

**FIFTEENTH AMENDMENT
RIGHT OF CITIZENS TO VOTE**

FIFTEENTH AMENDMENT RIGHT OF CITIZENS TO VOTE

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FIFTEENTH AMENDMENT—RIGHT OF CITIZENS TO VOTE

Amdt15.1 Overview of Fifteenth Amendment, Right of Citizens to Vote

The Fifteenth Amendment is the last of the three Civil War Amendments,¹ adopted in response to the end of the American Civil War with the intent to grant the federal government additional powers to address the lingering remnants of slavery.² The Fifteenth Amendment addresses the right of suffrage,³ providing in Section 1 that the right of U.S. citizens to vote may not be abridged by the government “on account of race, color, or previous condition of servitude.”⁴ The Supreme Court recognized as early as 1872 that although the Civil War and responsive Amendments may have been primarily focused on “African slavery,” the protections granted by that text were not limited to those “of African descent.”⁵ Describing this provision simply shortly after its adoption, the Supreme Court said “[i]f citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be.”⁶ The Court early on also struck down a state law that, although it contained “no word of discrimination on account of race or color,” had the effect of “inherently” making a prior condition of servitude “the controlling and dominant test of the right of suffrage.”⁷

Unlike the guarantees in the original Bill of Rights, the Fifteenth Amendment expressly constrains both “the United States” and “any State” from abridging these rights.⁸ The Fifteenth Amendment, with the other Civil War Amendments, thus helped to “fundamentally alter[]” the “balance of the pressures of localism and nationalism” by making “civil rights a national concern.”⁹ Further, while Section 1’s prohibitions are “self-executing,”¹⁰ Section 2 of the Fifteenth Amendment gives Congress the additional power to pass laws to enforce this guarantee.¹¹ As the Supreme Court explained in a 2009 opinion, “[t]he first century of congressional enforcement of the Amendment, however, can only be regarded as a failure.”¹² Although federal laws were adopted to enforce the Amendment shortly after ratification,

¹ See Intro.3.4 Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments). These are sometimes also known as the Reconstruction Amendments.

² See, e.g., *Slaughter-House Cases*, 83 U.S. 36, 67–68, 71 (1872).

³ See *id.* at 71 (noting that former slaves were “denied the right of suffrage” even after the abolishment of the institution of slavery).

⁴ U.S. CONST. amdt. XV, § 1.

⁵ *Slaughter-House Cases*, 83 U.S. at 71–72. See also *Rice v. Cayetano*, 528 U.S. 495, 499 (2000) (holding that a law limiting the right to vote for certain state trustees to “Hawaiians” violated the Fifteenth Amendment); *id.* at 512 (saying the Amendment “goes beyond” its original objective and “grants protection to all persons, not just members of a particular race”).

⁶ *United States v. Reese*, 92 U.S. 214, 218 (1875).

⁷ *Guinn v. United States*, 238 U.S. 347, 364–65 (1915). This case is discussed in Amdt15.S1.2 Grandfather Clauses.

⁸ U.S. CONST. amdt. XV, § 1.

⁹ *Younger v. Harris*, 401 U.S. 37, 61 (1971) (Douglas, J., dissenting); see also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion) (“The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race.”).

¹⁰ *Guinn v. United States*, 238 U.S. 347, 363 (1915).

¹¹ U.S. CONST. amdt. XV, § 1.

¹² *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

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Overview of Fifteenth Amendment, Right of Citizens to Vote

enforcement was “spotty and ineffective,”¹³ and ultimately those early laws were “repealed with the rise of Jim Crow.”¹⁴ Finally, Congress adopted the Voting Rights Act of 1965, discussed in more detail in a subsequent essay.¹⁵

Amdt15.2 Historical Background on Fifteenth Amendment

Fifteenth Amendment:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—The Congress shall have the power to enforce this article by appropriate legislation.

In the second session of the Thirty-ninth Congress, Congress extended the right to vote to African American men by statute in the District of Columbia and the territories, and in the seceded states, as a condition of readmission, the states had to guarantee Black men suffrage.¹ Following the election of President Ulysses S. Grant, the “lame duck” third session of the Fortieth Congress passed the amendment on February 26, 1869, and sent the proposed Fifteenth Amendment to the states for ratification. The struggle was intense because Congress was divided into roughly three factions: those who opposed any federal constitutional guarantee of Black male suffrage, those who wanted to go beyond a limited guarantee and enact universal male suffrage, including abolition of all educational and property-holding tests, and those who wanted or who were willing to settle for an amendment merely proscribing racial qualifications in determining who could vote under any other standards the states wished to have.² The latter group ultimately prevailed, and the Fifteenth Amendment was ratified by the states on February 3, 1870.³

SECTION 1—RIGHT TO VOTE

Amdt15.S1.1 Right to Vote Clause Generally

Fifteenth Amendment, Section 1:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

In its initial interpretations of the Fifteenth Amendment, the Supreme Court emphasized its aspect as a right exempting individuals from voter discrimination, rather than conferring a right to vote. “The Fifteenth Amendment,” it announced, did “not confer the right of suffrage upon any one,” but merely “invested the citizens of the United States with a new constitutional right which is . . . exemption from discrimination in the exercise of the elective franchise on

¹³ See *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966) (discussing the Enforcement Act of 1870).

¹⁴ *Nw. Austin*, 557 U.S. at 197.

¹⁵ Amdt15.S2.2 Federal Remedial Legislation.

¹ W. GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 29–31 (1965); Act of Jan. 8, 1867, ch. 6, 14 Stat. 375 (District of Columbia); Act of Jan. 25, 1867, ch. 15, 14 Stat. 379 (territories); Act of Feb. 9, 1867, ch. 36, 14 Stat. 391 (admission of Nebraska to statehood upon condition of guaranteeing against racial qualifications in voting); Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (First Reconstruction Act).

² GILLETTE, *supra* note 1, at 46–78. The congressional debate is set forth at 1 B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* 372 (1971).

³ See Amdt14.S2.1 Overview of Apportionment of Representation. The Equal Protection Clause has been extensively used by the Court to protect the right to vote. See Amdt14.S1.8.6.1 Voting Rights Generally.

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Grandfather Clauses

account of race, color, or previous condition of servitude.”¹ In subsequent cases, however, the Court, while conceding that the Amendment may have been originally construed as having been “designed primarily to prevent discrimination,” professed to be able “to see that under some circumstances it may operate as the immediate source of a right to vote.”²

Although “the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote,” the Court has stated that the Amendment “is cast in fundamental terms, terms transcending the particular controversy,” and “grants protection to all persons, not just members of a particular race.”³ The Court has construed “race” broadly to include classifications based on ancestry as well as those based on race.⁴

Amdt15.S1.2 Grandfather Clauses

Fifteenth Amendment, Section 1:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

The history of the Fifteenth Amendment has often been a record of belated judicial condemnation of various state efforts to disenfranchise African Americans, either overtly through statutory enactment or covertly through inequitable administration of electoral laws and toleration of discriminatory practices.¹ One of the first devices declared unconstitutional by the Court was the “grandfather clause.”² Beginning in 1895, several states enacted laws in which persons who had been voters or descendants of voters before the ratification of the Fourteenth and Fifteenth Amendments could be registered without meeting any literacy requirement. Black voters were therefore unable to avail themselves of the grandfather clause, and then kept from voting on grounds of illiteracy or through discriminatory administration of literacy tests. Meanwhile, illiterate White citizens could register without taking any literacy tests. With the achievement of the intended result, most states permitted these laws to lapse, but the State of Oklahoma’s grandfather clause had been enacted as a permanent amendment to the state constitution.³ A unanimous Court in the 1915 case *Guinn v. United States* condemned the device as recreating and perpetuating “the very conditions which the [Fifteenth] Amendment was intended to destroy.”⁴

¹ *United States v. Reese*, 92 U.S. 214, 217–18 (1876) (“The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race . . . as it was on account of age, property, or education. Now it is not.”); *See also*, *United States v. Cruikshank*, 92 U.S. 542, 555–56 (1876) (“[T]he right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race . . . is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the lat[er] has been.”).

² *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884) (recognizing that in former slave-holding state constitutions where skin color was a qualification for voting, the Fifteenth Amendment in effect conferred the right to vote on an African American voter because “it annulled the discriminating word ‘white,’ and thus left him in the enjoyment of the same right as white persons”); *Neal v. Delaware*, 103 U.S. 370 (1881).

³ *Rice v. Cayetano*, 528 U.S. 495, 512 (2000).

⁴ *Id.* at 514 (2000) (acknowledging that “[a]ncestry can be a proxy for race”).

¹ *See e.g.*, *Neal*, 103 U.S. at 388–89 (holding a state constitution that limited the franchise to White males unconstitutional).

² *Guinn v. United States*, 238 U.S. 347, 359 (1915).

³ *Id.*

⁴ *Id.* at 360.

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Grandfather Clauses

The Court voided a subsequent Oklahoma statute providing that persons who were qualified to vote in 1916, but who failed to register between April 30 and May 11, 1916, should be perpetually disenfranchised.⁵ The effect of this statute was that Black voters only had a twenty-day registration opportunity to avoid permanent disenfranchisement by virtue of the invalidated grandfather clause in *Guinn*. In striking down the law, Justice Felix Frankfurter declared for the Court that the Fifteenth Amendment nullified “sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.”⁶

Amdt15.S1.3 Exclusion from Primaries and Literacy Tests

Fifteenth Amendment, Section 1:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

During the same period, the Court faced the exclusion of African Americans from participation in primary elections. While the Court did rule in 1927 that a State of Texas law violated the Equal Protection Clause by prohibiting Black voters from participating in a party primary, it did not hold at first that primary contests were elections to which federal constitutional guarantees applied.¹ Instead, the Court found that when an exclusion was perpetuated by political parties not acting in obedience to any statutory command, the discrimination did not constitute state action and was therefore not prohibited.² This holding was reversed nine years later in *Smith v. Allwright* when the Court declared that, where the selection of candidates for public office is entrusted by statute to political parties, a political party is acting as a state entity and must abide by the Fifteenth Amendment.³ A severely divided Court was later faced with the exclusion of African Americans by a private organization that, independently of state law or the use of state election funds, monopolized access to Democratic nominations for local office. The exclusionary policy was struck down as unconstitutional but there was no opinion of the Court.⁴

In 1898, the Court held that literacy tests that apply to all voters equally are fair on their face, and in the absence of proof of discriminatory enforcement could not be said to deny equal protection.⁵ The Court did, however, affirm striking down a literacy test in the State of Alabama’s constitutional amendment, the legislative history of which disclosed that its intent was to disenfranchise Black voters in violation of the Fifteenth Amendment.⁶ After the passage

⁵ *Lane v. Wilson*, 307 U.S. 268 (1939).

⁶ *Id.* at 275.

¹ *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (“We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.”). *See also* *Nixon v. Condon*, 286 U.S. 73 (1932).

² *Grovey v. Townsend*, 295 U.S. 45 (1935).

³ *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941) (holding that Section 4 of Article I of the Constitution, the Elections Clause, authorizes Congress to regulate primary as well as general elections).

⁴ *Terry v. Adams*, 345 U.S. 461 (1953).

⁵ *Williams v. Mississippi*, 170 U.S. 213 (1898); *Cf. Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959).

⁶ *Davis v. Schnell*, 81 F. Supp. 872 (M.D. Ala. 1949), *aff’d*, 336 U.S. 933 (1949).

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Racial Gerrymandering and Right to Vote Clause

of the Voting Rights Act of 1965,⁷ when Congress amended the Act to suspend literacy tests throughout the Nation, the Court unanimously sustained the action as a valid measure to enforce the Fifteenth Amendment.⁸

Amdt15.S1.4 Racial Gerrymandering and Right to Vote Clause

Fifteenth Amendment, Section 1:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

The Court has held that racially-based redistricting in order to dilute minority voting power is unconstitutional under the Fifteenth Amendment.¹ In *Gomillion v. Lightfoot*, the Court found a violation of the Fifteenth Amendment in the redrawing of a 1957 municipal boundary line in Tuskegee, Alabama, from a square into a twenty-eight-sided figure that excluded from municipal elections all but a few of its 400 Black voters but no White voters.²

In the 1980 case *City of Mobile v. Bolden*, in a considerably divided decision with respect to the requirement of discriminatory intent,³ a plurality of the Court sought to restrict the Fifteenth Amendment to cases in which there is direct denial or abridgment of the right to register and vote, and to exclude dilution claims, such as the challenge to an at-large electoral system at issue.⁴ Three Justices in separate opinions disagreed with the plurality's basis for putting aside the Fifteenth Amendment and suggested they would have applied the Amendment to the vote dilution claim.⁵

Subsequent decisions have largely adopted the view of Justice Charles Whitaker's concurrence⁶ in *Gomillion* to resolve allegations of racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment.⁷ Despite the Court's acknowledgments that racial gerrymandering may violate the purpose of the Fifteenth Amendment, the Fourteenth Amendment continues to be the predominant constitutional authority in such cases.⁸

⁷ For discussion of the Voting Rights Act of 1965 and cases related to enforcement of federal statutes passed under the Fifteenth Amendment, see Amdt15.S2.1 State Action Doctrine and Enforcement Clause through Amdt15.S2.2 Federal Remedial Legislation.

⁸ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

¹ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

² 364 U.S. 339 (1960); *Wright v. Rockefeller*, 376 U.S. 52 (1964) (extending the reasoning of *Gomillion* to congressional districting but finding insufficient evidence of discriminatory intent).

³ 446 U.S. 55, 61–65 (1980) (rejecting race-based redistricting Fifteenth Amendment claim on the basis that “action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose”); *Id.* at 125 (Marshall, J., dissenting, adhering to the view that discriminatory effect is sufficient). *But see* *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (reassessing Voting Rights Act Section 2, currently codified at 52 U.S.C. § 10301, after 1982 Voting Rights Act amendment establishing “results” language in response to *City of Mobile v. Bolden*).

⁴ 446 U.S. at 65. *See also*, *Rogers v. Lodge*, 458 U.S. 613, 619 n.6 (1982) (recounting the split opinions in *City of Mobile* but “express[ing] no view on the application of the Fifteenth Amendment to this case”).

⁵ *City of Mobile*, 446 U.S. 84–85 (Stevens, J., concurring), 102 (White, J., dissenting), 125–35 (Marshall, J., dissenting).

⁶ *Gomillion*, 364 U.S. 349. (Whitaker, J., concurring).

⁷ *E.g.*, *Shaw v. Reno*, 509 U.S. 630, 645 (1993) (“This Court’s subsequent reliance on *Gomillion* in other Fourteenth Amendment cases suggests the correctness of Justice Whitaker’s view.”). *See also* *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

⁸ *Miller v. Johnson*, 515 U.S. 900 (1995) (citing *Shaw*, 509 U.S. at 657, and stating “Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of

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Amdt15.S2.1
State Action Doctrine and Enforcement Clause

SECTION 2—ENFORCEMENT

Amdt15.S2.1 State Action Doctrine and Enforcement Clause

Fifteenth Amendment, Section 2:

The Congress shall have the power to enforce this article by appropriate legislation.

The Fifteenth Amendment prohibits denial of rights guaranteed “by the United States or by any State,” giving rise to the “state action” doctrine.¹ Nevertheless, the Supreme Court’s early interpretations of legislation passed to enforce the Fifteenth Amendment pursuant to Section 2 implied that Congress could protect Constitutional rights against deprivations from private, not just official or state-authorized, sources.² In the 1903 case *James v. Bowman*, however, the Court held that the Enforcement Act of 1870’s prohibition on private as well as official interference with the right to vote on racial grounds was unconstitutional.³

The Court began moving away from that interpretation by the 1940s.⁴ In *Smith v. Allwright*, the exclusion of African Americans from political parties without the compulsion or sanction of state law was held to violate the Fifteenth Amendment because the political parties were acting in effect as agents of the state.⁵ Then, in *Terry v. Adams*, the Court considered a powerful but private political organization that was not regulated by the state and selected its candidates for the Democratic primary election by its own processes.⁶ The Court held that the exclusion of Black voters by the organization violated the Fifteenth Amendment, although a majority of the Justices did not agree on a rationale for the holding.⁷

In the 1960 case *United States v. Raines*, State of Georgia election officials challenged their own charges under the Civil Rights Act by alleging that the statute was unconstitutional as applied to private actors.⁸ The Court did not rule on the argument, holding that the statute could constitutionally be applied to the defendants and it would not hear their contention that it would be void when applied to others.⁹

a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.”) (citations omitted). See Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering.

¹ *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring) (“The State . . . must mean not private citizens but those clothed with the authority and influence which official position affords . . . [State Action] gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored.”)

² *Ex parte Yarbrough*, 110 U.S. 651, 665–66 (1884) (“The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a state, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the constitution of the United States”). See also, *United States v. Cruikshank*, 92 U.S. 542, 555–56 (1876).

³ 190 U.S. 127 (1903).

⁴ *E.g.*, *United States v. Classic*, 313 U.S. 299, 315 (1941); *United States v. Williams*, 341 U.S. 70, 77 (1951).

⁵ 321 U.S. 649 (1944).

⁶ 345 U.S. 461 (1953).

⁷ See Amdt15.S1.1 Right to Vote Clause Generally through Amdt15.S1.4 Racial Gerrymandering and Right to Vote Clause.

⁸ *United States v. Raines*, 362 U.S. 17 (1960).

⁹ See Amdt14.2 State Action Doctrine.

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Amdt15.S2.2
Federal Remedial Legislation

Amdt15.S2.2 Federal Remedial Legislation

Fifteenth Amendment, Section 2:

The Congress shall have the power to enforce this article by appropriate legislation.

Federal remedial legislation related to the Fifteenth Amendment¹ culminated in the passage of the Voting Rights Act of 1965 and its amendments.² Pursuant to the Voting Rights Act, Congress provided, among other things, that if the Attorney General determined that any state or political subdivision maintained any test or device, such as literacy tests, and that less than 50% of the voting age population in that jurisdiction was registered to vote or voted in the previous presidential election, such tests or devices were to be suspended for five years and no person could be denied the right to vote on that basis, and prescribed which states and jurisdictions with a history of discrimination were required to obtain “preclearance” before changing any voting law.³

Upholding the constitutionality of the Voting Rights Act a year later in *South Carolina v. Katzenbach*, the Court sketched the broad outlines of Congress’s power to enforce the Fifteenth Amendment.⁴ The Court held that Congress could “enforce” the guarantee of the right to vote by any rational means at its disposal.⁵ Congress was therefore justified in deciding that certain areas of the Nation were the primary locations of voting discrimination and in directing its remedial legislation to those areas.⁶ The *Katzenbach* decision affirmed Congress’s power to enact measures designed to enforce the Fifteenth Amendment through broad affirmative prescriptions rather than through proscriptions of specific practices. Subsequent decisions of the Burger Court confirmed the reach of this power.⁷ When Congress suspended literacy tests throughout the Nation in 1970, the Court unanimously sustained the action as a valid measure under the Fifteenth and Fourteenth Amendments.⁸

In the 1980 case *City of Rome v. United States*, the City had sought to exit the preclearance requirements of the Voting Rights Act by showing that it had not used any discriminatory practices within the prescribed period.⁹ The lower court found that the City had engaged in practices without any discriminatory motive, but that its practices had a discriminatory impact.¹⁰ The City thus argued that, because the Fifteenth Amendment reached only purposeful discrimination, the Act went beyond Congress’s power.¹¹ The Court held, however,

¹ In *Giles v. Harris*, 189 U.S. 475 (1903), the Court refused to order the registration of 6,000 Black voters who alleged that they were being wrongly denied the franchise, suggesting that the petitioners apply to Congress or the President for relief. The passage of the 1957 Civil Rights Act authorized the Attorney General of the United States to seek injunctive relief to prevent interference with the voting rights of citizens. The 1960 Civil Rights Act and its amendments expanded on this authorization by permitting the Attorney General to seek a court finding of “pattern or practice” of discrimination in any particular jurisdiction.

² Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437.

³ 52 U.S.C. §§ 10303(a), 10303(b).

⁴ 383 U.S. 301 (1966).

⁵ *Id.* at 325–26.

⁶ *Id.* at 330–31.

⁷ See *Gaston Cty. v. United States*, 395 U.S. 285 (1969) (holding that that evidence of past discrimination in the educational opportunities available to Black children precluded a North Carolina county from reinstituting a literacy test). See also, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Perkins v. Matthews*, 400 U.S. 379 (1971); *Georgia v. United States*, 411 U.S. 526 (1973); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32 (1978); *United States v. Board of Comm’rs of Sheffield*, 435 U.S. 110 (1978).

⁸ *Oregon v. Mitchell*, 400 U.S. 112 (1970) (splitting 5–4 on whether Congress could set voting age requirements).

⁹ 446 U.S. 156, 172 (1980).

¹⁰ *Id.*

¹¹ *Id.* at 173.

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Federal Remedial Legislation

that, even if discriminatory intent was a prerequisite to finding a violation of Section 1 of the Fifteenth Amendment,¹² Congress still had authority to proscribe electoral devices that have a discriminatory impact or effect.¹³ The Court stated:

It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are “appropriate,” as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia* Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.¹⁴

However, just as the Court showed the Voting Rights Act’s reach in *City of Rome*, it almost simultaneously set limitations in *City of Mobile v. Bolden* that same year. As enacted in 1965, another section of the Voting Rights Act, Section 2, largely tracked the language of Section 1 of the Fifteenth Amendment.¹⁵ In *City of Mobile v. Bolden*, a majority of the Court agreed that the Fifteenth Amendment and the Act were coextensive, but the Justices did not agree on the meaning to be ascribed to the statute.¹⁶ A plurality believed that because the constitutional provision reached only purposeful discrimination, Section 2 of the Voting Rights Act was similarly limited. A major purpose of Congress’s 1982 amendments to the Act,¹⁷ therefore, was to put aside this possible interpretation and to provide that any electoral practice “which results in a denial or abridgement” of the right to vote on account of race or color will violate the Act.¹⁸

The Court in *Shelby County v. Holder*,¹⁹ however, emphasized the limits to the enforcement power of the Fifteenth Amendment in striking down Section 4 of the Act, which provided the formula that determined which states or electoral districts are required to submit electoral changes to the Department of Justice or a federal court for preclearance under Section 5 of the Act.²⁰ In *Shelby County*, the Court described the section 5 preclearance process as an “extraordinary departure from the traditional course of relations between the States and the Federal Government”²¹ and violating the “fundamental principle of equal sovereignty” among

¹² *Cf. City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980).

¹³ *See City of Rome*, 446 U.S. at 173.

¹⁴ *City of Rome v. United States*, 446 U.S. 156, 177 (1980). *See also* *Lopez v. Monterey Cty.*, 525 U.S. 266 (1999).

¹⁵ Codified as amended at 52 U.S.C. §§ 10301, 10303(f).

¹⁶ 446 U.S. 55 (1980). *See id.* at 60–61 (Burger, C.J., Stewart, Powell, Rehnquist, JJ.); *id.* at 105 n.2 (Marshall, J., dissenting).

¹⁷ *See Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (applying the amended language in the Voting Rights Act in the context of multimember districting).

¹⁸ The 1982 amendments also changed the result in *Beer v. United States*, 425 U.S. 130 (1976), in which the Court had held that a covered jurisdiction was precluded from altering a voting practice covered by the Act only if the change would lead to a retrogression in the position of racial minorities. The 1982 amendments provide that the change may also not be approved if it would “perpetuate voting discrimination,” in effect applying the new Section 2 “results test” to preclearance procedures. S. REP. NO. 97–417, at 12 (1982); H.R. REP. NO. 97–227, at 28 (1981).

¹⁹ 570 U.S. 529 (2013).

²⁰ In 2006, Congress had reauthorized the Act for twenty-five years and provided that the preclearance requirement extended to jurisdictions that had a voting test and less than 50% voter registration or turnout as of 1972. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King, Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109–246, 120 Stat. 577 (2006).

²¹ *Shelby Cnty.*, 570 U.S. at 545.

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states.²² While the Court acknowledged that the disparate treatment of states under Section 4 could be justified by “unique circumstances,” such as those before Congress at the time of enactment of the Voting Rights Act,²³ the Court held that Congress could no longer “distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story” with respect to racial discrimination in covered jurisdictions.²⁴ The Court added, however, that Congress could “draft another formula [for preclearance] based on current conditions” that demonstrate “that exceptional conditions still exist justifying such an ‘exceptional departure from the traditional course of relations between the States and the Federal Government.’”²⁵

In the 2021 case *Brnovich v. Democratic National Committee*, the Court continued to set limits on the Fifteenth Amendment’s enforcement power as applied through the Voting Rights Act by narrowing the circumstances through which a successful challenge can be brought under Section 2.²⁶ The Court, noting that the decision was its first interpreting a state’s “generally applicable time, place or manner voting rules” under Section 2, distinguished the case from previous challenges brought in the redistricting contexts.²⁷ In upholding two State of Arizona election provisions, restrictions on out-of-precinct voting and third-party ballot collection²⁸ that were challenged as disproportionately burdening minority voters, the Court applied a new version of the “totality of circumstances” test from *Thornberg v. Gingles*, 478 U.S. 30 (1986), with emphasis on the requirement that an alleged violation of Section 2 show there is not “equal openness” of participation in the election process.²⁹ The Court also provided new “guideposts” that take the form of five specific, but nonexhaustive, circumstances for courts to consider.³⁰

²² *Id.* at 542 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)). The significance of the principle of equal sovereignty as enunciated in *Coyle v. Smith* had been considered by the Court in a previous challenge to the Act. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966). *Coyle*, while based on the theory that the United States “was and is a union of States, equal in power, dignity and authority,” 221 U.S. at 580, was distinguished by the Court in *Katzenbach* as concerning only the admission of new states and not remedies for actions occurring subsequent to that event. The Court in *Shelby County* held, however, that a broader principle regarding equal sovereignty “remains highly pertinent in assessing subsequent disparate treatment of States.” *Shelby County*, 570 U.S. at 544 (citing *Nw. Austin*, 557 U.S. at 203).

²³ *Shelby Cnty.*, 570 U.S. at 545–46 (quoting *Katzenbach*, 383 U.S. at 334–335).

²⁴ *Id.* at 546–47, 556.

²⁵ *Id.* at 545 (quoting *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 500–01 (1992)).

²⁶ 141 S. Ct. 2321 (2021).

²⁷ *Id.* at 2333 (“In the years since *Gingles*, we have heard a steady stream of § 2 vote-dilution cases, but until today, we have not considered how § 2 applies to generally applicable time, place, or manner voting rules.”)

²⁸ *Ariz. Rev. Stat. Ann.* §§ 16–122, 16–135; § 16–1005(H, I).

²⁹ 52 U.S.C. 10301(b); *See Brnovich*, 141 S. Ct. at 2338 (“The core of § 2(b) is the requirement that voting be ‘equally open.’ The statute’s reference to equal ‘opportunity’ may stretch that concept to some degree to include consideration of a person’s ability to use the means that are equally open. But equal openness remains the touchstone.”)

³⁰ *Brnovich*, 141 S. Ct. at 2338–40 (listing “nonexhaustive” circumstances to consider including: (1) the size of the burden imposed by a challenged voting rule, (2) the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982, (3) the size of any disparities in a rule’s impact on members of different racial or ethnic groups, (4) the opportunities provided by a state’s entire system of voting, and (5) the strength of the state interests served by a challenged voting rule); *Contra id.* at 2362 (Kagan, J., dissenting)

