

# Federalizing the Voting Rights Act

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## INTRODUCTION

In *Presidential Control of Elections*,<sup>1</sup> Professor Lisa Marshall Manheim masterfully canvasses how “a president can affect the rules of elections that purport to hold him accountable” and thereby “undermine the democratic will and delegitimize the executive branch.”<sup>2</sup> Bringing together insights from administrative law and election law, she categorizes how presidents exercise control over elections: priority setting through executive agencies, encouraging gridlock in independent agencies, and idiosyncratic exercise of their narrow grants of unilateral authority.<sup>3</sup>

Manheim’s principal concern is an executive influencing elections to entrench themselves and their allies in power.<sup>4</sup> Her prognosis for the future is steely-eyed, and she recognizes that presidential control over elections is likely to not only persist but to also expand in the coming years.<sup>5</sup> Rather than fight against the inevitability of presidential control, she advocates a checks and balances solution that achieves “meaningful counterbalance by empowering entities

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1. Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385 (2021).
2. *Id.* at 387.
3. *See id.* at 388–89.
4. *See id.* at 390–91.
5. *See id.* at 441–42.

outside the executive branch.”<sup>6</sup> In short, Manheim channels Madison in arguing that “ambition” should “counteract ambition.”<sup>7</sup>

In this Response, I agree with Manheim’s superb descriptive account of the problem and her powerful normative critique from an administrative law perspective. I therefore highlight Manheim’s contributions and expand on them in two ways.

First, I argue that Manheim has problematized a central premise of election law: the federal government is an ally in the fight to protect minority voting rights. Manheim examines the recent past, paying particular attention to the George W. Bush, Obama, and Trump Administrations. Although Manheim is the first to identify the worrying trend of presidential control of elections, it is an old phenomenon. By shining a spotlight on the problem of presidential control of elections today, Manheim encourages a reassessment of the more distant past, when the president was usually—but not always—a friend rather than foe of minority voting rights.

Second, I propose a solution to the emerging federal threat: amending Section 2 of the Voting Rights Act (“VRA”) to apply to the federal government.<sup>8</sup> This statutory revision would give plaintiffs a powerful tool to combat racial discrimination in voting committed by the federal government. This solution would also avoid the administrative law proxy fights that arose during the Trump Administration, where plaintiffs challenged policies because of their discriminatory effect on minority voters but framed their arguments as violations of the Administrative Procedure Act (“APA”).

Like Manheim, I examine the “nebulous legal line[]” between a president’s “lawful and unlawful actions.”<sup>9</sup> In so doing, I address how the federal government has both combatted and perpetrated racial discrimination in voting. Once again following Manheim’s lead, I bracket presidential conduct that is “brazenly . . . outside of the law,”<sup>10</sup> as a full discussion of President Trump’s actions in the run-up to and aftermath of the 2020 election is well beyond the scope of this short Response.

This Response is organized as follows. Part I discusses presidential control over elections during Reconstruction and the civil

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6. *Id.* at 459.

7. THE FEDERALIST NO. 51 (James Madison).

8. This statutory proposal expands on a blog post that I authored last year. See Travis Crum, *The Voting Rights Act Should be Amended to Apply to the Federal Government*, TAKE CARE BLOG (Aug. 8, 2020), <https://takecareblog.com/blog/the-voting-rights-act-should-be-amended-to-apply-to-the-federal-government> [<https://perma.cc/263C-L3ZP>].

9. Manheim, *supra* note 1, at 395, 395 n.32.

10. *Id.* at 392.

rights movement. Part II argues that Manheim has problematized the election law narrative by showing that, unlike during Reconstruction and the civil rights movement, the federal government is no longer a reliable ally in the fight for minority voting rights. Here, I address litigation against the Trump Administration and during the 1990 redistricting cycle. Part III argues that Congress should amend Section 2 to apply to the federal government.

## I. PRESIDENTIAL CONTROL OF ELECTIONS THROUGHOUT HISTORY

During Reconstruction and the civil rights movement, the federal government helped advance and defend minority voting rights. In the conventional narrative, however, the federal government is frequently treated as an undifferentiated whole or, to the extent that there is differentiation, the president takes a back seat to Congress and the Supreme Court.<sup>11</sup> Drawing on Manheim's approach, this Part focuses on the president's historical role during two periods of suffrage expansion.

Let's start with Reconstruction. By the end of the Civil War, "[t]he executive . . . dominated the government, and the nation, in a way that none of the Founders—or even the politicians of 1860—could ever have imagined."<sup>12</sup> President Abraham Lincoln's assassination, however, temporarily upended this new balance of power and installed a far weaker president.

President Andrew Johnson's vision for Reconstruction was at loggerheads with Radical Republicans in Congress, and he routinely vetoed laws that protected the rights of freedpersons.<sup>13</sup> But given the Radical Republicans' veto-proof majorities, Congress was able to dictate Reconstruction policies and enfranchised Black men living in the federal territories, the District of Columbia, and the Reconstructed South.<sup>14</sup> Johnson is rightly villainized in the court of history, and his

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11. Cf. RON CHERNOW, GRANT 856–58 (2017) (arguing that Grant's role in protecting the rights of Black Southerners has been overlooked).

12. GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 19 (2006). Although Lincoln's suspension of habeas corpus is taught in almost every first-year law school Constitutional Law course, it "is not generally well known" "that Lincoln was prepared to use military force upon the US Capitol to maintain Republican control of the House when it met to organize itself on December 7, 1863." EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 107 (2016).

13. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 276 (1988) (discussing Johnson's veto of the First Reconstruction Act and his vision of "a Reconstructed South controlled by loyal yeomen").

14. See Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1595–96 (2020).

vetoed of suffrage expansion are significant early examples of a president nefariously attempting to influence elections.

Following Johnson's disastrous administration, President Ulysses S. Grant sent a dramatically different message in his inaugural address by endorsing the Fifteenth Amendment's ratification.<sup>15</sup> Empowered by newly passed Enforcement Acts, Grant "direct[ed] the fight against the Ku Klux Klan and crush[ed] the largest wave of domestic terrorism in American history."<sup>16</sup> Grant's presidency witnessed the creation of the Department of Justice ("DOJ"), which quickly "brought nearly 2,500 criminal cases under the Enforcement Acts, mostly for conspiracy to hinder voting or to deprive a person of equal protection of the laws because of race."<sup>17</sup> Grant's use of federal troops also helped prop up the pro-Reconstruction government of Louisiana after the deadly 1872 election.<sup>18</sup> Grant's record, however, is not spotless. In his last two years in office, he declined to send federal troops to protect Black voters in Louisiana, Mississippi, and South Carolina.<sup>19</sup>

Tragically, the federal government ultimately abandoned Black voters in the South.<sup>20</sup> Most infamously, Union troops left the South after the Compromise of 1877, which predictably resulted in increased violence against Black voters.<sup>21</sup> Less well known is Congress's repeal in 1894 of several Reconstruction-era laws that protected the right to vote.<sup>22</sup> Although the Southern States deserve primary blame, the federal government's inaction in the late 1800s and early 1900s helped enable the rise and consolidation of Jim Crow.

Fast forward to the civil rights movement and the federal government returns in its more familiar role as protagonist. After Bloody Sunday, President Lyndon B. Johnson ("LBJ") backed the Voting Rights Act of 1965 in a speech before a joint session of Congress where he famously invoked the civil rights movement's "We Shall Overcome" protest song.<sup>23</sup> Johnson's DOJ wrote the VRA, including its

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15. See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 107 (2019).

16. CHERNOW, *supra* note 11, at 856.

17. FONER, *supra* note 15, at 121.

18. See FOLEY, *supra* note 12, at 112.

19. See CHERNOW, *supra* note 11, at 840–43.

20. See Travis Crum, *Reconstructing Racially Polarized Voting*, 70 *DUKE L.J.* 261, 310 (2020) (detailing tactics adopted by Southern Redeemers).

21. See FONER, *supra* note 13, at 582–83.

22. See Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 36 (1894); Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction over Election Contests, and the Political Question Doctrine*, 72 *FLA. L. REV.* 1153, 1173 (2020).

23. See ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLES FOR VOTING RIGHTS IN AMERICA* 27–29 (2015).

novel coverage formula and preclearance provisions.<sup>24</sup> And following the VRA's enactment, the DOJ helped ensure that it was enforced in the South.<sup>25</sup>

From a doctrinal perspective, the Court upheld the VRA and endorsed a rationality standard for Congress's Reconstruction Amendment enforcement authority.<sup>26</sup> But it was the President who actually enforced what Congress had directed, and the civil rights movement showcases what can be accomplished in the fight for voting rights when all three branches of the federal government move in lockstep with broad popular support.

## II. THE EMERGING FEDERAL THREAT

Manheim's account differs substantially from the story just told, and it reflects the changes in the power of the administrative state over the past few decades as well as the Trump Administration's penchant for unlawful behavior. Notwithstanding their racial undertones, the major voting rights cases brought against the Trump Administration did not involve the VRA. Instead, these cases were largely litigated under the Constitution and other statutes, most notably the APA. Put simply, these cases were administrative law proxy wars.

Take the recent dispute over adding a citizenship question to the Census, which Manheim discusses as an example of a president exercising influence over an election-related process to enhance his political allies' power.<sup>27</sup> The Trump Administration stated that it added a citizenship question to generate "improved citizenship data to better enforce the VRA."<sup>28</sup> Critics responded that the administration's real motive was to facilitate redistricting based on citizen voting age population ("CVAP") rather than total population. CVAP-based redistricting would have dramatic consequences for Hispanic political power given lower rates of citizenship and the younger median age of that ethnic group.<sup>29</sup> In addition, a citizenship question *itself* would

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24. See *id.* at 32–33. LBJ successfully advocated for Texas's exclusion from the 1965 coverage formula notwithstanding its long history of racial discrimination in voting. See RUTH P. MORGAN, GOVERNANCE BY DECREE: THE IMPACT OF THE VOTING RIGHTS ACT IN DALLAS 19 (2004) (discussing LBJ's opposition to Texas becoming a covered jurisdiction); see also generally Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001) (canvassing Texas's history of racial discrimination in voting).

25. See BERMAN, *supra* note 23, at 40.

26. See *South Carolina v. Katzenbach*, 383 U.S. 301, 334–37 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966); Crum, *supra* note 14, at 1569–72.

27. See Manheim, *supra* note 1, at 421–22.

28. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

29. See Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1394–95 (2019) (discussing the Trump Administration's motives in adding a citizenship question); Dep't of

likely result in “a disproportionate number of noncitizens and Hispanics [being] uncounted.”<sup>30</sup>

Even though the case clearly implicated political power, it was not—and could not—be resolved under the VRA.<sup>31</sup> Instead, the Court decided the case under the Constitution’s Enumeration Clause and the APA. After holding that the Enumeration Clause permitted a citizenship question,<sup>32</sup> the Court determined that the Secretary of Commerce’s stated rationale for adding one was pretextual and remanded to the agency for a newly reasoned decision.<sup>33</sup>

The Court’s statutory decision departed from its usually deferential approach toward agencies. Indeed, the “Court ha[d] never held an agency decision arbitrary and capricious on the ground that its supporting rational was ‘pretextual.’”<sup>34</sup> The novelty of the Court’s APA ruling suggests that the majority was concerned about the president manipulating the Census to his advantage by targeting a politically vulnerable group.<sup>35</sup>

Although the Court left the door open to a citizenship question being added to the 2020 Census, the Trump Administration ultimately abandoned that effort.<sup>36</sup> But then, in July 2020, President Donald Trump issued a memorandum purporting to exclude undocumented immigrants for purposes of apportioning seats amongst the states in the U.S. House of Representatives and allocating votes in the Electoral College.<sup>37</sup> This brings us to my second example.

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Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (plurality opinion) (noting that “Latinos make up a large share of the unauthorized alien population”).

30. *Dep’t of Commerce*, 139 S. Ct. at 2584 (Breyer, J., concurring in part and dissenting in part).

31. Although the plaintiffs raised an equal-protection claim, it was rejected by the district court and was not squarely addressed by the Supreme Court. *See id.* at 2564–65 (majority opinion).

32. *See id.* at 2567.

33. *See id.* at 2573–76.

34. *Id.* at 2579 (Thomas, J., concurring in part and dissenting in part); *see also* Jennifer Nou, *Census Symposium: A Place for Pretext in Administrative Law?*, SCOTUSblog (June 28, 2019, 12:54 PM), <https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law/> [<https://perma.cc/DU5G-83YD>] (“[A]dministrative law has and will likely continue to tolerate some forms of pretext. A potentially new principle introduced in the case, however, is the idea that such pretext must at least be plausible.”).

35. Moreover, the Court’s constitutional holding on the Enumeration Clause issue ignored its “usual practice [of] avoid[ing] the unnecessary resolution of constitutional questions.” *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 197 (2009).

36. *See* Michael Wines, *2020 Census Won’t Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/us/trump-census-citizenship-question.html> [<https://perma.cc/CBK2-SVUZ>].

37. *See* Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020).

The plaintiffs challenging the Trump memorandum brought claims under Section Two of the Fourteenth Amendment, the Census Act, and 2 U.S.C. § 2a(a).<sup>38</sup> The Court, however, resolved the case on standing and ripeness grounds.<sup>39</sup> The latter grounds proved prescient given the Trump Administration's failure to produce any Census data before it left office and President Joe Biden's rescission of the memorandum.<sup>40</sup>

The Trump Administration's machinations with the Census and apportionment demonstrate the emerging federal threat to minority voting rights.<sup>41</sup> Moreover, the litigation proceeded under constitutional and statutory provisions that, in many ways, were proxies for the underlying political struggle. But lest one object that the Trump presidency was *sui generis*—and, in many ways, it assuredly was—my final example comes from the George H.W. Bush Administration.<sup>42</sup>

During the 1990 redistricting cycle, the DOJ adopted an interpretation of Section 5 that required covered jurisdictions to maximize the number of majority-minority districts to obtain preclearance.<sup>43</sup> This policy diverged from the Court's interpretation of Section 5's effects prong, which prohibited election changes "that would lead to a *retrogression* in the position of racial minorities."<sup>44</sup>

At first blush, the DOJ's policy appears at odds with the political interests of the first Bush Administration. After all, it enhanced

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38. Three district courts enjoined the memorandum on statutory and constitutional grounds. *See* *New York v. Trump*, 485 F. Supp. 3d 422, 477 (S.D.N.Y. 2020) (statutory grounds); *City of San Jose v. Trump*, 497 F. Supp. 3d 680, 686 (N.D. Cal. 2020) (statutory and constitutional grounds); *Useche v. Trump*, 2020 WL 6545886, at \*1 (D. Md. Nov. 6, 2020) (statutory grounds).

39. *See Trump v. New York*, 141 S. Ct. 530, 536–37 (2020) (per curiam). The Court's three liberal Justices would have reached the merits and ruled against the administration on statutory grounds. *See id.* at 542 (Breyer, J., dissenting).

40. *See* Hansi Lo Wang, *Census Bureau Stops Work on Trump's Request for Unauthorized Immigrant Count*, NPR (Jan. 13, 2021, 9:18 AM), <https://www.npr.org/2021/01/13/956352495/census-bureau-stops-work-on-trumps-request-for-unauthorized-immigrant-count> [<https://perma.cc/3G8A-N7RP>] (discussing the U.S. Census Bureau's decision to halt all work on President Trump's directive to produce a count of unauthorized immigrants); Exec. Order No. 13,986, 86 Fed. Reg. 7,015 (Jan. 21, 2021) (reversing the Trump Administration's policy).

41. The Trump Administration's actions implicating the right to vote were not limited to the Census and apportionment. The United States Postal Service's handling of ballots during the COVID-19 pandemic prompted several courts to enjoin its practices. *See Jones v. U.S. Postal Serv.*, 2020 WL 5983112, at \*1 (S.D.N.Y. Oct. 8, 2020) (collecting cites).

42. Another example discussed by Manheim is the second Bush Administration's preclearance of a Texas redistricting plan that the Supreme Court subsequently invalidated on Section 2 grounds. *See Manheim, supra* note 1, at 423–24 (discussing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 399–400 (2006)).

43. *See* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2378–79 (2003).

44. *Beer v. United States*, 425 U.S. 130, 141 (1976) (emphasis added).

minority descriptive representation and thus created safe seats for Democrats. But the downstream effect was to bleach neighboring districts and thereby increase Republican chances of winning those seats.<sup>45</sup>

The Supreme Court pushed back on the DOJ's policy in the *Shaw* line of cases<sup>46</sup> and refused to give any deference to DOJ's interpretation of Section 5.<sup>47</sup> As a matter of administrative law, the Court's no-deference decision accords with the broader rule that the constitutional avoidance doctrine comes before *Chevron's* second step in the proverbial order of operations of statutory interpretation.<sup>48</sup> It is also in harmony with Professor Jennifer Nou's suggestion that courts should not defer in situations when "agency actors . . . lack[] internal mechanisms of political independence."<sup>49</sup>

These administrative law solutions, however, can only go so far. More sweeping reform is needed in an era when "the ideology of voter fraud—and the adoption of harshly restrictive measures—has flourished"<sup>50</sup> and have been proclaimed by President Trump himself while trying to hold onto power. This Response advocates such a solution: federalizing Section 2 of the VRA.

### III. REVISING SECTION 2

Section 2 of the VRA is a "permanent, nationwide ban on racial discrimination in voting."<sup>51</sup> As currently written, Section 2 governs election laws that are "imposed or applied by any State or political subdivision."<sup>52</sup> Despite being the primary protector of minority voting rights in the wake of *Shelby County*,<sup>53</sup> Section 2 does *not* bind the federal government. Thus, amending the VRA to encompass the federal

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45. See John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 618–19 (1998) (observing that the creation of majority-minority districts in covered jurisdictions "increase[d] the percentage of Republican districts overall").

46. See *Shaw v. Reno*, 509 U.S. 630, 652 (1993) (recognizing the racial gerrymandering cause of action under the Equal Protection Clause).

47. See *Miller v. Johnson*, 515 U.S. 900, 924–27 (1995).

48. See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988).

49. Jennifer Nou, *Sub-Regulating Elections*, 2013 SUP. CT. REV. 135, 171.

50. Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 215.

51. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

52. 52 U.S.C. § 10301(a) (2014).

53. See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2145–47 (2015).

government would add a powerful tool against any future President or Congress that engaged in racial discrimination in voting.

To be sure, there are constitutional constraints against the federal government engaging in racial discrimination in voting, but the Court has set a high bar for such claims. The Fourteenth Amendment's Equal Protection Clause—which has been reverse incorporated to apply to the federal government via the Fifth Amendment's Due Process Clause<sup>54</sup>—requires a finding of discriminatory intent.<sup>55</sup> And although the federal government is bound by the Fifteenth Amendment's plain text,<sup>56</sup> that Amendment has been similarly construed by a plurality of the Court as proscribing only intentional denial of the right to vote.<sup>57</sup>

By contrast, Section 2 prohibits not only intentional discrimination<sup>58</sup> but also practices that “result[] in the denial or abridgement” of the right to vote on account of race, color, or language-minority status.<sup>59</sup> In other words, Section 2 endorses a discriminatory-effects standard that is far easier to prove than discriminatory intent.<sup>60</sup> Judges are reluctant to ascribe the actions of politicians as racist, even when there is smoking gun evidence.<sup>61</sup> Thus, revising Section 2 to bind the federal government would ensure that future voting rights suits against federal statutes and regulations would need to establish only discriminatory effects rather than discriminatory intent.

For decades, Section 2 was used primarily to bring so-called vote-dilution claims against redistricting plans.<sup>62</sup> Under *Thornburg v. Gingles*,<sup>63</sup> plaintiffs bringing a vote-dilution claim must satisfy certain “preconditions.”<sup>64</sup> Specifically, plaintiffs must establish that a minority group constitutes a majority of a compact, residentially-segregated area and that voting is racially polarized.<sup>65</sup> Once the *Gingles* factors are satisfied, courts employ a totality-of-the-circumstances approach to determine whether minority voters have “less opportunity than other members of the electorate to participate in the political process and to

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54. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

55. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

56. U.S. CONST. amend. XV, § 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.”) (emphasis added).

57. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion).

58. See *Veasey v. Abbott*, 830 F.3d 216, 229 (5th Cir. 2016) (en banc).

59. 52 U.S.C. § 10301(a).

60. See, e.g., Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 69–73.

61. See Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 539 (2018).

62. See, e.g., Crum, *supra* note 20, at 275–84.

63. 478 U.S. 30 (1986).

64. *Id.* at 50.

65. See *id.* at 50–51.

elect representatives of their choice.”<sup>66</sup> At this stage of the inquiry, a critical consideration is whether the number of majority-minority districts is “roughly proportional to the minority voters’ respective shares in the voting-age population.”<sup>67</sup>

Given that the federal government does not draw redistricting plans, the *Gingles* factors appear ill-suited for a revised Section 2. Of course, the federal government *apportions* seats in the House of Representatives.<sup>68</sup> But notwithstanding the surface-level similarity between apportionment and redistricting,<sup>69</sup> the two processes are distinct and the Constitution divvies up seats in Congress regardless of whether minority voters are residentially segregated and voting is racially polarized.

In recent years, plaintiffs have invoked Section 2 to challenge voter-suppression laws that were enacted after *Crawford v. Marion County Election Board*<sup>70</sup> and *Shelby County v. Holder*.<sup>71</sup> As this Response was going to print, the Supreme Court issued its decision in *Brnovich v. DNC*,<sup>72</sup> where it adopted a restrictive standard for vote-denial claims brought under Section 2. Given the widespread condemnation of *Brnovich* in the voting rights community,<sup>73</sup> any Congress that would amend Section 2 to apply to the federal government would almost certainly statutorily overrule *Brnovich* as

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66. 52 U.S.C. § 10301(b).

67. *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994); see also Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1676 (2001) (commenting that *De Grandy* made rough proportionality “the preeminent measure of fairness in redistricting”).

68. See Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1923–24 (2018); see also *supra* notes 27–40 (discussing the Trump Administration’s census-related actions).

69. See James A. Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 884 (2006) (noting that these terms are often used interchangeably but refer to distinct concepts).

70. 553 U.S. 181, 204 (2008) (plurality opinion) (upholding Indiana’s photo ID law).

71. 570 U.S. 529, 557 (2013) (invalidating the VRA’s coverage formula); see also *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 242 (4th Cir. 2016) (invalidating North Carolina’s post-*Shelby County* voter suppression law); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 439–40 (2015) (documenting this development).

72. See *Brnovich v. DNC*, 141 S. Ct. 2321 (2021). Under *Brnovich*, courts should examine five factors in adjudicating vote-denial claims: (1) the burden imposed by the voting rule; (2) whether similar voting rules were in widespread use in 1982; (3) the voting rule’s racially disparate impact; (4) other opportunities to vote provided by the jurisdiction’s overall electoral system; and (5) the jurisdiction’s interest in preserving the challenged voting rule. See *id.* at 2338–40.

73. See, e.g., Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court’s Voting Rights Decision Was Worse Than People Think*, ATLANTIC (July 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330/> [https://perma.cc/6WH4-L35C]; Richard L. Hasen, Opinion, *The Supreme Court is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [https://perma.cc/5P87-UCE8].

well.<sup>74</sup> Setting aside what precise standard would govern Section 2 claims brought against the federal government, my proposal would lower the burden-of-proof by permitting a finding of discriminatory effect to establish liability.<sup>75</sup>

My proposal is also in accord with Manheim's checks-and-balances approach.<sup>76</sup> And it goes beyond Manheim's concern with *presidential* control of elections because it would apply to statutes passed by Congress. It would empower private parties to challenge the federal government's actions in the electoral realm. Indeed, allowing private entities to bring Section 2 suits against the federal government avoids the pitfalls of unified control, especially given the heterogeneity of redistricting litigants.<sup>77</sup>

Moreover, the federal government frequently sets statutory limits on its own conduct. The APA is perhaps the most famous example, although that super-statute restricts decision-making through procedural rather than substantive protections.<sup>78</sup> On the substantive front, the Religious Freedom Restoration Act of 1993 mandates that federal laws "that impose[] a substantial burden on religious exercise" must survive strict scrutiny.<sup>79</sup> Anti-discrimination statutes like Title VII also apply to the federal government.<sup>80</sup> Amending Section 2 would thus treat voting rights like many other anti-discrimination regimes and provide plaintiffs with a new tool to check the emerging federal threat against the right to vote free of racial discrimination.

## CONCLUSION

Some law review articles are blessed with perfect timing. Unfortunately, in election law, this can be a mixed blessing, as it usually means that a profound crisis has spurned calls for democratic

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74. Indeed, this would not be the first time Congress amended the VRA in response to the Court narrowly interpreting that statute. See *Brnovich*, 141 S. Ct. at 2332 (discussing Congress's 1982 revisions in response to *City of Mobile v. Bolden*, 446 U.S. 55 (1980)).

75. See *supra* notes 58–61.

76. Cf. Manheim, *supra* note 1, at 460 (advocating the creation of private rights of action).

77. See Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 570–74 (2013) (canvassing the identities of repeat players in redistricting litigation).

78. Cf. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015) (arguing that the APA qualifies as a super-statute).

79. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691–92 (2014).

80. See, e.g., *Evans v. Sebelius*, 716 F.3d 617, 618 (D.C. Cir. 2013) (discussing Title VII and Age Discrimination in Employment Act of 1967 claims brought against the federal government).

reform.<sup>81</sup> Manheim's article will undoubtedly attract attention after the Trump Administration, as the threat of the imperial presidency exerting its influence over elections has never been clearer. Let us hope that our democracy is up for this fight.

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81. For example, a student note on an obscure provision of the Voting Rights Act could achieve prominence after the Supreme Court guts the VRA's crown jewel. *See* *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (invalidating the VRA's coverage formula); Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2019–21 (2010) (advocating the use of the VRA's bail-in provision if and when the Supreme Court neutralizes Section 5); Devlin Barrett, *Student Maps Voting-Rights Approach*, WALL ST. J. (Apr. 13, 2014, 8:30 PM), <https://www.wsj.com/articles/student-maps-voting-rights-approach-1397435415> [<https://perma.cc/66AH-KHGT>] (discussing this note's role in developing the post-*Shelby County* litigation strategy).