

**Statement of the Honorable Jerrold Nadler for the Hearing on
“Congressional Authority to Protect Voting Rights After *Shelby
County v. Holder*” Before the Subcommittee on the Constitution,
Civil Rights, and Civil Liberties**

**Tuesday, September 24, 2019 at 2:00 p.m.
2237 Rayburn House Office Building**

When Congress passed the Voting Rights Act in 1965, it aimed to deliver on what had long been an empty promise to African Americans and other people of color: the right to participate in our democracy as equal citizens. The Act not only prohibited states from denying the right to vote on the basis of race, but also required certain states and other local jurisdictions that had practiced the most severe forms of discrimination to get approval from the Justice Department, or from a court, before making any changes to their voting laws.

Congress enacted this “preclearance” requirement to address what the Supreme Court called an “unremitting and ingenious defiance of the Constitution” by states determined to suppress the vote.

States would enact laws designed to disenfranchise black voters, like literacy tests; and when those laws were struck down by the courts after years of litigation the states would simply switch to some other method of voter suppression, like poll taxes.

This relentless game of whack-a-mole meant that black voters could be shut out of the polling place even if they were successful in every lawsuit they brought because by the time they succeeded in striking down a discriminatory law, a new one would already be in place to keep them from the ballot box. So, as the Supreme Court explained when it first upheld the Voting Rights Act in *South Carolina v. Katzenbach*, Congress put in place the preclearance requirement “to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”

For decades afterward, the ability of African Americans and other people of color to cast votes and to run for office improved dramatically. But because many state and local governments persisted in attempting to suppress the vote in communities of color—or to dilute their votes through racial gerrymandering—Congress reauthorized the Voting Rights Act in 1970, 1975, 1982, and 2006. Each time, the legislation passed by overwhelming bipartisan margins. And each time, Congress kept essentially the same “coverage formula” for determining which jurisdictions would be subject to preclearance.

Six years ago, however, the Supreme Court gutted the Voting Rights Act in its disastrous decision in *Shelby County v. Holder*. Despite the fact that this Subcommittee—of which I was the Ranking Member at the time—heard from dozens of witnesses and assembled thousands of pages of evidence of ongoing discrimination when it last reauthorized the Act in 2006, the Supreme Court decided to substitute its own judgment for that of Congress.

By a 5 to 4 vote, the Court essentially held that the law was a victim of its own success: in the Court's view, because things had improved in the jurisdictions subject to preclearance, Congress could no longer justify imposing preclearance on those jurisdictions.

Justice Ruth Bader Ginsburg put it this way in her dissent: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." She was right.

The *Shelby County* decision unleashed a deluge of voter suppression laws across the nation, including in many states and local jurisdictions that had been subject to preclearance before *Shelby County*. Within 24 hours, Texas and North Carolina moved to reinstitute draconian voter ID laws, both of which were later held in federal courts to be intentionally racially discriminatory. We have heard evidence about these and other ongoing voter suppression laws in five hearings before this Subcommittee so far this year.

Another troubling aspect of the Court's reasoning in *Shelby County* was its emphasis on the supposed "equal sovereignty" of the states and on states' authorities to administer elections—even when they have abused that authority to deny the right to vote. The Court's reasoning barely acknowledged that the Constitutional Amendments enacted after the Civil War, during Reconstruction, fundamentally re-ordered Congress's relationship to the states when it comes to protecting the civil rights of all Americans.

As we will be discussing today, the Fourteenth Amendment guarantees equal protection under the law; and the Fifteenth Amendment prohibits any state from denying the right to vote on the basis of race. Crucially, both Amendments give Congress the power to enforce these rights "by appropriate legislation." In its decision in *Katzenbach*, the Supreme Court held that this authority under the Fifteenth Amendment means Congress "may use any rational means" to make laws protecting the right to vote.

But in *Shelby County*, the Court appeared to depart from that standard and applied a different, heightened form of scrutiny. The *Shelby County* decision left substantial confusion in its wake, while giving states free reign to enact stringent voter ID laws, to purge their voter registration rolls, and to engage in a host of other measures designed to roll back the achievements of the Voting Rights Act.

Nonetheless, Congress has the power—and indeed the obligation—to reverse this tide. The Fourteenth and Fifteenth Amendments expressly empower us to enact laws protecting the right to vote and guaranteeing the equal protection of all citizens. And although the Supreme Court’s decision in *Shelby County* did great damage, the Court made clear that it was not striking down preclearance altogether. Rather, it invalidated the part of the law that determines *which* jurisdictions are subject to preclearance. It explained it was doing this because Congress had not substantially updated that formula for several decades. In fact, the Court expressly said that Congress could “draft another formula based on current conditions.”

So that is what we have set out to do. We have already held a series of hearings documenting ongoing and pervasive threats to voting rights in various parts of the country. If we can target those jurisdictions that have been the worst offenders in recent years—those that have enacted discriminatory voter ID laws; shut down polling places; purged voter rolls; or diluted minority voting power—then there is every reason to believe that Congress has full authority to act.

We can no longer afford to wait. The right to vote lies at the very core of our democracy and is foundational to the rule of law. I look forward to hearing from today's witnesses and to forging a path ahead to protect the sacred right to vote for all Americans.