

# Practice-Based Preclearance:

## Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes

November 2019



## EXECUTIVE SUMMARY

Section 5 of the Voting Rights Act (VRA) was instrumental in furthering the VRA's goals from its inception in 1965 until the Supreme Court's 2013 *Shelby County v. Holder* decision. When *Shelby County* was decided, Section 5 required states and local jurisdictions with a history of discrimination in voting against racial, ethnic, and language minorities to obtain federal approval for every proposed voting-related change before it could go into effect. This provision prevented the implementation of many voting changes that would have denied voters of color a voice in our democracy, from discriminatory polling place changes or closures to dilutive redistricting, and had a deterrent effect that prevented would-be bad actors from proposing discriminatory changes.

Without a fully-functioning Section 5 in place, states and local jurisdictions have employed a number of tactics to discriminate against voters of color, including shortening voting hours and days, erecting new barriers to voter registration, purging eligible voters from the rolls, implementing restrictive voter identification laws, closing polling places, and reconfiguring voting districts. But even when a coverage formula based on a jurisdiction's history of violating the Constitution and VRA was in effect, it could not always reach incidents of discrimination against newly emerging or mobilizing communities of voters of color living in places without an established record of VRA violations. Congress must enact a new geographic coverage formula for Section 5, and complement it with a provision—practice-based preclearance—that targets the known tactics policymakers have repeatedly used to silence minority voters whose presence is growing.

It is increasingly the case that our nation's most rapidly growing racial, ethnic, and language-minority communities are present in cities and states where they did not have a significant presence in the past. Throughout American history, conditions like these have triggered the use of particular tools to preserve the balance of political power between majority and emerging minority communities. From the widespread backlash against the successes of Reconstruction to today's simultaneous resurgence of anti-immigrant sentiment and adoption of measures like citizenship documentation requirements to register to vote, state and local lawmakers have established a pattern that the VRA is designed to combat.

Practice-based preclearance would focus administrative or judicial review narrowly on suspect practices that are most likely to be tainted by discriminatory intent or to have discriminatory effects, as demonstrated by broad historical experience. A practice-based preclearance coverage formula would extend to any jurisdiction across the country that is home to a racially, ethnically, and/or linguistically diverse population and is seeking to adopt a covered practice, in spite of advance notice of

its discriminatory potential. Diverse jurisdictions under the Voting Rights Advancement Act of 2019 are states and political subdivisions where two or more racial, ethnic, or language-minority groups each represent 20 percent or more of the voting-age population or where a single language-minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision. Based on the most recent Census Bureau data, 15 whole states, the District of Columbia, and 801 counties or county equivalents (25.9 percent of all counties in the country) currently satisfy this threshold. This represents 6.9 percent of all counties in the Northeast portion of the country, 4.6 percent of all counties in the Midwest, 42 percent of all counties in the South, and 31.3 percent of all counties in the West. These jurisdictions would not be required to preclear all their voting-related changes, only those that are most frequently and fundamentally discriminatory based on their historical use to silence the political voices of communities of color.

The following practices would need to be precleared if adopted in a diverse state or political subdivision:

1. **Changes in Method of Election:** Where voters of color have overcome first-generation barriers to the ballot, manipulation of elections to ensure majority domination has become popular. For example, numerous lawmakers in places with growing and mobilizing minority communities have adopted at-large and multimember districts in which white majorities can outvote those cohesive minority communities. Two separate analyses of voting discrimination have found that discriminatory changes in method of election occur with great frequency in the modern era. For example, since 1957, there have been at least 1,753 legal and advocacy actions that successfully overturned a discriminatory change in method of election because of its discriminatory intent or effects.
2. **Redistricting:** Persistently high rates of residential segregation and racially polarized voting have made it possible for people with discriminatory motives to use the redistricting process to deny political power to emerging or sizeable minority populations. The complexity and obscurity of redistricting have enhanced its attractiveness as a tool for limiting minority voters' influence at times when racial motives generally are not socially acceptable. Two separate analyses of voting discrimination have found that discriminatory redistricting changes occur with great frequency in the modern era. For example, 982 redistricting plans have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.

3. **Annexations or Deannexations:** Annexations or deannexations dilute minority political power by selectively altering the racial and ethnic makeup of a jurisdiction's electorate. In recent history these changes have often taken place quietly – often without the immediate notice required under pre-*Shelby County* Section 5 – and at times when minority voters' strength was growing within the political jurisdiction. Two separate analyses of voting discrimination have found that discriminatory annexations or deannexations occur with great frequency in the modern era. For example, at least 219 annexations or deannexations have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.
4. **Identification and Proof of Citizenship Requirements:** Over the past twenty years, in places where African American voters have mobilized in historic numbers, and communities of color with immigrant origins are making a mark as patriotic naturalized citizens and first- and second-generation Americans, restrictive identification requirements have become an increasingly popular intervention. ID laws impose prerequisites to registering or voting that go above and beyond the legal minimum requirement of attestation to adulthood and U.S. citizenship, and that voters of color are disproportionately unable to satisfy. Two separate analyses of voting discrimination have found that discriminatory identification and citizenship requirements occur with great frequency in the modern era. For example, at least 52 attempts to implement discriminatory voter ID requirements have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.
5. **Polling Place Closures and Realignment:** Residential segregation has made racially-motivated manipulation of polling place locations an effective tool for deterring voters of color. With in-person voting enjoying sustained popularity and importance, in light of factors like the growing population of limited-English proficient voters, a trend of polling place closures threatens to dampen the electoral influence of underrepresented communities who have consistently lost access to voting resources when polling places are consolidated. Two separate analyses of voting discrimination have found that discriminatory polling place closures or realignments occur with great frequency in the modern era. For example, at least 295 attempts to move or close polling locations have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.

6. **Withdrawal of Multilingual Materials and Assistance:** Throughout history, policymakers with discriminatory motives have ascribed to limited-English proficient Americans allegations of ignorance, mental deficiency, and a dangerous other-ness, and have sought to deny them a political voice by imposing explicit or de facto English literacy prerequisites to voting. In the modern era, election administrators exclude language-minority voters by eliminating and obstructing multilingual assistance and the channels through which it is provided. Two separate analyses of voting discrimination have found that discriminatory barriers to language access occur with great frequency. For example, courts and lawmakers have taken remedial action to combat discriminatory effects or intent in at least 84 instances of obstruction, withdrawal, or severe neglect of language assistance services since 1957.

Congress and the President must work to ensure that the VRA provides effective protections to all voters of color, whether or not they live in jurisdictions with established histories of discriminatory election policymaking. A practice-based trigger would ensure that the VRA tracks known patterns of discrimination and redresses the most problematic restrictions adopted under the circumstances that make them likely to be unfair, before they take effect and without the crushing cost of litigation.