

Fall 11-8-2016

## The Vote is Precious

Melissa A. Logan

Indiana University Maurer School of Law, meliloga@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ijlse>



Part of the [Law Commons](#)

---

### Publication Citation

Melissa, A. Logan, *The Vote is Precious*, 5 Ind. J.L. & Soc. Equality 105 (2016).

This Student Note is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Law and Social Equality by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [kdcogswe@indiana.edu](mailto:kdcogswe@indiana.edu).

## NOTE

### The Vote is Precious

Melissa A. Logan\*

#### ABSTRACT

*This Note traces the history of the voter suppression in the United States, connecting present-day efforts to restrict access to the polls to harmful practices of the past. After demonstrating that the United States has never truly fulfilled the promise of the Fifteenth Amendment—that no citizen shall be denied the right to vote based on race, color, or previous condition of servitude—I argue that the federal government must take steps to protect voters from racial discrimination. I propose that Congress can use the power bestowed to it under the Elections Clause to regulate the time, place, and manner of elections in order to preempt any state’s attempt to suppress the vote.*

#### INTRODUCTION

On September 21, 2015, Congressman John Lewis visited Bloomington, Indiana, to discuss his graphic novel series, *March*,<sup>1</sup> which tells his story of growing up in Troy, Alabama, becoming involved in the civil rights movement, and marching with Dr. Martin Luther King, Jr. His efforts with the Student Nonviolent Coordinating Committee (SNCC) were pivotal in ensuring the full enfranchisement of Blacks in the American South.<sup>2</sup> He is now a United States Representative for Georgia, and his involvement in civil rights campaigns continues to this day.<sup>3</sup> During a question-and-answer session, Congressman Lewis was asked to explain the importance of voting to Blacks, broken by a system in which they no longer had faith. Congressman Lewis responded, “The vote is precious. It’s almost sacred in a democratic society such as ours. It’s the most powerful nonviolent tool or instrument that we have and we should use it. And I say to people, why did people try to keep us from voting? It must be important.”<sup>4</sup>

---

\* Editor-in-Chief, *Indiana Journal of Law and Social Equality*, Volume 5; Indiana University Maurer School of Law, J.D. Candidate, May 2016; Brown University B.A. 2011. I would like to thank Professor Luis Fuentes-Rohwer for his inspiration and guidance, Samantha von Ende for her thoughtful comments, Mary Mancuso for her endless advice and support, and all the members of *the Indiana Journal of Law & Social Equality*. This Note is dedicated to one of my fiercest supporters, my grandmother, Joyce Luanne Logan.

1 JOHN LEWIS, ANDREW AYDIN & NATE POWELL, *MARCH: BOOK ONE* (2013); JOHN LEWIS, ANDREW AYDIN & NATE POWELL, *MARCH: BOOK TWO* (2015); JOHN LEWIS, ANDREW AYDIN & NATE POWELL, *MARCH: BOOK THREE* (2016).

2 See generally, JOHN LEWIS & MICHAEL D’ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* (1998).

3 See generally, *John Lewis*, CONGRESSMAN JOHN LEWIS, <https://johnlewis.house.gov/john-lewis> (last visited Oct. 23, 2016).

4 The Power of Words with Jon Lewis, Andrew Aydin, & Nate Powell, COMMUNITY ACCESS TELEVISION SERVICES (Sept. 21, 2015), <http://catstv.net/m.php?q=2661>, at 1:27:05.

The vote *is* precious. While we often speak of a right to vote, the ability to vote may not be a right at all. On paper, every American citizen is entitled to vote without being discriminated against because of his or her race, native language, or socioeconomic status.<sup>5</sup> Nevertheless, a right without a remedy is not a right; a right must be enforced in order for the right to be legitimate. For the last fifty years, the Voting Rights Act of 1965<sup>6</sup> (VRA) has been the prophylactic guarantor of the right to vote. However, the coverage provision of VRA that allowed the Department of Justice to enforce the Act was invalidated in 2013.<sup>7</sup> Now, voting is arguably a mere privilege that American citizens *may* exercise, but disenfranchisement of “others” prevents this privilege from becoming an absolute right guaranteed to all. The struggle to extend the franchise to groups beyond White male landowners has taken centuries. While some argue that the ills of voter discrimination and unequal access to the polls is over, as evidenced by the *Shelby County* decision,<sup>8</sup> it would be a mistake to assume the problem of disenfranchisement is a relic of the past.

During the past two presidential elections in 2008 and 2012, as well as the current 2016 election, Democrats and Republicans have warred over voter suppression and its racial impact.<sup>9</sup> Yet in a culture that feels less and less comfortable explicitly confronting race and racism, it is unlikely that the problem of Black disenfranchisement, or the disenfranchisement of other minority groups,<sup>10</sup> can be addressed directly in a race-conscious manner. Still, the connection between race and the struggle to achieve an unencumbered right to vote is undeniable.

The current wave of voter-suppressive legislation is not an anomaly. Rather, it is an episode in the ebb and flow of systematic oppression, at the well-known intersection of racial and voting discrimination that pre-dates Reconstruction. It is another reincarnation of Jim Crow. Today, concerted efforts to disenfranchise Black Americans continue and have expanded to impact other minority voters as well.<sup>11</sup>

This Note will first trace the history of voting rights and tools of suppression used to disenfranchise Black voters. Part I.A will analyze the period beginning at the founding and through Reconstruction. Part I.B focuses on the voter suppression trends following Reconstruction until the 1950s. Part I.C looks at the “Second Reconstruction” and the shift toward protecting the vote during the latter part of the

5 52 U.S.C. §§ 10301(a), 10303(f)(2), 10306(a). (2012).

6 The Voting Rights Act of 1965, 52 U.S.C. § 10101 (2012).

7 *Shelby Cnty., Alabama v. Holder*, 133 S. Ct. 2612 (2013); *see infra* at Part III.A, section ii for a discussion of *Shelby County*.

8 *Id.* at 2618 (“There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”); *see also* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 226 (2009) (Thomas, J. concurring in part and dissenting in part) (“The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists.”)

9 *See, e.g.*, Andrew Cohen, *No One in America Should Have to Wait 7 Hours to Vote*, THE ATLANTIC (Nov. 5, 2012), <http://www.theatlantic.com/politics/archive/2012/11/no-one-in-america-should-have-to-wait-7-hours-to-vote/264506/>; Halimah Abdullah, *As Election Day nears, voter ID laws still worry some, encourage others*, CNN (Oct. 12, 2012, 5:51 PM), <http://www.cnn.com/2012/10/12/politics/voter-laws-update/>.

10 *See, e.g.*, Jim Rutenberg, *The New Attack on Hispanic Voting Rights*, NEW YORK TIMES MAGAZINE (Dec. 17, 2015), <http://www.nytimes.com/2015/12/20/magazine/block-the-vote.html>.

11 *See, e.g., id.*

twentieth century. Part II compares the recent waves of voter suppression and how they connect to efforts and vote suppression of the past, arguing that the voter restrictive legislation being proposed and passed across the nation is not a new form of vote suppression. Rather, it is another incident in the ebbs and flows of voter suppression and voter mobilization. Finally, this Note argues that the federal government must intervene to ensure equality in voting. Part II.B. proposes that a race neutral proposal is the best way to combat voter suppression. This note suggests that the federal government set voter registration, identification, and procedural standards for all federal elections under the Election Clause.

## I. HISTORICAL EBBS AND FLOWS OF VOTER SUPPRESSION AND DEMOBILIZATION

In the United States, voting has never been an inclusive right. The access to the franchise has been restricted by race, gender, socio-economic status, and age. Voters are still required to prove their eligibility through administrative hurdles that impede some would-be voters from participating in elections. In order to create effective solutions for the future, we must look back at our country's voting history.

### A. *Founding through Reconstruction*

At the founding of the United States of America, only free adult male property owners, twenty-one years of age and older, could vote.<sup>12</sup> Some states also gave free Black men the right to vote prior to the Civil War, although this ability was largely eliminated before the enactment of the Fifteenth Amendment.<sup>13</sup> Ratified in 1870, the Fifteenth Amendment was the last of the Reconstruction Amendments. The Amendment reads: "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>14</sup> It also gives Congress the power to "enforce this article by appropriate legislation."<sup>15</sup> Federal power to enforce the Fifteenth Amendment was extended by the Enforcement Act of 1870.<sup>16</sup> This Act provided that it was the duty of all election officers:

to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred

---

12 See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 2 (2000).

13 See *id.* at 54–55.

14 U.S. Const. amend. XV, § 1.

15 *Id.* § 2.

16 Enforcement Act of 1870, 16 Stat. 140 § 2.

dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.<sup>17</sup>

The Reconstruction Amendments were a radical attempt to realize racial equality after the destabilizing Civil War. The aims of the Thirteenth, Fourteenth, and Fifteenth Amendments were bold. However, the Radical Republicans who drafted the Reconstruction Amendments were ahead of their time, because the country was not ready for political and social equality for Black Americans. It would be almost a century before the words in the Reconstruction Amendments were given any effect or practical meaning through the passage of the Voting Rights Act of 1965.<sup>18</sup>

The Radical Republicans wanted to give Congress broad power, because the legislature did not trust the Supreme Court to guarantee the rights promised in the Reconstruction Amendments.<sup>19</sup> Their fears proved to be true soon after the ratification of the Fifteenth Amendment. When faced with challenges to the Reconstruction Amendments, the Supreme Court narrowed the reach of the legislation, essentially thwarting any attempt to achieve the equality pledged by the recently amended Constitution.<sup>20</sup>

The Fifteenth Amendment was effectively reduced to meaningless words by the Supreme Court in 1876.<sup>21</sup> Kentucky election inspectors were indicted for refusing to count the vote of William Garner because of his race, thereby violating the Fifteenth Amendment.<sup>22</sup> In *United States v. Reese*, the Supreme Court affirmed the dismissal of the suit, narrowly construing the power of the Amendment: “The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude.”<sup>23</sup> The Court further reasoned that the Fifteenth Amendment did not provide a punishment; accordingly, it could not “substitute the judicial for the legislative department of the government” to create a punishment or set a limit on who could be convicted of the general prohibition against abridging an individual’s right to vote on account of race.<sup>24</sup> After *Reese*, the Fifteenth Amendment afforded no remedies for a Black person who was unconstitutionally prevented from voting because of his or her race.

In *United States v. Cruikshank*,<sup>25</sup> the federal government’s powers under the Enforcement Act were also gutted by the Supreme Court. The *Cruikshank* defendants were charged with conspiracy under the Enforcement Act after a gruesome murder of a Black family in Louisiana, which came to be known as the Colfax Massacre.<sup>26</sup> In

---

17 *Id.* § 2.

18 P.L. 89-110.

19 See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1801 (2010).

20 See *e.g.*, *Slaughter-House Cases*, 83 U.S. 36 (1873).

21 *United States v. Reese*, 92 U.S. 214 (1876).

22 *Id.* at 215.

23 *Id.* at 217.

24 *Id.* at 221.

25 92 U.S. 542 (1876).

26 Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1071 (2009).

his majority opinion, Chief Justice Waite never explicitly detailed the horror of Easter Sunday 1874, when an estimated 100 Blacks were killed by the White League, a paramilitary group intent on securing white rule in Louisiana, in a clash with Louisiana's almost entirely Black state militia.<sup>27</sup> The Court found the rights or privileges at which the conspiracy was aimed were "rights or privileges which were derived from the state and which the federal government had no power to protect."<sup>28</sup> The Court did not seem to think that the Reconstruction legislation affected the balance of power created between the state and national government by the Tenth Amendment; some even argued it misinterpreted the Framers' theory.<sup>29</sup> *Cruikshank* "signaled open season on blacks and other racial minorities."<sup>30</sup> These decisions effectively transferred the responsibility to protect civil rights back to the states, the exact circumstance the framers of the Reconstruction Amendments were trying to avert.

### B. Post-Reconstruction to the Second Reconstruction

Southern Black Americans were not completely disenfranchised. Some were able to successfully vote and some were elected to public office.<sup>31</sup> In fact, two Black men, Hiram Revels and Blanche K. Bruce, were elected to represent Mississippi in the United States Senate in 1870 and 1875, respectively.<sup>32</sup> Nevertheless, the overall outlook was grim.

Formal enfranchisement of Blacks during Reconstruction "ended with Supreme Court decisions gutting both the [F]ourteenth and [F]ifteenth [A]mendments on the same day followed soon by a political decision to terminate already dwindling enforcement efforts."<sup>33</sup> By 1877, Reconstruction was officially dead with the presidential election of Rutherford B. Hayes and the removal of the remaining troops in the South.<sup>34</sup> The Southern states continued to implement strategies to disenfranchise Black voters; some strategies included both formal disenfranchisement by preventing them from registering and informal disenfranchisement by allowing their names to be on the rolls without the ability to actually exercise the franchise. The attempts to eliminate or control the Black vote "through bribery or coercion [ ] created a general atmosphere of corruption

27 See generally *The Colfax Massacre*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/general-article/grant-colfax/> (last visited Aug. 8, 2016).

28 Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 528 (1973).

29 See Huhn, *supra* note 26, at 1075 ("The Court's ruling on state action in *Cruikshank* certainly did not accord with the understanding of the Framers. The Republican members of Congress articulated this principal theory: 'Allegiance and protection are reciprocal rights.' They believed that citizens owe allegiance to their government because (and to the extent that) the government affords them protection.").

30 Huhn, *supra* note 26, at 1077.

31 See JOHN HOPE FRANKLIN, *Legal Disenfranchisement of the Negro*, in *AFRICAN AMERICANS AND THE RIGHT TO VOTE* 207 (Paul Finkelman ed., 1992).

32 See generally *Breaking New Ground -- African American Senators*, UNITED STATES SENATE, [http://www.senate.gov/pagelayout/history/h\\_multi\\_sections\\_and\\_teasers/Photo\\_Exhibit\\_African\\_American\\_Senators.htm](http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Photo_Exhibit_African_American_Senators.htm) (last visited Aug. 8, 2016).

33 Derfner, *supra* note 28, at 523.

34 See generally C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1991).

surrounding southern elections, causing many whites to feel that eliminating the possibility of [B]lack voting would reduce the fraud, corruption and violence that had been necessary to maintain [W]hite control.”<sup>35</sup> Somehow, the corruption that developed to keep Black Americans from voting converted into the cause of disenfranchisement.

Still, at the turn of the century, Black voters continued to look to the courts to realize their rights, which, although unenforced, were still the letter of the law. Jackson W. Giles, a citizen of Montgomery, Alabama, brought a suit in equity “on behalf of himself and on behalf of more than five thousand [N]egroes, citizens of the county of Montgomery, Alabama, similarly situated and circumstanced as himself, against the board of registrars of that county.”<sup>36</sup> Giles sought to compel the county voting officials to register him, and thousands of other eligible Black voters, who had been illegitimately precluded from registering after the state constitution had been amended.<sup>37</sup>

Writing for the Court, Justice Oliver W. Holmes Jr., put Black voters in a catch-22: the Court acknowledged the probability that the challenged provisions to the Alabama constitution were void but found no way to remedy the situation.<sup>38</sup> It could not add Giles’ name to an unconstitutional voting list but also did not strike the grandfather provisions down as unconstitutional:

The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But of course he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?<sup>39</sup>

The Court saw political rights as unenforceable, concluding that “[u]nless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form.”<sup>40</sup> The non-interventionist approach established in *Giles* became the blueprint for Southern resistance to the civil rights movement, “serv[ing] as notice that the Court would not stand as a barrier to the mass disfranchisement of African-Americans in the Deep South.”<sup>41</sup>

Weary of Black enfranchisement, Southern legislatures looked for legal ways to prevent Southern Blacks from voting while still complying with the Reconstruction Amendments. The states and their political leaders, both Northern and Southern, concocted various schemes to maintain an all-, or overwhelming majority-, White

---

35 Derfner, *supra* note 28, at 535.

36 *Giles v. Harris*, 189 U.S. 475, 482 (1903).

37 *Id.*

38 *Id.* at 486.

39 *Id.*

40 *Id.* at 488.

41 Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA L. REV. 903, 910 (2008).

electorate “merely to eliminate the Negro voter.”<sup>42</sup> The disenfranchisement schemes were effective. For example, the amount of Black registered voters in Louisiana dropped from 130,334 in 1896 to 5,320 by 1900; by 1910, only 730 Black voters remained registered, a mere 0.5% of eligible Black men.<sup>43</sup> From the late 1800s until the eventual passing of the Voting Rights Act of 1965, tools to suppress the Black vote included grandfather clauses, violence and intimidation, white primaries, purging voting lists of Black registered voters, poll taxes, and literacy tests.<sup>44</sup>

### i. Poll Taxes

The poll tax was one of the first disenfranchisement devices used to circumvent the requirements of the Fifteenth Amendment. In 1889, Florida was the first state to institute a two-dollar poll tax.<sup>45</sup> The Mississippi Constitution was amended in 1890 to also require voters to pay a poll tax of two dollars per year.<sup>46</sup> Some states instituted cumulative poll taxes, which demanded that past and current taxes be paid, thereby increasing the amount a potential voter owed.<sup>47</sup> In other states, poll taxes had to be paid years in advance of an election—another barrier that kept Blacks away from the polls.<sup>48</sup> During this time period, the meaning of the poll tax evolved, “where it once had referred to a head tax that every man had to pay and that sometimes could be used to satisfy a taxpaying requirement for voting, it came to be understood as a tax that one had to pay in order to vote.”<sup>49</sup> This shift allowed for poll taxes to be used in a discriminating fashion as local officials often made it difficult for only Black men to pay their taxes in order to vote.<sup>50</sup>

The practice spread throughout the South. By 1904, every ex-Confederate state adopted the poll tax.<sup>51</sup> Most states charged between one and two dollars, which “represented a significant charge to many inhabitants of the nation’s economic backwater region.”<sup>52</sup> The amount was especially harsh in the South, particularly for recently-freed slaves who overwhelmingly worked as tenant farmers or sharecroppers.<sup>53</sup> The consequences of the poll tax were devastating. At a Mississippi constitutional convention, a state legislator called the poll tax “the most effective instrumentality of Negro disenfranchisement”; another Mississippi Congressman

---

42 Franklin, *supra* note 31, at 210.

43 Derfner, *supra* note 28, at 542; Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 303 (2000).

44 *See generally*, FRANCES FOX PIVEN, LORRAINE C. MINNITE & MARGARET GROAKE, KEEPING DOWN THE BLACK VOTE: RACE AND THE DEMOBILIZATION OF AMERICAN VOTERS (2009).

45 FRANKLIN, *supra* note 31, at 210.

46 *Id.* at 210.

47 KEYSSAR, *supra* note 12, at 111.

48 Derfner, *supra* note 28, at 535.

49 KEYSSAR, *supra* note 12, at 112.

50 *Id.* at 105.

51 *Id.* at 63.

52 J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 64 (1974).

53 *Id.* at 65.



stated that ninety percent of Black Mississippians were disenfranchised by the device.<sup>54</sup>

The poll tax, however, was not limited to Black disenfranchisement. The device also had class consequences, preventing poorer Whites from exercising their right to vote.<sup>55</sup> In 1937, the practice was upheld by the Supreme Court in *Breedlove v. Suttles*.<sup>56</sup> *Breedlove* involved a challenge by a White male voter who was not allowed to become a registered voter in Georgia because he had not paid poll taxes.<sup>57</sup> *Breedlove* argued that because the Georgia poll tax only applied to persons between the ages of twenty-one and sixty, and only applied to women if they registered to vote, the poll tax was repugnant to the Equal Protection Clauses of the Fourteenth and Nineteenth Amendments.<sup>58</sup> The Court reasoned that requiring a payment as a condition of voting did not deny a privilege or immunity of United States citizenship because the “[p]rivilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate.”<sup>59</sup>

Poll taxes in federal elections were outlawed in 1964 with the ratification of the Twenty-Fourth Amendment,<sup>60</sup> which states:

the right of citizens of the United States to vote in any primary or other election or President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.<sup>61</sup>

Two years later, the Supreme Court extended this proscription to local elections in *Harper v. Virginia State Board of Elections*.<sup>62</sup> The Court found “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”<sup>63</sup>

## ii. Literacy Tests

Another voter qualification that seemingly complied with the Fifteenth Amendment was the requirement that a person be literate to vote. Literacy tests were pervasive throughout the entire country. In fact, between 1889 and 1913, nine Northern states required all voters to be able to read English.<sup>64</sup> The provisions generally required the applicant to read a section of the state or federal constitution

---

54 *Id.* at 66.

55 *See id.* at 71–72.

56 302 U.S. 277 (1937).

57 *Id.* at 280.

58 *Id.* at 280–81.

59 *Id.* at 283.

60 U.S. Const. amend. XXVI.

61 *Id.* § 2.

62 383 U.S. 663 (1966).

63 *Harper*, 383 U.S. at 666.

64 KOUSSER, *supra* note 52, at 57.

to qualify.<sup>65</sup> Like the poll tax, the potential reach of literacy tests was crushing. An estimated fifty percent of Black men were illiterate during this time.<sup>66</sup> In 1900, the literacy test estopped a majority of Black voters in that year, and would have disenfranchised as many as thirty to forty percent of Whites in some states if it were applied fairly.<sup>67</sup> The mere existence of the measure prevented Black voters from even attempting to register because Negroes “believe[d] that they [would] have a hostile examination put upon them by the white man, and they believ[ed] that that [would] be a preventive to their exercising the right of suffrage, and they [would] not apply for registration.”<sup>68</sup>

The practice was deemed constitutional in *Williams v. Mississippi* in 1898, which indirectly targeted the practice by challenging the composition of a jury that could only include registered voters.<sup>69</sup> The Supreme Court found that the Constitutional amendments that prescribed qualifications for electors, including a literacy provision, were constitutional both facially—because there was no outward discrimination between the races—and as-applied, because “it has not been shown that their actual administration was evil, only that evil was possible under them.”<sup>70</sup>

In fact, the Supreme Court has never found literacy tests to violate the Reconstruction Amendments. As recently as 1959, the Court declared literacy requirements were constitutional on their face where the literacy requirements were neutral on race, creed, color, and sex.<sup>71</sup> Despite their potential constitutionality, literacy tests were suspended under the Voting Rights Act of 1965 (VRA).<sup>72</sup> The section suspending such tests was upheld by the Supreme Court in *Katzenbach v. Morgan*.<sup>73</sup> Nevertheless, it is possible that literacy tests could be implemented in such a way that does not violate the Reconstruction Amendments or the VRA.<sup>74</sup>

### iii. Grandfather Clauses

Poll taxes and literacy tests not only disenfranchised a majority of Black eligible voters but also had a disparate impact on poor Whites.<sup>75</sup> To remedy the consequence for White voters, states implemented Grandfather clauses that exempted from literacy tests any person who could vote prior 1867, or anyone who

---

65 *Id.* at 58.

66 KEYSSAR, *supra* note 12, at 112.

67 KOUSSER, *supra* note 52, at 580.

68 *Id.* at 59.

69 170 U.S. 213 (1898).

70 *Williams*, 170 U.S. at 225.

71 *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51–52 (1959).

72 52 U.S.C. § 10303(a)(1).

73 384 U.S. 641 (1966).

74 Any literacy test imposed, however, must comply with the requirements of § 4(e), which prohibits conditioning the right to vote on the ability to read write, and understand English for American citizens who studied in “American-flag” schools where the predominant language of instruction was not English.

75 Alan Greenblatt, *The Racial History of the ‘Grandfather Clause’*, NPR, (Oct. 22, 2013, 9:44 AM) <http://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause>.

was a direct descendant of a registered voter prior to 1867.<sup>76</sup> In other words, if your grandfather could vote before the Reconstruction Amendments, so could you. While this practice was race-neutral on paper, the obvious consequence was to prevent any Black person from being able to vote, as the Fifteenth Amendment was not passed until 1870.<sup>77</sup> Enacting grandfather clauses was a political decision that was more about enfranchising poor Whites than it was about disenfranchising Blacks.<sup>78</sup>

Drafters of grandfather clauses knew such legislation was “grossly unconstitutional.”<sup>79</sup> Accordingly, nearly every state included a sunset provision that would allow enough White voters to become registered before the laws could be challenged in court.<sup>80</sup> The strategy proved effective as the clauses were not challenged until 1910, and the Supreme Court did not issue a ruling on grandfather clauses until 1915.<sup>81</sup> The gap in time between the 1890s, when the majority of grandfather clauses were instituted, and the Supreme Court decision twenty-five years later allowed White voters to be added to the voting rolls and Black voters to be removed.

The Court heard a challenge, in *Guinn v. United States*, to a grandfather clause in an Oklahoma state constitutional amendment in October 1913, but the decision was not released until June 1915, after a year and eight months elapsed.<sup>82</sup> A unanimous Court concluded that the Oklahoma constitutional amendment was invalid and that the Amendment was void because it attempted to deny citizens the right to vote using pre-Fifteenth Amendment standards.<sup>83</sup> Despite a public understanding of the unconstitutionality of the clause and the Supreme Court’s clear decision, the Oklahoma legislature was able to avoid compliance by drafting a new law that automatically registered voters who were registered in 1914, an exclusively White electorate; anyone not grandfathered in under the new standard could only register between April 30 and May 11, 1916, or forfeit their right to vote.<sup>84</sup> This practice continued for over two decades until it, too, was invalidated by the Court in 1939.<sup>85</sup>

#### iv. Lynch Mob Terror and Intimidation

Another powerful tool to prevent Blacks from exercising their right to vote, even if they were registered, was to make Blacks so fearful of violent consequences of voting that they would simply choose to stay home on Election Day. The Ku Klux Klan, formed in 1865 by a group of Confederate Army veterans in Pulaski,

---

76 MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 62 (2004).

77 U.S. Const. amend. XV.

78 Greenblatt, *supra* note 75 (quoting Michael Klarman explaining that grandfather clauses were “politically necessary, because otherwise you’d have too much opposition from poor whites who would have been disenfranchised.”).

79 *Id.*

80 *Id.*

81 *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

82 *Guinn*, 238 U.S. at 347.

83 *Id.* at 356–57, 368.

84 Greenblatt, *supra* note 75.

85 *Lane v. Wilson*, 307 U.S. 268 (1939).

Tennessee,<sup>86</sup> aimed to “destroy Congressional Reconstruction by murdering [B]lacks—and some [W]hites—who were either active in Republican politics or educating [B]lack children.”<sup>87</sup> KKK night riders threatened violence, and often followed through with their promise, against Black voters.<sup>88</sup> Lynch mob terror, a traumatizing terrorism tolerated by state and federal officials, peaked in the period between 1890 and 1940, claiming the lives of thousands of Black Americans.<sup>89</sup> Racial terror lynching was a tool used to enforce Jim Crow laws and racial segregation—a tactic for maintaining racial control by victimizing the entire African-American community, not merely punishment of an alleged perpetrator for a crime.”<sup>90</sup>

Black citizens were publicly and extrajudicially executed for various reasons, including fear of interracial sex, minor social transgressions, allegations of crime, and to send a message to the entire Black community that they were not welcome, resulting in mass exodus from the area.<sup>91</sup> In the early twentieth century, lynching was also used to silence Black leaders demanding economic and civil rights.<sup>92</sup> Lynching was an effective type of terror, with the public spectacle and press coverage for the death of fellow Black citizens:

[S]outhern [B]lacks lived with the knowledge that any one of them could be a victim at any time. They also knew those unlucky enough to be chosen as targets could not expect protection from the law, for law enforcement officers often acquiesced or even joined in the mob violence. To avoid provoking a violent response, many [B]lacks adopted deferential patterns of conduct towards [W]hites . . .<sup>93</sup>

After seeing a Black person lynched for attempting to vote, many would-be Black voters likely decided that attempting to vote was not worth their life and opted not to vote.

White officials used less violent forms of intimidation to informally keep Blacks from voting. For example, Governor Eugene Talmadge publically warned: “Wise Negroes will stay away from the white folks’ ballot boxes on July 17. . . . We are the true friends of the Negroes, always have been and always will be as long as they stay in the definite place we have provided for them.”<sup>94</sup>

---

86 *See generally* *Ku Klux Klan*, THE RISE AND FALL OF JIM CROW, PBS, [http://www.pbs.org/wnet/jimcrow/stories\\_org\\_kkk.html](http://www.pbs.org/wnet/jimcrow/stories_org_kkk.html) (last visited Nov. 7, 2016).

87 *Id.*

88 JOSEPH L. BERND, *White Supremacy and the Disenfranchisement of Blacks in Georgia, 1946*, in AFRICAN AMERICANS AND THE RIGHT TO VOTE 20, 25 (Paul Finkelman ed., 1992).

89 *See generally* EQUAL JUSTICE INITIATIVE, *Lynching in America: Confronting the Legacy of Racial Terror Report Summary* (2015), <http://eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf> (last visited Nov. 7, 2016).

90 *Id.* at 5.

91 *Id.* at 10–17.

92 *Id.* at 14; *see also* PIVEN ET AL., *supra* note 44, at xii (detailing the assassination of Medgar Evers, NAACP Mississippi field secretary in his driveway by Ku Klux Klansman).

93 Lu-in Wang, *The Complexities of “Hate”*, 60 OHIO ST. L.J. 799, 836 (1999).

94 BERND, *supra* note 88, at 24.

## v. White Primaries

Future Supreme Court Justice Thurgood Marshall called White primaries the “most effective, and on the surface the most legal” device to check Black participation in Southern politics.<sup>95</sup> At their onset, primaries were local, informal affairs that were unregulated by law and therefore prone to unlawful, discriminatory acts.<sup>96</sup> As primary elections became formalized and regulated by political parties, formal rules still limited the ability to participate to White voters only.<sup>97</sup> This practice was initially upheld by the Court because primaries were not understood to be within the meaning of an election under the Constitution.<sup>98</sup> Marshall observed:

It is one of those little ironies of which Southern politics is full, that the primary movement which was motivated, at least in part, by democratic motives and a desire for wider participation in the representative process was turned into a device for eliminating millions of Negroes from participation in government.<sup>99</sup>

The White primary system was challenged on numerous occasions, with the four most prominent cases arising out of Texas. In *Nixon v. Herndon*, the Supreme Court found the practice violated the Fourteenth Amendment and therefore did not reach the validity of the statute under the Fifteenth Amendment.<sup>100</sup> Five years later, the Court was again confronted with the validity of White primaries and, for a second time, invalidated the practice under the Equal Protection Clause of the Fourteenth Amendment.<sup>101</sup> Three years later, the Court in *Grovey v. Townsend*, rejected Fourteenth and Fifteenth Amendment claims, deferring to the Texas Supreme Court, which found that the Democratic party’s exclusion of Black voters did not constitute state action.<sup>102</sup>

In 1944, the White primary was ruled unconstitutional under the Fifteenth Amendment in *Smith v. Allwright*.<sup>103</sup> Writing for the eight-to-one majority, Justice Stanley F. Reed held:

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.<sup>104</sup>

---

95 THURGOOD MARSHALL, *The Rise and Collapse of the “White Democratic Primary”*, in AFRICAN AMERICANS AND THE RIGHT TO VOTE 335 (Paul Finkelman ed., 1992).

96 *Id.*

97 *Id.* at 336.

98 See *Newberry v. United States*, 256 U.S. 232 (1921).

99 MARSHALL, *supra* note 95, at 336.

100 273 U.S. 536 (1927).

101 *Nixon v. Condon*, 286 U.S. 73 (1932).

102 295 U.S. 45, 53 (1935).

103 321 U.S. 649 (1944).

104 *Smith*, 321 U.S. at 661–62 (internal citations omitted).

The decision in *Smith* was surely a step forward for the safeguarding of voting rights. In fact, Professor Michael J. Klarman claims *Smith* “inaugurated a political revolution in the urban South” and led to monumental increases in Black voter participation.<sup>105</sup> Despite its significance, the demise of the White primaries was not the final cure for voter discrimination. Writing in 1957, Thurgood Marshall accurately noted “[t]he collapse of the white Democratic primary, despite fond hopes, has not resulted in full participation by all in the political life of the south.”<sup>106</sup>

#### vi. Purging Voter Rolls

During the first half of the twentieth century, many important steps were taken in extending the franchise to all, including the passage of the Nineteenth Amendment that expanded the right to vote to women, at least in theory.<sup>107</sup> However, these lawful protections could not guarantee that all eligible voters could actually register and vote in practice. In Georgia, there were 135,000 registered Black voters; in an effort to disenfranchise them, the Democratic Party launched a campaign to challenge the registration of thousands of Black voters.<sup>108</sup>

The motivation for this massive disenfranchisement was to ensure the election of Democrat Eugene Talmadge for governor of Georgia by preventing Blacks from voting for his primary rival, James V. Carmichael, who the majority of Black voters supported.<sup>109</sup> Talmadge’s campaign implemented a white supremacy drive “to organize groups indoctrinated with the ‘white supremacy’ viewpoint, but also sought to provide local supporters with specific means of reducing the number of black votes.”<sup>110</sup> The plan involved using a provision of Georgia law that allowed any citizen to “challenge the voting right of a registrant thought to be improperly qualified.”<sup>111</sup> The purging of voting lists was challenged in federal courts. However, when federal courts issued injunctions ordering that the disqualified registrants be reinstated, the local officials could not comply because the names had been lost or destroyed.<sup>112</sup> White voters, mainly of low socio-economic status, were also purged. Nevertheless, “the exclusive thrust of the action in most counties, and the major thrust of it in the remaining counties, was its use as a racial device against blacks.”<sup>113</sup>

On Election Day in Savannah, Georgia, Chatham County officials halted voting for several hours until the Chatham County Democratic Executive Committee chairman could arrive to handle the numerous challenges brought against Black voters, challenges that were made by Talmadge supporters.<sup>114</sup> When polls closed for

---

105 Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 Fla. ST. U.L. REV. 55, 56, 70–71 (2001).

106 MARSHALL, *supra* note 95, at 340.

107 U.S. Const. amend. XIX.

108 BERND, *supra* note 88.

109 *Id.*

110 *Id.* at 22.

111 *Id.*

112 *Id.* at 25.

113 *Id.*

114 *Id.* at 28.



the evening, thousands of Black voters were left waiting in the street.<sup>115</sup> Because of the long wait, newspapers estimated that more than 5,000 Black voters were unable to participate in the election.<sup>116</sup> Talmadge won the county by a margin of 3,629.<sup>117</sup> Thus, the disenfranchisement of Black voters had a significant effect on the outcome of the primary election.

The 1946 Georgia gubernatorial election is but one example of the effectiveness of purging voter lists. Even if litigation had been successful in ruling the practice unlawful, the ability to enforce such a ruling was rendered impossible by corrupt local officials and the postviolation litigation process.

### C. A Shift Toward Civil Rights Protection and the “Second Reconstruction”

Despite the long history of voter suppression, many fundamental changes to constitutional law during the twentieth century expanded the franchise. Grassroots efforts were key in creating the momentum that led to a shift in doctrine by Congress and the Supreme Court.

#### i. Civil Rights Acts of 1957, 1960, and 1964

Many view *Brown v. Board of Education of Topeka*<sup>118</sup> the landmark case which ended segregation in public schools and led to the dismantling of Jim Crow—as a turning point in the fight for racial equality. Ironically, in the immediate aftermath of the *Brown* decision, its opponents led the charge to strengthen civil rights protections at the federal level. In an effort to distance his administration from the decision,<sup>119</sup> President Dwight D. Eisenhower drafted proposed legislation, which served as the basis for the Civil Rights Act of 1957, the first civil rights legislation since Reconstruction.<sup>120</sup> The 1957 Act was passed “to provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States” and created the Civil Rights Division of the Department of Justice as well as the Commission on Civil Rights, and authorized the appointment of the Assistant Attorney General for Civil Rights.<sup>121</sup> This legislation signaled the growing federal interest in enforcing civil rights laws by combating voter suppression efforts in federal elections.

In 1959, the Civil Rights Commission’s report recognized the system was broken, concluding, “qualified Americans, are, because of their race or color, being

---

115 *Id.*

116 *Id.*

117 *Id.*

118 347 U.S. 483 (1954).

119 Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 134–35 (1994).

120 Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 § 101(a).

121 *Id.*; *Civil Rights Division*, U.S. DEP’T OF JUSTICE, [www.justice.gov/crt](http://www.justice.gov/crt) (last visited Oct. 31, 2016); *Mission, About Us*, U.S. COMMISSION ON CIVIL RIGHTS, [www.usccr.gov/about/index.php](http://www.usccr.gov/about/index.php).

denied their right to vote.”<sup>122</sup> One year later, Congress passed the Civil Rights Act of 1960,<sup>123</sup> in response to Southern resistance to court orders regarding school desegregation and established the federal courts as “voting referees.”<sup>124</sup> As he signed the Act into law, President Eisenhower commented he believed it held “great promise of making the Fifteenth Amendment of the Constitution fully meaningful.”<sup>125</sup>

While the 1957 and 1960 Acts focused on voting rights, the Civil Rights Act of 1964 focused on equal access to public accommodations.<sup>126</sup> Although the 1964 Act would ostensibly be “appropriate legislation” to enforce the Fourteenth Amendment right to Equal Protection, unfavorable precedent<sup>127</sup> made the Court hesitant to rely on any of the Reconstruction Amendments to uphold the law.<sup>128</sup> Therefore, instead of relying on the race-conscious amendments, the Court avoided the racial issue and found the 1964 Act constitutional under the Commerce Clause.<sup>129</sup>

## ii. The Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) is arguably the most radical civil rights legislation passed to date. The VRA, “an act to enforce the Fifteenth Amendment,” gave unprecedented power to the federal government to oversee elections, both state and federal.<sup>130</sup> Section 2 states, “[n]o voting qualifications 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.”<sup>131</sup> Section 2 is violated when a law or practice intends to discriminate based on race or has a disparate impact on a certain race.<sup>132</sup> The most controversial sections, 4 and 5, singled out states and local jurisdictions with a history of racial discrimination in voting for federal intervention known as pre-clearance.<sup>133</sup> Section 4(b) outlined the coverage formula.<sup>134</sup> Originally, covered jurisdictions were those who used a test or device as a prerequisite to voting on

---

122 Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 492 n.54 (2014) (citing U.S. COMM’N ON CIVIL RIGHTS, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, 1959 107 (1959)) (last visited Oct. 31, 2016).

123 Pub. L. 86-449.

124 Dwight D. Eisenhower, Statement by the President Upon Signing the Civil Rights Act of 1960, THE AM. PRESIDENCY PROJECT (May 6, 1960), <http://www.presidency.ucsb.edu/ws/?pid=11771> (last visited Nov. 7, 2016).

125 *Id.*

126 Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241.

127 *E.g.*, Civil Rights Cases, 109 U.S. 3 (1883).

128 Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1803 (2010) (“Lawyers from the Kennedy and Johnson administrations, however, argued that the Commerce Clause theory was the safer route. To reach the Fourteenth Amendment question, the Supreme Court would have to overturn a series of precedents dating back to the 1870s that had severely limited Congress’ power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments. . . . It was risky to ask the Supreme Court to overturn years of settled precedents; . . .”).

129 *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

130 Pub. L. 89-110, 79 Stat. 437.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*



November 1, 1964, and had less than fifty percent voter registration or a comparatively low turnout in the 1964 election.<sup>135</sup> The section was reformulated in 1970; the most recent formula applied to states or counties that had a voting test and less than fifty percent voter registration or turnout.<sup>136</sup> Section 5 requires that any of the § 4(b) covered jurisdictions had to get approval from the Department of Justice before any voting-related changes could be implemented.<sup>137</sup>

Unsurprisingly, the vast majority of covered jurisdictions were in the Deep South.<sup>138</sup> These jurisdictions, however, were not ordained for perpetual intervention. Any covered jurisdiction could seek a § 4(a) bailout upon proving in the past ten years that a number of factors were met: full compliance with the VRA; no further violation of § 4(b); no objection from the Attorney General or denial of a § 5 declaratory judgment by the District Court of the District of Columbia; there were no adverse judgments in any voting discrimination lawsuits nor any pending lawsuits alleging discrimination; and no violations of the Constitution or federal, state, or local laws with respect to voting rights unless the jurisdiction could establish that any such violations were trivial, were promptly corrected, and were not repeated.

Still, some say the VRA was not strong enough. “Although the Voting Rights Act outlaws discriminatory election administration procedures, it is the actions and inactions of federal officials, not the existence of the law, which protects and undermines the right to vote.”<sup>139</sup> Despite any perceived flaws, the VRA had been fundamental in undoing, or at least neutralizing, the discriminatory practices of decades past. The electorate became even larger in 1971 when the Twenty-Sixth Amendment to the Constitution lowered the voting age from twenty-one to eighteen.<sup>140</sup> The electorate was finally more inclusive of all Americans.

### iii. The Important Role of Social Movements in Obtaining Civil Rights Legislation

This shift toward civil rights protection was not done entirely out of the goodness of politicians’ hearts; rather, politicians were also motivated by the Great Migration and the civil rights movement.<sup>141</sup> Between 1910 and 1960, almost five million Blacks left the South for large cities in the North and West.<sup>142</sup> By leaving the rural South, more Blacks became enfranchised and now constituted an important electorate for both parties.<sup>143</sup> Eighty-five percent of these Black migrants resettled in New York, New Jersey, Pennsylvania, Ohio, Michigan, Illinois, and California, seven

---

135 *Id.*  
136 Voting Rights Amendments of 1970, §§ 3–4, 84 Stat. 315.

137 *Id.*  
138 See U.S. DEP’T OF JUSTICE, Jurisdictions Previously Covered by Section 5, <http://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last visited Nov. 7, 2016).

139 TYSON D. KING-MEADOWS, WHEN THE LETTER BETRAYS THE SPIRIT: VOTING RIGHTS ENFORCEMENT AND AFRICAN AMERICAN PARTICIPATION FROM LYNDON JOHNSON TO BARACK OBAMA 3 (2011).  
140 U.S. Const. amend. XXVI.

141 PIVEN ET AL., *supra* note 44, at 34–35.

142 Klarman, *supra* note 119, at 30.

143 PIVEN ET AL., *supra* note 44, at 34–35.

states that controlled almost eighty percent of the presidential electoral votes.<sup>144</sup> Black voters had historically voted with the Republican Party but now found themselves in the heart of the Democratic base in the North.<sup>145</sup> The electoral leverage, coupled with the civil rights movement, transformed American politics.

Black-led social movements for political and social equality were also pivotal in the passage of the civil rights legislation in the 1950s and 1960s. After returning from fighting for democracy in World War II, Black soldiers returned home only to be reminded that the promise of democracy was still yet to be fulfilled in their own country. The Second World War's most significant ramification for racial change may have been its impact on Black attitudes and the ability of the Black community to mobilize.<sup>146</sup>

American Blacks had almost universally supported the preceding generation's war to make the world safe for democracy, only to be disappointed when neither the ideological underpinnings of the war nor their own contributions to the war effort yielded substantial changes in American racial practices.<sup>147</sup> This hypocrisy would not be lost on the Supreme Court Justices either: "the Justices cannot have failed to observe the tension between a purportedly democratic war fought against the Nazis, with their theories of Aryan supremacy, and the pervasive disfranchisement of Southern blacks."<sup>148</sup> The civil rights movement brought the problems in the South to the rest of the country. Had the violent atrocities of Bloody Sunday in Selma, Alabama,<sup>149</sup> not been televised, the VRA would likely not have been passed so quickly. The political success of the midcentury civil rights legislation must be understood within the context of the struggle for civil rights and racial equality.

Collective action in the Black community concerning voting, especially, has continued into the twenty-first century. During the 2004 presidential election, prominent Black figures such as Sean "Diddy" Combs and Russell Simmons urged young voters to participate with the famous "Vote or Die" campaign<sup>150</sup> and "Rock the

---

144 Klarman, *supra* note 119, at 30–31.

145 PIVEN ET AL., *supra* note 44, at 37.

146 Klarman, *supra* note 105, at 73–74 (2001) ("Another critical change in circumstance that enabled more effective enforcement of Smith was the greater capacity of Southern blacks by 1944 to capitalize on a favorable Court decision. Earlier civil rights victories in the Supreme Court had entailed few practical consequences, partly because the African-American community had been unable to mobilize behind their enforcement. Smith was a highly salient event for Southern blacks, and they quickly seized upon it as the occasion for registering to vote and demanding access to Democratic primaries. Thousands of returning World War II veterans took their release papers that entitled them to exemption from the poll tax, headed off to city hall, and demanded that they be registered to vote. Many expressed the conviction that '[a]fter having been overseas fighting for democracy, . . . when we got back here we should enjoy a little of it.'")

147 Klarman, *supra* note 119, at 16.

148 Klarman, *supra* note 105, at 64.

149 Marty Roney, 'Bloody Sunday' Altered History of a Horrified Nation, USA TODAY (March 3, 2015, 8:49 PM), <http://www.usatoday.com/story/news/nation/2015/03/03/black-history-bloody-sunday-march/24327949/>.

150 Sean 'P. Diddy' Combs and His Army of Politically Conscious Celebrities Launch Massive Citizen Change VOTE OR DIE Outdoor Campaign, PR NEWSWIRE (Oct. 6, 2004, 1:00 PM), <http://www.prnewswire.com/news-releases/sean-p-diddy-combs-and-his-army-of-politically-conscious-celebrities-launch-massive-citizen-change-vote-or-die-outdoor-campaign-74143212.html>.

Vote.” The campaign proved to be successful; twenty-one million voters under thirty years of age went to the polls, the biggest turnout of the youth vote since 1972.<sup>151</sup>

By the latter part of the twentieth century, the promise of the Fifteenth Amendment was more than mere words in the Constitution. Real change was implemented, and access to polls was possible. Still, challenges remain to fulfilling the Fifteenth Amendment to this day.

## II. THE RACIAL DISPARITY IN VOTING RIGHTS, WHILE IMPROVED, HAS YET TO BE SOLVED.

In 2015, we celebrated the fiftieth anniversary of the Voting Rights Act. Nevertheless, the fight to ensure the promise of the Fifteenth Amendment, the right to vote regardless of the color of one’s skin, is far from over in the twenty-first century. In fact, research suggests that recent proposed and passed voting regulations “indicate that proposal and passage are highly partisan, strategic, and radicalized affairs. These findings are consistent with a scenario in which the targeted demobilization of minority voters and African-Americans is a central driver of recent legislative developments.”<sup>152</sup> In other words, some of the methods and tools might have changed but the United States is facing “Jim Crow 2.0”—another wave of systematic voter disenfranchisement, often because of racial and political motivations. Sadly, when comparing current voting regulations to those of the past, a shocking trend appears: none of this disenfranchisement is new.

### A. Progress Made to Ensure Universal Suffrage Continues to Be Undermined by State Action.

States continue to control access to the ballot, leaving the federal government with few options to combat voting rights violations.<sup>153</sup> Despite the improvements and efforts made to improve access to voting, restrictive state legislation still makes voting harder than it ought to be.<sup>154</sup> In 2013, Keith G. Bentele and Erin E. O’Brien analyzed what causes or motivates a state’s decision to enact restrictive voting laws.<sup>155</sup> The pair found that the continued exclusionary practice, a tradition dating back to the nineteenth century, is “a tendency bolstered, yet again, by the power and flexibility federalism grants to the states.”<sup>156</sup>

As was done to maintain one-party rule in the South during the first half of the twentieth century, current practices are politically motivated. “[R]ecent

151 Jose Antonio Vargas, *Vote or Die? Well, They Did Vote: Youth Ballots Up 4.6 Million from 2000, in Kerry’s Favor*, THE WASHINGTON POST, Nov. 9, 2004), at C01.

152 Keith G. Bentele & Erin E. O’Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1088 (2013).

153 See, e.g., PIVEN ET AL., *supra* note 44, at 169 (“Federal prosecutors have few modern tools to use in combating the wide variety of vote suppression tactics. . . . Instead, they rely mainly on what is left of the Enforcement Act of 1870.”).

154 See, e.g., Eric Black, *Why is Turnout So Low in U.S. Elections? We Make It More Difficult to Vote than Other Democracies*, MINNPOST (Oct. 1, 2014), <https://www.minnpost.com/eric-black-ink/2014/10/why-turnout-so-low-us-elections-we-make-it-more-difficult-vote-other-democrac>.

155 Bentele & O’Brien, *supra* note 152.

156 *Id.* at 1091.

legislative efforts to restrict voter access are usefully conceptualized as yet another wave of election reforms in a long history for such reforms, pursued in order to demobilize and suppress particular categories for partisan gain.”<sup>157</sup> In fact, political leaders in areas with large Black populations and increased minority turnout in a previous presidential election are more likely to propose restrictive legislation; this association makes it clear that “*the racial composition of a state is strongly related to the proposal of changes that would restrict voter access.*”<sup>158</sup> Today’s voter suppression efforts overwhelmingly favor Republicans because people of color are more likely to vote Democrat.<sup>159</sup> Bentele and O’Brien note, “[w]hile we can only infer motivation, these results strongly suggest that the proposal of these policies has been driven by electoral concerns differentially attuned to demobilizing African-American and lower-income Americans.”<sup>160</sup>

State actors, motivated by partisan politics, have few incentives to guarantee the right to vote. States have implemented new laws, or resurrected old practices, in the name of preventing voter fraud, which, while race-neutral on their face, have had a devastating racial impact on the ability to vote in state and federal elections.<sup>161</sup> Recent efforts at voter demobilization and vote dilution are today’s Jim Crow practices.

Today’s disenfranchisement may look different than that of the nineteenth and twentieth centuries. We do not have voting officials that discriminatorily impose literacy tests or poll taxes to overtly prevent Black people from voting. Most state officials, unlike their nineteenth- and twentieth-century predecessors, would not go on record to say that their voting regulation is implemented to discriminate.<sup>162</sup> While some old practices may have died, many of the old practices have resurfaced and continue to affect access to the polls today.

As discussed previously,<sup>163</sup> one effective practice in demobilizing voters is to purge the voting lists and remove would-be voters from the list of eligible voters or challenge the registration of a voter on Election Day. Sadly, this trend still continues

---

157 *Id.* at 1104.

158 *Id.* at 1096, Table 2.

159 PIVEN ET AL., *supra* note 44, at 14 (“The GOP agenda is to make it harder to vote. You purge voters. You don’t register voters . . . You pick the states where you go after Democrats.”).

160 Bentele & O’Brien, *supra* note 152, at 1098; *see also* PIVEN ET AL., *supra* note 44, at 6 (“Since [the 2000 election of George W. Bush], the Republican Party has relied on stratagems like redistricting, highly partisan election administration, and old fashioned vote suppression to win what continue to be very close elections.”).

161 *See* PIVEN ET AL., *supra* note 44, at 164 (“Like vote suppression since the days of Reconstruction, vote suppression today masquerades under the cover of party-run ‘ballot-security’ campaigns to fight fraud, and is also embedded in the rigmarole of ‘prudent’ election administration. Either way, formal and informal practices and campaign techniques that target minorities for vote suppression are usually justified as necessary to promote the integrity of the electoral process, a formulation that makes dirty politics look clean.”).

162 Unfortunately, some state officials have no problem admitting the political and racial consequences for voting regulations. *See* Brett LoGiurato, *Here’s The Racist ‘Daily Show’ Interview That Cost A Local GOP Chair His Job*, BUSINESS INSIDER (Oct. 24, 2013, 5:33 PM), <http://www.businessinsider.com/daily-show-interview-don-yelton-racist-resign-2013-10>.

163 *See* discussion *supra* Section II.B.

today.<sup>164</sup> Even with court intervention, the damage may already be done as purged voters are often forced to vote provisionally.<sup>165</sup>

Ahead of a close 2004 Presidential election, Republicans implemented a multipronged “antifraud” strategy including poll-watcher campaigns and the use of challengers at the polls in key states. No Republican has won the White House without winning the state of Ohio, making the state, which was never subject to the VRA’s preclearance requirements, a prime place for restrictive voting practices. Cuyahoga County, which is home to Cleveland, is the most consistently Democratic county in the state.<sup>166</sup> Between 2000 and 2004, 168,000 voters in the county were purged in an overly aggressive interpretation of the National Voter Registration Act.<sup>167</sup> During the 2004 election, Ohio republicans also purged Democratic-leaning voters in Cincinnati.<sup>168</sup> In Hamilton County, twelve percent of registered voters were moved from active to inactive status; voters whose registration records were inactive had to show identification to vote at a time before providing identification to vote was a requirement.<sup>169</sup> If the polling official did not believe the voter’s identification was satisfactory, the voter was forced to cast a provisional ballot.<sup>170</sup> After the election, Republican Secretary of State J. Kenneth Blackwell ordered all provisional ballots be set aside and not be counted in the election.<sup>171</sup> All provisional ballots cast in Hamilton County came from Cincinnati, a city with a large Black population that tended to vote Democrat.<sup>172</sup> President George W. Bush won Ohio and was reelected, but many questioned the validity of the Ohio outcome because of voter suppression.<sup>173</sup>

In 2015, a tiny county in Georgia experienced “the worst voter suppression . . . ever seen” according to a former Department of Justice attorney, John Powers.<sup>174</sup> Hancock County, Georgia, is a small county of less than 1,000 people; the county is overwhelmingly Black with only 96 White residents.<sup>175</sup> The eligibility of hundreds of voters was challenged without notice.<sup>176</sup> One hundred and seventy-six voters were prevented from voting in the local elections; of those voters, all but two were Black.<sup>177</sup>

---

164 See generally Myrna Pérez, *Voter Purges*, BRENNAN CENTER FOR JUSTICE (Sept. 2008), <https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf> (detailing comprehensive study of twenty-first century voter purges in twelve states).

165 Jackie Borchardt, *Ohio Voters Improperly Removed from Rolls Can Vote in November Election*, *Court Rules*, CLEVELAND.COM, (Oct. 19, 2016, 8:45 PM) (last updated (Oct. 20, 2016, 3:16 PM), [http://www.cleveland.com/metro/index.ssf/2016/10/ohio\\_voters\\_removed\\_from\\_rolls.html](http://www.cleveland.com/metro/index.ssf/2016/10/ohio_voters_removed_from_rolls.html)).

166 Rich Exner, *Democratic Presidential Candidates Do Best in Cuyahoga County; Putnam Leads for Republicans: Statistical Snapshot*, CLEVELAND.COM (Oct. 22, 2012), [http://www.cleveland.com/datacentral/index.ssf/2012/10/democratic\\_presidential\\_candid.html](http://www.cleveland.com/datacentral/index.ssf/2012/10/democratic_presidential_candid.html).

167 PIVEN, *supra* note 44, at 173.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 See e.g., Robert F. Kennedy, Jr., *Was the 2004 Election Stolen?*, ROLLING STONE (June 1, 2006), <http://www.commondreams.org/views06/0601-34.htm>.

174 John Fisher, *The Worst Case of Voter Suppression That I Have Ever Seen*, THOSE PEOPLE (Dec. 2, 2015), <https://thsppl.com/the-worst-case-of-voter-suppression-that-i-have-ever-seen-e8e4b99bbb03#.hl9xxxe3e>.

175 *Id.*

176 *Id.*

177 *Id.*

Challenging the registration of voters and purging names from the lists of eligible voters is a practice in which the victims often do not know until it is too late and they are unable to vote. Remedial lawsuits can do nothing to prevent the practice nor change the outcome of an election affected by the violation.

### i. Voter Identification Laws

The past decade has seen the rise of voter identification laws, regulations that require a voter to present a photographic identification in order to vote.<sup>178</sup> In 2006, Indiana was the first state to enact a strict photo identification law.<sup>179</sup> The Court upheld the law in 2008, finding that the state's interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence justified the "limited burden on voter rights."<sup>180</sup> The record presented to the Court was a limited one;<sup>181</sup> in 2008, few truly understood the impact these laws would have on low-income and minority voters.<sup>182</sup> Judge Richard Posner, who authored the preceding Seventh Circuit opinion upholding the law,<sup>183</sup> later recanted his previous stance in a fiery dissent from an order denying a petition to rehear a challenge to Wisconsin's voter identification law.<sup>184</sup> Judge Posner concluded, "[t]here is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud . . . and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens."<sup>185</sup> He cited Bentele and O'Brien's research, noting that photo identification laws are "highly correlated with a state's having a Republican governor and Republican control of the legislature and appear to be aimed at limiting voting by minorities, particularly [B]lacks."<sup>186</sup>

In fact, many argue that voter identification laws should be invalidated as poll taxes, which were found to violate the 24th Amendment. Congressman Lewis called the legislation "a poll tax by another name."<sup>187</sup> The congressman lamented "[n]ew restraints on the right to vote do not merely slow us down. They turn us backward, setting us in the wrong direction on a course where we have already traveled too far and sacrificed too much."<sup>188</sup> With documented evidence that voter identification laws

---

178 Suevon Lee, & Sarah Smith *Everything You've Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (March 9, 2016 7:33 AM), <https://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>.

179 *Id.*

180 *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008).

181 *Id.* at 201–02.

182 See Ezra Klein, *Voter ID Laws Fix a Fake Problem by Creating a Real One*, VOX (Dec. 21, 2014, 10:11 AM), <http://www.vox.com/2014/8/7/5979377/voter-id-laws-fix-a-fake-problem-by-creating-a-real-one>.

183 *Crawford v. Marion Cnty. Election Bd.*, 375 F. Supp. 2d 788 (7th Cir. 2007) (*reh'g en banc denied*).

184 *Frank v. Walker*, 768 F.3d 783, 784 (Posner, J., dissenting); see also Michael Hiltzik, *A Conservative Judge's Devastating Take on Why Voter ID Laws Are Evil*, LA TIMES (Oct. 13, 2014, 10:17 AM), <http://www.latimes.com/business/hiltzik/la-fi-mh-why-voter-id-laws-are-evil-20141013-column.html>.

185 *Frank*, 768 F.3d at 796 (Posner, J., dissenting).

186 *Id.* at 30.

187 John Lewis, *A Poll Tax by Another Name*, N.Y. TIMES (Aug. 26, 2011), <http://www.nytimes.com/2011/08/27/opinion/a-poll-tax-by-another-name.html>.

188 *Id.*

impact citizens' ability to exercise their right on Election Day, voter identification laws are currently being litigated across the country.<sup>189</sup>

ii. *Northwest Austin, Shelby County, and the Evisceration of the Voting Rights Act*

In July 2006, Congress overwhelmingly passed a twenty-five year extension of the VRA.<sup>190</sup> Nevertheless, the Court heard a challenge to the constitutionality of the coverage formula a mere three years later in *Northwest Austin Municipal Utility District Number One v. Holder*.<sup>191</sup> The Court disposed of the case by allowing the utility district to bail out of the preclearance requirement, thereby avoiding the constitutional question of the validity of the Act.<sup>192</sup> Nevertheless, the Court expressed doubt about the VRA's continuing viability by commenting that the VRA was justified by "exceptional conditions" decades before, but "we are now a very different Nation."<sup>193</sup> Chief Justice Roberts wrote that the Court would not answer the "difficult constitutional question" of whether current conditions justified "the extraordinary legislation otherwise unfamiliar to our federal system."<sup>194</sup> In a concurrence in part and dissent in part, Justice Thomas took the Chief Justice's doubts one step forward, concluding, "[t]he extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists."<sup>195</sup>

Four years later, the Court heard another challenge to the VRA. In this suit, an Alabama county challenged §§ 4(b) and 5 of the VRA as facially unconstitutional.<sup>196</sup> Unlike Northwest Austin, Shelby County was ineligible for a bailout because the Attorney General recently objected to proposed voting changes.<sup>197</sup> The Court cited *Northwest Austin*, finding that the VRA "imposes current burdens and must be justified by current needs."<sup>198</sup> The Court invoked federalism principles, without any real consideration of how the Reconstruction Amendments may have affected or influenced the federalism designed by the founders in 1787.<sup>199</sup> Chief Justice Roberts' majority opinion gave new meaning to the doctrine of equal sovereignty, citing only his opinion in *Northwest Austin*.<sup>200</sup> The Chief Justice noted

---

189 Michael Wines, *Critics See Efforts by Counties and Towns to Purge Minority Voters from Rolls*, N.Y. TIMES (July 31, 2016), <http://www.nytimes.com/2016/08/01/us/critics-see-efforts-to-purge-minorities-from-voter-rolls-in-new-elections-rules.html>.

190 Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES (July 21, 2006), <http://www.nytimes.com/2006/07/21/washington/21vote.html>.

191 557 U.S. 193 (2009).

192 *Id.* at 211.

193 *Id.*

194 *Id.*

195 *Id.* at 226 (Thomas, J., concurring in part and dissenting in part).

196 *Shelby Cnty.*, 133 S. Ct. at 2621–22.

197 *Id.*

198 *Id.* at 2622 (citing *Northwest Austin*, 557 U.S. at 203).

199 *Id.* at 2623–24.

200 See Charles and Fuentes-Rohwer, *supra* note 122, at 520 ("[N]ote how equal sovereignty begins as an 'historic tradition' at the start of the paragraph, morphs into a 'doctrine' in the middle of the paragraph, and comes to life as a 'fundamental principle' by the end of the paragraph. . . . *Northwest Austin* not



that improvements in Black turnout were “in large part *because of* the Voting Rights Act,”<sup>201</sup> but found that because Congress did not update the coverage formula, the Court was left “with no choice but to declare § 4(b) unconstitutional.”<sup>202</sup> Section 5 remained intact and the Court invited Congress to “draft another formula based on current conditions.”<sup>203</sup> However, without the coverage formula, the VRA is essentially lifeless, allowing previously covered jurisdictions free reign to implement voting changes without any supervision or intervention to prevent discriminatory laws from being implemented.

Justice Ruth Bader Ginsberg penned a passionate dissent maintaining, “the VRA provided a fit solution for minority voters as well as for States.”<sup>204</sup> Justice Ginsburg pointed to the Reconstruction Amendments finding, “[i]t cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments.”<sup>205</sup> She also noted that the challenges being faced by today’s minority voters were not direct attempts but rather “subtler second-generation barriers” for which Congress believed preclearance was necessary so as not to risk loss of the gains that had been made.<sup>206</sup> Again, like in *Giles v. Harris*, the Court’s majority opinion put voting rights in an impossible catch-22: “If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime.”<sup>207</sup> Justice Ginsburg elaborated that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”<sup>208</sup>

*Shelby County* is a rare, exceptional case in which an act of Congress that was once constitutional is no longer, not because of new understanding of the Constitution but rather an assumption that the underlying need for the legislation was no longer viable. Essentially, the Court found that racism and discriminatory voting practices were historical phenomena of the twentieth century because of improvements in the last fifty years, despite the wealth of research that contradicts that conclusion.

States that wanted to implement new voting changes, but were blocked by the Department of Justice thanks to the § 4(b) coverage requirement, wasted no time in taking advantage of the impotent legislation. In fact, as soon as *Shelby County* was decided, Greg Abbott, Attorney General for the state of Texas, announced that the

---

only distorted the meaning of what the Court said in *South Carolina v. Katzenbach* but also revived the equal dignity of the states that *Katzenbach* buried.”)

201 *Shelby Cnty.*, 133 S. Ct. at 2626 (emphasis in original).

202 *Id.* at 2631.

203 *Id.* More than three years after the *Shelby County* decision, Congress has made no legitimate effort at updating the coverage formula, leaving the VRA toothless.

204 *Id.* at 2634 (Ginsburg, J., dissenting).

205 *Id.* at 2637.

206 *Id.* at 2642 (citing 2006 Reauthorization §§ 2(b)(2), (9)).

207 *Id.* at 2638.

208 *Id.* at 2650.



state would be immediately initiating new voter identification laws that had previously been blocked by the Obama administration.<sup>209</sup> On the very same day it was decided, *Shelby County* began to have devastating consequences for minority voters.

### iii. The Present: Voting Rights in 2016

Many lament that the 2016 Presidential election will be the first national election without the full protections of the Voting Rights Act since its inception.<sup>210</sup> Voting rights advocates worry over the restrictive voting laws and over voter suppression that might affect the outcome of the election.<sup>211</sup> In fact, voters have been purged from voting lists during the primary and general seasons of the 2016 presidential election.<sup>212</sup> The next president will likely nominate several Supreme Court Justices,<sup>213</sup> making the 2016 election a key moment for the future of voting rights.

Still, there are positive signs. In 2015, two states, Oregon<sup>214</sup> and California,<sup>215</sup> passed automatic registration bills, removing one of the biggest barriers to voting and making access to the polls easier.

During the summer months of 2016, district and federal courts in key battleground states struck down numerous voter identification laws, citing racial animus as a motivating factor for these laws.<sup>216</sup> In examining North Carolina's voter

---

209 Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, THE GUARDIAN (Jun. 25, 2013, 3:32 PM), <http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision>.

210 See, e.g., Sari Horwitz, *For Government's Top Lawyer on Voting Rights, Presidential Election Has Begun*, WASH. POST (Jan. 13, 2016), [https://www.washingtonpost.com/world/national-security/for-governments-top-lawyer-on-voting-rights-presidential-election-has-already-begun/2016/01/13/b9942d36-b953-11e5-829c-26ffb874a18d\\_story.html](https://www.washingtonpost.com/world/national-security/for-governments-top-lawyer-on-voting-rights-presidential-election-has-already-begun/2016/01/13/b9942d36-b953-11e5-829c-26ffb874a18d_story.html); NPR, *Block the Vote: A Journalist Discusses Voting Rights and Restrictions*, (Aug. 10, 2015, 2:21 PM), <http://www.npr.org/2015/08/10/431238980/block-the-vote-a-journalist-discusses-voting-rights-and-restrictions>; @NAACP. TWITTER (JAN. 12, 2016, 12:15 PM), <https://twitter.com/NAACP/status/687004928779366400>.

211 Dale Ho, *Will the 2016 Presidential Election Be Decided by Voter Suppression Laws?*, ACLU (Jan. 14, 2016, 10:45 AM), <https://www.aclu.org/blog/speak-freely/will-2016-presidential-election-be-decided-voter-suppression-laws>.

212 Gregory Krieg, *Sanders Campaign, New York Officials Cry Foul After New York Voters Report Issues*, CNN (Apr. 20, 2016, 4:29 PM), <http://www.cnn.com/2016/04/19/politics/new-york-primary-voter-problem-polls-sanders-de-blasio/>; Dan Horn, *Ohio Election Roll Purge Challenged by Voting Rights Advocates*, WKYC (July 28, 2016, 8:32 PM), <http://www.wkyc.com/news/politics/ohio-election-roll-purge-challenged-by-voting-rights-advocates/283644184>.

213 Rebecca Shabad, *How Could the Next President Reshape the Supreme Court?*, CBS NEWS, (Jan. 5, 2016 6:00 AM), <http://www.cbsnews.com/news/the-next-president-could-reshape-the-supreme-court/>; see also Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 70*, N.Y. TIMES, (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

214 Andrew Prokop, *Oregon will be the first state to automatically register voters*, VOX (March 17, 2015 12:20 PM), <http://www.vox.com/2015/3/17/8231387/oregon-voter-registration-automatic>.

215 Andrew Prokop, *California governor signs bill to automatically register people to vote*, VOX (Oct. 10, 2015, 4:10 PM), <http://www.vox.com/2015/9/14/9319889/california-automatic-voter-registration>.

216 Camila Domonoske, *As November Approaches, Courts Deal Series Of Blows To Voter ID Laws*, NPR (Aug. 2, 2016, 5:11 PM), <http://www.npr.org/sections/thetwo-way/2016/08/02/488392765/as-november-approaches-courts-deal-series-of-blows-to-voter-id-laws>.

identification laws, the Fourth Circuit considered the actions of North Carolina legislators in the aftermath of the *Shelby County* decision.<sup>217</sup> While acknowledging that the lawmakers were partly motivated by partisan politics, the Fourth Circuit found that “discriminatory racial intent motivated the enactment of the challenged provisions in [the legislation].”<sup>218</sup> Similarly, the United States District Court for the District of North Dakota enjoined a voter identification law in because of its disparate impact on Native American voters.<sup>219</sup>

The decisions in the recent cases concerning VRA and voter suppression give hope that courts might be able to stop voter suppression before a national election, even without the full protection of the VRA. However, that possibility alone is not enough. Voting must be protected during primaries, local, and state elections, not just for federal elections during a presidential election year. Because it seems unlikely that Congress will be able to come up with a new coverage formula and because of the Supreme Court’s skepticism towards race-conscious solutions in *Shelby County*, it is likely that a race-neutral approach to increasing voter access is the best option to combat voter discrimination.

### *B. Looking Forward: Fixing a Racial Issue Through a Race-Neutral Approach*

From analyzing the history of the franchise, it is clear that access to the ballot box has, and continues to be, a racial issue in the United States. However, in order truly to achieve the promises of the Fifteenth Amendment, the most practical approach might be one that, at least on paper, does not acknowledge the racial problem.<sup>220</sup>

A new preclearance coverage formula under § 4(b) of the VRA is the obvious possibility. With the celebration of the fifty-first anniversary of the Act on August 8, 2016, there were renewed calls to return the VRA to its full power.<sup>221</sup> However, recent history shows us that voter suppression is a nationwide problem. It seems improbable that Congress would agree to allow the Justice Department to oversee the election

217 N.C. State Conf. of the NAACP v. McCrory, 821 F.3d 204, 227–29 (4th Cir. 2016).

218 *Id.* at 57–58 (“[T]he totality of the circumstances -- North Carolina’s history of voting discrimination; the surge in African American voting; the legislature’s knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so -- cumulatively and unmistakably reveal that the General Assembly used SL 2013-381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party.”).

219 *Brakebill v. Jaeger*, 1:16-cv-008-DLH-CSM (D.N.D. Aug. 1, 2016) (granting motion for preliminary injunction enjoining North Dakota Secretary of State from enforcing the North Dakota’s voter ID laws during the pendency of litigation).

220 Charles & Fuentes-Rohwer, *supra* note 122, at 499 (“Following *Shelby County*, we can no longer confidently assume that the Court will permit Congress to justify voting rights law and policy on the ground of remedying racial discrimination in the political process.”).

221 *The NAACP Legal Defense Fund Marks the Anniversary of the Voting Rights Act as Threats to Equal Political Participation Remain*, NAACP LEGAL DEF. FUND (Aug. 6, 2016), <http://www.naacpldf.org/press-release/naacp-legal-defense-fund-marks-anniversary-voting-rights-act-threats-equal-political-p>; Angelia Wade, *On the 51st Anniversary of the Voting Rights Act, Now Is the Time to Restore It to Its Full Power*, AFL-CIO (August 5, 2016), <http://www.aflcio.org/Blog/Political-Action-Legislation/On-the-51st-Anniversary-of-the-Voting-Rights-Act-Now-Is-the-Time-to-Restore-It-to-Its-Full-Power>.

laws of every state in the Union; yet, such supervision would be the only way to ensure that every eligible voter has the ability to vote free of discrimination. In a different vein, both President Barack Obama and Senator Bernie Sanders have raised the idea of making Election Day a national holiday.<sup>222</sup> While this solution would address access to the ballot during presidential elections, it would do nothing to help voters in primaries or during local elections.

The best solution might be for the federal government to mandate the regulations for federal elections. The government can establish how citizenship must be proved, allow absentee ballots to be requested online, regulate the timetable for early voting and weekend hours, and permit same-day registration. In other words, Congress should establish procedures that make it easier to vote and protect the practices that many states have been attempting to eradicate.

The power of the federal government to regulate the time, place, and manner of its own elections under the Election Clause was upheld in *Arizona v. Inter Tribal Council of Arizona, Inc.*<sup>223</sup> The Court blocked Arizona's attempt to require additional proof of citizenship because federal law preempted the state action, holding that when the federal government acts under its Election Clause power, federal regulations necessarily displace any conflicting state law.<sup>224</sup> Thus, the federal government could effectively preempt a state's attempts at voter suppression. In fact, a state judge in Kansas recently ruled that a two-tiered system of voter registration was unlawful.<sup>225</sup> While the basis for this decision was based on the National Voter Registration Act, this rationale can easily be extended to the federal government's power under the Election Clause.

The Election Clause method is not a perfect approach. It would still require Congress to approve such a method, and it would not stop a future suppression tool that has yet to be implemented or proposed. Nevertheless, it would be an effective corrective measure that would allow the federal government to regain control over voting rights without a full-functioning Voting Rights Act.

## CONCLUSION

Since the founding, the United States has struggled with unequal and discriminatory voting practices. The Radical Republicans laid a foundation for

---

222 Ben Mathis-Lilley, *Obama Endorses Idea of National Voting Holiday*, SLATE (May 12, 2016, 1:12 PM), [http://www.slate.com/blogs/the\\_slatest/2016/05/12/president\\_obama\\_backs\\_election\\_day\\_voting\\_holiday\\_in\\_rutgers\\_student\\_interview.html](http://www.slate.com/blogs/the_slatest/2016/05/12/president_obama_backs_election_day_voting_holiday_in_rutgers_student_interview.html); *Make Election Day a National Holiday*, BERNIE SANDERS U.S. SENATOR FOR VERMONT, <http://www.sanders.senate.gov/democracyday>.

223 133 S. Ct. 2247 (2013).

224 *Id.* at 2256–57 (“The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to ‘make or alter’ state election regulations. Art. I, § 4, cl. 1. When Congress legislates with respect to the ‘Times, Places and Manner’ of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States.”).

225 *Judge Rules Secretary of State Kris Kobach “Lacks the Authority to Create a Two-Tiered System of Voter Registration”*, ACLU OF KANSAS (Nov. 4, 2016), <https://www.aclukansas.org/en/press-releases/court-permanently-blocks-kobachs-dual-voter-registration-system>; *Brown v. Kobach – Memorandum decision and Order*, ACLU OF KANSAS, <https://www.aclu.org/legal-document/brown-v-kobach-memorandum-decision-and-order>.

political equality in the Reconstruction Amendments. Those values, after lying dormant for about a hundred years, were given practical meaning during the civil rights movement of the twentieth century. Despite the progress made over the last half-century, the Reconstruction Amendments have yet to be fully realized. Political parties still have incentives to introduce restrictive voting regulations, which far too often have negative racial consequences. Voter suppression practices that characterized the post-Reconstruction period have evolved into modern forms that allow discrimination against Black and minority voters.

The United States has a damning history of voter suppression. This legacy continues today in new forms of modern disenfranchisement that target Black and other minority voters. The states should no longer be trusted to regulate voting without federal supervision or intervention. The vote is precious—far too precious a right to be delegated to the state laboratories of democracy. In order to truly protect equal access to the ballot, the federal government must take a more active, prophylactic role in protecting the promise of the Fifteenth Amendment, the right to vote without discrimination based on race.