Legal Analysis of the Durbin-Warren Right to Vote Amendment

By Franita Tolson
Professor of Law
Vice Dean for Faculty and Academic Affairs
University of Southern California Gould School of Law
(Affiliation for identification purposes only)

"Section 1. Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides."

Section 1 would create an explicit right to vote in the text of the U.S. Constitution. In lieu of express text, the U.S. Supreme Court has inferred a right to vote from the Voter Qualifications Clause of Article I, Section 2 and the Fourteenth and Fifteenth Amendments. In a series of cases, the Court held that Article I, Section 2, which requires voters in federal elections have the same qualifications as the electors who vote for "the most numerous branch of the State legislature," confers a fundamental right to vote in federal elections.[1] Similarly, the Court has held that the Equal Protection Clause of the Fourteenth Amendment protects a fundamental right to vote in state elections.[2] Unlike federal elections*,* states can choose whether to extend the right to vote, but once available, the state must offer the right on equal terms. Finally, the Fifteenth Amendment guarantees to each citizen a right to vote free of racial discrimination.[3] Despite these provisions, there is no federal constitutional text that explicitly guarantees a right to vote in local, state, or federal elections.

By recognizing an explicit right to vote in the constitutional text, Section 1 of the proposed amendment will elevate the right to vote to the same level of constitutional protection as enjoyed by enumerated constitutional rights. Under current Supreme Court caselaw, enumerated rights like the First Amendment right to freedom of speech and the Second Amendment right to bear arms are given broad protection from abridgments or denials by local, state and federal governments.[4] While the Court has recognized an array of unenumerated constitutional rights like the right to vote,[5] the Court has accorded less protection to these rights than the protections extended to enumerated constitutional rights. This disparity in treatment occurs because there are interpretive disputes over the initial recognition of unenumerated constitutional rights that leave them susceptible to judicial

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[1] U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* amend. XVII (similar requirement for senate elections); s*ee* Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) (stating that "the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution"); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (holding that Art. I, § 2, of the Constitution "gives persons qualified to vote a constitutional right to vote and to have their votes counted").

[2] *See id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *Harper*, 383 U.S. at 665 (relying on the Equal Protection Clause to protect the right to vote in state elections because this right "is nowhere expressly mentioned" in the Constitution); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (invalidating a state legislative apportionment scheme on the grounds that the plan diluted the constitutionally protected right to vote of the state's citizens).

[3] *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[4] *See, e.g.,* District of Columbia v. Heller, 554 U.S. 570 n. 27 (2008) (arguing that rational basis review "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms."); Citizens United v. FEC, 558 U.S. 310, 329 (2010) (refusing to resolve the case on narrower grounds because the federal law regulating corporate independent expenditures involves political speech "that is central to the meaning and purpose of the First Amendment").

[5] *See, e.g.,* Obergefell v. Hodges, 576 U.S. 644 (2015) (right to same sex marriage); Lawrence v. Texas, 539 U.S. 558 (2003) (right of personal autonomy); Saenz v. Roe, 526 U.S. 489 (1999) (right to travel); Zablocki v. Redhail, 434 U.S. 374 (1978) (the right to marry or not to marry); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (right to receive information); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy); NAACP v. Button, 371 U.S. 415 (1963) (right to use the federal courts and to advise others to use them); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (right to hold one's own beliefs); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1928) (right of association); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to rear children in accordance with parental values and beliefs).

revision in the long term.[6] These disputes sometimes extend beyond seeking to narrow the scope of an implied constitutional right to revoking the right outright.[7]

By making the right to vote explicit in the constitutional text, Section 1 would ensure that the right to vote receives the same level of protection as the enumerated constitutional rights explicit in the text. The Supreme Court's approach to voting rights has been markedly uneven, with the scope of the right often dependent upon whether the regulation applies to state elections, federal elections, or both. The unevenness with which the Court has approached the right to vote is best illustrated by its determination that, even though the right to vote in federal elections must exist, the Constitution does not require the states to extend the right to vote in state elections to its citizens.[8] Section 1 would correct this asymmetry by mandating that citizens be allowed to vote in any public election—local, state or federal.

Section 1's determination that there is a fundamental right to vote in "any public election" also prevents states from abridging or denying the right to vote, as defined by their state laws and state constitutions, in the context of state and local elections. Under current caselaw, states have broad authority to enact nondiscriminatory voter qualifications standards for local, state, and federal elections,[9] but their authority to enact procedural regulations governing local and state elections is substantially broader than their authority to regulate the times, places and manner of federal elections.[10] Even though voter qualifications can still vary from state to state, Section 1 would prevent states from imposing either voter qualification standards or election regulations that "abridge or deny" the right to vote in any public election. Importantly, the protections of Section 1 do not vary based on whether the election is local, state, or federal, nor does it matter whether the regulation is a time, place, or manner regulation or a voter qualification standard.

"Section 2. The fundamental right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State or political subdivision within a State unless such denial or abridgment is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."

Section 2 restores the strict scrutiny standard of *Harper v. Virginia State Board of Elections*, which requires all restrictions on the right to vote to be the least restrictive means of furthering a compelling

[6] *Compare* Roe v. Wade, 410 U.S. 113 (5-4 decision creating a tripartite framework to analyze abortion restrictions and holding that states do not have a compelling interest in preventing a woman from obtaining an abortion prior to viability) *with* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (holding that the undue burden standard, rather than Roe's "rigid" trimester framework, better reconciles the state's interest in potential life with a woman's constitutional right to terminate her pregnancy prior to viability).
[7] *Compare* Lochner v. New York, 198 U.S. 45 (1905) (invalidating a New York maximum hour law as a violation of the liberty of contract protected by the Due Process Clause of the Fourteenth Amendment) *with* West Coast Hotel v. Parrish, 300 U.S. 379, 392 (1937) (finding that "freedom of contract is a qualified and not an absolute right" in upholding the constitutionality of minimum wage legislation).
[8] *Harper*, 383 U.S. at 665.
[9] *See* Arizona v. Inter Tribal Council of Arizona, 570 U.S. 1, 26 (2013) ("Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Six Amendments.").
[10] *See* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); *Inter Tribal Council*, 570 U.S. at 9 (describing Congress' power under Article I, Section 4 to regulate federal elections as "paramount").

government interest, as the appropriate framework for judicial review of laws that abridge or deny the right to vote. In *Harper*, the Court applied strict scrutiny and invalidated the poll tax on the grounds that the tax invidiously discriminated on the basis of wealth and abridged the fundamental right to vote.[11] Harper rejected the state's argument that the affluence of the voter was a relevant measure of one's qualifications to vote, noting that the overall importance of the right to vote as fundamental required that "classifications which might invade or restrain them…be closely scrutinized and carefully confined."[12] *Harper* marked a notable departure from a case, decided just seven years prior, applying rational basis review to a state law that imposed a literacy test as a prerequisite to voting.[13]

Cases decided subsequent to *Harper* initially accorded very strong protection to the right to vote, and Section 2 draws on these cases, in addition to *Harper,* as the relevant governing precedents for what strict scrutiny requires. In *Kramer v. Union Free School District*, for example, the Supreme Court held that a childless stockbroker who lived with his parents could not be excluded from school board elections because the governing statute was overbroad and unduly narrowed the scope of the relevant electorate.[14] Similarly, in *Bullock v. Carter*, the Court invalidated the filing fees Texas imposed on candidates for certain state and federal offices, finding that the fees had an appreciable effect on voting even though there were other avenues available for candidates to get on the ballot that did not require the payment of a fee.[15] Notably, the Court recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation," and opted to assess the impact of Texas's ballot access law under the rigorous analysis commanded by *Harper*.[16] Because the filing fee system unduly narrowed voter choice by excluding legitimate candidates and was not the least restrictive means of defraying the cost of primary elections, the Court struck down the filing fee system.

In the years since *Harper,* the Court has modified the equal protection framework to be more deferential to state authority, applying a more lax analysis to any election—local, state and federal—while departing from the rigor that strict scrutiny demands.[17] For example, in *Anderson v. Celebrezze*, the Court applied a balancing test, rather than strict scrutiny, to a restrictive law that required independent presidential candidates to declare their candidacy earlier than the nominees of the two major political parties.[18] The Court invalidated the regulation on the grounds that the "State's interest in regulating a nationwide Presidential election is not nearly as strong" as it would be in the context of a purely state election. Notably, *Anderson* applied a version of the balancing test that was virtually identical to *Harper's* strict scrutiny standard, but cases purporting to follow *Anderson* applied a less

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[11] 383 U.S. 663, 670 (1966).
[12] *Id.* at 670.
[13] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53–54 (1959).
[14] 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.").
[15] 405 U.S. 134, 146 (1972) (rejecting the State's argument that "a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition" on the grounds that it forces the candidate to bypass the primary election which "may be more crucial than the general election in certain parts of Texas").
[16] *Id.* at 143; *see also* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (invalidating Tennessee's one-year durational residency requirement for state voters as an infringement on the fundamental right to vote).
[17] *See, e.g.,* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008) (applying a balancing test, rather than strict scrutiny, to assess the burdens imposed on the right to vote by Indiana's voter identification law that applied to both state and federal elections); Burdick v. Takushi, 504 U.S. 428, 434 (1992) (same for a Hawaii ballot access law).
[18] 460 U.S. 780, 783 (1983).

rigorous version of the balancing test because the strong national interest that justified strict scrutiny in *Anderson* was missing from these later cases.[19]

In *Burdick v. Takuski*, for example, the petitioner challenged a state law that prevented him from writing in Donald Duck as his candidate of choice for a Hawaiian congressional election.[20] The Court rejected his argument on the grounds that state law provided a myriad of opportunities for the petitioner to get his preferred candidate on the ballot. Given the other avenues for participation—a fact that had not been dispositive in earlier cases[21]—the Court characterized the burden on the right to vote as "limited," and reduced its scrutiny of the state's reasons for imposing the write-in ban to rational basis review.[22] *Burdick* treated the state's interest as paramount to that of the petitioner because, unlike *Anderson*, there was no countervailing national interest that warranted heightened scrutiny of the state regulation. As a result, the Court applied a watered-down version of the balancing test, accepting at face value the state's interest in "avoiding the possibility of unrestrained factionalism at the general election" without requiring proof that the write-in ban furthered this interest.[23]

More recently, in *Crawford v. Marion County Election Board*, the Court applied the *Anderson-Burdick* balancing test to assess the burdens of Indiana's voter identification law on the right to vote.[24] Prior to *Crawford*, most litigation strategies challenging voter identification laws on constitutional grounds equated these laws to the unconstitutional poll tax at issue in *Harper*. The analogy to the poll tax forced the Court to confront the inconsistencies in its caselaw regarding the appropriate standard of review given that *Harper* itself had resolved the constitutionality of the poll tax under strict scrutiny; even *Anderson* applied a balancing test that was strict-scrutiny-like and proper application could have led to the invalidation of Indiana's voter identification law.[25] Given the Court's extreme deference to the state's regulatory interests in *Burdick* (all while purporting to apply *Anderson*), *Burdick* signaled that *Anderson*'s balancing test did not require strict scrutiny and could, in some cases, result in an assessment of voting regulations under a standard akin to rational basis review.[26]

In *Crawford*, the Court struggled to reconcile all of these conflicting cases, ultimately reserving strict scrutiny for "rational restrictions on the right to vote . . . unrelated to voter qualifications," and holding that, for the remaining regulations, courts must "identify and evaluate the interests put forward by the

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[19] Arguably, elections for members of the House of Representatives can have national implications, but unlike the elections for President and Vice President, House elections are not "national" in the sense that those elected represent the entire population of the United States. *See id.* at 794–95 ("In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.").

[20] 504 U.S. 428, 430 (1992).

[21] *See* Bullock v. Carter, 405 U.S. 134 (1972).

[22] *Id.* at 438–39.

[23] *Id.* at 434, 439. The Court explained:

> Under [the *Anderson*] standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Id. (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)); *see also Anderson*, 460 U.S. at 788.

[24] 553 U.S. 181, 190 (2008).

[25] *See id.* at 189–91.

[26] *See Burdick,* 504 U.S. at 438–39. This has not been the Court's approach with respect to enumerated constitutional rights. *Cf.* District of Columbia v. Heller, 554 U.S. 570 n. 27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

State as justifications for the burden imposed by its rule."[27] *Crawford* thus endorsed a version of the *Anderson* balancing test that mimicked the Court's approach in *Burdick*, demanding little evidence from Indiana to corroborate its asserted interest in preventing fraud through its voter identification law.[28] Under current case law, application of the *Anderson-Burdick-Crawford* balancing test not only undermines the *Harper* standard, but rarely leads to the invalidation of restrictive voting laws because the Supreme Court does not place the onus on the state to justify these laws.

Section 2 of the proposed voting rights amendment would cure these deficiencies by restoring the strict scrutiny standard of *Harper v. Virginia State Board of Elections* and requiring a compelling governmental interest that is the least restrictive means of furthering that interest to protect the right to vote in "any public election."[29] This provision rejects the more deferential *Anderson-Burdick-Crawford* balancing standard because rational basis review, or any standard that falls short of strict scrutiny, could never be the appropriate governing framework to assess any voting restriction that abridges or denies the right to vote.[30] However, strict scrutiny will not apply to local, state, or federal regulations that enforce or expand the guarantees of Section 1, so long as the regulations do not restrict, abrogate or dilute these guarantees.[31]

"Section 3. The portion of section 2 of the fourteenth article of amendment to the Constitution of the United States that consists of the phrase 'or other crime,' is repealed."

Section 3 would prevent courts from treating felon disenfranchisement as a compelling state interest within the meaning of Section 2 of this provision. In *Richardson v. Ramirez,*[32] the Supreme Court held that states do not violate the Equal Protection Clause of the Fourteenth Amendment by disenfranchising those with felony convictions.[33] The Court concluded that, because Section 2 of the Fourteenth Amendment expressly exempts disenfranchisement grounded on prior conviction of a felony from the penalty of reduced representation, states do not violate Section 1 of the Fourteenth Amendment by excluding these individuals from the franchise.[34] Section 3 would eliminate the words "or other crime" from Section 2 of the Fourteenth Amendment to prevent courts from interpreting the Fourteenth Amendment as a sanction for felon disenfranchisement and, by

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[27] *See Crawford*, 553 U.S. at 189–90 ("[E]ven rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."). *But see id.* at 204 (Scalia, J., concurring) (arguing that the *Burdick* standard applies "[t]o evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process" and it "calls for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote").

[28] *Id.* at 194 (Majority opinion) ("The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.").

[29] *See generally* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2208 (2016) ("Strict scrutiny requires the university to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'") (internal citation omitted).

[30] While the Court has interpreted Article I to require that the right to vote in federal elections be mandatory, Article II gives the state legislatures significantly more flexibility in determining whether to extend the right to vote in presidential elections to its citizens. Under Section 2, strict scrutiny would attach to voting regulations once the state permits its citizens to vote for presidential electors, since the election becomes a "public election" within the meaning of this provision. *See* Bush v. Gore, 531 U.S. 98 (2000).

[31] *Cf.* Katzenbach v. Morgan, 384 U.S. 641 n.10 (1966) (applying a similar interpretation to Congress's power under Section 5 of the Fourteenth Amendment).

[32] 418 U.S. 24 (1974).

[33] *Id.* at 54–55.

[34] *Id.*

implication, a compelling government interest under Section 2 of the proposed right to vote amendment.

"Section 4. The Congress shall have the power to enforce this article and protect against any denial or abridgement of the fundamental right to vote by legislation."

Section 4 is similar to the enforcement provisions of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, both of which give Congress broad authority to enforce the substantive provisions of those amendments "through appropriate legislation." However, Section 4 departs from these provisions in important ways. First, Section 4 omits the word "appropriate" to signal that Congress' power to enforce the right to vote enshrined in Section 1 is not subject to the unduly narrow reading of congressional enforcement authority stemming from the Supreme Court's decision in *City of Boerne v. Flores*. In *City of Boerne v. Flores*,[35] the Court held that Congress can adopt only those remedies that are congruent and proportional to the harm to be addressed when acting pursuant to Section 5 of the Fourteenth Amendment.[36] In legislating pursuant to Section 5, Congress must create a legislative record illustrating a pattern of unconstitutional behavior on the part of the states that demands federal intervention.[37] Congress is prohibited from adopting remedies that would expand the scope of protections accorded to the constitutional rights recognized by the Court.

The Supreme Court has been inconsistent in its application of the congruence and proportionality standard, leaving no clear guidance for determining the appropriate scope of federal legislation. For example, in *Coleman v. Court of Appeals of Maryland*,[38] the Court held that Congress could not enact the self-care provision of the Family Medical Leave Act ("FMLA") because Congress had not established a record of discrimination on the basis of sex with respect to illness-related job loss.[39] The FMLA requires employers, including the state, to provide unpaid leave to employees with serious medical conditions. Ignoring evidence of the "well-documented pattern of workplace discrimination against pregnant women,"[40] *Coleman* raised the bar with respect to the degree of discrimination that Congress must establish to "appropriately" legislate under Section 5 of the Fourteenth Amendment.[41] The *Coleman* decision stands in marked contrast to *Nevada Department of Human Resources v. Hibbs*,[42] a case in which the Court sustained the constitutionality of a provision of the FMLA that entitled employees to twelve weeks of paid leave to care for a family member.[43] In doing so, the Court viewed the legislative record much more generously than the Court in *Coleman*, deferring to the legislative evidence of gender disparities with respect to family leave.[44]

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[35] 521 U.S. 507 (1997).
[36] *Id.* at 508 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").
[37] *Id.* at 530-32 (finding that the legislative history lacked patterns of religious discrimination on the part of the states that justified the Religious Freedom and Restoration Act of 1993).
[38] 566 U.S. 30 (2012).
[39] *Id.* at 33.
[40] *Id.* at 51 (Ginsburg, J., dissenting).
[41] *Compare* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003) (upholding FMLA's family leave provision under *Boerne*'s congruence and proportionality standard) *with Coleman*, 566 U.S. at 41 (requiring Congress to establish record of discrimination with respect to individual provisions of FMLA).
[42] 538 U.S. 721 (2003).
[43] *Id.* at 737.
[44] *Id.* at 726-27.

The Court has also been inconsistent in applying the *Boerne* standard in cases involving the Americans with Disabilities Act ("ADA"), a statute that, like the FMLA, has the dubious distinction of being struck down in part, and upheld in part, based on the exact same legislative record. In *Board of Trustees of the University of Alabama v. Garrett*,[45] the Court invalidated portions of the ADA as an improper use of Congress's authority under Section 5. In contrast, *Tennessee v. Lane* upheld Title II of the ADA because the Court found that Congress was able to establish a disparity with respect to how states administered services to the disabled with respect to the fundamental right to access the courts.[46]

Section 4 adopts the interpretation of Congress's enforcement authority established by the Supreme Court in *McCulloch v. Maryland:* "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[47] This standard was reaffirmed by the Supreme Court in cases like *South Carolina v. Katzenbach* and *Katzenbach v. Morgan* as proper interpretations of Congress's authority to enforce the Fourteenth and Fifteenth Amendments.[48] In *Morgan*, for example, the Court held that it would defer to Congress's legislative judgment "so long as [the Court] could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with the letter and spirit of the constitution,' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause."[49] Section 4 of the proposed amendment rejects the *City of Boerne* congruence and proportionality standard in favor of the interpretation of congressional enforcement authority embraced by *McCulloch v. Maryland, South Carolina v. Katzenbach,* and *Katzenbach v. Morgan.*

Second, Section 4 rejects any interpretation of the legislative power of Congress, the states, or their political subdivisions that would prohibit these entities from enacting of legislation that provides broader protection for the fundamental right to vote than accorded to the right by judicial interpretations of Section 1 of this provision. *Boerne's* congruence and proportionately standard severely limited Congress's ability to determine the scope of constitutional violations based on its own judgment, as was routine in legislation enacted prior to the decision. Under Section 4, Congress as well as states and their political subdivisions are permitted to enact regulations that increase the protections for the fundamental right to vote beyond what the courts decree.

Finally, the Supreme Court has not resolved whether the congruence and proportionality standard applies to Congress's enforcement authority under Section 2 of the Fifteenth Amendment,[50] but Section 4 of the proposed amendment would not require Congress to establish a legislative record of purposeful discrimination, racial or otherwise, on the part of the states and/or their political subdivisions as a prerequisite to enacting legislation to protect the fundamental right to vote created by Section 1 of this provision. Section 4 authorizes Congress to enact legislation that makes or alters the times, places and manner of local, state and federal elections; that govern nondiscriminatory voter qualification standards; or that determine if such voter qualifications are

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[45] 531 U.S. 356 (2001).
[46] Tennessee v. Lane, 541 U.S. 509, 515 (2004).; *see also id.* at 542 (Rehnquist, C.J., dissenting) (arguing that under *Garrett* "brief anecdotes" of discrimination do not suffice for inquiry into whether Congress has properly exercised its authority under section 5 of the Fourteenth Amendment).
[47] Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (citing McCulloch v. Maryland, 17 U.S. 316, 421 (1819))).
[48] 384 U.S. 641 (1966).
[49] *Id.* at 651.
[50] *See generally* Shelby County v. Holder, 570 U.S. 529 (2013).

met when doing so is necessary to prevent the abridgment or denial of the right to vote in local, state, or federal elections.[51]

[51] Section 4 expands Congress's authority over voter qualifications beyond what the constitutional text and current Supreme Court caselaw explicitly authorizes. *See* Arizona v. Inter Tribal Council of Arizona, 570 U.S. 1, 26 (2013).