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“Restoring the Voting Rights Act: Combating Discriminatory Abuses”  
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To Chairman Blumenthal, Ranking Member Cruz, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to appear and speak about the Senate version of the John Lewis Voting Rights Advancement Act of 2021 (“VRAA”). It is beyond dispute that voting rights are under assault, and this provision is a necessary step towards restoring the protections of the Voting Rights Act of 1965 (“VRA”). Indeed, the COVID-19 pandemic revealed, in stark fashion, the urgent need for new federal voting rights legislation by exacerbating already existing inequities in our political system. For example, Georgia closed 214 polling places, located mostly in poor or minority communities, between 2012 and 2018.<sup>1</sup> These earlier polling place closures, coupled with a shortage of poll workers and additional pandemic related closings, led to waiting times of nine, ten, and sometimes, eleven hours to cast a ballot during the 2020 election cycle.<sup>2</sup> The challenges faced by those seeking to exercise their right to vote in Georgia and other states derive, in part, from the U.S. Supreme Court’s decision in *Shelby County v. Holder*. The *Shelby County* decision effectively hobbled the preclearance regime of the VRA, which would have prevented many of these polling place closures by requiring the state to submit these changes to the federal government for approval before they could take effect.

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<sup>1</sup> Mark Niese, Maya T. Prabhu, and Jacquelyn Elias, *Voting precincts closed across Georgia since election oversight lifted*, THE ATLANTA JOURNAL CONSTITUTION, Aug. 31, 2018, available at <https://www.ajc.com/news/state--regional-govt--politics/voting-precincts-closed-across-georgia-since-election-oversight-lifted/bBkHxptlim0Gp9pKu7dfnN/>.

<sup>2</sup> Sam Levine, *More than 10-hour wait and long lines as early voting starts in Georgia*, THE GUARDIAN, Oct. 12, 2020, available at <https://www.theguardian.com/us-news/2020/oct/13/more-than-10-hour-wait-and-long-lines-as-early-voting-starts-in-georgia>.

Since *Shelby County*, hundreds of polling places have closed in jurisdictions formerly covered by the VRA, making voting less accessible for minority communities. To name some of the worst offenders, Louisiana has 126 fewer polling places than it did in 2012,<sup>3</sup> and Mississippi closed five percent of its polling places (around 100 precincts) in six years,<sup>4</sup> but this problem is not uncommon. According to the NAACP, “since 2013, jurisdictions formerly covered by [s]ection 5 closed, on average, almost 20% more polling stations per capita than jurisdictions in the rest of the country.”<sup>5</sup>

Georgia, which was a swing state in the 2020 presidential election, also overhauled its voting laws in the wake of that election, enacting changes that will have a deleterious effect on the ability of communities of color to cast a ballot in the state. Georgia’s new restrictions, for example, would curb access to the absentee voting process that was used at high rates by minority communities during the 2020 election cycle.<sup>6</sup> Other states like Florida, Texas, and Arkansas have followed Georgia’s lead, enacting recent changes to their voting laws also designed to curb this historic turnout among minority groups.

Due to the pandemic, state legislators—particularly in Pennsylvania which, like Georgia, was a crucial swing state in the 2020 presidential election—have shown an interest in restricting absentee voting, seeking to make voting through this method more burdensome to limit its use by voters. Among these proposed restrictions include imposing witness signature requirements; limiting absentee ballot return options; and reducing access to drop boxes.<sup>7</sup> While the pandemic has led to increased attention to voting by mail, state legislatures are also seeking to restrict voting in the ways in which we have become very familiar: through strict voter identification and proof of citizenship requirements and by purging the voting rolls.

Numerous states have introduced bills that either strengthen or impose new voter identification requirements, and others have introduced measures to expand their voter purge practices.<sup>8</sup> These measures have been a foil, ostensibly enacted under the auspices of addressing voter fraud, but for all practical purposes, burdening the rights of minority voters. Similarly, a number of bills have been proposed across multiple states that would require documentary proof of citizenship to register to vote, a requirement that has been litigated for over a decade and that is potentially a violation of federal law.<sup>9</sup> In all, over 400 bills with restrictive voting provisions have been introduced in 49

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<sup>3</sup> Elizabeth Crisp, *Louisiana voters have fewer polling places after dozens shuttered in recent years*, THE ADVOCATE, Sept. 10, 2019, available at [https://www.theadvocate.com/baton\\_rouge/news/politics/article\\_fd89ca52-d374-11e9-aaa2-c3e60a57db25.html](https://www.theadvocate.com/baton_rouge/news/politics/article_fd89ca52-d374-11e9-aaa2-c3e60a57db25.html).

<sup>4</sup> Anna Wolfe and Alex Rozier, *Free from federal oversight, 5 percent of Mississippi polling locations have closed since 2013*, MISSISSIPPI TODAY, Oct. 24, 2018, available at <https://mississippitoday.org/2018/10/24/free-from-federal-oversight-5-percent-of-mississippi-polling-locations-have-closed-since-2013/>.

<sup>5</sup> NAACP LDF, *Democracy Diminished: State and Local Threats to Voting Post Shelby County v. Holder*, June 22, 2021, available at [https://www.naacpldf.org/wp-content/uploads/LDF\\_01192021\\_DemocracyDiminished-4b\\_06.24.21v2.pdf](https://www.naacpldf.org/wp-content/uploads/LDF_01192021_DemocracyDiminished-4b_06.24.21v2.pdf).

<sup>6</sup> Nick Corasaniti and Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES, April 2, 2021, available at <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html>.

<sup>7</sup> Alison Durkee, *Pennsylvania Governor Vetoes Voting Restrictions – But GOP Could Still Pass Voter ID Rule Anyway*, FORBES, June 30, 2021, available at <https://www.forbes.com/sites/alisondurkee/2021/06/30/pennsylvania-governor-vetoes-voting-restrictions---but-gop-could-still-pass-voter-id-rule-anyway/?sh=63854b4b216b>.

<sup>8</sup> Brennan Center for Justice, *Voting Laws Roundup: July 2021*, available at <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>.

<sup>9</sup> *Id.* See also *Arizona v. Inter Tribal Council of Ariz., Inc.* (“*Arizona Inter Tribal*”), 570 U.S. 1 (2013) (finding that Arizona’s documentary proof of citizenship requirement was preempted by the National Voter Registration Act).

states.<sup>10</sup> Effectively, this means that there is only one state in which legislators have not introduced restrictive voting measures, highlighting the need for federal intervention on this front.<sup>11</sup>

The absence of a VRA coverage formula, particularly considering the spate of newly proposed and enacted voting restrictions, will only exacerbate the discrimination that minorities traditionally face when trying to vote. And the Supreme Court has signaled that it likely will not intervene. In the recent case of *Brnovich v. DNC*, the Court held that two Arizona voting laws—one that prohibits ballot collection by anyone other than election officials and close family members, and another that requires ballots cast anywhere other than an assigned precinct be discarded—do not violate Section 2 of the Voting Rights Act.<sup>12</sup> The Court made this determination despite conclusive evidence that both restrictions disproportionately disenfranchised voters of color relative to whites, contrary to Section 2’s mandate that minority voters have equal opportunity to participate in the political process.<sup>13</sup> *Brnovich*’s interpretation of Section 2, unsanctioned by the text and history of the statute, privileges a status quo that is less inclusive and more restrictive than what Congress envisioned in amending Section 2 almost forty years ago.<sup>14</sup>

This rollback in voting protections is occurring at a time in which states are posed to redraw their state legislative and congressional seats following the 2020 census. Communities of color will be particularly vulnerable during the upcoming round of redistricting given the invalidation of Section 4(b) of the Voting Rights Act and the Court’s narrow reading of Section 2 of the Act in the *Brnovich* decision. Even when there was a coverage formula and a more robust version of Section 2 in place, legislators in several states sought to undermine the political power of these groups in defending their 2010 redistricting plans. Their justifications for doing so ranged from arguing that the Voting Rights Act *required* packing minority groups into fewer districts;<sup>15</sup> to hiding behind partisan justifications to excuse racial gerrymandering;<sup>16</sup> and to engaging in outright intentional racial discrimination in voting.<sup>17</sup>

As this discussion illustrates, the right to vote is increasingly under threat, but these threats are not unprecedented. For its part, the *Shelby County* decision tried to paint pervasive voter discrimination as a relic of a time long past, ignoring that legislators often fall back on certain reliable practices to

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<sup>10</sup> *Voting Laws Roundup*, *supra* note 8.

<sup>11</sup> Vermont is the exception. See Maria Cramer, Vermont’s Governor Expands Voting Rights, Bucking Republican Push, N.Y. TIMES, June 7, 2021, *available at* <https://www.nytimes.com/2021/06/07/us/vermont-voting-rights.html>.

<sup>12</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

<sup>13</sup> Among the considerations, according to the Court, that support its finding that there is no Section 2 liability is that the Arizona restrictions do not impose inconveniences that are inconsistent with the “usual burdens” of voting; the voting rules do not depart from what was standard practice in 1982; and states can legislate to prevent fraud, even if the fraud occurs in another state. *Id.*

<sup>14</sup> See, e.g., *id.* (Kagan, J., dissenting). As Justice Kagan notes:

The majority...finds its decision on a list of mostly made-up factors, at odds with Section 2 itself. To excuse this unusual free-form exercise, the majority notes that Section 2 authorizes courts to conduct a “totality of circumstances” analysis. ... That inquiry hardly gives a court the license to devise whatever limitations on Section 2’s reach it would have liked Congress to enact. But that is the license the majority takes. The “important circumstances” it invents all cut in one direction—toward limiting liability for race-based voting inequalities. ...

*Id.*

<sup>15</sup> *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015).

<sup>16</sup> *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

<sup>17</sup> *Abbott v. Perez*, 138 S. Ct. 1 (2018).

diminish the political power of minority communities. Part of the reason that the Court’s view of voting discrimination is so narrow is because that body focuses on actions that affirmatively keep someone from casting a ballot or, alternatively, looks for explicit statements of discriminatory intent.<sup>18</sup> The Court ignores that state legislators use a mix of old and new tactics in their voter suppression efforts, seeking to achieve the same ends without articulating their discriminatory motives for doing so.

The VRAA accepts the invitation extended by *Shelby County v. Holder* to provide a new coverage formula that is better tailored to remedy potential constitutional violations. The prior coverage formula violated the equal sovereignty principle, according to the Court, because it applied to mostly southern jurisdictions, but not equally guilty northern states.<sup>19</sup> Even more perniciously, in the Court’s view, coverage was determined based on whether states used devices such as poll taxes and literacy tests, which have been illegal for at least four decades.<sup>20</sup> By singling out certain electoral schemes that disenfranchise and/or minimize the voting power of communities of color, the VRAA’s practice-based coverage updates the provisions that would trigger federal oversight of state electoral systems – from the long eradicated practices heavily criticized by the *Shelby County* Court to techniques that have been consistently used and, importantly, are still being used by states to disenfranchise minority voters. This structure complements the VRAA’s geographic coverage formula, which triggers preclearance if jurisdictions have committed a certain number of voting rights violations under federal law. Historically, many of these violations have involved practices that would be subject to practice-based coverage under the current bill, making this provision a vital pre-enforcement mechanism to screen these laws before they can do damage.<sup>21</sup>

This written testimony focuses on Congress’ broad authority to enact the practice-based preclearance provision of the VRAA. To explain the scope of this authority, the remainder of this testimony is organized as follows. Part I clarifies the scope of congressional power under the Fourteenth and Fifteenth Amendments and the Elections Clause of Article I, Section 4,<sup>22</sup> illustrating that these provisions provide sufficient constitutional authorization for practice-based coverage under existing judicial precedents. Part II discusses the VRAA’s demographic trigger, which subjects to practice based preclearance only those jurisdictions that have racial or minority groups that account for 20% or more of the political subdivision’s voting age population. The 20% threshold tailors coverage to those jurisdictions most likely to use the covered changes to undermine the political power of their minority populations. This section also briefly canvasses some of the practices that would be subject to coverage under the VRAA to show that states have long used these practices as vehicles for discrimination, illustrating the need for federal intervention. Because Congress can rely on multiple sources of constitutional authority as justification for practice-based

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<sup>18</sup> *Abbott v. Perez*, 138 S. Ct. 1 (2018); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

<sup>19</sup> *Shelby County v. Holder*, 570 U.S. 529, 544-45 (2013) (noting that “despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.”).

<sup>20</sup> The Twenty-Fourth amendment to the constitution outlawed poll taxes for federal elections in 1964, and the Supreme Court declared poll taxes in state elections unconstitutional in 1966. *See Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

<sup>21</sup> *See* Part II, *infra*.

<sup>22</sup> The Elections Clause, in its entirety, provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” U.S. CONST. art. I, § 4, cl. 1.

coverage and there is ample evidence that the targeted practices have been used to abridge or deny the right to vote, this testimony concludes that practice based preclearance is a constitutional use of congressional power.

## I. The Constitutional Framework

In assessing the legislative record underlying the Voting Rights Act, the *Shelby County* majority heavily criticized Congress' failure to show "anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."<sup>23</sup> By requiring a record of intentional discrimination, in 2013, similar to the extensive record of discrimination in voting that Congress established in 1965, the Court placed a substantial hurdle before Congress should it seek to authorize a new coverage formula relying on the Fourteenth and Fifteenth Amendments alone.

Indeed, one of the biggest landmines facing the Voting Rights Act in the years prior to *Shelby County* was that it had basically functioned since 1982 as an effects-based regime. States can violate Section 2 of the Voting Rights Act if they adopt a law, practice or procedure that has the effect of discriminating based on race. Similarly, Section 5 preclearance is premised on a showing of nonretrogression, which asks whether the proposed change has the purpose or effect of making minorities worse off than under the prior law. Neither provision requires that the state act with discriminatory purpose to face liability, but Section 2 violations as well as Section 5 preclearance denials were a substantial portion of the record that Congress compiled in 2006. Despite the Court's incessant focus on discriminatory intent and its efforts to hamstring federal voting rights legislation, however, Congress is not helpless in the face of the current challenges to the right to vote and minority political representation. *Shelby County* notwithstanding, Congress retains substantial authority under the Fourteenth and Fifteenth Amendments as well as the Elections Clause to pass the practice-based coverage provision of the VRAA.

### 1) The Fourteenth and Fifteenth Amendments

The Fourteenth and Fifteenth Amendments protect a fundamental right to vote and prohibit racial discrimination in voting, respectively. While the Fifteenth Amendment empowers Congress to address racially discriminatory action by the states, the Fourteenth Amendment separately authorizes Congress to target practices, either discriminatory or nondiscriminatory, that undermine the fundamental right to vote in state, local, or federal elections. However, the *Shelby County* Court read both Amendments to require Congress to establish a pattern of intentionally discriminatory action on the part of the states as a prerequisite for reauthorizing the original coverage formula of Section 4(b).<sup>24</sup>

This view misrepresents prior caselaw. Initially, the Supreme Court broadly interpreted Congress' power to enforce the Fourteenth and Fifteenth Amendments. For example, in *South Carolina v. Katzenbach*, the Court held that the preclearance provisions of the VRA were constitutional under the

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<sup>23</sup> *Shelby County*, 570 U.S. at 554.

<sup>24</sup> Congress initially passed the Voting Rights Act in 1965 under the Fifteenth Amendment, but cited both the Fourteenth and Fifteenth Amendments when it reauthorized the Act in 1970. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 52 U.S.C. §§10101 (2006)).

Fifteenth Amendment, citing the famous language from *McCulloch v. Maryland* regarding the scope of federal power:

Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>25</sup>

Similarly, in *City of Rome v. United States*, the Court rejected the argument that Congress' enforcement power under the Fifteenth Amendment was limited to remedying only intentional racial discrimination, noting that "even if [Section] 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to [Section] 2, outlaw voting practices that are discriminatory in effect."<sup>26</sup> The Court further observed that Congress may pass legislation under Section 2 of the Fifteenth Amendment to prohibit acts that do not violate Section 1 of the Act, "so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch v. Maryland*."<sup>27</sup>

The Court has also described Congress' enforcement power under the Fourteenth Amendment as broader than the judicial power to define the substantive scope of Section 1 of the Amendment.<sup>28</sup> In *Katzenbach v. Morgan*, for example, the Court held that legislation enacted pursuant to Section 5 of the Amendment would be upheld

so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with 'the letter and spirit of the constitution' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.<sup>29</sup>

In effect, the Court interpreted Congress' enforcement powers as "no less broad than its authority under the Necessary and Proper Clause," capable of addressing state action that has a discriminatory purpose, that has a discriminatory effect, or that might not even violate the substantive provisions of the Amendments.<sup>30</sup> And given the reach of the Necessary and Proper Clause,<sup>31</sup> Congress' power to renew the Voting Rights Act had been beyond question until the Court's decision in *City of Boerne v. Flores*.

In *City of Boerne*, the Court substantially narrowed Congress' enforcement power under the Fourteenth Amendment. At issue was the refusal of city authorities to grant a building permit to the regional Catholic archbishop to enlarge a church building that had been designated a historic landmark.<sup>32</sup> The archbishop claimed that this refusal violated the Religious Freedom Restoration Act of 1993 ("RFRA"), the relevant provision of which prohibited state governments from

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<sup>25</sup> *Id.* at 308.

<sup>26</sup> 446 U.S. 156, 173 (1980).

<sup>27</sup> 17 U.S. 316 (1819).

<sup>28</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (recognizing Congress' power under the Fifteenth Amendment to pass the VRA but seeing no need to overrule its own contrary precedents).

<sup>29</sup> *City of Rome*, 446 U.S. 156, 176 (1980) (citing *Katzenbach v. Morgan*, 384 U.S. at 641 (1996)).

<sup>30</sup> *Id.* at 175.

<sup>31</sup> See generally *United States v. Comstock*, 130 S. Ct. 1949 (2010) (discussing the extraordinary breadth of the Necessary and Proper Clause).

<sup>32</sup> *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) (evaluating a city ordinance that required preapproval for all construction affecting historic landmarks and buildings).

“substantially burdening’ a person’s exercise of religion even if the burden results from a rule of general applicability.”<sup>33</sup> In passing RFRA, Congress relied on its enforcement power based on the rationale that it was protecting one of the First Amendment freedoms from state infringement under the Fourteenth Amendment.<sup>34</sup>

Congress passed RFRA in response to a Supreme Court decision, *Employment Division v. Smith*, which held that rational basis review applied to laws of general applicability that infringe on a person’s exercise of religion.<sup>35</sup> Contrary to this caselaw, RFRA subjected these laws to strict scrutiny. The fact that RFRA increased the level of scrutiny for laws of general applicability beyond that required by *Smith* led the Court to conclude that RFRA was not a proper exercise of Congress’ enforcement powers because the statute did not deter or remedy a constitutional violation.<sup>36</sup> Instead, Congress made it more difficult for states to defend laws that would be constitutional under the Court’s jurisprudence.

According to the Court, Congress could not use its Section 5 power to “decree the substance of the Fourteenth Amendment’s restrictions on the states” because “[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”<sup>37</sup> In other words, Congress’ enforcement powers are limited to remedial fixes and do not include the ability to make substantive changes to the scope of the Fourteenth Amendment.<sup>38</sup> In order to distinguish Congress’ remedial power from acts that make a substantive change in the governing law, *Boerne* established that “there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>39</sup>

There are two important takeaways from the *City of Boerne* decision as it pertains to Congress’ authority to protect the right to vote. First, *Shelby County* never determined whether *City of Boerne*’s “congruence and proportionality” standard also applies to the Fifteenth Amendment, leaving the standard by which the Court reviews congressional authority in flux.<sup>40</sup> The Court contended that the coverage formula of Section 4(b) failed rational basis review<sup>41</sup> and the standard derived from *Northwest Austin Municipal Utility District Number One v. Holder*,<sup>42</sup> which, according to the Court,

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<sup>33</sup> *Id.* at 515–16.

<sup>34</sup> *Id.* at 519–20.

<sup>35</sup> *Id.* at 512–16.

<sup>36</sup> *Id.* at 519.

<sup>37</sup> *Id.* (arguing that Congress “does not enforce a constitutional right by changing what the right is”).

<sup>38</sup> *Id.* at 520.

<sup>39</sup> *Id.* at 519–20. The Court later expounded on the congruence and proportionality test. *See* *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (Congress could not subject states to suits under Title I of the American with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Congress could not subject states to suits under the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Congress could not subject states to suits for patent infringement). *But see* *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Pitts*, *supra* note 30, at 247 (arguing that “the most important contribution *Hibbs* made to the congruence and proportionality body of jurisprudence is that the [Supreme] Court somewhat lessened Congress’s burden to prove a widespread pattern of recent constitutional violations to justify a prophylactic remedy”).

<sup>40</sup> In its grant of certiorari, the Court acknowledged that the preclearance regime is based on dual sources of constitutional authority, but otherwise ignored the implications of this fact in assessing the regime’s constitutionality. *See* *Shelby Cty. v. Holder* (2013) (discussing only Fifteenth Amendment), *cert. granted*, 568 U.S. 1006 (2012) (acknowledging Fourteenth and Fifteenth Amendments in grant of certiorari).

<sup>41</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013) (explaining that Section 4(b) was rational “in both practice and theory” when adopted but is now irrational).

<sup>42</sup> 557 U.S. 193 (2009).

“guides [its] review under both [the Fourteenth and Fifteenth] Amendments.”<sup>43</sup> However, the *Northwest Austin* case did not articulate a standard of review under these provisions.<sup>44</sup>

In reality, Congress’ power under Section 2 of the Fifteenth Amendment remains significantly broad and ostensibly undisturbed by the Court’s opinion in either *City of Boerne* or *Shelby County*.<sup>45</sup> The appropriate standard for Fifteenth Amendment legislation remains the standard articulated by the Court in *South Carolina v. Katzenbach* and *City of Rome v. United States*.<sup>46</sup> These cases give Congress significantly more leeway regarding the scope of federal legislation than *City of Boerne*’s congruence and proportionality test.

Second, while the Court’s decision in *City of Boerne* sharply circumscribed Congress’ ability to enforce the Fourteenth Amendment, it remains true, after the decision, that intentional discrimination is not a prerequisite for a Fourteenth Amendment violation. That decision specifically pertained to the scope of congressional power, not the contours of what the Court has determined to be a substantive violation of the Fourteenth Amendment. Thus, post-*City of Boerne*, Congress is constitutionally empowered to identify and target the practices that state legislatures use to abridge or deny the right to vote in violation of the Fourteenth Amendment, even if such actions are not racially discriminatory.

This view accords with existing caselaw. In *Harper v. Virginia State Board of Elections*, the Court held that the Equal Protection Clause of the Fourteenth Amendment protects a fundamental right to vote.<sup>47</sup> Importantly, the *Harper* decision established that voting is a fundamental right under the Fourteenth Amendment that is distinct from the Fifteenth Amendment’s prohibition on racial discrimination in voting. As the Court held in *Harper* and has consistently reaffirmed for decades, the Fourteenth Amendment can be violated by practices that abridge or deny the right to vote in the absence of racially discriminatory intent.<sup>48</sup> Congress has the authority, under Section 5, to address these violations and *City of Boerne* does not prohibit Congress from doing so.

## 2) The Elections Clause

The *Shelby County* Court expressed reservations about Section 4(b) of the VRA because of the federalism costs that the formula imposed on covered jurisdictions, but the federalism issue is significantly more complicated than the Court appreciated. Notably, the Elections Clause empowers states to choose the “Times, Places, and Manner” of federal elections but, importantly, reserves to

<sup>43</sup> *Shelby Cty.*, 570 U.S. 529 n.1.

<sup>44</sup> See *Northwest Austin Municipal District Number One v. Holder*, 557 U.S. 193, 2004 (2009) (“The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. . . . That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test [congruent and proportional or rational basis.]” (citations omitted)).

<sup>45</sup> *Shelby County v. Holder*, 570 U.S. 529, 555 (2013) (declining to resolve whether the congruence and proportionality standard applied to the Fifteenth Amendment and noting that Section 4(b) is not “consistent with the letter and spirit of the constitution” as required by the *McCulloch* standard); *Id.* at 569 (Ginsburg, J., dissenting) (“Today’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed ‘rational means.’”).

<sup>46</sup> 383 U.S. 301 (1966).

<sup>47</sup> *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

<sup>48</sup> See *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (noting that “[e]ven rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications and that courts must balance the benefits of the law against its burdens in assessing constitutionality).



Congress the power to make or alter state electoral schemes. In essence, Congress has a veto power over certain state electoral practices, a veto that was present in the VRA's suspension of regulations that govern federal elections in targeted states.<sup>49</sup> Yet the Court, in assessing the constitutionality of the coverage formula of Section 4(b), ignored how the Elections Clause, as a potential source of congressional authority for the VRA, mitigated the federalism concerns present in the case.

Because of its structure, the Elections Clause has less to do with federalism, as that term is typically understood,<sup>50</sup> and more to do with providing an organizational structure that gives the states broad power to construct their electoral systems while retaining final policymaking authority for Congress. According to the Court, Congress' authority under the Elections Clause "is paramount,"<sup>51</sup> and that body has, on occasion, imposed substantive requirements that states must follow in structuring federal elections.<sup>52</sup> The Clause's overarching purpose is to ensure the continued existence and legitimacy of federal elections,<sup>53</sup> the health of which have been continually challenged by many of the practices that would be subject to practice-based coverage.

The Supreme Court has ignored how congressional power under the Elections Clause challenges the narrative of state sovereignty that dominates this area and, ultimately, led to the invalidation of Section 4(b) of the Voting Rights Act. The Court, at least initially, believed that Congress had the authority to circumscribe the states' authority over elections, but not because of broad federal power under the Elections Clause. Instead, the Court assumed that the extraordinary circumstances of extensive discrimination in the south warranted federal intervention in matters traditionally regulated by the states. In *South Carolina v. Katzenbach*, for example, the Court rejected the argument that the VRA distorted our constitutional structure of government and offended our system of federalism.<sup>54</sup> The *Katzenbach* Court noted that although the states "have broad powers to determine the conditions under which the right of suffrage may be exercised," the Fifteenth Amendment supersedes contrary exertions of state power.<sup>55</sup> The idea that Congress can intervene in elections only when states are behaving badly has persisted in the case law, but this view ignores other constitutional provisions, like the Elections Clause, that do not require a finding of official wrongdoing.

Instead, the Elections Clause embodies principles that ensure the legitimacy of federal elections, contrary to the state centered values that are the focus of the Court's federalism jurisprudence. As

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<sup>49</sup> See Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).

<sup>50</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991) (reviewing the "system of dual sovereignty between the States and the Federal Government").

<sup>51</sup> *Arizona Inter Tribal*, 133 S. Ct. 2247, 2253 (2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

<sup>52</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (plurality opinion) (describing the Apportionment Acts of 1842, 1862, and 1901, which required, at various points, that members of the House be elected from single member districts that are compact, contiguous, or have equal populations).

<sup>53</sup> See Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211 (2018).

<sup>54</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 313-14 (1966) ("Case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration. Voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders."); see also *City of Rome v. United States*, 446 U.S. 156, 176 (1980) ("[L]egislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with the letter and spirit of the constitution,' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.").

<sup>55</sup> *Katzenbach*, 383 U.S. at 324.

the Court has recognized, the Elections Clause prioritizes federal law, despite the substantial authority that states exercise over federal elections, because “[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules” to “insur[e] against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.”<sup>56</sup> Moreover, the Clause “act[s] as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate.”<sup>57</sup>

The Court must interpret the allocation of power between the two levels of government in a manner that best promotes these goals by recognizing that Congress has wide ranging authority to achieve these ends. Under the Clause, Congress has authority to “alter” state law where appropriate, “make” law completely independent of the state’s legal regime, and “commandeer” state officials to implement federal law. This structure permits Congress to enact a complete code for federal elections, which is an invaluable source of authority, particularly if states have jeopardized the health and vitality of federal elections in some way. These values, as well as the text and structure of the Clause itself, empower Congress to pass broad federal voting rights legislation.

First, as sovereign, Congress’ power over the times, places, and manner of federal elections is broader than the power retained by the states.<sup>58</sup> For example, in *Foster v. Love*, the Court held that 2 U.S.C. § 7, which sets the November date for the biennial election for federal offices, preempted a Louisiana law allowing candidates for federal office to be “elected” on primary day in October if they obtained a majority of the votes.<sup>59</sup> Notably, the Court did not hold that the states must have the opportunity to set the date for federal elections *first* before Congress could act, which would indicate that federal action is limited to displacing state authority rather than setting its own rule. Congressional power under the Clause not only allows Congress to set a date even if Louisiana had failed to do so for its general election, but Congress could arguably set voter qualifications if there was also a gap in that area, indicating that federal power under the Clause is different in kind and scope than state authority.<sup>60</sup> The Court has recognized that the Elections Clause “gives Congress ‘comprehensive’ authority to regulate the details of elections, including the power to impose ‘the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.’”<sup>61</sup>

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<sup>56</sup> *Arizona State Legis. v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015).

<sup>57</sup> *Id.*

<sup>58</sup> The Court has rejected a construction of congressional power in other contexts in which the scope of Congress’ authority would be unduly tied to the actions of the states or the courts. *See Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966) (rejecting New York’s challenge to the literacy test provisions of the VRA because Congress does not need a judicial determination that state literacy requirements violate the Constitution before Congress can act).

<sup>59</sup> *See* 522 U.S. 67, 68-69 (1997); *see also* *Millsaps v. Thompson*, 259 F.3d 535, 547, 549 (6th Cir. 2001) (upholding the Tennessee early voting statute because the law was not “intended to make a final selection of a federal officeholder” on the day before Election Day).

<sup>60</sup> *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B. U. LAW REV. 317 (2019). *See also* Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 52 U.S.C. §§ 20301-20311 (2018). UOCAVA created a uniform federal ballot specifically for use by a category of voters overlooked by state law—military personnel—and incorporated state voter qualification standards to determine which personnel were entitled to vote. The practical effect of UOCAVA, through its incorporation of state voter qualification standards for a category of voters overlooked or insufficiently protected by state law, was to create a new category of voters for purposes of federal elections even though UOCAVA was enacted pursuant to Congress’ authority under the Elections Clause.

<sup>61</sup> *Foster v. Love*, 522 U.S. 67, 71 n.2 (1997) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *see also id.* (stating that this authority encompasses both congressional elections and “any ‘primary election which involves a necessary step in

Second, the text of the Clause, which gives Congress a general supervisory power, allows Congress to commandeer state offices, state law, and state officials to execute federal law—authority that stands in stark contrast to traditional views about the nature of sovereignty under federalism doctrine.<sup>62</sup> The Clause’s text, providing that “The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed* in each State by the Legislature thereof” is very different from Congress’ authority, in which Congress “*may at any time* by Law make or alter such Regulations.”<sup>63</sup> The use of the mandatory language “shall be prescribed” to describe state authority and “may ... make or alter” to describe congressional authority illustrates that Congress can act if it chooses, but states must act, even if at the behest of Congress.

Thus, to the extent that federalism traditionally is, and has been, about granting a subunit of government final policymaking authority in an area of governance, the Elections Clause denies states the true hallmark of sovereignty by giving Congress veto authority over state regulations governing the times, places, and manner of federal elections. The failure to recognize congressional sovereignty in this context has led the Supreme Court to either interpret Congress’ power under the Elections Clause more narrowly than is appropriate to avoid intruding on the states’ authority over elections or, as in the case of *Shelby County*, ignore the Clause altogether. But its presence as a source of federal power, when combined with congressional enforcement authority under the Fourteenth and Fifteenth Amendments, affects judicial review of the legislative record in important ways.

### 3) Judicial Assessment of the Legislative Record

Congress has power pursuant to multiple sources of constitutional authority to enact practice-based coverage, which implicates the Fifteenth Amendment’s prohibition against racial discrimination in voting; the Fourteenth Amendment’s protections for the fundamental right to vote; and congressional power over the times, places, and manner of federal elections under the Elections Clause. The fact that multiple constitutional provisions are at play—which, in the aggregate, allows Congress to reach practices that govern local, state, and federal elections—necessitates more deference to the legislative record than if Congress were acting pursuant to one or two provisions that serve as a narrower grant of authority than these three sources of authority, collectively. The

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the choice of candidates for election as representatives in Congress” (quoting *United States v. Classic*, 313 U.S. 299, 320 (1941)).

<sup>62</sup> *Cf.* *New York v. United States*, 505 U.S. 144, 151-54 (1992) (holding that Congress could not commandeer states into enacting a federal regulatory program by forcing them to take title to their waste). *See also* *Shelby County v. Holder*, 570 U.S. 529 (2013) (criticizing the preclearance regime for “requir[ing] States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own.”). *But see* Tolson, *Election Law Federalism*, *supra* note 53 (arguing that the Elections Clause permits Congress to impose the requirements of the preclearance regime on the states). Other scholars have also argued that Congress can commandeer state officials when acting pursuant to the Elections Clause. *See, e.g.*, Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 237-38 (1997). *See also* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 109 (2013):

[Congress’] power to enforce its “general supervisory power[]”... has remained intact [under the Elections Clause], even with the Court’s developing Eleventh Amendment jurisprudence, which carves out a protected zone for core state functions.... Similarly, direct federal regulation [of elections] is unaffected by the concern for impermissible federal commandeering of state functions presented by congressional attempts to compel state undertakings for federal programs directly.

<sup>63</sup> U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

Supreme Court’s caselaw has suggested that the scope of congressional authority to enforce and protect constitutional rights is broader—or alternatively, increased deference to the legislative record is warranted—when Congress enacts legislation pursuant to multiple sources of constitutional authority.<sup>64</sup> Authorization based on multiple constitutional provisions has, in some cases, proven to be the difference between invalidation and constitutionality for some federal statutes.<sup>65</sup> The paradigmatic example is the Affordable Care Act, which survived a constitutional challenge in 2012 because the Court found that the Act, though an unlawful exercise of the commerce power, was a valid use of the taxing power.<sup>66</sup>

The Court also has not been shy about sustaining legislation where Congress has failed to specify the source of authority pursuant to which it is acting. In *Fullilove v. Klutznick*,<sup>67</sup> for example, the Court upheld an affirmative action program requiring that ten percent of federal funds granted for local public works be allocated to minority owned firms.<sup>68</sup> The Court found that the program was a constitutional exercise of federal power under the Spending Clause and the Commerce Clause, even though Congress did not rely on either provision in enacting the law.<sup>69</sup> Similarly, in *Woods v. Cloyd W. Miller Co.*,<sup>70</sup> the Court upheld the Housing and Rent Act as a lawful exercise of the war power, inferring from “the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause.”<sup>71</sup> Even though hostilities had ceased, the Court observed that, “[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”<sup>72</sup>

Uncertainty about the actual source of federal authority was on full display in *Jones v. Alfred H. Mayer*,<sup>73</sup> where the Court upheld 42 U.S.C. § 1982, which guaranteed to all citizens the right to convey real and personal property, as a valid exercise of the Thirteenth Amendment.<sup>74</sup> Section 1982 was originally part of Section 1 of the Civil Rights Act of 1866, and many then in Congress believed that the Act exceeded the scope of congressional authority under the Thirteenth Amendment.<sup>75</sup> While the Act was reauthorized after the passage of the Fourteenth Amendment, which provided sufficient justification for its provisions, there has never been any suggestion that *Jones* was wrongly decided because the Court focused on the Thirteenth Amendment instead of the Fourteenth.

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<sup>64</sup> See Michael Coenen, *Combining Constitutional Clauses*, 164 U. Pa. L. Rev. 1067, 1086-88 (2016) (discussing *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *The Legal Tender Cases*, 79 U.S. 457 (1870), as decisions that rest “on the combined effect of multiple enumerated powers” but noting that “[n]ot much has happened since then in the world of power/power combination analysis” because most decisions focus on one source of authority “as independently sufficient to sustain the federal enactment under review”).

<sup>65</sup> For example, Congress enacted Title VII of the Civil Rights Act of 1964 pursuant to its authority under the Commerce Clause, but in 1972, extended the reach of the statute to authorize money damages against state governments under the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976) (explaining that Congress relied on Fourteenth Amendment to amend Title VII of Civil Rights Act of 1964). After the Court’s decision in *Seminole Tribe*, if Congress had relied on the Commerce Clause alone, the 1972 amendments would have been invalidated. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (holding that Congress cannot abrogate state sovereign immunity under Commerce Clause).

<sup>66</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563-66 (2012).

<sup>67</sup> 448 U.S. 448 (1980).

<sup>68</sup> *Id.* at 490.

<sup>69</sup> See *id.* at 473-76.

<sup>70</sup> 333 U.S. 138 (1948).

<sup>71</sup> *Id.* at 144.

<sup>72</sup> *Id.*; see also *Wilson-Jones v. Caviness*, 99 F.3d 203, 208 (6th Cir. 1996) (“A source of power has been held to justify an act of Congress even if Congress did not state that it rested the act on the particular source of power.”).

<sup>73</sup> 392 U.S. 409 (1968).

<sup>74</sup> *Id.* at 413.

<sup>75</sup> *Id.* at 455 (Harlan, J., dissenting) (presenting a comprehensive review of the legislative history suggesting that many in the Thirty-Ninth Congress believed that 1866 Civil Rights Act was unconstitutional).

*Jones* and the unusual historical circumstances surrounding § 1982 might also suggest that far-reaching and potentially controversial legislation can gain substantial legitimacy from the fact that Congress can draw on multiple sources of power. A prominent example of this is Section 4(e) of the VRA, which prohibits literacy tests as a precondition for voting as applied to individuals from Puerto Rico who have completed at least the sixth grade. In *Katzenbach v. Morgan*,<sup>76</sup> the Court upheld Section 4(e) as an appropriate exercise of Congress' authority to enforce the Fourteenth Amendment.<sup>77</sup> The Court sustained Congress' ban on literacy tests, even though Congress made no evidentiary findings that literacy tests were being used in a racially discriminatory manner and an earlier court decision found these tests to be constitutional as a general matter.<sup>78</sup> As a practical matter, the Court might have been willing to defer to Congress because of the myriad provisions that the Court identified as potential sources of authority for Section 4(e)—ranging from the treaty power to the Territorial Clause of Article III—even though Congress did not explicitly rely on any of these provisions in enacting the legislation.<sup>79</sup> At the very least, *Morgan* illustrates that the presence of multiple sources of constitutional support has some relevance to the inquiry into the scope of congressional power,<sup>80</sup> a position that received the Court's full-throated endorsement in the *Legal Tender Cases*<sup>81</sup> and *McCulloch v. Maryland*.<sup>82</sup>

As this caselaw illustrates, the Court's review of the legislative record of The VRAA must account for the unique circumstances of each provision upon which Congress has relied to justify its legislation which, in the case of practice-based coverage, warrants greater judicial deference to the underlying legislative record than if Congress is proceeding based on the Fourteenth or Fifteenth Amendments alone.<sup>83</sup>

## II. Practice-based Preclearance as a Constitutional Use of Federal Power

Practice-based preclearance directly addresses the Supreme Court's concerns, in *Shelby County v. Holder*, about having a coverage formula that not only singled out some jurisdictions for preclearance while excluding equally offending jurisdictions from oversight, but that also required jurisdictions to

<sup>76</sup> 384 U.S. 641 (1966).

<sup>77</sup> *Id.* at 655-58 (concluding that New York's English literacy requirement for voters could discriminate against New York's large Puerto Rican community, but not requiring congressional findings that prove this proposition).

<sup>78</sup> *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (holding that literacy tests are constitutional absent discriminatory intent).

<sup>79</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 646 n.5 (1966) (stating that Court need not consider whether Section 4(e) could be sustained under Territorial Clause).

<sup>80</sup> Even Justice Scalia, an enduring critic of expansive federal authority, suggested that federal power is broader when Congress can point to an additional source of authority to support its legislation. *See Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) (“[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.”). At the very least, the presence of an additional source of power arguably expands the universe of means that Congress can employ in furthering the ends of the statute. *Cf. Gonzales*, 545 U.S. at 38 (Scalia, J., concurring) (“As the Court said in the *Shreveport Rate Cases*, the Necessary and Proper Clause does not give ‘Congress . . . the authority to regulate the internal commerce of a State, as such,’ but it does allow Congress ‘to take all measures necessary or appropriate to’ the effective regulation of the interstate market, ‘although intrastate transactions . . . may thereby be controlled.’” (citations omitted)).

<sup>81</sup> 79 U.S. 457, 534 (1870) (holding it is “allowable to group together any number of [enumerated powers] and infer from them all that the power claimed has been conferred”).

<sup>82</sup> 17 U.S. 316, 407-12 (1819) (finding that Congress' power to charter a bank stems from its “great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies” as supplemented by the Necessary and Proper Clause).

<sup>83</sup> Tolson, *The Spectrum of Congressional Power*, *supra* note 60.

preclear *all* changes to their election laws (even the most innocuous regulations).<sup>84</sup> The VRAA addresses these concerns, first, by narrowing the scope of coverage to jurisdictions with substantial minority populations, and second, by focusing only on specific practices that jurisdictions use (and have used) to undermine the political influence of these groups.

*A. 20% Demographic Trigger Tailors Coverage to Jurisdictions with Substantial Minority Populations*

The demographic trigger limits the reach of preclearance for covered practices to jurisdictions with minority populations of at least 20%. As the number of minorities increases in a jurisdiction, history has shown that 20% approaches the threshold that tends to trigger backlash by the majority and make the jurisdiction more likely to engage in the covered practices to diminish minority political power. Scholars refer to this number as the “tipping point”—or the threshold at which the presence of minorities in previously all white spaces, such as schools, workplaces, or residential areas, will trigger either defections from these spaces or, importantly, backlash by members of the majority.<sup>85</sup> The tipping point dynamic does not involve a fixed number and varies depending on the context—the tipping point for a school or a place of employment might be 30% to 40% minority whereas it might only be 9-12% for a previously all white neighborhood.<sup>86</sup>

Importantly, the tipping point concept also applies to the political domain.<sup>87</sup> In one study, scholars noted that the black voting age population of a majority-minority district in the south during the 1990s needed to be at least forty-one percent for the probability of electing a black representative to exceed the likelihood of electing a white one.<sup>88</sup> Later studies have confirmed that, as the minority population grows in a district, the elected representative is more likely to be a person of color.<sup>89</sup> Thus, as jurisdictions become increasingly minority and racial bloc voting increases, the likelihood that white voters will be able to elect their candidate of choice decreases proportionately.

Given this, the majority often takes steps to prevent minority groups from effectively utilizing their political power once they have reached numbers sufficient to affect the outcome of an election. In *League of United Latin American Citizens (LULAC) v. Perry*, for example, the Supreme Court held that the state of Texas violated Section 2 of the Voting Rights Act by dismantling a 57.5% majority-Latino legislative district in its mid-decade 2003 redistricting, just as residents in the district were set

<sup>84</sup> *Shelby County v. Holder*, 570 U.S. 529, 544-45 (2013).

<sup>85</sup> See Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 47 (1985).

<sup>86</sup> See, e.g., Christine H. Rossell & Willis D. Hawley, *Understanding White Flight and Doing Something About It*, in EFFECTIVE SCHOOL DESEGREGATION 157, 165-71 (Willis D. Hawley ed., 1981) (arguing that the tipping point for schools is between thirty and forty percent minority); Manal Totry-Jubran, *Law, Space and Society: Legal Challenges of Middle-Class Ethnic Minority Flight*, 34 Harv. J. Racial & Ethnic Just. 57, n.37 (2018) (arguing that “neighborhoods tip after reaching a 9% to 12% minority”). See also Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, n.37 (2005) (discussing the tipping point dynamic in the context of juries noting that, “Electoral minorities need not constitute a majority of the jury in order to affect the verdict; they need only have enough members so that one of them sits at the ‘tipping point of the jury.’”).

<sup>87</sup> See, e.g., Terry Smith, *White Backlash in a Brown Country*, 50 VAL. U. L. REV. 89, 128 (2015) (“In the voting rights context, the tipping point concept has been used to measure the percentage of the minority population at which the probability of electing a black candidate exceeds that of electing a white candidate. In the related context of partisan gerrymandering, tipping point probability can measure the likelihood of electing a Democrat of whatever race versus a Republican.”).

<sup>88</sup> Charles S. Bullock, III and Richard E. Dunn, *The Demise of Racial Redistricting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1237 (1999).

<sup>89</sup> Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FL. ST. L. REV. 659, 667 (2010).

to vote out the Republican incumbent. The Latino voters in this district—District 23—had consistently voted against the incumbent, almost voting him out in the 2002 elections.

The Court held that, while the state’s decision to redistrict mid-decade was not *prima facie* evidence of an unlawful partisan gerrymander, the state’s desire to protect the incumbent nonetheless violated Section 2 of the VRA. The Court noted that “the State took away the Latinos’ opportunity because Latinos were about to exercise it,”<sup>90</sup> diminishing “the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive.”<sup>91</sup>

Notably, minorities do not have to be the majority, or anywhere close to the majority, to generate backlash like that experienced by the Latino voters in District 23. The same 2003 mid-decade redistricting of Texas that sought to stymie the political power of the Latino voters in District 23 also broke apart racially diverse District 24, which was 49.8% white, 25.7% African American, and 20.8% Latino. While African Americans were not a majority of the voters in the district, they were the swing bloc that had consistently elected the incumbent Democratic representative to Congress because they comprised over 64% of the voters in the Democratic primary.<sup>92</sup>

As the dismantling of District 24 shows, it is not uncommon for jurisdictions to take affirmative steps to diminish the political power of minorities, even when their numbers are relatively small. As influential election law scholar Pamela Karlan has argued, “blacks are more likely to occupy a pivotal position when they are a relatively small share of the electorate, because white voters are then less likely to perceive them as a threat. As the possibility that blacks might be a dominant component of a biracial coalition grows, white backlash increases as well.”<sup>93</sup> She goes on to conclude that, “black influence grows as blacks increase to roughly 30% of the electorate; black voters face increasing resistance when they constitute between 30% and 50% of the electorate; and beyond 50%, the relationship between presence and influence is again positive,” allowing the black voting majority to dictate electoral outcomes.<sup>94</sup> By setting the threshold for practice based preclearance at 20% minority population, the VRAA seeks to protect minority groups just as they have reached numbers that are meaningful enough to influence the political process and that, notably, approaches the threshold in which backlash will increase as the majority perceives their growing political influence.<sup>95</sup>

Because the use of racial criteria in the demographic trigger is designed to tailor the reach of a statute that the Supreme Court had once deemed to be both overbroad and underinclusive,<sup>96</sup> its 20% threshold is arguably a constitutional use of race that should not trigger strict scrutiny under the Court’s caselaw. The Supreme Court has held that strict scrutiny applies regardless of whether the

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<sup>90</sup> *LULAC v. Perry*, 548 U.S. 399, 428-35 (2006).

<sup>91</sup> *Id.* at 438.

<sup>92</sup> *Id.* at 443-444.

<sup>93</sup> Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 *VAND. L. REV.* 291, 312-13 (1997).

<sup>94</sup> *Id.* at 313.

<sup>95</sup> *Cf. Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tx. 2017) (detailing that city’s discriminatory redistricting plan enacted where Latino had increased from 18.7% of city’s voting age population in 1990 to 50.6% by 2015).

<sup>96</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013).

government is trying to harm racial minorities,<sup>97</sup> or benefit them.<sup>98</sup> However, just because a statute mentions race does not mean that strict scrutiny is warranted. For example, in *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court upheld a provision of the Michigan constitution, Section 26, that prohibited state entities and public universities from using race based preferences in admissions and other decisions. Although Section 26 is clearly written in racial terms by prohibiting the use of race in official governmental decision making, the Court declined to view this provision as the equivalent of “[g]overnment action that classifies individuals on the basis of race [which] is inherently suspect” and would therefore trigger strict scrutiny under the Equal Protection Clause.<sup>99</sup> The same rationale applies to the VRAA’s demographic trigger, which is not a racial classification designed to help or harm racial minorities, but is instead a benchmark designed to confine coverage to jurisdictions that are likely to offend given the size of their minority populations.

Even if the Court determines that strict scrutiny applies, the trigger is narrowly tailored, consistent with the Court’s precedents. In recent decades, the Court has sustained the government’s power to use racial percentages for the purpose of protecting minority political power, most notably in permitting states to create majority-minority districts at a threshold necessary for minority groups to elect their candidate of choice.<sup>100</sup> The VRAA’s demographic trigger is fairly modest by comparison, using a 20% threshold only for purposes of reducing the number of jurisdictions that would be subject to preclearance and further tailoring the scope of the statute.

#### B. *The VRAA’s Preclearance Requirement for Specific Discriminatory Practices Further Narrows the Statute*

Instead of relying on outdated practices to determine coverage, Congress has relied on over six decades of experience to isolate the election changes that have historically and are currently being used to minimize the political power of minority groups as their political influence increases. A quick canvas of some of the changes that would be subject to preclearance under the VRAA illustrates why the abuse of these particular practices, right when minority groups are at number sufficient to exercise meaningful political power, raise unique concerns pursuant to the Fourteenth and Fifteenth Amendments and the Elections Clause.

#### 1) **Changes in Method of Election/Redistricting**

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<sup>97</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (finding that a state law that prohibited interracial marriage violated the Equal Protection Clause of the Fourteenth Amendment); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (invalidating state statute that prohibited African Americans from serving on juries).

<sup>98</sup> See, e.g., *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (invalidating minority set-aside provision for city contracts); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (same for federal contracts).

<sup>99</sup> *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014).

<sup>100</sup> See *Bush v. Vera*, 517 U.S. 952 (1996) (finding that a state can create a majority-minority district for the compelling purpose of avoiding liability under Section 2 of the Voting Rights Act, but the districts must be narrowly tailored to further that purpose); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (rejecting constitutional challenge to majority-minority districts that were 65% minority because that was the threshold needed for minority community to elect their candidate of choice). The Supreme Court has held that these racial targets are flexible and must focus on the threshold at which the minority group can elect their candidate of choice. See *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015) (rejecting the argument that compliance with Section 5 of Voting Rights Act, even though a compelling governmental interest, required Alabama to maintain specific numerical minority percentages for its majority-minority districts; instead, Section 5 required districts to be at a percentage sufficient for the minority group to elect their candidate of choice).



Many of the Court’s early cases in this area recognized the risk that certain election changes can pose to minority voting power. In 1965, for example, the Court declined to find that multimember districts were per se unconstitutional, but acknowledged that, “It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”<sup>101</sup> In enacting the Voting Rights Act to enforce the mandates of the Fifteenth Amendment, Congress likewise recognized these potential dangers such that it suspended *all* changes to a covered jurisdiction’s election laws so that the Department of Justice can assess whether the scheme in fact “operate[s] to minimize or cancel out the voting strength of racial or political elements of the voting population.”

The Court has, on several occasions, validated Congress’ position that both minor and major changes can undermine the right to vote, necessitating a preclearance regime of sufficient breadth to prevent states from circumventing the Act’s protections. In *Allen v. State Board of Elections*, the Court held that Section 5 of the Voting Rights Act required Mississippi to preclear a number of changes to their election laws including a shift from district elections to at-large elections for county supervisors and changing the office of county superintendent of education from an elective office to an appointive one.<sup>102</sup> Preclearance was required, according to the Court, because of the recognition that the change from a district to an at-large or multimember election scheme was the “type of change [that] could therefore nullify [the] ability [of minority groups] to elect the candidate of their choice just as would prohibiting some of them from voting.”<sup>103</sup> And even the shift from an appointive office to an elective one is a change that should be subject to preclearance because “[t]he power of a citizen’s vote is affected by this [change].”<sup>104</sup>

While there are currently no jurisdictions subject to the preclearance requirement because of Section 4(b)’s invalidation in *Shelby County v. Holder*, the holding in *Allen* that both major and minor changes are subject to preclearance for covered jurisdictions remains good law post-*Shelby County*. Moreover, jurisdictions have continued to adopt changes that could potentially subject them to being bailed into the preclearance regime under the remaining provisions of the Voting Rights Act. For example, in the recent case of *Patino v. City of Pasadena*, a federal district court invalidated a 2014 city council plan that changed the city of Pasadena, Texas from eight single member districts to six single member districts and two at-large districts.<sup>105</sup> Notably, the court held that the city acted with discriminatory intent towards Latinos in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Because of these findings, the court concluded that the city should again be subject to the preclearance requirement and must submit any future changes to its redistricting plan to the Department of Justice for preclearance before those changes can go into effect. In the *Patino* case, the court’s decision to place the city back into preclearance was relatively straightforward because of its intentionally discriminatory actions. However, the city’s blatantly discriminatory behavior should not obscure that changes to the method of election have also

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<sup>101</sup> *Fortson v. Dorsey*, 379 U.S. 433 (1965). See also Practice-based Preclearance, *supra* note 106, 14 (“At-large and multi-member elections for local offices gained popularity just as the successes of Reconstruction motivated white majorities to seek more creative barriers for voters of color.”).

<sup>102</sup> *Allen v. State Bd. Of Elections*, 393 U.S. 544 (1969).

<sup>103</sup> *Id.* at 569.

<sup>104</sup> *Id.*

<sup>105</sup> *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tx. 2017).

abridged or denied the right to vote in violation of the Fourteenth Amendment in the absence of discriminatory intent.<sup>106</sup>

Given that the rules governing how officials are elected can be manipulated to harm minority groups, it is unsurprising that redistricting also has been a point of vulnerability for voters of color. The Supreme Court case of *Gomillion v. Lightfoot* established, over sixty years ago, that the state does not have unrestricted power to organize and reorganize its electoral districts, a principle that has been extended to the context of congressional elections as well. Notably, the Court decided *Gomillion* before *Reynolds v. Sims* and *Wesberry v. Sanders*, which are famous for imposing the one person, one vote rule on states in drawing legislative districts.<sup>107</sup> In *Gomillion*, the Court held that the twenty-eight sided “uncouth” figure, not unlike many of the districts drawn by states today, violated the Fifteenth Amendment because it fenced out almost all the African American voters from the City of Tuskegee. Practice based preclearance would prevent states from using de-annexations, like the plan at issue in *Gomillion*, from undermining minority voting power. Importantly, *Gomillion* was not a one-off nor is it truly a relic of the past. According to a recent report, “Since 1957, 982 redistricting plans have been either withdrawn, or alternatively, challenged or invalidated by a court or the DOJ.”<sup>108</sup> Many of these challenges have come in recent decades.

In *Alabama Legislative Black Caucus v. Alabama*, for example, the Court held that a redistricting plan that packed black voters into majority-minority districts well beyond the numbers required for those voters to elect their candidate of choice violated the Equal Protection Clause of the Fourteenth Amendment. The state argued that the nonretrogression principle of Section 5 of the Voting Rights Act required that majority-minority districts maintain the same percentage of minority voters as they had on the eve of redistricting. Had the state been successful, this would have diminished the political power of minority populations, limiting their ability to influence election outcomes across a greater number of districts. Indeed, the state’s interpretation raised significant constitutional concerns, according to the Court, because “it would be difficult to explain just why a plan that uses racial criteria predominantly to maintain the black population” based on some artificial threshold, without assessing the ability of black voters to elect their preferred candidate, is narrowly tailored to achieve the compelling governmental interest in preventing Section 5 retrogression.<sup>109</sup>

Similarly, the Supreme Court, in *Cooper v. Harris*, found that North Carolina violated the Fourteenth Amendment by raising the percentage of minority voters in two districts that had, prior to the redistricting, been districts in which minorities, who were less than fifty percent of the districts’ populations, could elect their candidate of choice with the help of white crossover voters. Like Alabama, the North Carolina legislature tried to pack minority voters into these districts to diminish their political strength statewide. The Court rejected the argument that the legislature would face liability under Section 2 of the Voting Rights Act for failing to increase the number of voters within one of the districts. The fact that black voters could elect their candidate of choice with sufficient

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<sup>106</sup> See Asian Americans Advancing Justice (AAAJ), *Practice Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, Nov. 2019, available at [https://www.advancingjustice-aajc.org/sites/default/files/2019-11/Practice%20Based%20Preclearance%20Report%20Nov%202019%20FINAL%20-%20reduced\\_0.pdf](https://www.advancingjustice-aajc.org/sites/default/files/2019-11/Practice%20Based%20Preclearance%20Report%20Nov%202019%20FINAL%20-%20reduced_0.pdf) (“Since 1957, there have been at least 1,753 legal and advocacy actions that successfully overturned a discriminatory change in method of election because of its discriminatory intent or effects.”)

<sup>107</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>108</sup> Practice Based Preclearance, *supra* note 106.

<sup>109</sup> *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 277-78 (2015).

crossover voting from white voters indicated that racial bloc voting—one of the elements of a successful Section 2 claim—was absent.

Just as the Court has read the Fourteenth and Fifteenth Amendments to prevent states from adopting redistricting plans that dilute or otherwise minimize minority political power, Congress also has broad authority to prohibit such actions in enforcing these amendments. Practice based preclearance would complement the enforcement mechanism in Section 2 of the VRA by preempting those redistricting plans that would otherwise violate the statute’s terms, saving resources and years of litigation.

Additionally, Congress’ power to regulate the “manner” of federal elections under the Elections Clause also applies to congressional redistricting plans, authority that the Supreme Court has read incredibly broadly.<sup>110</sup> The historical record bears out this view of the Clause. In a comprehensive review of founding era sources discussing the “manner” of elections, Professor Robert Natelson observed that “English, Scottish, and Irish sources used the phrase ‘manner of election’ to encompass the times, places, and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; strictures against election-day misconduct; and the rules of decision (majority, plurality, or lot).”<sup>111</sup> Professor Natelson further concluded that “Americans ascribed the same general content to the phrase ‘manner of election’ as the English, Irish, and Scots did.”<sup>112</sup> As the next section shows,<sup>113</sup> the breadth of the term “manner” results in significant overlap between manner regulations and voter qualification standards. But the abuse of these methods by the states, a trend that has become increasingly more common in the wake of the *Shelby County* decision, justifies judicial deference to exercises of congressional power that target these types of hybrid regulations.<sup>114</sup>

## 2) Restrictive Voter Identification/Proof of Citizenship Requirements/Language Assistance

It has been difficult for courts to police the boundary between voter qualification standards and manner regulations because of the uncertainty surrounding the definition of these terms,<sup>115</sup> but

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<sup>110</sup> 285 U.S. 355, 366 (1932) (resolving a challenge to a congressional redistricting plan and finding that Congress, pursuant to the Elections Clause, can implement “a complete code for congressional elections”).

<sup>111</sup> Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (2010). In his summary of the evidence, Professor Natelson noted that American, English, Irish, and Scottish lawmakers defined “manner of election” in largely the same way, encompassing factors such as elector and candidate qualifications, time of elections, terms of office, place of elections, rules for elections, mechanics of voting, election dispute procedures and regulation of election day misconduct. *Id.* at 17-18.

<sup>112</sup> *Id.* at 13-14 (discussing the 1721 South Carolina election code that “described ‘the Manner and Form of electing Members’ to the lower house of the colonial assembly as including the qualifications of office-holders and the freedom of voters from civil process on election days,” and the 1780 Massachusetts Constitution which “described the ‘manner’ by mandating the time of the election . . . property and age qualifications of electors, a notice of election, and who would serve as election judges”); *see also id.* at 16 (“State election laws adopted after Independence employed ‘manner of election’ and its variants in the same general way. The ‘mode of holding elections’ in a 1777 New York statute provided for public notice at least ten days before election in each county for elections for governor, lieutenant-governor, and senate. It specified the places for election, the supervising officers and election judges, times of notice, returns of poll lists, declaration of winner, and some voter qualifications.”).

<sup>113</sup> *See id.* at 20 (explaining that “[t]he constitutional language governing congressional elections differed from usual eighteenth-century ‘manner of election’ provisions” because the Constitutions lists “qualifications, times, and places separately from ‘Manner’” and describes “the residuum as ‘the Manner of holding Elections’”).

<sup>114</sup> *Cf. South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>115</sup> *See Ariz. Inter Tribal*, 570 U.S. 1 (2013) (noting that a federal statute precluding a state from enacting voting qualifications would be constitutionally questionable). *But see Or. v. Mitchell*, 400 U.S. 112, 122 (1970) (referring to the

Congress is not so constrained. As I have argued in my scholarship,<sup>116</sup> voter identification laws and proof of citizenship requirements should be considered manner regulations rather than voter qualification standards because requiring that a voter show identification or proof of citizenship to prevent fraud or to ensure the integrity of the electoral process aligns more with regulating the mechanics of the actual election, as opposed to functioning as a voter qualification standard that determines whether a person is qualified to vote (such as an age or residency requirement). As such, Congress can prevent the state from prioritizing its interest in ensuring the integrity of the electoral process where such concerns are not empirically supported and instead are a pretext for disenfranchisement.<sup>117</sup>

Given their somewhat ambiguous nature—touching on both the manner of federal elections and voter qualification standards—these laws illustrate that the Fourteenth and Fifteenth Amendments, coupled with Congress’ power under the Elections Clause, can and should reach stringent voter identification and/or proof-of-citizenship requirements that undermine minority turnout and participation in state and federal elections. These laws condition voting on the ability of one to pay because, in many cases, those lacking the required identification must purchase underlying documents to get the ID or to show proof of citizenship. Legally, states must provide the ID, but not the underlying documents, free of charge if a person cannot afford it. However, birth certificates can cost between \$10 and \$25, and in some places, now can exceed \$40; a passport costs \$110. While some states have held steady in the price of birth certificates, others have either increased their prices or add processing fees to the cost of birth certificates. Compared to 2012, in Texas a birth certificate is now \$23 instead of \$22; Mississippi is \$17 instead of \$15; Tennessee is now \$15 (instead of \$8). In Georgia, a birth certificate remains \$25 but now there is an \$8 processing fee to obtain the document. For naturalized Americans, replacement citizenship documents cost \$220.<sup>118</sup>

According to the Brennan Center, approximately 11% of eligible voters lack identification. To put these numbers in broader perspective, nearly five hundred thousand eligible voters do not have access to a vehicle and live more than 10 miles from the nearest state ID issuing office that is open more than two days a week. Over 10 million voters in 10 states live more than 10 miles from their nearest ID issuing office that is open more than two days a week.<sup>119</sup> The requirement of voter ID also has a disparate racial impact. Although 11% of all voters lack the requisite ID, among voters of color this number is much higher, approaching 25% of African Americans, 20% of Asians, and 19% of Latinxs.<sup>120</sup> Additionally, there are 1.2 million eligible African American voters and 500k eligible Latinx voters live more than 10 miles from their nearest ID issuing office that is open more than two days a week.<sup>121</sup>

Voter identification laws and proof of citizenship requirements, although facially neutral, mimic the disenfranchising efforts of the pre-Voting Rights Act era. For example, in 1965, less than one

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single-member district requirement for congressional elections as a voter qualification standard).

<sup>116</sup> See Tolson, Spectrum of Congressional Authority, *supra* note 60.

<sup>117</sup> See Tolson, Elections Clause “Federalism,” *supra* note 53, at 2269 (arguing that the Court must “conced[e] the sovereignty that Congress has under the [Elections] Clause, which may, in some limited instances, permissibly interfere with state control over voter qualifications”).

<sup>118</sup> Keesha Gaskin and Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, July 29, 2012, available at [https://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge\\_of\\_Obtaining\\_Voter\\_ID.pdf](https://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

percent of African Americans were registered to vote in Dallas County, Alabama, even though African Americans constituted half of the county population. The registration office was open only two days a month, and the registrars would arrive late, leave early, and take long lunches, making the process of registering to vote difficult, if not impossible. In addition to literacy tests and other discriminatory voter qualification standards, the difficulty of registering to vote—which the Court has found to be a “manner” regulation subject to congressional authority under the Elections Clause—arguably contributed to the low percentage of African Americans in the county capable of exercising their right to vote.

There has been a similar trend in many jurisdictions formerly covered by the Voting Rights Act. Some jurisdictions—Alabama, Mississippi, Texas, to name a few—have part-time ID issuing offices in the rural regions with the highest concentrations of people of color and people in poverty. More than one million eligible voters in these states fall below the federal poverty line and live more than 10 miles from their nearest ID issuing office open more than two days a week. In addition, Florida significantly cut back early voting including Sunday voting used for the “souls to the polls” that black churches used to get its membership to the polls. This trend is not limited to the south. For example, the ID issuing office in Sauk City, Wisconsin is only open the fifth Wednesday of any month. Obviously not every month has a fifth Wednesday.<sup>122</sup>

There are other historical parallels that one can draw on to make the point that voter identification and proof of citizenship laws should be covered practices under the VRAA. In 1889, North Carolina law allowed registrars to require that a voter prove “as near as may be” his “age, occupation, place of birth and place of residency . . . by such testimony, under oath, as may be satisfactory to the registrar.” In many cases, black men born into slavery did not know their age and often lived on streets with no names and in houses with no numbers; therefore, they could not vote under the North Carolina regime. While voter registration is very common today, in 1889, it was used to disenfranchise African Americans.<sup>123</sup>

Like North Carolina’s registration law, North Dakota’s voter identification law requires that prospective voters show a valid form of identification that must provide the person’s legal name, current residential street address in North Dakota, and date of birth. The problem is that a large percentage of Native Americans in North Dakota live on reservations with no addresses, resulting in widespread disenfranchisement among this population. Tribal leaders printed IDs for individuals to comply with the North Dakota law ahead of the 2018 elections, but many individuals were still disenfranchised because of the sheer number of people who needed identification.<sup>124</sup> Voter identification laws have become common, but in the broader political and societal structure of North Dakota, these laws—like the 1889 North Carolina voter registration law—became tools for disenfranchisement.

Like voter identification laws, proof of citizenship requirements also has disparate racial impacts and burden the fundamental right to vote. Moreover, these requirements have an ugly history. According to the Brennan Center,

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<sup>122</sup> *Id.*

<sup>123</sup> J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

<sup>124</sup> Brakkton Booker, *North Dakota and Native American Tribes Settle Voter ID Lawsuits*, NPR, Feb. 14, 2020, available at <https://www.npr.org/2020/02/14/806083852/north-dakota-and-native-american-tribes-settle-voter-id-lawsuits>.

Some proof of citizenship requirements apply to voters who are ‘challenged’ at the polls. Ohio has one such law, which is the same law amended just after the Civil War to allow challenges to voters with a ‘distinct and visible admixture of African blood.’ Although racial appearance is no longer an express ground for challenge, experience shows that voters who ‘look foreign’ are still likely to be challenged more often.<sup>125</sup>

Arizona implemented a documentary proof of citizenship law in 2004 that led to 75% of new registrants in Arizona’s largest county being rejected for failure to provide documentation. Although that rate of rejection fell after two years of intense public education (and years of litigation challenging the constitutionality of the law), approximately 17% of new registrants – many of whom are Latinx and almost all of whom are recognized by state officials to be eligible citizens – were consistently being rejected under the requirement.

The Supreme Court has held that states have broad authority to enact these restrictions to ensure the integrity of their elections by preventing fraud or the appearance of fraud, but voter fraud is rare. The Washington Post, for example, found 31 credible instances (not prosecutions or convictions, but credible allegations) of in person fraud from 2000 to 2014 out of one billion votes cast.<sup>126</sup> Another study similarly found 10 cases nationwide from 2000-2012 and zero successful prosecutions of voter fraud in five states where politicians have claimed that there is fraud during the years 2012-2016.<sup>127</sup> Even though in-person voter fraud and illegal voting by noncitizens is negligible, since 2010, 15 states enacted more restrictive voter ID laws and 12 states passed laws making it harder for citizens to register or stay on the voter rolls.<sup>128</sup>

Practice-based preclearance would allow Congress to ensure that voter identification and documentary proof of citizenship requirements are necessary and not pretextual attempts to undermine minority voting rights. These protections are key, not only for racial, but also language minorities. The VRAA would also require preclearance of efforts to withdraw or reduce multilingual materials and assistance as well as proposed reductions and relocations of polling places that would affect jurisdictions in which at least 20 percent of adult residents are members of a language minority group. Currently, Sections 4(e), 4(f)(4), and 203 require these jurisdictions to provide voting materials in their native language to voters who have limited English proficiency. However, enforcement of these provisions has been spotty and noncompliance with these provisions have been widespread.<sup>129</sup> For example, the state of Texas is required, under Section 203, to provide bilingual election materials because of their large Latinx population; however, in 2016, MALDEF

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<sup>125</sup> Brennan Center for Justice, *Proof of Citizenship*, Sept. 2006, available at <https://www.brennancenter.org/sites/default/files/analysis/Proof%20of%20Citizenship.pdf>.

<sup>126</sup> Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, WASH. POST, Aug. 6, 2014, available at <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

<sup>127</sup> Sami Edge and Sean Holstege, *Voter Fraud is not a persistent problem*, NEWS21, Aug. 20, 2016, available at <https://votingwars.news21.com/voter-fraud-is-not-a-persistent-problem/>. See also Election Fraud in America, <https://votingrights.news21.com/interactive/election-fraud-database/> (database of all election fraud cases reported to News21 since 2000).

<sup>128</sup> See Brennan Center for Justice, *New Voting Restrictions in America*, Nov. 2019, available at <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf>

<sup>129</sup> United States Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report*.

found that many counties in the state failed to provide the required materials.<sup>130</sup> These failures, and others, illustrate the necessity of additional safeguards to help protect the voting rights of these vulnerable communities.

As mentioned prior, formerly covered jurisdictions have escalated the pace in which they have closed or consolidated polling places in the wake of the *Shelby County* decision. This trend is common in jurisdictions with large numbers of language minorities including Texas, North Carolina, and Arizona. Arizona, in particular, was added to the preclearance regime in 1975 because Congress expanded Section 5 to better encompass language minority communities. Nonetheless, the state has been particularly aggressive in making voting harder for communities of color by, for example, closing more polling places than any other state since 2013; imposing additional hurdles to registration such as its documentary proof of citizenship requirement; and making voting harder with laws like the out of precinct rule and ban on ballot collection challenged in the *Brnovich* decision.<sup>131</sup>

Congress has broad authority, pursuant to the Elections Clause and the Fourteenth and Fifteenth Amendments, to address the pernicious effects of voter identification and proof of citizenship requirements as well as the failure of jurisdictions to protect language minority populations. Recognizing that state and federal power in this area does not fall in neat silos, the Court has, in prior cases, sustained Congress' broad authority under the Clause despite the implications for the state's authority over voter qualifications. In *Ex Parte Yarbrough*, for example, the Court sustained an indictment under the 1870 Enforcement Act against individual defendants who conspired against a black man "in the exercise of his right to vote for a member of the Congress of the United States . . . on account of his race, color, and previous condition of servitude . . ." <sup>132</sup> The Court held that the Fifteenth Amendment "gives no affirmative right to the colored man to vote," suggesting that this provision standing alone was insufficient support for the Act, but ultimately concluding that "it is easy to see that under some circumstances it may operate as the immediate source of a right to vote."<sup>133</sup> Those circumstances are present where Congress regulates federal elections under the Elections Clause, as it was in *Yarbrough* and as it seeks to do through the VRAA.<sup>134</sup>

In addition to recognizing that Congress could, in some instances, protect the right to vote from private discriminatory behavior through the Elections Clause, *Yarbrough* and another case, *In re Coy*,<sup>135</sup> also held that Congress' authority under the Elections Clause is not diminished simply

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<sup>130</sup> *Id.* at 191. *See also id.* (noting a similar pattern for Asian Americans in New York state).

<sup>131</sup> *Id.* at 171. *See also* *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (Kagan, J., dissenting) (noting that "Arizona's out-of-precinct policy has such a racially disparate impact on voting opportunity. Much of the story has to do with the siting and shifting of polling places. Arizona moves polling places at a startling rate. Maricopa County (recall, Arizona's largest by far) changed 40% or more of polling places before both the 2008 and the 2012 elections.").

<sup>132</sup> *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884); *see also* Richard M. Valelly, *Partisan Entrepreneurship and Policy Windows, in* *Formative Acts* 126, 133 (Steven Skowronek ed., 2007) (noting that the *Yarbrough* Court, in holding that Congress has ample authority to protect federal elections under Elections Clause, "strengthened Fifteenth Amendment enforcement by fusing it to the congressional regulatory power contained in Article I").

<sup>133</sup> *Yarbrough*, 110 U.S. at 665.

<sup>134</sup> *Id.* at 662 (upholding Sections 5508 and 5520 of the 1870 Enforcement Act as a lawful exercise of Congress' power under the Elections Clause, the Fifteenth Amendment, and the Necessary and Proper Clause because Congress "must have the power to protect the elections on which its existence depends from violence and corruption"); *see also* Valelly, *supra* note 132, at 135 ("[A] unanimous Court ruled that in order to protect the electoral processes that made it a national representative assembly, Congress could protect the right to vote of any citizen, Black or white.").

<sup>135</sup> 127 U.S. 731 (1888).

because a federal regulation may affect state and local elections.<sup>136</sup> Federal law made it a crime for any election official to “violate or refuse to comply with his duty” at “any election for representative or delegate in Congress,” but the defendant election inspectors argued they could not be indicted under federal law because they were tampering with the returns to taint state and local elections, not the U.S. House election.<sup>137</sup> The Court found this argument “manifestly contrary to common sense” because “[t]he manifest purpose of both systems of legislation is to remove the ballot-box as well as the certifications of the votes cast from all possible opportunity of falsification, forgery, or destruction.”<sup>138</sup> Just as the Court has allowed Congress to regulate both constitutional and unconstitutional state action when legislating pursuant to the Fourteenth and Fifteenth Amendments, Congress’ power under the Elections Clause has, by necessity, touched on voter qualification standards and state elections in the course of vindicating Congress’ interest in protecting the health and legitimacy of federal elections. These provisions, in the aggregate, give Congress broad authority to enact the practice-based coverage provision of the VRAA.

## Conclusion

The practice-based coverage provision isolates those practices that states have historically used to abridge or deny the right to vote, and it does so without singling out any particular jurisdiction or geographic area. Its structure not only complies with the equal sovereignty principle that was central to the invalidation of Section 4(b) in *Shelby County*, but this proposed legislation also addresses the steadily increasing threats to the right to vote that necessitate federal action, particularly as the number of states seeking to make voting harder grows.<sup>139</sup> The list of covered practices is those that have been and will continue to be used by states as vehicles for disenfranchisement.

Congress’ power under the Fourteenth and Fifteenth Amendments and the Elections Clause provide sufficient authorization for practice-based coverage because those provisions empower Congress to enact legislation to prevent local, state, and federal election regulations that abridge or deny the right to vote, or that have a racially discriminatory impact. Because the VRAA can be justified based on multiple sources of constitutional authority, the Supreme Court must be more deferential to the legislative record than if Congress was acting pursuant to the Fourteenth and Fifteenth Amendments alone.

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<sup>136</sup> See *id.* at 752 (stating that federal government may regulate Congressional elections, regardless of state and local elections taking place); *Yarborough*, 110 U.S. at 662 (stating that no federal powers are “annulled because an election for state officers is held at the same time and place”).

<sup>137</sup> *In re Coy*, 127 U.S. 731, 749-50, 753 (1888).

<sup>138</sup> *Id.* at 755; see also Valelly, *supra* note 132, at 135-36 (arguing that the Court rejected the claim because “during the elections the state and local elections officials had, for all intents and purposes, become officers of the United States and were subject to the jurisdiction of the United States”).

<sup>139</sup> *Cf. Shelby County v. Holder*, 570 U.S. 529 (2013).