

THE PATH FORWARD FROM *SHELBY COUNTY V. HOLDER*

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The author of this essay believes that she was asked to write for this symposium because she is not an insider, i.e., she is not a constitutional law scholar, civil rights scholar or election law scholar. Thus, this essay can bring a perspective of someone who is not in any particular camp. As an outsider, the author's initial reaction to the *Shelby County* decision was "it makes sense for the Court to be concerned that the coverage formula for preclearance that was put in place in 1965 is outdated." After doing further research and reading, the author's initial reaction has been tempered. However, the author remains convinced that the *Shelby County* decision has forced some decisions that can no longer be avoided regarding the best path forward in the protection of every citizen's right of suffrage.

The question presented by *Shelby County v. Holder* is whether the legacy formula for static preclearance is valid several decades after its initiation. A corollary question that *Shelby* does not address, but which commentators suggest is in dispute, is whether a need still exists for the proactive remedy of preclearance. This essay posits that although the need for some type of preclearance still exists for some jurisdictions, the static coverage formula of the Voting Rights Act (VRA) is no longer valid and needs to be updated. Thus, the path forward is to revise the coverage formula and, until such can be done, to continue to utilize the flexible §3 "bail in" provision of the VRA to subject violating jurisdictions to temporary preclearance. In addition, although this essay will demonstrate that the educational, economic and political resources of Blacks lag behind that of Whites, Blacks have closed the gap somewhat since 1965. Thus, Blacks must harness the power that comes from such gains to wage battle against those who would take away their suffrage right.

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I. The Continuing Need for Preclearance

Although the coverage rubric for identifying problematic jurisdictions was no longer adequate for the task, the need for preclearance as a proactive remedy for violations of the 14th and 15th Amendments still exists. As Justice Ginsburg pointed out in her dissent in *Shelby County*, the record before Congress demonstrates that although the disenfranchising mechanisms have changed, the fact remains that some jurisdictions continue to work to disenfranchise minorities.¹ Further, the low registration and voting rates of Blacks in some jurisdictions suggests that the mechanisms may be working. Disenfranchisement attempts alone would not, however, justify a proactive remedy if the beleaguered groups had sufficient resources and power to defeat the attempts at disenfranchisement. Unfortunately, as will be shown below, while some gains have been made by Blacks in the triad of educational, economic and political resources (“triad” or “resources triad”), the fact remains that Blacks in many jurisdictions still do not have sufficient resources to fight against disenfranchisement completely on their own.

To understand the essay’s argument, one must start with a brief foray into the role played by the vote in a democracy. In its simplest terms, a democracy is based upon the idea that the people governed have the ability to utilize the election process to attempt to elect those persons who will best protect their interests. As everyone knows, however, even at the start of the American democracy, only a very limited group of people (white, property-owning males) were allowed to vote. The departure from the simple democratic idea and the impetus for disenfranchisement stems from the general idea that many persons in power (we will call them the “ins”²) will seek to retain that power and to protect their interests. In a democracy, the “ins” are well aware of the fact that “[t]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.”³ As Gunnar Myrdal explained in his commissioned landmark study of the “Negro Problem,”⁴ “unquestionably the most

1 *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2639 (Pointing to the fact that Congress found that, “between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory.” Further, “the majority of DOJ objections included findings of discriminatory intent, and that the changes blocked by preclearance were ‘calculated decisions to keep minority voters from fully participating in the political process.’”).

2 This term, “ins,” was used by John Hart Ely in his 1980 book, *Democracy and Distrust*. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, *THE LAW OF DEMOCRACY, LEGAL STRUCTURES OF THE POLITICAL PROCESS* 13 (4th Ed. 2012) (explaining the genesis of the terms “ins” and “outs”).

3 *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966).

4 GUNNAR MYRDAL, *THE NEGRO PROBLEM AND MODERN DEMOCRACY, AN AMERICAN DILEMMA* 497

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important thing that Negroes get out of politics where they vote is legal justice – justice in the courts; police protection and protection against the persecution of the police; ability to get administrative jobs through civil service; and a fair share in such public facilities as schools, hospitals, public housing, playgrounds, libraries, sewers and street lights.”⁵ Thus, in a democracy, the “ins” will attempt to either limit or diffuse enfranchisement to the extent needed to allow them to stay in power and to keep the benefits that flow from enfranchisement to themselves.⁶ Accordingly, we see attempts by the “ins” to limit who can vote and/or to diffuse the efficacy of the votes of certain disfavored groups. However, these attempts to stay in power and keep others out of power can be defeated or minimized to the extent that the targeted groups have the knowledge and the power (or the ability to obtain the power) to fight against the “ins.”

In the case of Blacks, we see a history of them having, losing, regaining and then losing again the suffrage right because they did not have sufficient power to fight against disenfranchisement on their own. Specifically, in the early history of the United States, states such as New Jersey, Massachusetts, New Hampshire, New York and North Carolina allowed Blacks to vote.⁷ Subsequently, however, New Jersey took away Blacks’ right to vote in 1807, and New York took it away in 1820.⁸ By 1865, only five states (all of which were in New England) allowed Blacks to vote on the same terms as Whites.⁹ Subsequently, with the passage of the 14th and 15th Amendments and enforcement by the federal government, in the Reconstruction and Redemption period from 1868 to 1900, male Blacks registered to vote in the south by the hundreds of thousands.¹⁰ Further, the number of Black southern legislators elected hit a high of 325 in 1872.¹¹ Thus, Blacks

(1944).

⁵ MYRDAL, *supra* note 4 at 497 (1944). Myrdal’s study was made possible by funds granted by Carnegie Corporation of New York and was relied upon in *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁶ See ISSACHAROFF et al., *supra* note 2, at 2 (“Historical evidence provides convincing reasons to believe that those who currently hold power will deploy that power to try to preserve their control. Thus, democratic politics constantly confront the prospect of law being used to freeze existing political arrangements into place.”).

⁷ See ISSACHAROFF et al, *supra* note 2, at 24-25 (New Jersey in the 1776 state constitution and the 1790 election laws granted the vote to all inhabitants; at the time of ratification of the U.S. Constitution, four additional states allowed Blacks to vote: Massachusetts, New Hampshire, New York and North Carolina).

⁸ See ISSACHAROFF et al, *supra* note 2, at 16, 24.

⁹ ERIC FONER, RECONSTRUCTION, 1863-1877, AMERICA’S UNFINISHED REVOLUTION 222 (1988).

¹⁰ U.S. Dept. Of Justice, Civil Rights Division, Voting Section, Introduction, http://epic.org/privacy/voting/register/intro_a.html.

¹¹ U.S. Dept. Of Justice, Civil Rights Division, Voting Section, Introduction, http://epic.org/privacy/voting/register/intro_c.html; see ISSACHAROFF et al, *supra* note 2, at 96 (“During the Reconstruction period following the Civil War, and even during the first few years of Redemption - the period of reassertion of state autonomy and white supremacy beginning after the election of 1876 - black male turnout remained high: in all but two Southern states a majority

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disproved the forecasts of many commentators that claimed that the newly freed slaves were not prepared for political rights, that they would not vote, and that they would be controlled by their former masters.¹² The Blacks “demonstrate[d] political shrewdness and independence, and the ability to use the ballot to affect the conditions of their freedom.”¹³ Unfortunately, with the withdrawal of the federal government from the south, the end of Reconstruction and Black enfranchisement in the south came about “not because propertyless blacks succumbed to economic coercion, but because a politically tenacious black community, abandoned by the nation, fell victim to violence and fraud.”¹⁴ Consequently, by the beginning of the 20th century, almost all Blacks had been disenfranchised in the south.¹⁵

Despite the existence of Black organizations, Black Colleges and Universities, and the Black Press, Blacks lacked sufficient power to fight against disenfranchisement, as will be shown below. It is important to note that Blacks were not helpless. They had fought for and won many protections for themselves in the area of civil rights. In addition, they had worked to provide higher education for themselves through historically black colleges and universities, and they were successful businesspeople, health professionals, educators, and entertainers. This essay suggests, however, that the ability to fight for the right to vote is obtained through the resources triad of economic power, political power, and educational power and that Blacks were limited in all of these areas.

The question thus becomes whether the many changes that have occurred in the United States since the VRA was passed in 1965 have resulted in Blacks¹⁶ making gains in enfranchisement and in the resources triad such that they have sufficient power to fight against those who seek to take away their vote and/or diffuse the power of their vote. Another way of stating the question is to ask whether the balance of resources has shifted sufficiently to allow Blacks to take advantage of a level playing field to fight for and obtain their rights, if they so choose. The evidence will demonstrate that Blacks have made significant strides with regard to a basic high school education and some gains with regard to advanced degrees. In the economic and political realm, however, the overall strides are heartening in some jurisdictions, but minimal in others. Thus, the evidence supports the argument that gains in the triad may not be significant enough to give all

of adult black males voted in the presidential election of 1860”).

12 FONER, *supra* note 9, at 279.

13 FONER, *supra* note 9, at 279.

14 FONER, *supra* note 9, at 279.

15 ISSACHAROFF et al, *supra* note 2, at 96; U.S. Dept. Of Justice, Civil Rights Division, Voting Section, Introduction, http://epic.org/privacy/voting/register/doj_vra_1965.html.

16 Again, the focus is on Blacks because they were the group intended to benefit primarily from the VRA.

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Blacks sufficient power to fight obtain their rights and to retain them once gained. Accordingly, the federal government must identify those jurisdictions where a combination of disenfranchisement mechanisms and lack of power dictate a need for a proactive preclearance remedy.

Before examining the resources triad, it is vital to examine the registration and voting rates of Blacks to determine whether any possible evidence of disenfranchisement exists. As the Supreme Court in *Shelby County* noted, the political clout of Blacks in the covered states has indeed improved dramatically since 1965. The registration and voting rates of Blacks in most covered states is on par with or better than the registration and voting rates of Whites.¹⁷ However, this pattern is not repeated for the United States as a whole. In fact, the gap between White and Black registration rates has narrowed only slightly, although the voting rates of registered Whites and Blacks has narrowed more significantly. Specifically, in 1965, Whites registered to vote at a 19% higher rate than Blacks, and registered Whites voted at a 10% higher rate than Blacks.¹⁸ In 2012, the gap for registration had narrowed slightly to 16%, while the gap for voting rates of registered voters had narrowed to 3%.¹⁹ Also, the fact that the number of registered Blacks in most of the covered states is higher than the national average²⁰ indicates that the number of registered Blacks in some of the other states is lower than the national average. This supposition is borne out by low Black registration rates in Massachusetts (46.3%), Nevada (50%), and Washington (44.8%).²¹ It is possible that the lower registration rates are due

17 The numbers for Blacks and Whites are respectively as follows: Alabama, 69%, 64.5%; Georgia, 63.5%, 62.9%; Louisiana, 75.8%, 75.5%; Mississippi, 74.10%, 74.2%; South Carolina, 68.6%, 70.2%; and North Carolina [included because of the high number of counties covered], 61.3%, 69.3%. U.S. Census Bureau, Voting and Registration in the Election of November 2010 - Detailed Tables (2011), available at www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (last visited October 30, 2013).

18 In Nov. 1966 60.2% of Blacks registered to vote and 71.7% of Whites registered to vote. Further, 69.23% of registered Black voters voted and 76% of registered White voters voted. Census data, available at

<http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html>.

19 In 2010, 58.8% of Blacks registered to vote and 68.3% of Whites registered. Further, 69.24% of registered Black voters voted and 71.29% of White voters voted. U.S. Census Bureau, Voting and Registration in the Election of November 2010 - Detailed Tables (2011), available at www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (last visited October 30, 2013).

20 Six of the original covered states have higher registration rates than the national rate (Alabama, 69%; Georgia, 63.5%; Louisiana, 75.8%; Mississippi, 74.10%; South Carolina, 68.6%; and North Carolina [included because of the high number of counties covered], 61.3%). U.S. Census Bureau, Voting and Registration in the Election of November 2010 - Detailed Tables (2011), available at www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (last visited October 30, 2013).

21 U.S. Census Bureau, Voting and Registration in the Election of November 2010 - Detailed Tables (2011), available at www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (last visited October 30, 2013).

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to apathy, i.e., the Blacks have not taken advantage of the opportunity to vote. It is also possible that the lower registration rates are due to affirmative attempts to block Blacks' access to registration. In either scenario, the Blacks in these jurisdictions lack political clout. However, to the extent that the latter scenario is involved, it suggests that Blacks in some jurisdictions need help in protecting their rights.

To the extent that disenfranchising mechanisms account for some of the low registration and voting states, a question is raised as to whether there was a choice not to fight or an inability to fight. Thus, we examine Blacks' resources triad to gauge the ability to fight. In the educational field, the measurement of resources has two parts: objective and comparative. The objective measure of educational attainment examines the question of whether Blacks have attained a high enough level of education to enable them to understand and attempt to counter attempts at disenfranchisement. On a purely objective level, Blacks have made enormous strides since 1965 in achieving a basic education. In 1965, 72.9% (almost three-fourths) of the Black population had not achieved a high school (or equivalent) education.²² Speeding forward to 2012, however, has that number dropping to 16.7% for Blacks. Thus, to the extent that a basic education allows Blacks to understand and fight against disenfranchisement, Blacks have made significant strides. Arguably, however, the ability to understand and counter the subtle or nuanced disenfranchisement mechanisms that the "ins" are currently employing requires more than a basic education. On this score, however, Blacks have also made strides in that 52.4% of Blacks have acquired at least some college education and 19% have acquired a bachelor's degree or higher.

The second measurement of education is comparative. Thus, to the extent that Blacks are competing with Whites for employment based upon education (and the economic power that comes with better paying employment), one would hope to see some improvement in the education gap between Blacks and Whites. In this area, we have more of a mixed bag, but overall, Blacks have narrowed the gap in all categories. With regard to the percentage of persons not receiving even a high school education (or equivalent), Blacks are in comparatively almost the same position that they occupied in 1965. At that time, 50% more Blacks than Whites had *not* achieved a high school education, and in 2012, 43% more Blacks than Whites remained in this position.²³ The picture brightens somewhat, however, with

22 Census data from 1965 showing that 72.9% of Blacks had less than a high school (or equivalent) education. U.S. Dept. of Commerce, Statistical Abstract of the United States 1965, 86th Annual Edition (1965), *available at* <http://http://www2.census.gov/prod2/statcomp/documents/1965-01.pdf> (last visited November 1, 2013).

23 In 1965, 72.9% of Blacks had less than a high school (or equivalent) education as compared to

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regard to the comparative numbers of Blacks versus Whites finishing high school and going on to college. In 1965, 81% more Whites than Blacks finished high school (or the equivalent), and 98% more Whites than Blacks obtained an associate degree or some college. In 2012, Blacks beat out Whites slightly in this area, with 8% more Blacks than Whites finishing high school (or the equivalent) and 13% more Blacks than Whites obtaining an associate degree or some college. The downside of closing this gap is that more Whites than Blacks go on to obtain advanced degrees,²⁴ i.e., more Blacks than Whites stop their education at an associate degree (or some college).²⁵ The upside, however, is that even with regard to the attainment of advanced degrees, the gap between Blacks and Whites has closed significantly. In 1965, 111% more Whites than Blacks obtained a Bachelor's or higher degree, while in 2012, only 59% more Whites than Blacks obtained a Bachelor's or higher degree.²⁶

The second aspect of the resources triad is that of economic resources. The author recognizes that economic resources are not necessarily sufficient to ensure enfranchisement. This fact is demonstrated well by the fact that Asians in America have the highest median income and lowest unemployment rate of all groups,²⁷ including Whites, but they have the lowest registration and voting rates.²⁸ Although the reason for the low rates may be culturally driven, there is also a possibility that some of the low rates may also be due to intentional disenfranchisement. In the same way that economic resources are not sufficient for enfranchisement, economic resources are not necessary in order to exercise the suffrage right once

48.7% of Whites. In 2012, 16.7% of Blacks had less than a high school (or equivalent) education as compared to 11.7% of Whites. U.S. Dept. of Commerce, *supra* note 22.

24 19% White vs. 12.10% Black in attaining a bachelor's degree and 11.3% White vs. 6.9% Black in attaining a graduate or professional degree. U.S. Census Bureau, Current Population Survey, 2012 Annual Social and Economic Supplement, *available at* <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html>.

25 33.4% of Blacks vs. 29.6% of Whites. U.S. Census Bureau, *supra* note 24.

26 In 1965, 4.7% of Blacks obtained a bachelor or higher degree, as compared with 9.9% to Whites. U.S. Dept. of Commerce, *supra* note 22. In 2012 19% of Blacks obtained a bachelor or higher degree, as compared to 30.3% of Whites. U.S. Census Bureau, *supra* note 19.

27 Median income for Asians is \$68,636, for Whites \$57,009, for Latinos \$39,005 and for Blacks \$33,321. Carmen DeNavas-Walt, Bernadette D. Proctor, Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2012 Current Population Reports*, 13 & 15, *available at* <http://www.census.gov/prod/2013pubs/p60-245.pdf> (last visited Nov. 2, 2013).

Unemployment rate for Asians is 6.8%, for Whites 7.5%, for Latinos 10.8% and for Blacks 13.4% U.S. Census Bureau, Statistical Abstract of the United States: 2012, Labor Force, Employment, and Earnings, *available at* http://www.census.gov/compendia/statab/cats/labor_force_employment_earnings.html.

28 The registration rate and voting rates are as follows: Asian - 34.1%, 62.52%; White - 67%, 71.29%; Black - 58.8%, 69.24%; Latino - 33.8%, 60.5%. U.S. Census Bureau, Voting and Registration in the Election of November 2010 - Detailed Tables (2011), *available at* www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (last visited October 30, 2013).

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granted and protected. This point was aptly demonstrated by the enormous number of economically impoverished Blacks who voted during Reconstruction. Conversely, without economic resources, groups are hard pressed to prevail against concerted efforts to disenfranchise them. This inability to prevail was demonstrated by the severe decline in Black disenfranchisement after Reconstruction ended in the south.

It is well-recognized that in 1965, the economic position of Blacks was dire. Blacks were “largely relegated to ‘unskilled and semi-skilled jobs,’”²⁹ and the non-white unemployment rate in 1962 was 124 percent higher than the White rate.³⁰ Further, in 1965, the median income for Whites was 84% higher than that of non-Whites³¹ and the percentage of non-Whites living in poverty was 256% higher than that of Whites.³²

In 2013, the economic picture for Blacks is better, but still a mixed bag. On the one hand, Blacks have achieved success in a myriad of workplace arenas, many of which were not available to them in 1965 or were available in a much more limited way. Thus, while there were Black doctors, lawyers, musicians, businesspeople, teachers etc. in 1965, they represented a small percentage of the total Black population. In 2013, the U.S. not only has many more Blacks in these positions, but it has them occupying top positions in the business field, the medical field, the military, the education field and the government. In addition, Blacks are prominent in the entertainment arenas of sports, music, movies and television.³³

On the other hand, the difference between the median household income of Blacks and Whites has changed only slightly since 1965. As explained above, in 1965, Whites made almost twice as much (84% more) in median household income as Blacks.³⁴ That gap has narrowed somewhat, but as of 2012, Whites still make over two-thirds more (69% more) in median household income than Blacks. Further, more than one-quarter (27.2%) of all Blacks still live at or below poverty level,³⁵ as compared to less than one-

29 *United Steelworkers of American v. Weber*, 443 U.S. 193, 202 (1979).

30 *United Steelworkers of American v. Weber*, 443 U.S. 193, 202 (1979). The comparison is to the general category of “non-White,” as opposed to Black, because the data set at the time did not separate non-Whites into distinct categories.

31 The White median income in 1965 was \$6,858 as compared to \$3,724 for non-Whites. DeNavas-Walt et al., *supra* note 27.

32 The percentage of non-Whites living in poverty was 40.43%, as compared to 11.37% of Whites. DeNavas-Walt et al., *supra* note 27.

33 See AKHEE JAMIEL WILLIAMS, *DIVIDED WE FALL, IGNORANT WE FAIL*, 120 (2013).

34 Median household income of Whites in 1965 was \$6,858 as compared to \$3,724 for Blacks. U.S. Dept. of Commerce, *Statistical Abstract of the United States 1965*, 86th Annual Edition (1965), available at <http://www2.census.gov/prod2/statcomp/documents/1965-01.pdf> (last visited November 1, 2013). That same income in 2010 was \$57,009 for Whites as compared to \$33,321 for Blacks. DeNavas-Walt et al., *supra* note 27 at 5.

35 27.2% of Blacks live in poverty in 2012. DeNavas-Walt et al., *supra* note 27, at 13.

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tenth of Whites.³⁶ Thus, although the gap between White and Black poverty levels has narrowed with “only” 180% more Blacks living in poverty than Whites as compared to the 256% rate of 1965, the fact that more than one-quarter (27.2%) of Blacks live in poverty significantly lessens their economic clout.³⁷ The last measure of economic well-being is the rate of unemployment.³⁸ Here, the gap between White employment and Black employment has remained about the same over the intervening years.³⁹

The third and final “leg of the resource triad” is political, defined as having persons in political office who will and can protect one’s right to vote and the effectiveness of that vote. One method for measuring Blacks’ political resources is to examine how many persons in office are protecting that group’s rights. Doing so would, however, require an empirical study that is beyond the scope of this essay. Some might argue, however, that a substitute for such a study is to examine the number of Blacks holding political office.⁴⁰ This author views such a measure with skepticism because it seems to be based upon a number of unwarranted assumptions. First, it seems to assume that all Blacks in office will look out for the interests of all Blacks. It also seems to assume that Blacks in office will only protect the interests of other Blacks and further, that all Blacks have the same interest. Other possible assumptions are that Black voters elect only Black candidates, that Black candidates are elected only by Blacks, that the interests of Blacks and the interest of Whites are mutually exclusive, and that no Whites in office will look out for the interests of non-Whites.

36 9.7% of Whites lived in poverty in 2012. DeNavas-Walt et al., *supra* note 27, at 13.

37 In 1965, 40.43% of non-Whites (the census at the time did not pull out figures for particular races) lived in poverty as compared to 11.37% of Whites. U.S. Dept. of Commerce, Statistical Abstract of the United States 1965, 86th Annual Edition (1965), *available at* <http://www2.census.gov/prod2/statcomp/documents/1965-01.pdf> (last visited November 1, 2013). In 2012, 27.2% of Blacks live in poverty, as compared to 9.7% of Whites. DeNavas-Walt, et al., *supra* note 27, at 13.

38 U.S. Census Bureau, Statistical Abstract of the United States: 2012, Labor Force, Employment, and Earnings, *available at* http://www.census.gov/compendia/statab/cats/labor_force_employment_earnings.html.

39 In 1965, the unemployment rate was 4.8% for White and 8.51% for non-White. U.S. Dept. of Commerce, Statistical Abstract of the United States 1965, 86th Annual Edition (1965), *available at* <http://www2.census.gov/prod2/statcomp/documents/1965-01.pdf> (last visited November 1, 2013). In 2010, the unemployment rate was 7.5% for White and 13.4% for Black. U.S. Census Bureau, Statistical Abstract of the United States: 2012, Labor Force, Employment, and Earnings, *available at*

http://www.census.gov/compendia/statab/cats/labor_force_employment_earnings.html.

40 In the area of political office, Abigail Thernstrom, in arguing that preclearance is no longer needed, relies on the high number of Blacks in political office in the south. Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act*, 3 NATIONAL AFFAIRS (2010), *available at* <http://www.nationalaffairs.com/publications/detail/redistricting-race-and-the-voting-rights-act> (last visited on Nov. 2, 2013).”

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If the number of Blacks in political office was a good indicator of Blacks' political clout, then one commentator argues that the numbers are high enough to give Blacks sufficient political clout. Specifically, Abigail Thernstrom states the following: "in 1964, only five blacks held seats in Congress, none from any southern state, and just 94 blacks served in any of the 50 state legislatures, with only 16 in the southern states that were home to half of the nation's black population. But largely as a consequence of race conscious districting, the Congressional Black Caucus today has 42 members, 17 of them from the South. And as of 2008, almost 600 blacks held seats in state legislatures; another 8,800 were mayors, sheriffs, school board members, and other officeholders. Fully 47% of these public officials lived in the seven states originally covered by the Voting Rights Act, even though those states now contain only 30% of the nation's black population."⁴¹ This essay counters that, even if the statistics that Ms. Thernstrom cites show that Blacks in the covered states may have sufficient political clout, the fact that 70% of the Black population is able to elect only 53% of the Black elected officials suggests that the Blacks in these other jurisdictions may in fact not have sufficient political clout to protect their suffrage right.

A second mechanism for determining the adequacy of Blacks' political resources is to determine whether any disenfranchising mechanisms have been enacted in a particular jurisdiction. If such a mechanism has passed it demonstrates a lack of political clout because the persons in political office either could not or would not block the mechanism. In applying this test to the election scene one need only examine the Dept. of Justice website to see that jurisdictions continue to enact disenfranchising mechanisms. Of course, not all jurisdictions are enacting discriminatory voting laws, but the evidence suggests that jurisdictions still exist where disenfranchisement mechanisms are enacted because Blacks lack sufficient political resources to defeat such enactments.

II. The Problems with the Static Coverage Formula

The Supreme Court in *Shelby County v. Holder* based its decision of the unconstitutionality of the §4(b) coverage formula on the fact that the coverage formula was outdated.⁴² Leaving aside whether the Court was correct from a constitutional standpoint, a question best left to experts in constitutional law, this essay posits that the coverage formula was indeed broken and needed to be fixed because it no longer accurately identified the jurisdictions that are in need of coverage under a proactive preclearance remedy. Specifically, the enfranchisement scene has changed dramatically, and therefore, a coverage scheme that was reverse engineered to deal with

⁴¹ Thernstrom, *supra*, note 40.

⁴² *Shelby Cnty.*, 133 S.Ct. at 2631.

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very specific states and their disenfranchisement mechanisms can no longer be used to justify continued preclearance requirements for those states, while exempting other states from preclearance.

In evaluating the efficacy of the coverage formula, it is important to remember that the justification for the preclearance remedy as outlined above is two-fold. It should be applied as a remedy for jurisdictions that violate the 14th and 15th Amendments and whose affected citizens do not have the power or the resources to defeat those attempts on their own.⁴³ Unfortunately, the invalidated coverage formula no longer accurately identified the jurisdictions that should be brought under preclearance for four reasons: (1) it had no mechanism for evaluating whether the affected citizens had sufficient power to protect their own suffrage rights; (2) it could create false positives, i.e., jurisdictions that were subject to preclearance that should not be so subjected; (3) it did not capture those jurisdictions that were utilizing disenfranchisement mechanisms that did not fit the narrow definition of “test or device” utilized by the VRA; and (4) its focus on overall voter registration could lead to false negatives, i.e., jurisdictions that were not subject to preclearance, but should be so subjected.

Before illustrating the problems with the coverage formula, one must recall that the invalidated formula required preclearance of changes in voting laws for any jurisdiction that utilized a “test or device,” and where less than 50% of eligible persons were registered to vote or less than 50% of eligible persons voted in the requisite presidential election.⁴⁴ The formula was static in that it measured a jurisdiction’s eligibility for preclearance from a set date (1964, 1968 and 1972) and did not allow a jurisdiction to “bail out” of coverage simply by showing that the eligibility criteria no longer applied. Rather, the jurisdiction needed to demonstrate basically that no instances of voting discrimination had occurred for the previous ten years.⁴⁵ As the U.S. Attorney General explained in *Shelby County*, this coverage formula was

43 For a summation of the arguments as to whether minorities currently have sufficient clout to fight against voting discrimination see Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708 (2006).

44 §4(b), 79 Stat. 438 (1965), 42 U.S.C §1973b(b) (1965) (Any State or subdivision of a State “which (1) the Attorney General determines maintained on November 1, 1964, [November 1, 1968 or November 1, 1972], 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, [November 1, 1968 or November 1, 1972], or that less than 50 per centum of such persons voted in the presidential election of November 1964 [,November 1968 or November 1972]. The brackets represent the fact that the original VRA was based upon 1964 data, but subsequent amendments to the VRA added in the years 1968 and 1972”); see §5(a), 79 Stat. 438 (1965), 42 U.S.C. §1973c (a) (1965) (providing that those jurisdictions that were covered by §4(b) could not make any changes to their voting laws without seeking preclearance by either the Attorney General or a court of three judges).

45 42 U.S.C. §1973b(a).

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“reverse-engineered”⁴⁶ to target those southern states that had utilized violence, intimidation and various tests and devices for over 60 years to keep black voter registration at rates of 5% (MS) to 31% (LA).⁴⁷ As such, the VRA coverage formula was effective in bringing the targeted states under preclearance because those states had traditionally used certain tests and devices and had large black populations such that the suppressed Black registration and voting would cause the overall voter registration and/or voting to drop to 50% or below.

The first problem with the invalidated formula is that, because it was reverse-engineered to achieve a particular result, it presumed a lack of sufficient power by the citizens of the covered jurisdictions and thus had no mechanism for measuring whether Blacks did in fact lack such power. Given the changes that have occurred since 1965, however, this lack of sufficient power of a given jurisdiction’s citizens may no longer be presumed. Thus, some mechanism for determining a lack of power is needed. A related problem is that, due to the static nature of the formula, it could create false positives in that a covered jurisdiction, whose citizens could arguably protect themselves against future bad acts, would continue to be subject to preclearance.

The third problem with the coverage formula is that its use of “test or device” as a prerequisite to coverage does not capture those jurisdictions that use more subtle mechanisms for disenfranchisement such as “gerrymandering, annexations, adoption of at-large elections and other structural changes”⁴⁸ designed to dilute the effect of the minority vote.⁴⁹ Nor

47 See interactive map at <http://www.prenhall.com/divisions/hss/app/faragher6/map28.2/> showing voter registration among African Americans in 1960.

47 See interactive map at <http://www.prenhall.com/divisions/hss/app/faragher6/map28.2/> showing voter registration among African Americans in 1960.

48 See U.S. Dept. Of Justice, Civil Rights Division, Voting Section, Introduction at http://epic.org/privacy/voting/register/doj_vra_1965.html (last visited on 10/30/13) (Stating that, in 1970 and 1975, Congress heard testimony of the new mechanisms utilized to prevent newly registered black voters from effectively using the ballot. Those mechanisms included gerrymandering, annexations, and adoption of at-large elections.).

49 42 U.S.C. §1973(b)(c) (“The phrase ‘test or device’ shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.”); 42 U.S.C. §1973b(f)(3) (“In addition to the meaning given the term under subsection (c) of this section, the term ‘test or device’ shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term ‘test or device’, as defined in this subsection, shall be employed only in making the determinations under the third

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does the test capture tactics designed to disenfranchise not only Blacks, but Asians, Native Americans and Latinos. Examples include changing voting hours without notice, limiting voting hours, and/or moving ballot boxes. In fact, even at the time of the VRA's enactment, two states with a long history of racial discrimination in voting, Texas and Arkansas, were not subject to preclearance because they used a poll tax, and poll taxes were not encompassed by the definition of "test or device."⁵⁰

The final problem with the coverage formula is that its static nature creates false negatives, i.e., states that would not be subject to preclearance despite the fact that they engage in voting discrimination against citizens who lack protective power. For example, there may be jurisdictions where the minority population is small enough that low minority registration or voting rates would not depress total registration or voting rates to 50% or below. Even if one or more of these jurisdictions arguably should be subject to preclearance, the coverage formula would not dictate that result. For example, Massachusetts was not a covered jurisdiction under the §4(b) formula, but Massachusetts has evidence of recent attempts at disenfranchisement of minority groups.⁵¹ Further, there is evidence that its minority groups lack political power due to its extremely low voter registration rates for Blacks, Asians and Latinos.⁵²

In addition, even though previously covered states that continued to engage in voting discrimination would have remained subject to preclearance under the old formula, some commentators might question the legitimacy of such continued coverage when these states no longer utilize "tests or devices" and/or have registration and voting rates that are well above 50%. The Supreme Court demonstrates this type of questioning in *Shelby County*⁵³ when it calls into question the need for preclearance by pointing to Black voter turnout and registration rates, as well as the discontinued use of "tests and devices." The Court, however, failed to recognize that in many of the covered states, the enfranchisement of Blacks might begin to decline without coverage because the states would use the modern, disenfranchising mechanisms, and the Blacks in those states lack power to resist such attempts at disenfranchisement.

sentence of that subsection.").

⁵⁰ ISSACHAROFF et al, *supra* note 2, at 556. Note that when the VRA was amended in 1975 to include English-only election materials as a "test or device," it brought Texas under preclearance (as well as Arizona, New Mexico and some counties in CA). *Id.* at 557.

⁵¹ United States v. City of Boston, MA (D. Mass. 2005) (court found §2 violations against minorities of Spanish, Chinese and Vietnamese heritage). Dept. of Justice website http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php#boston (last visited on Nov. 2, 2013).

⁵² As of 2010 the rates were 46.3%, 47% and 38.8% respectively. U.S. Census Data <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html>.

⁵³ *Shelby Cnty.*, 133 S.Ct. at 2625.

III. The Path Forward

Significant changes have occurred in the education and political arena; however, political impact is arguably still weak because of the continuing severely disparate economic position of Blacks as compared to Whites. Thus, preclearance is arguably still needed, but the coverage provision needs to be revised to better align it with the realities of today's voting environment and to allow for greater ease in taking jurisdictions off of the covered list and putting jurisdictions onto the covered list.⁵⁴ Until the coverage provision can be redesigned, however, the courts can use the VRA's §3 "bail in" provision to bring jurisdictions that violate the 14th and 15th Amendments under the §5 preclearance regime.⁵⁵ Specifically, §3(c) allows a court that has found a jurisdiction to be in violation of the 14th or 15th Amendment⁵⁶ to retain jurisdiction for as long as the court deems appropriate. During this period of retained jurisdiction, the state or subdivision may not change its voting laws without approval by the court or by the U.S. Attorney General. This bail-in provision has been used successfully in the past,⁵⁷ and the U.S. Department

⁵⁴ For a discussion of a possible VRA revision *see* Gerken, *supra* note 43 at 708. For a discussion of how section 5 can be revised to better address the current election landscape *see* Comment, Enbar Toledano, *Section 5 of the Voting Rights Act and its Place in "Post-racial" America*, 61 EMORY L.J. 389 (2011-2012).

⁵⁵ For a commentator that agrees with this author that the bail-in option is a viable one, *see* Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L. J. 1992, 2021 (2010). The note also proposes potential amendments to the bail-in provision that Congress could make to make it a more useful enforcement tool. *Id.* at 2036.

⁵⁶ 42 U.S.C. §1973a(c) (2006). The provision states that, "If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title." The provision also allows a state to obtain preclearance from the Attorney General.

⁵⁷ *See* Crum, *supra* note 55 at 2010-2015 (finding that although no jurisdiction was bailed-in during the VRA's first decade, "[s]ince 1975, section 3 has bailed-in two states, six counties, and one city: the State of Arkansas; the State of New Mexico; Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and the city of Chattanooga, Tennessee."). *See also*, U.S. Dept. of Justice at <http://www.justice.gov/crt/about/vot/> (after the Shelby County decision was handed down, the Department of Justice's website made it clear that, although jurisdictions that were subject to preclearance via the section 4(b) coverage provision

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of Justice has made it clear with its recent lawsuits against Texas and North Carolina that it will utilize the §3(c) bail in provisions to bring violating jurisdictions under preclearance.⁵⁸ However, changes in the VRA are not sufficient. Affected citizens must use the resources triad that they possess to better protect their right of suffrage.

were no longer subject to preclearance, jurisdictions that were subject to preclearance via section 3(c) were still subject to preclearance).

58 In announcing its filing of two lawsuits against Texas, both of which, *inter alia*, ask the court to order bail-in pursuant to Section 3 (c) of the VRA, the Department of Justice stated, “we will keep fighting aggressively to prevent voter disenfranchisement. We are determined to use all available authorities, including remaining sections of the Voting Rights Act, to guard against discrimination and, where appropriate, to ask federal courts to require preclearance of new voting changes.” U.S. Dept. of Justice at <http://www.justice.gov/opa/pr/2013/August/13-ag-952.html>. In addition, in the press release concerning the Justice Departments suit against North Carolina involving North Carolina’s August 2013 voting legislation, the Department has asked the court to order bail-in pursuant to Section 3(c). U.S. Dept. of Justice at <http://www.justice.gov/opa/pr/2013/September/13-crt-1096.html>.