

Trusting the Federalism Process Under Unique Circumstances: United States Election Administration and Cybersecurity

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TRUSTING THE FEDERALISM PROCESS UNDER UNIQUE
CIRCUMSTANCES: UNITED STATES ELECTION
ADMINISTRATION AND CYBERSECURITY

TABLE OF CONTENTS

INTRODUCTION	1980
I. A SHORT HISTORY OF AFRICAN AMERICAN DISENFRANCHISEMENT AND THE VOTING RIGHTS ACT OF 1965.	1984
<i>A. African American Suffrage in the Reconstruction Era ..</i>	1985
<i>B. The Civil Rights Movement and the VRA</i>	1988
<i>C. The VRA's Enactment and Authority.....</i>	1991
II. AMERICAN ELECTION SYSTEMS AND THE 2016 ELECTION ..	1994
<i>A. Security Breach in the 2016 Election.....</i>	1995
<i>B. Modern Election Systems and Cybersecurity Vulnerabilities</i>	2000
III. HOW CONGRESS CAN FORCE STATES TO UPDATE ELECTION CYBERSECURITY SYSTEMS AND STANDARDS	2004
<i>A. Analogizing the VRA with Election Cybersecurity</i>	2005
<i>B. Challenges to the Analogy.....</i>	2011
1. <i>Shelby County and the VRA's Coverage Formula.....</i>	2011
2. <i>Malfeasance Versus Nonfeasance: Intent's Role Within the Analogy</i>	2013
CONCLUSION.....	2014

INTRODUCTION

In October 2016, the Department of Homeland Security (DHS) revealed that various state-based election systems were breached prior to Election Day.¹ In a postelection audit, seventeen United States intelligence agencies agreed that Russian hackers perpetrated the breach.² Later, a leaked National Security Agency (NSA) document demonstrated that the Russian government also directed a spear-phishing³ attack against a third-party American voting machine company.⁴ Ultimately, a DHS official testified that twenty-one states' election systems were targeted prior to the 2016 election,⁵ but independent reporting suggests that the breach extended to a total of thirty-nine states.⁶

1. Press Release, Dep't of Homeland Sec. and Office of the Dir. of Nat'l Intelligence on Election Sec. (Oct. 7, 2016), <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national> [<https://perma.cc/86LD-9MF8>] [hereinafter DHS on Election Security].

2. See INTELLIGENCE CMTY. ASSESSMENT, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, at ii (2017), <https://www.documentcloud.org/documents/3254239-Russia-Hacking-report.pdf> [<https://perma.cc/V2RP-K4TN>]; UNITED STATES INTELLIGENCE COMMUNITY, *Intelligence Careers*, <https://www.intelligencecareers.gov/icmembers.html> [<https://perma.cc/MEB2-K6B9>] (explaining how seventeen separate organizations form the United States Intelligence community).

3. A spear-phishing hack is a targeted cyberattack perpetrated via email. Kim Zetter, *Hacker Lexicon: What Is Phishing?*, WIRED (Apr. 7, 2015, 6:09 PM), <https://www.wired.com/2015/04/hacker-lexicon-spear-phishing/> [<https://perma.cc/5TJJ-BZ7R>]. The email appears to originate from someone the victim knows and pertains to the victim's interests or occupation. *Id.* If the victim opens the email, the hack is completed when the victim clicks on something within the email—such as a hyperlink or an attachment—encrypted with a virus. *Id.*

4. Matthew Cole et al., *Top-Secret NSA Report Details Russian Hacking Effort Days Before 2016 Election*, INTERCEPT (June 5, 2017, 3:44 PM), <https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/> [<https://perma.cc/FK6M-CHYK>].

5. Matt Zapotosky & Karoun Demirjian, *Homeland Security Official: Russian Government Actors Tried to Hack Election Systems in 21 States*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/world/national-security/homeland-security-official-russian-government-actors-potentially-tried-to-hack-election-systems-in-21-states/2017/06/21/33bf31d4-5686-11e7-ba90-f5875b7d1876_story.html?utm_term=.97c5fab34d90 [<https://perma.cc/5T5D-3FX5>].

6. Michael Riley & Jordan Robertson, *Russian Hacks on U.S. Voting System Wider than Previously Known*, BLOOMBERG (June 13, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-06-13/russian-breach-of-39-states-threatens-future-u-s-elections> [<https://perma.cc/VWS6-PKHL>]. The breach pertaining to the 2016 election will be explained at greater length in Part II.A.

In July 2017, one in four American voters said they would consider not voting in upcoming elections due to cybersecurity concerns.⁷ In response, various legislators and interest groups presented ideas and plans to fix gaps in election cybersecurity.⁸ But these reforms were offered well after many election administration and cybersecurity experts had already expected America's aging election systems to fail.⁹

Although many agree that America's election cybersecurity needs an overhaul,¹⁰ there is disagreement as to how far Congress may go to require these changes. The United States Constitution delegates much of Congress's authority in this area to the states through the Elections Clause: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in *each State* by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."¹¹

This Note recognizes that the Elections Clause grants Congress the authority to regulate states' election procedures,¹² and therefore it does not question Congress's power to regulate states' cybersecurity procedures in elections. Rather, this Note explores the boundary of Congress's authority; specifically, whether Congress can enact legislation that permits federal oversight onto specific states and not others.

7. CARBON BLACK, ELECTION (IN) SECURITY 5 (2017), https://www.carbonblack.com/wp-content/uploads/2017/07/ElectionInSecurity_Carbon_Black_July2017_Report.pdf [<https://perma.cc/NY6F-9KGU>].

8. *See, e.g.*, Securing America's Voting Equipment (SAVE) Act of 2017, S. 2035, 115th Cong. (2017); Protecting the American Process for Election Results (PAPER) Act, H.R. 3751, 115th Cong. (2017); DANIELLE ROOT & LIZ KENNEDY, CTR. FOR AM. PROGRESS, 9 SOLUTIONS TO SECURE AMERICA'S ELECTIONS 2-3 (2017), <https://cdn.americanprogress.org/content/uploads/2017/08/15140845/ElectionSecurity-brief.pdf> [<https://perma.cc/4EWP-T76Q>]; Letter from Nat'l Election Def. Coal. to Cong. (June 21, 2017), <https://www.electiondefense.org/election-integrity-expert-letter/> [<https://perma.cc/2QHR-9PY4>].

9. *See infra* Part II.B.

10. *See, e.g.*, LAWRENCE NORDEN & CHRISTOPHER FAMIGHETTI, BRENNAN CTR. FOR JUSTICE, AMERICA'S VOTING MACHINES AT RISK 6-7 (2015), https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf [<https://perma.cc/U4HY-XHDW>].

11. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

12. *See infra* text accompanying notes 231-33.

To determine the extent to which Congress has the authority to target certain states with election cybersecurity oversight, this Note compares the present issue with one that the Court debated over fifty years ago.¹³ In 1965, Congress implemented the Voting Rights Act (VRA), an election administration reform bill targeted at states that denied African Americans the right to vote.¹⁴ This Note illustrates a parallel between how states failed to ensure African Americans access to the ballot prior to the VRA¹⁵ and how states failed to establish secure elections.¹⁶ The analogy demonstrates that Congress can force states with obsolete election cybersecurity systems to submit to federal cybersecurity audits just as Congress enacted the VRA to force states with a history of race-based voter disenfranchisement to preclear any election changes through federal oversight.¹⁷ Although these situations differ in that one concerns voter access to the polls and the other involves election cybersecurity, a comparison is helpful because both test the extent to which the federal government may oversee specific states' election administration procedures.

The federal election cybersecurity audit is a concept based on several proposals and reports published after the 2016 election.¹⁸ The Election Infrastructure and Security Act of 2017, a bill proposed in the 115th Congress, "require[d that] the voting systems used in elections for Federal office ... comply with national standards developed by the National Institute of Standards and Technology

13. *See infra* Part III.A.

14. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

15. Election administration procedures such as strict voter identification, voter list purges, and polling station closures still present barriers to minority voters. *See* Danielle Root & Adam Barclay, *Voter Suppression During the 2018 Midterm Elections*, CTR. FOR AM. PROGRESS ¶¶ 2-9, 5-8 (Nov. 20, 2018, 9:03 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections/> [<https://perma.cc/9JU6-DFYL>]. Although this Note acknowledges that race-based voter disenfranchisement is still an issue today, it focuses on those barriers which led to Congress enacting the VRA to serve its analogy.

16. *See infra* Part III.A.

17. *See infra* Part III.

18. *See infra* notes 21-23. This Note does not advocate a specific policy, but instead highlights those ideas suggested since the 2016 election and repackages them to create a hypothetical that can be compared to the VRA.

[(NIST)].”¹⁹ If Congress adopted legislation like this to establish a threshold standard, then it could further enforce those standards through a coverage formula—similar to the VRA’s—that triggers federal oversight of noncompliant jurisdictions.²⁰ DHS or NIST officials could serve as auditors because both agencies share expertise in election cybersecurity.²¹ The audits could be modeled after any of the eight election cybersecurity assessments that DHS already offers,²² or the eighty-eight “best practices” suggested by the Center for Internet Security.²³ The audits would identify weaknesses in the states’ election systems and oversee updates to cybersecurity vulnerabilities.²⁴

In Part I, this Note details the history of African American voter disenfranchisement, focusing on the period between the Civil War and the Civil Rights Movement. Studying this period demonstrates how states failed to ensure African Americans access to the ballot, thereby providing Congress the authority to intervene through the VRA. Part II explains the cybersecurity breach that occurred during the 2016 election cycle, outlines how state-based voter registration databases and voting machines are outdated and susceptible to hackers, and details how states have responded since 2016. Part III reviews the Supreme Court’s decision in *South Carolina v. Katzenbach*, which upheld the VRA and found that Congress could focus federal oversight onto certain states due to “*unique circumstances*.”²⁵ This Part then analogizes *Katzenbach*’s legal reasoning to the

19. Election Infrastructure and Security Promotion Act of 2017, H.R. 1907, 115th Cong. (2017).

20. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438.

21. See Hande Guven, *Can NIST Be the Savior of Federal Cybersecurity?*, NEW AM. (Aug. 10, 2017), <https://www.newamerica.org/cybersecurity-initiative/c2b/c2b-log/can-nist-be-savior-federal-cybersecurity/> [<https://perma.cc/6LDA-HKN7>].

22. DEP’T OF HOMELAND SEC., DHS CYBERSECURITY SERVICES CATALOG FOR ELECTION INFRASTRUCTURE 5-11 (2018), http://www.eac.gov/assets/1/6/DHS_Cybersecurity_Services_Catalog_for_Election_Infrastructure.pdf [<https://perma.cc/G7XL-YYFH>].

23. CTR. FOR INTERNET SEC., A HANDBOOK FOR ELECTIONS INFRASTRUCTURE SECURITY 35-66 (2018), <https://www.cisecurity.org/wp-content/uploads/2018/02/CIS-Elections-eBook-15-Feb.pdf> [<https://perma.cc/L6QL-R8D5>].

24. Identical bills were submitted in both houses of the 115th Congress to provide for such audits, but those bills incentivized states to request federal auditors in exchange for federal funds that had to be spent on local election systems. See *Helping State and Local Governments Prevent Cyber Attacks (HACK) Act*, S. 1510, 115th Cong. (2017); S. Amend. 656 to H.R. 2810, 115th Cong. (2017).

25. 383 U.S. 301, 334-35, 337 (1966) (emphasis added).

cybersecurity context to explain why Congress has the authority to force states that fail to meet minimum election security standards to submit to federal cybersecurity audits. Finally, Part III also acknowledges some challenges to this analogy—such as whether the analogy is consistent with *Shelby County v. Holder*,²⁶ and whether a valid analogy requires malfeasance in both circumstances—and then responds to those critiques.

I. A SHORT HISTORY OF AFRICAN AMERICAN DISENFRANCHISEMENT AND THE VOTING RIGHTS ACT OF 1965

Although the United States federal government never explicitly denied the right to vote based on race, African Americans have struggled to gain equal access to the ballot box.²⁷

In early, postcolonial America, free African Americans could vote in most states.²⁸ But by the early 1800s, most African Americans were disqualified through voting eligibility requirements such as race, sex, slavery, or property ownership.²⁹ Southern slaves were eventually freed through the Emancipation Proclamation,³⁰ but slavery was not abolished throughout the Union until after the Civil War.³¹ This created a problem: what rights did newly freed persons hold? Specifically, could they vote?

This Part summarizes African Americans' struggle to achieve access to the ballot box after the Civil War and details how the federal government justified its intervention to assist in that effort. First, Part I.A reviews the Reconstruction Era's initial success, but ultimate failure, in securing African Americans the ability to vote. Next, Part I.B studies how the Civil Rights Movement's incremental accomplishments led to federal government intervention to end

26. 133 S. Ct. 2612 (2013).

27. See James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 469-70 (1999).

28. See *id.* at 469 n.125.

29. See Xi Wang, *Building African American Voting Rights in the Nineteenth Century*, in THE VOTING RIGHTS ACT: SECURING THE BALLOT 1, 2-3 (Richard M. Valelly ed., 2006); Tucker, *supra* note 27, at 471 ("By 1865, most states limited suffrage to white males. Only two of the thirty-six states then in the Union, Maine and Vermont, never had imposed any legal limits on the suffrage of blacks." (internal citations omitted)).

30. Emancipation Proclamation, Proclamation No. 17, 12 Stat. 1268 (1863).

31. See U.S. CONST. amend. XIII.

African American disenfranchisement. Finally, Part I.C briefly explains how Congress enacted the VRA and examines the VRA's underlying authority.

A. African American Suffrage in the Reconstruction Era

During the Reconstruction Era, Republicans intended to address many fundamental issues stemming from slavery—specifically newly freed slaves' voting rights.³² President Abraham Lincoln's Reconstruction plan included a measure to “control postwar politics and administration.”³³ This strategy repackaged the Civil War's “Iron-clad Test Oath” to guarantee that Reconstruction would be managed by those who intended to incorporate the newly freed slaves into American society.³⁴

But when President Andrew Johnson assumed Reconstruction's management, he did not follow President Lincoln's plan.³⁵ Instead, President Johnson pardoned those who perpetrated the Southern rebellion.³⁶ This action allowed the South to elect anti-secessionist representatives and govern itself without oversight.³⁷ President Johnson's pardon allowed several former slave states to enact the Black Codes, a series of laws that “sought to circumvent the Thirteenth Amendment and replace the individual slave holder with the state as master of this servant race.”³⁸

32. See Eric Foner, Remarks at the Conference on the Second Founding (Nov. 14, 2008), in 11 U. PA. J. CONST. L. 1289, 1291-92, 1294 (2009).

33. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 26 (2004).

34. See ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 86 (2d ed. 2015); VALELLY, *supra* note 33, at 26.

35. See VALELLY, *supra* note 33, at 26-27.

36. See *id.* at 27.

37. See FONER, *supra* note 34, at 91-92.

38. Michael P. O'Connor, *Time Out of Mind: Our Collective Amnesia About the History of the Privileges or Immunities Clause*, 93 KY. L.J. 659, 685 (2004). Mississippi and South Carolina are often cited as the States with the most egregious examples of Black Codes. See, e.g., FONER, *supra* note 34, at 93-95. But it is important to note that the Black Codes were a problem beyond the former Confederate states. See W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 564 (1992).

Because states failed to ensure African Americans' access to the ballot,³⁹ Congress enacted the Reconstruction Acts of 1867,⁴⁰ which established a military presence in the South.⁴¹ Federal intervention advocates drafted this legislation to protect African Americans from former slaveholders.⁴² While these military forces served many roles, they were specifically tasked with protecting the right to vote.⁴³ Shortly thereafter, Congress further protected African American suffrage through new constitutional amendments. The Fourteenth Amendment provided Congress the authority to make laws that could safeguard rights such as suffrage,⁴⁴ and the Fifteenth Amendment ensured that no law could disenfranchise an otherwise eligible voter based on his or her race.⁴⁵

The federal government's military occupation briefly succeeded in registering African Americans to vote⁴⁶ and propelled African Americans into powerful political positions,⁴⁷ but pre-Civil War power dynamics returned after military withdrawal in 1876.⁴⁸

Military withdrawal had two significant effects on African American suffrage. First, when the southern states⁴⁹ reacquired

39. See FONER, *supra* note 34, at 86.

40. See Military Reconstruction Acts, ch. 153, 14 Stat. 428 (1867), ch. 6, 15 Stat. 2 (1867), ch. 30, 15 Stat. 14 (1867); Tenure of Office Act, ch. 154, 14 Stat. 430 (1867); Command of the Army Act, ch. 170, 14 Stat. 485, 486-87 (1867); Local Prejudice Act, ch. 196, 14 Stat. 558 (1867).

41. See VALELLY, *supra* note 33, at 31-32.

42. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 74 (1866) (statement of Rep. Thaddeus Stevens) ("We have turned, or are about to turn, loose four million slaves without a hut to shelter them or a cent in their pockets.... [I]f we leave them to the legislation of their late masters, we had better have left them in bondage.").

43. See VALELLY, *supra* note 33, at 31.

44. U.S. CONST. amend. XIV.

45. U.S. CONST. amend. XV. *But see* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 3-4 (1976) (arguing that the Fifteenth Amendment is a weak result of compromise that "did not confer the suffrage on anybody").

46. See VALELLY, *supra* note 33, at 33.

47. African Americans were elected to local, state, and federal government positions throughout the South in the 1870s. See FONER, *supra* note 34, at 150-52. Overall, African Americans were most successful in South Carolina, where they controlled majorities in both state legislative houses by 1874. *Id.* at 151.

48. See VALELLY, *supra* note 33, at 47-49.

49. It is unfair to characterize this problem as cleanly divided between the North and the South because institutional racism also existed in former Union states. See, e.g., *id.* at 124 (explaining how Maryland Democrats attempted to disenfranchise African American voters). However, this Note highlights the role that southern states played in minority voters' suppression because they were the states that challenged the VRA's coverage formula. See

sovereignty, they ratified new state constitutions that structurally disenfranchised African Americans.⁵⁰ For example, Mississippi drafted a new constitution in 1890 that included a literacy test, poll tax, and good moral character test.⁵¹ Mississippi's 1890 constitution was promulgated without submission to the public, whereas the state's 1868 constitution was subject to the voters' approval.⁵² This systematic approach to exclude African Americans is further demonstrated through a widely used practice known as the grandfather clause. Although there were various iterations, a grandfather clause generally guaranteed voter eligibility to any person who could trace their lineage to an eligible voter before a specific date.⁵³ The cutoff typically required that a person's ancestor be able to vote during a period when African Americans could not vote.⁵⁴ Thus, grandfather clauses "came to represent all that was foul about southern disenfranchisement."⁵⁵ Southern states also implemented direct primary systems in the 1890s, which effectively organized White Democrats behind one candidate and blocked African American influence over the general election's outcome.⁵⁶

Second, without a military presence, violence against African Americans raged in the South.⁵⁷ The Democratic Party encouraged this viciousness to depress African American voter participation.⁵⁸

South Carolina v. Katzenbach, 383 U.S. 301, 307 n.2 (1966).

50. See VALELLY, *supra* note 33, at 124-26 (summarizing how Alabama, Arkansas, Florida, Georgia, North Carolina, South Carolina, Tennessee, and Texas structurally disenfranchised African Americans).

51. See Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of Cotton v. Fordice*, 71 U. CIN. L. REV. 421, 441 (2002) (quoting *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 402 (5th Cir. 1991)).

52. See ROBERT L. MADDEX, *STATE CONSTITUTIONS OF THE UNITED STATES* 203 (2d ed. 2006).

53. See R. VOLNEY RISER, *DENYING DISENFRANCHISEMENT* 49-56 (2010) (cataloguing examples from Massachusetts to Alabama).

54. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 90 (rev. ed. 2009).

55. See RISER, *supra* note 53, at 49.

56. See *id.* at 13; VALELLY, *supra* note 33, at 156-57.

57. See DU BOIS, *supra* note 38, at 674-684; FONER, *supra* note 34, at 184-91.

58. See DU BOIS, *supra* note 38, at 483 ("Organized clubs of masked, armed men, formed as recommended by the central Democratic committee, rode through the country at night, marking their course by the whipping, shooting, wounding, maiming, mutilation, and murder of women, children, and defenceless men.... Crimes like these ... were the means ... to elect a President of the United States." (citation omitted)).

In 1868, secret Democratic Party organizations such as the Knights of the White Camellia, The Innocents, and the Ku Klux Klan (the Klan) marched nightly throughout Louisiana.⁵⁹ Over 2000 people were killed or wounded in Louisiana shortly before the 1868 election.⁶⁰

The structural barriers and rampant violence curbed African American voter turnout: out of the approximately 21,000 New Orleans Republicans, only 276 voted,⁶¹ and in St. Landry, no votes were cast for the Republican presidential candidate even though Republicans outnumbered Democrats in the parish by over 1000 registrants.⁶²

The Reconstruction Era started with the potential to integrate African Americans into the democratic system after ending slavery, but the states failed to ensure African Americans' access to the ballot.⁶³ Although the Constitution now guaranteed that suffrage could not be denied based on race, African Americans had to overcome racially motivated, state-imposed hurdles such as poll taxes, literacy tests, and grandfather clauses to vote.⁶⁴ However, African Americans responded to the states' subservient treatment with a social movement that led to the federal government restoring African Americans' access to the ballot.

B. The Civil Rights Movement and the VRA

The United States underwent significant changes during the first half of the twentieth century that led to the Civil Rights Movement. In 1920, women were guaranteed the right to vote via constitutional

59. *See id.* at 474.

60. *Id.* at 681. These crowds were seen marching with shotguns and pistols. H.R. MISC. DOC. NO. 154, at 9 (1869). Firearms were so popular in the weeks leading up to the 1868 election that merchants were selling Colt revolvers at twice the normal purchase price. *Id.* at 10.

61. *See* DU BOIS, *supra* note 38, at 474.

62. *See id.* at 681 ("Here occurred one of the bloodiest riots on record, in which the Ku Klux killed and wounded over 200 Republicans, hunting and chasing them for two days and nights through fields and swamps. Thirteen captives were taken from the jail and shot. A pile of twenty-five dead bodies were found half-buried in the woods.")

63. *See supra* text accompanying notes 32-34, 48-62.

64. *See supra* text accompanying notes 45, 50-55.

amendment.⁶⁵ Although African American women were now eligible to vote, they faced the same voting barriers obstructing African American men.⁶⁶ Later, during the Great Depression, African Americans pressured President Franklin D. Roosevelt's New Deal to include programs that specifically assisted poor African Americans.⁶⁷ These programs served all Americans equally, which in turn provided African Americans a reason to reconsider the Democratic Party as viable political leadership.⁶⁸ Meanwhile, the Supreme Court slowly dismantled its "separate but equal" doctrine and attempted to desegregate public schools.⁶⁹ This brought race back to the forefront of America's consciousness.

America continued to change with the Civil Rights Movement in the 1950s. The Movement was a response to the racial tension plaguing American society.⁷⁰ While efforts initially addressed desegregation, "the right to vote ... was always at the heart of the [C]ivil [R]ights [M]ovement."⁷¹

The Movement revived post-Reconstruction Era violence and voter intimidation in the South. In 1961, Commissioner of Public Safety Eugene Connor refused to protect the Freedom Riders while Klansmen beat the activists in Birmingham, Alabama.⁷² In 1964, three young men were murdered while trying to register voters in an area of Mississippi that was controlled by the White Citizens' Council and the Klan.⁷³ In 1965, Sheriff Jim Clark beat and arrested Ms. Annie Lee Cooper as she waited in line to register to vote in Selma, Alabama.⁷⁴ It became clear that the Civil Rights Movement

65. U.S. CONST. amend. XIX.

66. See ROSALYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE: 1850-1920*, at 146-48 (1998).

67. See Harvard Sitkoff, *The New Deal and Race Relations*, in *FIFTY YEARS LATER: THE NEW DEAL EVALUATED* 93, 96-101 (Harvard Sitkoff ed., 1985).

68. *Id.* at 93.

69. See Linda S. Greene, *From Brown to Grutter*, 36 *LOY. U. CHI. L.J.* 1, 3-7 (2004).

70. See KEYSSAR, *supra* note 54, at 206.

71. *See id.*

72. JULIAN E. ZELIZER, *THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY* 30 (2015).

73. See ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* 121-22 (2015).

74. John Herbers, *Woman Punches Alabama Sherriiff*, *N.Y. TIMES*, Jan. 26, 1965, at 1, PROQUEST, Doc. No. 116675179.

could not rely on local authorities to end state-based discrimination, and it therefore needed the federal government's support.⁷⁵

Although the federal government sympathized with civil rights activists, it was slow to act due to the Southern Democrats' power and the Republican Party's internal identity crisis.⁷⁶ Over a seven-year span, the federal government enacted three different pieces of civil rights legislation that included voting rights reform.⁷⁷ But critics argued that the legislation inadequately safeguarded African Americans' ability to access the ballot.⁷⁸ Although 1964 represented the highest African American voter turnout ever recorded in the South during a presidential election, nearly 57 percent of African Americans were still not registered to vote.⁷⁹ The difference in registration rates between African American and White voters during the 1964 election was staggering: 77 percent White compared to 31 percent African American in Louisiana, 66 percent compared to 19 percent in Alabama, and 66 percent compared to 6 percent in Mississippi.⁸⁰ State-implemented discriminatory voting devices,

75. See KEYSSAR, *supra* note 54, at 207.

76. See *id.* at 207-08 (explaining that Southern Democrats wielded power in Congress, while Republicans debated whether to appeal to southern White voters or abandon their traditional civil rights platform).

77. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 101(a)(2)(A), 801, 78 Stat. 241, 241, 266 (1964) (requiring that voting rules and procedures be applied equally to all races and that certain registration and voting statistics be supplied to the Civil Rights Commission); Civil Rights Act of 1960, Pub. L. No. 86-449, §§ 301, 401, 601, 74 Stat. 86, 88-90 (1960) (addressing federal election record maintenance, criminalizing denial to vote based on race, and extending the Civil Rights Commission's authority); Civil Rights Act of 1957, Pub. L. No. 85-315, §§ 101(a)-(e), 111, 131(a)-(c), 71 Stat. 634, 634, 637 (1957) (establishing the Civil Rights Commission, elevating the authority of the Justice Department's Civil Rights Division, and providing the Attorney General prosecutorial authority in voting rights cases). This legislation marked the start of a new era. The Civil Rights Act of 1957 was the first civil rights legislation that the federal government had enacted since the Reconstruction Era, and it was the first civil rights bill that the Senate voted on in the twentieth century. See KEYSSAR, *supra* note 54, at 208; LAWSON, *supra* note 45, at 199.

78. KEYSSAR, *supra* note 54, at 208-10; LAWSON, *supra* note 45, at 246-49, 299; GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 96-97 (2013).

79. See ZELIZER, *supra* note 72, at 203.

80. See *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Judiciary Comm.*, 89th Cong. app. at 32 (1965) [hereinafter *Voting Rights House Hearings*] (statement of Nicholas Katzenbach, Att'y Gen. of the U.S.).

such as literacy tests and good moral character tests, still obstructed African American voters.⁸¹

The Civil Rights Movement focused its efforts on race-based voter discrimination through public demonstrations in Selma.⁸² The organizers chose Selma because the city epitomized the African American voting experience in 1964: “[While 57] percent of the population was African American[,] about 99 percent of the voters were white.”⁸³ The protests continuously succeeded in drawing national attention to their cause and culminated in the Selma-Montgomery March.⁸⁴ This demonstration, which later became known as Bloody Sunday, erupted in police violence against civil rights activists.⁸⁵ Even in light of the federal government’s recent attempts to address race-based voter discrimination, the violence on Bloody Sunday convinced federal legislators to take further action where the states had repeatedly failed.⁸⁶

The Civil Rights Movement seized the federal government’s attention and succeeded in obtaining federal orders to desegregate public accommodations.⁸⁷ However, even with these victories, African Americans were still unable to equally access the ballot box.⁸⁸ To remedy this continued problem, Congress passed a voting rights overhaul bill that provided an intricate solution to African American disenfranchisement.

C. The VRA’s Enactment and Authority

President Lyndon B. Johnson used his landslide victory in 1964 to move quickly on civil rights legislation.⁸⁹ Prior to his inauguration, President Johnson directed Nicholas Katzenbach, his future

81. *See id.* at 30.

82. *See ZELIZER, supra* note 72, at 205.

83. MICHAEL WALDMAN, *THE FIGHT TO VOTE* 147 (2016).

84. *See id.* at 148.

85. *See* Roy Reed, *Alabama Police Use Gas and Clubs to Rout Negroes*, N.Y. TIMES, Mar. 8, 1965, at 1, PROQUEST, Doc. No. 116803419 (describing how state troopers attacked civil rights protestors after the protestors crossed the Edmund Pettus Bridge).

86. *See* WALDMAN, *supra* note 83, at 152-58.

87. *See* MAY, *supra* note 78, at 97.

88. *See supra* text accompanying notes 79-81.

89. *See ZELIZER, supra* note 72, at 159, 161-62.

Attorney General, to draft a voting rights bill⁹⁰ to secure African Americans the ballot.⁹¹ Since President Johnson acted early in his term to address other important civil rights issues, he needed to wait for political cover to address African American voters.⁹²

Three days after Bloody Sunday, President Johnson introduced his voting rights bill to Congress.⁹³ Congressional supporters praised the bill, noting that this legislation would finally guarantee African Americans the right to vote after recent attempts had failed.⁹⁴ After examining⁹⁵ and debating the bill,⁹⁶ the legislature overwhelmingly passed the bill through both houses.⁹⁷ President Johnson signed this bill, the Voting Rights Act of 1965, into law on August 6, 1965.⁹⁸

At its outset, Congress framed the VRA as federal action to “enforce the [F]ifteenth [A]mendment.”⁹⁹ But before the Fifteenth

90. See MAY, *supra* note 78, at 95-99.

91. Lyndon B. Johnson, President of the U.S., President Johnson's Special Message to the Congress: The American Promise, Address Before the Joint Session of Congress (Mar. 15, 1965) (transcript available at <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise/> [<https://perma.cc/58ZD-Q4MJ>]) (“This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote. This bill will establish a simple, uniform standard which cannot be used, however ingenious the effort, to flout our Constitution. It will provide for citizens to be registered by officials of the United States Government if the State officials refuse to register them. It will eliminate tedious, unnecessary lawsuits which delay the right to vote. Finally, this legislation will ensure that properly registered individuals are not prohibited from voting.”).

92. See Zelizer, *supra* note 72, at 204.

93. See S. 1564, 89th Cong. (1965); H.R. 6400, 89th Cong. (1965).

94. *E.g.*, S. REP. NO. 89-162, pt. 3, at 2 (1965) (“Three times within the past 8 years the Congress has attempted to secure the constitutional right to vote free from racial discrimination. Those attempts have not been successful.”); H.R. REP. NO. 89-439, at 9 (1965) (“What has been the effect of the 1957, 1960, and 1964 voting rights statutes? Although these laws were intended to supply strong and effective remedies, their enforcement has encountered serious obstacles.”).

95. Both the Senate and the House of Representatives spent nine days interviewing witnesses about the bill in their respective committees. See *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. (1965) [hereinafter *Voting Rights Senate Hearings*]; *Voting Rights House Hearings*, *supra* note 80.

96. See MAY, *supra* note 78, at 154-57, 164, 166-67.

97. S. 1564, 89th Cong., 111 CONG. REC. 19,200-01 (1965) (passing the House of Representatives 328-74); S. 1564, 89th Cong., 111 CONG. REC. 19,374, 19,378 (1965) (passing the Senate 79-18).

98. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

99. See *id.* The VRA's original language even parallels the Fifteenth Amendment. Compare U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall

Amendment could be enforced, Congress had to identify which states had failed to secure African Americans access to the ballot. The VRA implemented the following formula to identify where enforcement should be focused: states or political subdivisions that used voting devices¹⁰⁰ and fewer than 50 percent of adults were registered to vote, or voted, in 1964.¹⁰¹ After the formula identified those states and political subdivisions, all tests or devices applicable to federal, state, and local elections used in those areas were suspended “[t]o assure that the right ... to vote [was] not denied or abridged on account of race or color.”¹⁰² Once the VRA covered a state or political subdivision, the Attorney General or the United States District Court for the District of Columbia was required to preclear all future voting practices in those jurisdictions.¹⁰³ The preclearance requirement ensured that any new election procedures would not result in “denying or abridging the right to vote on account of race.”¹⁰⁴

The VRA also empowered the Attorney General to send federal examiners to the covered states and political subdivisions.¹⁰⁵ When the Attorney General assigned federal examiners to a covered jurisdiction, the federal examiners were mandated to review voter qualifications¹⁰⁶ and register voters,¹⁰⁷ as well as remove ineligible

not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”), *with* Voting Rights Act § 2 (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”).

100. The VRA defined voting tests or devices as:

[A]ny requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Voting Rights Act § 4(c).

101. *See id.* § 4(b). A state or county could be removed from statutory coverage if the United States District Court for the District of Columbia issued a declaratory judgement stating that the area had not used racially discriminatory voting procedures in the past five years. *See id.* § 4(a).

102. *Id.* § 4(a).

103. *See id.* § 5.

104. *Id.*

105. *See id.* § 6(b).

106. *See id.* §§ 7(a), 9(b).

107. *See id.* § 7(b).

voters from the rolls.¹⁰⁸ The Attorney General could also assign federal examiners to observe polling locations and vote tabulation procedures “for the purpose of observing whether persons who are entitled to vote are being admitted to vote ... [and] whether votes cast by persons entitled to vote [were] being properly tabulated.”¹⁰⁹ The VRA even authorized the Department of Justice to test whether poll taxes were constitutional.¹¹⁰ Through the VRA, Congress established an effective system to enforce the Fifteenth Amendment in states that failed to ensure African Americans access to the ballot.

The Reconstruction Era began with a promise to integrate African Americans to American life in a post-slavery society, but that promise failed to materialize in the South due to malintent state actors.¹¹¹ Nearly one hundred years after the Fifteenth Amendment provided African Americans the right to vote, the federal government enacted the VRA to guarantee and protect African American suffrage in states that both obstructed and failed to protect that right.¹¹²

The next Part shifts focus to the cybersecurity breach in the 2016 election and examines how states’ voter registration databases and voting machines are outdated and susceptible to hackers. This Note will return to the VRA’s social history as a comparison to the current cybersecurity issues challenging the states.¹¹³

II. AMERICAN ELECTION SYSTEMS AND THE 2016 ELECTION

In June 2016, reporters first informed the American public that Russian government hackers had infiltrated the Democratic National Committee’s (DNC) online network.¹¹⁴ One month later,

108. *See id.* § 7(d).

109. *Id.* § 8.

110. *See id.* § 10(b). President Johnson’s administration quickly won this battle. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that a state-imposed poll tax in Virginia violated the Equal Protection Clause of the Fourteenth Amendment).

111. *See supra* Part I.A.

112. *See supra* text accompanying notes 45, 93-110.

113. *See infra* Part III.A.

114. Ellen Nakashima, *Russian Government Hackers Penetrated DNC, Stole Opposition Research on Trump*, WASH. POST (June 14, 2016), <https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on->

WikiLeaks published roughly 20,000 private DNC emails related to this hack.¹¹⁵ Ultimately, an investigation into this hack uncovered Russian government attacks on various United States election systems.¹¹⁶ Part II.A provides a brief timeline explaining how United States intelligence officials uncovered Russian meddling in the 2016 election and how the United States responded. Part II.B examines how states failed to adequately secure elections prior to the 2016 election by not updating their voter registration systems and vote tabulation machines.

A. Security Breach in the 2016 Election

While investigating the Russian government's cybersecurity attack on the DNC, DHS learned that a Russian company breached some state election systems prior to the 2016 election.¹¹⁷ At that time, DHS cautioned all states to check their cybersecurity systems and request federal assistance if needed.¹¹⁸ In January 2017, the United States Intelligence Community (USIC) concluded that "Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the [United States] presidential election."¹¹⁹ Specifically, the USIC determined that Russian intelligence had accessed multiple states' and localities' electoral technology since 2014,¹²⁰ but the attempt in 2016 was an "escalation in directness, level of activity, and scope of effort compared to previous operations."¹²¹ President Putin disputed these findings and asserted that Russia

trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0_story.html?utm_term=.ce2c19a03ea8 [https://perma.cc/DU5A-MWKD].

115. Tom Hamburger & Karen Tumulty, *WikiLeaks Releases Thousands of Documents about Clinton and Internal Deliberations*, WASH. POST (July 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/22/on-eve-of-democratic-convention-wikileaks-releases-thousands-of-documents-about-clinton-the-campaign-and-internal-deliberations/?utm_term=.59bbd3d312b3 [https://perma.cc/WL6D-G9FE].

116. See *infra* text accompanying note 117; see also DHS on Election Security, *supra* note 1.

117. DHS on Election Security, *supra* note 1.

118. *Id.*

119. INTELLIGENCE CMTY. ASSESSMENT, *supra* note 2, at ii.

120. See *id.* at 3.

121. *Id.* at ii.

never engaged in election hacking.¹²² An ongoing investigation into this matter has led to the indictment of three Russian companies, twelve Russian citizens, and thirteen Russian nationals for interference with the 2016 election.¹²³

In response to the USIC's conclusion, DHS designated election infrastructure as "critical."¹²⁴ This classification provided voting systems with various federal protections, such as "streamlined access to classified threat information sharing, opportunities for added training[,] and various other tools aimed to help both public and private entities."¹²⁵ DHS deliberately explained that "[t]his designation [*did*] not mean a federal takeover, regulation, oversight or intrusion concerning elections," but instead "enable[d DHS] to prioritize ... cybersecurity assistance to state and local election officials ... who request it."¹²⁶

Six months after the USIC published its assessment, a leaked NSA document revealed that the Russian government directed a spear-phishing attack against an unnamed American company that manufactures and services American voting machines.¹²⁷ Later that month, it was also reported that Russia breached thirty-nine

122. See Ian Phillips & Vladimir Isachenkov, *Putin Denies Russian Hacking, Hails Trump as 'Straightforward'*, BOS. GLOBE (June 1, 2017), <https://www.bostonglobe.com/news/world/2017/06/01/putin-russian-state-has-never-been-involved-hacking/i6uF8GilmoAoZHf93gZAmJ/story.html> [https://perma.cc/L6DP-N6BP]. After some initial confusion, the White House clarified that it accepted the USIC's conclusion rather than President Putin's statement. See Justin Fishel, *White House Disputes that Trump Denied Russia Still Targeting the US*, ABC NEWS (July 18, 2018, 7:51 PM), <https://abcnews.go.com/Politics/trump-answers-asked-russia-targeting-us/story?id=56664385> [https://perma.cc/47XU-CC5Q].

123. See Katelyn Polantz & Stephen Collinson, *12 Russians Indicted in Mueller Investigation*, CNN (July 14, 2018, 4:21 PM), <https://www.cnn.com/2018/07/13/politics/russia-investigation-indictments/index.html> [https://perma.cc/2AJJ-2RTP]; Del Quentin Wilber & Aruna Viswanatha, *Russians Charged with Interfering in U.S. Election*, WALL ST. J. (Feb. 16, 2018, 7:29 PM), <https://www.wsj.com/articles/russians-charged-with-interfering-in-u-s-election-1518804495> [https://perma.cc/5J7Y-8JST].

124. Press Release, Jeh Johnson, Sec'y of Homeland Sec., Statement by Sec'y Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017) [hereinafter DHS on Election Infrastructure], <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical> [https://perma.cc/UD3H-HMTZ].

125. Katie Bo Williams, *DHS Designates Election Systems As 'Critical Infrastructure'*, HILL (Jan. 6, 2017, 6:10 PM), <http://thehill.com/policy/national-security/313132-dhs-designates-election-systems-as-critical-infrastructure> [https://perma.cc/A3X9-2S5H].

126. DHS on Election Infrastructure, *supra* note 124.

127. See Cole et al., *supra* note 4; see also *supra* note 3 and accompanying text.

states' election systems in the 2016 hack.¹²⁸ A DHS official rebuffed this report, testifying that the Russian government only breached twenty-one states' election systems and that none of these systems involved vote tallying.¹²⁹ Soon thereafter, a published survey stated that “[one] in [four American] voters said they [would] consider not voting in upcoming elections over cybersecurity fears.”¹³⁰

In September 2017, DHS concluded its investigation and notified the twenty-one affected states.¹³¹ In most states, DHS “only saw preparations for hacking, like scanning to find potential modes for attack.”¹³² But two states experienced a more severe breach. In June 2016, the Federal Bureau of Investigation (FBI) notified Arizona election officials that hackers infiltrated the state's election systems.¹³³ Although the systems were not compromised, hackers did steal a Gila County election official's username and password.¹³⁴ In July 2016, Illinois election officials also discovered a cybersecurity breach.¹³⁵ While hackers did not alter any data, they conducted “the first successful compromise of a state voter registration database.”¹³⁶ It was later estimated that as many as 90,000 voter records were compromised.¹³⁷ Hackers accessed Illinois's voter database, which

128. See Riley & Robertson, *supra* note 6.

129. See Zapotosky & Demirjian, *supra* note 5.

130. See CARBON BLACK, *supra* note 7, at 5.

131. See Sari Horwitz et al., *DHS Tells States About Russian Hacking During 2016 Election*, WASH. POST (Sept. 22, 2017, 5:21 PM), https://www.washingtonpost.com/world/national-security/dhs-tells-states-about-russian-hacking-during-2016-election/2017/09/22/fd263a2c-9fe2-11e7-8ea1-ed975285475e_story.html?utm_term=.fd6e3746c0a6 [https://perma.cc/3EBT-YRKD].

132. Joe Uchill, *DHS Tells 21 States They Were Russian Hacking Targets Before 2016 Election*, HILL (Sept. 22, 2017), <https://thehill.com/policy/cybersecurity/351981-dhs-notifies-21-states-of-they-were-targets-russian-hacking> [https://perma.cc/K9QH-FWJE]; see also Callum Borchers, *What We Know About the 21 States Targeted by Russian Hackers*, WASH. POST: THE FIX (Sept. 23, 2017, 5:21 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/09/23/what-we-know-about-the-21-states-targeted-by-russian-hackers/?utm_term=.d752a640c2b8 [https://perma.cc/3296-K2HD] (detailing how much is known about the cyberattacks in each state).

133. See Ellen Nakashima, *Russian Hackers Targeted Arizona Election System*, WASH. POST (Aug. 29, 2016), https://www.washingtonpost.com/world/national-security/fbi-is-investigating-foreign-hacks-of-state-election-systems/2016/08/29/6e758ff4-6e00-11e6-8365-b19e428a975e_story.html?utm_term=.56b1791d287a [https://perma.cc/27DG-LPFJ].

134. See *id.*

135. See *id.*

136. See *id.*

137. See Riley & Robertson, *supra* note 6.

stored voter's "names, dates of birth, genders, driver's licenses[,] and partial Social Security numbers."¹³⁸ The FBI suspected Russian hackers in both the Arizona and Illinois incidents.¹³⁹ In response, both states shut down their respective voter registration systems for one week to investigate these issues and revamp cybersecurity measures.¹⁴⁰ DHS officials concluded that widespread attempts to infiltrate states' election systems demonstrated Russian attempts to meddle in the 2016 election.¹⁴¹

In February 2018, the Director of National Intelligence, Dan Coates, warned that "Russia's next target [was] the 2018 midterm elections."¹⁴² One month later, Congress allocated \$380 million "to improve the administration of elections for Federal office, including to enhance election technology and make election security improvements."¹⁴³ Congress ordered the Election Assistance Commission (EAC) to disburse these funds within forty-five days, and states have up to 2023 to spend it.¹⁴⁴ The EAC received all state funding

138. *Id.*

139. See Nakashima, *supra* note 133.

140. See *id.*; see also Chuck Goudie & Christine Tressel, *How the Russians Penetrated Illinois Election Computers*, ABC7 (July 19, 2018), <https://abc7chicago.com/politics/how-the-russians-penetrated-illinois-election-computers/3778816/> [<https://perma.cc/3NDL-7DC7>].

141. See Horwitz et al., *supra* note 131. The United States Senate Select Committee on Intelligence later affirmed many of these findings. See S. SELECT COMM. ON INTELLIGENCE, RUSSIAN TARGETING OF ELECTION INFRASTRUCTURE DURING THE 2016 ELECTION: SUMMARY OF INITIAL FINDINGS AND RECOMMENDATIONS (2018), <https://www.intelligence.senate.gov/publications/russia-inquiry> [<https://perma.cc/52AN-K4UL>].

142. Sonam Sheth, *Top Intelligence Chiefs Issue a Dire Warning About the Kremlin's Ongoing Efforts to Influence the US, Defend Against Trump's Attacks on the FBI, and Explain What Happened with a Shady Russian Offering Dirt on Trump*, BUS. INSIDER (Feb. 13, 2018, 11:53 AM), <https://www.businessinsider.com/intelligence-chiefs-testify-russia-north-korea-china-senate-intel-committee-2018-2#the-fbi-informed-the-white-house-last-year-about-the-rob-porter-allegations-1> [<https://perma.cc/P8V6-TRNU>].

143. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348. Congress also allocated approximately \$300 million to the FBI to counter Russian cyberattacks. *Id.*; see also Dustin Volz, *U.S. Spending Bill to Provide \$380 Million for Election Cyber Security*, REUTERS (Mar. 21, 2018, 1:30 PM), <https://www.reuters.com/article/us-usa-fiscal-congress-cyber/u-s-spending-bill-to-provide-380-million-for-election-cyber-security-idUSKBN1GX2LC> [<https://perma.cc/R2J4-FSYJ>].

144. See Consolidated Appropriations Act, 2018; Tony Pugh, *States Using Election Security Grants for New Voting Machines that Won't Be Ready for 2018*, MCCATCHY (June 25, 2018, 12:17 PM), <https://www.mcclatchydc.com/news/politics-government/election/article213676634.html> [<https://perma.cc/HC5T-C94X>].

requests by July 2018 and had dispersed 96 percent of the funds by August 2018.¹⁴⁵

Although the funding is needed, Executive Director for the EAC Brian Newby described the financing as “not enough to buy new voting systems and too much for some of the small security things that need to be done.”¹⁴⁶ Further, despite the quick pace at which Congress instructed the EAC to distribute the funds, it was not expected that the money would necessarily affect election administration in 2018.¹⁴⁷ While some states spent the money on hiring election security auditors to inspect voting machines, others used it to begin the long search process for new voting machines.¹⁴⁸

The 2016 election cycle served as a wake-up call to state and local jurisdictions that election cybersecurity desperately needed improvement to secure confidence in election results. Both federal and state authorities worked together to make the 2018 midterms arguably “the most secure elections [that the United States had] ever held.”¹⁴⁹ This effort appears to have succeeded because DHS did not observe any successful cybersecurity attacks on Election Day.¹⁵⁰

145. Press Release, Election Assistance Comm’n, State & Territories Plan to Spend Majority of HAVA Grant Funds on Election Security System Upgrades (Aug. 21, 2018), <https://www.eac.gov/news/2018/08/21/state--territories-plan-to-spend-majority-of-hava-grant-funds-on-election-security-system-upgrades/> [<https://perma.cc/2UTV-U2UM>].

146. Bill Lucia, *\$380 Million of Election Assistance Money Only Goes So Far*, ROUTE FIFTY (July 13, 2018), <https://www.routefifty.com/management/2018/07/federal-election-official-ac-knowledges-limits-voting-assistance-funds-states/149731/> [<https://perma.cc/8H27-GHHR>]. Since these funds were distributed and implemented in some states, Director Christopher Krebs of the Cybersecurity and Infrastructure Security Agency—the nation’s top cybersecurity official—described the funding as putting states “light years” ahead of where they were in 2016, but concluding that “there’s certainly more to do.” See Derek B. Johnson, *Cyber Chief Pushes Audits As Key to Election Security*, FCW (Feb. 13, 2019), <https://fcw.com/articles/2019/02/13/krebs-hicks-house-homeland-audits.aspx> [<https://perma.cc/J8DF-MXQ9>].

147. See Pugh, *supra* note 144.

148. See *id.* (citing South Carolina, Louisiana, and Georgia as three states with paperless voting machines who would not spend these funds to improve cybersecurity in the 2018 election cycle).

149. David Becker, Opinion, *The Midterms Will Be the Most Secure Elections We’ve Ever Held*, WASH. POST (Oct. 31, 2018), https://www.washingtonpost.com/opinions/the-midterms-will-be-the-most-secure-elections-weve-ever-held/2018/10/31/e60ff8d6-d930-11e8-9559-712cbf726d1c_story.html?noredirect=on&utm_term=.12167a8eaba4 [<https://perma.cc/49E9-LPFG>] (describing improvements in federal cybersecurity monitoring pertaining to elections and state-run election result audit systems).

150. Jacqueline Thomsen, *DHS Has ‘Not Seen’ Successful Cyberattack on Midterm Elections*, HILL (Nov. 7, 2018, 1:39 AM), <https://thehill.com/policy/cybersecurity/415431-dhs-has-not-seen-successful-cyberattack-on-midterm-elections> [<https://perma.cc/DCH7-62MH>]

But one successful election should not be used to declare the problem solved.¹⁵¹ As the next Section explains, many jurisdictions still face an uphill battle to reaching optimal election cybersecurity defense standards, practices, and procedures.

B. Modern Election Systems and Cybersecurity Vulnerabilities

The Russian attack on election systems in 2016 demonstrates a reason to be concerned about cybersecurity in American elections. While it was not proven that Russian hacking affected the outcome of the 2016 elections,¹⁵² former Director of the Central Intelligence Agency R. James Woolsey is “confident [that] the Russians will be back, and that they will take what they have learned ... to attempt to inflict even more damage in future elections.”¹⁵³ But this principle is not exclusive to Russian actors—other malicious independent or organized actors, domestic or abroad, could also orchestrate a cyber-attack on an American election.¹⁵⁴ Those attacks could—among other things—focus on voter registration databases or attack voter machine security.

The cybersecurity concerns presented in the 2016 election focused on voter registration databases.¹⁵⁵ Russian agents reportedly breached election systems in at least twenty-one states.¹⁵⁶ Arizona

(“We’ve not seen, or we’re not aware, of any successful cybersecurity-related compromises of election infrastructure.”). *But see* Preston Gralla, *A Close Look At Cyber Security During the Midterm Election*, SYMANTEC: ELECTION SECURITY (Nov. 19, 2018), <https://www.symantec.com/blogs/election-security/close-look-cyber-security-during-midterm-election> [https://perma.cc/RJQ5-XKC7] (detailing “[s]mall attempts at cyber disruption” pertaining to the 2018 midterm elections).

151. *See* Gralla, *supra* note 150.

152. *See* INTELLIGENCE CMTY. ASSESSMENT, *supra* note 2, at 8.

153. R. James Woolsey, *Foreword* to LAWRENCE NORDEN & IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, *SECURING ELECTIONS FROM FOREIGN INTERFERENCE 1* (2017). Although the White House has been unclear about its stance on Russian meddling in the 2016 election, see Fishel, *supra* note 122, it seems concerned that Russia poses a threat in the future. *See* Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2018, 8:50 AM), <https://twitter.com/realDonaldTrump/status/1021784726217142273> [https://perma.cc/LM6Y-DMN4].

154. *Worldwide Threat Assessment of the US Intelligence Community: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. 1-2 (2017), <https://www.dni.gov/files/documents/Newsroom/Testimonies/SSCI%20Unclassified%20SFR%20-%20Final.pdf> [https://perma.cc/PM6K-6B22] (statement of Daniel R. Coats, Director of National Intelligence).

155. *See* Horwitz et al., *supra* note 131.

156. *See* Riley & Robertson, *supra* note 6; Zapotosky & Demirjian, *supra* note 5.

and Illinois seemed to have experienced the most serious breaches,¹⁵⁷ but these occurrences may have been more widespread than is publicly known.¹⁵⁸ Russian hackers also attacked voter registration software companies to gain access to states' voter databases, suggesting that the threat extends beyond state-managed systems.¹⁵⁹

By accessing voter registration systems, hackers can manipulate the databases to accomplish three problematic results. First, hackers could interfere with a voter's ability to cast a ballot by deleting a voter from the active list, marking a voter as a felon in states that do not allow felons to vote, or changing a voter's party affiliation to make the voter ineligible in the party's primary.¹⁶⁰ Second, hackers could manipulate the voter registration systems to affect election outcomes via mail-in voting.¹⁶¹ Theoretically, hackers could alter preexisting voter information, or create fictional registered voters, and funnel mail-in ballots to an address where fraudulent votes could be cast by mail.¹⁶² Experts generally agree that mail-in ballots are more susceptible to fraudulent voting than in-person voting because no one observes mail-in voters fill out the ballot.¹⁶³ Finally, hackers could simply shut down a voter registration system, or delete the voter roll entirely, to cause havoc prior to or on Election Day.¹⁶⁴

Meanwhile, prior to the 2016 election, America's voting machines and vote tabulation procedures were also vulnerable because they

157. See *supra* text accompanying notes 131-41.

158. See S. SELECT COMM. ON INTELLIGENCE, *supra* note 141 (finding that Russian-affiliated cyber actors were in a position to alter or delete voter registration data in a "small number of states").

159. See Cole et al., *supra* note 4.

160. NORDEN & VANDEWALKER, *supra* note 153, at 16.

161. See *id.*

162. See *id.*

163. See Sami Edge & Sean Holstege, *No, Voter Fraud Actually Isn't a Persistent Problem*, WASH. POST: POST NATION (Sept. 1, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/01/voter-fraud-is-not-a-persistent-problem/?utm_term=.683397715059 [<https://perma.cc/UN7K-E9FK>]; see also Christopher Ingraham, *7 Papers, 4 Government Inquiries, 2 News Investigations and 1 Court Ruling Proving Voter Fraud Is Mostly a Myth*, WASH. POST: WONKBLOG (July 9, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/09/7-papers-4-government-inquiries-2-news-investigations-and-1-court-ruling-proving-voter-fraud-is-mostly-a-myth/?noredirect=on&utm_term=.e8ca7015e9ec [<https://perma.cc/B6FX-CJS5>].

164. See NORDEN & VANDEWALKER, *supra* note 153, at 16-17.

were old, faulty, and dangerously under-secured. After poor ballot designs placed Florida's 2000 presidential election result in question, the federal government pushed states to update their voting machines.¹⁶⁵ Since that federal overhaul, it has been up to the individual states to decide when to update their machines.¹⁶⁶ Some experts think that voting systems can last between one to two decades, while others suggest that these machines should last no more than ten years because they function on computer-based technology that quickly becomes obsolete.¹⁶⁷ In 2016, forty-three states used voting machines that were purchased at least ten years earlier, and fourteen states used machines that were purchased over fifteen years earlier.¹⁶⁸

There are three clear reasons why states should regularly update voting machines.¹⁶⁹ First, computer-based technology—such as motherboards, memory cards, and touch screens—fail after years of wear and tear.¹⁷⁰ When voting machines fail on Election Day, they cause long lines while they are either repaired or replaced.¹⁷¹ Second, many computer-based voting machines currently in use are based on unsupported and outdated technology, therefore making them vulnerable to even the most novice hackers.¹⁷² In the most egregious examples, the entire state of Georgia, as well as jurisdictions in California and Ohio, had long-term plans to operate machines on Windows XP and Windows 2000, even though Microsoft no longer supports those operating systems.¹⁷³ Third, it is difficult to find replacement parts and compatible technology to support aging voting machines.¹⁷⁴ In the 2016 election, forty-three states and the District of Columbia were using machines that were no

165. See NORDEN & FAMIGHETTI, *supra* note 10, at 8.

166. See *id.* at 9.

167. See *id.* at 8.

168. See *id.* at 9.

169. See *id.* at 12-15.

170. See *id.* at 12-14.

171. See *id.* at 14.

172. See *id.* at 15.

173. See *id.*

174. See *id.* at 15-17.

longer in production.¹⁷⁵ This makes finding replacement parts expensive and time consuming.¹⁷⁶

Despite knowing that aging voting machines were vulnerable, many states failed to switch to new machines prior to the 2016 election.¹⁷⁷ In 2015, experts estimated that it would cost \$580 million to replace the vote tabulation machines that were being used in forty states, and \$3.5 billion to replace the popular touchscreen voting machines that were being used in thirty states.¹⁷⁸ Many state and local election officials admitted that there was neither political will, nor available funding, to replace these machines.¹⁷⁹ Even when election officials did have the funds, some purchased replacement parts for old machines from uncertified online vendors, thus adding additional security risks.¹⁸⁰

But even when states had new voting machines prior to the 2016 election, many had inadequate security protocols to protect and secure those voting machines. Many states and counties relied on private companies to store voting machines when the machines were not in use and depended on these companies to prepare voting machines for Election Day with software updates.¹⁸¹ Hackers could easily target these companies prior to Election Day, rather than local governments, and achieve the same goal. These companies were targeted—albeit unsuccessfully—prior to the 2016 election.¹⁸² Further, in some precincts hackers can tamper with voting machines inperson because states and localities leave the machines

175. *See id.* at 15.

176. *See id.*

177. *See id.*; *see also* Michael Wines, *Wary of Hackers, States Move to Upgrade Voting Systems*, N.Y. TIMES (Oct. 14, 2017), <https://www.nytimes.com/2017/10/14/us/voting-russians-hacking-states-.html> [<https://perma.cc/Y4V4-9E7W>].

178. *See* NORDEN & FAMIGHETTI, *supra* note 10, at 17 n.102.

179. *See* Wines, *supra* note 177.

180. Kate Rabinowitz, *Election Security a High Priority—Until it Comes to Paying for New Voting Machines*, PROPUBLICA (Feb. 20, 2018, 5:00 AM), <https://www.propublica.org/article/election-security-a-high-priority-until-it-comes-to-paying-for-new-voting-machines> [<https://perma.cc/V8KY-XKHT>].

181. *See* HARVARD KENNEDY SCH. BELFER CTR. FOR SCI. & INT'L AFFAIRS, *THE STATE AND LOCAL ELECTION CYBERSECURITY PLAYBOOK 12* (2018), <https://www.belfercenter.org/sites/default/files/files/publication/StateLocalPlaybook%201.1.pdf> [<https://perma.cc/24DS-S7LY>].

182. Cole et al., *supra* note 4. Hackers have targeted voting machines prior to Election Day reaching as far back as South Africa in 1994, and as recently as Ukraine in 2014. *See* NORDEN & VANDEWALKER, *supra* note 153, at 7.

unguarded after the machines are delivered to the polling stations.¹⁸³ Additionally, many states and localities do not have restrictions or standards in place to retire voting machines.¹⁸⁴ Because anyone can purchase these machines, a malicious hacker could buy and study them to learn their vulnerabilities. The hacker could then use that information to disrupt an election in a state or locality still using that same machine.

Russian efforts to disrupt the 2016 presidential election demonstrated that states' election systems were vulnerable to a security breach.¹⁸⁵ Voter registration databases and voting machines appear to have been particularly easy targets, and they could serve hackers as effective tools to disrupt administering elections in the future.¹⁸⁶ Even though state officials recognized these obvious gaps in their election security, their systems remained both outdated and unprotected on Election Day.¹⁸⁷

The next Part analogizes the states' failure to establish secure elections with the states' failure to ensure African Americans access to the ballot box. It also recognizes challenges to this analogy, and rebuts those challenges.

III. HOW CONGRESS CAN FORCE STATES TO UPDATE ELECTION CYBERSECURITY SYSTEMS AND STANDARDS

Thus far, this Note has explained how states failed to protect African American voting rights throughout most of American history, and how the federal government finally intervened to secure African American suffrage through the VRA.¹⁸⁸ Further, this Note described the Russian cybersecurity attacks on various state election systems

183. See, e.g., Ed Felten, *E-Voting Links for Election Day*, FREEDOM TO TINKER (Nov. 2, 2010), <https://freedom-to-tinker.com/2010/11/02/e-voting-links-election-day/> [<https://perma.cc/CK95-UJRJ>] (describing a professor's annual visit to various precincts prior to Election Day to demonstrate that voting machines were unguarded from tampering).

184. See, e.g., Andrew W. Appel, *How I Bought Used Voting Machines on the Internet*, PRINCETON U.: COMPUTER SCI. BLOG (Feb. 8, 2007), <https://www.cs.princeton.edu/~appel/avc/> [<https://perma.cc/EVM5-CXJ2>] (describing how a professor was able to buy retired North Carolina voting machines that were still utilized in other jurisdictions).

185. See *supra* Part II.A.

186. See *supra* Part II.B.

187. See *supra* text accompanying notes 177-80.

188. See *supra* Part I.

during the 2016 election and demonstrated how states' registration systems and voting machines were vulnerable to hackers during that election cycle.¹⁸⁹ This Part compares these two events and explores the boundary of Congress's authority to target specific states' cybersecurity procedures in elections. The analogy demonstrates that Congress has the constitutional authority to force states with outdated election cybersecurity systems to submit to federal cybersecurity audits. Additionally, this Part addresses potential counterarguments to the analogy.

A. Analogizing the VRA with Election Cybersecurity

During the VRA's construction and enactment, the legislation faced various federalism-based challenges. When President Lyndon B. Johnson tasked Attorney General Nicholas Katzenbach to draft a new and aggressive voting rights bill, the Attorney General urged the President to instead consider a constitutional amendment.¹⁹⁰ Attorney General Katzenbach worried that the proposed bill conflicted with federalism principles because the Elections Clause authorized states, rather than the federal government, to define the voters' qualifications.¹⁹¹ Later, during the legislative process, the bill's opponents framed their position as standing against federal government intrusion on states' rights: "[T]he ultimate impact of the bill sets a dangerous precedent for unwarranted intrusion of Federal power into legitimate concerns of State and local governments."¹⁹² States subjected to the VRA's coverage formula vehemently criticized the bill as unconstitutionally targeting specific states.¹⁹³ Even public discourse asked whether the VRA overstepped the federal government's constitutional authority.¹⁹⁴ The Supreme Court

189. See *supra* Part II.

190. See MAY, *supra* note 78, at 50-51.

191. See *id.*

192. *E.g.*, H.R. REP. NO. 439, at 67-68, 71 (1965) (statement of Rep. Edwin E. Willis).

193. *E.g.*, *Voting Rights Senate Hearings*, *supra* note 95, at 705-06 (statement of Robert Y. Button, Att'y Gen. of the Commonwealth of Va.) ("[T]he bill manifestly does not even attempt to achieve [an end to racial discrimination] on an impartial, uniform, nationwide basis as it should ... but only snipes at the problem piecemeal.").

194. See, *e.g.*, Editorial, *An Immoral Law*, WALL ST. J., Mar. 22, 1965, at 14, PROQUEST, Doc. No. 133069038 ("If it is immoral, as the President says, to deprive a qualified citizen of his right to vote 'under color of a literacy test,' is it moral to violate one part of the

would ultimately consider the VRA's constitutionality based on a federalism challenge.¹⁹⁵

The day following the VRA's enactment, seven states and twenty-seven counties were brought within the VRA's coverage formula.¹⁹⁶ South Carolina was one of the covered states.¹⁹⁷ The federal government immediately mandated that South Carolina suspend its literacy test,¹⁹⁸ and eventually Attorney General Katzenbach assigned federal examiners to two South Carolina counties.¹⁹⁹ Additionally, South Carolina failed to report a change in its polling locations' operating hours, thereby violating the VRA's preclearance provision.²⁰⁰ South Carolina challenged the law,²⁰¹ claiming that the VRA "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution."²⁰² Further, South Carolina argued that the coverage formula violate[d] the Due Process Clause because it "violated the principle of the equality of States."²⁰³ Ultimately, the Court upheld the VRA as "a valid means for carrying out ... the *Fifteenth Amendment*."²⁰⁴

At the outset, the Court outlined the *unique circumstances* under which Congress enacted the VRA.²⁰⁵ It specifically highlighted the discriminatory purpose behind southern states' constitutional conventions in the 1890s, and how the mid-twentieth century civil rights bills failed to stop race-based voter discrimination.²⁰⁶ The Court even mentioned the protests in Selma, Alabama as demonstrating that race-based disenfranchisement, not political apathy, barred African Americans from the ballot box.²⁰⁷ Within this

Constitution under the color of upholding another which is in no wise in conflict?").

195. See *infra* text accompanying note 202.

196. See *South Carolina v. Katzenbach*, 383 U.S. 301, 318 (1966).

197. *Id.*

198. See *id.* at 319.

199. See *id.* at 322.

200. See *id.* at 320.

201. Alabama, Georgia, Louisiana, Mississippi, and Virginia joined South Carolina's lawsuit. See *id.* at 307-08 n.2.

202. *Id.* at 323.

203. *Id.* South Carolina also claimed that the VRA violated the Bill of Attainder Clause and separation of powers principles, which the Court promptly rejected. See *id.* at 323-24.

204. *Id.* at 337 (emphasis added).

205. See *id.* at 308, 310-15.

206. *Id.* at 310-11, 310-11 n.9, 313-14.

207. *Id.* at 315.

context, the Court recognized that Congress enacted the VRA to address “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”²⁰⁸ It was under “these *unique circumstances* ... [that] Congress responded in a permissibly decisive manner.”²⁰⁹

The Court explained its reasoning in two steps. First, the Court reviewed precedent Fifteenth Amendment caselaw.²¹⁰ Although the Court acknowledged that states have the power to administer local elections, the Court found that the Fifteenth Amendment “supersedes contrary exertions of state power.”²¹¹ Therefore, when the States exercised their election administration power to block African Americans from the voting booth, the Fifteenth Amendment authorized Congress to intervene.²¹²

Second, the Court compared Congress’s express powers against the state’s reserved powers under the *McCulloch* test:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.²¹³

As applied to the VRA, Congress’s power under the Fifteenth Amendment was “complete in itself, [could] be exercised to its utmost extent, and acknowledge[d] no limitations, other than [as] prescribed in the constitution.”²¹⁴ Through this reasoning, the Court held that Congress justifiably tailored its election administration oversight to specific jurisdictions because the Fifteenth Amendment placed few limitations on Congress.²¹⁵

208. *Id.* at 309.

209. *Id.* at 335 (emphasis added).

210. *See id.* at 324-25.

211. *Id.* at 325.

212. *Id.* (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

213. *Id.* at 358 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis omitted)).

214. *Id.* at 327 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

215. *See id.*

Shifting to the election cybersecurity context, those most worried about federal intervention in state election administration cite federalism concerns similar to those used by VRA skeptics and opponents.²¹⁶ After DHS uncovered Russia's cyberattack on state election systems prior to the 2016 election, DHS offered cybersecurity assistance to protect each state's vote tabulation and direction results.²¹⁷ But Georgia Secretary of State Brian Kemp, the State's chief election official, denied DHS's offer over a concern that federal assistance would lead to oversight in Georgia's state-run elections.²¹⁸ Later, when DHS declared election systems "critical infrastructure" in order to funnel federal funding to states and address these issues, Secretary Kemp criticized the designation as "a federal overreach into a sphere constitutionally reserved for the states."²¹⁹ Connecticut's chief election officer, Secretary of State Denise Merrill, best articulated the critics' concerns: "Elections have always been run and organized by the states [and] there has always been a fear that there would be federal intervention that would not recognize differences among the states."²²⁰

In spite of these concerns, if Congress were to enact legislation that required states with outdated election cybersecurity systems to submit to federal cybersecurity audits, akin to the VRA's coverage formula,²²¹ then Congress could justify it under a *Katzenbach* analysis.

The *Katzenbach* Court first contextualized the VRA within the *unique circumstances* that were present at the VRA's enactment.²²² Thus, Congress would look for a similar set of unique circumstances in the election cybersecurity context. Congress would likely first acknowledge that various states had not updated their voting

216. See *supra* text accompanying notes 190-95, 202.

217. Aliya Sternstein, *At Least One State Declines Offer for DHS Voting Security*, NEXTGOV (Aug. 25, 2016), <https://www.nextgov.com/cybersecurity/2016/08/some-swing-states-decline-dhs-voting-security-offer/131037> [<https://perma.cc/R24E-5ZE2>].

218. See *id.*

219. Tim Starks, *DHS Labels Elections As 'Critical Infrastructure'*, POLITICO (Jan. 6, 2017, 6:39 PM), <https://www.politico.com/story/2017/01/elections-criticalinfrastructure-home-land-security-233304> [<https://perma.cc/9DQH-VKDR>].

220. Eric Geller, *Elections Security: Federal Help or Power Grab?*, POLITICO (Aug. 28, 2016, 7:09 AM), <https://www.politico.com/story/2016/08/election-cyber-securitygeorgia-227475> [<https://perma.cc/G49B-HABA>].

221. Voting Rights Act of 1965, Pub. L. No. 110, § 4(b)-(c), 73 Stat. 437, 438-39.

222. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308-15 (1965).

machines in over ten to fifteen years.²²³ Then in 2016, Russian hackers attacked between twenty-one and thirty-nine states' election systems.²²⁴ At least Illinois's and Arizona's systems were successfully infiltrated, and one spear-phishing attack was perpetrated against a third-party voting machine provider.²²⁵ Congress would also want to highlight states' election cybersecurity activity before and after the 2016 election.

Prior to the election, even though states and local jurisdictions recognized a need to update their voter registration systems and voting machines, holdouts declined to act either due to budgetary concerns or a lack of political will.²²⁶ Soon after the 2016 election, when the federal government made assistance available, some election officials declined this offer due to federalism concerns.²²⁷ Congress would want to emphasize the appearance that the only changes being made in some states and jurisdictions are due to congressional grant money,²²⁸ and those funds are still not enough to address the plethora of election cybersecurity concerns across the country.²²⁹ Thus, these unique circumstances—a reliance on outdated voting machines and registration systems, a threat of future election interference, and the reluctance to upgrade voting machines—provide Congress the justification for targeted precision akin to the VRA.

The analogy continues under the *Katzenbach* analysis by reviewing precedent Elections Clause caselaw to determine how far Congress's authority extends.²³⁰ Overall, the Court has interpreted the Elections Clause to provide Congress sweeping authority to regulate the time, place, and manner of elections.²³¹ Even though

223. NORDEN & FAMIGHETTI, *supra* note 10, at 9; *see also Katzenbach*, 383 U.S. at 308-15.

224. Riley & Robertson, *supra* note 6; Zapotosky & Demirjian, *supra* note 5.

225. *See* Cole et al., *supra* note 4; Riley & Robertson, *supra* note 6; Zapotosky & Demirjian, *supra* note 5.

226. *See supra* text accompanying notes 177-80, 223.

227. *See supra* text accompanying notes 216-20.

228. *See supra* text accompanying notes 143-48.

229. *See supra* text accompanying notes 146-47, 173.

230. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966).

231. *See, e.g., Foster v. Love*, 522 U.S. 67, 71 n.2 (1997) (holding that Congress may override state regulations with uniform election rules); *Ex parte Yarbrough*, 110 U.S. 651, 660-62 (1884) (holding that states have the power to regulate election administration until Congress acts); *Ex parte Siebold*, 100 U.S. 371, 384-85 (1879) (holding that Congress's power to regulate elections overrides the state's regulation when the practices conflict). For an

states manage elections, Congress has the power to modify or displace any state election regulation.²³² Recently, the Court articulated this doctrine in a clear statement: “[T]he States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it ‘terminates according to federal law.’”²³³ Thus, the Court would likely assess Congress’s authority under the Elections Clause as a plenary power.

Finally, in concluding the *Katzenbach* analysis, Congress’s action would satisfy the *McCulloch* test as legitimate and within Congress’s authority.²³⁴ As suggested earlier, Congress’s authority is vast within the scope of the Elections Clause.²³⁵ In regulating and auditing election cybersecurity systems, Congress would be legislating the manner of elections.²³⁶ Hence, if Congress set a minimum cybersecurity standard, then the states would have to adjust their procedures to meet this threshold without exception. For example, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Court held that a federal statute that articulated voter registration form standards superseded a state law that modified the same form.²³⁷ Further, Congress’s federal election cybersecurity audit would serve as an enforcement mechanism to carry out Congress’s cybersecurity standards. Because the Court treats the Elections Clause as a plenary power, a congressional statute defining election cybersecurity standards that is enforced through a federal audit would likely satisfy the *McCulloch* test because it is “within the scope” of Congress’s constitutional power to regulate the manner of elections.²³⁸

In sum, Congress’s oversight—through the VRA—of states that disenfranchised African Americans demonstrates that Congress can

overview on Elections Clause jurisprudence, see Robert A. Kengle, *To Accept or To Reject: Arizona v. Inter Tribal Council of Arizona, the Elections Clause, and the National Voter Registration Act of 1993*, 57 *How. L.J.* 759, 761-67 (2014).

232. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805-06 (1995).

233. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013) (citing *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001)).

234. See *Katzenbach*, 383 U.S. at 326-27 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

235. See *supra* text accompanying notes 231-33.

236. See *Katzenbach*, 383 U.S. at 310, 337.

237. 133 S. Ct. at 2257.

238. *Katzenbach*, 383 U.S. at 326-27 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421).

both set election cybersecurity standards and force those states with outdated election cybersecurity systems to submit to federal audits. The *unique circumstances* in each situation justify targeted congressional oversight of specific states.²³⁹ Additionally, the Fifteenth Amendment and the Elections Clause provide Congress the constitutional authority to intervene in state election administration in both circumstances.²⁴⁰ Because the Court considers these constitutional powers to be so comprehensive, Congress's actions satisfy the *McCulloch* test, and thus satisfy the *Katzenbach* analysis.²⁴¹

B. Challenges to the Analogy

When assessing the analogy made in Part III.A, critics may question it on a few points. This Section identifies and answers two notable counterarguments.

1. Shelby County and the VRA's Coverage Formula

Critics may argue that the analogy fails because it is based on bad law. In *Shelby County v. Holder*, the Court struck down the VRA's coverage formula.²⁴² The Court recognized that Congress established the coverage formula to address race-based voter discrimination in 1965, but the formula had not changed in nearly fifty years.²⁴³ Challengers may argue that the analogy is unsuccessful because it is so closely tied to a historical example that proved to be unconstitutional.²⁴⁴

The *Shelby County* decision certainly affects Fourteenth and Fifteenth Amendment jurisprudence moving forward²⁴⁵ and serves

239. See *supra* text accompanying notes 205-09, 222-29.

240. See *supra* text accompanying notes 210-12, 230-33.

241. See *supra* text accompanying notes 213-15, 234-38.

242. 133 S. Ct. 2612, 2625-27 (2013).

243. *Id.*

244. See *id.* at 2618, 2625-27.

245. See, e.g., Jon Greenbaum et al., *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 *How. L.J.* 811, 814 (2014) (asserting that the Court incorrectly applied Fifteenth Amendment precedent in deciding *Shelby County*); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 *WASH. L. REV.* 379, 381-82, 384 (2014) (arguing that preclearance is still constitutional under the Reconstruction Amendments).

as a commentary on statutory shelf life,²⁴⁶ but it does not undercut the VRA's validity as it was enacted. The Court noted in *Shelby County* that Congress justifiably enacted the coverage formula in 1965 but determined that this particular provision could not be rationalized in 2013.²⁴⁷ The Court reasoned that the coverage formula was unconstitutional because it lacked those *unique circumstances* (such as literacy tests and low voter registration in African American communities) that existed when Congress wrote the formula.²⁴⁸

Although the *Shelby County* Court gutted the coverage formula, its holding does not weaken the comparison to election cybersecurity concerns. The analogy relies on the VRA to demonstrate Congress's authority to legislate oversight over specific states under *unique circumstances*, rather than stand as good law. For example, if Congress enacted legislation like the VRA that targeted states with outdated election cybersecurity systems and successfully compelled those states to update those systems through a federal audit, then the *Shelby County* decision may later become persuasive caselaw to strike down the cybersecurity coverage formula because the *unique circumstances* that permitted Congress to enact targeted federal oversight onto specific states would no longer exist. But in the present context, the *Shelby County* holding does not apply because Congress has yet to employ any oversight over states regarding election cybersecurity, let alone targeted oversight compelling technology upgrades.²⁴⁹ Therefore, even though the Court gutted the VRA coverage formula in *Shelby County*, that holding does not affect the analogy presented here.

246. See Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 61 (2015) (using *Shelby County* to determine when a court may find that a statute is nullified due to passage of time and changed circumstances).

247. *Shelby County*, 133 S. Ct. at 2627.

248. *Id.* at 2627-29, 2631.

249. See Derek Hawkins, *The Cybersecurity 202: Why the Latest Election Security Bill Is Stalled in Congress*, WASH. POST: POWER POST (Aug. 31, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/08/31/the-cybersecurity-202-why-the-latest-election-security-bill-is-stalled-in-congress/5b8829fb1b326b3f31919eaa/?noredirect=on&utm_term=.ea3d3f540898 [<https://perma.cc/6P6N-BMS3>].

2. Malfeasance Versus Nonfeasance: Intent's Role Within the Analogy

Commentators may also criticize this analogy as unfairly comparing states' intent to disenfranchise African Americans with not updating election systems. Critics would be correct to identify a distinction between how states intentionally denied African Americans' access to the ballot box and how states are failing to provide voters secure elections. The states' obstructionist tactics prior to the VRA are not equivalent to a state legislature that is indifferent to old voting machines, wants to enhance voter registration systems but cannot afford the change, or is willing to upgrade their election technology but distrusts federal involvement.²⁵⁰ Even in the most shocking example where states are using systems with outdated and unsupported software, there is no evidence that states are intentionally using old machines to reach a mischievous goal.²⁵¹ Therefore, challengers may argue that the analogy fails because the states' intent in each circumstance is consequentially different.

Although this distinction is accurate, the analogy hinges on the *unique circumstances* in these examples rather than the demonstrated intent. In the VRA example, States obstructed African American access to the ballot box through structural barriers and scare tactics.²⁵² The *Katzenbach* Court specifically recounted the States' race-based voter discrimination history prior to upholding the VRA as a valid exercise of constitutional authority.²⁵³ Even the *Shelby County* Court, which struck down the coverage formula, recognized that the VRA was only able to target federal oversight onto specific states due to these *unique circumstances*.²⁵⁴ In the election cybersecurity context, even after Russian hackers infiltrated state election systems, many states still did not act to update their machines and systems.²⁵⁵ At least some states and jurisdictions acted only after Congress offered funding for election

250. Compare Part I.A-B, with Part II.B.

251. See *supra* text accompanying notes 177-80.

252. See *supra* Part I.

253. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-15, 324-29 (1966).

254. *Shelby County v. Holder*, 133 S. Ct. 2612, 2627-29 (2013).

255. See *supra* text accompanying notes 217-19.

cybersecurity updates without federal oversight.²⁵⁶ In the wake of such a serious threat, the states' inaction presents Congress with another *unique circumstance* to justify and necessitate targeted federal oversight.

This analogy is not meant to compare the states' intent in each example, nor does the analogy rely on evident malfeasance. Instead, the analogy relies on the demonstrated *unique circumstances* in each situation. Since the comparison survives this distinction between function and intent, the analogy still holds.

CONCLUSION

In *South Carolina v. Katzenbach*, the Court held that Congress had the constitutional authority to enact the VRA.²⁵⁷ Even though the VRA treated some states differently than others, the Court found this disparate treatment was constitutional due to "*unique circumstances*."²⁵⁸ Should Congress decide to enact legislation that both sets new election cybersecurity standards and enforces those standards through targeted federal oversight of those states with outdated election systems, then Congress's action would be constitutional because analogous *unique circumstances* exist today.²⁵⁹

In response to Russia's cybersecurity attack on the 2016 election, former Director of National Intelligence James Clapper testified that "[i]f there has ever been a clarion call for vigilance and action against a threat to the very foundation of our democratic political system, this episode is it."²⁶⁰ In July 2017, after it was revealed that various state election systems were breached,²⁶¹ one in four American voters said they would consider not voting in upcoming elections over cybersecurity fears.²⁶² While some states are acting to secure American democracy and improve voter confidence, many states lag behind.²⁶³ The states that fail to update their election systems need more cybersecurity expertise and more funding to

256. See Sternstein, *supra* note 217.

257. *Katzenbach*, 383 U.S. at 337.

258. *Id.* at 334-35 (emphasis added).

259. See *supra* Part III.A.

260. NORDEN & VANDEWALKER, *supra* note 153, at 6.

261. See *supra* text accompanying note 127.

262. See CARBON BLACK, *supra* note 7, at 5.

263. See *supra* text accompanying notes 175, 177, 181-84.

complete desired upgrades.²⁶⁴ Without the federal government's intervention, it seems inevitable that further cybersecurity breaches will lead to a more anxious and uncertain electorate.

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264. *See supra* text accompanying notes 148, 170, 180, 182-83.

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