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WHO BAILS? A MULTIVARIATE ANALYSIS OF BAILOUTS UNDER SECTION 4 OF THE VOTING RIGHTS ACT

DAVID BLANDING & SHANE GRANNUM

INTRODUCTION

Noticeably absent from the Supreme Court’s 2013 decision in Shelby County v. Holder, which invalidated the coverage formula of the Voting Rights Act (VRA), was any discussion of the fact that covered states and localities can be released from preclearance requirements using the “bailout” process stipulated by Section 4. Although the mechanism has been the subject of considerable legislative, judicial and public debate since the VRA was first adopted, surprisingly little is known about the factors that predict successful bailout. Our exploratory study attempts to fill this gap in scholarly knowledge using a dataset comprised of jurisdictions covered under the VRA. We derive several alternative hypotheses about the probability that covered jurisdictions bail out from the VRA and construct multivariate logistic regression models to test these hypotheses. Preliminary results indicate that state public policy liberalism, local racial demographics, and federal legislative changes affect the probability of bailing out. Specifically, we find that greater liberalism in state policy preferences is associated with a higher probability of bailing out of the VRA. In addition, having a higher percentage of black residents in a jurisdiction is associated with decreased probability of successful bailout. Finally, we find that jurisdictions covered as a result of the 1970 reauthorization are significantly more likely to have bailed out than ones covered as a result of the original 1965 law, while jurisdictions covered under later reauthorizations are no more or less likely to have bailed out. These findings extend our understanding of state and local responses to federal mandates, and should be of great interest to policymakers as
Congress and the Supreme Court continue to wrestle with the constitutionality of the Voting Rights Act.

The Supreme Court’s 2013 decision in *Shelby County v. Holder* was a landmark setback for the Voting Rights Act.\(^1\) It represented the first time the Court had invalidated any provision of the law since it was first challenged and upheld in *South Carolina v. Katzenbach*.\(^2\) The impetus for the *Shelby* majority’s departure from previous decisions was its perception that the federalism costs the Voting Rights Act imposed upon certain states and localities through the coverage formula were no longer justified by conditions in those areas.\(^3\) Significant advances in minority political participation had taken place in the 38 years since the coverage formula had last been revised.\(^4\) The formula’s success was thus its own undoing. The majority contended that Congress had failed to heed reservations the Court had expressed about the incompatibility of the temporary provisions of the Voting Rights Act with “current conditions” in *Northwest Austin Municipal Utility District Number One v. Holder* (hereafter *NAMUDNO*) four years earlier. This left the Court “no choice” in its mind but to declare the existing coverage formula unconstitutional.\(^5\)

Conspicuously absent from the Roberts Court’s analysis of the VRA in *Shelby* was any discussion of the role § 4(a)\(^6\) might have played in balancing out the burdens of preclearance. § 4(a) of the VRA is the provision that allows covered jurisdictions to terminate federal supervision of their election laws by obtaining a declaratory judgment from the D.C. District Court.\(^7\) The absence of discussion of the bailout mechanism is particularly striking given the fact that the provision had been praised in the past as an example of congressional conscientiousness in lawmaking.\(^8\) Had the Roberts Court scrutinized use of the bailout provision by covered states and municipalities more closely, it might have at least tempered its

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3. *Shelby Cnty.*, 133 S. Ct. at 2618 (“There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in covered jurisdictions.”).
4. The majority in *Shelby* noted that black voter turnout exceeded white voter turnout in covered jurisdictions (*Shelby Cnty.*, 133 S. Ct. 2612), and cited an appellate judge’s earlier observation that “[c]overed jurisdictions have far more black officeholders as a portion of the black population than do uncovered ones” (*Autotel v. Nev. Bell Tel. Co.*, 697 F. 3d. 848 (2012; emphasis in original)).
5. *Shelby Cnty.*, 133 S. Ct. at 2631.
6. 52 U.S.C. § 10304(a) (West).
7. *Id.*
8. In *City of Boerne v. Flores*, the Court drew attention to the fact that, unlike the Religious Freedom Restoration Act, which it ultimately declared unconstitutional, the Voting Rights Act was characterized by “termination dates, geographic restrictions, [and] egregious predicates.” 521 U.S. 507, 533 (1997).
concerns about the federalism costs the preclearance requirement imposed upon states and municipalities with a history of racial inequality in political participation. The bailout mechanism ensures that jurisdictions that can demonstrate sustained, good faith effort to eradicate racially discriminatory election practices and the remnants thereof will not be at the mercy of the federal government permanently. It should therefore have been a component of the Court’s assessment of the federalism costs of the Voting Rights Act in *Shelby*.

The bailout mechanism has been the subject of considerable legislative, judicial, and scholarly debate since the VRA was first adopted, yet surprisingly little is known about the factors that lead to bailout. This exploratory study attempts to fill this gap in knowledge using a dataset comprised of jurisdictions covered under the VRA’s different formulas since 1965. We examine several possible predictors of bailout from the VRA and construct multivariate logistic regression models to test the correlations of these factors with the act of bailing out. Results suggest that state public policy liberalism, local racial demographics, and federal legislative changes all affect the probability that a covered jurisdiction bails out.

Part I of this article traces the legislative history of the bailout provision from the 1965 law to the 2006 Voting Rights Act Reauthorization and Amendments Act. We note that amendments to the §4(b) coverage formula during the 1970 and 1975 reauthorizations to account for the persistence of discrimination and inequality in elections not only expanded the geographic application of the §5 preclearance provision substantially, but also yielded few bailouts. However, Congress' attempt to facilitate bailouts of political subdivisions after *City of Rome v. US* led dozens to begin applying after about a decade. Most strikingly, all of the covered jurisdictions that applied for bailout after 1997 were successful, casting doubt upon claims that bailing out was too difficult. Part II examines how
the Supreme Court interpreted this provision from *South Carolina v. Katzenbach* to *Shelby County v. Holder*. We trace the shift in the Court’s views of the bailout provision from reverence in cases like *Boerne v. Flores* to tacit disdain in *NAMUDNO*. Part III presents the results of our multivariate analysis of bailouts in covered jurisdictions. Specifically, we find that being in a state with more liberal policy preferences is associated with a higher probability of bailing out of the VRA. In addition, having a higher percentage of black residents in a jurisdiction is associated with decreased probability of successful bailout. Finally, we find that jurisdictions covered as a result of the 1970 reauthorization are significantly more likely to have bailed out than ones covered as a result of the original 1965 law, while jurisdictions covered under later reauthorizations are no more or less likely to have bailed out. The final section of the manuscript considers the implications of our findings for ongoing debates about the Voting Rights Act. The findings presented in this exploratory article extend our understanding of state and local responses to federal mandates, and should be of great interest to both scholars and policymakers as Congress and the Supreme Court continue to wrestle with the constitutionality of the Voting Rights Act.

**I. LEGISLATIVE HISTORY OF THE BAILOUT PROVISION**

The 1965 Voting Rights Act was designed to provide the federal government a comprehensive instrument for remedying electoral injuries African Americans had suffered since the end of Reconstruction, including poll taxes, literacy tests, and all manner of intimidation and harassment. Congress dealt with these violations of the Fifteenth Amendment by outlawing racial discrimination in elections in §2. Additionally, Congress prohibited states and localities from intimidating prospective voters in §11(b) and from providing false information to voters in §11(c). Another important section of the law, §3(a), authorized the U.S. Department of Justice to dispatch federal employees to monitor local elections. The bulk of the VRA’s power to confront voting
discrimination nevertheless derived from §5, which required jurisdictions with a record of racial discrimination in voting to obtain approval from the U.S. Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia of all proposed election laws before implementing them. Which jurisdictions were subject to this preclearance provision was determined by §4(b), commonly known as the "coverage formula." All or parts of 21 states have been affected by the three iterations of the coverage formula the Voting Rights Act has employed.

Figure 1. States Affected by the Voting Rights Act

This figure shows states that have been either fully or partially covered as a result of changes to the coverage formula of the Voting Rights Act in 1965, 1970, and 1975. No new jurisdictions were added after 1975, the last year the coverage formula was revised. However, many jurisdictions have bailed out since 1975, partly as a result of changes to the preconditions for bailout.

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18 52 U.S.C.A. § 10302(c) (West); If the Attorney General denied preclearance for a specific voting change, a jurisdiction could either pursue declaratory judgment on behalf of the federal court in D.C. or revise the law and resubmit it for preclearance.
19 52 U.S.C.A. § 10303(b) (West).
21 See id.
22 See id.
23 See id.
In the 1965 law, §4(b) singled out jurisdictions that employed a “test or device” to determine a resident’s eligibility to vote as of November 1, 1964 and either had voter registration rates less than 50 percent as of November 1, 1964 or had voter turnout rates less than 50 percent in the 1964 presidential election. This formula resulted in full coverage of seven different states: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. Additionally, the formula captured four counties in Arizona, one county in Hawaii, one county in Idaho, and forty counties in North Carolina. These jurisdictions were required to submit all voting laws for preclearance changes before implementing them.

The Voting Rights Act of 1965 did not immediately end racial discrimination in American elections. Instead, by 1970, new improprieties and victims had emerged. States had begun to adopt laws aimed not at the outright disenfranchisement of black voters, but at attenuating the power of the ballots these voters cast. Furthermore, violations of the rights of Latinos, Asians, and Native Americans to vote resulting from policies and practices that rested upon English language ability came to Congress’ attention. Congress responded by extending the temporary provisions of the Act for another five years, inserting a provision for language assistance to minorities, and extending the geographic scope of the coverage formula. Changes in the coverage formula meant that jurisdictions that employed electoral devices or tests or had low registration and turnout in

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24 Id.; The architects of the 1965 Voting Rights Act justified the extraordinary protections provided by §4(b) and §5 by reminding members of Congress in 1965 that previous efforts to address racial discrimination in voting had all but failed. Although the Civil Rights Act of 1957 had allowed the U.S. Attorney General to bring suits in federal courts on behalf of aggrieved parties in jurisdictions that had implemented discriminatory voting laws, for example, these suits would languor in the courts for weeks and months while voters remained disenfranchised. Moreover, the vast majority of voting discrimination suits were brought in southern federal courts, where judges were generally more sympathetic to Jim Crow laws. Testifying in front of the House Judiciary Committee in March 1965, Attorney General Nicholas Katzenbach said that the extraordinary provisions of the VRA were designed to protect minority voters from “a desire [on the part of State legislatures]...to outguess the courts of the United States or even to outguess the Congress of the United States” by passing a plethora of discriminatory laws that neither the federal government nor Congress could feasibly stop. See Allen v. State Bd. of Elections, 393 U.S. 567 (1980).

25 Id. supra note 20.

26 Id.

27 For examples of vote dilution tactics used in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia, see Chandler Davidson & Bernard Grofman, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (1994); See also Allen, 393 U.S. at 550-53 (listing new election laws in Mississippi and Virginia that introduced at-large voting, transformed elective offices into appointive offices, placed certain prohibitions on potential independent candidates, and developed new procedures for casting votes for write-in candidates).

28 See Section 4 of the Voting Rights Act, supra note 20.

29 Id.
the presidential election of 1968 were now required to pre-clear new voting laws with the federal government. The 1970 revision of the coverage formula resulted in coverage of five counties in Arizona; two counties in California; three towns in Connecticut; 18 political subdivisions in Maine; nine towns in Massachusetts; ten towns in New Hampshire; three counties in New York; and one county in Wyoming.\(^\text{30}\)

When it reviewed the temporary provisions of the Voting Rights Act in 1975, Congress again found evidence of racial discrimination, particularly in a comprehensive report submitted to Congress by the U.S. Commission on Civil Rights (USCCR).\(^\text{31}\) These observations led Congress to extend the temporary provisions of the VRA for seven years and expand the geographic reach of the preclearance requirement to new areas of the country.\(^\text{32}\) Now, jurisdictions employing discriminatory tests or devices or exhibiting low voter registration or turnout as of the 1972 presidential election were subject to federal preclearance.\(^\text{33}\) This modification of the coverage formula brought Texas and Arizona, two counties in California, five counties in Florida, two townships in Michigan, one county in North Carolina, three counties in New Mexico, two counties in Oklahoma, and two counties in South Dakota under the federal regulatory umbrella.\(^\text{34}\) The third coverage formula resulted in the most expansive geographic coverage yet, and substantially altered the previous map of covered jurisdictions.\(^\text{35}\)

The architects of the §4(b) coverage formula clearly sought to capture as many jurisdictions with records of racial discrimination in voting as possible. However, the coverage formula sometimes unintentionally subjected jurisdictions to §5 preclearance that did not have records of

\(^{\text{30}}\) Id.


\(^{\text{32}}\) See id.

\(^{\text{33}}\) See id.

\(^{\text{34}}\) See Section 4 of the Voting Rights Act, supra note 20; Congress also used the 1975 reauthorization process to strengthen the provision for providing election assistance to language minorities, as electoral disparities persisted for language minorities after 1970. Id. at 328-336. The revised language assistance provision drew special attention to political jurisdictions that would not otherwise have fallen under federal supervision. Two counties in New York and one county in Arizona, already required to seek preclearance for racial discrimination against black voters, were also covered because of evidence of discrimination against Spanish-language and American Indian-language minorities, respectively. Three counties in Arizona that had been released from the preclearance requirement were once again captured because of evidence indicating discrimination against American Indian-language minorities. Finally, the state of Alaska, which had been exempted from preclearance previously, was covered again because of discrimination against Alaskan Native-language minorities.

\(^{\text{35}}\) See Section 4 of the Voting Rights Act, supra note 20.
racial discrimination per se. For example, Elmore County, Idaho met the criteria of having employed a “test or device” and of having turnout below 50 percent in the 1964 presidential election because it prohibited prostitutes from voting and had a significant population of military personnel who were registered to vote outside the state. The 1965 Voting Rights Act mitigated against such supererogatory coverage by authorizing the federal courts to exempt from preclearance jurisdictions that had been directly covered and could prove that they had not enacted a racially discriminatory test or device in the preceding five years. Codified as §4(a) of the Act, this “bailout” mechanism “was designed to allow the immediate exemption of those covered states or independently covered political subdivisions that had not discriminated on the basis of race in registering voters or conducting elections.” Prior to 1980, some political subdivisions of fully covered states understood the bailout mechanism to mean that a covered jurisdiction could essentially seek refuge from the preclearance requirement piecemeal by demonstrating that some part of the jurisdiction satisfied the criteria for bailout. But as the Court held in City of Rome v. US, subdivisions of properly covered political jurisdictions could not pursue bailout independently. Thus for example, the City of Birmingham, Alabama could not bail out unless the State of Alabama as a whole did, because Alabama itself had met the criteria for coverage under the original formula. The original bailout provision merely provided an escape route for improperly covered jurisdictions.

As the coverage formula was amended, so too was the bailout provision. In 1970, Congress extended the number of years covered jurisdictions needed to be free of discriminatory tests and election devices from five to ten. This change made it very difficult for a jurisdiction to bail out unless it had been improperly identified for coverage. With the expansion of §4(b) in 1975 to protect language minority groups against English-only voting
practices and ballots, the bailout provision also evolved into two different sets of criteria. One set applied to political jurisdictions covered because of discrimination against racial minorities. A covered jurisdiction with a history of racial discrimination was now required to prove that it had not enacted a test or device with the purpose of denying or abridging the right of racial minorities to vote in the preceding 17 years. Another set of criteria applied to jurisdictions covered because of discrimination against language minorities. A jurisdiction that had been subject to preclearance for discriminating against language minorities was required to prove that it had not implemented an English-only voting barrier.

Neither the 1970 nor the 1975 reauthorization of the Voting Rights Act provided an incentive or clear pathway for covered jurisdictions to bail out. By repeatedly extending the timeframe in which a jurisdiction must not have enacted a test or device, Congress made it difficult for most jurisdictions to bail out prior to the 1982 amendments to the bailout provision. Moreover, courts remained skeptical that most jurisdictions could enact and implement nondiscriminatory voting changes without federal scrutiny. In Virginia v. United States, the Supreme Court affirmed the D.C. federal court’s decision to deny the Commonwealth of Virginia’s application for bailout. Virginia became the second (and remains the most recent) fully-covered state to apply for bailout. As law professor Timothy O’Rourke notes, “Virginia had sought to distinguish its suit from Gaston County on the grounds that the Commonwealth, unlike Gaston County, had not sought ‘to reinstate [its] literacy test.’” But the D.C. court, and later the Supreme Court, argued that “this may change the consequences of an exemption, [but] it does not change the criteria for obtaining one.” Even after the D.C. federal court admitted that Virginia’s literacy test had only been enacted after “an exhaustive canvass of registrars throughout the

43 See id.
44 See id. at Tit. II, § 201; In amending the bailout criteria in 1975, Congress did not characterize any specific types of English-only voting barriers as discriminatory. The statute left this determination up to the U.S. District Court for the District of Columbia.
46 See infra note 47.
47 See infra note 49.
49 See infra note 49.
51 Id. at 776.
the Court argued that the test would likely dilute the black vote considerably. In other words, even jurisdictions that managed to demonstrate some constructive efforts to weed out discrimination in their voting changes could not escape federal scrutiny. In the 1970s, federal courts denied bailout to six applicants. Jurisdictions that had already bailed out were also unsafe: political subdivisions in Alaska and New York that had successfully bailed out were later bailed back in upon further investigation from federal authorities. Pursuant to the §4(b) amendment of 1970, three counties in Arizona and one county in Idaho were re-covered due to maintaining a ‘test or device’ to determine voter eligibility and/or persistent low turnout in presidential elections.

Between 1966 and 1970, six jurisdictions successfully bailed out of preclearance: the State of Alaska; three counties in Arizona (Apache, Coconino, and Navajo); one county in Idaho (Elmore); and one county in North Carolina (Wake). Two counties in North Carolina (Gaston and Nash) applied for bailout but were rejected; in both cases, the U.S. Supreme Court rendered decisions against bailout. In Gaston County v. Virginia, 386 F. Supp. at 1321, aff’d, 420 U.S. 901. Id. See, e.g., id.; Yuba Cnty. v. United States, No. 75-2170 (D.D.C. May 25, 1976); El Paso Cnty. v. United States, No. 77-0815 (D.D.C. Nov. 8, 1977); and City of Rome v. United States, 446 U.S. 156, 162-70 (1980).

The State of Alaska successfully bailed out of the preclearance requirement in 1966. See Alaska v. United States, No. 101-66 (D.D.C. August 17, 1966). Pursuant to the 1970 amendments to §4(b) coverage, election districts 8, 11, 12, and 16 were re-covered. In 1972, a lawsuit brought on behalf of the State of Alaska was successful in bailing out all 4 re-covered election districts. Thus, the State of Alaska was again exempt from federal preclearance as of March 1972. See Alaska v. United States, No. 2122-71 (D.D.C. March 10, 1972). Pursuant to the 1975 amendments to §4(b) coverage, which stipulated protections for voters who belonged to language minority groups, the State of Alaska was re-covered for discrimination against Alaskan Native-language minority groups. See 40 Fed. Reg. 49, 422 (1975). The State of Alaska was unsuccessful in its attempt to bail out again in 1979. See Alaska v. United States, No. 78-0484 (D.D.C. May 10, 1979). The State of Alaska’s complicated history with the bailout provision continued in 1984, when the State’s bailout application was denied right before the new criteria were implemented on August 5, 1984. See The Bailout Standard, supra note 18, at 415. See also Alaska v. United States, No. 84-1362 (D.D.C. July 24, 1984).

Three counties in the State of New York, all in New York City, were covered pursuant to the 1970 amendments to §4(b) coverage formula: Kings County (Queens); Bronx County; and New York County (Manhattan). A lawsuit brought on behalf of the State of New York successfully bailed all three counties out of federal preclearance as of April 1972. See New York v. United States, No. 2419-71 (D.D.C. April 3, 1972). In 1973, the U.S. Attorney General re-opened bailout litigation and each of the three bailed out counties was covered again in January 1974. See New York v. United States, No. 2419-71 (D.D.C. January 10, 1974), aff’d, 419 U.S. 888 (1974).

See Hancock & Tredway, supra note 38, at 396. See also 36 Fed. Reg. 5809 (1971).


United States, the majority opinion held that Gaston County “had not met its burden of proving that its use of the literacy test, in the context of its historic maintenance of segregated and unequal schools, did not discriminatorily deprive Negroes of the franchise.”\(^6\) Michael McDonald argues in his essay “Who’s Covered? Coverage Formula and Bailout” that the Supreme Court’s decision in *Gaston County* likely derailed steps taken by Congress to open bailout to jurisdictions compliant with the Voting Rights Act, since a “history of segregation prior to 1964 could be factored into bailout decisions.”\(^6\)

After the Supreme Court’s controversial decisions in *City of Rome v. United States* and *Mobile v. Bolden*, Congress began debating the merits of reauthorizing the temporary provisions of the VRA for a third time.\(^6\) As amended in 1982, the Voting Rights Act included two new sections that effectively overrode both of these Supreme Court decisions. In contravention of *Mobile*, the new Voting Rights Act clarified that establishing that a law had or would have a discriminatory *effect* was sufficient to prove a denial of voting rights.\(^6\) More pertinently, Congress responded to *City of Rome* by revising the bailout section to enable political subdivisions of fully covered states to bail out of preclearance independently.\(^6\)

Under the bailout criteria included in the 1982 iteration of the Voting Rights Act, a subdivision could bail out of preclearance requirements if it demonstrated that it: had not used a racially discriminatory test or device over the past ten years; had not passed a law that diluted ballots cast by minority voters; had not been convicted of racial discrimination in its election practices; had not had a federal examiner monitor its elections; had pre-cleared all changes in election law within its


\(^{61}\) McDonald, supra note 9, at 258.

\(^{62}\) In *Mobile v. Bolden*, 446 U.S. 55 (1980), a majority of Supreme Court justices ruled that litigants could only prove discrimination in voting based on race, color, or language minority status if they showed that voting changes in a given jurisdiction were enacted with discriminatory intent. Previously, showing that a voting change had disparately disenfranchised black voters was sufficient to find a jurisdiction in violation of the Voting Rights Act.

\(^{63}\) Discontent with the decision in *Mobile v. Bolden* was expressed by members of Congress, witnesses, and committee reports throughout deliberations on the 1982 amendments. Senator Charles C. Mathias of Maryland who exemplified this discontent in his statement submitted for the record of the U.S. Senate Judiciary Committee on January 27, 1982, said that “the plurality in *Bolden* places a virtually impossible burden on plaintiffs” and reflects “a crippling blow to the overall effectiveness of the Act.” He noted that, as a result of the decision, “plaintiffs must reach back into time and produce direct evidence of discriminatory purpose” and compel Congress to “correct the plurality’s misinterpretation of Congressional intent in *Bolden* and restore the original meaning of Section 2.” See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1390 (1983).

\(^{64}\) See infra note 64.
jurisdiction; and had made a sustained effort to eliminate intimidation and harassment and expand registration opportunities for minority voters.\textsuperscript{65} The revised bailout provision gave both the U.S. Attorney General and the U.S. District Court for the District of Columbia discretion to disregard “trivial” violations of the preclearance requirement, “promptly corrected” errors, and violations that “were not repeated.”\textsuperscript{66} At the same time, the revised bailout provision authorized the U.S. District Court to reopen litigation if, within ten years of bailing out, a jurisdiction was suspected of engaging in conduct proscribed by the Act.\textsuperscript{67}

These revisions were at once catalytic and inhibitive. On the one hand, the new criteria represented the first genuine opportunity for political subdivisions within covered states to regain autonomy over their election processes. The U.S. Senate Judiciary Committee’s Subcommittee on the Constitution argued that “[b]ailout is clearly achievable” and predicted that one quarter of counties in covered states would be eligible for bailout immediately.\textsuperscript{68} On the other hand, the volume and specificity of the new criteria led many to conclude that it would be difficult, if not altogether impossible, for most political subdivisions to avail themselves of the new bailout provision.\textsuperscript{69}

Reflecting the majority view that the new criteria would make it easier

\textsuperscript{65} Jurisdictions that had failed to pre-clear election law changes could do so nunc pro tunc (or retroactively) without penalty at the time of their application for bailout. See 42 U.S.C. §1973b(a)(3) (1982), invalidated by Shelby Cnty., Ala., v. Holder, 133 S. Ct. 2612 (2013).


\textsuperscript{67} See id.


\textsuperscript{69} For example, in a June 1982 hearing on the Voting Rights Act amendment, Senator Orrin Hatch (R-UT) opined that “[w]e have now substituted for that single [bailout] factor six or seven new factors that require additional efforts, and that place additional burdens upon the States.” See 128 Cong. Rec. 13297 (1982). Similarly, Representative Caldwell Butler (R-VA) went so far as to suggest that the new provision “is wholly unreasonable and affords merely an illusory opportunity to be released from coverage.” See S. Rep 97-417, at 168 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 341. Some legal commentators were also dubious of the possibility that a high number of bailouts would suddenly occur. Shortly after the 1982 reauthorization of the VRA, for example, Professor O’Rourke wrote that “[i]t is unlikely, in my view, that all jurisdictions can qualify for bailout under the new provision by 1992. First, many jurisdictions will not be able to meet the provision’s [Section 5] compliance standards. Second, many jurisdictions may not be able to satisfy the provision’s “positive steps” requirement...since the meaning of “constructive efforts” is ambiguous, jurisdictions may be unable to determine what kind of action is necessary or sufficient to satisfy the terms of the law. See O’Rourke, supra note 22, at 789. Similarly, Paul Hancock and Laura Tredway offered several reasons few jurisdictions would suddenly bail out: “individual counties within covered states may be unaware of the opportunity for an independent bailout action under the new standard. Covered jurisdictions may view the standard as difficult when compared to the burdens of continued coverage and may simply have elected to remain covered. Other jurisdictions may remain unwilling to take the corrective action necessary to allow minority citizens a fair opportunity for full and effective participation. It is equally possible, however, that a substantial number of jurisdictions are laying the required groundwork for bailout, as evidenced by the [recent] increase in section 5 submissions.” See The Bailout Standard, supra note 18, at 422.
for jurisdictions to bail out of the VRA, Congress postponed implementation until August 5, 1984 “to allow the Department of Justice ‘to prepare for such a heavy load of litigation under the new standards.’”

Some members of Congress sought to prevent jurisdictions with a history of racial discrimination in voting from escaping scrutiny under the new criteria by expanding the timeframe for eligibility under the old criteria from 17 to 19 years. But, ultimately, a small number of jurisdictions did bail out during the interim period: one county in Colorado that had been denied previously (El Paso); three towns in Connecticut (Groton, Mansfield, and Southbury); one county in Hawaii (Honolulu); one county in Idaho (Elmore); nine towns in Massachusetts (Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and Wrentham); and one county in Wyoming (Campbell). Alaska attempted to bail out under the pre-1982 criteria, but its application was not considered until the new criteria were activated and the federal government determined that Alaska should pursue bailout under the new standards.

Bailout outcomes since the 1982 Voting Right Act reauthorization comport with the projections of both critics and proponents of the revised bailout language. On the one hand, the sudden increase in new applicants predicted by some congressional leaders never materialized; no jurisdiction applied for bailout under the amended standards until 1997. On the other hand, every jurisdiction that has applied for bailout since 1997 has been successful. This perfect rate of success calls into question the assertions of some that the bailout criteria are unduly onerous, or that the Department of Justice has been unwilling to consent to bailouts. To the contrary, it appears that the bailout mechanism is working as intended to reward those jurisdictions that have made genuine long-term efforts at reducing the vestiges of racial discrimination in elections. The best explanation for the paucity of bailed out political jurisdictions may well be that, as former Department of Justice attorney Gerald Hebert wrote nearly a decade ago, “jurisdictions are just not applying.” Unfortunately, these historical developments escaped the Roberts Court in Shelby.

70 See id. at 411.
72 Id. at 412-15.
73 See Hebert, supra note 9, at 270
75 See Hebert, supra note 9, at 270.
II. JUDICIAL APPRAISALS OF THE BAILOUT PROVISION

A review of previous opinions concerning the Voting Rights Act affirms that the Supreme Court’s attitude toward the bailout provision evolved from reverence to tacit disdain in relatively short order. This disdain seemed to rest not on the availability of empirical evidence about bailout outcomes, but on suppositions and secondhand information about the bailout process. By the time the Shelby County case reached its docket, the Court seemed persuaded by a cadre of observers who had long asserted that the 1975 formula did not reflect “current political conditions.”

References to the section of the Voting Rights Act that allows covered jurisdictions to terminate federal preclearance of their election laws are relatively neutral prior to Boerne v. Flores. The Court’s first opportunity to assess the constitutionality of the Voting Rights Act bailout provision arose in South Carolina v. Katzenbach. South Carolina had asked the Court to rule that it was improper for Congress to delegate authority to review bailout petitions to the District Court for the District of Columbia only. In addition, the state contended that the bailout procedures were “a nullity because they impose an impossible burden of proof upon States and political subdivisions entitled to relief.” The majority in Katzenbach rejected both of these arguments in no uncertain terms. The Court found that the bailout provision represented a proper use of Congress’ Article III authority to establish lower federal courts. Moreover, since “an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government,” the Court held that “the burden of proof is quite bearable.” Here, then, the Court not only countenanced the bailout provision, but dismissed criticism that its burdens were too onerous to satisfy.

The bailout provision became an issue once again in City of Rome v.

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79 Id.
80 Id.
81 Id.
82 Id.
83 Id. at 332.
United States, when a city in Georgia asked the court to exempt it from federal supervision of its election laws. In denying the request, the Court held that Rome was not a “political subdivision” or “state” within the meaning of §4(a), since it was only subject to preclearance as a result of the entire state of Georgia having been covered. To be eligible for bailout, Rome would have to have been brought under the auspices of the federal government independently of the state. Absent this fact, Rome was eligible to bail out only if the entire state of Georgia were eligible. The majority’s decision was not uncontroversial. Justice Powell argued in his dissent that the majority was engaged in a “protean construction [that] reduces the statute to irrationality” because it had ruled two years earlier in United States v. Sheffield that the term “state” in §4(a) of the Voting Rights Act applied to both states as a whole and subdivisions thereof. Yet this apparent contradiction had the effect of affirming that the bailout provision was designed to reward political jurisdictions that had made good faith efforts to remedy racial discrimination in elections. Rome, whatever kind of political unit it might have been, had made legislative changes that “reduced the importance of the votes of Negro citizens.” Powell’s dissent nevertheless suggests that he regarded the bailout provision as the fulcrum in the balance between federal authority to remedy violations of voting rights and “local control of the means of self-government.” After challenging the correctness of the majority’s interpretation of §4(a), he took a slightly different tack and concluded that the majority’s interpretation “renders the Voting Rights Act unconstitutional as applied to the city of Rome.” For Justice Powell, the constitutionality of the coverage formula and preclearance provision depended upon coterminous application of the bailout provision: “If §4(a) imposes the burden of preclearance on Rome, the same section must also relieve that burden when the city can demonstrate its compliance with the Act’s quite strict requirements for bailout.” The majority’s refusal to extend even the possibility of bailout

85 Id.
86 Id.
87 Id.
88 Id. at 198 (Powell, J. dissenting).
90 Rome, 446 U.S. at 187.
91 Id. at 201.
92 See id.
93 Id. at 200.
to Rome made the Voting Rights Act unconstitutional because it allowed the federal government to encroach upon state and local administration of elections without offering them some mechanism for regaining their autonomy. The majority opinion in Shelby County v. Holder recognized no such interdependence, but if Powell's dissent is any indication, the bailout mechanism could have been treated as a counterweight to the coverage formula.

The strongest endorsement of the bailout provision came when the constitutionality of the Voting Rights Act was not at issue. In Boerne v. Flores, the Supreme Court examined the constitutionality of the Religious Freedom Restoration Act (RFRA) by drawing repeated comparisons to the Voting Rights Act. The majority noted that whereas a substantial record of racially discriminatory voting laws and practices had buttressed the Voting Rights Act, the RFRA lacked a comparable evidentiary record. Instead, proponents of the RFRA had provided only anecdotal evidence of alleged violations of the religious freedom people of Jewish or Hmong descent. The Court implicitly praised the fact that the VRA's temporary provisions "were confined to those regions of the country where voting discrimination has been most flagrant," as well as the fact that the provisions "affected a discrete class of state laws, i.e., state voting laws." These were in contrast to the "sweeping coverage" of the RFRA, which represented an "intrusion at every level of government" into "official actions of almost every description" and "[applied] to all Federal, State, and local Governments." The Court cast a particularly positive light upon the bailout provision by acknowledging the absence of a comparable measure in the RFRA: "RFRA has no termination date or termination mechanism." By contrast, the VRA authorized jurisdictions subject to its more onerous requirements to terminate their subordinate administrative status by satisfying certain criteria. The Court seemed to pronounce the bailout provision a model of conscientious legislative design. Along with the evidentiary record and narrow tailoring, the bailout provision "tend[ed] to ensure Congress' means are proportionate to ends legitimate."

95 Id.
96 Id.
97 Id. at 531.
98 Id. at 533.
99 Id. at 532.
100 Id.
101 Id. at 533.
The Roberts Court offered a decidedly different rendering of the bailout provision when it took up the constitutionality of the Voting Rights Act in *NAMUDNO*.[102] Indeed, its rationale for ultimately granting Northwest Austin an exemption from the preclearance requirements ran directly counter to the language used to uphold the Voting Rights Act in *City of Rome*.103 Alluding to the government’s argument that the utility district met the definition of a “state” under §4(a) but not the definition of a “political subdivision,” the Court lamented that this interpretation “has helped to render the bailout provision all but a nullity.”104 The similarity of this language with the government’s unsuccessful argument in *South Carolina v. Katzenbach* and the irony of the fact that the Court’s shift in attitude toward the bailout provision occurred against the backdrop of a rapid redesign of the bailout provision to facilitate bailouts by political subdivisions should not be lost. Here, the Court was offering its harshest criticism of the bailout provision yet. Also, the decision was the first to command a majority of the justices, decades after successful bailouts by dozens of political subdivisions around the country under a version of the bailout provision developed precisely for that purpose. The Court’s antagonistic posture might explain why it did not address the “symmetry” of the bailout provision and coverage formula in *Shelby*: by then it had already decided that the scale had tipped in favor of federal control.

### III. Multivariate Analysis of §4 Bailouts

Identifying factors that affect the probability of bailout out of the preclearance requirement of the Voting Rights Act requires an understanding of: (1) how state and local governments respond to federal laws and (2) the conditions under which state and local governments create new policies. Since the bailout process depends both upon the rules articulated by the federal government and upon the initiative of covered jurisdictions, bailout represents an example of both federalism and policy

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102 *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 196-97 (2009) (In a surprising decision over a provision that has consistently been upheld as constitutional, the Court held that the District is eligible under the Voting Rights Act to seek bailout for release from its pre-clearance requirements to make changes to its board elections).  
103 *Id.* at 202 (holding that “although the historic accomplishments of the Voting Rights Act are undeniable,” it “now raises serious constitutional concerns. The preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to our federal system. Some of the conditions that the Court relied upon in upholding this statutory scheme have unquestionably improved, and the Act imposes current burdens and must be justified by current needs”).  
104 *Nw. Austin*, 557 U.S. at 211.
innovation at work.

The bailout process implicates federalism because covered jurisdictions must meet certain federal prerequisites to be initially eligible for bailout. From the perspective of state and local actors, compliance with any federal mandate entails both consequences and rewards. Covered jurisdictions that bail out must first weigh the consequences of noncompliance with federal preclearance requirements and the benefits of compliance with the federal requirements. Then they must weigh the costs of the bailout process against the benefits of a successful bailout. In short, the rules set by the federal government are paramount to the decision making of covered jurisdictions. Since compliance with §5 creates the preconditions for bailout under §4(b), we assume that those factors most conducive to compliance with §5 will also be conducive to bailout. Conversely, factors that tend to undermine state and local compliance with federal law should also decrease the probability of terminating federal control over election lawmaking in covered jurisdictions.

The bailout process is also an example of policy innovation. While the preclearance provision imposes certain constraints upon the development and implementation of new election laws in covered jurisdictions, the bailout provision preserves some degree of local autonomy over the federal government's election supervision role by allowing covered jurisdictions to terminate the relationship. Covered jurisdictions that pursue bailout are in some sense exercising the kind of prerogative that states and localities do when they enact licensing laws, smoking bans, or other policies. Even though they must meet federal preconditions, these jurisdictions decide for themselves whether and when to initiate the bailout process.

Political scientists know a great deal about the factors that influence state and local behaviors in the context of federalism and policy innovation. In general, we expect that characteristics of covered jurisdictions that are more conducive to compliance with federal mandates will also be more conducive to bailout, since successful bailout has historically required compliance with the preconditions set out in §4(a) of the Voting Rights Act. Previous research suggests that several factors will influence state

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105 See 52 U.S.C.A. § 10303(b) (West).
107 See Section 4 of the Voting Rights Act, supra note 20.
108 But see Nw. Austin, 557 U.S. 193 (2009) (authorizing the bailout of a utility district in Texas, and thereby establishing that all political subdivisions of a parent entity covered under §4(b) may sue to terminate preclearance requirements if these subdivisions lack any ostensible history of racially discriminatory electoral devices or low voter turnout).
and local compliance with the mandates of the Voting Rights Act. From this we can derive some hypotheses about the factors that will influence the likelihood of bailing out.

The factor most likely to matter is the population’s general disposition toward federal policy activism. This disposition is referred to in political science as policy mood. States vary across space and time in the degree to which they embrace active federal government, and recent evidence suggests that local governments are responsive to ambient public opinion on issues like immigration. In particular, increased liberalism in policy mood, where “liberalism” signifies a high level of comfort with federal spending or policymaking in different arenas, can lead local governments to adopt more liberal public policies. In this case, liberalism in policy preferences implies comfort with federal supervision of election laws, while conservatism implies discomfort with federal supervision of election laws. Thus, we expect that covered jurisdictions within more ideologically liberal states will be more likely to bail out under §4(a). It might seem counterintuitive to predict that covered jurisdictions in areas where the population has more liberal policy views are more likely to bail out; the greater degree of comfort with federal activism that more liberal policy mood implies arguably also implies a lower level of motivation to pursue the autonomy bailout affords. Indeed, one might think that, contrary to what we posit, a covered jurisdiction in a state that is less comfortable with federal intervention would be more likely to attempt to terminate federal supervision of its election laws by bailing out. Yet we believe that covered jurisdictions in more ideologically liberal states will be more likely to comply with the prerequisites of bailout, and by doing so, increase their chances of successfully bailing out. Higher levels of liberalism in state policy mood should thus be associated with a higher probability of bailing out.

The literature suggests that in addition to policy mood, demographics, region, and partisanship can influence state and local responses to federal
The demographic characteristic that could affect both the likelihood of bailing out and the policy liberalism of a state is the size of the black population in a covered jurisdiction. Studies linking larger black populations to higher levels of black voter registration, turnout, and office holding affirm that a key ingredient in political empowerment is numerical capacity. Covered jurisdictions with a larger black population could have more of the wherewithal to satisfy the requirements of bailout, though if the black share of the population is in some way a proxy for political empowerment, it is also possible that these jurisdictions will have less desire or need to exercise the bailout option of the Voting Rights Act.

Regional culture is another factor studies have linked to state and local policymaking. In his seminal work on federalism, Professor Daniel Elazar argued that states operate according to three distinct political subcultures: traditionalistic, moralistic, and individualistic. Scholars have paid particular attention to the effects of political culture in the South, where historical events like the Civil War and Civil Rights Movement have burnished a distinctive legacy of anti-federalism. Prominent examples of the South's cultural aversion to the federal government include the "massive resistance" movement, which ensued after Brown v. Board of Education was decided, and Barry Goldwater's libertarian and socially conservative presidential campaign. Isolating the South in statistical models is often an effective way to determine whether differences in policy outcomes result from regional subcultures. The effects of culture are

114 See, e.g., Edward Alan Miller & David Blanding, Pressure Cooker Politics: Partisanship and Symbolism in State Certification of Federal Stimulus Funds, 12 STATE POL’Y Q. 58 (2012) (finding that states with Republican governors certified their intent to accept federal stimulus funds seven days later, on average, than states with Democratic governors); Paru R. Shah, Melissa J. Marschall, & Anirudh V.S. Ruhl, Are We There Yet? The Voting Rights Act and Black Representation on City Councils, 1981 – 2006, 75 J. POL. 993 (2013) (finding, inter alia, that cities covered under §5 of the VRA are significantly more likely to elect African Americans to office than cities not covered under §5).


116 See infra note 114.

117 Daniel J. Elazar, AMERICAN FEDERALISM: A VIEW FROM THE STATES (1966). Traditionalistic cultures believe the role of government is to protect the existing social hierarchy, with elites at the top. Moralistic cultures are those that believe government must promote equality and social justice. Finally, individualistic cultures believe government should be very limited, functioning largely if not exclusively to protect the market.

118 See V. O. Key, SOUTHERN POLITICS IN STATE AND NATION (1949).


difficult to predict in this case. The South’s anti-federalist culture could motivate covered jurisdictions in the region to seek bailouts, thus increasing their chances of actually bailing out. But the regional culture might also deter covered areas from following the rules that are sine qua non of bailout. We shall see if being in the South is a harbinger of eventual restoration of autonomy or persistent subservience to the federal government.

A final factor that research on federalism and policymaking suggests could influence the chances of bailout in covered jurisdictions is partisanship.121 Both elite and mass partisanship can influence state responses to federal legislation. For lay voters, symbolic attachments to a party label shape both awareness of and affect toward political issues. For political leaders, partisanship affects the policy options identified and the criteria used to adjudicate between policy alternatives. One study conducted after the passage of the 2009 American Reinvestment and Recovery Act122 found that states with Republican governors took significantly longer to certify their intent to accept federal stimulus funds than states led by Democrats.123 The study argued that these governors were under pressure to stanch worsening recessions without appearing to endorse the economic policy approach of the newly elected Democratic president.124 Attachment to the Democratic Party or the Republican Party may similarly shape compliance with bailout requirements and the pursuit of bailout.

To estimate the probability that covered jurisdictions bail out, we collected data on political entities across the United States that have been brought under the auspices of the federal government at some point since the Voting Rights Act was adopted in 1965.125 In states that are fully covered, the unit of analysis is the county. In states that are not fully covered, like Alaska and New Hampshire, the unit of analysis is an autonomous political subdivision of the state that was specifically cited for

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123 See infra note 121.
125 We treat independent cities, parishes, or other political units as county equivalents for the purposes of our analysis. Since these do not overlap with any counties that are covered, there is no danger that data on these units might erroneously be double-counted within our dataset. Special Project Grant for Comty. Health Serv, Pub. L. 89-110, 79 Stat. 437 (1965).
coverage under the Voting Rights Act at some point and is thus functionally equivalent to a covered county. Our dataset consists of 949 of these counties and county equivalents in total.

This approach offers important methodological advantages over using larger or smaller units of analysis. We could have assembled a dataset comprised of *states* that have been fully or partially covered by the VRA. However, a dataset of this type would have included significantly fewer observations, as only 21 states have been affected by the VRA, and this is far too few for a robust multivariate analysis. Using counties as the unit of analysis yields a sample in which it is possible to observe systematic patterns and relationships along a number of different dimensions simultaneously. We could also have assembled a dataset comprised of smaller units of analysis, such as cities, towns, or electoral precincts. As noted above, a number of municipalities have also been subject to preclearance requirements independently of states. However, using counties and county equivalents enables us to capture data on important measures of interest that are not available for units smaller than states. This is especially critical given that we are interested in jurisdictions covered under Voting Rights Act. Most covered jurisdictions are in the South, where counties are typically the smallest autonomous political unit for which a range of germane political data is available.126 In sum, relying upon counties and county equivalents as the unit of analysis maximizes the size of our sample, facilitates more accurate and robust statistical analysis, and provides access to relevant electoral data.

Among the measures we are able to include because of this methodological choice are the percentage of black residents in the jurisdiction, the political partisanship of residents of the jurisdictions, and the state’s policy mood. To capture the possible effect of differences in black political empowerment, we calculated the percentage of the county population that was black as of the last U.S. Census. This is consistent with previous literature suggesting that black voters will be more politically engaged and efficacious where they constitute a higher share of the population and electorate.127

We operationalize states’ general dispositions toward the federal government using the variable state mood. States exhibiting more liberal

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126 See Section 4 of the Voting Rights Act, supra note 20.
policy moods are more accepting of federal policy, while states with more conservative policy moods are more resistant to federal policymaking. State mood is an adaptation of a national-level index that has been used in numerous social science studies over the past three decades.\textsuperscript{128} The index aggregates mass preferences for more or less government activity across a range of policy domains into a single underlying dimension that represents the nation's views of how involved the federal government should be in public policy along a continuum from conservative to liberal.\textsuperscript{129} State mood was derived from this identical measure of the nation's preferences for federal intervention using a statistical procedure called multilevel regression and post-stratification.\textsuperscript{130} The higher the value of this variable the more the state prefers the federal government to be involved; the lower the value of the variable, the more the state prefers a restrained federal government. Consistent with our hypothesis that a more liberal state policy ideology will increase the chances of bailout out, we expect that higher values of state mood will be associated with a greater probability of bailing out.

We control for three additional factors that might distinguish jurisdictions that bail out from those that do not. The first of these control variables is political partisanship. We identified political partisanship in each covered jurisdiction by calculating Obama's share of the two-party vote in the 2012 election in each political jurisdiction. The values of this variable theoretically range from zero to 100, with higher values signifying stronger allegiance to the Democratic Party and lower values signifying stronger allegiance to the Republican Party.

The second factor we account for in our models is the version of the Voting Rights Act coverage formula under which each jurisdiction was


\textsuperscript{129} The preferences themselves are identified using national surveys administered since 1952 that include questions on subjects such as education spending, national defense, and government involvement in civil rights enforcement. \textit{See James A. Stimson, Public Opinion in America: Moods, Cycles, and Swings} (Westview Press 1991).

covered. The Voting Rights Act’s coverage formula has been revised three times to account for changes in the nature of racially discriminatory electoral activity from outright voter disfranchisement to more subtle vote dilution, and each of those iterations of the coverage formula brought new jurisdictions under the auspices of the federal government. Accounting for which iteration of the coverage formula each jurisdiction was subject to helps us appreciate the extent to which the changes in the coverage formula have themselves influenced the chances of bailing out. The extent to which differences in the coverage formula can explain differences in the probability of bailing out should reveal much about the prudence of attacking the coverage formula in Shelby County v. Holder.\(^\text{131}\) We operationalize the three versions of the coverage formula using a series of dichotomous categorical variables representing the 1965, 1970 and 1975 coverage formulas. A For each of these “dummy” variables, each jurisdiction is coded one if it was brought in under the corresponding version of the coverage formula, and zero otherwise. Thus, for example, a jurisdiction covered under the 1970 formula would be coded one on the 1970 formula dummy variable, and zero on both the 1965 and 1975 dummy variables.

The third factor we consider is whether a covered jurisdiction is in the South. Since racial discrimination in voting was more pronounced and pervasive in the South than outside of it when the Voting Rights Act was first adopted, most covered jurisdictions are in the South. Jurisdictions were coded one if they are in any of the 11 states that seceded from the Union during the Civil War, and zero if they are not.\(^\text{132}\)

Table 1 contains summary statistics for the variables used to estimate the probability of bailing out. Most of the indicators of interest vary considerably. Yet it must be noted that a small fraction of covered jurisdictions have bailed out. As of 2013, 88 (9.45 percent) covered jurisdictions had successfully exercised the “bailout” mechanism, while the remaining 843 had not. This statistic lends credence to former Department of Justice attorney Gerald Hebert’s observation that “the real problem is that jurisdictions are just not applying.”\(^\text{133}\) Yet we believe that the paucity of bailouts makes it even more valuable to identify any systematic distinctions that might exist between those jurisdictions that bail out and


\(^{132}\) The 11 states are: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

Turning to the other factors, we can see that covered jurisdictions were about 24 percent black as of 2013 on average, although the black share of the population in these jurisdictions varied as much as 20 percentage points around that mean, and ranged from zero percent in Skagway, AL to 85.7 percent in Jefferson County, Mississippi. Partisanship also varies significantly across covered areas, with Obama earning his smallest share of the two-party vote (11.12 percent) in Carmon Parish, Louisiana and his highest share (100 percent) in Prikham’s Grant, New Hampshire. All of the covered jurisdictions were brought in under the first three iterations of the Voting Rights Act: 595 (62.7 percent) were covered under the original 1965 law, 50 (5.27 percent) were covered after the VRA was reauthorized and the coverage formula was modified, and 304 (32.03 percent) were covered after the formula was modified for a third and final time in 1975. Not all of those districts were covered at the same time: 279 were covered on September 23, 1975, one was covered on October 22, 1975, two were covered on January 5, 1976, and four were covered on August 13, 1976. Notably, no jurisdictions were brought under federal supervision when the VRA was reauthorized in 1982 or 2006, nor were there any modifications to the coverage formula.

Table 1. Characteristics of Covered Jurisdictions ($N = 949$)

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>Standard Dev.</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent Black</td>
<td>20.781</td>
<td>19.490</td>
<td>0</td>
<td>85.7</td>
</tr>
<tr>
<td>State Mood</td>
<td>38.695</td>
<td>2.668</td>
<td>32.72</td>
<td>54.97</td>
</tr>
<tr>
<td>Obama’s Share of Two-Party Vote</td>
<td>51.541</td>
<td>20.569</td>
<td>11.123</td>
<td>100</td>
</tr>
</tbody>
</table>

Note: the number of observations in the models presented will be less than in this table. Jurisdictions in Alaska are excluded because of incomplete data.

Table 2 reports the results of multivariate logistic regressions predicting the probability that a covered jurisdiction had bailed out as of 2013. Coefficients on each independent variable are expressed as odds ratios for easier interpretation. Odds ratios vary from zero to one and can be multiplied by 100 to represent the percentage increase or decrease in the
probability of an outcome of interest. For any continuous variable in our model, an odds ratio greater than one should be interpreted as an increase in the probability of bailing out given a one percent increase in the corresponding variable, while an odds ratio smaller than one should be interpreted as a decrease in the probability of bailing out given a one percent increase in the corresponding variable. Odds ratios on categorical variables should be interpreted somewhat differently. With categorical variables, an odds ratio greater than one signifies that jurisdictions belonging in a given category are more likely to bail out than jurisdictions belonging in a "reference" category not shown in the table, while an odds ratio smaller than one signifies that jurisdictions belonging in a given category are less likely to bail out than jurisdictions belonging in the reference category.

Table 2. Estimating the Probability of Bailout in Covered Jurisdictions

<table>
<thead>
<tr>
<th></th>
<th>All</th>
<th>South</th>
<th>Non-South</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Mood</td>
<td>1.319*</td>
<td>3.902***</td>
<td>0.649</td>
</tr>
<tr>
<td></td>
<td>(0.160)</td>
<td>(1.281)</td>
<td>(0.165)</td>
</tr>
<tr>
<td>Percent Black</td>
<td>0.885***</td>
<td>0.898**</td>
<td>0.923</td>
</tr>
<tr>
<td></td>
<td>(0.021)</td>
<td>(0.018)</td>
<td>(0.039)</td>
</tr>
<tr>
<td>Obama’s Share of Two-Party Vote</td>
<td>1.014</td>
<td>1.031</td>
<td>0.975</td>
</tr>
<tr>
<td></td>
<td>(0.021)</td>
<td>(0.019)</td>
<td>(0.024)</td>
</tr>
<tr>
<td>1970 Formula</td>
<td>30.667**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(36.108)</td>
<td>(0085)</td>
<td></td>
</tr>
<tr>
<td>1975 Formula</td>
<td>0.056</td>
<td>&lt;0.000</td>
<td>&lt;0.000</td>
</tr>
<tr>
<td></td>
<td>(0.0002)</td>
<td>(8.25x10^-25)</td>
<td>(2.13x10^-9)</td>
</tr>
<tr>
<td>Constant</td>
<td>&lt;0.000</td>
<td>&lt;0.000</td>
<td>&lt;0.000</td>
</tr>
<tr>
<td></td>
<td>(0.0002)</td>
<td>(8.25x10^-25)</td>
<td>(2.13x10^-9)</td>
</tr>
<tr>
<td>N</td>
<td>928</td>
<td>852</td>
<td>76</td>
</tr>
<tr>
<td>Wald χ²</td>
<td>45.63***</td>
<td>193.89***</td>
<td>9.23*</td>
</tr>
<tr>
<td>-2 Log Likelihood</td>
<td>257.821</td>
<td>147.090</td>
<td>57.727</td>
</tr>
</tbody>
</table>

Entries are odds ratios. Figures in parentheses are standard errors, clustered by state. *p < 0.05; ** p ≤ 0.01; ***p ≤ 0.001. Jurisdictions in Alaska are excluded because of incomplete data. The reference category for the VRA
coverage formula variables is the 1965 formula; thus, the odds ratios for the
formula variables should be interpreted as differences in the likelihood of
bailing out if a jurisdiction was covered under the 1970 and 1975 formulas
and the likelihood of bailing out if a jurisdiction was covered under the
1965 formula.

Results in Column 1 support our hypothesis that covered jurisdictions
are significantly more likely to bail out as the policy mood of the state in
which the covered jurisdiction lies becomes more liberal. Ceteris paribus,
covered jurisdictions are approximately 32 percent more likely to bail out
for each additional unit of liberalism in state mood (OR: 1.319; \( p = 0.023; \)
32% \( \approx 1.00 - 1.319 \times 100 \)). To put this another way, the more citizens in a
state embrace active federal government, the more likely a covered
jurisdiction in that state is to bail out. At the same time, results also indicate
that there is an inverse relationship between the probability of bailout and
the black share of the population. The odds ratio on percent black signifies
that the probability of bailing out declines approximately 12 percent on
average each time the black share of a covered jurisdiction’s population
increases (OR = 0.884; \( p < 0.0001; \) 12% \( \approx 1.00 - 0.884 \times 100 \)). Thus,
covered jurisdictions where African Americans comprise a larger share of
the population are less likely to bail out from the preclearance requirements
of the Voting Rights Act. One possible explanation for this finding is that
covered jurisdictions with larger black populations are more comfortable
with federal oversight of elections, as the African American populations of
these districts stand to benefit from such oversight. In other words, percent
black may be a crude proxy for local political mood; a higher share of
black residents may simply signify a more positive disposition toward the
federal government as a policy interloper and therefore greater comfort
with federal supervision of election laws. We do not find evidence of a
high correlation between the black share of a covered jurisdiction’s
population and the liberalism of policy preferences in the outlying state.
Thus, it is fair to say that these two factors exert independent pressures
upon covered jurisdictions where they exert any at all.

Finally, the results suggest that jurisdictions that were brought under the
auspices of the federal government as a result of the coverage formula
adopted in 1970 are approximately 30 times more likely to bail out than
jurisdictions covered under the 1965 law. On the other hand, we find that
jurisdictions covered as a result of the 1975 law are not significantly less
likely to bail out than jurisdictions covered as result of the 1965 law (OR =
0.056; \( p = 0.06 \)). Likewise, there is no evidence of a statistical relationship
between political partisanship in covered jurisdictions and the probability of bailing out. Covered jurisdictions that gave a greater share of the two-party vote to President Obama in 2012 are not significantly more likely to have bailed out than covered jurisdictions that voted more strongly for Obama's Republican opponent.

Columns 2 and 3 of Table 1 disaggregate the models according to whether covered jurisdictions are in southern states. Of the 949 covered jurisdictions identified in our dataset, the vast majority (89.99 percent) are in the South. Only 95 covered jurisdictions (10.01 percent) were in states outside the South. This divide is a reminder that the original coverage formula was designed to capture the region where racial discrimination in voting was most pronounced and pervasive. Imbued as it is with such historical, political, and sociological significance, this regional distinction may also explain differences in the probability of bailing out under the Voting Rights Act. The model in Column 2 essentially tests where there is an interaction between region and the other variables in the model. Of particular interest to us is the possibility that the unique culture of the South might affect the strength of the effect of policy mood on bailing out. The evidence from the model in Column 2 validates that suspicion: ceteris paribus, covered jurisdictions in the South are nearly four times more likely to bail out on average for each unit increase in the liberalism of state policy mood (OR: 3.902; \( p < 0.001 \)). Conversely, we can see from Column 3 that the probability of bailing out does not increase significantly as state mood becomes more liberal in covered jurisdictions outside the South.

Table 3 reports the results of models incorporating another set of interactions. Specifically, the models in these columns test for the existence of an interaction between state policy mood and percent black. Earlier we noted that while the percentage of black residents in a covered jurisdiction might also be, like state mood, a sign of affect toward the federal government, state mood and percent black were not strongly correlated. This does not, however, preclude the possibility of an interactive relationship between state mood and percent black. It is possible that covered jurisdictions with larger black populations that also lie in states with more liberal policy preferences will be less likely to bail out than their counterparts in states with less liberal policy preferences. Given our earlier finding that a higher black share of a jurisdiction's population is associated with a lower probability of bailing out, this possibility does not seem remote. While jurisdictions in more liberal states may be more likely to comply with the stipulations for bailing out, jurisdictions in which a larger share of the population stands to benefit from retaining federal supervision
of election laws may be less likely to pursue bailout. In short, state mood and racial demographics may work at cross purposes for covered jurisdictions. Although jurisdictions characterized by both high ambient policy liberalism and large black populations may be better positioned to bail out, they may be less inclined to bail out. If this is true, the coefficient on the interaction of state mood and percent black will be negative, signifying that the chances of bailing out decline as policy liberalism and the size of the black share of the population both increase.

The results in Table 3 suggest that there are interactive effects between state mood and percent black; however, these effects occur only among covered jurisdictions in the South. The interaction of state mood and percent black has a statistically significant coefficient only in the South model, presented in Column 2. Since it is less than one, the coefficient signifies a decline in the probability of bailing out. To be precise, the coefficient signifies that, ceteris paribus, the probability of bailing out in the South decreases about 2.4 percent on average as both state mood and percent black increase. This finding is consistent with our expectation that covered jurisdictions that have larger black populations and are in states with more liberal policy positions will be less likely to bailout. In the South, the demographic characteristics of covered jurisdictions and policy ideology of the surrounding state operate at cross purposes.

<p>| Table 3. The Interactive Effects of State Mood and Percent Black on Bailout |
|---------------------------------|-----------------|-----------------|-----------------|
|                                | All             | South           | Non-South        |
| State Mood                     | 1.286           | 5.040***        | 0.657           |
|                                | (0.169)         | (1.685)         | (0.181)         |
| Percent Black                  | 0.727           | 2.419**         | 1.154           |
|                                | (0.286)         | (0.702)         | (0.937)         |
| State Mood x Percent Black     | 1.005           | 0.976***        | 0.995           |
|                                | (0.01)          | (0.007)         | (0.019)         |
| Obama’s Share of Two-Party Vote| 1.013           | 1.034           | 0.976           |
|                                | (.020)          | (0.022)         | (0.023)         |
| 1970 Formula                   | 27.658**        | (33.981)        |
| 1975 Formula                   | 0.060           | (0.090)         |</p>
<table>
<thead>
<tr>
<th></th>
<th>&lt;0.000*</th>
<th>&lt;0.000</th>
<th>&lt;0.000</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(0.0001)</td>
<td>(8.25x10^{-25})</td>
<td>(2.13x10^{-9})</td>
</tr>
<tr>
<td>N</td>
<td>928</td>
<td>852</td>
<td>76</td>
</tr>
<tr>
<td>Wald $\chi^2$</td>
<td>99.81***</td>
<td>3600.10***</td>
<td>9.20</td>
</tr>
<tr>
<td>-2 Log Likelihood</td>
<td>257.435</td>
<td>145.802</td>
<td>57.677</td>
</tr>
</tbody>
</table>

Entries are odds ratios. Figures in parentheses are standard errors, clustered by state. *$p \leq 0.05$; **$p \leq 0.01$; ***$p \leq 0.001$. Jurisdictions in Alaska are excluded because of incomplete data. The reference category for the VRA coverage formula variables is the 1965 formula; thus, the odds ratios for the formula variables should be interpreted as differences in the likelihood of bailing out if a jurisdiction was covered under the 1970 and 1975 formulas and the likelihood of bailing out if a jurisdiction was covered under the 1965 formula.

Overall, our results indicate that state public policy liberalism, local racial demographics, and federal legislative changes are linked to a covered jurisdiction’s probability of bailing out. Moreover, there is evidence that the positive effect state policy liberalism has upon the chances of bailout are attenuated by the size of the black share of a covered jurisdiction’s population: the larger this share, the smaller the impact state policy liberalism has. We are cautious of extrapolating the existence of a causal relationship from these results, as additional analysis would be required to establish whether changes in the variables shown here to have a significant relationship with bailout actually cause changes in the probability of bailout. Nevertheless, the results point to some possible explanations for the fact that some covered jurisdictions have bailed out while others have not. The evidence corroborates some prior studies of the bailout process, but casts doubt upon assumptions made within the Supreme Court about the difficulties of bailing out under the coverage and bailout provisions in operation when *Shelby County v. Holder* was decided. The persistence of federal supervision of election laws in covered jurisdictions seems to be at least partly a function of the sociopolitical characteristics of covered jurisdictions.

134 See, e.g., Hebert, *supra* note 9.
IV. IMPLICATIONS AND CONCLUSION

In adopting the 1965 Voting Rights Act, Congress exercised its 15th Amendment authority to ensure that the right to vote was not denied or abridged on account of race or skin color. The Supreme Court’s invalidation of §4(b) of the Voting Rights Act in Shelby County marked the end of decades of judicial support for the basic constitutionality of the Voting Rights Act. Amidst changing patterns of black registration, turnout, and representation in government, the Court determined that it had no choice but to find the formula unconstitutional. The fact that such a consequential decision turned on the perception that the burdens the VRA imposed on states were no longer compatible with political reality draws our attention to the provision of the VRA ostensibly designed to offset the federalism costs of preclearance by giving states and localities a way to reclaim their autonomy. The Supreme Court gave little heed to this balancing mechanism, seemingly already convinced that it was either irrelevant or inutile. Yet we show here that the bailout mechanism has produced the desired effects for dozens of covered jurisdictions: rewarding consistently nondiscriminatory behavior with administrative autonomy. Moreover, our statistical models reveal that it is possible to identify factors conducive to bailout.

Congress cannot simply reverse course on the Voting Rights Act and reinstate the invalidated coverage formula; it will need to devise a formula that both accomplishes the venerable goals of the original law and passes the “current conditions” test the Roberts Court seemed to announce in Shelby. A bill to amend the Voting Rights Act introduced by Senator Patrick Leahy in 2014 devoted a substantial portion of its real estate to modifying §4(b) to capture today’s perpetrators of electoral improprieties. Yet revising §4(a) to facilitate more bailouts might also go a long way toward mollifying the concerns about federalism that underlay the “current conditions” argument in Shelby and are likely to frame judicial reviews of the Voting Rights Act for at least the near future. Building upon Gerald Hebert’s observation that every jurisdiction that has

136 U.S. CONST. AMEND. XV
137 E.g., Shelby Cnty., 133 S. Ct. at 2612.
138 See id.
139 See id.
140 S. 1945, 113th Cong. (2014). New bills have been introduced in 2015, including S. 1659 and H.R. 2867.
applied for bailout since 1982 has been successful,¹⁴² this study identifies the political and demographic characteristics that make applications for bailout more enticing. The bailout provision that emerges from congressional debates over the Voting Rights Act should be one that anticipates how these ideological and demographic characteristics will shape the behavior of jurisdictions covered under a revised VRA.

¹⁴² See Hebert, supra note 9, at 270.