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Proportional Voting Through the Elections Clause: Protecting Voting Rights Post-*Shelby County*

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ABSTRACT

The Voting Rights Act passed fifty years ago and its success at curbing electoral discrimination is unquestioned. Section 5's preclearance, which requires specific jurisdictions to seek federal preapproval of election laws, was central to this success. Yet the Supreme Court, in *Shelby County v. Holder*, invalidated the formula that selected preclearance jurisdictions. Without the formula, preclearance can no longer protect against voting discrmination. *Shelby County v. Holder* compels rethinking voting rights legislation.

This Comment advocates for the Elections Clause as the new foundation for voting rights legislation. The Clause grants Congress authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives." The Supreme Court has interpreted the Clause to give Congress broad authority in dictating all manner and mode of federal elections. Legislation that is permissible under the Clause likely includes regulations mirroring preclearance. This Comment argues that one promising variety of such regulation is a national proportional voting system able to combat gerrymandering. This proposal highlights that through the Elections Clause, Congress can guarantee continued voting rights protections.

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INTRODUCTION

The Voting Rights Act (VRA) is one of the most important pieces of American legislation.[1] Born of the long and bloody struggle of the Civil Rights Movement, the Act fought to demolish the entrenched and ubiquitous electoral barriers imposed on minority voters throughout the country. It has been a success by every account. Within years of its passing, minority registration, turnout, and representation skyrocketed.[2]

Preclearance, found in the VRA's Section 5, is the process by which particularly worrisome jurisdictions must seek federal preapproval for election law changes.[3] It is considered the central reason for the Act's achievements, yet this tool recently became a victim of its own success.[4] In *Shelby County v. Holder*,[5] the U.S. Supreme Court struck down the formula that decides which jurisdictions must seek preclearance because of "the dramatic progress since 1965."[6] The Court invited Congress to modernize the formula, but there is doubt that any formula can allay the Court's concerns.[7] Preclearance may never be revived.

Shelby County provides an opportunity to revitalize debate over how the United States approaches voting rights. Strong voting rights protections are still necessary. As the Court conceded, voting discrimination has not been eradicated.[8] Evidence of this need is provided by dubious post-*Shelby* election laws passed by districts once under the yoke of preclearance.[9] In light of *Shelby County*,

1. *See* Gilda R. Daniels, *A Vote Delayed is a Voted Denied: A Preemptive Approach to Eliminating Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L.REV. 57, 65 (2009) ("The Voting Rights Act (VRA) of 1965 is considered one of the most important and effective pieces of congressional legislation."); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 2 (2007) ("President Lyndon B. Johnson called the Act 'one of the most monumental laws in the entire history of American freedom.'").
2. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting) (detailing the "significant progress" initiated by the VRA).
3. The Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. § 1973c (2014)).
4. *Cf.* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004) ("The emerging conclusion is that [preclearance] has served its purposes . . . .").
5. 133 S. Ct. 2612 (2013).
6. *Id.* at 2630 (internal quotation marks omitted).
7. See *infra* Part I.B for a discussion on the proposed Voting Rights Amendment of 2014 that has drawn skepticism on its constitutionality and effectiveness.
8. *Shelby Cnty.*, 133 S. Ct. at 2619 ("[V]oting discrimination still exists; no one doubts that.").
9. Part I.C., *infra*, details the restrictive election laws passed by former Section 5 states.

the Fourteenth and Fifteenth Amendments are now unstable bases for voting rights legislation. Congress must look elsewhere.

This Comment proposes that Congress shift the voting rights focus to the Elections Clause. The Elections Clause, Article I, Section 4 of the Constitution, allows Congress to dictate the "[t]imes, Places and Manner of holding Elections for Senators and Representatives."[10] The Supreme Court has continually found that the Clause affords Congress great authority. Most recently, in *Arizona v. Inter Tribal Council of Arizona*,[11] the Court affirmed that it "embraces authority to provide a complete code for congressional elections."[12] This authority likely grants Congress the ability to enact legislation mirroring preclearance.[13] And though Elections Clause power extends only to federal elections, Congress can employ certain strategies to encompass state election laws as well.

This Comment illustrates the power of the Elections Clause in one area with great potential for harm: redistricting. States must redraw legislative districts every ten years.[14] When one political party is in control of the redistricting process, lines are frequently drawn to reduce the minority party's representation. Unfortunately, this often has the side effect of also reducing the power of minority races. Without preclearance-like protections, this outcome will only increase after the next decennial census in 2020. A national law must be enacted to protect voting rights from deleterious redistricting.

The solution is a proportional voting (PV) system for all legislative districts. PV systems utilize multimember districts that lower the winning threshold for a candidate below 50 percent. This affords all groups, including minority populations, the opportunity for more equitable representation. Proportional voting will also reduce or completely eliminate the ills of redistricting. Through the Elections Clause, Congress can require this voting on all congressional districts while incentivizing application to state districts as well, thus limiting undue influence on one of the most important processes of our democracy.

Part I of this Comment briefly discusses the history and structure of the VRA. This Part also discusses *Shelby County* and its effects on election law. Part II discusses the Elections Clause and the scope of authority granted to Congress. Part III examines redistricting and its resulting inequality. Finally, Part IV argues that a PV system is the solution to this inequality. Additionally,

10. U.S. CONST. art. 1, § 4, cl. 1.
11. 133 S. Ct. 2247 (2013).
12. *Id.* at 2253 (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).
13. See *supra* text accompanying note 101.
14. CHARLES S. BULLOCK, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 11 (2010).

it argues that Congress can and should impose this system nationwide through the Elections Clause.

I. THE VOTING RIGHTS ACT

The Fourteenth and Fifteenth Amendments[15] prohibit voter discrimination.[16] Yet early enforcement attempts were unsuccessful because "[w]henever one form of voting discrimination was identified and prohibited, others sprang up in its place."[17] Discrimination had a tremendous effect on elections: African American registration was abysmal—below 10 percent in Mississippi[18]—and few minorities held elective office. Congress thrice attempted to give the Amendments more clout in the Civil Rights Acts of 1957,[19] 1960,[20] and 1964.[21] But these well-meaning efforts were "relatively toothless"[22] and did "little to cure the problem of voting discrimination."[23] Finally, President Lyndon B. Johnson ordered his Attorney General to write the "toughest voting rights act that [he] [could] devise . . . ."[24] The result was the Voting Rights Act of 1965.[25] After decades of inequality, and through the struggle of the Civil Rights Movement, President Johnson signed the Voting Rights Act on August 6, 1965.[26]

15. Also known as the Reconstruction Amendments or the post-Civil War Amendments.
16. The Fourteenth Amendment requires "equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.
17. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2633 (2013).
18. South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966); Louis Menand, *The Color of Law*, THE NEW YORKER (July 8, 2013), http://www.newyorker.com/arts/critics/atlarge/2013/07/08/130708crat_atlarge_menand. Alabama's African American registration was at 19.4 percent in 1964 and Louisiana's registration was 31.8 percent in 1965. *Katzenbach*, 383 U.S. at 313. Though Selma, Alabama, was 50 percent Black, "only 383 of the fifteen thousand African-Americans living there were registered to vote." Menand, *supra*.
19. The Civil Rights Act of 1957, Pub. L. 85–315, 71 Stat. 634.
20. The Civil Rights Act of 1960, Pub. L. 86–449, 74 Stat. 89.
21. The Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241.
22. Menand, *supra* note 18.
23. *Katzenbach*, 383 U.S. at 313.
24. Menand, *supra* note 18.
25. The Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. § 1973c (2014)).
26. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)). The heroic struggle for a more comprehensive and meaningful voting rights law was of great historical importance; the details of which are outside the scope of this Comment. For a thorough account of the struggle leading up to the passage of the Voting Rights Act, see GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013).

A. Preclearance

The VRA tackles voter discrimination in numerous ways. It bans the use of any test or device "as a prerequisite for voting or registration for voting."[27] The Act also addresses minority vote dilution by prohibiting political processes that give one group of voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[28] Furthermore, the VRA authorizes federal examiners to oversee elections in suspect jurisdictions.[29]

All of these tools are important, but the heart of the VRA is the innovative approach of Section 5.[30] The Section requires certain voting districts to have any changes to its election law—"from moving a polling place across the street to a congressional redistricting"[31]—approved by federal officials before implementation. Covered districts must prove these changes neither have a "discriminatory purpose nor a discriminatory effect" in order to obtain federal approval.[32] The preclearance coverage formula, found in Section 4,[33] provides that if a district employed a test or device and had below 50 percent voter turnout in the 1964, 1968, or 1972 presidential elections, then that district is covered by the preclearance requirements of Section 5.[34] Coverage is not permanent as jurisdictions can "bail out" if certain requirements are met.[35] Before its invalidation, the preclearance formula covered nine states entirely and portions of seven others.[36] All fully-covered states were in the South, but jurisdictions in states like Michigan, New York, and California also had to seek preclearance.[37]

Congress has seen the importance of preclearance and renewed the provision four times, with the most recent renewal occurring in 2006.[38] After

27. 42 U.S.C. § 1973b (2014).
28. *Id.* This provision was added to the VRA by the 1982 Amendment. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).
29. 42 U.S.C. § 1973a (2014).
30. Daniels, *supra* note 1, at 69 ("The importance of Section 5 is difficult to overstate."); Karlan, *supra* note 1, at 6 ("[Preclearance] has been critical to the Act's success with respect to both first-and second-generation issues.").
31. Daniels, *supra* note 1, at 70.
32. Karlan, *supra* note 1, at 5.
33. The Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. § 1973b(b) (2014)).
34. 42 U.S.C. § 1973b(b) (2014).
35. *See* Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1059 (2013).
36. 28 C.F.R. § 51 app. (2014).
37. Levitt, *supra* note 35, at 1058.
38. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments

"compil[ing] thousands of pages of evidence,"[39] Congress stated in the 2006 amendment that "[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965."[40] But despite Congress's continuing belief that the Act remains necessary, the Court recently "cut the heart out of the Voting Rights Act."[41]

B. *Shelby County v. Holder*

In *Shelby County v. Holder*, Shelby County, Alabama, challenged the constitutionality of the Act's preclearance and coverage provisions.[42] The Court ultimately invalidated Section 4's coverage formula with a 5–4 vote because it thought the "drastic departure from basic principles of federalism" was no longer justified.[43] The majority opinion noted that "voting discrimination still exists; no one doubts that."[44] But "sections 4 and 5 were intended to be temporary . . . ."[45] Even though Congress has continually extended Sections 4 and 5, it made no "change to [the VRA's] coverage formula."[46] The opinion emphasized that "things have changed dramatically,"[47] and yet "the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way."[48]

The majority also noted that under the Fourteenth and Fifteenth Amendments,[49] "a statute's current burdens must be justified by current needs, and any

of 1970, Pub. L. No. 91-285, 84 Stat. 315; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006).

39. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013).
40. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 § 2(b)(3).
41. Justin Sink, *Biden: 'Fight Back' Against Voter ID Efforts*, THE HILL (Apr. 7, 2014), http://thehill.com/video/in-the-news/202804-biden-fight-back-against-voter-id-efforts.
42. *Shelby Cnty.*, 133 S. Ct. 2612 (2013).
43. *Id.* at 2618.
44. *Id.* at 2619.
45. *Id.* at 2620.
46. *Id.* at 2621.
47. *Id.* at 2625.
48. *Id.* at 2626.
49. The majority opinion did not clearly state that its ruling was restricted to the Fourteenth and Fifteenth Amendments. The Court did, however, state that Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO), 557 U.S. 193 (2009) guided its analysis. *Id.* at 2622. Specifically, the Court noted that "[b]oth the Fourteenth and Fifteenth Amendments were at issue in [NAMUDNO] . . . and accordingly [NAMUDNO] guides our review under both Amendments in this case." *Id.* at 2622 n.1. Further, both the concurrence and dissent assumed the ruling pertained to these Amendments. *See Shelby Cnty.*, 133 S. Ct. at 2632 (Thomas, J., concurring)

disparate geographic coverage[50] must be sufficiently related to the problem that it targets."[51] Although Congress amassed "thousands of pages of evidence before reauthorizing the Voting Rights Act . . . .[, it] did not use the record it compiled to shape a coverage formula grounded in current conditions."[52]

The majority did not give specific guidance on what a valid Section 4 would look like. But it did highlight a handful of missteps to avoid, including: (1) violating the "principle of equal sovereignty,"[53] (2) not recognizing "the dramatic progress since 1965,"[54] (3) failing to have any "disparate geographic coverage be sufficiently related to its targeted problems,"[55] and most importantly, (4) failing to justify "current burdens . . . by current needs."[56] The Supreme Court concluded by reasserting that it made "no holding on § 5 itself."[57]

These stringent requirements will make it very difficult, if not impossible, for Congress to enact a new, meaningful Section 4 formula. Congress compiled a vast record[58] that allowed them to conclude that electoral discrimination persists.[59] These were not fringe findings, but findings supported by a vast majority of Congress—the 2006 renewal passed the House 390–33 and the Senate 98–0.[60] Yet this was not sufficient for the Court to find "current conditions" continuing to justify the preclearance formula. There is vocal opposition arguing that *Shelby County* is not based on sound constitutional principles.[61] But even if it was wrongly decided, the Court could take decades to overturn its *Shelby* opinion. Consequently, *Shelby County* likely marked the end of preclearance.[62]

("'The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists.'" (quoting NAMUDNO, 557 U.S. at 226)); *Id.* at 2652 (Ginsburg, J., dissenting) ("Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment.").

50. Disparate geographic coverage refers to the fact that preclearance mostly covered jurisdictions in the South.
51. *Id.* at 2627 (internal quotation marks omitted).
52. *Id.* at 2629.
53. *Id.* at 2623–24.
54. *Id.* at 2630 (internal quotation marks omitted).
55. *Id.* (internal quotation marks omitted).
56. *Id.* at 2627 (internal quotation marks omitted).
57. *Id.* at 2631.
58. *See* Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong., 2d Sess. (2006).
59. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, § 2(b), 120 Stat. 577 (2006).
60. 152 CONG. REC. 14303, 15325 (2006).
61. *See, e.g.*, Ellen D. Katz, *What Was Wrong With the Record?*, 12 ELECTION L.J. 329 (2013).
62. *See* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 99–100 (2013) ("*Shelby County* thus closes the chapter on the most important and most successful of the civil rights laws from the 1960s.").

C. Post-*Shelby County*: Continued Need for Voting Protections

Shelby County has already produced disheartening results. The most troubling is the proliferation of voter identification (ID) laws. The majority of states once under the scrutiny of federal preclearance have already enacted strict voter ID laws.[63] Texas actually announced the implementation of its voter ID law within hours of the *Shelby County* decision.[64]

Not all voter ID laws are harmful to voting rights,[65] but that is often the result. One of the commonly asserted purposes of these laws is to stop voter fraud.[66] This rationale is unconvincing, however, since statistics show that the actual incidence of voter fraud is miniscule.[67] If voter fraud is not the actual motivation, the best alternative explanation is partisan politics. As some Republican officials accidentally let slip, voter ID laws hamper Democratic support.[68] This is

63. Before *Shelby County*, ten states were all or mostly covered. 28 C.F.R. pt. 51 app. (2012). Of these ten states, six have enacted a photo identification (ID) requirement since *Shelby County*. *Interactive Map: The War on Voting Rights*, THE NEW YORKER, Feb. 12, 2014, http://www.newyorker.com/online/blogs/newsdesk/2014/02/interactive-map-the-war-on-voting-rights.html.

64. Press Release, Statement by Texas Attorney General Greg Abbott (June 25, 2013), *available at* https://www.oag.state.tx.us/oagnews/release.php?print=1&id=4435 ("With today's decision, the State's voter ID law will take effect immediately.").

65. South Carolina passed a photo ID law in 2011 that obtained preclearance. South Carolina v. U.S., 898 F. Supp. 2d 30 (D.D.C. 2012). The law's unique feature was a "reasonable impediment provision" that allows voters to vote without a photo ID. *Id.* at 32. Even though the law could have disparate racial effects, the court found "the sweeping reasonable impediment provision in [the law] eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused." *Id.* at 40.

66. North Carolina Governor Pat McCrory signed his state's voter ID law to "ensure[] that no one's vote is disenfranchised by fraudulent ballot," further stating that "protecting the integrity of every vote cast is among the most important duties [he] [has] as Governor." Pat McCrory, *Governor McCrory Signs Popular Voter ID Into Law*, YOUTUBE (Aug. 12, 2013), http://www.youtube.com/watch?v=ykw2zre6yrQ. In Texas, Governor Rick Perry touted his state's bill as "securing the integrity of the ballot box," with Speaker of the Texas House Joe Straus proclaiming the bill was a "major step[] to ensure elections are . . . without fraud . . . ." Press Release, Office of the Governor Rick Perry, Gov. Perry: SB 14 Takes a Major Step in Securing the Integrity of the Electoral Process (May 27, 2011), *available at* http://governor.state.tx.us/news/press-release/16189.

67. A Department of Justice report found that there were forty voters indicted for voter fraud between 2002 and 2005. Amy Bingham, *Voter Fraud: Non-Existent Problem or Election-Threatening Epidemic?*, ABC NEWS (Sept. 12, 2012), http://abcnews.go.com/Politics/OTUS/voter-fraud-real-rare/story?id=17213376 ("Only 26 of those cases, or about .00000013 percent of the votes cast, resulted in convictions or guilty pleas."); *see also* JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD 6 (2007) ("Such photo ID laws are effective only in preventing individuals from impersonating other voters at the polls—an occurrence more rare than getting struck by lightning."); The New York Times Editorial Board, *The Dishonesty of Voter ID Laws*, N.Y. TIMES, Oct. 1, 2013, at A24 (discussing Kansas's voter ID law and how, "as usual, there is no evidence that any significant voter fraud exists").

68. The House Majority Leader of Pennsylvania, Mike Turzai, stated that his state's voter ID law would "allow Governor Romney to win the state of Pennsylvania." Luke Johnson, *Mike Turzai,*

reinforced by the fact that only Republican-controlled states have enacted voter ID laws post-*Shelby County*.[69]

Political motivations are certainly not inherently malicious; indeed, competition between parties is central to our democratic system.[70] Voter ID laws, however, inevitably hamper voter turnout because they impose a barrier to voting, no matter how small. Further, numerous studies have found that minorities are disproportionately affected by these laws.[71] Thus, even if legislators are no longer making decisions because of race, election laws can nevertheless affect minority

Pennsylvania GOP House Majority Leader: Voter ID Will Allow Mitt Romney To Win State, HUFFINGTON POST (June 25, 2012), http://www.huffingtonpost.com/2012/06/25/mike-turzai-voter-id_n_1625646.html. Even though Governor Romney did not win Pennsylvania, he lost to President Obama by only 5 percent, doing twice as well as Senator McCain's 10 percent loss in that state. Pennsylvania GOP Chairman Rob Gleason stated that he thought "that probably photo ID helped a bit in that" improvement. Nick Wing, *Rob Gleason, Pennsylvania GOP Chair: Voter ID Law Helped Republicans Cut Into Obama Vote*, HUFFINGTON POST (July 17, 2013), http://www.huffingtonpost.com/2013/07/17/rob-gleason-voter-id-pennsylvania_n_3613057.html. One North Carolina Republican official candidly admitted his pleasure in the reduction of African American and student turnout that resulted from his state's voter ID law. *Suppressing the Vote*, The Daily Show with Jon Stewart (Oct. 23, 2013), *available at* http://www.thedailyshow.com/watch/wed-october-23-2013/suppressing-the-vote. Though Republican officials vehemently denounced the official's comments, the interview highlights a pervasive belief that voter ID laws help Republican candidates. *See id.*

69. The six states that have passed photo ID laws after Shelby County are: Alabama, Mississippi, North Carolina, South Carolina, Texas and Virginia. *Interactive Map: The War on Voting Rights*, *supra* note 63. Of these states, only Virginia is not completely controlled by Republicans. *2014 State and Legislative Partisan Composition*, NAT'L CONFERENCE OF STATE LEGISLATURES (NCSL), http://www.ncsl.org/documents/statevote/legiscontrol_2014.pdf (last updated Jan. 31, 2014) [hereinafter NCSL].

70. Additionally, political motivations do not automatically invalidate legislation if "a nondiscriminatory law is supported by valid neutral justifications . . . ." Crawford v. Marion Cnty. Elections Bd., 553 U.S. 181, 204 (2008). But "a restriction on voting whose only plausible justification was pure partisanship might well not survive constitutional scrutiny." Issacharoff, *supra* note 62, at 106.

71. *See* South Carolina v. U.S., 898 F. Supp. 2d 30, 40 (D.D.C. 2012) ("[T]he evidence reveals an undisputed racial disparity of at least several percentage points: About 96% of whites and about 92–94% of African Americans currently have one of the [valid] photo IDs."); JON C. ROGOWSKI & CATHY J. COHEN, TURNING BACK THE CLOCK ON VOTING RIGHTS 2 (2012) (discussing the disparate impact voter ID laws have on young Black voters compared to young white voters); BRENNAN CENTER FOR JUSTICE, POLICY BRIEF ON VOTER IDENTIFICATION 1 (2006) ("Not only are minority voters less likely to possess photo ID, but they are also more likely than white voters to be selectively asked for ID at the polls."); Raul A. Reyes, *Proposed Voting Rights Fix May Leave Latinos Vulnerable at Polls*, NBC NEWS (Feb. 13, 2014), http://www.nbcnews.com/news/latino/proposed-voting-rights-fix-may-leave-latinos-vulnerable-polls-n28526 ("[S]tate voter ID laws . . . have been shown to disproportionately affect Hispanic and other minority voters."). *But cf.* Kate Nocera, *How North Carolina's Voter ID Law Could Actually Help Democrats This Year*, BUZZFEED (Apr. 28, 2014), http://www.buzzfeed.com/katenocera/how-north-carolinas-voter-id-law-could-actually-help-democra (discussing how North Carolina's voter ID law may actually result in increased minority registration due to the backlash of the law).

voters.[72] Voter ID laws are just the beginning as other restrictions have been and will be enacted.[73] These laws have a proclivity to harm, even if enacted with the best intentions. Without preclearance review, their potential effects cannot be fully assessed before implementation. We are fifty years removed from the signing of the VRA, yet voting rights still require meaningful protection.

Several members of Congress recognized the need to continue preclearance and introduced the Voting Rights Amendment Act of 2014 on January 16, 2014.[74] Most notably, the bill rewrites the coverage formula. Under the new formula, preclearance would attach to jurisdictions that have had three or more voting rights violations within the last fifteen years.[75] An entire state will be covered if five or more violations occurred in the previous fifteen years, one of which the state committed.[76] Violations include judicial determinations that the jurisdiction violated the Fifteenth Amendment or Section 2 of the VRA.[77] A violation cannot, however, be "based on the imposition of a requirement that an individual provide a photo identification . . . for voting in an election."[78]

The 2014 Amendment is much needed legislation that would revive preclearance. But it suffers from a number of fundamental flaws. First, self-serving political considerations surrounding the bill render its passage unlikely. Congressional representatives are unlikely to support a bill that reapplies preclearance to their home districts. Additionally, the Amendment would impose preclearance on districts not previously covered; representatives are especially unlikely to sup-

72. LEVITT, *supra* note 67, at 6 ("The voter fraud phantom drives policy that disenfranchises actual legitimate voters, without a corresponding actual benefit."). Unfortunately, there is some evidence that this effect on minority rights is not only known to legislators, but desired. Professors Keith Bentele and Erin O'Brien conducted an empirical study on restrictive voter access legislation between 2006–2011 and found that "the targeted demobilization of minority voters and African Americans is a central driver of recent legislative developments." Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. POL. 1088, 1088 (2013).

73. Recently enacted laws include limiting early voting days and requiring proof of citizenship to register. *See, e.g.*, Steven Yaccino & Lizette Alvarez, *New G.O.P. Bid to Limit Voting in Swing States*, N.Y. TIMES (Mar. 29, 2014), http://nyti.ms/1fzSGAi (noting "[t]he flurry of new measures is in large part a response to recent court rulings that open the door to more restrictive changes"). One of the stranger laws is a Florida prohibition on voters using the restroom while waiting in line to vote. Anthony Man, *Voters Are Told to Hold Everything-Yes, Everything-at Some Polling Places*, SUN SENTINEL (Apr. 9, 2014, 1:10 PM), http://www.sun-sentinel.com/news/broward/broward-politics-blog/sfl-voters-banned-from-using-restrooms-20140409,0,1869709.story.

74. *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2d Sess. 2014).

75. *See id.* at H.R. 3899 § 3(b)(1)(B)(i). A jurisdiction will also be covered with one violation in the last fifteen years if it also has "had persistent, extremely low minority turnout during the previous 15 calendar years." *See id.* at H.R. 3899 § 3(b)(1)(B)(ii).

76. *See id.* at H.R. 3899 § 3(b)(1)(A).

77. *Id.* at H.R. 3899 § 3(b)(3)(A).

78. *Id.* at H.R. 3899 § 2(a).

port a bill that applies stringent restrictions for the first time.[79] Second, the Voting Rights Amendment Act of 2014 explicitly exempts voter ID laws. This ignores one of the most potentially harmful and increasingly ubiquitous forms of restrictive legislation.[80] Finally, the bill's constitutionality is unclear because the preclearance coverage formula does not require a constitutional violation.[81] As Professor Rick Hasen argues, the current Supreme Court is unlikely to "allow states or political subdivisions to be bailed back into coverage based upon conduct which has not been found to be unconstitutional. Doing so would exceed Congress's power to enforce the 14th and 15th amendment and violate principles of state sovereignty by being not congruent and proportional to the extent of state violations."[82] For these reasons, the Voting Rights Amendment Act of 2014 is not the best path forward after *Shelby County*.

II. THE ELECTIONS CLAUSE

After *Shelby County*,[83] the Fourteenth and Fifteenth Amendments can no longer serve as unwavering anchors for voting rights. If the United States is to truly guarantee equal access to the voting booth, we must devise a fresh approach. Joining the growing list of commentators,[84] this Comment advocates for the Elections Clause as the new foundation for voting rights.

The Elections Clause is found in Article I, Section 4 of the Constitution and states in its entirety: "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 Regu-

79. Daniel P. Tokaji, *Responding to* Shelby County*: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 97 (2014). This hurdle is in addition to the "general dysfunction of Congress . . . ." Rick Hansen, *Initial Thoughts on the Proposed Amendments to the Voting Rights Act*, ELECTION LAW BLOG (Jan. 16, 2014, 1:32 PM), http://electionlawblog.org/?p=58021.

80. William Yeomans, *After* Shelby County, 40 HUM. RTS. Q. 3, 4 (2014).

81. Tokaji, *supra* note 79, at 97; Rick Hasen, *Initial Thoughts on the Proposed Amendments to the Voting Rights Act*, ELECTION LAW BLOG (Jan. 16, 2014, 1:32 PM), http://electionlawblog.org/?p=58021.

82. Hasen, *supra* note 79; *see also* Tokaji, *supra* note 79, at 97.

83. 133 S. Ct. 2612 (2013).

84. *See* Brief for Gabriel Chin et al. as Amici Curiae Supporting Respondents at 4, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 417743 ("The Elections Clause . . . provides distinct, clear authority for Congress to enact Section 5's pre-clearance procedures . . . ."); Issacharoff, *supra* note 62, at 113 ("Instead of the limited race-driven use of equal protection and the Fifteenth Amendment, there is un-tested room for expansion of congressional intervention under the Elections Clause."); Daniel Tokaji, Shelby County v. Holder*: Don't Forget the Elections Clause*, SCOTUSBLOG (Feb. 13, 2013, 11:43 AM), http://www.scotusblog.com/2013/02/shelby-county-v-holder-dont-forget-the-elections-clause.

lations, except as to the Places of chusing [sic] Senators."[85] The Clause serves two distinct functions. First, it imposes a duty on the states to proscribe the time, place, and manner of electing representatives. Second, the Clause grants Congress the authority to alter these state regulations, or make their own regulations all together.[86]

The Clause's original purpose was to allow the federal government to protect federal elections against state impropriety or inaction.[87] The Articles of Confederation granted state legislatures exclusive rights to select federal delegates.[88] This created the potential for dysfunction, though, since "[v]irtually nothing of consequence could occur in the Congress established by the Articles without the consent of nine states."[89] This system also allowed the British to hamper federal processes when they captured South Carolina's capital during the Revolutionary War.[90] Delegates at the Constitutional Convention in Philadelphia sought to avoid this dysfunction as both Federalists and Anti-Federalists recognized "control over elections as inherent in the idea of sovereignty."[91] As put by Alexander Hamilton, the Elections Clause rests on the proposition "that every government ought to contain in itself the means of its own preservation."[92] Thus, the Convention gave Congress ultimate authority to make and alter congressional election regulations.[93]

The Supreme Court has continually found that Congress's Elections Clause power is expansive.[94] The Court first addressed congressional Elections Clause power in 1879, finding that "Congress may, if it sees fit, assume

85. U.S. CONST. art. 1, § 4, cl. 1.
86. Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247, 2253 (2013).
87. Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1039 (2005).
88. ARTICLES OF CONFEDERATION AND PERPETUAL UNION OF 1781, art. V, cl. 1 ("[D]elegates shall be annually appointed in such manner as the legislature of each state shall direct . . . .").
89. Greene, *supra* note 87, at 1031.
90. *Id.* at 1035.
91. *Id.* at 1032.
92. THE FEDERALIST NO. 59, at 331 (Alexander Hamilton) (Glazier & Co. ed., 1826).
93. Greene, *supra* note 87, at 1033. Though multiple limiting amendments came out of the state conventions, none successfully altered the Convention's language. *Id.* at 1039.
94. *See* Brief for Gabriel Chin et al., *supra* note 84, at 4 ("Congress' Elections Clause power is broad and plenary."); Issacharoff, *supra* note 62, at 112 (arguing that the Court in *Inter Tribal* "confirm[ed] the plenary authority of Congress with regard to the time, place, and manner of voting in federal elections . . . ."); Karlan, *supra* note 1, at 16 ("The Supreme Court's recent decisions under the Elections Clause have confirmed the longstanding interpretation of the clause as a grant of essentially plenary authority."); *see also* Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3 d 791, 794 (7th Cir. 1995) (Posner, J.) ("So Congress was given the whip hand.").

the entire control and regulation of the election of representatives."[95] The Court reaffirmed this authority in *Inter Tribal*.[96] There, the Court examined the National Voter Registration Act of 1993 (NVRA), which did not require proof of citizenship when registering to vote in federal elections.[97] Community groups argued the NVRA preempted an Arizona law that did require prospective voters to provide "satisfactory evidence of United States citizenship."[98]

The Court found that, first, the NVRA was a proper exercise of congressional Elections Clause authority. Justice Scalia[99] wrote the 7–2 majority opinion that confirmed "[t]he Clause's substantive scope is broad" and "'embrace[s] authority to provide a complete code for congressional elections . . . .'"[100] Specifically, the opinion determined that

> [t]he power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'[101]

Further, *Inter Tribal* highlighted the Elections Clause's unique preemption analysis. Courts ordinarily must assume Congress did not intend to preempt the states "unless that was the clear and manifest purpose of Congress."[102] But the Court "ha[s] never mentioned such a principle in [its] Elections Clause cases."[103] Instead, congressional "Elections Clause legislation, 'so far as it extends and conflicts with the regulations of the State, *necessarily* supersedes them.'"[104]

This sweeping Elections Clause authority encompasses legislation prohibiting the odious electoral barriers formerly proscribed by the VRA's preclearance mechanism.[105] Under the Elections Clause, Congress could prevent potential

95. *Ex parte* Siebold, 100 U.S. 371, 396 (1879) (emphasis added).
96. 133 S. Ct. 2247 (2013).
97. *See id.* at 2251.
98. *See id.* at 2252 (quoting ARIZ. REV. STAT. ANN. § 16-166(F) (West 2012)).
99. Justice Scalia's authorship is important because he professes a presumption against federal preemption. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 290–94 (2012). His approval of broad powers further demonstrates Congress's constitutional strength under the Elections Clause.
100. Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247, 2253 (2013).
101. *Id.* at 2253–54 (quoting *Ex parte* Siebold, 100 U.S. 371, 392 (1880)).
102. Arizona v. U.S., 132 S. Ct. 2492, 2501 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1937)).
103. *Inter Tribal*, 133 S. Ct. at 2256.
104. *Id.* (quoting *Ex parte* Siebold, 100 U.S. at 384) (emphasis added).
105. *See* Issacharoff, *supra* note 62, at 112–13 (arguing that the Court in *Inter Tribal Council* did not "limit the ability of Congress to reach most of the major voting concerns of recent years" with the

barriers on election day by regulating "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[106] The Court has also found the Clause to allow legislation beyond election day, including rules governing congressional primaries[107] and redistricting of congressional boundaries.[108] States cannot enact contradictory laws. Thus, just as they did with preclearance, Congress could protect voting rights before they are infringed.

The Elections Clause's strength derives from the direct constitutional grant of "general supervisory power."[109] Congress oversees states by either supplementing or completely supplanting state-made federal election law. In contrast, legislation under the Reconstruction Amendments is remedial. For remedial legislation to be constitutionally valid, Congress must demonstrate "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[110] This requirement forces Congress to compile "extensive evidence of widespread and ongoing unconstitutional conduct to support congressional remedial action."[111] Congress's apparent deficient evidentiary support of "current conditions" was a central issue in *Shelby County*.[112] This tight ev-

Elections Clause); Tokaji, *supra* note 84 ("Many important applications of the VRA's preclearance requirements fall squarely within Congress's Elections Clause power.").

106. Smiley v. Holm, 285 U.S. 355, 366 (1932). The Elections Clause's final phrase, "except as to the Places of chusing [sic] Senators," does not meaningfully limit congressional authority. The Court never specifically mentions the term in *Inter Tribal Council* nor in *Ex parte* Seibold. Additionally, literature discussing the history of the Elections Clause only references the phrase in passing. *See, e.g.*, Greene, *supra* note 87, at 1032.

107. United States v. Classic, 313 U.S. 299, 317 (1941) ("[W]e think that the authority of Congress, given by § 4, includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress.").

108. *See* Vieth v. Jubelirer, 541 U.S. 267, 276 (2004) ("Article I, §4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished."); *see also* Tokaji, *supra* note 84 ("[T]he Elections Clause also empowers Congress to make rules regarding congressional districting."). I discuss redistricting at length in Parts III and IV, *infra*.

109. Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 795 (7th Cir. 1995) (quoting *Ex parte* Seibold, 100 U.S. 371, 387 (1879)).

110. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

111. Ellen D. Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248, 249 (2014).

112. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629–30 (2013). The Court in *Shelby County* never articulated that "congruence and proportionality" is the standard to gauge evidentiary support under the Fourteenth and Fifteenth Amendments, just that "[C]ongress did not use the record it compiled to shape a coverage formula grounded in current conditions." *Id.* at 2629. In *NAMUDNO*, the court explicitly avoided answering this question in regards to the Voting Rights Act. Nw. Austin Mun. Util. Dist. No. One (NAMUDNO) v. Holder, 557 U.S. 193, 204 (2009). There, the Government argued for a "rational means" test and NAMUDNO argued for the "congruence and proportionality" standard, yet the Court merely stated that "[t]he Act's

identiary standard is not imposed on Congress under the Elections Clause.[113] Further, the Court decided *Inter Tribal Council* and *Shelby County* in the same term. These two cases elucidate the Court's contrasting views on congressional authority under the Elections Clause and the Reconstruction Amendments.[114] For these reasons,[115] Congress should look to the Elections Clause to further voting rights.

The Clause retains it superiority even though it only explicitly applies to federal elections.[116] First, Congress can still likely apply Elections Clause regulation to all elections. As Part IV.C illustrates, Congress can incentivize states to adopt federal regulations, erasing the only disadvantage. Even if it cannot, though, guaranteed protection against one harm is better than doubtful protection against all harms. There is no question the Clause can at least safeguard federal voting rights. This must be preferred to the post-Civil War Amendments that *Shelby County* called into question, even if those Amendments can encompass federal and state election laws. The Elections Clause is the best means to protect voting rights post-*Shelby County*.

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preclearance requirements and its coverage formula raise serious constitutional questions under either test." *Id.* Regardless, scholarship on the issue generally finds that the "congruence and proportionality" standard applies to remedial voting rights legislation under the Fourteenth and Fifteenth Amendments. *See* Issacharoff, *supra* note 62, at 107–08 (*Boerne* "imposed a tight means-ends requirement for remedial statutes that turned on 'congruence' of the remedy and the identified harm. In *Shelby County*, this meant that the passage of time since the inception of the VRA's coverage formula wore away at the remedial justification of the statutory scheme" (footnote omitted)); Katz, *supra* note 111, at 249.

113. *See* Issacharoff, *supra* note 62, at 108 ("[T]he level of constitutional scrutiny should drop when Congress exercises powers directly granted by the Constitution rather than powers inherited pursuant to the enforcement of the Equal Protection Clause.").

114. *See id.* at 100 ("The two Supreme Court cases invite a comparison of the distinct sources of federal power over elections and an examination of their relative potential effectiveness in controlling the renewed battles over voter eligibility.").

115. There are additional ancillary benefits, including a resistance to Eleventh Amendment attacks and issues of state sovereignty. *See* Brief for Gabriel Chin et al., *supra* note 84 ("Congress' power under the Elections Clause is not qualified by the principle of state sovereignty."); Issachroff, *supra* note 62, at 108–09 (arguing that Congress's Elections Clause "authority has remained intact, even with the Court's developing Eleventh Amendment jurisprudence").

116. The Court's solitary mention of the Elections Clause in *Shelby County* was to point out that "[t]he Federal Government retains significant control over federal elections." *Shelby Cnty.*, 133 S. Ct. at 2623. This brief mention may indicate that the Court overlooked the Clause because preclearance regulated all laws—federal, state, and local. Regardless, the Court's brevity is surprising given that an entire amicus brief was devoted to arguing that the Elections Clause supports the preclearance mechanism. *See* Brief for Gabriel Chin et al., *supra* note 84.

III. REDISTRICTING: WHERE POLITICS AND RACE COLLIDE

This Comment highlights the potential of the Elections Clause to further the goals of the VRA,[117] in both federal and state elections, by proposing means to overhaul redistricting, one of the most pervasive obstructions to voting equality.

A. Redistricting Overview

The United States government is a representative democracy. Instead of citizens voting on every issue, we elect representatives to make day-to-day decisions. This is a simple concept, and one that every American child learns at an early age. A more complicated notion is how voters are grouped together to elect these representatives.

There are two systems of allocating voters to representatives currently in use in American districts: single-member districts and multimember districts. Single-member districts simply break the jurisdiction into multiple districts represented by one representative. All state legislative and congressional districts are currently single-member. Multimember districts, or at-large districts, pool voters into districts with more than one representative. Historically, at-large districts were used to disenfranchise minority voters because a majority party or race could capture every seat if each seat within the district is separately elected.[118] In response to this concern, Congress outlawed congressional multimember districts in 1967.[119]

Regardless of district type, states must redistrict all legislative lines at least once every ten years.[120] Populations are always in flux, and thus voter numbers within districts are not static. Voters in a more populated district will have diluted power compared to a less populated district. After the census is conducted every ten years, states must redistrict to reset district populations.

117. The Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. § 1973c (2014)).

118. *See Shelby Cnty.*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting); Greene, *supra* note 87, at 1059–60. For instance, if California was entirely at-large for congressional districts, Democrats could capture every one of the state's fifty-three representatives because they are the majority party in the state overall.

119. *See* 2 U.S.C. § 2(c) (2014). Part IV.A, *infra*, argues for this law's repeal and imposition of a Proportional Voting system.

120. *See* BULLOCK, *supra* note 14.

B. Gerrymandering

Though re-equalizing populations helps balance voter influence, the parties in charge of redistricting still play an important role in distributing voter power.[121] In most states, the legislature has the authority to redraw all districts—congressional as well as state legislative districts.[122] Further, a single political party often controls the redistricting process. One-party control generally requires the governorship and majority in both houses of the state legislature.[123] Over half of the states currently satisfy this condition and thus are susceptible to unilateral redistricting by one party.[124] This can occur even without complete control of the legislature since minority party representatives will often support a redistricting plan in exchange for an uncompetitive seat.[125]

Gerrymandering is the process by which legislators manipulate district lines for political gain. The most prevalent means of gerrymandering is the pack-and-crack method. Pack-and-crack seeks to either pack the minority party's supporters into a small number of districts or crack pockets of these supporters into multiple districts.[126] Either process limits the influence of the

121. *See id.* at 2 ("A districting scheme can make some votes worth more than others."); Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 558 (2011).

122. Legislators in thirty-seven states have redistricting authority. Morgan Cullen & Michelle Davis, *5 Trends Shaping Redistricting*, STATE LEGISLATURES, Oct.–Nov. 2012, at 30, 32, *available at* http://www.ncsl.org/Portals/1/Documents/magazine/articles/2012/SL_1012-Redistricting.pdf; BULLOCK, *supra* note 14, at 9. Twenty states give some redistricting authority to independent commissions, with thirteen having primary control of the process. NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL), REDISTRICTING COMMISSIONS: LEGISLATIVE PLANS, http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx (last updated June 25, 2008).

123. BULLOCK, *supra* note 14, at 9.

124. Of the thirty-seven states with legislator controlled redistricting, twenty-nine are controlled by one party. Eighteen are controlled by Republicans, including Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin and Wyoming. Eleven are controlled by Democrats, including Connecticut, Delaware, Illinois, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont and West Virginia. *See* NCSL, *supra* note 69.

125. *See* Jean Merl, *State's Redrawn Congressional Districts Protect Incumbents*, L.A. TIMES (Feb. 9, 2002), http://articles.latimes.com/2002/feb/09/local/me-cong9 (describing how "Republicans went along" with a Democratic plan in order to protect incumbents).

126. *See* Vieth v. Jubelirer, 541 U.S. 267, 286 n.7 (2004). Professors Adam Cox and Richard Holden have described another gerrymandering method called Matching Slices. *See* Cox & Holden, *supra* note 121, at 564–67. In essence, this method matches a percentage of the majority party's supporters with a slightly less percentage of similarly enthusiastic minority party supporters, ensuring the minority's most strident supporters are neutralized. *See id.* at 567–72. Professors Cox and Holder convincingly argue that even if the matching slices theory has not previously been articulated, it is an efficient model for maximizing power through redistricting. *See id.* at 556–57.

minority party's supporters. Therefore, even though districts may be equal in population, voter influence depends on how districts are drawn.

Gerrymandering has been used for blatantly racist ends. For instance, Mississippi, the state with the highest Black population, gerrymandered its districts in 1966. By cracking populations, the state did not have a single district where Blacks comprised a majority.[127] As a result, Mississippi did not send an African American to Congress until the maps were redrawn in 1986.[128]

Though racial gerrymandering is no longer legal,[129] political gerrymandering is legal[130] and pervasive. A good example of political gerrymandering can be found in Utah's four congressional districts. Utah's legislature and governorship are controlled by Republicans.[131] Though heavily Republican statewide, voter turnout is near equal between Democrats and Republicans in the state's largest county, Salt Lake County.[132] During the 2011 redistricting, the state legislature cracked Salt Lake County into three congressional districts, with the

127. BULLOCK, *supra* note 14, at 16.

128. *Id.*

129. Racial gerrymandering violates the Equal Protection Clause unless "narrowly tailored to further a compelling governmental interest." Shaw v. Reno, 509 U.S. 630, 643 (1993). Grouping individuals only by race "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 647. This is an "impermissible racial stereotype[]." *Id.*

130. Political gerrymandering suits are brought as Equal Protection challenges, but were not held justiciable until *Bandemer* in 1986. Davis v. Bandemer, 478 U.S. 109 (1986). The Court ruled that "a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133. This standard proved to be nearly impossible to satisfy and "has served almost exclusively as an invitation to litigation without much prospect of redress." *Vieth*, 541 U.S. at 279 (quoting SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 886 (rev. 2d ed. 2002)). In *Vieth*, the plurality would have liked to see *Bandemer* overruled and suits of political gerrymandering held non-justiciable. *Id.* at 305 ("We conclude that neither Article I, §2, nor the Equal Protection Clause, nor . . . Article I, §4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."). Thus, minority parties can challenge political gerrymandering, but these suits are rarely, if ever, successful. *See* League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 419 (2006) ("[T]here is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best."); Issacharoff, *supra* note 62, at 106 ("[A]n election law is not unconstitutional merely because it might reflect in part partisan motivations . . . .").

131. *See* NCSL, *supra* note 69.

132. This is calculated by using the actual votes cast in the 2012 General Election. UTAH LIEUTENANT GOVERNOR: ELECTIONS, 2012 GENERAL ELECTION (2012), *available at* http://elections.utah.gov/Media/Default/2012%20Canvass/2012%20General%20Canvass%20Report.xls. Republicans garnered 257,568 votes statewide compared to Democrat's 111,160. *Id.* Yet in Salt Lake County, the turnout was 71,808 Republican and 66,980 Democrat. *Id.*

fourth hugging the County's border.[133] After gerrymandering, three Republicans won by an average margin of 43 percent.[134] Six-time Democratic incumbent Jim Matheson won the fourth district by a margin of 0.3 percent, or just 768 votes.[135] Even though Democrats received 32 percent of all congressional votes statewide,[136] Republicans were 768 votes away from taking every congressional seat.[137]

This tactic is certainly not unique to Republicans, as Democrats frequently take advantage of their power in other states. For instance, Democrats designed Texas's redistricting plan after the 1990 census. Even though Republican congressional candidates received more than 50 percent of the total vote share for the five elections during the plan's life, their seat share never exceeded 43.4 percent.[138] In 1994, Democrats received only 43.1 percent of the congressional vote yet took 63.3 percent of the state's congressional seats.[139]

C. Redistricting and Voting Rights

Though racial gerrymandering is no longer legal, political gerrymandering can still disenfranchise racial minority voters.[140] The controlling party's goal in partisan gerrymandering is to increase power at the expense of the opposing party's influence.[141] But reducing a party's influence can consequently reduce minority voting power when race is closely associated with party preference, as is currently the case. African Americans, Hispanics, and Asian Americans favor

133. *See* UTAH AUTOMATED GEOGRAPHIC REFERENCE CENTER, 2012 US CONGRESSIONAL DISTRICTS IN SALT LAKE COUNTY (2012), *available at* http://elections.utah.gov/Media/Default/Documents/VotingDistrictMaps/SALTLAKECounty_USCongressionalDistricts_2012.pdf.
134. *Id.*
135. *Id.*
136. *Id.*
137. Republicans are poised to capture this last seat in 2014 because Rep. Matheson has announced his retirement, the same Republican challenger is running again, and Governor Romney carried the district by 67 percent. *See* Sean Sullivan, *Rep. Jim Matheson (D-Utah) Will Retire*, WASH. POST (Dec. 17, 2013), http://www.washingtonpost.com/blogs/post-politics/wp/2013/12/17/rep-jim-matheson-d-utah-will-retire.
138. BULLOCK, *supra* note 14 at 109.
139. *Id.* at 116 tbl.5.1; *see also id.* at 114–15 (describing California's pro-Democrat gerrymandering efforts).
140. Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 209 (2013) ("[A] ruling party or coalition that seeks to hobble the competitive position of its adversary by making it more difficult for their constituencies to vote or campaign will inevitably discriminate against a racial group.").
141. *See* Cox & Holden, *supra* note 121, at 564 ("[A]lmost everyone agrees that redistricting authorities are centrally motivated by the desire for partisan advantage.").

Democrats by substantial margins.[142] For instance, African Americans voted for the Democratic presidential candidate by more than 84 percent the last five elections.[143] Conversely, white voters tend to favor Republican candidates.[144] The Supreme Court has acknowledged this polarity, stating that "race . . . correlates closely with political behavior."[145]

These voting patterns often make party preference a proxy for race.[146] Assuredly there is political and philosophical diversity within every race. Nevertheless, the current statistical correlation between party and race tempts gerrymandering legislators into treating areas where white voters live differently than areas where minority voters live.[147]

Gerrymandering legislators will treat minority populations differently even if their only intention is to treat the opposing party differently. Texas's 2011 redistricting plan highlights this problem. The Texas maps diluted minority voting power and minority groups sued. In its defense, Texas argued that the districts were "designed to help Republicans at the expense of Democrats, some of whom *happen to be minorities*."[148] The State further contended that "[i]t is perfectly constitutional for a Republican-controlled legislature to make partisan districting decisions, even if there are incidental effects on minority voters who support Democratic candidates."[149] Texas intended only to minimize Democratic influ-

142. William H. Frey, *Minority Turnout Determined the 2012 Election*, BROOKINGS, at fig.3 (May 10, 2013), http://www.brookings.edu/research/papers/2013/05/10-election-2012-minority-voter-turnout-frey; *see also* Alexander Kuo et al., *Why Are Asian Americans Democrats?*, POLITICO MAGAZINE, Mar. 18, 2014, http://www.politico.com/magazine/story/2014/03/asian-americans-democrats-104763.html.

143. Cox & Holden, *supra* note 121, at 572; Frey, *supra* note 142.

144. Frey, *supra* note 142; Ronald Brownstein, *Republicans Can't Win With White Voters Alone*, THE ATLANTIC (Sept. 7, 2013), http://www.theatlantic.com/politics/archive/2013/09/republicans-cant-win-with-white-voters-alone/279436 (describing the modern trend of white voters favoring Republicans, noting that "[t]he past two elections have offered Republicans many encouraging signs about their standing with whites").

145. Easley v. Cromartie, 532 U.S. 234, 257 (2001).

146. *See* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 61 (2014) (arguing that nowadays, race and party cannot be separated); Daniels, *supra* note 1, at 71 ("In most jurisdictions today, African-American voters are largely equated with the Democratic Party. Consequently, Republican legislators often use party as a proxy for race and cast the unwanted African-American voter in Democratic districts.").

147. *See* Cox & Holden, *supra* note 121, at 572 ("This, we argue, would lead a redistricting authority who is interested only in partisan advantage to treat African American voters differently from white voters when assembling electoral districts.").

148. Defendant's Response to Plaintiffs and the United States Regarding Section 3(c) of the Voting Rights Act at 23, Perez v. State of Texas, SA-11-CA-360-OLG-JES-XR (W.D. TX Aug. 5, 2013) (emphasis added).

149. *Id.* at 19.

ence, yet it recognized this had also diluted minority voting power. This illustrates that even if laws are colorblind they can still impose barriers that create disparate effects along racial lines. Thus, when race and party substantially overlap, gerrymandering will result in minority vote manipulation.[150]

D. Proportional Opportunity as the Goal

Before a solution can be proposed, a goal must defined. There are numerous reasons to dissuade voter manipulation for political gain. But this Comment continues on the assumption that the central goal for reducing improper manipulation should be to promote proportional representation. Proportional representation simply means that communities—racial, political, religious or otherwise—have representation in proportion to their size. This is important because representatives serve as proxies for their constituents. When representation diverges significantly from the composition of the jurisdiction's overall population, democratic principles are frustrated. This recognizes the distinction between "one person, one vote" and "one person, one value"[151]—everyone has only one vote, but not everyone's vote will carry the same weight.[152] This concept was also an underlying goal of the VRA.[153]

Historical resistance to proportional representation has been centrally concerned with proportional representation as a requirement.[154] Yet, proportionality as a goal is distinctive from proportionality as a requirement. As Lani Guinier argues, "[t]he purpose is not to guarantee 'equal legislative outcomes'; equal opportunity to

150. *Cf.* Levitt, *supra* note 35, at 1083 ("Drawing primarily based on race or ethnicity risks a legal challenge if there is no obligation under the Voting Rights Act; drawing primarily based on other criteria risks a legal challenge if there is an obligation under the Voting Rights Act.").

151. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1641 (1993).

152. This concept is illustrated well in the U.S. Senate where every state has two senators, regardless of population. This affords voters in smaller states greater influence in the Senate than more populated states. *See* Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES (Mar. 10, 2013), http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html ("[A] Vermonter has 30 times the voting power in the Senate of a New Yorker just over the state line . . . .").

153. As President Johnson stated at the signing of the Voting Rights Act, "every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right." MAY, *supra* note 26, at 119–20. An equal right to vote is meaningless if the value of that vote is unequal.

154. As Benjamin E. Griffith testified at Lani Guinier's nomination to head the Justice Department's Civil Rights Division, "[r]ace-driven redistricting should not be allowed to lead to the creation of a system of safe or reserved seats for members of different racial or ethnic groups, thereby insuring proportionate representation." Voting Rights, Hearing Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary H.R., 103rd Cong. 161(1994) (written statement of Benjamin E. Griffith, Esq., Griffith & Griffith, Cleveland, MS); *see also id.* at 2 (Rep. Henry J. Hyde) ("Access to the ballot, without respect to race, is not a complex public policy question. Gerrymandering to maximize minority office holding is.").

influence legislative outcomes regardless of race is more like it."[155] Stated differently, the goal is not really proportional representation but proportional opportunity—minority voters should have equal ability to elect whomever they want. Consequently, voting rights legislation must focus on equalizing electoral opportunity.

Partisan gerrymandering is an exemplary impediment to proportional opportunity. Gerrymandering provides a legal means to reinforce majority power at the expense of the opposing party.[156] If successful, this will naturally result in disproportionate opportunity, regardless of who is redistricting—Republicans and Democrats alike will gerrymander to unnaturally inflate their supporters' influence. Accordingly, proportional opportunity is necessarily thwarted by partisan gerrymandering. And when race correlates with party preference, gerrymandering will often result in voting rights inequity along racial lines.

Manipulation of the electoral system for politically convenient reasons erodes our democracy's fundamental purpose to represent the will of the people. The United States needs a means to guarantee to all populations the proportional opportunity to elect representatives. This goal is especially imperative for minority populations because of the historic, prolonged voting rights abuses inflicted on them in this country, the effects of which are still festering.

IV. PROPOSED SOLUTION

The VRA[157] successfully curbed inequitable redistricting plans. Yet Section 5's preclearance is now hobbled with the invalidation of Section 4's coverage formula. States once required to seek preclearance are already eyeing the next redistricting cycle to impose new maps.[158] The United States needs a new approach to redistricting and elections to avoid the harmful effects of inequitable redistricting plans.

155. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN A REPRESENTATIVE DEMOCRACY 14 (1994).

156. The motivation is further heightened because plans will generally last a decade. BULLOCK, *supra* note 14, at 109.

157. The Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. § 1973c (2014)).

158. In his press release hours after *Shelby County*, Texas's Attorney General said redistricting maps "may also take effect without approval from the federal government." Press Release, Statement by Texas Attorney General Greg Abbott (June 25, 2013), *available at* https://www.oag.state.tx.us/oagnews/release.php?print=1&id=4435.

A. Proportional Voting

If proportional opportunity is the goal, partisan politics is the enemy. Minority communities are rarely proportionally represented when legislators gerrymander districts that separate community members to achieve their political ends. Consequently, any remedy must remove politics' ability to taint district composure. This is best done with a PV system.

PV systems scrap the traditional winner-take-all single-member district model in favor of multimember districts. Single-member districts require a candidate to garner 50 percent plus one vote. Since the average congressional district comprises roughly 700,000 voters, this generally requires minority communities to have around 300,000 members[159] to elect a congressional candidate of their choice.[160] Often, a minority population will comprise a significant portion of a state, but not be geographically compact enough to compose majority-minority districts.[161] PV systems fix this problem by creating multimember districts large enough to cover more pockets of minority communities. PV systems also avoid the historical problem of at-large districts being used to disenfranchise by lowering the winning percentage, or "threshold of exclusion," below 50 percent.[162] The threshold of exclusion is the minimum percentage a cohesive minority community must comprise within a district to elect at least one representative.

A technical explanation of PV systems and the threshold will help illuminate the point. The threshold of exclusion is dependent on which PV method is used. There are three main methods: limited voting, cumulative voting, and choice voting. Limited voting allows voters to vote for as little as one candidate to as many as one less than the amount of open seats within a district.[163] Thus, if there are five open seats in one district, a voter may be allowed to vote for between one and four candidates. Cumulative voting allows voters to distribute a set amount of votes, usually equal to seats available, among candidates.[164] Voters can concentrate all

159. The average congressional district is 710,767 voters. KRISTIN D. BURNETT, CONGRESSIONAL APPORTIONMENT: 2010 CENSUS BRIEFS 1 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.

160. Assuming minority cohesiveness and a majority opposed to minority candidates.

161. Geographic compactness is the first factor minority communities must prove to win majority-minority districts under the VRA's Section 2. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

162. *See Fair Voting/Proportional Representation*, FAIRVOTE, http://www.fairvote.org/reforms/fair-representation-voting (last visited Mar. 26, 2014).

163. Steven J. Mulroy, *Nondistrict Vote Dilution Remedies Under the Voting Rights Act*, *in* AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW & VOTING 200 (2d ed. 2012).

164. *Id.* at 201.

votes to a few or even one candidate.[165] If there are five open seats, a voter could give one candidate all five votes, meaningfully increasing the likelihood of victory for that candidate. Finally, in choice voting, voters rank candidates from most preferred to least preferred, though not all candidates need to be ranked.[166] Here, candidates garnering a certain percentage of first-choice votes are seated. This winning percentage, known as the Droop Quota, is calculated by dividing the total votes cast by number of open seats plus one.[167] In an election with 500 votes cast for 5 seats, all candidates garnering 101 or more first choice votes are elected. Any remaining seats are filled through successive rounds based on successive preference votes.[168]

The threshold of exclusion in a limited voting system is a function of the number of votes per voter (V) and the number of seats to be filled (S);[169] in cumulative and choice voting systems, the threshold of exclusion is a function of only the number of votes per voter (V). Limited voting's threshold of exclusion is V/(V+S). For choice and cumulative voting the threshold formula is 1/(V+1).[170] Below are thresholds of exclusion for a varying number of votes per voter and open seats:

165. Cumulative voting originated in stockholder elections to protect minority shareholder rights. See ROBERT W. HAMILTON ET AL., CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES: CASES AND MATERIALS 410–12 (11th ed. 2010); Guinier, *supra* note 151, at 1632.

166. Mulroy, *supra* note 163, at 201. Choice voting is also known as single transferable vote, the Hare system, or preference voting. *Id.* at 211 n.18.

167. STEVEN HILL, 10 STEPS TO REPAIR AMERICAN DEMOCRACY 205 n.9 (2006); Mulroy, *supra* note 163, at 211 n.20.

168. See CITY OF CAMBRIDGE, PROPORTIONAL REPRESENTATION BROCHURE (2014), *available at* http://www.cambridgema.gov/~/media/BD029816F80C4CDC89FD22B40EEBE4BE.ashx (explaining its choice voting system and how candidates are elected).

169. This formula assumes that the majority will not vote for the minority preferred candidate. Mulroy, *supra* note 163, at 202.

170. *Id.*

TABLE 1.

Limited Voting					
Seats (S)	**Votes per Voter (V)**				
	1	**2**	**3**	**4**	**5**
3	25.0%	40.0%	*	*	*
4	20.0%	33.3%	42.9%	*	*
5	16.7%	28.6%	37.5%	44.4%	*
6	14.3%	25.0%	33.3%	40.0%	45.4%
Cumulative Voting/Choice Voting					
Seats (S)	**Votes per Voter (V)**				
	2**	**3**	**4**	**5**	**6**
***	33.3%	25.0%	20.0%	16.7%	14.3%

* V must be less than or equal to S in Limited Voting.

** V cannot be below two for Cumulative/Choice.

*** In Cumulative/Choice Voting, the threshold is not dependent on the number of open seats.

As opposed to traditional winner-take-all systems, the threshold of exclusion for PV systems is necessarily less than 50 percent. Minority communities would not need to be crammed into majority-minority districts to have an opportunity to elect a representative of their choice. Electoral opportunities will inherently approach proportionality as the threshold is lowered.

PV systems also limit gerrymandering. Assume multimember districts should be between three and five representatives.[171] Twenty-four states have five or fewer congressional seats.[172] Imposing a proportional voting system could thus completely eliminate the harmful racialized effects of congressional gerrymandering in nearly half of all states. Twenty-six states could theoretically continue gerrymandering, but its effectiveness in diluting the minority vote would be greatly reduced. Packing and cracking is significantly more difficult when the threshold of exclusion is below 50 percent. And again, the threshold of exclusion for any PV system is necessarily less than 50 percent, regardless of

171. The number of seats per district is a policy-laden question dependent on the level of inclusion desired. HILL, *supra* note 167, at 207 n.17. FairVote, an elections focused independent non-profit, developed PV plans for all fifty states' congressional districts utilizing three to five member districts. FAIRVOTE, THE FAIR VOTING SOLUTION TO GERRYMANDERING (2012), *available at* http://www.fairvote.org/assets/2012-Redistricting/Fair-Voting-Overview.pdf. This is a reasonable plan because it would result in an exclusion threshold of between 16.7 percent and 25 percent—likely neither too high nor too low.

172. BURNETT, *supra* note 159, at 2 tbl.1.

how many seats a given district has. Cracking a population would risk scattering pockets of opposing voters large enough to exceed the threshold in other districts,[173] and packing a population would risk the group obtaining multiple representatives in that district. As barriers to inclusion diminish, exclusion becomes increasingly challenging.[174]

A PV system would also replace preclearance's racially charged standards and issues of disparate impact. Preclearance required a court to parse legislative history to ensure there is not a "discriminatory purpose nor a discriminatory effect."[175] PV systems are inherently race-neutral as they increase inclusion for all communities. Political, gender, and religious minorities would all benefit because any cohesive community over the threshold of exclusion can elect at least one representative. Additionally, unlike preclearance, a national PV system would naturally cover every jurisdiction, erasing preclearance's disparate geographic coverage imposed on the South.

PV system's biggest weakness may be its unfamiliarity to most voters.[176] Calculating the threshold of exclusion and tallying votes can be a complicated concept. But voters need not understand the system to operate it.[177] Voting in a PV system is straightforward—either you are ranking your favorite candidates, voting for a few favorites, or distributing votes. Cambridge, Massachusetts, employs choice voting and explains how to rank candidates in three sentences.[178]

173. Like whack-a-mole, a squashed minority voice in one district will result in increased representation in another.

174. Though gerrymandering would be greatly reduced, it would not be 100 percent eradicated. For these states still needing to redistrict, an Independent Redistricting Commission (IRC) could be added to vanquish any lasting partisan influences. An IRC gives all redistricting authority to citizens wholly independent of the legislature. An IRC could redistrict the multimember districts to guarantee a politically neutral redistricting process. *See* Kevin Reyes, Note, *Redistricting or Rethinking? Why Proportional Representation May be a Better Solution Than California's Independent Redistricting Commission*, 20 S. CAL INTERDISC. L.J. 655, 685–87 (2011) (arguing that though a PV would reduce ability to gerrymander, a redistricting commission should still "draw the lines for the multimember districts to eliminate whatever bias may be left in this system"); Levitt, *supra* note 35 (examining California's IRC and its adherence to the VRA).

175. Karlan, *supra* note 1, at 5.

176. Mulroy, *supra* note 163, at 206. Another drawback is the potential proliferation of fringe parties if the threshold is too low. This occurs in some countries such as Israel, which had its threshold at 1 percent. HILL, *supra* note 167, at 83–85, 207 n.17. But this problem can easily be overcome by increasing the threshold to a reasonable level. *See id.* (discussing and dismissing the potential drawback of fringe candidates); *see also* Mulroy, *supra* note 163, at 207.

177. A 1998 study that polled voters using cumulative voting for the first time found that the "beneficial property of the system does not appear to be at the expense of making voting a significantly more difficult task for the less educated among them." Richard L. Engstrom & Robert R. Brischetto, *Is Cumulative Voting Too Complex? Evidence from Exit Polls*, 27 STETSON L. REV. 813, 827 (1998).

178. CITY OF CAMBRIDGE, *supra* note 168.

Regardless, a process's underlying complexity should not deter its application. As Douglas Amy argues, "more complexity is actually good. In televisions, you must embrace a more complex technology—like high-definition—to get a much better picture. Similarly, you need a more complex voting system to get a better and fairer political result."[179]

Numerous cities, counties, and school boards currently utilize a PV system.[180] Further, "proportional systems are used by *most* of the established democracies in the world today."[181] Though no state presently uses a PV system statewide, Illinois's house of representatives employed cumulative voting for almost a century.[182] Members of both parties expressed strong support for the process[183] as it created a more balanced legislature by helping "political minorities like Republicans in liberal areas and Democrats in conservative areas; it also helped women and racial minorities win representation."[184] Alas, a Reagan-era ballot measure aimed at limiting government had the little known effect of also scrapping the state's cumulative voting system.[185]

Compelling a PV system poses no insurmountable legal barriers. Generally, "[t]here is no federal constitutional or statutory provision barring the use of alternative electoral systems."[186] Moreover, federal courts have found that PV systems do not violate the VRA.[187] The VRA's Section 2 explicitly does not "establish a right to have members of a protected class elected in numbers equal to their proportion in the population."[188] But even if proportional representation is not guaranteed, it certainly is not prohibited.[189]

179. Douglas J. Amy, Editorial, *A Better Election System*, LOWELL SUN (Oct. 19, 2009), http://www.lowellsun.com/editorials/ci_13588970.
180. Mulroy, *supra* note 163, at 200–01; FAIRVOTE, *supra* note 1771.
181. HILL, *supra* note 167, at 84.
182. Mulroy, *supra* note 163, at 201; HILL, *supra* note 167, at 63.
183. HILL, *supra* note 167, at 63–71.
184. *Id.* at 68.
185. *Id.* at 70.
186. Mulroy, *supra* note 163, at 202; *see also* HILL, *supra* note 167, at 82 ("Nothing in the U.S. Constitution requires single-seat districts for the U.S. House, the 50 state legislatures, or local government.").
187. *See, e.g.*, United States v. Vill. of Port Chester, 704 F. Supp. 2d. 411, 448 (S.D.N.Y. 2010) ("There is no case law that rejects cumulative voting as a lawful remedy under the Voting Rights Act."); United States v. Euclid City Sch. Bd., 632 F. Supp. 2d 740, 752 n.11 (N.D. Ohio 2009) ("[N]o particular election scheme is required by Section 2; both limited and cumulative voting systems can be 'legally acceptable.'").
188. 42 U.S.C. § 1973(b) (2014).
189. Mulroy, *supra* note 163, at 204 ("The proviso clarifies only that minority voters are not entitled to proportional representation . . . .").

A 1967 law poses a specific issue for congressional districts, requiring "no district to elect more than one Representative . . . ."[190] The law's purpose was to avoid the at-large districts that were particularly injurious in the pre-VRA world.[191] But at-large multimember districts are different than multimember districts elected through a PV system. With the former, each seat within the district is elected separately, allowing the majority to capture every seat. In contrast, PV systems combine all seats within a district into one election, and then equitably distribute representatives. This overcomes the prior ills of multimember districts. Thus, with a PV system in place, the 1967 requirement is an anachronism, and, as discussed in Part IV.B, *infra*, the law is easily changed.

Civil rights experts have been arguing for PV for decades without much success.[192] *Shelby County* necessitates revisiting the issue because the Court's decision took away the backstop that preclearance historically provided. The Equal Protection Clause remains a defense against blatant racial gerrymandering, but partisan gerrymandering is ubiquitous and legal. When race is so closely associated with party, political pugilism over legislative maps far too often results in disproportionate opportunity and representation of minority races—and disproportionate opportunity is, by definition, vote dilution.[193] Preclearance can no longer prohibit this result. It is time to use the momentum after *Shelby County* to rethink voting rights.

B. Applying the Law Nationally

To secure voting rights nationwide, Congress should require every state to adopt a uniform PV system for all legislative districts. First, states are unlikely to adopt a PV system by themselves. The lack of current statewide application illustrates that this is so.[194] Second, if states do adopt a PV system one by one, the result would be a slowly evolving patchwork of electoral systems, creating further

190. 2 U.S.C. § 2(c) (2012 & Supp. 2014).

191. *See* Branch v. Smith, 538 U.S. 254, 258 (2003) ("When Congress adopted §2c in 1967, the immediate issue was precisely the involvement of the courts in fashioning electoral plans. The Voting Rights Act of 1965 had recently been enacted . . . ."); HILL, *supra* note 167, at 82 ("Ironically, there is one federal law—passed in 1967 to help more racial minorities—that mandates single-seat districts for U.S. House elections."); *see also supra* text accompanying note 118.

192. *See* Guinier, *supra* note 151.

193. *The Role of Section 2: Redistricting & Vote Dilution*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., http://www.redrawingthelines.org/redistrictingvotedilution (last visited Oct. 9, 2014) ("Practices that have the effect of depriving minority voters of an equal opportunity to elect a candidate of choice constitute minority vote dilution.").

194. Though states cannot adopt a congressional PV system because of the 1967 law, they are free to adopt a PV system for their own legislative districts. As previously discussed, Illinois used cumulative voting statewide for nearly a century. *See supra* text accompanying note 182.

voter confusion. Finally, requiring a PV system in every state would increase cooperation in Congress because political minorities will benefit. As mentioned, Republicans can be elected in urban areas and Democrats elected in rural districts.[195] In fact, every multimember district in the country would likely have at least one Republican and one Democrat.[196] Representing the same constituents will facilitate bipartisanship.

Congress's Elections Clause authority encompasses enacting proportional voting legislation for two reasons. First, the Clause grants Congress authority to fight gerrymandering. The Court in *Vieth v. Jubelirer*[197] stated that the Elections Clause bestows power "on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering."[198] Gerrymandering has existed since the beginning of the eighteenth century.[199] States would "take care so to mould [sic] their regulations as to favor the candidates they wished to succeed."[200] The framers worried this "would produce a like inequality" in the federal legislature.[201] The Court found "significant that the Framers provided a remedy for such practices in the Constitution. Article I, §4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished."[202] The *Vieth* Court pointed out that Congress exercised this authority in the past by requiring districts to be contiguous, compact, and as equal in population as possible.[203] Congress has also introduced five bills since 1980 to specifically regulate gerrymandering.[204]

Second, imposition of a proportional voting is a "manner of holding elections" within the Clause's scope. The law would entail (1) dictating the size of districts and (2) prescribing the method by which representatives are elected. These electoral processes are analogous to other "manner[s]" found within the Clause's scope. Compelling multimember districts is no different than current

195. HILL, *supra* note 167, at 68.
196. FairVote found that Republicans and Democrats could win a seat in every district if districts are three to five members. FAIRVOTE, *supra* note 171.
197. 541 U.S. 267 (2004).
198. Vieth v. Jubelirer, 541 U.S. 267, 276 (2004).
199. *Id.* at 274.
200. *Id.* at 275 (quoting James Madison, Notes of the Constitutional Convention, *in* The Records of the Federal Convention of 1787, at 240–41 (Max Farrand ed., 1911)).
201. *Id.* (quoting James Madison, Notes of the Constitutional Convention, *in* The Records of the Federal Convention of 1787, at 240–41 (Max Farrand ed., 1911)).
202. *Id.*
203. *Id.* at 276.
204. *Id.* at 276–77.

federal law limiting districts to one representative.[205] Requiring a PV voting method is analogous to the NVRA; instead of detailing who can vote in federal elections, the law will define how to vote in federal elections. Congress would be appropriately exercising its authority to completely make or alter congressional districts[206] "to any extent which it deems expedient."[207]

There is historical support for district sizes being a "manner" of elections. James Madison described "manner" to the Constitutional Convention as:

> "[w]hether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts, or all meet at one place, *should all vote for all the representatives, or all in a district vote for a number allotted to the district* . . . ."[208]

Further, a central Anti-Federalist concern with the Elections Clause was Congress's ability to create at large districts "and thereby enable a minority of voters with concentrated interests to control a state's entire slate of representatives."[209] Both sides of the debate over the Clause's reach understood it allowed Congress to dictate district size.

The only legal hurdle to overcome is the outdated 1967 law requiring one member districts.[210] Congress need only modify the law from mandating "no district to elect more than one Representative,"[211] to "no district to elect *less than three nor more than five* Representatives *to be elected by a proportional voting system*."[212] This simple alteration would have the profound effect of transfiguring all congressional districts into PV districts.

205. Branch v. Smith, 538 U.S. 254, 266 (2003) ("Pursuant to [Elections Clause] authority, Congress in 1929 enacted the current statutory scheme governing apportionment of the House of Representatives.").
206. Vieth v. Jubelirer, 541 U.S. 267, 275 (2004).
207. Arizona v. Inter Tribal Council, 133 S. Ct. 2247, 2254 (2013).
208. 5 James Madison, Debates on the Adoption of the Federal Constitution, in the Convention Held at Philadelphia in 1787; with a Diary of the Debates of the Congress of the Confideration 401 (Jonathan Elliot, rev.) (1891) (emphasis added).
209. Greene, *supra* note 87, at 1033.
210. The law would also conflict with some states' constitutions requiring one representative per district. *See, e.g.*, CAL. CONST. art. 21, § 6(d). But federal law preempts state law and thus, this potential conflict poses no real barrier.
211. 2 U.S.C. § 2(c) (2012 & Supp. 2014) (emphasis added).
212. This allows each state to decide which PV system to embrace. For true uniformity and to lower confusion, Congress could easily require one PV system be implemented. Analyzing the comparative benefits of each PV method is beyond the scope of this Comment.

C. Obstacles to Reform

This law will certainly encounter hurdles. The most difficult hurdle is applying the law to state legislative lines. The Elections Clause clearly applies only to "elections for Senators and [Congressional] Representatives . . . ."[213] Requiring a PV system for only congressional elections is not an insignificant benefit—it will supply minority populations a greater ability to influence federal policy. Additionally, congressional representatives can arguably influence state policy because of their national pulpit.

But Congress should still try to extend the PV system to states because the states were largely responsible for the electoral ills that compelled the VRA in the first place.[214] Though Congress cannot require adherence through the Elections Clause, they have tools available that can encourage application to state districts. First, states may be motivated to impose a PV system for state elections if they are already required to use one for congressional elections. It would be duplicitous and a waste of resources to oversee two election efforts—one PV and one that maintains the status quo.[215] Additionally, states could reduce their overall redistricting costs by using the same system for both kinds of districts. Instead of having to redraw every state district every ten years, states could reduce the state redistricting effort by using multimember districts. If states are not self-motivated, Congress could make federal funds contingent on PV system adoption to state districts. Congress utilizes this approach regularly.[216] Though Congress cannot impose a PV system on state districts, states will be motivated to make such a move, and Congress can further incentivize the change.

Another substantial difficulty will be the partisan politics of passing such a law. Congress lately has been particularly opposed to passing any legislation.[217]

213. U.S. CONST. art. 1, § 4, cl. 1.

214. *See generally* Menand, *supra* note 12 (describing the various racist state laws and acts of state officials leading up to and during the Civil Rights Movement).

215. *Cf.* CAL. SEC'Y OF STATE, in CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 70 (2008), *available at* http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf (predicting a "[p]otential increase in state redistricting costs once every ten years due to two entities performing redistricting").

216. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." (quoting Fullilove v. Klutznick, 448 U.S. 448 (1980))).

217. *See* CNN Political Unit, *Poll: This is a 'Do-Nothing' Congress*, CNN (Dec. 26, 2013), http://politicalticker.blogs.cnn.com/2013/12/26/poll-this-is-a-do-nothing-congress ("Assuming lawmakers don't pick up the pace next year, and that's a safe bet as 2014 is an election year, this will become the least productive Congress in at least the last four decades."). Ironically, this gridlock is due in large part to gerrymandering, which has created safe seats for representatives on the extremes of

There may be even less motivation to pass this law because it would mean that some representatives would no longer benefit from gerrymandering. This sentiment is misguided, though, because both parties are injured by gerrymandering. Democrats and Republicans control redistricting for a substantial number of districts.[218] Benefits in one state to Democrats are often balanced by detriments in another state to Republicans, and vice versa.[219] Furthermore, political preferences change. Legislators cannot guarantee that a state now dominated by their party will not change persuasion to the other party, or even a third party. Democrats controlled the South in the not-too-distant past.[220] Representatives must recognize that this unpredictable change of party loyalties may remove their party from holding the cartographical power. Both parties benefit by putting down the weapon of gerrymandering, even though certain individual politicians may temporarily be at risk.[221]

Even with this understanding, this law would concededly take time to become passable. The stalling of the Voting Rights Act Amendment of 2014 is proof enough of Congress's current lack of concern toward voting rights.[222] But then again, Congress overwhelmingly re-approved the original, and much more intrusive, VRA less than a decade ago.[223] Voting rights have not substantially improved over that period; the only difference is the political will to act. As with

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the political spectrum. *See* Chunka Mui, *To End Gridlock, Start by Ending Gerrymandering*, FORBES (Dec. 9, 2011), http://www.forbes.com/sites/chunkamui/2011/12/09/to-end-gridlock-end-gerrymandering.

218. There are eighteen states controlled by Republicans and eleven states controlled by Democrats. *See supra* note 124. These Republican states account for 170 congressional districts and the Democratic states account for 87 districts. *See* U.S. CENSUS BUREAU, APPORTIONMENT POPULATION AND NUMBER OF REPRESENTATIVES, BY STATE: 2010 CENSUS (2010), *available at* http://www.census.gov/population/apportionment/files/Apportionment%20Population%202010.pdf. Before California's recent adoption of an independent redistricting commission, its 53 districts were controlled by Democrats, bringing their total to 140.

219. For instance in 2011 while Utah redistricted in favor of Republicans, *supra* Part III.B, Illinois was redistricting in favor of Democrats, *Illinois Redistricting: State GOP Leaders File Suit Over New, Democrat-Skewed Map*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/07/20/illinois-redistricting-st_n_904753.html (last updated Sept. 19, 2011).

220. BULLOCK, *supra* note 14, at 79 ("During the course of the 1990s, Democrats, who had controlled every southern legislature for decades, lost both chambers in Florida, South Carolina, and Virginia, and the Texas senate . . . .").

221. Even this is limited because incumbency is a powerful weapon that grants representatives greater name recognition, expertise and fundraising capabilities.

222. *See* Wesley Lowery, *Cantor Loss Clouds Prospects for New Voting Rights Bill*, WASH. POST (June 23, 2014), http://www.washingtonpost.com/politics/cantor-loss-clouds-prospects-for-new-voting-rights-bill/2014/06/23/97dcb6ec-fb07-11e3-b1f4-8e77c632c07b_story.html.

223. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006).

countless other pressing issues, one can only hope Congress soon recognizes the deleterious consequences of inaction.

A third difficulty is cost to states. Congress does not need to fund Elections Clause legislation,[224] and in this congressional climate, Congress is unlikely to approve any new spending. An unfunded mandate may create opposition within the states, and states have influence with congressional representatives.[225] But any additional costs are likely to be offset by savings. The only changes a PV system imposes are how candidates are selected and the size of districts. Voting in a PV election takes no special equipment and uses a normal ballot. [226] The only additional costs would be training election staff and voters on the new system. Substantial savings would derive from less redistricting; half of the states could completely forgo congressional redistricting. Additionally, one of the biggest costs of redistricting is litigation over the plans.[227] PV systems' ability to increase minority representation may well reduce litigation, further offsetting any surplus costs.

A final hurdle is comfort with the status quo. Implementation of a PV system would be a fundamental change to the electoral system. It took massacres like Bloody Sunday in Selma, Alabama, before the VRA had sufficient support to be fully implemented and initiate radical change.[228] Thankfully, contemporary conditions are not as bleak, nor as tense as they were in 1965. Yet our job is not done. America was founded on the principle of forming a "more perfect Union."[229] Gerrymandering that reduces the value of some voters' votes is fundamentally imperfect. The temporary discomfort in adopting a PV system is

224. *See* Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller, 129 F.3d 833, 837 (6th Cir. 1997) ("Article I section 4 explicitly grants Congress the authority to force states to alter their regulations regarding federal regulations, and does not condition its grant of authority on federal reimbursement."); Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995) ("Congress can . . . regulate federal elections *and* force the state to bear the expense of the regulation."); Issacharoff, *supra* note 62, at 110 ("The motor-voter law survived all constitutional challenges, including those asserting that by forcing states to implement a federal law, including bearing the cost of the implementation, Congress was either commandeering state officials or otherwise compromising the integrity of state fiscal autonomy.").

225. See BULLOCK, *supra* note 14, at 10–11 (discussing the influence state legislatures have with congressional representatives).

226. *See* CAMBRIDGE MASS., SPECIMEN BALLOT (2009), *available at* http://www.cambridgema.gov/CityOfCambridge_Content/documents/2009%20Municp.%20Specimen%20Ballots.pdf.

227. CAL CITIZENS REDISTRICTING COMM'N, ACTUAL AND ESTIMATED COSTS OF SELECTING THE FIRST COMMISSION AND REDRAWING THE STATE'S CONGRESSIONAL, SENATE, ASSEMBLY, AND BOARD OF EQUALIZATION DISTRICTS 3 (2012), *available at* http://wedrawthelines.ca.gov/downloads/meeting_handouts_062012/handouts_20120605_crc_costreport.pdf (showing that litigation costs were $1.8 million of a $10.5 million budget).

228. MAY, *supra* note 26, at 95.

229. U.S. CONST. pmbl.

dramatically outweighed by such a system's ability to take us one step closer to perfection.

CONCLUSION

Shelby County[230] provides an opportunity to reevaluate voting rights legislation. The VRA[231] is now without preclearance, its most successful tool, and its revival seems unlikely. But there is a better, more robust base for voting rights legislation in the Elections Clause. The Elections Clause's grant of plenary supervisory power affords Congress great authority. This authority surpasses the now unstable power of the Fourteenth and Fifteenth Amendments. Under the Clause, Congress can enact legislation that restores the ability to protect voting rights before they are infringed.

One example of the Elections Clause's potential is in combating gerrymandering. Though no longer used for patently racist ends, gerrymandering remains a black eye on American democracy. The pervasive political weapon continues to hamper proportional opportunity for all voters, but especially minority communities. Congress can and should require all states to implement a PV system through its broad Elections Clause authority. A PV system is a simple yet effective means to increase proportional opportunity for all communities. This is just one example of the Elections Clause's expansive power.[232]

The United States is a much different country than it was fifty years ago. But as Justice Ruth Bader Ginsburg stated, giving up on voting rights "is like throwing away your umbrella in a rainstorm because you are not getting wet."[233] The Elections Clause can continue the fight against inequality and restore this country's commitment to protect our most important democratic process.

230. 133 S. Ct. 2612 (2013).
231. The Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. § 1973c (2014)).
232. Other potential legislation includes a national voter ID law, standard early voting deadlines, vote by mail requirements, and regulating other such tools still being used to disenfranchise.
233. *Shelby Cnty.*, 133 S. Ct. at 2650 (2013) (Ginsburg, J., dissenting).