

Testimony of
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Before the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Of the U.S. House Committee on the Judiciary
The Need to Enhance the Voting Rights Act: Practice-Based Coverage
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Chair Cohen, Ranking Member Johnson, and distinguished members of the committee, it is an honor to testify before you today. My name is Bernard L. Fraga, and I am an associate professor of political science, with tenure, at Emory University in Atlanta, Georgia. My research focuses on the quantitative analysis of elections in the United States, with particular attention to the causes and consequences of disparities in voter turnout. I received my B.A. in Political Science and Linguistics from Stanford University and my Ph.D. in Government and Social Policy from Harvard University.

The right to vote is the cornerstone of representative democracy. In the majority opinion for *Reynolds v. Sims*,¹ Chief Justice Earl Warren noted that as “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”² The same year *Reynolds v. Sims* was argued, however, John Lewis was arrested for carrying a “One Man, One Vote” sign in Selma, Alabama and Fannie Lou Hamer was beaten nearly to death by state troopers in Montgomery County, Mississippi for her voting rights activism. Less than a week *after* Chief Justice Warren read the *Reynolds v. Sims* decision, Freedom Summer activists James Chaney, Andrew Goodman, and Michael Schwerner were murdered while trying to organize a voter registration drive. Thus, at the same time voting can be recognized as central to our system of government, the vote can be denied in places where resistance to changing the existing power structure is entrenched and unyielding.

It took federal action through the Voting Rights Act of 1965 to change this pattern. However, a powerful tool of the act for combatting efforts to restrict the right to vote was rendered inactive after *Shelby County v. Holder*.³ In that decision, the preclearance provisions of the Voting Rights Act, which mandated federal oversight for election law changes in a set of

¹ 377 U.S. 533 (1964)

² *Ibid*, at 562.

³ 570 U.S. 529 (2013)

states and counties, were ruled inoperable as the coverage formula was deemed unconstitutional. Noting that while “voting discrimination still exists; no one doubts that,”⁴ Chief Justice Roberts called on Congress to “draft another formula based on current conditions.”⁵

In the attached report, I outline a flexible, forward-looking formula for practice-based preclearance that can secure our rights far into the future. Drawing on a database of over 3,500 legal cases or proceedings related to minority voting rights, along with historical, theoretical, and empirical evidence regarding where voting rights violations are likely to occur, I show a strong relationship between the racial/ethnic composition of a state or county and the likelihood that that the jurisdiction will see a violation. This pattern appears across racial/ethnic minority groups and over time. Specifically, I find the following:

1. Historical evidence indicates a clear relationship between attempts to restrict the franchise and the size of the racial/ethnic minority population in the jurisdiction. In states and counties with a larger minority population, efforts to limit the participation of racial/ethnic minority citizens are substantial and persist absent federal intervention to protect the right to vote. (Pgs. 2-7 of the report)
2. In recent years, voting rights-related litigation is vastly more common in states and counties with sizeable racial/ethnic minority populations. This pattern persists even when isolating the analysis to litigation resulting in successful prosecution of a voting rights case. (Pgs. 8-19 of the report)
3. Combined with a practice-based approach to preclearance, a population-limited trigger for preclearance coverage can ensure an appropriate balance between protecting voting rights and creating additional requirements for election officials. The threshold that best balances this tradeoff is 20%, such that practice-based preclearance would be required for states or counties where at least two racial/ethnic groups each make up at least 20% of the jurisdiction’s population. (Pgs. 19-23 of the report)

I invite members of the committee to read the attached report and the conclusions therein, and ask that the report be officially entered into the record. In closing, I urge the committee to reinvigorate the Voting Rights Act and renew the promise of voting rights for all Americans. Indeed, no single action taken by the members of this Congress may be more consequential. It is up to you, and the other members of the House and Senate, to heed the call.

⁴ Ibid, at 2.

⁵ Ibid, at 24.

A POPULATION-LIMITED TRIGGER FOR PRACTICE-BASED PRECLEARANCE UNDER THE VOTING RIGHTS ACT

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I. INTRODUCTION

In 2013, the *Shelby v. Holder*¹ decision invalidated the key formula used to determine which jurisdictions would be subject to the Section 5 “preclearance” provisions of the Voting Rights Act. Writing for the 5-4 majority, Chief Justice Roberts stated “a statute’s current burdens must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that it targets. The coverage formula met that test in 1965, but no longer does so.”² Instead, the Court indicates “Congress may draft another formula based on current conditions...Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”³

In this report, I outline the rationale for a current population-limited trigger for additional scrutiny of election practices that could be used to violate the voting rights of Black, Hispanic, Asian American, Pacific Islander, and American Indian/Alaska Native (AIAN) populations. I first demonstrate that there is strong historical, theoretical, and empirical evidence for a relationship between the share of the electorate that is minority and potential violations of minority voting rights. Using a detailed database of recent voting rights act-related litigation, I then show that in counties and states where two racial/ethnic groups separately compose at least

¹ 570 U.S. 529 (2013)

² *Ibid.*, at 18. Internal quotes and references to *Northwest Austin* (557 U.S. 193, 2009) omitted.

³ *Ibid.*, at 24.

20% of the voting-age population, “current conditions” justify additional scrutiny of covered election practices via the Voting Rights Act.

By constructing a formula for coverage of specific election practices based on contemporary demographics, I provide a flexible trigger that both meets current needs and can adapt to the changing conditions of the future. Combined with a cogent analysis of which election practices should be subject to additional scrutiny, and any further triggers based on established, recent discriminatory practices, this formula could be one part of a strengthened Voting Rights Act that protects the voting rights of all Americans.

II. HISTORICAL AND THEORETICAL BASIS FOR A POPULATION-LIMITED TRIGGER

In this section, I discuss why a population-limited trigger is justifiable based on the extant record of where minority voting rights violations have occurred. I first begin by outlining the history of federal oversight to protect racial/ethnic minority voting rights. Then, drawing on theoretical understandings of elections and extant empirical evidence, I discuss the circumstances where federal oversight may be most necessary to safeguard voting rights.

a. Reconstruction, Jim Crow, and the Role of Federal Oversight in Ensuring Minority Voting Rights

For most of U.S. history, the voting rights of racial/ethnic minority groups were curtailed by statutes and laws restricting access to the franchise. At the start of the Civil War, *de jure* exclusion of the African-American population was nearly complete, as a handful of northern states permitted African Americans to vote by law, but whether enslaved or free, the much larger

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Black population of the South was excluded from the franchise.⁴ Native Americans on Indian lands and Asian Americans were *de jure* barred from voting as they were ineligible for citizenship or naturalization.⁵ Latinos held tenuous, but at times electorally relevant voting rights, especially in the former Mexican territories where nearly all Latinos resided prior to 1900.⁶

After the Civil War, the historical record of minority voting rights indicates periods of expansion, contraction, and then expansion that directly coincides with federal action to prevent states from *de jure* or *de facto* racial/ethnic discrimination in voting. The first notable expansion of voting rights to African-Americans occurred with the Reconstruction Acts of 1867 and 1868, which granted the vote to formerly enslaved Black men and placed voter registration under the control of Union (Northern) military commanders. Over 700,000 African Americans registered to vote, outnumbering White registrants in multiple Southern states and ensuring election of a Congress and state legislatures conducive to the 14th and 15th Amendments.⁷ However, the 14th Amendment's *de facto* application to African-Americans alone meant that most Native Americans, Latinos, and Asian Americans remained barred from voting.⁸

White resistance to enfranchisement of Black men was immediate, severe, and concentrated in the South where the relatively high proportion of Black voters relative to white voters meant that Black men could exert significant influence on election outcomes. The “Redeemer” movement, as it was called, viewed ending Black suffrage as the proximate goal to regain political power for former Confederates and sympathizers, resorting first to violence and

⁴ Fraga (2018), at 21-22.

⁵ *Ibid*, at 22-24; McCool, et al. (2007) at 1-2.

⁶ Fraga (2018), at 23; Montejano (1987) at 39.

⁷ Fraga (2018), at 24; Walton, et al. (2012) at 233, 247, 263; Davidson (1992) at 10.

⁸ Haney López (2006), at 37

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then *de facto* disenfranchising policies implemented by local election officials.⁹ These policies, including poll taxes, literacy tests, and residency requirements, were administered in a racially discriminatory manner but were ruled as beyond federal oversight by the Supreme Court in *U.S. v. Reese*.¹⁰ The removal of remaining federal troops from the South in 1877, and Congress's failure to pass legislation designed to counter *U.S. v. Reese*, directly resulted in heavily-Black Southern states passing new constitutions between 1890 and 1910 with the specific, intentional goal of disenfranchising African Americans.¹²

The second period of expansion again indicates the important role of federal oversight in places where racial/ethnic minorities are a significant share of the population. Through Supreme Court rulings outlawing Grandfather Clauses (1915)¹³ and the final iteration of the White Primary (1944),¹⁴ heavily-Black and heavily-Latino (in particular, Texas) states of the South were no longer able to *de jure* prevent African-Americans and Latinos from voting statewide. However, the poll tax and literacy test were still administered in a discriminatory fashion by local officials in heavily-Black and Latino counties,¹⁵ just as resistance to ending the White Primary was strongest in heavily-Black parts of Southern states.¹⁶ Indeed, by the 1950s, Black voter registration rates were relatively high in Northern cities and rapidly increasing Southern counties with smaller Black concentrations.¹⁷ In ending the ban on naturalization for remaining Asian and Latin American origin groups, the 1952 McCarran-Walter Act opened the door to

⁹ Fraga (2018), at 25; Foner (1988) at 424; Keyssar (2009), at 85.

¹⁰ 92 U.S. 214 (1876)

¹¹ Goldman (2001), Kousser (1974), at Ch. 2-3.

¹² Davidson (1992), at 10-11; Walton, et al. (2012), at 368; Perman (2001).

¹³ *Guinn v. United States* (238 U.S. 347, 1915)

¹⁴ *Smith v. Allwright* (321 U.S. 649, 1944)

¹⁵ Keyssar (2009), at 89; Brischetto, et al. (1994)

¹⁶ Key (1949), at 519-523.

¹⁷ *Ibid.*; Valelly (2004), at 154.

naturalization (and voting rights) for any legal resident of the United States.¹⁸ Thus, by the mid-1950s federal action had eliminated the explicit racially discriminatory barriers to voting outside of heavily-minority counties.

Stronger federal action was necessary to ensure voting rights in places with a large share of racial/ethnic minority citizens. The Civil Rights Acts of 1957, 1960, and 1964 sought to eliminate discriminatory voter registration practices in the South by targeting the methods used by local election officials to curb Black voter registration.¹⁹ Yet resistance continued, culminating in the violent, “Bloody Sunday” attacks by local officials in heavily-Black Selma, Alabama.²⁰ This spurred passage of the Voting Rights Act of 1965, mandating two key forms of federal oversight for jurisdictions with a recent history of discriminatory election practices: federal voting registrars and a requirement that election law changes are “precleared” by federal officials prior to implementation.²¹ While not explicitly defining states and counties subject to federal supervision on the basis of population size, each of the 7 states covered in whole or in part²² by the coverage formula outlined in Section 4 were at least 20% African-American and were the top 7 states in Black population percentage as of the 1970 Census.

The Voting Rights Act of 1965 was amended and expanded to include American Indian/Alaska Native, Hispanic, and Asian American/Pacific Islander populations through amendments in 1970 and 1975. Mirroring the situation for African-Americans in the Deep South, discrimination was most severe in states and localities with relatively large numbers of Latino and Native American voters. For instance, testimony in favor of the 1975 VRA Amendments by

¹⁸ Takaki (1998), at 412-414.

¹⁹ Matthews and Prothro (1966), at 19.

²⁰ May (2013)

²¹ Davidson (1992), at 19; Davidson and Grofman (1994), at 379.

²² 40 out of 100 counties in North Carolina were covered via Section 4 of the Voting Rights Act of 1965 at the time of enactment. These counties had a higher Black population share on average than non-covered counties in North Carolina.

Latino witnesses focused on voting rights violations in counties in Texas and California with large shares of Latino citizens.²³ Disenfranchisement of Native American voters appeared in states and counties with tribal lands and reservations concentrating potential Native American voting strength.²⁴

b. Minority Population Size is Associated with Attempts to Restrict Voting Rights

The history of minority voting rights briefly outlined above indicates a generalizable relationship between minority population size and attempts to restrict voting rights. While at various times limitations on the franchise were quite widespread (and impeded participation for non racial/ethnic minority groups as well²⁵), the pockets of most determined efforts to restrict minority voting rights were areas of the country where racial/ethnic groups made up a larger than average share of the population. Attempts to counter continued disenfranchisement through federal intervention thus also focused on these areas, during both the Reconstruction Era and Civil Rights Era. The creation, preservation, and reinstatement of minority voting rights across the United States thus hinges on the actions of the federal government.

This historical evidence aligns with theoretical expectations about where incentives to disenfranchise should be most acute. In an often-quoted section of the canonical text *Southern Politics in State and Nation* (1949), political scientist V.O. Key noted that “in grand outline the politics of the South revolves around the position of the Negro,” and due to the substantial size of the Black population in the historic “black belt” region, “the whites of the black belt have the most pressing and most intimate concern with the maintenance of the established pattern of racial and economic relations.”²⁶ By the 1960s, disenfranchisement came with significant costs to

²³ de la Garza, Rodolfo O. and Louis DeSipio. (1993), at 1482-1484.

²⁴ Jackson (2004), at 272-274

²⁵ Keyssar (2009)

²⁶ Key (1949), at 5, 513.

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Southern states and counties, including threat of sustained protests and federal action; in theory, this cost should be borne only when white dominance on election day would be threatened with Black enfranchisement.²⁷ Indeed, empirical evidence indicates that the immediate impact of the Voting Rights Act of 1965 on Black enfranchisement was greatest in the heavily-Black counties of the Deep South, precisely where electoral incentives to disenfranchise were strongest.²⁸ Thus, while the legacy of slavery and Jim Crow may be associated with efforts to disenfranchise,²⁹ the key differentiator *within* the South was minority population size. Where minority groups could influence politics, even if only as significant members of coalitions with White voters, efforts to restrict voting rights followed.

These incentives remain most powerful in states and counties with significant racial/ethnic minority populations today. Just as in the past, where a racial/ethnic group is a larger share of the population, they will be more likely to have substantial influence on election outcomes. Different from past trends, and speaking to the success of the Voting Rights Act in eliminating the most egregious forms of disenfranchisement, campaigns, candidates, and voters themselves now seek to leverage the power that large and/or growing racial/ethnic minority populations have when given the opportunity to vote. Indeed, voter turnout for racial/ethnic minority groups is now significantly higher in states and counties where minority citizens make up a larger than average share of the population.³⁰ Officeseeking by candidates from minority groups is also far more common in heavily-minority states and legislative districts, as are opposing efforts to dilute minority voting strength via manipulation of electoral systems and

²⁷ Alt (1994), at 359.

²⁸ Alt (1994); Fraga (2018), at 33.

²⁹ See, e.g., Acharya, et al. (2018)

³⁰ Fraga (2018), Ch. 4-5

district boundaries.³¹

Further discussion of recent trends in potential voting rights violations is provided in Section III of this report, but in short, the relationship between a state or county's minority population size and efforts to disenfranchise minority voters has a solid historical, theoretical, and empirical basis. Thus, there is a clear need for federal oversight to protect minority voting rights in jurisdictions with large shares of minority voters today, and to provide a flexible coverage formula that can account for growing racial/ethnic minority populations in the future. This need is most acute in the protection of Latino and Asian American/Pacific Islander voting rights, whose population growth often occurs in areas that did not have a history of repressing African-American voting rights.

III. DETERMINING AN APPROPRIATE POPULATION-LIMITED TRIGGER

If a population size-based trigger is to be used to determine which jurisdictions warrant additional scrutiny in the application of certain election practices, what population threshold or thresholds should trigger coverage? Again we must turn to the patterns of past voting rights violations, but be cognizant of the need to “draft another formula based on current conditions.”³² In this section, I demonstrate that the pattern of potential and actual VRA violations from 1982 to the present indicates that a racial/ethnic group population size threshold of 20% is justifiable, that such a formula would provide flexibility to address both current and future needs as racial/ethnic group populations change over time, and that specifying *two* racial/ethnic groups must *each* meet the threshold appropriately considers where policies could reasonably impede the voting rights of racial/ethnic minority groups.

³¹ Lublin, et al. (2009), at 534; Stephanopoulos (2014), at 103-108.

³² *Shelby County v. Holder*, 570 U.S. 529 (2013), at 24.

a. Tracking Potential Violations of Minority Voting Rights

To track previous potential violations of minority voting rights, I rely on a database constructed by Dr. J. Morgan Kousser. Dr. Kousser is professor emeritus of history and social science at the California Institute of Technology, and a leading expert on voting rights. Dr. Kousser’s research, and specifically a previous version of the database I use, were discussed by Dr. Kousser in testimony to the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary in October 2019.³³ In that testimony, Dr. Kousser remarked that his effort to “create a database of all voting rights actions under any federal or state statutes or constitutional provisions” was designed to allow “evaluations of the adequacy of past and potential coverage schemes if Congress wishes to replace Section 4 of the VRA.”³⁴ It is in this capacity that I use his database.³⁵

Dr. Kousser’s database has approximately 3,540 legal cases or proceedings³⁶ related to minority voting rights from 1965 to 2018.³⁷ Of these cases, 2,510 focus on potential violations of Black voting rights, 801 with potential violations of Hispanic/Latino voting rights, 32 with potential violations of Asian American voting rights, and 135 with American Indian or Alaska

³³ Testimony of Professor J. Morgan Kousser, U.S. House Committee on the Judiciary, October 17, 2019.

³⁴ *Ibid.*, p. 1.

³⁵ I am grateful to Dr. Kousser for his willingness to share the database with me. All errors in use or interpretation of the database are my own.

³⁶ A majority of the “actions” in Dr. Kousser’s database are lawsuits brought by Black, Latino, or Native American plaintiffs against state or county officials in charge of election processes. Most of the remainder are Section 5 preclearance “Voting Determination Letters” posted by the Department of Justice for states and counties covered under Section 5 of the Voting Rights Act. A small fraction are cases where minority voting rights are violated by non-governmental bodies using the election process, e.g. political action committees (PACs) gathering signatures for voting rights-related referenda. Cases are organized by state or political subdivision (e.g. counties), and thus cases spanning multiple counties within the same state, but not the state as a whole, may be counted more than once.

³⁷ This figure excludes “More Information Requests,” (MIRs) where the Department of Justice asked for additional information from Section 5-covered jurisdictions regarding preclearance submissions (*see* Testimony of Professor J. Morgan Kousser, U.S. House Committee on the Judiciary, October 17, 2019, at 8). MIRs are not incorporated into my analysis as they were used inconsistently from 1982-2013 and Dr. Kousser’s database only includes MIRs that resulted in a “withdrawal of the submission or a substantial change to make it more favorable for minorities.” Inclusion of MIRs would make differences between formerly Section 5 covered and non-covered jurisdictions more acute, and given the strong correlation between former Section 5 coverage and racial/ethnic minority population size, make the patterns justifying a population-limited trigger even more pronounced.

Native voting rights.³⁸ Table 1 shows the number of cases by group and by decade from 1965 to 2018, the most recent year with comprehensive data in Dr. Kousser’s database. In Table 1 we see that the total number of cases per decade peaked in the 1980s and 1990s. Cases where Black and Native American voters were the primary groups of interest peaked in the 1980s, while cases where Hispanic or Asian American citizens were principal groups peaked in the 1990s.

Table 1: Voting Rights Cases by Racial/Ethnic Group and Decade, 1965-2018

Decade	All Jurisdictions					Section 5 Covered Only				
	<i>Total</i>	<i>Black</i>	<i>Hispanic</i>	<i>Asian</i>	<i>AIAN</i>	<i>Total</i>	<i>Black</i>	<i>Hispanic</i>	<i>Asian</i>	<i>AIAN</i>
1960s	102	94	3	0	4	100	94	1	0	4
1970s	620	469	79	1	20	597	463	76	1	9
1980s	1136	963	121	4	35	1009	881	92	1	17
1990s	1119	669	398	10	25	950	549	341	7	12
2000s	356	199	124	8	26	223	137	64	3	11
2010s	207	116	76	9	25	63	36	21	0	5

Note: Racial/Ethnic group counts may exceed values in “Total” column as some suits cited the experiences of multiple racial/ethnic groups. “AIAN” stands for American Indian/Alaska Native.

Table 1 also provides separate statistics for cases involving counties or towns subject to the Voting Rights Act Section 5 preclearance provisions from 1965 to 2013. A similar pattern of cases by decade and by race appears for these jurisdictions in isolation, as prior to the invalidation of Section 5 coverage in *Shelby v. Holder* the vast majority of cases were in preclearance-covered jurisdictions. Of course, the nature of Section 5 coverage pre-*Shelby* meant that the strongest predictor of a lawsuit or other action being taken on behalf of minority

³⁸ Dr. Kousser did not indicate which racial/ethnic minority groups were the principal focus of a case for a small number of entries in his dataset. These cases are excluded from the group-specific tabulations in Table 1, but efforts were made to ascertain which racial/ethnic group would be most impacted by associated rulings if this would make a material difference in my conclusions.

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plaintiffs was whether or not the county was subject to preclearance.³⁹ However, in every decade after the 1970s at least 100 cases were filed *outside* of Section 5 preclearance jurisdictions.

In the more detailed analyses below, I focus on the period from 1982 forward, as the 1982 amendments to the Voting Rights Act and *Gingles* decision clarified the intent of the VRA of 1965 with an eye to policies with discriminatory effect, not just discriminatory intent. The post-1982 period is also when the vast majority of “successful” voting rights actions occurred,⁴⁰ and the bulk of potential violations of minority voting rights overall, constituting 74% of cases in all jurisdictions and 70% of cases in jurisdictions covered by Section 5 from 1965-2013. Finally, I examine *all* cases of potential minority voting rights violations, not just cases that resulted in an outcome favorable to minority plaintiffs. Given the different legal standards used to make judgements about vote dilution versus vote denial, Section 5 versus Section 2 claims, and voting rights violations more broadly over time, the more complete picture of where plaintiffs indicated a voting rights violation *may* have occurred is one appropriate metric for determining where, e.g., U.S Department of Justice resources would need to be deployed.

Finally, this report focuses on counties and states as units of analysis, as Dr. Kousser’s database is organized at the state and county level. American Indian lands are also important political units from the perspective of American Indian voting rights, and a key part of both the Voting Rights Act Section 203 language assistance formula and the proposed coverage formula. However, violations of voting rights occurring in or for those with residence in Indian reservations are generally directed to the state or county whose territory overlaps with those reservations.⁴¹

³⁹ Kousser (2015), at 16.

⁴⁰ Testimony of Professor J. Morgan Kousser, U.S. House Committee on the Judiciary, October 17, 2019, at 7.

⁴¹ See, e.g., *Brief of Amicus Curiae Navajo Nation In Support of Respondents, Brnovich v. DNC* 594 U.S. ____.

b. Geographic Pattern of Potential Voting Rights Violations

Compiling Dr. Kousser's data, we see wide dispersion in potential voting rights violations when examining state-level suits and legal actions. Figure 1 shows states with a statewide potential voting rights violation during the period from 1982-2018. Color indicates which racial/ethnic group's voting rights were most clearly impacted in the first alleged statewide violation. Broadly speaking, the distribution of first cases by race/ethnicity often coincides with which groups make up the largest share of the racial/ethnic minority population in each state. In the Deep South, African-American plaintiffs were the first to allege a statewide violation. In most of the Southwest, Latino plaintiffs were first. In Alaska and Arizona, both of which came under Section 5 preclearance as a result of historical discrimination against Alaska Native and American Indian populations, respectively, these groups were first to allege a statewide violation of their voting rights.

Figure 1: States with Statewide Potential Voting Rights Violations, 1982-2018

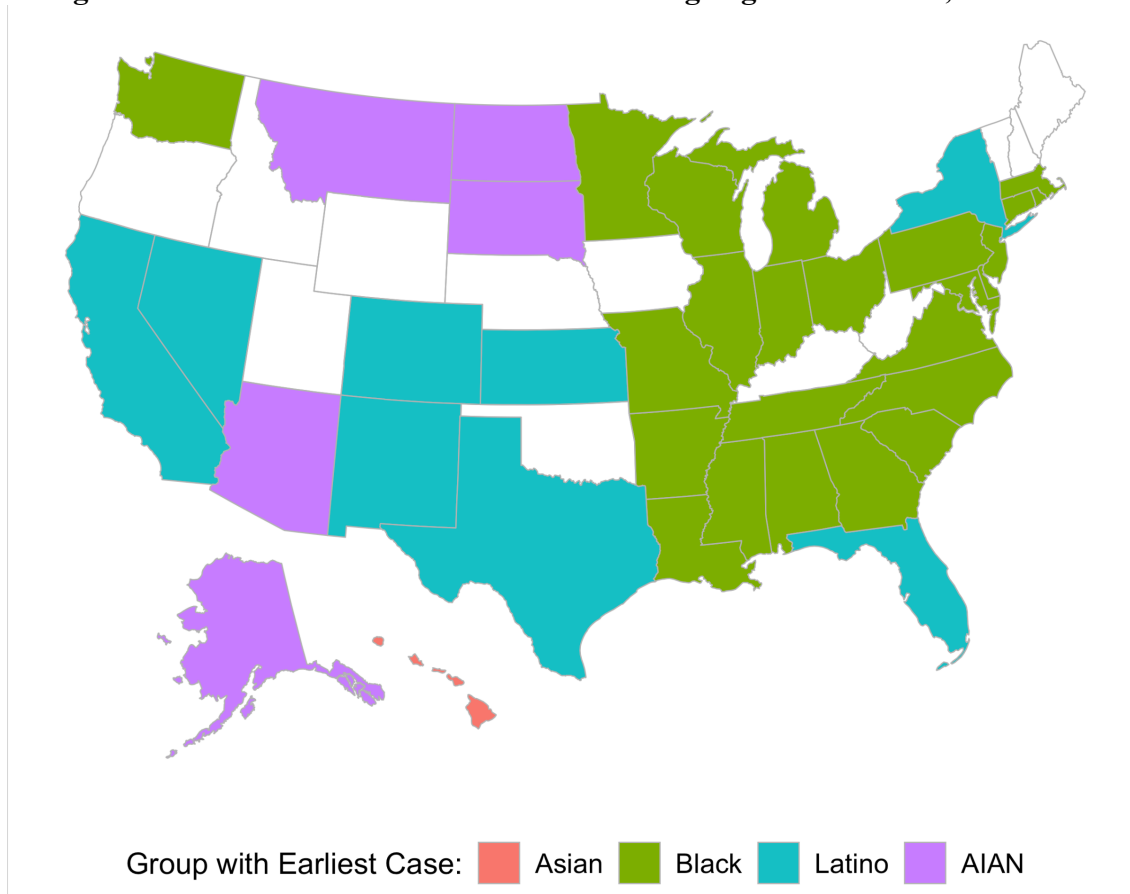
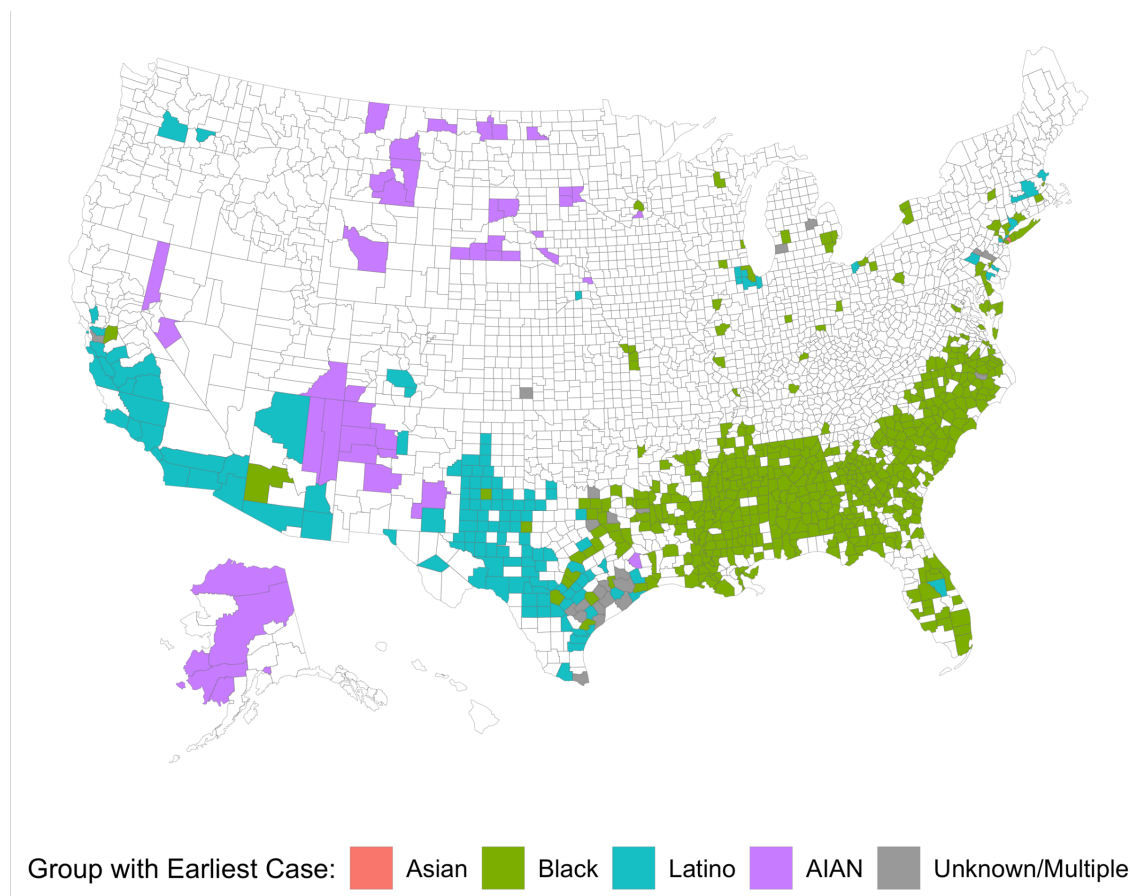


Figure 2 documents which counties that have ever had a violation or potential violation via litigation. Again, this does not include the DOJ’s More Information Request process, which may mask additional potential violations that were averted in Section 5 covered counties.⁴² As with the statewide map in Figure 1, Figure 2 shows only counties with potential voting rights violations occurring between 1982 and 2018. Shading indicates the first group to bring a suit at the county level, and counties in white did not have a county-level suit. Again, we see a pattern broadly consistent with the known distribution of racial/ethnic groups in the United States, though the map makes it more clear that potential voting rights violations are concentrated in the Deep South, heavily-minority urban counties of the North and Midwest, and some heavily-

⁴² Fraga and Ocampo (2007)

Latino and Native American areas of the Southwest and West.

Figure 2: Counties with Potential Voting Rights Violations, 1982-2018



c. Data on Racial/Ethnic Group Population Size

Figures 1 and 2 are suggestive of a pattern of recent potential voting rights violations similar to the historical record I discuss in Section II of this report. To provide more firm evidence on this dimension, I rely on data from the U.S. Census Bureau that is contemporaneous to *each* potential violation in Dr. Kousser’s database. Specifically, I rely on yearly intercensal estimates of the voting-age population by race/ethnicity from 1982 to the present at both the state and county level.⁴³ Yearly intercensal estimates for racial groups other than Whites and African-Americans are not available at the county level until 1990. Thus, for years from 1982-1990, I

⁴³ e.g., <https://www.census.gov/programs-surveys/popest/data/tables.1982.html>

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interpolated the 1980 to 1990 state or county-level change in the voting-age population by race and ethnicity, providing trends in the non-Hispanic White, Black, Hispanic, and Asian American/Pacific islander voting-age populations.⁴⁴ For years from 2010-2018, I rely on data from the U.S. Census Bureau's Population Estimates Program (PEP), which is broadly similar to the Intercensal estimates.⁴⁵

As the above indicates, one advantage of a coverage trigger based on racial/ethnic population size is the fact that all data necessary to enact the formula is already collected, compiled, and analyzed by the U.S. Census Bureau. A determinations file, similar to that provided every five years for establishing coverage under the population-based formula for language assistance in Section 203 of the Voting Rights Act, could be constructed by the Census Bureau and provided to the Department of Justice for publication in the Federal Register.

d. Correlating Potential Violations with Population Size

A descriptive analysis of the relationship between racial/ethnic minority group population share and potential voting rights violations confirms the patterns suggested by Figures 1 and 2, and validates the historical and theoretical foundations for a population-limited trigger for coverage as outlined in Section II of this report.

Dr. Kousser's database indicates that a majority of states have had at least one potential minority voting rights violation since 1982. In the 12 states that have not, no single racial/ethnic group was 10% or more of the state's voting-age population at any point in time between 1982 and 2018. However, in *every* state where a single racial/ethnic group has been at least 10% of the state's voting-age population, at least one suit or action has been brought at the statewide level. On average, the first statewide potential violation in a state occurred when the group in question

⁴⁴ <https://www.census.gov/data/datasets/time-series/demo/popest/1980s-state.html>

⁴⁵ <https://www.census.gov/data/datasets/time-series/demo/popest/2010s-counties-detail.html>

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was 12% of the voting-age population. For states that have never had a statewide violation, the average size of the single largest racial/ethnic minority group is only 5.2%.

A county-level analysis provides additional insights. As with states, counties that have had a violation or potential violation of minority voting rights since 1982 had larger minority populations at the time of their first potential violation, on average. Since 1982, at least 804 counties have had at least one potential violation of minority voting rights occur in their jurisdiction. 61% of counties with violations had their first violations happen when a single racial/ethnic minority group was 20% or more of the jurisdiction voting-age population. Furthermore, only 321 counties where a single racial/ethnic minority group makes up more than 20% of the population have not had a voting rights-related lawsuit, approximately one-third of the counties with a minority population reaching this threshold.

Table 2: Minority Group Percentage at Time of First Potential Violation, 1982-2018

Single Group Voting-Age Population	Counties with Violation	Counties with No Violation	Percent with Violation
Less than 10%	126	1648	7.1%
10-20%	187	418	30.9%
20-30%	183	156	54.0%
30-40%	145	60	70.7%
40-50%	81	44	64.8%
50% or more	81	61	57.0%

Table 2 also indicates that the likelihood of a violation increases sharply as the county population shifts from having a single racial/ethnic group making up less than 10% of the county's voting-age population, to 10-20%, to 20-30%. Beyond the 20-30% category, increases

A Population-Limited Practice-Based Preclearance Trigger

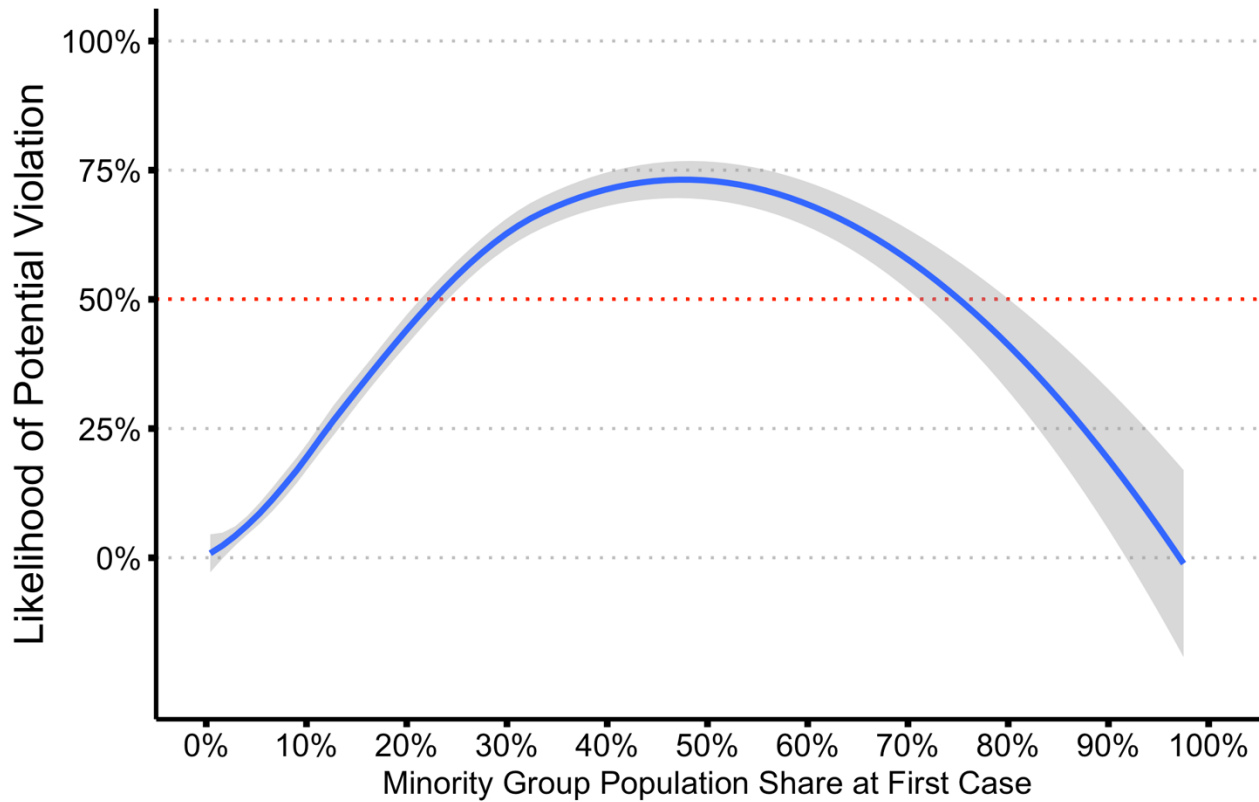
in the percentage of counties with a violation are significantly smaller. Indeed, once a single non-white racial/ethnic group makes up a majority of the county (the final row in Table 2), the likelihood of a voting rights violation *decreases* relative to jurisdictions where a single racial/ethnic group is nearly a majority of the voting-age population, dropping to roughly the rate we see in the 20-30% category.

Another way of visualizing this pattern is presented in Figure 3. Figure 3 plots the share of counties with a potential violation as a function of the size of the racial/ethnic group at the time the violation occurred (or the size of the largest racial/ethnic group in the county today, if no potential violation occurred between 1982 and 2018). The blue line is the moving average⁴⁶ of the share of counties with a potential violation (left side of chart) given the racial/ethnic group size specified (bottom of the chart). The red line in the middle of the chart denotes the point where a county has even (50% yes, 50% no) odds of a potential violation.

Figure 3 again shows a very strong relationship between the size of the racial/ethnic minority population and the likelihood of a potential voting rights violation. We see a roughly linear increase in the likelihood of a violation as the population approaches roughly 20%, with diminishing returns to further increases in single minority group population size before the probability begins to decrease after 50% minority. Furthermore, the point of equal likelihood of having a potential violation versus not occurs when the racial/ethnic group whose rights may have been violated is approximately 20% of the overall voting-age population in the jurisdiction. Beyond 20%, counties have better-than-even chances of having had a potential violation, until roughly 75% when the likelihood of a violation drops below 50-50 once again.

⁴⁶ In statistical terms, the moving average I use is a tricubic weighted smoothing function. It does not assume that trends are linear. The 95% confidence interval of the smoother surrounds the blue line in light gray.

Figure 3: Likelihood of Potential Violation as a Function of Minority Group Percentage

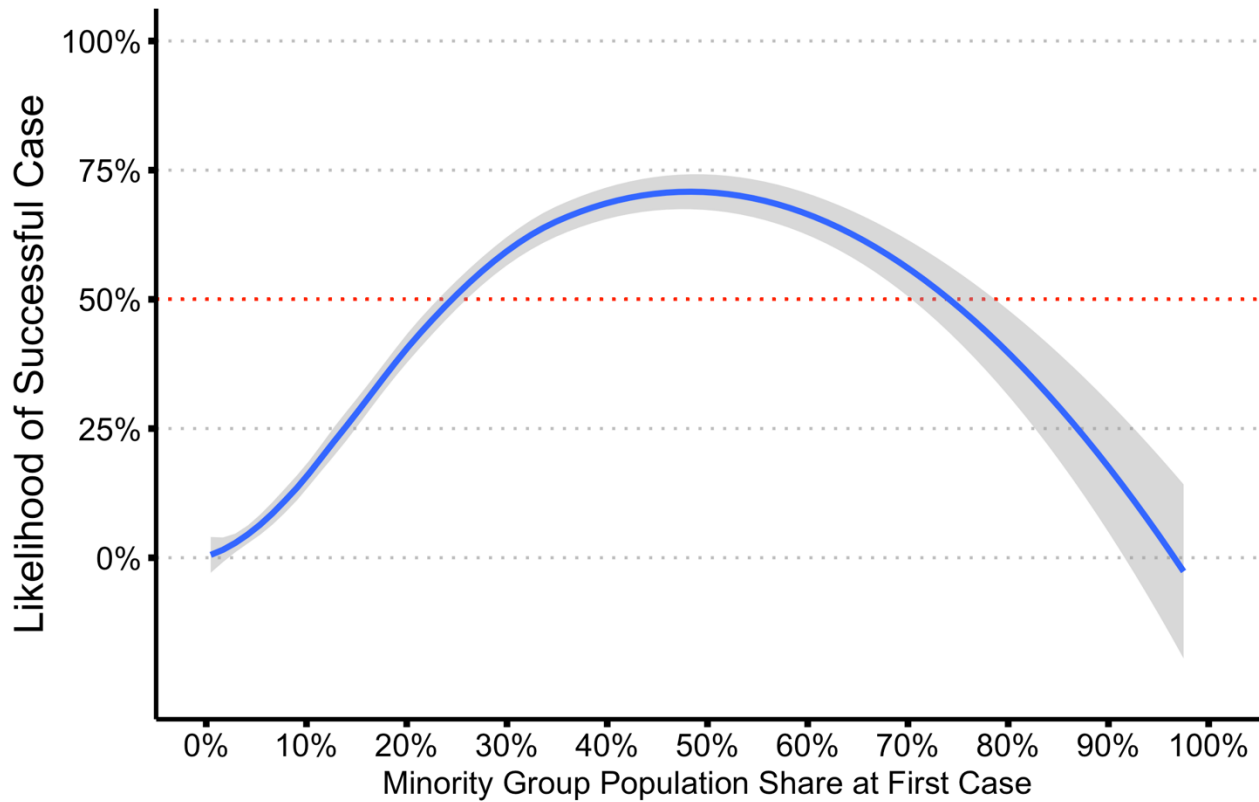


A similar pattern is present for counties with successful cases, where courts determined (or appeared set to determine according to defendants, as they were settled out of court) that a violation of a group’s voting rights had occurred. Figure 4 shows these patterns at the county level.⁴⁷ In Figure 4, we see almost exactly the same rate of successful cases as a function of minority group population share as we do for the number of cases overall (successful or not). The chance of a successful voting rights case is better than 50-50 when a minority group is about 25% of the voting-age population in a county. Of course, not all voting rights-related actions result in an outcome in favor of plaintiffs. However, Figure 4’s close match with Figure 3 indicates that the relationship between voting rights suits and minority group size is not

⁴⁷ For consistency with the rest of the analyses, More Information Requests (MIRs) are not included here despite the fact that they often resulted in a policy change favoring minority (potential) plaintiffs. See Section III(a) for a more extended discussion of how these requests impact potential voting rights litigation.

attributable to an increased number of unsuccessful cases brought by minority plaintiffs in heavily-minority counties.

Figure 4: Likelihood of Successful Voting Rights-related Legal Action as Function of Minority Group Percentage



e. Ensuring equal treatment of counties based on probability of a violation

The analyses above demonstrate that once a racial/ethnic minority group grows large enough to make up 20% of a county’s voting-age population, the probability of at least one potential voting rights-related legal action reaches 50%. Given the nature of the election practices that would be subject to preclearance, in that these are commonly used practices that are often tarnished by those seeking to discriminate against minority voters, this threshold may be an appropriate benchmark for determining where additional scrutiny is warranted. However, it is important to consider how various population thresholds balance the need to protect voting

rights with the potential to add an additional layer of review of state and county election practices.

Table 3: County-level False Negative and False Positive Rates with Different Thresholds

Single Group Threshold	False Negative Rate	False Positive Rate	Overall Error Rate
10% or More	15.8%	52.2%	27.1%
20% or More	39.1%	39.6%	19.9%
30% or More	61.8%	35.0%	20.7%
40% or More	79.9%	39.3%	23.4%
50% or More	89.9%	43.0%	24.6%

In any process where some jurisdictions are going to be subject to additional scrutiny, while others are subject to conventional review, there will be instances where *after the fact* we see that the additional scrutiny did not result in finding a violation or the conventional review revealed a violation on its own. Therefore while the goal is to minimize such instances, it is not realistic to eliminate them entirely. With this in mind, Table 3 examines the suitability of various single-group relative population size thresholds in terms of the recent history of potential voting rights violations in counties nationwide. Under the population thresholds listed in the first column of Table 3, a county would gain practice-based preclearance if it had a single non-white racial/ethnic group’s population making up the indicated percentage of the voting-age population in the county. The “False Negative Rate”, also called Type I error, indicates the percent of counties that would *not* be covered via the indicated population threshold formula, but did have a potential violation. The false negative rates in Table 3 indicate that with all population thresholds higher than 20%, more than half of counties having potential violations would *not* have triggered practice-based preclearance based on the population at the time of their first potential violation.

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The “False Positive Rate,” also called Type II error, indicates the percent of counties that *are* covered via the listed population threshold-based trigger, but *have never* had a potential violation in Dr. Kousser’s database. While generally lower than the false negative rate, we do see that at both the high end of the potential thresholds and low end of potential thresholds, a larger share of jurisdictions would be subject to preclearance despite never having a voting rights suit filed against the jurisdiction.⁴⁸

The final column of Table 3, titled “Overall Error Rate” aggregates Type I and Type II error and shows the percent of counties nationwide that are either incorrectly excluded (not covered despite having had a violation) or incorrectly included (covered despite never having a violation). While differences between coverage thresholds are relatively small, we do see that the 20% threshold for coverage minimizes the *overall* number of counties with violations that are missed and covered counties that have not had suits filed against them in the past.

At the highest racial/ethnic minority population percentages, Figure 3 shows that the rate of potential violations decreases drastically. Table 3 also indicates that the number of false positives begins to increase with thresholds beyond 30%, as in recent decades heavily-minority counties have *not* had potential voting rights violations despite many of these counties being subject to preclearance under Section 5 of the Voting Rights Act. From a theoretical perspective, this is logical: in such places contemporary methods used to violate minority voting rights are unlikely to change the underlying dynamic of which racial/ethnic group holds power, so attempts to disenfranchise are rare. Therefore, in places where a single *minority* group is more than 80%

⁴⁸ Here it is important to note that the term “false” is used for consistency with scientific studies of classification metrics. Given the vagaries of the litigation process, it would be incorrect to assume that jurisdictions that have not had a suit filed against them are free of voting rights violations that would be scrutinized via the preclearance process. In other words, the false positive rate is likely a significant overestimate of the share of jurisdictions where, *after the fact*, we would say preclearance was unnecessary.

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of the population, and therefore (numerical) minority racial/ethnic group is less than 20%, disenfranchisement is similarly unlikely. Crafting a two-group formula as such also accords with the reality that 15th Amendment protections apply to *all* Americans, not just members of specific racial/ethnic minority groups.

Table 4 documents the effect of using a two-group threshold on false negative, false positive, and overall error rates. Error rates are little changed from Table 3, as today, few counties have a single racial/ethnic minority group at or exceeding 80% of the county’s population. However, the small number of counties that do have such a high minority population have no recent history of voting rights violations, and with future demographic shifts more counties will likely fall into this category in the future. Requiring that *two* racial/ethnic groups are at least 20% of the voting-age population in a jurisdiction thus both recognizes the “current conditions” cited by C.J. Roberts in the *Shelby* decision, and acknowledges how our country will “change” in the future.

Table 4: County-level False Negative and False Positive Rates with Two-Group Thresholds

Two-Group Threshold	False Negative Rate	False Positive Rate	Overall Error Rate
10% or More	15.9%	52.0%	27.0%
20% or More	39.8%	38.6%	19.6%
30% or More	63.7%	32.1%	20.4%
40% or More	84.2%	33.2%	23.2%

The 20% threshold proposed above also serves to allocate legal resources as efficiently as possible. Due to the nature of the election procedures that would be subject to preclearance, where policies may be facially race-neutral but used to discriminate under certain circumstances, it may be useful to concentrate additional effort on places where discriminatory effect is more

likely to occur. Counties unlikely to have a violation may not need extra scrutiny for these commonplace practices. Of course, jurisdictions under the threshold could still be subject to litigation under Section 2 of the Voting Rights Act, as they are today. These jurisdictions may also fall into coverage as their racial/ethnic minority population grows.

IV. CONCLUSION

For over 150 years, the federal government has played a key role in preserving the voting rights of racial/ethnic minorities. After the Civil War, the erosion of minority voting rights was most severe in states of the former Confederacy with large African-American populations; the Voting Rights Act of 1965 targeted these states and counties and secured the right to vote for all Americans. In the words of C.J. Roberts, “there is no denying that, due to the Voting Rights Act, our Nation has made great strides,”⁴⁹ but the changing demographic and political profile of the country persuaded the Court to call for a formula based on “current conditions” of racial discrimination in voting that “no one doubts” still exist.⁵⁰

In this report, I provided the rationale for one such formula. Tracking thousands of voting rights-related judicial actions in recent decades, and buttressed by historical, theoretical, and empirical evidence regarding where voting rights violations are likely to occur, I show a strong relationship between the racial/ethnic composition of a state or jurisdiction and the likelihood that the jurisdiction will see a violation of racial/ethnic minority voting rights. Evaluating tradeoffs between various population size-based thresholds, I also demonstrate that one threshold in particular, 20%, ensures fairness in which jurisdictions are subject to the added scrutiny of a tailored preclearance provision.

⁴⁹ *Shelby County v. Holder*, 570 U.S. 529 (2013), at 16.

⁵⁰ *Ibid*, at 2.

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The Voting Rights Act of 1965's special provisions were a key tool in the federal government's arsenal to ensure all Americans could participate in the electoral process. A flexible, forward-looking formula will ensure that the Act can continue to secure our rights far into the future. No other action of the current Congress may be more consequential than the reinvigoration of this commitment to the American people.

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