

TESTIMONY OF

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ON H.R. 4

THE VOTING RIGHTS ADVANCEMENT ACT OF 2019

BEFORE THE

**U.S. HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES**

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I. INTRODUCTION

My name is Debo P. Adebile. I am here in my personal capacity as a citizen, an attorney, a voting rights litigator for several decades and not in any other role. Thank you for inviting me to testify today about an issue that is central to our democracy: Restoring one of the core provisions of the Voting Rights Act.

For more than twelve years I was a litigator at the NAACP Legal Defense Fund, Inc. (“LDF”) and I served in various positions there, including several years as the Director of Litigation. While at LDF, I twice defended the Voting Rights Act from constitutional attack before the United States Supreme Court. First, in 2008 in the *Northwest Austin Municipal Utility District v. Holder* case, and then, in 2013, in the *Shelby County v. Holder* case.

I also had the honor of testifying before this body and before the United States Senate Judiciary Committee Subcommittee on the Constitution in 2006, the last time the Voting Rights Act was reauthorized. That year—not even 15 years ago—an overwhelming bipartisan majority of this House voted to reauthorize the Voting Rights Act, including the Sections 4 and 5 preclearance process that I will focus on today. A unanimous Senate then supported the bill, and President George W. Bush signed it into law.

I want to focus my testimony today on two things.

First, the impact the Court’s decision in *Shelby County* has had on our democracy: What we lost as a result of that decision, and what I contend the foreseeable results have been.

The preclearance protections created by the 1965 VRA brought profound changes—and profound benefits—to American Democracy. In many ways, it was the VRA that helped make the promise of *true* American democracy possible, for the first time in our history.¹ To be sure, there remains much more work to be done to perfect our Union. But the VRA made a huge difference. And no single law or policy has been more effective than preclearance in guarding equal voting rights and blocking and deterring the scourge of racial discrimination in elections. We know too that earlier legislative efforts proved unsuccessful.

The Court’s *Shelby County* decision stopped the preclearance process in its tracks. And because preclearance has from the start been such a singularly effective policy, its demise demonstrably weakened minority voting rights protections, that has moved us farther away from our core American ideals. We should be motivated to expand and adapt the use of preclearance precisely because

¹ See, e.g., N. Hannah Jones, *Our democracy’s founding ideals were false when they were written. Black Americans have fought to make them true.*, NEW YORK TIMES MAGAZINE, Aug. 14, 2019, <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

it is such an effective tool in expanding opportunities to participate in our democracy. The Voting Rights Advancement Act of 2019 does that.

Second, I want to address some potential constitutional questions regarding the Voting Rights Advancement Act of 2019.

When Congress reauthorized the VRA in 2006, it legislated against the backdrop of an unbroken line of Supreme Court authority holding, in case after case, that the VRA’s preclearance process was a constitutional means for the Congress to ensure the an equal right to vote.² Indeed, when the Civil War ended, at what Pulitzer Prize winning historian Eric Foner calls our “Second Founding,” we as a Nation amended our Constitution to provide Congress with substantial, affirmative power to finally enforce the Founding principle that all are created equal, *especially* when it comes to participation in self-government.³ Each of the Reconstruction Amendments thus provided new, specific authority for this body to act to ensure and defend equal voting rights, stating that “[t]he Congress *shall have* power to enforce this article by appropriate legislation.”⁴

² See *Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

³ See generally Eric Foner, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

⁴ E.g., U.S. CONST. amend. XV, § 2.

That power remains undiminished. This body has the power and the constitutionally vested responsibility to take action to remedy discrimination in our democracy. That includes the power to impose prophylactic measures to combat discriminatory election laws and practices before they take effect. Congress has broad power to combat pervasive discrimination in our elections, including measures that are tailored to target those jurisdictions where they are most needed. And, the Supreme Court’s decision in *Shelby County* changes none of that.

The Court in *Shelby County* held that the VRA’s preclearance coverage criteria—the rules that say which jurisdictions are “covered” and therefore must have their election law changes scrutinized in advance through the preclearance process—was unconstitutional, because it had not been updated since the 1970s, and therefore was not based on “current conditions.”⁵ But the opinion leaves open substantial room for Congress to establish new criteria, and thereby to fix the constitutional problem that the Court identified. In fact, Chief Justice Roberts invited Congress to do just that.⁶

The bill before you does so:

⁵ *Shelby County, Ala. v. Holder*, 570 U.S. 529, 554 (2013).

⁶ *Id.* at 557.

(1) It creates a dynamic standard, based on each jurisdiction’s recent history, whereby geographic coverage will adjust by moving the temporal window of triggering violations forward;

(2) treats all states and jurisdictions as equally eligible to move in or out of preclearance; and

(3) establishes what is effectively a bailout presumption through which covered jurisdictions are no longer subject to preclearance after 10 years unless their continuing violations merit it. This focus on current conditions is exactly what the Court asked for in *Shelby County*. And it comes well within the ample powers that Congress has to legislate in order to enforce the promise of an equal right to vote for all.

Congress approaches this legislation with the knowledge that we are decades away from 1965. We are also often told that things have changed in America since 1965. Thankfully this is true in many significant ways. But the VRA is best understood not as an endpoint, but as a beginning, of a new era of commitment to a robust minority inclusion principle that would give meaning and power to our constitutional promises of equality. As I have explained elsewhere, “[w]e do not dishonor our progress by demanding more it.”⁷ The success of the Voting Rights

⁷ Debo P. Adegbile, *Looking Backward to and Forward from the 2006 Voting Rights Act Reauthorization*, in *THE MOST FUNDAMENTAL RIGHT* 356, 379 (Daniel McCool ed., 2012).

Act should be regarded as an invitation, to all of us, to renew that commitment with each generation, and to continue to perfect our Union. When the Reconstruction Amendments were first passed, the Republican politician and famed abolitionist Charles Sumner announced that they had made the federal government, and Congress in particular, the “custodian of freedom.”⁸ There is perhaps no more important duty in a democratic society. Now is the time to take up that charge once again, and to renew our commitment to this Nation’s highest ideals. I urge this committee and this Congress to pass this important legislation.

II. THE VRA AND PRECLEARANCE: WHAT WE GAINED AND WHAT WE LOST

A. What We Gained: The Reconstruction Amendments and the VRA

The struggle that led to the Voting Rights Act is not unfamiliar to Congress. Respected Congressman John Lewis, often says that he “shed a little blood on that bridge in Selma[,] and friends of [his] gave their lives[,] so that no person would be denied their right to vote.”⁹

The VRA has often been called the “crown jewel” of American liberties.¹⁰

That statement is a testament to both the sacred price paid by those on the front

⁸ See Eric Foner, Testimony before the U.S. Comm’n on Civil Rights, Sept. 13, 2019 (Tr. forthcoming), *available at* https://www.youtube.com/watch?v=sgs_le-EKs0.

⁹ E.g., Rep. John Lewis (@repjohnlewis), TWITTER (Aug. 6, 2018, 4:24 PM), <https://twitter.com/repjohnlewis/status/1026610007251607552?lang=en>.

¹⁰ Herbert H. Denton, *Reagan Signs Voting Rights Act Extension*, WASH. POST, June 30, 1982, <https://www.washingtonpost.com/archive/politics/1982/06/30/reagan-signs-voting-rights->

lines in the fight for an equal right to vote, and to its singular effectiveness as a piece of legislation.

No one disputes that the VRA *worked*. At oral argument in *Shelby County*, Justice Alito, for example, said it was “one of the most successful statutes that Congress passed during the twentieth century.” And it’s critical to understand *why* the VRA, and especially preclearance, has been such an effective tool in combatting the pervasive threat of discrimination in voting.

In the era before the VRA, explicit, pervasive legal discrimination and subjugation on the basis of race was the norm in the South, a place and time, still in living memory, that we refer to as Jim Crow. The right to vote, what the United States Supreme Court has called “‘a fundamental political right, because [it is] preservative of all rights,’”¹¹ was withheld through mechanisms like poll taxes and literacy tests—invariably applied in a discriminatory fashion, as the infamous “grandfather clauses” illustrate—to completely disempower African Americans in the political process and maintain a broader system of segregation.¹²

act-extension/b59370f1-fc93-4e2f-b417-2b614ea55910/ (quoting President Reagan as calling the right to vote “the crown jewel of American liberties”); *see also* Theodore Shaw, *John Roberts Dismantled the ‘Crown Jewel’ of the Civil-Rights Movement*, THE NATION, Sep. 14, 2018, <https://www.thenation.com/article/john-roberts-dismantled-the-crown-jewel-of-the-civil-rights-movement/>.

¹¹ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

¹² *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

The path there was not inexorable. At the end of the Civil War, we as amended our Nation’s Constitution, explicitly to make good on the promise of equal justice—and an equal vote—for all. The 15th Amendment, for example, provided that the right to vote “shall not be denied or abridged . . . on account of race, color, or previous condition of servitude,” and furthermore that Congress “shall have the power to enforce this article by appropriate legislation.”¹³ Congress took up that charge, passing important civil rights legislation that might have stopped the rise of segregation and protected the right to vote for black Americans in the South. But the Supreme Court struck down much of legislation,¹⁴ and then refused to enforce the Reconstruction Amendments in the context of private litigation.¹⁵ “[R]elief from a great political wrong,” the Supreme Court said, denying voting rights to a black man in Alabama, “must be given [to African Americans] by the legislative and political department of the government of the United States.”¹⁶

As Reconstruction faded and gave way to Jim Crow, Congress needed to act—to reassert its authority under the Reconstruction Amendments and take up its

¹³ U.S. CONST. amend. XV.

¹⁴ See *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁵ See *Giles v. Harris*, 189 U.S. 475, 482 (1903).

¹⁶ *Id.* at 488.

role as a co-equal branch of government and a driver of national policy. That it took Congress so long to react is a tragedy of our history.¹⁷ And it also shows that the history of the right to vote is not a linear one—that it is marked by struggle and by backsliding as well as progress.¹⁸

But Congress’s commitment flowed back from its low ebb, driven in no small part by the path-marking activists who fought for decades in the courts and in the streets for their full right to an effective ballot. Congress ultimately passed new civil rights legislation, in 1957, 1960, and again in 1964, which “authorized and then expanded the power of ‘the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds.’”¹⁹ But none of it was enough to overcome entrenched discrimination.

Justice Ginsburg, recounting the history in her *Shelby County* dissent, called it a “hydra” problem: Groups like the NAACP, the NAACP Legal Defense and Educational Fund, Inc., the Lawyers’ Committee for Civil Rights Under Law, in turn MALDEF, the Department of Justice, and many individual lawyers like Fred Gray of Alabama, A.P. Tureaud of Louisiana, Armand Derfner of South Carolina,

¹⁷ See also Foner, Testimony for the U.S. Comm’n on Civil Rights, *supra* n.8.

¹⁸ See, e.g., Alex Keyssar, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 1 (2000) (“Change was neither linear nor uncontested: the sources of democratization were complex, and the right to vote was itself a prominent political issue....”).

¹⁹ *Shelby County*, 570 U.S. at 56 (Ginsburg, J., dissenting) (quoting *Katzenbach*, 383 U.S., at 313).

to name just a few would bring affirmative litigation challenging one barrier to African-American political participation, but even when they won, the state or local government would often resist and new discriminatory rules would be introduced.²⁰

Preclearance—the system instituted by Sections 4 and 5 of the Voting Rights Act—was designed to address the “hydra” problem. That is, to uproot voting discrimination that had proven particularly persistent and adaptive. Section 5 instituted a new, model of regulation that was far better suited to the problem of discrimination in elections. And Section 4 directly targeted for closer supervision under this new preclearance regime the parts of the country that had been governed under a system of slavery and then apartheid for centuries.

As every Justice on the Court in *Shelby County* acknowledged, and as the Congress expressly found when it reauthorized the VRA, the pre-implementation approach worked where other repeated attempts had failed.²¹ In just the first five years after the VRA was passed, for example, about as many African-American people registered to vote in Alabama, Mississippi, Georgia, Louisiana, and North and South Carolina as had done so in the entire century after the end of the Civil

²⁰ *Id.* at 562–63 (Ginsburg, J., dissenting).

²¹ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (“VRA Reauthorization and Amendments Act of 2006”), Pub. L. No. 109-246, 120 Stat. 577, § 2(b)(1).

War.²² And the VRA’s legal basis in the Reconstruction-era Fifteenth Amendment was repeatedly upheld as against constitutional challenges. “As against the reserved powers of the States,” the Court explained in the still-seminal decision upholding the VRA, “Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”²³

The VRA, and especially its prophylactic design, was so successful at moving the Nation away from Jim Crow’s subjugation and toward real democracy that it gained broad bipartisan support. It was reauthorized in 1970, 1975, 1982, and then again in 2006, and signed into law by Republican presidents each time.

Through these reauthorization efforts Congress has stayed the course because the impulse to discriminate in elections, or to deny full participation to disfavored groups, or to subordinate African Americans, Latinx, or Asian-American voters, among others, in parts of the country, notwithstanding strong medicine, has not just gone away. The Section 5 preclearance process worked not simply because it deterred jurisdictions from passing discriminatory election laws (though it did that), or because it changed the mindset of those in power (though it may have done that, too in some circumstances), but also because when

²² *Shelby County*, 570 U.S. 562–63 (Ginsburg, J., dissenting) (citing Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting* 7, 21 (B. Grofman & C. Davidson eds. 1992)).

²³ *Katzenbach*, 383 U.S. at 324.

jurisdictions continued to pass discriminatory laws, the preclearance process blocked those laws from going into effect. And to point this out is no slight to those jurisdictions that were covered under the previous Section 4 standard. Change takes time, and change is hard. As James Madison wrote: “If men[/people] were angels, no government would be necessary.”²⁴

The reauthorization efforts in 2006 bear this out. Even four decades after the 1965 VRA, the more than 15,000-page record compiled by the Congress in support of reauthorization showed that discrimination on the basis of race had not disappeared in covered jurisdictions.²⁵ To be sure, it had changed. Many of the most blatant impediments to voter registration had ceased; instead, what Congress in 2006 called “second generation” forms of discrimination, like redistricting maps or changes in the forms of election that dilute the political strength of African Americans or other minority groups, had come to the fore.²⁶ But at least in

²⁴ THE FEDERALIST NO. 51 (James Madison).

²⁵ See generally *Northwest Austin Mun. U. Dist. No. One v. Holder* 573 F. Supp. 2d 221 (D.D.C. 2008), *rev'd and remanded sub nom. Northwest Austin Mun. U. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (including the appendix, found at 289–301, which provides a representative sample of section 5 objections based on discriminatory intent from Alabama, California, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia).

²⁶ VRA Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 577 §§ 2(b)(2)–(3) (2006).

“covered” jurisdictions where preclearance was required, those measures were still being blocked by Section 5.²⁷ The preclearance process was still working.

Congress looked at the facts in 2006, and determined that “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote.” Congress determined that a failure to continue the preclearance regime would “undermin[e] the significant gains made by minorities in the last 40 years.”²⁸

I will address the *Shelby County* decision in more detail. But it is worth noting here that the *Shelby County* Court did not say the voluminous record created during the 2006 reauthorization was inaccurate. The Court’s majority opinion conceded that racial discrimination in our elections remains, as the Congress documented, and also that preclearance works. What that means is that by suspending the preclearance process, the Court effectively ensured that more of the discrimination that fully intact law had stopped would work its way into our laws. A vital lever for protecting our democracy and tool for combatting discrimination was taken away. And as the Congress predicted, the foreseeable happened after the *Shelby County* decision invalidated the current preclearance process.

²⁷ VRA Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 578 § 2(b)(9) (2006).

²⁸ *Id.*

B. What We Lost: After *Shelby County*

The demise of the preclearance process has been harmful.

The U.S. Civil Rights Commission’s 2018 report, *An Assessment of Minority Voting Rights Access in the United States*, lays in detail what we have lost as Nation as a result of the *Shelby County* decision.²⁹ We have lost an effective process that prevented scores of discriminatory laws and rules that would have corrupted democracy in cities, counties, and States across the country from going into effect. We have lost the transparency and accountability that comes from having a system where election law changes are exposed to scrutiny by civil rights experts and the public before they may be imposed on an electorate. We have lost the deterrent effects that the preclearance provided. And we have lost the signal that preclearance sent, that our national government remains the “custodian of freedom,” willing and able to stop state and local governments from subordinating minorities or disfavored groups in the political process.³⁰

The preclearance process was and had been like a checkpoint for our democracy, keeping the road ahead safe by preventing discrimination from even starting its engines. *Shelby County* was unfortunately regarded by some as a green light to impose discriminatory voting measures. Since *Shelby County* was decided,

²⁹ See generally U.S. COMM’N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES: 2018 STATUTORY REPORT (2018).

³⁰ *Id.* at 278–80.

more than 20 states have enacted new, restrictive voting laws, and successful affirmative lawsuits—an surefire indicator of illegal voting rights violations—have *quadrupled*.³¹ These statewide laws—and again, I am just talking about statewide laws, not even county and local measures—include onerous new voter registration requirements like proof of citizenship or government-issued ID, massive voter roll purges, and rollbacks in early voting and ballot box access.³² And they include States that were “covered” under Section 4, but also States that were not.

It’s worth looking in particular at the formerly covered jurisdictions, who were subject to the preclearance process before the 2013 *Shelby County* decision. Look at Texas, where the State enacted and continues to operate using a strict voter ID law that a federal court declared discriminatory against African-American and Latinx voters.³³ Look at North Carolina, where before the ink on the *Shelby County* decision was dry, the legislature passed an “omnibus” election bill that the Fourth Circuit Court of Appeals later held discriminated against African-American voters with “surgical precision.”³⁴ Look at Georgia, where in the wake of long lines, purges, and other irregularities affecting African-American voters during the

³¹ *Id.* at 82, 227.

³² *Id.* at 82–183.

³³ *Id.* at 80 (quoting U.S. Comm’n on Civil Rights Briefing Meeting Feb. 2, 2018 (2018) at 90 (statement by Sherrilyn Ifill)).

³⁴ *Id.* at 12.

2018 election, a federal court has held that the entire state election system is subject to challenge.³⁵

My point is not to relitigate the question of whether the old “covered” jurisdictions deserve some particular scrutiny. That ship has sailed, and the approach in this legislation takes a fresh approach. My point is that those formerly covered jurisdictions provide us with a natural experiment, a “before-and-after” that demonstrates that the preclearance process works, and prevents serious harms to voting rights.

Just as the presence of preclearance sent a signal to jurisdictions that discrimination in voting was unacceptable, the elimination of preclearance sends a message that the federal government is in retreat. In this moment, Congress’s focus and commitment is of paramount importance.

The question, in light of *Shelby County*, is how to put this effective tool back into service.

III. THE VRAA: ANSWERING *SHELBY COUNTY* AND FULFILLING CONGRESS’S ROLE

Congress can fix the problem posed by the Court in *Shelby County*—just as the Court invited Congress to do. Restoring the preclearance process would be a step forward for American democracy that all Americans, regardless of race, creed,

³⁵ *Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018).

or party, could be proud of—just as leaders from both parties proudly supported the VRA’s full re-authorization just over a decade ago. And the Voting Rights Advancement Act does just that, all consistent with the Court’s decision in *Shelby County*.

I will explain the details, but let me give the nutshell version up front: The *Shelby County* decision concerns the VRA provisions that say which state and local jurisdictions are “covered” and subject to preclearance. But *Shelby County* also leaves Congress with ample room to reinstate a preclearance process, by changing the coverage approach to one that is based on “current conditions,” not conditions that are anchored at a fixed point in the past. And that is exactly what the VRAA does.

A. What *Shelby County* Says

When we talk about preclearance, we often think about Section 5 of the VRA. That is the portion of the law that details the preclearance process itself, whereby, any time a “covered” state or political subdivision wants to enact or impose a new rule for voting or elections it must obtain “preclearance” from the civil rights division of the Department of Justice that the new rule being imposed “does not have the purpose and will not have the effect of denying or abridging the right to vote” on account of membership in a protected group.³⁶ In other words, if

³⁶ 52 U.S.C.A. § 10302(c).

a jurisdiction is “covered,” then any changes to its election laws need to be reviewed by civil rights experts to make sure that the change is not discriminatory. Those civil rights experts need to provide prior approval, or “preclearance.” Otherwise, the jurisdiction must go to court and prove its new election law is not discriminatory in order to bring that law into effect.

Shelby County did not hold that Section 5, or similar measures, are unconstitutional. And in fact, the Supreme Court addressed that question after the VRA was first passed, holding in *South Carolina v. Katzenbach* that measures like Section 5 can be a permissible, constitutional exercise of power under the Fifteenth Amendment.³⁷ I’d also note that Article I’s Elections Clause, which accords Congress broad power “to pre-empt state regulations governing the ‘Times, Places and Manner’ of holding congressional elections,” may provide additional, substantial authority to impose the same type of prophylactic process for state election laws, at least so long as they touch on elections for federal office.³⁸

The question is about which jurisdictions are “covered”—and subject to the preclearance process.

The struck coverage approach for the VRA’s preclearance regime is set out in Section 4(b) of the statute. Prior to *Shelby County*, and as the Court focused on

³⁷ *Katzenbach*, 383 U.S. at 327 (citing *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

³⁸ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013).

in that case, the law provided that a state or subdivision (like a county) would be covered if the Attorney General determined that two criteria were met: First, that the state employed a discriminatory “test or device” in voting, like a literacy test, a “good character test,” or some other method of exclusion used in the Jim Crow South. And second, that under 50% of the voting age population was registered to vote or turned out to vote in a presidential election. But those criteria needed to be met only as of particular dates: November 1964; November 1968; or November 1972. If at any of those points the criteria had been met for a particular State or county, then that State or county was covered.³⁹ The result was that much of the former segregated South was covered, as were a number of other jurisdictions that met the criteria in 1968 or 1972, including Texas, Alaska, Arizona and parts of New York.

States and counties were able to “bail out” of coverage by showing a record of non-discrimination, and the Court in its 2009 *Austin* decision expanded the bailout provision to cover towns and other sub-county entities. But it remained the case that whether or not a jurisdiction was covered in the first place was determined by reference to a static point in history—and that the Supreme Court had upheld the VRA preclearance and coverage system time and again for decades up through the 2006 reauthorization.

³⁹ See 52 U.S.C.A. § 10303(b)(c).

In *Shelby County*, the Court found that Section 4(b)'s coverage rule was unconstitutional because it imposed preclearance coverage based on factual criteria that were anchored to fixed points in the past and that the Court perceived to be outdated.

In striking down 4(b), the Court began with two legal principles: First, restricting the autonomy of the States in making election laws imposes “federalism costs.” Second, treating states differently from one another violates a “fundamental principle of equal sovereignty” among the States. From those principles, the Court articulated two interrelated rules for evaluating the VRA’s preclearance coverage: It “must be justified by current needs” and, to the extent that it provides “disparate geographic coverage,” the disparity must be “sufficiently related to the problem that it targets.”⁴⁰

From those premises, the Court concluded that the coverage rule in Section 4 was no longer valid. The Court acknowledged, consistent with the *Katzenbach* decision, that it had once been valid.⁴¹ Of course, a line of Supreme Court decisions made that clear. And it acknowledged that, in reenacting the VRA, Congress had produced reams of evidence that discrimination in voting remained a

⁴⁰ See also *Northwest Austin Mun. U. Dist. No. One v. Holder* 557 U.S. 193, 202–03 (2009).

⁴¹ *Shelby County*, 570 U.S. at 546.

serious problem.⁴² But, the Court stated (and it is worth quoting this language):
“Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.”⁴³

The Court said “things have changed dramatically” from the Jim Crow era.⁴⁴ Voter registration and turnout have achieved near parity across racial groups.⁴⁵ Literacy tests and other first-generation forms of discrimination have “been forbidden nationwide for over 40 years.”⁴⁶ Yet, the Court complained, “[c]overage today is based on decades-old data and eradicated practices.”⁴⁷

The Court’s reasoning amounts to a syllogism: The Constitution requires that the imposition of preclearance on certain States be “justified by current needs.” Moreover, the coverage rule imposes preclearance coverage “based on 40-year-old facts.” Therefore, the Constitution is violated.

There are many who disagree with this reasoning. Judge Richard Posner, for one, said that the legal principle of “equal sovereignty” that undergirded much of

⁴² *Id.* at 553.

⁴³ *Id.* at 554.

⁴⁴ *Id.* at 547.

⁴⁵ *Id.* at 551 (citing *Katzenbach*, 383 U.S. at 313, 329–30).

⁴⁶ *Id.* at 547.

⁴⁷ *Id.* at 551.

the opinion does not exist, and that “[t]he opinion rests on air.”⁴⁸ And a comprehensive study of voting rights violations in the U.S. from 1957 on showed that the old coverage standard was in any case “still congruent with proven violations, and that to the extent that recorded violations had decreased, that was not because problems had ended, but because the Supreme Court had made it more difficult to win lawsuits.”⁴⁹ The “40-year-old facts” that the Court pejoratively referenced were in fact directly tied to the facts on the ground in the present day, as Congress had found in the first place after its own painstaking efforts.⁵⁰ Past was, in fact, prologue.

But you of course do not have the luxury of disagreeing. Nor in this context do I. And so my far more important point for you today is that the bill you are considering directly addresses the central logic of the Court in *Shelby County*: by revamping the coverage approach into something that is dynamic, that changes over time, that responds to changes on the ground, and that reflects current conditions. Chief Justice Roberts, in his *Shelby County* opinion, invited Congress to “draft

⁴⁸ Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking down the law is all about conservatives' imagination*, SLATE, June 26, 2013, <https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html>.

⁴⁹ Morgan Kousser, *Do The Facts of Voting Rights Support Chief Justice Roberts's Opinion in Shelby County?*, TRANSATLANTICA (2015), <http://journals.openedition.org/transatlantica/7462>.

⁵⁰ See also, e.g., DEBO P. ADEGBILE, VOTING RIGHTS IN LOUISIANA 1982–2006.

another formula based on current conditions.”⁵¹ The Voting Rights Advancement Act takes up that invitation.

B. What The VRAA Does

So let me highlight the provisions in the VRAA that I think are particularly responsive to *Shelby County* and its reasoning. And let me start by emphasizing, again, the power of Congress to legislate here in light of the specific grant of authority in the Reconstruction Amendments in particular: “Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting.”⁵² The VRAA’s provisions, all of which tailor the criteria for coverage to recent history and a record of pervasive voting rights violations, are a highly rational means for using the powerful and effective preclearance tool to improve democracy and safeguard rights.

VRAA Section 3

Most importantly, Section 3 of the VRAA lays out a new coverage standard for the preclearance process, replacing the one that the Court in *Shelby County* found unconstitutional. Under VRAA’s new Section 3, the basic rule is this: If there are contemporary and persistent voting rights violations in your State or

⁵¹ *Shelby County*, 570 U.S. at 557.

⁵² *Katzenbach*, 383 U.S. at 324.

county that meet a statutory threshold, then you will be subject to preclearance. But if you improve, your status changes.

Under VRAA Section 3, *statewide* preclearance applies if either (1) 15 or more voting rights violations occurred in the State in the most recent 25-year period; or (2) 10 or more voting violations in the State in the most recent 25-year period with at least 1 of the violations being committed by the State itself. Section 3 provides that a political subdivision within a State will be covered if the State itself commits 3 or more voting violations in the most recent 25-year period. Because it has only a 25-year look back, Section 3 of the VRAA addresses only *recent* discriminatory practices, and it inherently bases coverage on current conditions. A jurisdiction is covered for 10 years after the year of the most recent voting rights violation in the State or subdivision, unless the State or subdivision obtains a “bail-out” under Section 4(a).⁵³ This ensures that coverage is fluid, dynamic—States are not locked into preclearance indefinitely for violations committed long ago. That addresses the central concern in *Shelby County*.

The VRAA’s definition of a “voting rights violation” that counts toward triggering the coverage also ensures that it is not too broad, which again addresses the *Shelby Court*’s concerns about what it perceived as the “federalism costs” associated with preclearance generally. A “voting rights violation” entails a final

⁵³ Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019).

judgment or consent decree that the VRA or the Fourteenth or Fifteenth Amendment has been violated, or a failure to get preclearance for a new election rule.⁵⁴ At the center of the coverage analysis are serious violations that have survived judicial scrutiny. Fifteen such events in the course of 25 years indicate a pervasive problem with discrimination in elections in a particular state, which is consistent with the standard that the Supreme Court embraced in the *Katzenbach* case, and reaffirmed in *Shelby County*.⁵⁵

Indeed, the 25-year lookback is an especially important provision because a shorter period might not be a broad enough window to indicate whether or not voting rights violations have been pervasive under *Katzenbach*, especially given the nature of elections, which are cyclical and occur every two or four years. That is all the more true because election changes tend to happen around the census and redistricting, which occur once a decade.

Another important aspect of the proposed coverage approach is that it has a built-in, ten-year bailout. The period of coverage runs for ten years from the last violation, after which a jurisdiction is no longer covered. Jurisdictions that improve can rapidly move out of coverage, even if discrimination was pervasive 15

⁵⁴ *Id.* at § 3(b)(3).

⁵⁵ *Id.* at § 3(b)(1)(A)(i).

years before. That is a 180-degree difference from the prior system, and it keeps the coverage standard even more tightly confined to “current conditions.”

VRAA Section 4

In addition to a new coverage approach, the VRAA in its Section 4 also does something new: It creates a separate preclearance process that is not jurisdiction-specific, and instead focuses on a particular set of practices that have repeatedly been found to be discriminatory by the courts, like redistricting, or consolidation of polling places that reduces access to the ballot.⁵⁶ As a constitutional matter, this is a much narrower form of preclearance. And of course, the fact that a jurisdiction changes political boundaries, or takes some other action that has been used for discriminatory purposes in the past, is not dispositive; it just triggers a level of oversight that is justified by the known potential of certain legal changes to serve discriminatory ends.

VRAA Section 5

Finally, the VRAA also amends the existing “bail-in” provisions, whereby a court can order a jurisdiction covered by the preclearance process. Under the current VRA, courts can only do so based on a finding of discriminatory intent.⁵⁷

⁵⁶ *Id.* at § 4.

⁵⁷ VRA Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 581 § 5(c) (2006).

The VRAA allows courts to bail a jurisdiction into the preclearance process based on a finding that the State has taken actions with discriminatory effects in violation of federal voting rights laws.⁵⁸ This new bail-in provision provides another mechanism for determining which jurisdictions should be subject to preclearance based on *current conditions*, not historical practices. And because the bail-in provision applies to all jurisdictions, it also does not run afoul of *Shelby County*'s prohibition on equal sovereignty.

Those are just a few of the improvements in the VRAA—specifically the ones that are most closely related to the preclearance system that was at issue in *Shelby County*. All of them contribute to creating a stronger and more durable Voting Rights Act—one which marries the singularly effective preclearance process with a coverage approach that is dynamic and tethered to a recent history of serious voting rights violations. These changes are worthy additions to one of the most important and effective pieces of legislation in our Nation's history. And they are an important step forward towards realizing democracy in America.

IV. CONCLUSION

The history of voting rights since the Reconstruction era is one in which Congress's commitment to the great principle of equal rights and an equal vote for all has ebbed and flowed, often in dynamic tension with the decisions of the

⁵⁸ Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. § 4A(c) (2019).

Supreme Court. *Shelby County's* signaling and real-world effects are problematic. But the Legislative Branch remains charged with serving as the “custodian of freedom,” in which the power to enforce our commitment to equality is vested by the Constitution.

The Voting Rights Act was never an endpoint. It was and it remains an invitation to make this Union more perfect, by continuing to honor, more fully and more faithfully with time and effort, the principle that all people are created equal, for which so many have fought and died. We cannot walk away from that invitation.

Progress begets progress. In the face of a history of persistent efforts to deny the vote and restrict democracy, the VRA, and now the VRAA, illuminate the path forward.

I look forward to responding to your questions about this important legislation.