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## Preclearance and Politics: The Future of the Voting Rights Act

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## PRECLEARANCE AND POLITICS: THE FUTURE OF THE VOTING RIGHTS ACT

*Paige E. Richardson*

### I. INTRODUCTION

In 1965, ninety-five years after the ratification of the Fifteenth Amendment, Congress passed the Voting Rights Act (the “VRA” or the “Act”).<sup>1</sup> The Act addressed the discriminatory practices and procedures utilized by some regions of the United States to disenfranchise Black and other non-white voters.<sup>2</sup> The years following the ratification of the Fifteenth Amendment showed federal action must be supplemented to address state resistance to equal voting rights, particularly for Black Americans.<sup>3</sup> Section 2 of the VRA prohibits discriminatory voting practices on a national level, while Sections 4 and 5 implement a coverage formula to determine which regions must seek preclearance from the federal government for changes to voting practices.<sup>4</sup>

Section 5 of the VRA was originally written to expire after five years.<sup>5</sup> However, the Act enjoyed bipartisan support and was consistently renewed until 2006.<sup>6</sup> The 2006 Amendments failed to update the coverage formula, which had last been updated in 1975.<sup>7</sup> For this reason, in *Shelby County v. Holder*, the Supreme Court of the United States declared the coverage formula in Section 4 of the VRA unconstitutional.<sup>8</sup> Because the coverage formula was held unconstitutional, federal preclearance measures in Section 5 of the VRA could no longer be enforced, which destroyed the effectiveness of the VRA as a whole.<sup>9</sup> Since *Shelby County*, Congress has not revitalized the VRA through new legislation or amendments.<sup>10</sup>

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1. The United States Department of Justice, *History of Federal Voting Rights Laws*, CIVIL RIGHTS DIVISION (July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws> [<https://perma.cc/BG4G-N9DG>] [hereinafter U.S. D.O.J.]; U.S. CONST. amend. XV. The Voting Rights Act of 1965 will henceforth be referred to as “the VRA.”

2. U.S. D.O.J., *supra* note 1.

3. *Id.*; U.S. CONST. amend. XV.

4. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. §§ 10301, 10303-04 (2014) (original version at 42 U.S.C.A. § 1973) (The section titles, i.e., Section 5, correspond to the original version of the Act.)).

5. *See* U.S. D.O.J., *supra* note 1.

6. EDWARD B. FOLEY ET AL., *ELECTION LAW AND LITIGATION* 101 (Vicki Been et al. eds., 2014).

7. *Shelby County v. Holder*, 570 U.S. 529, 538-39 (2013).

8. *Id.*

9. *Id.* at 559 (Ginsburg, J., dissenting).

10. The United States Department of Justice, *Section 4 of the Voting Rights Act*, CIVIL RIGHTS DIVISION (May 5, 2020), <https://www.justice.gov/crt/section-4-voting-rights-act> [<https://perma.cc/VL69->

In Section II, this Comment will analyze the VRA itself before moving into a historical analysis of voting rights litigation, specifically in connection with Sections 4 and 5—the coverage formula and preclearance sections of the Act. Next, Section II will review the Court’s decision in *Shelby County*.<sup>11</sup> Section III will discuss the continuing forms of discrimination faced at voting polls and the future viability of VRA amendments. A specific inquiry into the John Lewis Voting Rights Advancement Act (“John Lewis Act”)<sup>12</sup> will trace the path this bill—considered the most likely contender to revitalize the VRA—must take not only to pass into law, but also to retain legal status in the face of potential legal challenges at the Supreme Court. Finally, Section IV will conclude by considering the utility of alternative methods should amendments to the VRA not pass Congress or the Supreme Court.

## II. BACKGROUND

Once a bipartisan issue and now a contentious debate, the Voting Rights Act has a storied history. Part A of this Section will analyze the VRA itself. Then, Part B will discuss the relevant litigation involving the VRA. Finally, Part C will review the Supreme Court’s decision in *Shelby County v. Holder*.

### A. The Voting Rights Act of 1965

The VRA is split into several sections that create a cause of action and specific enforcement measures meant to eliminate voting discrimination. Section 2<sup>13</sup> prohibits race- and language-based voting discrimination practices, stating:

[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial of abridgement of the right of any

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XL5U] [hereinafter U.S. D.O.J., *Section 4*].

11. *Shelby County*, 570 U.S. 529.

12. John Lewis Voting Rights Advancement Act, S.4263, 116th Cong. (2019-2020). Senator Patrick Leahy introduced this resolution to rename the Voting Rights Advancement Act to the John Lewis Voting Rights Advancement Act in honor of the late Representative John Lewis.

13. Though the constitutionality of Section 2 is not directly applicable to this topic, it is important to note that the Court has struggled with the implementation of Section 2 in the past. The Act provided little beyond a “totality of the circumstances” test for the courts to use in voter dilution cases. It was not until 1986 that the Court created a framework for establishing preconditions to Section 2 violation cases. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). *Gingles* also authorized the use of the factors specified in the Senate Report in establishing a Section 2 violation. *Id.* at 44-45; see also *Johnson v. DeGrandy*, 512 U.S. 997, 1010 n.9 (1994); *FOLEY ET AL.*, *supra* note6.

citizen of the United States to vote on account of race or color.<sup>14</sup>

Section 2 also sets forth the elements of a violation. A VRA violation is established “if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members” of a protected class, as defined by the Act.<sup>15</sup> One factor that may be considered in determining the level of participation is prior election of representatives from the aggrieved group.<sup>16</sup>

Section 2 is supplemented by the enforcement provisions set forth in Section 3. This Section 3 has become important following *Shelby County* due to Subsection C, which provides:

[i]f in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth and fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred . . . the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate.<sup>17</sup>

After the *Shelby County* decision, Section 3(c) is currently the government’s only available method of enforcing any of the VRA against regions in violation.<sup>18</sup>

Section 4 sets forth the voting regulations covered by the VRA. Section 4(c) defines a test or device as “any requirement that a person as a prerequisite for voting or registration for voting” that necessitates a demonstration “of an ability to read, write, understand or interpret any matter”; of educational achievement or subject knowledge; of good character; or of qualification through voucher of other registered voters or members of another class.<sup>19</sup> The focus on literacy and comprehension was not only a measure instituted to combat racial literacy tests, it was also important to the 1975 Amendment, which focused on the effects of English-only elections and expanded the VRA coverage to include areas where non-English speaking groups were disenfranchised.<sup>20</sup>

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14. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. § 10301(a) (2014)).

15. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. § 10301(b) (2014)).

16. *Id.*

17. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. § 10302(c) (2014)).

18. Section 3(c) and its importance in maintaining some form of federal preclearance measures will be analyzed in Part IV of this comment.

19. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. § 10303(c) (2014)).

20. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52

The actual coverage formula in Section 4(b), under which regions became party to the Section 5 preclearance requirements, reads:

The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.<sup>21</sup>

Should any region meet the above requirements, it would automatically be subject to Section 5 preclearance review.<sup>22</sup> The coverage formula was extended in 1982 and 2006 but has not been updated or amended since 1975.<sup>23</sup> As a consequence of the *Shelby County* ruling, there are no regions currently under the auspices of the Section 4(b) coverage formula.<sup>24</sup>

This additionally means that although the *Shelby County* Court refused to determine the constitutionality of Section 5, it has nevertheless been rendered ineffective due to the lack of a proper coverage formula.<sup>25</sup> Section 5 relies on the coverage formula from Section 4(b) for application.<sup>26</sup> In effect, Section 5 puts a freeze on all changes made to voting practices, devices, or procedures in the covered areas until such time that the United States District Court for the District of Columbia releases a declaratory judgement finding the change to have neither the purpose nor the effect “of denying or abridging the right to vote” for protected classes.<sup>27</sup> Any appeal of the District Court’s decision would go straight to the Supreme Court.<sup>28</sup>

A covered region could instead seek administrative review of the proposed voting changes if it wished to avoid costly litigation in D.C.<sup>29</sup> The region submits the proposed changes to the Civil Rights Division of

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U.S.C.A. § 10303(e-f) (2014)); FOLEY ET AL., *supra* note6.

21. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. § 10303(b) (2014)). This quotation only includes the original coverage formula. The 1970 and 1975 amendments were similar in language and updated the census dates.

22. U.S. D.O.J., *Section 4*, *supra* note10.

23. *Id.*

24. *Id.*

25. *Id.*

26. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. § 10304(a) (2014)).

27. *Id.*

28. The United States Department of Justice, *Section 5 of the Voting Rights Act*, CIVIL RIGHTS DIVISION (Sept. 11, 2020), <https://www.justice.gov/crt/about-section-5-voting-rights-act> [<https://perma.cc/F3EM-XBL4>].

29. *Id.*

the Department of Justice.<sup>30</sup> The Attorney General then has a sixty-day period in which to submit an objection to the proposed change, otherwise the covered region can commence implementation.<sup>31</sup> An overwhelming majority—ninety-nine percent—of preclearance requests are done through administrative review rather than litigation.<sup>32</sup>

The John Lewis Act and other bills seeking to re-establish the preclearance requirements of the VRA attempt to do so by updating the coverage formula in Section 4(b).<sup>33</sup> While this would be an effective response to the constitutional issue raised in *Shelby County* regarding the outdated coverage formula, it fails to take the unofficial animosity towards Section 5 itself into account. There is a long history of litigation regarding Section 5 and its constitutionality.

### *B. Section 5 Preclearance Litigation History*

In 1966, South Carolina sought a declaration from the Supreme Court that the VRA, and its Section 5 preclearance requirements in particular, were unconstitutional in *South Carolina v. Katzenbach*.<sup>34</sup> While the Court observed valid federalism concerns, it held that Congress had the authority to implement the VRA under Section 2 of the Fifteenth Amendment, which states that Congress has the power to “effectuate by appropriate measures the constitutional prohibition against racial discrimination in voting.”<sup>35</sup> Chief Justice Warren relied in particular on the historical necessity of prompt and effective action in eradicating racial voting discrimination.<sup>36</sup> The Chief Justice cited the long history of Congressional failure to fully enforce the Fifteenth Amendment and the failure of Congress’s prior case-by-case approach.<sup>37</sup> While the Court acknowledged the uncommon approach that Section 5 takes, “the Court [] recognized that exceptional conditions can justify legislative measures not otherwise appropriate.”<sup>38</sup> *Katzenbach* represents the first true challenge to the VRA, and the Court categorically defended every challenged aspect of the Act.

Later in *Allen v. State Board of Elections*, the Court specifically recognized the broad sweep of Section 5 preclearance. The Court stated

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30. *Id.*

31. *Id.*

32. *Id.*

33. See Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019-2020).

34. *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

35. *Id.* at 308.

36. *Id.* at 308-09.

37. *Id.* at 309-15.

38. *Id.* at 334 (citing *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934); *Wilson v. New*, 243 U.S. 332 (1917)).

that:

The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race . . . [T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes ‘all action necessary to make a vote effective.’<sup>39</sup>

The Court also held that “Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters.”<sup>40</sup> As a result, the Court gave a broad interpretation to the types of devices, practices, and procedures that could fall under Section 5 preclearance. Affected practices included reapportionment plans and changing to a district at large voting scheme.<sup>41</sup>

Three years later, in a change of pace, the Court determined that substantive issues of redistricting are applicable under Section 5 only if they “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>42</sup> Before this decision, the Court had “read the jurisdiction of [Section] 5 . . . expansively so as ‘to give the Act the broadest possible scope’ and to reach ‘any state enactment which altered the election law of a covered State in even a minor way.’”<sup>43</sup> However, the Court continued to proclaim the constitutionality of Section 5 itself and to uphold the District Court’s findings of invidious and discriminatory purposes.<sup>44</sup> The Court also upheld the validity of Section 5 in cases where specific regions, rather than the whole state, were under preclearance, once again rejecting a federalism challenge to the validity of Section 5.<sup>45</sup>

The most substantial shift regarding Section 5 jurisprudence occurred in 2009. In *Northwest Austin Municipal Utility District Number One v.*

39. *Allen v. State Bd. Of Elections*, 393 U.S. 544, 565, 566 (1969).

40. *Georgia v. United States*, 411 U.S. 526, 532 (1973).

41. *See Allen*, 393 U.S. at 565-66; *Georgia*, 411 U.S. at 532.

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

43. *Id.* at 141 (Marshall, J., dissenting) (citing *Allen*, 393 U.S. at 566, 567; *Georgia*, 411 U.S. 526; *Perkins v. Matthews*, 400 U.S. 379 (1971); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

44. *See City of Rome v. United States*, 446 U.S. 156 (1980) (holding that a voting practice must be free of both discriminatory purpose and effect to be precleared, that the VRA did not violate principles of federalism as the Civil War Amendments are “specifically designed as an expansion of federal power and an intrusion on state sovereignty,” and that the VRA was a valid extension of Congressional power under the Fifteenth Amendment); *Rogers v. Lodge*, 458 U.S. 613 (1982) (holding that remedy requiring use of single-member district schemes over at-large districting schemes was constitutional upon evidence of invidious purposes).

45. *See Lopez v. Monterey Cnty.*, 525 U.S. 266, 283-84 (1999) (holding that there is “no merit in the claim that Congress lacks Fifteenth Amendment authority to require federal approval before the implementation of a state law that may have just such an effect in a covered county. Section 5, as we interpret it today, burdens state law only the extent that that law affects voting in jurisdictions properly designated for coverage.”).

*Holder* (“*NAMUDNO*”), Chief Justice Roberts responded to a constitutional challenge to the VRA preclearance requirements using the principle of constitutional avoidance.<sup>46</sup> Chief Justice Roberts determined that the issue in *NAMUDNO* could be resolved via a Section 4(b) bailout for the aggrieved political subdivision;<sup>47</sup> however, the opinion indicated the Court’s animosity towards Sections 4 and 5.

The Court made specific reference to the fact that, in some states, Black voter registration was higher than white voter registration.<sup>48</sup> The Court reasoned that “[m]any of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [VRA] have been eliminated.”<sup>49</sup> While Chief Justice Roberts acknowledged Section 5’s role in creating such marked improvement, he maintained that issues of federalism<sup>50</sup> and historic misgivings as to the scope and validity of Section 5<sup>51</sup> may justify a change in the appropriateness of the constitutional remedy.<sup>52</sup> The *NAMUDNO* dicta reads almost as a declaration of unconstitutionality in regards to Section 5. Such comments are important when contextualizing the Court’s decisions in *Shelby County* and determining future viability of VRA amendments.

### C. *Shelby County v. Holder*

After the 2006 Amendments to the VRA, Shelby County, Alabama sought declaratory judgement regarding the constitutionality of Sections 4(b) and 5 of the VRA.<sup>53</sup> The Court determined that Section 4(b), as last amended in 1975, was unconstitutional.<sup>54</sup> The “extraordinary measures,” specifically the unequal treatment of states, were no longer appropriate enough to satisfy constitutional requirements.<sup>55</sup> The Court emphasized the constitutional guarantees of state sovereignty and equal sovereignty, highlighted the states’ rights to determine the exercise of voting in its

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46. *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009) (“*NAMUDNO*”).

47. *Id.* at 211.

48. *Id.* at 201.

49. *Id.* (citing H.R. REP. NO. 109-478, at 12 (2006); *Bartlett v. Strickland*, 556 U.S. 1, 8-12 (2009)).

50. *NAMUDNO*, 557 U.S. at 203.

51. *Id.* at 202 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 358-62 (1966) (Black, J., concurring and dissenting); *Allen v. State Bd. Of Elections*, 393 U.S. 544, 565, 586 (1969) (Harlan, J., concurring in part and dissenting in part); *Georgia v. U.S.*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting); *City of Rome v. United States*, 446 U.S. 156, 209-21 (1980) (Rehnquist, J., dissenting); *Id.* at 200-06 (Powell, J., dissenting); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 293-98 (1999) (Thomas, J., dissenting); *Id.* at 288 (Kennedy, J., concurring in judgement)).

52. *NAMUDNO*, 557 U.S. at 202-03.

53. *Shelby Cnty. v. Holder*, 570 U.S. 529, 529-30 (2013).

54. *Id.* at 557.

55. *Id.* at 535.

territory,<sup>56</sup> and argued the VRA violated these traditional guarantees.<sup>57</sup> Because the evidence showed that voting registration was in parity and first generation discrimination devices such as poll taxes and literacy tests were no longer in force, the extraordinary circumstances requiring the extraordinary measures of the VRA had expired and constitutionality was no longer appropriate.<sup>58</sup>

In his concurrence, Justice Thomas explicitly considered Section 5 preclearance to be unconstitutional.<sup>59</sup> Justice Thomas wrote that voting discrimination did not rise to the level of flagrancy that was previously seen in 1965 when the VRA was adopted.<sup>60</sup> As such, he maintained that “[w]hile the Court claims to issue no holding on [Section] 5 itself, . . . its own opinion compellingly demonstrates that Congress has failed to justify current burdens with a record demonstrating current needs.”<sup>61</sup> He continued, “[b]y leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court’s opinion, I would find [Section] 5 unconstitutional.”<sup>62</sup>

While dicta regarding Section 5 was abundant in *Shelby County*, only the holding regarding Section 4(b)—the VRA coverage formula—was binding.<sup>63</sup> The Court emphasized that Congress could “draft another formula based on current conditions”; however, it also stated that “Congress must ensure that the legislation it passes to remedy th[e] problem speaks to the current conditions.”<sup>64</sup> Given the Court’s lengthy explanation on the parity of voting registration and the burden that Section 5 places on the principles of federalism and state sovereignty, the question remains whether the Court would accept Section 5 as amended in 2006 as constitutional.

### III. ARGUMENT

It is important to preface any argument surrounding the potential constitutionality of VRA bills or amendments with a survey of contemporary voting discrimination conditions. Part A of this Section will focus on the effects of *Shelby County* and discuss the current metrics of voting discrimination. Next, Part B will introduce the VRA bills currently

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56. *Id.* at 543-44.

57. *Id.*

58. *Id.* at 547-49.

59. *Id.* at 557-59 (Thomas, J., concurring).

60. *Id.* at 558-59 (Thomas, J., concurring).

61. *Id.* at 559 (Thomas, J., concurring) (internal quotations and citations omitted).

62. *Id.* (internal quotations and citations omitted).

63. *Id.* at 557.

64. *Id.*

in the United States Congress, with a specific focus on coverage formulas and preclearance requirements. Part C will analyze the likelihood of the John Lewis Act passing through Congress, while Part D will analyze the likelihood of the Act surviving a constitutional challenge in the United States Supreme Court.

*A. Effect of Shelby County and Contemporary Voting Discrimination*

While the majority in *Shelby County* presented its own reasoning as to the potential constitutional challenge to Section 5 preclearance procedures, Congress had significant research showing the continuing positive impact of the VRA.<sup>65</sup> In her dissent in *Shelby County*, the late Justice Ginsburg relied on these Congressional findings in her reasoning for the continued application of the VRA.<sup>66</sup>

One difference between the Roberts majority and the Ginsburg dissent is the differentiation between first- and second-generation voting barriers that are covered by the VRA.<sup>67</sup> Second-generation barriers to voting are “electoral arrangements that affect the weight of minority votes,”<sup>68</sup>—specifically racial gerrymandering, at-large voting, and discriminatory annexation.<sup>69</sup> Justice Ginsburg relied on the prevalence of second-generation barriers to voting to demonstrate the continued necessity of the VRA.<sup>70</sup> The 109th Congress “amassed a sizeable record”<sup>71</sup> showing racial discrimination and “systemic evidence that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed.”<sup>72</sup>

A closer look at the Congressional findings on which Justice Ginsburg relied shows that the Department of Justice objected to over 700 proposed voting procedure changes in covered jurisdictions between 1982 and 2004.<sup>73</sup> The Roberts majority correctly concluded that the 700 rejected changes represent a small number of the total proposals;<sup>74</sup> however, the Congressional findings show that there were more Section 5 complaints

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65. *Id.* at 565 (Ginsburg, J., dissenting) (citing *NAMUDNO*, 557 U.S. 193, 205 (2009); *NAMUDNO*, 679 F.3d 848, 865-73 (C.A.D.C. 2012) (overturned by *NAMUDNO*, 557 U.S. 193); H.R. REP. NO.109-478, at 5, 11-12 (2006); S. REP. NO.109-295, at 2-4, 15 (2006)).

66. *Shelby Cnty.*, 570 U.S. at 565 (Ginsburg, J., dissenting).

67. *Id.* at 564-65.

68. *Id.* at 554.

69. *Id.* at 563-64.

70. *Id.* at 593.

71. *Id.* at 565 (citing *NAMUDNO*, 557 U.S. at 205) (internal quotations omitted).

72. *Id.* at 559 (citing *Shelby Cnty. v. Holder*, 679 F.3d 848, 866 (2012)) (internal quotations omitted).

73. H.R. REP. NO. 109-478, at 21 (2006), reprinted in 2006 U.S.C.C.A.N. 618.

74. *Shelby Cnty.*, 570 U.S. at 547.

filed between 1982 and 2004 than between 1965 and 1982.<sup>75</sup> Congress additionally reported that these changes were not minor, but rather “calculated decisions to keep minority voters from fully participating in the political process.”<sup>76</sup>

Since *Shelby County*, advocacy groups have claimed that voter suppression, particularly in states previously covered by preclearance requirements, has risen.<sup>77</sup> Much of the voter suppression following *Shelby County* falls into three specific areas: polling place closures, stricter voter ID laws, and proof of citizenship requirements.<sup>78</sup> Some of these changes, polling place closures in particular, may seem innocuous; however, since *Shelby County*, advocacy groups report that states and localities formerly under the auspices of Section 5 preclearance requirements have been enacting these changes systematically in ways that specifically disenfranchise Black, Latinx, and other non-white voting groups.<sup>79</sup> In particular, Texas, Arizona, Georgia, Louisiana, Mississippi, Alabama, South Carolina, and North Carolina have been accused of significantly increasing the number of discriminatory voting laws without the regulatory factor of federal preclearance.<sup>80</sup>

Within twenty-four hours of the *Shelby County* decision being released, Texas implemented strict voter photo ID laws.<sup>81</sup> These laws were previously rejected through preclearance, as they would leave an estimated 600,000 Texas voters without suitable IDs.<sup>82</sup> Texas additionally could not show that the ID laws would not discriminately affect Black and Latinx voters or other marginalized groups.<sup>83</sup> Eventually, this specific law was rejected by the Fifth Circuit for violating Section 2 of the VRA.<sup>84</sup> However, Texas later passed another photo ID law which was accepted by the Fifth Circuit.<sup>85</sup>

Two months after the *Shelby County* decision, North Carolina enacted

75. H.R. REP. NO. 109-478, at 21 (2006), reprinted in 2006 U.S.C.C.A.N. 618.

76. *Id.*

77. *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/6QC5-9HBA>].

78. Sam Levine & Ankita Rao, *In 2013 the supreme court gutted voting rights—how has it changed the US?*, THE GUARDIAN (June 25, 2020), <https://www.theguardian.com/us-news/2020/jun/25/shelby-county-anniversary-voting-rights-act-consequences> [<https://perma.cc/BMW7-EUFP>].

79. *Id.*

80. *Id.*

81. *The Effects of Shelby County v. Holder*, *supra* note 77.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

HB 589,<sup>86</sup> which included a photo ID requirement, eliminated same day registration, annual voter registration drives, and the county board's ability to keep the polls open for an extra hour, and restricted early voting and pre-registration.<sup>87</sup> This bill was later struck down by the Fourth Circuit for violating Section 2 of the VRA.<sup>88</sup> Mississippi and Alabama likewise each instituted their own photo ID laws that were previously barred by federal preclearance.<sup>89</sup>

Texas has also closed more polling places than any other state in the country. Between 2012 and 2018, states and localities formerly governed by Section 5 have closed 1,688 polling places.<sup>90</sup> Of the 1,688 total polling place closures, Texas was responsible for 750.<sup>91</sup> In comparison, the next highest state was Arizona with 320 closures.<sup>92</sup> All of the closures significantly and disproportionately impacted non-white voting groups.<sup>93</sup>

While voter suppression has been significant, in many instances the changes are made on a municipal level.<sup>94</sup> This makes it harder for groups like the ACLU or the NAACP to hear about or track cases of voter suppression.<sup>95</sup> It also makes it nearly impossible for discriminatory voting practices to be stopped *before* they harm voters.<sup>96</sup> To stop voting discrimination before it harms voters, Congress would have to pass a new bill restoring the VRA and the federal preclearance system.<sup>97</sup>

### B. VRA Congressional Bills

There have been efforts in the House of Representatives to pass bills restoring the VRA. Last year, U.S. Representative John Sarbanes (D-MD) introduced the For the People Act of 2019 ("For the People Act").<sup>98</sup> This was an omnibus bill that was purported to "expand Americans' access to the ballot box, reduce the influence of big money in politics, and

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote*, THE LEADERSHIP COUNCIL ON CIVIL & HUMAN RIGHTS (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [https://perma.cc/5GEZ-UNJR].

91. *Id.*

92. *Id.* The other states included in the study were Georgia (-214), Louisiana (-126), Mississippi (-96), Alabama (-72), North Carolina (-29), South Carolina (-18), and Alaska (-6).

93. *Id.*

94. Levine & Rao, *supra* note 78.

95. *Id.*

96. *Id.*

97. *Id.*

98. For the People Act of 2019, H.R. 1, 116th Cong. (2019).

strengthen ethics rules for public servants,” among other purposes.<sup>99</sup> In particular, Title II of the For the People Act commits the House to restoring the VRA to its power pre-*Shelby County*.<sup>100</sup>

The bill cited the “clear and persistent problem” of racial discrimination in voting as reasoning for restoration of the VRA.<sup>101</sup> In particular, the bill identified photo ID requirements, restrictions on early voting, elimination of same-day registration, purging voters from the rolls, and closing polling places as particularly troubling trends since 2013.<sup>102</sup> The House pledged to “restore protections for voters against practices in States and localities plagued by the persistence of voter disenfranchisement” and “ensure that Federal civil rights laws protect the rights of voters against discriminatory and deceptive practices.”<sup>103</sup>

The House passed the For the People Act on March 8, 2019 and the bill was received by the Senate on March 12, 2019.<sup>104</sup> The For the People Act languished in the Senate since being received without any vote.<sup>105</sup> It was reintroduced in January 2021, where it once again passed the House and was received by the Senate.<sup>106</sup> Despite this delay, the House moved forward with its commitments to the For the People Act, built a substantial record, and introduced the Voting Rights Advancement Act of 2019, now called the John Lewis Act of 2020, which specifically addresses issues related to preclearance and the negative discriminatory effects of the *Shelby County* decision.<sup>107</sup>

The John Lewis Act’s specific purpose is to “amend the Voting Rights Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to [S]ection 4 of the Act.”<sup>108</sup> Under the revised coverage formula, the John Lewis Act would apply to any state if “fifteen or more voting rights violations occurred in the State during the previous 25 calendar years; or ten or more voting rights violations

99. *Id.*

100. *Id.* at Title II.

101. *Id.* at § 2001(5).

102. *Id.* at § 2001(4-5).

103. *Id.* at § 2001(7)(D-E) (2019).

104. *Id.*

105. *Id.*

<sup>106</sup> Sylvia Albert, *Why Congress must pass HR 1 and the John Lewis Act*, ROLL CALL (Mar. 2, 2021), <https://www.rollcall.com/2021/03/02/why-congress-must-pass-hr-1-and-the-john-r-lewis-voting-rights-act/>.

<sup>107</sup> *Annotated Guide to H.R. 1, the For the People Act of 2019*, BRENNAN CTR. FOR JUST. (Apr. 13, 2020), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-hr-1-people-act-2019#t2-top> [https://perma.cc/5KA2-D35E]; see also Luke Broadwater, *After Death of John Lewis, Democrats Renew Push for Voting Rights Law*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/john-lewis-voting-rights-act.html> [https://perma.cc/37NM-FQ4N] (commenting on the impact of Rep. Lewis’s death on voting rights and explaining the decision to reintroduce the VRAA under his name.).

<sup>108</sup> Voting Rights Amendment Act of 2019, H.R. 4, 116th Cong. (2019).

occurred in the State during the previous 25 calendar years, at least one of which was committed by the State itself (as opposed to a political subdivision within the State).<sup>109</sup> This coverage formula would apply to specific political subdivisions as a separate unit if “three or more voting rights violations occurred in the subdivision during the previous 25 calendar years.”<sup>110</sup> These amendments are particularly important as they address the issue in *Shelby County*—outdated coverage formula data—by imposing twenty-five year rolls.<sup>111</sup> In other words, the data would always be from, at most, twenty-five years earlier.

In addition to creating the twenty-five year rolls, the John Lewis Act limits each affected locations’ coverage period to ten years, or as soon as it can establish a clean record.<sup>112</sup> To establish a clean record, a state may obtain a declaratory judgement.<sup>113</sup> After obtaining the judgement, a state will be cleared from coverage unless the state commits more voting rights violations following this issuance of the judgement.<sup>114</sup> Political subdivisions may seek declaratory judgements in the same way as states, but can also be cleared through a state-wide judgement.<sup>115</sup>

In a significant shift, the John Lewis Act focuses on specific historically discriminatory practices on a nation-wide level.<sup>116</sup> Such practices include: changes to the method of election; changes to jurisdiction boundaries; changes through redistricting; changes in documentation or qualifications to vote; changes to multilingual voting materials; changes that reduce, consolidate, or relocate voting locations, or reduce voting opportunities; and changes to the maintenance of the voter registration lists.<sup>117</sup> This shift in the process of review for voting rights violations would effectively incorporate “second-generation” voting barriers into the VRA.<sup>118</sup>

Importantly, these discriminatory practices would be reviewed on a nation-wide level, though it is unclear how this process would impact the federalist separation of powers argument against the implementation of the VRA. On one hand, the states that have historically been covered by the VRA would no longer be able to claim that they are being unfairly targeted; however, the new coverage formula would likely apply to states

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109. *Id.* at § 3(b)(1)(A)(i-ii).

110. *Id.* at § 3(b)(1)(B).

111. Senator Patrick Leahy, *VRAA of 2019 One Pager*, <https://www.leahy.senate.gov/imo/media/doc/VRAA%20of%202019%20one%20pager.pdf>

112. Voting Rights Amendment Act of 2019, H.R. 4, 116th Cong. § 3(b)(2)(A-B) (2019).

113. *Id.* at § 3(b)(2)(B)(i).

114. *Id.*

115. *Id.* at § 3(b)(2)(B)(ii).

116. *Id.* at § 4A(b).

117. *Id.*

118. *Shelby County v. Holder*, 570 U.S. 529, 563-64 (2013) (Ginsburg, J., dissenting).

that have never before been subject to the VRA.<sup>119</sup> Two such states at risk if the John Lewis Act is passed into law are New York and California.<sup>120</sup> This could conceivably decrease the chances of New York and Californian U.S. Representatives and Senators voting for the passage of the bill. These are also two powerful states that could provide strong and influential new voices in the separation of powers argument.

The John Lewis Act also explicitly requires that violations be reviewed under a results-based test, rather than a purpose-based test.<sup>121</sup> A results-based review process would likely result in many more violations than a purpose-based test. For instance, under a purpose-based test, the court would determine whether the alleged voting rights violations were imposed for a discriminatory purpose. Under a results-based review process, the court would simply determine whether the alleged voting rights violation had a discriminatory effect.

While the John Lewis Act sufficiently updates the coverage formula as required by *Shelby County*, the many additional changes it imposes may harm rather than help the bill. The nation-wide review process in particular presents potential new constitutional challenges under the Tenth Amendment and principles of federalism.<sup>122</sup> Ultimately, whether the John Lewis Act could survive a constitutional challenge is a null question until the bill is enacted, which presents its own challenges.

### *C. Likelihood of the John Lewis Act Being Passed by Congress*

Since the *Shelby County* decision, Congress has been unable to pass any VRA amendments.<sup>123</sup> What was once a bipartisan issue has now become partisan, with votes following the Democratic-Republican party line.<sup>124</sup> Neither the For the People Act nor the John Lewis Act were brought up for debate, much less a vote, in Senator Mitch McConnell's Republican-led Senate.<sup>125</sup> In order for any VRA amendment to have the hope of passing into law, it seems that both the House and the Senate must

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119. Vann R. Newkirk II, *The Democrat's New Voting-Rights Moment*, THE ATLANTIC (Mar. 2, 2019).

120. *Id.*

121. Leahy, *supra* note 110.

122. See also Michael E. Solimine, *Rethinking District of Columbia Venue in Voting Rights Preclearance Actions*, 103 GEO. L.J. (Fall 2014) (raising federalism concerns regarding venue in federal preclearance that have not previously been argued in front of the United States Supreme Court.).

123. See William R. Yeomans, *Private: The Voting Rights Act and Partisanship*, ACS: EXPERT FORUM (Aug. 5, 2015), <https://www.acslaw.org/expertforum/the-voting-rights-act-and-partisanship/> [<https://perma.cc/MV6F-JNGJ>]; see also EDWARD B. FOLEY ET AL., *supra* note 5.

124. Yeomans, *supra* note 122.

125. See For the People Act of 2019, H.R. 1, 116th Cong. (2019); VRAA, H.R. 4, 116th Cong. (2019-2020).

be Democratically controlled.<sup>126</sup> In addition, either the President would have to be Democratically-inclined or the Democrats would have to have a two-thirds majority of the Senate in order to overrule a presidential veto.

As of now, it seems likely that the John Lewis Act would be signed into law if it reached President Biden's desk.<sup>127</sup> While the Democrats hold the slight majority both the Senate and the House, passing the John Lewis Act would require every Democratic Congressperson and Senator to fall in line. This could present a problem as some Democrats have expressed reticence to some of President Biden's plans. While the John Lewis Act faces better prospects under a Democratically-led Congress and White House, there is still broad Republican disagreement and the issue of constitutional challenges in front of a conservative Supreme Court.<sup>128</sup>

#### *D. Likelihood of the John Lewis Act Surviving a Constitutional Challenge*

Even if the John Lewis Act passes the Senate and is signed by the President, the implementation of the bill could face challenges at the judicial level. Though it is, at best, an imprecise science to guess how Supreme Court justices may opine on any given issue, most justices have hinted as to their stance on Section 5 of the VRA. Therefore, it is possible to go through each justices' relevant opinions to determine how likely it may be for the John Lewis Act to survive a constitutional challenge.

##### 1. Chief Justice Roberts

Chief Justice Roberts was the author of the majority opinions in both

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126. See Marianne Levine, *McConnell won't allow vote on election reform bill*, POLITICO (Mar. 6, 2019), <https://www.politico.com/story/2019/03/06/mcconnell-election-reform-bill-1207702> [https://perma.cc/FZ6A-9LSZ].

127. President Biden has been an outspoken proponent of the VRAA. See Joe Biden (@JoeBiden), TWITTER (Aug. 6, 2020, 1:02 PM), <https://twitter.com/JoeBiden/status/1291419262788263938>; Seth McLaughlin, *Biden: GOP can honor memory of John Lewis by passing Voting Rights Act*, WASH. TIMES (July 28, 2020), <https://www.washingtontimes.com/news/2020/jul/28/biden-gop-can-honor-memory-john-lewis-passing-voti/>. As of January 27, 2021, the John Lewis Voting Rights Advancement Act has not passed through Congress to President Biden. Democratic Congresspeople are now calling on President Biden to use his Executive powers to protect voting rights. See Amy Gardner, *In wake of 2020 election, Democratic senators urge Biden to expand voting rights protections*, WASH. POST (Feb. 17, 2021), [https://www.washingtonpost.com/politics/in-wake-of-2020-election-democratic-senators-urge-biden-to-expand-voting-rights-protections/2021/02/17/0ef97cb4-7140-11eb-93be-c10813e358a2\\_story.html](https://www.washingtonpost.com/politics/in-wake-of-2020-election-democratic-senators-urge-biden-to-expand-voting-rights-protections/2021/02/17/0ef97cb4-7140-11eb-93be-c10813e358a2_story.html).

128. Senator McConnell, in particular, has expressed his opinion that voting obstacles no longer exist for Black Americans and as former Senate majority leader had refused to allow voting rights legislation on the floor. See Luke Broadwater, *After Death of John Lewis, Democrats Renew Push for Voting Rights Law*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/john-lewis-voting-rights-act.html> [https://perma.cc/37NM-FQ4N].

*NAMUDNO*<sup>129</sup> and *Shelby County*.<sup>130</sup> Both opinions called the constitutionality of Section 5 into question. Though the question of the constitutionality of Section 5 was not reached in either case, there is dicta suggesting that the extended preclearance method of reviewing the election policies of political subdivisions, counties, and states violates the principle of federalism.<sup>131</sup>

Chief Justice Roberts' main concerns seem to be that Section 5 applies too broadly and that it invalidates the principle of equal sovereignty that is afforded to all states in the union.<sup>132</sup> While the John Lewis Act updates the coverage formula and applies nationwide instead of targeting specific states, it also imposes additional federalism costs.<sup>133</sup> There is not enough information to deduce with any sort of accuracy how Chief Justice Roberts would vote as a justice. However, it is important to note that as a lawyer, he actively worked against the VRA.<sup>134</sup> Voting rights work made up the bulk of Chief Justice Roberts efforts during his tenure with the Department of Justice's Civil Rights Division.<sup>135</sup> There, Chief Justice Roberts, under the guidance of the Reagan administration, fought against key 1982 VRA extensions under Section 2.<sup>136</sup> Whether this work reflects the Chief Justice's jurisprudential reasoning going forward is unclear.

## 2. Justice Thomas

Unlike Chief Justice Roberts, Justice Thomas has been an outspoken critic of Section 5.<sup>137</sup> In his separate opinions in both *NAMUDNO* and *Shelby County*, Justice Thomas argued that Section 5 is unconstitutionally broad and exceeds Congress's powers under the Fifteenth Amendment.<sup>138</sup> Justice Thomas has stated that the second generation barriers to voting that have previously been presented to Congress are not enough to justify

129. *NAMUDNO v. Holder*, 557 U.S. 193 (2009).

130. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

131. *Id.* at 540.

132. *Id.*

133. Travis Crum, *Crum: The Voting Rights Advancement Act of 2019*, ELECTION L. BLOG (Mar. 1, 2019, 4:10 PM), <https://electionlawblog.org/?p=103838>.

134. Adam Liptak, *A More Liberal Supreme Court? Not When It Comes to Voting Rights*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/supreme-court-voting-rights.html>; Ari Berman, *Inside John Roberts' Decade Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 10, 2015), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/>.

135. Berman, *supra* note 139.

136. *Id.*

137. *See* *NAMUDNO v. Holder*, 557 U.S. 193 (2009) J., Thomas, concurring in judgement in part, dissenting in part); *Shelby County*, 570 U.S. 529 (J., Thomas concurring).

138. *NAMUDNO v. Holder*, 557 U.S. 193, 216 (2009) J., Thomas, concurring in judgement in part, dissenting in part); *Shelby County*, 570 U.S. 529, 557 (J., Thomas concurring).

the extraordinary measure of federal preclearance.<sup>139</sup> It seems likely that Justice Thomas's opinion would not change if presented with a facial challenge to the John Lewis Act.

### 3. Justice Breyer

In comparison, Justice Breyer has been a supporter of the VRA and Section 5. Justice Breyer joined in Justice Ginsburg's dissent in *Shelby County*, which argued for the continuation of the VRA under the Congressionally approved formula.<sup>140</sup> Based on this prior support for the continuation of Section 4 and the changes the John Lewis Act makes in an attempt to appease federalism concerns, it seems likely that Justice Breyer would be in favor of preserving the constitutionality of the bill and revitalizing Section 5 preclearance measures.

### 4. Justice Alito

Justice Alito joined both majority opinions in *NAMUDNO* and *Shelby County*.<sup>141</sup> Though Justice Alito has not personally written opinions on the constitutionality of Section 5, he authored the majority opinion in *Abbott v. Perez*,<sup>142</sup> a racial gerrymandering case, wherein he argued that evidence of past discrimination cannot be used in consideration of legislative policies.<sup>143</sup> The *Abbott v. Perez* decision could signal that Justice Alito would be more likely to find the John Lewis Act unconstitutional for its reliance on evidence of racial discrimination within the past fifteen years.<sup>144</sup>

### 5. Justice Sotomayor

Just like Justice Breyer, Justice Sotomayor joined Justice Ginsburg in her *Shelby County* dissent.<sup>145</sup> Additionally, Justice Sotomayor has been a vocal dissenter in the both the Supreme Court and the Second Circuit's voting rights cases.<sup>146</sup> It would be surprising for Justice Sotomayor to find the John Lewis Act facially unconstitutional, especially on Section 5

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139. *Id.*

140. *See Shelby Cnty.*, 570 U.S. 529, 559 (J., Ginsburg, dissenting).

141. *See NAMUDNO*, 557 U.S. 193; *Shelby Cnty.*, 570 U.S. 529.

142. *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

143. *Id.* at 2324-25.

144. *See VRAA*, H.R. 4, 116th Cong. (2019-2020).

145. *See Shelby Cnty.*, 570 U.S. 529, 559 (J., Ginsburg, dissenting).

146. Liptak, *supra* note 134; *see Hayden v. Pataki*, 449 F.3d 305, 367-68 (2d Cir. 2006) (Sotomayor, J., dissenting); *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Sotomayor, J., dissenting); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (Sotomayor, J., dissenting).

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### 6. Justice Kagan

As with Justices Sotomayor and Breyer, Justice Kagan joined Justice Ginsburg's dissent in *Shelby County*.<sup>147</sup> She has also joined Justice Sotomayor's more recent voting rights decisions.<sup>148</sup> It would be likely that she would join Justices Breyer and Sotomayor in finding the John Lewis Act facially constitutional.

### 7. Justice Gorsuch

Justice Gorsuch has not been on the Court long enough to truly build an analysis of his voting history on voting rights. However, some observers have found Justice Gorsuch's opinions relating to the VRA to evince some animosity towards anti-discrimination enforcement measures.<sup>149</sup> In *Abbott v. Perez*, Justice Gorsuch joined Justice Thomas's separate concurrence in which Justice Thomas argued that the VRA does not apply to redistricting cases.<sup>150</sup> Justices Thomas and Gorsuch's interpretations of the VRA would likely destroy the post-*Shelby County* functioning aspects of the VRA.<sup>151</sup> If Justice Gorsuch also agrees with Justice Thomas's views on Section 5, it is likely that Justice Gorsuch would find the John Lewis Act and Section 5 unconstitutional as well.

### 8. Justice Kavanaugh

Similarly to Justice Gorsuch, Justice Kavanaugh has had limited time on the bench to provide any significant opinions on the matter of voting rights and the VRA. It also appears that Justice Kavanaugh has not opined on the issue in the past. There is no evidence to truly show whether he would lean in any particular direction.

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147. See *Shelby Cnty.*, 570 U.S. 529, 559 (Ginsburg, J., dissenting).

148. See, e.g., *Raysor*, 140 S. Ct. 2600 (Sotomayor, J., dissenting); *Merrill*, 141 S. Ct. 25 (Sotomayor, J., dissenting).

149. Rick Hasen, "Neil Gorsuch Declares War on the Voting Rights Act", ELECTION L. BLOG (June 25, 2018, 8:01 PM), <https://electionlawblog.org/?p=99789> (citing Mark Joseph Stern, *Neil Gorsuch Declares War on the Voting Rights Act*, THE SLATE (June 25, 2018), <https://slate.com/news-and-politics/2018/06/abbott-v-perez-neil-gorsuch-says-the-voting-rights-act-does-not-prohibit-racial-gerrymandering.html>).

150. *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (Thomas, J., concurring).

151. Mark Joseph Stern, *Neil Gorsuch Declares War on the Voting Rights Act*, THE SLATE (June 25, 2018), <https://slate.com/news-and-politics/2018/06/abbott-v-perez-neil-gorsuch-says-the-voting-rights-act-does-not-prohibit-racial-gerrymandering.html>.

### 9. Justice Barrett

Justice Barrett is the newest member of the Court and there is not much to draw on to determine her jurisprudence. However, in her confirmation hearing, Justice Barrett answered a series of questions from then-Senator Harris regarding the VRA.<sup>152</sup> In response to Harris's line of questioning, Justice Barrett declined to discuss the state of racial discrimination in the country.<sup>153</sup> Justice Barrett then stated that it was her impression based on her reading of *Shelby County* that Congress need only rectify the issues with the Section 4 coverage formula in order to revive the VRA and Section 5.<sup>154</sup> It is unclear solely from this hearing where Justice Barrett stands on the issue of the VRA and preclearance constitutionality, especially based on her resistance to opining on any issues that could be litigated before the Supreme Court in the future.<sup>155</sup>

### 10. An Unclear Resolution

To reiterate the earlier caveat, it is difficult to predict how justices may decide cases that come before them. It is especially difficult here, given that Justices Gorsuch, Kavanaugh, and Barrett are so new to the bench. However, it seems that Justices Thomas, Alito, and Gorsuch would be most likely to find the John Lewis Act or Section 5 of the VRA unconstitutional on a facial challenge, while Justices Sotomayor, Breyer, and Kagan would be most likely to find the John Lewis Act and Section 5 constitutional. It is not entirely clear where Chief Justice Roberts and Justices Kavanaugh and Barrett would fall on this issue. This analysis leaves us with no clear answers as to whether VRA amendments would survive a constitutional challenge in the Supreme Court, but this does determine it would likely be a close decision. Even if the John Lewis Act cannot pass the Senate or cannot withstand a constitutional challenge, it is possible that the VRA can remain effective through other means.

## IV. SECTION 3(C) AND PRECLEARANCE

Since *NAMUDNO* was decided in 2009 and concerns for Section 5 federal preclearance measures began in earnest, observers have considered Section 3, often called the “bail-in mechanism,” to be the

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152. *WATCH: Sen. Kamala Harris questions Supreme Court nominee Amy Coney Barrett on voter suppression*, PBS (Oct. 14, 2020), <https://www.pbs.org/newshour/politics/sen-kamala-harris-questions-supreme-court-nominee-amy-coney-barrett-on-voter-suppression>.

153. *Id.*

154. *Id.*

155. *Id.*

VRA's saving grace.<sup>156</sup> Section 3(c) of the VRA allows federal judges who find Fifteenth Amendment violations to require the counties to opt into federal preclearance.<sup>157</sup> Unlike the Section 5 mandatory preclearance measures that were rendered ineffectual when the Court found the coverage formula unconstitutional, Section 3(c) remains operational.<sup>158</sup> In fact, Section 3(c) has been used more frequently following the *Shelby County* holding.<sup>159</sup> It is entirely possible that without legislation strengthening the VRA, Section 3(c) is Congress's only path to policing racially discriminatory voting practices.<sup>160</sup>

Unfortunately, Section 3(c) has significant application issues. Section 3(c) was meant to bolster and support Section 5's preclearance measures. Judicial findings of discrimination referred to preclearance were meant as a stopgap measure, not a replacement for Section 5.<sup>161</sup> As a result there is little jurisprudence regarding standards of review in Section 3(c) cases.<sup>162</sup> It is unclear what standards a judge would be required to use in referring a political subdivision or state to federal preclearance, though many have called for the creation of such a standard.<sup>163</sup>

## V. CONCLUSION

In conclusion, *Shelby County* rendered the most effective provision of the VRA inoperable. Though the option to revitalize the VRA preclearance measures was left open to Congress, there have been substantial obstacles in effecting new legislation. The House of Representatives has passed voting rights bills onto the Senate, which have not been debated, nonetheless voted on. Senator McConnell and other Republicans have openly stated their animosity towards voting rights legislation, making voting rights a partisan issue. Even if a bill were to be passed by Congress and was signed into law, any constitutional challenge would place the legislation in front of a divided Supreme Court. Though there is not a clear and obvious majority of the Supreme Court that

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156. See Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 992 (2010).

157. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. § 10302(c) (2014)).

158. Paul M. Wiley, Note, *Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. 2115 (2014).

159. Edward K. Olds, Note, *More Than "Rarely Used": A Post-Shelby Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185 (2017).

160. *Id.*

161. *Id.*

162. *Id.*

163. See *id.*; Crum, *supra* note 156; Wiley, *supra* note 158; *Establishing Coverage Formula for Voting Rights Act*, ABA (Aug. 13, 2013), [https://www.americanbar.org/groups/public\\_interest/election\\_law/policy/13a10e/](https://www.americanbar.org/groups/public_interest/election_law/policy/13a10e/).

2021]

PRECLEARANCE AND POLITICS

1109

opposes the VRA and Section 5 preclearance, there are significant signals from key justices showing that Section 5 could remain in dire straits. Until there is a clear decision on the future of Section 5, Section 3(c) bail-ins remain operational, but lacking a bright line legal standard. The current voting rights situation reflects federalist principles but fails to address the extraordinary circumstances of contemporary race- and language-based voting discrimination.