

# DEFENDING AGAINST A DEFENSE: THE VRA’S POST-SHELBY COUNTY NEED FOR CONGRESS TO CHECK PRECLEARANCE BY REVISING BAILOUT

David L. Udall\*

*Preclearance, the central protective provision of the Voting Rights Act, has been deactivated by the U.S. Supreme Court. Congress or the Department of Justice will likely reactivate it. Preclearance defends minorities against state-sponsored voter discrimination. However, that shield bears a weighty constitutional price. It undercuts important structural protections in the Constitution that guard against tyrannical power and protect fundamental freedoms. Because the provision will probably be reactivated, Preclearance—which effectively checks voter discrimination—must itself be checked to defend constitutional safeguards. But this must be done without sacrificing the minority voter protection guaranteed by the Fifteenth Amendment. Revising its counterpart, Bailout, is the best way to ease the erosive burdens that Preclearance imposes on constitutional fortifications while still keeping the Preclearance shield in place. This Note examines the need for Congress to modify Bailout post-Shelby County v. Holder and offers Bailout revisions to help defend the safeguards of liberty provided by both the Constitution and the Voting Rights Act.*

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\* Juris Doctor Candidate, University of Arizona, James E. Rogers College of Law. I am grateful for all the feedback, guidance, and support I have received from Dean Toni Massaro, Tim Stackhouse, Charles Scheurich, Daniel Arellano, Karen Jurichko Lowell, Kimberly O’Hagan, and the *Arizona Law Review* in writing this Note. I also thank the Arizona Secretary of State Elections Office for sparking my interest in the subject, and Jeff Haws for our conversations that helped me develop some of the finer points of this work. Especially, I thank my wife, who helped me develop the core focus of this Note, and for all the love, encouragement, help, and support of my wife and children.

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## INTRODUCTION

Take a journey with me back in time. Imagine you are observing a legislative session in the state of Alabama in the mid-1940s. World War II is just ending, and the memory of it is fresh on the mind. You watch as a senator introduces a bill that proposes some changes to the state's voter registration requirements. This newly proposed law would require that an applicant be able to comprehend and explain a provision in the Constitution before he or she can register to vote. On the Senate floor, the senator eloquently says that the purpose of the new requirement is to encourage Alabama citizens to at least have a basic understanding of their country's foundational law when they exercise their ultimate power as a voter.

This makes sense, you think to yourself. After all, this requirement buffers against the possibility of the tyrannical catastrophe that befell the Weimar Republic and led to the rise of Nazi Germany in its stead.<sup>1</sup> You think that the senator's proposal will protect against such an oppressive disaster because it encourages people to educate themselves about their government and be involved in maintaining the liberties it protects.

Suffice it to say, you see nothing sinister about the proposed law on its face.<sup>2</sup> However, unbeknownst to you while observing the legislative proceedings, the new requirement will covertly disenfranchise African-American voters. When seeking to register as a voter, an African-American applicant will be asked almost impossible-to-answer questions about the Constitution by the state's voting registrars<sup>3</sup> while Caucasian applicants will receive the no-brainer questions.<sup>4</sup> Even if an African-American applicant gets the right answer, the registrar will require a lengthy elaboration, and will eventually deny the application based on a subjective judgment that the applicant did not possess the necessary level of comprehension or articulation.<sup>5</sup> Caucasian applicants will receive no such treatment.

The bottom line: There is nothing wrong with the facially neutral law itself, or its outward purpose; yet the same law subtly authorizes an under-the-table way of excluding the African-American vote. And this is precisely what was intended.<sup>6</sup>

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1. To provide a very brief and general summary, the Nazis rose to power "legitimately" through the democratic processes in the Weimar Republic (Germany's government at the time), and only when they held enough democratically granted power did they reorganize the government into a dictatorship. For a study of the rise of Nazi Germany, see generally RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* (2003).

2. In fact, such voter registration requirements, on their face, still do not violate the Constitution. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959) (affirming the states' use of literacy tests absent a showing of racial discrimination as applied). The Voting Rights Act statutorily outlawed these practices, at least in jurisdictions that were covered by Preclearance. 42 U.S.C. § 1973b(c)-(f) (2012); see also *infra* Part I.B.1.

3. An African-American applicant, for example, might be asked the following: "Please read aloud and then explain in detail the meaning of the excerpted paragraph from the Twenty-third Amendment to the Constitution." The paragraph reads in part: "A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State . . . and they shall meet in the District and perform such duties as provided by the twelfth article of amendment." U.S. CONST. amend. 23, § 1. Note that this Amendment was not around in the 1940s, but serves only for the illustrative purposes of this hypothetical. This is a typical example of the discriminatory tactics that were used in the South. See, e.g., *Alabama Voter Literacy Test (circa 1965)*, CRMVET.ORG, <http://crmvvet.org/info/litques.htm> (last visited Feb. 6, 2014).

4. Such as: "Please read aloud and then explain briefly the meaning of the excerpted paragraph from the Constitution." The paragraph reads in its entirety: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

5. See, e.g., *Davis v. Schnell*, 81 F. Supp. 872, 875 (S.D. Ala. 1949).

6. The above hypothetical is based on *Davis. Id.* at 872.

In June of 2013, the U.S. Supreme Court deactivated the core protective provision in the Voting Rights Act (VRA) that defended against the above scenario. The Court in *Shelby County v. Holder* undermined this statutory protection by demolishing the foundational provision upon which it was built.<sup>7</sup>

In 1965, Congress enacted the VRA in response to sophisticated and widespread state-sponsored discrimination in voting. Within the Act, it created an effective shield to protect minority voters against such discrimination. In an unprecedented move,<sup>8</sup> Congress shaped this central provision by seizing control of the legislative tools that constitutionally belong to the states. The provision, known as Section 5 Preclearance, protects minority voters by requiring discriminating states to send every change in their election law or practices to the federal government for review before the change can take effect.<sup>9</sup> Preclearance relies on a geographic coverage formula in Section 4 of the Act to target and cover areas of voter discrimination.<sup>10</sup> This Preclearance provision has turned out to be the only effective remedy<sup>11</sup> against voter discrimination by the states, and it has proved to be an essential check against state-sponsored voter oppression.

However, the Preclearance shield also acts as a double-edged sword. While Preclearance strikes at the problem of voter discrimination, its very nature undercuts key structural protections in the Constitution that provide essential checks against tyrannical power and guard basic freedoms. In particular, Preclearance undermines federalism—the vertical structural protection that divides power between the states and the federal government<sup>12</sup>—by requiring sovereign states to ask for federal permission to enact their own election laws.

Because Preclearance was meant to be a temporary response to a widespread state-sponsored discrimination problem,<sup>13</sup> and because the geographic coverage formula it relied on made it proportional to that problem,<sup>14</sup> its heavy constitutional costs have historically been justified in the eyes of the Supreme

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7. See *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

8. Transcript of Oral Argument at 15, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) [hereinafter Oral Argument], available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-96.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf).

9. 42 U.S.C. § 1973c(a) (2012).

10. See *id.* § 1973b(b). The coverage formula targets jurisdictions that used a “test or device” (for a definition, see *infra* note 50) in determining voter eligibility and those that had low minority turnout rates at certain presidential elections before 1975. *Id.* As will be explained below, any jurisdiction (state, county, city, even a school district) can be the target of Preclearance coverage. For more detail, see *infra* Part I.B.1.

11. See *infra* Parts I.A, II.A.

12. See *infra* Part II.B.2.

13. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2625 (2013) (noting that Preclearance was originally set to expire after five years); *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 328, 333–35 (1966) (outlining the pervasive, state-sponsored discrimination problem and holding that Preclearance, although constitutionally burdensome, was justifiable as a temporary solution to it), *abrogated by* *Shelby County*, 133 S. Ct. at 2612.

14. See *Shelby County*, 133 S. Ct. at 2625.

Court. By June of 2013, however, the coverage formula was almost 50 years out of date,<sup>15</sup> and Bailout—the only statutory mechanism that allowed jurisdictions covered by Preclearance to be exempted—was defective.<sup>16</sup> As a result, many covered jurisdictions, especially covered states, were locked under the heavy Preclearance shield even years after any discrimination had occurred.<sup>17</sup> During that time period, the Preclearance requirements became stricter even while minority voter statistics in covered jurisdictions were on or above par with the rest of the country.<sup>18</sup> For these and other reasons, the Court in *Shelby County* declared the coverage formula unconstitutional.<sup>19</sup> Without the underlying coverage formula tethering Preclearance to a geographical location, the Preclearance shield is now dormant.

The Court did explicitly leave the door open for Congress to draft a new formula as long as the coverage lines are drawn based on current voter discrimination data.<sup>20</sup> In January of 2014, Congress responded to the Court's invitation and is now considering an amendment to the VRA that includes a formula for new Preclearance coverage.<sup>21</sup> Even if Congress does not ultimately act on the bill, however, the Preclearance shield will likely still be reactivated. The U.S. Department of Justice is already pursuing what is called a Section 3 Bail-in action against the entire State of Texas.<sup>22</sup> If successful, this action would put the state back under the Preclearance requirements even without a legislated coverage formula. This means that either way, the inherently burdensome nature of Preclearance will probably continue to be an issue in the VRA's future.

Preclearance, which effectively protects voting minorities by checking state-sponsored discrimination, must itself therefore be checked in order to defend and preserve key constitutional protections against tyranny. To provide such a safeguard going forward, the VRA needs modification focused on lessening Preclearance's constitutional burdens without forfeiting the only effective security against voter discrimination by the states.

Revising Preclearance's counterpart is the best way to achieve this goal. Section 4(b) Bailout—the statutory mechanism that provides exemption from Preclearance—has proven ineffective at preventing overinclusion of Preclearance coverage.<sup>23</sup> Once covered, it is incredibly difficult for a covered jurisdiction, and nearly impossible for a covered state, to receive Bailout exemption (or, “bail out”). This reality is the driving factor behind Preclearance's constitutional concerns—

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15. *Id.*

16. *See infra* Parts I.B.2.b, IV.

17. *See infra* Parts I.B.2.b, IV.

18. *Shelby County*, 133 S. Ct. at 2625–26 (citing voter registration and turnout statistics).

19. *Id.* at 2631.

20. *Id.*

21. Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014).

22. 42 U.S.C. § 1973a(c) (2012); Lyle Denniston, *Preclearance Requirement Sought for Texas on Voting*, SCOTUSBLOG (July 25, 2013, 10:43 AM), <http://www.scotusblog.com/2013/07/preclearance-sought-for-texas-on-voting/>.

23. *See* 42 U.S.C. § 1973b (2012); *infra* Parts I.B.2.b, IV.

once covered, a sovereign state must submit to federal election law oversight even if it no longer discriminates. Revising Bailout will keep the Preclearance shield's effectiveness intact while substantially easing its weighty constitutional burdens. In other words, such revision will protect important structural safeguards in the Constitution against erosion, without sacrificing the minority voter protection guaranteed by the Fifteenth Amendment.

This Note proceeds as follows: Part I provides a brief history and layout of the VRA and its legal structure, with an emphasis on Preclearance and Bailout. Part II outlines the constitutional conflict, which highlights the benefits and burdens of the provision, and focuses on how the statutory Preclearance shield undercuts constitutional protections. Part III discusses recent case law, paying particular attention to the *Shelby County* decision and its aftermath. Finally, Part IV examines the need for Congress to alter the Bailout mechanism so the Preclearance/Bailout system will provide more constitutionally justifiable protection if and when Preclearance is reactivated. It then suggests and explains specific Bailout revisions that will help make that happen.

## I. OVERVIEW: THE ORIGINS AND OPERATIONS OF THE VOTING RIGHTS ACT

### A. Historical Scope

On February 3, 1870, the Fifteenth Amendment to the United States Constitution was ratified.<sup>24</sup> Its clarion call was that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>25</sup> A civil war had been fought and a nation was trying to reunite. African Americans, for the first time in U.S. history, were constitutionally invited to the polls.

Fast forward to March 7, 1965. A group of African Americans were beaten violently by state troopers in Selma, Alabama during a peaceful march protesting the denial of their constitutional right to vote.<sup>26</sup> Tear gas filled the air, billy clubs were brandished and used to beat down the demonstrators, and mounted troopers charged in at them.<sup>27</sup> Many demonstrators were severely injured, at least one close to death.<sup>28</sup> For nearly a century after the Fifteenth Amendment's

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24. Gabriel J. Chin & Anjali Abraham, *Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments*, 50 ARIZ. L. REV. 25, 40 (2008).

25. U.S. CONST. amend. XV, § 1.

26. *American Memory, Today in History: March 7, First March from Selma*, LIBRARY OF CONG., <http://memory.loc.gov/ammem/today/mar07.html> (last visited Jan. 24, 2014) [hereinafter *First March from Selma*].

27. The Cost, NAT'L PARK SERV., <http://www.nps.gov/nr/travel/civilrights/cost.htm> (last visited Jan. 25, 2014); Selma-to-Montgomery March: National Historic Trail & All-American Road, NAT'L PARK SERV., <http://www.nps.gov/nr/travel/civilrights/al4.htm> (last visited Jan. 25, 2014).

28. Marianna Wertz, Amelia Boynton Robinson: Her Love of Freedom Is 'A Higher Power', Address at the Labor Day Conference of the Schiller Institute and the International Caucus of Labor Committees (Sept. 1,

ratification, racial discrimination in voting existed in many parts of the country; and for many, the promise of that Amendment was rendered hollow.<sup>29</sup>

Many states used poll taxes, gerrymandering, violence, and facially neutral legal devices (such as the example provided in the Introduction),<sup>30</sup> to exclude African-American voters from registering and voting.<sup>31</sup> Starting around 1957, an effort by civil rights groups led to litigation targeting these various types of discrimination.<sup>32</sup> But this individualized, case-by-case remedy was ineffective at stopping states from finding new ways to discriminate.<sup>33</sup> Individual litigation would sometimes stop a specific discriminatory practice; but in response, many of these states would pass more sophisticated legislation to maneuver around the new requirements.<sup>34</sup> As a result of this individualized litigation, discrimination became more disguised.<sup>35</sup>

### *B. The Voting Rights Act*

In the wake of the violence in Selma, Congress enacted one of the most effective yet controversial pieces of legislation to date.<sup>36</sup> The Voting Rights Act of 1965 “shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims.”<sup>37</sup> The VRA provided many tools to fight state-sponsored racial discrimination, such as allowing for federal observers to investigate and monitor

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2001) (transcript available at [http://www.schillerinstitute.org/conf-iclc/2001/Labor%20Day/conf\\_sep\\_2001\\_mw\\_.html](http://www.schillerinstitute.org/conf-iclc/2001/Labor%20Day/conf_sep_2001_mw_.html)) (“The wire photo of her left for dead on Edmund Pettus Bridge, which went around the world on the news that night, helped spark the outpouring of support for the civil rights movement, which culminated in the passage of the Voting Rights Act of 1965.”).

29. See, e.g., Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 13 (2010) (discussing the history of the VRA).

30. An example of a facially neutral device is the use of voter-eligibility laws. See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 23–27 (1999).

31. *Id.*

32. BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* 6 (2007) (“Overall, the [Civil Rights Act of 1957] triggered an initially gradual, but later quickening, process of litigative action.”).

33. See, e.g., Seaman, *supra* note 29, at 14.

34. See, e.g., *id.*; Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960–1990*, 5 U. PA. J. CONST. L. 665, 685 (2003) (discussing the “newer, more subtle ways of minimizing black voter registration” after successful pre-VRA litigation).

35. See, e.g., *Need for Preclearance*, 122 HARV. L. REV. 495, 495 (2008) (stating that the pre-VRA litigation routine was “well established: The states would find some apparently nonracial test by which to disenfranchise blacks, the restriction would be challenged in court, the plaintiffs would occasionally win, and the states would always devise a new restriction just as effective as the last one”).

36. *First March from Selma*, *supra* note 26.

37. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (upholding for the first time the constitutionality of Section 5), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

elections in areas of possible discrimination<sup>38</sup> and enhancing the Justice Department's ability to enforce the promise of the Fifteenth Amendment through a better individual litigation scheme.<sup>39</sup> But the VRA did far more than beef up traditional, private-right-of-action enforcement and provide for federal observation at the polls. The central feature of the VRA struck at the heart of the problem: the ability of the states to enact their own voting laws to discriminate on the basis of race.

Before getting to the VRA's centerpiece, Preclearance, a brief canvass of the entire Act's structure will provide useful context for how the Act works. The VRA starts out affirming the mandate of the Fifteenth Amendment—equal voting rights.<sup>40</sup> It then offers several enforcement mechanisms to give teeth to the Amendment's language. First, Section 2 of the VRA allows the U.S. Attorney General, or "any aggrieved person," to bring a discrimination suit in the United States District Court for the District of Columbia.<sup>41</sup> Next, the Act authorizes the Justice Department to send in federal observers to ensure there is no voter discrimination within a targeted jurisdiction.<sup>42</sup> In Section 4, a coverage formula identifies and covers jurisdictions that discriminated against minority voters in the 1960s and 1970s, and requires these jurisdictions to submit to Preclearance and other requirements.<sup>43</sup>

In addition to the coverage formula, the Justice Department itself may seek to cover a discriminating jurisdiction under what is known as Section 3 Bail-in by filing an action in federal court.<sup>44</sup> There is also a Bailout provision that allows for covered jurisdictions to be removed from Preclearance, which will be discussed in some detail below.<sup>45</sup> We turn now to Section 5 Preclearance, the core protective mechanism of the Act.

### 1. The Preclearance Shield

Congress adopted the "inventive"<sup>46</sup> Preclearance provision in response to a national crisis where previous attempts to enforce the Fifteenth Amendment's

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38. 42 U.S.C. § 1973f(a) (2012).

39. *Id.* § 1973a.

40. *Id.* § 1973(a).

41. *Id.* § 1973(a)–(b).

42. *Id.* § 1973f(a).

43. *Id.* § 1973b(b) (coverage formula). An example of one of the other requirements a covered jurisdiction must submit to is that it must provide ballots in minority languages if a language minority in a covered jurisdiction meets certain population requirements. *See id.* § 1973b(f)(4).

44. *Id.* § 1973a(c). Specifically, the action is brought before the District Court for the District of Columbia. *Id.*

45. *Id.* § 1973b(a); *see infra* Part I.B.2.

46. *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966), *abrogated by Shelby County v. Holder*, 133 S. Ct. 2612 (2013).



promise were not working.<sup>47</sup> Congress has never taken so drastic a measure before or since its adoption of Section 5 of the VRA.<sup>48</sup> Here is how the provision works: If a jurisdiction meets the coverage definition contained in Section 4 of the Act, it becomes covered by Preclearance.<sup>49</sup> Section 4 coverage is formulated to target jurisdictions that used a “test or device”<sup>50</sup> in determining voter eligibility and had a minority turnout rate lower than 50% in the 1964 or the 1972 presidential elections.<sup>51</sup> Section 5 Preclearance requires covered jurisdictions to submit any and all election law or practice changes to the Justice Department or the District Court for the District of Columbia for review before the change can take effect.<sup>52</sup> This is true no matter how minor the voting change.<sup>53</sup> Essentially, jurisdictions covered by Preclearance must ask the United States for permission to change anything related to elections.

To receive preclearance, a covered jurisdiction must show that the proposed change does not discriminate against minority voters in purpose or in effect.<sup>54</sup> Specifically, a covered jurisdiction cannot “enact or seek to administer” any “standard, practice, or procedure with respect to voting”<sup>55</sup> unless the jurisdiction can show that the voting change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color”<sup>56</sup> or because a person belongs to a “language or minority group.”<sup>57</sup>

The drafters of the VRA recognized that the coverage formula might well include jurisdictions within its scope that had not discriminated against minority

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47. *McCain v. Lybrand*, 465 U.S. 236, 243 (1984) (“Congress concluded that case-by-case litigation under previous legislation was an unsatisfactory method to uncover and remedy the systematic discriminatory election practices in certain areas.”).

48. *See* Oral Argument, *supra* note 8, at 15.

49. 42 U.S.C. § 1973b(b) (2012).

50. A “test or device” is defined in the statute as any voting requirement that: (1) tested skills in reading, writing, understanding, or interpreting (including writing voting materials in English only when over 5% of the voting-age population does not speak English); (2) tested a person’s education or knowledge; (3) required a person to have “good moral character”; or (4) required a person to prove he or she was qualified by the testimony of “registered voters or members of any other class.” *See id.* § 1973b(c)–(f). For an example, see the opening hypothetical in the introduction.

51. *Id.* § 1973b(b) (coverage formula); *see also* Seaman, *supra* note 29, at 17. The coverage formula was last updated in 1975 to include jurisdictions that had a minority turnout lower than 50% as of the 1968 and 1972 presidential elections. *Id.* at 21. It was also changed to include jurisdictions that discriminated against language minorities. *Id.* at 31–32. The coverage formula has not been updated since then. *Id.*

52. *Id.* § 1973c(a). However, the vast majority of preclearance submissions are received by the Justice Department. *See infra* note 211.

53. *Id.*

54. *Id.* § 1973c.

55. *Id.* § 1973c(a).

56. *Id.*

57. *Id.* Since 1975, “minority group” has been expanded to include language minorities as defined in Section 19731(c)(3). Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400, § 203.

voters.<sup>58</sup> Section 4(b) Bailout creates an exemption from Preclearance in an attempt to remedy this overinclusion.<sup>59</sup>

## 2. *Balancing Preclearance with Bailout*

### a. **How Bailout Works**

Bailout exempts a covered jurisdiction from Preclearance if the jurisdiction can show that within the past ten years it: (1) has not violated its citizens' voting rights; (2) has met the Preclearance requirements; (3) has tried to prevent VRA infringements; and (4) has made efforts to include minorities as election officers.<sup>60</sup>

In order to receive exemption from Preclearance, the burden is on the covered jurisdiction to seek a declaratory judgment from a three-judge panel of the D.C. District Court.<sup>61</sup> Originally, no covered "political subdivision" (a local jurisdiction other than a state; e.g., school or utility districts, cities, counties, etc.) could be eligible for Bailout purposes if it were part of a larger coverage scheme.<sup>62</sup>

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58. H.R. Rep. No. 89-439, at 14–15 (1965).

59. *Id.* Section 4(b) has been amended a couple of times. A detailed account of the amendments can be found in Seaman, *supra* note 29, at 21.

60. 42 U.S.C. § 1973b(a) (2012); *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 212 (2007) (summarizing the Bailout provision). In more detail, to qualify for Bailout, a covered jurisdiction must meet the following six requirements during the ten-year period prior to and during the action seeking Bailout: (1) it has not used any test or device for the purpose or with the effect of voting discrimination within its territory; (2) there have been no adverse judgments (other than the denial of a declaratory judgment in a Bailout action) in lawsuits alleging voting discrimination; there have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice and there are no pending lawsuits that allege voting discrimination; (3) no federal examiners or observers have been assigned to the jurisdiction seeking Bailout; (4) the jurisdiction and all governmental units (which, for clarity, will be called "political subdivisions" in the body of this Note. *See infra* note 62) within it have complied with Section 5 Preclearance; (5) no change affecting voting submitted by the jurisdiction and any of its governmental units ("political subdivisions") has been objected to by the Attorney General or denied by the D.C. District Court and no Section 5 submissions or declaratory judgment actions may be pending; and (6) there have been no violations of the Constitution, the laws of the United States, or the laws of any state or local government pertaining to voting discrimination (unless it is shown by the jurisdiction that the violations were trivial, corrected, and not repeated). Additionally, the jurisdiction must show that minorities are participating in the electoral process; it must have removed voting procedures and election methods that prevent or weaken minority electoral influence; it must demonstrate that constructive efforts have been made to facilitate more convenient voter registration and to appoint minority persons as election officials; and it must publicize its intent to seek Bailout. *See* 42 U.S.C. § 1973b (2012).

61. *See* 42 U.S.C. § 1973b(a)(1) (2012).

62. Seaman, *supra* note 29, at 19. Although the term "governmental units" is used in addition to "political subdivisions" within the Bailout provisions, this Note will use only the term "political subdivisions" for clarity. Any technical distinction is not necessary here.

For example, if an entire state was the target of Preclearance coverage, a county, city, or even school district within that state could not bail out separately from the state as a whole. On the other hand, if only a county was the target of Preclearance coverage, then the county could bail out.<sup>63</sup>

In 2009, the Supreme Court held that *any* political subdivision covered by Preclearance is eligible to seek Bailout.<sup>64</sup> Therefore, smaller jurisdictions (e.g., counties, cities, or school districts) are now eligible for Bailout even if part of a larger coverage scheme. After successfully obtaining Bailout, the uncovered jurisdiction is placed on a ten-year period (referred to as the “recapture” period) during which the district court may reopen the case upon application by the U.S. Attorney General, or other aggrieved individuals, to determine whether coverage should be reinstated.<sup>65</sup>

#### **b. Why Bailout Matters and Why It Did Not Work**

Bailout was meant to counterbalance Preclearance by preventing overinclusion of Preclearance coverage. Significantly, seeking Bailout is the only way a covered jurisdiction can have Preclearance coverage removed.<sup>66</sup> At one point in the Act’s history, it was expected that the prospect of Bailout would cause a wave of covered jurisdictions to apply for its relief.<sup>67</sup> In fact, Congress delayed the effective date of one of the Bailout amendments to give time to the Justice Department to prepare for an onslaught of Bailout actions.<sup>68</sup> Nevertheless, the anticipated mass of lawsuits never came.<sup>69</sup> While true that more jurisdictions have bailed out since the Court’s revision of the Bailout standard, that increase was still a tiny fraction of the more than 12,000 covered jurisdictions.<sup>70</sup> Importantly, only a single state out of the nine<sup>71</sup> covered states has been able to bail out—and it was short-lived. Alaska was initially successful, but was then subsequently covered again not long afterwards and has not been able to bail out since.<sup>72</sup>

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63. However, cities, school and utility districts, etc., could not bail out separately from that covered county.

64. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 210 (2009). More on the reasoning behind the *Northwest Austin* holding will be addressed below. *See infra* Part III.A.1.

65. 42 U.S.C. § 1973b(a)(5) (2012).

66. *Id.* § 1973b(a)(1).

67. *Seaman*, *supra* note 29, at 25–26.

68. *Id.* at 26.

69. *Id.* at 27.

70. Corey Dade, *Communities Find Relief from Voting Rights Act*, NPR (Aug. 11, 2011, 10:02 PM), <http://www.npr.org/2012/08/11/158381541/communities-find-relief-from-voting-rights-act>.

71. The Preclearance requirement applied to Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Adam Liptak, *Supreme Court Takes Voting Rights Case*, N.Y. TIMES, Jan. 10, 2009, at A13.

72. *See Seaman*, *supra* note 29, at 19 n.59, 22 (Bailout obtained in 1966; recovered in 1975 due to a coverage formula amendment and denied subsequent Bailout).

The trouble is that many of these long-covered jurisdictions no longer deserved coverage, but could not be exempted because of a faulty Bailout mechanism. For example, Mississippi, which was a covered state, has had the best minority voter turnout in the nation, while Massachusetts, a noncovered state, has had the worst.<sup>73</sup> Despite the well-intended attempt to prevent overinclusion, the Bailout provision has not lived up to expectations—once covered, it is difficult for any jurisdiction, and seemingly impossible for states, to bail out.

There are several flaws in the Bailout mechanism that need repair in order to effectuate Bailout in its proper role as a counterbalance to the constitutionally burdensome Preclearance shield. Before diving into this problem (which will be addressed in Part IV), we need to take a closer look at why Preclearance has been effective, yet costly.

## II. A CONSTITUTIONAL CLASH: THE BENEFITS AND BURDENS OF PRECLEARANCE

The chief benefits and burdens of Preclearance are constitutional in nature. Two safeguards of liberty guaranteed by the Constitution—one a powerful benefit that Preclearance protects, and one that is heavily burdened by Preclearance—are in erosive tension with each other.

First, the Fifteenth Amendment guarantees the right to vote free from racial discrimination.<sup>74</sup> This constitutional protection is effectuated as against state-sponsored voter discrimination through the statutory provision of Preclearance. Restated, the chief benefit of the statutory Preclearance shield is the protection of the constitutional right to vote. Second, the Constitution provides important structural protections, such as federalism, that guard against tyranny.<sup>75</sup> The major burdens of Preclearance significantly undermine at least two of these constitutional protections. This Part examines each of these constitutionally conflicting safeguards, along with other benefits and burdens of Preclearance, to

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73. Hans A. von Spankovsky, *Roberts and Scalia Are Right*, NATL. REVIEW ONLINE (March 7, 2013, 4:00 AM), <http://www.nationalreview.com/articles/342364/roberts-and-scalia-are-right-hans-von-spakovsky> (reporting, as the Chief Justice asked at oral argument, that the worst minority turnout occurred in Massachusetts while the best occurred in Mississippi, where African-American turnout exceeded Caucasian turnout). Moreover, “[m]ost of the worst offenders—states where in 2004 whites turned out or were registered in significantly higher proportion than African-Americans—are not covered. These include, for example, the three worst—Massachusetts, Washington, and Colorado.” *Id.* (quoting *Shelby County v. Holder*, 679 F.3d 848, 891 (D.C. Cir. 2012) (Williams, J., dissenting), *rev’d*, 133 S. Ct. 2612 (2013)). For a summary of additional evidence, see *Shelby County v. Holder*, 133 S. Ct. 2612, 2625–27 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)); *Nw. Austin*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part).

74. U.S. CONST. amend. XV.

75. See *infra* Part II.B.2.

set the stage for *Shelby County*<sup>76</sup> and this Note's solution to help resolve the inherent constitutional conflict while keeping both shields strong.<sup>77</sup>

#### *A. The Benefits of the Preclearance Shield*

##### *1. The Chief Benefit: Protecting the Constitutional Right to Vote*

The purpose of Preclearance, and its most important benefit, is protecting the constitutional right to vote. Fundamentally, freedom to choose is a central part of being human; it is a divine gift, right, and duty. Voting provides a vehicle for expressing that choice in a democratic society and is vital to its very existence.<sup>78</sup> The Founders recognized that the likelihood of tyranny increases as power is consolidated: "The accumulation of all powers . . . may justly be pronounced the very definition of tyranny."<sup>79</sup> In an effort to prevent such a consolidation, they framed a government of separated authorities, both horizontally (separation of powers) and vertically (federalism, or the state-to-federal division of authority), and laid the ultimate power of choosing who operates the divided spheres of government at the feet of the people.<sup>80</sup> Voting is therefore how "We the People"<sup>81</sup> give expression to that power and maintain the "ultimate guardian[ship] of [our] own liberty."<sup>82</sup>

To emphasize the vital importance of the people's power in this system of government, Samuel Adams said: "Let each citizen remember at the moment he is offering his vote . . . that he is executing one of the most solemn trusts in human society for which he is accountable to God and his country."<sup>83</sup> For nearly a century after the Fifteenth Amendment was ratified, that primary constitutional right and obligation was denied to a sizeable group of U.S. citizens simply because of the color of their skin.

Section 5 Preclearance successfully protected against racial discrimination at the ballot box for nearly 50 years.<sup>84</sup> By requiring discriminating

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76. See *infra* Part III.

77. See *infra* Part IV.

78. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

79. THE FEDERALIST NO. 47 (James Madison).

80. THE FEDERALIST NO. 51 (James Madison).

81. U.S. CONST. pmbl.

82. Thomas Jefferson, *Notes on the State of Virginia*, in 1 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (1784).

83. Samuel Adams, *Article, Unsigned, April 2nd*, in 4 THE WRITINGS OF SAMUEL ADAMS 250, 253 (Harry Alonzo Cushing ed., 1908) (capitalization altered) (article was originally published in the *Boston Gazette* on April 16, 1781).

84. H.R. Rep. No. 109-478, at 117 (2006) (statement of Rep. Sensenbrenner) (calling the Voting Rights Act "one of the most important pieces of civil rights legislation ever enacted."); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 736 (2008) ("[T]he Voting Rights Act . . . [is] widely regarded as the most successful intervention for racial minorities during the last century . . .").

states and jurisdictions to seek approval from the federal government for every proposed voting change, Preclearance effectively preempted *any* attempt to deny the right to vote based on race.<sup>85</sup> This has provided outstanding protection for minority voters. Prior to the enactment of Section 5, individual lawsuits proved ineffective at stopping state-sponsored racial discrimination in voting.<sup>86</sup> Preclearance disarmed the discriminating states by confiscating the very legislative instruments they used against their own minority citizens.

Rather than focus on trying to redress voting discrimination's harm retroactively, which was previously accomplished through *individual* litigation, the drafters of Section 5 Preclearance fashioned a frontward shield focused on minority *group* rights<sup>87</sup>—operating to prevent electoral harm to minorities *before* it happened.<sup>88</sup> That change of focus is the chief factor in the great success of the VRA.<sup>89</sup> By blocking the covered states' ability to pass discriminatory legislation through forcing them to send all election-related changes to the federal government for review, the Preclearance shield provided two layers of protection: First, it effectively prevented covered jurisdictions from enacting future discriminatory voting legislation. Second, it also delivered an effective deterrent to *all* jurisdictions (covered or not) by threatening federal oversight of state election matters should a jurisdiction be inclined to discriminate.<sup>90</sup>

## 2. Other Benefits

There are peripheral benefits to Preclearance as well. Preclearance allows for minority participation early in the covered jurisdictions' efforts to alter election procedures.<sup>91</sup> Additionally, even some *covered* jurisdictions perceive Preclearance to be beneficial because they effectively receive a “federal stamp of approval” for their precleared election changes—proof to the public that they are not

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85. See *supra* Part I.B.1.

86. Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 *How. L.J.* 785, 791 (2006).

87. See Nicholas Pedriana & Robin Stryker, 'Effects-Based' Civil Rights Law: Comparing U.S. Voting Rights, Equal Employment Opportunity, and Fair Housing Legislation 3 (Nov. 2, 2012) (unpublished draft; cited with permission) (available at [http://sociology.arizona.edu/sites/sociology.arizona.edu/files/files-page/rights\\_paper\\_pedriana\\_stryker.pdf](http://sociology.arizona.edu/sites/sociology.arizona.edu/files/files-page/rights_paper_pedriana_stryker.pdf)).

88. See 42 U.S.C. § 1973c(a) (2012).

89. See Pedriana & Stryker, *supra* note 87, at 3. As an example of that success, one man moved in 2009 to a city covered by Preclearance so he could live in a place subject to “federal voting oversight.” Michael Theis, *Skepticism Persists in Voting Rights Act Bailout Debate*, FREDRICKSBURGPATCH (Mar. 24, 2011, 12:27 PM), <http://fredericksburg.patch.com/groups/politics-and-elections/p/skepticism-persists-in-voting-rights-act-bailout-debate>.

90. 42 U.S.C. § 1973c(a) (2012); Seaman, *supra* note 29, at 33. The deterrent of imposed Preclearance is made operative by the Bail-in provision. See 42 U.S.C. § 1973a(c).

91. Brief for Jurisdictions That Have Bailed Out Under the Voting Rights Act as Amici Curiae Supporting Appellees at 13, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322).

discriminating.<sup>92</sup> This federal approval suggests the covered jurisdictions' election modifications are legal, which provides them with a cost-effective means of avoiding expensive Section 2 litigation.<sup>93</sup>

All told, there are substantial benefits to Section 5 Preclearance. Most importantly, this protective mechanism has vigorously defended the Fifteenth Amendment's guarantee of the fundamental right to vote.<sup>94</sup> Preclearance's benefits, however, do not come without a price.

### ***B. The Burdens of the Preclearance Shield***

While Preclearance has been the only effective shield for minority voting rights, it also imposes significant burdens on both constitutional safeguards and covered jurisdictions. This is true independent of the outdated coverage formula that the Supreme Court struck down in *Shelby County*. The Preclearance shield bears a weighty price in and of itself.

#### *1. Administrative Burdens*

First, the Preclearance shield places a heavy burden on covered jurisdictions. It is expensive for jurisdictions to preclear their election changes.<sup>95</sup> Gerald Herbert, a Bailout expert, said "the labor costs incurred by dealing with the [P]reclearance paperwork amounts to about \$1,500 [of taxpayer dollars] per request."<sup>96</sup> Preclearing voting changes is also time consuming. It takes around 60 days for the Justice Department to approve a voting change, even when the request is expedited.<sup>97</sup> It can be damaging for a covered jurisdiction to have to wait months for approval of minor and routine election changes before they can go into effect.<sup>98</sup> For example, Juanita Pitchford, the voter registrar for the city of Fredericksburg, Virginia (which was a covered state) stated: "We are pushing to accommodate voters more easily[.] If we have to get another voting machine, even just [one] voting machine, I have to go through preclearance."<sup>99</sup> In short, Preclearance charges a high price for its implementation.

One might say that no price is too high to prevent discrimination. That is a fair point, but this sentiment misses the mark. Because of the ineffective Bailout

92. *Id.* at 15.

93. *Id.* This may also be a reason why more jurisdictions decide not to bail out. Seaman, *supra* note 29, at 31.

94. U.S. CONST. amend. XV, § 1.

95. *See* 42 U.S.C. § 1973c(a) (2012); Scope of Requirement, 28 C.F.R. § 51.12 (2011) (covered jurisdictions must preclear "[a]ny change affecting voting, even though it appears to be minor or indirect").

96. Theis, *supra* note 89; Complaint for Declaratory Judgment and Injunctive Relief at ¶ 35, *Arizona v. Holder*, 839 F. Supp. 2d 36 (2012) (No. 11CV01559) [hereinafter Complaint] (labeling the process as "costly and burdensome"). *But see* Seaman, *supra* note 29, at 30 (estimating the average "cost for preparation of a submission" to be around \$500).

97. Theis, *supra* note 89; *see also* Complaint, *supra* note 96, at ¶ 35 (discussing submission costs); Seaman, *supra* note 29, at 30 (same).

98. Theis, *supra* note 89

99. *Id.*

mechanism, as discussed in detail in Part IV, covered jurisdictions—especially states—that *no longer* discriminate must bear these costly burdens without much hope of ever bailing out.

That said, if these administrative concerns were the only problems with Preclearance, its benefits would probably have easily outweighed its burdens. However, the provision imposes more serious problems.

## 2. Constitutional Burdens

The statutory Preclearance shield exacts weighty constitutional costs. In exchange for powerful minority voter protection, Preclearance saps the strength of bedrock constitutional principles that constitute important structural pillars of our American system of government. This is true independent of the out-of-date Section 4 coverage formula struck down by the Court in June of 2013. At least two constitutional principles are significantly weakened by Preclearance: federalism, and equal sovereignty. First, Preclearance undercuts federalism<sup>100</sup>—the vertical diffusion of power between the states and the federal government.

### a. Undercutting the Federalism Shield

Federalism embodies the idea that the federal government’s power vis-à-vis the states is limited by the Constitution. States retain all powers that are not specifically delegated to the federal government. This “dual sovereignty” is manifest throughout the Constitution’s structure,<sup>101</sup> and at least twice in the Constitution there is clear language that explicitly affirms a federalist system.<sup>102</sup> Moreover, the Supreme Court in recent case law has reaffirmed the importance of federalism in our governmental structure, reasoning that “[s]tate sovereignty is not just an end in itself[.] ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”<sup>103</sup>

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100. This Author recognizes that there are competing theories about the principle and importance of federalism, and takes the position (as will be explained in subsection a) that federalism is an important structural protection provided by the Constitution.

101. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Lane County v. Oregon*, 74 U.S. 71, 76 (1868).

102. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *see also* U.S. CONST. art. I, § 8 (“The Congress shall have power to” do only that listed in Article I.). And there is at least one implicit reference in Article V of the Constitution, which additionally supports the federalist structure of our government. U.S. CONST. art V (allowing two-thirds of the states to amend the Constitution in place of Congress).

103. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)) (internal quotation omitted) (holding a woman charged with a crime had standing to raise a Tenth Amendment claim to challenge a federal statute that applied to the states); *see also* *Gonzales v. Raich*, 545 U.S. 1 (2005) (including federalism principles as a component of the commerce clause analysis); *Printz v. United States*, 521 U.S. 898 (1997) (federal government cannot command state executives).



This vertical separation of power, in connection with horizontal separations of power, is a vital structural protection to basic rights, just as the substantive Bill of Rights is a fundamental protection. Both structural protections are necessary for the existence and fortification of the substantive protections found in the Constitution.<sup>104</sup> Without the structural, there would be no continued guarantee of the substantive.

In addition, federalism allows the needed breadth of authority for state and local action, whose institutions are better equipped to solve the more immediate and diverse problems unique to each location.<sup>105</sup> This not only frees up the more constitutionally limited federal government to focus its resources on issues of national concern, but also allows for a more accountable government with state and local power that is closer to the people.<sup>106</sup>

In summary, federalism protects basic rights and promotes governmental efficacy and accountability. It effectuates these protections by dispersing governmental power and providing a vertical check-and-balance system through fostering intergovernmental competition for popular support.<sup>107</sup> Federalism thereby serves as an essential and interconnected layer of security against tyranny. Figure 1 offers a clearer picture of where federalism fits in our constitutional apparatus of protection:

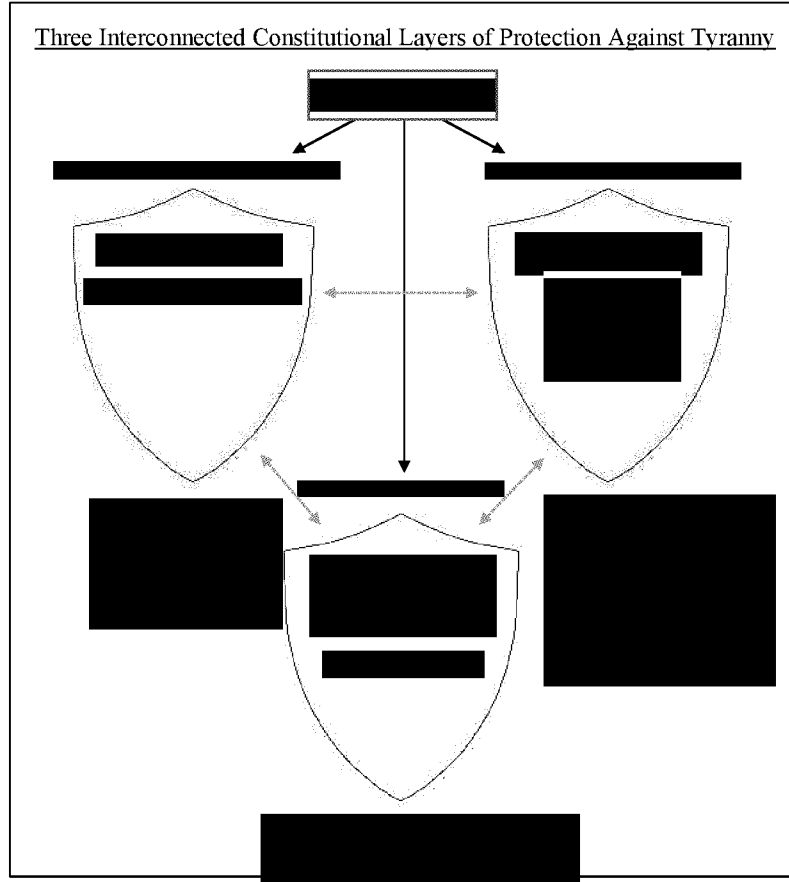
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104. For example, the structural dispersal of power on both a horizontal and vertical plane buffers against the possibility of the government abridging or interpreting away the textual protection of the Bill of Rights. The vertical structural protection works by insulating a state from a federal imposition that its people believe would constitute tyrannical control. Further, when little pieces of a great power are in many hands, the potential for that power to be wielded oppressively diminishes drastically. *Cf.* THE FEDERALIST NO. 47 (James Madison).

105. A.E. Dick Howard, *The Values of Federalism*, 1 NEW EUR. L. REV. 143, 150–51 (1993).

106. *Id.* at 150–51, 154–56.

107. THE FEDERALIST NO. 51 (James Madison).



The Preclearance defense mechanism works against the federalism shield. One of the many powers not delegated to the federal government and reserved by the Constitution to the states is the basic power of regulating their own elections.<sup>108</sup> The people of the state, who exercise their ultimate power through their elected representatives, shape a state's election laws to fit the needs unique to their location. This is a fundamental example of why the federalism shield is needed—to allow local jurisdictions the ability to respond effectively to the needs of their citizens, and to provide a closer, more accountable government.<sup>109</sup> By requiring

108. Gregory v. Ashcroft, 501 U.S. 452, 461–62 (1991) (states have constitutional power to “regulate their own elections”); cf. U.S. CONST. art. I, § 8.

109. Howard, *supra* note 105, at 150–51, 154–56.

covered states to ask for federal permission to change their own election laws and practices, Preclearance sends a great crack through the protective structural pillar of federalism. It forces sovereign states to subject every single election change, no matter how insignificant, to far-away federal oversight and censorship.<sup>110</sup>

The most significant constitutional problem with Preclearance is that it increases the federal government's influence over the states—in other words, it *consolidates* governmental power in favor of the federal government.<sup>111</sup> As Justice Black put it, this consolidation treats states as “little more than conquered provinces.”<sup>112</sup> Preclearance thereby undermines one of the fundamental and interconnected structural safeguards that the Constitution was designed to offer.

### b. Undercutting Equal Sovereignty

A second constitutional principle burdened by Preclearance is equal sovereignty. Although this principle has historically been grounded in states' admission into the Union,<sup>113</sup> the Court in *Shelby County* expanded its scope and used it as a requirement that the federal government treat states equally.<sup>114</sup> Preclearance burdens this constitutional principle, according to the Court, because covered states wear a “badge of shame”<sup>115</sup> and must ask for federal permission to do what other states are constitutionally free to do on their own.<sup>116</sup>

While it is true that the only effective remedy against discriminatory states has been to seize control of their sovereign election powers, the question was, and still is, whether these constitutional burdens can be justified, mitigated, or even eliminated short of tossing Preclearance protection altogether. Rightful and deserved coverage has in the past provided (and still does provide) justification for Preclearance's independent constitutional burdens. There is little doubt that Preclearance was acceptable in 1965, when it was enacted as a temporary, five-year<sup>117</sup> provision in response to the blatant, unrelenting, and unapologetic state-

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110. See Oral Argument, *supra* note 8, at 15 (counsel for Shelby County characterizing Preclearance as a prior restraint on a state exercising “their core sovereign functions”); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 358–60 (1966) (Black, J., concurring and dissenting), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

111. See *supra* note 79 and accompanying text.

112. *Katzenbach*, 383 U.S. at 358–60 (Black, J., concurring and dissenting) (“[I]t seems to me that [Section] 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that ‘The United States shall guarantee to every State in this Union a Republican Form of Government.’”) (quoting U.S. CONST. art. IV, § 4).

113. *Shelby County v. Holder*, 133 S. Ct. 2612, 2648 (2013) (Ginsburg J., dissenting).

114. See *id.* at 2648–49; see also Josh Patashnik, *Arizona v. California and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1, 41 (2014) (“The equal-footing doctrine is one of the pillars of American federalism.”).

115. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 235 (D.D.C. 2008), *rev'd* 57 U.S. 193 (2009).

116. *Shelby County*, 133 S. Ct. at 2623–24.

117. *Id.* at 2625.

sponsored discrimination against minority voters.<sup>118</sup> The Court at that time justified Preclearance's heavy constitutional burdens by pointing to the provision's temporary nature that was intended to fix a national emergency, and because the coverage formula made it proportional to the problem.<sup>119</sup> And Preclearance was proportional, and therefore justified, because it was understood that the Bailout mechanism would be enough to release deserving jurisdictions from the burdensome coverage.<sup>120</sup> That justification was no longer enough in June of 2013.<sup>121</sup>

### III. TRACKING THE DECISIONS AND THE AFTERMATH OF *SHELBY COUNTY*

Preclearance now lies dormant in the wake of *Shelby County*. The Supreme Court, in 2013, bulldozed the coverage formula foundation upon which the Preclearance shield was built. Before jumping into this landmark opinion and its aftermath, a review of some relevant history is helpful.

#### A. Past Decisions

As far back as 1966, the Supreme Court, when it first ruled on Preclearance's constitutionality, acknowledged concern about the provision's constitutional costs. In *South Carolina v. Katzenbach*, the Court stated that Preclearance was an exceptional measure justified to fit the needs of an exceptional time: "Exceptional conditions can justify legislative measures *not otherwise appropriate*."<sup>122</sup> In other words, because Preclearance was a temporary response to a national crisis of state-sponsored voter discrimination, its inherent constitutional burdens were justifiable.<sup>123</sup>

As time marched on, the Court repeatedly upheld Preclearance's constitutionality.<sup>124</sup> For example, in *Lopez v. Monterey County*, the Court upheld Preclearance when challenged by a *noncovered* state.<sup>125</sup> There, California required one of its political subdivisions, Preclearance-covered Monterey County, to implement state-sponsored voting changes, and the Court upheld the Justice

118. See *id.* at 2620 ("[Preclearance] was [originally] justified to address 'voting discrimination where it persists on a pervasive scale.'" (quoting *Katzenbach*, 383 U.S. at 308)).

119. See *Katzenbach*, 383 U.S. at 334–35; *Nw. Austin*, 557 U.S. at 193.

120. See *supra* Part I.B.2.b.

121. See *Shelby County*, 133 S. Ct. at 2612.

122. *Katzenbach*, 383 U.S. at 334 (emphasis added).

123. The Court in *Katzenbach* stated: "The constitutional propriety of the [VRA] must be judged with reference to the historical experience which it reflects." *Id.* at 308.

124. See *Shelby County*, 133 S. Ct. at 2621–22, 2625; see also *Lopez v. Monterey County*, 525 U.S. 266 (1999), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Georgia v. United States*, 411 U.S. 526 (1973), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

125. 525 U.S. at 282.

Department's mandate that these voting changes go through Preclearance.<sup>126</sup> California argued that interpreting Preclearance in this way—applying it to a state not found to have committed any “historical wrong”—violated the Constitution.<sup>127</sup> The Court admitted that the VRA, by its nature, “intrudes on state sovereignty,” but concluded that such burdens were justified.<sup>128</sup> It reasoned that its holding added no *additional* burden than what the VRA itself imposed.<sup>129</sup>

In short, the Court in past decisions consistently recognized the inherently burdensome constitutional nature of Preclearance, but it also consistently declared that the burdens were *justified*. That changed in 2009.

*I. Northwest Austin*

In the 2009 Supreme Court decision *Northwest Austin Municipal Utility District Number One v. Holder*, the Court sent a clear warning that the most recent congressional reauthorization<sup>130</sup> of Section 5 Preclearance was not on firm constitutional footing.<sup>131</sup> In *Northwest Austin*, the Court cautioned: “[Section 5,] which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs . . . [and] differentiates between the States despite our historic tradition that all the States enjoy equal sovereignty.”<sup>132</sup>

The case was essentially unanimous—an 8–1 decision, with a concurring and dissenting opinion written by Justice Thomas that advocated striking down Preclearance immediately.<sup>133</sup> Chief Justice Roberts, writing for the majority, expressed deep concern about the 2006 renewal of the VRA that extended Preclearance for another 25 years.<sup>134</sup> The majority cited statistics stating that the discrepancy between minority and nonminority voter registration is minimal today as compared with the vast discrepancy that existed nearly 50 years ago; and, in some cases, minority registration is even greater than majority registration.<sup>135</sup> The Court coupled this data, which suggested there was no longer sufficient

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126. *Id.*

127. *Id.*

128. *Id.* at 284.

129. *Id.* at 284–85.

130. The VRA has been renewed several times, most recently in 2006. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. For a summary of the renewals, see Seaman, *supra* note 29, at 12–26 (discussing how each renewal extended Preclearance for progressively longer and longer periods of time past its originally intended five-year lifespan).

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

132. *Id.* at 202, 203 (internal quotation marks omitted).

133. *See id.* at 212 (Thomas, J., concurring in the judgment in part and dissenting in part).

134. *See id.* at 201–04 (majority opinion); *see also supra* note 130.

135. *Nw. Austin*, 557 U.S. at 201–02.

justification for Preclearance, with the substantial constitutional costs Preclearance imposes on our federal system of government.<sup>136</sup>

In the end, however, the Court sidestepped the standard of review issue, dodged the constitutional question regarding Preclearance by using the doctrine of judicial restraint, and then modified Bailout by allowing political subdivisions within a covered jurisdiction to unilaterally bail out<sup>137</sup> to resolve the case at hand.<sup>138</sup> By way of speculation, modifying Bailout in this way may have been the Court's last attempt to justify Preclearance's constitutional burdens by making it easier for some covered jurisdictions to actually bail out when deserved.<sup>139</sup>

The most important part of *Northwest Austin* for our purposes is this: The Court planted two seeds in its precedent about the constitutionality of the 2006 extension of Preclearance. In dicta, the Court stated that (1) the substantial burdens on federalism had to be "justified by current needs," and (2) the geographical coverage formula needed to accurately target current discrimination hot spots.<sup>140</sup> With those requirements sown (and without deciding whether they were met here), the Court waited for harvest in a future case.

### B. *Shelby County*

That case came in June of 2013. In *Shelby County v. Holder*, a now-sharply divided Supreme Court struck down the Section 4 coverage formula because it was nearly 50 years out of date, and was no longer justified by current conditions on the ground.<sup>141</sup> The history of the case is as follows: Shelby County, Alabama did not qualify for Bailout, and therefore facially challenged the constitutionality of both the coverage formula and Preclearance itself.<sup>142</sup> Both the District Court for the District of Columbia and the Court of Appeals for the D.C. Circuit upheld the provisions' constitutionality.<sup>143</sup> In their opinions, both courts relied on documentation of voter discrimination compiled by Congress to support its 2006 reauthorization and held that the two-part test from dicta in *Northwest Austin* was satisfied.<sup>144</sup> Shelby County petitioned the U.S. Supreme Court, and the Court granted certiorari.<sup>145</sup>

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136. *Id.* at 202. The Court then criticized the outdated provision for violating equal sovereignty and federalism. *Id.* at 203.

137. *See supra* Part I.B.2.a.

138. *See Nw. Austin*, 557 U.S. at 193.

139. *See id.* at 202, 206–11 (criticizing Preclearance, then altering Bailout).

140. *See id.* at 203.

141. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (5–4 decision).

142. *Shelby County v. Holder*, 811 F. Supp. 2d. 424 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).

143. *Id.*; *Shelby County v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).

144. *Shelby County*, 811 F. Supp. 2d. at 435; *Shelby County*, 679 F.3d at 853; *see also* Persily, *supra* note 60, at 182 (discussing Congress's documentation).

145. *Shelby County*, 133 S. Ct. at 2612.

After reciting the history of the VRA, the Court outlined the inherent, constitutionally burdensome nature of Preclearance before diving into whether the provision was justified by the outdated coverage formula that made Preclearance proportional to the discrimination problem.<sup>146</sup> The Court reaffirmed that Preclearance violated federalism because it required covered 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.”<sup>147</sup> Further, the Court noted that a proposition allowing the federal government to review state laws *before* they went into effect was both considered and rejected at the Constitutional Convention in favor of letting state laws take effect subject to later challenge.<sup>148</sup> The Court also declared that the principle of equal sovereignty was violated because Preclearance only applied to nine states, while all others were free to enjoy their constitutional power to enact their own election laws.<sup>149</sup> Because Preclearance hinged on the outdated coverage formula, the Court focused its attention on the coverage provision to determine if it *presently* justified these heavy constitutional burdens.<sup>150</sup>

The Court, led once again by Chief Justice Roberts, used the two requirements it planted in *Northwest Austin* to guide its analysis of the case. Specifically, the Court framed its inquiry as follows: (1) were the substantial federalism burdens that Preclearance imposes justified by current needs; and (2) did the coverage formula proportionally target current voter discrimination areas (as required by equal sovereignty)?<sup>151</sup> Restated, both prongs boil down to one issue: whether Preclearance was *now* justified by *where* it was imposed.

To answer this question, the Court first contrasted discriminatory conditions today with their history. The Court emphasized that Preclearance coverage was crafted to address the crisis in voting discrimination of past decades when blatant, state-run discrimination was widespread.<sup>152</sup> But today, things are different.<sup>153</sup> The Court recognized that the changes are in large part a result of the VRA.<sup>154</sup> Important to its decision, the Court stated that “[v]oter turnout and registration rates” in covered jurisdictions “now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold

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146. Congress’s 2006 reauthorization left the coverage formula unchanged—its geographical coverage was therefore still calibrated to the conditions of 1975. That meant that jurisdictions covered by the requirement were those that had low minority turnout in the 1968 and 1972 presidential elections. Seaman, *supra* note 29, at 21.

147. *Shelby County*, 133 S. Ct. at 2624.

148. *Id.* at 2623.

149. *Id.* at 2624.

150. *Id.* at 2627–31.

151. *See id.* at 2622; *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

152. *Shelby County*, 133 S. Ct. at 2629.

153. *Id.* at 2625.

154. *Id.* at 2626.

office at unprecedented levels.”<sup>155</sup> Yet, even as conditions for minorities drastically improved in covered jurisdictions, Congress *expanded* rather than contracted Preclearance’s influence and potency.<sup>156</sup> In addition to the original provisions being “reauthorized as if nothing had changed,” Congress’s 2006 expansion amended Section 5 Preclearance to prohibit “more conduct than before,”<sup>157</sup> and it did so for another “25 years on top of the previous 40—a far cry from the initial five-year period.”<sup>158</sup>

“[H]istory did not end in 1965,” wrote the Court, “[t]he [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future.”<sup>159</sup> In declaring the coverage formula unconstitutional, the Court invited Congress to rewrite it according to true and current discriminatory patterns.<sup>160</sup>

### C. Aftermath for the VRA

*Northwest Austin* provided a warning shot. Absent remedial action by Congress, the *Shelby County* Court followed through and blasted a gaping hole through the bottom center of the VRA, rendering its core protective provision inoperative. But the Act is not defeated.

*Shelby County* altered the VRA in a number of important ways. To first provide some contrast, here is what the ruling did *not* do. It did not touch Section 2, which allows for individual discrimination cases to be brought in federal court.<sup>161</sup> It also did not affect the Section 3 Bail-in mechanism that allows the Justice Department to seek an action in federal court to bring a discriminating jurisdiction under Preclearance coverage.<sup>162</sup> Importantly, the ruling did not alter or affect Preclearance itself.<sup>163</sup>

What the ruling does do, first and foremost, is nullify Preclearance—at least temporarily. Preclearance is only effective against *covered* jurisdictions. Because the coverage formula of the Act has been declared unconstitutional, there

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155. *Id.* at 2625–27 (quoting *Nw. Austin*, 557 U.S. at 202). For a summary of additional evidence, see *Nw. Austin*, 557 U.S. at 226 (Thomas, J., concurring in part and dissenting in part); see also *supra* note 73 and accompanying text.

156. *Shelby County*, 133 S. Ct. at 2625–27.

157. *Id.* at 2621, 2626.

158. *Id.* at 2626.

159. *Id.* at 2628–29.

160. *Id.* at 2631. Justice Thomas wrote a concurrence in which he joined the Court in full, but would also strike down Preclearance itself for the same reasons as the coverage formula. See *id.* at 2631–32 (Thomas, J., concurring). Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented vehemently. Justice Ginsburg condemned the Court for, among other things, not employing *any* standard of review, *id.* at 2644 (Ginsburg, J., dissenting), for expanding “dictum” that alters the scope of the equal sovereignty doctrine, *id.* at 2649, and for denying any deference to a bipartisan Congress that reauthorized the Act after analyzing over 15,000 pages of documented evidence, see *id.* at 2651–52. For an update on Congress’s response to the decision, see *infra* Part III.D.

161. See 42 U.S.C. § 1973 (2012).

162. *Id.* § 1973a(c).

163. *Id.* § 1973c(a).



are no more covered jurisdictions—all of them depended on the outdated formula for coverage. Additionally, Section 4(b) Bailout is temporarily inoperative because there are no covered jurisdictions subject to Preclearance that are in need of exemption anymore.<sup>164</sup> Although rendered dormant by the Court's demolition of the coverage formula, the Preclearance/Bailout system's future is not over.

#### *D. Epilogue: The Future for the Preclearance Shield*

On July 25, 2013, U.S. Attorney General Eric Holder filed a lawsuit in the District Court for the District of Columbia and announced that he is seeking to re-cover the entire state of Texas through a Section 3 Bail-in action.<sup>165</sup> This move suggests two things. First, it demonstrates that Congress is not the only authority that can activate Preclearance coverage by covering targeted jurisdictions. Second, it may indeed show the future of Preclearance, and future enforcement of the entire VRA for that matter, should Congress decide not to redraw the coverage lines. The Justice Department can unilaterally cover jurisdictions *without* any congressionally determined formula through bailing in jurisdictions, one jurisdiction at a time.

Moreover, on January 16, 2014, members of Congress introduced a bill containing a new coverage formula.<sup>166</sup> The formula would cover states that have had “[five] or more voting rights violations . . . [within] the State during the previous 15 calendar years, at least one of which was committed by the State itself . . . .”<sup>167</sup> Additionally, it would generally cover smaller jurisdictions that have had three or more violations of the VRA within the last 15 years.<sup>168</sup> The proposed formula would avoid the outdated problem by not zeroing in on a specific period of time (such as the 1964 election), but by establishing instead a floating time period (i.e., within the last “15 calendar years”) by which to impose coverage.<sup>169</sup> If enacted, this coverage formula currently would cover four states.<sup>170</sup>

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164. *See id.* § 1973b(a). Striking down the coverage formula had the additional effect of nullifying any requirement that applies only to covered jurisdictions, such as the ballot language provision, which requires covered jurisdictions to print election ballots in minority languages if the language minority group is a certain percentage of their population. *See id.* § 1973b(f)(4).

165. Denniston, *supra* note 22. This move by the Justice Department illustrates why some refer to Bail-in as the Act's “secret weapon.” Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, THE NATION (Jan. 16, 2014, 11:53 AM), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act-test>.

166. Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014); Berman, *supra* note 165.

167. H.R. 3899 § 3(b)(1)(A).

168. *Id.* § 3(b)(1)(B).

169. This attribute of the proposed coverage formula, however, entirely fails to prevent the lock-in problem of the defective Bailout mechanism—once covered, it is very difficult for a jurisdiction, if not impossible in the case of states, to bail out. *See infra* Part IV.A.

170. The covered states would be Georgia, Louisiana, Mississippi, and Texas. Berman, *supra* note 165. Along with a new coverage formula, members of Congress also are seeking, among other things, to strengthen Section 3 Bail-in. *Id.*

These two events show that Preclearance is not dead. Inactive, yes—but possibly not for very long. Congress can redraw the coverage lines, or the Justice Department can seek to bail in jurisdictions, and either of these will reactivate Preclearance. Therefore, the inherent constitutional burdens that the Preclearance shield imposes are still relevant and still must be mitigated. Remodeling Preclearance’s Bailout counterpart is the best way to ease the tension still looming on the horizon between the Preclearance shield and the Constitution’s safeguards against tyranny.

#### IV. FIXING BAILOUT: A PATH TO A MORE CONSTITUTIONAL PRECLEARANCE

Revising Bailout will check the Preclearance shield’s burdensome nature. Through modifying Bailout, the powerful benefits of Preclearance’s deterrent effect against voting discrimination can be preserved, and its heavy constitutional burdens can be substantially lightened. This Part proposes revisions that will do just that. First, we will look at the need for Bailout revision to accomplish these twin objectives.

##### *A. The Need for Bailout Revision*

The Preclearance shield is constitutionally burdensome independent of the Section 4 coverage formula.<sup>171</sup> Because that shield probably will return, its costly constitutional nature still needs to be addressed. In order to ease Preclearance’s undermining effect on key constitutional protections, something must change.

The reason Preclearance is no longer constitutionally justified is because the outdated coverage formula,<sup>172</sup> coupled with the faulty Bailout mechanism, locked jurisdictions, particularly states, under Preclearance coverage seemingly forever. Even when they had not been discriminating, and even when their minority voter statistics far exceeded noncovered jurisdictions, covered states could not effectively receive exemption from the Preclearance requirements.<sup>173</sup> This is because seeking Bailout is the *only* way covered jurisdictions can be uncovered,<sup>174</sup> and Bailout has proven ineffective, especially for states.<sup>175</sup>

Of all jurisdictions that were covered—and that probably will be in the future—and unable to bail out, states have been the most constitutionally problematic. When states are locked under seemingly indefinite Preclearance

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171. See *supra* Part II.B.2.

172. See 42 U.S.C. § 1973b(b) (2012) (coverage conditions set to the 1968 and 1972 presidential elections).

173. See *supra* notes 72–73 and accompanying text.

174. 42 U.S.C. § 1973b(a)(1) (2012).

175. See *supra* Part I.B.2.b.

coverage (as was the case pre-2013<sup>176</sup>), the federalism (and equal sovereignty) concerns are at their height.<sup>177</sup>

Once thought of as the counterbalance to Preclearance, Bailout has not prevented overinclusion as designed,<sup>178</sup> and thereby it has not alleviated Preclearance's constitutional problems.<sup>179</sup> It follows that if Bailout is revised to allow otherwise eligible jurisdictions—especially states—to be exempted from Section 5 Preclearance, the weighty Preclearance shield itself will be more proportional to actual voter discrimination and will therefore be more constitutionally justifiable as a result.<sup>180</sup>

In other words, such a revision to Bailout will allow Preclearance to target only jurisdictions that need it, for the time they need it, because jurisdictions—especially states—that no longer require coverage will be able to effectively bail out. In this way, the provision's heavy burdens on constitutional safeguards<sup>181</sup> can be alleviated and phased out while its unmatched voter protection is preserved.

### ***B. The Revisions***

Bailout modification that focuses on the constitutional concerns of Preclearance is the best way to preserve the VRA's effectiveness while lessening the provision's constitutional burdens. Consequently, several revisions are needed

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176. See *supra* Part I.B.2.b

177. See generally U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, . . . are reserved to the States . . . .” (emphasis added)). Also, “states” explicitly enjoy “dual sovereignty” with the federal government while the same cannot necessarily be said for local jurisdictions. See *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.” (emphasis added)). Although there are federalism problems when the federal government violates the rights of a local jurisdiction other than a state, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (federal government cannot control county sheriff), the point here is that when a state is involved, the federalism problem is on a much larger scale.

178. See *supra* Part I.B.2.b.

179. See, e.g., Seaman, *supra* note 29, at 27.

180. Making Section 5 more constitutionally justified through Bailout revision is not novel. In fact, Congress considered it during the 2006 reauthorization. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 217–18 (2006) [hereinafter *Expiring Provisions Hearing*] (testimony of Prof. Hasen) (“One thing that I think would go a long way toward helping the constitutional case and also take off some of the burden in a lot of these jurisdictions is to ease the Bailout requirements.”). Congress ultimately decided to leave Bailout unchanged and instead decided to mount a wealth of documents to support the current need for Preclearance. *Id.* A few scholars have also stressed the need for Bailout revision. See, e.g., Seaman, *supra* note 29, at 54–57 (discussing the urgent need for a revised Bailout provision and offering suggestions to streamline Bailout). Many of the revisions suggested in Seaman's article and in others will be explained later. See *infra* Part IV.B.

181. See *supra* Part II.B.2.

to make Bailout more easily achievable without letting jurisdictions that intend to discriminate off the hook. This is especially true for future-covered (hereinafter referred to simply as “covered”) states, as will be shown.<sup>182</sup>

Section 4(b) Bailout currently (although inactive until Preclearance is reactivated) allows jurisdictions covered by Preclearance to be exempted from such coverage if the jurisdiction can show that, within the past ten years: it has not violated the voting rights of its citizens; it has complied with the preclearance requirements; it has attempted to prevent VRA violations; and it has tried to include minorities in the election process.<sup>183</sup> More of Section 4(b)’s relevant technical requirements will be laid out below.<sup>184</sup>

This Part offers one vital revision to Section 4(b) Bailout that will minimize Preclearance’s constitutional costs by allowing Bailout for states that deserve it even if jurisdictions within them do not. Additionally, it offers other revisions that will make Bailout more attainable for all covered jurisdictions while keeping the Preclearance shield effective. Each of the revisions is addressed in turn below.

### *1. Bifurcating Bailout—The Primary Revision*

First and foremost, states must be able to bail out on their own merits, even if individual jurisdictions within their territory (counties, cities, school districts, etc.) are ineligible and remain covered.<sup>185</sup> The *Northwest Austin* Court has already implemented the reverse of this idea—namely, that political subdivisions within covered jurisdictions can now bail out on their own.<sup>186</sup>

Currently, a covered jurisdiction cannot bail out unless and until *all* “political subdivisions” (e.g., school district, city, county, etc.)<sup>187</sup> within it are eligible for Bailout.<sup>188</sup> This is true even if the jurisdiction is in every way otherwise eligible.<sup>189</sup> Take, for example, the following situation in a covered state: If only a single, rogue school district<sup>190</sup> within the covered state has failed to meet a single

182. The *Northwest Austin* decision that allows political subdivisions that are part of a larger coverage scheme to individually bail out has not lessened the extent that Section 5 violates federalism. See Dade, *supra* note 70 (stating that although more jurisdictions have sought Bailout since *Northwest Austin*, it is still a tiny fraction of the covered jurisdictions).

183. 42 U.S.C. § 1973b(a) (2012) (Bailout requirements); Persily, *supra* note 60, at 212 (summarizing Bailout).

184. For a more detailed review of all the Bailout requirements, see *supra* note 60.

185. This idea is mentioned in Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 284–85 (2003) (“States, counties, cities, and school districts could bail out on their own merits—regardless of what had happened in other jurisdictions that happen to lie within its borders or because it was subsumed in a covered jurisdiction.”), and in Seaman, *supra* note 29, at 61–62. However, the idea was not fleshed out in these articles, and it warrants further development and focus.

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

187. See *supra* notes 60, 62 and accompanying text.

188. 42 U.S.C. § 1973b (2012).

189. *Id.*

190. Pitts, *supra* note 185, at 284–85.

Bailout requirement and is therefore ineligible to bail out, the *entire* state becomes ineligible as well.<sup>191</sup> This is the case even if every other political subdivision in the state, and the state itself, has met all the Bailout requirements.<sup>192</sup> In effect, this makes it almost impossible for states to bail out from Preclearance coverage. This reality in turn aggravates Preclearance's constitutional burdens, and fractures any justification for them, because it locks covered states under seemingly indefinite coverage even when no longer needed.<sup>193</sup> This, however, need not be the case.

Statewide election law matters are generally separate from local election issues and therefore should be treated as such for Bailout purposes.<sup>194</sup> In most states, the state elections office is responsible for statewide and legislative candidates as well as statewide propositions (in applicable states), while county and local offices handle local elections and issues.<sup>195</sup> While it is true that a state lawmaking body may enact voting laws that affect all levels of government in the state<sup>196</sup> and might therefore be viewed as the accountable "boss" in a hierarchical structure over jurisdictions within its boundaries, this concept misses the mark in the VRA context.

Despite a covered state's efforts to comply with the Act, enact nondiscriminatory laws for all levels of government, and give minorities as much election aid and opportunity as possible, it cannot control all possible discrimination in advance at all local levels. The requirement to have all political subdivisions within a state in compliance before the entire state can bail out is

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191. *Id.*

192. *Id.* This is true even though the other political subdivisions in that state could bail out separately post-*Northwest Austin*. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). Only the state itself must suffer the extended consequences of the school district's ineligibility.

193. See, e.g., *supra* Part I.B.2.b.

194. See, e.g., Directive 2012-35, Jon Husted, Ohio Sec'y of State, In Person Absentee Voting Days and Hours (Aug. 15, 2012), available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2012/Dir2012-35.pdf> (illustrating that county and local officials are elected locally to serve local election matters).

195. See, e.g., Ken Bennett, Ariz. Sec'y of State, *2012 Unofficial Election Results*, CLARITY ELECTIONS, <http://results.enr.clarityelections.com/AZ/42050/113875/Web01/en/summary.html> (last updated Dec. 7, 2012, 11:51 AM) (showing only statewide and legislative candidates and only statewide initiatives and referenda); N.Y. STATE, BD. OF ELECTIONS, 2012 CANDIDATE LIST FOR THE SEPTEMBER 13, 2012 PRIMARY ELECTION (Nov. 2012) (showing a list of statewide and legislative candidates, but no county or local candidates); Ruth Johnson, Mich. Sec'y of State, *2012 Official Michigan General Election Results*, MICHIGAN.GOV (Nov. 6, 2012), <http://miboecfr.nictusa.com/election/results/12GEN/> (Nov. 6, 2012) (showing state election results, but not listing local election matters); Linda McCulloch, Mont. Sec'y of State, *2012 Unofficial Election Results*, MONTANA SECRETARY OF STATE (Nov. 2012), <http://electionresults.sos.mt.gov> (last visited Feb. 22, 2014) (same).

196. See, e.g., ARIZ. CONST. art. VII, § 10; see also generally Alisha Green, *It's Complicated: State and Local Government Relationships*, SUNLIGHT FOUNDATION (Feb. 19, 2013, 12:36 PM), <https://sunlightfoundation.com/blog/2013/02/19/its-complicated-state-and-local-government-relationships/> (discussing how cities generally must act within the bounds set by state law).

probably one of the chief reasons that no state has been able to effectively bail out.<sup>197</sup> The unequal and antifederalist treatment of these states, in turn, has been the core concern with respect to the constitutionality of the Preclearance requirement.<sup>198</sup> It is critical, therefore, that states be allowed to bail out independent of the political subdivisions within them.

Allowing states and local jurisdictions to bail out separately will ease the stress Section 5 Preclearance places on important constitutional protections. State lawmaking bodies would be free to enact voting laws that influence state election matters while the still-covered political subdivisions within them would be required to continue seeking preclearance from the United States for local election matters. Additionally, if states can bail out separately from the local jurisdictions within them, states will be put in a better position to shepherd the still-covered jurisdictions to become Bailout eligible. The bailed-out state could thereby be a leader and example, rather than only a boss and a manager, to the covered jurisdictions within its boundaries, while those local jurisdictions that truly need coverage remain covered.

By making it possible for states to bail out on their own merits, this revision, in concert with those offered below, will lighten the considerable weight of the Preclearance shield on the Constitution's structural protections.

## 2. Other Helpful Bailout Revisions

### a. Diluting the Potency of Automatic Failure Provisions

At least two of the provisions in the current Bailout scheme that automatically preclude Bailout eligibility, if triggered, should be revised to a totality-of-the-circumstances approach.<sup>199</sup> The current Bailout provisions include several ten-year requirements, the violation of any of which automatically prevents a jurisdiction from bailing out.<sup>200</sup> Most of these requirements are for good reason, and they track the language in the Act that is intended to prevent voter discrimination in the first place.<sup>201</sup> Those should remain in their current form. The two provisions in need of revision are as follows.

First, the current Bailout scheme requires that no federal observers<sup>202</sup> have been dispatched to the jurisdiction seeking Bailout within the last ten years.<sup>203</sup>

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197. See *supra* notes 72–73 and accompanying text.

198. See *supra* Part II.B.2.

199. This idea is also mentioned in Pitts, *supra* note 185, at 285.

200. 42 U.S.C. § 1973b (2012). There are some narrow exceptions that need not be delved into here.

201. For a detailed review of the ten-year requirements, see *supra* note 60.

202. 42 U.S.C. § 1973f(a). The Act previously specified that the jurisdiction must be certified for federal examiners (who would register voters) before federal observers (who monitored elections) could come in, but the federal examiner provisions have been repealed. James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 239 (2007).

203. 42 U.S.C. § 1973b(a)(1)(C).

Federal observers are sent to jurisdictions to be the “eyes and ears” of the federal government and to make sure the jurisdiction’s elections are complying with the VRA.<sup>204</sup> Once a jurisdiction is certified for federal observance, observers are dispatched to it. The U.S. Attorney General can certify a jurisdiction for federal observers in two ways.<sup>205</sup> First, the Attorney General can certify observers if he or she received 20 “meritorious written complaints” that allege voter discrimination.<sup>206</sup> Second, the Attorney General can assign observers on a discretionary basis if he or she believes “certification is necessary to cure a constitutional violation.”<sup>207</sup> Almost all of the more recent observers have been dispatched on a discretionary basis.<sup>208</sup>

The second Bailout provision that should be revised requires that an applying jurisdiction not have received *any* objections by the Attorney General for any change affecting voting that was submitted for Preclearance within the last ten years.<sup>209</sup> Objecting to a proposed voting change is also a discretionary function of the Attorney General.<sup>210</sup>

Covered jurisdictions should not be barred from Bailout simply because the Justice Department dispatches federal observers within its boundaries to investigate *possible* voter discrimination. Likewise, the fact that the Attorney General objects to a change that a jurisdiction submits for preclearance should not, by itself, make the jurisdiction ineligible per se to bail out. In their current form, these provisions give the Attorney General too much unilateral power over covered states.<sup>211</sup> The federal observer and objection provisions unnecessarily

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204. Tucker, *supra* note 202, at 229.

205. 42 U.S.C. § 1973f(a) (federal observer provision); Tucker, *supra* note 202, at 236.

206. Tucker, *supra* note 202, at 236.

207. *Id.*

208. *Id.*; see also U.S. Dep’t of Justice, Civil Rights Div., Voting Section, *About Federal Observers and Election Monitoring*, JUSTICE.GOV, [http://www.justice.gov/crt/about/vot/examine/activ\\_exam.php](http://www.justice.gov/crt/about/vot/examine/activ_exam.php) (last visited Jan. 24, 2014).

209. 42 U.S.C. § 1973b(a)(1)(E).

210. See *Blanding v. DuBose*, 454 U.S. 393, 401–403 (1982) (Rehnquist, J., concurring) (“There seems to be something inherently unsatisfactory about a system which places such discretionary authority in the hands of a few unelected federal officials who are wholly detached from the realities of the locality and the preferences of the local electorate.”); see also, e.g., Letter of Objection from Ralph F. Boyd, Jr., Assistant Attorney Gen., U.S. Dep’t of Justice, to Jean E. Wilcox, Deputy Cnty. Attorney, Coconino Cnty. (Feb. 4, 2003), available at [http://www.justice.gov/crt/about/vot/sec\\_5/ltr/l\\_020403.php](http://www.justice.gov/crt/about/vot/sec_5/ltr/l_020403.php).

211. The Supreme Court has questioned the Justice Department’s ability to execute Section 5 fairly, and this matters because the agency makes almost all Preclearance determinations. Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation’s History of Discrimination in Voting*, 10 LEGIS. & PUB. POL’Y 51, 59 (2006). It is true that federal observers are generally sent to respond to alleged voter discrimination. This Bailout revision is aimed only at letting the jurisdictions have a voice in the matter, not at eliminating the federal observer requirement altogether. See 42 U.S.C. § 1973f(a) (2012).

deter many jurisdictions from even seeking Bailout because if one of these provisions is triggered within the last decade, it *alone* will render Bailout impossible.<sup>212</sup>

Transforming the auto-failure nature of these two provisions into a totality-of-the-circumstances approach will give states a voice in the matter and will improve a covered jurisdiction's Bailout prospects, thereby easing Preclearance's constitutional problems. Factors that the district court could employ in a totality-of-the-circumstances approach include: (1) the Justice Department's reasons for dispatching federal observers or objecting, and the jurisdiction's responses; (2) the number of times observers have been sent, or the amount of objections that jurisdictions have received, during the ten-year time period; (3) any evidence found of actual discrimination or the absence of such evidence; and (4) other surrounding circumstances that shed light on the intent of the applying jurisdiction within the last decade.

These totality-of-the-circumstance alterations will allow for more fairness to covered jurisdictions in obtaining Bailout and will provide a check to federal discretionary influence over state and local election matters. By so doing, they will help ease the constitutional problems of Preclearance.

#### **b. Streamlining Bailout**

The more that Bailout-eligible jurisdictions actually seek and receive Bailout, the more justified Preclearance will become because the remaining covered jurisdictions under Preclearance will be only those that truly deserve such coverage. Streamlining the Bailout process may help bolster the Preclearance/Bailout scheme's effectiveness and efficiency, and will thereby ease Preclearance's burdensome nature because Bailout will become more attractive to covered jurisdictions that are concerned about the cost of seeking such relief. This subsection reviews proposals for streamlining Bailout and advocates for their adoption to make Bailout more efficient, objective, effective, and attractive to covered jurisdictions.

Because many covered jurisdictions were unaware of when they became eligible for Bailout, one suggestion offered (and rejected) during the 2006 Senate Hearing for VRA reauthorization was to have the U.S. Attorney General keep track of jurisdictions that are eligible for Bailout and to notify them when eligible.<sup>213</sup> Professor Christopher Seaman has recommended that Bailout should be streamlined by combining this 2006 Senate Hearing suggestion with other ideas of his that would make Bailout less daunting, more accessible, and more efficient.<sup>214</sup>

Seaman suggested that there should be an "automatic" Bailout for jurisdictions that, among other things, have not received an objection to a proposed

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212. Pitts, *supra* note 185, at 285.

213. *Expiring Provisions Hearing*, *supra* note 180, at 19–20 (testimony of Prof. Hasen). For a list of Bailout eligibility requirements, see *supra* note 60 and accompanying text.

214. Seaman, *supra* note 29, at 12.



election change or have not been denied preclearance during the previous 30 years.<sup>215</sup> Additionally, he suggested that a simplified, “optional” Bailout should be made available to jurisdictions that: (1) have not, within the last 20 years, violated Sections 2, 5, or 203 (involving language minority groups); and (2) have shown minority participation at or near the same rate as majority voters.<sup>216</sup> This scheme would work in tandem with the Attorney General keeping track of jurisdictions that were, or would become, eligible for “optional” Bailout, and the jurisdictions would be notified of eligibility every six months.<sup>217</sup>

Streamlining Bailout will make the Preclearance/Bailout system at the heart of the VRA a well-oiled machine. In combination with the foregoing revisions, it will allow Preclearance to effectively be phased in (through Bail-in or “recapture,” as described below) and out (through a more effective and efficient Bailout) where needed and will offset the burdensome nature of the Preclearance shield as a result.

### 3. Preserving Minority Voter Protection

One might say that making Bailout easier for jurisdictions comes with a risk that these bailed-out jurisdictions will begin to discriminate again on the basis of race.<sup>218</sup> This concern, while legitimate, is unnecessary. In addition to the Section 3 Bail-in provision that allows for *any* discriminating jurisdiction to be placed under Preclearance coverage,<sup>219</sup> Section 4(b) Bailout provides an additional built-in safety net called “recapture.”<sup>220</sup> The recapture provision requires a successfully bailed-out jurisdiction to be subject to a ten-year period during which the district court may reopen the case upon application by the Attorney General or “any aggrieved person” to determine whether Preclearance coverage should be reinstated.<sup>221</sup>

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215. *Id.* Specifically, he proposed that jurisdictions that have not received objections, etc., since the 1982 renewal of the VRA should be automatically bailed out. *Id.* Because there are no more covered jurisdictions, and this Note is proposing Bailout revisions that will affect future-covered jurisdictions, the Author has modified Seaman’s proposal to cover the more general timeframe he was aiming at.

216. *Id.*

217. *Id.*

218. History provides good examples of this concern. For a brief discussion of how the states in the early-to-mid 1900s found ways around new antidiscrimination laws to discriminate legally, see *supra* Parts I, II.A.

219. See *supra* note 44 and accompanying text. Moreover, Bail-in could be easier than ever if the recently proposed bill that amends the VRA is passed. See Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014). In addition to crafting a new coverage formula, the bill would also remove the onerous Bail-in requirement that a plaintiff prove *intentional* discrimination. Berman, *supra* note 165. Any violation of the VRA or federal voting rights laws would suffice as proof irrespective of the jurisdiction’s intent if the bill is passed. *Id.*

220. 42 U.S.C. § 1973b(a)(5) (2012); see also *supra* note 65 and accompanying text.

221. 42 U.S.C. § 1973b(a)(5) (putting the case on the court’s inactive docket).

Recapture ensures that the above Bailout revisions—which help the provision achieve its goal of preventing overinclusion by making Bailout more fair and efficient—are a *safe* way to scale down and phase out the Preclearance project in jurisdictions that deserve to be exempted. If a recently bailed-out jurisdiction discriminates against minority voters again, it can efficiently be placed back under Preclearance coverage without a lengthy and difficult Bail-in proceeding. This will allow jurisdictions—especially states—that are truly worthy of Bailout to operate as constitutionally designed while keeping the protective deterrent effect of Preclearance intact where truly needed.

If concern still exists that the above Bailout revisions will undermine minority voter protection, Congress can revise the recapture provision to keep Preclearance's deterrent effect in place on the tail end of the Preclearance/Bailout scheme. One suggestion is that Congress could lengthen the recapture period, say from 10 to 20 years. This would provide a longer testing period for the Justice Department to take the discriminatory temperature of the newly bailed-out jurisdiction. It would keep the deterrent warning of a reimposed Preclearance close at hand, while still letting the jurisdiction operate on its own. In effect, Congress could lengthen Preclearance's leash on the jurisdiction before completely relinquishing federal influence altogether.

Taken together, the above Bailout revisions make it possible for deserving jurisdictions—especially states—to effectively be exempted from Preclearance by fixing some of the flaws in the current Bailout counterbalance. Additionally, the revisions—in connection with the recapture and Bail-in provisions—effectively keep Preclearance's deterrent effect in jurisdictions that need it, for the time they need it, while letting those that have truly earned Bailout operate on their own as constitutionally required. With the post-*Shelby County* likelihood of Preclearance being reactivated wholesale through a new coverage formula, or piecemeal through Bail-in actions,<sup>222</sup> these Bailout revisions will help ease the erosive pressure that Preclearance has placed on the fortifications of federalism (and equal sovereignty) without sacrificing the key defense for minority voters.

### CONCLUSION

The Preclearance shield, central to the success of the Voting Rights Act, effectively defends minorities against state-sponsored voter discrimination. That protection bears a weighty constitutional price. It undermines important structural defenses in the Constitution that guard against tyrannical power and protect fundamental freedoms. Preclearance, which checks voter discrimination, must itself be checked to defend constitutional safeguards without sacrificing voter protection.

Revising its counterpart, Bailout, is the best way to ease the heavy burdens Preclearance imposes on the structural safeguards in the Constitution while still keeping the Preclearance shield in place. *Shelby County* has passed the

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222. See *supra* Part III.D.

ball back into Congress's court. While it is there, Congress should revise Bailout to defend the defenses of liberty provided by both the Constitution and the Voting Rights Act.

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