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Tempering Society's Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy

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INTRODUCTION

In 2013, the Supreme Court declared an end to the racial disparity in minority voter registration and turnout numbers that existed in the Jim Crow South and justified essential elements of the Voting Rights Act of 1965.[1] With that declaration, the Court reduced a century-long struggle for voter equality to a mere debate over specific policy choices, clouded by "decades-old data and eradicated practices."[2] For the Court, the history of de jure racial discrimination was comfortably in the past and the federal government was no longer justified in singling out states that were traditionally the most egregious deniers of civil rights.[3] The Court's historical observation is not only wrong; it represents an increasingly lax attitude toward the history of the Civil Rights Movement and the ongoing struggle for racial equality at the ballot box. A more complete and nuanced view of this history, or more specifically the history of one of the

1. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2627–28 (2013).
2. *See id.*
3. *See id.* at 2630–31 ("If Congress had started from scratch in 2006, [Section 4 of the Voting Rights Act of 1965] plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40–year–old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.").

movement's greatest victories—the Voting Rights Act of 1965[4]—is needed to guarantee continued progress toward a more inclusive American democracy.

One of the most important goals of the Civil Rights Movement was to ensure voting rights for African Americans living in the South,[5] who were almost completely disfranchised.[6] Nearly a century after the ratification of the Fifteenth Amendment,[7] the vast majority of Southern African Americans had no meaningful influence on the election of public officials.[8] This reality created a vicious cycle of marginalization and misrepresentation that only federal action could remedy,[9] because the white majority in many jurisdictions became entrenched in their political dominance.[10] Thus, any opportunity for voter equality would have to come from outside these communities, where prejudice and politics negated any chance of change from within. Such an opportunity would not be realized until the passage of the Voting Rights Act of 1965.[11]

The success of the Voting Rights Act of 1965 represents one of the greatest achievements of American democracy. The Act put an end to a number of facially neutral tactics that the South used to stifle the power of the minority voting electorate, such as literacy tests, poll taxes, and the use of separate ballot boxes.[12] By eliminating such obstacles to voter equality, the Act paved the way for increased voter participation among African Americans,[13] which in turn led to increased minority representation.[14]

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4. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended as 52 U.S.C.A. §§ 10101, 10301 to 10314 (West, Westlaw through P.L. 113-296)).

5. *See infra* Part II.

6. In fact, Southern African Americans had been largely disfranchised since the beginning of the twentieth century. *See* RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS 128 (2004).

7. U.S. CONST. amend. XV. The Fifteenth Amendment provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* § 1.

8. *See infra* Part I.C.

9. *See infra* Part I.

10. *See generally* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969 (1976) (discussing the political struggle for African-American enfranchisement in the South before the passage of the Voting Rights Act of 1965).

11. *See infra* Part II.C.

12. *See infra* Parts I.C, II.

13. *See* Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 111, 126 n.7 (1991).

14. *Id.* at 113 tbl.1; CQ PRESS, AMERICAN POLITICAL LEADERS 1789–2005, at 378 (2005).

Despite what the Supreme Court's opinion in *Shelby County v. Holder* may suggest,[15] however, the victories of the Voting Rights Act are far from complete.

Even with the gains brought about by the Voting Rights Act, minorities—especially African Americans—continue to be underrepresented in public office.[16] Although African Americans make up a substantial portion of the population, their numbers in key public offices are surprisingly scarce.[17] The disparity is perhaps most striking in the South, where African Americans make up an especially significant proportion of the population but have limited representation in both state legislatures and Congress.[18] Although many factors contribute to this disparity, tragically, many white Americans fail to recognize—or simply choose to ignore—the continued struggle for voter equality, which has been largely hidden behind the courthouse doors since the passage of the Voting Rights Act.[19]

By shifting the focus on the fight for voter equality from the streets to the courthouse, the Voting Rights Act had the unintended consequence of allowing many white Americans to claim that the struggle for voter equality was over.[20] By recognizing a technical equality, many whites were free to

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15. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2627–28 (2013) (suggesting the end of disproportionate minority political representation).

16. *See, e.g.*, Karen Shanton, *The Problem of African American Underrepresentation on Local Councils*, DEMOS, http://www.demos.org/publication/problem-african-american-underrepresentation-city-councils [http://perma.cc/7MYJ-3YUZ] (last visited Sept. 25, 2015) (discussing racial voting inequality in the election of local councils).

17. Eric Ostermeier, *African-American US Representatives by the Numbers*, SMART POL. (Aug. 28, 2013), http://editions.lib.umn.edu/smartpolitics/2013/08/28/african-american-us-representa/ [http://perma.cc/GC9N-EV84]; KHALILAH BROWN-DEAN ET AL., 50 YEARS OF THE VOTING RIGHTS ACT: THE STATE OF RACE IN POLITICS 4 (2015) ("Based on the most recent data, African Americans are 12.5% of the citizen voting age population, but they make up a smaller share of the U.S. House (10%), state legislatures (8.5%), city councils (5.7%), and the U.S. Senate (2%). Latinos make up 11% of the citizen voting age population, but they are a smaller share of the U.S. House (7%), state legislatures (5%), the U.S. Senate (4%), and city councils (3.3%). Asian Americans are 3.8% of the citizen voting age population but a smaller share of the U.S. House (2%), state legislatures (2%), the U.S. Senate (1%), and city councils (0.4%)."). Note that this Author does not suggest that there is or should be any "quota" or correct proportion of African Americans to their representation. Instead, these comparisons are necessary to understand that voters remain bound in a race-based society.

18. Bridgette Baldwin, *Backsliding: The United States Supreme Court,* Shelby County v. Holder *and the Dismantling of Voting Rights Act of 1965*, TOURO L.J. RACE GENDER & ETHNICITY, 2015, at 251, 260–61.

19. *See infra* Part III.

20. *See infra* Part III; Michael C. Dawson & Lawrence D. Bobo, Editorial Introduction, *One Year Later and the Myth of a Post-Racial Society*, 6 DU BOIS REV. 247, 247 (2009) ("Many commentators, both conservative and liberal, have celebrated the election of Barack Obama as president of the United States,

downplay the effects of lasting prejudice and became inclined to accept misinformation, which suggests that there is no issue of fairness or equality in American elections and that African Americans are in many ways better off than white Americans.[21] This development has led to renewed efforts to accomplish the very thing that the Voting Rights Act was designed to prevent—implementing measures that on their face do not discriminate on the basis of race but, nevertheless, have the purpose or effect of doing so. As a result, political and legal battles are erupting over voting restrictions, such as voter identification laws, and are being fueled by misinformation.[22] Correcting such misinformation by placing modern developments in their historical context is the job of historians.

This Article presents a brief history of the Voting Rights Act of 1965 with an eye toward correcting the historical misconceptions that courts have promulgated and that have led to increased challenges to voter equality. The hope is that a more nuanced and complete understanding of the fight for African-American enfranchisement will inform political and legal battles over voting rights.

Part I of this Article discusses the necessity of the Voting Rights Act, suggesting that federal legislation was necessary to combat the tangential means of African-American disfranchisement in the Jim Crow South. Part II provides an overview of the Voting Rights Act, highlighting the important features that were designed to halt the discriminatory practices of many states. Part III discusses the broader impact of the Act on the Civil Rights Movement as the fight for the ballot box moved from public protests in the streets to legal activism in the courthouse. Part IV traces the distortion of jurisprudential understandings of the Act as well as the growing misconceptions of the general public surrounding the exercise of the right to vote, suggesting that the foundations have been laid over time for renewed challenges to the Voting Rights Act. Part V discusses the current obstacles to minority voter participation and how to dismantle those obstacles,

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claiming the election signified America has truly become a 'post-racial' society. It is not just Lou Dobbs who argues the United States in the '21st century [is a] post-partisan, post-racial society.' This view is consistent with beliefs the majority of White Americans have held for well over a decade: that African Americans have achieved, or will soon achieve, racial equality in the United States despite substantial evidence to the contrary. Indeed, this view is consistent with opinions found in the *Boston Globe*, *Wall Street Journal*, *New York Times*, and elsewhere . . . .").

21. *See* Peter Wallsten & David G. Savage, *Voting Rights Act Opponents Point to Barack Obama's Election as Reason to Scale Back Civil Rights Laws*, CHIC. TRIB. (Mar. 15, 2009), http://articles.chicagotribune.com/2009-03-15/news/0903140356_1_civil-rights-laws-voting-rights-act-voting-districts [http://perma.cc/M37Q-UTMN].

22. *See infra* Part V.

focusing on recent cases concerning voter identification laws. Finally, this Article concludes with a call for an increased awareness of the Voting Rights Act and its history, so that the past will not be repeated.

I. HISTORICAL NECESSITY OF THE VOTING RIGHTS ACT OF 1965: DISFRANCHISEMENT AND FEIGNED IGNORANCE IN THE SOUTH

The history of the Voting Rights Act of 1965 provides an opportunity to examine the ebb and flow of the American democratic experience. From the high tides of sweeping voter inclusion to low tides of widespread voter disfranchisement, many of those without socio-economic power have had to struggle to attain and maintain political influence.[23] Although this struggle has played out on numerous fronts,[24] perhaps the most striking example has been the fight for unrestrained suffrage for African Americans—a dream that remains unfulfilled.[25] Despite a brief period of high electoral participation during the First Reconstruction,[26] African Americans in the South were largely disfranchised nearly a century after the ratification of the Fifteenth Amendment, and state laws—designed to be facially neutral but practically discriminatory—would have continued to stifle the fight for voting equality without federal intervention.[27]

A. The Early Struggle for African-American Political Power

People of African decedent have been fighting for political rights in North America since before the establishment of the United States.[28] The

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23. *See* Maurice R. Davie, *Minorities, A Challenge to American Democracy*, 12 J. EDUC. SOC. 451, 451–54 (1939). Often in American politics, those of a different nationality or racial background from the white majority have been excluded from the political process. *Id.* at 454 (noting in 1939 that "[i]n America [the feeling of prejudice] is strongest against the Negroes, more intense against Asiatics than whites, and against southern and eastern Europeans as contrasted with northern and western"). This historical reality should be troubling to those citizens who value the authenticity of American elections, because "the basic test of a democracy is whether it can be extended to include representatives of different nationalities and races on a basis of equality." *Id.* at 451.

24. *See, e.g.*, MARCIA AMIDON LUSTED, THE FIGHT FOR WOMEN'S SUFFRAGE (2012) (discussing the history of the Women's Suffrage Movement).

25. *See infra* Part V.

26. *See infra* Part I.A.

27. *See infra* Part I.C.2. The problem was not just in the South, however. Many states outside of the former Confederacy enacted obstructive measures, such as voter identification laws, that made it more difficult for minorities to have an equal opportunity to participate in elections.

28. *See, e.g.*, Audreye E. Johnson, *William Still, A Pioneer African American Social Worker*, 21 J. SOC. & SOC. WELFARE 27, 28 (2015) (noting Paul Cuffe's

success of the American Revolution only intensified this struggle, as the newly created country reaffirmed its support for the institution of slavery.[29] Unsurprisingly, enslaved people had no voice in a government that treated them as mere private property, rather than members of a society founded upon freedom and self-determination.[30] To make matters more troublesome, the states frequently denied even free African Americans access to the ballot box, especially in the South.[31] Obstacles to voter equality took the form of overtly racist laws, which denied voting rights to African Americans as a class.

After the Civil War, the same racist attitudes that justified denying African Americans the right to life, liberty, and property continued to linger in the minds and culture of much of the Southern white electorate.[32] Some whites were so frustrated with African Americans exercising basic freedoms that they often resorted to terrorism and violence to ensure that constitutional guarantees of racial equality were never realized.[33] For example, in 1866, after a confrontation between white police officers and African Americans in Memphis:

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efforts to attain voting rights in Massachusetts for free people of African descent who paid taxes).

29. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."). Of course, such provisions were not without stark opposition. *See* Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY 118 (Jean Allain ed., 2012).

30. *See* Davie, *supra* note 23, at 451 ("The Negroes, for example, were not conceived as members of American society. Nor was Jefferson thinking of them when, as chief draftsman of the Declaration of Independence, he wrote: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'" (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776))).

31. North Carolina was the only Southern state to grant some free African Americans the right to vote for much of the pre-Civil War period. JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860, at 106–07 (prtg. 1995); *see also* Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 424–25 (1986) (discussing the voting rights of free African Americans in the North before the Civil War). In addition, Congress passed legislation that provided a mechanism for only white immigrants to become citizens of the United States. Naturalization Act of 1790, ch. 3, 1 Stat. 103.

32. *See generally* ORVILLE VERNON BURTON, THE AGE OF LINCOLN 234–300 (2007) (discussing life in the South after the Civil War); *see also* MICHAEL A. BELLESILES, 1877: AMERICA'S YEAR OF LIVING VIOLENTLY 21 (2010).

33. BURTON, *supra* note 32, at 274.

> [T]he white city recorder, John C. Creighton, gave a speech urging mayhem . . . Whites did their best to comply. The report [of the Freedmen's Bureau] summarized, "Negroes were hunted down by police, firemen and other white citizens, shot, assaulted, robbed, and in many instances their houses searched under the pretense of hunting for concealed arms, plundered, and then set on fire." Men, women, and children were killed, some shot in bed. Law enforcement personnel were themselves the murderers and arsonists. . . . The lawless mob reigned over Memphis during the next five days, the mayor unwilling or unable to establish control.[34]

Such violence made clear that many Southern whites were still unwilling to accept federally imposed rights for African Americans, including the right to vote.

Such hostility towards African Americans necessitated a comprehensive national response, which illustrated the importance of guaranteeing the right to vote to African Americans in the South. Primarily, the federal government recognized the need to occupy the South to keep freedmen safe from retaliation by Confederate sympathizers, but this strategy was neither a long-term solution nor always effective because Southern officials often facilitated racial violence.[35] Thus, African Americans needed more than temporary protection. They needed the ability to directly influence the government by exercising an unimpeded right to vote.

B. The Rising Tide of African-American Voter Participation During Reconstruction

Emancipation did not automatically bring about African-American enfranchisement.[36] The adoption of the Fifteenth Amendment was necessary to guarantee—at least theoretically—that the right to vote would not be denied or abridged on account of race or color.[37] To buttress this guarantee, Congress utilized its "power to enforce [the Fifteenth Amendment] by appropriate legislation"[38] and passed a series of acts

34. *Id.*
35. *See* BELLESILES, *supra* note 32, at 21–22.
36. The Thirteenth Amendment merely provided that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.
37. U.S. CONST. amend. XV, § 1.
38. *Id.* § 2.

designed to ensure Southern compliance with the mandate of African-American suffrage.[39]

With federal support and oversight, African Americans began to vote at increasingly higher rates throughout the South. By 1880, African-American voter turnout exceeded 50% in most Southern states and was as high as 70% in Tennessee, 77% in South Carolina, 81% in North Carolina, and 84% in Florida.[40] During this period, African Americans also began to serve in all levels of public office in the South.[41] Southern African-American officeholders during Reconstruction included a governor, lieutenant governors, treasurers, secretaries of state, speakers of the house, and a state supreme court justice.[42] These statistics represented a dramatic increase in political influence for a people who were almost completely without political rights 25 years earlier.

Despite dramatic gains in African-American political influence, the technical voter equality that existed in the law books never translated to complete voter equality in practice.[43] Much of the eligible African-American electorate never actually cast ballots[44] and a significant disparity remained between the general African-American population and African-American representation in key public offices.[45] This gap only widened as Reconstruction came to an end.[46]

As the end of Reconstruction neared, African-American voter turnout plummeted.[47] From 1880 to 1892, African-American voter turnout decreased by an average of 40% in Southern states.[48] From 1892 to 1900, that decline was even more dramatic.[49] By 1912, the South had virtually disfranchised

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39. *See generally* JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 76–96 (2d prtg. 2006) (discussing the enforcement legislation of the Fifteenth Amendment).

40. *See* VALELLY, *supra* note 6, at 128 tbl.6.3. African American voter turnout numbers for other states in 1880 included: 55% in Alabama, 57% in Arkansas, 42% in Georgia, 44% in Louisiana, 45% in Mississippi, 59% in Texas, and 59% in Virginia. *Id.*

41. ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION, at xiv (La. State Univ. Press rev. ed. 1996). African Americans served in many local offices, such as mayor, postmaster, sheriff, coroner, and city council. *Id.*

42. *Id.* at xvi tbl.6.

43. *Id.* at xiv.

44. *See* VALELLY, *supra* note 6, at 128.

45. *See* FONER, *supra* note 41, at xiv.

46. *See* VALELLY, *supra* note 6, at 128 tbl.6.3.

47. *See id.*

48. *See id.* Florida (83%), Mississippi (98%), South Carolina (78%), and Tennessee (56%) experienced the most dramatic declines. *See id.*

49. *See id.*

African Americans, with less than 4% voter turnout in every Southern state.[50]

C. The Post-Reconstruction Dismantling of African-American Voting Rights

The re-disfranchisement of African Americans in the post-Reconstruction South was the product of a calculated scheme.[51] Many Southern whites had no intention of allowing Southern blacks to continue to exercise their constitutional right to vote.[52] As federal oversight subsided towards the end of Reconstruction, these Southern whites took advantage of an opportunity to once again strip African Americans of political power.[53] From Virginia to Texas, states across the South began to pass a series of acts and constitutional amendments designed to disfranchise black citizens.[54] These states accomplished this task without running afoul of the plain language of the Fifteenth Amendment by utilizing polices that were facially neutral but practically discriminatory.[55]

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50. *Id.*

51. *See generally id.* at 121–31 (discussing the post-Reconstruction disfranchisement of African American in Southern states).

52. *See* Orville Vernon Burton, Terence R. Finnegan, Peyton McCrary & James W. Loewen, *South Carolina*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1865-1990, at 191, 195 (Chandler Davidson & Bernard Grofman eds., 1994).

53. LAWSON, *supra* note 10, at 6. Consider the situation in Claiborne Parish, Louisiana, even after African Americans were given greater legal protection:

> The white terrorists, called "bulldozers" in Louisiana, had no reason to fear local law enforcement, which they dominated. When federal troops came into [the] parish during the 1876 election, the bulldozers "stopped killing [African Americans] as much as they had been; the White Leagues stopped raging about with their guns so much." But only the governor could request federal assistance, and that office had fallen into the hands of the terrorists themselves.

BELLESILES, *supra* note 32, at 21 (footnote omitted).

54. One example was South Carolina's so-called "Eight-Box Ballot Law," which illustrates the extreme measures that Southern whites were willing to take to prevent African Americans from exercising their right to vote:

> Under this rule, ballots for individual offices had to be placed in separate ballot boxes. Put your ballot in the wrong box, and it would not be counted. Although the boxes were usually labeled properly, this meant little to illiterate black voters unable to read the labels. And if this were not enough, many election supervisors shifted the boxes around periodically. Countless wrongly placed—and hence uncounted—ballots were the result.

CHARLES L. ZELDEN, VOTING RIGHTS ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 75 (2002).

55. J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 33–36 (1999).

1. The Texas Experience

Southern states instituted a number of measures to effectively disfranchise African Americans without overtly discriminating on the basis of race.[56] These measures took advantage of demographic realities and utilized selective enforcement measures to virtually eliminate African-American political influence in the South.[57] These measures included the institution of a white primary for the dominant political party—the Democratic Party, poll taxes, and discriminatory literacy tests and polling place. Although states throughout the South utilized some or all of these measures,[58] Texas provides an illustrious example that has great relevance today.

a. The White Primary

The white primary in Texas began in 1895, when the Texas legislature first supported efforts to require political parties to hold primary elections.[59] In doing so, "Texas recognized political parties as a functional segment of the state's governmental machinery."[60] This move was significant because political parties could set their own racist qualifications for primary participants. The Terrell Election Law of 1905 formalized this loose system: Texas state law now encouraged both of the major parties, and the county election committees, to more widely adopt the then-existing voter qualifications that directly barred African Americans and other minorities from voting in primary elections.[61]

Because of restrictive voter qualifications,[62] by the early twentieth century, the Democratic Party was the only relevant party in Texas.[63] Thus, keeping African Americans and other minority voters out of the Democratic primary amounted to total disfranchisement. Professor David Montejano writes that one of the stated purposes of the Terrell Law was to prevent opening "the flood gates for illegal voting as one person could buy up the

56. *See id.*
57. *Id.* at 35 (noting "ingenious southern authors could twist seemingly neutral devices for partisan and racist purposes").
58. VALELLY, *supra* note 6, at 126 tbl.6.2.
59. Henry Allen Bullock, *The Expansion of Negro Suffrage in Texas*, 26 J. NEGRO EDUC. 369, 370–71 (1959).
60. *Id.* at 370.
61. *See* Robert Brischetto et al., *Texas*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 235, 237, 434 n.37 (Chandler Davidson & Bernard Grofman eds., 1994); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 207–09 (1974).
62. *See* Brischetto et al., *supra* note 61, at 269 tbl.8.9.
63. Bullock, *supra* note 59, at 370–71.

Mexican and Negro votes"—in other words, to prevent voter fraud.[64] The effective result of the all-white primary system, however, was to prevent legitimate minority voters from participating in the nomination process in Texas.[65] For example, the Dimmit County newspaper reported on June 12, 1914 that the "White Man's Primary Association," as the local white primary system was known, "absolutely eliminates the Mexican vote as a factor in nominating county candidates, though we graciously grant the Mexican the privilege of voting for them afterwards."[66] Thus, under the guise of preventing "fraud," white primary laws also permitted white Democrats to control the votes of registered, but effectively disfranchised, minority voters during the primary elections.

In 1918, African Americans first successfully challenged a nonpartisan white primary system in Waco, Texas.[67] In response, the Texas State legislature in 1922 enacted a law providing that "all qualified voters under the laws and constitution of the State of Texas who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic party primary election . . . in no event shall a negro be eligible to participate."[68] This restriction essentially meant that any person voting in a party primary had to affirm: "I am a white and I am a Democrat."

In 1924, African Americans filed a federal lawsuit to stop the enforcement of the 1922 statute on the grounds that it violated the Fourteenth and Fifteenth Amendments and to prevent Texas from drawing a tighter stranglehold on African-American suffrage.[69] The U.S. Supreme Court in 1927 declared the Texas statute unconstitutional.[70] The Texas legislature immediately responded by stipulating that every political party in the state, through its Executive Committee, "shall in its own way determine who shall be qualified to vote or otherwise participate in such political party."[71] Promptly thereafter, the Democratic Party again banned all non-white voters from the party's primary elections.[72] The new law barred both African-American and Latino voters.[73] As M. C. González, a founder of The League of United Latin American Citizens ("LULAC"), explained in 1929, "the establishment of 'white man's' primaries to

64. DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986, at 143 (1987).
65. *Id.*
66. *Id.* at 143–44 (citation omitted).
67. Brischetto et al., *supra* note 61, at 237.
68. Qualifications of Voters in Democratic Primaries, 1923 Tex. Gen. Laws 74.
69. Bullock, *supra* note 59, at 372.
70. Nixon v. Herndon, 273 U.S. 536 (1927).
71. Authorizing Political Parties Through State Executive Committees to Prescribe Qualitifications of Their Members, 1927 Tex. Gen. & Spec. Laws 193.
72. *See* Brischetto et al., *supra* note 61, at 238.
73. *See id.*

prevent blacks and Mexican Americans from exercising their right of suffrage" was a significant burden faced by Latinos in the 1920s.[74] Not until 1944 did the Supreme Court also rule this form of the Texas white primary laws unconstitutional.[75]

b. Discriminatory Literacy and Polling Place Requirements

At the same time when Texas implemented the all-white primary, the state also disfranchised African-American and Latino voters through secret ballots and polling place laws that restricted or barred assistance for illiterate voters.[76] The Terrell Election Law of 1903 first established the secret ballot in Texas, but still allowed white Democratic partisan election judges to "assist" illiterate voters with reading and completing their ballots.[77] Before that, political parties would print ballots and hand them out to supporters.[78] Enslaved African Americans had largely been prohibited from learning to read,[79] and, after the Civil War, educational opportunities for African Americans remained severely limited[80] and racially segregated.[81] So the racial impact of the new secret ballot law upon its enactment was clear: in 1900, 45.1% of adult African-American men were illiterate; by comparison only 8.6% of white men in Texas were illiterate.[82] Thus, many African Americans who were unable to navigate complex written ballots alone were largely disfranchised.

Texas polling place laws later went even further, fully prohibiting an illiterate person from receiving any help with voting.[83] Latino citizens who did not speak English fared no better than illiterate African Americans under Texas laws. As Montejano explains, "in 1918, the legislature passed a law eliminating the interpreter at the voting polls and stipulating, moreover, that no naturalized citizens could receive assistance from the

74. MARIO T. GARCÍA, MEXICAN AMERICANS 27 (1989) (describing the writing of González).
75. Smith v. Allwright, 321 U.S. 649 (1944).
76. *See* KOUSSER, *supra* note 61, at 50, 208.
77. *Id.*
78. *Id.* at 50.
79. ALWYN BARR, BLACK TEXANS: A HISTORY OF AFRICAN AMERICANS IN TEXAS, 1528–1995, at 23 (2d ed. 1996) ("Although Texas had no law against the education of slaves as did most southern states, opposition to their instruction produced a black population over 95 percent illiterate at the end of the Civil War.").
80. *Id.* at 64–65.
81. TEX. CONST. art. VII, § 7 (1876) ("Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.").
82. KOUSSER, *supra* note 55, at 55 tbl.2.1.
83. Garza v. Smith, 320 F. Supp. 131, 134 (W.D. Tex. 1970), *vacated by* 401 U.S. 1006 (1971) (citing then-current TEX CONST. art. VI, § 2 (1876)).

election judge unless they had been citizens for twenty-one years."[84] This legislation ensured voter disfranchisement for illiterate voters, most of whom were minorities.[85]

c. Poll Tax

The poll tax was also a critical part of Texas's system of disfranchisement. In 1902, after the growing, multiracial Populist coalition emerged in the 1890s as a political threat to the Democrats, the Texas legislature passed a state constitutional amendment requiring the payment of a poll tax as a prerequisite for voting.[86] As one of Texas's primary disfranchising devices, the poll tax was aimed directly at African Americans, but also adversely affected other minorities and poor whites who were Populist sympathizers.[87] Because minority voters were disproportionately poor, the cost of paying the poll tax kept their registration and turnout rates low for much of the twentieth century.[88] The poll tax, equivalent to $15.48 in today's dollars, cost some African-American and Mexican laborers in Texas most of a day's wage.[89]

The creation of a poll tax was justified as a means of preventing voter fraud.[90] A.W. Terrell, the chief architect of the Texas poll tax, summarized the pretext for poll taxes: that they would "protect the citizen against machine politics, convention dictation, and corrupt methods at the polls."[91] The view at the time was that, because casting a ballot costs nothing, "votes are quite cheap" and were "frequently sold for a trifle."[92] Forcing each voter to pay a poll tax supposedly increased the "value" of the vote and made "political machines"—any political movements that conservative Democrats viewed as a threat—buying the votes of poor African American and Latino voters more difficult. In addition, "proponents of the poll tax argued that the restriction would eliminate 'irresponsible' voters. Voting, according to these conservatives, was not a natural right, but a privilege which the state should deny to those unwilling to pay the tax."[93] The threat of voter fraud was even used to excuse the failings of the law: one article

84. MONTEJANO, *supra* note 64, at 143.
85. *See id.*
86. *See* Donald S. Strong, *The Poll Tax: The Case of Texas*, 38 AM. POL. SCI. REV. 693, 693–94 (1944).
87. *Id.* at 694–95.
88. *Id.* at 694.
89. Brischetto et al., *supra* note 61, at 139.
90. *See, e.g.*, A.W. Terrell, *Purity of Ballot*, DALL. MORNING NEWS, Mar. 8, 1906, at 3.
91. *Id.*
92. *Id.*
93. KOUSSER, *supra* note 55, at 200.

pleaded that "it is better than no law at all," because "whatever else may be said of it, it will be found effectual to prevent fraud."[94]

Nonetheless, a revealing *Houston Daily Post* article published on October 31, 1902, made clear that the poll tax as a fraud prevention tool was a mere pretext to disguise poll tax supporters' true intent—to disfranchise African-American voters.[95] In the article, E.G. Senter, journalist and eventual Democratic state senator, initially states that "[t]he poll tax amendment to the constitution, if adopted by the people of the State at the coming general election, will preserve the purity and integrity of the ballot in this State."[96] As he continues to argue for the adoption of the poll tax, however, it becomes clear that, for Senter, the primary justification for a poll tax was the suppression of African-American voters.[97] Showing his true justification, Senter argued, "Another and, if possible, a more weighty reason why the poll tax amendment should be adopted is that it means the elimination of the race issue in politics. . . . With two strong parties in Texas today, the negro would hold the balance of power."[98] Thus, preventing fraud was a pretext for the true discriminatory purpose: to minimize the minority vote so to ensure the dominance of the Democratic Party in Texas.

Through the mid-1960s, some mainstream Texas politicians and newspapers continued to view the poll tax as a legitimate means of preventing fraud, even as the poll tax's discriminatory impact on African-American voters was clear.[99] However, although some Texans knew that the purpose of the poll tax was to disfranchise African Americans and other minorities, they continued to use the pretext of fraud to justify a poll tax even during the Civil Rights Movement. In fact, during the turmoil of the Civil Rights Movement in 1963 when throughout the nation a debate on getting rid of poll taxes was raging, Texans voted to maintain the poll tax in a referendum.[100] An amendment to the U.S. Constitution was necessary to finally eliminate this voting restriction.[101]

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94. *The Poll Tax Provision and the Election Law*, DALL. MORNING NEWS, Jan. 22, 1904, at 6.

95. E.G. Senter, *The Poll Tax: Some Very Strong Reasons Why the Amendment Should Be Adopted*, HOUS. DAILY POST, Oct. 31, 1902, at 6.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See generally* Orville Vernon Burton, Expert Report, *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey4073.pdf [http://perma.cc/NEN3-HUGQ] (filed June 27, 2014) (Expert Report for *U.S. v. Texas*, No. 2:13-cv-00263 (S.D. Tex. 2014)).

100. *Id.*

101. U.S. CONST. amend. XXIV.

2. The Nature of Disfranchisement in the Jim Crow South

The tactics white supremacists used were tragically effective. Despite the gains of the Reconstruction years, by 1912 African-American voter participation was almost non-existent in the South.[102] As a result, the number of African-American public officials plummeted. For example, no African Americans from the South were elected to Congress in the first half of the twentieth century.[103] Thus, Southern white supremacists were able to almost completely strip African Americans of all political power, even though the laws on the books did not overtly display a racial bias.

The nature of African-American disfranchisement in the Jim Crow South shows the power of subterfuge, which was put into motion as follows. First, take advantage of the demographic weaknesses across the African American population that white Southerners had already actively promoted, such as poverty and poor education. Second, tailor voting laws to take advantage of those weaknesses by creating insurmountable obstacles for the poor and the poorly educated. Third, create a flexible enforcement mechanism, whereby racist local officials can make sure to include whites that may suffer from the same disadvantages, while excluding African Americans. Finally, use violence, fear, and intimidation to deter the few brave enough to attempt to vote. Southern white supremacists designed this playbook to practically disfranchise African Americans without writing a discriminatory purpose into the letter of the law or running afoul of the Fifteenth Amendment.

The nature of disfranchisement in the Jim Crow South made clear that only federal intervention could end the tactics used to deny African Americans access to the polls without overtly discriminating on the basis of race. Thus, President Johnson noted in 1965: "Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books—and I have helped to put three of them there—can ensure the right to vote when local officials are determined to deny it."[104] Recognizing this tragedy, President Johnson called on Congress to pass new legislation that would ensure African American enfranchisement once and for all—the Voting Rights Act of 1965.[105]

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102. VALELLY, *supra* note 6, at 128 tbl.6.3.
103. CQ PRESS, *supra* note 14, at 378.
104. *Lyndon B. Johnson: Voting Rights Act Address*, GREAT AM. DOCUMENTS, http://www.greatamericandocuments.com/speeches/lbj-voting-rights.html [https://perma.cc/GM4R-W3YL] (last visited May 30, 2015) (transcript of President Johnson's speech on the Voting Rights Act of 1965, delivered on March 15, 1965).
105. *Id.*

II. THE PROVISIONS OF THE VOTING RIGHTS ACT OF 1965: A VISION AND A VICTORY

The Voting Rights Act of 1965 was more than a response to the injustices that white supremacists perpetrated in the Jim Crow South. The Act was an essential component of the vision of the Civil Rights Movement, which recognized that suffrage was as much an affirmation of one's humanity as it was a means to political representation. From W.E.B. Dubois to Dr. Martin Luther King, Jr., African-American leaders passionately advocated for the unimpeded right to vote.[106] These leaders recognized that impediments came in a variety of forms and could be stealthily instituted because the white electorate could ignore the pretext that cloaked these impediments.[107] The observations of those leaders were tragically accurate. Nearly a century after the passage of the Fifteenth Amendment, legal impediments to African-American enfranchisement were in full force throughout the South,[108] but the tides of public opinion were shifting.[109] The country as a whole was becoming more sympathetic to the Civil Rights Movement's call for a more inclusive American democracy.[110]

A. The Vision of the Act

In the 1960s, Congress recognized that federal legislation was needed to eradicate "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[111] As a result, "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."[112] To be effective, these

106. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 32 (Stanley Appelbaum & Candace Ward eds., Dover Publ'ns 1994) (1903); *"Give Us the Ballot," Address at the Prayer Pilgrimage for Freedom*, MARTIN LUTHER KING, JR. & GLOBAL FREEDOM STRUGGLE, http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_give_us_the_ballot_address_at_the_prayer_pilgrimage_for_freedom/index.html [http://perma.cc/7UN5-TYQZ] (last visited Aug. 31, 2015) (transcript of Martin Luther King, Jr.'s May 17, 1957 speech).

107. *"Give Us the Ballot," Address at the Prayer Pilgrimage for Freedom*, *supra* note 106.

108. *See generally* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1865-1990 (Chandler Davidson & Bernard Grofman eds., 1994) (discussing the disfranchisement of African Americans throughout the South).

109. *See infra* Parts II.A, III.

110. *See infra* Parts II.A, III.

111. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

112. *Id.*

measures would have to respond to the nature of disfranchisement in the Jim Crow South.[113] Merely reaffirming the prohibition on overtly discriminatory laws would not be enough. To ensure African-American enfranchisement, Congress would have to craft legislation that would make states using subterfuge to circumvent the protections of the Fifteenth Amendment impossible.[114] This legislation would take the form of the Voting Rights Act of 1965.[115]

B. The Highlights of the Act

Congress drafted the Voting Rights Act of 1965 to provide robust protection of minority voters, responding directly to the tactics used to disfranchise African Americans in the Jim Crow South. The two sharpest fangs of the Act were Section 2 and Section 5, which outlawed qualification tests for voters[116] and required federal preclearance of any state or local action that could negatively impact minority voters, respectively.[117] These sections provided strong, yet incomplete, protection to African Americans living in the South.[118]

Section 2 prohibits the use of a "qualification or prerequisite to voting, or standard, practice, or procedure . . . [to] deny or abridge[] . . . the right of any citizen of the United States to vote."[119] This section applies nationwide, to "any State or political subdivision."[120] As originally enacted, Section 2 only protected those who were prevented from voting "on account of race or color."[121] Congress later expanded the section to apply to language minority groups as well.[122]

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113. *See supra* Part I.C.2.

114. The Fifteenth Amendment provides that "[t]he 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." U.S. CONST. amend. XV, § 1. Thus, the language does not expressly cover laws that were not facially discriminatory but were discriminatory in practice. *See supra* Part I.C.

115. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended as 52 U.S.C.A. §§ 10101, 10301 to 10314 (West, Westlaw through P.L. 113-296)).

116. 52 U.S.C.A. § 10301. Note, however, that Section 4 struck the first blow to disfranchisement by prohibiting the use of devices used to stifle the minority vote, such as literacy tests.

117. 52 U.S.C.A. § 10304.

118. *See infra* Part II.C.

119. 52 U.S.C.A. § 10301(a).

120. *Id.*

121. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437.

122. 52 U.S.C.A. §§ 10301(a), 10303(f)(2).

Although Section 2 set forth broad protections, it provided only a limited remedy through a private right of action.[123] Citizens with standing have a right to bring an action against the state or its subdivision for violations of the Act, because Congress passed the Act pursuant to the enabling clauses of the Fourteenth and Fifteenth Amendments to the Constitution.[124] Practically, however, lawsuits under the Act are so expensive that plaintiffs seldom have the money or the legal expertise to pursue a Section 2 claim, unless they are backed and financed by the Justice Department, a large law firm, or an organization—such as the NAACP, the ACLU, or MALDEF—that can pay for the attorneys, expert witness, travel, depositions, court fees, and other expenses associated with litigation. In contrast, the jurisdiction defending the suit can pull from a virtually unlimited pool of tax money to mount a defense of its actions. The realities of litigation limit enforcement of Section 2, yet its clear prohibition against voter qualification tests directly combats a major device used in the Jim Crow South to suppress African-American voters.[125]

Section 5 of the Voting Rights Act provides a more robust enforcement mechanism than Section 2, requiring jurisdictions with a history of discrimination to send any potential changes in their election rules and procedures to the federal government for preclearance.[126] Section 5 ensures that a state does not adopt election procedures or redistricting plans that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[127] For example, retrogression would occur if, under an election plan, African Americans regularly elected two candidates, yet a change in the election laws resulted in the election of only one black candidate. Section 5 successfully combated the practices of racial gerrymandering and annexations of predominantly white areas adjacent to majority-black areas to diminish the effect of African-American voters.[128] Additionally, the section curbed the common practice in the South of replacing single-member districts with at-large and multi-member districts.[129] The success

123. *See* Morse v. Republican Party of Va., 517 U.S. 186, 189 (1996).
124. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.
125. *See supra* Part I.C.
126. *See* 52 U.S.C.A. § 10304.
127. Beer v. United States, 425 U.S. 130, 141 (1976). All retrogression does not constitute a violation, however. For example, African Americans' representation may drop from two seats to one because of a decrease in population and not solely because district lines were changed.
128. For a discussion of annexations, see Peyton McCrary, Note, *How the Courts Came to Treat Annexations Under the Voting Rights Act*, 26 J. POL'Y HIST. 429 (2014).
129. *See* White v. Regester, 422 U.S. 935, 935–36 (1975); *see also supra* Part IV (discussing why at-large and multi-member voting districts hurt African Americans).

of the Voting Rights Act depended in large part on Section 5, making it the crux of enforcement, "the steel spine of the law."[130]

Though potent, Section 5 is narrower in application than Section 2 and affects only jurisdictions with a history of discrimination.[131] The applicability of Section 5 depends on an "automatic trigger" that uses the jurisdiction's past voting records, the percentage of eligible voters, the voting-age population that voted in the preceding presidential election, and the prior use of the literacy test.[132] The design of the trigger meant that some jurisdictions slipped through the cracks.[133] In a glaring omission, Section 5 did not apply to the former Confederate state of Texas until the 1975 renewal of the Act, which included English-only ballots in the trigger formula.[134] The application of Section 5 to jurisdictions with a history of discrimination against language minority groups significantly expanded the Act's impact on Hispanic populations and resulted in a large number of additional jurisdictions covered.[135] Congress made no attempt, however, to expand Section 5 protection in either the 1982 or 2006 renewals of the Voting Rights Act, and in 2013 the Supreme Court effectively destroyed the protection of Section 5, holding that the preclearance formula—which is used to determine which states are subject to the preclearance requirement—was unconstitutional.[136]

Despite modern limitations, Section 2 and Section 5 of the Voting Rights Act of 1965 provided specific enforcement mechanisms to accomplish the goal of increasing minority voter participation. With Section 2 preventing the use of mechanisms that interfere with the right to vote[137] and Section 5 requiring the federal government to approve any changes that could negatively affect minorities,[138] the stage was set for change in the South. Although neither section provides complete protection to minority voters, the strength of the sections made them among the most powerful instruments of voter equality.[139]

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130. Richard Wolf, *Section Affects Which States Subject to Law*, USA TODAY, June 26, 2013, at 2A.
131. *Compare* 52 U.S.C.A. § 10301 *with* § 10304.
132. 52 U.S.C.A. § 10303(b).
133. *See* Brischetto et al., *supra* note 61, at 242.
134. *Id.*
135. *Id.*
136. Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).
137. 52 U.S.C.A. § 10301.
138. 52 U.S.C.A. § 10304.
139. *See infra* Part II.C.

C. An Incomplete Victory

After the passage of the Voting Rights Act of 1965, African-American voter participation grew dramatically but slowly in the South.[140] This growth in voter participation translated into more African-American representatives in various levels of government, especially during the 20 years immediately following the passage of the Act.[141] For example, although only 3 African Americans were elected as state legislators in the South in 1965, by 1980 that number rose to 176.[142] Southern states also began to send their first African-American representatives to Congress since Reconstruction.[143]

The passage of the Voting Rights Act of 1965 made these gains possible by gradually putting an end to pretextual voting limitations and ensuring that districting schemes would not dilute the African-American vote.[144] This victory was far from complete, however. Decades after Congress passed the Voting Rights Act of 1965, African Americans still do not enjoy sufficient political representation.[145]

The passage of the Voting Rights Act of 1965 by itself did not ensure many of the gains in African-American political influence. Many states continued to disregard the provisions of the Act until their challenges were defeated in court.[146] Thus, the courtroom battles of the 1960s and 1970s became as important for the enforcement of African-American voting rights as the public protests of the previous decades. These courtroom battles, however, were not without their shortcomings.[147]

III. THE IMPACT OF THE VOTING RIGHTS ACT OF 1965 ON THE BROADER CIVIL RIGHTS MOVEMENT: FROM THE STREETS TO THE COURTHOUSE

Despite the triumphs of the Voting Rights Act of 1965,[148] the Act had a drawback in practice: the focus of the Civil Rights Movement shifted from public protests in the streets to legal activism in the courtroom. This shift was problematic because the continued struggle for voter equality moved increasingly out of the national spotlight as coverage of the

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140. *See* Grofman & Handley, *supra* note 13, at 111.
141. Increased support for African-American candidates generally cannot explain this trend, because majority white districts in the South continued to vote for only white candidates in virtual every election. *Id.* at 114 tbl.2.
142. *Id.* at 113 tbl.1.
143. CQ PRESS, *supra* note 14, at 65.
144. *See* Grofman & Handley, *supra* note 13, at 111.
145. BROWN-DEAN ET AL., *supra* note 17, at 4.
146. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966).
147. *See infra* Part III.
148. *See supra* Part II.C.

Vietnam War captivated the American public.[149] Hidden behind courtroom doors, the movement received declining media attention.[150] As the media attention waned, so did the focus on the daily plight of African Americans in the South and one of the driving forces behind much of the Civil Rights Movement's victories.

A. The Role of the Media in the Civil Rights Movement

The media's impact on the Civil Rights Movement cannot be overstated. Unlike the First Reconstruction of the mid- to late-nineteenth century, the so-called Second Reconstruction of the twentieth century was covered by television and newspaper photographers, which brought raw depictions of African American suffering and heroics to living rooms across the country.[151] These reports made it difficult for the national electorate to ignore the fraud and violence that Southern white supremacists were perpetuating.[152] Rather than being able to blindly accept misinformation or claims of exaggerated political ploys, white Americans were forced to face the heartbreaking reality of life in the Jim Crow South.

By the 1960s, stories concerning the Civil Rights Movement captivated the American audience. For example, when Governor Orval Faubus of Arkansas closed a Little Rock high school for the year in 1958, Claude Sitton of the *New York Times* responded by writing a story "just about every day" that exposed Faubus's and the Arkansas legislature's racist actions.[153] The Little Rock high school saga inspired many other reporters and photographers to spread out across the South, "picking off race stories as they emerged, seeking out stories that were hard to find, and seeing ordinary stories through a new racial prism," all at great danger to themselves.[154] One of those stories covered Autherine Lucy, who had fought for three years for the right to attend the University of Alabama before succeeding.[155] Reporters flocked to cover her first days on campus,

149. GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 400 (2006) ("[T]he escalation of the war in Vietnam, and the protests against it, steadily diverted attention from civil rights.").

150. *Id.*

151. *See, e.g.*, *id.* at 86 (describing the Emmett Till trial as "another significant journalistic milestone. . . . [Till] brought white reporters into the Deep South in unprecedented numbers to cover a racial story. . . . Northerners were shocked and shaken by what they read").

152. *See id.*

153. *Id.* at 194.

154. *Id.* at 196.

155. *Id.* at 128.

where she barely escaped with her life from segregationists' attacks.[156] These images brought to life the struggle for racial equality, which culminated when Americans across the country tuned in for coverage of the march from Selma to Montgomery, Alabama.[157]

On March 7, 1965, cameras were rolling when over five hundred African Americans gathered at the Brown Chapel in Selma, Alabama.[158] Martin Luther King, Jr. had organized a march to Montgomery to protest a state trooper's fatal shooting of African American Jimmie Lee Jackson, who was trying to protect his mother during a demonstration.[159] When the group halted their march at the Edmund Pettus Bridge, Alabama troopers awaited them, carrying clubs "as large as baseball bats" and joined by a hundred white segregationists eager for violence.[160] Major John Cloud announced to the peacefully assembled marchers that they had two minutes to disassemble.[161] Before the two minutes had passed, however, the troopers attacked.[162] Those on horseback rode over the crowd, and those on foot wielded nightsticks; even after the demonstrators retreated, the troopers released tear gas and pursued those who fled.[163]

These images were broadcast across the country, spawning a national outcry of what became known as "Bloody Sunday."[164] Ignoring the strife of African Americans in the Jim Crow South was no longer possible for those who witnessed the savage abuse of peaceful protestors. After the media coverage of the Civil Rights Movement led to widespread outrage,[165] congressional action was accordingly set in motion.[166] Thus, the media played an important role in the passage of the Voting Rights Act of 1965 and other important legislation.

B. The Media and the Voting Rights Act of 1965

Although the Voting Rights Act of 1965 gave African Americans the legal ammunition to fight disfranchisement, the Act sucked some of the

156. *Id.* at 128–32.
157. For images of the march, see *Selma Marches, Bloody Sunday Mark 50th Anniversary*, ABC NEWS, http://abcnews.go.com/US/photos/selma-marches-bloody-sunday-mark-50th-anniversary-29411771/image-hosea-williams-john-lewis-confront-troopers-bloody-sunday-29412040 [http://perma.cc/Q5JF-WZRY] (last visited Aug. 23, 2015).
158. ROBERTS & KLIBANOFF, *supra* note 149, at 385.
159. *Id.* at 384–85.
160. *Id.* at 385.
161. *Id.*
162. *Id.* at 386.
163. *Id.*
164. *Id.* at 387.
165. *Id.*
166. *Id.* at 394.

oxygen out of the political arm of the Civil Rights Movement, as the horrors of Southern racism no longer dominated the headlines. African-American leaders began to focus increasingly on securing their hard-won legislative victories in the courthouse, with much success. In *South Carolina v. Katzenbach*,[167] the Supreme Court upheld the constitutionality of the Voting Rights Act of 1965 against South Carolina's demand to block enforcement of certain provisions.[168] In *Allen v. State Board of Elections*,[169] the Court held that Section 5 of the Voting Rights Act applied to all uncleared voting changes that covered states might attempt to make.[170] The Court in *Oregon v. Mitchell* also upheld the Act's ban on literacy tests, which white supremacists had previously used to deny African Americans the right to vote.[171]

As the focus of civil rights leaders shifted to securing judicial victories, so did the media attention, because legal battles did not captivate audiences like public protests. Thus, the "the escalation of the war in Vietnam, and the protests against it, steadily diverted attention from civil rights."[172] Additionally, by the late 1960s, media organizations lost their most prominent editors and journalists who had "made the civil rights years their most dazzling era."[173] These forces that led to the decline in media attention had broader implications.

Enfranchisement also diffused black militancy, channeling protests into traditional political and judicial processes. Reverend James Bevel, who had helped Martin Luther King, Jr. in organizing demonstrations,[174] commented: "There is no civil rights movement anymore. President Johnson signed it out of existence when he signed the voting-rights bill."[175] Having gained the Voting Rights Act of 1965, leaders lost the momentum necessary to fight other racial disparities, such as income inequality, in large part because "welfare issues proved less susceptible to attack than segregation and disenfranchisement."[176] Previous leaders in the Civil Rights Movement turned to politics to continue their fight with political tactics rather than public demonstrations. For example, John Lewis,

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167. 383 U.S. 301 (1966).
168. *Id.* at 308.
169. 393 U.S. 544 (1969).
170. *Id.* at 565 ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.").
171. 400 U.S. 112, 133 (1970).
172. ROBERTS & KLIBANOFF, *supra* note 149, at 400.
173. *Id.* at 405.
174. *Id.* at 314–315.
175. AUGUST MEIER & ELLIOT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT, 1942–1968, at 329 (1973).
176. *Id.* at 339.

knocked unconscious during Bloody Sunday,[177] became a Congressman representing Georgia.[178] Thus, the Civil Rights Movement entered the era of courtroom battles, rather than confrontation in front of news cameras.

Without adequate media attention, the Civil Rights Movement seemed to be at a standstill for many outsiders, and as a result, for many white Americans the fight for voter equality was over. Assuming that American democracy finally gave everyone an equal voice and that the bigotry and oppression of the Jim Crow South was comfortably in the past became easy. Such attitudes would prove to be devastating to the continued struggle for voter equality, as courts increasingly took a more lax view toward the history of the Voting Rights Act of 1965, even going as far as to rewrite history and declare that America had entered an era of a post-racial society.[179]

IV. THE DISTORTION OF THE VOTING RIGHTS ACT OF 1965: THROWING AWAY THE HISTORY BOOKS

In 2013, the Supreme Court suggested that race was no longer a motivating factor in the design of American electoral policies.[180] What the Court failed to realize—or chose to ignore—was that minority groups still experienced significant political inequality, both at the polls and in the halls of legislators.[181] This oversight was especially troublesome given the history of the Voting Rights Act of 1965, because the Court essentially allowed the very thing the Act was designed to prevent—facially neutral restrictions on voting that marginalize minority citizens.[182] This change, however, did not occur overnight; for years, the Court had been chipping away at the spirit of the Act and thereby dismantling the legacy of the Civil Rights Movement.[183] The progression of the judicial demolition of the Voting Rights Act of 1965 thus set the stage for renewed challenges and familiar subterfuge.

A. Fracturing the Voting Rights Act of 1965

The first successful challenge to the Voting Rights Act of 1965 came just a decade after the Act's passage. In *City of Mobile v. Bolden*,[184] the

177. ROBERTS & KLIBANOFF, *supra* note 149, at 386.
178. *Id.* at 406.
179. *See infra* Part IV.
180. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2627–28 (2013).
181. *See infra* Part IV.D.
182. *See supra* Part I.C.2.
183. *See infra* Part IV.A–C.
184. 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

Supreme Court addressed the constitutionality of Mobile's at-large system of municipal elections, which was the subject of a class action lawsuit by African American citizens of the city.[185] Those citizens argued that "the practice of electing the City Commissioners at large unfairly diluted [their] voting strength . . . in violation of § 2 of the Voting Rights Act of 1965, of the Fourteenth Amendment, and of the Fifteenth Amendment,"[186] because, among other things, "the effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary"[187]—namely, the complete denial of any political representation to racial minorities.[188]

Both experience and logic supported the plaintiff's argument. Despite the fact that African Americans were a significant proportion of the city's population, no African Americans had been elected to the Mobile City Commission because the at-large system of elections allowed the white majority to leverage its numerical power to elect all three commissioners.[189] The plaintiffs argued that the institution of single-member districts would more fairly concentrate African American power and allow them to exercise their right to vote in a meaningful way by electing at least one city commissioner.[190]

The plaintiff's arguments did not convince the Court. The plurality explained that the Voting Rights Act of 1965 "add[ed] nothing to the [black citizens'] Fifteenth Amendment claim"[191] and that the Constitution does not guarantee proportional representation[192] or even proportional voting power.[193] In upholding Mobile's at-large municipal election

185. *Id.* at 58.
186. *Id.* (footnote omitted).
187. *Id.* at 64.
188. *See id.* at 65–66 ("The claim that at-large electoral schemes unconstitutionally deny to some persons the equal protection of the laws has been advanced in numerous cases before this Court. That contention has been raised most often with regard to multimember constituencies within a state legislative apportionment system. . . . [T]he focus in such cases has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. 'Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities . . ., a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests.'" (quoting Whitcomb v. Chavis, 403 U.S. 124, 158–59 (1971))).
189. *See id.* at 73.
190. *See id.* at 64–66.
191. *Id.* at 61.
192. *Id.* at 79.
193. *See id.* at 73 (arguing the mere fact that "Negroes register and vote in Mobile 'without hindrance,' and that there are no official obstacles in the way of Negroes who wish to become candidates for election to the Commission" negates any concern that "no Negro had been elected to the Mobile City Commssion,"

system—which practically denied African-American political power—the plurality made clear "the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment," the Fifteenth Amendment, or the Voting Rights Act of 1965.[194]

In short, the likelihood that Mobile's white majority was using subterfuge in designing its electoral system to deny African-American representation did not amount to proof that would satisfy the standard set by the plurality. Accordingly, the Court placed the burden on the plaintiffs to prove purposeful racial discrimination.[195] In failing to recognize the significance of the Voting Rights Act of 1965, the plurality hindered voting equality progress by allowing facially neutral but practically discriminatory practices, at least as long as the victims of racial discrimination cannot prove that those practices are a "conceived or operated . . . [as a] purposeful devic[e] to further racial . . . discrimination."[196] As Congressional action would soon make clear,[197] this interpretation of the law was in direct contrast with the purpose of the Voting Rights Act of 1965 in its historical context.

B. Congressional Mending

When the Voting Rights Act of 1965 came up for renewal in 1982, Congress responded to the Supreme Court's holding in *Bolden* by strengthening the Act.[198] The 1982 amendments made a powerful change by prohibiting electoral policies whose purpose or "result" diluted minority voting strength.[199] This change, which was extremely significant, outlawed pre-existing election laws that were racially discriminatory and made clear that plaintiffs would not have to prove that the election laws involved a

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despite the fact that African Americans make up a significant portion of the population").

194. *See id.* at 61, 65–66.

195. *See id.* at 66 ("Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*. We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination." (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)) (citations omitted)).

196. *Id.* at 70 (quoting *Whitcomb*, 403 U.S. at 149).

197. *See infra* Part IV.B.

198. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

199. *Id.*

discriminatory purpose.[200] The change also showed the strength of Congress's conviction that states should not be free to use subterfuge to deny citizens the right to vote, with overwhelming bipartisan majorities in both houses voting for the amendments.[201]

In the wake of the 1982 Renewal, the Supreme Court began to reject at-large and multi-member state legislative districts.[202] The Court found that while at-large elections themselves are not inherently discriminatory, they become so when combined with racial bloc voting.[203] That is, at-large elections result in discrimination when minority group members constitute a politically cohesive and geographically compact unit and "a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks."[204] If an overwhelming majority bloc votes mostly for persons of their race, more districts are necessary to open up the system for minority candidates.[205] Although these decisions were sometimes met with hostility, the Court would hold true to Congress's intentions, at least for a short period of time.[206]

C. Renewed Challenges

The next round of successful challenges to the Voting Rights Act of 1965 came amid a changing Supreme Court. During the decades after the passage of the Act, Presidents Richard Nixon, Ronald Reagan, George H.W. Bush, and George W. Bush packed the Court with conservative Justices.[207] Some of these Justices harbored suspicions about both the wisdom of federal oversight of state voting laws and the constitutionality of certain provisions of the Voting Rights Act.[208] As they gained greater

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200. Thornburg v. Gingles, 478 U.S. 30, 74 (1986).

201. *See generally* Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L.Q. 1 (1984) (discussing the legislative history of the 1982 Amendments to the Voting Right Act).

202. *See, e.g.*, *Gingles*, 478 U.S. at 80.

203. *Id.* at 63.

204. *Id.*

205. *See id.*

206. *See infra* Part IV.C.

207. *See Members of the Supreme Court of the United States*, SUP. CT., http://www .supremecourt.gov/about/members.aspx [http://perma.cc/H4LE-9NX3] (last visited Sept. 25, 2015).

208. *See, e.g.*, Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO MAG. (Aug. 10, 2015), http://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222 [http://perma.cc/97W5-A2H5].

influence over the Court, these Justices undermined the implementation of the Act through increasingly restrictive judicial interpretations.[209]

By the turn of the twenty-first century, the conservative Justices of the Supreme Court exercised significant influence[210] and set the stage for a renewed series of challenges to the Voting Rights Act. For example, in *Reno v. Bossier School Parish School Board*,[211] the Supreme Court ruled that Section 5 of the Voting Rights Act "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose."[212] The Bossier Parish School Board redrew its districts after the 1990 census, and the proposed redistricting plan contained no majority-black districts.[213] Despite the obvious impact on African-American voting power, the Supreme Court upheld the decision of the district court to grant preclearance.[214] As some scholars have argued, "the decision effectively minimized use of Section 5 as a weapon for protecting minority voters from discrimination."[215]

Over the next few years, challenges to the Voting Rights Act of 1965 continued to chip away at the Act's essential provisions, and some Justices made clear their belief that portions of the Act lacked sufficient constitutional support. For example, in *Northwest Austin Municipal Utility District No. One v. Holder*,[216] Chief Justice Roberts, writing for a majority of the Court, stated:

> More than 40 years ago, this Court concluded that "exceptional conditions" prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.[217]

This statement was all but a call to challenge the constitutionality of the preclearance provisions of the Voting Rights Act. The Court would answer this call a few years later.

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209. *See infra* notes 221–27 and accompanying text.
210. A majority of the Court was appointed by Republican Presidents. *See Members of the Supreme Court of the United States*, *supra* note 207.
211. 528 U.S. 320 (2000).
212. *Id.* at 341.
213. Peyton McCrary, Christopher Seaman & Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 300–01 (2006).
214. *See, e.g.*, *id.* at 278.
215. *Id.*
216. 557 U.S. 193 (2009).
217. *Id.* at 211.

Challenges culminated in 2013 with the Supreme Court's ruling in *Shelby County v. Holder*.[218] In *Shelby County*, the Court held that the formula that determines which jurisdictions are covered under the Voting Rights Act's preclearance provisions is no longer valid, because the formula is based on "decades-old data and eradicated practices" and does not satisfy the constitutional requirement that "current [statutory] burdens . . . must be justified by current needs."[219] In writing for the majority, Chief Justice Roberts noted:

> But history did not end in 1965. By the time the [Voting Rights Act of 1965] was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[ ]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African–Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.[220]

Thus, the Court felt that the problem of racial discrimination in political elections was comfortably in the past and the Voting Rights Act, as a matter of constitutional law, must reflect this historical viewpoint.

The above statement reflects two fundamental misunderstandings that influenced the Court's decision. The first fundamental misunderstanding concerns the current state of racial inequality in political representation. Although great strides have been made since the passage of the Voting Rights Act, the Act has not achieved racial equality at the ballot box or in legislative halls.[221] For example, districting schemes have been used to marginalize the black electorate, minimizing their representation, and as a result, African-American representation continues to lag behind what it would be—given that electorate's proportion of the population—if discrimination and prejudice were really in the past.[222]

The second fundamental misunderstanding concerns the logic behind the preclearance provisions of the Voting Rights Act. Congress did not design the preclearance provisions to merely "punish" states with a history

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218. 133 S. Ct. 2612 (2013).
219. *See id.* at 2627–28.
220. *Id.* at 2628–29.
221. *See supra* Part II.C.
222. *See supra* Part II.

of racial discrimination but instead designed them to prevent those states—whose majority has shown a willingness to suppress the constitutional rights of its minority citizens—from enacting voting restrictions that are practically discriminatory but facially neutral.[223] As Justice Ginsburg eloquently stated in her dissenting opinion, "the sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective."[224] Justice Ginsberg continued, "[t]he Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself."[225] Thus, in a memorable metaphor, Ginsburg compared "throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes" to "throwing away your umbrella in a rainstorm because you are not getting wet."[226] This metaphor would prove to be tragically on point.

Not long after the decision in *Shelby County* was announced, a storm of efforts to disfranchise minority voters rained down upon states previously subject to preclearance. For example, in Texas, mere hours after the decision, officials began to put into motion voter identification laws that would have the practical effect of limiting access to the polls for African Americans and Latino voters.[227] Such efforts were repeated throughout the South, and the reality of continued obstacles to racial equality began to distort the picture of a post-racial society painted by the Court. To understand the full implications of the Court's decision in *Shelby County v. Holder*, one must confront that reality and understand its historical context.

D. Behind the Veil of Ignorance

In *Shelby County v. Holder*, the Supreme Court failed to recognize the continued political inequality that exists in the United States.[228] That oversight is shockingly reminiscent of the blind acceptance of pretextual voting restrictions used to deny Southern African Americans the right to vote only 50 years ago. This observation is troubling, because such ignorance paves the way for continued attacks on the integrity of American democracy, in which racial minorities often face greater obstacles to exercising their right to vote than do their white counterparts. To overcome these obstacles and not repeat the mistakes that made the Voting Rights

223. *See supra* Parts I–II.
224. *Shelby Cnty.*, 133 S. Ct. at 2651 (Ginsberg, J., dissenting).
225. *Id.*
226. *Id.* at 2650.
227. *See infra* Part V.A.
228. *See supra* Part IV.C.

Act necessary in the first place, America must understand the demographic disadvantages of those who are most often the victims of voter suppression.

The tragic reality of suppressed African-American political representation can only be understood in conjunction with various socio-economic factors, some of which have developed or worsened since the passage of the Voting Rights Act of 1965. First, African Americans are disproportionately impoverished and more often suffer from a lack of access to basic resources, such as transportation or childcare services.[229] As a result, what may seem trivial to wealthier citizens, such as registering to vote or taking off work on election day, can become an insurmountable obstacle for poor minorities and single-parent households. Second, because of limited means and discriminatory housing practices, African Americans are typically concentrated geographically.[230] This concentration makes African Americans an easy target for districting schemes, which either divide their votes among various districts to the point that they get no representation or "lock in" virtually all of their votes into one district so that they have as small of a legislative representation as possible.[231] Third, African Americans often do not have access to a quality education, which traps many in low-paying, low-skill jobs that involve inflexible work schedules, little-to-no paid leave, and the need to work overtime to make ends meet.[232] Consequently, onerous

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229. Associated Press, *Racial Disparities Persist*, N.Y. TIMES (Nov. 14, 2006), http://www.nytimes.com/2006/11/14/us/14brfs-race.html?_r=0 (noting a roughly $20,000 gap between the median incomes for white households and black households); *see also* Robert D. Bullard, *All Transit Is Not Created Equal*, REIMAGINE, http://reimaginerpe.org/node/306 [http://perma.cc/R9QJ-GDAX] (last visited Sept. 25, 2015); WOMEN'S ECON. SEC. CAMPAIGN, CHILD CARE MATTERS: BUILDING ECONOMIC SECURITY FOR LOW-INCOME WOMEN (2010), *available at* http://www.wfgm.org/images/2012/wesc_childcarematters.pdf [http://perma.cc/5T6A-27Y9].

230. Douglas S. Massey, Andrew B. Gross & Kimiko Shibuya, *Migration, Segregation, and the Geographic Concentration of Poverty*, 59 AM. SOC. REV. 425, 436, 443 (1994) (noting that poor African Americans have a 58% to 70% chance of moving into another area at least as poor as their previous residence, which suggests a connection to a racially segregated housing market); George Gonzalez, *Racial and Ethnic Minorities Face More Subtle Housing Discrimination*, HUD.GOV (June 11, 2013), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-091 [http://perma.cc/T5L2-VFAC] (finding that agents informed African American renters of 11% fewer available units, show them 4% fewer units, and that agents inform African American homebuyers of 17% fewer homes and show them 18% fewer homes).

231. DAVID EDMONDS, CASTE WARS: A PHILOSOPHY OF DISCRIMINATION 131 (2006); *No More Packing or Cracking*, ECONOMIST (June 16, 2011), http://www.economist.com/node/18836108 [http://perma.cc/P88B-A66X].

232. *See* Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REP. (Jan. 28. 2015, 12:01 AM), http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal [http://perma.cc/KBC9-S4F3] (explaining the effects of racial disparities in education throughout

voting registration requirements often present significant burdens that are not realized by more wealthy, white Americans. Finally, African Americans make up a disproportionately high population of the nation's jails and prisons,[233] which is significant, because those who have been incarcerated or are convicted of a felony are denied the right to vote.[234]

The above socio-economic realities are just some of the demographic disadvantages African Americans and other racial minorities suffer. Just like the demographic disadvantages of the past, which white supremacists used to deny African Americans the right to vote in the Jim Crow South, modern disadvantages can be exploited to deny citizens of their constitutional right to vote. With the Supreme Court's weakening of the Voting Rights Act, exploitation seems almost too irresistible for those who are determined to evade the democratic process and ensure political victories through subterfuge and misrepresentation. The only way to battle this subterfuge is through historical context; the nation must understand that the reasons that justified the Voting Rights Act are relevant in today's society.

V. THE VOTING RIGHTS ACT OF 1965 TODAY: CONTINUING CHALLENGES AND A RENEWED CALL FOR VOTER EQUALITY

Historical context matters, both in the immediate context of a bill's passing, and perhaps even more importantly, in the context of the longue durée, or larger historical context, of change over time. Just as the

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grammar school, high school, college, and beyond, and noting that 10% fewer African Americans attend college, and that 16% of African Americans drop out of high school); *Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, U.S. DEP'T EDUC. (Mar. 21, 2014), http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities [https://perma.cc/WDD2-LG54] (noting that 57% of African American high school students do not have access to the full range of math and science courses offered in high school); Michael A. Fletcher, *The Incredible Pay Disparity Facing Blacks and Hispanics in Retail Work*, WASH. POST (June 2, 2015), http://www.washingtonpost.com/news/wonkblog/wp/2015/06/02/retail-work-can-be-difficult-for-almost-everyone-but-heres-why-its-even-worse-for-blacks-and-latinos/ [http://perma.cc/K2MB-9677] (noting that African Americans are more likely than whites to work in retail jobs, that they tend to have the lowest-paying retail jobs, and that these jobs involve unpredictable schedules and forced part-time hours).

233. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), http://www.prisonpolicy.org/reports/rates.html [http://perma.cc/45F7-BPYU] (finding that African American were incarcerated five times more than whites, and that in every state's jails and prisons, African Americans were overrepresented).

234. *Felon Voting Rights*, NAT'L CONF. STATE LEGISLATURES (July 15, 2014), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [http://perma.cc/TDC6-QUTF] (noting that in only two states—Maine and Vermont—a convicted felon never loses the right to vote).

historical context influenced the enactment of the Voting Rights Act of 1965,[235] that historical context is critical today for understanding the movement by some states toward more restrictive voting laws. These reforms must be examined in light of the history of facially neutral—but practically discriminatory—voter restrictions, which were used throughout the Jim Crow South to disfranchise racial minorities.[236] This Part will examine one set of such restrictive voting laws—voter identification laws—in their historical context, using the Texas experience with these laws as an example. As this Author recently argued in testimony and a report during major voting rights litigation,[237] Texas's long history of official acts to deny minorities an equal opportunity to participate in the electoral process exposes the true nature of the recent push to implement voter identification laws, which is to further restrict the voting rights of racial minorities who are perceived as a political threat to the Texas Republican Party.

A. The Texas Experience with Voter Identification Laws

In 2011, the Republican-dominated Texas legislature[238] and the Republican Governor[239] passed and signed into law Senate Bill 14 ("SB 14"), which is an in-person voter identification law that the state implemented in 2013.[240] This voter identification law is an example of the State of Texas' continued efforts to restrict the influence and opportunities of minority voters. Voter restrictions historically tend to arise in a predictable pattern when the party in power perceives a threat of minority voter increases or opportunities.[241] This argument goes beyond simply asserting that voter identification laws harm minority voters, additionally explaining what has happened to the Republican Party over the past 15 years, during which the growing impulse to suppress minority voters has been directly related to the Party of Lincoln's dwindling appeal to non-whites. This lesson is

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235. *See supra* Parts I–II.

236. *See supra* Part I.

237. In *Veasey v. Perry*, 29 F. Supp. 3d 896 (S.D. Tex. 2014), to name one example, this author was an expert witness on the topic of voter restrictions, such as voter identification laws, and the Voting Rights Act.

238. OFFICE OF GOV'T RELATIONS, TEX. A&M UNIV. SYS., THE TEXAS 82ND LEGISLATURE, REGULAR AND 1ST CALL SESSION: CUMULATIVE REPORT 1 (2011), *available at* http://assets.system.tamus.edu/files/gov/pdf/82nd-Leg-EOS-reportweb.pdf [http://perma.cc/R2WZ-4QFM].

239. *Id.*

240. *Bill: SB 14*, TEX. LEGISLATURE ONLINE HIST., http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB14#vote1815 [http://perma.cc/GXZ7-8Z6P] (last visited Sept. 25, 2015).

241. 29 F. Supp. 3d 896.

clearly shown when the Texas voter identification law is placed in its historical and modern contexts.

1. The Texas Voter Identification Law in Its Historical Context

When examined in its historical contexts, the Texas voter identification law is a modern-day continuation of the longstanding practice in Texas of passing election laws to make minority voting more difficult and to dilute the effectiveness of minority votes, while professing that the laws are race-neutral attempts to prevent voter fraud. There is a direct causative line that goes from Post-Reconstruction state-sponsored acts that denied racial minorities access to the ballot box—such as the white primary, the secret ballot, the poll tax, re-registration requirements, the use of literacy tests, and purging of registration and voting lists—to SB 14.[242] Although attempts to impose other voting restrictions occurred, after Section 5 of the Voting Rights Act covered Texas in 1975, most were successfully challenged by the Justice Department under Section 5 or by minority plaintiffs in court.[243]

At the time SB 14 was finally implemented in 2013, Texas officials were fully aware of the real difficulties that African Americans and other minority voters faced in obtaining acceptable photo identification.[244] Most tellingly, in 2012, a federal court in Washington, D.C. had already determined that SB 14 would have a racially discriminatory effect and used the Voting Rights Act of 1965 to block implementation of the law.[245] On June 25, 2013, however, the Supreme Court struck down as unconstitutional the part of the Voting Rights Act used to block SB 14.[246] This ruling gave Texas the option of enforcing SB 14. Within mere hours of the Court's decision, the Texas Governor and Attorney General both announced that the state would enforce SB 14 immediately and without any alterations to mitigate the law's discriminatory effect.[247] As a result, Texas was able to allow SB 14 to act as a modern-day version of the poll tax, restrictive voter registration laws, and similar devices Texas utilized throughout its history to suppress minority voting rights.

Throughout its history and into the present, Texas has implemented various disfranchising devices similar to SB 14 in purpose or effect,

242. *See* Burton, *supra* note 99, at 43–50.
243. *See id.* at 33–41.
244. *Id.* at 54.
245. Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated by*, 133 S. Ct. 2886 (2013).
246. Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).
247. Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, July 6, 2013, at A9.

including poll taxes and re-registration requirements, which all acted as discriminatory prerequisites to casting a vote.[248] Each of these devices was later invalidated under either the Voting Rights Act or the U.S. Constitution.[249] These predecessor "race-neutral" disfranchising devices also erected unnecessarily restrictive barriers to lawful minority voters' access to the ballot and relied on socioeconomic disparities, which themselves sprang from Texas's state-sponsorship of racial discrimination, to disproportionately prevent minorities from voting.[250] Today, SB 14 interacts with racial disparities in education, employment, housing, health, and transportation to substantially burden African-American and minority voters who must overcome significantly more financial and logistical difficulties to comply with SB 14.[251] Moreover, Texas's stated impetus for passing SB 14—the prevention of voter fraud—is not a novel pretext for discrimination, but rather the very same rationale that Texas has repeatedly used to pass laws that disfranchise minority voters.[252]

Texas has used the pretext of preventing voter fraud several times to justify practically discriminatory voter restrictions. For example, in response to the potential for a substantial increase in African-American and Latino voter registration and participation in Texas following the Voting Rights Act and Twenty-fourth Amendment prohibiting the poll tax for voters in federal elections, the Texas legislature quickly moved to replace the poll tax with a restrictive annual re-registration requirement.[253] Texas Governor John Connally immediately called a special session of the Texas legislature to develop an annual re-registration system that a newspaper at the time described as "patterned on the old poll tax system, but minus the tax."[254] In 1966, only five states had annual re-registration requirements.[255] Using the "old canard of turn-of-the-century disfranchisers," Connally argued that the law would prevent voter fraud.[256] The re-registration law was declared unconstitutional in 1971 due to its substantial disfranchising effect,[257] but this "setback" would not discourage Texans determined to limit the political influence of minority voters.

Another example of the use of the voter fraud ploy in Texas came soon after the invalidation of the re-registration requirement. The following year,

248. *See supra* Part I.C.1.
249. *See supra* Part II; U.S. CONST. amend. XXIV.
250. *See supra* Part I.C.
251. *See* Burton, *supra* note 99, at 21–33.
252. *See id.* at 7.
253. Brischetto et al., *supra* note 61, at 240.
254. CHANDLER DAVIDSON, RACE AND CLASS IN TEXAS POLITICS 51 (1990).
255. *Id.* at 52.
256. *Id.* at 51–52.
257. Beare v. Smith, 321 F. Supp. 1100 (S.D. Tex. 1971), *aff'd*, Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974).

the state enacted a new voter purge law that would have required re-registration of the entire state electorate. This tactic, despite Texas's proposals to minimize the problem, would have caused substantial difficulties for minority voters.[258] The extension of the Voting Rights Act's preclearance requirement to Texas in 1975, however, allowed the U.S. Department of Justice to object to the new purge law, which a federal court then enjoined.[259] Not only was another pretextual effort to restrict minority voting rights thwarted but also future efforts would prove more difficult with Section 5 acting as an obstacle.

Although Section 5 of the Voting Rights Act impeded Texas's pretextual efforts to restrict minority voting for some time, the Supreme Court effectively gutted Section 5's protection in *Shelby County v. Holder*.[260] As a result, the Texas Republican Party was free to address a perceived threat to their hegemony—minority voting power—which was similar to the threats of the Populist Party in the 1890s and early 1900s and the Civil Rights Movement of the 1960s that the Democratic Party experienced when it enacted disfranchising and diluting laws to reduce the effects of minority voting.[261] This perceived threat was not unfounded because Texas was clearly becoming a majority minority state. Thus, after large increases in the Texas minority population during the 2000s and the increased turnout of minority voters when African American Barack Obama ran as a Democrat during the 2008 election, the Texas Republican Party proposed an in-person photo voter identification law.[262] A number of observers could read through the lines to determine the true intent of this law.[263]

No one who observes American popular culture or social media can avoid knowing that many people understand that the claim of voter fraud to justify voter identification laws is simply a pretext. This is part of the public conversation, but just as in the end of the first Reconstruction, people still deny that reality. On January 12, 2014, the nationally syndicated *Doonesbury* cartoonist Gary Trudeau published a panel linking these kinds of discriminatory laws to the historical tradition of voter

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258. Letter from J. Stanley Pottinger, Assistant Attorney Gen., U.S. Dep't of Justice, to Mark White, Tex. Sec'y of State 3 (Dec. 10, 1975), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/TX-1000.pdf [http://perma.cc/V2TG-BGEH].

259. Brischetto et al., *supra* note 61, at 240.

260. *See supra* Part IV.C.

261. *See* Strong, *supra* note 86, at 693–94.

262. *See generally* Burton, *supra* note 99 (describing the events that led to the passage of SB 14).

263. *See* text accompanying notes 265–76.

discrimination in the United States.[264] Trudeau's cartoon featured his radio talk show host, "Mark," interviewing "Jimmy Crow," a cartoon character deliberately drawn as a crow to symbolize the "Jim Crow" period of disfranchisement and the nadir of American race relations.[265] Radio host Mark commented: "IT'S LIKE BOOKING A GUEST . . . FROM 1930." In the second panel, Jimmy Crow is reading a newspaper and the only readable headline on that paper proclaims, "JIM CROW IS BACK."[266] In the third panel, Mark states, "SO, JIMMY CROW, QUITE A YEAR! EVER SINCE THE ROBERTS COURT GUTTED THE VOTING RIGHTS ACT . . . YOUR VOTER SUPPRESSION LAW HAVE BEEN ALL THE RAGE!"[267] And Jimmy Crow explains, "THAT'S RIGHT, MARK! FOR THE GOP NOW, RESTRICTING VOTER ACCESS JUST MAKES *GOOD SENSE*!"[268] Jimmy Crow elaborates, "SAY YOU HAD A BASKET-BALL TEAM, BUT YOUR PLAYERS WERE TOO SHORT TO WIN . . . WHAT DO YOU DO? GO TO THE TROUBLE OF RECRUITING TALL PEOPLE? OR RIG THE GAME TO KEEP TALL PEOPLE FROM PLAYING?"[269] Mark retorts, "RIG THE GAME?" and Jimmy Crow responds, "OF COURSE! IT'S MUCH EASIER!"[270] The final panel makes it clear that rigging the game is using voter identification laws such as Texas's SB 14. Mark comments, "AND BY 'TALL,' WE MEAN 'BLACK,' RIGHT?" And Jimmy Crow elaborates, "BLACK, HISPANIC, YOUNG, OLD, DISABLED—ANYONE WHO'S *TALL*!"[271]

A few months earlier, on *The Colbert Report*, Stephen Colbert, a native of South Carolina, had journalist Bill Moyers, a native Texan, as a guest.[272] The conversation turned to the recent Supreme Court *Shelby County* decision on the preclearance section of the Voting Rights Act.[273] Moyers was upset with the decision and when Colbert facetiously challenged Moyers that things have changed and there was no need for Section 5 preclearance, Moyers countered that the Supreme Court was giving the green light to discriminatory laws, and he referred specifically to Texas: "They tried last year . . . the voter ID, the other efforts to

264. G.B., Trudeau, *Doonesbury, January 12, 2014*, KEYSTONE PROGRESS DAILY FUNNIES (Jan. 12, 2014), http://kpdailyfunnies.blogspot.com/2014_01_01_archive.html#.VgfhQRbm7lI [http://perma.cc/W87T-CL38].
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Bill Moyers*, COLBERT REP. (June 26, 2013), http://www.cc.com/video-clips/3ca2a0/the-colbert-report-bill-moyers [http://perma.cc/6BET-96FE].
273. *Id.*

disqualify voters at the polls."[274] But he concluded, "the racists in the South, and they're still there, your state of South Carolina and my state of Texas . . . will be overcome."[275]

As the above examples show, the "voter fraud" rationale for the enactment of voter identification laws became the target of jokes, because it was obvious that this rationale was mere pretext. This observation is especially accurate when such laws are viewed in their historical context. The sad reality, however, is that these laws represent a nationwide trend that is nothing to laugh at. This trend puts the Texas voter identification law in its modern context, showing just how dangerous the lax attention to the history of the Voting Rights Act can be.

2. The Texas Voter Identification Law in Its Modern Context

Placing the story of SB 14 into the context of other states' voter identification laws before *Shelby County v. Holder* is especially instructive for showing the danger of these laws in their modern context. The passage of SB 14 was the culmination of repeated attempts to pass increased voter identification requirements, which restrict the types of acceptable identification used for voting. These attempts in Texas occurred as other states attempted to pass similar legislation.

In 2005, Indiana passed a voter identification law that required voters to present proof of identification that complies with the following requirements:

> (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
> (2) The document shows a photograph of the individual to whom the document was issued.
> (3) The document includes an expiration date, and the document:
> (A) is not expired; or
> (B) expired after the date of the most recent general election.
> (4) The document was issued by the United States or the state of Indiana.[276]

274. *Id.*
275. *Id.*
276. An Act to Amend the Indiana Code Concerning Elections, Pub. L. No. 109–2005, § 1, 2005 Ind. Acts 2005, *available at* http://www.in.gov/legislative/pdf/acts_2005.pdf [http://perma.cc/E9RH-PRCG].

Under the new law, voters who did not have the proper photo identification were allowed to cast a provisional ballot.[277] To have their votes counted, voters were required to visit a designated government office within ten days and either bring proper photo identification or sign a statement saying they cannot afford one.[278] The Supreme Court upheld this law in *Crawford v. Marion County Election Board*.[279]

Also in 2005, Georgia passed a voter identification law, HB 244, which required voters to present proof of identification.[280] Acceptable proofs of identification included:

> (1) A Georgia driver's license that was properly issued by the appropriate state agency;
> (2) A valid identification card issued by a branch, department, agency, or entity of the State of Georgia, any other state, or the United States authorized by law to issue personal identification, provided that such identification card contains a photograph of the elector;
> (3) A valid United States passport;
> (4) A valid employee identification card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, this state, or any county, municipality, board, authority, or other entity of this state;
> (5) A valid United States military identification card, provided that such identification card contains a photograph of the elector; or
> (6) A valid tribal identification card containing a photograph of the elector.[281]

HB 244 dramatically reduced the number of acceptable forms of voter identification from 17 to 6.[282] Under the law, those unable to produce any of the items of identification would be allowed to vote a provisional ballot upon swearing or affirming that the elector is the person identified in the elector's voter certification.[283] The provisional ballot would only be

277. *Id.* § 2, at 2005–06.
278. *Id.*
279. 553 U.S. 181, 191 (2008) ("While petitioners argue that the statute was actually motivated by partisan concerns and dispute both the significance of the State's interests and the magnitude of any real threat to those interests, they do not question the legitimacy of the interests the State has identified. Each is unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process.").
280. Act No. 53, 2005 Ga. Laws 253, § 59 (H.B. 244).
281. *Id.*
282. *Id.*
283. *Id.*

counted if the registrars were able to verify current and valid identification of the elector.[284] After a constitutional challenge to the law, the Georgia legislature repealed the statute and passed a new law that was similar but "require[d] each county to issue free of charge a 'Georgia voter identification card,' with a photograph of the voter, to any registered voter who does not have another acceptable form of identification."[285] With this accommodating change, Georgia's voter identification law was eventually upheld.[286]

Both the Indiana and Georgia voter identification laws disadvantage minority voters, but the Texas voter identification law is even less forgiving. Instead, after receiving approval from the *Shelby County* decision, Texas decided to deviate from these laws, which federal courts have upheld, and instead enacted a voter identification law that provided even less protections for minority voters.[287] For example, even as the federal courts articulated the need for less restrictive voter identification requirements, Texas legislators worked to enact more restrictive voter identification requirements, denying public or state student identification, but accepting gun ownership identification, which whites are more likely to hold.[288] Such requirements have drawn a number of criticisms and are currently being successfully challenged in federal court,[289] but the Supreme Court has yet to weigh in on the debate.

When the Supreme Court does finally decide to weigh in, it should consider the historical context of voter identification laws, such as Texas' law. Although supporters of the Texas law may point to the recent Supreme Court ruling upholding the Indiana voter identification law, the Court has previously recognized the importance of historical context in voting rights litigation. For example, in the 1973 case *White v. Regester*,[290] the Supreme Court held that multi-member districts in Dallas and Bexar counties in Texas must be changed to single-member districts because of

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284. *Id.*

285. Common Cause/Ga. v. Billups, 554 F.3d 1340, 1346 (11th Cir. 2009).

286. *Id.* at 1357.

287. *See generally* Veasey v. Abbott, No. 14-41127 (5th Cir. Aug. 5, 2015) (slip opinion), *available at* http://www.scotusblog.com/wp-content/uploads/2015/08/Veasey-opinion-5th-CA-8-5-15.pdf [http://perma.cc/7KDG-FL5T] (noting with approval that the district court found "(1) SB 14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it; (2) a disproportionate number of Texans living in poverty are African–Americans and Hispanics; and (3) African–Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination.").

288. *Id.* (manuscript at 2–3).

289. Parts of the Act have recently been struck down by the U.S. Fifth Circuit Court of Appeals. *See id.* (manuscript at 36).

290. 412 U.S. 755, 763–64 (1973).

the history of political discrimination—and the residual effects of that discrimination—against African Americans and Latinos.[291] In contrast, in *Whitcomb v. Chavis*[292] just two years before, the Supreme Court upheld the use of multi-member districts in Marion and Lake Counties, Indiana, where plaintiffs had similarly argued that the votes of African Americans were diluted.[293] The key difference between the Texas law and these cases is the legacy of discrimination that plagues Texas politics. Thus, history matters, and in the case of voter identification laws, Texas deliberately and knowingly made their state's voter identification law more restrictive than those of other states. The Court should keep the lessons of the past in mind when evaluating future challenges to such laws.

CONCLUSION

A more nuanced and complete understanding of the fight for African-American enfranchisement is necessary to inform modern political and legal battles over voting rights. Just as the Voting Rights Act of 1965 was necessary to combat the tangential means of African-American disfranchisement in the Jim Crow South,[294] today federal authorities must be given the tools to remain vigilant enforcers of civil rights where states are unwillingly or unable to halt efforts to restrict minority voting power. Such tools are necessary because minority voters are still vulnerable to state attempts to strip them of their voting rights through facially neutral, but practically discriminatory, legislation.[295] This vulnerability has only increased as a result of recent Supreme Court decisions, which have displayed distorted jurisprudential understandings of the Act and have been accompanied by growing misconceptions of the general public surrounding the exercise of the right to vote.[296] To reverse course and drive toward greater protection for minority citizens, an increased awareness of the Voting Rights Act and its history is necessary. Such awareness is essential to secure the future of American democracy and ensure the troubled past will not be repeated.

The Supreme Court can erode or strengthen our democratic culture, but in the last few years, it has been undermining it. Democracy is not static—it advances and retreats—but lately, we have been regressing.

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291. *Id.*
292. 403 U.S. 124 (1971).
293. *Id.*
294. *See supra* Part II.
295. *See supra* Part IV.D.
296. *See supra* Part IV.C.