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NOT A MERE OMISSION: RECONCILING THE CLEAR STATEMENT RULE AND THE VOTING RIGHTS ACT

Bertrall L. Ross II*

INTRODUCTION

The temporary provisions of the Voting Rights Act (VRA) are scheduled for reauthorization in 2007. Since the last reauthorization and amendment of the VRA in 1982, federal courts have increasingly relied on a textual mode of statutory interpretation that requires congressional intent to be clear on the face of the statute. In some areas of law, courts have relied on a textual canon of statutory interpretation known as the "clear statement rule," which requires congressional intent to be "super" clear on the face of the statute. The clear statement rule has emerged as an impediment


1. In 1982, Congress established a twenty-five-year window for the temporary provisions of the VRA, including most importantly Section 5, which requires states with a history of discrimination to pre-clear any changes in voting laws with the Department of Justice or the District Court for the District of Columbia. 42 U.S.C. § 1971 (2000). The permanent provisions of the VRA include Section 2, which prohibits voting schemes that result in discrimination on account of race or color. 42 U.S.C. § 1973 (2000).

2. The textual mode of statutory interpretation (i.e., "new textualism") is most prominently associated with the appointment of Justice Antonin Scalia to the Supreme Court in 1986. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Prince-

3. The Court has applied the clear statement rule to ascertain congressional intent to interfere with state functions under the Commerce Clause. See, e.g., United States v. Bass, 404 U.S. 336, 339 (1971) (refusing to adopt a broad meaning of a federal criminal statute enacted under the Commerce Clause "in the absence of clearer direction from Congress"); for the Court's application of the clear statement rule to interpret congressional power under the Spending Clause, see, for example, Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); for an
to the broad construction of federal civil rights legislation that reaches into areas of traditional state jurisdiction.  

The Supreme Court established the clear statement rule as a "check" on federal congressional power to protect under-enforced federalism values. This check requires that a narrow interpretive presumption be applied to statutes that affect the federal-state balance of power. In particular, under the clear statement rule, Congress is required to unambiguously express its intent on the face of a statute, to override the constitutional federalism balance. In the context of the VRA, this would require Congress to unambiguously express its intent, on the face of the statute, to address particular voting schemes because of the constitutionally-based state jurisdiction over voting regulations.

Thus far, the Supreme Court, without explanation, has not applied the example of the use of the clear statement rule to determine intent to abrogate State Eleventh Amendment sovereign immunity under Section 5 of the Fourteenth Amendment, see, for example, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-240 (1985) ("States will be deemed to have waived its immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'") (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

4. Professor Eskridge was one of the first commentators to describe the rule as a "clear statement rule," going so far as to describe it as a "super strong clear statement rule." Symposium; A Reevaluation of the Canons of Statutory Interpretation, 45 VAND. L. REV. 593, 597 (1992) [hereinafter Symposium].

5. See Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ('In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'); other commentators have described the checking function of the clear statement rule. See Nickolai G. Levin, Constitutional Statutory Synthesis, 54 ALA. L. REV. 1281, 1363 (2003) (describing statutory interpretation under the clear statement rule as "a 'backdoor' to enforce structural constitutional norms that are unenforced or underenforced constitutionally"). But see Deanna L. Ruddock, Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations, 70 N.C. L. REV. 1563, 1585 (1992) (describing the clear statement rule as a "check [on] the excesses of federal congressional powers . . .").

6. The description of the clear statement rule as establishing a presumption or tie-breaker is derived from David L. Shapiro. Professor Shapiro argues that the clear statement rule establishes a presumption in favor of continuity that prevents "a loosely or vaguely worded statement [from being] . . . expansively interpreted." David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. REV. 921, 942 (1992). Professor Ruddock argues that the clear statement rule reflects a trend, "in which the Court employs a 'plain meaning' form of statutory interpretation to construe a statute more narrowly than Congress intended." Ruddock, supra note 5, at 1589.

7. Atascadero, 473 U.S. at 243 ("It is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this [federal-state] balance.").

clear statement rule to the ever-expanding reach of the VRA.\textsuperscript{9} In fact, on the same day that the Court extended the clear statement rule and the narrow interpretive presumption to the question of the coverage of the Age Discrimination and Employment Act (ADEA) in \textit{Gregory v. Ashcroft},\textsuperscript{10} the Court in \textit{Chisom v. Romer} did not even acknowledge the clear statement rule when interpreting the question of the coverage of the VRA.\textsuperscript{11} Instead, the Supreme Court held in favor of a broad interpretation of the VRA that was contrary to the clear statement rule.\textsuperscript{12}

Scholars have criticized the Supreme Court for failing to provide guidance on when the clear statement rule applies.\textsuperscript{13} These scholars have been unable to provide a viable explanation for why the Court did not apply the clear statement rule in \textit{Chisom}. One commentator, without resolving the tension between \textit{Gregory} and \textit{Chisom}, argued that the clear statement rule applies to the VRA on the basis of the statute’s reach into an area of traditional state jurisdiction.\textsuperscript{14} A second commentator, while also failing to reconcile the conflicting Supreme Court decisions, argued that \textit{Chisom} controls on the question of whether the clear statement rule applies to the VRA.\textsuperscript{15}

Despite the holding in \textit{Chisom}, two courts of appeal in the last three years have applied the clear statement rule to preclude the application of Section 2 of the VRA to felon disenfranchisement laws.\textsuperscript{16} Section 2 of the


\textsuperscript{10} \textit{Gregory}, 501 U.S. at 452; \textit{Chisom}, 501 U.S. at 380.

\textsuperscript{11} \textit{Chisom}, 501 U.S. at 380.

\textsuperscript{12} \textit{Id.} at 396.

\textsuperscript{13} Symposium, supra note 4, at 634; Ruddock, supra note 5, at 1591.

\textsuperscript{14} Skinnell, supra note 9 and accompanying text, at 376-77.

\textsuperscript{15} Lauren Handelsman, Note, \textit{Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965, 73 FORDHAM L. REV. 1875, 1937 (2005) (“Chisom undoubtedly stands for the proposition that the clear statement rule does not apply to all legislation passed pursuant to the Fourteenth and Fifteenth Amendments, despite the Court’s conclusions in Gregory. Accordingly, Gregory, despite the Second Circuit’s contention to the contrary, is not controlling precedent in determining whether the clear statement rule applies to the VRA.”).}

\textsuperscript{16} Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005); Muntaqim v. Coombe, 366 F.3d 103 (2d Cir. 2004). The impetus to apply a clear statement rule derived from a 1996 split decision by the Second Circuit Court of Appeals. \textit{See Baker v. Pataki}, 85 F.3d 919 (2d Cir. 1996). Half of the en banc Second Circuit held that the clear statement rule applied and the other half of the en banc court said that it did not. These cases are discussed below. \textit{See infra Part I. B.}
VRA invalidates any "voting qualifications, practices or procedures" that result in discrimination on account of race.\textsuperscript{17} Despite the clarity of the Act's language, these courts have held that Congress has failed to make its intent to address felon disenfranchisement laws unmistakably clear on the face of Section 2 of the VRA.\textsuperscript{18} The courts explained that the failure of the Supreme Court to apply the clear statement rule to the VRA in \textit{Chisom} was a mere omission and that the rule does apply to the question of the applicability of the VRA to felon disenfranchisement laws.\textsuperscript{19}

Congress can address the uncertainty regarding the applicability of the VRA to felon disenfranchisement laws by adding specific statutory language that extends Section 2 of the VRA to these laws.\textsuperscript{20} However, this approach is both problematic and unnecessary. It is problematic because if politicians who are fearful of being seen as soft on crime reject such an amendment, it could be used by the courts as evidence of the limitations of the scope of Section 2 of the VRA. It is also problematic because even if Congress amended Section 2, congressional delineation of the application of the VRA to a particular voting qualification would conflict with another canon of statutory interpretation that could ultimately limit the scope of the VRA.\textsuperscript{21}

More importantly, this approach is unnecessary because there is a viable explanation for why the clear statement rule does not apply to the VRA. This explanation supports the argument that Section 2 of the VRA, in its present form, applies to felon disenfranchisement laws. This explanation is drawn from the Fifteenth Amendment, which was the source of Congress's power to enact the original VRA of 1965.\textsuperscript{22}

The Voting Rights Act of 1965 has been described as the most impor-

\textsuperscript{17} 42 U.S.C. 1973(a) (2000).
\textsuperscript{18} For a discussion of the ambiguity in Section 2 of the VRA, see infra Part I. B.
\textsuperscript{19} \textit{Baker}, 85 F.3d at 932.
\textsuperscript{20} The temporary provisions of the VRA are up for reauthorization in 2007. During the prior reauthorization of the VRA in 1982, Congress also amended Section 2 of the VRA to establish the so-called "results" test. 42 U.S.C. 1973(a) (2000). The reauthorization of the VRA in 2007 provides for a similar opportunity for Congress to amend Section 2 of the VRA.
\textsuperscript{21} Under the linguistic canon \textit{expression unius}, which means "the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced," congressional delineation of one particular application of a statute may constrain other potential applications of the statute. \textit{WILLIAM N. ESKRIDGE, JR. \& PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY} 824 (West Publishing 3d ed. 2001) (1988). For a discussion of this conflict see infra Part IV.
\textsuperscript{22} "The right to vote shall not be denied or abridged on account of race, color, or condition of servitude." U.S. CONST. Amend. XV, § 1.
tand piece of civil rights legislation in our history.\textsuperscript{23} After the famous march on Selma, Alabama led by Martin Luther King,\textsuperscript{24} President Lyndon Johnson promulgated and the Congress enacted the VRA to eliminate discrimination in voting.\textsuperscript{25} One of the central mandates of the VRA of 1965 was to ‘nullify[\textsuperscript{26}] sophisticated as well as simple-minded modes of discrimination’ in voting. Congress derived this mandate from judicial interpretations of the Fifteenth Amendment. This mandate, as it has evolved, fundamentally conflicts with the clear statement rule. Both the Supreme Court and the Congress that adopted the mandate recognized the fundamental importance of the right to vote to disenfranchised classes of people, and the willingness of states to evade the constitutional prohibition through increasingly subtle and sophisticated discriminatory voting schemes.\textsuperscript{27} On the basis of this mandate, the Court has applied a presumption in favor of a broad interpretation of the VRA, which presumes that Congress intended to address all voting schemes that have the potential to discriminate.\textsuperscript{28} This presumption is overturned only if Congress has expressed its intent \textit{not} to address a particular scheme.\textsuperscript{29}

The Constitution gives the states authority to regulate elections.\textsuperscript{30} Because the VRA’s prohibition on discriminatory voting practices affects state power over elections, the clear statement rule presumes that Congress did

\textsuperscript{23} See, e.g., Abner Mikva, \textit{Doubting OurClaims to Democracy}, 39 ARIZ. L. REV. 793, 797 (1997) ("The Voting Rights Act of 1965 and its progeny may well be the most important civil rights legislation passed since the Thirteenth, Fourteenth and Fifteenth Amendments").

\textsuperscript{24} For a description of the march on Selma, see TAYLOR BRANCH, \textit{PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65}, 591-594 (Simon & Schuster) (1998). During the march, police shot and killed young Jimmy Lee Jackson who emerged as a martyred symbol of the VRA with a photograph of “Jimmy Lee Jackson’s frail grandfather, holding up his voting card” symbolizing its success. \textit{Id.} at 606.


\textsuperscript{26} See H.R. REP NO. 89-439, at 12 (1965), as reprinted in 1965 U.S.C.C.A.N. 2437, 2449 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

\textsuperscript{27} Lane, 307 U.S. at 275 (identifying the purpose of the Fifteenth Amendment as “nullify[\textsuperscript{26}] sophisticated as well as simple-minded modes of discrimination” in supporting the invalidation of a modification of a voting scheme that had previously been declared unconstitutional by the Court.).

\textsuperscript{28} See e.g. Perkins v. Matthews, 400 U.S. 379, 387 (1971). See discussion \textit{infra} Part III. B.

\textsuperscript{29} Chisom v. Roemer, 501 U.S. 380, 389 (1991) (rejecting a narrow construction of the VRA on the basis of the logic that “if Congress had such an intent [in favor of the narrower interpretation], Congress would have made it explicit in the statute, or at least Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.”).

\textsuperscript{30} U.S. CONST. art. I, § 4, cl. 1.
not intend to address a voting scheme unless Congress clearly stated otherwise. The application of the clear statement rule to the VRA thus eviscerates congressional power to nullify sophisticated forms of discrimination in voting because it establishes a conflicting presumption in favor of a narrow interpretation of the VRA to protect federalism values. The potential for the evisceration of congressional power to fulfill the Fifteenth Amendment constitutional mandate explains why the Supreme Court has not applied the clear statement rule to the VRA, and why it should not be applied to the question of the coverage of felon disenfranchisement laws under the VRA. Therefore, Congress should not feel compelled by the clear statement rule to explicitly state which voting schemes it intends to affect. The Court has already forestalled the problem by tacitly recognizing that the clear statement rule has no applicability in the voting rights context. 31

This Article proceeds in four parts. Part I describes the emergence of the clear statement rule as a rule intended to protect under-enforced federalism values. This section contrasts the Court’s application of the clear statement rule to the determination of the coverage of the ADEA in Gregory with the Court’s failure to apply the rule to the determination of the coverage of the VRA in Chisom. Part I then examines the recent application of the clear statement rule to the question of the applicability of the VRA to felon disenfranchisement laws by two lower federal courts.

Parts II and III jointly provide explanations for the failure to apply the clear statement rule to the VRA. Part II examines the establishment of the Fifteenth Amendment mandate to nullify simple-minded and sophisticated forms of discrimination in voting and the adoption of this mandate by Congress as one of the central purposes of the VRA. Part III argues that the Court has relied on the Fifteenth Amendment mandate to establish a broad interpretive presumption in cases determining the coverage of the VRA. This argument asserts that the Court failed to apply the clear statement rule to the VRA because the broad interpretive presumption fundamentally conflicted with the clear statement rule. In the voting context, the Court appropriately recognized that the constitutional Fifteenth Amendment mandate trumps the quasi-constitutional clear statement rule and the federalism values that it protects. Part IV offers a politically feasible recommendation for reforming the VRA in order to ensure its broad coverage in the future.

31. Chisom, 501 U.S. at 403 (adopting the standard established in Allen v. State Bd. of Elections, 393 U.S. 544 (1969) that the “[VRA] should be interpreted in a manner that provides ‘the broadest possible scope’ in combating racial discrimination.”).
I. THE DEVELOPMENT AND EVOLUTION OF THE CLEAR STATEMENT RULE

A. GREGORY V. ASHCROFT AND CHISOM V. ROEMER: THE EMERGENCE OF CONFLICTING INTERPRETIVE PRESUMPTIONS

In 1991, the Supreme Court decided *Gregory v. Ashcroft*, and suggested in dicta that the clear statement rule was applicable to legislation enforcing the Fourteenth Amendment.\(^{32}\) The clear statement rule requires that Congress make unmistakably clear on the face of a statute its intent to address conduct that may alter the federal-state balance.\(^{33}\) Prior to *Gregory*, the Court had employed the clear statement rule as an interpretive canon to check federal congressional power to legislate under the Commerce Clause\(^{34}\) and the Spending Clause.\(^{35}\) The Court also employed the rule to determine whether Congress intended to abrogate state sovereign immunity under the Eleventh Amendment.\(^{36}\)

The clear statement rule represents a sort of "backdoor" federalism\(^ {37}\) through which the Court has subtly reasserted the force of the Tenth Amendment\(^ {38}\) after its diminution in *Garcia v. San Antonio Metropolitan Transit Authority*.\(^ {39}\) In *Garcia*, the Court limited the force of the Tenth Amendment by holding that judicial protection for states from the interference of federal laws is unnecessary because "[t]he political process ensures that laws that unduly burden the States will not be promulgated."

\(^{33}\) *Id.* at 460.
\(^{35}\) *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981) (applying the clear statement rule to the question of whether the federal government conditioned receipt of federal funds under the Development Disabled Assistance and Bill of Rights act of 1975 on the States "assum[ption of] the high cost of providing ‘appropriate treatment’ in the ‘least restrictive environment’ to their mentally retarded citizens.”).
\(^{37}\) See *Levin*, supra note 5, at 1363 (describing the clear statement rule as a "backdoor" mechanism "to enforce structural constitutional norms . . ."); Symposium, *supra* note 4, at 598 (describing the clear statement rule as "a ‘backdoor’ version of . . . constitutional activism").
\(^{38}\) The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
\(^{39}\) 469 U.S. 528, 556 (1985).
In *Gregory*, the Court re-established some judicial protection for states from the interference of federal laws through the clear statement rule. The Court, in establishing this alternative federalism-protecting canon of interpretation, reasoned that “[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”

Justice O’Connor, one of the primary proponents of the so-called “federalism revolution” associated with the Rehnquist Court, wrote for the majority in *Gregory*. Justice O’Connor noted the numerous advantages of the “federalist structure of joint sovereigns” including, most importantly, providing a check on the abuse of government power. According to the Court, “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” The clear statement rule was thus established as “an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”

In *Gregory*, the Court specifically addressed whether the ADEA applied to state judges. Because the application of the ADEA to state judges would interfere with the authority of states to determine the qualifications of their representatives under Article IV, Section 4 and the Tenth Amendment of the United States Constitution, the clear statement rule required Congress to make its intent to interfere with this core state function unmistakably clear on the face of the statute.

The ADEA applies to all state employees subject to some exceptions. One exception excludes state employees that are “appointee[s] on

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43. *Id.* at 458.
44. *Id.* at 461.
45. *Id.* at 455-56.
47. The ADEA, which prohibits age discrimination against any employee, excludes from the definition of employee “any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.” 29 U.S.C. 630(f) (2000).
the policymaking level." The Court held that it was at least ambiguous whether a state judge was an “appointee on the policymaking level” and, therefore, Congress had not made its intent unmistakably clear to cover state judges on the face of the ADEA.

In Gregory, there was an additional set of questions about the constitutional source of congressional power to enforce the ADEA. The Court explained that the clear statement rule did not depend on the source of the federal authority to enforce the ADEA. The application of the clear statement rule would be appropriate regardless of whether Congress enacted the ADEA under its Commerce Clause power or its power under Section 5 of the Fourteenth Amendment. Justice O’Connor explained,

[i]f Congress passed the ADEA extension under its [Section] 5 [of the Fourteenth Amendment] powers, the concerns about federal intrusion into state government that compel the result in this case might carry less weight . . . . But this Court has never held that the Amendment may be applied in complete disregard for a State’s constitutional powers.

Justice O’Connor concluded, “[i]n the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or [Section] 5 of the Fourteenth Amendment.”

In sum, the Gregory Court established a rule of presumption in favor of a narrow construction of federal statutes enacted under the Commerce Clause and Section 5 of the Fourteenth Amendment. This “clear statement rule” mandated that ambiguous statutes be interpreted narrowly to avoid interference in areas of traditional state powers unless Congress affirmatively expressed its intent to have the statute reach that far.

49. Id. at 467.
50. Id. at 468.
51. Section 5 of the Fourteenth Amendment provides Congress with the “power to enforce, by appropriate legislation, the provisions of this article [the Fourteenth Amendment].” U.S. CONST. amend. XIV, § 5. These provisions include the Due Process Clause and the Equal Protection Clause of Section 1 of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 1.
52. Gregory, 501 U.S. at 468.
53. Id. at 470.
54. Id. (“In the face of . . . ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.”).
55. Id.
The same day *Gregory* was decided, the Court created considerable confusion regarding the reach of the clear statement rule in *Chisom*.\(^\text{56}\) In *Chisom*, the Court addressed whether judicial elections were within the scope of Section 2 of the VRA of 1982.\(^\text{57}\) The ambiguity in Section 2 of the VRA involved the use of the term "representatives of their choice" and whether judges were in fact representatives.\(^\text{58}\) The respondent argued that the use of the term "representatives" was "evidence of congressional intent to exclude vote dilution claims involving judicial elections from the coverage of [Section] 2."\(^\text{59}\)

The Court disagreed with this narrow construction of the Act and instead favored a broad interpretation of the VRA to include judicial elections.\(^\text{60}\) Justice Stevens, writing for the majority, explained "[w]e are convinced that if Congress had ... an intent [to exclude judicial elections], Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment."\(^\text{61}\) Thus, instead of requiring Congress to make its intent to address particular conduct unmistakably clear on the face of the statute, as required under the clear statement rule, the Court in *Chisom* established a conflicting presumption in favor of a broad and inclusive interpretation of the VRA.\(^\text{62}\) The Court held, without any acknowledgement of the clear statement rule, that Section 2 of the VRA applied to judicial elections.\(^\text{63}\)

\(^\text{57}\) Section 2 states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) [42 U.S.C.S. § 1973b(f)(2)], as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

\(^\text{59}\) *Chisom*, 501 U.S. at 395-96.
\(^\text{60}\) *Id.* at 404.
\(^\text{61}\) *Id.* at 396.
\(^\text{62}\) *Id.*

\(^\text{63}\) Commentators have failed to adequately explain the anomaly associated with the application of the clear statement rule in *Gregory* and the failure to apply the clear statement rule in *Chisom*.
Justice O’Connor joined the majority opinion. However, she did not offer any explanation as to why the clear statement rule applied to the question of the coverage of the ambiguous ADEA, but not to the question of the coverage of the similarly ambiguous VRA. The Court did offer a small clue as to why the interpretive presumption was reversed in the voting context. In the first sentence of the majority opinion in *Chisom*, the Court noted that “[t]he preamble of the Voting Rights Act of 1965 establishes that the central purpose of the Act is ‘[t]o enforce the [F]ifteenth [A]mendment to the Constitution of the United States.’” Whereas the Court in *Gregory* held that the clear statement rule and its presumption in favor of a narrow construction of statutes applied to legislation enforcing the Commerce Clause and the Fourteenth Amendment, the Court did not address whether it applied to legislation enforcing the Fifteenth Amendment. The Court implicitly recognized in *Chisom* that statutes enforcing the Fifteenth Amendment are different.

**B. THE APPLICATION OF THE CLEAR STATEMENT RULE TO THE VRA BY LOWER COURTS**

The Supreme Court’s failure in *Chisom* to explain why the clear statement rule does not apply to the VRA has led to a split in the circuits on the question of the proper scope of Section 2 of the VRA. In particular, the disagreement centers on whether the determination of the applicability of Section 2 of the VRA to felon disenfranchisement laws should be subject to the clear statement rule.

Proponents favoring the application of the clear statement rule to the VRA focus on the fact that the VRA is legislation that alters the federal-state balance. Therefore, the clear statement rule is necessary to ascertain whether Congress, in applying the VRA to state felon disenfranchisement

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som. Professor Eskridge argues that “*Gregory* itself provides little guidance on when to apply the [clear statement rule]” and that Justice O’Connor provided “no guidance . . . about why it [the clear statement rule] was inapplicable in the voting rights case.” See Eskridge, *supra* note 2, at 634-35. See also, Ruddock, *supra* note 5, at 1591 (noting the lack of clarity in the scope of the clear statement rule). Professor Frederick Slabach argues that the clear statement rule did not apply in *Chisom* because the VRA was an “unequivocal expression of congressional intent to disrupt important state powers in order to remedy racial discrimination.” See Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823, 862 (1994).

64. Symposium, *supra* note 4, at 634 (noting that “Justice O’Connor was a member of the (silent) majority in Chisom, and thus we have no guidance from the author of Gregory about why [the clear statement rule] was inapplicable in the voting rights cases”).


66. *Id*.

67. See *infra* notes 75-78 and accompanying text.

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laws, intended to alter this balance and intrude into an area of traditional state jurisdiction. The proponents dismiss the failure of the Court to apply the clear statement rule in *Chisom* as nothing more than a mere omission.  

Those who oppose the application of the clear statement rule to the VRA rely on two arguments. First, opponents argue that the VRA lacks ambiguity on the question of its applicability to felon disenfranchisement laws; therefore, the clear statement rule is not applicable. According to this argument, the VRA’s prohibition on discriminatory voting qualifications does not include any exceptions. Thus, the Act clearly applies to felon disenfranchisement laws. Second, opponents focus on the fact that Congress enacted the VRA under its Fourteenth and Fifteenth Amendment enforcement powers. Opponents point out that these two amendments were specifically intended to alter the federal-state balance. Therefore, the clear statement rule concerns about whether Congress intended to alter the federal-state balance in its application of the VRA to a particular voting qualification are superfluous. The following analysis will describe the two sides of the argument in further detail and explain why each is inadequate for addressing the applicability of the clear statement rule to the VRA.

In 1996, the Second Circuit addressed a challenge to New York’s felon disenfranchisement law under Section 2 of the VRA, but did not reach a conclusion. Instead, the en banc court divided evenly on the question of whether Section 2 of the VRA even applied to state felon disenfranchisement laws. Judge Mahoney, writing for half of the court, relied on the clear statement rule to hold that Section 2 did not apply to felon disenfranchisement laws. He explained that the application of Section 2 to felon disenfranchisement laws would undermine the constitutional federal-state balance by interfering with the state’s authority to “regulat[e] the times, places, and manner of conducting federal elections,” and to define and enforce criminal laws. As a result of this alteration of the federal-state balance, Judge Mahoney subjected the VRA to the clear statement rule’s pre-

68. See infra notes 80-82 and accompanying text.
69. See infra notes 84-94 and accompanying text.
70. See infra notes 96-103 and accompanying text.
71. See id.
73. Id. Prior to this decision, the Sixth Circuit assumed that Section 2 of the VRA applied to state felon disenfranchisement laws, but concluded that Tennessee’s felon disenfranchisement law did not violate Section 2. See Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986).
74. Baker, 85 F.3d at 922.
75. Id. at 931 (quoting U.S. CONST. art. 1, § 4, cl. 1).
76. Id.
sumption in favor of a narrow construction of statutes. He concluded that
the failure of Congress to affirmatively express its intent to address felon
disenfranchisement laws in the statute suggested that Section 2 of the VRA
did not apply. 77

The presumption in favor of a narrow interpretation of the VRA con-
flicted with the Supreme Court’s opinion in Chisom, which established a
presumption in favor of a broad interpretation of the VRA. 78 The Second
Circuit unpersuasively reconciled this conflict by describing the Court’s
failure to apply the clear statement rule as a mere omission and not “an in-
struction to the lower courts to refrain from applying Gregory [the clear
statement rule] in the context of the Voting Rights Act.” 79 By describing
the failure of the Chisom Court to apply the clear statement rule as an omis-
sion, the Second Circuit overlooked the fact that the Court not only omitted
a discussion of the rule, but also applied an interpretive presumption that is
directly contrary to the rule. Both the application of the VRA to judicial
elections as addressed by the Supreme Court in Chisom and the application
of the VRA to felon disenfranchisement laws as addressed by the Second
Both the Supreme Court and the Second Circuit found ambiguity in Section
2 of the VRA. 80 Instead of narrowly interpreting the VRA, as the clear
statement rule would require, the Supreme Court resolved this ambiguity in
favor of a broad interpretation of the Act. However, the Second Circuit fa-
vored a narrow interpretation of the Act under the clear statement rule. 81
The characterization of the Supreme Court’s failure to apply the clear
statement rule in Chisom as a mere omission lacks credibility considering
the Court’s application of a conflicting interpretive presumption.

Judge Feinberg and Judge Newman, writing separately for the other
half of the Second Circuit in Baker held that the VRA applied to New

77. Baker, 85 F.3d at 932.
78. See supra Part I. A.
79. Id. (Mahoney, J.).
intended Section 2 of the VRA to apply to judicial elections in the face of the ambiguity in the
use of the use of the term “representatives” in the statute), with Baker, 85 F.3d at 928 (interpreting
whether Congress intended Section 2 of the VRA to apply to felon disenfranchisement laws in the
face of the ambiguity created by the legislative decision to not subject States to scrutiny for main-
taining felon disenfranchisement laws in Section 4 of the VRA).
81. Compare Chisom, 501 U.S. at 404 (applying the VRA to judicial elections despite the am-
biguity in the statute), with Baker, 85 F.3d. at 932 (holding that the VRA was inapplicable to felon
disenfranchisement laws because of the ambiguity in the legislative history of the statute and the
failure to fulfill the clear statement standard of Gregory v. Ashcroft).
York's felon disenfranchisement law. Addressing the clear statement rule, Judge Feinberg concluded that the language of the VRA was not ambiguous and thus the rule did not apply. Relying on the use of the term "any citizen" in Section 2 of the VRA, Judge Feinberg held that "any citizen usually means any citizen," and, therefore, Section 2 applies to felons who continue to be citizens.

Judge Feinberg introduced a logical argument, but he failed to recognize the high threshold established by the Court for determining whether a statute is unambiguous, especially with the use of the term "any." In 1985, the Court addressed the question of whether Congress, in the Rehabilitation Act of 1973, had unambiguously abrogated State Eleventh Amendment sovereign immunity to suits by citizens for monetary damages. The Rehabilitation Act allowed "any recipient of Federal assistance" to sue state entities for money damages for violations of the Act. Despite the use of the all-encompassing term "any," the Court held that this "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Instead, under the clear statement rule, the Court required additional specificity not provided in the statute.

The Supreme Court's view of the ambiguity of the term "any" has not changed. As recently as 2004, the Court held that the use of the term "any entity" was ambiguous in a case involving the interpretation of the Telecommunication Act of 1996. The Court explained, "any can and does

82. Baker, 85 F.3d. at 940, 943.
83. More recently the Ninth Circuit explained that Section 2 of the Voting Rights Act was unambiguous in its application to state felon disenfranchisement laws. See Farrakhan v. Washington, 338 F.3d. 1009, 1016 (9th Cir. 2003) ("Felon disenfranchisement is a voting qualification, and Section 2 is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA").
84. Baker, 85 F.3d. at 939 (Feinberg, J).
85. Id. (Feinberg, J).
88. Id. at 246.
89. Id. at 238 (In determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, "we have required "an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States." (quoting Quern v. Jordan, 440 U.S. 332, 342 (1979)).
mean different things depending upon the setting." In the particular setting of this case, the Court found that "any entity" referred to private entities and excluded public entities.

Judge Feinberg's explanation that the use of the term "any citizen" removes ambiguity from the statute is inadequate. "Any citizen" can arguably be limited to "any citizen eligible to vote," which would exclude felons, or be broadened to include any citizen of the United States, which would include children and felons. Thus, the Court could easily find a level of ambiguity in the use of the term "any" in the VRA to subject it to the clear statement rule.

Judge Newman agreed with Judge Feinberg that Section 2 of the VRA applied to felon disenfranchisement laws, but for a different reason. Judge Newman explained that the clear statement rule did not apply to the VRA because the Act was legislation enforcing the Fourteenth and Fifteenth Amendments, which "already altered the constitutional balance of federal and state powers ...." However, Judge Newman misconstrued the Supreme Court's holding in Gregory as making a distinction between the application of the clear statement rule required by legislation enacted under the Commerce Clause and the application of the clear statement rule required by legislation enacted under the Civil War Amendments (CWA). While it is true that the Court distinguished legislation under the enforcement power of the Fourteenth Amendment, the Court held in Gregory that

92. Id.
93. The Eleventh Circuit has identified another point of ambiguity that justifies the application of the clear statement rule to the question of the applicability of Section 2 of the VRA to felon disenfranchisement laws. Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005). In particular, the Eleventh Circuit explained,

Although Section 2 of the VRA does not require proof of intentional discrimination behind the enactment of the challenged voting qualification, Congress's decision to retain the phrase "on account of race or color" makes it unclear as to whether Section 2 would apply to Florida's felon disenfranchisement provision, which is endorsed by the Fourteenth Amendment, applies to felons without regard to race or color (it is particularly telling that over seventy percent of the plaintiffs' class is white), and is administered as one component of a felon's criminal sentence. Moreover, the deep division among eminent judicial minds on this issue demonstrates that the text of Section 2 is unclear. Finally, the interpretation of the statute advanced by the dissenters would suggest that currently incarcerated felons may also fall within the scope of the statute. Unless one concedes that Section 2 of the VRA reaches currently incarcerated felons, the interpretation advanced by the dissenters provides an additional reason why the statute is unclear.

Id. at 1229, n.30.
95. Id.
96. Id.
97. Gregory v. Ashcroft, 501 U.S. 452, 468 (1991) ("[T]he principles of federalism that con-
the ADEA would be subject to the clear statement rule regardless of whether it was legislation enforcing the Commerce Clause or the Fourteenth Amendment.\textsuperscript{98}

In addition, the clear statement rule only requires that Congress make its intent clear to alter the constitutional federal-state balance and to face the constitutional issue associated with each particular application of the statute.\textsuperscript{99} The fact that the Fourteenth Amendment already altered the federal-state balance is not relevant to this inquiry. The clear statement rule does not limit the ability of Congress to alter the federal-state balance through its Fourteenth Amendment enforcement power.\textsuperscript{100} Nevertheless, Congress must make clear when altering the federal-state balance that it intended to do so.\textsuperscript{101} For this reason, the Court in \textit{Gregory} held, contrary to Judge Newman’s explanation, that the clear statement rule would apply to legislation enforcing the Fourteenth Amendment.\textsuperscript{102}

Judge Newman’s explanation may be moot considering the recent developments on the question of the applicability of the VRA to state felon disenfranchisement laws. Over the last three years, the Ninth Circuit in \textit{Farrakhan v. Washington},\textsuperscript{103} the Second Circuit in \textit{Muntaqim v. Coombe},\textsuperscript{104} and the Eleventh Circuit in \textit{Johnson v. Governor of State of Florida},\textsuperscript{105} returned to the question of the applicability of Section 2 of the VRA to state felon disenfranchisement laws. The Ninth Circuit agreed with Judge Feinberg’s holding that Section 2 of the VRA unambiguously applied to felon disenfranchisement laws.\textsuperscript{106} The Eleventh Circuit relied on a questionable application of the constitutional avoidance doctrine in holding that Section 2 of the VRA did not apply to felon disenfranchisement laws.\textsuperscript{107}

\textsuperscript{98} \textit{Gregory}, 501 U.S. at 469.
\textsuperscript{99} See id. at 461 ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision") (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).
\textsuperscript{100} See supra Part I. A.
\textsuperscript{101} See supra Part I. A.
\textsuperscript{102} See supra Part I. A.
\textsuperscript{103} 338 F.3d. 1009, 1009 (9th Cir. 2003).
\textsuperscript{104} 366 F.3d. 102, 106 (2d Cir. 2004).
\textsuperscript{105} 405 F.3d. 1214 (11th Cir. 2005).
\textsuperscript{106} \textit{Farrakhan}, 338 F.3d at 1016 ("Felon disenfranchisement is a voting qualification, and Section 2 is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.").
\textsuperscript{107} See Johnson v. Governor of State of Fla., 405 F.3d 1214, 1229-32. The Second Circuit in
In *Muntaqim*, the Second Circuit broke the deadlock established in *Baker*. Consistent with Judge Mahoney's opinion in *Baker*, the court relied on the clear statement rule to hold that the VRA did not apply to felon disenfranchisement laws. But, the court based its application of the clear statement rule on a "significantly refined" law of federal-state relation that had developed since the split in *Baker*. The refinement came in the form of the Supreme Court's decision in *City of Boerne v. Flores*, which limited congressional enforcement powers under the CWAs.

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment authorize Congress to enact appropriate legislation to enforce the provisions of the respective amendments. In *City of Boerne*, the Supreme Court defined appropriate legislation as prophylactic legislation that has "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." The Court established the standard to ensure that Congress did not exceed its power under the enforcement clauses of the CWAs by substantively redefining a judicially-determined constitutional right contained in the amendments. The proportionality and congruence standard limits congressional power to legislation that remedies or deters unconstitutional deprivations. A key to differentiating a substantive redefinition of a constitutional right from legislation that remedies or deters unconstitutional deprivations is whether Congress has identified unconstitutional conduct that the statute is intended to address and whether the statute invalidates a substantial amount of constitutional conduct.

The Supreme Court has established an intent requirement for viola-

*Muntaqim v. Coombe* specifically doubted the applicability of the constitutional avoidance doctrine because while the court considered the statute to be vague, it did not consider it to be ambiguous as required by the doctrine. 366 F.3d at 128, n.22. For a discussion of the Eleventh Circuit opinion see infra Section III(D)(3).

108. See *Muntaqim*, 366 F.3d 102, 102 (2nd Cir. 2004).
109. *Id.* at 115.
110. *Id.* at 120.
112. Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Similarly, Section 2 of the Fifteenth Amendment states: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.
113. *City of Boerne*, 521 U.S. at 520.
114. *Id.* at 520-22.
115. *Id.* at 518.
116. *Id.* at 530.
tions of the Fourteenth Amendment Equal Protection Clause.117 The Second Circuit focused on the discrepancy between this intent standard and the "results test" of Section 2 of the VRA.118 The court reasoned that "[i]n the absence of a record compiled by Congress establishing that felon disenfranchisement laws have been used to discriminate against minority voters" the VRA, as applied to state felon disenfranchisement laws, may exceed congressional enforcement power.119 Based on this separation of power concern and the ongoing federalism concerns regarding federal interference into areas of state authority to regulate elections and enforce criminal laws, the court applied the clear statement rule.120

The Second Circuit, in Muntaqim, relied on the clear statement rule's presumption in favor of a narrow interpretation of statutes to "require Congress to make its intention with respect to felon disenfranchisement clear" to apply the VRA to these laws.121 As described above, the narrow interpretive presumption of the clear statement rule conflicted with the broad interpretive presumption applied in Chisom that required a clear showing that Congress did not intend to address voting practices such as judicial elections in the VRA.122 Once again, the Second Circuit relied on the mere omission reasoning of Judge Mahoney in Baker, arguing that the "Chisom Court's failure to mention the clear statement rule cannot be construed to mean that the rule should never be applied."123 The Second Circuit concluded that Congress did not make its intent clear to address felon disenfranchisement laws in the VRA and concluded that the VRA did not apply to these laws.124

Regardless of whether the clear statement rule is applied to protect separation of power values or federalism values, the Second Circuit once again failed to provide an adequate explanation to reconcile the conflict between the Court's application of the narrow interpretive presumption of the clear statement rule to the ADEA in Gregory and the Court's application of a broad interpretive presumption to the VRA in Chisom. Arguably, the development of the proportionality and congruence standard in City of Boerne...
altered the federalism calculation after *Chisom*, and the clear statement rule appropriately protects separation of powers values. Under this rationale, Congress would not only have to identify every potential application of the VRA to satisfy the clear statement rule, but would also have to document unconstitutional discrimination associated with every potential application of the VRA to satisfy the proportionality and congruence test. This requirement would be extraordinarily onerous and, more importantly, it would be contrary to the Fifteenth Amendment mandate.

Part II describes the emergence of this Fifteenth Amendment mandate to nullify sophisticated and simple-minded forms of discrimination and the adoption of this mandate by Congress in the legislative history of the VRA of 1965. Part II argues that this mandate has been the basis for the Supreme Court’s support for an increasingly expansive reach of the VRA into areas not addressed explicitly in the statute. It is on the basis of this constitutional mandate that the Court’s holding in *Chisom* makes sense.

**II. THE FIFTEENTH AMENDMENT MANDATE**

Congress enacted the VRA in 1965 under its Fifteenth Amendment enforcement powers. The Fifteenth Amendment is one of the most under-applied and under-scrutinized constitutional provisions. Since the enactment of the VRA, the Supreme Court has rarely addressed a challenge specifically under the Fifteenth Amendment. This is based in part on the erroneous assumption by a plurality of the Court in *City of Mobile v. Bolden* that the Fifteenth Amendment imposes the same subjective intent evidentiary standard as the Fourteenth Amendment Equal Protection Clause. The Fifteenth Amendment not only imposes a distinct evidentiary standard, which is beyond the scope of this paper, but it has a unique purpose that conflicts with the clear statement rule’s interpretive presumption. This part describes the development of the Fifteenth Amendment mandate to nullify sophisticated and simple-minded forms of discrimination and the incorporation of this mandate into the VRA. As demonstrated below, this mandate


126. The only case since the enactment of the VRA in 1965 to address a statute specifically under the Fifteenth Amendment without reference to the Voting Rights Act was *Rice v. Cayetano*, in which the Court invalidated a statute that restricted the vote in the election for the Office of Hawaiian Affairs to native Hawaiians. 528 U.S. 495 (2000).

127. This assumption is based on dicta in *City of Mobile v. Bolden*, in which the plurality suggested that the Fifteenth Amendment imposed the same subjective intent standard as the Fourteenth Amendment Equal Protection Clause. 446 U.S. 55, 62 (1980), superseded by statute, 544 F. Supp. 1122 (W.D. Tenn. 1982) ("Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.").
serves as the basis for the broad interpretive presumption applied by the Supreme Court in the voting context.

A. THE EMERGENCE OF THE FIFTEENTH AMENDMENT MANDATE

The passage of the Fifteenth Amendment marked a dramatic increase in federal interference with the power of the states to regulate elections. Prior to the Fifteenth Amendment, the regulation of the time, place, and manner of elections was within the sole constitutional domain of the states. In the first forty-five years following the enactment of the Fifteenth Amendment, the Supreme Court did not invalidate a single facially neutral voting law. It was not until 1915 that the Court, in two separate cases, invalidated facially neutral grandfather clauses under the Fifteenth Amendment. One of those cases, involving a challenge to an Oklahoma grandfather clause, set in motion the establishment of the broad Fifteenth Amendment mandate.

In 1915 black voters challenged an Oklahoma grandfather clause in *Guinn v. United States*. The pertinent clause of the statute stated:

No person shall be registered as an elector of this state or be allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government . . . , and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution.

The date set forth in the statute, January 1, 1866, predated the enactment of the Fifteenth Amendment by four years. Although not stated in the opinion, it can be deduced that this date was designated because at that time very few blacks were eligible to vote in Oklahoma. Therefore, the statute had the effect of requiring blacks to pass a literacy test in order to vote and grandfathering whites out of the literacy test requirement. The Court held

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129. Between the ratification of the Fifteenth Amendment in 1870 and the 1915 Supreme Court decision in *Guinn v. United States*, the Court had consistently taken a reactionary position to voting rights claims by blacks. *See* *Giles v. Harris*, 189 U.S. 475 (1903) (denying equitable relief to black voters subject to discriminatory voting tests under the Alabama Constitution that was alleged to be "part of a general scheme to disfranchise" black voters), *United States v. Reese*, 92 U.S. 214 (1875) (holding that the Fifteenth Amendment created a right without a remedy for violations by state election officials).
132. *Id.* at 357.
that, despite the lack of facially discriminatory language, the statute "inherently brings that [a discriminatory] result into existence since it is based purely upon a period of time before the enactment of the 15th Amendment, and makes that period the controlling and dominant test of the right of suffrage."\textsuperscript{133}

The very next year, the Oklahoma legislature amended the grandfather clause to circumvent the Fifteenth Amendment and the Court's holding in \textit{Guinn}.\textsuperscript{134} The statute grandfathered in those electors who had voted in the 1914 general election and established a twelve-day registration window for those not eligible to vote in that election.\textsuperscript{135} Failure to register during this twelve-day period for those not eligible to vote in the 1914 general election resulted in permanent disenfranchisement.\textsuperscript{136} The problem with the amendment was that the grandfather clause, invalidated by the Court in \textit{Guinn}, was in effect during the 1914 general election and, as a result, few blacks were eligible to vote in that election.\textsuperscript{137} As a result of this scheme, nearly every white automatically remained qualified to vote under the statute, while blacks had twelve days to register to vote or permanently lose their rights.\textsuperscript{138}

The Court addressed a challenge to the amended Oklahoma grandfather clause in 1939 when a black plaintiff who had been denied the right to vote challenged the law.\textsuperscript{139} The Court recognized the practical effect of the scheme and invalidated the law under the Fifteenth Amendment because it "operated unfairly against the very class on whose behalf the protection of the Constitution was here successfully invoked."\textsuperscript{140} The Court, anticipating similar discriminatory schemes and modifications in the future, established as the mandate of the Fifteenth Amendment the "nullification of sophisticated as well as simple-minded modes of discrimination."\textsuperscript{141}

This Fifteenth Amendment mandate required subsequent courts to address novel and complex voting schemes that discriminated on account of race. Several courts relied on this mandate to invalidate a number of voting practices prior to the enactment of the VRA. In particular, courts relied on

\textsuperscript{133} \textit{Guinn}, 238 U.S. at 364-65.
\textsuperscript{134} Lane v. Wilson, 307 U.S. 268, 270 (1939).
\textsuperscript{135} \textit{Id.} at 271.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 276.
\textsuperscript{138} \textit{Id.} at 271.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} Lane, 307 U.S. at 277.
\textsuperscript{141} \textit{Id.} at 275.
the mandate to invalidate long-standing practices that operated to discrimi-
nate against blacks, such as interpretation tests for registration,\textsuperscript{142} poll tax
requirements,\textsuperscript{143} and redistricting schemes that drew blacks out of the city
boundaries.\textsuperscript{144} However, Congress eventually realized that states had the
continued capacity to develop newer and more complex schemes to evade
the Fifteenth Amendment requirements. Litigation in the courts did not
eliminate these novel and complex schemes, despite the broad Fifteenth
Amendment mandate. The registration rates of blacks continued to be dra-
matically lower than whites, elected officials in many parts of the country
continued to be unresponsive to the needs of the black community, no
blacks were represented in the federal government, and few to no blacks
were represented in state or municipal governments, particularly in the
South.\textsuperscript{145} These realities, combined with a burgeoning civil rights move-
ment, forced Congress to enact the VRA.

B. THE ADOPTION OF THE FIFTEENTH AMENDMENT MANDATE IN THE
LEGISLATIVE HISTORY OF THE VOTING RIGHTS ACT OF 1965

Congress enacted the VRA after prior legislative attempts failed to al-
leviate voting discrimination. These legislative efforts continued to rely on
the litigation model for alleviating discrimination, and were not effective in
countering the use of increasingly novel and sophisticated discriminatory
voting schemes by states and municipalities.\textsuperscript{146} As an example, Congress

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\textsuperscript{142} Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1942), aff'd 336 U.S. 933 (1949) (invalidat-
ing an interpretation test under the Fourteenth and Fifteenth Amendment because registrars either
applied a more difficult test to black voters than white voters or did not require white voters to
pass an interpretation test at all).

\textsuperscript{143} United States v. Dogan, 314 F.2d 767, 770-72 (5th Cir. 1963) (holding that the Sheriff's
imposition of onerous burdens on blacks to pay poll tax as demonstrated by the requirements and
the fact that no black had paid their poll tax was a violation of the Fifteenth Amendment).

\textsuperscript{144} Gomillion v. Lightfoot, 364 U.S. 339 (1960) (invalidating a redistricting scheme that drew
the black population out of the voting district).

\textsuperscript{145} Congress noted that since the enactment of the Civil Rights Act of 1958:
In Alabama, the number of [black] registered to vote has increased by only 5.2 percent
between 1958 and 1964 to 19.4 percent; in Mississippi, approximately 6.4 percent of voting age
[blacks] were registered in 1964 compared to 4.4 percent in 1954; and in Louisiana, the in-
crease in [black] registration has been imperceptible—from approximately 31.7 percent in
1956 to approximately 31.8 percent of the eligible [blacks] registered as of January 1, 1965.
Meanwhile the percentage of registered white voters in Louisiana is 80.2 percent.

\textsuperscript{146} See Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 637 (1957); Civil Rights Act of
Congress also noted the painfully slow nature of progress in which “[j]udicial relief has had to be
gaged [sic] not in terms of months, but in terms of years.” H.R. REP. No. 89-439, at 4 (1965), as
reprinted in \textit{1965 U.S.C.C.A.N. 2437, 2441}. The legislative history of the VRA also described
the burdensome nature of this litigation in terms of the “incredible amount of time has had to be

described the efforts of officials in Dallas County, Alabama to evade the non-discriminatory voting requirements.  

According to the 1960 census, Dallas County, for which Selma is the county seat, had approximately 29,500 citizens of voting age, of whom 14,500 were white persons and 15,000 were black.  

In 1961, 64% of whites and only one percent of blacks were registered to vote in Dallas County. During the period from 1954 to 1960, the registrars of Dallas County had only registered fourteen black voters. The Department of Justice brought a voting discrimination suit in April 1961, and thirteen months later the suit went to trial. The court found that the registrars had discriminated on account of race, but held that injunctive relief was not available because the registrars were no longer in office. 

In 1963, the Fifth Circuit Court of Appeals reversed and ordered injunctive relief, but “refused to hold that Negro applicants must be judged by standards no different than the lenient ones that had been applied to white applicants during the long period of discrimination . . .” Because registration in Alabama was permanent, many blacks and few whites were required to register under the stricter standards adopted in 1964, which required “the applicant . . . to demonstrate his ability to spell and understand by writing individual words from the dictation of the registrar.” The Department of Justice filed a second suit in March of 1964 challenging as discriminatory the voting test and the delays in the registration process of blacks. In February of 1965, more than four years after the initial suit brought by the Department of Justice, the court enjoined the use of these tests and entered orders requiring registrars to address the issue of delay in registration. At the end of this hard-fought litigation, only 383 of the 15,000 blacks in Dallas County had registered to vote. Thus, in Dallas County, it “took more than four years to open the door to the exercise of

\[\text{heinonline} -- 7 \text{Loy. J. Pub. Int. L.} 181 2005-2006\]
constitutional rights conferred almost a century ago."\(^{158}\)

Congress determined that it would not be feasible to engage in Dallas County-style litigation throughout the country\(^ {159}\) and recognized that "[t]he burden [was] too heavy. The wrong to our citizens [was] too serious. The damage to our national conscience [was] too great not to adopt more effective measures than exist today."\(^ {160}\)

Congress recognized state authority to "fix the qualifications for voting" in Article I, Section 2 and the Seventeenth Amendment to the Constitution.\(^ {161}\) But, Congress appropriately determined that the Fifteenth Amendment prohibition on voting discrimination overrode this state authority.\(^ {162}\) Congress quoted an earlier Fifteenth Amendment case and noted, "[w]hen a State exercises power wholly within the domain of State interest, it is insulated from Federal judicial review. But such insulation is not carried over when State power is used as an instrument for circumventing a federally protected right."\(^ {163}\) In the area of the federally protected right to vote, Congress adopted the Fifteenth Amendment mandate to "nullify[s] sophisticated as well as simple-minded modes of discrimination."\(^ {164}\) This mandate would serve as the basis for a broad and expansive interpretation of the VRA.

Part III describes the operation of the VRA, particularly the preclearance provisions of Section 4 and Section 5, and the broad prohibition on voting discrimination in Section 2. Part III also examines how the Supreme Court, relying on the Fifteenth Amendment mandate, has established a broad interpretive presumption for both Section 5 and Section 2 of the VRA. This part argues that the cases interpreting the VRA provide a basis for the Court’s failure to apply the clear statement rule and the narrow interpretive presumption in Chisom, despite the extension of the clear statement rule to legislation enforcing the Fourteenth Amendment in Gregory. Finally, Part III argues that the distinguishing characteristics of felon disenfranchisement laws cited by the lower courts do not change the fact that the broad interpretive presumption applies to the question of whether Section 2 of the VRA applies to felon disenfranchisement laws.


\(^{159}\) Id.

\(^{160}\) Id.

\(^{161}\) Id. at 2449.

\(^{162}\) Id. ("[T]he 15th amendment outlaws voting discrimination, whether accomplished by procedural or substantive means.").

\(^{163}\) Id. (quoting Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

\(^{164}\) 1965 U.S.C.C.A.N. 2437 at 2449 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).
III. THE SUPREME COURT AND THE VRA: THE ESTABLISHMENT OF A BROAD INTERPRETIVE PRESUMPTION

A. THE OPERATION OF THE VOTING RIGHTS ACT OF 1965

Congress intended Section 5 of the VRA to be "the front line defense against voting discrimination." Section 5 operates in conjunction with Section 4 to establish special requirements for jurisdictions that have a history of voting discrimination. Congress employs the triggering formula of Section 4 and the preclearance provision of Section 5 to establish a presumption of invalidity for certain devices and tests that have historically denied the vote on account of race in certain jurisdictions. It also requires those jurisdictions to prove that any changes in voting schemes do not have the purpose or effect of discriminating on account of race.167

The trigger formula of Section 4 of the VRA affects all states or voting jurisdictions in which literacy tests or similar devices were employed in the 1964, 1968, or 1972 elections and in which less than 50% of the electorate registered or voted in those respective elections. Coverage means that the use of these "tests or devices" is suspended and the Attorney General can send federal examiners to the states to register voters or federal observers to monitor the conduct of elections. Under Section 5, those states or municipalities are required to submit changes to any voting scheme to the Attorney General or to the District Court for the District of Columbia for approval. To obtain approval, a state or municipality is required to demonstrate that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ."171

168. Congress specifically excluded felon disenfranchisement laws from the definition of tests or devices under Section 4 of the VRA. 42 U.S.C. 1973(b)(c) (2000); H.R. REP. NO. 89-439, at 25-26, as reprinted in 1965 U.S.C.C.A.N. 2437, 2457 (The Act "does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony."). This only meant that the use of felon disenfranchisement laws by States in 1964 would not be a part of the triggering formula that would lead to the coverage impositions and requirements of Section 5 of the VRA. This did not mean that covered States that enacted or broadened their state felon disenfranchisement laws would not be subject to the Section 5 restrictions on changes to voting qualifications that had the purpose or effect of discriminating on account of race. See id.
171. Id.
Section 5 of the VRA has had the powerful effect of shifting the burden of proof from citizens, who were required to demonstrate that changes in voting laws discriminated on account of race, to the state or municipality, to demonstrate that changes in voting laws do not discriminate on account of race. This places the litigation burden on the states or municipalities as opposed to individual complainants. Any delays or costs of litigation are, therefore, borne by the state. Congress enacted Section 5 as a temporary provision subject to periodic reauthorization on the basis of need.\textsuperscript{172} Section 5 is scheduled for reauthorization in 2007.\textsuperscript{173}

In contrast, Section 2 of the VRA is a permanent provision that has nationwide application and force. On the basis of the language of the statute, Section 2 has coextensive coverage with Section 5 of the VRA as it applies to "any voting qualification, prerequisite, practice or procedure."\textsuperscript{174} The difference between Section 2 and Section 5 of the VRA lies in the presumption of validity of the challenged voting laws or practices and the burden of proof. Unlike Section 5, election laws and practices challenged under Section 2 of the VRA are valid and applicable until a court finds them to be discriminatory.\textsuperscript{175} Also, unlike Section 5 of the VRA, the burden of proof to demonstrate discrimination is on the complaining party, as opposed to the state.\textsuperscript{176} Therefore, the burdens and delays of litigation continue to be primarily borne by the complaining party under Section 2 of the VRA.

Because changes to voting laws in jurisdictions that have a history of discrimination must be pre-cleared under Section 5 of the VRA, this section usually determines the coverage of both Section 5 and Section 2 of the VRA. The next part will show that in the early cases, the Supreme Court did in fact focus on the coverage of Section 5 of the VRA. These cases reveal that in determining the coverage of Section 5 of the VRA, the Court has relied on the Fifteenth Amendment mandate to "nullify sophisticated and simple-minded forms of discrimination."\textsuperscript{177} The Court's reliance on this mandate has led it to establish a presumption of broad coverage for the

\textsuperscript{172} In the most recent reauthorization in 1982, the temporary provisions of the VRA were set to expire in twenty-five years. See 42 U.S.C. § 1973b (2000).

\textsuperscript{173} Id.

\textsuperscript{174} 42 U.S.C. § 1973 (2000). See e.g., Holder v. Hall, 512 U.S. 874, 886-87 (1994) (O'Connor, J., concurring) (holding that it is only logical that standard, practice, or procedure be interpreted the same way under Section 2 and Section 5 of the VRA); Allen v. State Bd. of Elections, 393 U.S. 544, 566-68 (1969) (relying in part on the legislative history of Section 2 of the VRA to determine the coverage of Section 5). For a discussion see infra Part III. B.


\textsuperscript{176} Id.

\textsuperscript{177} See infra Part III. B.
VRA that has resulted in the expansive reach of the Act without the affirmative intent of Congress.

B. THE BROAD INTERPRETIVE PRESUMPTION AND SECTION 5 OF THE VRA

In 1969, the Supreme Court established a presumption in favor of a broad interpretation of the VRA in the seminal case of Allen v. State Board of Elections. This case involved a challenge to the meaning of the phrase “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” in Section 5 of the VRA. The State of Mississippi brought three challenges in which it alleged that the establishment of at-large elections for board members, the change in the status of county offices from elective to appointive, and the change in “the requirements for independent candidates running in general elections” were not covered by Section 5 of the VRA, and thus, were not subject to pre-clearance. The State of Virginia brought an additional claim that a voting change allowing a judge to assist a “qualified voter in the preparation of his ballot” was not a change subject to pre-clearance under Section 5.

The Court’s application of a broad interpretive presumption for the VRA is most clearly demonstrated in the challenge to the coverage of the at-large system of elections in eleven counties in Mississippi. Congress never specifically expressed an affirmative intent to address potentially discriminatory vote dilution schemes, such as the creation of at-large districts, in the text or the legislative history of the VRA. The State of Mississippi relied on this omission to support its argument that the Section 5 pre-clearance requirement did not apply to the creation of at-large districts. The Court disagreed with the State’s “narrow construction” of Section 5.

180. Prior to the adoption of the at-large system of elections, all Mississippi counties “by law were divided into five districts” and “each district elected one member of the [county’s governing board].” Id. at 550.
182. Id. at 553.
183. Id. at 564-65.
184. Id. at 565.
Instead, the Court reiterated the Fifteenth Amendment mandate explaining, "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."\textsuperscript{186} The Court read into this mandate a requirement that the Act be given the "broadest possible scope."\textsuperscript{187} On the basis of this reading, the Court construed the statute to include vote dilution claims because "the Act gives a broad interpretation to the right to vote . . . ."\textsuperscript{188}

The Court also examined the legislative history as further support for a broad interpretation of the Act.\textsuperscript{189} Although the Court did not identify any specific discussions of the challenged procedures in the legislative history, the Court asserted, "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way."\textsuperscript{190} The Court concluded that the voting changes made by Mississippi and Virginia were covered by Section 5 and subject to pre-clearance.\textsuperscript{191}

Thus, the Court in \textit{Allen}, without the affirmative intent of Congress, dramatically extended the reach of the VRA into the area of vote dilution practices. This second generation of voting discrimination has been the focus of litigation under the VRA over the past thirty-five years.\textsuperscript{192} More relevant to this discussion, the \textit{Allen} Court applied an interpretive presumption in favor of a broad construction of the VRA that would be followed by later courts. The Court recognized that at-large elections, appointive offices, changes in the requirements for independent candidates, and the establishment of voting assistance procedures were the types of subtle schemes that Congress intended to subject to the coverage of the VRA.\textsuperscript{193}

In 1970, a year after the Court’s decision in \textit{Allen}, Congress renewed the temporary provisions of the VRA, including Section 5.\textsuperscript{194} In doing so,

\begin{itemize}
  \item \textsuperscript{187} Id. at 567
  \item \textsuperscript{188} Id. at 565-66 (quoting 42 U.S.C. § 1973 (c)(1) (1964)).
  \item \textsuperscript{189} Id. at 566-69.
  \item \textsuperscript{190} Id. at 566.
  \item \textsuperscript{191} Id. at 569-70.
\end{itemize}
Congress affirmed the Court’s interpretive presumption in favor of a broad construction of the VRA in *Allen*.\(^{195}\) Congress also provided evidentiary support for the expansive reading of the VRA to address vote dilution claims, particularly challenges to at-large elections and the other claims addressed in *Allen*.\(^{196}\) In the legislative history, Congress identified a United States Commission on Civil Rights’ Report that demonstrated the dilutive effects on the black vote of switching to at-large elections and the discriminatory effects of abolishing or establishing appointive office and “withholding information about qualifying for office . . .”\(^{197}\) While these subtle and sophisticated discriminatory devices may not have been envisioned by the drafters of the original VRA, Congress demonstrated, in its discussion of these schemes, that it intended all discriminatory voting schemes to be addressed by the VRA.\(^{198}\)

In two cases decided in the early 1970s, the Supreme Court further developed the contours for the broad interpretive presumption of the VRA on the basis of this congressional support. In the first case, *Perkins v. Matthews*,\(^{199}\) the Court addressed whether a municipality’s annexation of adjacent areas was covered by the VRA. The city of Canton, Mississippi, annexed surrounding populated areas prior to the mayoral election of 1969.\(^{200}\) Voters and mayoral candidates challenged the city’s failure to pre-clear the change under Section 5 of the VRA.\(^{201}\) Like the voting changes in *Allen*, Congress did not specifically mention annexations as one of the qualifications, standards, practices, or procedures on the face of the VRA or in the legislative history of the VRA of 1965 or 1970.\(^{202}\) Nevertheless, the Court held that this change was subject to pre-clearance because it had two effects

\(^{195}\) H.R. REP. NO. 91-397, at 7 (1970), as reprinted in 1970 U.S.C.C.A.N. 3277, 3284 (“The decision underscores the advantage [s]ection 5 produces in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color.”).

\(^{196}\) See *Allen*, 393 U.S. at 550-54.


\(^{198}\) See id. at 3283.


\(^{200}\) Id. at 382, n.4.

\(^{201}\) Id. at 383.

on voting: "(1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation . . . ."\textsuperscript{203}

The Court concluded that annexations fell within the coverage of Section 5 of the VRA and established a standard for determining coverage that would be followed by subsequent courts.\textsuperscript{204} The Court explained that "[Section] 5 was designed to cover changes having a potential for racial discrimination in voting . . . ."\textsuperscript{205} The "potential to discriminate standard" is consistent with the interpretive presumption established for the VRA in \textit{Allen} on the basis of the Fifteenth Amendment mandate as it would encompass nearly every voting scheme. The Court held on the basis of this standard that "such potential [to discriminate] inheres in a change in the composition of the electorate affected by an annexation."\textsuperscript{206}

The second case, \textit{Georgia v. United States},\textsuperscript{207} involved a challenge to Georgia's reapportionment scheme. The one-person, one-vote line of cases established a requirement for periodic reapportionment to even out the populations of voting districts.\textsuperscript{208} Approximately every ten years after the release of census data, each state is constitutionally required to reapportion the districts.\textsuperscript{209} The reapportionment of the districts requires a redrawing of district lines in which legislatures map out the boundaries of equal population districts.\textsuperscript{210} These districts function as the geographic voting units for elected officials to both federal and state governments. The question that arose in \textit{Georgia v. United States} was whether the covered jurisdictions, like the State of Georgia, would be required to pre-clear their redistricting schemes under Section 5 of the VRA.\textsuperscript{211}

\textsuperscript{203} \textit{Perkins}, 400 U.S. at 388.
\textsuperscript{204} \textit{Id}.
\textsuperscript{205} \textit{Id} at 388-89.
\textsuperscript{206} \textit{Id} at 389. The Court in \textit{Perkins} also held that a challenged at-large election scheme in changing the location of polling places were subject to preclearance under Section 5 of the VRA. \textit{Id} at 387.
\textsuperscript{208} \textit{See Reynolds v. Sims, 377 U.S. 533 (1964) (establishing the constitutional requirement under the Fourteenth Amendment Equal Protection Clause of one-person, one-vote in the apportionment of districts).}
\textsuperscript{209} In order to comply with the one-person, one-vote requirement of \textit{Reynolds v. Sims}, States are required to reapportion after the release of each new census every ten years.
\textsuperscript{210} \textit{Reynolds}, 377 U.S. at 577 (requiring that state apportionments be "as nearly of equal population as is practicable.").
\textsuperscript{211} \textit{Georgia}, 411 U.S. at 531.
The Court relied on the holding in *Allen* and again applied an interpretive presumption in favor of a broad application of the VRA.\(^{212}\) The Court concluded that redistricting was subject to the pre-clearance requirement of Section 5 of the VRA despite the lack of explicit discussion of redistricting on the face of the statute.\(^{213}\) The Court determined that if Congress disagreed with the broad scope given to the VRA in *Allen*, that "it had ample opportunity to amend the statute."\(^{214}\) Instead, the Court concluded that based on the reauthorization without modification of Section 5, "*Allen* correctly interpreted the congressional design" of the VRA.\(^ {215}\)

The Court's holding in *Georgia* paralleled that of a later Court in *Chisom*.\(^ {216}\) Consistent with *Chisom*, the Court explained that there must be affirmative language indicating that Congress did not intend to address a particular voting law or practice.\(^ {217}\) This obviously conflicts with the clear statement requirement that Congress affirmatively express its intent to address a particular practice on the face of the statute. This broad interpretive presumption led the Court to extend the VRA to redistricting practices that would also become the focus of later litigation under the VRA.\(^ {218}\)

Congress, in the reauthorization of the VRA in 1975, once again affirmed the broad interpretation of the Act established by the Supreme Court.\(^ {219}\) Congress recognized that "[a]s registration and voting of minority citizens increases, other measures may be resorted to, which would dilute increasing minority voting strength."\(^ {220}\) Specifically, the Court identified potentially discriminatory measures addressed by the Court in *Allen*, *Perkins*, and *Georgia*, such as "switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting."\(^ {221}\)

This broad interpretive presumption continued in other Section 5 cases leading up to *Chisom*. The Court held that the pre-clearance requirement of

\(^{212}\) *Georgia*, 411 U.S. at 532.

\(^{213}\) Id.

\(^{214}\) Id. at 533.

\(^{215}\) Id. at 533.

\(^{216}\) *See supra* Part I. A.

\(^{217}\) *Georgia*, 411 U.S. at 533 (noting that "had Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute.").


\(^{221}\) Id.
Section 5 of the VRA applied to a Board of Education rule that required “employees to take unpaid leaves of absence while they campaign for elective office,” the change from a plurality to a majority voting requirement for election to office, the staggering of terms of elected officials, and changes in election dates and candidate filing periods. In each case that interpreted the coverage of Section 5, the Court relied on the Fifteenth Amendment mandate to nullify subtle and sophisticated discrimination in voting, or the broad coverage standard of whether the challenged practice had a potential for discrimination. The Court never sought to ascertain an affirmative intent by Congress to address a particular voting practice or law.

The Court followed the amendment and reauthorization of the VRA in 1982, and extended this broad interpretive presumption to the question of the coverage of Section 2 of the VRA. The following part will discuss two cases in particular, Thornburg v. Gingles and Holder v. Hall, which provide further support for the argument that Chisom and the failure to apply the clear statement rule to the VRA was consistent with past interpretations of the broad coverage of the VRA.

C. THE EXTENSION OF THE BROAD INTERPRETIVE PRESUMPTION TO SECTION 2 OF THE VRA

Congress last renewed the temporary provisions of the VRA in 1982. In the process, Congress amended Section 2 of the VRA to establish a “results test,” in which a complainant can prove on the basis of the

224. Id.
225. Id.
227. See, e.g., Dougherty County Bd. of Educ., 439 U.S. at 42 (“[T]he question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a potential for discrimination.”); NAACP, 470 U.S. at 181 (“Our inquiry is limited to whether the challenged alteration has the potential for discrimination.”).
228. See infra Part III. C.
232. “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .” 42 U.S.C. § 1973(a) (2000). Section 2 of the VRA was amended in response to the Court’s decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). See S. REP. NO. 94-417 (1982), 190
totality of the circumstances that a voting qualification, practice, or procedure resulted in discrimination on account of race.\textsuperscript{233} In the legislative history, Congress identified a second generation of voting laws that the VRA was intended to address.\textsuperscript{234} In particular, Congress once again identified some of the laws objected to by the Department of Justice in prior pre-clearance challenges and found by the Court to be within the terms of the VRA, such as the gerrymandering of districts, the establishment of appointive office, the institution of majority runoff elections, and the substitution of single district elections with at-large elections.\textsuperscript{235} The Court recognized the sophistication and ingenuity of these schemes and held that such laws were anticipated by Congress in the VRA.\textsuperscript{236}

Congress did not intend to limit the VRA to overtly discriminatory practices, but instead sought to subject those practices and procedures traditionally used by political groups to maintain power to additional scrutiny when used against racial groups.\textsuperscript{237} Therefore, Congress approved the interpretive breadth given to the VRA by the courts that extended the cover-
age of the VRA from the first generation vote denial practices, which included literacy tests, interpretation tests, and grandfather clauses, to the second generation vote dilution practices, which included redistricting and at-large districting schemes.

Following the amendment and reauthorization of the VRA in 1982, the Court, for the first time, specifically addressed the coverage of Section 2 of the VRA. In three cases, *Thornburg*, *Chisom*, and *Holder*, the Court addressed whether Section 2 extended to at-large elections, judicial elections, and the size of governing authorities. In each of these cases, the Court interpreted Section 2 broadly to cover the three voting schemes despite the lack of an affirmative intent of Congress. These cases demonstrate that Section 2 is coextensive with Section 5 of the VRA, and that by implication, Section 2 is subject to the same broad interpretive presumption that the Court has applied to Section 5. *Thornburg* and *Holder* also demonstrate that the refusal of the Court to apply the clear statement rule and the associated presumption of a narrow construction of the VRA in *Chisom* was not an anomaly nor a mere omission.

In *Thornburg*, the Court construed Section 2 of the VRA for the first time. The case involved a challenge to a redistricting plan that established multimember districts in North Carolina, allegedly resulting in the dilution of the black vote. In spite of the discussion of vote dilution practices in the legislative history of the VRA of 1982, nowhere on the face of the statute did Congress specifically identify the vote dilution practices it intended to address. Instead, Congress used the same language in Section 2 as it did in Section 5. Specifically, Section 2 addressed "any voting qualification, prerequisite, standard, practice, or procedure" that resulted in discrimination on account of race. Despite the lack of a clear statement addressing multimember districts, the Court followed its Section 5 jurisprudence and broadly interpreted Section 2. The Court concluded that "[t]his Court has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" Therefore, the Court concluded, on the basis of a standard that mirrored the potential to discriminate standard applied in Section 5 cases, that Section 2 of the VRA

238. *Thornburg*, 478 U.S. at 34.
239. *Id.* at 35.
243. *Id.* at 47 (quoting Burns v. Richardson, 384 U.S. 73, 88 (1966)).
covered an at-large voting scheme.  

Eight years later, and three years after the Court's decisions in *Chisom* and *Gregory*, the Court extended the coverage of Section 2 of the VRA into an area not mentioned in the Act nor addressed in the legislative history. Any argument that the Court's failure to apply the clear statement rule in *Chisom* was a mere omission must address the fact that the Court in *Holder* also did not apply the clear statement rule. The *Holder* Court addressed the question of "whether the size of a governing authority is subject to a vote dilution challenge under [Section] 2 of the Voting Rights Act of 1965." In *Holder*, the plaintiffs alleged that the single commissioner system diluted the black vote in a Georgia county, violating Section 2 of the VRA. The Bleckley County Commissioner had all legislative and executive authority in the county. Nearly 20% of the eligible voters in Bleckley County were black, making it highly unlikely that blacks would be able to elect the commissioner of their choice. The Georgia legislature authorized the expansion of the commission to five members, but the Georgia voters rejected the referendum. Black registered voters and the NAACP challenged the single commissioner system in Bleckley County. The *Holder* Court found that Section 2 applied to challenges to the size of the governing authority, but held that the lack of an appropriate benchmark standard necessary to determine whether a governing authority size diluted the black vote made the issue non-justiciable.

In her concurrence, Justice O'Connor provided an explanation for why Section 2 covers challenges to the size of governing authorities. Justice O'Connor relied on the fact that the Court had held that the size of governing authorities was subject to pre-clearance challenges under Section 5. She explained that because Section 2 was textually coextensive with Section 5 in its coverage of "standard, practice, or procedure," it was illogical to argue that the size of a governing authority is a "standard, practice, or procedure" under Section 5 and not a "standard, practice, or procedure"
with respect to voting under Section 2.\textsuperscript{255}

Thus, on the coverage question, \textit{Holder} was consistent with \textit{Chisom} in holding in favor of a broad interpretive presumption contrary to the clear statement rule. Like the Court's upholding of the coverage of judicial elections in Section 2 in \textit{Chisom}, the \textit{Holder} Court upheld the Section 2 coverage of the size of governing authorities despite the lack of a clear expression of intent to specifically address these schemes on the face of the statute.\textsuperscript{256} The Court relied on Section 5 jurisprudence expanding the reach of the VRA into unforeseen areas to fulfill the mandate to nullify sophisticated and subtle forms of discrimination.\textsuperscript{257}

The broad interpretive presumption applied by the Court in \textit{Chisom} was consistent with the long-standing interpretative practice in the voting area. However, the failure of the Court to apply the clear statement rule was also consistent with long-standing interpretive practice in the voting area. The Court derived the broad interpretive presumption for cases determining the coverage of the VRA from the Fifteenth Amendment mandate established by the Court.\textsuperscript{258} Both the Court and Congress understood the novel and sophisticated mechanisms that could potentially be used by state actors to discriminate against voters on account of race. The Court and Congress also understood that Congress could not possibly anticipate all of the novel and sophisticated discriminatory voting schemes in a single act. Therefore, Congress adopted the broadest possible language and the Court has applied the broadest possible interpretation to address all potential forms of voting discrimination with the VRA. With its decisions in \textit{Chisom} and \textit{Holder}, the Court also demonstrated that a broad interpretive presumption based on the Fifteenth Amendment constitutional mandate trumps the narrow interpretive presumption in the clear statement rule, which was derived from a constitutional federalism mandate.\textsuperscript{259}

The Court has not established a similar broad interpretive mandate for the Fourteenth Amendment or legislation enforcing the Fourteenth Amendment. This failure explains the Court's decision to apply the clear statement rule in \textit{Gregory} and why such a holding was consistent with the Fourteenth Amendment. But with the Fifteenth Amendment and legislation enforcing the Fifteenth Amendment, the Court has established, and Congress has approved, a broad interpretive mandate that trumps the federalism

\textsuperscript{255} \textit{Holder}, 512 U.S. at 886 (O'Connor, J., concurring).
\textsuperscript{256} \textit{Id.} at 886.
\textsuperscript{257} \textit{See id.} (citing cases interpreting the broad coverage of Section 5 of the VRA).
\textsuperscript{258} \textit{See supra} Part II. A.
\textsuperscript{259} \textit{See supra} Part I A.
concerns of the clear statement rule. In the case of the Fifteenth Amendment, the Framers' intent to interfere with state authority in the area of voting, combined with the need to "nullify sophisticated and simple minded forms of discrimination in voting," provides justification for the Court's failure to apply the clear statement rule to the VRA.\textsuperscript{260}

This argument does not address all of the arguments as to why the clear statement rule applies to the question of the applicability of Section 2 to felon disenfranchisement laws. The next part argues that the distinctions identified by courts between felon disenfranchisement laws and other voting laws are irrelevant to the determination of the appropriate interpretive presumption and the applicability of the clear statement rule.

D. ARE FELON DISENFRANCHISEMENT LAWS DIFFERENT?

The lower courts that have held that Section 2 of the VRA does not apply to felon disenfranchisement laws on the basis of the clear statement rule have relied on three additional arguments. First, these courts argue that felon disenfranchisement laws existed for a long time prior to the CWAs and, therefore, it is necessary to determine whether Congress clearly intended to address these laws in the VRA.\textsuperscript{261} Second, these courts have explained that felon disenfranchisement laws are a part of the core authority of states to punish criminals.\textsuperscript{262} Therefore, unlike other voting qualifications, it is necessary to determine whether a state clearly intended to infringe on this core state function. Finally, courts have held that applying Section 2 of the VRA to felon disenfranchisement laws would conflict with state authority to maintain these laws under Section 2 of the Fourteenth Amendment.\textsuperscript{263} Courts applying the latter arguments employ the clear statement rule as a constitutional avoidance doctrine and explain that Congress's failure to clearly express its intent to address felon disenfranchisements laws justifies an alternative interpretation of the VRA.\textsuperscript{264} These arguments regarding felon disenfranchisement laws do not change the applicability of the broad interpretive presumption in determining whether Section 2 of the VRA applies to state felon disenfranchisement laws.

1. LONG-STANDING NATURE OF FELON DISENFRANCHISEMENT LAWS

For half of the en banc Second Circuit in \textit{Baker v. Pataki}, and the

\begin{itemize}
  \item \textsuperscript{260} See supra Part III. A.-B.
  \item \textsuperscript{261} See infra Part III. D. 1.
  \item \textsuperscript{262} See infra Part III. D. 2.
  \item \textsuperscript{263} See infra Part III. D. 3.
  \item \textsuperscript{264} See infra Part III. D. 3.
\end{itemize}
panel majority in *Muntaqim v. Coombe*, the fact that felon disenfranchise-
ment laws existed before the CWAs justified the application of the clear statements rule to the question of Section 2's coverage of felon disenfranchise-
law. Because these practices existed before the CWAs, the Second Circuit surmised that "felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to perpetuate racial discrimination forbidden by those amendments." According to this logic, if the court had addressed the countervailing broad interpretive mandate of the Fifteenth Amendment, it likely would have held that the balance of presumption favors the clear statement rule's narrow presumption. This is so because the Fifteenth Amendment and, by extension, the VRA was not intended to address felon disenfranchisement laws.

This argument fails to address the fact that the Fifteenth Amendment, and, by extension, the VRA, have addressed both long-standing and novel laws. At-large election schemes, the location of polling places, the establishment of registration requirements for independent candidates, redistricting, the administration of judicial elections, and the determination of the size of the governing authority are all state practices that pre-date the Fifteenth Amendment. Yet in each of these cases, the Court has held that these practices are subject to the Fifteenth Amendment mandate and, by extension, the broad interpretive presumption of the VRA, as legislation enforcing the Fifteenth Amendment. The Court’s determination of whether a broad interpretive presumption applies has not turned on whether the voting standards are long-standing or novel, but instead on whether the practices have a potential to discriminate, which felon disenfranchisement laws clearly do.

265. *Muntaqim*, 366 F.3d at 123; *Baker*, 85 F.3d at 928.
266. *Baker*, 85 F.3d at 928.
267. The court did not address this issue because it reconciled the conflict between its application of the clear statement rule in *Gregory* and its failure to apply the clear statement rule in *Chisom* on the basis of the argument that the Court in *Chisom* inadvertently omitted discussion of the clear statement rule. This attempt to reconcile the two cases is problematic in light of the later holding of the Supreme Court in *Holder v. Hall*, 512 U.S. 874 (1994) (applying the VRA to the size of a governing authority without applying the clear statement rule). See supra Part II. C.
268. See *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (applying the VRA to address at-large election schemes, the location of polling places and the establishment of registration requirements for independent candidates); *Georgia v. United States*, 411 U.S. 526 (1973) (applying the VRA to address redistricting); *Chisom v. Roemer*, 501 U.S. 380 (1991) (applying the VRA to address judicial elections); *Holder v. Hall*, 512 U.S. 874 (1994) (applying the VRA to address the size of a governing authority).
269. See *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978) ("[I]n determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a potential for discrimination.

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In addition, the determination of whether the clear statement rule applies to federal laws regulating state practices has not turned on whether the state practices are long-standing or not. The Court, in *Gregory v. Ashcroft*, and other cases applying the clear statement rule,\(^{270}\) has never relied on the long-standing nature of the state practice or law as the basis for applying the clear statement rule. Thus, the long-standing nature of felon disenfranchisement laws is irrelevant to the determination of the appropriate interpretive presumption. Regardless of whether felon disenfranchisement laws existed prior to the CWA or emerged five years ago, the broad interpretive presumption applies to the determination of whether Section 2 of the VRA covers felon disenfranchisement laws because of the Fifteenth Amendment mandate to "nullify sophisticated and subtle forms of discrimination."

2. **Core State Authority to Enact Felon Disenfranchisement Laws**

The Second Circuit distinguished state authority to interfere with felon disenfranchisement laws from other voting qualifications on the basis of the fact that "States possess primary authority for defining and enforcing the criminal law."\(^{271}\) Therefore, unlike in the case of other voting qualifications, a clear congressional intent within the VRA to interfere with state authority to enforce criminal law is necessary.

At the same time, the court appropriately recognized that felon disenfranchisement laws are a voting qualification.\(^{272}\) Thus, felon disenfranchisement laws are at the intersection of two areas of state constitutional authority: the authority of the state to determine voting qualifications and the authority of the state to punish criminals. The question is whether this broad interpretive presumption applies to the determination of the reach of the VRA into areas of criminal law.

It is impossible to separate the voting qualification function of felon disenfranchisement laws, for which the primary justification is the purity of

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272. *Baker*, 85 F.3d. at 931 (Mahoney, J.) (explaining that states have the authority to enact felon disenfranchisement laws because "[t]he states have the primary responsibility for regulating the times, places, and manner of conducting federal elections [under] U.S. Const. art. 1, § 4, cl. 1, and even more obviously for regulating elections to state office.").
the ballot box, from the criminal punishment aspect of felon disenfranchisement. Nevertheless, it is important to recall the justification for the broad Fifteenth Amendment mandate, which is to ensure that laws are invalidated that will potentially result in subtle and sophisticated discrimination. Felon disenfranchisement laws and their effect of disenfranchising a large segment of the minority voting population, both in prison and out of prison, have the potential to discriminate and perpetuate the empowerment of white racial voting blocs and the disempowerment of minority racial voting blocs. Therefore, while felon disenfranchisement laws are not simply about voting, the broad interpretive presumption, nevertheless, should apply in determining the applicability of the VRA to felon disenfranchisement laws.

### 3. SECTION 2 OF THE FOURTEENTH AMENDMENT

Finally, the Eleventh Circuit in *Johnson v. Governor of State of Florida*, employed the clear statement rule as a sort of constitutional avoidance doctrine to hold that Section 2 of the VRA does not apply to felon disenfranchisement laws. The court explained that felon disenfranchisement laws are presumptively constitutional under Section 2 of the Fourteenth Amendment, which states in relevant part:

> [W]hen the right to vote at any election for the choice of electors . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

In 1974, the Supreme Court decided *Richardson v. Ramirez*, and relied on this provision to hold that California’s felon disenfranchisement law did not violate the Equal Protection Clause because it discriminated against fel-

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274. For example in Georgia, 12.6 percent of black males and only 2 percent of non-black males are disenfranchised as a result of the State felon disenfranchisement law that prohibits persons in prison, probation or parole from voting. Ryan S. King and Marc Mauer, *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia* 4-5 (2004) available at http://www.sentencingproject.org/pdfs/atlanta-report.pdf.


The Eleventh Circuit explained that the Supreme Court's interpretation of Section 2 of the Fourteenth Amendment meant that states have constitutional authority to disenfranchise felons. The court acknowledged that there is an exception to this constitutional authority as recognized by the Supreme Court in the 1983 case of Hunter v. Underwood, which held that the Alabama felon disenfranchisement law violated the Equal Protection Clause because it discriminated on account of race, despite the constitutional support for these laws in Section 2 of the Fourteenth Amendment. Nevertheless, the Eleventh Circuit explained that this exception only constrains states from enacting and maintaining felon disenfranchisement laws that intentionally discriminate on account of race in violation of the Equal Protection Clause.

The Eleventh Circuit argued that the Equal Protection Clause is the only exception to state authority to maintain felon disenfranchisement laws. Under this reasoning, the constitutional authority of states to maintain felon disenfranchisement laws under Section 2 of the Fourteenth Amendment is not constrained by any other constitutional or statutory provisions such as the Fifteenth Amendment or the VRA. Thus, according to the court, the invalidation of felon disenfranchisement laws under Section 2 of the VRA would be of questionable constitutionality under Section 2 of the Fourteenth Amendment. The Eleventh Circuit, employing the clear statement rule as a sort of constitutional avoidance doctrine, held that a clear statement of congressional intent is required to extend the VRA into this area of questionable constitutionality.

This theory is unsustainable. Article I, Section 4 of the Constitution authorizes states to establish voting procedures. However, state authority has been constrained by the Fourteenth Amendment Equal Protection Clause and the Fifteenth Amendment. Legislation such as the VRA, which enforces these two amendments, also trumps state authority to establish voting qualifications under Article I, Section 4 of the Constitution, to the extent that states cannot enact discriminatory voting qualifications contrary to the Act.

278. Johnson, 405 F.3d at 1217.
280. Johnson, 405 F.3d at 1230.
281. Id. See Muntaqim v. Coombe, 366 F.3d 102, 123 n.20 (2d Cir. 2004).
282. Johnson, 405 F.3d at 1230.
The authority of states to enact and maintain felon disenfranchisement laws under Section 2 of the Fourteenth Amendment is no different than state authority to establish voting procedures under Article I, Section 4 of the Constitution. In each case, state power is constrained by the requirements not to discriminate under the Fourteenth Amendment Equal Protection Clause, the Fifteenth Amendment, and legislation such as the VRA, enforcing one or both of these amendments. It would truly be an anomalous result if only the Equal Protection Clause constrained state authority to enact felon disenfranchisement laws under Section 2 of the Fourteenth Amendment, while the Fifteenth Amendment and legislation enforcing the Fifteenth Amendment, like the VRA, are held to not constrain state authority at all. The Eleventh Circuit never attempted to reconcile this anomaly and it is doubtful that it could.

Applying Section 2 of the VRA to felon disenfranchisement laws raises the same constitutional question associated with applying any part of the VRA to any other state voting qualification. The Supreme Court has never subjected the determination of the extension of the VRA to novel and sophisticated state voting qualifications to the constitutional avoidance inquiry because of the implicit recognition that there is no constitutional problem to avoid. This analysis does not change when determining whether the VRA addresses state felon disenfranchisement laws.

IV. CONCLUSION

On its face, the Gregory Court’s holding applying the clear statement rule to the question of the coverage of the ADEA and the Chisom Court’s holding, decided the same day, which failed to apply the clear statement rule to the question of the coverage of the VRA, may seem anomalous. However, the holding in Chisom was more than a failure to apply the clear statement rule. In fact, the Court in Chisom applied an interpretive presumption that directly conflicted with that of the clear statement rule. In contrast to the narrow interpretive presumption of the clear statement rule, which requires that Congress express an affirmative intent to address a particular practice, the Court applied a broad interpretive presumption in which Congress is required to express an affirmative intent not to address a particular practice. The anomaly of the conflicting holdings disappears after an examination of the case law interpreting the VRA leading up to Chisom,

284. Gabriel J. Chin, Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?, 92 GEO. L.J. 259, 272-75 (2004) (arguing that Section 2 of the Fourteenth Amendment failed to address voting discrimination and was repealed upon ratification of the Fifteenth Amendment.).

285. See supra Part I. A.
which indicates that the Court has consistently applied a broad interpretive presumption to the question of the coverage of both Section 5 and Section 2 of the VRA. This case law reveals that the true anomaly would have resulted if the Court had applied the clear statement rule in Chisom.

The explanation of the seeming anomaly in Chisom is extremely important as we look forward to the reauthorization of Section 5 of the VRA and the potential amendment of Section 2 of the VRA in 2007, and the day that the Supreme Court finally grants certiorari on the question of the applicability of the VRA to felon disenfranchisement laws. The question that could arise in 2007 is whether Congress should amend Section 2 of the VRA to provide a clear statement of its intent to address felon disenfranchisement laws. The answer must unambiguously be “no.” An attempt to introduce language expressing the clear intent of Congress to address felon disenfranchisement laws would be unnecessary, would raise political problems, and would potentially present a conflict with another textual canon of statutory interpretation.

A clear statement of Congressional intent to address felon disenfranchisement laws is unnecessary because, as discussed above, based on the broad interpretive presumption applied in Allen and its progeny, the Court should interpret Section 2 of the VRA to reach felon disenfranchisement laws. Furthermore, an attempt to incorporate a clear statement of intent would also raise potential political problems for those legislators who would support such a measure. Politicians’ fear of being perceived as “soft on crime” might lead them to oppose such a measure. If such an amendment were proposed and rejected, the Court would likely interpret the VRA as not reaching felon disenfranchisement laws despite the broad interpretive presumption. Therefore, the introduction of an amendment specifically addressing felon disenfranchisement laws would likely be counterproductive in the long run.

A clear statement of intent to address felon disenfranchisement laws on the face of Section 2 of the VRA may also present interpretive problems associated with another textual canon of statutory interpretation. In particular, a clear statement to address felon disenfranchisement laws may result in the exclusion of future novel discriminatory voting schemes on the basis of the textual canon expressio unius est exclusion alterius, which means “inclusion of one thing indicates exclusion of the other.” Expressio unius is based on the negative implication that “the enumeration of certain things in a statute suggests that the legislature had no intent of including things not

286. See ESKRIDGE & FRICKEY, supra note 21, at 824.
It is unlikely that the Court would roll back the coverage of the VRA from voting practices that the Court has already held are covered. But the Court could use the canon to hold that future discriminatory voting schemes that have not been addressed are not covered because of congressional failure to enumerate such schemes. This would be extremely costly to the efforts of Congress to nullify sophisticated discriminatory voting schemes that states could potentially develop in the future.

The most appropriate reform of the VRA to ensure that the Court interprets the Act as covering felon disenfranchisement laws is to re-emphasize the Fifteenth Amendment mandate on the face of the statute. The preamble to the VRA should include the Court's statements from *Lane v. Wilson* and *Allen v. State Board of Elections* emphasizing that the purpose of the Act is to "nullify sophisticated and subtle forms of discrimination," a purpose described in the legislative history of the original VRA of 1965. This purpose expressed on the face of the statute should be the starting point for any coverage determination by the courts. An analysis of the expansive reach of the VRA from *Allen* through *Chisom* and *Holder* should guide the courts toward a broad interpretive presumption for the VRA that requires the courts to assume coverage unless Congress expresses its intent not to address a particular voting scheme. The change to the preamble is a minor reform, which is likely to be politically acceptable. Most importantly, it is the best path to ensure a future in which any and all voting qualifications, standards, practices, or procedures can be challenged under the VRA.

287. See ESKRIDGE & FRICKEY, supra note 21, at 824.