Breathing Life into The Voting Rights Act

The Fight Against Modern Day Voter Suppression

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Abstract

This thesis analyzes the continued relevance of the Voting Rights Act in the aftermath of the United States Supreme Court *Shelby County v. Holder* decision and in the midst of 21st Century voter suppression laws. This discussion begins at the struggle to achieve political equality and chronicles the subsequent legislative battle, passage and success of the Voting Rights Act. On the basis of data on voter discrimination around the country, I conclude by proposing a rewriting of Section 4 and 5 of the Voting Rights Act in order to achieve racial equity in a changing political landscape.

Introduction
In the first half of the 20th century, southern Alabama was both rural and segregated. It is also where Henry “Hank” Sanders was born and raised in 1942. At the age of 29 Hank moved from rural Alabama to the city of Selma where the protests and fights of the early 1960s led to the passage of the Voting Rights Act (VRA). While in Selma, Sanders experienced first hand Voting Rights Act’s impact on the rise of black electoral politics. Before the VRA was passed in 1965, only 393 black citizens had been registered to vote out of the 15,000 eligible black adults. After the Act’s passage, however, Alabama became one of Section 4 and 5’s covered jurisdictions with more then 10,000 black voters registered. Benefiting from the increase in black constituency, Sanders became Alabama’s first African American State Senator since the Reconstruction and represented a VRA sanctioned majority-black district. No one in Hank Sanders’ family might ever have imagined that he would achieve such prominence, and now, as an elderly statesman, he has seen the very act that enabled his political career undermined by the right-wing of the highest court in the land. In 2013, Sanders, who had been serving for 30 years, watched in shock as the Supreme Court’s Shelby v. Holder decision struck down the seminal Section 4 of the Act doing away with its coverage formula and stripping the Act of its essential political power. “It’s the most destructive Supreme Court decision in my lifetime,” said Sanders in response to the Court’s decision, “It reverses the very foundation of all the progress that we have made” (Berman 5).

In the wake of the Court’s decision many States have taken the liberty to pass voter suppression laws that were previously prohibited under its jurisdiction. The question now stands: how can the VRA protect against these modern forms of voter suppression? Here I will highlight the flawed reasoning of the Court’s decisions regarding the Voting Rights Act as well as show an upsurge in voter suppression laws that have been a direct consequence of its rulings. This
analysis and evidence leads to a proposal that is aimed at combatting Justice Robert’s Constitutional concerns as well as revitalizing the Voting Rights Act.

**Chapter One: The VRA’s Journey to Passage**

As passed on August 6th, 1965, The Voting Rights Act promised to secure voting rights for all American citizens and end barriers to black voter registration in the form of political intimidation, violence or random tests and quizzes. The motivation for the Act grew out of a long struggle with black voter registration in Selma, Alabama. Selma is nestled in Dallas County in the Black Belt region of Alabama, which was named for its dark, rich soils conducive for agriculture. This region was characterized by a population that 50% black as a consequence of slavery. The black residents that remained in the area after emancipation became part of the exploitive system of tenant sharecropping and lived under the strict enforcement of deeply rooted racial segregation. Much of the South had similar stories to Selma, and had difficulty politically mobilizing large black populations in the face of white oppression.

Although African American men and women achieved their right to vote from the passage of the 15th (1870) and 19th (1920) Amendments respectively, African American voter registration and turn-out were starkly low due to continued suppression tactics. The same was true for Selma as well as many other Alabama counties, only 125 black residents had managed to register to vote by 1963 (Henderson, 1). Frustration among Selma’s black residents with the obstacles to democratic participation were growing to the point where many felt that matters had to be taken into their own hands. “Every time one of us went down to the courthouse to register the registrar would be out to lunch” said local resident Marie Foster, “or he would say it was closed for the day or would quiz you on something he knew you couldn't answer. One of their favorite questions was, ‘how many bubbles are there in a bar of soap?’” (Henderson, 1). After
careful consideration of the political climate in Selma, Dr. Martin Luther King and the Student Christian Leadership Committee (SCLC) made the decision to come to Selma and begin a voting rights campaign. Together they hoped they could light the necessary spark to ignite the Selma black community (Henderson, 4).

After continued protests and clashes with the police, the SCLC made the decision to take an executive approach to voting rights -- directly petitioning the President of the United States. On February 10, 1965, Dr. King visited the White House to make a formal proposal to President Johnson for a Voting Rights Act. His proposal included, an initiative to allow blacks to register to vote at post offices if they were refused elsewhere, providing machinery that would automatically eliminate the imposition of discriminatory standards by state officials, an end to literacy tests, the writing of legislation that applied to all federal, state, and local elections, and authorization to send federal registrars to enforce the law and concentrate on the most oppressive regions of the country (Henderson, 6). Despite his hesitation due to the fact that this proposal was so soon after the passage of the Civil Rights Act of 1964, after the meeting, President Johnson reassured the civil rights leaders that he supported full and equal voting rights and would send a charge to congress about formulating an Act (Henderson, 6).

Meanwhile, after meeting with President Johnson, Dr. King returned to Alabama to organize a march from Selma to Montgomery in support of black voting rights. In an effort to stop the march Governor Wallace—known for his defense of racial segregation—charged Selma’s Mayor and state troopers to use “whatever measures necessary” to put an end to the protest (Henderson, 7). Dr. King and the other participants from SCLC, realizing the danger involved, backed out of the march. On the morning on March 7th, Dr. King had returned to Atlanta and was preparing his Sunday morning sermon at Ebenezer Baptist Church (Henderson,
7). Despite the change of plans, over a thousand people showed up at the march and decided to proceed as planned. The march was forever known as Bloody Sunday. As the marchers crossed the bridge they came to face a line of Alabama State troopers on horseback. Through a megaphone the major yelled, “Go back to your church. Go back home. I’m going to give you three minutes to disperse.” (Henderson, 11) As the marchers stood their ground, the State troopers advanced through the crowd with “tear gas, night sticks, and whips” brutally injuring many demonstrators, 17 of whom were hospitalized (Henderson, 12). In the midst of the violence and oppression, cameras were rolling and images of the horrific scene replayed throughout the country as thousands of citizens watched on television and decried the atrocities taking place in the South. The reaction quickly mobilized support and pressure for new voting legislation. One month after the event, a Gallup poll taken in April 1965 reported that 76 percent of the public favored a voting rights law (Henderson, 13). Johnson had the majority he needed. Soon afterwards the first draft of the voting rights legislation was penned. “The legislation would suspend literacy tests and give the Attorney General the power to appoint federal examiners to supervise voter registration in states and political subdivisions where fewer than 50 percent of the voting age residents were registered to vote on November 1, 1964. Other provisions established criminal penalties for interference with voter rights, outlined a judicial recourse for delinquent state and local governments, and directed the Attorney General “forthwith” to institute proceedings against the use of the state and local poll taxes as a qualification for voting” (Henderson, 15). After being drafted, the bill that stayed in line with many of Dr. Martin Luther King’s suggestions now only had to pass through the Congress and Senate before being signed into law by President Johnson.

The VRA’s Legislative History
The Johnson administration introduced the Voting Rights Act to the House on March 17, 1965 and to the Senate on the following day. A bi-partisan bill was also introduced that banned both poll taxes and literacy tests as well as setting the trigger for federal oversight to areas where less than 25% of the voting-age population of black citizens was registered regardless of the prevalence of literacy tests. The Senate Judiciary Committee had the job of first passing the bill before it was sent to the Congress for a floor debate and vote. Predictions showed that the House would have a smoother time passing the VRA in light of its several civil rights advocates, while the Senate judiciary committee's chairman, on the other hand, was a staunch opponent of civil rights legislation (Henderson, 2). The chief witness in the Senate Judiciary Committee hearings was Attorney General Katzenbach. In response to many conservative objections to the bill, Katzenbach argued that the bill was consistent with the Constitution by stating that the 15th Amendment makes it unconstitutional for a state to deprive a citizen of their right to vote on the basis of race which gives the federal government the right to prevent such discrimination by state legislatures and ban their discriminatory voting qualifications (Henderson, 3).

In response to other liberal criticisms the Senate hearings added some Amendments that incorporated their suggestions. These changes exempted from the bill’s trigger formula areas where less than 20% of the voting-age population was non-white, authorized federal courts to appoint federal voting examiners and suspended discriminatory literacy tests and other their devices such poll taxes (Henderson, 3). Other amendments included making it a criminal offense to interfere with another citizen’s right to vote but also exempting automatic trigger provisions from states and subdivisions whose percentage of non-white voting-age population who voted in the last presidential election was either above the national average or at 60% (Henderson, 4).
During the House Judiciary Committee hearings, Attorney General Katzenbach once again acted as chief witness in support of the bill and emphasized that the bill was constitutional and targeted massive discrimination. Congressional civil rights leaders claimed that the bill did not go far enough to aid people in areas where no literacy tests were administered for voting no matter how blatant the discrimination was that they regularly faced at the voting polls. They argued that these areas constituted half of the non-white voting-age population and were just as important to protect. They also called for a ban of poll taxes and state requirements that voters be literate in English, which discriminated against Hispanic voters (Henderson, 4). Conservative Committee members similarly lauded the bill as unconstitutional and an overstep of federal power over a state’s right to govern their voting population.

After both the House and Senate bills left Committee, they were subjected to a great deal of floor debate. The Senate floor debates surrounded arguments about the flat ban on poll taxes as well as the bill’s alleged unconstitutionality. Supporters of the bill noted that the bill was utterly constitutional, upholding the 15th Amendment that bans forms of voting discrimination on the basis of race. House floor debates subsequently produced a bill that differed from the Senate’s proposed bill in myriad ways. The House bill included a full ban on the use of poll taxes in state and local elections. Also the Senate bill’s trigger exempted political subdivisions that had less than 20 percent of their voting-age population who was non-white but they also included a trigger formula for political subdivisions which had less then 25 percent of their voting-age population of a non-white race. The Senate also waived English language literacy requirements for persons educated in English-speaking American schools through sixth grade (Henderson 9). Due to the discrepancies between the bills protocol called for the bills to be reconciled in a joint committee meeting.
Upon completion of the compromises, Congress presented a final bill that would include the House version of the trigger formula, the Senate’s waiver of the English language literacy requirement and the Senate’s tax provision (Henderson 9). The House and Senate overwhelmingly passed the bill, and the Voting Rights Act was signed into law by President Johnson on August 6, 1965. Upon reflection of the bill’s passage, Attorney General Katzenbach stated, “The time was right because one, LBJ had a long record in civil rights and was very sympathetic and two, you had the demonstrations in Selma and the public opinion which followed... It must also be stressed how important a role Martin Luther King played. He was good at dramatizing the voting problems and convincing members of the Congress that the black community in the South was in support of voting legislation” (Henderson, 10).

VRA Contents and Implications

Although the Act was originally broken up into 19 sections and reauthorized four times. The parts of the Act that are important for our analysis are Sections 2, 3, 4, and 5. The paraphrased versions of the Act are as follows:

*Sec. 2. Prohibitions on practices that deny voting to citizens on the basis of race or color.

This section provides an overhaul of all discriminatory voter legislation and is one of the last remaining active sections of the Act. The U.S. Supreme Court, as well as other legal scholars have argued that this section is enough to combat voter discrimination, however, unlike other sections of the Act Section 2 puts the burden on victims of discrimination to prove that state’s discriminatory intent in court. This task is not only a lengthy and expensive process but it is also increasingly difficult to prove legislative discriminatory intent when 21st Century voter suppression laws have been written as carefully deceptive.
Sec. 3.  a) If a state or political subdivision violates the 15th Amendment federal examiners will be sent to enforce it as instituted by the Attorney General.

b) if tests or devices are being used to prohibit voting they will be suspended.

c) Court will retain jurisdiction of State or political subdivision and the same practices will continue until they are determined that they do not deny citizens from voting on the basis of race

- The practice may be enforced if the Attorney General does not object to it within 60 days of submission.

Sec. 4 a) No citizen will be denied the right to vote for not complying with a test or device in order to vote in any state or political subdivision described in Sub-Section b. unless state brings action to U.S. D.C. District Court and it determines that no such test has been used in the past 5 years before filing action.

- The Court will retain jurisdiction of the area after 5 years

b) The provisions of Sub-Section a. apply to states and political subdivisions that the Attorney General determines (1) maintained on November 1st, 1964 any voting tests or devices and (2) had less than 50% of their population registered to vote as of 1 November 1st, 1964 and had less than 50% of their population vote in the November, 1964 Presidential election.

c) A test or device is any prerequisite for voting that asks participants to show ability to read, write or interpret, demonstrate educational achievement or knowledge on a subject, possess good moral character or pre-qualifications by voucher of registered voters.
d) States will not be found to have been using a test or device if the incidents were few in number, the effects had been eliminated and there’s no reason to believe they would reoccur in the future.

e) No one who does not speak English will be denied the right to vote.

Conservative members of the Court have called the coverage formula, outlined in this section, into question. The coverage formula is split into two parts, the first part covered areas that instituted voter suppression tests or devices as of November 1st, 1964. The second part covered areas that had less then 50% of their population registered to vote as of November 1st, 1964 or had less than 50% of the population turn out to vote during the November 1964 election. The resulting covered districts were: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia and certain political subdivisions in four other states - Arizona, Hawaii, Idaho, and North Carolina (Civil Rights Division Page).

Sec. 5. When a state or political subdivision enacts a voting qualification or practices different from what was in effects on 11/1/64 they may institute a action in U.S. District Court D.C. to prove that the practice does not deny voting to people on the bases of race and until the Courts decides the case or enter judgment no person cannot be denied voting rights for not complying with the qualifications or practice. (Epstein 340-343)

Section 5 of the Act set up the preclearance requirement for covered jurisdictions. Since the Court struck down Section 4, Section 5 no longer has any applicability but proved to be highly effective in preempting voter suppression laws in its almost 50 years of activity. In 1970 the coverage formula was updated to reference November 1968 and added partial coverage to ten
states: Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York, and Wyoming. Half of these states (Connecticut, Idaho, Maine, Massachusetts, and Wyoming) filed successful "bailout" lawsuits. In 1975 the Act extended to protect language minorities which were defined as persons who are “American Indian, Asian American, Alaskan Natives or of Spanish heritage." (Civil Rights Division Page) Congress also expanded the coverage formula, based on the presence of tests or devices and percentages of voter registration and participation as of November 1972. In addition, the 1965 definition of "test or device" was expanded to include the practice of providing any election information, including ballots, only in English in states or political subdivisions where members of a single language minority constituted more than 5% of voting-age citizens. These Amendments covered the states, Alaska, Arizona, and Texas and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota. In 1982, the coverage formula was extended again, this time for 25 years, but no changes were made to it. Finally in 2006, the coverage formula was again extended for 25 years (Civil Rights Division Page).

Chapter Two: The Voting Rights Act’s Erosion in the Court

As stated, the Voting Rights helped to bar over 1,000 discriminatory voting practices from being implemented. However, despite the Voting Rights Act avid success in achieving political equality, the Rehnquist court began to follow a path that diverged from anti-subordination and merged with anti-classification that used the idea of a colorblind Constitution to erode at the central provisions of the law through Shaw v. Reno (1993), Miller v. Johnson (1995), Shaw v. Hunt (1996) and culminating in Shelby County v. Holder (2013). The decisions of each of these cases articulate how the Court upholds their notion of a colorblind Constitution that denies the experience of color and racism and ends up refusing to protect vulnerable citizens.
As noted in Jack Balkin’s work, *What Brown v. Board of Education Should Have Said*, the notions of anti-classification and anti-subordination interpretations take differing views on the Supreme Court’s decisions on racial cases. Anti-classification takes the position that the Constitution is colorblind and does not separate out classes based on race. They are staunch opponents to Jim Crow and fear that any future legislation or policy that makes racial classifications or distinctions are harmfully reactionary (Balkin 12). Anti-subordination, on the other hand, supports equal citizenship and believes that the evil of segregation was not in the separation of races but the denigration of the black race below the white race (Balkin 12). Race classification was simply a means through which society subordinated blacks and maintained white domination (Balkin 12). These two views converge in Justice Harlan’s dissent in *Plessy v. Ferguson* (1896). Though many celebrate his words as conforming to one interpretation or the other it is clear that his dissent highlights both, allowing each side to claim him as their own.

As the court gave justification to segregation under Jim Crow in *Plessy*, Justice Harlan’s dissent lauded it as a pernicious decision and offered his own interpretation of the Constitution on these matters, which has a mix of both anti-classification and anti-subordination influences. Justice Harlan states that in the eye of the law and the Constitution there is no superior, dominant, or ruling class and we cannot proceed while “colored citizens are so inferior and degraded that they cannot be allowed to sit in coaches occupied by white citizens.” (Sullivan 618-619). He also states that we cannot reconcile putting the brand of servitude and degradation on a large class of our fellow citizens and equals before the law. These arguments clearly support an anti-subordinate interpretation of the Constitution and societal relations. Justice Harlan also claims, however, that the Constitution is colorblind and neither knows nor tolerates classes among citizens - a clearly anti-classificationist interpretation (Sullivan 618). Starting from this
mixed interpretation the Supreme Court in overturning *Plessy* and beyond take a decidedly anti-subordinate view of the Constitution on race matters. Yet this changes when questions of racial gerrymandering sanctioned under the Voting Rights Act are considered.

In *Shaw v. Reno* (1993) otherwise referred to as, *Shaw I*, the Court strikes down racial gerrymandering in North Carolina. After redistricting Section 5 covered areas in their state, North Carolina sought preclearance from the Attorney General. The state’s racial breakdown consisted of 78% white, 20% black, 1% Native American and 1% Asian (Shaw 1). In their first redistricting plan they drew one majority minority district - the Attorney General declined the plan because he thought a second majority minority district could also be drawn using previously existing boundary lines. After North Carolina drew two new majority minority districts, the Attorney General approved the plan but some white citizens in these district did not and claimed that the new plan constituted unconstitutional racial gerrymandering (Shaw 3). The Appellants claimed that the districts were drawn in a seemingly convoluted manner that suggested an arbitrary concentration on black voters which they believed violated the Equal Protection Clause of the 14th Amendment. The Court’s opinion, written by Justice O’Connor, highlights the important purpose of the 14th and 15th Amendment which as she states were aimed at reprimanding the attempts of Southern officials to prevent blacks from exercising their right to vote. These Amendments along with the Voting Rights Act played a large role in ensuring minority access to the voting booth. In *Shaw*, however, these amendments were used by white appellants to claim that the Voting Rights Act sanctioned racially gerrymandered districts, districts that they claimed were in violation of their “constitutional rights to participate in a ‘color-blind’ electoral process” (Shaw 7). This argument appropriates Justice Harlan’s anti-classificationist dissent in *Plessy* in order to promote a color-denying interpretation of the
Constitution. The appellants also object to highly irregular districts that have only served to segregate the races for the purposes of voting (Shaw 7).

The Court agreed with this assertion and concluded that North Carolina’s redistricting plan violated the Equal Protection Clause of the 14th Amendment. In favor of a colorblind, anti-classificationist reading of the Constitution, the Court used the judicial review of strict scrutiny in order to rule against minority voting equity. All laws regarding race are subject to strict scrutiny under the 14th Amendment, meaning that a state legislature would have to present a narrowly tailored compelling governmental interest for the law and prove that it was not discriminatory. In light of this, race in the Courts is subject to the highest level of scrutiny. This high level of scrutiny is employed in this case but instead in the effort to appease white voter interests in a racially neutral electoral process in the midst of a radicalized political system. The Court believed that North Carolina’s redistricting plan that separated individuals of the same minority race into majority-minority districts was akin to political apartheid that enforced misconceptions about a racial group who do not in fact vote in a monolith (Shaw 11). They supported the plaintiff’s Equal Protection Clause challenge to separating voters into districts according to race. They also feared that such a practice would reinforce racial stereotypes and institute a political system that was race-conscious rather than race-neutral. Justice O’Connor in an effort to achieve the colorblind society that she believes the Constitution aspires to, asserts that:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us
into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendment embody, and to which the Nation continues to aspire. It is for these reasons that race based districting by our state legislatures demands close judicial scrutiny (Shaw 19).

This view steeped in the doctrine of anti-racial classification weighs in as if we already live in a colorblind-society where race plays no bearing on our political or economic lives and we lack the contemporary existence of a racial hierarchy. This is simply incorrect. Since the purposes of the 14th and 15th Amendments were a way for racial minorities to gain equal justice in all spheres of life, we must ask, are we there yet? And if the answer is no then does it serve us to act as if racial classifications do not exist? If even the justices on the highest court in the land cannot make these distinctions or name the continuation of systemic racism then the country not only suffers from a state of stagnation, but is vulnerable to reactionary ideology as well.

In his dissent Justice John Paul Stevens articulated the constitutionality of the state’s right to uphold minority rights. He distinguishes between when a majority group in power redefining electoral boundaries solely to enhance its own political strength at the expense of a weaker group and when a majority seeks to empower a minority group through electoral boundaries. In his view “when the majority acts to facilitate the election of a member of a group that lacks such power because it remains underrepresented in the state legislature—whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics” the duty to govern impartially has not been violated (Shaw). Similarly in Shaw v Hunt or also known as Shaw II when the Court reaffirmed their ruling in Shaw I, Justice Steven’s dissent highlighted an anti-subordinate message that asserted that the
legislatures in these cases had a compelling interest in creating minority-majority districts in response to a long history of political oppression and silencing simply for the reason to make it easier for black leaders to participate in the legislative process and represent their constituency in Congress.

Using Shaw I as a precedent two years later, the case Miller v. Johnson, struck down a Georgia congressional district that used similar racial gerrymandering tactics. After not passing preclearance from the VRA for failing to create majority-black districts in black concentrated areas, Georgia made three majority-black districts that eventually received preclearance (Sullivan 703). After clearance white voters in the district sued claiming that the district violated the Equal Protection Clause. The Court agreed with their constitutional challenge underscoring their doctrine of anti-classification and asserting that under the Equal Protection Clause not only can you not segregate people on the basis of race in public accommodation but you can also not segregate people on the basis of race into separate voting districts (Sullivan 703-704).

These cases present us with an anti-classificationist lineage in the Supreme Court that was primed to gut the Voting Rights Act in Shelby v, Holder (2013). In a contentious 5-4 decision, the Court struck down Section 4 of the Voting Rights Act which demonstrates the “coverage formula” that determines which jurisdictions which jurisdictions are subject to preclearance from the federal government before enacting changes to their voting procedures which is outlined in section 5. The coverage formula as articulated in 1965 covered jurisdiction that maintained tests or devices as prerequisites to voting and had a low minority voter registration and turnout in the 1960s and early 1970s. This coverage formula has not changed since and was recently reauthorized by Congress in 2006. Shelby County, the petitioner, sued Attorney General, Eric Holder claiming that Sections 4 and 5 of the Voting Rights Act are
unconstitutional. In agreement with this assertion, the Court’s guiding principle had its foundation *Northwest Austin v. Holder* (2009) where the Court stated that the Voting Rights Act “imposes current burdens and must be justified by current means” - in other words since the Act imposes severe regulations currently is must be due to a problem that still currently exists in our political system. Building from this point it becomes Chief Justice Roberts assertion that the coverage formula is no longer needed because problems of minority voter discrimination are a thing of the past. Justice Robert’s also claims that having the states have to appeal to the federal government to pass laws they could otherwise enact on their own undermines their autonomy.

The Court’s decision in *Shelby* operates under many illusions and false assumptions about our current political climate. Justice Roberts claims that because minorities hold office at extraordinary high levels all forms of blatant voter discrimination have all ceased. He quotes the Census Bureau and presents the evidence that black voter turnout has exceeded white voter turnout in five out of six states originally covered in Section 5 of the Voting Rights Act (Holder 2). He also claims that because discriminatory tests and devices have been outlawed for over 40 years, they are never, in fact, used. His claim that Section 4 is unconstitutional because in light of current conditions, simply demonstrated an inaccurate assessment of current political conditions and fails to take secondary discriminatory practices into consideration and myopically considers blatant and overt discrimination as the only form of racial voter intimidation (Holder 3).

He also asserts that using outdated methods of assessing voter discrimination should not be applicable to evaluate our current day situation. Justice Roberts also carries on a federalism argument that states that the Federal Government should not have the power to review and veto state enactments before they are signed into law. Following this idea abandons the concept outlined in previous precedents that the Voting Rights Act is an exceptional measurement
employed under exceptional circumstances. The opinion claims that giving states differential treatment violates a “fundamental principle of equal sovereignty” (Holder 10). Justice Roberts incorrectly assumes that because minority voter turnout and registration has risen significantly that voter discrimination is no longer an issue but in fact the coverage formula needs to become more attuned to new methods in order to combat voter discrimination in all forms as well as use up-to-date.

Justice Ginsburg’s opinion succinctly counter-points the Court’s incorrect assumptions by asserting that “throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet” (Holder 33). Both Justices in the dissent and the majority have recognized that minority voters have made great strides since the passage of the Voting Rights Act in 1965 but while the majority believes this as a sign that we no longer need the Voting Rights Act the dissenters correctly understands this to mean that the Voting Rights Act has been successful and is working as it should which is precisely why we should uphold its reauthorization. As Justice Ginsburg asserts, in the Court’s convoluted view “the very success of section 5 of the Voting Rights Act demands its dormancy” (Holder 1). She understands the Voting Rights Act as a piece of unique legislation that fulfills the promises of the 14th and 15th Amendments to the Constitution and has worked effectively to eliminate many forms of minority voter discrimination (Holder 4). In fact many jurisdictions that are covered under preclearance still submit changes to their voting process to the federal government, which are routinely struck down as creating barriers to minority voting. It is these “second-generation barriers” to voting that the Voting Rights Act has been poised to catch before they are enacted, as oppose to the
overt means of discrimination that Justice Roberts fixates on and claims to have been outlawed for more than 40 years.

When Congress made the carefully researched and debated decision to reauthorize the Voting Rights Act in 2006 they considered that although the Act has eliminated most “first-generation barriers” to minority voting, many “second-generation barriers” still exist and are just as detrimental to the equity of our political system (Holder 7-8). Such examples of discriminatory voting changes that have been blocked by the preclearance include but are not limited to the following:

• In 1995, Mississippi sought to reenact a dual voter registration system, “which was initially enacted in 1892 to disenfranchise Black voters,” and for that reason, was struck down by a federal court in 1987.

• Following the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found to be “designed with the purpose to limit and retrogress the increased black voting strength . . . in the city as a whole.”

• In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town’s election after “an unprecedented number” of African-American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen.

• In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce the availability of early voting in that election at polling places near a historically black university (Holder 15-17).
All of these examples clearly illustrate how rampant barriers to minority voting still exist among the covered jurisdictions and therefore show the necessity to reinstate and extend coverage of the Voting Rights Act preclearance system. The dissenting opinion also takes into consideration that Shelby County, Alabama in particular has been continuously subject to Section 5’s restraining effect and has been found to have “denied or abridged voting rights on account of race or color more frequently than all the other States in the Union” (Holder 25). This stresses the urgency and importance for upholding this piece of legislation especially in relation to the petitioners who need the use of the preclearance system the most.

The dissenting opinion also illustrates that deference should be given to Congress who reauthorized the Act after considering numerous witness reports and case studies that lead them to conclude that there was still an inherent demand for the preclearance system (Holder 35). Congress concluded that “40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution” (Holder 37). Simply, and I might add optimistically, the failure of the Court’s decision was in failing to understand why the VRA has proven effective. Pessimistically, many members of the Court may indeed believe that the voting process has become too inclusive. The Court appears to believe that the VRA’s success in eliminating the specific devices that existed in 1965 means that preclearance is no longer needed but in actuality the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding (Holder 36).

Chapter Three: Battling Voter Suppression in the 21st Century
We now turn our attention to discuss some of these second-generation barriers to voting that have proved prominent in the 21st Century political world. Like a strain of bacteria resistant to antibiotics, discrimination against black voters has responded to efforts to eradicate it and has morphed and evolved to allow itself to fall more easily through the cracks cleverly disguised as a rational and compelling state interest unrelated to race. This modern day voter suppression has graduated from more overt methods such as poll taxes and literacy tests to less obvious voter-ID requirements, early voting closings, eliminating same-day registration and enacting unequal redistricting plans. Not only have the flood gates been opened for the passage of these destructive laws after the Court’s gutting of the VRA but these laws have become so pervasive that they not only permeate Southern states but also many Northern states and districts that were not ever covered by Section 4 and 5 of the VRA to begin with. And not only are black people affected, but non-drivers, senior citizens, people who have served time in jail, students, persons who work two or three jobs, speakers of languages other than English, and the list could go on, are now having difficulty exercising their right to vote.

Since the reauthorization of the VRA in 2006 there have been numerous instances of voter suppression throughout the country as well as many that have gone unchecked after the Court’s invalidation of Section 4. Through the VRA the Justice Department has blocked 1,116 discriminatory voting changes from going into effect from 1965-2004. They also objected to the implementation of 37 electoral proposals after the VRA’s Congressional reauthorization in 2006 (Berman 5). The VRA has been highly effective at blocking several forms of voter suppression during its tenure.

Before I advocate for a new amendment that would revitalize the strength of the VRA, we must understand the modern day voting tactics that need to be protected against the most. As
Frances Fox Piven writes in, *Keeping Down the Black Vote*, there are many anecdotes of citizens trying to exercise their most fundamental democratic right and getting turned away from the polls. Many have “had their name wrongly purged from the voter registration rolls; were improperly challenged about their eligibility and called to election board hearings to prove it; were photographed while standing in line to vote by campaign operatives trying to intimidate them by demanding to see identification; were subject to misinformation campaigns urging them to vote on the wrong day; were bullied by men with clipboards dressed to look like government officials, who drove in black sedans from one polling place to another to intimidate more voters; were told their college dormitory was not a legal voting address despite a court order finding that it was; were wrongly accused of fraud or of being a felon barred from voting-- the list goes on and on” (Piven 165-166).

Stories of black voter suppression like these should be told, but, for our purposes, I will focus on tactics and statistics about methods that can be prevented and preempted by a constitutionally and politically sound amendment to the Voting Rights Act. We begin with the upsurge of voter-ID laws around the country. Liberated from the political constraints of Section 4 and 5 of the VRA the South are ready to dust off their pre-21st Century play books and pass voting laws and restrictions “that can be challenged only through a preliminary injunction or after years of lengthy litigation, often in hostile Southern Courts, with the burden of proof now on those facing discrimination rather than on those who discriminate” (Berman 5). In the wake of the *Shelby* decision this started with voter-ID laws. Five Southern states rushed to pass voter-ID laws that have been shown to disproportionately create barriers to voting for minorities and the elderly. These states were, Alabama, Mississippi, South Carolina, Texas and Virginia (Berman 6). The debate around voter-ID laws has been vicious and mostly set along party lines.
Democrats claim that the laws disadvantage minority voters by adding an extra cost to voting which has been proven to deter and alienate voters who are already politically illiterate.

Republicans, on the other hand, assert that these laws are necessary to ensure the integrity of our electoral system and help fight voter fraud -- a problem that has proven negligible and nearly nonexistent in our political system. Much evidence has shown that not only is in-person voter fraud very rare but the prevalence of voter-ID laws decrease minority access to exercising their most fundamental democratic right.

In *The Disproportionate Impact of Voter-Id Requirements on the Electorate - New Evidence from Indiana*, scholars, Barreto, Nunez and Sanchez (2009) present evidence from Indiana that indicates how minorities will be disproportionately disadvantaged by the enactment of stringent Voter-Id law in Indiana. Through the case *Crawford v. Marion County Election Board* (2008) the Court upheld Indiana’s strict voter-ID laws that forced all registered voters to present a photo ID with them at the polls in order to combat voter fraud. The Court balanced the state’s interest in upholding voter confidence with the possibility of voter suppression and ruled that the state’s compelling interest outweighed alleged accusation of voter suppression. As has been asserted the requirement for photo-identification for voting adds an extra cost to potential voters, “requiring time and political knowledge to engage the various levels the government to satisfy the rules of participation. Institutional burdens to participation have long been established to have the largest impact on individuals who have fewer resources, less education, smaller social networks and are more institutionally isolated” (Barreto 111). Adding a photo identification requirement on top of all of this only creates more barriers to voting and Barreto’s research has found strong evidence to support their thesis that the strict voter-ID laws would substantially affect lower-income, minority and elderly voters and potential voters (Barreto 111).
Barreto and his colleagues found a random representative sample of the Indiana Electorate and conducted 1,000 interviews with registered voters and 500 interviews with non-registered adults. Indiana’s stringent voter-ID laws require that voters bring with them an Indiana State sanctioned ID that includes their photo, an expiration date and their full legal name that must match the voter-registration records (Barreto 112). Moreover, if a voter unable to show the proper identification they can submit a provisional ballot and either supply the proper id within 10 days or file an affidavit claiming an indigency exception. The poll officials also have full discretion regarding filing for indigency and can challenge eligibility or deem whether they believe their identification to be not valid.

Barreto found a strong statistical difference in access to a valid photo-ID that significantly reduces the opportunity to vote for minority, low-income, less-educated and the youngest and oldest residents of Indiana. Their data shows an 11.5 point gap between white and black adult access to voter-ID, showing that under Indiana’s law 14% of likely white voters will be turned away from the polls while 20% of likely black voters could be turned away (Barreto 113). This proves that blacks are disproportionately impacted by Indiana’s voter-ID law. Indiana’s statistics are not merely anomaly, they have been proven to be quite representative of the American electorate where according to a 2006 study, whites are more likely to have drivers licenses than non-whites which shows that similar non-white populations around the country will also have a disproportionate impact on minority voters (Barreto 115).

It is also important to note that motivations behind voter-ID laws and other voter suppression tactics are not purely racially driven but fall along party lines in a Republican effort to demobilize likely Democratic voters, such as minorities. Even President Obama has been quoted saying that “the right to vote is threatened today in a way that it has not been since the
Voting Rights Act became law nearly five decades ago. Across the country, Republicans have led efforts to pass laws making it harder, not easier, for people to vote” (Baker). “Keeping down the black vote” as well as “the Democratic vote” has been an important Republican strategy in recent political campaigns and has also been a long-standing fixture of American electoral politics. Demobilizing Democratic voters also follows the long held American narrative of black political subordination. Though voter suppression has long been a part of our history, modern day tactics hide under the guise of initiatives to increase the effectiveness of our electoral system and prevent voter fraud. It is important to recognize these tactics when they are proposed and devise a way to legally and politically fight against them.

However, despite these assertions and Barreto’s findings, some scholars are more optimistic about the future of minority voting in light of changing racial relations in the South. Anthony Gaughan writes in Has the South Changed? Shelby County and the Expansion of the Voter-Id Battlefield about the several reasons why he believes the voter-ID laws will not undermine minority rights in the South. He first contends that minority voting rights in the South have been on a steady increase for years even in the midst of voter-ID laws. He found that there was an overall trend in Florida, Georgia, Louisiana, and Tennessee that suggested that black and Latino voter turnout exceeded white voter turnout during the 2012 Presidential election despite voter-ID requirements in those states (Gaughan 131). Although this may be true, Gaughan fails to take note that this election was a particularly historic and significant election for minority voters and the country of the whole as we re-elected our first black President. The presence of voter-ID laws may not have proven enough to stop the momentum of voting America’s first black President into the White House - thus such an important national election proves to be a significant outlier in our analysis. He also points out that there is notable backlash effect in
response to the upsurge of voter-ID laws around the country. He finds that despite this upsurge black voter turnout has risen from 53% in 1996 to 66% in 2012 (Gaughan 134). While this is a significant statistic it is important to recognize that it does not, however, negate the disproportionate impact of these laws that is a testament to the resiliency of minority communities around the country who have mobilized and taken it upon themselves to combat efforts by their local governments to suppress their voices.

Gaughan also asserts that there is reason for optimism because of changing racial demographics around the country where minorities are representing a growing percentage of the electorate. Due to this fact it would seem as though political parties and candidates who supported bills that were hostile to minorities would be doomed to political peril (Gaughan 143). While this seems to be worthwhile it raises the objection that minority concentrated populations have been in existence around the country for decades but has not yet deterred candidates and parties from utilizing varying methods that they believe will help their own empowerment and reelection. Voter suppression, especially voter-ID laws, have been passed and used mainly by the republican party as a tactic to demobilize democratic bases - as long as doing so stays within their political interest and the likes of the Voting Rights Act no longer has any power to stop them they will continue these oppressive disenfranchising practices. The only true optimism that we can find from the rise of voter-ID laws is in the upsurge of resistance against them from which there is a strong history which precedes it, where America’s black population has often been in constant struggle for equity in the face of political and social discrimination.

Minority voter suppression also occurs through the practice of purging voter registration lists. The National Voters Registration Act or the NVRA calls for the maintenance of inactive lists, or lists of voters who have failed to respond to the register confirming a change of address.
If a voter is deemed “inactive” after two and a half years, they can be purged from the registration list. In the 2004-2006 federal election cycle 12-13 million registration records were purged under the guidelines of the NVRA in the 42 states reporting data to the U.S. Election Assistance Commission (Piven 180). The problem with the NVRA is that it is often not implemented properly and the local and federal governments often fail to carry out opportunities for registration. One example of this happened during the 2000 presidential election where black leaders in St. Louis grew concerned that many black citizens would not be able to vote because of a recent voter registration list purge. Black Congressman candidate, State Senator William Lacy Clay Jr., gave a speech before the election day and warned that if many eligible voters were unable to vote the next day due to an incorrect registration list they would file a suit in court for an extension of the voting hours (Piven 181). Low and behold the next day hundreds of black voters were turned away unaware that their names had been thrown out on the “inactive list” and as promised the Democrats filed a suit in the Circuit Court asking for election day extensions. The Court denied the request, and due to mishandled implementation and proper education of the NVRA, hundreds of minority voices went unheard.

Other rampant voter suppression laws have come in the form of early voting closings, prohibition of same-day registration, and proof of citizenship requirements. After the Shelby decision North Carolina passed one of the most strict and wide-sweeping voter restriction laws, “the law did away with same-day voter registration and a popular program to preregister high school students to vote. It cut early voting to 10 days from 17, mandated a strict photo identification requirement that excluded student and state worker IDs and ended straight-ticket party voting, all of them measures that are expected to hurt Democrats, election law analysts said” (Yaccino). Key swing states, Ohio and Wisconsin, which are also Republican controlled
have also passed laws that cut down on early weekend voting (Yaccino). This practice is often favored by low-income voters who cannot afford to miss work to head to the polls during the week and black voters who often head to the polls as a community after church service on Sunday morning. Similarly same-day registration accommodates people who do not have the time or political knowledge to register ahead of time. Many States have also implemented a proof of citizenship requirement such as a birth certificate, passport or certificate of naturalization. Once again this law disfavors low-income people who either do not possess these documents or do not have the time and money to obtain them. The following figure, aptly named the “Map of Shame” and created by the Lawyer’s Committee for Civil Rights Under Law, depicts the States where a myriad of voter suppression laws have been passed and proposed.

![Map of Shame: Vote Suppression Legislation by State](image)

Figure 1.
As shown in this figure eight States require photo voter ID, six States request to see a photo ID at the polls and an astounding 22 States proposed photo voter ID legislation. Moreover, five States have passed proof of citizenship laws around the country. Contrary to Justice Robert’s belief, voter suppression in the American Political system is very much alive and prevalent and supporters of political equity are in need of a counter attack.

**A Proposal for the Revival of the Voting Rights Act**

One point that the Court’s *Shelby* opinion is correct on is that the current formula does not take into account “current political conditions”. The old Section 4 coverage formula statistics, based in 1965, are in desperate need of an update. Proposing a new amendment to the Voting Rights Act that would include modern day data on voter suppression and reflect current political equity challenges would revitalize the Act and strengthen it to not only eradicate political discrimination but also pass constitutional strict scrutiny. It is also essential that a new amendment leave itself open to not only periodic reauthorization but also revision while being accompanied by a Government study on new legislative voter suppression tactics. This will allow the Government to be ahead of the curb, allowing the VRA to act as a nimble, flexible, and living document that can adapt to new strategies in electoral discrimination. The following is my proposed amendment to the VRA that would encompass these characteristics:

- **Sec. 4 a)** *No citizen will be denied the right to vote for not complying with a voting requirement in order to vote in any state or political subdivision described in Sub-Section c. unless state brings action to U.S. D.C. District Court and it determines that no such requirement has been used in past 5 years before filing action.*
b) A voting requirement is any prerequisite for voting that asks participants to provide photo ID, birth certificate, passport and other documents in order to prove citizenship and/or identity.

c) No state shall pass changes in their electoral process regarding time, date, and location of voting that disadvantages voters on the basis of race and whose discriminatory nature outweighs its state interest.

d) The previous Sub-Section applies to states that have successfully implemented voter requirements and discriminatory electoral laws as determined by Congress as of the passage of this amendment.

e) No one who does not speak English will be denied the right to vote.

f) This amendment shall be enacted retroactively, subjecting all current voting laws in the covered states to Congressional review.

g) This amendment is subject to revision and review by the U.S. Congress every 5 years following proper Congressional study and analysis of current political conditions at the time of review.

• Sec. 5. b) When a state or political subdivision enacts a change in their electoral process regarding voting requirements and/or time, date, and location of voting that disadvantages voters on the basis of race they may institute an action in U.S. District Court D.C. to prove that the practice does not deny voting to people on the bases of race and until the Courts decides
the case or enter judgement no person can be denied voting rights for not complying with the requirements.

This Amendment not only strengthens the country’s political equity by taking into account more common modern day adaptations of voter suppression but it also allows itself to reform and reshape according to evolving practices - it is the antidote that evolves with the bacteria.

**Conclusion**

Although I’d like to think this solution is unassailable there are many forms of racial voter suppression that it does not have the capacity to address simply because of the lack of political will. The most damaging and prevalent form of voter suppression is felony disenfranchisement. The sheer number of men of color who are convicted of a felony from poor neighborhoods greatly decreases the amount of voters and in turn decreases a politician’s incentive to pay attention to the communities which are most in need. This problem is compounded even more when prison based gerrymandering is taken into consideration. Under this practice people who are sent away from their community to prison are not counted as a resident of their own community but instead are counted as a resident of the rural town in which their prison is located. This leaves their home underrepresented with less congressional representation and less government funding. Prisoners then return to increasingly disadvantaged communities who have been abandoned by their governments. Not only does this practice strip prisoners of their voices but it also utilizes their imprisonment as a way to transfer power and representation from themselves and their families to the predominantly white areas where they are held captive. It blocks out the voices of a critical mass of our population who is in need of increased political representation, assistance, and empowerment.
Aside from these issues there are also many forms of in-person voter suppression that laws are limited to enforce against. These include deceptive election practices and the circulation of false information and voter intimidation. Alternate forms of maintaining political equity like the effective implementation of accessible voter education will go a long way in combatting issues that laws have little power to reach. If states that pass voting requirement laws and enact voting changes are truly concerned with the integrity and effectiveness of our electoral process then Congress needs to hold them accountable to providing voters with the proper and correct information about their new initiatives in a timely manner as well as offer those without the means of obtaining requirements with time and assistance in order to do so. The bottom line? They should be making it easier for citizens to vote, not harder.
Works Cited


"Section 4 of the Voting Rights Act." Civil Rights Division Page. The United States Department of Justice - Civil Rights Division

