The Price Tag on Voting Equality: How to Amend the Voting Rights Act Using the Spending Power

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This Note reviews Supreme Court jurisprudence leading up to the invalidation of Section 5 of the Voting Rights Act (VRA) and argues that the VRA should be amended using Congress's spending power in order to minimize federalism costs and thus survive constitutional review. The introduction sets the stage and draws parallels between the context of the VRA's enactment and present circumstances. Part I highlights the past success of Section 5 and describes the current conditions necessitating its revival, including the inadequacy of remedies that are currently available and the rise in voter suppression. Part II analyzes the jurisprudence surrounding Section 5, particularly the federalism revolution that undermined its constitutionality and the Roberts Court's veneration of federalism principles in the field of election law. Based on this analysis, Part II predicts that the Supreme Court will not uphold an amendment to the VRA without significant modifications. Lastly, Part III provides a framework for a VRA amendment, which conditions receipt of future Help America Vote Act (HAVA) funds on states' participation, and analyzes the proposed amendment's compliance with Spending Clause precedent.

Introduction

"At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama."[1]

With these words, President Lyndon B. Johnson opened his Voting Rights Act (VRA) address to a joint session of Congress in what is considered one of the most important speeches of his presidency.[2] A week before, voting rights activists set out on a fifty-four-mile march from Selma to Montgomery, Alabama to commemorate the death of Jimmie Lee Jackson, a fellow activist

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1. Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281, 281 (Mar. 15, 1965).

2. ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 27 (2015).

who was murdered by police.[3] The march ended in violence on the Edmund Pettus Bridge, a landmark named for the Alabama leader of the Ku Klux Klan, when state troopers brutally attacked and teargassed the peaceful demonstrators.[4]

The march was a microcosm of the civil rights movement's struggle to enfranchise Black Americans. Since Reconstruction, Black Americans' right to vote had been fervently denied through the use of Jim Crow laws, violence, and intimidation.[5] As a result, only three percent of eligible Black Americans in the South were registered to vote in 1940.[6] Prior to Jackson's murder, civil rights leaders Martin Luther King Jr. and John Lewis came to Selma to run a voting rights campaign that was met with predictable opposition.[7] Registrants were arrested in droves, and civil rights activists were enjoined by a state court judge from gathering.[8] And yet, voting rights were still not a national priority; they did not even appear in President Johnson's inaugural address that January.[9]

The bridge in Selma was undoubtedly a turning point. Video footage of the incident, known as "Bloody Sunday," aired on ABC to almost 50 million Americans, resulting in national outrage and an unexcepted surge in support for reform.[10] With this momentum, President Johnson framed the VRA, a law poised to dramatically change the election landscape, as a means of saving the country's soul from the "crippling legacy of bigotry and injustice."[11] The bill passed the House of Representatives and the Senate with overwhelming support[12] and continued to receive bipartisan support for each subsequent reauthorization.[13] The enactment of the VRA resulted in an immediate spike

3. Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, HISTORY (July 18, 2020), https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement [https://perma.cc/R7N5-UFDG].

4. *Id.*

5. *See Race and Voting*, CONST. RTS. FOUND. [hereinafter *Race and Voting*], https://www.crf-usa.org/brown-v-board-50th-anniversary/race-and-voting.html [https://perma.cc/2A7R-5JEY] (describing a variety of laws including "poll taxes, literacy tests, 'grandfather clauses,' and 'white primaries'" that disenfranchised Black voters); *Jim Crow Laws*, HISTORY (Mar. 26, 2021), https://www.history.com/topics/early-20th-century-us/jim-crow-laws [https://perma.cc/WT9G-PMEC] (describing Jim Crow laws in the United States, including those used to limit Black Americans' rights to vote).

6. *Race and Voting*, *supra* note 5.

7. BERMAN, *supra* note 2, at 16–18.

8. *Id.* at 17–18.

9. The President's Inaugural Address, 1 PUB. PAPERS 71, 71–74 (Jan. 20, 1965).

10. Klein, *supra* note 3.

11. Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281, 284 (Mar. 15, 1965).

12. *Voting Rights Act*, ASS'N OF CTRS. FOR THE STUDY OF CONG., https://congresscenters.org/great-society-congress/exhibits/show/legislation/vra [https://perma.cc/7UBB-FDQE].

13. James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 206 (2007).

in voter registration and civic participation, and it was highly successful in staving off discriminatory laws in the following decades.[14]

The potency of the VRA was largely attributable to Section 5, a mechanism that required certain states to submit voting changes to the federal government for approval or "preclearance" before the changes could be implemented.[15] However, in the 2013 case *Shelby County v. Holder*,[16] the Supreme Court struck down the formula that dictated which states were subject to preclearance review thereby rendering Section 5 inoperable. The decision rested on a perceived conflict between the formula and a constitutional commitment to the equal sovereignty of states, but it was likely motivated by the Court's view of the federalism costs associated with Section 5 more generally.[17] After the crown jewel of the civil rights movement was gutted, states with glaring histories of discrimination were released from federal oversight.

As the country experiences another "racial reckoning" following the events of summer 2020, we approach a similar juncture.[18] On a harrowing day in May, history and fate met on a daylit street in Minneapolis, engendering social unrest and renewing focus on racism and inequality in America.[19] The right to vote is "preservative of all rights";[20] therefore, in order to change the country's trajectory, Congress must once again take deliberate and thoughtful action to protect it. This Note argues that Congress should amend the VRA through the Spending Clause rather than continuing to rely on the enforcement power of the Fifteenth Amendment. Part I highlights the past success of Section 5 and describes the current conditions necessitating its revival. Part II analyzes the jurisprudence surrounding Section 5 and predicts that the Supreme Court will not uphold an amendment to the VRA without significant modifications. Finally, Part III provides a framework for a VRA amendment that capitalizes on Congress's expansive powers under the Spending Clause.

14. *See* SONIA K. GILL, DALE HO, ADRIEL I. CEPEDA DERIEUX, KRISTEN LEE & MARC ALEXANDER AULT, THE CASE FOR RESTORING AND UPDATING THE VOTING RIGHTS ACT, ACLU 14–18 (2019), https://www.aclu.org/sites/default/files/field_document/aclu_2019_report_to_congress_on_the_voting_rights_act_final_for_submission.pdf [https://perma.cc/G2NN-U8CC] (discussing the initial success of the VRA and its continued effectiveness over time as states attempted to get around its provisions).

15. *Id.* at 12–14.

16. 570 U.S. 529 (2013).

17. *Id.* at 534–35, 557.

18. Ailsa Chang, Rachel Martin & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020, 9:00 AM), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit [https://perma.cc/D5D2-4HRB].

19. *Id.*

20. Yick v. Hopkins, 118 U.S. 356, 370 (1886).

I. The United States Has Not Outgrown Section 5

A. Structure and History of the VRA

The influence of Section 5 of the VRA was primarily attributable to its design: it prevented changes in election practices and procedures from taking effect in certain "covered" jurisdictions before the federal government reviewed and approved them.[21] The formula that determined which jurisdictions were covered by Section 5 incorporated voter registration rates, levels of electoral participation, and the existence of tests or devices that restricted access to the ballot.[22] In order to obtain approval or "preclearance," these jurisdictions had to undergo either judicial review through a three-judge panel in the District of Columbia or administrative review through the Department of Justice (DOJ).[23] In both venues, the jurisdictions had the burden of proving that the proposed measure did not discriminate against ethnic or language minorities.[24]

Prior to the VRA's enactment, Black Americans were systemically excluded from the franchise in the former Confederate states.[25] Shortly after Reconstruction ended in 1877, Black Americans experienced considerable backlash as a result of their civic and political gains.[26] Between 1890 and 1910, all of the former Confederate states implemented measures designed to restrict Black Americans' access to the ballot such as literacy tests, grandfather clauses, and disqualification for crimes of moral turpitude.[27] While these practices were formidable weapons for disenfranchisement, extralegal practices were also employed. White supremacist government officials condoned mob violence and lynchings, and organizations like the Ku Klux Klan systematically intimidated Black Americans from exercising their right to vote.[28]

The Civil Rights Act of 1957 was Congress's first foray into voting rights for Black Americans since the passage of the Fifteenth Amendment

21. *About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUST.: CIV. RTS. DIV. [hereinafter *About Section 5*], https://www.justice.gov/crt/about-section-5-voting-rights-act [https://perma.cc/SDY7-CS84] (Sept. 11, 2020).

22. *Id.*

23. *Id.*

24. *Id.*

25. GILL, *supra* note 14, at 8–9.

26. *Id.* at 7–8.

27. *Id.* at 8–9. Grandfather clauses permitted illiterate whites to bypass the literacy test requirement by proving their grandfathers were eligible to vote, and crimes of moral turpitude were specific classes of felonies that were charged exclusively against Black Americans. *Id.*

28. *See id.* at 8 n.36 (discussing how white supremacy terrorist organizations "used violence as a tool to strategically intimidate Blacks and deny them an equal place in American society").

prohibited racial discrimination in regard to voting in 1870.[29] The Act created the Civil Rights Division of the DOJ, which enabled the federal government to prosecute efforts to abridge or deny the right to vote on account of race.[30] In spite of two amendments to the Civil Rights Act that targeted disenfranchisement, the Act was "ineffective" according to the U.S. Commission on Civil Rights.[31] Even with aggressive DOJ enforcement, litigation was slow, enforcing the judgments was onerous, and the mechanisms used by government officials varied widely, making them incompatible with reactive litigation.[32]

These difficulties demonstrated that, in order to be effective, the legislative remedy would need to be prophylactic and, thus, led to the creation of Section 5. After its passage in 1965, the VRA had immediate and profound effects on Black Americans' political participation.[33] States such as Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia saw a sixty-seven percent increase in voter registrations.[34] Each of these states, with the exception of North Carolina (which contained covered political subdivisions), were covered by Section 5 in its entirety.[35] By the 1970s, the difference in registration rates between Black and White voters dropped to eight percent across the United States.[36] However, as the adage goes, history tends to repeat itself, and soon states were devising subtler methods of preventing Black Americans from effectively participating, such as at-large elections, appointment of officials, and candidate qualifications.[37] In *Allen v. State Board of Education*,[38] Mississippi argued that these kinds of

29. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957); GILL, *supra* note 14, at 1 n.2, 9–10.

30. GILL, *supra* note 14, at 10 & n.48 (citing Civil Rights Act of 1957 §§ 111, 121, 131).

31. U.S. COMM'N ON CIV. RTS., 1963 REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 14, 26–28 (1963).

32. *Id.* at 13–15.

33. The Johnson Administration sent federal examiners to oversee voter registration in nine counties. SUSAN CIANCI SALVATORE, U.S. DEP'T OF THE INTERIOR, CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS 71 (2009), https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights_VotingRights.pdf [https://perma.cc/KPY2-8HRE]. In two counties, Dallas County, Alabama and Leflore County, Mississippi, Black voter registration rates soared from two percent to over seventy percent within three years. *Id.*

34. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 4 (2004).

35. *Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUST.: CIV. RTS. DIV., https://www.justice.gov/crt/section-4-voting-rights-act#formula [https://perma.cc/DK4A-2KAP] (May 5, 2020).

36. Vishal Agraharkar, *50 Years Later, Voting Rights Act Under Unprecedented Assault*, BRENNAN CTR. FOR JUST. (Aug. 2, 2015), https://www.brennancenter.org/our-work/research-reports/50-years-later-voting-rights-act-under-unprecedented-assault [https://perma.cc/GG8G-Q8EU].

37. BERMAN, *supra* note 2, at 59–60.

38. 393 U.S. 544 (1969).

changes were not subject to Section 5 review since Section 5 only applied to "enactments which prescribe who may register to vote."[39] However, the Supreme Court rejected this narrow construction of Section 5, ensuring that it would continue to prevent varied modes of discrimination.[40]

The undeniable success of Section 5 is reflected in the "extensive" legislative record put forth for the 2006 reauthorization of the VRA.[41] The Senate highlighted that Black representatives in Georgia and Mississippi, both covered jurisdictions, had been elected at proportional or higher rates than the percentage of Black Americans in the voting-age population.[42] Furthermore, registration rates between Black Americans and Whites in many covered states were almost equivalent, and in some, Black voter turnout surpassed that of Whites in the 2004 election.[43] Throughout the reauthorization process, these accomplishments were framed as "a direct result of the Voting Rights Act," further justifying its reauthorization.[44] However, in *Shelby County*, they were distorted to support the evidentiary leap that racism and voter suppression are no longer prevalent issues.[45]

B. The Persistence of Racially Polarized Voting and Resurgence of Discriminatory Practices Support Federal Intervention

The current political conditions in the United States support the revival of Section 5. In particular, the political parties' ability to leverage racially polarized voting for partisan gain and the alarming rate at which discriminatory measures are being enacted necessitates federal intervention. Since racially polarized voting underpins the use of voter suppression as a partisan tactic, it will be examined first.

The Supreme Court recognized the prominent role racially polarized voting holds in antidiscrimination voting law in *Thornburg v. Gingles*[46] by

39. *Id.* at 564.

40. *Id.* at 565–66.

41. *See* Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 428 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 570 U.S. 529 (2013) (noting the extensive legislative record in support of the reauthorization of Section 5).

42. 152 CONG. REC. 15,260–61 (2006) (statement of Sen. Arlen Specter).

43. *Id.*

44. Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), (b)(9), 120 Stat. 577, 577–78 (2006).

45. *Compare Shelby Cnty.*, 570 U.S. at 547–49 (framing the improvements in Black voter participation and representation as reasons that continued protective measures may no longer be needed), *with* H.R. REP. NO. 109–478, at 6 (2006) (stating that although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").

46. 478 U.S. 30 (1986).

making it indispensable to vote dilution claims.[47] The requisite showing under *Gingles* is: (1) the racial group must be sufficiently large and geographically compact to constitute a majority in a single member district; (2) the relevant minority must be politically cohesive; (3) the White majority must vote sufficiently as a bloc to enable it usually to defeat the minority preferred candidate.[48] If a plaintiff fails to establish that both groups engage in racially polarized voting, their claim will be dismissed.[49]

Examining the data, studies indicate that racially polarized voting in the United States has been relatively consistent since 1965.[50] In fact, during the 2006 hearings, Congress heard testimony that White bloc voting had been at least seventy percent cohesive in almost every election in a Section 5 jurisdiction since 1982.[51] In the 1990s, there was evidence to suggest that racially polarized voting had temporarily decreased, which the Supreme Court was quick to take note of.[52] However, any such decline has since reversed. Racial polarization was evident in the 2016 presidential election, in which fifty-eight percent of White voters preferred Donald Trump and eighty-eight percent of Black voters favored Hillary Clinton.[53] As further discussed below, this phenomenon incentivizes political parties with White voter bases to suppress minority votes, meaning the basis for strong antidiscrimination laws remains.[54]

While the consequences of *Shelby County* are still unfolding, numerous states have been emboldened to pursue voter suppression in the absence of Section 5 enforcement. Within hours of the Court's decision, the Texas Attorney General announced that the state would be enacting one of the

47. *Id.* at 49–51 (listing three preconditions for vote dilution claims); *see* Mary J. Kosterlitz, Thornburg v. Gingles*: The Supreme Court's New Test for Analyzing Minority Vote Dilution*, 36 CATH. U. L. REV. 531, 560 (1987) (asserting "[t]he majority's rationale for creating the new three-part test for analyzing vote dilution claims is premised on the idea that racial bloc voting is the most crucial factor in section 2 litigation").

48. *Gingles*, 478 U.S. at 50–51.

49. *See id.* (describing the showing of the minority group being "politically cohesive" and the majority group having "predictabl[e] . . . success" as being "necessary preconditions" for a voter dilution claim).

50. Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 273 (2020) (noting that "since the passage of the VRA in 1965, Republicans have won at least a plurality of the White vote and Democrats have overwhelmingly won the Black vote in *every* presidential election" (emphasis in original)).

51. S. REP. NO. 109-295, at 123 (2006).

52. Bartlett v. Strickland, 556 U.S. 1, 25 (2009) (plurality opinion); *see also id.* at 33 (Souter, J., dissenting) (noting that "racial polarization has declined").

53. Alec Tyson & Shiva Maniam, *Behind Trump's Victory: Divisions by Race, Gender, Education*, PEW RSCH. CTR. (Nov. 9, 2016), https://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education/ [https://perma.cc/CZ6Y-8SU3]; *see also* S. REP. NO. 109-295, at 123 (discussing racially polarized voting in covered jurisdictions as of 2006).

54. *See infra* notes 62–64 and accompanying text.

strictest voter identification laws in the country, which had previously been rejected during preclearance review.[55] When the voter ID law was challenged in the trial court, experts testified that there were more than a million eligible voters in Texas who did not have compliant photo IDs and these individuals were disproportionately Black and Latino.[56] In North Carolina, the legislature quickly enacted a multitude of voting reforms, including strict voter ID requirement, a reduction in early voting, and elimination of same-day registration.[57] Data suggested that these reforms would disproportionately affect Black voters in North Carolina.[58]

The aforementioned voter ID laws went to the Supreme Court on emergency appeal weeks before the 2014 election; however, they were permitted to stay in place for the election that year.[59] This result and the years of litigation that have followed highlight significant problems with reactive litigation.[60] In fact, North Carolina is still litigating its voter ID laws. While the Fourth Circuit struck down North Carolina's initial law, North Carolina Republicans passed the measure (over the Governor's veto) in an amendment to the state constitution, and there are multiple ongoing cases challenging it.[61]

55. *The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018) [hereinafter *The Effects of* Shelby County], https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/3CSV-N9X9]. That year, Texas also adopted interim redistricting maps that were based off of a map that was denied preclearance before *Shelby County*. Abbott v. Perez, 138 S. Ct. 2305, 2314–17 (2018).

56. *Supreme Court Allows Discriminatory ID Law to Stand*, BRENNAN CTR. FOR JUST. (Oct. 18, 2014), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-allows-discriminatory-id-law-stand [https://perma.cc/Z3VK-7CTZ] (noting that " registered voters are 305 percent more likely and Hispanic registered voters are 195 percent more likely than white registered voters to lack photo ID").

57. *The Effects of* Shelby County, *supra* note 55.

58. Trip Gabriel, *Court Decisions on Voting Rules Sow Confusion in State Races*, N.Y. TIMES (Oct. 7, 2014), https://www.nytimes.com/2014/10/08/us/politics/midterm-elections-voting-laws-court.html [https://perma.cc/5RMY-GBET]; *see also* Carrie Johnson, *Justice Department Sues North Carolina over Voter ID Law*, NPR (Sept. 30, 2013, 3:02 PM), https://www.npr.org/sections/thetwo-way/2013/09/30/227591062/justice-department-to-sue-north-carolina-over-voter-id-law [https://perma.cc/3BV3-5P39] (noting a study from the North Carolina Department of Motor Vehicles that found 300,000 registered voters lacked the requisite ID to vote under the state's new voter ID laws).

59. North Carolina v. League of Women Voters of N.C., 574 U.S. 927 (2014); Veasey v. Perry, 574 U.S. 951 (2014).

60. *See* Veasey v. Abbott, 888 F.3d 792, 796–97, 804 (5th Cir. 2018) (allowing Texas to implement a modified version of the voter ID law); N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214–15 (4th Cir. 2016) (striking down the voter ID law under Section 2 of the VRA because it targeted Black Americans with "surgical precision").

61. *See, e.g.*, N.C. State Conf. of NAACP v. Raymond, 981 F.3d 295, 298–301, 311 (4th Cir. 2020) (reversing district court's issuance of a preliminary injunction against North Carolina's state constitution amendment requiring voter ID); N.C. State Conf. of NAACP v. Moore, 849 S.E.2d 87, 89 (N.C. Ct. App. 2020) (reversing the lower court's invalidation of the amendment to North Carolina's state constitution requiring voter ID).

Following these enactments in 2013, former Attorney General Eric Holder warned of "open season" for voter suppression.[62] The partisan advantage that can result from these methods is evidently too good to refuse. For example, Wisconsin's voter ID law, which according to one study affected Black Americans at a rate three times higher than Whites, could have prevented or deterred enough voters to change the outcome of the 2016 presidential election in Wisconsin.[63] Therefore, it is unsurprising that fourteen states enacted restrictive voting laws between the 2012 and 2016 elections with only six of those states being previously covered jurisdictions.[64]

Less visible voting practices are changing across the country as well. Between 2014 and 2016 the number of individuals purged from voter registration rolls rose by thirty-three percent as compared to 2006 to 2008.[65] The increase in purge rates immediately following *Shelby County* was "significantly higher" for previously covered jurisdictions, which no longer had to preapprove the purge procedures with the DOJ.[66] While aggressive purges are not illegal *per se*, states often use inaccurate information and methods to remove individuals.[67] Therefore, federal review prior to implementation is essential for preventing eligible voters from being turned away at the polls.

62. Johnson, *supra* note 58.

63. The study estimated that between 16,801 and 23,252 eligible voters were prevented or deterred from voting due to the voter ID law, and Donald Trump's margin of victory over Hillary Clinton was 22,748 votes. Kenneth R. Mayer & Scott McDonell, *Voter ID Study Shows Turnout Effects in 2016 Wisconsin Presidential Election*, UNIV. OF WIS.-MADISON (Sept. 25, 2017, 7:00 PM), https://elections.wisc.edu/wp-content/uploads/sites/483/2018/02/Voter-ID-Study-Release.pdf [https://perma.cc/3ATV-R22X]; *Wisconsin Presidential Race Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 1, 2017, 11:27 AM), https://www.nytimes.com/elections/2016/results/wisconsin-president-clinton-trump [https://perma.cc/3FFX-5KFT].

64. *Election 2016: Restrictive Voting Laws by the Numbers*, BRENNAN CTR. FOR JUST. (Sept. 28, 2016), https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers [https://perma.cc/J6Q5-3U52].

65. *See* Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 21, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds [https://perma.cc/ZGQ6-BTWG] (noting that sixteen million voters were purged from 2014 to 2016 as compared to only around twelve million from 2006 to 2008). Data collection from 2016 to 2018 similarly shows an over forty percent increase from the same baseline. *Id.* (stating that seventeen million voters were purged from 2016 to 2018 compared to around twelve million from 2006 to 2008).

66. JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1, 3–4 (2018), https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote [https://perma.cc/9UBL-987D].

67. *See* Jonathan Brater, *Voter Purges: The Risks in 2018*, BRENNAN CTR. FOR JUST. (Feb. 27, 2018), https://www.brennancenter.org/our-work/research-reports/voter-purges-risks-2018 [https://perma.cc/5SPK-KPEQ] (discussing voter purges conducted through "end-run around[s] [of] federal" laws aimed at preventing large-scale voter purges in the run-up to elections, and noting that voter purges are often "prone to error").

The aforementioned evidence undermines one forceful criticism of the VRA. Opponents pointed to the "infinitesimally small" number of objections the DOJ had issued in the years leading up to the reauthorization to suggest that jurisdictions would not enact discriminatory laws if Section 5 were eliminated.[68] It is true that over the VRA's life span, only 1,402 out of 125,885 total submissions were objected to, a rate of approximately one percent, and that the objection rate dropped to .02 percent in the ten years prior to the 2006 reauthorization.[69] However, objections were a singular aspect of Section 5's overall functionality and interpreting the data requires a more nuanced approach.

States' recent actions support the powerful deterrent effect of Section 5, which was difficult to estimate when preclearance was still in place. However, Congress did hear testimony supporting this reality: "legislators, city council members, lawyers in the State Attorney General's Office, or lawyers for localities" actively factor Section 5 compliance into their decision-making process before proposing a change to the DOJ.[70] Additionally, the number of objections does not accurately encapsulate the back-and-forth between the DOJ and the jurisdictions. For a more complete picture, the number of "more information requests" (MIRs) issued by the DOJ must also be taken into account.[71] The number of MIRs is six times greater than the number of objections, and the portion of MIRs that directly resulted in a jurisdiction ceasing to pursue a voting change increased the number of rejected submissions by fifty-one percent.[72] Finally, although the number of MIRs and objections had both declined since 1994, this trend may be dictated less by states' approach to voting laws and more by outside factors.[73] Temporal analysis of Section 5 activity suggests that the Supreme

68. *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 20–21 (2006) (statement of Gregory S. Coleman, Weil Gotshall & Manges).

69. *Id.* at 5 (statement of Wan J. Kim, Assistant Att'y Gen., Civil Rights Division of the Department of Justice).

70. *Id.* at 26 (statement of Robert B. McDuff).

71. *See generally* Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVE ON DEMOCRACY, PARTICIPATION, AND POWER 47 (Ana Henderson ed., 2007), https://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf [https://perma.cc/QP3Y-DMU3] (discussing the importance of MIRs in weighing the effectiveness of Section 5 of the VRA).

72. *Id.* at 63–64.

73. A study analyzing Section 5 data from 1969 to 2013 reported that actions under Section 5 experienced steep drops after *Beer v. United States* in 1976 and *Shaw v. Reno* in 1992, where the Supreme Court curtailed Section 5 power. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in* Shelby County*?*, TRANSATLANTICA AM. STUD. J., no. 1, 2015, at 1, 10, http://transatlantica.revues.org/7462 [https://perma.cc/BWM5-F84Q]. In contrast, they were most prevalent after the favorable decision in *Allen v. Board of Elections* in 1969 and following Congress's indication that the DOJ should ignore *Beer v. United States* in the 1982 reauthorization of the VRA. *Id*. at 10–11.

Court and Congress's treatment of Section 5, not contemporaneous racial dynamics, best explain the rise and fall of objections and MIRs.[74]

C. Section 2 Litigation Cannot Replace Preclearance

After striking the fatal blow to the preclearance formula in *Shelby County*, Justice Roberts offered this hollow reassurance: "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."[75] For a number of reasons, enforcement under Section 2 has proven to be undeserving of Justice Roberts's endorsement. Section 2 and Section 5 previously worked in tandem: Section 2 eliminated discriminatory practices currently in place and Section 5 prevented backsliding.[76] Because Section 2 was designed to serve a different purpose, its features are unamenable to filling the void left by Section 5.

Under Section 5, jurisdictions were prohibited from adopting voting changes that would lead to a "retrogression": a diminishment a minority group's ability to elect their candidate of choice as compared to prior procedures.[77] Nonretrogression is a bright-line standard since the outgoing law provides a critical benchmark by which to judge the incoming law.[78] Furthermore, the impact on a minority group's ability to participate could often be assessed using statistics alone by comparing the new measure to the baseline.[79] The well-defined standard and inevitability of review allowed policymakers to collect data and tailor their proposals for compliance in advance.[80]

By contrast, the Section 2 inquiry is multifaceted: it asks whether, under a totality of the circumstances, racial or ethnic groups "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[81] As the standard suggests, all

74. *Id.* at 9–11.

75. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

76. *See* Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1963–64 (2018) (discussing Section 2's role in proscribing "present practice[s]" that deny or abridge the right to vote, and Section 5's prior role in "prevent[ing] covered jurisdiction from implementing . . . retrogressive electoral practices").

77. Georgia v. Ashcroft, 539 U.S. 461, 477 (2003).

78. *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2152–53 (2015) (discussing the bright-line characteristics of Section 5 review); *Holder v. Hall*, 512 U.S. 874, 883–84 (1994) ("Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change.").

79. *See* Noel H. Johnson, *Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Revive Preclearance Nationwide?*, DUKE J. CONST. L. & PUB. POL'Y, no. 3, 2017, at 1, 2 (stating preclearance would be denied if a minority group's voting power was diminished "even if by the barest of statistical margin").

80. Elmendorf & Spencer, *supra* note 78, at 2154.

81. Bartlett v. Strickland, 556 U.S. 1, 11 (2009) (plurality opinion) (quoting 42 U.S.C. § 1973).

considerations are relevant, including nine factors cited by the Supreme Court (several of which are nonquantitative).[82] While those factors include retrogression, the plaintiff's ability to prove retrogression is far from determinative.[83] Ultimately, courts must assess a multitude of factors, along with how the law fits into the larger framework of election laws in the jurisdiction, before reaching a conclusion.[84]

Additionally, while courts had consistently considered retrogression in Section 2 cases prior to *Shelby County*, there has been a recent push to wholly remove retrogression from the discrimination analysis, which would further reduce Section 2's ability to fill the void left by Section 5.[85] Thus, the nature of Section 2 proceedings make it a complex and unpredictable remedy, and even its current protections are vulnerable to new limitations.

The suitability of Section 2 as a replacement is further undermined by the resource intensive nature of litigation and the placement of the burden of proof. Under Section 5, the state or political subdivision seeking preclearance had the burden of proving nonretrogression.[86] Therefore, the cost of any data collection or experts was shouldered by the state rather than the adversely affected group. The informal presentation of information also mitigated costs that would otherwise be incurred with adversarial litigation. In Section 2 litigation, the burden of proof is on the plaintiff;[87] thus, the chances of successfully challenging a discriminatory law are lower, and plaintiffs must perform cost-benefit analyses regarding whether to pursue a claim at all. The superiority of administrative review is evidenced by the fact that ninety-nine percent of jurisdictions sought administrative rather than judicial review,[88] and the DOJ described the process as an "expeditious, cost-effective

82. Thornburg v. Gingles, 478 U.S. 30, 36–37 (1986).

83. *See* Katz, *supra* note 76, at 1965 ("No single factor standing alone—be it retrogression or an unfavorable comparison to practices elsewhere—establishes a violation of section 2.").

84. *Id.* (noting that Section 2's "'totality of circumstances' review" means that all circumstances are relevant to the inquiry and that the "validity of an electoral practice under section 2 has always depended critically on the context in which states used the practice").

85. *See, e.g.*, Defendant City of Pasadena's Reply Brief in Support of Its Motion for Summary Judgment at 10, Patino v. City of Pasadena, No. 04-14-cv-03241 (S.D. Tex. Aug. 9, 2016), ECF No. 78 (arguing that "retrogression arguments that might have been cognizable under the now-inapplicable section 5" should not be considered in a Section 2 case); Petition for Writ of Certiorari at 14, North Carolina v. League of Women Voters of N.C., 135 S. Ct. 1735 (2015) (No. 14-780) (arguing that the circuit court's use of a retrogression analysis in a section 2 case was in error); *see also* Reply Brief of Appellant, The Ohio General Assembly at 2–3, Ohio State Conf. of NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014) (No. 14-3877) (arguing that "Appellees . . . resort[] to an impermissible retrogression analysis that compares SB 238 to the prior early voting regime").

86. *About Section 5*, *supra* note 21.

87. Elmendorf & Spencer, *supra* note 78, at 2155.

88. *About Section 5*, *supra* note 21.

alternative to litigation."[89] Therefore, the administrative nature of Section 5 proceedings minimized costs for states and voters.[90]

In the absence of Section 5, there is also less notice and transparency in the lawmaking process. Before *Shelby County*, communities received notice of the proposed changes when they were submitted to the DOJ.[91] Therefore, the public could review the proposal and submit feedback directly to the DOJ prior to a law's enactment.[92] Now plaintiffs must use the discovery process to search for evidence, hampered by unequal access to information and the cost of discovery.[93] Voting rights advocates also experience difficulties monitoring voting changes, which often occur in small towns dispersed throughout the country.[94]

Finally, blocking a discriminatory voting change *ex ante* is inherently superior to invalidating the change after it has produced negative effects. In Section 2 lawsuits, preliminary relief is difficult to obtain—some estimate that preliminary injunctions are granted in only five percent of voting discrimination cases[95]—meaning the law will be in effect until the conclusion of the lawsuit. The harm resulting from stymied political participation is irreparable, and considering the litigation process often takes years, it is likely to affect multiple elections. Timewise, the DOJ review process also benefited jurisdictions by providing prompt responses that ensured proposed laws were only held in limbo for a few months.[96]

In sum, states across the country have reacted swiftly to *Shelby County* by enacting a myriad of discriminatory voting practices, such as voter ID laws and voter registration purges. These actions further undermine the

89. *The Shelby County Decision*, U.S. DEP'T OF JUST.: CIV. RTS. DIV., https://www.justice.gov/crt/shelby-county-decision [https://perma.cc/YKZ5-3C5M] (Aug. 6, 2015).

90. *About Section 5*, *supra* note 21.

91. *See* GILL, *supra* note 14, at 35 (describing how requiring jurisdictions to report voting changes to the federal government provided "notice" of these proposed changes).

92. *See* 28 C.F.R. § 51.29 (2020) ("Any individual or group may send to the Attorney General information concerning a change affecting voting in a jurisdiction to which section 5 applies."); *see also* GILL, *supra* note 14, at 35 (discussing how the ACLU would regularly fight proposed voting changes based on preclearance requests submitted by local governments).

93. *See Voting Rights Act After the Supreme Court's Decision in* Shelby County*: Hearing Before the Subcomm. on the Const. & Civ. Just. of the H. Comm. on the Judiciary*, 113th Cong. 52 (2013) (testimony of Spencer Overton, Professor of Law, The George Washington University Law School) (discussing the expensive discovery process and difficulty of collecting and analyzing data in lawsuits aimed to block voter discrimination).

94. *Continuing Challenges to the Voting Rights Act Since* Shelby County v. Holder, *Hearing Before the Subcomm. on the Const., Civ. Rts., & Civ. Liberties of the H. Comm. on the Judiciary*, 116th Cong. 3 (2019) (statement of Kristen Clarke, President and Executive Director, National Lawyers' Committee for Civil Rights Under Law).

95. Elmendorf & Spencer, *supra* note 78, at 2145 n.8.

96. The DOJ typically reviewed changes within 60 days of submission, and if the DOJ needed to request additional information, it aimed to reach a final determination within 60 days of the jurisdiction's response. *About Section 5*, *supra* note 21.

already flawed argument that Section 5 had become obsolete. Current antidiscrimination law is ill-equipped to protect voting rights in these cases due to the nature of the litigation: it can take years and significant resources to reach a final determination, and even if plaintiffs are successful, legislatures have the ability to circumvent adverse rulings by enacting different, but nevertheless discriminatory laws. Therefore, the federal government must return to its proactive role in protecting the fundamental right to vote.

II. A New Coverage Formula Is Not the Right Solution

A. Impact of the Federalism Revolution

In recognition of the ongoing need for Section 5 of the Voting Rights Act, the House of Representatives passed the Voting Rights Advancement Act, a bill that would establish an updated coverage formula to replace the one that was invalidated in *Shelby County v. Holder*.[97] However, the bill does not ameliorate the significant federalism costs associated with Section 5, and legislators are admittedly expecting a "long, drawn-out legal battle" over the bill if passed.[98] Accordingly, there is a significant risk that the Supreme Court will invalidate the revised law based on *Shelby County* and surrounding decisions.

Over the years, the Supreme Court has imbued the Tenth Amendment with varying degrees of power to limit federal action. The Rehnquist Court ushered in what is often referred to as a "federalism revolution" because of its commitment to curbing federal power and its aggressive approach to restoring state sovereignty.[99] Consistent with this philosophy, the Rehnquist Court invalidated more federal laws than all prior Courts combined.[100] Whether the Roberts Court places as high a premium on federalism generally

97. *See generally* Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. §§ 3–4 (2019) (proposing criteria for states and political subdivisions to be subject to Section 4(a) of the VRA and a newly created preclearance process).

98. Ella Nilsen, *The House Has Passed a Bill to Restore Key Parts of the Voting Rights Act*, VOX (Dec. 6, 2019, 1:30 PM), https://www.vox.com/2019/12/6/20998953/house-bill-voting-rights-advancement-act [https://perma.cc/4MQK-2TUB].

99. Joshua R. Meddaugh & John R. Theadore, *Federalism Lost: The Roberts Court's Failure to Continue Rehnquist's Federalism Revolution*, 24 NAT'L ITALIAN AM. BAR ASS'N J. 49, 49, 52 (2016).

100. Rosalie Berger Levinson, *Will the New Federalism Be the Legacy of the Rehnquist Court?*, 40 VAL. U. L. REV. 589, 590 (2006); *see also* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES (Apr. 17, 2005), https://www.nytimes.com/2005/04/17/magazine/the-unregulated-offensive.html [https://perma.cc/Y7ZX-N78V] (stating the Rehnquist Court had a higher rate of overturning federal laws on constitutional grounds than any other Supreme Court).

is debated by scholars;[101] however, in the field of election law, federalism is a dominant concern.[102]

During the Rehnquist era, there were indications that Section 5 might be in trouble. The Rehnquist Court inherited precedent applying rational basis review to Congress's enforcement powers under the Reconstruction Amendments.[103] In the initial pass at Section 5, the Warren Court held that preclearance review was "rational in both practice and theory" and the technicalities of the coverage formula were deemed "largely beside the point" because the formula was "relevant to the problem of voting discrimination."[104] In *City of Rome v. United States*,[105] the Burger Court rejected the argument that the VRA violated federalism principles;[106] however, the three dissenting Justices presaged the impermanence of deferential review.[107] Chief Justice Rehnquist, joined by Justices Stewart and Powell, argued that preclearance intruded on state and local sovereignty,[108] and Rehnquist suggested that a higher level of scrutiny would be used in the future.[109]

Justice Rehnquist's words began to come to fruition in *City of Boerne v. Flores*.[110] In *Boerne*, the Court invalidated the Religious Freedom Restoration Act because it exceeded Congress's authority under the Fourteenth Amendment's enforcement power.[111] In doing so, the Court formulated a new standard of review for preventative legislation enacted under Section 5 of the Fourteenth Amendment: the "congruence and

101. For an argument that the Roberts Court reasserts federal authority, see Meddaugh & Theadore, *supra* note 99, at 66–79, which cites to several decisions by the Roberts Court and asserts that these are an evolution from the Rehnquist Court's "new federalism" toward a posture more favorable to the federal government.

102. *See* Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 553–54 (2015) (arguing the Roberts Court defers to states in election law matters on both substantive and procedural issues).

103. *See* South Carolina v. Katzenbach, 383 U.S. 301, 324, 326 (1966) (stating that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting" when evaluating the constitutionality of the VRA); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (stating that the test for the constitutionality of § 4(e) of the VRA is whether it is "plainly adapted to [the] end" of enforcing the Equal Protection Clause of the Fourteenth Amendment).

104. *Katzenbach*, 383 U.S. at 329–30.

105. 446 U.S. 156 (1980).

106. *See id.* at 179–80 ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments by appropriate legislation." (internal quotations omitted)).

107. *E.g.*, *id.* at 200 (Powell, J., dissenting); *id.* at 209 (Rehnquist, C.J., dissenting).

108. *Id.* at 209.

109. *See id.* at 209 (Rehnquist, C.J., dissenting) (arguing that the Court must "carefully scrutinize the alleged source of congressional power to intrude so deeply" into state and local governments).

110. 521 U.S. 507 (1997).

111. *Id.* at 536.

proportionality" test.[112] This standard requires "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[113] Yet, it was unknown whether the Court would apply this standard to the VRA, which was enacted under the Fifteenth Amendment, and the Rehnquist Court continued to refer favorably to the Fourteenth Amendment's enforcement powers.[114]

B. Federalism in the Roberts Court

Chief Justice Roberts's discussion of federalism at his confirmation hearing set the tone for his tenure on the Court by referring to federalism as "genius" because it reserves to the states, which are "close[r] to the people[,] . . . issues of State and local concern."[115] One area that the Roberts Court has deemed to be of particularly local concern is voting rights. In a case unrelated to election law, the Court digressed to state that our system of federalism protects individual liberties, specifically political liberties.[116] The political benefits enumerated included civic participation, policies closely tailored to a jurisdiction's needs, attentive state governments due to interstate competition, and states' ability to serve as laboratories of democracy.[117] Therefore, it logically follows that the Roberts Court would believe the locus of power for election laws should be within the states.

This view likely explains the Court's differential treatment of federal and state election laws: the policy decisions of federal lawmakers are scrutinized while state laws receive highly deferential review. In recent election law cases, the Court has defined states' interests at a high level of generality and upheld the legitimacy of their interests with minimal supporting evidence. For example, in *Crawford v. Marion County Election Board*,[118] the Court stated in a plurality opinion that preventing voter fraud and safeguarding voter confidence were valid and "unquestionably relevant" state interests using a nineteenth-century anecdote and "scattered incidents of in-person voter fraud" elsewhere in the country.[119] Again, in *Doe v.*

112. *Id.* at 520.

113. *Id.*

114. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 518 (2004) (stating the Fourteenth Amendment's enforcement power, "as we have often acknowledged, is a broad power indeed" (internal quotations omitted)); Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003) (stating that under the Enforcement Clause of the Fourteenth Amendment, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct").

115. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 190 (2005).

116. Bond v. United States, 564 U.S. 211, 214, 221 (2011).

117. *Id.* at 221.

118. 553 U.S. 181 (2008).

119. *Id.* at 191, 195 nn.11–12 (plurality opinion).

Reed,[120] the Court recognized "combating fraud, detecting invalid signatures, and fostering government transparency and accountability" as legitimate interests sufficient to require the disclosure of signatures on a referendum.[121] Supporting these generalized interests, the Court stated that the threat was not "merely hypothetical" and cited isolated examples of fraud, almost all of which were from other states.[122]

By contrast, *Northwest Austin Municipal Utility District Number One v. Holder*[123] and *Shelby County* demonstrate the Supreme Court's distrust of the federal government to legislate in this area. The Court's decision in *Northwest Austin* has been described by many commentators as a "warning shot" signaling that the constitutionality of Section 5 was in jeopardy.[124] There, a utility district in Texas with no history of voting discrimination argued it was entitled to bail out of Section 5 coverage, or in the alternative, that Section 5 was unconstitutional.[125] The majority invoked but did not apply the congruence and proportionality standard, stating "current needs" related to voting discrimination must justify the "current burdens" of Section 5.[126] In describing the current needs, the majority stated that "[t]hings have changed in the South" and spotlighted high rates of voter registration and "unprecedented levels" of minority representation.[127] The optimistic rendering of the South and the discussion of Sections 4 and 5's intended impermanence[128] strongly suggest that, in the Court's view, the need for Section 5 coverage is no longer present. However, the Court stopped short of

120. 561 U.S. 186 (2010).

121. *Id.* at 197–98.

122. *Id.* (citing Brief for the States of Ohio et al. as Amici Curiae in Support of Respondents, Doe v. Reed, 561 U.S. 186 (2010) (No. 09-559) (cataloguing instances of fraud across several states)).

123. 557 U.S. 193 (2009).

124. *See, e.g.*, Mario Q. Fitzgerald*, A New Voting Rights Act for a New Century: How Liberalizing the Voting Rights Act's Bailout Provisions Can Help Pass the Voting Rights Advancement Act of 2017*, 84 BROOK. L. REV. 223, 235 (2018) (containing a heading stating that "*The Supreme Court Gives a Warning Shot on the Voting Rights Act's Constitutionality in* Northwest Austin"); Corey J. Wasserburger, *If It's Not Broken, Then Why Fix It? The U.S. Supreme Court Signals a Shift Under Section 5 of the Voting Rights Act in* Northwest Austin Municipal Utility District Number One v. Holder, 129 S. Ct. 2504 (2009), 89 NEB. L. REV. 420, 421 (2010) ("With its decision in *Northwest Austin Municipal Utility District Number One v. Holder*, the U.S. Supreme Court sounded a warning shot across the bow of Section 5 of the Voting Rights Act.").

125. *Nw. Austin*, 557 U.S. at 196–97.

126. *See id.* at 203–04 (stating that "current burdens [] must be justified by current needs," but declining to apply the congruence and proportionality standard over a rational basis standard because the "preclearance requirements and [] coverage formula raise serious constitutional questions under either test").

127. *Id.* at 202.

128. *Id.* at 199, 202.

the natural conclusion.[129] Nevertheless, the Court entered the domain of the policymaker—a space that is off-limits when reviewing state election laws—by challenging Congress's evaluation of the legislative record.[130]

Furthermore, the opinion was clear on the cost of Section 5, stating that "Section 5 goes beyond the prohibition of the Fifteenth Amendment," and listing numerous dissenting opinions that also expressed "serious misgivings" regarding its constitutionality.[131] Specifically, the Court stated that the preclearance requirement "imposes substantial federalism costs" by burdening local governments with the "intrusion" of the federal government.[132] In addition, the Court also introduced a new application of the "equal sovereignty" principle, which would reappear in *Shelby County*.[133] The equal sovereignty argument was raised and rejected in *South Carolina v. Katzenbach*,[134] where the Court held that Section 5's limited application to select states was permissible because the equal sovereignty principle only applied to the conditions of admission to the Union.[135] Nevertheless, in *Northwest Austin*, the Court abruptly abandoned this interpretation, writing that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[136]

Four years later, the Supreme Court decided *Shelby County*.[137] Although *Shelby County*'s holding was purportedly limited to invalidating the outdated coverage formula based on the equal sovereignty principle,[138] the Court's analysis has important implications for efforts to revive preclearance. Proceeding in the same manner as the *Northwest Austin* opinion, the majority in *Shelby County* addressed the current situation in covered states, stating there is no longer "pervasive, flagrant, widespread, and rampant" racial

129. *See id.* at 204–06, 211 (deciding the case on statutory rather than constitutional grounds based on the constitutional avoidance principle despite the "serious constitutional questions" raised by the VRA).

130. *Id.* at 204–05; *see also id.* at 217 (Thomas, J., concurring) (stating that the Framers "intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections" (quotations omitted)).

131. *Id.* at 202.

132. *Id.* (internal quotations omitted) (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

133. *Id.* at 203; *see supra* note 18 and accompanying text.

134. 383 U.S. 301 (1966).

135. *Id.* at 328–29; *see* Steven D. Schwinn, *The Roberts Court's Rule on Racial Equality*, 40 PREVIEW U.S. SUP. CT. CASES 342, 346 (2013) (noting that the "Court had previously applied an equal sovereignty principle only to the conditions upon which states were admitted to the Union" and that "one of the Court's own prior cases rejecting a constitutional challenge to [Section 5] of the VRA said as much").

136. *Nw. Austin*, 557 U.S. at 203.

137. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

138. *Id.* at 542, 557.

discrimination comparable to the kind that existed when Section 5 was approved using rational basis review.[139] After establishing that the South had improved, admittedly somewhat due to the VRA,[140] the Court began its legal analysis without establishing a standard of review and ultimately never articulated one.[141] This omission has immense practical importance for amending the VRA because even though the overall analysis suggests a minimally deferential standard, the Court has not directly established what level of deference it will give.

The *Shelby County* opinion is also replete with federalism language, suggesting that federalism concerns are the driving force behind the scrutiny. According to the majority, the relationship that preclearance creates between the states and the federal government is one of subjugation where "[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."[142] In contrast, a system that properly respected state sovereignty would allow states to "retain broad autonomy in structuring their governments and pursuing legislative objectives."[143] As aptly noted by Professor Sandy Levinson, the majority even seems to expand the traditional interpretation of the Tenth Amendment.[144] The Court stated, "[T]he Constitution provides that all powers not *specifically* granted to the Federal Government are reserved to the States or citizens."[145] By adding the word "specifically," the Court appears to be harkening back to a rejected interpretation of the Tenth Amendment, in which Congress's powers would be limited to those expressly granted by the Constitution.[146]

Nevertheless, it was the federalism principle of equal sovereignty that reemerged in *Northwest Austin*, not the overall federalism costs, that was ultimately the decisive factor. The Court rebuked Congress for enacting a coverage formula that "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty."[147] It is unclear how far

139. *Id.* at 554 (internal quotations omitted).

140. *Id.* at 548.

141. *Id.* at 550–57.

142. *Id.* at 544.

143. *Id.* at 543.

144. Sandy Levinson, *Tendentious, Mendacious or Audacious? John Roberts Rewrites the 10th Amendment*, BALKANIZATION (June 30, 2013, 3:19 PM), http://balkin.blogspot.com/2013/06/tendentious-mendacious-or-audacious.html [https://perma.cc/B97E-BJFA].

145. *Shelby Cnty.*, 570 U.S. at 543 (emphasis added).

146. *See* Levinson, *supra* note 144 (stating that "Congress explicitly rejected amending the proposed Tenth Amendment . . . to include the magic word [expressly] that had, of course, been present in the Articles of Confederation"); McCulloch v. Maryland, 17 U.S. 316, 406 (1819) (rejecting the idea that the Tenth Amendment "excludes incidental or implied powers [] and . . . requires that every thing granted shall be expressly and minutely described").

147. *Shelby Cnty.*, 570 U.S. at 540 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2006)).

the Court will expand this principle in the future; however, it significantly undermines proponents' arguments that the federalism costs are actually lessened by Section 5's limited application. Furthermore, the "formula itself takes on constitutional significance" for the majority.[148] The majority declined to view the case as an as-applied challenge, in which case the Court would narrowly decide whether the formula was unconstitutional as-applied to Shelby County, not whether the law was unconstitutional in its entirety.[149] An as-applied challenge would likely fail because Shelby County would be covered by any formula.[150] This suggests the formula must be accurate in the eyes of the Court and presents Congress with a difficult task in devising a new one.

The Court's treatment of the *Northwest Austin* opinion is an additional cause for concern. *Northwest Austin*'s binding precedent was limited to whether or not a utility district could avail itself of Section 5's bailout procedure,[151] and did not even include a standard of review to guide future decisions.[152] Nevertheless, the Court in *Shelby County*, citing the case over thirty times throughout a twenty-four-page opinion, stated "*Northwest Austin* guides our review under both [the Fourteenth and Fifteenth] Amendments in this case."[153] The Court then chided the dissent for acting "as if our decision in *Northwest Austin* never happened."[154] Just as the *Shelby County* Court relied on dicta in *Northwest Austin* as if it were binding precedent,[155] so too will a future opinion likely refer to *Shelby County*'s strong federalism language to invalidate Section 5.

Finally, the flood of election law cases surrounding the 2020 election allowed the members of the Roberts Court to further delineate their positions on this issue. Roberts himself has stayed the federalism course. In upholding the Seventh Circuit's decision to stay a lower court's injunction, Roberts wrote separately to underscore the difference between state and federal courts

148. Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 733 (2014) (emphasis omitted).

149. *Shelby Cnty.*, 570 U.S. at 554–55 ("Shelby County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The county was selected based on that formula, and may challenge it in court.").

150. *See id.* at 581–85 (Ginsburg, J., dissenting) (stating that "as applied to Shelby County, the VRA's preclearance requirement is hardly contestable" and listing multiple reasons why in Shelby County, Alabama, the current burdens imposed by Section 5 are justified by the current needs).

151. *Nw. Austin*, 557 U.S. at 197, 211.

152. *See id.* at 203–04 (stating that "current burdens [] must be justified by current needs" when evaluating the constitutionality of Section 5 of the VRA, but declining to apply the congruence and proportionality standard over a rational basis standard because the "preclearance requirements and [] coverage formula raise serious constitutional questions under either test").

153. *Shelby Cnty.*, 570 U.S. at 542 n.1.

154. *Id*. at 556.

155. *See, e.g.*, *id.* at 557 ("But in issuing [the *Northwest Austin*] decision, we expressed our broader concerns about the constitutionality of the Act.").

altering election rules.[156] He explained that the federal district court "intru[ded] on state lawmaking processes," whereas a state court could permissibly alter election rules by interpreting the state constitution.[157]

Other Justices endorsed an extreme form of deference to the states: the "independent state legislature" doctrine. The independent state legislature doctrine—a view then-Chief Justice Rehnquist and Chief Justice Roberts have previously offered support for—is an interpretation of the Elections Clause that asserts state legislatures are the highest authority in election law.[158] Although the doctrine was rejected by a majority of the Court in 2015,[159] Justices Alito, Gorsuch, Kavanaugh, and Thomas have taken the position that state legislatures have essentially unreviewable authority in determining election practices.[160] However, Chief Justice Roberts did not join these opinions and Justice Barrett was not involved in the decisions.[161] Therefore, it is clear that at least five Justices support significant deference to state legislatures. The only question is whether the Court will go a step further and fully embrace the independent state legislature doctrine.

III. The Back Door: Using Congress's Broad Spending Power to Amend the VRA

Since the founding of the United States, Framers and scholars have discussed Congress's ability to bypass the limits on its power through the Spending Clause.[162] The spending power permits Congress to "lay and collect

156. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring).

157. *Id.*

158. Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. (forthcoming 2021) (manuscript at 2, 14–15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720065.

159. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 816–18 (2015) (holding that the Elections Clause allows states to use citizen initiatives to enact regulations regarding redistricting and does not solely delegate election regulation to state legislatures).

160. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (mem.) (stating that constitutional provisions that grant state legislatures "the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election"); Moore v. Circosta, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting) (mem.) (stating "[a]s they observed, efforts like these . . . offend the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators"); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring) (mem.) (stating "[t]he Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules").

161. Douglas, *supra* note 158, at 15.

162. *See generally* THE FEDERALIST NO. 30 (Alexander Hamilton) (arguing that the Constitution must include an implied general power of taxation for the federal government); THE FEDERALIST NO. 34 (Alexander Hamilton) (arguing that the Constitution must contemplate the federal government having the power to raise and expend funds to combat emergencies as they

Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[163] Spending Clause jurisprudence has identified few effective limits to this power.[164] Therefore, when Congress lacks the power to directly legislate in a particular area, it often uses the Spending Clause's back door to influence state action.[165] Under a cooperative federalism program, states and the federal government share enforcement authority and policymaker power.[166] This proposal looks to existing spending programs as examples of valid cooperative federalism endeavors that a VRA amendment can learn from.

The proposed program would be a cooperative federalism program that uses federal funds to encourage all states to submit to federal preclearance of election procedures. The program is modeled off of the Clean Air Act, a spending program that greatly expanded the federal government's presence in air pollution control.[167]

A. Background on Spending Programs

The Clean Air Act is a primary example of a cooperative federalism regime implemented through Congress's Spending Clause powers. The Environmental Protection Agency (EPA) sets national standards for air quality that participating states must comply with in exchange for the continued receipt of highway funds.[168] States retain autonomy in the process because each state designs and implements a plan for achieving compliance.[169] The plan devised by the state, which must be adopted by the state within three years of the EPA's promulgation of new standards, is reviewed by the EPA for adequacy.[170] If a state fails to submit a plan, submits an inadequate plan, or fails to enforce its plan, the EPA is required to impose sanctions.[171] The EPA uses two types of sanctions: withholding federal funds

arise, particularly in relation to national defense, given the uncertain nature of the future); THE FEDERALIST NO. 41 (James Madison) (discussing the power of taxation and how it must extend to internal taxation, as well as the potential outer limits of the Spending Clause).

163. U.S. CONST. art. I, § 8, cl. 1.

164. *See* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 355–56 (2008) (outlining the failure of the Court to establish direct limitations on Congress's spending power).

165. *See id.* at 346–47 (articulating the perception that the Spending Clause offered Congress a method to increase its power at the expense of states' rights).

166. Anuradha Sivaram, *Why Citizen Suits Against States Would Ensure the Legitimacy of Cooperative Federalism Under the Clean Air Act*, 40 ECOLOGY L.Q. 443, 446, 449 (2013).

167. *See* Brigham Daniels, Andrew P. Follett & Joshua Davis, *The Making of the Clean Air Act*, 71 HASTINGS L.J. 901, 923 (2020) (relaying the view of the Clean Air Act's sponsor that the Act was "a major extension of federal involvement in air pollution control").

168. Sivaram, *supra* note 166, at 450.

169. *Id.*

170. *Id.*

171. *Id.*

and offset sanctions (sanctions that require the state to achieve higher reductions in other areas of pollution).[172] While the state retains primary enforcement authority, failure to properly enforce the state plan can result in the EPA assuming all enforcement responsibilities until the state agrees to remedy its failure.[173] When the Act was being debated in the Senate, proponents of the Act emphasized that states retained the ability to act first, and federal intervention would occur only in situations of non-compliance.[174]

Although the heavy involvement of the federal government in the administration of the Clean Air Act increases the federalism costs of the program, it is necessary to avoid issues that have plagued other spending programs. For example, the defunct No Child Left Behind (NCLB) Act was a Spending Clause program enacted in 2002, which greatly expanded the federal government's role in elementary and secondary education.[175] The program was designed to allow states more autonomy than a program like the Clean Air Act; therefore, states were permitted to set their own proficiency standards for student attainment.[176] Because states that failed to meet their own standards were sanctioned, states consistently set lower standards in order to ensure compliance.[177]

B. The Proposed Program

Congress must connect the condition it seeks to impose—states' adoption of the new preclearance process—to a federal grant that is awarded for a similar purpose.[178] The Help America Vote Act of 2002 (HAVA) is a fitting choice because the purpose of the Act is to provide the states with funds to update voting machines, assist with the administration of federal elections, and set minimum standards for the administration of federal elections.[179] In order to receive a federal grant under HAVA, the states had to provide at least a five-percent match and submit a plan regarding use of

172. *Id.*

173. *Id.* at 451.

174. Daniels, *supra* note 167, at 924.

175. *See* Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 128 (2006) (describing the NCLB Act as a use of Congress's Spending Clause power); Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), https://www.edweek.org/ew/section/multimedia/no-child-left-behind-overview-definition-summary.html [https://perma.cc/7ENG-SP69] (discussing how NCLB "significantly increased the federal role in holding schools responsible for the academic progress of all students").

176. Klein, *supra* note 175.

177. Heise, *supra* note 175, at 144.

178. *See* South Dakota v. Dole, 483 U.S. 203, 209 (1987) (holding that Congress acts appropriately within the limitations of its spending power when it conditions the receipt of federal funds "in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended").

179. Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 101–102, 116 Stat. 1666, 1668–70.

the funds.[180] Every state has complied,[181] and $3.5 billion of the original $3.65 billion appropriation had been distributed as of 2016.[182] In 2018 and 2020, Congress appropriated an additional $805 million as part of the HAVA Election Security Funds.[183]

The proposed program will incentivize states to submit to a form of preclearance review by making it a condition of receiving future HAVA awards. The program will function similarly to the Clean Air Act's partnership between the state and federal government. Like the EPA, the DOJ will promulgate national standards once a year, and the states will submit plans for compliance, including any voluntary election law changes for approval. The program alters the DOJ's former role in the preclearance process by having it articulate minimum standards in addition to performing compliance review. For example, the DOJ could predetermine which methods of verifying voters' identities at the polls are acceptable and how many days of early voting are mandatory. Articulating standards should reduce the amount of back-and-forth between the DOJ and the states as the rules provide notice regarding common practices. Efficiency is critical due to the volume of submissions the DOJ will be handling. Furthermore, creating affirmative requirements, rather than simply preventing retrogression as Section 5 previously did, will advance voting rights by eliminating the damaging practices that have emerged over the last eight years, which may have been resistant to Section 2 litigation for a number of reasons.

If a state fails to submit an implementation plan, submits an inadequate one, or fails to properly enforce it, the DOJ should employ two tiers of sanctions. If the failure can be offset by affirmative action, that should be the primary remedy. For example, if the state improperly purges voter registration rolls, the state should be required to implement a voter outreach program or commit additional resources to voter education to counteract the detrimental effects of its actions. If an offset sanction is not reasonable under the circumstances or if the state fails to comply, the DOJ will inform the Appropriations Committee that the state is no longer eligible to receive the next HAVA award.

180. *Funding Elections Technology*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 28, 2020) [hereinafter *Funding Elections Technology*], https://www.ncsl.org/research/elections-and-campaigns/funding-election-technology.aspx [https://perma.cc/WJ3F-BZPM].

181. *See* ARTHUR L. BURRIS & ERIC A. FISHER, CONG. RSCH. SERV., RS20898, THE HELP AMERICA VOTE ACT AND ELECTION ADMINISTRATION: OVERVIEW AND SELECTED ISSUES FOR THE 2016 ELECTION 24 (2016), https://fas.org/sgp/crs/misc/RS20898.pdf [https://perma.cc/UT6T-W98Q] (noting that "all states . . . received [HAVA funds] for election administration improvements").

182. *Id.* at Summary.

183. CONG. RSCH. SERV., IF11356, ELECTION SECURITY: STATES' SPENDING OF FY2018 AND FY2020 HAVA PAYMENTS (2020) [hereinafter ELECTION SECURITY], https://crsreports.congress.gov/product/pdf/IF/IF11356 [https://perma.cc/AGF8-VDYB].

C. Evaluation of an Alternative Proposal

In addition to a bill that would revive Section 5 by amending the coverage formula,[184] Congress is currently considering H.R. 1, which requires states to use independent commissions to draw congressional districts.[185] While a reform of this nature would reduce federalism costs by handing over power to independent state actors rather than the federal government, the Court's varying interpretations of the Elections Clause leave independent commissions in murky constitutional waters.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[186] the Court narrowly upheld a voter referendum requiring the state to create an independent redistricting commission.[187] However, four members of the Court diametrically opposed this interpretation. In his dissent, joined by Justices Scalia, Alito, and Thomas, Chief Justice Roberts vehemently protested that the term "legislature" in the Elections Clause cannot be broadly defined to encompass the state's legislative process, and instead must be limited to the legislative body itself.[188] Although the *Arizona* precedent is on the books and other states have since relied on it,[189] the recent opinions by Justices Alito, Gorsuch, Kavanaugh, and Thomas discussed *supra*[190] reinforce this concern. Therefore, H.R. 1 is a riskier approach than a spending program because it removes state legislatures' entire role in the process, potentially violating the independent legislature doctrine. It also mandates rather than incentivizes state reforms.

D. Compliance with Spending Clause Precedent

A cooperative federalism program that incentivizes states to submit to preclearance review by conditioning receipt of future HAVA funds on participation should comply with existing Spending Clause jurisprudence. In *South Dakota v. Dole*,[191] the seminal Spending Clause case, the Supreme Court upheld Congress's use of the spending power to condition the receipt of federal highway funds on the adoption of twenty-one as the state's

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

185. For the People Act of 2019, H.R. 1, 116th Cong. § 2401 (2019).

186. 576 U.S. 787 (2015).

187. *Id*. at 793.

188. *Id.* at 825 (Roberts, C.J., dissenting). Article I, Section Four of the U.S. Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. CONST. art. I, § 4.

189. *See, e.g*., MICH. CONST. art. IV, § 6 (mandating independent redistricting commissions for state legislative and congressional districts in Michigan); UTAH CODE ANN. § 20A-19-103 (LexisNexis 2020) (repealed 2020) (establishing standards for the Utah Independent Redistricting Commission).

190. *See supra* note 160 and accompanying text.

191. 483 U.S. 203 (1987).

drinking age.[192] The Court articulated a four-prong test to determine constitutionality: the conditions must (1) serve the "general welfare," (2) be "unambiguous[]," (3) be related "to the federal interest in particular national projects or programs," and (4) not violate any other provisions of the Constitution.[193] Afterwards, the Court recognized that Spending Clause legislation can also run afoul of the Constitution if the "financial inducement . . . [is] so coercive as to pass the point at which pressure turns into compulsion."[194] However, noncoercion was not a meaningful limit on the spending power until *National Federation of Independent Business v. Sebelius* (*NFIB*)[195] was decided in 2012.[196]

In *NFIB*, a plurality of the Court determined that the Medicaid expansion in the Affordable Care Act was an unconstitutional use of the spending power because the financial inducement was equivalent to a "gun to the head."[197] While the exact implications of *NFIB* cannot yet be determined, particularly because no opinion obtained a majority, scholars argue that the plurality opinion will control and have discerned two requirements for coercion: (1) the conditions are attached to an existing federal program whose financial contributions are significant relative to states' budgets and (2) states must participate in a separate program in order to continue to receive these funds.[198]

The proposed spending program should satisfy all of the requirements set out by the Supreme Court, and each will be discussed in turn.

First, for the general welfare requirement, the "courts should defer substantially to the judgment of Congress" in determining what qualifies.[199] Since the Court has further elaborated that this may not even be a "judicially

192. *Id.* at 205–06.

193. *Id.* at 207–08 (internal quotations omitted).

194. *Id.* at 211 (internal quotation omitted).

195. 567 U.S. 519 (2012).

196. Elizabeth G. Patterson, *The Spending Power After* NFIB*: New Direction, or Medicaid Exception?*, 68 SMU L. REV. 385, 390 (2015) ("Prior to *NFIB*, there was considerable doubt as to whether the Court accepted coerciveness as a basis for invalidating congressional grant programs.").

197. *NFIB*, 567 U.S. at 575–77, 580–81, 585.

198. *See, e.g.*, Samuel R. Bagenstos, *Viva Conditional Federal Spending!*, 37 HARV. J.L. & PUB. POL'Y 93, 95 (2014) (arguing that Chief Justice Roberts's Spending Clause opinion in *NFIB* renders a spending condition coercive only when a state's continued receipt of funding from a (1) "very large"; (2) preexisting spending program; (3) depends on participation in a "separate and distinct program"); Ellen K. Howard, *Breaking Down the Supreme Court's Spending Clause Ruling in* NFIB v. Sebelius*: A Huge Blow to the Federal Government or a Mere Bump in the Road?*, 35 U. ARK. LITTLE ROCK L. REV. 609, 612 (2013) (arguing that Chief Justice Roberts's Spending Clause opinion in *NFIB* creates a two-part test, asking "(1) whether the existing federal grant that Congress is threatening to terminate in the future is significant, and (2) whether that grant is independent from Congress's new condition that the states must adopt in order to keep receiving the original grant" (emphasis omitted)).

199. *Dole*, 483 U.S. at 207.

enforceable restriction at all,"[200] voting equality will undoubtedly satisfy promotion of the general welfare.

Second, satisfying the unambiguous requirement is more a matter of meticulous drafting than a limitation on the substantive use of the Spending Clause; therefore, it is largely beyond the scope of this Note.[201] Nevertheless, it is worth noting that the Supreme Court has interpreted unambiguous as requiring "clear notice" from the perspective of the states.[202] Therefore, long-standing programs will inevitably run into questions that were not anticipated by its drafters, and at that time, courts may intervene to invalidate application of conditions that states did not receive sufficient notice of.

Third, the proposal is likely to satisfy the relatedness requirement because HAVA's purpose is to reform voting administration, and the condition is that the state must submit to federal oversight regarding election laws and administration. The relatedness analysis in *Dole* demonstrates how neatly the proposal fits within this requirement. In *Dole*, the Court held the requirement was met because both highway funds and drinking age statutes promote "safe interstate travel."[203] Therefore, the relationship can be defined at a high level of generality and still meet the relatedness requirement.

Fourth, the program does not violate any other provisions of the Constitution. As discussed above, opponents of the legislation could argue that the program violates the Elections Clause. Notwithstanding several Justices' interpretation of the Elections Clause that reads "legislature" in a hypertextualist manner,[204] the fact that the states' legislatures will freely consent to the program and continue to create their own election law proposals may circumvent the issue. Additionally, federalism considerations do not constrain the federal government at this step in the analysis. Rather, because states have a choice whether or not to accept the funds, federalism concerns are arguably incorporated into the question of whether the financial inducement effectively eliminates the states' ability to choose and is thus coercive.

Finally, the program should comply with the additional considerations set out in *NFIB*. First, although HAVA is a preexisting program, it is relatively new and compromises a small portion of states' budgets. Prior allocations have also been relatively modest size: the largest grant allocated

200. *Id.* at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam)).

201. *See* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 599 (2013) (arguing the clear notice requirement necessitates that Congress "hammer[] out a more precise statutory deal").

202. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 295–96 (2006).

203. *Dole*, 483 U.S. at 208.

204. *See supra* notes 158–61 and accompanying text.

from the 2020 HAVA funds was $38 million,[205] whereas, in *NFIB*, the majority of states stood to lose more than $1 billion in Medicaid funding in a single year.[206] Critically, the federal grants have been one-off payments with no guarantee of future funding. Therefore, states are relying on HAVA funding to a much lesser extent than Medicaid funding.[207] Without the first consideration being met, the second criteria should not be determinative. Although the change from the minimum requirements instituted by HAVA to a preclearance program would likely constitute a "shift in kind, not merely degree," even more so than the expansion of Medicaid coverage was, none of the other coercive aspects of the Medicaid expansion are present here.[208] States were not expecting HAVA funds on an annual basis; instead, if and when new appropriations are made is subject to Congress's discretion.[209] Thus, the proposed program is unlikely to be unconstitutionally coercive.

Having arguably passed constitutional muster, the effectiveness of the proposed solution must still be examined. In theory, the proposal has the potential for nationwide coverage, which is beneficial because voting discrimination is less geographically localized than it was when the VRA was initially adopted;[210] however, this may be difficult to achieve in practice. The program's compliance with the new coercion standard is a double-edged sword: the program should survive constitutional review under *NFIB*, but the limitation on the financial inducement is an obstacle to attaining widespread adoption, particularly among the worst offending states. Legislators who have enacted discriminatory laws to help entrench themselves in power will not be keen on submitting to federal oversight. If these states do not acquiesce, significant resources will be expended on jurisdictions that likely would not have enacted discriminatory laws regardless.

205. *State Allocations of 2020 HAVA Funds: 2020 Appropriation at $425 Million*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/sites/default/files/news/documents/2020HAVA_State_Allocation_Chart_with_Match.pdf [https://perma.cc/7D2B-QJYS].

206. CONG. RSCH. SERV., R42367, MEDICAID AND FEDERAL GRANT CONDITIONS AFTER *NFIB V. SEBELIUS*: CONSTITUTIONAL ISSUES AND ANALYSIS 2 (2012), https://www.everycrsreport.com/reports/R42367.html [https://perma.cc/6FGY-5S9M].

207. *See Funding Elections Technology*, *supra* note 180 (discussing how states received only $3 to $34 million from the 2018 HAVA appropriations, and this does not even cover most states needs for updating their voting infrastructure).

208. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 583 (2012) (asserting that the Medicaid expansion constitutes a "shift in kind, not merely degree").

209. *See* ELECTION SECURITY, *supra* note 183 (discussing Congress's decision to appropriate HAVA funds in 2018 and 2020 based on its assessment of the need to protect states from election interference).

210. *See* Joshua S. Sellers, Shelby County *As a Sanction for States' Rights in Elections*, 34 ST. LOUIS U. PUB. L. REV. 367, 381 (2015) ("[B]y the time of the 2012 election, 19 states passed 27 restrictive voting measures, and a few months before the 2014 midterm elections, new voting restrictions [were] set to be in place in 22 states." (alteration in original) (internal quotations and footnotes omitted)).

However, in light of the likelihood of success of other proposals,[211] a Spending Clause program may be the only solution that will pass constitutional review with the current Supreme Court. While state participation is a significant obstacle, there is an incentive inherent in all Spending Clause programs: whether or not a particular state accepts, the state is paying for the program in federal tax dollars. Therefore, the program may be able to achieve its theoretical promise in practice.

Conclusion

The winding history of voting rights in the United States has demonstrated the incredible progress that can be achieved through the use of the right methods. For almost fifty years, Section 5 protected minority voters from state and local governments that had racial and political incentives to disenfranchise them. In the time since Section 5's invalidation, there has been a dramatic rise in discriminatory election law changes. Now Congress must examine legislative proposals to address this issue with pragmatism, particularly with regard to Supreme Court jurisprudence that demonstrates hostility to federal intervention in election matters. Thus, a legislative solution that ignores the Court's concerns in *Shelby County* or fails to grapple with the Court's overarching desire to focus election law power in the states would likely be futile.

In order to circumvent these issues, Congress can, and should, use the spending power to incentivize states to voluntarily submit federal oversight. A spending program that operates using HAVA funds should comply with the Court's traditional test for constitutionality as well as the recent precedent from *NFIB*. While the proposal has limitations, particularly whether states with discriminatory histories will acquiesce, other proposals, such as creating a new coverage formula or independent state election commissions, would likely be invalidated by the Supreme Court. A legislative remedy that will withstand judicial scrutiny in the long-term is essential, and the Spending Clause may be the only constitutional provision up to the challenge.

211. *See supra* notes 148–50 and 184–90 and accompanying text.