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## From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform

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*The Voting Rights Act of 1965 revolutionized access to the voting booth. Rather than responding to claims of voter suppression through litigation against individual states or localities, the Voting Rights Act introduced a coverage formula that preemptively regulated a large number of localities across the country. In doing so, the Voting Rights Act replaced reactive, piecemeal litigation with a proactive structure of continual federal oversight. As the most successful civil rights law in the nation's history, the Voting Rights Act provides a blueprint for responding to one of the most pressing civil rights problems the country faces today: police misconduct. As with voter suppression in*

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*the mid-twentieth century, abusive police conduct against minority citizens is a national problem perpetrated by thousands of localities. Federal efforts to cure the problem through litigation against individual police departments have failed to produce widespread reform. This Article applies the lessons of the Voting Rights Act by proposing the use of a coverage formula to identify and regulate local police departments engaged in a pattern of unconstitutional misconduct. While such a law would significantly enhance federal power over police departments, such a change is both necessary to curb police misconduct and constitutionally permissible.*

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## INTRODUCTION

Selma, Alabama, and Ferguson, Missouri, will forever be known for government violence against Black Americans. In Selma, in March of 1965, state troopers beat peaceful marchers who sought the ability to vote.<sup>1</sup> Five decades later, in Ferguson, in August of 2014, a police officer shot and killed an unarmed Black teenager, Michael Brown, who was stopped in the street by the officer on suspicion he had stolen cigarillos from a convenience store.<sup>2</sup> Both incidents generated national attention because they reflected ingrained national problems. In the 1960s, countless localities across the South replicated the voting discrimination in Selma, persisting despite decades of federal remedial efforts.<sup>3</sup> Similarly, the Ferguson Police Department is not an outlier in using deadly force against Black Americans: Philando Castile,<sup>4</sup> Alton Sterling,<sup>5</sup> Samuel DuBose,<sup>6</sup>

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1. See *infra* Part II.C (describing the historical circumstances surrounding the violence in Selma).

2. See, e.g., Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html> [https://perma.cc/S85M-6V7J] (providing details on the Michael Brown shooting).

3. See *infra* Part II.B (detailing a series of laws passed by Congress to deter voter suppressions through piecemeal, reactive litigation).

4. Matt Furber & Richard Pérez-Peña, *President Calls Police Shootings ‘American Issue,’* N.Y. TIMES, July 8, 2016, at A1 (describing police shooting of Philando Castile in Falcon Heights, Minnesota, during a traffic stop).

5. Richard Fausset et al., *U.S. Examines Police Killing in Louisiana*, N.Y. TIMES, July 7, 2016, at A1 (describing police shooting of Alton Sterling in Baton Rouge, Louisiana).

6. Sharon Coolidge et al., *Prosecutor: UC Officer ‘Purposefully Killed’ DuBose*, CIN. ENQUIRER (July 30, 2015), <http://www.cincinnati.com/story/news/2015/07/29/publish/30830777> [https://perma.cc/8GN8-WQZE] (describing shooting of Samuel Dubose by University of Cincinnati police officer during a traffic stop).

Tamir Rice,<sup>7</sup> Eric Garner,<sup>8</sup> Walter Scott,<sup>9</sup> Laquan McDonald,<sup>10</sup> and at least 655 other Black individuals are among those killed by police since the death of Michael Brown.<sup>11</sup>

For voting rights, the violence at the Selma march was a tipping point. It led to the enactment of the federal Voting Rights Act of 1965 (hereinafter VRA).<sup>12</sup> That law proved to be the most successful civil rights statute in the country's history, radically altering the federal response to voter discrimination.<sup>13</sup> Replacing earlier statutes that provided for litigation in response to individual instances of racial discrimination, the VRA created a coverage formula to identify offending states and localities and it subjected them to preemptive and ongoing federal oversight.<sup>14</sup> Unusual in its breadth and contentious at its time, the VRA eradicated discriminatory devices and techniques and gave millions of Black Americans access to the polls.<sup>15</sup> Indeed, the VRA was so successful in changing the voting landscape today that the Supreme Court recently deemed the illness of voting discrimination cured.<sup>16</sup>

Ferguson is this generation's Selma; police misconduct, our civil rights problem. Michael Brown's death sparked protests and riots around the country.<sup>17</sup> Today, across the political spectrum is deep and widespread concern about

7. Allen G. Breed, *Police Killing Data Filled with Many Unknowns*, HUFFINGTON POST (Dec. 7, 2014), [http://www.huffingtonpost.com/2014/12/07/police-killings\\_n\\_6284358.html](http://www.huffingtonpost.com/2014/12/07/police-killings_n_6284358.html) [<https://perma.cc/BU5T-QEXP>] (describing the police shooting of twelve-year-old Tamir Rice in Cleveland).

8. Martin Kaste, *System for Reporting Police Killings Unreliable, Study Finds*, NPR (Mar. 6, 2015), <http://www.npr.org/2015/03/06/391269342/system-for-reporting-police-killings-unreliable-study-finds> [<https://perma.cc/LWR7-X6DY>] (reporting on police shooting of Eric Garner in New York).

9. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<https://perma.cc/LJ9D-UQTG>] (describing the shooting death of Walter Scott by a North Charleston police officer, caught on a cell phone camera).

10. Monica Davey & Mitch Smith, *Justice Officials to Investigate Chicago Police Department After Laquan McDonald Case*, N.Y. TIMES (Dec. 6, 2015), <http://www.nytimes.com/2015/12/07/us/justice-dept-expected-to-investigate-chicago-police-after-laquan-mcdonald-case.html> [<https://perma.cc/5XVK-RU8K>] (describing the shooting of Laquan McDonald by a Chicago police officer).

11. The Fatal Encounters website aggregates and fact checks news reports of civilian deaths at the hands of law enforcement. This figure only reflects documented deaths of African American individuals at the hands of police between August 10, 2014, and September 30, 2016. It does not include the 777 cases where Fatal Encounters was unable to determine the race of the victim. Thus, this figure is possibly underinclusive. See *Spreadsheets*, FATAL ENCOUNTERS, <http://www.fatalevents.org/spreadsheets> [<https://perma.cc/693U-5W7X>].

12. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

13. See *infra* Parts II.D & E (describing the key provisions of the VRA and the impact it had on Black voter registration and turnout).

14. See *infra* Part II.D (discussing key provisions of the VRA).

15. See *infra* Part II.E (discussing the impact of the VRA on problematic jurisdictions).

16. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating the coverage formula of the VRA).

17. See, e.g., Bosman & Fitzsimmons, *supra* note 2.

abusive police practices and their impact upon racial minorities.<sup>18</sup> Indeed, in 2016 Terrence M. Cunningham, President of the International Association of Chiefs of Police, which is the largest police organization in the United States, apologized for his profession's "mistreatment of communities of color."<sup>19</sup> With little hope of local police departments (or their governing municipal bodies) reforming themselves, there is a growing consensus that only new forms of federal intervention will produce the necessary reform.<sup>20</sup> So far, however, Congress has created only limited federal tools for remedying police violations of civil rights.<sup>21</sup> The Department of Justice (DOJ) can pursue lawsuits in federal courts against police departments and officers, but such suits must be filed individually against single departments and their personnel. Relief is only available if the DOJ is able to prevail in its particular claims or reach a favorable settlement. Likewise, individuals who are victims of police misconduct can bring civil lawsuits in federal court for damages. But those suits—which can be expensive to pursue in the first place—can only generate a remedy against an individual department or officer. Reaching other police departments requires additional lawsuits, and even succeeding against a particular department (or officers) on a given claim does not guarantee that that department (and officers) will refrain from engaging in other kinds of abusive practices in the future.

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18. See Eric L. Adams, *We Must Stop Police Abuse of Black Men*, N.Y. TIMES, Dec. 5, 2014, at 35 (addressing ways to prevent police abuse that is targeted at communities of color); see also Emily Badger, *We've Reached a Tipping Point when Charles Krauthammer Is More Outspoken on Police Abuses than Barack Obama*, WASH. POST, Dec. 4, 2014 (addressing police bias and excessive force) ("When partisans who haven't said much about these issues before start to speak up, too, that's a sign that a larger swathe of America may be waking up to that reality, too."); Susan Saulny, *Chicago Police Abuse Cases Exceed Average*, N.Y. TIMES, Nov. 15, 2007, at 24 (findings from new report show patterns of police abuse were worst in low-income minority neighborhoods); Mitch Smith & Matt Apuzzo, *U.S. Makes Deal with Cleveland on Police Abuses*, N.Y. TIMES, May 26, 2015, at 1 (reporting that the Justice Department opened nearly two dozen investigations into police departments and found patterns of unconstitutional policing); Ilya Somin, *Reducing Police Abuses by Reducing the Number of Hostile Interactions Between Police and Civilians*, WASH. POST, July 10, 2016 (addressing the problem of police brutality and excessive force use against African Americans and the socioeconomic factors that heighten these encounters).

19. Tom Jackman, *U.S. Police Chiefs Group Apologizes for 'Historical Mistreatment' of Minorities*, WASH. POST (Oct. 17, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/10/17/head-of-u-s-police-chiefs-apologizes-for-historic-mistreatment-of-minorities> [<https://perma.cc/9W7N-LA8X>].

20. See, e.g., Blake Fleetwood, *Congress Finally Acts to Prevent Police Killings, but Will It Make a Difference?*, WASH. MONTHLY (Dec. 17, 2014), [http://www.washingtonmonthly.com/ten-miles-square/2014/12/congress\\_finally\\_acts\\_to\\_preve053348.php](http://www.washingtonmonthly.com/ten-miles-square/2014/12/congress_finally_acts_to_preve053348.php) [<https://perma.cc/PT9L-PSSR>] (describing Republican Senator Rand Paul's support for the federal Death in Custody Reporting Act); Jon Swaine, *Eric Holder Calls Failure to Collect Reliable Data on Police Killings Unacceptable*, GUARDIAN (Jan. 15, 2015), <http://www.theguardian.com/us-news/2015/jan/15/eric-holder-no-reliable-fbi-data-police-related-killings> [<https://perma.cc/Q7VJ-KD46>] (reporting on a statement by then-Attorney General Eric Holder that the inability even to track police use of force "strikes many—including me—as unacceptable").

21. See *infra* Part I (detailing the gradual growth of these limited regulations of local police conduct).

The limited tools available today to combat police misconduct bear a striking resemblance to those the federal government used to combat voting discrimination prior to the enactment of the VRA. Lawsuits had been limited to individual towns or counties with respect to particular voting practices and relief depended upon prevailing at trial or through settlement. While the DOJ can and does pursue litigation today against individual police officers and departments, the piecemeal approach that the law requires has proven insufficient to produce widespread reform.<sup>22</sup> Just as prior to the VRA, when lawsuits against local election officials had been a mechanism too little and too late to protect the right to vote, suing police officers and their departments in response to excessive violence and other abuses leaves today's law enforcement inadequately accountable and civil rights under protected.<sup>23</sup>

Remedying local police misconduct will require a federal law modeled upon the core provisions of the VRA. The law would set forth a coverage formula to identify police departments engaged in civil rights violations, and it would impose targeted reforms upon those departments in order to prevent future violations.

From the perspective of states and localities that historically exercised near plenary control over elections, the VRA was an intrusive federal statute. A law modeled upon the VRA to reduce police misconduct would likewise represent a significant increase in the power of the federal government over state and local affairs. However, given the magnitude of police misconduct and the failures of past responses to it, aggressive federal intervention is consistent with constitutional principles of federalism.

Part I describes the failures of past and current efforts to combat local police misconduct and the resulting persistence of civil rights abuses. Part II discusses the history of the VRA, its provisions, and its impact on voting discrimination to establish instructive precedent for remedying modern police abuses. Part III sets out the details of a federal law modeled upon the VRA to remedy police misconduct. It describes how Congress could develop a coverage formula to identify police departments engaged in unlawful conduct by consideration of criteria such as the number of civilians killed by a municipality's police department; the frequency of civil rights lawsuits against departments; unusual trends in arrest, stop, and search data; and shortfalls in officer disciplinary measures. Part III also identifies the reforms to which covered departments could be subject, including new rules governing use of force, the adoption of early intervention systems (computerized databases that allow supervisors to catch problematic patterns of behavior by individual officers), improved complaint management procedures, body cameras and other technological tools, and

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22. See *infra* Part II.D (chronicling the passage of 42 U.S.C. § 14141, which gives the United States Attorney General the authority to initiate structural reform litigation against police departments engaged in a pattern or practice of unconstitutional misconduct).

23. See *infra* Part I (demonstrating this problem across multiple regulatory avenues).

ongoing oversight measures. Part IV considers the constitutional issues raised by a federal law modeled upon the VRA to respond to police misconduct and why, notwithstanding federalism concerns, such a law is likely to survive judicial review.

## I.

### FAILED RESPONSES TO POLICE MISCONDUCT

Police misconduct, which frequently entails a constitutional violation, is a major civil rights problem. The problem remains unsolved despite decades of effort to produce reform.<sup>24</sup> In 1931, President Herbert Hoover's National Commission on Law Observance and Enforcement issued its "Report on Lawlessness in Law Enforcement," which described widespread physical abuse of suspects during custodial interrogations.<sup>25</sup> While that report generated some reforms, abusive conduct on the part of police remains entrenched today. Federal taskforces have found a range of problems that commonly afflict police departments, including racial profiling; excessive uses of force; unlawful stops, arrests, and searches; dishonesty under oath; and the planting of evidence.<sup>26</sup> Such tactics implicate a series of constitutional protections including the Fourth Amendment's protections against unreasonable searches and seizures, the Fifth Amendment's right against self-incrimination and to due process, the Sixth Amendment's safeguards at trial, and the Fourteenth Amendment's requirements of due process and equal protection of the laws. Decades of academic study have likewise concluded that misconduct that entails constitutional violations plagues police agencies across the country.<sup>27</sup>

Police misconduct disproportionately affects members of racial minority groups. Blacks and Latinos in particular are more likely "to live in high-crime neighborhoods where policing may be contentious" and "to report having negative interactions with police."<sup>28</sup> In jurisdictions across the country, racial minorities are subject to a disproportionate number of unlawful traffic stops,<sup>29</sup>

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24. See, e.g., PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [<https://perma.cc/K5Z4-3DFS>].

25. NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 3 (1931).

26. Michael S. Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 L. & SOC. INQUIRY 171, 172 (2009) (reporting on six national commissions that have catalogued police misconduct).

27. Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 380-81 (2010) (citing examples of police misconduct identified in the academic literature).

28. Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC. PROBS. 305, 305 (2004).

29. For a general review of the national scope of racial profiling in traffic stops, see David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [<https://perma.cc/MPW6-Z5Q9>]; Sharon LaFraniere & Andrew Lehren, *The Disproportionate Risks of*

*Terry* stops,<sup>30</sup> and officer use of deadly force.<sup>31</sup> As a result, the proportion of Black and Latino residents in a geographical area correlates with the frequency of civil rights complaints for police brutality filed in that geographical area.<sup>32</sup>

Besides the equal protection issues that are implicated, unequal treatment of certain members of the population has real consequences. A vast literature demonstrates that the legitimacy and effectiveness of policing depend heavily on perceptions by ordinary citizens that officers are following fair procedures in their interactions with the public and can be trusted.<sup>33</sup> Legitimacy fosters citizen

*Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/8QGB-8VW5>] (describing evidence of bias in traffic stops in Greensboro, North Carolina). Data also shows that Black individuals are overrepresented in traffic stops. *See, e.g.*, Christopher Ingraham, *You Really Can Get Pulled Over for Driving While Black*, *Federal Statistics Show*, WASH. POST (Sept. 9, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show> [<https://perma.cc/EC85-YK3B>] (showing that more Black drivers were pulled over than White drivers, according to the limited Justice Department statistics). In self-reported surveys, Black and Latino drivers are also more likely to believe that they were pulled over unjustifiably by law enforcement. *See* Richard J. Lundman & Robert F. Kaufman, *Driving While Black: Effects of Race, Ethnicity, and Gender on Citizen Self-Reports of Traffic Stops and Police Actions*, 41 CRIMINOLOGY 1, 195 (2003) (describing the results of a study which confirmed that “police are significantly more likely to stop African-American male drivers”).

30. The New York Police Department (NYPD) is an iconic example of this phenomenon. On August 12, 2013, U.S. District Judge Shira Scheindlin ruled that the NYPD’s stop-and-frisk program violated the constitutional rights of minority residents, as it constituted a “policy of indirect racial profiling.” Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [<http://perma.cc/BS4W-86C8>] (providing details about Judge Scheindlin’s ruling). In 1990, the NYPD officers only recorded 41,438 *Terry* stops. FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* 128 (2012). By 2011, this number had risen to an astonishing 685,724—an increase of over 1,500 percent. Dylan Matthews, *Here’s What You Need to Know About Stop and Frisk—and Why the Courts Shut It Down*, WASH. POST (Aug. 13, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/13/heres-what-you-need-to-know-about-stop-and-frisk-and-why-the-courts-shut-it-down> [<https://perma.cc/2VYT-B4A7>]. Of those stopped by the NYPD pursuant to this policy, an estimated 87 percent were either Latino or African American. ZIMRING, *supra* note 30, at 129. And these stops rarely led to an arrest or yielded illegal contraband. On average, the NYPD seizes illegal contraband once for every 143 stops of African Americans and 99 stops for Latinos. Adam Serwer & Jaeah Lee, *Charts: Are the NYPD’s Stop-and-Frisks Violating the Constitution?*, MOTHER JONES (Apr. 29, 2013), <http://www.motherjones.com/politics/2013/04/new-york-nypd-stop-frisk-lawsuit-trial-charts> [<https://perma.cc/74WF-WD3F>].

31. *The Counted: People Killed by Police in the US*, GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [<https://perma.cc/5EXT-Z8NZ>] (showing that 7.18 per million Blacks and 3.5 per million Latinos were killed by police in 2015, compared to only 2.92 whites).

32. *See, e.g.*, Malcolm D. Holmes, *Minority Threat and Police Brutality: Determinants of Civil Rights Criminal Complaints in U.S. Municipalities*, 38 CRIMINOLOGY 343 (2000) (using data on 18 U.S.C. § 242 complaints to identify patterns of complaint frequency in demographically varied municipalities).

33. *See generally*, CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513 (2003).



cooperation with law enforcement, thus making the job of officers easier.<sup>34</sup> If, by contrast, the public perceives the police to be acting unfairly, the police lose legitimacy, citizen disobedience increases, and cooperation from the community in preventing and solving crimes diminishes.<sup>35</sup> In large municipalities like New York City, Blacks and Latinos report lower levels of trust in law enforcement as a result of police treatment of minority residents; subsequently, Blacks and Latinos are less willing to cooperate with the police.<sup>36</sup> When distrust undermines the *effectiveness* of police work, it implicates broader public concerns. Specifically, its impact extends beyond any particular individual or group subject to mistreatment and, through unsolved crimes and other deficiencies, imposes costs upon society as a whole.

Nonetheless, police misconduct does not implicate all *localities* equally. A DOJ study concluded that certain police departments have generated significantly more federal complaints for misconduct than other similarly sized police departments.<sup>37</sup> One reason for such disparities is the structure of a police department itself. Experts in policing report that “the roots of police misconduct rest within the organizational culture of policing.”<sup>38</sup> In particular, “lax supervision and inadequate investigation” of internal wrongdoing make some departments considerably more likely to produce misconduct than others.<sup>39</sup> Given the considerable decentralization of American policing, wide disparities can thus exist from one municipality to the next.<sup>40</sup>

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34. See, e.g., Tracey L. Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651 (2009); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375 (2006).

35. See, e.g., Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement?: The Influence of the Purposes and Targets of Policing*, 17 PSYCH. PUB. POL'Y & L. 419 (2011).

36. Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322, 332–40 (2005) (showing this disparity in Tables 1 through 4).

37. See *Federal Response to Police Misconduct: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. 92–162 (1992) (showing New Orleans and Los Angeles County as the top locations for misconduct).

38. Simmons, *supra* note 27, at 381; see also ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE ACCOUNTABILITY IN THE UNITED STATES 1, 33, 45 (1998) (describing the ways organizational structures contribute to police misconduct); INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter CHRISTOPHER COMMISSION REPORT] (linking the LAPD's organizational mismanagement to misconduct); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 493–94 (2004) (explaining how organizational culture can facilitate police brutality).

39. Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 818 (1999).

40. Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 141–48 (2016) (describing decentralization in American law enforcement and its effects).

Police departments have proven unwilling or unable to take adequate steps to prevent or remedy officer misconduct.<sup>41</sup> Police departments tend to protect their own and have little incentive to watch for or respond to abusive practices.<sup>42</sup> Even in cases of egregious police behavior that generates widespread publicity, a department's response may be to close ranks rather than to recognize fault.<sup>43</sup> State and local officials have also failed to curb police misconduct. This, too, is not surprising. Preventing and remedying police misconduct is costly and requires localities to reallocate scarce resources from schools, parks, and other services to deal with police reform.<sup>44</sup> Government officials depend upon favorable relationships with their police departments and elections may turn on the level of police support.<sup>45</sup>

#### A. *Approaches to Preventing and Remedying Police Misconduct*

When violations of rights persist at the local level, the federal government can intervene. The DOJ has pursued some instances of police misconduct, but those efforts have not resulted in comprehensive reform.<sup>46</sup> The basic shortcoming is that the remedial tools Congress has created can, at best, address

41. See *id.* at 148–50 (showing how municipalities have had little incentive to address police misconduct that disproportionately affects minority residents and discussing the example of the Maricopa County Sheriff's Department).

42. Armacost, *supra* note 38, at 454 (explaining how “[i]n the face of outside criticism, cops tend to circle the wagons, adopting a ‘code of silence,’ protecting each other, and defending each other’s actions. If the misconduct is found to be true, moreover, their departments deem the miscreants ‘rogue cops’ whose conduct does not reflect negatively on the organization from which they came”).

43. See, e.g., Sheryl Gay Stolberg & Jesse Bidgood, *Prosecutors Say Baltimore Police Mishandled Freddie Gray Case*, N.Y. TIMES (July 29, 2016), <http://www.nytimes.com/2016/07/29/us/freddie-gray-baltimore.html> [<https://perma.cc/AR4N-RZJS>] (“After a string of high-profile defeats, the prosecutors who were unable to win convictions of police officers in the death of Freddie Gray . . . sharply accused the city’s Police Department of undermining them.”). Some authors have described a “blue wall of silence” or an “unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer.” Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998).

44. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1408–09 (2015) (reporting on resource constraints).

45. For example, the nonpartisan research organization MapLight has shown that lobbying groups associated with police unions have spent over a million dollars in recent years to influence elections. See MAPLIGHT, <http://maplight.org/us-congress/lobbying?client=Police> [<https://perma.cc/7W8K-8H2F>]; see also Lee Fang, *Baltimore Activists Recount How Police Unions Crushed Accountability Reforms*, INTERCEPT: UNOFFICIAL SOURCES (May 1, 2015), <https://theintercept.com/2015/05/01/police-union-influence-maryland-runs-deep> [<https://perma.cc/U4FE-3E2M>]; Lee Fang, *Maryland Cop Lobbyists Helped Block Reforms Just Last Month*, INTERCEPT: UNOFFICIAL SOURCES (Apr. 28, 2015), <https://theintercept.com/2015/04/28/baltimore-freddie-gray-prosecute> [<https://perma.cc/D53T-8URD>].

46. Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1353 (“Historically, the federal government has never acted as ‘the front line troops in combating . . . police abuse.’”) (quoting John R. Dunne, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice in *Police Brutality: Hearing Before the H. Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. 133 (1991)).

only specific problems in individual departments through a piecemeal approach. There is, in other words, no current mechanism for the DOJ or any other entity to target multiple departments in a single remedial action, nor is there any mechanism to ensure the sustainability of federal police reform efforts.

In addressing police abuses, the DOJ has made use primarily of two statutes: 18 U.S.C. § 242, which authorizes the DOJ to bring criminal charges against police officers who willfully deprive individuals of their constitutional rights,<sup>47</sup> and 42 U.S.C. § 14141, which empowers the DOJ to pursue equitable relief against police departments engaged in a pattern or practice of unconstitutional conduct.<sup>48</sup> In principle, these two statutes give the DOJ considerable power to curb police abuses. However, they have proven to be of limited effectiveness, since resource limitations have prevented the DOJ from deploying either statute in more than a small number of cases.<sup>49</sup>

In addition, because of a lack of recordkeeping on local police behavior, the DOJ has struggled to identify which police officers and which police departments are actually in violation of the statutory provisions.<sup>50</sup> Further, state and local governments have tended to resist federal intrusion, which has blunted the effectiveness of the DOJ's statutory powers.

This is not the first time the DOJ has lacked adequate tools to remedy local violations of the constitutional rights of minority citizens. Before the enactment of the VRA, the DOJ was likewise limited to addressing violations of voting rights through piecemeal tools that failed to produce more systemic reform. It should, therefore, come as little surprise that a similar piecemeal approach to remedying police misconduct is not effective.

Other efforts beyond DOJ interventions to address police misconduct have also failed to alter the overall landscape. The federal courts have invalidated certain police practices. However, as courts are limited to specific cases, they too

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47. 18 U.S.C. § 242 (2012) (“Whoever, under color of any law . . . willfully subjects any person in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned . . .”).

48. 42 U.S.C. § 14141 (2012) (“Whenever the Attorney General has reasonable cause to believe that [a police department is engaged in a pattern or practice of unconstitutional conduct], the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.”).

49. Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100–01 (2001) (reporting that the DOJ lacks the resources to address policing problems like racial profiling, as indicated by the small number of consent decrees under § 14141); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1407–11 (2000) (linking lack of DOJ enforcement of § 14141 cases to resource constraints); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3192, 3226 (2014) (discussing reasons for the small number of § 14141 cases); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 493 (2008) (stating that the DOJ has cited cost effectiveness as a reason for avoiding litigation in § 14141 cases).

50. Rushin, *Federal Enforcement of Police Reform*, *supra* note 49, at 3240 (outlining problems of case selection).

have not served as the engine of more generalized reform. Efforts by victims to sue errant officers or their departments have likewise produced only limited success.

The remainder of Part I examines efforts to prevent and remedy police misconduct by addressing the successes and shortcomings of four approaches: the exclusion of evidence at trial, civil lawsuits, criminal prosecution of individual officers, and structural reform litigation. As Part I shows, while each of these tools has been useful in certain circumstances, none has produced general reform. The result, as was true with respect to voting prior to the VRA, is ongoing misconduct directed largely at minority citizens that evades a cure.

### 1. *Exclusion of Evidence*

The exclusionary rule aims to deter police misconduct by barring admission at trial of evidence obtained in violation of the Constitution. The Supreme Court first adopted the rule in 1914 in *Weeks v. United States*, ruling unanimously that the government could not use evidence obtained unlawfully by a federal law enforcement agent against a defendant at trial.<sup>51</sup> The Court explained, “[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts.”<sup>52</sup> *Weeks* and its progeny were limited to federal law enforcement, a relatively small subsection of police officers, but in 1961 the Court extended the exclusionary rule to state law enforcement agents in *Mapp v. Ohio*.<sup>53</sup>

While empirical evidence suggests that federal and state courts make regular use of the exclusionary rule to bar unlawfully obtained evidence,<sup>54</sup> the rule has added only limited value in actually curbing police misconduct. Since *Weeks* and *Mapp*, the Supreme Court has carved out numerous exceptions to the exclusionary rule.<sup>55</sup> As a result, the rule today is substantially narrower than the scope of misconduct that exists in American police departments.

For example, a wide range of police wrongdoing may violate the Constitution but not result in the collection of incriminating evidence, such that the exclusionary rule is of no practical relevance.<sup>56</sup> In addition, the deterrent

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51. 232 U.S. 383, 398 (1914).

52. *Id.* at 392.

53. 367 U.S. 643, 655 (1961).

54. See David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580 (2008) (reporting that 300,000 cases each year are thrown out because of Fourth Amendment violations).

55. See, e.g., *United States v. Leon*, 468 U.S. 897, 919–20 (1984) (permitting prosecutors to use evidence obtained unlawfully if officers nonetheless acted in good faith); *Nix v. Williams*, 467 U.S. 431 (1984) (holding that police are allowed to use evidence obtained unlawfully if evidence would have been inevitably discovered).

56. For example, in August of 2013 a federal district court found that the NYPD’s use of stop-and-frisk violated the constitutional rights of minority residents because it constituted a “policy of

value of the rule is reduced when most criminal convictions result not from trials but from guilty pleas in which defendants waive any challenges to constitutional violations by police investigators.<sup>57</sup>

Scholars and policymakers have criticized the exclusionary rule for, among other things, allowing “manifestly dangerous criminals”<sup>58</sup> to go free on what might seem like a technicality and failing to serve the interests of those who are innocent.<sup>59</sup>

Perhaps, most significantly, the future of the exclusionary rule may be in doubt. In recent cases, members of the Supreme Court have expressed considerable skepticism about the continued usefulness of the rule.<sup>60</sup> So far, that skepticism has translated into gradual narrowing of the circumstances in which exclusion of evidence is required.<sup>61</sup> Yet some commentators have predicted that in the future the Court may significantly limit or dispense with the rule entirely.<sup>62</sup> As a result, the exclusionary rule has done little to reform police misconduct in the past and is not likely to play a significant role in reform in the future.

## 2. Civil Litigation

Private litigants have sought redress for police misconduct through civil litigation, but this avenue also has significant limitations. Under 42 U.S.C. § 1983, litigants can bring suit in federal court against police officers who deprive them of federal constitutional rights.<sup>63</sup> Such suits, however, are difficult to win.<sup>64</sup>

A series of problems also stand in the way of using § 1983 to remedy police misconduct in a systemic fashion. Individual officers are protected from civil suit

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indirect racial profiling.” Goldstein, *supra* note 30. Notably, in 90 percent of these cases no arrest or summons resulted and thus the exclusionary rule was irrelevant. *Id.*

57. Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831–33 (2003).

58. Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 111 (2003).

59. Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL’Y 457, 465 (1997).

60. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 599 (2006) (expressing skepticism about the continuing need for the exclusionary rule because of improved professionalization of law enforcement).

61. *See, e.g.*, *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (applying the attenuation doctrine to hold exclusion of evidence was not warranted where a police officer unlawfully stopped a pedestrian and demanded to see his identification, ran a background check that produced an outstanding warrant, arrested the individual on the basis of that warrant, and in the search incident to the arrest discovered narcotics and drug paraphernalia possession of which the defendant was prosecuted and convicted).

62. *See generally* Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751 (2007); James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008).

63. 42 U.S.C. § 1983 (2012) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding . . .”).

64. *See, e.g.*, Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 783 (1979) (showing that juries “are not impartial because many jurors disfavor plaintiffs and favor police defendants”).

by the qualified immunity doctrine,<sup>65</sup> which shields them from liability when they are acting within the scope of their employment and their behavior does not demonstrate a clear disregard for constitutional rights.<sup>66</sup> Officers whose conduct leaves them beyond the safe harbor of qualified immunity generally still benefit from departmental indemnification policies. Virtually all departments indemnify police officers for penalties resulting from a successful § 1983 action.<sup>67</sup> As a result, officers rarely if ever personally feel the financial consequences of their own misconduct. The deterrent value of § 1983 is thus modest for individual officers.

Alternatively, a plaintiff can use § 1983 to reach into the deeper pockets of the relevant municipality. Since *Monell v. NYC Department of Social Services*, private litigants have had the ability to bring suit against municipalities that, in their hiring, training, or supervision of police officers, were deliberately indifferent to the constitutional rights of individuals.<sup>68</sup> In practice, however, two significant hurdles stand in the way of municipal liability as a mechanism for police reform.

First, punitive damages are not available against municipalities via a *Monell* suit on the rationale that punitive damages would only penalize the taxpayers.<sup>69</sup> The absence of punitive damages—a remedy designed to deter unlawful behavior—means any resulting judgment (or threat thereof) may be insufficient to alter police practices, even assuming available compensatory damages are sufficient to prompt victims to bring lawsuits in the first place.<sup>70</sup> In essence, in many instances it is not worth the trouble even to initiate the suit. Additionally, although attorney’s fees in § 1983 cases are recoverable under certain circumstances,<sup>71</sup> without the possibility of a lawyer being able to share in

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65. See generally Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 892–95 (2014) (explaining the historical basis and scope of modern qualified immunity doctrine).

66. See *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (establishing the “clearly established” law standard for qualified immunity cases); *Forrester v. White*, 484 U.S. 219, 223 (1988) (explaining that “[w]hen officials are threatened with personal liability . . . they may . . . be induced to act with an excess of caution . . . in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct”).

67. Schwartz, *supra* note 65, at 912–13 (showing that officers were responsible for paying judgments, settlements, or legal fees in a mere 0.41 percent of cases).

68. *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 663 (1978) (establishing that a § 1983 plaintiff may recover from a government agency based on the actions of an employee); *accord* *City of Canton v. Harris*, 489 U.S. 378, 379 (1989) (concluding that a municipality may be liable for the actions of an employee under § 1983 if the municipality was deliberately indifferent to the likelihood that a constitutional violation would occur through its failure to train or oversee officers).

69. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (immunizing municipalities from punitive damage awards in § 1983 cases).

70. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (punitive damages are “intended to punish the defendant and to deter future wrongdoing”).

71. 42 U.S.C. § 1988 (2012) (“In any action or proceeding to enforce a provision of [§] 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”); see SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES

an award of punitive damages, victims who cannot afford to hire counsel on their own may have a difficult time finding legal representation.

Second, the organization of local governments works to prevent police departments from ever internalizing the costs of *Monell* suits. As Professors Samuel Walker and Morgan Macdonald explain, “[O]ne agency of government, the police department, commits abuses of rights, another agency, the city attorney’s office, defends the conduct in court, and a third agency, the city treasurer, pays whatever financial settlement results from the litigation.”<sup>72</sup> Given the absence of punitive damages and the fact that police departments might not bear the costs of any financial award obtained in litigation, departments may have little incentive to undertake reform efforts on their own.

More generally, the shortcomings of § 1983 litigation are exacerbated by challenges that apply to virtually all civil litigation such as the cost of bringing the claim, the difficulty of obtaining an effective lawyer, and other similar procedural barriers.<sup>73</sup> In sum, while civil litigation may prove a viable remedy in some cases of police misconduct, it does not serve well as a regulatory mechanism.

### 3. *Criminal Prosecution*

Criminal prosecution of police officers also fails as an adequate regulatory tool. Most criminal law is state law and thus prosecutions of officers in state court confront several significant barriers that can prove fatal to obtaining a conviction. While federal law has attempted to provide a solution, prosecution under the federal statute is limited.

In many state prosecutions, fellow officers are responsible for investigating cases of alleged criminal wrongdoing, and, as a result, cases might never get off the ground.<sup>74</sup> For instance, the department might make a case against an officer low priority. Investigating officers might also decline to pursue leads with the same vigor they bring to other cases, or decide witnesses are biased against the police and thus unreliable. In another instance, investigators might downplay evidence that in a different case would be deemed probative. Or they might give

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LITIGATION: THE LAW OF SECTION 1983, at §§ 10:1–10:52 (4th ed. 2016) (discussing the complexities associated with obtaining and calculating attorney’s fees under in section 1983 claims).

72. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. C.R.L.J. 479, 495 (2009).

73. See, e.g., Robert E. Litan, *Speeding Up Civil Justice*, 73 JUDICATURE 162, 162 (1989) (“[H]igh costs of litigating in America unreasonably impede access to the civil justice system . . . .”); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 517 (2009) (concluding that “low value disputes are not prosecuted because litigation cost can impose an insurmountable . . . barrier”); Joan Grace Ritchey, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 318–31 (2001) (reporting on difficulties of access to counsel).

74. John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 804 (citing California as a state where “investigations of police misconduct are conducted by the Internal Affairs Division of the suspect officer’s own department”).

an alleged officer-perpetrator more regular benefits of doubts and be susceptible to signals from other officers who oppose the investigation. In some circumstances, outright interference with the investigation might occur, for example through destruction of evidence.<sup>75</sup> Even if an investigation proceeds, a further roadblock might emerge. Prosecutors, dependent upon their own relationships with local law enforcement, are often reluctant to pursue criminal charges against the police.<sup>76</sup>

One solution to these localized conflicts of interest is prosecution by the federal government under 18 U.S.C. § 242, which provides that “[w]hoever, under color of any law . . . willfully subjects any person in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . or imprisoned.”<sup>77</sup> Yet limited prosecutorial resources have left this statute underutilized; the DOJ only has resources to investigate and bring charges in a small portion of cases.<sup>78</sup> In addition, in *Screws v. United States*, the Supreme Court held that the term “willfully” under § 242 requires prosecutors to demonstrate that an officer acted with the knowledge and intent that his or her actions would cause a deprivation of civil rights.<sup>79</sup> As a result of this interpretation, federal prosecutors have found winning § 242 cases to be extremely challenging.<sup>80</sup>

More generally, criminal prosecution is only ever possible when an officer actually violates an applicable criminal statute. Existing criminal laws do not address a good deal of police misconduct.<sup>81</sup> In addition, criminal cases by their very nature impose heightened proof requirements. Unless the officer pleads guilty, conviction requires proof beyond a reasonable doubt. Finally, even when cases get to trial, juries (and judges when they act as fact finders) have proven

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75. See, e.g., Rikki King, *Arlington Officer Fired for Destroying Evidence Against Him*, HERALD NET (July 27, 2016), <http://www.heraldnet.com/news/arlington-officer-fired-for-destroying-evidence-against-him> [<https://perma.cc/7LSC-JP4N>] (describing how an officer destroyed evidence relevant to an internal investigation into his conduct); Emily Previti, *Former Police Chief Covered for Officer, Destroyed Evidence*, WITF (Mar. 16, 2016), <http://www.witf.org/news/2016/03/report-former-police-chief-covered-for-officer-destroyed-evidence.php> [<https://perma.cc/3KFK-KLYE>] (showing an example of a police chief who destroyed evidence relevant to an internal investigation of an officer).

76. Jacobi, *supra* note 74, at 804 (describing how prosecutors face “an impossible conflict of interest between their desire to maintain working relationships and their duty to investigate and prosecute police brutality”) (internal citation omitted).

77. 18 U.S.C. § 242 (2012).

78. Rushin, *Federal Enforcement of Police Reform*, *supra* note 49, at 3203 (reporting that between 1981 and 1990, the DOJ only had resources to investigate 30–40 percent of § 242 complaints and brought charges in 1 percent of cases).

79. 325 U.S. 91 (1945).

80. Jacobi, *supra* note 74, at 809–11 (describing how “[the] *Screws* specific intent element deters federal prosecutions of police misconduct”).

81. Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 n.138 (1999) (claiming that criminal prosecution only captures a small subset of the most egregious police misconduct).



reluctant to enter guilty verdicts against police officers.<sup>82</sup> For all of these reasons, criminal liability is not well suited to addressing the range of officer misconduct that exists today.

Combined, the barriers to criminal prosecution have limited its usefulness as a weapon to fight police wrongdoing.

#### 4. *Structural Reform Litigation*

Recognizing the inadequacy of traditional tools to address abusive police conduct, Congress has empowered the DOJ to bring structural reform litigation (SRL) against police departments. Under 42 U.S.C. § 14141, the Attorney General has the authority to seek equitable relief against police departments engaged in a pattern or practice of unconstitutional misconduct.<sup>83</sup> However, use of this mechanism has also faced significant hurdles.

Although public and private litigants had used SRL for decades to reform prisons and schools, a pair of judicial decisions prevented simply applying existing statutory measures to police departments. First, in 1976 the Supreme Court held in *Los Angeles v. Lyons* that a private plaintiff did not have standing to initiate SRL against a police department unless the plaintiff could prove a real, immediate, and continuing threat of injury.<sup>84</sup> In *Lyons*, an LAPD officer had used a chokehold on the plaintiff,<sup>85</sup> but the Court held that since the plaintiff could not prove a substantial likelihood that he would be subject to a chokehold again,<sup>86</sup> he lacked standing to initiate SRL to enjoin the behavior.<sup>87</sup>

A few years later, the DOJ sought an injunction against the Philadelphia Police Department (PPD) after concluding that the PPD engaged in systemic misconduct that violated the Constitution.<sup>88</sup> However, in *United States v. City of Philadelphia*, the U.S. Court of Appeals for the Third Circuit held that the DOJ likewise lacked the necessary standing to initiate SRL against the PPD.<sup>89</sup> After *Lyons* and *City of Philadelphia*, it appeared that until authorized by Congress, nobody had the requisite standing to initiate SRL against police departments.

Congress made SRL available after the 1991 video of LAPD officers beating Rodney King on the side of a California highway.<sup>90</sup> In the wake of this

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82. Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 *FORDHAM URB. L.J.* 639, 643–48 (2003) (discussing problems of burdens of proof in prosecutions against officers).

83. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (1994).

84. 461 U.S. 95, 101–02 (1983).

85. *Id.* at 97.

86. *Id.* at 111–13.

87. *Id.*

88. *United States v. City of Philadelphia*, 644 F.2d 187, 190 (3d Cir. 1980).

89. *Id.* at 206 (“[W]e will hold the Attorney General to the same pleading requirements we demand of a private litigant who brings an action under the Civil Rights Acts.”).

90. See Seth Mydans, *Seven Minutes in Los Angeles—A Special Report: Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, *N.Y. TIMES* (Mar. 18, 1991),

event, the House Subcommittee on Civil and Constitutional Rights convened a hearing on police brutality in the United States.<sup>91</sup> Invoking the Rodney King incident, Democratic members of the subcommittee bemoaned the inadequacy of existing legal remedies for police misconduct and championed SRL as the means to overhaul problematic police departments like the LAPD.<sup>92</sup> Civil rights advocates also testified as to the benefits of the approach.<sup>93</sup>

Following the subcommittee hearing, several members of Congress introduced the Police Accountability Act of 1991.<sup>94</sup> The Act authorized the U.S. Attorney General to seek equitable relief against police departments engaged in a pattern or practice of unconstitutional conduct.<sup>95</sup> Although the measure failed to become law in 1991,<sup>96</sup> a similar provision was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994<sup>97</sup> and codified at 42 U.S.C. § 14141.

Section 14141 has allowed the DOJ to make important strides in reforming some of the nation's most troubled police departments, including those of Los Angeles; Washington, DC; Seattle; New Orleans; Newark; Cleveland; Cincinnati; and Pittsburgh.<sup>98</sup> In these cases, the DOJ has successfully obtained equitable relief by forcing municipalities to allocate resources to police reform and empowering supportive local police leaders to make important policy changes that would have otherwise been politically impractical.<sup>99</sup> These cases have focused on reforming use of force policies, establishing internal oversight mechanisms, overhauling complaint procedures, improving officer training, ensuring bias-free policing, and promoting community policing.<sup>100</sup> At the same time, however, reform under § 14141 has been limited for three reasons.

First, the DOJ only has the resources to pursue a small number of SRL cases each year. Between 1994 and 2013, the DOJ has pursued an average of around three investigations pursuant to § 14141 annually, resulting in just one reform

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<http://www.nytimes.com/1991/03/18/us/seven-minutes-los-angeles-special-report-videotaped-beating-officers-puts-full.html> [<https://perma.cc/YC6W-BE8A>] (reporting on Rodney King incident).

91. See *Police Brutality: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. (1991).

92. *Id.* at 131 (describing as “very, very useful” DOJ authority to bring pattern or practice litigation) (statement of Rep. Don Edwards).

93. *Id.* at 54–118, 61 (“If there is a pattern or practice of abuse, the Justice Department ought to be able to deal with it . . .”) (statement of ACLU of Southern California Legal Director Paul Hoffman).

94. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1402–03 (2000) (reporting on legislative history).

95. *Id.*

96. Joan Biskupic, *Crime Measure Is a Casualty of Partisan Skirmishing*, 49 CONG. Q. WKLY. REP. 3528, 3530 (1991).

97. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (1994).

98. Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1378 (reporting on localities targeted under § 14141).

99. *Id.* at 1396–408 (reporting on effectiveness of SRL).

100. *Id.* at 1378–87 (describing each of these sort of reforms in turn).

case actually brought per year.<sup>101</sup> Given that there are around 18,000 law enforcement agencies in the United States,<sup>102</sup> the probability that any given police department will be subject to SRL via § 14141 in any given year is close to zero. Put differently, even if a pattern or practice of misconduct is present in just one of every one hundred police departments, the DOJ is capable of investigating just 2 percent of those departments each year.<sup>103</sup>

A second problem is that reform depends very heavily on cooperation from police departments. While the DOJ has succeeded in reforming police departments that have been compliant partners, other departments have proven resistant to reform because of local opposition to federal intervention.<sup>104</sup> The point underscores a fundamental limitation of SRL as a regulatory mechanism: it only works when local officials buy into the reform process and actively participate in achieving solutions.<sup>105</sup>

Specifically, where the DOJ has been able to leverage the structure of municipal governments and generate cooperation from relevant municipal officials, it is able to achieve favorable settlements in § 14141 cases.<sup>106</sup> By contrast, as the recent case of the Alamance County Sheriff's Department in North Carolina demonstrates, § 14141 falters when there is local resistance. In that case, which involved racially biased policing practices,<sup>107</sup> the DOJ was unable to reach a settlement with the police department or the county and went

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101. Rushin, *Federal Enforcement of Police Reform*, *supra* note 49, at 3244–47.

102. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), <http://www.bjs.gov/content/pub/pdf/cslllea08.pdf> [<https://perma.cc/3Z93-DD74>].

103. Rushin, *Federal Enforcement of Police Reform*, *supra* note 49, at 3230.

104. For example, the DOJ sought to overhaul the Alamance County Sheriff's Department, but ultimately failed to prove its case in the first federal § 14141 trial. *See* Michael D. Abernethy, *Judge Dismisses DOJ Case Against Johnson, Finds No Evidence of Unconstitutional Practices*, TIMES-NEWS (Aug. 7, 2015), <http://www.thetimesnews.com/article/20150807/NEWS/150809283> [<https://perma.cc/XV25-PC7U>].

105. Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1416–18 (documenting need for local support in successful use of § 14141).

106. Specifically, the DOJ has proven adept at working directly with local officials (including city attorneys, mayors, managers, and council members) in ways that bypass police departments and force reform. *Id.* at 1400–01.

107. The DOJ believed that Sheriff Terry Johnson in Alamance County, North Carolina was engaged in a pattern of racially charged policing tactics; a full-scale investigation by the DOJ concluded that Sheriff Johnson was in violation of § 14141. *See ACLU Urges Alamance Sheriff to Comply with DOJ Requests in Light of Lawsuit*, ACLU (Dec. 20, 2012), <https://www.aclu.org/news/aclu-urges-alamance-sheriff-comply-doj-requests-light-lawsuit?redirect=criminal-law-reform-immigrants-rights/aclu-urges-alamance-sheriff-comply-doj-requests-light-lawsuit> [<https://perma.cc/N92H-JSQZ>]; Colin Campbell, *McCrory Honors Alamance County Sheriff Facing Federal Allegations of Racial Profiling*, NEWS & OBSERVER (Dec. 19, 2014), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article10198235.html> [<https://perma.cc/LHN7-43N3>]; David Zucchino, *Sheriff's Treatment of Latinos Splits Town: A North Carolina Lawman Practices Discriminatory Policing, the Justice Department Says*, L.A. TIMES, Nov. 24, 2012, at A13.

to trial.<sup>108</sup> Ultimately, the federal district court held that the DOJ failed to prove a pattern or practice of misconduct.<sup>109</sup> As a result, the misconduct giving rise to the allegation was left unchanged—and the shortcomings of § 14141 exposed.

Third, § 14141 suffers from a problem that plagues all existing tools to combat police misconduct: a lack of comprehensive data that could serve as the basis for proving that a violation exists and reform is needed. The federal government currently compiles little data on police behavior.<sup>110</sup> It lacks data on such things as the frequency of officer use of force, wrongful stops and arrests, civilian complaints against police, and even on the number of civilians killed by law enforcement.<sup>111</sup>

In October 2016, the DOJ announced that in early 2017 it would start collecting nationwide data on police shootings and other violent encounters with the public. It remains to be seen whether such efforts will bear fruit.<sup>112</sup> As a result, the DOJ is currently in a poor position to assess the comparative levels of misconduct across police departments and identify the worst offenders. Therefore, when deployed, SRL has proven effective in many respects, but it is not a tool that can easily generate more widespread reform.

##### 5. Summary

In sum, the current array of legal mechanisms to fight police misconduct—the exclusionary rule, civil litigation, federal prosecution, and federally initiated structural reform litigation—all suffer from similar defects. These mechanisms rely on piecemeal, reactive litigation—a strategy that is woefully inadequate to securing widespread and enduring reform. Police officers who violate individual rights face little risk of being held liable for their actions or of being otherwise sanctioned. Although the federal government has powers to investigate and pursue police misconduct, current constraints—resource limits, a lack of data, evidentiary requirements, and evasive tactics by police departments—limit the punch those powers can deliver.

These problems are not unprecedented. Five decades ago, similar hurdles stood in the way of remedying racial discrimination in voting rights. Recognizing the limits of the existing tools to confront such discrimination, Congress adopted

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108. Emery P. Dalesio, *Attorney: NC Sheriff Won't Settle Profiling Claims*, ASSOCIATED PRESS (Sept. 26, 2012), <http://www.sandiegouniontribune.com/news/2012/sep/26/attorney-nc-sheriff-wont-settle-profiling-claims> [<https://perma.cc/VWY5-82K4>] (discussing a case in which the DOJ was not able to negotiate a settlement that entails reforms, and was forced to take the case to trial).

109. Abernethy, *supra* note 104.

110. Eric Lichtblau, *Justice Department to Track Use of Force by Police Across U.S.*, N.Y. TIMES, Oct. 14, 2016, at A12 (describing the general lack of adequate data on police behavior).

111. *Id.* (describing how the DOJ has historically failed to keep track of individuals killed by law enforcement or use of force incidents; further describing how the federal government has sought to correct these gaps in the existing data).

112. *Id.*

a whole new approach with the Voting Rights Act of 1965. Congress could take a similar approach to remedy police misconduct.

## II.

### BLUEPRINT: VOTING RIGHTS

The VRA represented an extraordinary response to the seemingly intractable problem of discrimination against Black citizens who sought to vote. Prior efforts to protect voting rights in the federal courts and through other forms of federal intervention had consistently come up short. Litigation was slow, costly, and dependent upon evidence that often lay in the hands of violators themselves. The risk of any particular locality facing sanction was always slim; and when one discriminatory practice was stamped out, another took its place.

These circumstances, which led to the innovations of the VRA, mirror in important respects conditions that exist today with respect to police misconduct. The experience in addressing voter discrimination—a seemingly entrenched problem at its time—sheds important light on how to address the problem of police practices that violate constitutional rights particularly of minority citizens. The issues are not, of course, identical. Applying lessons from the historical experience with voting reform to the contemporary problem of policing requires careful attention to differences between the two scenarios. Once such differences are taken into account, however, the VRA provides an exceedingly useful blueprint for police reform efforts.

#### A. *The Fifteenth Amendment*

The VRA represented the culmination of nearly a century of efforts at the federal level to protect the ability of Black citizens to vote. Those efforts started with the Fifteenth Amendment. Ratified in 1870, it provided in Section 1 that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”<sup>113</sup> Section 2 of the Amendment empowered Congress to enforce the Section 1 command “by appropriate legislation.”<sup>114</sup> Pursuant to that power, Congress enacted the Enforcement Acts of 1870 and 1871, which prohibited, by criminal penalty, discrimination by state officials in voter registration as well as certain private interferences with voting (and other federal) rights.<sup>115</sup>

Yet neither the clear command of the Fifteenth Amendment nor the early implementing statutes secured voting rights. While state laws no longer specifically limited voting to White citizens, by the 1890s, southern states had enacted literacy tests, registration requirements, property qualifications, good character tests, and a slew of other devices designed to prevent Black citizens

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113. U.S. CONST. amend. XV, § 1.

114. *Id.* § 2.

115. 16 Stat. 140, § 1–2 (1870); 16 Stat. 433, § 1 (1871).

from voting. Grandfather clauses and selective enforcement of these measures ensured White citizens were able to exercise the franchise.<sup>116</sup> As a result of these tests—and intimidation of and violence towards would-be voters—Black registration and voting rates in the South were very low, typically in the single percentage digits.<sup>117</sup>

From a modern perspective, it may be hard to appreciate how deeply entrenched discriminatory voting practices were during the nineteenth century and a good part of the twentieth—and how difficult it proved to end those practices. The Fifteenth Amendment and its Enforcement Acts were simply no match for the widespread interference with voting that occurred—and thus it remained a basic feature of American life.

Mirroring the difficulties of using civil litigation to reform police misconduct, private litigants rarely brought cases under the early voting rights statutes and piecemeal litigation was ineffective in producing general and long-lasting reform.<sup>118</sup> Beginning with a pair of decisions in 1915 invalidating grandfather clause exemptions that benefited White voters,<sup>119</sup> the Supreme Court provided some relief but not enough to guarantee equality in voting.<sup>120</sup>

Even though the Fifteenth Amendment prohibited denying the right to vote on the basis of race, discriminatory practices stood in the way of voting equality. While Congress and the Supreme Court tried to provide some relief, they were unsuccessful in fully securing voting rights. In the late 1950s, Congress began passing a series of Civil Rights Acts, which laid the foundation for the VRA.

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116. See GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY*, at xi-xii (2013).

117. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 32 (2004) (stating that Black voter registration in Louisiana was only 1.1 percent in 1904; 2 percent in Mississippi in 1892; 5 percent in Florida in 1896).

118. MAY, *supra* note 116, at 65.

119. *Guinn v. United States*, 238 U.S. 347, 364 (1915); *Myers v. Anderson*, 238 U.S. 368, 381–82 (1915).

120. In 1939, the Court invalidated a grandfather exemption to a registration deadline. *Lane v. Wilson*, 307 U.S. 268, 275 (1939). In 1944, the Court invalidated “white primary” laws. *Smith v. Allwright*, 321 U.S. 649, 666 (1944). In 1960, the Court invalidated racially discriminatory registration challenges. *United States v. Thomas*, 362 U.S. 58, 59 (1960). The Court also invalidated racial gerrymandering in Tuskegee, Alabama. *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960). And in a series of cases beginning in 1949, the Court invalidated discriminatory uses of voting tests. See *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (holding that provisions of the Louisiana Constitution and statutes “requir[ing] voters to satisfy registrars of their ability to understand and give reasonable interpretations of any section of Federal or State Constitution violated” the Fifteenth Amendment and the 1957 Act); *Alabama v. United States*, 371 U.S. 37 (1962) (per curiam) (affirming circuit court that under the 1957 Voting Rights Act, in a suit brought by the United States, a district court may order the registration of specified voters found to have been discriminatorily denied registration because of their race); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam) (affirming district court decision invalidating under Fifteenth Amendment provision of Alabama constitution requiring registrants to “understand and explain any article of the constitution of the United States in the English language”).

*B. Litigating Voting Rights*

The Civil Rights Acts of 1957, 1960, and 1964 included new statutory provisions to protect voting rights. However, because those provisions also operated in a piecemeal fashion and were dependent upon adjudication by courts, their benefits soon proved limited.

The Civil Rights Act of 1957 empowered the Attorney General to bring suits to protect the right to vote from deprivation or interference because of race or color.<sup>121</sup> The Act prohibited threats and intimidations for the purpose of interfering with the right to vote in federal elections and gave the Attorney General authority to bring suits against individuals engaging in such behavior.<sup>122</sup> Further, the Act established a Civil Rights Commission with the power to identify and investigate discriminatory mechanisms that abridged the right to vote.<sup>123</sup>

As the Attorney General brought lawsuits under the 1957 statute, it became clear that successful litigation required access to voting records to demonstrate that Black citizens were in fact treated differently than their White counterparts.<sup>124</sup> Thus, the Civil Rights Act of 1960 made the Attorney General responsible for compiling state voting statistics in order to establish the presence of a pattern or practice of racial discrimination.<sup>125</sup> In addition, Congress plainly recognized that if the federal government were to prevail in a lawsuit, it would need to enact concrete measures to ensure localities did not revert back to unlawful conduct. Thus, the statute permitted courts, by way of remedy, to appoint federal registrars with powers to register prospective voters at the state level. As a result, the federal government did not need to return to court to seek further judicial assistance in registering voters: federal executive officers had power to complete the registrations themselves.

Four years later, Congress created additional tools to attack discriminatory voting practices. The Civil Rights Act of 1964 provided for the expedition of voting suits and their trial before a three-judge district court with a direct appeal to the Supreme Court.<sup>126</sup> The statute also prohibited newly adopted voter qualifications in elections for federal offices, denial of voter registration because of immaterial errors in completing registration forms, and literacy tests as a

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121. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131 (c), 71 Stat. 637 (codified as amended at 52 U.S.C. § 10101 (2012)).

122. *Id.*

123. *Id.* § 105, 71 Stat. 635.

124. *Civil Rights Act of 1960: Hearings Before the S. Comm. on the Judiciary*, 86th Cong. 9 (1960) (“In many cases, discrimination in registration can be proved only by comparing the records of Negro applicants with those of White applicants. At the present time, the Government lacks any procedure by which to compel the production of these records before a suit is filed.”).

125. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 52 U.S.C. § 10101 (2012)).

126. Civil Rights Act of 1964, Pub. L. No. 88-352, § 101(3)(h), 78 Stat. 241 (codified as amended at 52 U.S.C. § 10101 (2012)).

qualification for voting unless conducted in writing,<sup>127</sup> and it created a (rebuttable) presumption of literacy for applicants who had completed the sixth grade.<sup>128</sup>

Although Congress enacted the Civil Rights Acts of 1957, 1960, and 1964 to end discrimination in voting, the overall benefits were modest. In 1960, only 28 percent of eligible Black citizens in southern states were registered to vote; by 1964 the figure had climbed to just 38 percent.<sup>129</sup> Neither a constitutional amendment nor a series of federal statutory measures were adequate to end discriminatory voting practices. With millions of citizens still denied the franchise, it took the Voting Rights Act of 1965 to produce more sweeping reform.

### C. *Selma and the 1965 Act*

While the 1964 reforms were more aggressive than any before, they were barely in effect when Congress acted again with a sweeping federal statute known as the Voting Rights Act of 1965. Soon after his landslide victory in the 1964 election, President Lyndon Johnson, back in office on the promise of a Great Society, set to work on further civil rights reforms. On December 14, 1964, Johnson instructed Attorney General Nicholas Katzenbach to prepare a new voting rights law<sup>130</sup> and by March 1 of the following year, DOJ staffers had drafted an expanded Voting Rights Act.<sup>131</sup>

Initially, senior members of Johnson's staff, including Katzenbach himself, had reservations about moving forward with further federal intervention in state and local election practices.<sup>132</sup> Historically, states and localities controlled election processes and federal interventions altered the balance between national and state/local power in an important domain of governmental authority. While it might seem natural today to have strong federal oversight of elections, in the 1960s virtually everyone would have recognized the shift in the balance of power that such oversight entailed—and the attendant political opposition any proposals would produce. So too, a proposal for greater federal intervention in police practices—also an area historically of state and local power—implicates important federalism issues and would likely generate resistance on that basis. The VRA experience both shows that such resistance is not new and can be overcome.

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127. *Id.* § 101(2)(A)–(C).

128. *Id.* § 101(3)(c).

129. RICHARD K. SCHER, *POLITICS IN THE NEW SOUTH: REPUBLICANISM, RACE AND LEADERSHIP IN THE TWENTIETH CENTURY* 250 (2d ed. 1997).

130. NICK KOTZ, *JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA* 245 (2005).

131. *See* MAY, *supra* note 116, at 95.

132. For example, Horace Busby, an aide and advisor to President Johnson, worried that the bill would mark “a return to Reconstruction.” *Id.*



Within the Johnson administration, all doubts about the need for a stronger federal voting law gave way with the violence that accompanied the Selma to Montgomery civil rights march on “Bloody Sunday,” March 7, 1965.<sup>133</sup> The march was the catalyst for the VRA’s passage in August of 1965. The fifty-four mile march, led by a coalition of civil rights organizations, aimed to draw attention to interference with Black voter registration.<sup>134</sup> State troopers and local residents beat and tear-gassed marchers at the Edmund Pettus Bridge.<sup>135</sup> Two days later, Martin Luther King Jr. led a second march that turned back when it arrived at a police barricade at the same bridge.<sup>136</sup> Martin Luther King Jr. and the marchers only completed the march after President Lyndon Johnson federalized the Alabama National Guard to protect the marchers from violence.<sup>137</sup>

On March 15, President Johnson presented his voting rights bill at a nationally televised joint session of Congress.<sup>138</sup> The VRA was introduced in the House on March 17, 1965, and in the Senate the next day.<sup>139</sup> Recognizing the need for bipartisan support, President Johnson enlisted the Republican minority leader, Illinois Senator Everett McKinley Dirksen, to help prepare and shepherd the bill.<sup>140</sup> Passage of the legislation was by no means certain. Southern representatives vigorously opposed the bill as an undue—and in their view unconstitutional—interference with state powers.<sup>141</sup>

On the other hand, some members of Congress, led by Senator Ted Kennedy, thought the proposed bill did not actually go far enough. Among other things, Senator Kennedy sought to add a provision barring poll taxes (already prohibited in federal elections under the Twenty-fourth Amendment) in state and local elections.<sup>142</sup> After Senator Kennedy’s proposed amendment narrowly failed,<sup>143</sup> the bill passed with bipartisan support and President Johnson signed it into law on August 6, 1965.<sup>144</sup> At the signing ceremony, President Johnson described the franchise as “the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men.”<sup>145</sup>

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133. *Id.* A draft of the VRA was completed six days before the Edmund Pettus Bridge incident.

134. *See id.* at 80–84.

135. *Id.* at 85–89.

136. *Id.* at 90, 99–104.

137. *Id.* at 130.

138. Special Message to the Congress on the Right to Vote, 1 PUB. PAPERS 287 (Mar. 15, 1965).

139. *See* H.R. 6400, 89th Cong. (1965); S. 1564, 89th Cong. (1965) (enacted); 111 CONG. REC. 5176, 5227–28 (1965).

140. *See* MAY, *supra* note 116, at 95.

141. *See* Part IV.A.1 *infra*.

142. *See* MAY, *supra* note 116, at 157–58.

143. *Id.* at 159. The Kennedy amendment was defeated by just four votes. *Id.*

144. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

145. Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 840, 842 (Aug. 6, 1965).

Nearly a century after ratification of the Fifteenth Amendment and after several failed efforts to end racial discrimination in voting, Congress had produced a statutory scheme with new and dramatic tools to equalize access to the voting booth.

#### *D. Key Provisions*

The Voting Rights Act of 1965 was a product of its time. Pervasive voter discrimination, enforced through violence that culminated in the events at Selma, and a history of failed federal reforms of the past created the conditions for enactment and use of a sweeping law.

The VRA was both retrospective, targeting existing ways in which states and localities impeded voting rights, and anticipatory, heading off new tactics of voter suppression. The VRA's specific provisions reflected the fact that earlier federal voting laws, dependent upon litigation and judicially imposed remedies, had proven ineffective at curbing abuses and thus a new, more radical approach was needed.<sup>146</sup> Most significantly, in place of piecemeal litigation, which required proof of discriminatory practices, the VRA established federal oversight of statutorily designated jurisdictions. These jurisdictions were required to demonstrate progress in order to be released from federal supervision.

While the Voting Rights Act of 1965 had some similarities to the Civil Rights Acts of previous years, it included significant new measures to combat voting discrimination. Like its predecessor laws, the VRA prohibited, in Section 2, racially discriminatory voting practices<sup>147</sup> and included a provision for litigation by the DOJ and private plaintiffs to enforce the requirements of the Fifteenth Amendment.<sup>148</sup>

The innovative parts of the 1965 Act were the coverage formula of Section 4<sup>149</sup> and the accompanying preclearance requirements of Section 5.<sup>150</sup> Under Section 4(b), states or their political subdivisions became "covered" if they used any test or device as a condition for voter registration on November 1, 1964, and either less than 50 percent of voting age persons were registered to vote on that date or less than 50 percent voted in the presidential election that year.<sup>151</sup> In other words, the statute made the presence of a test or device combined with low

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146. See Alexander Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 79 (explaining that the VRA was "enacted . . . as a substitute for litigation, which had proved a sadly inadequate engine of reform").

147. 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.").

148. *Id.* §§ 3, 11, 12(a)-(d). The Supreme Court interpreted the VRA to allow private lawsuits in *Allen v. State Board of Elections*, 393 U.S. 544, 561 (1969).

149. *Id.* § 4, 79 Stat. 438-39.

150. *Id.* § 5, 79 Stat. 439.

151. *Id.* § 4(b), 79 Stat. 438.

participation evidence of discrimination without any further proof.<sup>152</sup> As a result of this formula, in 1965 six states in their entirety became covered jurisdictions—Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—along with a swath of thirty-nine counties in North Carolina and one county in Arizona.<sup>153</sup>

Section 4 of the VRA also banned all tests or devices in covered jurisdictions,<sup>154</sup> but the most impactful tool was Section 5. It provided that changes in voting procedures could not take effect in a covered jurisdiction unless first approved by either the Attorney General or a three-judge district court in Washington, DC.<sup>155</sup> In other words, the VRA froze the power of covered states and counties to regulate voting without federal approval.<sup>156</sup> Moreover, in order to obtain “preclearance,” the jurisdiction itself was required to prove that the proposed change in voting procedures had neither “the purpose [nor] . . . the effect of denying or abridging the right to vote on account of race or color.”<sup>157</sup> As such, Section 5 prevented states and political subdivisions from adopting new discriminatory practices that the VRA had not specifically anticipated.

While the VRA represented a radical intervention into state and local government, it did provide a means for states and localities to escape federal oversight. Covered jurisdictions could bail out of the preclearance requirements if they could prove a five-year record of no discrimination.<sup>158</sup> That said, no state has been able to bail out of coverage, but political subdivisions have successfully done so.<sup>159</sup>

The VRA also provided for the appointment of federal voting examiners. Courts could appoint examiners as part of a remedial measure in a lawsuit

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152. The statute defined test or device broadly as “any 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.” *Id.* § 4(c), 79 Stat. 438.

153. 28 C.F.R. pt. 51, app. (2015). For a breakdown of voting rates at the time of consideration of the bill, see *Fact Sheet on Voting Rights*, CONG. Q., Mar. 19, 1965, at 429–33.

154. Voting Rights Act § 4(a).

155. *Id.* § 5.

156. In practice, most proposed voting changes were submitted to the Attorney General (rather than the court). See U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE’S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS 5 (2006), <http://www.usccr.gov/pubs/051006VRASatReport.pdf> [<https://perma.cc/26RM-EP7W>] (“The Division receives more than 99 percent of all section 5 preclearance submissions.”). The number of such proposals increased over time: there were 1,542 made between 1965–1974; 13,874 between 1975–1981; and 101,641 between 1982–2004. *Id.* at 23.

157. Voting Rights Act § 5.

158. *Id.* § 4(a).

159. See *Jurisdictions Currently Bailed Out*, U.S. DEP’T JUST., <http://www.justice.gov/crt/section-4-voting-rights-act#bailout> [<https://perma.cc/DSP6-B2MW>] (last visited Jan. 1, 2016).

instituted by the Attorney General.<sup>160</sup> More significantly, the Attorney General could determine that examiners were needed in political subdivisions covered by Section 4(b). Under the statute, the Civil Service Commission was required to appoint voting examiners whenever the Attorney General certified either of the following: (1) that the Attorney General had received meritorious written complaints from at least twenty residents alleging that they have been disenfranchised under color of law because of their race, or (2) that the appointment of examiners was otherwise necessary to effectuate the guarantees of the Fifteenth Amendment.<sup>161</sup> The Attorney General was to make the second determination by considering, among other factors, whether the registration ratio of nonwhites to whites was reasonably attributable to racial discrimination, or whether there was evidence of good faith efforts to comply with the Fifteenth Amendment.<sup>162</sup> These certifications by the Attorney General were not reviewable in any court.<sup>163</sup>

The power of the examiners lay in registration. Under the VRA, the examiners were required to test the voting qualifications of applicants (according to regulations of the Civil Service Commission prescribing times, places, procedures, and forms).<sup>164</sup> The examiner was to place “promptly” on a list of eligible voters “[a]ny person” the examiner found “to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States.”<sup>165</sup>

In sum, federal officials could simply bypass state and local registration decisions (or lack of action). Examiners were required to transmit their lists at least once a month to the appropriate state or local officials, who were required by the statute to place the listed names on the official voting rolls.<sup>166</sup> Any person listed by an examiner was then entitled to vote in all elections held more than forty-five days after the examiner transmitted that person’s name.<sup>167</sup> While the law provided a mechanism for state officials to challenge the registration, again the tables were turned: the state had to prove the individual was actually ineligible to vote.<sup>168</sup>

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160. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 3(a), 120 Stat. 578 (codified as amended at 52 U.S.C. § 10305 (2012)).

161. Voting Rights Act § 6(b).

162. *Id.*

163. *Id.* § 4(b).

164. *Id.* §§ 7(a), 9(b).

165. *Id.* § 7(b).

166. *Id.*

167. *Id.*

168. *Id.* §§ 7(b), 9(a). Other provisions of the VRA authorized the appointment of election observers, *id.* § 8, and directed the Attorney General to litigate the constitutionality of poll taxes, *id.* §§ 10(a), 10(b), and (in areas where examiners had been appointed) authorized federal courts to order that the counting of ballots by individuals denied access to the polls on election day were counted and included in the total vote, *id.* § 12(e).

These provisions reflected the problem with past efforts to enforce voting rights. The principal motivation of the 1965 Act was that the case-based approach to remedying voting discrimination was ineffective. Piecemeal litigation was slow, expensive,<sup>169</sup> and required proof that officials were applying seemingly neutral requirements in a discriminatory manner. While the federal government invariably prevailed in voting rights cases it took to court,<sup>170</sup> when a case invalidated one practice, states and localities simply employed another tactic to prevent Black citizens from exercising the franchise—thus necessitating a new round of litigation.<sup>171</sup>

At the same time, because no statutory response to voting discrimination would be absolutely precise, under the VRA some state conduct that was arguably not unconstitutional could well be swept into the new federal regime. In justifying the two components of the coverage formula—use of a test or device and low registration or voting in 1964—the House Committee observed that “[t]he record . . . indicates that where these two factors are present there is a strong probability that low registration and voting are a result of racial discrimination in the use of such tests.”<sup>172</sup> According to the committee’s report, “[d]ecisions of the Federal courts and the reports of the U.S. Civil Rights Commission persuasively indicate that many of the States and political subdivisions to which the formula applies have engaged in widespread violations of the 15th amendment over a period of time.”<sup>173</sup>

The congressional report’s references to “strong probability” and “many” are instructive. The committee fully recognized that the formula would bring some non-discriminating jurisdictions under federal oversight.<sup>174</sup> That result did not, however, mandate a more precise formula given the possibility of bailout.<sup>175</sup> Likewise, the House Committee found that “most if not all of the tests and devices affected are not capable of fair administration,” which justified their automatic suspension.<sup>176</sup> With respect to the appointment of examiners, the

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169. The Attorney General testified that each of the seventy-one voting rights cases filed by the DOJ under the 1957, 1960, and 1964 Civil Rights Acts required six thousand man-hours just to “analyze voting records in a single county.” *Voting Rights: Hearings Before Subcomm. No. 5 of the Comm. on the Judiciary*, 89th Cong. 5 (1965) (statement of Att’y Gen. Nicolas Katzenbach).

170. See, e.g., S. REP. NO. 89-162, reprinted in 1965 U.S.C.C.A.N. 2508, 2547 (1965) (“No voting discrimination suit has ever been concluded without a judicial finding of racial discrimination by either the district court or the court of appeals.”).

171. 1965 U.S.C.C.A.N., at 2544–45 (“The inadequacy of existing [civil rights] laws is attributable to both the intransigence of local officials and dilatory tactics, two factors which have largely neutralized years of litigating effort by the Department of Justice.”).

172. H.R. REP. NO. 89-439 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2444.

173. 1965 U.S.C.C.A.N., at 2445.

174. *Id.*

175. *Id.* at 2446 (“This provision for overturning the presumption or inference created by the determinations in section 4 provides assurance that no State or subdivision will be treated unfairly and that the suppression of tests and devices will be applied only to areas where it is necessary to enforce the rights guaranteed under the 15th amendment.”).

176. *Id.*

committee also believed the law provided sufficient safeguards to protect states and localities from unjustified federal intrusion.<sup>177</sup>

When applying the VRA framework to policing, it is useful to keep these aspects of the 1965 statute in mind. The members of Congress who enacted the VRA understood that voting discrimination was a complex problem. They recognized localities differed in their makeup and practices, and exact indicators of whether unconstitutional discrimination had occurred in any particular instance did not exist. The lesson, in responding to police misconduct, is that perfection—a perfectly tailored legislative response to civil rights violations—is likely not feasible and should not be the goal in pursuing reform.

As originally enacted, the VRA was set to expire in five years.<sup>178</sup> However, Congress extended the statute—with certain updates and amendments—five times, most recently with a twenty-five-year extension in 2006.<sup>179</sup> In 1970, Congress reauthorized the VRA for an additional five years, and extended the coverage formula in Section 4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968.<sup>180</sup> That change brought within the set of covered jurisdictions several counties in California, New Hampshire, and New York.<sup>181</sup> Congress also extended nationwide the ban (in Section 4(a) of the 1965 Act) on denying citizens the right to vote on the ground that they failed to comply with a test or device.<sup>182</sup>

In 1975, Congress reauthorized the VRA for seven more years and extended its coverage to jurisdictions that had a voting test and less than fifty percent voter registration or turnout as of 1972.<sup>183</sup> The 1975 law also reached beyond race. It amended the statutory definition of “test or device” to include also English-only voting materials in jurisdictions where more than five percent of voting-age citizens spoke a single language other than English.<sup>184</sup> With these changes, Alaska, Arizona, Texas, and certain counties in California, Florida, Michigan, New York, North Carolina, and South Dakota became covered jurisdictions.<sup>185</sup> In addition, the 1975 law made permanent the nationwide ban on tests and devices.<sup>186</sup>

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177. *Id.* at 2447–48 (“The appointment of examiners would not be automatic. . . . [I]n some areas in which tests or devices are suspended, the appointment of examiners may not be necessary to effectuate the guarantees of the 15th amendment. This could be the case where local election officials and entire communities have demonstrated determination to assure full voting rights to all irrespective of race or color.”).

178. Voting Rights Act § 4(a).

179. *See infra* notes 180–192.

180. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 3–4, 84 Stat. 315.

181. *See* 28 C.F.R. pt. 51, app. (2015).

182. Voting Rights Act Amendments of 1970, § 6, 84 Stat. 315.

183. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101, 202, 89 Stat. 400, 401.

184. *Id.* § 203, 89 Stat. 401, 402.

185. *See* 28 C.F.R. pt. 51, app. (2015).

186. Voting Rights Act Amendments of 1975, § 102, 89 Stat. 400.

In 1982, Congress reauthorized the VRA for twenty-five years, but this time it did not alter the coverage formula, instead leaving in place the earlier baselines.<sup>187</sup> Congress also amended the bailout provisions to permit political subdivisions of covered jurisdictions to bail out under certain circumstances.<sup>188</sup> In addition, Congress responded to the Supreme Court's decision in *Mobile v. Bolden*, which held that Section 2 prohibited only those laws with a discriminatory purpose,<sup>189</sup> by amending Section 2 to prohibit voting laws with a discriminatory effect regardless of any discriminatory purpose.<sup>190</sup>

In 2006, Congress again reauthorized the VRA for twenty-five years, once more without changing the coverage formula.<sup>191</sup> Congress also extended the reach of Section 5 to prohibit changes to voting laws made with "any discriminatory purpose," as well as changes to voting laws that diminished the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice."<sup>192</sup> In so doing, Congress determined that while there had been progress in eliminating "first-generation" barriers to ballot access—and thus an increase in minority voting—"second-generation" barriers remained a problem.<sup>193</sup> Such second-generation barriers included racial gerrymandering (redrawing of legislative districts to segregate races for purposes of voting); use of a system of at-large voting in place of district-by-district voting in cities with a sizable Black minority population; and discriminatory annexation by incorporating majority-White areas into city limits. All of these barriers reduced the effect of prior increases in Black voting.<sup>194</sup> At the time of the 2006 reauthorization, multiple jurisdictions were still subject to preclearance requirements, as a result of their history of discriminatory practices. Nine states were wholly covered (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia), and six more states were covered in part (California, Florida, Michigan, New York, North Carolina, and South Dakota).<sup>195</sup>

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187. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

188. *See id.* § 2, 96 Stat. 131–33.

189. 446 U.S. 55, 62 (1980).

190. Voting Rights Act Amendments of 1982, § 3, 96 Stat. 134; *see* *Bush v. Vera*, 517 U.S. 952, 992 (1996) ("The results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting.") (O'Connor, J., concurring).

191. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

192. 52 U.S.C. §§ 10304(b)–(d) & 10303(f)(2) (2012).

193. *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1614 (2006).

194. *Id.*; *see also* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 §§ 2(b)(2)–(3), 120 Stat. 577.

195. *See Jurisdictions Previously Covered by Section 5*, U.S. DEP'T JUST., <http://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [<https://perma.cc/DP4C-23VN>] (last visited Jan. 1, 2016).

### E. Impact

The Voting Rights Act of 1965 is the most successful civil rights law in the history of the United States.<sup>196</sup> The impact of the 1965 Act was immediate and dramatic.<sup>197</sup> By 1968, more than one million new Black voters were registered,<sup>198</sup> a figure that included more than 50 percent of the Black voting-age population in every southern state.<sup>199</sup> The most dramatic immediate change occurred in Alabama, where the percentage of Black Americans registered to vote rose from 11 percent in 1956 to 51.2 percent in 1966.<sup>200</sup>

Over the longer term, the Act delivered impressive (though not perfect)<sup>201</sup> results as the number of registered Black voters continued to climb<sup>202</sup> and the historic gaps between Black and White registration rates narrowed.<sup>203</sup> In addition, there was significant growth in the number of Black elected officials.<sup>204</sup> Most notably, by the time the Supreme Court heard *Shelby County v. Holder*, “African-American voter turnout ha[d] come to exceed White voter turnout in five of the six States originally covered by Section 5, with a gap in the sixth State of less than one half of one percent.”<sup>205</sup>

The circumstances and challenges to voting rights, which led to the innovations of the VRA, mirror in important respects conditions that exist today with respect to police misconduct. With prior efforts to remedy police misconduct having proved inadequate, the VRA model offers a way forward. The VRA preclearance formula provides an example of how a new statutory

196. See, e.g., DAVID J. BODENHAMER, *THE REVOLUTIONARY CONSTITUTION* (2012) (“[T]he Voting Rights Act was the most successful civil rights act ever passed by Congress.”); William J. Consovoy & Thomas R. McCarthy, *Shelby County v. Holder: The Restoration of Constitutional Order*, in *CATO SUP. CT. REV.* 31 (2013) (“The Voting Rights Act of 1965 is possibly the most consequential law in our nation’s history.”); Samuel Isascharoff, *Does Section 5 of the Voting Rights Act Still Work?*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 107 (David L. Epstein et al. eds., 2006) (“[T]he . . . [VRA] was successful beyond the scope of any other civil rights statute.”); “*Voting Rights Act*,” in 4 *ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY: 1896 TO THE PRESENT* 57 (Paul Finkelman ed., 2009) (“The Voting Rights Act of 1965 is generally considered the most successful piece of civil rights legislation in the history of the United States.”).

197. See KEVIN J. COLEMAN, CONG. RESEARCH SERV., *THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW* 13 tbl.3 (2015), <https://www.fas.org/sgp/crs/misc/R43626.pdf> [<http://perma.cc/RQ4R-V5ZM>].

198. RICHARD K. SCHER, *POLITICS IN THE NEW SOUTH: REPUBLICANISM, RACE AND LEADERSHIP IN THE TWENTIETH CENTURY* 250 (2d ed. 1997) (reporting an increase in the number of Black citizens registered to vote from just under 2 million prior to the VRA to 3.3 million in 1968).

199. U.S. COMM’N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION* 12–13 (1968).

200. See COLEMAN, *supra* note 197, at 13 tbl.3.

201. See, e.g., H.R. REP. NO. 94-196 (1975) (explaining “[t]hat minority political progress has been made . . . is undeniable. However, . . . continuing and significant deficiencies yet exist in minority registration and political participation”).

202. See *id.* at 6 (reporting, among other things, that in Mississippi while 6.7 percent of Black citizens were registered to vote prior to 1965, by 1972 the estimated figure was 62.2 percent).

203. See *id.* (“[C]losing registration gaps have occurred throughout the covered southern jurisdictions.”).

204. *Id.*

205. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).



framework could contribute to effectively remedying police practices that violate civil rights.

### III.

#### A NEW RESPONSE TO POLICE MISCONDUCT

A new federal statute modeled on the VRA to remedy police misconduct would set out a coverage formula to identify the jurisdictions reached by the law and the reforms to be imposed upon those jurisdictions. This Part takes up those two issues in turn. It first examines, in Part III.A, how Congress could develop an appropriate coverage formula. The analysis considers the complexities associated with determining the nature and scope of police misconduct.<sup>206</sup> Part III.B outlines a series of reforms that Congress could impose upon covered jurisdictions.

##### A. Coverage Formula

Congress should enact a federal coverage formula to address a range of common forms of local police misconduct, including unlawful stops, searches, seizures, and arrests in violation of the Fourth Amendment;<sup>207</sup> excessive uses of force in violation of the Fourth Amendment;<sup>208</sup> and racial profiling or otherwise discriminatory police practices in violation of the Fourteenth Amendment.<sup>209</sup>

This Section provides a detailed discussion of how Congress can undertake that task. It does not, however, provide a ready-made coverage formula for Congress to adopt. That choice is deliberate. The coverage formula will determine which local police departments become subject to federally-imposed

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206. To be clear, we do not set out a ready-made coverage formula for Congress to adopt. Just as identifying an appropriate formula in the VRA required hearings, the compiling of various sources of data, and debate over their usefulness, here, too, it would be premature just to settle on one formula at the outset. Accordingly, we limit ourselves to identifying some key metrics and data requirements associated with them. Likewise, while we identify some useful reforms, they are not deemed exhaustive.

207. The Fourth Amendment generally guarantees that a person has the ability to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV. Police officers typically need probable cause to execute a search or arrest. Such probable cause must be made on an “individualized suspicion of wrongdoing.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). In cases where an officer lacks probable cause but has reasonable suspicion that a person may be engaged in a criminal act, the Fourth Amendment also permits a limited detention. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

208. See *Graham v. Connor*, 490 U.S. 386, 394 (1989) (finding that the force used by law enforcement while conducting an arrest or investigatory stop is evaluated under the Fourth Amendment and will be found to be excessive if it constitutes an “unreasonable” seizure). For example, police officers may only use deadly force under the Fourth Amendment when they have probable cause to believe that a suspect poses an immediate threat to the safety of the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

209. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (suggesting in dicta that the Equal Protection Clause of the Fourteenth Amendment prohibits the selective or discriminatory enforcement of the law); see also *Washington v. Davis*, 426 U.S. 229, 239–40 (1976) (concluding that an Equal Protection violation happens when the state’s administration of a facially neutral law is motivated by a discriminatory purpose and results in a discriminatory effect).

reforms and federal governmental oversight. As with the VRA, it is *Congress* that should settle on a specific coverage formula. The task of deciding on the criteria underlying the coverage formula is both complex and politically sensitive.

The complexities will require Congress to use all of the tools at its disposal to collect and analyze data and hear from experts on the benefits and costs of different choices. While the discussion below identifies many of the relevant considerations, only Congress should make the ultimate selection of a coverage formula. Political considerations also call upon Congress to make this decision. This decision should involve an opportunity for discussion, in a democratically accountable forum, of the problem of police misconduct and the path to reform. Here again the VRA is instructive. Adoption of that law's coverage formula came only after a sustained period of debate with an opportunity to hear and consider all of the implications of a mechanism that subjected some jurisdictions to federal requirements.

Before detailing the process of developing a suitable coverage formula, it is useful to identify some challenges at the outset. The federal government faces three significant challenges that differentiate police misconduct from voter registration.

First, a simple metric cannot capture all types of police wrongdoing. Police misconduct runs the gamut from minor intrusions, like unjustified *Terry* stops, to more tragic interactions, like wrongful uses of deadly force. Congress based the VRA formula upon a simple measure: the presence of a test or device and voting rates below 50 percent of the eligible population in the preceding Presidential election. Given the complexities of police misconduct, there is no comparable single statistical measure that can serve as the basis for a reliable coverage formula.<sup>210</sup> Development of a suitable metric will thus likely be more difficult. One concern looms large: in the context of policing, a particular *outcome*, even death at the hands of the police, is not itself conclusive evidence a constitutional violation occurred. (After all, police officers are permitted to use force, even deadly force, in some circumstances.)

At the same time, it is important not to overstate the ease by which Congress adopted the VRA or the differences between voting and policing. As the preceding section demonstrates, there was considerable debate in Congress about the VRA's formula when it was proposed—and little sense that perfection had been achieved.

Outcome-based indicators can be unreliable for voting rights, as they could be for police misconduct. That an individual was not registered to vote or did not vote might reflect racial discrimination on the part of election administrators—

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210. This is similar to the VRA because at the time of the VRA discriminatory voting practices took many forms and Congress did not pretend that it could track the incidence of various tactics but instead relied upon low registration rates and low voting rates as proxy measures of discrimination. *Supra* Part II.D.

or result from a personal choice not to participate in elections. Congress's use of voter participation figures in the VRA should therefore be understood as a proxy for a problem—unlawful conduct—rather than a perfect measure of it. The VRA suggests that the task, then, is identifying a similar proxy—recognized as such—for the problem of police misconduct.

It is not necessarily a problem that a police coverage formula would be more complex than the VRA formula. A complex formula might be more difficult to develop, but the end result might well be greater accuracy. In other words, a more complex formula might be an improvement on the more simple approach of the VRA. Finally, computer technology and statistical methods available today far outpace those that were available in the early 1960s, such that complexities present far less of a challenge today than they did when Congress enacted the VRA.

A second challenge is that frontline policing is complicated and dangerous. It requires officers to engage in unstructured, highly discretionary interactions with the public. Indeed, much policing work takes the form of “frontline counseling,” that is, calming altercations and addressing public nuisances.<sup>211</sup> Officers also face unique risks and must make split-second decisions. The discretionary nature of policing thus creates opportunities for wrongdoing and makes monitoring difficult. In many cases, the only witnesses to an incident are the police officer and the victim. The potential impact of police misconduct is also very high: it is more serious to be the subject of a bullet wrongly fired than a ballot wrongly denied.

A third challenge is the lack of comprehensive police data. Neither the federal government nor any other entity currently keeps national statistics on police misconduct.<sup>212</sup> In part, the lack of comprehensive data reflect the fact that policing is decentralized.<sup>213</sup> The 18,000 law enforcement agencies in the United

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211. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 24, at 91 (stating that “[p]olicemen deal with people when they are both most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, and when they are ashamed”).

212. *See, e.g.*, Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Uncounted in Federal Stats*, WALL STREET J., Dec. 3, 2014, at A1 (describing data deficiencies in police killing data).

213. As is voting. In general, police departments rely on top-down command structures with a police commissioner or chief (or chiefs) at the top that are responsible for setting internal policies and procedures. *See* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. (forthcoming 2017); *see also* Peter K. Manning, *A Dialectic of Organisational and Occupational Culture*, in POLICE OCCUPATIONAL CULTURE: NEW DEBATES AND DIRECTIONS 49, 70 (Megan O'Neill et al. eds., 2007) (explaining that the top command in a police department is typically “composed of officers above the rank of superintendent (or commander) including chief, and deputy chief or assistant chief”). Police chiefs that oversee city police departments often serve at the pleasure of city officials. City officials can often remove a police chief from his or her position at will. *See* 62 C.J.S. Municipal Corporations § 596. By contrast, communities typically elect sheriffs. *See* 80 C.J.S. Sheriffs and Constables § 3.

States operate with a large degree of independence.<sup>214</sup> While the federal government keeps detailed records on crime rates and officers killed in the line of duty, there are no national databases on police misconduct.

Again, though, the history of the VRA is instructive in providing a framework to compile necessary data. The implementation of the VRA formula required compiling and updating statistics on voter registration and participation down to the local level in order to determine which states and localities fell within the coverage formula. When developing a coverage formula, the federal government will require national data on police misconduct. Generating such data is feasible, particularly given the sophisticated tools available today for collecting and analyzing information. Below we set out some practical ways for going about the task.

One solution to the lack of data is to seek information from local police departments themselves, with mechanisms to ensure accurate reporting. The Fourteenth Amendment gives Congress ample authority to compel states and localities to collect and turn over data as a means for identifying and curbing police misconduct.<sup>215</sup> The federal government already relies upon self-reporting to collect certain information from police departments.<sup>216</sup>

For example, three of the major datasets on local police departments—the Uniform Crime Reports (UCR), the National Incident Based Reporting System (NIBRS), and the Law Enforcement Management and Administrative Statistics (LEMAS)—depend upon local police departments to report crime rates,<sup>217</sup> incidents surrounding criminal acts,<sup>218</sup> and administrative policies.<sup>219</sup> However,

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214. U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), <http://www.bjs.gov/content/pub/pdf/cslea08.pdf> [<https://perma.cc/3Z93-DD74>] (estimating the number of state and local law enforcement agencies at approximately 17,985).

215. See generally Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 170–71 (2012) (explaining why information demands under Congress's Reconstruction powers are exempt from the anti-commandeering doctrine that otherwise prevents the federal government from compelling information from the states).

216. The FBI collects information on crimes reported in most jurisdictions in the United States through the Uniform Crime Reports (UCR). These annual statistics report the number and rate of different crimes in each reporting jurisdiction. UCR is self-reported and voluntary. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications> [<https://perma.cc/5C8S-WXFY>] [hereinafter UCR REPORTS]. Crime data is also aggregated in the National Incident Based Reporting System (NIBRS). See Lynn A. Addington, *Studying the Crime Problem with NIBRS Data: Current Uses and Future Trends*, in HANDBOOK ON CRIME AND DEVIANCE 23–42 (Marvin D. Krohn et al. eds., 2009). Further, the federal government collects information on police department written policies, internal operations, and community policing initiatives through the Law Enforcement Management and Administrative Statistics (LEMAS). See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS (LEMAS): 2007 SAMPLE SURVEYS OF LAW ENFORCEMENT AGENCIES (2007), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/31161> [<https://perma.cc/2GJS-ZXDE>] [hereinafter LEMAS].

217. See generally UCR REPORTS, *supra* note 216.

218. See generally Addington, *supra* note 216.

219. See generally LEMAS, *supra* note 216.

self-reporting has predictably led to problems.<sup>220</sup> Social scientists and reporters have documented police departments altering or manipulating data reported to the federal government.<sup>221</sup> If the federal government simply asks police departments to report on their own misconduct—with the promise of federal intervention if the reported figure is high—the risk of underreporting will be high. Nonetheless, in assessing where misconduct exists, it is virtually impossible for the federal government to bypass data collection at the local level because that is where the relevant information is generated. Accordingly, the government must implement self-reporting in a way that minimizes risks of cheating.

The subparts that follow thus identify five statistics that Congress can acquire from local police departments using methods that ensure a high degree of accuracy. They also explain how Congress can use these statistics to identify systemic misconduct that can serve as the basis for generating a coverage formula of the sort adopted in the VRA. Congress has already taken action to generate some of the proposed data, but in other cases, new legislation will be needed.

While different data collection methods are conceivable, these five proposed measures go a long way in identifying whether police misconduct that merits a federal response exists.<sup>222</sup>

### 1. *Police Use of Force and Civilian Deaths*

One statistical measure that Congress could usefully incorporate into a coverage formula is the frequency of (a) police use of force and (b) civilian deaths at the hands of law enforcement. The public has long called for the federal government to collect this data because of its significance to democratic control

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220. See Barry & Jones, *supra* note 212 (describing discrepancies between self-reported numbers on justifiable homicides numbers obtained by the Wall Street Journal and FBI's count).

221. See, e.g., Fox Butterfield, *As Crime Falls, Pressure Rises to Alter Data*, N.Y. TIMES, Aug. 3, 1998, at A16 (describing pressures on local police to alter self-reported crime statistics); Michael Matza et al., *U.S. Review Set for Philadelphia Crime Reports*, PHILA. INQUIRER, Nov. 14, 1998, at B01 (describing investigations into underreporting of crime statistics by the Philadelphia Police Department); Steve Thompson & Tanya Eiserer, *Experts: Dallas Undercount of Assaults Builds "Artificial Image,"* DALL. MORNING NEWS (Dec. 15, 2009), <http://www.dallasnews.com/news/news/2009/12/15/20091214-Experts-Dallas-undercount-of-assaults-6330> [<https://perma.cc/37T8-43DG>] (describing the Dallas Police Department's underreporting of assault statistics); Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014) (describing how police departments systemically underreport or manipulate rape statistics).

222. It is worth mentioning that we envision these five forms of data as helpful to Congress in establishing an initial coverage. This sort of a coverage formula need only last for a limited period of time. We also envision Congress enacting a formula that regularly incorporates updated statistical measures as they become available. As in the voting rights context, we would expect that over time, second generation compliance issues may emerge. In such a situation, we imagine that Congress could recalculate the weight and inclusion of various metrics. We further envision Congress establishing a bailout procedure for police departments, similar to the VRA.

over law enforcement.<sup>223</sup> Such calls have grown louder after the recent deaths of Michael Brown,<sup>224</sup> Eric Garner,<sup>225</sup> and Tamir Rice,<sup>226</sup> and the calls cross political lines.<sup>227</sup>

The frequency of officer use of force and civilian deaths at the hands of law enforcement is a valuable proxy for systemic misconduct in a police department. An unusually large number of uses of force by a police department may be consistent with a department that is using force too often and in violation of the Fourth Amendment. This could suggest that a department has failed to train adequately its officers on the constitutionally justifiable circumstances under which they may utilize force against a criminal suspect. Such a pattern may also be demonstrative of a lack of adequate internal accountability. Use of excessive force or deadly force is the most common justifications for the DOJ to bring a § 14141 claims against a department.<sup>228</sup> Of the sixty-eight investigations the DOJ has initiated since 1994, forty-eight involved claims of excessive force.<sup>229</sup>

The recent federal investigation of Ferguson, Missouri, serves as an example. There, the DOJ found that the “FPD engages in a pattern of excessive force in violation of the Fourth Amendment.”<sup>230</sup> The DOJ reported that Ferguson officers are “quick to escalate encounters with subjects they perceive to be

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223. See *One Thing the U.S. Government Doesn't Count: How Often Police Kill Civilians*, L.A. TIMES (Dec. 16, 2014), <http://www.latimes.com/opinion/editorials/la-ed-police-statistics-20141217-story.html> [<https://perma.cc/6BV9-Q97R>] (calling for a comprehensive national database on police killings).

224. See, e.g., Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows> [<http://perma.cc/MKY4-DQU9>] (citing Michael Brown's death as inspiring a national conversation on the lack of nationwide data on police killings).

225. See, e.g., Martin Kaste, *System for Reporting Police Killings Unreliable, Study Finds*, NPR (Mar. 6, 2015), <http://www.npr.org/2015/03/06/391269342/system-for-reporting-police-killings-unreliable-study-finds> [<http://perma.cc/T2ED-DYFS>] (discussing how the deaths of Michael Brown and Eric Garner inspired national calls for more accurate data on police conduct).

226. See, e.g., Allen G. Breed, *Police Killing Data Filled with Many Unknowns*, HUFFINGTON POST (Dec. 7, 2014), [http://www.huffingtonpost.com/2014/12/07/police-killings\\_n\\_6284358.html](http://www.huffingtonpost.com/2014/12/07/police-killings_n_6284358.html) [<https://perma.cc/BU5T-QEXP>] (describing calls for national data after the multiple deaths involving African Americans).

227. See Blake Fleetwood, *Congress Finally Acts to Prevent Police Killings, but Will It Make a Difference?*, WASH. MONTHLY (Dec. 17, 2014), [http://www.washingtonmonthly.com/ten-mile-square/2014/12/congress\\_finally\\_acts\\_to\\_preve053348.php](http://www.washingtonmonthly.com/ten-mile-square/2014/12/congress_finally_acts_to_preve053348.php) [<http://perma.cc/E9AQ-EBAS>] (describing “rare bipartisan vote” for data collection on people killed in police custody).

228. *Fixing the Force*, PBS FRONTLINE, <http://apps.frontline.org/fixingtheforce/#allegations> [<https://perma.cc/QW5C-5LE5>]; see U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE ALBUQUERQUE POLICE DEP'T 1 (2014), [http://www.justice.gov/crt/about/spl/documents/apd\\_findings\\_4-10-14.pdf](http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf) [<https://perma.cc/R67E-XCZS>] [hereinafter ALBUQUERQUE INVESTIGATIVE FINDINGS LETTER] (finding that the Albuquerque Police Department “engages in a pattern or practice of use of excessive force, including deadly force”).

229. *Fixing the Force*, *supra* note 228.

230. U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<http://perma.cc/24E3-7286>] [hereinafter FERGUSON INVESTIGATIVE REPORT].

disobeying their orders or resisting arrest.”<sup>231</sup> The DOJ found that officers deployed “canines to bite individuals when the articulated facts do not justify this significant use of force”<sup>232</sup> and turned to force in cases where a suspect’s behavior is “annoying or distasteful but does not pose a threat.”<sup>233</sup> Additionally, the DOJ found that Ferguson officers over-relied on force when dealing with “vulnerable populations, such as people with mental health conditions or intellectual disabilities and juvenile students.”<sup>234</sup> These findings are similar to those in other cases where the DOJ has identified misconduct.<sup>235</sup> Not surprisingly, a pattern of excessive force often accompanies an unusually large number of civilian deaths at the hands of law enforcement.<sup>236</sup>

Congress has recently taken a significant step towards generating data on officer use of force and civilian deaths. The Death in Custody Reporting Act (DCRA) requires police departments to report the death of any person “who is detained, under arrest, or is in the process of being arrested”<sup>237</sup> along with the date, time, location, and circumstances of the death.<sup>238</sup> The DCRA ties compliance with reporting requirements to the receipt of federal funding—a powerful means to ensure timely and accurate reporting.<sup>239</sup> DCRA-generated data have multiple benefits. Police departments cannot easily underreport the required information. A death in police custody generates significant attention and Congress could discover a failure to report.<sup>240</sup> Additionally, compared to

231. *Id.*

232. *Id.* at 31.

233. *Id.* at 33.

234. *Id.* at 35.

235. *See, e.g., Fixing the Force, supra* note 228 (identifying forty-eight cases where the DOJ found a pattern of excessive uses of force).

236. For example, the DOJ investigation of the Albuquerque Police Department found the agency involved in twenty deaths over a four-year period, the majority of which were unconstitutional. ALBUQUERQUE INVESTIGATIVE FINDINGS LETTER, *supra* note 228, at 2–3.

237. Death in Custody Reporting Act, Pub. L. No. 113-242, § 13727(a) (codified as 42 U.S.C. § 13727 (2012)). The DCRA is a reauthorization of a 2000 law that expired in 2006. Under that predecessor statute police departments were sluggish in reporting data and the DOJ did not release any comprehensive statistics. Allie Gross & Bryan Schatz, *Congress Is Finally Going to Make Local Law Enforcement Report How Many People They Kill*, MOTHER JONES (Dec. 17, 2014), <http://www.motherjones.com/politics/2014/12/death-custody-reporting-act-police-shootings-ferguson-garner> [<https://perma.cc/E948-RDU5>].

238. 42 U.S.C. § 13727(b) (2012).

239. Eli Hager, *The Ferguson Bill*, MARSHALL PROJECT (Dec. 12, 2014), <https://www.themarshallproject.org/2014/12/12/the-ferguson-bill> [<http://perma.cc/ZDY7-UX99>] (explaining that states could lose up to 10 percent of federal funding if they fail to comply).

240. Indeed, observers can already largely determine the frequency of police killings based solely on media reports. *See, e.g.,* Reuben Fischer-Baum & Al Johri, *Another (Much Higher) Count of Homicides by Police*, FIVETHIRTYEIGHT (Aug. 25, 2014), <http://fivethirtyeight.com/datalab/another-much-higher-count-of-police-homicides> [<http://perma.cc/5NQQ-XHZU>] (describing privately-created databases on social media of police killings). For an example of such efforts, see Kyle Wagner, *We’re Compiling Every Police-Involved Shooting in America. Help Us.*, DEADSPIN (Aug. 20, 2014), <http://regressing.deadspin.com/were-compiling-every-police-involved-shooting-in-america-1624180387> [<http://perma.cc/RM7R-MQ4M>] (requesting the public’s help in complying police killing data from 2011 to 2013 through news reports).

other reporting requirements, reporting on deaths is not expensive or burdensome to police departments as most departments “already maintain ‘use of force’ reports.”<sup>241</sup>

Beyond the DCRA data, the FBI has announced it will collect and publish data on deadly police incidents involving physical force, Tasers, blunt weapons, and firearms.<sup>242</sup> The Bureau of Justice Statistics (BJS), an agency within the Department of Justice, has also begun using open-source data and news reports to independently create a comprehensive database of police killings.<sup>243</sup> Once launched, these databases can both serve as a check on figures reported by police departments under the DCRA and furnish a broader count of civilian deaths caused by the police beyond those that occur in police custody. In addition, the DOJ has recently announced an ambitious plan to track a wider range of officer uses of force across American police departments.<sup>244</sup>

Civilian death rates are not a perfect measure of problematic police departments. After all, an officer’s decision to use deadly force may be justified. In addition, officers in particularly dangerous jurisdictions might justifiably use deadly force more frequently than officers in safer areas.<sup>245</sup> Accordingly, it would be unfair to determine misconduct exists solely on the basis of raw civilian death counts. Nonetheless, an appropriately weighted measure of civilian deaths can serve as a powerful component of an overall coverage formula.<sup>246</sup>

Obtaining useful data on officer use of force that does not result in death is more challenging but not impossible. Unlike civilian deaths, which receive significant media attention and can be authenticated through third-parties, less serious uses of force by law enforcement—shoves, punches, kicks, injurious restraints and such—may remain undetected. Thus, there is a significant risk of underreporting.

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241. See *One Thing the U.S. Government Doesn’t Count*, *supra* note 223 (explaining that the FBI annually collects data from 18,000 agencies for ‘Crime in the United States’ reports but not ‘use of force’ data, which is already maintained in most police departments for their own analyses and personal reviews).

242. Tom McCarthy, Jon Swaine & Oliver Laughland, *FBI to Launch New System to Count People Killed by Police Officers*, *GUARDIAN* (Dec. 9, 2015), <http://www.theguardian.com/us-news/2015/dec/09/fbi-launch-new-system-count-people-killed-police-officers-the-counted> [<http://perma.cc/H8GK-AK2P>].

243. Tom McCarthy, *US Government Database Hopes to Tell ‘Whole Story’ of Police Killings After Year of Guardian Count*, *GUARDIAN* (Dec. 14, 2015), <http://www.theguardian.com/us-news/2015/dec/13/justice-department-database-police-killings-counted-statistics> [<https://perma.cc/T5Z8-HTGP>].

244. Lichtblau, *supra* note 110.

245. In 2012, 8 percent of officers in metropolitan counties were victims of assault in the line of duty compared to 4.9 percent of officers in nonmetropolitan counties. See *UCR REPORTS*, *supra* note 216 (navigate to the Law Enforcement Officers Killed or Assaulted [LEOKA] database, then click on “Officers Assaulted”; on the right-hand side, click on “Table 66” under “Data tables,” which shows frequencies of assaults in different sized metropolitan areas).

246. One way to accomplish this would be to weigh the frequency of police killings against the relative dangerousness of each jurisdiction as measured by the jurisdiction’s homicide rates or the rate at which officers suffer injuries in the line of duty.



One approach to address this problem is a requirement for more detailed incident reports. Such reports would require officers to document altercations and would be subject to review by supervisors and external auditing. Another approach is the institution of a mechanism to collect statements from those involved in police interactions or to receive citizen complaints. Cameras and other technology can also collect information, particularly if combined with auditing measures (e.g., to assess whether written reports match what the camera captures or to identify instances in which cameras appear to have been turned off). Strong penalties for underreporting—loss of funding, for example—could enhance the success of these and other possible strategies.

Overall, data on police use of force and civilian deaths can serve as one part of a coverage formula that seeks to identify police departments with systemic issues of police misconduct.

## 2. *Frequency of Civil Rights Suits and Payouts*

A second useful statistic is the number of § 1983 civil rights suits filed by private parties alleging unconstitutional officer misconduct and the amount paid from these suits. These statistics provide a useful proxy for the presence of misconduct because claims are bound to result in civil suits. To be sure, there are significant hurdles to filing and succeeding in § 1983 claims, but data about such claims provide information that allows for comparison of police departments around the country. Even if only a small percentage of victims overall file claims, and even if only a small number of claims succeed, identifying which departments are subject to or held liable under § 1983 claims is valuable.

Victims of police misconduct have two options for filing a § 1983 claim. Victims can sue the officers directly. Although in many such cases the qualified immunity doctrine will bar a successful claim,<sup>247</sup> some plaintiffs overcome the doctrine by way of a declaratory judgment or settlement. Further, even claims dismissed on qualified immunity grounds, or claims that result in a judgment of no liability, can provide useful information. A high number of claims filed per capita relative to comparable communities will suggest a problem with police misconduct in those communities. As an alternative to suing the officer, victims of police misconduct can sue the department for failure to adequately train or supervise its officers.<sup>248</sup> Again, some such claims will succeed, meaning the plaintiff will obtain a judgment or a settlement. While success is a useful indicator of what is happening within a particular department, even the number and nature of failed claims is a useful metric when compared to trends in other police departments.

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247. See *supra* text accompanying note 65–66.

248. See *supra* text accompanying note 68.

As with any of the measures proposed in this Article, civil suits are not a perfect indicator of police misconduct. One caution is that lawsuits generally result from greater levels of misconduct. Thus, many lower-level abuses will not be captured. Another problem is that not everybody sues. Victims may not know their rights, lack the resources to bring a suit or hire a lawyer, or face other obstacles that keep them from going to court.<sup>249</sup> At the same time, some individuals will be litigious and their lawsuits may not reflect anything resembling problematic police conduct. But modern methods of data analysis can control for these kinds of issues. Even without such controls, deviations from the experiences of peer departments can signal the existence of a problem in how the police are doing business.

Reliable data on § 1983 claims are easy to generate. Federal court filings are rigorously tracked. The BJS already reports on every lawsuit filed in federal court (by the statutory provision that is the basis of the claim) and its disposition. It would not be difficult to tweak existing collection efforts to specifically identify § 1983 claims brought on the basis of police misconduct and the named defendant.<sup>250</sup>

In addition to relying upon the BJS, municipalities can also provide information about § 1983 claims. Whether a claim is filed against an individual officer or against a department, the municipality defends the lawsuit and pays out any judgment or settlement.<sup>251</sup> Municipalities therefore necessarily have detailed records on § 1983 lawsuits involving allegations of police misconduct. Most significantly, municipalities have records of the amounts paid out in settlement of individual cases—figures that might otherwise be difficult to obtain. Congress can readily get hold of this sort of information.

For example, Congress can require the clerk of the federal court to transmit settlement information in § 1983 cases to the DOJ or can tie federal funding to police departments to transmitting this information. Congress can also likely just direct municipalities to turn over the data with mechanisms such as loss of federal funding and random audits to ensure accurate reporting.<sup>252</sup> Some risks, of course, ensue. Municipalities may have an incentive to avoid or slow down settlements in cases of police misconduct. In practice, however, the impact may well be small given all of the preexisting reasons for such cases to settle promptly. Some additional measures may also be required to protect the privacy of the parties and to preserve the confidentiality provisions inherent in settlements.

The power of civil rights claims data should not be underestimated. In the handful of cases where this sort of data has been obtained, it has revealed

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249. Such factors could include fear of retaliation, the victim's immigration status, or a victim's own criminal activities coming to light.

250. Indeed, analysis of data already collected by the Bureau might yield this information.

251. See *supra* text accompanying note 67.

252. See *supra* note 215 and accompanying text.

startling patterns of civil rights abuses. The Chicago Police Department (CPD) is a case in point. Over the last decade, the City of Chicago has paid out a jaw-dropping \$500 million in civil rights settlements, judgments, and legal fees all related to police misconduct.<sup>253</sup> In 2013 alone, the city paid \$84.6 million—more than triple the amount that the city had anticipated in its budgetary projections.<sup>254</sup> Bearing out the significance of these figures, the DOJ announced a § 14141 investigation of the CPD soon after the release of a video showing the shooting of Laquan McDonald.<sup>255</sup> Put differently, there is good reason to think that if a municipality keeps civil rights claims information secret, it is because the information is damning. Mere refusal to make such information available itself could serve as a presumption of widespread misconduct.

In sum, data on the frequency and payout per capita from § 1983 suits can serve as a valuable metric for identifying the most problematic local police agencies.

### 3. Arrest, Stop, and Search Data

Congress could also make use of arrest, stop, and search data as part of a coverage formula. Many police departments already voluntarily report arrest data to the federal government.<sup>256</sup> Typically, the data show the number of arrests made each year;<sup>257</sup> in many cases statistics are broken down into offense categories searchable by suspect age, gender, and race.<sup>258</sup> Generating arrest, stop, and search information from all police departments (which conditioning federal funding on collection and production of data will achieve) could be especially useful in identifying misconduct. Of course, analysis of the data would need to include controls for such factors as the age, gender, and racial makeups of reporting jurisdictions, so as to permit meaningful comparative assessments.<sup>259</sup>

253. Andrew Schroedter, *Beyond Burge*, BETTER GOV'T ASS'N (Apr. 3, 2014), <http://www.bettergov.org/news/beyond-burge> [<https://perma.cc/AZQ8-9XTE>].

254. *Id.*

255. See Monica Davey & Mitch Smith, *Justice Officials to Investigate Chicago Police Department After Laquan McDonald Case*, N.Y. TIMES (Dec. 6, 2015), <http://www.nytimes.com/2015/12/07/us/justice-dept-expected-to-investigate-chicago-police-after-laquan-mcdonald-case.html> [<https://perma.cc/5XVK-RU8K>].

256. The FBI collects data on arrests by local law enforcement through the UCR. The reports are voluntary and some agencies fail to report information over the entire course of the year. Nonetheless, between 1980 and 2012, the FBI obtained complete arrest data for police departments serving 72–86 percent of the national population. See *Arrest Data Analysis Tool*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm> [<https://perma.cc/A89Q-CP2E>] (navigate to “Methods” tab to learn more about the methodology for the presently available arrest statistics).

257. *Id.* (navigate to “Agency-Level Counts” for number of arrests by jurisdiction; navigate to “National Estimates” for estimated arrests by all reporting law enforcement agencies).

258. *Id.* (navigate to “Definitions” tab for variables available for analysis using provided tools).

259. Some barriers exist, of course, but they are not insurmountable. For example, while arrests generate records of booking and detention, stops and searches might not create any kind of paper trail. But some localities already require a record be made of every stop. See, e.g., *Stop, Question, and Frisk Data*, N.Y. POLICE DEP'T, [http://www.nyc.gov/html/nypd/html/analysis\\_and\\_planning/](http://www.nyc.gov/html/nypd/html/analysis_and_planning/)

Collecting this kind of data would allow for identification of racial disparities in arrests, stops, and searches. Again, Ferguson provides a timely example. The DOJ determined that “[d]ata collected by the Ferguson Police Department from 2012 to 2014 shows that African Americans account for eighty-five percent of vehicle stops, ninety percent of citations, and ninety-three percent of arrests made by FPD officers”<sup>260</sup> and that (controlling for other factors) Black drivers were more than twice as likely to be searched during vehicle stops as White drivers.<sup>261</sup> These figures strongly suggest unlawful police conduct.

Apart from racial disparities, data can demonstrate outright illegal stops, arrests, and searches. Once more, Ferguson is instructive. The DOJ found that the FPD engaged in a significant number of arrests for things like “[f]ailure to [c]omply” with an officer’s demands; “[d]isorderly [c]onduct”; “[i]nterference with [o]fficer[s]”; and “[r]esisting [a]rrest.”<sup>262</sup> The DOJ reported that many of these charges were not a valid basis for arrest as a matter of state or local law.<sup>263</sup> In other instances, while some arrests within the designated categories were expected, the large number raised a red flag. It suggested that the police “reflexively resort to arrest immediately upon noncompliance with their orders, whether lawful or not” and are “quick to overreact to challenges and verbal slights.”<sup>264</sup> After all, individuals need not engage with the police,<sup>265</sup> and if they do engage, they need not do so respectfully.<sup>266</sup> High numbers of arrests in failure-to-comply and related offenses suggest that the police are arresting people who are not doing anything illegal.<sup>267</sup>

Data on what happens after a stop, search, or arrest can also shed light on police conduct. Large numbers of stops *without* arrests “suggests . . . that police suspicions are being aroused too easily and the decision to interfere with people’s liberty is being made too lightly.”<sup>268</sup> Likewise, unusually low rates of

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stop\_question\_and\_frisk\_report.shtml [https://perma.cc/ZR3P-RFSL]. Congress could extend this requirement nationwide.

260. FERGUSON INVESTIGATIVE REPORT, *supra* note 230, at 4.

261. *Id.*

262. *Id.* at 25.

263. *Id.* at 28 (describing “stops and arrests that have no basis in law”).

264. *Id.* at 25.

265. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 437 (1991) (holding that “no seizure occurs when police ask questions of an individual, ask to examine the individual’s identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required”).

266. *See* Ken Armstrong, ‘You’re Really Being an Asshole, Officer’: The Law on Cursing at Cops, MARSHALL PROJECT (June 26, 2015), <https://www.themarshallproject.org/2015/06/26/you-re-really-being-an-asshole-officer> [https://perma.cc/Q7SE-PWBD] (describing how state and federal courts have protected the right to curse at officers in ways short of “fighting words” or other calls to violence).

267. *See id.* (describing “contempt of cop” cases).

268. CHRISTOPHER STONE ET AL., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 24 (2009), <http://assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> [http://perma.cc/GG7A-Q6G8].

*prosecutions* of arrested defendants may suggest that officers are engaged in a pattern of unlawful arrests. Prosecutors, of course, have various reasons (e.g., resource constraints, availability of witnesses and other evidence, or a policy of leniency in certain cases) for declining to proceed to court even if the arrest was lawful. But it would not be difficult to control for such factors and identify jurisdictions where the ratio of arrests to prosecutions suggests problematic police conduct.<sup>269</sup> *Charging* decisions might also be revealing. In Ferguson, charges against arrested individuals were overwhelmingly brought in municipal court for violations of the municipal code, not state criminal law, leading the DOJ to conclude that Ferguson officers were mostly motivated to fill city coffers.<sup>270</sup>

In sum, arrest, stop, and search data, while imperfect, could be useful components of a federal coverage formula for identifying problematic police agencies.

#### 4. Officer Disciplinary Records

Disciplinary records are also useful for identifying police misconduct. Access to such records under open records laws varies. Only twelve states make disciplinary records publicly available in most circumstances.<sup>271</sup> In twenty-three states and the District of Columbia, disciplinary records are confidential.<sup>272</sup> In fifteen states, records are available to the public only in limited circumstances, such as where suspension or termination resulted.<sup>273</sup>

In addition, police union contracts in many cities contain provisions requiring purges of disciplinary files.<sup>274</sup> Such arrangements thwart even the DOJ. For example, when the DOJ initiated its investigation of the Cleveland Police Department for a possible pattern or practice of unconstitutional misconduct, it

269. For example, evidence suggests the NYPD has used minor arrests and legally questionable stop-and-frisks largely as a means of harassing minority citizens, few of whom are actually prosecuted. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 631–35, 641–43 (2014).

270. See FERGUSON INVESTIGATIVE REPORT, *supra* note 230, at 3, 8.

271. Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <http://www.wnyc.org/story/police-misconduct-records> [<https://perma.cc/BZ4L-ACF7>] (“In these states, police disciplinary records are generally available to the public. Many of these states still make records of unsubstantiated complaints or active investigations confidential.”).

272. *Id.* (listing states where police personnel records are confidential either under a specific state statute—as in Delaware, California, and New York—or under privacy exemptions or public employee personnel records exemptions to state open record laws).

273. *Id.* It is also worth noting that this would likely not constitute commandeering. See *infra* Part IV.B.4.

274. See *Police Union Contract Project*, CHECK POLICE, <http://www.checkthepolice.org> [<https://perma.cc/9BX5-YKQL>] (scroll down for table comparing union contracts; navigate to “Police Contracts Database” for a full database of union agreements); see also Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. (forthcoming 2017) (showing that, based on a sample of 178 police union contracts, a significant number included a requirement that management purge or otherwise not consider disciplinary records in future employment action).

found that the department's collective bargaining contract mandated removal of disciplinary actions and penalties from departmental databases after two years.<sup>275</sup>

Chicago illustrates the usefulness of disciplinary records. After seven years of litigation, University of Chicago law professor Craig Futterman won a protective order requiring Chicago to release a portion of its police disciplinary records from the period 2001–2008 and 2011–2015.<sup>276</sup> The records show that the CPD determined 95.89 percent of 56,438 citizen complaints were unsubstantiated and required no action at all.<sup>277</sup> Further, less than 2 percent of 28,567 allegations of misconduct filed against the CPD between March 2011 and September 2015 resulted in some sort of discipline.<sup>278</sup> The most common punishment in the small number of substantiated complaints was a short suspension or letter of reprimand.<sup>279</sup> Moreover, Black residents filed 61 percent of complaints but accounted for only 25 percent of sustained complaints;<sup>280</sup> for White residents, the figures were 21 percent and 58 percent respectively.<sup>281</sup> Finally, residents directed a large number of complaints at a small number of officers (less than 10 percent of the CPD),<sup>282</sup> suggesting a police department that fails adequately to oversee its officers.<sup>283</sup>

It is likely unrealistic to expect states across the country simply to alter their open records laws to facilitate the release of information about police discipline. Even in states that do decide to grant public access to disciplinary records, some municipalities will continue to reach agreements with local police unions to limit

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275. Rosa Flores & Mallory Simon, *Chicago's Next Fight: Trying to Purge Police Misconduct Records*, CNN (Dec. 20, 2015), <http://www.cnn.com/2015/12/18/us/chicago-police-misconduct-records> [<https://perma.cc/QKL4-3P2Z>].

276. Rob Wildeboer, *Complaints Against Chicago Police Published After 20-Year Saga*, WBEZ CHI. (Nov. 9, 2015), <http://www.wbez.org/news/complaints-against-chicago-cops-published-after-20-year-saga-113715> [<https://perma.cc/6RMG-SJQP>].

277. CITIZENS POLICE DATA PROJECT, <http://cpdb.co> [<https://perma.cc/BHB4-5ZLY>] (navigate to findings; scroll down for data).

278. *Id.*

279. *Id.* (reporting no penalty in 335 of sustained cases; a reprimand in 580 cases; suspension of less than one week in 797 cases; suspension of more than one week in 254 cases; and termination in 33 cases).

280. *Id.*

281. *Id.*

282. *Id.* (“Repeat officers—those with 10 or more complaints—make up about 10% of the force but receive 30% of all complaints. They average 3.7x as many complaints per officer as the rest of the force.”).

283. The Los Angeles Police Department (LAPD) was in a similar position in 1991. While the vast majority of LAPD officers, against whom an allegation of excessive force or improper tactics was made from 1986 to 1990, had only one or two allegations of excessive force, some 183 officers had four or more allegations; 44 had six or more; 16 had eight or more; and one had 16. CHRISTOPHER COMMISSION REPORT, *supra* note 38. Likewise, a small cohort of officers was involved in most of the department's use of force cases. *Id.* at x. The Chicago and LAPD cases are consistent with the belief among many academics that “10 percent of . . . officers cause 90 percent of the problems.” SAMUEL WALKER ET AL., EARLY WARNING SYSTEMS: RESPONDING TO THE PROBLEM POLICE OFFICER 1 (2001), <http://www.ncjrs.gov/pdffiles1/nij/188565.pdf> [<https://perma.cc/8G3K-HX2R>].

access to these records (unless such arrangements are specifically barred under state law).

Yet Congress can play a useful role by creating minimum national disclosure requirements. For example, Congress could require at a minimum disclosure of incident counts and outcomes without identifying the officer or complainant. That information alone would greatly enhance our ability to identify problematic police departments and bring them under the coverage formula.

Overall, by acquiring access to officer disciplinary records, Congress could craft an effective coverage formula that identifies police departments that have systemically failed to respond to officer misconduct.

### 5. *Citizen Complaints*

Congress could also sidestep local police departments and obtain data on police misconduct directly from the public. Again, the VRA provides guidance. Under Section 6, if the DOJ received at least twenty validated complaints about a covered jurisdiction infringing upon voting rights, the Attorney General could assign federal examiners to oversee electoral processes on the ground and register voters directly.<sup>284</sup> While under the VRA citizen complaints were not a component of the coverage formula, complaints of police misconduct could be a useful mechanism to identify where police misconduct exists. On the other hand, citizen complaints could, as with the VRA, be relied upon to trigger remedial measures within covered departments, such as deployment of federal officials to monitor department activities.

Relatedly, technological leaps make collecting data far easier today than it was at the time of the VRA. The DOJ could easily create an online national reporting system for complaints against local and state police departments. Victims of misconduct would submit a complaint and federal regulators would use the database to identify agencies with the highest number of complaints per capita.

A public reporting system would avoid the problem of underreporting by police departments. It would also capture the entire scope of police misconduct. Citizens could file complaints about everything from unjustified *Terry* stops to perceived racial profiling and excessive use of force. Importantly, the system design would identify which police departments generate high numbers of citizen grievances. For this purpose at least, individual reports would not require resource-intensive verification. While citizens might, of course, submit false reports—especially if, as is likely desirable, anonymous submissions are permissible—no single report will make a difference in determining trouble spots. As with “How’s My Driving?” programs, only high numbers of reports against a department or an officer will matter; feedback algorithms and other

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284. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 6, 79 Stat. 437.

devices can ameliorate problems of false reports.<sup>285</sup> In sum, citizen complaints, while imperfect, could help expand the scope of the coverage formula and make it more sensitive to a wider range of police misconduct.

Congress could use all five of these methods to design a coverage formula that would bring police departments with patterns of misconduct under federal supervision. Like the VRA, once a department is covered, a separate section of the act would lay out the reforms necessary to release the department from supervision.

### B. Reforms

As with the VRA, covered police jurisdictions would be subject to measures designed to remedy existing constitutional violations and prevent future occurrences. The set of reforms the DOJ has already developed in § 14141 cases provides a useful starting point. Typically, § 14141 settlements require mechanisms to reduce the frequency of officer use of force and improve investigation of use-of-force cases;<sup>286</sup> provisions requiring departments to implement or update their early intervention systems;<sup>287</sup> additional training for frontline officers;<sup>288</sup> improved procedures for investigating citizen complaints;<sup>289</sup> and new mechanisms for external oversight and accountability.<sup>290</sup> Where implemented in § 14141 cases, these core reforms have led to significant reductions in civil rights violations by law enforcement officers.<sup>291</sup> While they

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285. See Lior Jacob Strahilevitz, “How’s My Driving?” *For Everyone (and Everything?)*, 81 N.Y.U. L. REV. 1699, 1763–64 (2006) (suggesting the creation of “How’s My Policing?” programs and explaining their feasibility).

286. See *infra* Part III.B.3.

287. See *infra* Part III.B.1.

288. See *infra* Part III.B.3.

289. See *infra* Part III.B.2.

290. See *infra* Part III.B.4. External oversight takes two forms. First, many settlements involve the appointment of an external monitor. See Rushin, *Federal Enforcement of Police Reform*, *supra* note 49, at 3247 (listing relevant departments). Second, a handful of settlements have implemented an Office of the Inspector General (or comparable permanent office) to oversee police behavior. See, e.g., Krishnadev Calamur & Eyder Peralta, *Cleveland, Justice Department Reach Agreement Over Police Conduct*, NPR (May 26, 2015), <http://www.npr.org/sections/thetwo-way/2015/05/26/409702982/cleveland-justice-department-reach-agreement-over-police-conduct> [<https://perma.cc/TG38-UJ3S>] (explaining how the Cleveland consent decree requires a new inspector general of police and a civilian head of the internal affairs unit).

291. Several studies report on the effectiveness of § 14141 reforms. The Vera Institute of Justice concludes that with DOJ intervention in Pittsburgh the department made substantial reforms that continued to exist after the monitors left. ROBERT C. DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE 40 (2005), [http://www.vera.org/sites/default/files/resources/downloads/277\\_530.pdf](http://www.vera.org/sites/default/files/resources/downloads/277_530.pdf) [<https://perma.cc/MAH6-468Y>]. A study in Los Angeles similarly found that the LAPD made substantial progress with DOJ intervention. CHRISTOPHER STONE ET AL., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD (2009), <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> [<https://perma.cc/YC2S-7KJN>]. The record is not, however, perfect. For example, in Pittsburgh, there have been scattered claims of lapses after DOJ intervention ended. See Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1410–11.



are not necessarily the only desirable reforms to impose upon covered police jurisdictions (mandating body cameras, for example, would be an additional useful measure), they have a strong likelihood of success.<sup>292</sup> Indeed, compared to the VRA remedies—suspension of tests, devices, and pre-clearance requirements in covered electoral jurisdictions—reforms generated from the § 14141 experience are both more precise and supported by a history of success.

### 1. Early Intervention Systems

Many police departments suffer from the “bad apple” problem. According to one study, 2 percent of all officers generate 50 percent of citizen complaints.<sup>293</sup> In remedying this problem in § 14141 cases, the DOJ has relied upon implementation of early intervention systems.<sup>294</sup> Some police departments have also adopted these systems on their own initiative.<sup>295</sup> Early intervention systems reflect that “within any cohort of police officers, a small percentage will have substantially worse performance records than their peers,” triggering a need for an early and aggressive departmental response.<sup>296</sup> Early intervention systems thus collect data on officer behavior and flag officers who appear to engage in suspicious conduct that merits supervisor intervention, investigation, and possibly discipline.<sup>297</sup>

Early intervention systems are highly effective in combatting misconduct.<sup>298</sup> One study shows, for instance, that intervention triggered by such systems reduced citizen complaints against officers in Minneapolis and New Orleans by 67 percent and 62 percent respectively.<sup>299</sup> In Miami-Dade County, the percentage of officers with zero use-of-force reports increased from 4 percent to 50 percent following the implementation of the early intervention system.<sup>300</sup> By improving the recordkeeping of officer behavior, early intervention systems

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292. Other possibilities, also used in certain § 14141 cases, could include training measures to reduce bias, enhancement of community policing, and rules about specific police practices such as uses of dogs and lineup procedures. See Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1378–87.

293. WALKER ET AL., *supra* note 283, at 1.

294. See Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1381–82 (identifying jurisdictions where EIS have been imposed).

295. See SAMUEL WALKER ET AL., SUPERVISION AND INTERVENTION WITHIN EARLY INTERVENTION SYSTEMS: A GUIDE FOR LAW ENFORCEMENT CHIEF EXECUTIVES 1–2 (2005), [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Early\\_Intervention\\_Systems/supervision%20and%20intervention%20within%20early%20intervention%20systems%202005.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Early_Intervention_Systems/supervision%20and%20intervention%20within%20early%20intervention%20systems%202005.pdf) [<https://perma.cc/PXW6-KMEB>] (reporting that EIS systems have been in use for more than 25 years).

296. See *id.* at 3.

297. POLICE EXEC. RES. FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 16 (2013), [http://www.policeforum.org/assets/docs/Critical\\_Issues\\_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf](http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf) [<https://perma.cc/P23K-X7GN>] [hereinafter PERF] (explaining how EIS reduces misconduct).

298. See WALKER ET AL., *supra* note 295, at 7.

299. *Id.* at 3.

300. *Id.*

allow a police department to respond more aggressively to potentially problematic patterns of behavior. These systems may further incentivize officers to comply with the law and departmental policies. Requiring covered jurisdictions to adopt an early intervention system would represent a relatively non-invasive but nonetheless effective reform measure.

## 2. *Citizen Complaint Management Reforms*

Congress could also require covered police departments to improve mechanisms for managing citizen complaints. A police department must be able to receive, investigate, and respond to citizen complaints in a timely and impartial manner. Besides bringing misconduct to light, an effective citizen complaint mechanism is essential to maintaining the community's trust and thus to the effectiveness of police work.

The Rodney King case is instructive. Immediately after the beating of Rodney King, his brother, Paul, sought to file a complaint with the LAPD.<sup>301</sup> However, rather than process the complaint, the receiving officer took Paul King to an interview room, interrogated him about his own possible involvement in criminal activity<sup>302</sup> and warned him that Rodney King was in “big trouble” for “put[ting] someone’s life in danger, possibly a police officer.”<sup>303</sup> So, too, George Holliday, whose video camera captured the beating, was turned away when he sought to file a complaint with the LAPD—which led him to release the footage to the media.<sup>304</sup> The LAPD simply lacked procedures to permit citizens to file complaints against police officers.

The ability to file a complaint is not in and of itself sufficient. There must also be some mechanism to ensure an adequate investigation and response—both because citizens need to know that their complaints are taken seriously and because, without a response, misconduct can continue. For example, in Los Angeles, the DOJ, as part of its § 14141 case, required the LAPD to adjudicate expeditiously civilian complaints and notify the complainant of the resulting decision.<sup>305</sup> The federal consent decree in the case also required the LAPD to audit a sample of civilian complaints regularly to determine whether the agency was satisfying the terms of the consent decree.<sup>306</sup> The federal consent decree even required the LAPD to send undercover informants to police stations around

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301. CHRISTOPHER COMMISSION REPORT, *supra* note 38, at 9–10.

302. *Id.* at 10.

303. *Id.*

304. *Id.* at 11.

305. OFFICE OF THE INDEP. MONITOR OF THE L.A. POLICE DEP’T, FINAL QUARTERLY REPORT 58 (2009).

306. Consent Decree at 40, *United States v. City of Los Angeles*, 2:00-cv-11769-GAF-RC (C.D. Cal. June 15, 2001), <http://www.clearinghouse.net/chDocs/public/PN-CA-0002-0006.pdf> [<https://perma.cc/8UBP-ZR9S>] (laying out the terms of the use of force stipulations).

the city to file complaints and surreptitiously monitor their progress.<sup>307</sup> Through this reform and oversight progress, the LAPD appeared to make significant strides in responding to civilian complaints during the time it was under federal oversight.<sup>308</sup>

It is important for a police department to respond quickly and appropriately to civilian complaints in order to maintain community trust. One reason the Chicago Police Department has lost the confidence of large swaths of the community is its poor rate of response to citizen complaints. The CPD takes action on less than 5 percent of all citizen complaints and those by Black Chicago residents receive even less attention.<sup>309</sup> The problem can also be sticky. Despite apparent improvement in complaint handling during the period of federal oversight in Los Angeles, subsequent reporting found that between 2012 and 2014, the Los Angeles Police Department failed to sustain *any* of the 1,356 complaints received involving allegations of police bias.<sup>310</sup>

In sum, Congress should require covered municipalities to adopt the complaint management reforms similar to those required by § 14141 settlements.<sup>311</sup>

### 3. *Use-of-Force Policies*

Congress could also require covered police departments to reform their policies on use of force. Nearly all settlements in § 14141 cases have addressed use of force.<sup>312</sup> Congress (or the DOJ) could establish clear policies on use of

307. *Id.* (stating that “the City shall develop . . . a plan for organizing and executing regular, targeted, and random integrity audit checks, or ‘sting’ operations . . . to identify and investigate . . . at-risk behavior, including: unlawful stops, searches, seizures . . . , uses of excessive force, . . . [and] to identify officers who discourage the filing of a complaint or fail to report misconduct”).

308. NICOLE C. BERSHON, OFFICE OF THE L.A. INSPECTOR GEN., COMPLAINT INVESTIGATIONS AUDIT FOR FISCAL YEAR 2010–2011, at 2–3 (2011), [http://www.oiglapd.org/Reports/Compl-A\\_FY10-11\\_4-13-11.pdf](http://www.oiglapd.org/Reports/Compl-A_FY10-11_4-13-11.pdf) [hereinafter *OIG COMPLAINT AUDIT 2010-2011*] (showing that between 97–100 percent of all complaints audited showed that officers conducted proper interviews, completed each investigatory step).

309. CITIZENS POLICE DATA PROJECT, *supra* note 277 (navigate to the “Collaboration” section describing the detailed description of how the Citizens Police Data Project obtained this data and the years it covers).

310. Kate Mather, *LAPD Found No Bias in All 1,356 Complaints Filed Against Officers*, L.A. TIMES (Dec. 15, 2015), <http://www.latimes.com/local/lanow/la-me-ln-lapd-biased-policing-report-20151215-story.html> [<https://perma.cc/F7DV-74ED>].

311. See Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1383–84 (describing the content of complaint management reforms required by § 14141 settlements). It is worth noting that the International Association of Chiefs of Police adopted similar standards on citizen complaint management in coordination with the Office of Community Oriented Police Services. See INT’L ASS’N OF CHIEFS OF POLICE, BUILDING TRUST BETWEEN THE POLICE AND THE CITIZENS THEY SERVE: AN INTERNAL AFFAIRS PROMISING PRACTICES GUIDE FOR LOCAL LAW ENFORCEMENT 20–26 (2008), <http://www.iacp.org/portals/0/pdfs/BuildingTrust.pdf> [<https://perma.cc/75A4-4P9D>]. The Commission on Accreditation for Law Enforcement Agencies has also recommended similar requirements. See *id.* at 22.

312. Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1378–79; PERF, *supra* note 297, at 12.

force and require their adoption in covered departments, as the DOJ has demanded in prior § 14141 cases.<sup>313</sup> Additionally, Congress could require police departments to adopt policies requiring independent supervisors to report to the scene of any use-of-force incident and separate all individuals involved in uses of force for purposes of individualized questioning. The DOJ has required a number of police departments across the country to install such procedures in § 14141 cases in order to prevent police officers from “conspiring together [after a use-of-force incident] to create a story that exonerates any and all officers of misconduct.”<sup>314</sup>

Other stipulations from § 14141 consent decrees could also be instructive in regulating police use of force. Congress could require a clear chain of command in all investigations of use of force.<sup>315</sup> Or Congress could require departments engage in de-escalation training to reduce the frequency with which officers deploy force.<sup>316</sup> Alternatively, Congress could follow the DOJ’s approach in § 14141 cases and require covered police departments themselves to establish clear use-of-force policies, including training and reporting requirements and review procedures.<sup>317</sup> Settlements from § 14141 cases provide significant guidance as to the type of use-of-force reforms that Congress could impose on covered police departments.

#### 4. Oversight

Oversight measures are an essential element of reform. In § 14141 cases, these measures have taken the form of court-appointed monitoring teams<sup>318</sup> of law enforcement experts and attorneys.<sup>319</sup> While such monitoring teams can be

313. Previous DOJ actions have required just this. PERF, *supra* note 297, at 12 (identifying use of force reform as a focus of “almost all of DOJ’s civil rights investigations”).

314. SAMUEL WALKER, THE BALTIMORE POLICE UNION CONTRACT AND THE LAW ENFORCEMENT OFFICERS BILL OF RIGHTS: IMPEDIMENTS TO ACCOUNTABILITY 3 (2015), <http://s3.documentcloud.org/documents/2086432/baltimore-police-union-contract.pdf> [<https://perma.cc/QPA9-EW5K>].

315. See, e.g., *United States v. City of Los Angeles*, No. 2:00-cv-11769-GAF-RC, at 23–27 (C.D. Cal. June 15, 2001), <http://www.clearinghouse.net/chDocs/public/PN-CA-0002-0006.pdf> [<https://perma.cc/GU63-ZH2C>] (establishing a clear chain of review every time an officer uses force).

316. See PERF, *supra* note 297, at 6 (describing de-escalation techniques).

317. See, e.g., *United States v. Territory of the Virgin Islands*, No. 3:08-cv-00158-CVG-RM, at 6 (D.V.I. Mar. 24, 2009), <http://www.clearinghouse.net/chDocs/public/PN-VI-0001-0003.pdf> [<https://perma.cc/WLT8-DUFA>] (requiring documentation of all uses of force); Consent Decree at 15, *United States v. Prince George’s Cty.*, No. 8:04-cv-00185-RWT (D. Md. Jan. 22, 2004), <http://www.clearinghouse.net/chDocs/public/PN-MD-0001-0003.pdf> [<https://perma.cc/ZG4C-SX7H>] (explaining reporting requirements for use of canines).

318. Rushin, *Federal Enforcement of Police Reform*, *supra* note 49, at 3247 (listing in Appendix B police departments subject to external monitoring); Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1391–96, 1401–04 (describing the monitoring process and its benefits).

319. Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 44, at 1390–91 (describing police preference for former police officers and DOJ preference for lawyers as monitors).

expensive,<sup>320</sup> they offer valuable expertise and impartiality.<sup>321</sup> External monitoring translates procedural requirements into substantive improvements and ensures organizational compliance. In Los Angeles, for example, the external monitoring team (part of the § 14141 settlement) assisted departmental personnel audit citizen complaint records to evaluate compliance with the consent decree requirements.<sup>322</sup> Congress might even require covered jurisdictions to create independent inspector general offices that oversee police departments. At least one recent § 14141 settlement has taken this route.<sup>323</sup>

### 5. *Body Cameras*

Congress could also mandate use of body cameras by police officers in covered jurisdictions. Emerging evidence suggests body camera use correlates with substantial reductions in officer misconduct and citizen complaints. For example, a study of the Orlando Police Department found that officers who used body cameras had a 53 percent reduction in use-of-force incidents and a 65 percent reduction in civilian complaints.<sup>324</sup> Another study in Rialto, California, found that body cameras resulted in a 60 percent reduction in use-of-force reports and an 88 percent reduction in citizen complaints.<sup>325</sup>

The DOJ has required the use of body cameras in only one § 14141 settlement thus far (Ferguson), likely because until recently such cameras and data storage devices were prohibitively expensive.<sup>326</sup> However, industry competition has dramatically driven down costs.<sup>327</sup> Making widespread use of body cameras is thus today entirely feasible. For instance, a federal district court recently required the NYPD to begin a pilot program using body cameras to

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320. *Id.* at 1388–89 (reporting the annual cost of a monitoring team is \$880,000 to \$2,200,000).

321. *See, e.g., id.* at 1401–04 (describing role of monitors in Los Angeles).

322. *Id.* at 1402.

323. Cory Shaffer, *Cleveland Will Create Police Inspector General as Part of Justice Department Reform*, CLEVELAND PLAIN-DEALER (May 26, 2015), [http://www.cleveland.com/metro/index.ssf/2015/05/cleveland\\_will\\_create\\_police\\_i.html](http://www.cleveland.com/metro/index.ssf/2015/05/cleveland_will_create_police_i.html) [<https://perma.cc/7A63-ZKXH>].

324. Nick Wang, *Study Shows Less Violence, Fewer Complaints When Cops Wear Body Cameras*, HUFFINGTON POST (Oct. 13, 2015), [http://www.huffingtonpost.com/entry/police-body-camera-study\\_561d2ea1e4b028dd7ea53a56](http://www.huffingtonpost.com/entry/police-body-camera-study_561d2ea1e4b028dd7ea53a56) [<https://perma.cc/4FHS-U3YM>].

325. David Feige, *Brutal Reality*, SLATE (Apr. 10, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/04/police\\_body\\_cameras\\_cops\\_commit\\_less\\_violence\\_and\\_complaints\\_are\\_real.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/police_body_cameras_cops_commit_less_violence_and_complaints_are_real.html) [<https://perma.cc/GKX6-6X28>].

326. Eyder Peralta, *Ferguson, Justice Unveil Draft of Negotiated Consent Decree*, NPR (Jan. 27, 2015), <http://www.npr.org/sections/thetwo-way/2016/01/27/464610005/ferguson-justice-unveil-draft-of-negotiated-consent-decree> [<https://perma.cc/N8NJ-S6LQ>] (“The agreement also requires body-worn cameras . . .”).

327. *See id.*; Christopher Mims, *What Happens When Police Officers Wear Body Cameras*, WALL STREET J. (Aug. 18, 2014), <http://www.wsj.com/articles/what-happens-when-police-officers-wear-body-cameras-1408320244> [<https://perma.cc/R8GA-49H5>] (reporting that body cameras now run \$300–\$400 and that cloud storage is cheaply available).

monitor officer behavior as part of resolution of an unlawful stop-and-frisk case.<sup>328</sup>

Some safeguards will be needed—cameras produce privacy concerns, for instance<sup>329</sup>—but mandating their use can significantly help detect and curb police misconduct and can be a useful component of imposed reform measures.

#### 6. *Additional Considerations*

While the preceding sections identify a series of potential reforms in covered jurisdictions, the final choice will require Congress's careful consideration. In making that choice, three factors bear emphasis. First, reforms should match the problem. The VRA reforms were successful because they responded to the particular problems voters faced when trying to register and vote. The VRA ensured a ban on current and future attempts at preventing Black voters from registering in covered jurisdictions. In enacting a VRA-style law to remedy police misconduct, it is particularly important that the reforms chosen address both present issues and potential attempts by police departments to get around initial remedies.

Second, it would be a mistake to imagine that the government's work is done once it identifies covered jurisdictions and mandates adoption of reforms. As with the VRA, the success of a federal policing law requires ongoing federal oversight to ensure that covered jurisdictions actually implement reforms and that those reforms remain in place on an ongoing basis. Congress should, for example, require the DOJ to report back on compliance in covered jurisdictions so that, if needed, Congress can take additional legislative measures to ensure the success of the law.

Third, Congress should view a federal policing law in dynamic terms and allow for adaptations to changed circumstances. As with the VRA, the law should contain a sunset provision so that its extension requires congressional renewal. Five or ten years down the road, problems of police misconduct might well look different from how they look today—perhaps less serious because the original law has succeeded, perhaps more serious because new challenges have arisen—with the attendant need for a new approach. There should also be provisions for change that occur at a local level. The VRA's bailout provision gave covered states and jurisdictions an incentive to end discrimination. Likewise, a federal policing law should permit covered jurisdictions that have succeeded in implementing reforms—such that they no longer engage in unconstitutional conduct—to end federal oversight. On the other hand, misconduct might emerge in jurisdictions not covered by the original statute.

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328. Mims, *supra* note 327 (describing federal judge's order that NYPD equip officers in certain districts with body cameras).

329. See JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL (2013), [https://www.aclu.org/files/assets/police\\_body-mounted\\_cameras.pdf](https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf) [<https://perma.cc/N7L5-MPPP>] (discussing privacy concerns).

Periodic revisiting of the legislative scheme will ensure newly bad actors become subject to reform measures.

#### IV.

##### FEDERALISM

Federal power, even when directed at violations of constitutional rights, is not unlimited. This Part examines the federalism issues raised when a federal statute seeks to remedy police misconduct. It concludes that whether such a statute is evaluated by comparison either to the Voting Rights Act as of 1965—as we suggest is proper—or in light of *Shelby County* and other recent cases, the statute should withstand constitutional review.

##### A. *The VRA as Precedent*

From some vantage points, federalism lay dormant from 1937 (when the Supreme Court capitulated to the New Deal) until William H. Rehnquist became Chief Justice in 1986 and cases like *United States v. Lopez*<sup>330</sup> launched a revolution.<sup>331</sup> Yet even in the intervening period, in which the Court invalidated just one law as beyond the scope of federal power,<sup>332</sup> federalism certainly mattered. The VRA itself generated a broad and deep debate on the meaning of federalism—and provided a framework for understanding the scope of federal power to protect minority rights, which should guide us today in evaluating federal remedies for police misconduct.

##### 1. *Congress*

Debates over the VRA included significant engagement by members of Congress regarding the proposed law's constitutionality. Opponents raised a series of interrelated objections to the bill that invoked federalism, separation of powers, and states' rights.

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330. 514 U.S. 549, 567–68 (1995) (invalidating the federal Gun-Free School Zones Act of 1990, which criminalized possession of guns within one thousand feet of a school, as beyond Congress's power under the Commerce Clause).

331. See, e.g., *United States v. Bailey*, 115 F.3d 1222, 1233 (5th Cir. 1997) (Smith, J., dissenting) (“*Lopez* is a landmark, signaling the revival of federalism as a constitutional principle, and it must be acknowledged as a watershed decision in the history of the Commerce Clause.”); *United States v. Bishop*, 66 F.3d 569, 591 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part) (“[*Lopez*] reflects a sea change . . .”); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) (“I have no doubt that when constitutional historians look back at the Rehnquist Court, they will say that the greatest changes in constitutional law were with regard to federalism.”); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 168 (1996) (calling *Lopez* an “about-face”); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 130 (2001) (discussing the “revolution” in federalism doctrine).

332. *Oregon v. Mitchell*, 400 U.S. 112, 134–35 (1970) (invalidating provision of Voting Rights Act Amendments of 1970 requiring states to register citizens between the ages of 18 and 21 as voters).

Opponents contended that the coverage formula was arbitrary<sup>333</sup> and that it was unfair—and therefore constitutionally improper—to penalize certain states and localities with the burden of federal oversight but not others.<sup>334</sup> They asserted that Congress intruded upon the authority of the states to govern elections<sup>335</sup> and that the legislation thus violated the Tenth Amendment.<sup>336</sup> Opponents also contended that the proposed bill ran afoul of a constitutional mandate requiring that states be treated equally.<sup>337</sup>

On the other hand, opponents urged that individual states should not be treated as undifferentiated masses; federal remedial law should not reach localities where constitutional violations did not exist.<sup>338</sup> According to the bill's

333. *See, e.g.*, S. REP. NO. 89-162, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2517 (1965) (“The dates are purely arbitrary. The percentage used is equally arbitrary. The events are purely arbitrary. The supposed result from the facts determined is purely arbitrary.”) (statement of Sen. Charles J. Bloch); 111 CONG. REC. 8352 (1965) (“[The bill is] an effort to nullify by arbitrary percentages . . . provisions of the Constitution . . . [that] clearly fix in the State the power to prescribe the qualifications for voters.”) (statement of Sen. Sam Ervin).

334. *See, e.g.*, S. REP. NO. 89-162, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2516 (1965) (“[T]he United States of America would be divided into two groups—the good and the bad—if you please. The ‘good’ . . . could go on exercising their rights and freedoms, and enforcing their statutes. The ‘bad’ . . . could not.”) (statement of Sen. Charles J. Bloch).

335. *See, e.g.*, 111 CONG. REC. 9030 (1965) (“Such an attempted curb on the legislative power of a State is a flagrant violation of our traditions of Government.”) (statement of Sen. John J. Sparkman); 111 CONG. REC. 9334 (1965) (“To try to outlaw and abolish completely a literacy test with reference to voting is . . . directly contrary to the Constitution of the United States . . . It is a matter far beyond the purview of the Congress to impose such limitations.”) (statement of Sen. John C. Stennis); 111 CONG. REC. 9489-90 (1965) (“It is punitive, sectional legislation. . . . All of the so-called triggering provisions restrict the bill mainly to Southern States, thereby making it regional legislation rather than national, general legislation which it should be if it is necessary at all.”) (statement of Sen. John H. Sparkman).

336. *See, e.g.*, 111 CONG. REC. 15719 (1965) (“[T]he Federal Government has been grabbing more and more power. . . . The States have become mere administrative arms of the Federal bureaucracy. . . . Soon they will be deprived of their last significant vestige of sovereignty—the right to lay down qualifications for participation in the governmental process—voter qualifications, even though the Constitution specifically grants this right to the States.”) (statement of Rep. Thomas Abernethy); 111 CONG. REC. 15720 (1965) (“[T]his administration . . . would require Virginia to prostrate itself before a three-judge Federal court in a foreign jurisdiction and establish its innocence of discrimination.”) (statement of Rep. William M. Tuck); 111 CONG. REC. 15720 (1965) (“[The bill] reaches a crest in the flood of Federal intrusions into matters constitutionally reserved to the States.”) (statement of Rep. William M. Tuck).

337. *See, e.g.*, 111 CONG. REC. 16015 (1965) (“[T]his ill-conceived formula can only have been arrived at by first determining that literacy tests of certain Southern States should be suspended and then coming up with a mathematical ratio that would accomplish this.”) (statement of Rep. William M. Tuck).

338. *See, e.g.*, 111 CONG. REC. 9489 (1965) (“This bill . . . would bypass the normal method of letting the courts determine where and how discrimination in voting exists.”) (statement of Sen. John H. Sparkman); 111 CONG. REC. 10448 (1965) (“The Supreme Court has held that a State can have a literacy test. . . . However, under this bill, the literacy test would be null and void in the States to which the bill would be applicable.”) (statement of Sen. Strom Thurmond).

Opposition to the poll tax provision and the use of examiners also invoked arguments about the judicial branch. *See* 111 CONG. REC. 11009 (1965) (“They ask that the Senate sit as judge and jury on this question [of the poll tax] and render a verdict of guilty. . . . They ask that this Senate set itself above the Supreme Court of the United States.”) (statement of Sen. Lister Hill); 111 CONG. REC. 10854 (1965) (“[T]he Attorney General is given the unlimited discretion to make a judicial determination that



opponents, legislation that singled out and penalized some states and localities, including their officials, was a bill of attainder<sup>339</sup> and an ex post facto law.<sup>340</sup>

In addition, such legislation was said to violate due process,<sup>341</sup> equal protection,<sup>342</sup> and the rights of citizens not to vote.<sup>343</sup> Opponents argued that there was insufficient evidence that racial discrimination explained disparities in voting rates.<sup>344</sup>

Opponents also challenged the bill as improperly motivated to appease vocal protesters,<sup>345</sup> some of whom were said to want the dismantling of the

examiners should be appointed . . . It is wrong in principle and in practice for a Government employee to be given this . . . quasi-judicial function.”) (statement of Sen. John C. Stennis).

339. *See, e.g.*, S. REP. NO. 89-162, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2522 (1965) (“It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.”) (statement of Sen. Charles J. Bloch); 111 CONG. REC. 8107 (1965) (“[T]he bill as written inflicts punishment without judicial hearing and is therefore a ‘bill of attainder.’”) (statement of Rep. Joel T. Broyhill).

340. *See, e.g.*, 111 CONG. REC. 7935 (1965) (“This bill . . . will completely abolish the constitutional power and duty of the States to fix the qualifications of voters. . . . [and] reduce the sovereign States . . . to mere puppets of the Federal Government.”) (statement of Rep. Howard W. Smith).

341. *See, e.g.*, 111 CONG. REC. 7257 (1965) (“[W]hat happens to the American tradition of a man being innocent until he is proved guilty? Under the provisions of this bill, a governmental body . . . would have to prove that it was not guilty of an act of discrimination.”) (statement of Rep. Joseph D. Waggoner); 111 CONG. REC. 8107 (1965) (“The present bill . . . denies due process and equal protection of the law, as guaranteed by the 14th amendment, to a large segment of our people in the States to which it applied.”) (statement of Rep. Joel T. Broyhill).

342. *See, e.g.*, 111 CONG. REC. 7257 (1965) (“[T]his bill is a punitive measure aimed at six Southern States . . . This discrimination, this favoritism, cannot be squared with the . . . 14th amendment. Nor can it be squared with section 2 of article 4.”) (statement of Rep. Joe D. Waggoner); 111 CONG. REC. 7257 (1965) (“Any citizen has the right to be treated alike when the franchise privilege is at question . . . We have no duty to lay a slide rule alongside voting statistics.”) (statement of Rep. Joe D. Waggoner Jr.).

343. *See, e.g.*, 111 CONG. REC. 10447–48 (1965) (“[T]his is a free country. . . . We cannot haul people to the polls and make them vote. . . . That would be depriving them of their freedom.”) (statement of Sen. Strom Thurmond); 111 CONG. REC. 15719 (1965) (“This frantic, fanatical drive to artificially stimulate people to vote may some day result in columns of people being marched to the polls on election day. One thinks of Russia where upward of 99 percent of the adult population goes to the polling places every election day.”) (statement of Rep. Thomas Abernathy); 111 CONG. REC. 15720 (1965) (“In Communist countries . . . they do not have the right not to vote. Citizens should have the right to vote. . . . But they should not be intimidated to vote.”) (statement of Rep. Thomas Abernathy).

344. *See, e.g.*, 111 CONG. REC. 15719–20 (1965) (“Many factors enter into voting and the failure to vote. Americans traditionally exercise the right not to vote, to ‘go fishing,’ to express their dissatisfaction with the candidates offered. Sometimes they stay at home out of overconfidence in their candidate’s victory. . . . Voting statistics strongly indicate that considerations other than race enter into low voter participation in any given election.”) (statement of Rep. Thomas Abernathy).

345. *See, e.g.*, 111 CONG. REC. 9335 (1965) (“Out of the public demonstrations has arisen a demand that Congress act and act now, because we are told that a great need exists . . . . But the existence of a need or problem . . . is not sufficient basis for legislation. . . . [T]here must be a [constitutional] grant of authority.”) (statement of Sen. John C. Stennis); 111 CONG. REC. 7934 (1965) (“We have seen invasion by persons posing as tourists, staging a sit-down strike in the White House itself. . . . We have seen similar invasion of the Capitol of the United States by demonstrators who remained until they were dragged down the Capitol steps and placed under arrest. We have seen picketing and demonstrations

government entirely,<sup>346</sup> and as enacted in the heat of circumstances.<sup>347</sup> For these reasons and others, opponents concluded, the bill violated—indeed, worked as a suspension of—the Constitution.<sup>348</sup>

It is not difficult to imagine similar arguments made against a federal law regulating police departments. Opponents are likely to emphasize that policing is traditionally the province of states and localities; that federally imposed requirements would displace local control; that it is unfair to regulate some police departments and not others; that the law lacked sufficient precision; that practices addressed do not necessarily reflect misconduct on the part of officers; and that Congress was responding, in a heavy-handed way, to public pressure following high-profile incidents such as the shooting in Ferguson. Such arguments need not be dismissed out of hand merely because they were offered in similar form at the time the VRA was under consideration. Nonetheless, it is useful in evaluating these arguments to recognize that they reflect a vision of federalism that is not new and that did not prevail at the time of an earlier period of widespread constitutional violations. While useful in reminding us that Congress has only limited powers, these arguments should not distract from the fact that Congress *has power* to remedy conduct that violates the protections individuals enjoy under the Constitution.

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day after day. . . .”) (statement of Rep. Howard W. Smith); 111 CONG. REC. 7935 (1965) (describing Congress as “yielding . . . to the menace of the howling mobs”) (statement of Rep. Howard W. Smith).

346. See, e.g., 111 CONG. REC. 7934 (1965) (“[M]any Communists, subversives, fellow travelers, and others of doubtful loyalty to their country, have attached themselves to this movement. . . . They have adopted the slogan, ‘We shall overcome.’ I pose the question, ‘Whom and what do they aim to overcome?’”) (statement of Rep. Howard W. Smith); 111 CONG. REC. 7935 (1965) (“Martin Luther King . . . has publicly announced that he will defy and violate any law of the land that he disagrees with. This is the language of rebellion and anarchy.”) (statement of Rep. Howard W. Smith).

347. See, e.g., 111 CONG. REC. 8107 (1965) (“The President’s bill obviously was hurriedly written under the stress of great emotion. It is fraught with inconsistencies and inequities and therefore must be thoroughly studied and debated.”) (statement of Rep. Joel T. Broyhill); 111 CONG. REC. 9489 (1965) (“[I]s it not just and proper that we consider the very unhealthy way that the pending legislation was presented to Congress? . . . It capitalized on the medium of television and publicity, which was its main purpose.”) (statement of Sen. John H. Sparkman); 111 CONG. REC. 15718 (1965) (“The voting issue . . . [has] fired up a wave of emotional hysteria . . . responsible for the birth of the President’s unwise, unconstitutional and dangerous proposal. . . . Similar hysteria has swept the pillars of freedom from under many free nations of this world. This bill is a clear and complete surrender to mobocracy.”) (statement of Rep. Thomas Abernathy); 111 CONG. REC. 16005 (1965) (“We find a Congress apparently willing to sweep away all vestiges of State sovereignties and to ignore constitutional restraints in order to placate the demands of the militant and lawless mobs in the streets who demonstrate for voting rights.”) (statement of Rep. John Williams).

348. See, e.g., 111 CONG. REC. 9340 (1965) (“[W]ould not the effect of the bill be to suspend the Constitution of the United States and particularly to suspend article I, section 2, which provides that the States have a right to fix voting qualifications?”) (statement of Sen. Strom Thurmond); 111 CONG. REC. 9340 (1965) (“If the Congress should . . . suspend the Constitution in the matter of fixing voter qualifications, would not that set a precedent for the Congress to pass other laws which would suspend other provisions of the Constitution if an expediency should arise that might appear to demand it?”) (statement of Sen. Strom Thurmond).

In enacting the VRA, Congress, by a large majority, rejected the constitutional arguments opponents offered. Supporters argued that the suspension of tests in covered jurisdictions was perfectly sensible;<sup>349</sup> that Congress enjoyed broad authority under the Fifteenth Amendment,<sup>350</sup> particularly in light of the history of evasive state conduct,<sup>351</sup> and such power included authority to displace traditional state regulations of voting,<sup>352</sup> and that the bailout provision adequately protected the states and localities from federal overreaching.<sup>353</sup> Supporters also rejected arguments that the bill represented a bill of attainder or ex post facto law or otherwise violated rights-protecting provisions of the Constitution.<sup>354</sup> Although the VRA was a novel form of legislation, members of Congress concluded it did not violate the Constitution.

## 2. *At the Court*

The Supreme Court rejected the constitutional objections as well when it heard the first challenge to the VRA in *South Carolina v. Katzenbach*. Since 1895, South Carolina had required that prospective voters be able to read and write any provision of the state constitution, with an exemption for certain categories of property owners.<sup>355</sup> By operation of the VRA, South Carolina

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349. See, e.g., 111 CONG. REC. 8297 (1965) (“[T]he record . . . clearly demonstrates that where a State uses a literacy test and there is a nonwhite population coupled with a low participation in the election process, the low voter participation is almost always caused by a discriminatory use of a test.”) (statement of Sen. Mike Mansfield); 111 CONG. REC. 15647 (1965) (“Decisions of the Federal courts and the reports of the U.S. Civil Rights Commission persuasively indicate that many of the States and political subdivisions to which the formula applies have engaged in widespread violations of the 15th Amendment over a period of time.”) (statement of Rep. Emanuel Celler).

350. See, e.g., 111 CONG. REC. 8301 (1965) (“[T]he grant of power in section 2 of the 15th Amendment . . . includes not only the power to strike down the strictly illegal but also the power to eliminate any substantial risk of evasion.”) (statement of Sen. Philip Hart).

351. See, e.g., 111 CONG. REC. 8364 (1965) (“Under the existing Federal law, litigation must be conducted again and again and in county after county. Long and tedious preparation, court delays, and the possibility of recurrent evasions of even the court orders beset the Department of Justice in every case.”) (statement of Sen. Jacob K. Javits); 111 CONG. REC. 8467 (1965) (“[The bill] was proposed only when experience had taught us the inadequacies of prior laws.”) (statement of Sen. Birch Bayh); 111 CONG. REC. 15644 (1965) (“[B]ecause of legal strategies and cunning subterfuges, very astute lawyers retained by certain States have rendered abortive . . . decisions of the courts; so that today we must have recourse to administrative remedies as well as judicial remedies.”) (statement of Rep. Emanuel Celler).

352. See, e.g., 111 CONG. REC. 8359 (1965) (“[W]hen a State has failed to honor the mandate of the 15th Amendment, Congress may adopt appropriate means, even if those means reduce the power of the States insofar as other provisions of the Constitution which preserve powers to them are concerned.”) (statement of Sen. Jacob K. Javits).

353. See, e.g., 111 CONG. REC. 8297 (1965) (“[S]ince the bill contains . . . escape clauses . . . there can be no legitimate complaint that the Congress exceeded its authority.”) (statement of Sen. Mike Mansfield); 111 CONG. REC. 8294 (1965) (“The bill provides the method for the States to cleanse themselves of any taint.”) (statement of Sen. Everett Dirksen).

354. As Senator Philip Hart explained, “The constitutional prohibition against ex post facto laws applies only to criminal statutes. The criminal provisions of the bill . . . do not operate retroactively. . . . Nor do the provisions of the bill . . . constitute an unlawful bill of attainder since they do not involve punishment.” 111 CONG. REC. 9795 (1965).

355. Brief of Plaintiff at 2, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

became a covered jurisdiction and its literacy test was suspended.<sup>356</sup> Invoking the Court's original jurisdiction, South Carolina made a series of arguments against the VRA, many of which tracked the opposition to the bill in Congress. South Carolina argued that the VRA deprived the state of its powers to prescribe voter qualifications under Article I of the Constitution;<sup>357</sup> violated a constitutional principle of equal statehood;<sup>358</sup> violated due process by "an arbitrary and irrebuttable presumption of racial discrimination by South Carolina and her inhabitants";<sup>359</sup> interfered with self-government in violation of the Guarantee Clause of Article IV;<sup>360</sup> and worked as a legislative trial in violation of the Bill of Attainder Clause of Article I, Section 9 and Article III's corresponding allocation of powers to the judiciary.<sup>361</sup> The state further argued that the law exceeded Congress's powers under the Fifteenth Amendment because the remedial provisions lacked a sufficient relationship to proven racial discrimination.<sup>362</sup>

In upholding the challenged provisions of the VRA, the Supreme Court in *South Carolina v. Katzenbach* took a broad view of congressional power. In his opinion for the Court, Chief Justice Earl Warren observed at the outset that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."<sup>363</sup> In that regard, Congress had "explored with great care the problem of racial discrimination in voting" and, as evidenced by the decisive vote in favor of the bill, "the verdict of both chambers was overwhelming."<sup>364</sup> The Court noted two lessons from the extensive congressional debates and record: that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution" and that "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."<sup>365</sup> The Court particularly emphasized the failures of piecemeal litigation under prior federal civil rights laws.<sup>366</sup> Context thus mattered. As the Court explained, "exceptional conditions can justify legislative measures not otherwise appropriate."<sup>367</sup>

Making quick work of South Carolina's arguments that the VRA was an unconstitutional bill of attainder, violated due process, or otherwise infringed

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356. *Id.*

357. *Id.* at 6–12.

358. *Id.* at 13–15.

359. *Id.* at 15.

360. *Id.* at 24.

361. *Id.* at 36–37.

362. *Id.* at 30–33.

363. 383 U.S. at 308.

364. *Id.* at 308–09.

365. *Id.* at 309.

366. *Id.* at 314.

367. *Id.* at 334.

constitutional rights,<sup>368</sup> the only serious question the Court saw was whether the VRA was indeed a proper exercise of Congress's powers.<sup>369</sup> On that issue, the Court assigned itself a modest role: "[T]he Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."<sup>370</sup>

Under this standard, the VRA easily survived. The Court explained that the statute was "clearly a legitimate response" to the problem of voting discrimination given the ineffectiveness of case-by-case litigation.<sup>371</sup> It was "permissible" for Congress to "confine[] . . . remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name"<sup>372</sup> and "where immediate action seemed necessary."<sup>373</sup>

The Court therefore deemed the coverage formula rational: "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters."<sup>374</sup> That voting discrimination might occur via means other than tests and devices was "irrelevant" in judging whether the chosen formula was rational.<sup>375</sup> Suspension of literacy tests and other devices was a "legitimate" response on the part of Congress<sup>376</sup> and federal review of new state election procedures was appropriate given that "Congress had reason to suppose that . . . States might try . . . to evade the remedies for voting discrimination contained in the Act itself."<sup>377</sup> Appointment of federal examiners was likewise "clearly . . . appropriate" because local officials might otherwise deploy "procedural tactics" to circumvent the operation of the law.<sup>378</sup> The bailout provision's requirement that jurisdictions prove they were not discriminating was a "quite bearable" burden given that "the relevant facts relating to the conduct of voting officials

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368. *Id.* at 323–24.

369. *Id.* at 324.

370. *Id.*

371. *Id.* at 328.

372. *Id.*

373. *Id.*

374. *Id.* at 330.

375. *Id.*

376. *Id.* at 334.

377. *Id.* at 335. Justice Black, who otherwise concluded the provisions of the Act were constitutional, thought the preclearance provision of Section 5 beyond Congress's authority. *See id.* at 360 (Black, J., concurring & dissenting) ("A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country.").

378. *Id.* at 336 (majority opinion).

are peculiarly within the knowledge of the States and political subdivisions themselves.”<sup>379</sup>

The Court also rejected South Carolina’s argument that by displacing state and local election laws Congress had usurped judicial power. “On the contrary,” the Court explained, with Section 2 of the Fifteenth Amendment, “the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [Section] 1” and “has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.”<sup>380</sup> Shoring up the conclusion, the Court invoked *McCulloch v. Maryland* to refute South Carolina’s claim that “Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—[such] that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts.”<sup>381</sup> Rather, the Court explained, “Congress is not circumscribed by any such artificial rules under s[ection] 2 of the Fifteenth Amendment.”<sup>382</sup> Nor was there any merit to South Carolina’s argument that Congress needed to treat states equally: “The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”<sup>383</sup>

### 3. *Lessons for Police Reform*

Under the constitutional standards applied to the VRA at the time of its enactment—by Congress in passing the bill, the President signing it into law, and the Court in *Katzenbach*—a federal law of the kind described in the preceding sections to remedy police misconduct would readily survive constitutional review. A coverage formula that brings police departments into federal oversight is a rational response to the failures of prior efforts that have relied upon piecemeal intervention and a reasonable mechanism to guard against future violations of rights. Such a formula may not be perfect. It may bring in some departments that are not engaged in misconduct and leave out others that are. However, the VRA-era standards make clear that perfection is not required. The envisaged reforms are also appropriate because they address the specific forms of police misconduct and they have a track record of success when used in § 14141 settlements. If *Katzenbach*’s framework holds true—such that “exceptional conditions can justify legislative measures not otherwise

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379. *Id.* at 332.

380. *Id.* at 325–26.

381. *Id.* at 327.

382. *Id.* The Court reiterated this approach the next year in upholding Section 4(e) of the VRA as a proper exercise of congressional power under Section 5 of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

383. 383 U.S. at 328–29.

appropriate”<sup>384</sup>—then Congress has ample authority to remedy the pervasive problem of police misconduct with broad federal intervention.

### B. Modern Developments

*Katzenbach* was not the Supreme Court’s last word on Congress’s power to regulate voting; other developments on the federalism front have occurred since the adoption of the VRA. This Section, which begins with *Shelby County*, sets out why a federal police misconduct law is also consistent with federalism principles of more recent vintage.

#### 1. Surviving Shelby County

In *Shelby County v. Holder*,<sup>385</sup> the Supreme Court held that the coverage formula of Section 4 of the VRA, as extended in 2006, was unconstitutional as beyond the scope of congressional power under Section 2 of the Fifteenth Amendment. The coverage formula therefore violated the Tenth Amendment.<sup>386</sup> The core of the problem, according to Chief Justice John Roberts in his opinion for the Court, was that the formula—based on data from the 1960s and 1970s—could not be justified “in light of current conditions.”<sup>387</sup> It did not reflect improvements in registration and voting<sup>388</sup> that had occurred largely as a result of the VRA itself.<sup>389</sup> Despite those improvements, Congress had not “eased the restrictions in [Section] 5 or narrowed the scope of the coverage formula in [Section] 4(b)” and thus the VRA’s cure was no longer “sufficiently related to the problem that it targets.”<sup>390</sup> Thus, Chief Justice Roberts explained, “[i]f Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula”<sup>391</sup> because “[i]t would have been irrational for Congress to distinguish between States . . . based on 40-year-old data, when today’s statistics tell an entirely different story” and equally “irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time.”<sup>392</sup> In reaching the conclusion that by retaining a dated formula Congress exceeded its enforcement powers under the Fifteenth Amendment, Chief Justice Roberts invoked the decision three years earlier in *Northwest Austin*, in which the Court expressed doubts about the

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384. *Id.* at 334.

385. 133 S. Ct. 2612 (2013).

386. *Id.* at 2630.

387. *Id.* at 2627.

388. *Id.* at 2618 (“There is no denying . . . that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”).

389. *Id.* at 2626 (“There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.”).

390. *Id.* at 2622, 2626 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

391. *Id.* at 2630.

392. *Id.* at 2630–31.

constitutionality of Section 5 but avoided that issue by resolving the case on statutory grounds.<sup>393</sup>

In *Shelby County*, the Court's invalidation of Section 4 of the VRA turned on the burdens Section 5 imposed upon the covered jurisdictions. Chief Justice Roberts explained that "this Court has made clear from the beginning that the Voting Rights Act is far from ordinary. At the risk of repetition, *Katzenbach* indicated that the Act was 'uncommon' and 'not otherwise appropriate,' but was justified by 'exceptional' and 'unique' conditions."<sup>394</sup> In other words, the legitimacy of the coverage formula of Section 4 had to be evaluated with an eye to the federalism burdens of Section 5.

Chief Justice Roberts identified three key federalism concerns. First, by treating some states less favorably than others, the VRA implicated the constitutional principle of the "equal sovereignty" of the states.<sup>395</sup> Of particular concern was that the VRA divided states into two groups<sup>396</sup> that represented a North-South divide. While this division was once pertinent, it no longer reflected present-day conditions.<sup>397</sup> Second, "disparate treatment," under the VRA, occurred in the particular context of state lawmaking. Covered states needed federal permission before taking legislative action.<sup>398</sup> Third, by targeting election laws, the VRA struck at a particularly important state lawmaking power, one that lay at the heart of self-government.<sup>399</sup>

In considering these three federalism burdens, Chief Justice Roberts made note of their now extended timeframe: "this extraordinary legislation was [originally] intended to be temporary, set to expire after five years."<sup>400</sup> Evaluated not just on its own but in light of these three federalism burdens, the Court found the coverage formula lacked a sufficient rationale and was unconstitutional.

While *Shelby County* gives some pause, it should not alter the conclusion in the preceding Section that a federal law directed at police misconduct is constitutionally sound. For Chief Justice Roberts made clear that under appropriate circumstances Congress indeed had the power to suspend state laws, require preclearance of new state laws, and treat some states less favorably than other states—but such measures would have to be justified by current conditions.<sup>401</sup> Thus, the Court in *Shelby County* did not invalidate Section 5 of

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393. *Nw. Austin*, 557 U.S. at 193.

394. *Shelby Cty.*, 133 S. Ct. at 2630 (quoting *Katzenbach*, 383 U.S. at 334, 335).

395. *Id.* at 2618.

396. *Id.* at 2628.

397. *Id.*

398. *Id.* at 2624.

399. *Id.*

400. *Id.* at 2625.

401. *See, e.g., id.* at 2629 ("Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.").



the VRA (though Justice Clarence Thomas would have done so)<sup>402</sup> nor did the Court preclude Congress from adopting a new Section 4 formula to justify the continued imposition of the Section 5 measures.<sup>403</sup> Finally, and critically, *Shelby County* did not overrule *Katzenbach*. Indeed, *Shelby County* actually endorsed the ruling in *Katzenbach* that, as of 1965, the VRA was a proper exercise of Congress's power even in light of the federalism issues the law implicated.

*Shelby County* itself thus supports federal regulation to remedy abusive police practices. Police misconduct today looks much more like the record of voter discrimination that was before the Court in *Katzenbach* than was before the Court in *Shelby County*. Current conditions might not support a decades-old voting formula, but current conditions do support a law identifying and reigning in police departments that violate constitutional rights. The most significant lesson of *Shelby County* is that when Congress exercises its power to remedy constitutional violations, it must adapt as conditions evolve.

The circumstances that justify federal intervention today might not exist tomorrow. Federalism requires ongoing attention—including on the part of Congress itself—as to whether a use of national power that regulates state government finds contemporary justification. Accordingly, if a federal law remedying police misconduct achieves the same degree of success as did the VRA, then *Shelby County* indicates that the law, if left unchanged, will no longer represent a proper exercise of congressional power. That outcome, however, is precisely the price for permitting strong federal intervention when, as with the case of police misconduct, constitutional violations persist.

## 2. *Standard of Review*

Perhaps, it is naive to invoke *Shelby County* and *Katzenbach* in support of a federal law remedying police misconduct. After all, it was easy for the Court majority in *Shelby County* to proclaim fidelity to *Katzenbach* when nobody had called that case into question and the issue was the constitutionality of a 2006 statute. One particular wrinkle is the question of the standard of review the Court today would apply to the federal law we have proposed.

Under *Boerne v. Flores*, a federal statute is a proper exercise of Congress's powers under Section 5 of the Fourteenth Amendment if there exist “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>404</sup> That test, the *Boerne* Court explained, ensures that Congress is indeed “enforcing” the Fourteenth Amendment by “remedy[ing] or prevent[ing] unconstitutional actions and measures” rather than seeking to “make a substantive change” to the meaning of the Fourteenth

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402. *See id.* at 2632 (Thomas, J., concurring) (“The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists.”) (internal quotation and citation omitted).

403. *Id.* at 2631 (majority opinion).

404. 521 U.S. 507, 520 (1997).

Amendment itself.<sup>405</sup> Under the congruence and proportionality standard, the *Boerne* Court (citing *South Carolina v. Katzenbach*) explained, “[t]he appropriateness of remedial measures must be considered in light of the evil presented” such that “[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”<sup>406</sup> In invalidating the federal Religious Freedom Restoration Act (RFRA) as failing the congruence and proportionality test, the *Boerne* Court contrasted the absence of “[state and local] laws passed because of religious bigotry” to justify the statute with the record of voting discrimination that supported the VRA.<sup>407</sup>

Although cited in *Boerne*, *Katzenbach* plainly did not apply a congruence and proportionality test. Thus, when the Roberts Court took up the challenge to the VRA, there was an underlying question as to whether *Boerne* governed. In *Northwest Austin*, Chief Justice Roberts noted that the utility district challenging the VRA contended that *Boerne* supplied the (tougher) governing standard, while the federal government, invoking *Katzenbach*, argued that it was “enough that the legislation be a rational means to effectuate the constitutional prohibition.”<sup>408</sup> In *Northwest Austin*, Chief Justice Roberts determined that there was no need to resolve the dispute because “[t]he Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test.”<sup>409</sup> Thus the impact of *Boerne* was left undecided.

The reader of *Shelby County* looking for resolution of the standard of review question left after *Northwest Austin* searches in vain. In his opinion in *Shelby County*, Chief Justice Roberts did not revisit the issue of the governing standard. His opinion makes no mention of *Boerne*’s congruence and proportionality test nor does it specifically endorse the government’s view that *Katzenbach*’s rationality approach governs. Highlighting these silences in her dissenting opinion, Justice Ruth Bader Ginsburg reiterated the *Katzenbach* standard of review,<sup>410</sup> pointed out that the “Court does not purport to alter settled

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405. *Id.* at 519–20.

406. *Id.* at 530.

407. *Id.*

408. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (internal quotation omitted).

409. *Id.*

410. Justice Ginsburg wrote that “Congress’ judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference.” *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting). In particular, she explained, “The VRA addresses the combination of race discrimination and the right to vote, which is ‘preservative of all rights.’ . . . When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress’ power to act is at its height.” *Id.* (internal citations omitted). Accordingly, “when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end.” *Id.* at 2637. She concluded: “*South Carolina v. Katzenbach* supplies the standard of review: ‘As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.’” *Id.* at 2638 (internal citation omitted).

precedent establishing that the dispositive question is whether Congress has employed ‘rational means,’<sup>411</sup> and criticized the majority for failing, in her judgment, to adhere to that deferential standard.<sup>412</sup> Perhaps the bottom line is that the *Shelby County* majority thought the coverage formula failed rational review, thereby also failing congruence and proportionality, which, as in *Northwest Austin*, obviated the need to decide which standard actually governed.

A federal law remedying police misconduct should meet even the higher of the two standards. The central problem for the government in *Boerne* was that Congress was remedying a problem that did not exist. The Court had already held that a state or local law that incidentally burdened religion was not unconstitutional. A police misconduct law, by contrast, is directed at unconstitutional conduct on the part of law enforcement. Put differently, the *Boerne* decision was grounded as much in principles of separation of powers as in federalism concerns. RFRA defied the Court’s own judgment about the scope of constitutional rights: Congress was intruding upon the domain of judicial power. A law remedying police misconduct would implicate federalism but it would not arrive at the Supreme Court as a RFRA-style effort to overturn an earlier Supreme Court decision.<sup>413</sup>

### 3. Localism

In one respect, our proposal is on even firmer constitutional footing than the original VRA was. In the congressional debates that produced the VRA and in both *Katzenbach* and *Shelby County*, the principle of state equality was invoked. Congress in enacting the VRA and the *Katzenbach* Court (which narrowed the understanding of equal state sovereignty to terms of admission to the Union) rejected the challenge to federal power on this basis. Chief Justice Roberts’ opinion in *Shelby County*, however, gives particular emphasis to the principle of equal state sovereignty: the disparate treatment of states, particularly along a northern–southern axis, was a key aspect of the Court’s federalism concern in evaluating the 2006 law.

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A lingering issue is whether, in light of the Court’s decision in *Boerne*, Justice Ginsburg means to reserve the “any rational means” standard to federal laws that address the *combined* problem of racial discrimination and voting. *Id.* But if there is some magic in *two* constitutional problems, it is found also in police misconduct where violations of constitutional rights have a racial (and thus equal protection) component.

411. *Id.* at 2638.

412. *Id.* at 2637–38 (“Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its judgments in this domain should garner.”).

413. In addition, because the remedies set out above are directed at the appropriate target—the police themselves—the proposal avoids the problem that doomed the civil remedy provision of the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598, 621–27 (2000) (holding that under a congruence and proportionality standard Congress’s Section 5 power did not support VAWA’s civil remedy because that remedy was directed at private perpetrators of violence rather than state governments).

Our proposal largely avoids the problem of unequal state sovereignty. Because policing is localized, it is unlikely that our formula will cover an entire state. All states will likely have some covered localities (and some that are not covered), and coverage is most unlikely to produce a North–South divide. Indeed, the formula we urge will likely be more rational (or more congruent and proportional) than the 1965 VRA was. Even though voting is also localized,<sup>414</sup> the VRA swept in entire states. Our more surgical approach thus avoids a key federalism concern of *Shelby County*. When Congress regulates not states but localities dispersed around the country, objections grounded in federalism—a state-centered principle—have less punch. Localities, of course, exist as a function of state government, from which they derive their authority, so regulating localities ultimately does implicate state governmental interests. Nonetheless, in our constitutional scheme, states have special footing; the Constitution makes no mention at all of towns, cities, or counties, and it provides protections to states that are not available to their subunits.<sup>415</sup> From a federalism perspective, a federal law that targets some states but not others should be viewed with greater skepticism than a federal law that targets some counties within every state.

#### 4. *Commandeering*

The Supreme Court has held that the federal government may not “commandeer” state legislative or executive officials by compelling them to carry out a federal program.<sup>416</sup> A federal law that requires localities (or states) to take action, such as by enacting a new law (or repealing an old) or implementing administrative measures, arguably involves unconstitutional commandeering.

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414. Article I provides that “[t]he 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 choosing Senators.” U.S. CONST. art. I, § 4. In practice, however, elections largely operate at the *local* level, governed by local rules, because states have turned over the electoral process to counties and townships. The degree of local control and the way in which it is exercised varies among states; even within individual states, practices vary because localities adopt different approaches. Commentators thus refer to the electoral process as “hyperfederalized.” ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* 3 (2009).

415. Notably, the Eleventh Amendment protects states but not cities and other subunits of state government.

416. *Printz v. United States*, 521 U.S. 898, 935 (1997) (“Congress cannot circumvent . . . [*New York*] by conscripting the States’ officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”) (invalidating provisions of the Brady Handgun Violence Prevention Act requiring local law enforcement officials to conduct background checks); *New York v. United States*, 505 U.S. 144, 162 (1992) (“While Congress has substantial powers to govern the Nation directly . . . the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”) (invalidating provisions of the federal Low-Level Radioactive Waste Policy Amendments Act requiring states to regulate low-level radioactive waste).

Thus, one objection is that by requiring changes in police practices our proposed reforms entail unconstitutional federal commandeering.

The commandeering objection, while deserving consideration, is readily addressed. Congress's power to respond to constitutional violations by the police derives from its powers to enforce the Equal Protection and Due Process Clauses of the Fourteenth Amendment (which incorporates most of the provisions of the Bill of Rights against the states). Although the Supreme Court itself has not decided whether the anti-commandeering principle applies to Congress's Reconstruction powers, it has held that a properly "congruen[t] and proportional[]" federal statute enacted under Section 5 of the Fourteenth Amendment may force state-level change in order to "remedy or prevent unconstitutional actions."<sup>417</sup> Many scholars take the position that the anti-commandeering doctrine does not apply when Congress acts to enforce the Reconstruction Amendments because those amendments give Congress special authority to regulate the states.<sup>418</sup> For example, the Family and Medical Leave

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417. *Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). A related question, given the degree to which policing is localized, is whether Congress can compel states to require localities to comply with federal requirements. In enacting a national law, it might well be easier for Congress to specify broad requirements but charge states with the detailed implementation that will be needed in light of local conditions. Can Congress require state-level changes—which themselves will take account of localized practices—rather than legislate change directly at the local level? The answer is surely yes. Localization of police is a product of state law. It would be odd to conclude that congressional power to force state government action disappears once states themselves delegate authority to a locality. In addition, from a federalism perspective it is surely less intrusive for Congress to give state government the ability to shape the details of a compliance program at the local level than for Congress itself (or a designated federal agency) to intervene in a more specific manner at the local level.

418. See Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 164–65 (2001) (treating the anti-commandeering principle as limited to exercise of Article I powers); Matthew D. Adler & Seth Kreimer, *The New Etiquette of Federalism*: New York, Printz and Yeskey, 1998 SUP. CT. REV. 71, 123 ("The Court's language in [*Penn. Dep't Corrections v. Yeskey*] 524 U.S. 206 (1998)] implies that the anticommeneering doctrines limit only legislation adopted pursuant to the Commerce Clause, and are inapplicable to a federal statute appropriately grounded in the Fourteenth Amendment."); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1006 n.13 (1995) ("Arguably, congressional commandeering as a means of exercising its Section Five power to enforce the Fourteenth Amendment's limitations on state authority . . . does not raise the same federalism issues [as uses of Article I powers], since the Reconstruction Amendments were openly designed to curb state sovereignty."); Daniel A. Farber, *Pledging A New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1140–41 (2000) ("[E]ven the anti-commandeering principle may well bow to Congress's enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments, as does the state's sovereign immunity."); Roderick M. Hills Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 888–89 (1998) ("The *New York* Court did not address the issue of whether *New York's* anticommeneering rule applied to any exercise of the Fourteenth Amendment, but the Court has upheld provisions of the Voting Rights Act of 1965 that arguably commandeer the electoral process of state governments."); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2210 (1998) ("[T]he Fourteenth Amendment retains important possibilities as part of the post-Civil War constitutional order for authorizing federal compulsion of states across a wide array of issues and substantive areas."); Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 171

Act (“FMLA”) allows eligible employees to take unpaid leave in response to a “serious health condition” on the part of the employee’s spouse, child, or parent. The Act applies to employees of state and local government just as it applies to private sector employees.<sup>419</sup> Aggrieved employees may obtain equitable relief and monetary damages against employers who “interfere with, restrain, or deny the exercise of” FMLA rights.<sup>420</sup> The constitutional basis for applying the law to public employees is Section 5 of the Fourteenth Amendment. Congress enacted the law to promote gender equity in the workplace in light of a long history of family care duties falling on female employees who then faced adverse consequences as a result of taking time off.<sup>421</sup> The Act requires state government to take affirmative steps to provide employees with leave (or else suffer a financial penalty); the Supreme Court has upheld the statute as a proper exercise of congressional authority.<sup>422</sup>

Indeed, the Voting Rights Act itself—enacted under Section 2 of the Fifteenth Amendment—works as a significant commandeering of the states and an interference with state delegation of authority to localities. The VRA suspended state and local laws governing voting, required the adoption of new state government administrative measures, and required states and localities to obtain federal approval before new voting policies could take effect. The Supreme Court has never suggested those provisions were unconstitutional commandeering.<sup>423</sup>

It bears underscoring that the Reconstruction powers permit Congress both to prevent states from engaging in certain activities and to demand that states

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(2012) (“Congress may commandeer the states pursuant to its powers under the Reconstruction Era Amendments. . . . The basis for this exception is straightforward: the Reconstruction Amendments changed Congress’s relationship vis-à-vis the states.”).

419. 107 Stat. 9, 29 U.S.C. § 2612(a)(1)(C) (2012).

420. *Id.* § 2615(a)(1).

421. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

422. *Id.* at 734.

423. In cases involving federal election statutes besides the Voting Rights Act, lower courts have rejected anti-commandeering arguments on the ground that the anti-commandeering cases involve uses of the Commerce Clause whereas the Constitution’s Elections Clause gives Congress special power to displace state (and local) election practices and thus its use is not constrained by the same anti-commandeering rules. *See, e.g., Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997). Courts have likewise rejected the companion argument that federal law that requires state governments to act to reform local voting practices interferes with the ability of states to structure state government, specifically the powers delegated to localities: again, the rationale is that the Constitution itself gives Congress power to interfere with those delegations through the Elections Clause. *See, e.g., Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008).

take affirmative steps,<sup>424</sup> as various federal civil rights laws require.<sup>425</sup> Thus, in remedying police misconduct, Congress is in no way limited to directing states and localities to refrain from some behavior. Instead, acting under the Fourteenth Amendment, Congress can also compel state and local governmental action. From a commandeering perspective, “the federal government could plausibly demand any enforcement service it wanted from the states.”<sup>426</sup> That conclusion makes considerable sense: as landmark constitutional cases demonstrate, remedying constitutional violations very often requires action on the part of the offender.<sup>427</sup>

#### CONCLUSION: POLITICS

The Voting Rights Act of 1965 provides a blueprint for remedying police misconduct. However, the plausibility of such decisive federal action depends

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424. As Professors Adler and Kreimer explain: “One might argue that, since the Constitution protects only against government action rather than government inaction, the only legislation required to implement the Fourteenth Amendment will impose negative duties and will thus be a permissible exercise of the federal preemption power. But such a response fails to account both for the scope of well-settled constitutional doctrine and for the legitimacy of congressional action under the Fourteenth Amendment to prevent, as well as to remedy, constitutional violations.” Adler & Kreimer, *supra* note 418, at 124.

425. *Id.* at 125–26 (“[M]uch . . . legislation—most prominently Title VII and the voting rights legislation sustained in *City of Rome*, as well as municipal responsibility for deliberate indifference to constitutional violations— . . . requires the states to take affirmative measures to comply with federal civil rights mandates.”).

426. Mikos, *supra* note 418, at 171. Beyond the Section 5 argument, the Court’s decision in *Reno v. Condon* provides an additional basis for exempting our proposed reforms from anti-commandeering constraints. 528 U.S. 141 (2000). *Condon* upheld the federal Driver’s Privacy Protection Act, which restricts the ability of the states to sell or otherwise disclose a driver’s personal information without the driver’s consent and imposes civil and criminal penalties for non-compliance. *Id.* at 145–46. In challenging the statute, South Carolina contended that it violated *New York* and *Printz* because it required that state employees “learn and apply the Act’s substantive restrictions,” including its various exemptions and that “these activities will consume the employees’ time and thus the State’s resources.” *Id.* at 150. In his opinion for a unanimous Court, Chief Justice Rehnquist, though acknowledging that the statute would “require time and effort on the part of state employees,” rejected the anti-commandeering claim, explaining that the law merely “‘regulate[d] state activities,’ rather than ‘seek[ing] to control or influence the manner in which States regulate private parties.’” *Id.* (quoting *South Carolina v. Baker*, 485 U.S. 505, 514 (1988)). States are not somehow exempt from federal law merely because adherence requires the state to take action: “[a]ny federal regulation demands compliance,” Chief Justice Rehnquist explained, and “[t]hat a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.” *Id.* at 150–51 (quoting *Baker*, 485 U.S. at 514–15). Thus, a federal law that imposes federal requirements upon existing state activities (rather than requires the states to get involved in regulating private parties on behalf of the federal government) presents no commandeering problem. Our proposals, because they limit or alter existing state and local police laws and practices, would fall within the *Condon* exemption. *See id.* at 151.

427. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“[S]chool authorities [in cases of unconstitutional racial segregation] are clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”) (quoting *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 437 (1968)) (internal quotations omitted).

on politics. Today, the divide between our political parties—and political preferences—often seems much greater than the six hundred miles that separate Ferguson from Selma. With Congress having failed even to adopt a new voting rights formula after *Shelby County*,<sup>428</sup> the chances of a federal police misconduct law may seem slight.

Yet political division is nothing new. The VRA itself ended with bipartisan support, but it did not begin there. The credit for unifying Congress—and the nation—after the brutality at the Edmund Pettus Bridge belongs to President Johnson. When he took the lectern at the televised joint session of Congress on March 15, 1965, Johnson laid out the stakes:

I speak tonight for the dignity of man and the destiny of democracy. I urge every member of both parties—Americans of all religions and of all colors—from every section of this country, to join me in that cause. At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.<sup>429</sup>

Five decades later, remedying police misconduct may well require a president who recognizes “So it was in Ferguson, Missouri,” and who, like President Johnson, champions reform.

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428. Bills proposing a new coverage formula have been introduced in the Senate and the House but have failed. *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3 (2014); Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. § 3 (2014).

429. President Lyndon B. Johnson, Voting Rights Act Address (Mar. 15, 1965).