however, the Court also stated that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.”⁹⁵ This statement was reaffirmed two years later in *Lopez v. Monterey County*,⁹⁶ suggesting to some observers that preclearance rested on firm ground.

Bearing these pronouncements in mind, Congress has gathered substantial evidence documenting the existence of unconstitutional voting discrimination in covered jurisdictions each time that it has extended the temporary provisions of the Voting Rights Act. The 2006 reauthorization continued this practice.⁹⁷ The legislative record demonstrated that, in the time since the Act had last been authorized, there had been “626 Attorney General objections that blocked discriminatory voting changes,” “653 successful section 2 cases,” “over 800 proposed voting changes withdrawn or modified in re-

⁸⁹ 383 U.S. 301 (1966).

⁹⁰ *Id.* at 309.

⁹¹ 446 U.S. 156 (1980).

⁹² *Id.* at 177.

⁹³ 521 U.S. 507 (1997).

⁹⁴ *Id.* at 520.

⁹⁵ *Id.* at 518.

⁹⁶ 525 U.S. 266 (1999).

⁹⁷ See *Shelby Cnty.*, 133 S. Ct. at 2635–36 (Ginsburg, J., dissenting) (detailing the legislative history of the 2006 reauthorization). The 109th Congress had cause to be especially thorough, as the Court had recently indicated that it would search for an adequate evidentiary record to support a congressional determination that states were engaging in unconstitutional conduct sufficient to justify congressional regulation. See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373–74 (2001).

sponse to More Information Requests,” “tens of thousands of observers sent to covered jurisdictions,” “105 successful section 5 enforcement actions,” “25 unsuccessful judicial preclearance actions,” and unquestionably a “strong deterrent effect” imposed by Section 5.⁹⁸ While the prophylactic remedy of federal preclearance undoubtedly imposed substantial federalism costs on the states, Congress did its best to demonstrate that this “means” was proportional to the problem it aimed to remedy; namely, the continued existence of unconstitutional racial discrimination in covered jurisdictions.

Against this background, I now turn to the Supreme Court’s decision in *Shelby County v. Holder*, which invalidated use of the statutory coverage formula as a means for subjecting jurisdictions to preclearance, thereby bringing into question the continuing vitality of the federal observer program, the language minority requirements, and the VRA’s bailout mechanism.

II. *SHELBY COUNTY V. HOLDER*

A. *The Court’s Reasoning*

*Shelby County v. Holder*⁹⁹ involved a constitutional challenge to Sections 4(b) and 5 of the Voting Rights Act by Shelby County, Alabama, a suburban community southeast of Birmingham. Shelby County fell within the coverage formula set out in Section 4(b) and was therefore responsible for complying with the preclearance requirement in Section 5. The county argued that changed conditions had rendered these provisions unnecessary and that federal intrusion upon state sovereignty was no longer warranted.

The Supreme Court agreed. Chief Justice Roberts’ majority opinion articulated three concerns that gave the Court “no choice but to declare § 4(b) unconstitutional.”¹⁰⁰

First, the Court noted that Section 5 “imposes substantial federalism costs”¹⁰¹ because it requires states to “beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own.”¹⁰² The Court also recognized that “[t]he preclearance proceeding ‘not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.’”¹⁰³ Given these features, the Court

⁹⁸ *Shelby Cnty. v. Holder*, 679 F.3d 848, 872 (D.C. Cir. 2012), *rev’d*, 133 S. Ct. 2612 (2013).

⁹⁹ 133 S. Ct. 2612 (2013).

¹⁰⁰ *Id.* at 2631.

¹⁰¹ *Id.* at 2621 (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 201 (2009)) (internal quotation marks omitted).

¹⁰² *Id.* at 2624.

¹⁰³ *Id.* (quoting *Shelby Cnty. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012) (Williams, J., dissenting)). The Court was referencing the fact that the Section 5 “retrogression” standard

observed that preclearance represents a “drastic departure from basic principles of federalism.”¹⁰⁴

Second, the Court noted that the VRA “differentiates between the States,” thereby conflicting with the historic tradition that states receive equal treatment.¹⁰⁵ In particular, preclearance “applies to only nine states (and several additional counties)” and forces them to wait “months or years and expend[] funds to implement a validly enacted law [while their] neighbor[s] can typically put the same law into effect immediately, through the normal legislative process.”¹⁰⁶ The Court therefore observed that preclearance represents a “dramatic departure from the principle that all states enjoy equal sovereignty.”¹⁰⁷

Third, in light of the first two points, the Court stated that the statute’s “‘current burdens’ must be justified by ‘current needs,’ and any ‘disparate geographic coverage’ must be ‘sufficiently related to the problem that it targets.’”¹⁰⁸ In 1966, the VRA’s departures from basic principles of federalism and equal sovereignty were justified by “unique circumstances”¹⁰⁹ that constituted an “extraordinary problem.”¹¹⁰ Accordingly, if Congress wants to continue to divide the states by subjecting only some of them to the unique remedy of federal preclearance, the Court noted that those jurisdictions must be “singled out on a basis that makes sense in light of current conditions.”¹¹¹ Congress “cannot rely simply on the past.”¹¹²

According to the Court, Congress failed to heed this command when it reauthorized the Voting Rights Act in 2006 without changing the coverage formula. Indeed, the Act’s “extraordinary and unprecedented features were reauthorized[] as if nothing had changed.”¹¹³ Coverage, the Court noted, was “based on decades-old data and eradicated practices.”¹¹⁴ Today, however, “[t]hings have changed in the South” because “[v]oter turnout and registration rates now approach parity,” “[b]latantly discriminatory evasions of federal decrees are rare,” and “minority candidates hold office at unprecedented levels.”¹¹⁵ In light of these changes, the “40-year-old facts” underlying the coverage formula no longer bore a “logical relation to the

differs from the discriminatory “results test” that governs litigation arising under Section 2 of the VRA.

¹⁰⁴ *Id.* at 2618.

¹⁰⁵ *Id.* at 2621 (quoting *Nw. Austin*, 557 U.S. at 203) (internal quotation mark omitted).

¹⁰⁶ *Id.* at 2624.

¹⁰⁷ *Id.* at 2618.

¹⁰⁸ *Id.* at 2627 (quoting *Nw. Austin*, 557 U.S. at 203).

¹⁰⁹ *Id.* at 2625 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 334–35 (1966)) (internal quotation marks omitted).

¹¹⁰ *Id.* at 2618.

¹¹¹ *Id.* at 2629.

¹¹² *Id.*

¹¹³ *Id.* at 2626.

¹¹⁴ *Id.* at 2627.

¹¹⁵ *Id.* at 2621–22 (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 202 (2009) (first alteration in original)) (internal quotation marks omitted).

present day.”¹¹⁶ Therefore, the Court had “no choice but to declare § 4(b) unconstitutional,” such that “[t]he formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.”¹¹⁷ Importantly, the Court issued no holding on Section 5 itself.¹¹⁸

B. Assessing the Continued Vitality of the Federal Observer Program, the Language Minority Requirements, and the Bailout Procedure in Light of Shelby County

Shelby County dealt a blow to preclearance, but left a variety of provisions unaddressed. This part will discuss three theories suggesting, ultimately, that in light of *Shelby County*, Section 4(b) is only unconstitutional as incorporated by Sections 5 and 4(f)(4), but not as incorporated by Section 8. Importantly, the statutory bailout mechanism only survives if *Shelby County*'s invalidation of Section 4(b) does not extend to either Sections 8 or 4(f)(4). This conclusion is based on the fact that litigants must have standing in a federal court before they may obtain a declaratory judgment entitling them to bailout under Section 4(a). It is well known that standing requires a plaintiff to allege a “concrete and particularized” injury that is causally connected to a defendant’s conduct and likely to be redressed by the requested relief.¹¹⁹ Thus, in order for a political subdivision to be able to meet these requirements, the federal government must *currently* be capable of imposing some burden on the jurisdiction — either federal observer coverage or the bilingual election material requirement — that a declaratory judgment under the bailout procedure would relieve.

Shelby County should be construed to preserve these provisions for three reasons. First, the Court’s opinion is ambiguous as to whether the coverage formula is facially unconstitutional, and even if it is, that holding should be limited to applications of preclearance upon the states. Second, the Court’s preference is to issue narrow constitutional holdings that preserve lawful applications of a challenged statute. Third, the Voting Rights Act contains a broad severability clause.

¹¹⁶ *Id.* at 2629. Importantly, the Court did not explicitly address the applicable standard of review. Nevertheless, it did not appear to be holding Congress to the “congruence and proportionality” test from *City of Boerne v. Flores*. See 521 U.S. 507, 520 (1997). Instead, the Court repeatedly mentioned a more accommodating standard of “rational[ity]” or “logical relation.” E.g., *Shelby Cnty.*, 133 S. Ct. at 2628. For discussion of this point, see Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 727–31 (2014); and Issacharoff, *supra* note 20, at 101–02.

¹¹⁷ *Shelby Cnty.*, 133 S. Ct. at 2631.

¹¹⁸ *Id.* (“We issue no holding on § 5 itself, only on the coverage formula.”). Justice Thomas did issue a concurrence finding Section 5 unconstitutional, *id.* at 2632 (Thomas, J., concurring), however, none of the other four Justices in the majority elected to join Justice Thomas’s opinion.

¹¹⁹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

1. *The Facial vs. As-Applied Distinction.*

The majority opinion in *Shelby County* is arguably ambiguous as to whether Section 4(b) is facially unconstitutional; in any event, even assuming that it *is* facially unconstitutional, the opinion indicates that the Court's holding should be limited to applications of preclearance upon the states.¹²⁰ The Court recognized that the plaintiffs went to district court seeking “a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their enforcement.”¹²¹ But the Court did not grant the county the precise relief it requested. Instead, it merely held that it had “no choice but to declare § 4(b) unconstitutional.”¹²²

This distinction is important. In past cases, the Court has explicitly detailed the scope of its holding in the midst of a facial challenge. In *Washington State Grange v. Washington State Republican Party*,¹²³ for example, the Court not only acknowledged the posture of the case, “[w]e granted certiorari to determine whether [the statute], on its face, violates the [Constitution],”¹²⁴ but also stated the grounds on which it decided the issue, “[w]e accordingly hold that [the statute] is facially constitutional.”¹²⁵ Similarly, in *United States v. Stevens*,¹²⁶ the Court noted that it had “granted the Solicitor General’s petition for certiorari to determine ‘whether [the statute]

¹²⁰ The Supreme Court’s approach to facial and as-applied challenges has been inconsistent in the area of election law. In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) — a challenge to Washington’s modified blanket primary system — and *Crawford v. Marion County*, 553 U.S. 181 (2008) — a challenge to Indiana’s voter identification requirement — the Court rejected facial challenges to both statutes, evincing a preference for as-applied challenges to election regulations. See, e.g., *Wash. State Grange*, 552 U.S. at 444 (“[R]espondents’ arguments . . . can be evaluated only in the context of an as-applied challenge.”). In *Citizens United v. Federal Election Commission*, however, the Court struck down a portion of the Bipartisan Campaign Reform Act on its face. See 558 U.S. 310, 331, 365–66 (2010). Significantly, in *Citizens United*, the Court explained that “the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.” *Id.* at 331. Thus, notwithstanding the posture of a case, the Court retains flexibility to tailor its remedy as it sees fit. More generally, however, the Court has recognized that “[f]acial challenges, which require a showing that a law is unconstitutional in all of its applications, are disfavored.” *Wash. State Grange*, 552 U.S. at 450–51. The Court is not kind to facial challenges because they “often rest on speculation,” “raise the risk of premature interpretation of statutes on the basis of factually barebones records,” “run contrary to the fundamental principle of judicial restraint,” and “threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Id.* See also *United States v. Salerno*, 481 U.S. 739, 745 (1987) (evincing the Court’s strong aversion to facial invalidations).

¹²¹ *Shelby Cnty.*, 133 S. Ct. at 2621–22.

¹²² *Id.* at 2631.

¹²³ 552 U.S. 442 (2008).

¹²⁴ *Id.* at 449.

¹²⁵ *Id.* at 459.

¹²⁶ 559 U.S. 460 (2010). Notably, *Stevens* was a First Amendment case. In that context, the Court has occasionally employed a different standard when a facial challenge is based on “overbreadth,” which typically will succeed if the statute lacks a “plainly legitimate sweep.”

is facially invalid.”¹²⁷ In deciding that the statute was substantially overbroad, there was no question that the Court found the provision *facially* unconstitutional. Finally, in *Citizens United v. Federal Election Commission*,¹²⁸ the Court took pains to delineate the grounds on which it decided the case: “Citizens United’s claim . . . implicates the *facial* validity of [the challenged provision].”¹²⁹ Again, the Court left no doubt that its decision would be understood as a facial invalidation.

In *Shelby County*, by contrast, the question certified for review did not state the claim as a facial challenge,¹³⁰ and the majority never addressed the distinction.¹³¹ In fact, the only clue on this point was given indirectly. The Supreme Court has held that a plaintiff can succeed in a facial challenge only by “establish[ing] that . . . the law is unconstitutional *in all of its applications*.”¹³² The majority opinion evokes this language: “Shelby County’s claim is that the coverage formula here is unconstitutional *in all its applications*, because of how it selects the jurisdictions subjected to preclearance.”¹³³ Notably, the first clause of that sentence implies that the Court was adjudicating a facial challenge to Section 4(b), and that use of the coverage formula is therefore unconstitutional in all circumstances. But the second clause obscures the picture by pointing to Section 5 as the reason for 4(b)’s invalidity, suggesting that the coverage formula is only unconstitu-

See *Washington v. Glucksberg*, 521 U.S. 702, 739–40 n.7 (1997) (Stevens, J., concurring) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)) (internal quotation mark omitted).
¹²⁷ *Stevens*, 559 U.S. at 472 (quoting Petition for Writ of Certiorari at i, *Stevens*, 559 U.S. 460 (No. 08-769)).

¹²⁸ 558 U.S. 310 (2010).

¹²⁹ *Id.* at 331 (emphasis added).

¹³⁰ See *Shelby Cnty. v. Holder*, 133 S. Ct. 594 (2012) (granting certiorari “limited to the following question: Whether Congress’ decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution”). However, the parties in *Shelby County* had repeatedly framed the case as a facial challenge to Sections 4(b) and 5 of the Voting Rights Act. Although the Solicitor General’s articulation of the question presented did not use the term “facial” — unlike in *Stevens* — the government’s brief in opposition to certiorari noted that “[t]he court of appeals correctly rejected petitioner’s facial challenge to the constitutionality of Sections 4(b) and 5 of the VRA.” Brief for Respondents in Opposition at 16, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96). Seizing on this point, Shelby County argued that the “[r]espondent does not contest that this case is an appropriate vehicle for definitively resolving the facial constitutionality of Section 5 and Section 4(b).” Reply Brief for Petitioner at 2, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96).

¹³¹ Justice Ginsburg’s dissent criticized this omission, asking “by what right, given its usual restraint, does the Court even address Shelby County’s facial challenge to the VRA?” *Shelby Cnty.*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting). She went on to provide several examples of voting discrimination in Alabama before concluding that “[Section] 5’s preclearance requirement is constitutional as applied to Alabama and its political subdivisions. And under our case law, that conclusion should suffice to resolve this case.” *Id.* at 2647.

¹³² *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added).

¹³³ *Shelby Cnty.*, 133 S. Ct. at 2629–30 (emphasis added).

tional in “all of its applications” of the *preclearance* requirement.¹³⁴ Indeed, Justice Ginsburg’s discussion of severability suggests that the Court invalidated every application of preclearance via the coverage formula, but nothing more. Specifically, her dissent criticized the Court for entertaining a facial challenge by failing to separate the unconstitutional applications of preclearance from the constitutional applications of preclearance.¹³⁵

Justice Scalia’s observation in *Chicago v. Morales*¹³⁶ is potentially instructive here. He noted that “before declaring a statute to be void in all its applications . . . we have at least imposed upon the litigant the eminently reasonable requirement that he establish that the statute was *unconstitutional* in all its applications.”¹³⁷ The *Shelby County* litigants never raised, much less established, that the coverage formula was unconstitutional in triggering the application of other sections of the Voting Rights Act. The Court never considered such issues, and the opinion does not expressly apply its ruling to, or even discuss, the constitutionality of those sections. Accordingly, even if the coverage formula is facially unconstitutional, that holding should be limited to applications of the preclearance requirement to the states.

2. *The Supreme Court’s Preference for Narrow Constitutional Holdings.*

Setting aside the facial and as-applied distinction, courts might nevertheless conclude that *Shelby County* should be narrowly interpreted to preserve Sections 8, 4(f)(4), and 4(a)(1).¹³⁸

The Supreme Court’s general preference is to issue narrow constitutional holdings that preserve lawful applications of a challenged statute. In *Ayotte v. Planned Parenthood of Northern New England*,¹³⁹ the Court noted that “[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the

¹³⁴ The subsequent sentence magnifies the ambiguity, noting that “[Shelby County] was selected based on [Section 4(b)], and may challenge it in court.” *Id.* at 2630. In doing so, the Court may have been signaling that it was deciding the constitutionality of the coverage formula *as applied* in these circumstances. Alternatively, the Court may have been acknowledging that *Shelby County* had standing to raise a facial challenge.

¹³⁵ See *Shelby Cnty.*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting). See also Hasen, *supra* note 116, at 734 (noting that the majority failed to “use a severability analysis to separate out unconstitutional applications of preclearance as counseled by judicial minimalism and urged by the dissent”).

¹³⁶ 527 U.S. 41 (1991).

¹³⁷ *Id.* at 77–78 (Scalia, J., dissenting).

¹³⁸ The discussion that follows focuses on Sections 8 and 4(f)(4) because those provisions impose affirmative burdens on covered jurisdictions, whereas Section 4(a)(1) operates as a safety valve to relieve burdens. For a discussion of the validity of the bailout procedure itself, see *infra* section II.B.3.d.

¹³⁹ 546 U.S. 320 (2006).

remainder intact.”¹⁴⁰ The *Ayotte* decision built on the foundation set in *United States v. Raines*,¹⁴¹ which affirmed that the Court “is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”¹⁴²

Building on this framework, courts might conclude that Section 4(b) is only unconstitutional as applied to Section 5, and that the Court’s holding in *Shelby County* should be interpreted to “leav[e] other applications in force.”¹⁴³ Four points lend credence to this argument.

First, as noted above, Sections 8 and 4(f)(4) were never at issue in *Shelby County*, and the Court did not contemplate the application of Section 4(b) in those contexts. The validity of the coverage formula as incorporated by those provisions is therefore an open question.

Second, invalidation of these provisions does not necessarily follow from the reasoning of *Shelby County*. In particular, Sections 8 and 4(f)(4) do not impose the substantial federalism costs that motivated the Court’s invalidation of the coverage formula with respect to Section 5. Section 5 is a uniquely severe remedial option. It presumes from the start that state and local enactments are unconstitutional, thereby reversing a fundamental organizing principle of our federal model of government. What is more, it both forces covered jurisdictions to bear the burden of proof that their actions are nondiscriminatory and transfers authority for deciding whether voting changes are discriminatory from local district courts to federal officials in Washington. Indeed, as the Court noted, Section 5 forces jurisdictions to “beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own.”¹⁴⁴

Sections 8 and 4(f)(4), by contrast, impose minimal burdens. Federal observers are limited to the role of monitoring the activities and procedures employed in polling places and sites where ballots are counted.¹⁴⁵ According to the Justice Department’s internal guidelines on Section 8, “[o]bservers are not allowed to give advice or direction to anyone, including poll officials, poll watchers and voters, nor do observers intervene or participate in

¹⁴⁰ *Id.* at 328–29 (citations omitted).

¹⁴¹ 362 U.S. 17 (1960).

¹⁴² *Id.* at 21 (quoting *Liverpool, N.Y. and Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1913)) (internal quotation mark omitted).

¹⁴³ *Ayotte*, 546 U.S. at 329.

¹⁴⁴ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013).

¹⁴⁵ See Tucker, *supra* note 28, at 248 (“[F]ederal observers can document voter treatment by election officials and others both outside and inside polling places; the availability of voting materials and assistance (particularly for language minority, first time, elderly, illiterate, and handicapped voters); and the extent to which all voters have an equal opportunity to participate in the electoral process.”).

the conduct of elections in any manner.”¹⁴⁶ Observers merely write reports of the activities they witness and provide them to attorneys in the Civil Rights Division’s Voting Section to determine whether “further enforcement of the Voting Rights Act is needed in the political subdivision.”¹⁴⁷ While the presence of federal monitors in state polling places imposes some burden upon state sovereignty, it is minimal relative to the burden of federal preclearance.

So too with Section 4(f)(4). That provision requires covered jurisdictions to ensure that any election information provided in English is also available in the language of particular minority groups. The requirement applies to all phases of the electoral process — from voter registration to assistance at the polls — and to all elections — federal, state, and local, as well as primary, general, and special elections.¹⁴⁸ The motivation behind Section 4(f)(4) is to ensure that every citizen will have “an effective opportunity to register, learn the details of the elections, and cast a free and effective ballot.”¹⁴⁹ The language minorities that are covered are “American Indians, Asian Americans, Alaska Natives, and Spanish-heritage citizens.”¹⁵⁰ While Section 4(f)(4) imposes administrative costs on the states,¹⁵¹ its interference with state sovereignty is far less than that imposed by Section 5, which, again, renders state enactments presumptively unconstitutional.

Third, at least with respect to federal observer coverage, the “current burdens” are justified by “current needs.” The Court’s principal concern in *Shelby County* was that the coverage formula used “40-year-old facts having no logical relation to the present day” as a trigger for federal preclearance.¹⁵² This critique does not apply to the imposition of federal observers under Section 8. The decisions to certify the 153 jurisdictions that are now subject to federal observer coverage were made progressively over the course of a forty-eight year period — they were *not* made on the basis of one date in

¹⁴⁶ U.S. ATTORNEYS’ MANUAL, TITLE 8: CIVIL RIGHTS RESOURCE MANUAL § 2.279, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title8/2mcvr.htm#8-2.279, archived at <http://perma.cc/6FYY-D87F>.

¹⁴⁷ See *About Federal Observers and Election Monitoring*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/examine/activ_exam.php (last visited Dec. 5, 2013), archived at <http://perma.cc/4773-PV7D>.

¹⁴⁸ U.S. ATTORNEYS’ MANUAL, TITLE 8: CIVIL RIGHTS RESOURCE MANUAL § 2.280, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title8/2mcvr.htm#8-2.280, archived at <http://perma.cc/MX6T-A9C4>.

¹⁴⁹ See *About Language Minority Voting Rights*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/sec_203/activ_203.php#languide (last visited Dec. 5, 2013), archived at <http://perma.cc/MYM8-F33X>.

¹⁵⁰ *Id.*

¹⁵¹ Even these costs are negligible. See *The Voting Rights Act: Section 203 — Bilingual Election Requirements: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 76–85 (2005) (statement of James Thomas Tucker) (detailing a study finding that 40% of surveyed jurisdictions incurred no added costs for either oral or written language assistance and concluding that, where they exist, “the costs of compliance generally comprise only a small fraction of total election expenses”).

¹⁵² *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629 (2013).

1964. More importantly, both certification and assignment decisions were — and, in the future, would be — based on current facts. In particular, before federal observers may be dispatched, the Attorney General must have either received “written meritorious complaints from residents, elected officials, or civic participation organizations” in the jurisdiction, or have determined, after conducting an investigation,¹⁵³ that the assignment of observers is “necessary to enforce the guarantees of the 14th or 15th amendment.”¹⁵⁴ In other words, the “current burden” of federal observer coverage can only be imposed *after* a determination that there is “current need.”

Unfortunately, the Court’s concern about “current burdens” being justified by “current needs” is likely fatal to Section 4(f)(4). Section 4(f)(4) directly incorporates the November 1972 election date as a trigger mandating the provision of bilingual election materials.¹⁵⁵ In contrast to Section 8, it does not impose this burden on the basis of evidence that the relevant minority group has faced recent barriers to participation in the political process. As a result, Section 4(f)(4)’s use of the coverage formula is likely unconstitutional unless a court decides that its intrusion upon state sovereignty is so minimal that its reliance on 40-year-old conditions is permissible.

Fourth, limiting the remaining inquiry to Section 8, the fact that federal observer coverage is justified by “current needs” justifies any disparate treatment of the states. The Court stated that any “disparate geographic coverage must be sufficiently related to the problem that it targets.”¹⁵⁶ Indeed, the Voting Rights Act was originally upheld because “Congress chose to limit its attention to the geographic areas where immediate action seemed necessary.”¹⁵⁷ The federal observer provision meets this test because its burdens can be imposed only on the basis of contemporaneous evidence of voting discrimination in a covered jurisdiction. Moreover, federal monitoring can effectively remedy the problem that it targets, since “the mere assignment of federal observers to an election makes people less likely to engage in discrimination because neutral outsiders are watching and documenting their actions.”¹⁵⁸ And “[w]hen observers are present in a county to monitor an election, one or more Department attorneys (usually from the Voting Section) are also present to act as liaison with local officials and minority lead-

¹⁵³ According to the Justice Department’s internal guidelines on Section 8, “[t]he decision to send federal observers to a county for a particular election is made by the Assistant Attorney General, Civil Rights Division, on the basis of pre-election surveys conducted by Voting Section attorneys and after consultation by the Voting Section with United States Attorneys.” U.S. ATTORNEYS’ MANUAL, *supra* note 146.

¹⁵⁴ 42 U.S.C. § 1973(f)(a)(2)(A)–(B) (2012).

¹⁵⁵ *Id.* § 1973b(b).

¹⁵⁶ *Shelby Cnty.*, 133 S. Ct. at 2627 (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 2504 (2009)) (internal quotation marks omitted).

¹⁵⁷ *Id.* at 2625 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)) (internal quotation marks omitted).

¹⁵⁸ Tucker, *supra* note 28, at 231.

ers and to take corrective action based on the information provided by the observers.”¹⁵⁹ Accordingly, the federal observer provision is highly “related to the problem that it targets” such that its use of the coverage formula is “rational in both practice and theory.”¹⁶⁰

It is important to remember that the Voting Rights Act confronts “the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system.”¹⁶¹ Therefore, “Congress’ power to act [wa]s at its height.”¹⁶² Ultimately, courts could permissibly conclude that Section 4(b) is only unconstitutional as applied to Section 5, and that the Court’s holding in *Shelby County* should be narrowly interpreted to “leav[e] other applications in force.”¹⁶³

3. Severability.

The Voting Rights Act contains an “exceptionally broad”¹⁶⁴ severability clause, which is relevant in two ways. First, the severability clause could permit courts to separate the unconstitutional applications of the coverage formula (preclearance) from the constitutional applications of the formula (federal observer coverage).¹⁶⁵ Second, the severability clause could permit courts to simply excise the coverage formula from Section 8’s two-part procedure, Section 4(f)(4)’s three-pronged formula, or the bailout procedure in Section 4(a)(1).

¹⁵⁹ U.S. ATTORNEYS’ MANUAL, *supra* note 146.

¹⁶⁰ *Shelby Cty.*, 133 S. Ct. at 2627 (citations and internal quotation marks omitted). To the extent that Section 8 would continue to use the coverage formula to distinguish between covered and non-covered states — given that, under this scenario, federal observers would only be deployable to covered jurisdictions — courts should afford Congress greater deference with respect to Section 8 because it imposes a less intrusive burden upon state sovereignty and is subject to the far more lenient bailout standard of Section 13. *See* 42 U.S.C. § 1973k (2012). Further, the 2006 congressional record did document continuing differences between covered and non-covered jurisdictions that could warrant disparate treatment for the purpose of federal monitoring. *See* Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 654–56 (2006) (showing a higher rate of VRA Section 2 litigation in covered jurisdictions than in non-covered jurisdictions). Finally, although the Court did not explicitly apply the *City of Boerne* standard, one might also say that the federal observer program is both “congruent” with and “proportional” to the evil it is designed to remedy because it targets actual constitutional violations. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹⁶¹ *Shelby Cty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting).

¹⁶² *Id.*

¹⁶³ *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). *See also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 509 (2014) (“[T]he VRA must be understood as a superstatute, that is, landmark legislation that demands the cooperation of multiple branches of government in order to fulfill its purposes. . . . [F]rom its inception, the Court has understood the VRA precisely in this way and has willingly cooperated with Congress, as the people’s representatives, in fulfilling the Act’s considerable promise.”).

¹⁶⁴ *Shelby Cty.*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting).

¹⁶⁵ *See supra* note 135 and accompanying text.

In relevant part, the statute states:

If any provision of [the Voting Rights Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Voting Rights Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.¹⁶⁶

The severability clause therefore evinces Congress's preference that any invalid applications of the Act be severed from the applications that do not transgress constitutional limits.¹⁶⁷ After introducing the Court's test for severability, I discuss each severability scenario in turn.

(a) *Severability Doctrine.*

The Supreme Court's "modern severability framework"¹⁶⁸ was set forth in *Alaska Airlines, Inc. v. Brock*.¹⁶⁹ There, the Court stated that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of th[e] court to so declare, and to maintain the act in so far as it is valid."¹⁷⁰ This presumption of severability can be rebutted, however, upon a showing of statutory interdependence.¹⁷¹ Two provisions are "interdependent" when their relationship is so significant that severance of one compels severance of the other.¹⁷² *Alaska Airlines* lays out a two-pronged test to guide this determination.¹⁷³

First, to determine whether two provisions are interdependent, courts must look to congressional intent and ask whether Congress would have enacted the remaining provision in the statute without the unconstitutional

¹⁶⁶ 42 U.S.C. § 1973p (2012).

¹⁶⁷ The Supreme Court has recognized the importance of these provisions, noting that "severability . . . is a question of legislative intent," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 n.5 (1987), and that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

¹⁶⁸ See Rachel J. Ezzell, Note, *Statutory Interdependence in Severability Analysis*, 111 MICH. L. REV. 1481, 1485 (2012). The Supreme Court has articulated its approach to severability in a number of closely related formulations. In *Buckley v. Valeo*, for example, the Court noted that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." 424 U.S. 1, 108 (1976) (quoting *Champlin Ref. Co. v. Corporation Comm.*, 286 U.S. 210, 234 (1932)) (internal quotation marks omitted). More recently, in *United States v. Booker*, the Court outlined a related approach: "[W]e must retain those portions of [an] Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." 543 U.S. 220, 258–59 (2005) (citations and internal quotation marks omitted). Ezzell notes, however, that when making severability determinations, the Court almost always cites back to *Alaska Airlines*. See Ezzell, *supra* at 1485 n.18.

¹⁶⁹ 480 U.S. 678 (1987).

¹⁷⁰ *Id.* at 684 (quoting *Regan*, 468 U.S. at 652) (internal quotation marks omitted).

¹⁷¹ See *id.* at 684–85.

¹⁷² Ezzell, *supra* note 168, at 1485.

¹⁷³ See *Alaska Airlines*, 480 U.S. at 684.

provision.¹⁷⁴ The statute's structure, legislative history, and the existence of a severability or nonseverability clause all represent relevant sources of evidence on this point. Importantly, "[t]he inquiry is eased when Congress has explicitly provided for severance by including a severability clause," for "the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision."¹⁷⁵

Second, courts must ask whether the remaining provision can "fully operat[e] as a law."¹⁷⁶ Although the functionality inquiry appears quite demanding, it, too, depends on abiding by Congress' general intent. In particular, the *Alaska Airlines* Court instructed that "[t]he more relevant inquiry . . . is whether the statute will function in a *manner* consistent with the intent of Congress."¹⁷⁷ This interpretation makes sense. Although courts presume that Congress would not enact a provision that is utterly incapable of functioning on its own, they defer to the legislature if the provision can operate in a manner that still advances Congress's basic objective, so long as that result is consistent with legislative intent.¹⁷⁸

Before turning to the severability of Sections 8, 4(f)(4), and 4(a)(1), I note that Section 5 *was* at issue in *Shelby County* and the Supreme Court did *not* declare it to be unconstitutional even though it incorporates the invalid coverage formula in Section 4(b). Although the majority opinion did not engage in severability analysis, the Court's actions suggest that Section 5 is not interdependent with the coverage formula. The provisions considered here incorporate the coverage formula in a similar manner as Section 5, but that does not guarantee that they can be permissibly severed. Still, the continued operation of Section 5 is worth bearing in mind.

(b) *Severability of Section 8: The Federal Observer Program.*

Applying the Court's severability framework in the present case, Section 8's federal observer program should be upheld as a constitutionally severable provision of the Voting Rights Act. First, the presence of the severability clause indicates that Congress did not intend for the validity of Section 8 to depend on the validity of Section 4(b). *INS v. Chadha*¹⁷⁹ is

¹⁷⁴ See *id.*; see also Ezzell, *supra* note 168, at 1485.

¹⁷⁵ *Alaska Airlines*, 480 U.S. at 686.

¹⁷⁶ *Id.* at 684 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)) (internal quotation mark omitted). See Ezzell, *supra* note 168, at 1485.

¹⁷⁷ *Alaska Airlines*, 480 U.S. at 685.

¹⁷⁸ Indeed, the *Ayotte* Court noted that "the touchstone for any decision about remedy is legislative intent After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (citations omitted). In *Ayotte*, the case was remanded for a determination of whether the legislature intended that the statute be susceptible to a "more finely drawn" remedy that would only enjoin unconstitutional applications of the statute. *Id.* at 331.

¹⁷⁹ 462 U.S. 919 (1983).

instructive on this point. In *Chadha*, the Court considered whether a legislative veto provision was severable from a provision permitting the Attorney General to suspend certain deportation proceedings. Importantly, the act at issue in *Chadha* contained a severability clause that is virtually identical to the one that appears in the Voting Rights Act.¹⁸⁰ Commenting on this clause, the Court noted that “[t]his language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the [provision at issue] was invalid.”¹⁸¹ Beyond this presumption, the independent validity of Section 8 is plainly consistent with Congress’s objectives in enacting the Voting Rights Act. The VRA was designed to remedy racial discrimination in voting, which had “infected the electoral process in parts of our country for nearly a century.”¹⁸² Section 8 advances this objective through the imposition of federal observers who collect evidence of unconstitutional voting discrimination and deter discriminatory action through their presence at polling locations. Thus, Congress would likely prefer that the federal observer provision be retained even without the invalid coverage formula.

Second, Section 8 is capable of “function[ing] in a manner consistent with the intent of Congress.”¹⁸³ As a preliminary matter, one may assume that a provision must be constitutionally valid for it to be capable of functioning in a manner consistent with legislative intent. As noted earlier, the federal observer program arguably meets this requirement, under both *Shelby County* and earlier precedent, even when coupled with the coverage formula.¹⁸⁴

But even if the coverage formula is severed from Section 8, Section 8 continues to be constitutionally valid. Recall that the Attorney General can dispatch federal observers to a particular polling location only after a two-part inquiry has been satisfied. First, the political subdivision must fall within the coverage formula in Section 4(b) of the Act. Second, the Attorney General must have either received “written meritorious complaints” that race-based voting discrimination is likely in that location or have determined, after investigation, that federal observers are “necessary” to enforce the guarantees of the Fourteenth and Fifteenth Amendments.¹⁸⁵ If the first part of the inquiry — the coverage formula — is severed from the two-part procedure, Section 8 continues to be valid because it would permit the Attorney General to dispatch federal observers only in a manner that comports

¹⁸⁰ Compare 42 U.S.C. § 1973p (2012) (VRA severability clause) with *Chadha*, 462 U.S. at 932 (reproducing the text of the severability clause in the challenged statute: “If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.”)

¹⁸¹ *Chadha*, 462 U.S. at 932.

¹⁸² *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

¹⁸³ *Alaska Airlines*, 480 U.S. at 685.

¹⁸⁴ See *infra* sections III.B.1 & III.B.2.

¹⁸⁵ See *supra* note 65 and accompanying text.

with *Shelby County*'s mandate — namely, that burdens be imposed on the basis of “current need” in a particular political subdivision. Moreover, removing the coverage formula would expand the federal observer program nationwide,¹⁸⁶ thereby eliminating any concern about denying the states equal sovereignty.

Turning back to functionality, if *Shelby County* is construed narrowly such that use of the coverage formula as a means of imposing the minimal burden of federal observer coverage is constitutionally proper,¹⁸⁷ then Section 8 is *entirely* functional.

Even without the coverage formula, however, Section 8 can continue to function in a manner consistent with Congress's intent. Again, excising the coverage formula would have the effect of expanding the geographic scope of the federal observer provision to the entire country, but the statute's structure reveals that Congress would prefer that result. Although Section 8 was originally designed to focus on jurisdictions that fell within the coverage formula, Section 3(a) of the VRA permits the Attorney General to seek the appointment of federal observers, by court order, in *any* proceeding undertaken in *any* jurisdiction to enforce the guarantees of the Fourteenth or Fifteenth Amendments. In other words, when Congress initially enacted the Voting Rights Act, it expressly permitted federal observers to be deployed to any jurisdiction in the United States so long as there was evidence of current need. Severing the coverage formula from Section 8 would be consistent with that command.¹⁸⁸

Nevertheless, Section 3(a) does give rise to a potential counterargument. Even if broadening Section 8's geographic scope would not be inconsistent with legislative intent, severing the coverage formula from the two-part Section 8 procedure would arguably permit the Attorney General (as opposed to a court) proactively to deploy federal observers upon a lesser showing than Congress required under Section 3(a). In particular, Section 3(a) permits courts to impose federal observer coverage “as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in [the] State or subdivision.”¹⁸⁹ Thus, Section 3(a) authorizes the imposition of federal observers in instances where constitutional violations have *conclusively* occurred. With Section 8, the coverage formula arguably served this same role because it was designed to pick out the jurisdictions where courts could *presume* that there was great deal of unconstitutional voting discrimination taking place.

¹⁸⁶ See *infra* section III.B.

¹⁸⁷ See *supra* section II.B.2.

¹⁸⁸ Cf. *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (noting that the choice between extension and nullification is within the “constitutional competence of a federal district court,” and ordinarily “extension, rather than nullification, is the proper course,” though a court should not use “its remedial powers to circumvent the intent of the legislature”). In the present context, extension is consistent with legislative intent.

¹⁸⁹ See 42 U.S.C. § 1973a(a) (2012). Section 3 thus requires that a court have concluded that intentional discrimination took place within the jurisdiction.

By severing the coverage formula from Section 8, however, a court would be permitting federal observers to be deployed to a political subdivision upon a lesser showing: namely, when the Attorney General makes an administrative determination, after investigation, that efforts to deny or abridge the right to vote on account of race are “likely” or that observers are “necessary” to enforce the Fourteenth and Fifteenth Amendments.¹⁹⁰ This determination by the Attorney General is not as demanding as a court affirmatively concluding through litigation that unconstitutional voting discrimination has in fact taken place within a jurisdiction. So the existence of Section 3 might suggest that Section 8 cannot function in a manner consistent with congressional intent, absent the coverage formula, because it would permit federal observers to be imposed after too lenient a showing of “current need.”

This counterargument ultimately falters on two fronts. First, the text of Section 3(a) *also* authorizes courts to impose federal observers “as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce [the Fourteenth or Fifteenth Amendments].”¹⁹¹ This authorization mirrors the Section 8 standard and permits courts to impose federal observers before there has been a conclusive determination that constitutional violations have occurred in the jurisdiction. Moreover, Section 3(c), which authorizes courts to impose federal *preclearance* after concluding that constitutional violations have occurred in a particular jurisdiction, lacks this more relaxed standard.¹⁹² So Congress recognized that federal observers impose a lesser burden than federal preclearance and afforded courts with the ability to deploy them under a more relaxed standard.

Second, the Department of Justice’s actual practices indicate that Congress supports the Attorney General’s operation of the federal observer program independent of the coverage formula, and under the Section 8 standard. Prior to the 2006 reauthorization of the Voting Rights Act, the U.S. Commission on Civil Rights issued a report on voting rights enforcement by the Department of Justice.¹⁹³ That report examined the federal observer program, noting that “[f]rom 1982 to 2004, the Justice Department utilized polling place observers roughly 500 times in elections in counties and parishes covered by the Section 4 coverage formula.”¹⁹⁴ More importantly, the Commission also found that “[i]n recent years, the Department of Justice expanded the observer program by sending observers to jurisdictions not covered by Section [4(b)] or 3(a).”¹⁹⁵ When it did so, the Department “ob-

¹⁹⁰ *Id.* § 1973f(a)(2)(B).

¹⁹¹ *Id.* § 1973a(a)(1).

¹⁹² *See id.* § 1973a(c). This provision is the so-called “bail-in” mechanism.

¹⁹³ U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE’S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS (2006), available at <http://www.usccr.gov/pubs/051006VRAStatReport.pdf>, archived at <http://perma.cc/F7KR-DQ6B>.

¹⁹⁴ *Id.* at 81.

¹⁹⁵ *Id.*

tained agreements from jurisdictions to permit the observers into the polling places.”¹⁹⁶ This practice has continued since 2004. As a result, the Attorney General has been deploying federal observers on a nationwide basis, without establishing the existence of prior constitutional violations in many of these jurisdictions, for at least a decade.¹⁹⁷ Further, the Civil Rights Commission’s report was part of the record before Congress when it reauthorized the Voting Rights Act in 2006. Congress also heard direct testimony on the subject. In particular, congressional hearings on Section 8 revealed that “the Department has routinely deployed its own civil rights personnel to serve as civil rights monitors in jurisdictions not covered by the Voting Rights Act.”¹⁹⁸ Importantly, Congress could have altered or prohibited this practice, but it did not do so.¹⁹⁹ Instead, Section 8 was reauthorized for an additional twenty-five years in light of this record.²⁰⁰ All told, Congress does not appear to have qualms about the Attorney General operating the federal observer program independently of either the coverage formula or a judicial finding of intentional discrimination.²⁰¹

Ultimately, Section 8 should be upheld as a constitutionally valid, separable provision of the Voting Rights Act.²⁰²

¹⁹⁶ *Id.* Severance of the coverage formula, however, would permit the Attorney General to deploy federal observers to a non-covered jurisdiction *without* obtaining its prior consent.

¹⁹⁷ This practice is likely to continue. In the aftermath of *Shelby County*, for example, then-Attorney General Eric Holder said that the Department’s new strategy is to expand the Voting Rights Act “beyond those states that had been covered before.” Devlin Bartlett, *Student Maps Voting-Rights Approach*, WALL ST. J. (Apr. 13, 2014), <http://online.wsj.com/news/articles/SB10001424052702303887804579499704059446402>, archived at <http://perma.cc/9MM-3QD3>.

¹⁹⁸ *The Voting Rights Act: Sections 6 and 8 — The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 5 (2005) (statement of Rep. Robert C. Scott of Virginia).

¹⁹⁹ Assuming that the existing safeguards in the VRA apply to these political subdivisions, it could be that Congress considers them sufficient to cabin the Attorney General’s discretion. In addition to the bailout procedure in Section 4(a)(1), for example, Section 13 of the VRA permits political subdivisions to terminate the assignment of federal observers by filing an action for a declaratory judgment in the United States District Court for the District of Columbia. Termination will occur upon showing that a majority of the nonwhite persons of voting age are registered to vote and that “there is no longer reasonable cause to believe” that persons will be deprived of or denied the right to vote on account of race, color, or membership in a language minority group. See 42 U.S.C. § 1973k (2012).

²⁰⁰ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 § 4, 120 Stat. 577, 580 (2006).

²⁰¹ See *United States v. Bd. of Comm’rs of Sheffield*, 435 U.S. 110, 132–33 (1978) (holding that by reauthorizing the VRA, without addressing the Attorney General’s interpretation of the Act that was clearly documented in the congressional record, Congress had endorsed the Attorney General’s interpretation); *Georgia v. United States*, 411 U.S. 526, 533 (1973) (finding Congressional endorsement of a judicial interpretation of the VRA under similar circumstances).

²⁰² Section 8 might also be independently upheld as a proper exercise of Congress’s authority under the Elections Clause. Scholars have noted that “there is untested room for expansion of congressional intervention under the Elections Clause,” Issacharoff, *supra* note 20, at 113, especially given that it affords Congress express authority to displace preexisting state

(c) *Severability of Section 4(f)(4): The Bilingual Election Materials Requirement.*

The coverage formula likely cannot be severed from the bilingual language requirements in Section 4(f)(4) of the Voting Rights Act. The presence of the severability clause does suggest that Congress did not intend for the validity of Section 4(f)(4) to depend on the validity of Section 4(b). But severability doctrine requires that the remaining provision be capable of functioning in a manner consistent with congressional intent. The version of Section 4(f)(4) that would remain after severance of Section 4(b) does not appear to satisfy this demand.

Severing the November 1972 election date from the three prongs of the Section 4(f)(4) coverage formula would mandate the provision of bilingual election materials in any jurisdiction where: (1) 5% of the voting-age citizens are members of a single-language minority group; (2) registration and election materials are provided only in English; and (3) fewer than 50% of the voting-age citizens are registered to vote or actually voted in the most recent election.²⁰³ Although this formula seems reasonable, Congress has expressly included an alternative, more detailed coverage formula²⁰⁴ imposing “essentially identical” requirements for the provision of bilingual election materials in Section 203 of the Voting Rights Act.²⁰⁵ Importantly, the Section 203 coverage formula incorporates the most recent census data and ties coverage under the provision to a detailed comparison with the national illiteracy rate.²⁰⁶ In other words, Congress knows how to write a coverage formula that incorporates recent data as a trigger for bilingual election materials, but the severed version of the Section 4(f)(4) trigger would not mirror Congress’s expressed preferences. And because the severed version of the Section 4(f)(4) formula would lack the features outlined in Section 203, it likely does not function in a manner consistent with congressional intent. As a result, if Section 4(f)(4) is not found to be constitutional independent of its incorporation of the coverage formula, it is likely invalid.

(d) *Severability of Section 4(a)(1): The Bailout Standard.*

Severance of the coverage formula from the bailout provision is only necessary if severance of the coverage formula from Section 8’s federal observer program is *also* necessary, thus expanding the geographic scope of the federal observer program nationwide. As noted earlier, the bailout standard only applies to coverage-formula jurisdictions subject to the special

regulatory regimes (in contrast to the more limited remedial authority afforded by the Fourteenth and Fifteenth Amendments). *See id.* at 107–13.

²⁰³ 28 C.F.R. § 55.5(a) (2014). Even this formulation assumes that the Court would substitute the most recent election for the November 1972 election date.

²⁰⁴ *See* 42 U.S.C. § 1973aa-1a(b)(2) (2012).

²⁰⁵ 28 C.F.R. § 55.8(a) (2014).

²⁰⁶ *See* 42 U.S.C. § 1973aa-1a(b)(2)(A) (2012).

remedial provisions in Section 5, Section 4(f)(4), and Section 8. So if Section 8 is constitutional notwithstanding its incorporation of the coverage formula, then the bailout standard would still be valid insofar as it applies to coverage-formula jurisdictions subject to Section 8, and severance of the coverage formula from the bailout standard would be unnecessary.

In the event that severance is necessary, however, the coverage formula can likely be separated from the bailout provision in Section 4(a)(1). Again, the VRA's broad severability clause suggests that Congress did not intend for the validity of Section 4(a)(1) to depend on the validity of Section 4(b). Moreover, severing the coverage formula, and thereby nationalizing the geographic scope of the bailout procedure, would permit the provision to function in a manner consistent with congressional intent.²⁰⁷ When the current bailout formula was first devised, the Senate Judiciary Committee Report explained that "the goal of the bailout . . . is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process."²⁰⁸ The bailout procedure was therefore deliberately and "inextricably linked to . . . the Act's special provisions," which were only imposed on covered jurisdictions.²⁰⁹ If the federal observer program expands nationwide, Congress would likely intend for the bailout procedure to mirror the scope of that program so that all "covered" jurisdictions would have an incentive to improve access to the political process and an opportunity to terminate federal intrusion.

III. WHY MIGHT A JURISDICTION CONTINUE TO SEEK BAILOUT?

There are several reasons why a political subdivision might continue to seek bailout even though *Shelby County* has lifted the burden of federal preclearance. These motivations are contingent, however, on how courts ultimately adjudicate the remaining provisions of the VRA in light of *Shelby County*. Accordingly, I will begin by analyzing this question under the assumption that the coverage formula is only invalid as a means of subjecting jurisdictions to federal preclearance. In the subsequent section, I will address the motivation to bail out under the assumption that all of the special remedial provisions are invalid because they incorporate the coverage formula.

²⁰⁷ As an initial matter, there is little doubt that the bailout procedure itself is independently constitutional. The bailout procedure itself imposes no federalism costs on the states; rather, it serves as a safety valve permitting jurisdictions to exempt themselves from the Act's other requirements. The bailout procedure also relates to "the jurisdiction's recent record of behavior rather than to a mere calendar date." S. REP. NO. 97-417, at 44 (1982), *reprinted in* 1982 U.S.C.C.A.N. 178, 222.

²⁰⁸ *Id.* at 59.

²⁰⁹ Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 382 (1985).

A. *Bailing Out in the Presence of an Operable Coverage Formula or Valid Federal Observer Program*

First, in the event that the coverage formula is severed or only invalid as a means of subjecting jurisdictions to federal preclearance, a covered jurisdiction might seek to bail out to eliminate the burden upon state sovereignty imposed by the presence of federal observers. Although federal observers are not permitted to interfere with the local conduct of an election, they still represent the enforcement arm of the Department of Justice and their presence may therefore be seen as an unwelcome intrusion into state affairs.²¹⁰ To be sure, in the event that the federal observer program is expanded nationwide, some jurisdictions would surely forgo bailout and welcome the imposition of federal observers in response to bona fide complaints of discriminatory behavior.²¹¹ But to the extent that intrusion by the federal government is seen as an unwelcome burden, concerned political subdivisions would at least be capable of terminating their coverage.²¹²

Second, even if the imposition of federal observers is not imminent, a jurisdiction might seek to bail out in order to separate itself from the stigma associated with past efforts to discriminate or present developments that might be viewed as discriminatory. This is particularly true in light of recent events. In the four months after *Shelby County* was decided, sixteen states enacted restrictions on voting that most Republicans believe will root out election fraud but most Democrats fear will disenfranchise minorities.²¹³ North Carolina, for example, is poised to implement a law that has been said to encompass “the greatest hits of voter suppression”²¹⁴ and has been called “the most sweeping antivoter law in at least decades.”²¹⁵ If a county in North Carolina wanted to disassociate itself from the historical stigma of having been subjected to preclearance, or from this statewide measure that

²¹⁰ One of the primary tasks of federal observers is to gather information that can be used in subsequent litigation to enforce the Voting Rights Act and the Fourteenth and Fifteenth Amendments. So the presence of federal observers in a particular jurisdiction increases the probability that local officials will ultimately wind up in litigation. Federal intrusion might also suggest that local officials are incapable of resolving problems with voting discrimination on their own.

²¹¹ See Tucker, *supra* note 28, at 242 (“Local election officials frequently welcome federal observers, particularly if they help establish compliance with the VRA.”).

²¹² A list of the jurisdictions most likely to consider federal observer coverage to be an unwelcome intrusion upon state sovereignty would probably include many of the southern jurisdictions that were formerly covered by Section 4(b). The bailout provision would therefore provide these jurisdictions with the opportunity to demonstrate, on a case-by-case basis, that they do not discriminate and that they have affirmatively improved access to the political process for minority voters.

²¹³ See Brandeisky et al., *supra* note 19; see also Tamasitis, *supra* note 22, at 963.

²¹⁴ See Berman, *supra* note 22.

²¹⁵ John Peragine, *North Carolina Prosecutor Takes Shots at the Laws He’s Obligated to Enforce*, N.Y. TIMES (Oct. 24, 2013), <http://www.nytimes.com/2013/10/25/us/north-carolina-prosecutor-takes-shots-at-the-laws-hes-obliged-to-enforce.html?pagewanted=all>, archived at <http://perma.cc/QE4K-WV6Q>.

others consider to be intentionally discriminatory, bailout would provide it with an opportunity to publicize its clean record. Moreover, the congressional hearings that were held on the bailout provision in 2005 revealed that jurisdictions *do* in fact want the opportunity to show that they do not discriminate. Gerald Hebert, the leading expert on the VRA's bailout provision, testified that:

[J]urisdictions today want to be able to demonstrate that they have a good record, that they offer equal opportunity. And when they find out that the bailout provisions are available to show that and to show their citizens that [they] do have an open process, they've pursued it, and they've been proud of it.²¹⁶

Although Section 13 of the Act provides an alternative mechanism for terminating federal observer coverage,²¹⁷ the statutory requirements of Section 4(a) are more onerous, and therefore more effectively defeat any associated stigma. Ultimately, the bailout provision would likely retain practical effect in the event that Section 8 is held to be valid.

B. Bailing Out in the Absence of Special Remedial Provisions

In the absence of the special remedial provisions, formerly covered jurisdictions might seek to bail out for two reasons. First, as noted before, these jurisdictions might want to remove the stigma associated with having been subjected to preclearance. To that end, they could request a declaratory judgment under Section 4(a) on the theory that they have complied with all of the requirements of that section.²¹⁸ Second, and along similar lines, formerly covered jurisdictions might seek to bail out in order to insulate themselves from any *new* coverage formula that Congress might enact.

Unfortunately, accomplishing either of those goals would be difficult in the absence of the special remedial provisions because any jurisdiction seek-

²¹⁶ *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 89 (2005) (testimony of J. Gerald Hebert, Former Acting Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice).

²¹⁷ A political subdivision may terminate federal observer coverage under Section 13 by filing an action for a declaratory judgment in the United States District Court for the District of Columbia and establishing that: (1) more than 50% of the nonwhite persons of voting age are registered to vote in the jurisdiction and (2) there is no longer reasonable cause to believe that persons will be deprived or denied the right to vote on account of race or color, or in contravention of the language minority provisions of the Voting Rights Act. 42 U.S.C. § 1973k (2012).

²¹⁸ The Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* (2012), which allows a party to sue to establish nonliability, does not overcome the justiciability hurdles discussed later in the text concerning standing. A party seeking declaratory relief must still present an actual controversy in order to satisfy the constitutional requirements of Article III. *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 239–41 (1937).

ing a declaratory judgment under Section 4(a) would confront a problem with standing.

It is well known that a litigant must have standing to invoke the power of a federal court. Standing requires a plaintiff to allege a “concrete and particularized” injury that is causally connected to a defendant’s conduct and likely to be redressed by the requested relief.²¹⁹

If the federal government is not capable of subjecting a jurisdiction to federal preclearance, federal observer coverage, or the language minority requirements, then a political subdivision would no longer be capable of alleging a concrete and particularized injury redressable by an exemption from the Act’s special remedial provisions. Additionally, a court would be unlikely to base standing in a bailout proceeding simply upon the desire to remove stigma. In *Allen v. Wright*,²²⁰ the Supreme Court stated that stigmatic injury affords standing only when it is a direct result of having personally been denied equal treatment.²²¹ Without operable special remedial provisions that distinguish between the states, no jurisdiction would be able to claim that it was being denied equal treatment, and being stigmatized as a result. Finally, in light of the current gridlock in Congress,²²² the possibility of future coverage cannot be said to be “actual or imminent,”²²³ nor can it be remedied in advance of Congress’s adoption of a new statute.

IV. COURTS SHOULD INTERPRET *SHELBY COUNTY* TO RETAIN THE FEDERAL OBSERVER PROGRAM

A nationwide federal observer program would be helpful post-*Shelby County* in at least five ways: (1) federal observer reports would serve as an efficient source of credible evidence in litigation to enforce the Voting Rights Act and the Fourteenth and Fifteenth Amendments; (2) a nationwide federal observer program would, by definition, document the current conditions of discrimination throughout the country, which could then be used to help fashion a new coverage formula; (3) federal observers would help ensure that poll workers correctly administer applicable prerequisites to voting; (4) the presence of federal observers would deter discriminatory behavior by citizens and election officials; and (5) a nationwide federal observer program would strengthen the legitimacy of our federal election system and increase voter confidence in the accuracy of results. I will address each of these benefits before commenting on the relationship between a nationwide federal observer program and the prior federal preclearance requirement.

²¹⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

²²⁰ 468 U.S. 737 (1984).

²²¹ *Id.* at 755.

²²² See Carl Hulse & Robert Pear, *Departing Lawmakers Bemoan the Decline of Compromise*, N.Y. TIMES (Jan. 2, 2015), <http://www.nytimes.com/2015/01/03/us/politics/departing-lawmakers-lament-capitols-partisanship.html>, archived at <http://perma.cc/P3AG-9NUU>.

²²³ *Cleveland Cnty. Ass’n for Gov’t by People v. Cleveland Cnty. Bd. of Comm’rs*, 142 F.3d 468, 472 (D.C. Cir. 1998).

A. *Observers Facilitate the Enforcement of the Voting Rights Act and the Fourteenth and Fifteenth Amendments*

Perhaps the most important role served by federal observers is to gather information that can be used in subsequent litigation to enforce the Voting Rights Act and the Fourteenth and Fifteenth Amendments.²²⁴ In particular, a violation of Section 2 of the VRA requires showing that an election practice or procedure has a disparate effect on a minority group, resulting in a denial or abridgement of their right to vote.²²⁵ Federal observers, “serv[ing] as the eyes and ears of the Justice Department,”²²⁶ frequently provide evidence that can be used to establish violations of Section 2 through their capacity to “observe the election procedures being used and their impact on minority voters.”²²⁷ In *United States v. Berks County*,²²⁸ for example, a district court directly utilized federal observer reports to conclude that the “English-only election notices and materials; dearth of bilingual poll officials; and barriers to voters’ ability to receive assistance from the person of their choice . . . result[ed] in an electoral system in which Hispanic and Spanish-speaking voters ha[d] less opportunity than other members of the electorate to participate in the electoral process.”²²⁹ Beyond this, if the discrimination that federal observers witness is a violation of the criminal provisions of the VRA,²³⁰ the evidence can be transmitted to the Civil Rights Division’s Criminal Section or the Criminal Division’s Public Integrity Section, both of which work with local U.S. Attorneys’ offices to prosecute such cases.

In order to establish a violation of the Fourteenth or Fifteenth Amendments, plaintiffs must demonstrate the existence of intentional discrimination.²³¹ Federal observers help satisfy this burden by reporting on, for example, how voters are treated inside and outside the polling place, whether they are offered provisional ballots if their names are not on the voter registration list, the availability of voting instructions, and the availability of assistance using the voting machine or casting a paper ballot. Additionally, in jurisdictions that are required to provide language assistance, federal observers report on the availability of language assistance, whether all written materials are provided in the covered language, and whether language assistance is available at every stage of the election process. Since federal observer reports are prepared by impartial monitors contemporaneously to the observed actions, “they provide evidence that is generally unassailable in

²²⁴ For a detailed discussion of the variety of ways that federal observers have facilitated the enforcement of these provisions, see Gray, *supra* note 72.

²²⁵ See 42 U.S.C. § 1973 (2012).

²²⁶ Tucker, *supra* note 28, at 233.

²²⁷ *Id.* at 232.

²²⁸ 277 F. Supp. 2d 570 (E.D. Pa. 2003).

²²⁹ *Id.* at 581.

²³⁰ See, e.g., 42 U.S.C. §§ 1973i, 1973j, 1973aa-3, 1973bb(b) (2012).

²³¹ See *Washington v. Davis*, 426 U.S. 229, 239–40 (1976).

court proceedings.”²³² In *Berks County*, for example, the court found “substantial evidence of hostile and unequal treatment of Hispanic and Spanish speaking voters,”²³³ as federal observer reports had documented numerous instances where poll workers directed hostile statements at Hispanic voters,²³⁴ required only Hispanic voters to verify their address,²³⁵ and required only Hispanic voters to show photo identification or a voter registration card even though it was not required under Pennsylvania law.²³⁶

Finally, by facilitating the enforcement of federal voting rights law, an expanded federal observer program would help restore the federal preclearance regime in the event that Congress does amend the Voting Rights Act. For example, the dominant bipartisan proposal responding to *Shelby County* — the Voting Rights Amendment Act²³⁷ — would use a rolling coverage formula as a trigger for Section 5.²³⁸ Specifically, the bill would reimpose federal preclearance in states where there have been five voting rights violations in the most recent fifteen-year period, as long as at least one of those violations was committed by the state itself.²³⁹ It also would reimpose federal preclearance in political subdivisions where there have been three voting rights violations in the most recent fifteen-year period, or one voting rights violation combined with persistent and extremely low minority-voter turnout.²⁴⁰ Lastly, the bill would lower the threshold for “bail-in” by permitting a court to require federal preclearance upon finding that a jurisdiction has violated any federal voting rights law, including Sec-

²³² Tucker, *supra* note 28, at 233. See also *James v. Humphreys Cnty. Bd. of Election Comm’rs*, 384 F. Supp. 114, 125 (N.D. Miss. 1974) (“It is impossible for the court to satisfactorily resolve many irreconcilable evidentiary disputes without resort to the federal observers’ reports. These reports, 18 in number, were compiled by disinterested persons almost immediately following the election; they were submitted in the regular course of official duty and are regarded as highly credible.”).

²³³ *Berks Cnty.*, 277 F. Supp. 2d at 575.

²³⁴ Amongst other things, the poll workers stated, “[t]his is the U.S.A. — Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name,” and “[d]umb Spanish-speaking people . . . I don’t know why they’re given the right to vote.” *Id.*

²³⁵ The poll officials told the Justice Department staff that they asked for address verification because Hispanics “move a lot within the housing project.” *Id.*

²³⁶ *Id.*

²³⁷ H.R. 3899, 113th Cong. (2014). Senator Patrick Leahy (D–VT) also introduced companion legislation in the Senate. See Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. (2014).

²³⁸ See Press Release, Rep. James Sensenbrenner, Sensenbrenner, Leahy & Conyers Lead Bipartisan, Bicameral Introduction of Legislation to Restore the Voting Rights Act (Jan. 16, 2014), <http://sensenbrenner.house.gov/news/documentsingle.aspx?DocumentID=367081>, archived at <http://perma.cc/5FE5-YC2Q>.

²³⁹ H.R. 3899, 113th Cong. § 3 (2014). A “voting rights violation” is defined to include: (1) a final judgment from a court that the state or subdivision violated the Fourteenth or Fifteenth Amendments to the Constitution; (2) a final judgment of a court that a state or political subdivision violated federal voting laws; (3) a failure or denial of preclearance by a court under Sections 5 or 3(c) of the VRA; or (4) a failure or denial of preclearance by the Attorney General under Sections 5 or 3(c) that is not overturned by a court. The Attorney General’s denial, however, cannot be based on the imposition of a photo identification requirement. *Id.*

²⁴⁰ *Id.*

tion 2 of the VRA.²⁴¹ Because federal observers provide evidence that is used to establish such “voting rights violations,” an expanded federal observer program would facilitate restoration of the proposed preclearance regime in the event that this enforcement model makes its way into law.²⁴²

B. Observers Document Evidence of “Current Need” that Can Be Used to Fashion a New Coverage Formula

In *Shelby County*, the Court was unconvinced that the “current burdens” of Section 5 were justified by “current needs” because the “40-year-old facts” underlying the coverage formula no longer bore a “logical relation to the present day.”²⁴³ The Court further declared that “Congress may draft another formula based on current conditions.”²⁴⁴

A nationwide expansion of the federal observer program could be useful for this endeavor because federal observer reports, by definition, document current conditions of discrimination in areas of the country where there is evidence that federal preclearance may still be needed. In particular, federal observers are only deployed to areas where the Department of Justice has received complaints of unconstitutional voting discrimination or where it has verified, after investigation, that efforts to deny or abridge the right to vote are likely to occur.²⁴⁵

In addition to this information-gathering role, federal observer reports could be useful as a complementary or direct component of any new coverage formula. In some instances, the proposed amendments to the Voting Rights Act would permit the reimposition of federal preclearance solely on the basis of conduct constituting statutory, but not *constitutional*, violations.²⁴⁶ The Court might conclude that this formulation exceeds Congress’s powers under the Reconstruction Amendments because it would impose the harsh remedy of federal preclearance without proof of unconstitutional conduct.²⁴⁷ Federal observer reports are less vulnerable to this critique because poll watchers typically document disparate treatment on the basis of race — the very definition of unconstitutional voting discrimination. Indeed, federal observer reports seem to exemplify the type of targeted evidence of uncon-

²⁴¹ *Id.* § 2. Importantly, and controversially, the bill explicitly exempts Section 2 cases based on a photo-identification requirement from the new bail-in standard. *See id.*

²⁴² Although the last reauthorization was passed with a Republican Congress and Republican president, the prospects of enactment for this or any other bill are uncertain at best. *See Zachary Roth, Top GOPer Confirms Congress Won’t Strengthen Voting Rights Act*, MSNBC (Jan. 14, 2015, 12:47 PM), <http://www.msnbc.com/msnbc/top-goper-confirms-congress-wont-strengthen-voting-rights-act>, archived at <http://perma.cc/9S8J-4NWQ>.

²⁴³ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629–31 (2013).

²⁴⁴ *Id.* at 2631.

²⁴⁵ *See supra* notes 65–67 and accompanying text.

²⁴⁶ *See supra* note 239, at § 2.

²⁴⁷ *See Rick Hasen, Initial Thoughts on the Proposed Amendments to the Voting Rights Act*, ELECTION LAW BLOG (Jan. 16, 2014, 1:32 PM), <http://electionlawblog.org/?p=58021>, archived at <http://perma.cc/GY3Z-2BLG>.

stitutional behavior that the Court suggested could be appropriate to justify the imposition of the VRA's special remedial provisions in a particular jurisdiction.²⁴⁸ And an expanded federal observer program would obtain this information on current conditions of discrimination more efficiently than the federal preclearance regime given that it would rely on bottom-up reporting by affected jurisdictions rather than universal reporting by all jurisdictions. Ultimately, a coverage formula tied in part to incriminating federal observer reports could provide a more surgically targeted pathway for distinguishing between the states and reimposing the federal preclearance requirement.²⁴⁹

C. *Observers Promote the Proper Administration of Applicable Election Procedures*

Federal observers serve an important role in facilitating the proper implementation of applicable prerequisites to voting. In Passaic County, New Jersey, for example, observers documented that Hispanic voters were frequently denied the right to vote because their names did not appear to be listed in the voter registration book.²⁵⁰ But Hispanic voters often have more than one surname. Federal observers learned that these voters had indeed registered under different surnames that *did* appear on the voter registration list. The observers communicated this information to the Department of Justice, which subsequently recommended to local election officials that they train their poll workers to ask any voter whose name does not appear in the registration book, "Have you registered under another name?" This simple alteration in the administration of the applicable election procedures prevented numerous instances of vote denial.²⁵¹

This type of federal monitoring has become all the more necessary in light of the recent proliferation of voting restrictions throughout the country.²⁵² Consider two examples. In North Carolina, citizens will soon be required to present a government-issued photo ID in order to vote, but the law excludes IDs from colleges, government employers, and those issued by

²⁴⁸ For example, despite Mississippi's dreadful track record with respect to voting discrimination, federal observers had only been deployed to forty-eight of the state's eighty-two counties at the time that the VRA was last authorized. See *The Continuing Need for Federal Examiners and Observers to Ensure Electoral Integrity: Hearing on S. 2703 Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 448 (2006) (testimony of Constance Slaughter-Harvey). Presumably, a more narrowly targeted coverage formula that focused on those forty-eight counties would more likely withstand judicial scrutiny given that federal observer assignments are directly tied to recent reports of unconstitutional discrimination.

²⁴⁹ Such a proposal involves one possible factor that could be used to rewrite the coverage formula, but it should not be the only one. Federal observers are not capable of documenting vote dilution. Thus, this proposal should be complemented by a factor capable of documenting current conditions of vote dilution.

²⁵⁰ See Tucker, *supra* note 28, at 232–33, 254–75. The discussion in this paragraph largely mirrors Prof. Tucker's helpful description of these events.

²⁵¹ *Id.* at 233.

²⁵² See Tamasis, *supra* note 22.

public assistance agencies, which are commonly used by poor and minority voters.²⁵³ Similarly, Texas's voter ID law, "the most stringent in the country,"²⁵⁴ requires citizens to show either a driver's license, election identification certificate, Department of Public Safety personal ID card, military ID, citizenship certificate, passport, or concealed-carry permit before they may be permitted to vote. It also mandates that there be a match between a voter's name as it appears on his or her ID and as it appears on the state's registration rolls.²⁵⁵

These requirements are facially neutral, but they pose implementation challenges for citizens and poll workers alike.²⁵⁶ In Texas, for example, former Speaker of the House Jim Wright was unable to vote in a recent election because he no longer possessed a valid license, and one of the state's legislators (and 2014 gubernatorial candidate), Wendy Davis, and the state's then-Attorney General (now Governor) Greg Abbott, were only permitted to vote after signing an affidavit — a procedure they had to endure because they lacked an exact name match with the state's registration list.²⁵⁷ As public officials responsible for enacting and defending the ID statute, respectively, Ms. Davis and Mr. Abbott were intimately familiar with the law's requirements and highly motivated to exercise their rights. Unfortunately, this did not prevent them from confronting obstacles. Their struggles do not bode well for ordinary citizens.²⁵⁸

²⁵³ See Peragine, *supra* note 215.

²⁵⁴ *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013).

²⁵⁵ *Id.* at 115–18. A federal district court recently invalidated the Texas law under both the U.S. Constitution and the Voting Rights Act. See *Veasey v. Perry*, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014). The Fifth Circuit subsequently entered a stay pending appeal by the State of Texas. *Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014), *enforced*, 135 S. Ct. 9 (2014) (mem.). As of the date this Article went to print, a decision on the merits was still pending in the Fifth Circuit.

²⁵⁶ They also present the opportunity for discriminatory administration and can have the effect of disenfranchising vulnerable populations. See Rachael V. Cobb, D. James Greiner & Kevin M. Quinn, *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 Q. J. POL. SCI. 1, 3 (2012) (finding "strong evidence that Hispanic and black voters were asked for IDs at higher rates than similarly situated white voters"); Issacharoff, *supra* note 20, at 113 ("Election officials are entrusted with administration of a system fraught with the potential for ends-oriented misbehavior, whether predicated on race, partisanship, personal gain, political favoritism, or outright corruption."); Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 5–6 (2009) (noting that when "[law[s] grant[] discretion to poll workers to accept or reject a prospective voter depending on whether the name on the photo identification 'conforms' to the name on the registration list . . . this discretion could invite unconscious bias into poll worker determinations of voter eligibility").

²⁵⁷ Washington Post Editorial Board, Editorial, *Texas Holds 'Em Voteless with New ID Law*, WASH. POST (Nov. 5, 2013), http://www.washingtonpost.com/opinions/texas-holds-em-voteless-with-new-id-law/2013/11/05/0600b99c-462d-11e3-bf0c-cebf37c6f484_story.html, archived at <http://perma.cc/FK2E-KAMA>.

²⁵⁸ See Anna M. Tinsley, *Election Officials Expect Voter ID Problems in Texas*, FORT WORTH STAR TELEGRAM (Feb. 4, 2014), <http://www.star-telegram.com/2014/02/03/5536635/election-officials-expect-voter.html>, archived at <http://perma.cc/7SVR-DF9A>. But see Manny Fernandez, *Party Predictions Differ in Texas on Impact of New Voter ID Law*, N.Y. TIMES

Further, when election officials are vested with broad discretion and charged with administering complex prerequisites to voting — as is common with voter identification laws — inadvertent error and discriminatory behavior are reasonable concerns.²⁵⁹ It is important to note that “poll workers operate in an environment where they may have to make quick decisions, based on little information, with few concrete incentives for accuracy, and with minimum opportunity to learn from their errors.”²⁶⁰ Research shows that these factors serve to “exacerbate the impact of unconscious bias.”²⁶¹ And notably, federal observers are typically the only party that can monitor misbehavior in the polling place. During the last reauthorization of the VRA, the former Acting Chief of the Voting Section, Barry Weinberg, stated that outside of Section 8, “there’s no other way for the law enforcement function of the Justice Department to be performed with regard to harassment and intimidation and disenfranchisement of racial and language minority group members in the polling place on Election Day.”²⁶² The reason, he added, is that “[s]tate laws are written to keep other people, including Federal investigators[,] out of the polls.”²⁶³ As a consequence, Mr. Weinberg concluded that the federal observer program “is crucial, and it’s irreplaceable in the Voting Rights Act.”²⁶⁴

D. Observers Deter Discriminatory Behavior by Citizens and Election Officials

During the most recent reauthorization of the Voting Rights Act, congressional hearings revealed that discriminatory treatment of racial and language minority voters by citizens, poll workers, and election officials continues to be a serious concern.²⁶⁵ Indeed, Congress found that the improper behavior “runs the gamut from actions that make [racial and language minority] voters feel uncomfortable by talking rudely to them, or ridiculing their need for assistance in casting their ballot,” to actions that

(Feb. 5, 2014), http://www.nytimes.com/2014/02/06/us/party-predictions-differ-in-texas-on-impact-of-new-voter-id-law.html?_r=2, archived at <http://perma.cc/7CP7-SWUB>.

²⁵⁹ See Page & Pitts, *supra* note 256, at 5–7; see also Eric Lach, *Arkansas Voters Complain About Quizzing by Poll Workers Checking ID*, TALKING POINTS MEMO (May 21, 2014, 1:22 PM), <http://talkingpointsmemo.com/muckraker/arkansas-voter-id-quizzes>, archived at <http://perma.cc/N4C-4T7M> (describing complaints that voters were “quizzed” about their names, addresses, and birthdates even though such “[q]uizzes are not part of the new [voter identification] law”); Zachary Roth, *Arkansas Voter ID Law Causes Chaos and Confusion*, MSNBC (May 22, 2014, 11:55 AM), <http://www.msnbc.com/msnbc/arkansas-voter-id-law-causes-chaos>, archived at <http://perma.cc/XC5R-DWML>.

²⁶⁰ Page & Pitts, *supra* note 256, at 5.

²⁶¹ *Id.*

²⁶² *The Voting Rights Act: Sections 6 and 8 — The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong.* 18 (2005).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See *id.*

effectively disenfranchise them, such as “failing to find their names on the lists of registered voters,” “refusing to allow them to vote on provisional ballots,” “misdirecting them to other polling places,” or assigning poll workers “who speak only English . . . [to] areas populated by minority language voters.”²⁶⁶

As it had during past reauthorizations, Congress found that the presence of federal observers deters this kind of discriminatory behavior.²⁶⁷ In particular, federal observers “provide a calming and objective presence which can serve to deter any abuse which might occur.”²⁶⁸ As scholars have noted, “the mere assignment of federal observers to an election makes people less likely to engage in discrimination because neutral outsiders are watching and documenting their actions.”²⁶⁹ Thus, “[s]imilar to Section 5 preclearance, federal observers can stop discrimination before it happens,”²⁷⁰ because “[f]ew officials discriminate when they are under the microscope.”²⁷¹

E. Observers Strengthen the Legitimacy of Our Federal Election System

Political scientists have documented the way that poll workers, as “street-level bureaucrats,” powerfully affect the experience that voters have on Election Day.²⁷² Poll workers are responsible for a wide range of activities, including setting up and taking down voting machines, determining when to check a voter’s identification, and deciding when to allow a voter to cast a provisional ballot.²⁷³ As a consequence, voters’ interactions with poll workers directly influence their perceptions of fairness in the democratic process and their confidence in whether their ballots are counted accurately.²⁷⁴

²⁶⁶ *Id.* at 24.

²⁶⁷ See H. REP. NO. 109-478 at 62 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 663; Tucker, *supra* note 28, at 231.

²⁶⁸ S. REP. NO. 94-295 at 21 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 787.

²⁶⁹ Tucker, *supra* note 28, at 231.

²⁷⁰ *Id.*

²⁷¹ *The Continuing Need for Federal Examiners and Observers to Ensure Electoral Integrity: Hearing on S. 2703 Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 391 (2006) (testimony of Constance Slaughter-Harvey).

²⁷² See Thad E. Hall et al., *How Poll Workers Shape Public Confidence in Elections*, 62 POL. RES. Q. 507, 507–08 (2009).

²⁷³ Thad Hall et al., *Poll Workers and the Vitality of Democracy: An Early Assessment*, 40 PS: POL. SCI. & POL. 647, 647 (2007).

²⁷⁴ See Hall et al., *supra* note 272, at 519. In the most recent congressional hearings on the federal observer program, then-Rep. Mel Watt (D–NC) made a similar point, stating that “[v]oters feel more at ease and confident when the Government places a high priority on election monitoring.” He also noted that “the role and continued need of well-trained Federal observers assigned to monitor elections . . . is absolutely critical,” and that “[t]he value to the average citizen of a Federal presence at the polls . . . is simply incalculable.” See *The Voting Rights Act: Sections 6 and 8 — The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 6 (2005).

As evidence mounts that poll workers are crucial actors in the Election Day experience, the training they receive in preparation for their responsibilities has concurrently risen in importance. Unfortunately, however, a survey of over 3,000 local election officials conducted by the Presidential Commission on Election Administration found that, on average, poll workers receive *far* less training than the eight hours that most election experts advise.²⁷⁵ Specifically, “[f]irst-time workers in smaller jurisdictions received an average of just 2.5 hours of training, while workers in larger jurisdictions received an average of 3.6 hours of training.”²⁷⁶ Of course, “[p]oll workers are only as good as the training they receive and their willingness to follow that training.”²⁷⁷

In light of this revelation, federal observers have become all the more necessary to ensure that voters across the nation are not intentionally or inadvertently denied the opportunity to exercise their right to vote. This is true because federal observers frequently document the training provided to poll workers, in addition to observing the procedures used on Election Day and their impact on minority voters.²⁷⁸ This information is often communicated to local election officials to facilitate the improvement of poll worker training and the implementation of nondiscriminatory practices.²⁷⁹ Moreover, if a poll worker refuses to follow their training, observers can pass on that information so that election officials can immediately remove the worker and abstain from hiring them in future elections.²⁸⁰

F. Comparison to Federal Preclearance Under Section 5

Expanding the federal observer program through severance of the coverage formula would not fully restore the safeguards of Section 5. Federal preclearance was largely used to curb redistricting plans and other practices that result in “vote dilution,”²⁸¹ whereas federal monitoring seeks to improve access to the polls, thereby remedying “vote denial.”²⁸² Federal preclearance was also a prophylactic remedy, a “command-and-control form of *ex ante* prohibitions” designed to anticipate and prohibit all deleterious changes.²⁸³ The approach offered here is an *ex post* liability regime that

²⁷⁵ See PRESIDENTIAL COMM’N ON ELECTION ADMINISTRATION, *THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION* 45 n.131 (2014); Ryan J. Reilly, *Nearly Half of Americans Live in Places Where Election Officials Admit Long Lines are a Problem*, HUFFINGTON POST (Dec. 3, 2013, 1:58 PM), http://www.huffingtonpost.com/2013/12/03/presidential-voting-commission-long-lines_n_4378760.html?utm_hp_ref=politics, archived at <http://perma.cc/SD8F-WMGB>.

²⁷⁶ Reilly, *supra* note 275.

²⁷⁷ Tucker, *supra* note 28, at 232.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See Pildes & Tokaji, *supra* note 27.

²⁸² See Tucker, *supra* note 28.

²⁸³ Issacharoff, *supra* note 20, at 116, 118.

utilizes private complaints as a basis for imposing federal monitors in locations where they can facilitate after-the-fact enforcement.

As was true in 1965, this kind of case-by-case litigation is not ideal because lawsuits to enjoin discriminatory voting laws are costly, slow, and leave those elected under the challenged law with the benefit of incumbency. But proposals must be measured against the status quo, and an electoral system buttressed by a nationwide federal observer program can better protect against voting discrimination than a system where Section 8 lies dormant as a casualty of *Shelby County*.

Ultimately, the litigation strategy offered here could salvage²⁸⁴ a provision that affords crucial evidence in voting rights litigation, ensures proper administration of applicable election procedures, deters misbehavior at the polls, strengthens public confidence in the legitimacy of our election system, and provides information that could be used to fashion a new coverage formula for Section 5. Moreover, this proposal can plausibly be accomplished in a foreseeable time-window. All told, it should serve as an interim strategy designed to complement the legislative campaign.²⁸⁵

V. COURTS SHOULD INTERPRET *SHELBY COUNTY* TO PRESERVE THE BAILOUT PROCEDURE

Retaining the federal observer program would have the effect of preserving standing in bailout proceedings. Courts *should* interpret *Shelby County* to preserve this procedure so that jurisdictions continue to have an incentive to improve accessibility to the electoral process for minorities. This opportunity is important. The Voting Rights Act is largely concerned with preventing backsliding, rather than mandating affirmative improvements in accessibility to the electoral process. For example, it prohibits literacy tests,²⁸⁶ poll taxes,²⁸⁷ and the use of intimidation or coercion against a voter.²⁸⁸ Section 5, moreover, prevents changes that would leave members of a racial minority group in a *worse* position than they had occupied before the change with respect to “their effective exercise of the electoral franchise.”²⁸⁹ In other words, the Section 5 standard does not turn on whether a jurisdiction could have done better, but rather, on whether the jurisdiction in fact did worse. These components are important to protect the

²⁸⁴ Indeed, *Salvage Through Severance* would perhaps be a more accurate, though less optimistic, title for this Article.

²⁸⁵ In exploring the legal theories outlined above, this Article has employed a charitable reading of *Shelby County*. But even if the Supreme Court decides that the coverage formula is not severable from Section 8, an expansion of the federal observer program could serve as a compromise legislative proposal — a first step — that Congress might support in light of the benefits outlined above. At the very least, this Article seeks to advance the dialogue by sparking that conversation.

²⁸⁶ 42 U.S.C. § 1973a(b) (2012).

²⁸⁷ *Id.* § 1973h.

²⁸⁸ *Id.* § 1973i(b).

²⁸⁹ *See Beer v. United States*, 425 U.S. 130, 141 (1976).

gains that have already been made, but they do not do much to encourage jurisdictions to move beyond a fairly low bar.²⁹⁰

The bailout provision is different — it requires jurisdictions affirmatively to *improve* accessibility to the electoral process for minorities before they can receive the government’s commendation for their good behavior. In particular, a political subdivision must:

- (i) [H]ave eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected by [the Voting Rights Act]; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.²⁹¹

Indeed, “[t]he required ‘positive steps’ to increase minority political participation constitute the heart of the revised bailout standard.”²⁹²

Further, recent bailout proceedings indicate that the provision is having its desired effect. Before obtaining a bailout judgment on May 29, 2013, the City of Falls Church, Virginia, engaged in a variety of constructive efforts aimed at improving access to the political process, including “conducting voter registration outreach at the local library and during annual citywide festivals, providing voter registration applications to local nonprofit organizations upon request, and appointing minority election officials.”²⁹³ Similarly, as a condition for obtaining bailout on April 20, 2012, the City of Pinson, Alabama, was required to form a citizens’ advisory group that was “representative of the City’s diversity.” The advisory group was charged with developing additional constructive measures that could be taken to increase opportunities for voter registration, the recruitment of a diverse group of poll officials, and improvements in levels of political participation in Pinson.²⁹⁴ Lastly, prior to obtaining a bailout judgment on August 31, 2012, Merced County, California, expanded local opportunities for convenient

²⁹⁰ The language minority provisions do require jurisdictions to improve access to the ballot, and the fear of Section 2 liability does encourage jurisdictions to take affirmative actions to improve access to the political process for minorities. Preserving bailout would complement these efforts and provide a different kind of opportunity — namely, the ability to obtain the federal government’s recognition that a jurisdiction does not discriminate.

²⁹¹ 42 U.S.C. § 1973b(a)(1)(F) (2012).

²⁹² Hancock & Tredway, *supra* note 209, at 420.

²⁹³ Consent Judgment and Decree ¶ 35, *City of Falls Church v. Holder*, Civ. No. 1:13-CV-00201-ABJ-DBS-RJL (D.D.C. May 29, 2013) (three-judge panel), available at http://www.justice.gov/crt/about/vot/misc/falls_church_cd.pdf, archived at <http://perma.cc/9Y89-VF59>.

²⁹⁴ Consent Judgment and Decree ¶ 48, *City of Pinson v. Holder*, Civ. No. 1:12-cv-255-CKK-KLH-RBW (D.D.C. Apr. 20, 2012) (three-judge panel), available at http://www.justice.gov/crt/about/vot/misc/pinson_cd.pdf, archived at <http://perma.cc/A48C-NARL>.

voter registration, engaged in Spanish-language outreach efforts, and increased early voting sites in areas accessible to the Hispanic community.²⁹⁵

In 2006, despite substantial progress under the Voting Rights Act, Congress determined that forty years was insufficient “to eliminate the vestiges of discrimination following nearly 100 years of disregard” for the Constitution.²⁹⁶ In light of that determination, the bailout procedure remains crucial because it incentivizes jurisdictions to continue moving along the right path. And the Voting Rights Act should be doing this in addition to preventing backsliding. Justice O’Connor said it best when she wrote that:

While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, *the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.*²⁹⁷

Justice Ginsburg mirrored this sentiment in her *Shelby County* dissent, noting that extension of the VRA was “necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination.”²⁹⁸ As one of the few provisions directly promoting “amelioration,” it is crucial that the bailout procedure be retained.

CONCLUSION

When President Lyndon Johnson signed the Voting Rights Act in 1965, he called it “one of the most monumental laws in the entire history of American freedom.”²⁹⁹ Consistent with this assertion, progress under the Act has been immense. Nevertheless, the project of the Voting Rights Act is incomplete. President Johnson went on to declare that he would not be satisfied “[u]ntil every qualified person regardless of the color of his skin has the right, unquestioned and unrestrained, to go in and cast his ballot in every precinct in this great land of ours.”³⁰⁰ The Supreme Court has now sent

²⁹⁵ Consent Judgment and Decree ¶ 40, *Merced Cnty. v. Holder*, Civ. No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C. Aug. 31, 2012) (three-judge panel), available at http://www.justice.gov/crt/about/vot/misc/merced_cd.pdf, archived at <http://perma.cc/H4MC-ATG7>.

²⁹⁶ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 § 2(b)(7), Pub. L. No. 109-246 § 2(b)(7), 120 Stat. 577, 578.

²⁹⁷ *Georgia v. Ashcroft*, 539 U.S. 461, 490–91 (2003) (emphasis added).

²⁹⁸ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2642 (Ginsburg, J., dissenting) (citation omitted).

²⁹⁹ Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 841 (Aug. 6, 1965), available at <http://millercenter.org/president/speeches/detail/4034> (last visited Nov. 16, 2014), archived at <http://perma.cc/EVS4-CRU8>.

³⁰⁰ *Id.*

Congress back to the drawing board to enact safeguards that fulfill this command.

As this Article has sought to demonstrate, however, Congress is not the only actor that can take affirmative steps to shape the post-*Shelby County* landscape. Rather, civil rights advocates and the Department of Justice may be able to deploy the existing statute coupled with the Court's severability doctrine to regain some of the protection that has been thrown into doubt. And they *should* do so. After all, "voting discrimination still exists; no one doubts that."³⁰¹ But as we all know, "any racial discrimination in voting is too much."³⁰²

³⁰¹ *Shelby Cnty.*, 133 S. Ct. at 2619.

³⁰² *Id.* at 2631.