5-2015

The Voting Rights Act Under Siege: The Development of the Influence of Colorblind Conservatism on the Federal Government and the Voting Rights Act

Melanie Adrienne Jones
Graduate Center, City University of New York

THE VOTING RIGHTS ACT UNDER SIEGE:
THE DEVELOPMENT OF THE INFLUENCE OF COLORBLIND CONSERVATISM ON THE FEDERAL GOVERNMENT AND THE VOTING RIGHTS ACT

by

Melanie A. Jones

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the Doctor of Philosophy, The City University of New York

2015

This manuscript has been read and accepted for the Graduate Faculty in Political Science in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

Dr. Andrew Polsky

_____	_____
Date	Chair of Examining Committee
	Dr. Joe Rollins
_____	_____
Date	Executive Officer

Dr. Andrew Polsky
Dr. Frances Fox-Piven
Dr. Charles Tien

Abstract

THE VOTING RIGHTS ACT UNDER SIEGE:
THE DEVELOPMENT OF THE INFLUENCE OF COLORBLIND CONSERVATISM ON THE FEDERAL GOVERNMENT AND THE VOTING RIGHTS ACT

by

Melanie A. Jones

Advisor: Dr. Andrew Polsky

Recent activity by state governments to change voting rights law to limit access to the polls by minority voters, and directly challenge the legislation that protects voters from discrimination based on race, reveals an unsettling trend: states are increasingly comfortable challenging the federal mandate promulgated by the Voting Rights Act (VRA) of 1965. The Voting Rights Act was once hailed as a crown jewel in the constellation of legislation born of the Civil Rights movement. Its implementation had a significant positive impact, expanding the integration of polls and elected offices. Reauthorized four times since 1965, the VRA appeared to have become a permanent piece of the American voting system. Yet in fact, the VRA has endured significant opposition from conservatives since 1965, opposition that has influenced the federal government that implements the law. The effort to weaken the protection made possible by the VRA is driven by race-based Republican partisanship interested in the establishment of a durable conservative majority. Recently, a challenge to Section 5 of the VRA, *Shelby v. Holder* (2013), resulted in a Supreme Court decision that ruled Section 4 of the Act is unconstitutional, thereby removing Section 5 coverage over all the states required to submit to federal review of their voting law changes.

This dissertation examines how the development of conservatism since 1965 has affected the implementation of the Voting Rights Act and the response by the federal government and the states to the law and its implementation over time. I argue that the development of colorblind conservatism and the ideological platform undergirding it has had a chilling and potentially devastating impact on the federal government's implementation of the spirit and letter of the VRA, on stated adherence to the mandates and intention of the Act, and, ultimately, on the rights of those the VRA was designed to protect.

Acknowledgements

My utmost gratitude goes to Dr. Daniel DiSalvo, who was kind enough to help me identify and develop a topic for this dissertation. I am even more indebted to Dr. Andrew Polsky, who agreed to sponsor me, took the time to read my many drafts, and met with me by phone and in person over the course of four years to bring this dissertation to fruition. I wish also to thank Drs. Frances Fox Piven and Charles Tien for serving on my committee. I appreciate the kind patience and incredible support of Dennis J. Shields, who urged me to take a fellowship at the University of Wisconsin-Platteville ("UWP"), where I was able to work and support myself while I successfully wrote the dissertation. Thanks to the members of the Social Science department at UWP, including, importantly, Drs. John Rink and Rosalyn Broussard. The department welcomed me, supported my mission, and treated me like a respected colleague. I appreciate the significant and consistent contributions of my father, Dr. George H. Jones, who was my ever-enthusiastic supporter. My father took the time to discuss with me the many relevant issues, gave me feedback on each chapter, and happily read and re-read drafts as the project progressed, always pleasantly and without complaint. I am ever thankful for the support and good advice of Calvin W. Sharpe, who maintains that I am his "awesome daughter," aka "M.A.D.," and who is an advocate for my greatness and success. I am extremely grateful for the support of Beth Gould and the members of the Brooklyn Salon, Jennifer Lutton, Sangu Iyer, Emily Bass, and Lisa Freedman. Beth masterminded the Salon, so that those of us working on dissertations can complete them. She read and re-read drafts and was more than happy to deposit the dissertation for me. Salon's generous support made me feel like a rock star among peers. The Salonistas reviewed all of the chapters, offered

academic and emotional support, and celebratory congratulations at each of the important milestone moments. “Arms up!” A heartfelt “thank you” to my friends and supporters—Courtney Lang, Dr. Myechia Jordan, Philippe Jean-Bart, Vince Matthews, Manal Aboelata, Curtis English, Dr. Travis Nelson, Dr. Shan Sappleton, Rose Smyrski, Lori Wedig, and my Uncle Fred, for their perpetual encouragement and confident reassurance when times got hard. Thank you to my family—my mother, Jan Jones, Stevie and Hakim Surmon, Moneer Massih-Tehrani, Kabral, Nikki, Isaiah and Zoe Sharpe, and Shirley Daniels. Respect and gratitude to my grandparents (and their parents and their parents’ parents, ad infinitum) for the spiritual support and the ancestral success that has enabled me to be in the position to earn such a degree—Bernice I. Jones, George H. Jones, Sr., Emily McCoy, and Frederick McCoy, Sr.— and finally, thanks to Monty “Mo’ Better” Mason for his affordable copyediting and careful preparation of the table of contents, footnotes, and bibliography.

My sincerest gratitude to you all. Thank you for helping me to make this happen.

I really appreciate it.

M. Adrienne Jones
2015

Table of Contents

Chapter 1
Introduction

The Problem. Since 1965, arguments seeking to justify voter discrimination based on race have not been politically viable. The advent of the Voting Rights Act (VRA) brought federal government control over state voter discrimination based on race, an influx of new voters, and apparent ideological consensus that voter discrimination based on race was now patently unacceptable. For nearly fifty years, the federal government, authorized by Congress, enforced by presidents, approved by the federal judiciary — and heeded by state legislatures at the polls and during redistricting — has administered the VRA. Much scholarship, even that which opposes the VRA, proceeds on the presumption that the VRA, its intention, and the sociological theory that underpins it, have earned a permanent place in the fabric of the American voting system.

Until recently, the idea that the VRA was a permanent part of the American political landscape was widely accepted. American geopolitical interests, namely its need to end racial discrimination as part of its effort to maintain its power as a global leader, helped to motivate the United States to administer the Act effectively. The passage of the VRA encountered much opposition, but the end result was a successful law passed by a formidable bipartisan coalition, a coalition that sustained itself through the 1990s, shepherding the legislation through multiple reauthorizations of its most controversial sections. The VRA has had a significant impact on voting rights and legislation since 1965: during the fifty years that it has been in force, the federal government, states, and

individuals have taken it into consideration when making determinations about voting regulations and access.

Despite the appearance that the VRA voting order is sacrosanct, it has in reality experienced much resistance, beginning at its inception and continuing since. The law is not and has never been universally accepted at the national level. Initially, the opposition consisted of Southern Democrats and states' rights advocates. But the main driving force over time has been conservative Republicans, and the anti-VRA coalition has found a secure home in the Republican Party. There, attacks on the VRA have been part of a race-based strategy to establish a popular majority grounded in hostility to affirmative steps to promote equality for racial and language minorities. The GOP-based conservative coalition has sharpened its arguments against the VRA into a persuasive ideology, often dubbed "colorblind conservatism," that resonates culturally and politically. This modern conservative ideology has established its own legitimacy, providing a strong counterweight to the liberal consensus that held sway through the 1990s. The argumentation and activities undertaken by conservatives against the VRA have slowly developed into effective challenges to the authority of the VRA and to the letter of the law.

During the long period of apparent VRA hegemony, there has existed a persistent and consistent conservative opposition waged specifically at the federal level. This resistance is far less obvious than recent resistance by state legislatures, pursued through the proposal and passage of voter ID laws and other limitations, all of which will arguably limit minority voter access. At the federal level, between 1965 and 2013, conservatives against the VRA have played a "long game" to influence the governmental

institutions at the national level that implement, enforce, and review the VRA. This "long game" opposition is not aimed exclusively at the VRA, instead, it is part of a larger Republican agenda to limit Civil Rights legislation and to establish long-term conservative majorities. (I use the term "long-game" not to imply a strategy consciously crafted to undermine the VRA over time, but rather to capture the persistence of conservatives who grasped any opportunity to undercut the law.) Although the far right has lost most of its battles against the VRA at the federal level, this conservative coalition has exerted some influence over all three of the branches of national government and periodically made important gains. Recently, conservatives have made significant progress against the VRA as a result of the Supreme Court decisions issued by the Roberts Court.

The development of this conservative influence is important because the federal government is responsible for enforcing the VRA. Furthermore, the weakening of the VRA order means the resurgence of race-based partisan voter limitations. This dissertation will discuss this conservative "long game" in detail as it has influenced Congress, the executive branch, and the Supreme Court. Tracking support for the VRA by the Federal Government is critical because it reveals cracks in the VRA support structure that have had, and will continue to have, a significant impact on the existence of a democratic voting system in the United States. Tracking support also makes it clear that the VRA does not provide permanent protection for minority voting rights.

This dissertation argues that the development of a conservative ideology, "colorblind conservatism," has caused friction between the VRA voting order and an emergent so-called Colorblind Voting Order. The inertia once generated by the liberal

consensus in favor of the VRA has shifted. Today, the new Colorblind Voting Order strongly challenges that older consensus to such an extent that it arguably now controls voting law and resists changes sought under the VRA at the national level. Analysis of primary and secondary literature will support these arguments. This analysis will be organized into a synthesis that not only describes, but also rationalizes the changes in the responses of the Federal Government to the VRA that have taken place in the last fifty years.

Intercurrence: The Impact of Overlapping Orders on American Political Development. The work presented in this dissertation relies significantly on the theory posited by American Political Development scholars Karen Orren and Stephen Skorownek, who argue that political orders in the United States are subject to "intercurrence," the awkward overlapping of old and new orders which produces friction and change."[1] When we apply this approach to voting rights, we see the development of those rights as a succession of orders and the tensions between them.

The VRA enshrined a new order of voting in 1965. The VRA Order contradicted the previous order of voting, the "Jim Crow" order (the voting law regime from 1877 to 1965), and interrupted the operation of traditional federalist relations between the states and the national government. The VRA Order is also inconsistent with the voting order urged by modern conservatives, who seek to overthrow the VRA Order.

In fact, the push for a Colorblind Voting Order emerged out of resistance to Section 5 of the VRA and from the tension between conservatives and VRA proponents. Proponents of the Jim Crow order were driven to resist the institution of the VRA Order.

[1] Orren, Karen and Stephen Skorownek. *The Search for American Political Development*, (Cambridge, UK: Cambridge University Press, 2004).

The change in the law struck at the heart of "states' rights" from the perspective of opponents of the VRA. The oppositional effort did not go smoothly at first. Traditional Jim Crow arguments failed in the mid-1960s and throughout the 1970s, and so conservatives developed new, more persuasive colorblind arguments, which conservative forces directed against the legislation from the mid-1980s onward. This dissertation investigates the application of those arguments at the national branch level. These arguments form the foundation of the tension between the VRA Order and the Colorblind Voting Order.

This dissertation investigates the intercurrence between successive, partly overlapping voting orders over time. In the history chapter, I illuminate intercurrence between the founding of the nation and Reconstruction; Reconstruction and Jim Crow, Jim Crow and the VRA Order, and today, the VRA Order versus the Voting Order. My research assumes the existence of significant friction between these orders. My mission is to identify change precipitated at the Federal Government level by the friction created by the awkward overlapping of the voting orders in the United States.

Voting Rights in the United States: Analysis of the Relevant Literature. Scholars have written at great length on race and voting rights in the United States. The seminal piece of literature is V.O. Key's analysis of Southern politics.[2] Key examined a number of states and showed how traditional Democratic Party dominance hindered the development of multiparty democracy in those regions, in large part based on the disenfranchisement of black voters.[3] The idea was that without party competition, blacks lacked the leverage they needed to maintain the right to vote in the face of opposition.

[2] Key, Valdimer Orlando. *Southern Politics and Nation* (New York, NY: Vintage Books, 1949).
[3] Corbett, John and Valdimer Orlando Key. "Mapping Southern Politics," *Center for Spatially Integrated Social Science*, accessed April 2015, http://www.csiss.org/classics/content/42.

Key wrote his work in 1949, a time when voter discrimination was increasingly under attack. Using a heavy emphasis on spatial modeling, Key determined that the monopoly held by the Democratic Party in the Southern states "assure [d] locally a subordination of the Negro population and, externally…block[ed] threatened interferences from outside with these local arrangements."[4] The VRA's special temporary provisions, Section 5 in particular, sought relief from state voter discrimination by targeting state jurisdictions charged with the worst voting records, the lowest registration, and lowest participation of blacks. The vast majority of these places were in the Southern states Key focused on in his study.

An alternative argument posits that party competition in the South was possible (i.e. there was room for the Republican party to grow in the South and represent blacks in their need for voting rights), but that neither major party was willing to forgo the support of white Southern voters by taking responsibility for black constituents. According to Paul Frymer, post-Reconstruction Republicans pulled out of the South instead of striving to expand the Southern wing of the party by aligning itself with blacks. The Republican Party was not motivated to work earnestly on behalf of blacks for fear of alienating white Southerners, and the Democratic Party thrived by excluding blacks and working against their interests. Frymer concludes that party competition was not exercised and that therefore both parties ignored the needs of the Negro community, which left anti-discrimination legislation unprotected and rendered blacks vulnerable to the onset and entrenchment of the Jim Crow voting order.[5]

[4] Key, V.O. *Southern Politics*, 665.
[5] Frymer, Paul. *Uneasy Alliances* (Princeton, NJ: Princeton University Press, 1999), chap. 2 and 49–86.

There are strong similarities between the legislative gains of the civil rights movement and those achieved during Reconstruction. The two eras have a number of features in common. Both periods involved "confrontations between North and South, between white and black, between federal and state government, [and both produced]…the daily evocation of the constitutional amendments, federal laws, government polities and court decisions." [6] Historian C. Vann Woodward coined the phrase "Second Reconstruction," to describe the legislative gains of the civil rights movement in his work comparing the First Reconstruction and the legislation achieved in the 1960s. Woodward's work revealed that Jim Crow laws were not an immediate or inevitable effect of the end of Reconstruction; instead, the phenomenon developed and congealed in the 1890s when states shifted to "legally prescribed, rigidly enforced, state-wide Jim Crowism."[7] Woodward determined ultimately that the First Reconstruction had failed, but he did not advance a solid explanation for exactly why.[8]

Based on Woodward's understanding of the similarities between the two reconstructions and the potential for disenfranchisement similar to that which occurred after Reconstruction in the 1880s, he warned Congress in 1981 that a weakening of the Section 5 preclearance provision of the VRA might "open the door to a rush of measures to abridge, diminish and dilute if not emasculate the power of the black vote in Southern states…[R]emove that law and the permissiveness will likely become irresistible—in spite of promises to the contrary."[9] Woodward's warning was designed to avoid a counter

[6] Woodward, C. Van. *The Future of the Past* (New York, NY: Oxford University Press, 1989), 199.
[7] Woodward, C. Vann. *The Strange Career of Jim Crow* (New York, NY: Oxford Univ. Press, 1974), xii.
[8] Woodward, C. Vann. *The Future of the Past* (New York: Oxford Univ. Press, 1989), 199.
[9] Woodward, C. Vann. "The Danger of Retreating from the Second Reconstruction," *Southern Changes*, accessed March 2015, http://beck.library.emory.edu/southernchanges/article.php?id=sc04-1_003

revolution, perhaps less extreme than that experienced after the First Reconstruction but a counter revolution that would potentially make a Third Reconstruction necessary.[10]

A number of explanations for the failure of the First Reconstruction have been asserted. In his work on the Reconstruction, historian Eric Foner developed a set of explanations for the failure of the First Reconstruction: violence, "the weakening of Northern resolve," the inability of Southern Republicans to develop a long-term appeal to whites, factionalism, corruption within the GOP, the rejection of land reform, and changing patterns in the national and international economic system.[11] Alexander Keyssar's seminal work on the history of enfranchisement reveals that the first era is a history of exclusion, expansion, and retraction. Keyssar,[12] motivated by his work on class participation and the history of enfranchisement in the United States, documented the expansion of the right to vote in the United States and revealed its cyclical nature. Keyssar concluded that democracy in the United States "is less unique than is sometimes claimed,"[13] and that universal suffrage wasn't a reality until two hundred years after the founding (i.e. in 1965). There has been a "long term trend toward greater inclusion but progress has not been smooth or steady and there have been recurrent setbacks."[14] The trend illustrated by Keyssar did not end with the passage of the VRA in 1965; exclusion, expansion, and contraction of voting rights, persists. More recently, Keyssar has noted

[10] Woodward, C. Vann. "The Danger of Retreating from the Second Reconstruction in Southern Changes." *Southern Changes*: The Journal of the Southern Regional Council. Vol. 4 No. 1 (1981): 13-15.
[11] Foner, Eric. *Reconstruction: Americas Unfinished Revolution*, *1863-1877* (New York: Harper and Row, 1988), 603.
[12] Keyssar, Alexander. *The Right to Vote: The Contested History of Democracy in the United States* (New York, Basic Books, 2000).
[13] Ibid., xxiii.
[14] Keyssar, Alexander, "What Struggles Over the Right To Vote Reveal About American Democracy," *Scholars Strategy Network*, accessed March 2015, http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_keyssar_on_right_to_vote_0.pdf

the similarity between modern voter ID laws and proposals, and laws proposed and passed during the late 1800s in contravention of the 15th Amendment to the US Constitution.[15]

It may be that institutions and institutional rules were the main forces that shaped race relations in the United States during the First Reconstruction. J. Morgan Kousser has engaged in comparisons of the First and Second Reconstructions, with a focus on politics between approximately 1863 through the turn of the twentieth century. Kousser has aimed to assess why the First Reconstruction failed in an effort to shed light on VRA problems that are "often taken for granted."[16] Kousser argues that institutions and institutional rules were the main force shaping race relations in the United States during the First Reconstruction. In his evaluation of the eleven Ex-Confederate States from Reconstruction through 1908, he shows how in the South, institutions and rules were used to discriminate against minority voters. Kousser notes a striking if underappreciated parallel: the disenfranchisement of blacks resulted in the disenfranchisement of a vast number of poor whites, as well as limiting the partisan choice in the Southern states.

Critical to this inquiry, then, is the question of whether the Second Reconstruction is in fact an unmitigated success. Richard Valelly compares the two reconstructions to determine why the Second Reconstruction, despite its frictions and weak spots, "… is still a relative success."[17] His focus is on how the "activities of the federal courts and the national party system structure influenced the prospects of coalition and movement

[15] Keyssar, A. "Voter Suppression Returns," *Harvard Magazine Forum* July-Aug 2012.
[16] Kousser, J. Morgan. "The Voting Rights act and the Two Reconstructions," *Author's Library Cal Tech*, accessed March 2015, http://authors.library.caltech.edu/41064/1/Brook.pdf), 2.
[17] Valelly, Richard M. *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago, IL: University of Chicago Press, 2004), 7.

politics" [18] during the two reconstructions. Valelly argues that the ability of Democratic Party biracial coalitions to expand into "long standing organizations" was far easier during the Second Reconstruction than the "creation of eleven new state-level parties overnight."[19] That last expedient had been necessary for the Republicans during the First Reconstruction, but was attempted unsuccessfully. According to Valelly, the existence of viable biracial coalitions in the South in favor of voting reform, combined with positive review by the federal judiciary at the start of the new legislation, made possible the success of the Second Reconstruction in contrast to the First. [20]

Valelly further argues that the response of the judiciary to voting rights law, especially the Court's initial review, is critical. Valelly states, "If the first decision or set of decisions is unfavorable, the Court's stance thus becomes a new strategic problem for a biracial coalition. The number and difficulty of political tasks that it has to perform suddenly increases."[21] Valelly argues that the institutionalization of enfranchisement through party and jurisprudence building was extremely difficult during the First Reconstruction but "relatively easy" and ultimately successful, during the Second.[22] He avers that the positive initial review of the VRA by the Supreme Court in *South Carolina v. Katzenbach* (1966) helped to secure permanently the new voting order established by the VRA.

In this dissertation, I argue that Valelly is largely, but not entirely, correct. The VRA is better established than similar post-Civil War Reconstruction law, and the legislation has achieved more. The legislation did take hold and has been administered by

[18] Ibid., 8.
[19] Ibid.,17.
[20] Ibid., 225.
[21] Valelly, *The Two Reconstructions*,19.
[22] Ibid., 20.

the federal government. Presidents have enforced the legislation, the Court has upheld it as constitutional (until recently), and Congress has reauthorized the temporary provisions of the law four times. States have taken minority voters into account when redistricting and at the polls. Voting participation by blacks and other minorities has risen significantly as has the number of minority elected officials. Valelly acknowledges that the VRA has encountered "friction and weak spots," but assumes that the political environment will maintain VRA hegemony in perpetuity.[23]

However, the "friction and weak spots" noted by Valelly are far more serious than he suggests. These tensions have developed and congealed into the existence of a strong conservative coalition, which over time has resisted the Act and gained control of the adjudicating ideology of the Supreme Court. The backlash has developed more slowly than was the case during the First Reconstruction, but it is no less detrimental. Since 1965, conservatives have worked a "long game" to influence the national governmental branches that implement the law. While a winning outcome of this offensive was by no means guaranteed, it has exercised a consistent influence, grown significantly, and gained strength. As a result, the future of the VRA is uncertain and at this moment, the legislation arguably wobbles and teeters on the edge of collapse.

The 2013 *Shelby v. Holder* decision struck at the heart of the VRA by essentially removing the power of the Section 5 preclearance provision. As Woodward warned representatives on the floor of Congress in 1981, the removal of the VRA's preclearance power weakens the legislation significantly and could open the door to racially discriminatory voting legislation by states. Recent challenges by states against the VRA

[23] Ibid.

have arguably been designed to discriminate against voters based on race. The Supreme Court decision in *Shelby* appears to have accelerated that process.[24]

Statement of the Argument. Conservative opposition existed prior to the passage of the VRA and has existed since, but its partisan center has shifted dramatically. During the years between 1965 and today, conservatives have persistently, even systematically, resisted the VRA. Conservatives have reframed their original hackneyed and unpersuasive arguments, which justified race discrimination, into "colorblind" arguments, which seem persuasive, commonplace, and have the patina of fairness. This ideological move has been generated by Republican leaders and institutions allied with the party, including conservative think tanks. Conservatives have thus managed to shift the onus of defending racial distinctions onto their liberal foes. During this period, conservative ideologues have influenced Republican presidents in particular on the VRA, expressed their opinions and postured in Congress, and slowly but surely gained influence over the Supreme Court's consideration of the VRA. This dissertation seeks to answer the questions: Has the conservative movement against the VRA undermined the law? How has the development of a conservative movement against the VRA affected the implementation of the VRA by the national government? Is the effect of the conservative movement at the federal level akin to the activity that caused the end of similar legislation during the First Reconstruction? What are the implications of these questions for the black electorate? To answer these questions, my research examines the conservative influence on the executive, legislative, and judicial branches between 1965 and 2013.

[24] Texas and North Carolina immediately enacted voting law changes denied preclearance by the DOJ in response to the *Shelby* decision.

I hypothesize that the GOP-conservative influence on the national government has resulted in the placing of limitations on the legislation, culminating in a decrease in VRA implementation and enforcement. These actions have made the VRA less effective at controlling state efforts to discriminate against voters based on race.

Chapter Preview. This dissertation consists of six chapters, including the Introduction and a Conclusion. The second chapter is a history of voting rights in the United States between 1850 and 1970.[25] The third, fourth, and fifth chapters look at the development of the influence of conservatism on the federal government and the VRA in, respectively, Congress, the executive branch, and the judiciary between 1970 and 2013.

The history chapter relies on secondary literature dealing with conservative resistance and full enfranchisement, states' rights, Reconstruction, and the Jim Crow period. The historical section will establish the ongoing existence of two political orders with a stake in voting rights, a VRA Order, committed to increasing minority voter access and representation, and a partisan-based, conservative resistance now dedicated to colorblind conservatism. The chapter is designed to provide the reader with an understanding of the difference between the Jim Crow voting order and the VRA Order, to provide a basis for the motivation of the proponents of the two orders, to show the impact each order has on the relationship between the states and the national government, and to provide a demonstration of the intercurrence principle, discussed above.

The remainder of the dissertation is designed to examine closely the rhetoric, actions, and impact of conservatism on each of the national branches in their treatment of the VRA between 1970 and 2013. In the successive chapters covering Congress, the

[25] The history chapter outlines voting orders through the end of the Johnson administration. The dissertation considers the influence of conservatism on the federal government's administration of the VRA from 1970-2013.

executive branch, and the judiciary, I will consider the rhetoric and actions of each branch to assess how conservative resistance to the VRA translated into or failed to translate into authoritative measures that negatively impacted the enforcement of the VRA. I will demonstrate that due to the influence of conservatism, support for the VRA has waned over time in all three branches. I will argue that in fact, the development of the response by each national branch to the VRA has not been linear or continuous, but has followed a more nuanced and circuitous route influenced by unique powers and limitations of the branches of government and the social and political contexts of each administration.

The executive branch chapter will consider whether executive support for the VRA has declined steadily since 1970, regardless of the party affiliation of the executive. My analysis will confirm that Republican presidents have been more resistant to the VRA than the Democratic presidents during the relevant time frame. Nevertheless, because partisan conservative resistance to the VRA has grown more acceptable over time, even Democratic presidents, including Barack Obama, the nation's first black President, have signaled less enthusiasm for, or enforced the Act to a lesser degree, than did President Lyndon Johnson. It is also the case that Republican presidents serving during time periods dominated by a liberal consensus in support of the VRA were more supportive of the law than some of the Democrats. I rely on Department of Justice (DOJ) statistics showing enforcement rates for the VRA, statements by Attorneys General before Congress, news reports, and secondary material in the form of biographies, law review articles, and journal articles. The chapter addresses executive directives to the DOJ,

renewal activity, and civil rights policy and statements, as well as relevant appointment activity and DOJ statistics.

Congress has renewed and expanded the VRA each time it has come up for reauthorization, but I seek to show that the legislative success of the VRA by roll call vote masks significant resistance. Specifically, I argue that the partisan Republican campaign against the VRA has adopted different ideological themes during reauthorization debates, and that the newer themes and arguments have gained traction in the form of increasingly robust dissent. To establish a path of ideological themes, I review roll call votes and testimony from the Congressional reauthorization hearings in 1970, 1975, 1982, and 2006, and use journal and law review articles about Congress and the VRA. The purpose will aim to identify arguments waged against the VRA by its opponents and to illuminate action taken by these opponents to decrease the effectiveness of the VRA or to overturn its temporary provisions. My work will demonstrate that debate has become more contentious at each reauthorization session due to the passage of time and resultant fading of the memories of Jim Crow, the improvements in voter access and minority electoral success, and the increased salience of colorblind conservative argumentation.

Judicial support of federal legislation is one of the main criteria for the success of voting rights legislation, according to Valelly. I seek to document the declining support for the VRA-defined voting rights order by the judiciary since 1970. I will consider relevant Supreme Court cases that span the time period. I propose to demonstrate that changes in the Court's membership by Republican appointments have increased judicial support for colorblind conservatism and opposition to the VRA. My work will trace the

incremental shift from complete assent in 1966,[26] to significant doubt,[27] to outright dissent on the constitutionality of the VRA's temporary provisions by 2013.[28]

These substantive chapters on the national government will be followed by a conclusion. The conclusion will summarize my findings and offer suggestions for further research.

[26] See *South Carolina v. Katezenbach*, 383 U.S. 301 (1966).
[27] *North Austin Municipal District No. 1 v. Holder*, 557 U.S. 193 (2009).
[28] *Shelby v. Holder*, 133 S. Ct. 2612 (2013).

Chapter 2
History of Voting and Race in the United States 1776-1965: Expansion and Contraction

In this chapter, I will illustrate the state of race-based voting law and practice in the United States prior to the adoption of the Voting Rights Act. The VRA ushered in a period in the United States where black Americans could vote, unmolested by state government intervention. This was a significant change from the period preceding the Voting Rights Act, during which states systematically restricted blacks from voting based on race. The Act establishes a bright line between the large-scale enfranchisement of blacks and the denial of that right. Because of that bright line, I will refer to race-based voting laws and practice before the VRA as occurring during the "Pre-Modern Period" and assert that the VRA introduced the "Modern Period." In this chapter, I divide the Pre-Modern period into intercurrent voting orders, describe the development of voting laws and practice and provide context for the later discussion of the influence of conservatism on the national branches in their enforcement of the VRA.

The Pre-Modern Voting Regime, encompassing the years 1776-1965, is characterized by the denial of black enfranchisement by state governments[29] and minimal interference by the federal government. However, within the Pre-Modern Voting Regime, there was an expansion and contraction of black voting rights. Orders represent periods of stasis during which regulation of black enfranchisement has definable characteristics that differ from prior and subsequent periods. The Pre-Modern Voting Regime can be divided into three orders, viz. The Establishment Voting Order (EVO)

[29] This includes the period of Radical Reconstruction. During that period, large numbers of blacks were registered, voted, and ran for office. Nonetheless, state governments resisted this aspect of the Reconstruction fiercely via their effort to restrict the black franchise; therefore, I describe the entire period as characterized by the denial.

lasting from the country's founding through the end of the Civil War; the Reconstruction Voting Order (RVO), including the period of Radical Reconstruction; and the Jim Crow Voting Order (JCO), which runs from the late 1800s until 1965.

The EVO, 1776-1863, is characterized by state control of the franchise and the denial of the right to vote based on class and race. During this period, there was an initial expansion of black voting rights and a subsequent contraction of those rights as the country progressed. In the late 1700s, the federal government worked toward ending slavery and providing the right to vote to blacks. For example, in 1780, Congress banned slavery in the federal territories. In 1794 slave exportation was banned, as was importation in 1808. "In fact, more progress was made to end slavery and achieve civil rights for blacks in America than was made by any other nation in the world."[30] Most but not all states denied the franchise to blacks. States that did allow blacks to vote overturned their laws as the century progressed and as slavery compromises between the Northern and Southern states collapsed. In 1820 the Missouri Compromise sanctioned slavery in the territories; in 1850, a Fugitive Slave Act was passed. In 1854, the Kansas Nebraska Act opened the possibility of slavery in the Western states. States reversed their voting laws and prohibited blacks from voting. For example, Maryland ended the black franchise in 1809 and North Carolina in 1835.[31]

Legal recognition of slavery and the expansion of the institution were important to the contraction of black voting rights. The black slave labor system yielded major economic benefits to slave and non-slave states alike and required the subordination of

---

[30] Cobb, Thomas R.R. *An Inquiry into the Law of Negro Slavery in the United States of America* (Philadelphia: T. &T.W. Johnson and Co., 1858), 153, 163, 169.
[31] Hancock, John. *Essays on the Elective Franchise*; or *Who Has the Right to Vote*? (Philadelphia: Merrihew & Son, 1865), 22-23.

blacks. Slave states denied the right to vote as part of a package of repression to maintain the chattel system. Free states denied the right to vote as part of the social hierarchy, which discouraged black citizenship as part of often myriad efforts to dissuade blacks from taking up residence in their states. The denial of the franchise was codified in state constitutions, supported by the U. S. Constitution, and well accepted as part of the social order in both Southern and Northern states.

The Constitution does not provide an affirmative right to vote. Under Article I, the Constitution leaves the administration of the franchise to the states. Section 4 provides that the federal government may take control over federal elections in the event that Congress is dissatisfied with state regulation, but in general, the administration of elections is not an express or implied right of Congress. Furthermore, states were empowered to conduct elections under the 10th Amendment police powers, which reserved rights for states to control law enforcement, marriage, education, and voting. During the EVO, the federal government did not interfere with state denial of the franchise to blacks. The second-class status of blacks was implied by the Constitution, and it provided neither recourse for blacks denied the right to vote nor power for the federal government to provide relief for such a denial. At no point was the federal government persuaded to intercede in state laws, based on arguments made by founding fathers, or white and black abolitionists, who attempted to persuade the federal government to intervene.

White supremacy developed during the 1800s in conjunction with the expansion of slavery and the subordination of blacks. White supremacist ideology included anti-black franchise arguments. Common parlance dictated that blacks were not citizens and

that they were less human than whites. These arguments were supported by eugenic evidence. Blacks were deemed incapable of being responsible or knowledgeable voters. White supremacist arguments provided a cultural base from which to launch social reprisals against blacks who attempted to register or vote and against those who took the vocal position that blacks should be able to vote. The arguments also provided a foundation for the legal denial of the franchise by state governments.

By the 1850s, slave and free state compromise had all but collapsed. The 1857 *Dred Scott* decision that Congress could not control slavery in the territories alarmed northern states, who were particularly concerned about the response of the Buchanan administration to the decision. Southern states maintained ongoing concern about the viability of slavery in the United States, and grew extremely concerned when the anti-slavery Republican Party elected a president and earned a majority in Congress. South Carolina hardliners provoked that state to secede from the Union after the election. Nine states followed. The Civil War ensued. The ongoing free state/slave state conflict led the nation to war and eventually to federal intervention into the institution of slavery. Federal intervention resulted in black citizenship and subsequently opened the franchise to blacks.

The outcome of the Civil War changed the relationship of the federal government to black civil rights and to the black franchise. Abraham Lincoln abolished slavery in Washington D.C. and issued the Emancipation Proclamation. Although the proclamation did not have the force of law in the Confederacy, it precipitated the end of the slave system nonetheless. To end slavery officially and permanently, Lincoln proposed and supported the passage of the 13th Amendment. By emancipating blacks, Lincoln ended

the "social death" caused by designation as a slave. Citizenship followed relatively quickly, emerging as a result of the 14th Amendment and a series of Civil Rights Acts.

The 14th Amendment stipulated that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person within its jurisdiction the equal protection of the laws."[32] This is the first appearance of language in the Constitution that specifically obligates states to respect the citizenship of blacks inside their borders. The 13th and 14th Amendments provided a foundation for the establishment of the black franchise.

Black voting quickly became a contested post-war issue. The presidents (Lincoln and Andrew Johnson) and Congress divided over black enfranchisement and whether it should be required of the Southern states to earn readmission to the Union. The relationship of the political parties in Congress was changed as a result of emancipation, and Southern Democrats gained seats as a result of the expansion of their electorate. The Republican Party was eager to gain a foothold in the South to neutralize the homogeneous power of Southern Democrats and to prevent the Southern gentry from regaining power it held prior to the war. As a result, Radical Republicans in Congress pushed hard to require that the South grant the franchise to blacks before readmission.

Presidents Lincoln and Johnson disagreed. The presidents prioritized restoring the Union. Reconstruction plans offered by the presidents did not include a requirement that states enfranchise black voters. Lincoln pledged to recognize any state government where 10% of the number of individuals who voted in the 1860 presidential election took an amnesty oath. President Johnson continued the Lincoln approach. He pardoned many Southern landowners who retook control of state governments, confiscated land

[32] U.S. Const. amend. XIV.

dispensed to blacks by the Freedman's Bureau, and refused Congressional urging to require that states adhere to the 14th Amendment dictates on voting. The Amendment did not provide an affirmative right to vote but did order a reduction in the size of the voting delegation of any state that "denied to any of the male inhabitants of such State…reduced in proportion [to the number of men excluded by the state to the whole number of citizens]."[33] Radical Republicans vied with Lincoln and Johnson over the proper contours of Reconstruction.

Radical Republicans gained control of Congress in 1866 and instituted their Radical Reconstruction program in 1867. Congress replaced civilian governments with U.S. Army occupation authority. The army governments conducted elections. Blacks voted in the elections while former Confederates were excluded from the ballot box and prevented from running for office. Integrated legislatures acted to provide the franchise to blacks, to protect those rights by revising state constitutions, and to pass legislation to prohibit segregation, to establish public education, and to open public transportation, state police, and other institutions to blacks.[34] Blacks were elected to local and state legislatures, state and local offices, and to Congress.

During Radical Reconstruction, Southern Democrats resisted black inclusion and the black franchise vociferously. Southern Democrats wielded intimidation, violence, black codes, and economic reprisals to prevent blacks from political participation.

[33] U.S. Const. amend. XIV.
[34] Barton, David, "The History of Black Voting Rights," as reposted in *Wall Builders,* March 3, 2003*,* accessed March 2015, http://www.wallbuilders.com/libissuesarticles.asp?id=134.

Democratic veterans established the Ku Klux Klan to overthrow Republican dictates and pave the way for Democrats to regain control.[35]

The worst instance of racial violence on record during Reconstruction was waged over objection to black electoral participation. During the 1866 Colfax Massacre, Southern Democrats slaughtered blacks and black sympathizers at the state Republican Convention in Colfax, Louisiana, killing forty blacks, twenty whites, and wounding one hundred fifty people.[36] In the wake of this attack, the Supreme Court held in *United States v. Cruikshank* (1870) that the Enforcement Acts of 1870, designed to punish vigilante violence like that meted out at Colfax, did not apply because the alleged offenders were not state representatives nor were they acting under color of state law.

In response to the massacre, Radical Republicans continued to work to protect black voting rights. Spurred by the intense and ongoing resistance of Southern Democrats, and concerned about how narrowly Ulysses S. Grant was elected to the presidency in 1868, Radicals proposed and passed the 15th Amendment. Although blacks are not mentioned specifically in it, the Radicals intended that the amendment serve to protect the franchise of voters regardless of "race, color, or previous condition of servitude."[37] Southern Democrats continued to resist. The passage of time and the resistance of Southern Democrats eroded Republican support for Radical Reconstruction. Northern Republican support also waned, setting the stage for party compromise in 1876.

When presidential candidates Rutherford B. Hayes and Samuel J. Tilden tied for the post, the parties agreed that in exchange for the removal of military authority in the

---

[35] Smalley, Eugene V. *A Brief History of the Republican Party: From its Organization to the Presidential Campaign of 1884* (New York: John Alden Publishing, 1884), 49-50.
[36] "The Riot in New Orleans," *Harper's Weekly*, Aug. 25, 1866.
[37] US Const. amend. XV.

states where it remained (Louisiana, South Carolina, and Florida), Republican Hayes would be granted the presidency. The agreement ended Radical Reconstruction and returned Southern Democrats *en masse* to Congress. The number of enfranchised blacks, particularly in the South, declined precipitously. Blacks were purged from the voter rolls, refused and removed from office, and excluded from polls in local, state, and federal elections. The compromise ended federal intervention into black electoral participation in the South.

The end of Radical Reconstruction legislation and enforcement of the Reconstruction amendments were facilitated by the Supreme Court. Post-Reconstruction decisions weakened future efforts to enforce the right to vote.[38] In the *Slaughter House Cases* (1873) the Court interpreted the 14th Amendment "privileges and immunities" clause as extending only to the federal government. The Court held in practice that the 14th Amendment did not restrict state enforcement of their police powers. The Court noted that the 14th Amendment was designed for the protection of former slaves, yet the limitations imposed on the amendment by the Court allowed discrimination against former slaves.[39] *U.S. v. Reese* (1878), the Court's first voting rights case under the Enforcement Acts of 1870, held that the 15th Amendment did not provide the right to vote; instead it prevented discrimination against those who were granted the right to vote by the state. The *Reese* decision also held that the section of the Enforcement Acts at issue was unconstitutional because it exceeded the scope of the 15th Amendment. These

[38] Frymer, *Uneasy Alliances,* 63.
[39] *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

cases provided a legal foundation for state to deny the right to vote in contravention of the Reconstruction Amendments.[40]

The Court continued to publish decisions that interfered with efforts by blacks to maintain citizenship and access to the franchise. The Civil Rights Cases (1883) struck the Civil Rights Act of 1875, which entitled individuals to the use of public facilities. The Court held that the legislation was beyond Congressional authority under the 14th Amendment, which applied to the states and not to private individuals.[41] But, in *Ex Parte Yarbourgh* (1884), the Court ruled that Congress did have the authority to pass the Enforcement Acts of 1870 and individuals did not have standing to interfere with voting in federal elections.[42] Nonetheless, in *Plessy v. Ferguson* (1866), the Court legitimized the "separate but equal" doctrine, which provided a legal foundation for the burgeoning Jim Crow regime. The Court ruled that as long as accommodations were equal, they could be separate.[43] Ironically, the dissent in *Plessy* established the basis for colorblind constitutionalism, at issue in this dissertation.[44] In *Williams v. Mississippi* (1898), the Court held that the states' administration of poll taxes and literacy tests were not discriminatory, because they were requirements imposed on all voters.[45]

The 1876 election of President Hayes began a "let alone" policy in the South.[46] Federal troops were removed and Hayes extolled the virtues of states' rights in spite of a high rate of white-on-black violence in the Southern states. Hayes was urged to seek the support of Southern Whigs, which he did in part to move the Republican Party away from

[40] *U.S. v. Reese* et al., 92 U.S. 214 (1876).
[41] *The Civil Rights Cases*, 109 U.S. 3 (1883).
[42] *Ex parte Yarbrough*, 110 U.S. 651 (1884).
[43] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[44] *Plessy*, dissent by Justice John Marshall Harlan.
[45] *Williams v. Mississippi*, 170 U.S. 213 (1898).
[46] Frymer, *Uneasy Alliances*, 63.

its affiliation with blacks. Enfranchised blacks remained Republican and disenfranchised blacks could be recruited to the party easily if solicited. Hayes did seek federal funding to enforce the right to vote for blacks but did not push the issue when support was denied. Paul Frymer argues that if Hayes had been able to secure funding, Republicans may well have been able to muster a Southern presence and Republican majorities in Congress in 1878. Hayes opted not to court black voters and instead focused on gaining the support of "disgruntled Southern white Democrats."[47]

As indicated above, *Plessy v. Ferguson* heralded the beginning of the Jim Crow Voting Order (JVO). The JVO persisted for over seven decades, from 1880 to 1965. The vast majority of blacks were barred from voting, and civil rights movements were largely unsuccessful. Denial of the right to vote took on a heightened importance in local social structures and in the relationship between states and the federal government. States desired, in particular, to exercise the right to set voter qualifications and to discriminate at the polls. The national government acquiesced to state control of the franchise and its limitations on black voters. Jim Crow regulations also applied in Washington D.C., the seat of the federal government.

The failure of the federal government to interfere with state voting regulations was in large part due to the inability of civil rights activists to pass legislation in Congress. Southern Democrats maintained significant power in Congress during the Jim Crow period. Once they returned to Congress after Reconstruction, Southern Democrats continued their domination of the South, held seats that were uncontested in state elections, and gained seniority. Seniority allowed Southern Democrats to attain control of committees important to preventing federal intervention in the JVO. Southern Democrats

[47] Ibid., 65.

blocked the passage of federal legislation that would provide benefits and protections to blacks. Democrats systematically denied passage of civil rights bills including anti-lynching provisions, integration efforts, and grants of public benefits. The legislative bottleneck made civil rights gains impossible. Because of this state of affairs, the NAACP was motivated to shift their focus away from its legislative program to one that focused on the courts.

Presidents after Hayes eschewed taking action to establish the franchise for black Americans until Harry Truman's effort in the 1940s. While presidents took some action on civil rights, action, which in some cases contributed to the effort toward the black franchise, no president after 1876 and before the 1940s made legislative efforts to secure the franchise for blacks. Presidents named blacks to federal posts, and sought the counsel of individual blacks like Booker T. Washington, but did little to provide benefits and protections on a grand scale. Those benefits that were established by presidents, like the New Deal, were strategically written to exclude blacks.

Truman prized civil rights and began during his presidency to push for civil rights reform. In 1946 Truman established a President's Committee on Civil Rights. On February 2, 1948 Truman delivered a "[d]aring civil rights speech to a joint session of Congress where he urged a civil rights package that included protection against lynching, better protection of the right to vote, and a permanent Fair Employment Practices Commission."[48] But little civil rights legislation actually resulted from Truman's call to action. The Congress, led by Southern Democrats, successfully opposed Truman's recommendations. Truman did use his executive power to end discrimination in federal

[48] Truman, President Harry S. "Special Message to the Congress on Civil Rights, February 2, 1948," *The American Presidency Project*, accessed March 2015, www.presidency.ucsb.edu/ws/?pid=13006.

employment and to end segregation in the U.S. military.[49] Indeed, the U.S. military played perhaps an unintended role in black efforts toward empowerment. Black participation in WWII had helped to fuel the civil rights movement, since black American veterans, having generally distinguished themselves in war as well as having encountered European societies less overtly hostile to blacks than in America, resented the poor treatment they encountered on their return to the United States. Blacks began to demonstrate against and to resist Jim Crow laws more actively.

The civil rights movement picked up steam in the 1950s. Martin Luther King, Jr. led the Montgomery Bus Boycotts in 1956. The civil unrest that resulted from civil rights action repeatedly became issues that demanded presidents' attention. Civil rights unrest prompted several executives to take action that further fueled the civil rights effort, and secured the civil rights movement's place on the national and international stage. President Eisenhower sent federal troops to Little Rock, Arkansas, in 1957 to assist black students enrolling at Little Rock High School. Subsequently, the president felt compelled to address the issue of black voting rights. He signed the Civil Rights Act of 1957 to provide voting rights protections, the first civil rights bill since Reconstruction.

The Civil Rights Act of 1957 established both a Civil Rights Commission to investigate voting irregularities and a Civil Rights Division in the Justice Department. The bill empowered the Attorney General and individuals to initiate litigation to provide relief for voting violations and trial by jury for registration obstruction. The power of the legislation was weak, limited by the influence of Southern Democrats in Congress. Ultimately, Eisenhower's actions produced little change in voting in the Jim Crow Voting Order.

[49] Executive Order no. 9981, *Desegregation of the Armed Forces*, (1948).

Eisenhower tried again in 1960. Seeking to fill holes in the Civil Rights Act of 1957, the president proposed a bill that assigned stronger penalties for registration and voter obstruction as well as establishing a civil rights commission. Again, the legislation did nothing to impact the status quo. Southern state governments continued to exclude black voters from registration and maintained segregation of schools and public facilities. Eisenhower urged Congress that "every individual regardless of his race, religion, or national origin is entitled to equal protection of the laws."[50] Cumulatively the civil rights acts passed under Eisenhower did improve black voter registration by 3%,[51] though neither bill made a significant impact on voter registration or ballot casting by southern blacks. Nevertheless, the legislative effort was important precisely because it established the White House as a civil rights advocate, helped to develop bipartisan support for black voting rights, and strengthened the platform for civil rights legislation to follow.

President Kennedy was also not motivated to take federal action until forced by incidents of civil rights unrest that he felt he could no longer ignore. Kennedy refused to send federal help to civil rights activists in a number of instances, but he was inclined to respond after a couple of high-impact events occurred. In September 1962, the president sent US Marshals to accompany James Meredith to register at the University of Mississippi by Supreme Court order. In April 1963, Martin Luther King Jr. was jailed while demonstrating in Birmingham, Alabama. In May 1963, Bull Connor ordered Birmingham police to use dogs and water hoses against demonstrators. These events brought national attention to segregation in the South. On the same day that Bull Connor refused to admit black students to the University of Alabama, June 11, 1963, the

[50] Miller, James A. "An Inside Look at Eisenhower's Civil Rights Record," *The Boston Globe*, Nov. 21, 2007.
[51] Ibid.

president sent the National Guard to Tuscaloosa and proposed a major civil rights bill to Congress.[52] The bill included voting protections for blacks. Kennedy's assassination in November 1963 made passage of the legislation during his term impossible.

President Johnson used the national grief from Kennedy's assassination to fuel momentum toward furthering the legislative effort for a comprehensive civil rights bill in 1964. Johnson was able to garner bipartisan support and push the bill through Congress. The 1964 act "outlawed discrimination based on race, color, religion, sex, or national origin."[53] Title I of the Act forbade discrimination in registration and voting, and outlawed literacy tests. The Act established a Commission on Equal Employment Opportunity to enforce equity in federal employment.[54] However, the Act did not provide a remedial alternative to that provided by the Civil Rights Acts of 1957 and 1960. Litigation remained the sole method to seek remedial action in voter discrimination cases under the Civil Rights Act of 1964. Accurately described as "the most sweeping civil rights bill passed in a century," the Civil Rights Act of 1964 ironically did not include provisions to prevent states from imposing discrimination at the polls and it did not significantly improve black voter registration or participation.

The civil rights community continued to push forward on the right to vote. Civil rights leaders pressured President Johnson for a comprehensive voting rights bill. Johnson refused. He deemed the request for a voting rights act, so close on the heels of the sweeping Civil Rights Act, unrealistic and unreasonable and asked the black community to be patient. Nonetheless, the president proposed a bill after the violence

[52] Smith, Kathy B. *The White House Speaks*, (Westport, CT: Greenwood Publishing Group, 1994),148.
[53] Civil Rights Act of 1964.
[54] "John Kennedy and Civil Rights," *History Learning Site*, accessed March 2015, http://www.historylearningsite.co.uk/john_kennedy_and_civil_rights.html.

undertaken by state actors against civil rights demonstrators on a march from Montgomery to Selma, Alabama in 1964. Following an international response to the event, whose horrors were televised around the world, the president gave a speech in support of a voting rights bill to Congress and submitted a proposal.

After the turn of the twentieth century, the Supreme Court had become a more reliable source of civil rights protection than the legislative or executive branches. The process was gradual and not absolute, but many of the Court's voting rights decisions did benefit petitioners seeking inclusion. The Court also encountered a subject matter shift during the Franklin Delano Roosevelt administration. The opinion of the Court gradually changed from non-interventionist and pro-states' rights to one more concerned with the enforcement of the Bill of Rights and the preservation of human and civil rights. In voting rights cases, the Court increasingly made federal intervention more the rule than the exception.[55]

However, the Supreme Court's voting rights decisions did not have an immediate democratizing impact on the franchise. Most of the Court's decisions did not prevent voter discrimination. States and political parties would just pick an alternative method to discriminate against voters. In *Guinn v. United States* (1915), the Court ruled that the grandfather clauses in the Maryland and Oklahoma constitutions violated the Fifteenth Amendment.[56] The decision voided provisions in the constitutions of Alabama, Georgia, Louisiana, North Carolina, and Virginia. In response, the Oklahoma state legislature replaced the grandfather clause with a new statute that allowed discrimination. The

[55] Wicker, Tom. "Johnson Urged Congress at Joint Session to Pass Law Insuring Negro Vote," *New York Times*, March 15, 1965.
[56] *Guinn v. United States*, 238 U.S. 347, 358 (1915).

second statute was subsequently struck down, but not until 1939, in *Lane v. Wilson*.[57]

In 1927, the Court ruled in favor of the plaintiff, Dr. L.A. Nixon, when he challenged a Texas state law that prevented him from voting in a Texas primary under the 14th and 15th Amendments.[58] In response to the decision, the Texas legislature adapted a new rule to an existing one that allowed political parties to "in [their] own way determine who shall be qualified to vote."[59] Nixon was once again denied the right to vote under the new rule based on his race, and he sued again. The Court struck down this new rule 5-4 to say that the Democratic executive committee was acting under a grant of state power. State officials, were not allowed to delegate official functions in such a way as to discriminate invidiously between white citizens and black.[60] The Court did not deal with Nixon's claims under the 15th Amendment.

Because the Democratic Party dominated the political systems of all the Southern states after Reconstruction, its state and local primary elections usually determined which candidate would ultimately win office in the general election. Thus, any voters excluded from the Democratic primary were effectively excluded from exercising any meaningful electoral choice. The Court did not provide protection for private action, however. After the *Nixon v. Condon* decision, the Texas Democratic Party adopted a rule banning blacks from primary elections. A Texas resident, R.R. Grovey, sued under the 14th and 15th Amendments. The Court held unanimously that the party rule was constitutional, the

[57] *Lane v. Wilson*, 307 U.S. 268 (1939).
[58] *Nixon v. Herndon*, 273 U.S. 536 (1927).
[59] *Nixon v. Condon*, 286 U.S. 73, 82 (1932).
[60] Ibid., at 73.

party was a private organization, which unlike the state, could discriminate against black voters.[61]

The Court eventually changed its position in *Grovey*, eleven years later in *Smith v. Allwright* (1944), another Texas primary case. In *Smith*, the Court overturned the Texas state law that allowed the Democratic Party to set internal rules. The Court held that by delegating its authority to the state party, the state allowed discrimination. Justice Reed explained, that a state cannot "permit a private organization to practice racial discrimination [in elections]."[62] By 1944, the Court had shifted from issuing decisions that established a legal foundation for Jim Crow to regularly issuing decisions that upheld racial equality under the 14th and 15th Amendments, both in public and in private organizations exercising state functions.

In 1954, the Court unanimously ruled that segregation in public education violated the 14th Amendment.[63] The *Brown v. Board of Education* decision did little to motivate integration, but it did establish a moral imperative that contributed to changing attitudes about segregation. The decision also reflected the strong degree to which the Court had become committed to individual rights. The Court applied the 15th Amendment similarly. In 1960 in *Gomillion v. Lightfoot*, the Court held that an Alabama electoral district, drawn with the purpose to disenfranchise black voters, violated the 15th Amendment. The Alabama legislature drew a twenty-eight-sided district, excluding all but a few potential black votes. According to the Court, Alabama's representatives were

[61] *Grovey v. Townsend* , 295 U.S. 45 (1935).
[62] *Smith v. Allwright*, 321 U.S. 649, 664 (1944).
[63] *Brown v. Board of Education* (1954).

unable to identify "any countervailing municipal function," which the redistricting was designed to serve and concluded that the sole reason for the district lines was race.[64]

The Court also became more interested in equality in the electorate in general. In *Baker v. Carr* (1962), the Court ruled that redistricting was not a political question and that the Court could evaluate it. As such, the Court ruled on the Tennessee redistricting law that arguably ignored significant growth and population shifts in the district. Two years later, in *Reynolds v. Sims* (1964), an Alabama lawsuit based on the principle of "one person, one vote," the Court held that state legislature districts need to be roughly equal in population. The decision affected many state legislatures that up to that point had not redistricted to take account of population growth disparities in districts.[65] These cases are an aside to the race voting cases, but they do reflect the development of the Court's jurisprudence that increasingly put value on equal access to the franchise. In short, the Court was prepared by the time the VRA was passed to support its unique method of federal intervention and purpose to expand and democratize the electorate. The Court initially supported the Act, much to the benefit of the VRA Order.

All three of the Pre-Modern voting orders described above were characterized by both the exclusion of the black voter from the franchise and by minimal interference by the federal government. Blacks were granted the right to vote after the Civil War, but the period during which blacks exercised the franchise was characterized by strong resistance from Southern Democrats, who restricted Southern blacks from voting after Reconstruction, and for a long period after power was effectively returned to the Southern gentry. The Southern effort was assisted greatly by these Southern Democrats

[64] *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).
[65] *Reynolds v. Sims*, 377 U.S. 533 (1964).

who wielded significant power in Congress and wielded the power to block all civil rights measures that would provide federal intervention. The development of the civil rights movement and the agreement of the executive branch to encourage legislative changes to eliminate voter discrimination eventually culminated in the Voting Rights Act.

Chapter 3
Congress: The Conservative "Long Game" and the VRA

Congress passed the VRA in 1965 and has reauthorized it, including its controversial temporary provisions, four times. Each of the final roll call votes approving the legislation in the House and the Senate garnered strong majorities.[66] However, roll call votes on the VRA or its renewal mask significant and consistent dissent in Congress. Each time the VRA has been considered, dissent has been expressed in one or more ways including: (1) argumentation against the Act; (2) the exercise of delay tactics to prevent consideration of a reauthorization bill; (3) the use of delay tactics to slow or stop deliberation over reauthorization; (4) the maintenance of a space for dissent against the Act, even during the height of the liberal consensus.

These elements have been present at each reauthorization of the VRA. The dissent, both tactical and argumentative, over the life of the Act establishes that the VRA has always commanded less than the full support of Congress. Strong legislative dissent, even though it has failed to prevent reauthorization, has been steady and contributed to the development of increasingly effective opposition to VRA enforcement. This matters because to remain operational and effective at protecting minority voters, the VRA needs the willing support of all three branches of national government. The consistent conservative dissent against the VRA has established Congress as a space in which dissent against the Act can be expressed and developed, and this dissent has had a negative impact on the VRA.

[66] Final roll call votes approving the reauthorization of the VRA have included large majorities in favor of reauthorization in the House and the Senate at each of the four reauthorizations. The roll call votes indicate strong, bipartisan support by Congress for the VRA.

The 1970 Reauthorization: Get the Monkey Off Our Backs. The Voting Rights Act experienced well-publicized success in its first five years. Registration of "nearly one million voters was recorded,"[67] accompanied by a strong increase in the number of blacks elected to office.[68] Because the VRA appeared to work, conservatives in Congress anticipated the possibility of securing the repeal of Section 5 as early as 1970, when the temporary provisions first came up for reauthorization. Harry Dent (SC), the then Republican Party Chairman and a key Congressional proponent of Nixon's Southern Strategy, remarked at a meeting of the Southern GOP state chairmen that "the Voting Rights Act looks like it's coming along pretty good so that the monkey will be off the backs of the South."[69] Dent's comment revealed that conservatives in 1970 were anxious to escape VRA coverage even though the legislation had not been fully enforced and had not achieved all of its aims.

Ironically, the apparent success of and publicity surrounding the Act masked much evidence of its actual failure. Proponents of reauthorization cited the unpublicized record of unsuccessful aspects of the VRA program as support for the argument that the temporary provisions of the VRA ought to be renewed. In 1970, neither black voter registration nor turnout had reached parity with the corresponding situations for white voters. Civil Rights Commission member Frankie Freeman explained, "[A]lthough black

[67] Laney, Garrine P. *The Voting Rights Act of 1965, as Amended*: *Its History and Current Issues* (Nova Science Publishers, Inc., New York, 2008), 19.
[68] Hannah, John A., et al., *U.S. Commission on Civil Rights, Political Participation* (Washington D.C.: U.S. Government Printing Office, 1968).
[69] Panetta, Leon E. and Peter Gall. *Bring Us Together: The Nixon Team and the Civil Rights Retreat* (Lippincott, first edition, 1971), 106.

voter registration is much higher now than it was before the passage of the Voting Rights Act, it still lags well behind white registration in all of the States covered by the act."[70]

Reauthorization proponents produced a bevy of witnesses in Congress to highlight what positive developments there were, to help make the case for reauthorization of the temporary provisions of the VRA. Also, proponents asserted that reauthorization was necessary because the work the Act was intended to do was not complete, and in fact it was hindered by various ongoing state actions.

During the 1970 reauthorization hearings, the Nixon administration led the conservative backlash against reauthorization of the temporary provisions in the House of Representatives. Attorney General John Mitchell pitched an alternative to the simple five-year renewal bill sponsored by Emmanuel Cellar (NY-D), and pushed the alternative bill from the House Judiciary Committee to the floor. The Mitchell bill appealed to conservatives. It called for a limited three-year extension of the Act, removal of the Section 5 preclearance provision, and an end to the use of the 1964 presidential election as the Section 5 trigger for coverage.[71] Republicans in general and Southerners in particular supported the Mitchell bill and worked to secure it as the House bill. Conservatives used delay tactics to help protect the bill. William Colmer (MS-D), a conservative and Chairman of the House Rules Committee, dubbed the Cellar Bill the "civil wrongs bill" and held it up for four months in the Rules Committee, releasing it

[70] U.S. Senate. Subcommittee on "Constitutional Rights of the Committee on the Judiciary." 1969 – 1970, Mrs. Frankie Freeman; Bills to Amend the VRA of 1965. 91st Cong., 1st and 2d Sess.,30. Freeman explains in her testimony before the Senate Subcommittee on Constitutional Rights in 1969 that "…there are many individual counties where black registration is especially low." In Alabama, less than half of black voters were registered in twenty-seven of sixty-seven counties; in twenty-four Mississippi counties, black registration was less than half; and fewer than 50% of black voters were registered in most South Carolina counties.

[71] May, Gary. *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* (City, ST: Duke University Press, 2014), 204.

only under the condition that it would be amended to "reflect the proposals embodied in the Mitchell bill."[72] House representatives voted 208-203 to substitute the Mitchell proposal for the Cellar bill and subsequently voted in favor of the Mitchell bill in a final roll call vote.[73] The winning votes came from Southern Democrats—representatives from all of the covered states voted in favor— in conjunction with a number of Northern and Midwestern Republican representatives. "It was the worst defeat for the VRA in legislative history."[74] This is the only time after the establishment of the VRA Order in 1965 that conservatives were successful at passing a version of the VRA that disabled Section 5 in a chamber of Congress.

During the House deliberations, conservatives argued specifically that the VRA had served its purpose, achieved success, and was no longer necessary. To reauthorize the temporary provisions, they averred, was tantamount to punishing the covered states for achieving "success."[75] Conservative advocates cited statistics to show that registration and participation in some of the covered states exceeded 50%. Reviving lamentations expressed in 1965, opponents of the Act complained that Section 5 of the VRA treated covered states unequally and provided limited and inconvenient forums for federal review of new state voting provisions (the Department of Justice or the District Court of the District of Columbia). Conservatives complained especially about the intervening Supreme Court decisions affirming Section 5, arguing that they were unlawful.[76]

---

[72] May, *Bending Toward Justice*, 205.
[73] Ibid., 179-234.
[74] Ibid., 205.
[75] *To Extend the Voting Rights Act of 1965 with Respect to Discriminatory Use of Tests ad Devices*: *Hearing before Committee on the Judiciary Committee*, *Subcommittee No. 5*, 91st Cong., 1st sess. May 14, 15; June 19, 26; July 1, 1969 Serial No. 3, 20. (Testimony by Senator Strom Thurman, Committee on the Judiciary Committee).
[76] *South Carolina v. Katzenbach*, 383 US 301 (1966); *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and *Gaston v. U.S.*, 395 U.S. 285 (1969).

Opponents asserted that the temporary provisions were in fact unconstitutional, and that they imposed an "onerous burden" on covered states by the Court. These assertions were made despite contemporaneous Supreme Court rulings affirming the constitutionality of the VRA and of Section 5.

The successful conservative backlash in the House was beaten back in the Senate. Proponents of the VRA in the Senate were able to curb the influence of conservative arguments and the use of delay tactics against the legislation. Philip Hart (MI-D) and Hugh Scott (PA-R) successfully prevented Senate Judiciary chair Sam Ervin's (NC-D) attempt to draw out the hearings past the August expiration date by proposing and securing a March 1 deadline for VRA consideration in the Senate Judiciary Committee.[77] Hart and Scott then proceeded to propose an alternative to the Mitchell bill that they correctly thought could win approval as its substitute. The Hart-Scott bill proposed a five-year extension, imposed a national ban on literacy tests, removed the possibility of nationwide application by retaining Section 5, and included both 1964 and 1968 as trigger years for Section 5 coverage. By keeping the 1964 trigger year, the bill ensured that the original states covered under the Act would still be covered. And by adding 1968 as a trigger year, the bill added additional jurisdictions, some outside the South, to the list of covered territories, which meant that Section 5 coverage, and the associated stigma alleged to accompany it, were no longer limited just to Southern states.

The Senate, without filibuster, adopted the Hart-Scott bill as a substitute for the Mitchell bill. Six Southern senators voted with the majority. Most Southern senators were anxious to appeal to their white electoral base, but they were also aware that they now

[77] May, *Bending Toward Justice,* 206.

had to "at least consider the black vote."[78] Senator Earnest Hollings (NC-D) told an aide, "I'm not going back to my state and explain a filibuster against black voters." [79] The Senate approved the Hart-Scott bill 64-12.[80]

Representatives in the House who were tentative about the Mitchell bill also supported the Hart-Scott bill. The measure provided a good alternative to the straight reauthorization codified in the Cellar bill and meant that Section 5 no longer applied only to Southern jurisdictions. Representatives who opposed the Mitchell bill also found a suitable alternative in the Hart-Scott provisions.[81] The House approved the Hart-Scott bill 272-132 forgoing the repeal of Section 5.

The 1970 reauthorization extended the temporary provisions of the VRA for five years. It prohibited the use of literacy tests nationwide and updated the Section 5 trigger to the 1964 and 1968 presidential elections. Additionally, the new law shortened the residency requirements for voting in presidential elections and lowered the voting age to eighteen.[82]

Conservative contestation of the VRA almost resulted in the loss of Section 5 in 1970. Conservatives entered the reauthorization process in pursuit of a venue to complain about the provision and later used that space to make arguments against the VRA generally and to urge limiting the purview of the Act. Finally, opponents used delay tactics to achieve substantive control over the legislation. These efforts were successful in the House and influential in the Senate, and reveal strong opposition to the VRA as

[78] Ibid., 208.
[79] Ibid., 207.
[80] J. Morgan Kousser, "The Strange Iconic Career of Section 5 of the Voting Rights Act, 1965-2007," *Texas Law Review* 86, (March 2008), 687.
[81] May, *Bending Toward Justice,* 208.
[82] Ibid., p. 208.

originally approved by a substantial part of Congress. Put another way, the law retained less than the full support of Congress only five years after its initial passage.

1975 Reauthorization: Subdued but Substantive Dissent. The VRA continued to be publicized as successful in 1975; meanwhile, enforcement continued to increase black voter registration. To ensure the institutionalization of the VRA voting order, supporters of the Act proposed extending the VRA's renewable temporary provisions for an additional ten years. Advocates also lobbied to pass amendments that would expand the Act to include protection for bilingual minorities and require some states to provide bilingual voting resources in areas where the number of non-English-speaking citizens was significant. But conservative opposition to the VRA remained active in Congress. Opponents broadened their offensive to include opposition to Section 5 enforcement—begun in 1970—and to the inclusion of bilingual minorities. [83]

By 1975, Supreme Court jurisprudence on the VRA had shifted rightward. Instead of construing Section 5 as a wide net covering "all kinds of voting law changes,"[84] the Burger Court began to establish limits on the purview of preclearance. (See Chapter 5). The executive branch exhibited ostensible support for the legislation but in fact was interested in ending Section 5 coverage. The Ford administration refrained from proposing a bill in Congress designed to neutralize Section 5 and instead expressed support for reauthorization. Attorney General Stanley Pottinger testified in support of

[83] By 1975, Section 5 enforcement had been operational for five years. In 1970, the DOJ published Section 5 guidelines and began earnest enforcement of the preclearance requirement.
[84] *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

reauthorization, stating that despite the impressive improvement in voting rights for blacks, "more need[s to] be done."[85] (See Chapter 4.)

Conservative dissent in Congress against the VRA, though more subdued than in 1965 or 1970, remained active. Conservatives took notice of the development of a black electorate and the emergence of a pro-voting-rights consensus in Congress. Representatives opposed to the VRA's temporary provisions worked to counter the efforts of proponents but attempted, at the same time, to appear to be fair, so that they might appeal to both white and black voters.[86] For instance, in the case of South Carolina, voters were split on reauthorization of the temporary provisions, and so the South Carolina Attorney General brought the local president of the NAACP to the House hearings with him so that South Carolina's testimony would reflect the split opinion of South Carolina constituents.[87]

The moderated tone of conservative dissent did not mean that opposition to the VRA had receded. Indeed, conservatives continued working to delay the proceedings and making arguments against the legislation, just as they had previously done. Conservatives complained about the trigger years (1964, 1968) for Section 5 coverage, as well as the limited judicial venues (only in Washington D.C.) available for mandatory preclearance review. Moreover, conservatives added new arguments to include objections to the expansion of the Act to cover and protect bilingual minorities under Sections 2 and 5 and the requirement that certain states provide bilingual ballots. The opposition pushed to

---

[85] U.S. Congress, Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary United States, Civil Rights Division, 579 Senate 94th Congress, *Hearings on S. 407, S.903, S. 1297, 1409 and 1443*, 1975. (Testimony of J. Stanley Pottinger, Assistant Attorney General).
[86] May, Gary. *Bending Toward Justice*, 209.
[87] U.S. Congress, Senate, House Subcommittee on Constitutional Rights of the Subcommittee on Constitutional Rights, 94th Congress 1st Session, *Hearings on S.407 S.903 S1297 S1409 and S1443*, 1975, 45. (Testimony of Clarence Mitchell).

limit the number of years of reauthorization to five instead of the ten proposed by VRA proponents. Conservatives again asserted statistics to show that all of the covered states had, by 1975, achieved better than 50% black voter registration and turnout. Dissenters presented witnesses who testified that none of the covered states had used literacy tests since 1965, and opponents made arguments in favor of relaxing the bailout provision to make it easier for states to escape coverage.

Just as they had done in 1970, VRA proponents were able to show persuasively in 1975 that despite significant gains, covered states had not yet achieved the level of improvement sought by the legislation.[88] The number of black elected officials remained low and registration had not yet reached parity. After only five years of active Section 5 enforcement, proponents successfully asserted that repeal or limitation of Section 5 coverage could easily result in recidivism.[89] Moreover, there was still much evidence that covered states avoided complying with Section 5 by failing to seek preclearance for voting law changes. Mississippi, for example, refused to repeal its literacy test and continued to require it for voter registration.[90] Furthermore, the Mississippi Attorney General refused to submit laws for Section 5 preclearance unless ordered by the state legislature or court order.[91] Proponents urged Congress to expand coverage over some states where discrimination against bilingual voters was evident, and other states were tasked with providing bilingual ballots for voters for whom English was a second language.[92]

---

[88] Ibid., Honorable Birch Bayh (S-IN),3-4.
[89] Ibid., Hon. Hugh Scott (S-PA),1, 9.
[90] Ibid., Frank Parker,131.
[91] Ibid., Frank Parker,135.
[92] Jordan, Barbara and Shelby Hearon. *A Self Portrait by Barbara Jordan*, (Garden City, NY: Doubleday & Company, 1979), 209.

Conservatives worked to resist and delay the reauthorization proceedings in a reprise of tactics employed in 1970. The chair of the Senate Judiciary Committee, James Eastland (D-MS), refused to hold hearings. Senate Majority Leader Mike Mansfield (D-MO) foiled this effort by invoking a parliamentary procedure that forced the chamber to take up the bill unchanged from the House version. Eventually, VRA reauthorization proponents were able to invoke cloture, and by July, a Senate vote seemed probable. Reauthorization was thrown into doubt and delayed again, however, when President Gerald Ford renounced earlier statements urging the reauthorization of the VRA and announced support for a nationwide VRA.[93] The President later reversed this position, and deliberations got back on track. (See Chapter 4). Nevertheless, the executive branch interference resulted in a conservative victory—a decrease in the length of the reauthorization. Instead of the ten-year extension pro-VRA advocates would have secured, the Act was renewed for only seven years.

Again in 1975, both chambers reauthorized the VRA, masking conservative opposition. The Senate voted seventy-seven to twelve in favor. In the House, three hundred forty-six voted in favor to fifty-six opposed.[94] The 1975 bill extended the Act for seven years, added coverage for bilingual minorities, and mandated states covered by the provision to provide bilingual ballots.

1982 Reauthorization: Outgunned. By 1982, the pro-voting rights consensus was on the wane. In the 1980s, the nation shifted rightward on civil rights. The tone and intensity of civil rights opposition increased sharply. The Reagan administration openly

[93] May, *Bending Toward Justice,* 212. In July, Ford sent a letter to Congressional leaders urging reauthorization, in August, as part of an effort to attract Southern voters, Ford argued for an amendment to the VRA that would remove the stigma from Southern states and apply Section 5 nationwide.
[94] Ibid., 212.

opposed affirmative action legislation and pushed an agenda designed to dismantle civil rights protections gained in the 1960s, including the VRA. The Supreme Court continued its movement away from liberal interpretation of the VRA to a more conservative position, limiting the application of Sections 2 and 5 as part of its VRA jurisprudence (See Chapter 5).

In Congress the climate for voting rights had shifted away from tacit consensus and so improved the atmosphere for open debate by the VRA's foes. Many Southern Democrats, in the period between 1965 and 1980, had switched to the Republican Party. Partisanship in Congress also shifted to the right. Far fewer moderate and cross-pressured members, essential to the establishment and maintenance of the VRA Order because of their willingness to compromise on civil rights issues, were in office. As a result of the shift in partisanship, a number of Southern Democratic lawmakers had retired and been replaced by Republicans. In addition, members of Congress on both sides of the aisle had become more ideologically aligned with their respective party centers.[95] The polarization evident in the 2000s began to emerge in the 1980s, though compromise was still commonplace.

Conservatives (now increasingly Republican) made an earnest effort in 1982 to challenge the VRA on traditional grounds and by using newly developed colorblind arguments. Conservatives resumed their use of delay tactics and pressed hard to limit the impact of both Sections 2 and 5 of the VRA during the reauthorization deliberations. Unfortunately for their cause, right-wing Republicans did not have the external support they needed to significantly impede the shape of the VRA legislation. On the other hand,

[95] Fleisher, Richard and John R. Bond. "The Shrinking Middle in the US Congress," *British Journal of Political Science* 34 (July 2004): 429-451.

the 1982 argumentation against the VRA got some traction, which prompted conservatives to emphasize said argumentation during later reauthorization hearings.

Despite these changes to the socio-political environment, conservatives had little success opposing the VRA in 1982. Conservatives were outgunned that year by the pro-reauthorization lobby. The pro-VRA lobby was organized under the umbrella of the Leadership Conference ("LC"). Under the LC, one hundred sixty-five civil rights organizations once only loosely affiliated, now joined together to ensure the reauthorization of the VRA. The LC appointed a full time director, opened a central office, prepared in advance suitable proposals for reauthorization, and gathered ample resources for the VRA debate in the House.[96]

The LC was ready and effective. Local affiliates lobbied in affected states and on the Hill, executed mailing campaigns on and off the Hill, and maintained phone banks to allow constituents to inform Congress members of their views.[97] The LC took the lead in writing the primary legislation considered in1982, H.R. 3112, participated in all negotiating and rewriting, and provided the majority of the witnesses who testified in Congress. In contrast, the conservative bloc had no corresponding external support and lacked a similar well-organized plan of attack.

House conservatives sought support, in particular from the Reagan administration, but it was not forthcoming. Attorney General Edwin Meese agreed several times to testify in the House, but he did not do so. Outside Congress, the administration was silent on voting rights, making no public statements of its view of VRA reauthorization. Conservatives most certainly could have aligned themselves with the executive branch if

[96] Boyd, Thomas M. and Stephen J. Markman, "The 1982 Amendments to the Voting Rights Act: A Legislative History," *Washington and Lee Law Review* 40 (Sept. 1982): 1351.
[97] Ibid., 1352.

there had been a clear stance taken by the administration and would have gained leverage as a result. In mid-June, President Reagan intensified the administration's silence when instead of making a position statement, he requested a report from the Attorney General detailing a "comprehensive recommendation [on the VRA not due until] October 1st."[98] The hopes of House conservatives were dashed; there would be no executive support to lend momentum to their effort. The lack of external support, plus the strength of the proponents' presentation in the House, rendered conservatives relatively powerless in the negotiations to reauthorize the VRA.

The 1982 House hearings lasted for eighteen days and included two field days in Montgomery, AL, and Austin, TX. Conservative opponents in 1982 were very interested in preventing the LC's amendment of Section 2 to allow plaintiffs to bring suits under that section based on either evidence of discriminatory intent or discriminatory effect. The amendment was designed to reverse the Supreme Court ruling in the *Mobile v. Bolden* case, which limited Section 2 review to instances where plaintiffs could establish intentional discrimination. Little attention was paid to Section 2 in the House debates. Only one day was spent exclusively on Section 2, as the rest of the time was devoted to Section 5 with commentary on Section 2 sprinkled throughout. Conservatives were able to gain very little leverage against Section 5 and did not attack the proposed amendments to Section 2.

Henry Hyde (R-IL), was the face of the conservative opposition in the House. Over the course of the House hearings, Hyde's opposition to Section 5 softened significantly. In response to testimony presented by the LC, Hyde slowly but surely shifted his position so that it aligned with the views of the pro-VRA lobby. At the start of

[98] Boyd, Markman, "The 1982 Amendments," 1364.

the House proceedings, Hyde wrote and supported an amendment, H.R. 3198, designed to draw attention away from the VRA proponents' bill, H.R. 3112. The Hyde bill proposed a nationwide plan that would have ended preclearance, and which did not include amendments to Section 2. During the course of the hearings, however, in response to what he learned from the testimony, especially that portion presented during the field hearings, Hyde repeatedly rewrote his legislation, each time changing it to align more closely with the positions of the Leadership Council. Hyde expressed shock when he learned about the high level of intentional discrimination occurring in the Southern states. He thought it unconscionable that polling places were moved to dissuade black voters, that balloting was not conducted in private, and that police were stationed outside polls to take pictures of black voters. By the end of the hearings, Hyde believed that Section 5 coverage was still necessary. Hyde did support a relaxed bailout standard, but now as a device to motivate state actors to cease discrimination against minority voters.[99] Hyde's opposition was not only masked but transformed by the reauthorization process.

Conservatives had success at delaying the 1982 proceedings in the House, which helped them negotiate an amendment to the bailout provision. By instigating a deadlock over the bailout provision, they were able to force VRA proponents to compromise on the bailout criteria. In a reprise of their 1975 opposition, conservatives argued in favor of independent bailout by jurisdictional subdivisions in covered states. The suggestion to allow independent bailout was a significant change to the original bailout provision. Previously, independent bailout for jurisdictions in states entirely covered by Section 5 was impossible. The amendment provided a process for jurisdictions to bailout if they were able to show the requisite term of racially fair treatment in elections. Anxious to

[99] Boyd, Markman,"1982 Amendments," 1357-1362.

escape the deadlock and pass the reauthorization bill in the House, proponents agreed to compromise and allow amendment of the bailout provision. Proponents granted conservatives an amendment that allowed bailout for jurisdictions in some instances when the entire state was not eligible for relief from coverage. [100]

The bill arrived in the Senate having gained much momentum and overwhelming support—even from some conservatives—in the House. The Senate sponsors of the bill, Edward Kennedy (D-MA) and Charles Mathias (R-MD), were anxious to maintain the pro-VRA reauthorization momentum. Kennedy and Mathias were aware that the bill could die in the Judiciary Committee, chaired by Strom Thurmond (D-SC). To ensure introduction of the bill to the floor, Mathias invoked the rarely used parliamentary rule XIV, one ordinarily reserved for uncontested legislation, to force the bill onto the Senate calendar. Kennedy and Mathias succeeded at getting the bill scheduled but the conservative opposition was still successful at delaying the deliberations, which were pushed to the start of the second session.[101] At the beginning of December 1982, Kennedy and Mathias had to introduce an identical substitute bill, S. 1992. Sixty-one Senators sponsored the second session bill but some of the strong momentum gained in the House had been lost.

During the second session, conservative opponents were able to mount additional delays[102] and take advantage of administrative support.[103] Breaking his previous silence, President Reagan made a statement during the Senate negotiations expressing support for

---

[100] Herbert, J. Gerald. *An Assessment of the Bailout Provisions of The Voting Rights Act, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power,* ed. Ana Henderson (Berkeley, CA: Berkeley Public Policy Press 2007), 261.
[101] Boyd, Markman. "1982 Amendments," 1384.
[102] Ibid., 1388.
[103] Ibid., 1384.

a bailout provision that would allow jurisdictions inside covered states to bailout independently. He also favored an extension of the bilingual bailout provision so that its expiration would be concurrent with the expiration of Sections 4 and 5, and, notably, an intent test under Section 2 instead of the effects test sought by VRA proponents.[104] The Attorney General reiterated these views in his testimony before the Senate.[105]

Due to the belated emergence of external support and strong conservative leadership, conservative opposition had some success in the Senate. Though Senate opposition did not result in amendments desired by the conservatives, they were able to stoke colorblind opposition to the VRA and maintain opposition to the VRA in the halls of the national legislature. Their vigorous resistance was recorded in the *Congressional Record*. Moreover, as previously discussed, conservatives were able to use delay tactics to slow the momentum of the reauthorization proceedings. Orrin Hatch (R-UT) chair of the Senate Subcommittee on the Constitution, led the offensive in the Senate. Hatch did an excellent job of organizing the Senate hearings to promote alarm about the Section 2 amendments and to evoke and repeat controversial criticism that helped to build VRA opposition in Congress. Unlike Representative Hyde, Hatch was not swayed by the proponents' presentation in the Senate.

At the start of the hearings, Hatch vehemently criticized House representatives for failing to sufficiently address the Section 2 amendments and used that failure to focus the Senate hearings on the possible change. Hatch made opposition to the Section 2 amendment the main focus of the Senate inquiry, with intermittent discussion of Section

[104] Boyd, Markman, 1982 Amendments," 1387.
[105] U.S. Congress. Senate. "Affirmative Action and Equal Protection." Committee on the Judiciary. Hearings before the Subcommittee . 97th Cong., 1st Sess. (May4, June 11, June 18, July 16, 1981), 69.

5. Hatch and other conservatives stressed the fact that an effects standard under Section 2 might result in the need to establish electoral quotas to promote the election of minority legislators under the VRA. The conservatives insisted that the application of an effects test could potentially result in an imperative of "proportional representation" in districts, where to date minorities had not had the opportunity to elect candidates of their choice.[106]

Proportional representation and quotas were concepts that had already been rendered objectionable to conservatives during the Reagan administration. Hatch made it a point to repeat the arguments against the amendment in his opening statements each day during the hearings, and he used the repetition to inflame opposition against "quotas" and "proportional representation." Hatch also incorporated his arguments into his questioning of witnesses and discussion with other committee members by focusing his inquiries and discussion on the potential for the undesirable outcomes. Hatch rejected the LC assumption that an effects test had traditionally been applied in Section 2 cases and argued that the amended Section 2 standard would introduce a new, unconstitutional, and inherently discriminatory standard of review under the VRA. Hatch's position was representative of conservative dissent in the Senate.

Conservative senators sought nationwide preclearance and a relaxed bailout standard, which would allow jurisdictions in covered states to bail out independently. Senator Thurmond of South Carolina supported the amended bailout provision. Thurmond also argued that nation-wide application of the law would ensure equal protection of the law. Amendments were offered to counter H.R. 3112; a strongly

[106] U.S. Congress. Senate. "1982 Voting Rights Act." Subcommittee on the Constitution of the Committee on the Judiciary. 1982 Voting Rights Act. 97th Cong., 2d Sess., HRG-1982-SJS-0071, 3.

supported one was submitted by Senator Grassley (R–IA), S.1975. The proposal included a five-year extension, the relaxed bailout provision, and an intent test under Section 2.[107]

Despite the administration's support, the senatorial conservative bloc still lacked the strong external backing enjoyed by proponents of reauthorization in the House. And representatives from covered states expressed less discontent with Section 5 than in previous years, due to familiarity with the Section 5 process, acquiescence to the provision, and concern for minority voter support. Covered states for the most part had learned to "tolerate [Section 5 requirements and constituents in covered states] and so applied virtually no pressure on their elected officials to repeal or weaken it."[108] HR 3112 passed the House on October 5, 1981, three hundred and eighty-one to twenty-four and was later passed in the Senate, eighty-five to eight. The House subsequently approved the Senate's amended version of the bill in October, 1982.

2006 Reauthorization: Rebel Warfare. In 2006**,** Republican conservatives expressed vehement dissent against the VRA. They argued loudly against extension of the legislation and its temporary provisions, using all available methods. Opponents caused delay during the deliberations and used the *Congressional Record* in an unorthodox manner to register strong opposition to the passage of the reauthorization even after it was approved. Strikingly, these tactics were used by conservatives to oppose the VRA, despite their clear pledge of support for the legislation in advance of the hearings and after a publically announced promise to pass it with minimal debate. Ultimately, the 2006 roll call votes in both houses on the VRA reauthorization were

[107] Boyd, Markman, "1982 Amendments," 1388.
[108] Ibid., 1387.

overwhelmingly in favor. Yet the dissent registered during these deliberations was the most intense waged during any reauthorization to date.

By the 109th Congress, the political climate had shifted significantly since the early 1980s. Colorblind conservatism was now a well-developed concept, widely promulgated among Republicans. A trend in the executive branch to end affirmative action measures established during the civil rights era had been strongly supported by several presidential administrations. Congress was now even more conservative and more polarized. Congressional seats lost to retirement or election during that period were now occupied by representatives who were more stridently ideologically aligned with their party bases, removing the earlier flexibility made possible by cross-pressured members of both parties who were willing to compromise.[109] The majority of Southern legislators in the 109th Congress were now staunch Republicans. Republicans controlled both chambers in 2006. The Republican Party had become well established as the center of opposition to civil rights laws passed in the 1960s, including the VRA.

During the 2000s, the Bush administration exercised partisan influence over civil rights enforcement, including the VRA. Publicly, President George W. Bush expressed support for the reauthorization of the VRA and encouraged Republican support of the bill in Congress. Yet in practice, the Bush administration enforced the VRA in a tepid manner. The administration supported what were essentially "reverse discrimination" lawsuits under the VRA and appointed partisan appointees to the Voting Rights Section of the Civil Rights Division, the office that administered Section 5 preclearance applications.[110] The Supreme Court also continued to shift rightward during the 2000s in

[109] Fleisher, Bond, "The Shrinking Middle," 429-451.
[110] The Voting Rights Section of the Department of Justice administers Section 5 of the VRA.

its VRA jurisprudence, prompting civil rights advocates to complain that the Court's interpretation of the law was out of alignment with the intention of Sections 2 and 5.

With the 1982 VRA set to expire in 2007, Congress began to consider reauthorization in 2006, a year early. James Sensenbrenner's (R-WI) tenure as chair of the House Judiciary Committee was set to expire. Sensenbrenner wanted the reauthorization to occur on his watch and be part of his legacy.[111] Civil rights proponents were anxious to reauthorize the VRA and its temporary provisions and were concerned about the increasingly hostile atmosphere toward anti-discrimination legislation in the 2000s, manifested by the presidential administrations, the courts, conservative lawmakers, and the general public. Proponents backed the move to consider the legislation early, and Republicans agreed.

At the time the Republican Party was in the midst of a campaign to appeal to black voters. Part of the campaign platform included the reauthorization of the VRA. Of course, Republican Party support for the VRA did not placate conservative opposition to civil rights laws inside the party but it did provide the party a high profile opportunity to woo black voters. On May 2, 2006, in a rare bipartisan event on the steps of the Capitol, Republicans pledged to renew the Act for twenty-five years.[112] The pledge signaled smooth sailing for the reauthorization, since Republicans tended toward extreme party discipline. To avoid contentious debate and to ensure the passage of the bill, both parties agreed to support a straight reauthorization of the VRA in Congress in 2006. It was expected that the VRA reauthorization would proceed quickly and uneventfully.

---

[111] Persily, Nathaniel. "The Promise and Pitfalls of the New Voting Rights Act," *Yale Law Journal* 117 (December 2007): 89.
[112] Hulse, Carl. "By A Vote of 98-0, Senate Approves 25-Year Extension of the Voting Rights Act," *The New York Times*, July 21, 2006.

It did not. A small contingent of mostly Southern dissenters broke from the Republican ranks during a closed GOP meeting just prior to the scheduled House debate. At the meeting, Lynn Westmoreland (R-GA) led the conservative "rebels" and challenged the bipartisan compromise to approve a straight renewal of the VRA. Westmoreland argued that it would discriminate against Southern states, fail to acknowledge improvements made on voting rights since the Act's inception, and be unfair to keep Georgia (for example) under the confines of the law, since the state had significantly improved its voting rights record.[113] The rebels found support among legislators critical of coverage for bilingual minorities under Section 203. Led by Steven King (R-GA), VRA renewal opponents argued for the repeal of Section 203.[114] "What people are really upset about is the bilingual ballots… [t]he American people want this to be an English speaking nation," stated Rep. Charles Whitlow Norwood Jr. (R-GA).[115] The bilingual ballot discussion dovetailed with recent tension over immigration legislation in the House, legislation that Republicans had actively delayed. The meeting became so heated that James Sensenbrenner walked out.[116] The scheduled House debate was delayed indefinitely, but it resumed about a month later. The rebels agreed to resume hearings on the condition that they could propose amendments. Four amendments were introduced, and all four failed.

Despite a strong façade of bipartisanship, consideration of the VRA in the Senate was heated.[117] Hearings were held in the Judiciary Committee and the Subcommittee on

[113] Hulse, Carl. "Rebellion Stalls Extension of the VRA" *The New York Times*, June 22, 2006.
[114] Babington, Charles. "GOP Rebellion Stops VRA: Complaints Include Bilingual Ballots and Scope of Justice Department Role in the South," *Washington Post*, June 22, 2006.
[115] Babington, "GOP Rebellion."
[116] Ibid.
[117] Kousser, *The Strange Iconic Career*, 761.

the Constitution. The issues debated in these sessions mirrored those heard in the House. Conservatives complained about Section 5 coverage and repeated the familiar federalism arguments against renewal. Debate over the bilingual provisions was also contentious, fueled by the ongoing immigration debate. At points, it seemed that the reauthorization would be held over until the next session. A potential deadlock was broken by President Bush's July speech to the NAACP. The president expressed support for a straight reauthorization of the VRA for twenty-five years.[118]

The same day as the president's NAACP address, Majority Leader Bill Frist (R-TN) scheduled a Senate vote and refused to allow amendments.[119] Frist substituted the bill on the Senate floor for a bill sanctioned by the Senate Judiciary Committee, which mirrored House Bill 9 exactly, in order to avoid the need for conference committee. The Frist bill was approved by the Senate ninety-eight to zero, on July 21, 2006. The Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César Chávez Voting Rights Act Reauthorization and Amendments Act of 2006 was signed into law the same month.[120]

The 2006 reauthorization extended the life of the VRA temporary provisions for twenty-five years. The content of the bill was very similar to previous bills. The Section 4 coverage formula and Section 5 coverage requirements remained the same, meaning that the same jurisdictions remained covered with no new states or jurisdictions made subject to DOJ oversight.[121] The bill *did* overturn two Supreme Court decisions considered to impose limitations on the VRA.[122]

---

[118] "Bush Addresses NAACP Convention," *CQ Transcripts Wire*, *Wilson Quarterly*, July 20, 2006.
[119] Hulse, Carl. "House Delays Renewal of Voting Rights Act," *New York Times*, June 21, 2006.
[120] "Bush Signs VRA Extension Amid Midterm Election Season," *Associated Press*, *USA Today*, July 7, 2006.
[121] Persily, "Promise and Pitfalls," 207-08.
[122] *Reno v. Bossier II*, 528 U.S. 320 (2000) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). The 2006 law made clear that discriminatory purpose is grounds for preclearance even if the purpose was not designed to

The civil rights lobby was aware of the need to protect Section 5 from a potential court challenge and so focused on building an appropriate record of support that would withstand a constitutional review. VRA proponents did not believe the temporary provisions could survive an attempt to revise the Section 4 formula, and so they focused on creating a record that could support Sections 4 and 5 as written. Proponents were aware that the standard for congressional support had changed. To be constitutional, proponents had to show that the legislation remained "congruent and proportional" to the harm it sought to restrain.[123] To achieve its goal, the Leadership Council provided witnesses to the House Judiciary Committee and the Subcommittee on the Constitution. A foundation-backed Commission on the VRA held hearings around the country. The ACLU compiled an 867-page dossier on Sections 2 and 5. These and additional reports and articles related to renewal were added to the 2006 record.[124] States covered in 1965, 1970, and 1975 remained covered under the 2006 agreement. No new states were added under Section 4 subject to Section 5 coverage despite evidence of voter discrimination in states not covered by Section 5.

In an unprecedented move, Senate Republicans replaced the Senate Report, "A Statement of Joint Views," with a partisan statement and published it after the hearings were complete. Customarily, reports are "published well before a bill is to be discussed on the floor, so that members can fully understand a bill's provisions… and [they are usually] the result of bipartisan participation."[125] In their report, Republicans rejected the

---

make minorities worse off than they were prior (*Bossier II*) and preclearance is required when laws have the effect of reducing the power of minority voters to "elect their preferred candidates of choice." The Congress also reversed *Ashcr*oft by restoring the pre-Ashcroft standard for determining whether redistricting plans needed to be submitted for preclearance.

[123] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[124] Kousser, "The Strange Iconic Career," 754-6

[125] Ibid., 761.

supportive views published in the original report and did not seek Democratic review or contribution before submission.[126] The *ex post facto* report expressed skepticism about the renewal process, calling it "rushed" and criticized the retrogression standard supported by proponents of the reauthorization legislation. Democrats, concerned about the report, stated that it "undermined the case supporting the constitutionality of the law," and concluded that the report was designed as an invitation to challenge in the Supreme Court.[127]

Conservatives were arguably heartened by the idea that a straight reauthorization of the temporary provisions would leave the Section 4 formula and Section 5 intact. By leaving the formula and coverage provisions unchanged, there was a greater likelihood that the section would be challenged and a lesser chance of its surviving Supreme Court review. The Roberts Court was extremely amenable to hearing cases demanding the consideration of civil rights law because part of the Chief Justice's agenda was to limit affirmative action provisions. The Court's conservative wing believed that the contemporary cultural framework demanded amendment or repeal of the VRA and other civil rights protections, thereby allowing state sovereignty to operate freely and therefore limit federal involvement in state police powers.

In fact, six days after the reauthorization was signed into law North West Austin Municipal Utility District (MUD) filed a challenge to the constitutionality of Section 5, in federal court.[128] Ostensibly a request to determine whether a Texas water utility district should be subject to Section 5, the real issue in the case concerned whether or not Section

[126] US Congress, Senate, "Fannie Lou Hamer, Rosa Parks, Coretta Scott, César E. Chávez Rights Reauthorization Act of 2006 Committee on the Judiciary Report Together with Additional Views," July 26, 2006.
[127] Persily, "Promise and Pitfalls," 89.
[128] Kousser, "The Strange Iconic Career," 763.

5 was constitutional, i.e., whether or not the evidence presented in Congress satisfied the *Boerne* "congruence and proportionality" standard in the 2006 reauthorization hearings. In the MUD decision, the Court implied that Section 5 of the VRA was probably not constitutional without amendment and strongly suggested that Congress adjust the coverage formula to avoid a fatal Supreme Court ruling on the issue in the future.[129]

Conclusion: The Long Game and External Support. The available evidence shows clearly that conservatives in Congress worked diligently and repeatedly to erode and impede the reauthorizations of the VRA between 1970 and 2006 but with little success. The end of the 2006 hearings resulted in the reauthorization of the VRA without amendment of Sections 4 or 5. The "new" legislation was challenged and reviewed by a Supreme Court with a new conservative majority. The Court was able to use the fact that the legislation was unrevised to argue that the law needed to be revised and later it was able to strike an important section of the law. (See Chapter 5). This is in part due to the fact that polarization in Congress prevented the revision of Section 5 in 2006. Thus, the success at the Supreme Court was in some degree due to the failure of conservative opponents of the VRA to make progress undermining the Act on the floors of Congress. Congressional conservatives will likely prevent any future revision of Sections 4 and 5 because polarization in Congress has eroded the basis for compromise. At this point, even minor alterations that might revive Section 4 in the eyes of the Supreme Court and make Section 5 operational again, will be very difficult to secure.

[129] *North Austin Municipal District No. 1 v. Holder*, 129 S.Ct. 2504 (2009).

Chapter 4:
Presidents and the Voting Rights Act, 1970-2013

Presidents between 1965 and 2013 have shifted to the right on the enforcement of the Voting Rights Act. Lyndon Johnson brought the law into being, yet even his enforcement effort was limited and reserved. Johnson was concerned about the electoral impact of legislation like the VRA. He is said to have declared that his support of civil rights legislation would cost the Democratic Party its southern support for a generation. He focused his attention on registration, did not operationalize Section 5, and did not use observers at the polls in nearly as many jurisdictions as he might have.

All of the presidents since Johnson have been influenced by conservative opposition in their enforcement of the VRA, especially as the ideology of colorblind conservatism acquired legitimacy. Republican presidents, pursuing a race-oriented strategy to build a durable party majority, have been predisposed to oppose the Act. Some have resisted general enforcement but selectively enforced the Act; others have stood the act on its head by using it to undermine its purpose of restoring and/or ensuring the rights of minority voters. Democratic presidents have been constrained in their enforcement of the Act by the rise of colorblind legal ideology or conservative pushback. On balance, no president since Lyndon Johnson has had the same high level of commitment to the VRA and the opportunity to enforce it as enthusiastically.

This chapter will demonstrate the impact of colorblind conservatism on the enforcement of the VRA by the executive branch. I begin with Republican presidents from 1970 through 2008, exploring their participation in VRA reauthorization, their rhetoric, the activities of the Department of Justice under their administrations, and

Republican presidents' appointments to the executive branch and federal judiciary. Next I examine the VRA legislative activity, rhetoric, actions and appointments of Democratic administrations. I demonstrate that presidents between 1970 and 2013 shifted rightward on the VRA and decreased enforcement in response to the influence of conservatism. When necessary, the discussion will include consideration of presidential treatment of civil rights regulation generally, on the premise that a presidents' civil rights policy includes voting rights.

The Moderate Republican Era: The Nixon and Ford Administrations. According to Steven Shull, there was a "clear break" in presidential advocacy of civil rights that began in the late 1960s and lasted until the mid-1970s.[130] Civil rights enforcement once dominated by legislation and court order; now became the responsibility of federal agencies in the executive branch.[131] Republican presidents, responding to the VRA in the early years, were influenced by a moderate conservative platform dedicated to limiting civil rights reform. But these conservative presidents served in the midst of a broadly accepted liberal consensus in favor of affirmative action-based reform of past racial discrimination. In the early 1970s, civil rights legislative remedies were expected to be utilized and Presidents Richard Nixon and Gerald Ford were obligated to instruct the DOJ to administer and enforce affirmative action legislation and the VRA. Constituents demanded the establishment of affirmative action programs and the enforcement of anti-discrimination legislation achieved by the civil rights movement. Both presidents expressed rhetorical opposition to the parts of the VRA Southerners found offensive—part of Nixon's Southern Strategy—and both presidents tried to take legislative action to

[130] Shull, Steven A. *American Civil Rights Policy from Truman to Clinton: The Role of Presidential Leadership* (Armonk, NY: ME. Sharpe, 1999), 51-52.
[131] Ibid., 51-52.

neutralize the strength of the offending temporary provisions when the Act came up for reauthorization, but both signed reauthorizations and complied with VRA enforcement in fact.

The civil rights records of the two presidents reveal politically nuanced support of civil rights goals. Both presidents were rhetorically against busing and discouraged the use of affirmative action in employment, but at the same time Nixon and Ford supported and enforced affirmative action measures like the Equal Rights Amendment and the Philadelphia Plan, which set goals for the hiring of minority contractors through the Department of Labor.[132] President Nixon also issued Executive Order 11478, which mandated the institution of affirmative action programs in federal agencies and departments.[133] Nixon and Ford's discussion about/enforcement of the VRA was accomplished in a similar fashion, contrary rhetoric followed by enforcement.

When given the opportunity to influence the substance of the VRA during the reauthorizations of 1970 and 1975, Presidents Nixon and Ford supported limiting or repealing Section 5 of the Voting Rights Act. Both submitted amendments designed to neutralize the power of Section 5 over Southern states, but to little avail. Nixon and Ford signed reauthorizations of the VRA and both enforced the Act. Of the Republican presidents, the Nixon and Ford administrations were influenced least by colorblind conservative principles and were the most vigorous enforcers of civil rights legislation generally and the VRA in particular. If measured by the number of objections issued to state voting laws, Nixon and Ford appear to be the most vigorous of all presidents in

[132] Ibid., 37.
[133] Executive Order no. 11478, Section 1, *Equal Opportunity in the Federal Government* (Aug. 8, 1969).

VRA enforcement[134]. Yet this *appearance of vigor* is due in part to the high number of non-conforming jurisdictions in the early years. The Nixon and Ford administrations were characterized by rhetorical opposition to but actual enforcement of the Voting Rights Act.

Nixon's opposition to the VRA arose out of his celebrated "Southern Strategy." The Southern Strategy sought to capitalize on cracks in the Southern wing of the Democratic Party opened by President Johnson's endorsement of civil rights legislation in the 1960s. In his effort to win white voters formerly unreachable by Republicans, Nixon ran his campaign on a "states' rights," "law and order" platform. This anti-affirmative action positioning appealed to those Southerners interested in maintaining traditional racial values and social relations. In the 1972 presidential election, the strategy contributed to Republican victories in five former Confederate states that had long been strongholds of the Democrats. For Nixon, the VRA was objectionable because it stigmatized Southern states for past wrongdoing (wrongdoing supported, of course, by states' rights proponents) and because it demanded that Southern states submit to federal oversight of voting law changes in violation of traditional federalism relations.

The VRA temporary provisions came up for reauthorization for the first time in 1970. The Nixon administration took the opportunity to challenge the legislation. The administration proposed opposition amendments to the VRA that would minimize the

[134] This statement does raise the question of standard of measurement. High numbers of objections at the inception of enforcement might not reflect that a president exercised the most stringent and purposeful enforcement of the VRA. Presumably, there were far more non-conforming jurisdictions in the early years and therefore more opportunities for objections. Also, as time progressed, states became more familiar with the VRA process, more cognizant of minority voters, and more responsive to DOJ questions and feedback prior to the issuing of objections.

mandate imposed by Section 5 and remove the stigma imposed on the Southern states.[135] The Nixon amendments advocated the removal of Section 5 from the VRA, empowering the attorney general instead to take action against any state (not just the covered states) that discriminated in its use of voter qualifications and procedures. The amendments also made it legal for the Attorney General to bring a VRA action in any federal court rather than limiting review to the District Court of the District of Columbia.[136] If the Nixon amendments had been successful, the category of covered states would have been removed from the statute, to be replaced by a nationwide ban on literacy tests, and the special venues for voting law review by the federal government would have ended. The changes would have removed the stigma imposed on Southern states and also implicated Northern states guilty of voter discrimination.[137] The amendments also would have reduced the strength of the VRA by removing federal oversight and preclearance review, and they would have limited voter discrimination relief to litigation.[138] As noted in the previous chapter, the Nixon amendments passed the House but failed in the Senate. (See Chapter 3).

Nixon publicly expressed his reluctance to sign the 1970 VRA re-authorization by commenting that he only signed the bill "to prevent the Goddamned country from blowing up!"[139] In the midst of protests over the incursion by U.S. troops into Cambodia, continuing civil rights protests, and the Kent State shootings, Nixon calculated that a

---

[135] Kotlowski, Dean J. *Nixon's Civil Rights*: *Politics, Principle and Policy* (Cambridge: Harvard University Press, 2001), 71, 95.
[136] "Voting Rights Act, Nixon Administration Proposal," *Congressional Digest*, Vol. 48 Issue 11 (Nov. 1969): 288.
[137] Kotlowski, *Nixon's Civil Rights*, 71, 95.
[138] Litigation had been the method of relief in the Civil Rights Acts of 1957 and 1969, and it had been determined that litigation alone was not a sufficient method to remedy voter discrimination and to provide seekers relief.
[139] Kotlowski, *Nixon's Civil Rights*, 71.

failure to sign the "most successful piece of civil rights legislation" might have been worse politically than the potential backlash resulting from a deviation from the Southern Strategy. Nixon was forced into a similar conundrum with other affirmative action programming. He rhetorically opposed busing but enforced it in several jurisdictions. He ostensibly opposed affirmative action but established the first federally funded affirmative action program. And, Nixon supported the Equal Rights Amendment. The Nixon administration's contradictory posture toward satisfying his obligation to civil rights legislation was beneficial in the early years of VRA administration.

After initially pledging support for the reauthorization,[140] Gerald Ford opposed renewal of the VRA in 1975. The Ford amendments sought again to remove the bite of Section 5 by "increasing the jurisdiction of the VRA to all 50 states, and the elimination of the need for covered states jurisdictions."[141] Ford also suggested the imposition of a national residency requirement on citizens voting in national elections.[142] Ford did succeed temporarily in creating doubt about what were thought to be easy deliberations to pass the reauthorization. The presidential disruption did influence the 1975 bill. The presidential intrusion resulted in a decrease in the proposed ten-year reauthorization period to seven years. However, the disruption was short-lived and unsuccessful at limiting the controversial sections. Like his predecessor, Ford failed in his attempt to neutralize the controversial substantive aspects of the VRA mandate. The VRA reauthorization passed the House and the Senate. The legislation signed by Ford did not include a national residency requirement, did not limit Section 5, continued the

[140] Gerald Ford, "Letter to the Senate Minority Leader Urging Extension of the Voting Rights Act of 1965," *The American Presidency Project*, March 2015, http://www.presidency.ucsb.edu/ws/index.php?pid=5097.
[141] Skrentny, John Davis. *The Ironies of Affirmative Action: Politics, Culture and Justice in America* (Chicago, IL: University of Chicago Press, 1996), 190.
[142] Ibid., 190.

proscription of covered states, extended the VRA for seven years, was expanded to include protections for language minorities, and permanently barred literacy tests nationwide. Ford signed the reauthorization of the legislation and enforced the Act vigorously.

Enforcement of the VRA by the Moderate Republican Presidents. The Nixon administration issued Section 5 guidelines in 1970. Prior to 1970, some states refused to submit voting law changes under Section 5 and others were willing but did not understand what to submit. Once the 1970 regulations were in place, Section 5 enforcement began in earnest and covered states became active at submitting voting law changes during the Nixon and Ford administrations. One measure of the strength of enforcement of the VRA is the number of objections issued by the DOJ against state law submissions under Section 5. Under the Nixon administration, objections increased over prior years, when there had been no objections. There were 729 objections issued by the DOJ in 1969-1970 and 6,900 objections filed between 1970 and 1975. The United States Commission on Civil Rights statistics indicates that the peak year for Section 5 objections was 1976. By this measure, Nixon and Ford were the most vigorous presidents, Republican or Democrat, in their enforcement of the most controversial section of the VRA.

Conservative Republicans and the VRA: Ronald Reagan, George H.W. Bush, and George W. Bush Administrations. The Reagan and George H.W. Bush ("Bush 41") presidencies were characterized by stronger ideological resistance to anti-discrimination law, including the VRA, but based on the number of DOJ objections, enforcement of the law during these administrations did not decrease significantly in comparison to the

presidents who preceded them. One of the Reagan administration's goals was to reduce the enforcement of anti-discrimination protection. Unfortunately for him, the president failed to make the necessary changes in the federal bureaucracy required to produce that shift across all of the agencies responsible for administering civil rights protections. Reagan did make inroads, however, into limiting some protections, and he contributed greatly to building the far-right conservative ideology that supported the dismantling of affirmative action. He also established an effective method to undermine civil rights initiatives later used very successfully by George W. Bush.

George H. W. Bush followed Reagan's lead on civil rights and the VRA, but was more timid about taking stances against civil rights laws because he feared the fallout generated by the Reagan administration's head-on confrontations over civil rights legislation. Reagan and H.W. Bush were more conservative in their administration of the VRA than either Nixon or Ford. Still, both Reagan and Bush did enforce the law in a manner consistent with its authors' intent. Consideration of the Reagan and Bush 41 presidencies reveals that they helped build support for a conservative agenda on civil rights and the VRA, but they could not dislodge the liberal consensus in favor of civil rights.

The Reagan Administration: Opening the Door to the Republican Right. Prior to Ronald Reagan, modern Republican presidents could be termed moderate conservatives. Reagan ushered in a renewed focus on conservative resistance to civil rights gains in a "departure from core civil rights legal values."[143] Reagan's agenda incorporated a quasi-

[143] Selig, Joel L. "The Reagan Justice Department and Civil Rights: What Went Wrong," *University of Illinois Law Review* 4 (1986). And see the contrasting view of William Bradford Reynolds, "The Reagan Administration and Civil Rights: Winning the War Against Discrimination, response to Selig," *University*

renewed "Southern Strategy" dedicated to dismantling civil rights' protections established in the 1960s. Reagan was unable to demolish federal anti-discrimination legislation and he was compelled, however reluctantly, to enforce the VRA. On an ideological level, however, Reagan opened the door to a conservative counterrevolution that has since grown considerably in institutional power and popular support. The administration's open disdain for race-based civil rights protections and its attempts to limit their scope helped to legitimize the conservative counterpoint of view. Even though the program as a whole was not immediately successful, it contributed to the long-game against the civil rights gains of the 1960s.

Ronald Reagan challenged civil rights law and ideology head-on. But because Reagan took office "at the height of federal efforts to impose numerical measures of equality," his efforts to oppose the liberal consensus in favor of the VRA faced concerted resistance. [144] Reagan sought to redirect civil rights protection. He openly expressed his ideological stance and confronted established civil rights law.[145] Reagan's predecessors in the Carter administration had increased incentives for minority entrepreneurs, established a number of race- and gender-conscious initiatives that expanded protection, and enforced "traditional" liberal civil rights legislation, including the VRA.[146] Reagan argued publicly that the Carter programs were faulty. He complained that "equal opportunity should not be jeopardized by bureaucratic regulations and decisions which

---

of Illinois Law Review. 4 (1987) Selig served as an attorney to the Civil Rights Division of the DOJ from 1969-1973 and 1977-1983; Reynolds was the Assistant AG from 1981-1988.

[144] Devins, Neal. "Reagan Redux: Civil Rights Under Bush," *Notre Dame Law Review* 68 (January 1993): 958.

[145] Ibid., 1000.

[146] Ibid., 958.

rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations . . . discriminatory."[147]

It was difficult for Reagan to make systematic changes to civil rights enforcement due to the interplay of the influence of the liberal consensus and the decentralization of civil rights enforcement across the executive branch. His administration failed to force the broad shift away from vigorous civil rights enforcement that he sought,[148] but the administration made progress on some projects and increased the salience of racial conservatism within large segments of the voting public. Unable to neutralize the liberal consensus as a whole, the president focused on decreasing relief to minorities on only a few civil rights issues: he attempted to return tax exempt status to racially discriminatory schools, to remove Mary Frances Berry and others among her colleagues from the independent bipartisan U.S. Commission on Civil Rights, to lead DOJ attacks on preferential hiring, and to oppose the VRA's use of disparate impact under Section 2 as evidence of discrimination in voting rights cases.

The effort waged in Congress during the 1982 reauthorization to exclude the disparate impact standard applied under Section 2 of the VRA was unsuccessful. The opposing efforts by a strong and well-organized civil rights lobby prevented eradication of the standard. Expressing the established perspective of the civil rights consensus, civil rights advocates sought to renew the Act and secure the right to bring causes of action for discrimination supported by findings of disparate impact. (See Chapter 3).

The Reagan administration's opposition to the 1982 reauthorization of the VRA was cut short. The administration felt compelled to change its position because it could

[147] Ibid., 958-959.
[148] Ibid., 959.

muster very little traction in Congress in the face of a strong minority lobby, which had the power to gather enough votes to pass a liberal version of the legislation. At issue in that session was the reauthorization of Section 5 and a proposed amendment to a permanent provision of the VRA, Section 2. Supporters of the VRA wanted Congress to reauthorize Section 5 and to amend Section 2 to include language explicitly stating that discrimination in Section 2 lawsuits could be established either by evidence of intentional discrimination or by evidence of discriminatory effect. Evidence of discriminatory effect had been excluded as an option for establishing discrimination in a Section 2 lawsuit in the *Mobile v. Bolden* (1980) decision, in which the Supreme Court upheld an at-large election for city commissioners when the plaintiff's proffer of discriminatory effect was rejected. [149] Traditionally, civil rights attorneys had used either evidentiary standard (intent or effect) to establish discrimination in at-large state voting systems. Accordingly, the loss of the discriminatory effect option resulted in what was essentially a moratorium on Section 2 lawsuits.

The Reagan administration expressed concern about the establishment of quotas for minority public officials and opposed the Section 2 amendment during the 1982 reauthorization. The administration's proposals included limiting the preclearance requirement to only specific named offenses under Section 5, shifting the burden of proof of discrimination to the DOJ (so that only laws affirmatively opposed by the DOJ might suffer rejection by the federal government), and retaining the *Mobile v. Bolden* decision as the standard under Section 2. As is discussed in greater detail in Chapter 3, deliberations in Congress were controlled by a well-organized pro-voting rights lobby led

[149] Bullock III, Charles and Katherine Ingles Butler."*Voting Rights,*" *in The Reagan Administration and Human Rights*, ed. Tinsley E. Yarbrough (City, State: Praeger Publishers, 1985), 31.

by the Leadership Council. The Council proved to be a formidable opponent of conservative Republicans in Congress on the issue of reauthorization and amendment.

The Reagan administration was unable to overcome the strong liberal coalition in favor of the VRA, and in fact lost its primary "soldier" in the House during the reauthorization hearings. Henry Hyde (R-IL), the face of conservative opposition, began the hearings staunchly convinced that Section 5 should not be renewed but was converted during the House hearings and became a supporter of the reauthorization of Section 5. Support for the VRA was also strong in the Senate. (See Chapter 3). Senator Bob Dole (R-KS) informed the president that a version of the VRA legislation that included Section 5 preclearance and an amended Section 2, would pass despite opposition by the White House.[150] After speaking with Dole, Reagan endorsed that version of the VRA. Reagan may have had concerns about the potential political blowback generated by opposition to the VRA. The Act was extremely popular among and widely supported by minority voters, and the administration was certainly aware that some fifty Republican congressional districts relied on the black vote.[151] Boasting that "[the] legislation proves our unbending commitment to voting rights," Reagan signed a reauthorization of the VRA in 1982, legislation, which strengthened voting rights for minorities.[152]

The Reagan administration did make progress at countering the intent of some civil rights initiatives, using methods subsequently employed by other presidents. In particular, Reagan used his appointment power to resist some anti-discrimination mandates and to lay a foundation for the later repeal of affirmative action programs. For example, in 1982, Reagan appointed Clarence Thomas to the chairmanship of the Equal

[150] Bullock, Charles S., III; Katherine I. Butler. "Voting Rights," p. 32.
[151] Ibid.
[152] Plass, *Exploring the Limits*, 171.

Employment Opportunity Commission ("EEOC"), which proved to be an effective means of resisting the anti-discrimination mandates established at the EEOC. Thomas adopted a non-confrontational, indirect approach against EEOC enforcement. Instead of speaking out against existing equal employment legislation or attempting to repeal it, Thomas changed the ideological direction of EEOC enforcement within the pre existing guidelines.[153] Reagan and his DOJ faced many attacks from civil rights groups and the media on issues of discrimination but none about the administration of the EEOC. Clarence Thomas was able to advance the goals of the Reagan administration without suffering backlash from interest groups.[154] Thomas changed the priorities of the EEOC, restructured it, and crafted an unassailable justification for the changes,[155] which allowed him to further the aims of conservatives, placate liberals, and avoid complaint and resistance. Thomas "shift[ed] scarce agency resources from disfavored to preferred policy objectives," the agency was able to make conservative policy progress while avoiding direct confrontations with Congress.[156]

Reagan's appointments to the Supreme Court and to lower federal courts helped to lay a foundation for the eventual reversal of some affirmative action programs and the VRA. Appointees Antonin Scalia and Sandra Day O'Connor agreed with Reagan that affirmative action discriminated against whites and that affirmative action was ineffective at combating racism.[157] Scalia subsequently took the helm of the conservative coalition within the Supreme Court and O'Connor provided intermittent, more moderate support of

[153] Devins, *Reagan Redux*, 965.
[154] Ibid., 963.
[155] Ibid., 969.
[156] Ibid., 964.
[157] Plass, Stephen. "Exploring the Limits of Executive Civil Rights Policy Making," *Oklahoma Law Review* 61 (Month 2008): 176.

limitations on anti-discrimination law. Reagan also appointed William Bradford Reynolds to the position of Assistant Attorney General, Clarence Pendleton to the chair of the Civil Rights Commission, and, as discussed, Clarence Thomas to the chair of the EEOC. Each of these appointments and others like them increased the conservative influence over the activities of the executive branch and the federal courts. This method of changing the personnel and thus ideology of civil rights initiatives was used extremely effectively by George W. Bush during his presidential term.

Reagan Administration Enforcement of the VRA. The Reagan administration was constrained in its ability to limit enforcement of the VRA. Although critics complained that the enforcement of the VRA under Reagan was "flaccid,"[158] this may be an unfair characterization of the Reagan DOJ. Bullock and Butler show that "[t]he incidence of proposed changes for 1981 and 1982 is similar to that during the last half of the Carter presidency," though the rate of objections during the first two years was lower than the preceding administration."[159] Bullock and Butler surmise that the Carter DOJ may have issued more objections during the first two years of the Carter administration due to the increased responsibility for Latino voters established during the 1975 reauthorization. The Lawyers Committee for Civil Rights noted a record number of VRA objections based on gerrymandering not seen during earlier administrations.[160] The Reagan administration did file fewer cases under the VRA than Carter "though the first few years of each term were similar.[161] The number of observers dispatched under the Reagan administration in 1982, 461, was the highest number ever dispatched for a single

[158] Bullock, Butler, "*Voting Rights*," 33.
[159] Ibid., 34.
[160] Ibid., 34.
[161] Ibid. 34.

election."[162] Bullock and Butler aver that "[c]ritics may be correct in saying that more could be done under President Reagan, but a charge that voting rights enforcement has been ignored is not supported. …"[163]

George H.W. Bush and the VRA. George Herbert Walker Bush ("Bush 41") expressed his objections to anti-discrimination law less forcefully than Reagan despite a similar agenda and strong conservative bias. Having seen the difficulties endured by the Reagan administration in its effort to challenge civil rights head on, Bush 41 tried to divorce himself from direct involvement in civil rights issues. As a result, he lost the support of both conservatives and civil rights proponents alike. He vacillated on controversial civil rights issues like the Civil Rights Acts of 1990 and 1991 (seeking to protect against job discrimination and providing the right to jury trial on discrimination claims) and Executive Order 11245 (providing equal employment opportunity). Bush 41 spoke publicly in favor of civil rights but maintained an effort to challenge civil rights legislation. "Bush sought to have it both ways. His brinkmanship, an attempt not to displease the right or the left, was designed to save him from the fires that so consumed the Carter and Reagan administrations."[164]

Yet Bush 41 did expand the influence of conservatism on the federal government. He had the opportunity to replace two justices on the Supreme Court. Both of the departing justices replaced by Bush 41 were liberals, giving him the opportunity to increase the conservative base on the Court. To conservatives, he missed one opportunity to redirect the Court. His selection of Justice David Souter proved to be "one of the

[162] Ibid. 34.
[163] Ibid., 34-35.
[164] Devins, *Reagan Redux*, 982.

biggest political blunders of a Republican president in the 20th Century."[165] Souter was an unknown commodity at the time of his appointment, but many perceived him as a true conservative. As his record would show, however, Souter was not a slave to the conservative agenda once he got his seat on the Court. Instead, he became a reliable liberal, at least on civil rights matters. Bush 41 was successful at creating a more conservative Court when he appointed Clarence Thomas, and he has indeed served as a reliable member of the conservative bloc on the Court since his arrival and a strident opponent of Section 5 of the VRA.

The George W. Bush Administration. George W. Bush ("Bush 43') was more successful at challenging civil rights protections than his Republican predecessors. His administration benefited from the development of conservative anti-discrimination legislation ideology and popular hostility toward affirmative action programs. Bush 43 combined the conservative posture, the ostensible support of civil rights protections exhibited by his father, and the appointment techniques introduced by Ronald Reagan. By exercising more control over appointees to the various agencies of the Executive Branch responsible for enforcing civil rights, Bush 43 was able to decrease enforcement of the VRA.

Publicly, George W. Bush expressed support for the VRA. His support for reauthorization of the VRA at the 2006 NAACP convention contributed to the passage of the bill. The NAACP speech broke a deadlock on the floor of Congress on VRA reauthorization. The same day of the speech, the bill returned to the House floor and the Speaker maneuvered the bill through the conference committee to avoid further potential

[165] "The Bush Legacy: The Supreme Court," January 12, 2009, *ABC News*, accessed March 2015, http://abcnews.go.com/TheLaw/BushLegacy/story?id=6597342&page=2.

delay. The bills emerging from the House and the Senate were identical, except for the titles, and therefore could be adopted easily, absent discussion about the slight differences in the caption.[166] (See Chapter 3).

By contrast, Bush 43 took steps to derail VRA enforcement. Like Reagan, the Bush administration benefited from challenges to civil rights initiatives that operated under the radar. He adopted Clarence Thomas' EEOC approach for the Voting Section of the Department of Justice. Instead of pushing to repeal the VRA or proposing amendments to weaken Section 5, Bush replaced the career personnel at the DOJ who were responsible for enforcing voting rights with political appointees who redirected the focus of the voting rights section away from minority voter protection. The administration supported the proposal and passage of state voter ID laws and other restrictions that worked against the mission of the VRA. The administration also used the law to bring suits to protect white voter claims that challenged VRA enforcement designed to enhance the voting rights of minorities.

Bush 43's approach spurred the departure of 60% of the career employees of the DOJ Voting Rights Section.[167] New appointees to the DOJ were selected for their political viewpoint, and those appointees in turn selected new employees based on political criteria. In one major voting rights case involving Alabama and Georgia, the DOJ filed legal briefs supporting positions rejected by career DOJ employees.[168] Career employees spoke about the significant changes to the Voting Rights Section of the DOJ

[166] Karlan, Pamela. "Lessons Learned," *Duke Journal of Law and Public Policy* Vol. 4:17 (Month, 2009): 18.
[167] An Investigation into the Removal of Nine U.S. Attorneys in 2006, US Department of Justice Office of the Inspector General &Office of Professional Responsibility, Sept. 2008.
[168] Pear, Robert. "Justice Department Challenges its Civil Rights Division," *The New York Times*, January 1, 1993. Just before Clinton entered the office of the President, the DOJ opposed the creation of multiple black districts in Alabama. In Georgia, the DOJ ruled that blacks did not have a legal basis to challenge the state commissioner who exercised all legislative and executive power and who was elected at large.

and complained about the refusal of the administration to adhere to the spirit of the law.[169] The administration supported Indiana's voter ID law in an amicus brief. The government's brief argued that voter fraud was a disincentive to lawful voters. At the time of the Indiana case, there were no recorded instances of voter ID fraud in the history of the state.[170] The brief downplayed evidence that support of the ID law was partisan and the fact that most Indiana voters who lacked the necessary identification to vote were poor and minority voters, a state of affairs that the VRA legislation is designed to avoid.[171] John Atlas argues that the Bush (43) administration energized the search for voter fraud as a method of disenfranchisement of minority voters in key battleground states.[172] The Bush administration failed to bring any voting cases under the VRA in the first five years of the administration, except one in support of white voters in Mississippi.[173] The administration precleared laws that would not have been so approved by its predecessors. It also endorsed the "DeLay" Texas redistricting plan, despite the conclusion of career employees that the plan violated Section 5's retrogression standard.[174]

The Bush 43 DOJ filed an amicus brief in favor of the state of Florida when the Brennan Center of New York sued the state under Section 2 of the VRA to ban a law that permanently disenfranchised ex-convicts. Career members of the Bush DOJ and

---

[169] The Voting Rights Section of the Civil Rights Division of the Department of Justice handles the direct administration of VRA preclearance submissions and lawsuits.
[170] *Crawford v. Marion County Election Bd*. 128 S.Ct. 1610, 1613 (2008).
[171] *Crawford v. Marion County Election Bd.* at 1620, Brief for the United States as Amicus Curiae, *Brennan Center for Justice*, accessed March, 2015, https://www.brennancenter.org/sites/default/files/legacy/Democracy/CrawfordvMarionCountyElectionBoard%20-%2012-10-07%20Amicus%20Brief%20of%20the%20United%20States.pdf, 20
[172] John Atlas, "The Struggle Over Voting Rights and the Future of Progressive Politics," *Social Policy* 38 (Spring 2008): 11-17.
[173] *United States v. Noxubee County Dem. Exec. Comm*., 494 F. Supp. 2d 440 (S.D. Miss. 2007).
[174] Karlan, *Lessons Learned*, 25-25.

newcomers holding a traditional civil rights ideology, such as then Deputy Attorney General Eric Holder and former Solicitor General Seth Waxman, filed amicus briefs in support of the Section 2 lawsuit.[175] The administration was also supportive of ending affirmative action admissions programs in the University of Michigan cases.[176] Additionally, and perhaps tellingly, Bush cut funding to civil rights enforcement.[177]

George W. Bush had a significant impact on the ideology of the Supreme Court. The Bush 43 appointees are solid conservatives who have increased the number of conservative decisions in contrast with the Courts that preceded them. Prior to the Bush administration, seven of the Supreme Court justices had been appointed by Republicans, yet most decisions on issues such as abortion, affirmative action, and individual rights (including voting), disappointed conservatives.[178] On many key cases, the Court ruled five to four, with O'Connor casting the deciding vote in unison with the Court's liberal bloc. Both Rehnquist and O'Connor announced their intention to step down during the Bush 43 administration, which meant that the president had the opportunity not only to name the next Chief Justice, but also, by nominating two conservatives, to change the balance on the Court. Bush named Chief Justice John Roberts and Justice Samuel Alito, both staunch conservatives, to the Court. Since then, on issues of affirmative action and voting rights, the Court's decisions have shifted definitively to the right, including the MUD and *Shelby v. Holder* decisions on the VRA. (See Chapter 5).

---

[175] "The Bush Admin Takes Aim: Civil Rights Under Attack," *Leadership Conference on Civil Rights Education Fund*, 32.
[176] Ibid.,5.
[177] Ibid., 35.
[178] Greenburg, Jan Crawford, "The Bush Legacy: The Supreme Court," *ABC News*, accessed March 2015, http://abcnews.go.com/TheLaw/BushLegacy/story?id=6597342.

The Democratic Presidents. On the whole, Democratic presidents from 1970 onward were more supportive of the VRA than their Republican counterparts. None of the Democrats have been responsible for signing a reauthorization of the VRA, so none has had the opportunity to attempt to amend the Act or to defend the reauthorization of the temporary provisions during a high profile reauthorization process. Despite belonging to the Democratic Party, which supports the VRA, Democratic Presidents since 1970 have not shown the level of aggressive support exhibited by Lyndon Johnson or the high level of enforcement exercised by Nixon and Ford. This situation is a direct consequence of the development of conservative opposition to civil rights and its subsequent growth. As the political environment has become more conservative, civil rights protections have come under attack and the movement for civil and voting rights has faded.

The Carter Administration on Civil Rights. Before ascending to the presidency, Jimmy Carter had a decent civil rights record as the governor of Georgia. He declared in his gubernatorial inaugural speech that "segregation was over and that racial segregation had no place in the future of the state," marking the first such public commentary from a governor from the Deep South.[179] Carter went on to hire blacks to statewide positions and made more of an effort to support desegregation efforts than his predecessors. Four out of five blacks supported Carter in his election as a result of his civil rights record.[180] As president, "Carter believed in racial equality" and engaged in a policy of civil rights enforcement in large part through executive orders.[181] Carter continued this trend while in

[179] "Jimmy Carter and Civil Rights," *Presidential History Geeks*, accessed March 2015, http://potus-geeks.livejournal.com/171526.html.
[180] "Jimmy Carter," *Spartacus Educational*, accessed March 2015, http://www.spartacus.schoolnet.co.uk/USAcarterJ.htm.
[181] Plass, *Exploring the Limits*, 169; Slotnick, Elliot E. "Lowering the Bench: Affirmative Action and Judicial Selection During the Carter Administration," 1 *YALE & L. POL'Y REV*. 270, 275 (1983).

office, appointing more diverse candidates to "federal leadership positions, including cabinet, sub- cabinet, White House, and judiciary positions than any prior president."[182]

The Clinton Administration and the VRA. President Bill Clinton recognized the importance of diversity in the nation's population as a political, cultural, and social reality. During his presidential campaign, he highlighted plans to increase diversity in government, improve civil rights enforcement, and break the cycle of poverty.[183] It was clear that while the nation had diversified, there were still "major disparities between whites and minorities in health status, unemployment rates, wages, and other key indicators of overall well being."[184] This state of affairs signaled the need to address civil rights issues less as a moral imperative and increasingly as a practical necessity.

Against this background, Clinton asserted a strong moral and rhetorical stance in favor of civil rights and proposed a strong civil rights agenda and a willingness to address a number of issues that had formerly been neglected. He sought to diversify the federal government and its programs and increase funding for civil rights enforcement.[185] From the outset, the administration alerted its agencies of the importance of "addressing non-compliance with federal civil rights law, including violations involving disparate impact."[186] Clinton was aggressive about using executive orders and memoranda to further civil rights aims. Yet despite his strong stance and agenda, he was unable to

---

[182] Shull, *American Civil Rights Policy*, 40-41.
[183] United States Civil Rights Commission on Civil Rights (USCCCR), *A Report of the Civil Rights Commission on Civil Rights* (USCCCR), "A Bridge to One America: The Civil Rights Performance of the Clinton Administration," Washington, DC: (April 2001):4.
[184] United States Civil Rights Commission on Civil Rights (USCCCR), *A Report of the Civil Rights Commission on Civil Rights*, "The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination and Ensuring Equality," Washington, DC (September 1999); USCCCR, "Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Opportunity Commission's Enforcement Efforts," Washington, DC (September 2000).
[185] USCCR, "A Bridge to One America," vi-vii.
[186] Ibid., v.

realize much of his civil rights agenda. His administration found itself stymied by a lack of Congressional support, poor implementation, and poor funding of civil rights enforcement agencies.

Because no VRA reauthorization occurred under Clinton's presidency, he never had the opportunity to take a position on the validity of the temporary provisions or to make proposals to amend the VRA. All the same, the record shows that Clinton supported voting rights. In 1993, he signed the National Voter Registration Act (NVRA), which also sought to reverse the effects of discriminatory and unfair voting laws by expanding the systems available for registration. The NVRA instituted mail-in registration and made it possible to register to vote in conjunction with getting a driver's license.[187]

The Clinton administration's support for the disparate impact standard in the enforcement of civil rights protections affected its support for voting rights. In 1994, Attorney General Janet Reno issued a memo to federal department heads, reiterating the directive to apply the disparate impact standard in civil rights enforcement.[188] The DOJ applied the standard in Section 2 VRA cases in accordance with Reno's directive and the 1982 VRA amendments. As a result, the drawing of majority minority districts became the most common remedy applied in Section 2 challenges to state districting complaints under the VRA.[189] Majority minority districts became the subject of challenge litigation after the 1990 census.

---

[187] Ibid., 54.
[188] Attorney General Janet Reno to Heads of Departments and Agencies that Provide Federal Financial Assistance, July 14, 1994, Office of the Attorney General, Memorandum, re: Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964.
[189] Cunningham, *Maximization at Any Cost*, 1.

The Clinton administration expressed its support for the districts and the disparate impact standard in its amicus brief in an important 1994 case, *Shaw v. Reno*, and worked through its Department of Justice to uphold the redistricting plans. Resistance to VRA relief plans ensured that voting rights remained a controversial issue at the end of the 1990s. Clinton acknowledged in a 2000 speech that "serious flaws in the mechanics of voting," still existed.[190]

The Barack Obama Administration and the VRA. The Obama administration has expressed support for the VRA and a dedication to protecting the law. The administration's approach to VRA enforcement has been contentious, despite the fact that there has been no reauthorization of the VRA during the Obama presidency. The development of a strong conservative opposition to the legislation, not to mention the work of the Republican Party and political entrepreneurs to propose and pass voter ID laws and to challenge the constitutionality of the VRA, have made enforcement of the VRA challenging for the Obama administration. The developments of the 2000s have meant that the Obama administration has had to enforce the Act in a hostile environment, defend the VRA against sustained attack, and ultimately begin to retool race-based voter rights protections after the Supreme Court ruled that Section 4 of the VRA is unconstitutional, effectively removing all states from coverage under Section 5 of the VRA.

By the time Obama entered office, the liberal consensus was no longer the predominant force undergirding voting rights law in the United States. Conservatives based in the Republican Party had, by 2008, developed an ideological basis for

[190] President William J. Clinton. "The Unfinished Work of Building One America," Message to Congress, January 15, 2001.

challenging the liberal consensus that resonated with the public, had built support around challenging the VRA, and had developed support for their position in the Supreme Court. The election of Barack Obama, the first black president, motivated an increase in conservative resistance to the VRA. Minority voters exhibited strong support for Obama and Republicans became convinced that they could not entice Obama supporters to support the Republican Party. This was a change of view by the Republicans who made an effort to attract minority voters during the late 1990s and early 2000s. That effort subsided by the mid-2000s, and gave way to a push for voter ID laws and constitutional challenges to the VRA.

State Voter ID Laws and Related Developments. The conservative campaign to propose and pass voter ID and similar laws began in the early 2000s. In 2005, Indiana passed a voter ID law that was subsequently upheld by a federal court.[191] In 2000, however, the proposal and passage of voter ID laws had not yet become a national trend. Voter ID laws, even in uncovered states like Indiana, pose an issue under the VRA. The laws arguably burden voters who are minorities, poor, and elderly; many of these voters have been shown, in the affected states, to have less access to sources to obtain voter IDs, and are more injured by limitations on early and absentee voting.[192] Republican legislators in favor of voter ID and similar laws argue that the provisions are designed to minimize voter fraud, a hotly contested justification due to overwhelming evidence that

[191] "Senate Enrolled Act No. 483," *In Gov Legislative Bills*, accessed March 2015, http://www.in.gov/legislative/bills/2005/SE/SE0483.1.html.
[192] Gaskins, Keesha and Sundeep Iyer. "The Challenge of Obtaining Voter Identification,' *Brennan Center for Justice*, accessed March 2015, http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf, 1.

affected states show little or no record of recent voter fraud.[193] During the first few years of the Obama administration, the DOJ had some success limiting the expansion of voter ID and similar laws in covered states and implementation of the laws. In the wake of two major Supreme Court decisions, it has been harder in recent years for the administration to combat voter ID and similar laws in covered and uncovered states.

Obama Administration Enforcement of the VRA. According to a US Commission on Civil Rights 2010 report, the Obama DOJ Section 5 enforcement has been "apolitical … fair… and consistent."[194] The Commission held that the enforcement methods and statistics were similar to those of the Bush 43 administration. The Commission described the Obama DOJ preclearance process as friendly to redistricting plans, and reported that the administration did not discriminate against Republican-controlled legislatures.[195] In 2011, the DOJ approved every plan submitted—twenty-six nationwide plans submitted by nine states. Six of the submitting states were controlled by Republican legislatures. The only plan challenged by the DOJ was the Texas plan, which was submitted for preclearance not to the DOJ but to federal court. The cycle marked the first time in history that Georgia and Louisiana received full administrative preclearance on the first attempt.[196]

Between 2011 and 2012 the Obama DOJ issued two effects-based administrative objections and only a few intent-based objections.[197] At the time the report about the 2010 census was written, numbers for 2012 were not available, and so the Commission

[193] Fund, John. "How Do You Address A Problem they Insist Doesn't Exist?" *National Review* ,accessed March 2015, http://www.nationalreview.com/article/375021/dems-voter-fraud-denial-john-fund
[194] US Commission on Civil Rights, "Redistricting and the 2010 Census," 30.
[195] Ibid., 26-27.
[196] Ibid., 28.
[197] Ibid., 44, 65.

refrained from commenting on any trends indicated by these two types of objections. The Commission did indicate that the DOJ followed its own guidelines (though some states, Texas in particular, registered some complaints that the guidelines were not clear.)[198] The Commission report also indicated that the DOJ was applying a similar standard to that used before the 2006 amendments in its assessment of intent-based objections, indicating that the DOJ took a conservative stance on objections to submissions.[199]

The Commission noted that the number of preclearance petitions submitted to the DOJ simultaneously with court filings or by court filing alone increased significantly.[200] The increase was huge compared to past cycles.[201] In 2011, twelve lawsuits were filed for preclearance; between 1972 and 2010 there had been a total of only 28 lawsuits.[202] The Commission discussed a number of reasons for the shift in practice including timing, better discovery, the belief that simultaneous filings would improve the odds of getting DOJ approval, and a belief that the DOJ would not clear the plans from particular states.[203] The report claims that the reason for the shift is not clear. The implication is that states began to resist DOJ oversight in favor of federal court. A court decree under Section 5 would preclude further preclearance by the DOJ under Section 5.

Important to the Commission's report, however, are the numerous statements of dissent by commissioners involved in preparing the report. Several raised the issue of the influence of the "constitutional overhang" of the *Northwest Austin v. Holder* case and the

[198] Ibid., 44.
[199] Ibid., 65.
[200] Ibid., 73.
[201] Ibid., 75.
[202] Ibid., 75.
[203] Ibid., 76.

pending *Shelby v. Holder* case. The commissioners complained that there was a gag order on the Civil Rights Commission, which prevented commissioners from discussing the constitutionality of Section 5 and the relevance of the upcoming Supreme Court decision. These commissioners did not argue that Section 5 was unconstitutional but indicated that the lawsuits were an important influence on state behavior that was worth mentioning and discussing in the 2010 redistricting report.

DOJ Enforcement 1970 -2010. During the course of the VRA's enforcement, relatively few objections have been issued. Since 1965, the number of voting law submissions objected to by the Department of Justice has "declined steadily to the point of relative insignificance."[204] In every category of submission, the number of objections by the DOJ has decreased. Over the same period, the number of submissions has increased drastically. From August 1965 until June 2004, jurisdictions filed 117,057 voting change submissions for administrative review. The department issued objections to 1400 or 1.2%.[205] In a Civil Rights Commission report breaking the relevant period into three sections, 1965-1974, 1975-1982 and 1982-2004, the Commission found that the DOJ interposed objections to 14.2% of submissions during the first period, 3.1% during the second period and 0.7% during the third.[206]

According to the 2006 U.S. Commission on Civil Rights, objections peaked in 1976 or 1986 depending on the metric used. Ninety percent of all voting law changes submitted before 2006 were submitted after 1982.[207] Since 1982 there have been a number of Supreme Court cases clarifying the boundaries of the Section 5 requirement,

[204] US Commission on Civil Rights, "Voting Rights Enforcement and Reauthorization," May 2006, 21.
[205] Ibid., 21.
[206] Ibid., 22.
[207] Ibid., 28.

which has resulted in more filings.[208] Also after 1982, states and local governments have submitted changes in a timelier manner, as compared with submissions during the 1965-1974 period when submissions were often late or not submitted at all.[209] Most states and local jurisdictions submitted changes to the DOJ; however, during the Obama administration, there has been an upsurge in filings with the district courts. Between 1972 and 2010, covered jurisdictions filed twenty-eight total lawsuits, a rate of about three per year. In 2011, thirteen lawsuits were filed in district court. Some of the redistricting plans at issue in the lawsuits were simultaneously filed with the DOJ.[210]

The statistics reveal that compared to the number of voting law changes, oversight by the federal government has not resulted in a high number of instances in which states must change their laws. The upshot is that interference with state government has been relatively low and likely less of an intrusion than many VRA critics think. White voters are in fact *still privileged* under the VRA Order, despite the improvement in voting power of blacks and other minorities. There has not been a complete abandonment of state sovereignty or majority voters under the VRA. Presidential enforcement of the VRA has not resulted in a complete transfer of control of state voting laws to the federal government.

Conclusion. Notable about the results discussed here is that conservatism has affected the enforcement of the VRA during both Republican and Democratic administrations. The last two administrations, Bush 43 and Obama, are extremely important because the impact of colorblind conservatism is highly visible. Bush 43's

[208] Ibid., 28.
[209] Ibid.
[210] US Commission on Civil Rights 2010, "Redistricting and the 2010 Census, Enforcing Section 5 of the Voting Rights Act, US Commission on Civil Rights," 75-79.

contradictory enforcement of the Act by using political appointees and aiming the legislation to remedy discrimination not identified by the Congressional purpose of the VRA resulted in a significant shift in VRA implementation. The government declined to assist minority voters and brought lawsuits under the VRA on behalf of whites. Bush 43's nomination of additional colorblind conservatives to the Court also hindered the application of the Act during and after his terms. In order for federal anti-discrimination laws to be effective, the states must respect it. The activities of the Bush 43 administration reveal that the long game against the VRA at the federal level resulted in a loss of respect for the enforcement of the VRA.

During the Obama administration, the DOJ has had significant difficulty wielding the oversight authorized by Section 5. This prevented the Obama administration from successfully objecting to voting law changes and put the executive branch in the position of having to defend Section 5 at the Supreme Court. State push back against the Act allowed states to maintain and implement regulations that arguably discriminated against minority voters. After the Supreme Court decision in *Shelby v. Holder*, state laws objected to under Section 5 were implemented without recourse by the Obama administration pursuant to the VRA. These changes in enforcement are not readily visible to the public. Because the presidents between 1965 and 2013 are known to have enforced the VRA, the subtle deterioration of the enforcement of the legislation in the executive branch has gone unfelt by the general public.

Chapter 5
The Supreme Court and the VRA, 1970-2013: Bending Toward a Colorblind Voting Order

Richard Valelly correctly observed that positive initial review by the Supreme Court provides a strong foundation for anti-discrimination law. The Court's first review of the Voting Rights Act in the 1966 decision, *South Carolina v. Katzenbach*, affirmed the constitutionality of the legislation, including the temporary and controversial Section 5.[211] As a result of the *South Carolina v. Katzenbach* decision, the legislation's unique feature mandating federal oversight of state voting law changes in covered states was subsequently treated as "a valid means for carrying out the 15th Amendment."[212] The nod from the Supreme Court fueled the ongoing application of the VRA, motivated full-fledged application of Section 5, and added solidity to the foundation of the VRA Order. But despite Valelly's confident assertion about the enduring impact of positive initial Supreme Court review, it does not assure the ongoing support of the judiciary. As the membership of the Court has become more conservative and colorblind conservative ideology has grown in influence, the Supreme Court's interpretation of the breadth and application of the VRA has narrowed significantly.

The shift to a colorblind conservative interpretation of the VRA by the Court occurred gradually. Early on, the Court began to narrow the application of Section 5, and over time it continued to pull back from broad applicability. Recently the Court disabled the application of Section 5 entirely.[213] The influence of colorblind conservative principles on the VRA resembles the impact of anti-discrimination legislation

[211] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
[212] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337 (1996).
[213] *Shelby v. Holder*, 133 S.Ct. 2612 (2013).

jurisprudence of the Court after Reconstruction. In both instances, the interpretation of voting rights as un-protectable voided statutes designed to enforce the 15th Amendment. The shift by the Court to a restrictive view of the VRA occurred more slowly than the analogous post-Reconstruction review. The Court's jurisprudence has severely limited the VRA, a development that contradicts Valelly's assertion that the VRA became securely entrenched as a result of robust party organization and positive initial review by the Supreme Court. While the Court's decision in *South Carolina v. Katzenbach* benefitted the VRA regime and provided stability, positive initial review did not result in permanence or make the legislation incontestable. In fact, because the legislation received positive initial review, conservatives against the Act were motivated to engage in a long game against it. The opposition has slowly but surely developed and strengthened its position in the Supreme Court, as the Court's members have included more Republican-appointed conservatives, negatively impacting the VRA.

This chapter evaluates the development of Supreme Court VRA rulings between 1966 and 2013, through a review of the Court's major decisions. The chapter is divided by Court—Warren, Burger, Rehnquist, and Roberts—and uses a selection of VRA decisions to illustrate the development of VRA jurisprudence. My study confirms a rightward trajectory in Supreme Court VRA decisions. The study also explores the substance of conservative arguments on the Court, provides insight into how those arguments have changed, and illustrates the relationship of conservative jurists to other political actors on the Right.

The Warren Court. The Warren Court was often considered an activist Court in favor of civil liberties. Chief Justice Earl Warren led a liberal majority that regularly used

judicial power to expand civil rights, civil liberties, and judicial and federal power.[214] Others on the Court, notably William Brennan, Hugo Black, William O. Douglas, Abe Fortas, and Thurgood Marshall, formed liberal majorities and were able to control decision making.[215] Cass Sunstein avers that "[t]o many people, the idea of judicial deference to the elected branches lost much of its theoretical appeal in the 1950s and 1960s, when the Supreme Court, under the leadership of Chief Justice Earl Warren, was invalidating school segregation (*Brown v. Board of Education*), protecting freedom of speech (*Brandenburg v. Ohio*) striking down poll taxes (*Harper v. Board of Elections*), requiring a rule of one person, one vote (*Reynolds v. Sims*), and protecting accused criminals against police abuse (*Miranda v. Arizona*)."[216] Rebecca Zietlow counters that in fact the Warren Court was less activist than the Rehnquist Court, since it only struck down seventeen acts of Congress in contrast to the Rehnquist Court's thirty-three.[217] Nonetheless, the rulings of the Warren Court were controversial, considered protective of minorities, counter-majoritarian, and activist. The jurisprudence caused much consternation in conservative circles.

The Warren Court did not disappoint on the issue of voting rights. In its first VRA decision, *South Carolina v. Katzenbach,* the Court sanctioned Section 5 as "appropriate legislation" to enforce the 15th Amendment.[218] In the lawsuit, South Carolina argued that

---

[214] Sunstein, Cass. 2005. "Justice Breyer's Judicial Pragmatism," *John H. Olin Law & Economics Working Paper Series* 267, November 2005, accessed March 2015, http://www.law.uchicago.edu/Lawecon/index.html.
[215] Associate Justices on the Warren Court included: Hugo Black, Stanley Forman Reed, Felix Frankfurter, William O. Douglas, Robert H. Jackson, Harold Hitz Burton, Tom C. Clark, Sherman Minton, John Marshall Harlan II, William J. Brennan, Charles Evans Whittaker, Potter Stewart, Byron White, Arthur Goldberg, Abe Fortas, Thurgood Marshall.
[216] Sunstein, "Justice Breyer," 3-4.
[217] **Zietlow**, **Rebecca E.** "The Judicial Restraint of the Warren Court (and Why it Matters)" *Ohio State Law Journal* 69 (2008): 259.
[218] *South Carolina v. Katzenbach*, 383 U.S at 337.

the VRA's prohibition against the use of "tests and devices" at the polls and the intervention of federal examiners violated states' right to implement and control elections. The Court disagreed. Writing for the majority, Earl Warren opined that the legislation was a legitimate exercise of remedial powers of the federal government to prevent racial discrimination in voting and approved the use of the unique remedy contained in the legislation to respond to the "insidious and pervasive evil" exercised by states to deny blacks the right to vote since the 15th Amendment's adoption in 1870.[219]

The decision was not unanimous. Justice Black concurred with the majority on the constitutionality of the legislation but issued the lone dissent on the validity of Section 5. Black argued that the section's ability to allow the federal government to strike down a state law in the absence of a traditional case or controversy was flawed and that the power violated the federalism boundaries established in the Constitution. Black opined: "Section 5, by providing that some of the states cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless…States treated in this way are little more than conquered provinces."[220]

Blacks' dissent did little to minimize the momentum inspired by the majority opinion. The potential negative impact on federalism under the VRA did not dissuade the Court, VRA advocates, or the Department of Justice from moving forward on VRA enforcement. The Johnson administration surged onward with registration drives and federal oversight of some polls.

---

[219] *South Carolina v. Katzenbach*, 383 U.S. at 309.
[220] *South Carolina v. Katzenbach*, Black, dissenting at 359.

Subsequent Warren Court decisions in *Allen v. State Board of Elections* (1969) and *Gaston County v. United States* (1969) augmented the *South Carolina* decision and ensured the applicability of Section 5 to a broad range of state voting law changes.[221] In *Allen*, the Court interpreted Section 5 as applicable to a broad range of voting law issues. The Court affirmed that private litigants could sue pursuant to Section 5 when states approved *any* new voting law. The Court cited Congressional intent to make Section 5 applicable to "subtle as well as obvious state regulations which have the effect of denying the right to vote because of race."[222] Dicta in *Allen* indicated that "any voting change in any covered electoral system" was subject to Section 5 and that continuing electoral discrimination was forbidden and therefore constitutionally regulated by the federal government.[223]

An influx of Section 5 submissions followed.[224] To that point, Section 5 had not been actively enforced. Official guidelines for preclearance submission had yet to be issued and enforcement was not comprehensive. In fact, several covered states and localities intentionally made voting law changes without seeking preclearance review in order to counter the impact of the VRA. The *Allen* decision began a trend toward enforcement and compliance with Section 5.[225] In 1970, the DOJ issued preclearance guidelines and began systematic review of preclearance petitions.[226] The support of the

---

[221] *Gaston County v. United States*, 395 U.S. 285 (1969).
[222] *Allen v. State Board of Elections*, 393 U.S. 544, 565-66 (1969).
[223] Ball, Howard, Dale Krane, and Thomas P Lauth, *Compromised Compliance: Implementation of the Voting Rights Act*, (Westport, CT, Greenwooss,1982), 98.
[224] Cunningham, Maurice T. *Maximization, Whatever the Cost: Race, Redistricting and the Department of Justice*, (Westport, CT, Praeger, 2001), 20.
[225] Preclearance submission is voluntary. Despite the broad approach taken in *Allen*, the Court only deems voting changes submitted pursuant to Section 5 if the state submits it. Submission does not occur just because a citizen makes the Attorney General aware of a legal change. In most instances, failure to submit is not considered "deliberate defiance of the act." See *Allen,* 393 U.S. at 572.
[226] Ball, Krane, Lauth. *Compromised Compliance,* 78.

Supreme Court allowed the VRA regime to expand beyond registration drives and federal poll watching and made operational the unique remedy provided by the legislation.[227]

The Supreme Court continued its support of a broadly applied VRA in the 1969 *Gaston County v. United States* decision.[228] The Court in *Gaston* affirmed the district court ruling that it had jurisdiction to consider the use of a literacy test in Gaston County, North Carolina, and the Court affirmed the lower court decision to deny reinstatement of the test. The county had "systematically deprived its black citizens the educational opportunities it granted its white citizens" such that voting age blacks might be unable to negotiate a literacy test, and therefore the provision violated the VRA.

The Warren Court's record of VRA jurisprudence reflects acceptance of the legislation and a relatively liberal interpretation of the statute, more liberal than any of the subsequent Courts. Warren Court decisions affirmed the constitutionality of the legislation and interpreted the intent of Congress to favor broad application. The Court applied the statute's remedial power to a wide range of voting rights changes and voting schema that minority voters alleged discriminated against them under the Act.[229]

The Burger Court. The Burger Court was generally supportive of the VRA. They did not question the constitutionality of the legislation and largely upheld the application of Sections 2 and 5 in a manner approved by the liberal consensus. However, the Burger Court was not willing to apply the VRA as liberally as had its predecessor. Under Chief Justice Warren Burger's leadership, the Court narrowed the application of Section 5.

Burger Court VRA jurisprudence shifted squarely away from comprehensive Section 5 coverage of all voting law changes. Thus, not *every* voting law change was

[227] Cunningham, Maurice. *Maximization*, 19.
[228] *Gaston County v. United States*, 395 U.S. 285, 297 (1969).
[229] *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

subject to Section 5. In *Connor v. Johnson (1971)* the Burger Court ruled that U.S. District Court decisions related to electoral apportionment could escape subsequent Section 5 review. "A decree of the United States District Court is not within reach of Section 5 of the Act," said the Court.[230] Subsequent *Conner* litigation did provide Section 5 review of laws passed after the litigation, even laws under development during the litigation process, but the decision meant that states could avoid preclearance of apportionment plans by taking preclearance-related litigation to district court.[231] District court orders were now unreviewable by the DOJ even if they caused a negative impact to black voters.

The Court refused to grant Section 5 relief in an instance when it felt that changes to black voting power were negligible. In *City of Richmond v. United States* (1975), the Court overruled the district court holding that the institution of a ward plan that included an annexation that decreased the black voter population by 10% was racially motivated.[232] The Court approved the ward plan because it left black voters with what it called a "proper share" of political power in Richmond, despite the annexation and resulting decrease in eligible black voters. Although the Court had held in the 1971 *Perkins* case that annexations were subject to Section 5,[233] the majority in *Richmond* minimized the significance of the apparent contradiction: "We did not hold in *Perkins* that every annexation effecting a reduction in the percentage of Negros in the city's population is prohibited by Section 5."[234]

---

[230] *Connor v. Johnson*, 402 U.S. 690 (1971).
[231] Ball, Krane, and Lauth. *Compromised Compliance*, 103.
[232] *City of Richmond v. United States*, 422 U.S. 358 (1975).
[233] See Ball, Krane, and Lauth. *Compromised Compliance*, 36. And, note that the Burger Court did rule that annexations were subject to Section 5 in *Perkins v. Matthews*, 400 U.S. 379 (1971).
[234] *Perkins v. United States*, 422 U.S. 358, 368 (1975).

In *Richmond*, the Court refused to equate a decrease in the proportion of black voters, where there had been a history of voting discrimination, as *prima facie* violation of Section 5. Rather, the Court held that it was not the intent of Congress to make every state voting law change subject to federal oversight. According to the Court, to rule in the alternative would have set too broad a precedent. A majority of the Court thought that since the Richmond annexation maintained viable electoral power for the district's black residents, the action did not have the effect prohibited by Section 5 and therefore should not be restricted. The dissent in *Richmond* argued the opposite, contending that the annexation was racially motivated, that it was a voting law change, and that Section 5 preclearance should apply.[235]

Following the *Richmond* decision, the Court further clarified its approach to Section 5 in *Beer v. United States* (1976) by establishing the retrogression requirement.[236] In *Beer*, the city of New Orleans complained that the Department of Justice denied its petition for preclearance of the city's 1970 city council districting plan. In its decision, the Burger Court opined that Section 5 denials of preclearance applied only to voting law changes that caused the "retrogression" of black voting power. In other words, unless there was a clear negative impact on black voters, i.e. a marked decline in black voting power, a law was not voidable. State action to *improve* voting opportunity for blacks in the community was not required; state action could only be curtailed when it caused a sufficient decrease in black voting power.

The standard of review established in *Beer* decreased the purview of Section 5 applicability. Only those voting law changes that *significantly* decreased minority-voting

[235] *Richmond*, v. *United States,* 422 U.S., Brennan, dissenting, 379-388.
[236] *Beer v. United States*, 425 U.S. 130 (1976).

power were disallowed under Section 5. Changes that caused a minimal decline in power, maintained the status quo, or resulted in only a negligible increase in voting power were exempt from interference by the Department of Justice based on the authority provided by the VRA. The Court expressed concern about setting too broad a purview for Section 5. These decisions evidence a retreat from the more comprehensive and liberal standard set by the Court in *Allen v. State Board of Elections*. They also express a contrary view of the intention of Congress to that described in earlier decisions.

On the other hand, many rulings reflected the Burger Court's willingness to abide by the VRA mandate. In *White v. Regester* (1975*)* the Court agreed nine to zero that a Texas redistricting plan "invidiously excluded" blacks and Mexican Americans from "effective participation in political life, specifically the election of representatives to the Texas House of Representatives."[237] In *White,* the Court upheld a Texas redistricting plan that mandated single member districts to improve minority voter influence. Mandates to establish single member districts in several covered states benefitted minority voters especially in localities that switched to at-large districts as many jurisdictions had done in response to the passage of the VRA. Similarly, in *United Jewish Organization v. Carey (1977),* the Court upheld as lawful the DOJ's demand that Brooklyn districts be drawn with race as a consideration, despite the loss of voting power of white Hasidic voters in New York City. [238] And, the Burger Court refused to allow individual jurisdictions inside covered states to bail out of Section 5 coverage independently. In *City of Rome v. United States* (1980), petitioners sought to escape from VRA coverage independent of the state

[237] *White v. Regester*, 412 U.S. 755, 769 (1975).
[238] Cunningham, *Maximization*, 28.

of Georgia.[239] The Court maintained that individual jurisdictions within a state could not be released from coverage independently when a state was covered under the VRA in its entirety.[240] Conservatives were not happy with the *City of Rome* ruling.[241]

In *United Jewish Organizations (U. J. O.). v. Carey* and *Thornburg v. Gingles,* the Court also approved the drawing of majority minority districts as part of relief pursuant to redistricting plans, viz. creating districts which provided minority voters an improved opportunity to elect the candidates of their choice. In U.J.O., [242] the Court said that if a majority minority district did not dilute the white vote, "compliance with a Justice Department Voting Rights Act objection is a complete defense to a lawsuit challenging the creation of new majority minority districts."[243] A decade later the Court reaffirmed its sanction of majority minority districts and established a framework to determine whether a district was lawful.

In *Thornburg v. Gingles* (1986) the Court ruled that majority minority districts could be drawn in instances where there had been "severe and persistent racially polarized voting" in the past, worthy of remedy. The Court set baseline requirements to determine whether a district was appropriate. The *Thornburg* decision set "three threshold conditions for establishing a Section 2 violation: (1) the racial group must be sufficiently large and geographically compact to constitute a majority in a single member district; (2) the group must be politically cohesive; and (3) the white majority must vote sufficiently as a bloc to enable [the bloc] to … usually … defeat the minority's preferred

[239] *City of Rome v. United States* 446 U.S. 156 (1980).
[240] Section 5 coverage applied to several states in their entirety however many jurisdictions became covered by Section 5 in 1970 and 1975 in states where Section 5 did not apply to the whole state.
[241] Ball, Krane, and Lauth. *Compromised Compliance*, 107.
[242] *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977).
[243] Parker, "Shaw," 49.

candidate." The state legislature attempted in *Shaw*, pursuant to DOJ directives, to draw a district that encompassed a voting bloc like that described in *Thornburg* but was denied.

The Burger Court also limited VRA relief under Section 2. In a watershed case, *Mobile v. Bolden* (1980), the Court overturned a precedent that provided Section 2 plaintiffs the option of establishing a case of voter discrimination based on discriminatory intent or discriminatory effect. The *Mobile* decision determined that plaintiffs must show that districts were drawn with discriminatory *intent* in order to provoke constitutional protection under Section 2. In *Mobile*, plaintiffs made a clear showing that the effect of the district system was to prevent blacks from electing candidates of their choice under the city council at-large election system. The Court ruled that "action by a state that is racially neutral on its face violates the Fifteenth Amendment only if it is motivated by a discriminatory purpose."[244] The city of Mobile's at-large election system had been established in 1911 and was arguably not instituted as part of an intentional plan to discriminate against black voters or to evade the dictates of the VRA. The decision was devastating to Section 2 lawsuits nationwide. VRA attorneys, convinced that intentional discrimination was almost impossible to prove, refused to accept new Section 2 litigation, while judges presiding over Section 2 cases stayed the litigation for failure to articulate a case.

The change to Section 2 jurisprudence imposed by the *Mobile* decision set the main agenda for the 1982 reauthorization hearings—the amendment of Section 2. (See Chapter 3). Proponents of the Voting Rights Act Order proposed an amended Section 2 that provided for both forms of proof —intent and effect. Conservatives argued against overturning *Mobile*. The conservative opposition argued that to allow remedy for

[244] *Mobile v. Bolden*, 446 U.S. 55, 62 (1980).

unintentional discrimination was akin to a mandate for "proportional representation," despite the explicit denial of such a mandate in the letter of the amendment.[245] Conservatives made much of the argument that only electoral plans that ensured equal descriptive representation would subsequently pass muster under the Voting Rights Act. (See Chapter 3).

John Roberts, then a special assistant to the Attorney General, was the point person for the Reagan administration's response to the Section 2 amendments. He agreed that an effects test might lead to "quota systems" in electoral politics and did not believe that the "savings clause" in the bill removed that danger. "Just as we oppose quotas in employment and education, so too we oppose them in elections."[246] The idea of proportional representation was abhorrent to conservatives, and created an effective wedge issue. Still, VRA proponents ultimately prevailed and amended Section 2 to include both bases for action.

The Supreme Court promptly heeded the change in the law. In accordance with the 1982 amendment, the Court retreated from the *Bolden* standard. In *Rogers v. Lodge* (1982),[247] which was argued during the 1982 reauthorization process but decided after its conclusion, the Court applied an analysis that was in sync with the new legislative language.[248] Justice White, who dissented in the *Mobile v. Bolden* decision, wrote for the Court to void an at-large election system in Burke County, Georgia. "[A]lthough the state

---

[245] Title 42, Chapter 20, Subchapter I – A, U.S. Code Section 1973, "…*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

[246] Roberts, John. "Talking Points For White House Meeting on Voting Rights Act," January 26, 1982, *Government Archives*, accessed March 2015, http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf.

[247] *Rogers v. Lodge*, 458 U.S. 613 (1982).

[248] Rush, Mark E. "*Shaw v. Reno* to *Miller v. Johnson*: Minority Representation and State Compliance with the Voting Rights Act", *Publius* 25 (Summer 1995): 172 fn. 78.

policy behind the at-large electoral system was 'neutral in origin,' the policy was being maintained for invidious purposes in violation of appellees' Fourteenth and Fifteenth Amendment rights." The system prevented blacks from being elected and was maintained in an effort to perpetuate invidious discrimination. Because the law resulted in discrimination against black voters, there was a viable basis for Section 2 relief that the Supreme Court respected.

The Court was also responsive to the 1982 amendments in its *Thornburg v. Gingles* (1985) decision.[249] Filed before the reauthorization, *Thornburg*, a Section 2 case from North Carolina, was heard after the Act had been reauthorized. The issue in *Thornburg* concerned the efficacy of seven districts established in the 1980 redistricting process. In the decision the Court applied a "totality of the circumstances" test to determine that that the majority of the new districts in fact violated Section 2 because in effect they diluted the black vote.

Some have referred to Burger Court VRA jurisprudence, as creating a "foot in the door for the Rehnquist Court's later application of colorblind jurisprudence and the subsequent death of minority voting rights."[250] This seems to go too far in reading subsequent developments back into an earlier period. The Court treated VRA application more sternly than the Warren Court, but was respectful of the liberal consensus and of Congress' adjustments to the legislation.

Abigail Thernstrom: Colorblind Conservative against the VRA. The 1980s marked a positive shift in conservative criticism against affirmative action law. "If the 1960s had been a time of opportunity for liberal critics, the 1980s were boom time for

[249] *Thornburg v. Gingles*, 478 U.S. 30 (1986).
[250] Hench, Virginia E. "The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters" *Case Western Reserve Law Review* 48 (1998): 727, 752.

critics of liberalism."[251] This criticism included the VRA. The emerging conservative critique of the VRA tracks the career of Abigail Thernstrom, whose scholarship contributed significantly to the development of colorblind conservative theory at the Supreme Court. Her intellectual brief against the VRA presaged arguments subsequently adopted and used by conservative members of the Supreme Court.

In her 1978 book, *The Odd Evolution of the VRA*, Thernstrom argued that the VRA was "odd" because it was no longer being used for its original aims: to remove the traditional roadblocks used to disenfranchise black voters, like poll taxes and literacy tests. Instead it was being applied to make sure that "blacks and language minorities," like Mexicans in Texas, were elected to office based on their numerical strength. Essentially, so Thernstrom argued, the Act had been converted from a tool designed to allow the franchise to serve as a means used to guarantee that minorities could elect the representatives of their choice.[252] Thernstrom maintained that the *Allen* decision changed the VRA into something not contemplated by the Congress under Section 5. *Allen*, said Thernstrom, "permanently blurred the distinction between disenfranchisement and dilution," and created a foundation for a "ward system" of proportional representation.[253] Thernstrom's 1987 work, "Whose Votes Count," became a "veritable bible" for conservative jurists, including five who often formed a majority on the Rehnquist Court in the late 1980s.[254] Thernstrom's arguments have continued to influence the conservative justices on the Roberts Court. Clarence Thomas' first reference in his *Holder v. Hall*

---

[251] Shatz, Adam. "Thernstrom's in Black and White," *The American Prospect*, December 10, 2001.
[252] Thernstrom, Abigail. *Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections,* (Washington, DC: American Enterprise Institute Press, 2009).
[253] Ibid., Given the opportunity, Thernstrom would have testified against the Section 2 amendment in the 1982 hearings; however, due to some poor political jockeying, she was ostracized and alienated by the Civil Rights community and was effectively barred from the proceedings.
[254] Ibid.

concurrence is to Thernstrom,[255] citing her interpretation of the shift in the application of the VRA as both accurate and, as Thernstrom argues, problematic.

Thernstrom's critique of majority minority districts also strongly influenced the Supreme Court.[256] She argued that such districts were essentially improper racial gerrymanders that resulted in proportional representation. This ultimately meant that remedial action under the VRA was an improper use of racial consideration by the state. The Court later adopted this assumption. On this particular subject, Thernstrom's arguments influenced the Court's decision in *Shaw v. Reno* (1994) and VRA jurisprudence to follow.[257] In *Shaw*, as part of relief to white plaintiffs challenging a minority district, the Court rejected the district based on the fact that it was drawn based solely on racial considerations. Applying strict scrutiny to state districting, the Court held that such electoral line drawing was akin to apartheid.[258]

The Rehnquist Court: Conservatives Begin to Wield Power. Beginning in 1986 and ending in 2005, the Rehnquist Court bridged the period between the throwback Jim Crow conservatism, largely delegitimized by the civil rights revolution of the 1950s and 1960s, and the emergence and ultimate ascendance of colorblind conservatism between the 1980s and 1990s. The maturation of colorblind conservatism as a respected ideology included arguments directed against the VRA. The threat of proportional representation, stoked at the 1982 reauthorization hearings, provided fuel and justification for colorblind arguments against the VRA in the public sphere and at the Supreme Court. Even as the Rehnquist Court demonstrated ostensible deference to the VRA, conservative justices

[255] *Holder v. Hall*, 512 U.S. 874 (1994) (Thomas concurring).
[256] Thernstrom's theories are echoed and supplemented by others, including Carol Swain and Carl Van Spavorsky of the *National Review*, and Timothy O'Rourke and Hugh Davis Graham.
[257] *Shaw v. Reno*, 509 U.S. 630 (1993).
[258] *Shaw v. Reno*, at 647 (1993).

narrowed its application, and limited allowable remedies. The Supreme Court expressed increasing doubts about such measures as the drawing of majority minority districts, which were required by the DOJ under Section 5 and by lower courts under Section 2. The shift in the Court's jurisprudence became especially pronounced when it began to apply strict scrutiny to state action taken pursuant to the VRA.

Changes in membership resulted in an increasingly conservative Court. Chief Justice William Rehnquist, a proponent of a conservative view of affirmative action prior to his elevation to lead the Court in 1986, penned or signed on to a number of decisions that narrowed the VRA during his tenure as Chief Justice.[259] On the Burger Court, Rehnquist had often been the lone dissenter on voting rights cases. But as a result of appointments to the Court by President Reagan (Sandra Day O'Connor in 1981, Antonin Scalia in 1986, and Anthony Kennedy in 1988), the views of the majority eventually came into alignment with Rehnquist's. The Rehnquist Court's agenda was facilitated in part by the departure of two justices important to decision making aligned with the liberal consensus. Both Thurgood Marshall and William Brennan Jr. retired from the Court during the Rehnquist years: Brennan in 1990 and Marshall in 1991. Their departure resulted in a marked shift rightward in Supreme Court jurisprudence. By the mid-2000s, a core of conservatives on the Court, including Scalia and Thomas, were often joined by the moderate conservatives (O'Connor and Kennedy) and wielded much power. As Chief, "Rehnquist helped transform a bench preoccupied with the rights of the poor and disenfranchised into one that …[preferred to leave societal problems to the legislature.]" The Court "reduced protections for criminal defendants, curtailed Congress' power in

[259] Liptak, Adam. "The Memo That Rehnquist Wrote and Had to Disown*", New York Times Week in Review*, September 11, 2005. In 1952, while a clerk for former Justice Jackson, Chief Justice Rehnquist, wrote a memo arguing against the ultimate decision in *Brown v. Board of Education*.

local affairs, and…made a point of boosting states' rights at the expense of federal power…and limited the Court's role in pushing goals such as school desegregation and prison improvements."[260]

One result of the 1982 Section 2 amendments was a shift in the response of the DOJ to preclearance submissions and a corresponding shift in the Court's response to DOJ mandated remedies, particularly the drawing of majority minority districts in redistricting challenges. In the late 1980s and in the 1990s, the most common DOJ response to redistricting challenges under Section 5 or Section 2 was to order the establishment of majority minority districts.[261] The remedy became especially pronounced after the 1990 census and resulted in the election of a significant number of blacks to Congress. The increase in black elected officials due to districting pursuant to the VRA stoked dissent against the VRA in the public and judicial spheres. "The striking increases in the number of majority-black and majority-Hispanic districts triggered a white backlash that focused on the use of race in drawing majority minority districts and on the shapes of some of the districts."[262] White voters in five Southern states (North Carolina, Louisiana, Georgia, Texas and Florida) alleged that the creation of majority minority districts violated their right to equal protection, and subsequent lawsuits raised the issue in additional jurisdictions.[263] The Court became increasingly intolerant of majority minority districting during the Rehnquist term.

---

[260] Biskupic, Joan. "Rehnquist Left Supreme Court with Conservative Legacy," *USA Today*, September 4, 2005.
[261] Cunningham, *Maximization*,1.
[262] Parker, Frank R. "*Shaw v. Reno*: A Constitutional Setback for Minority Representation", *PS: Political Science and Politics* 28 (March 1995): 47.
[263] *Ibid*.

In *Presley v. Etowah County* (1992), after the election of the first black district commissioner in Etowah, Alabama, the Supreme Court held that state officials' decision to decrease the powers of commissioners, removing authority over road maintenance and expenditures in their districts, did not fall under the purview of Section 5.[264] Minority plaintiffs argued that the county had not sought preclearance before it significantly altered commissioner duties. The Court concluded that coverage of each and every electoral change would be overly burdensome to the many districts inside a covered state and would leave federalism "… a mere poetic ideal."[265] Again, we see the Court refusing to apply the *Allen* standard and consider all voting changes under Section 5. The decision penalized the first black officeholder and provided no recourse under the VRA. This was a marked shift away from the purpose of the Act, to open the franchise and its fruits to minorities.

"White backlash" lawsuits became commonplace during the term of the Rehnquist Court. A landmark lawsuit, the North Carolina case, *Shaw v. Reno,* was decided in 1993. Brought under the VRA and the 14th Amendment, the case ultimately was decided under the Equal Protection Clause. White citizens of North Carolina sued to void the districting plan for North Carolina ordered by the DOJ pursuant to Section 5. The plan included the addition of a second majority minority district that was unusually shaped. The shape of the district in particular led the members of the Supreme Court to deem the districting plan design to be based solely on race. The Court denied the constitutionality of the plan, finding that it lacked consideration of traditional redistricting measures. A deeply divided Court agreed that the Equal Protection Clause did not permit

[264] *Presley v. Etowah County*, 502 U.S. 491, 509 (1992).
[265] *Presley*, 502 U.S. at 510.

an election law or redistricting plan that ". . . goes beyond what [is] reasonably necessary to avoid retrogression." [266] The Court refused to uphold any districting plan that classified citizens solely on the basis of race.[267]

The Court's belief that the district shape was based on the consideration of race was not unreasonable; the district was drawn to accommodate minority voters. However, the shape of a district is not necessarily indicative of unlawful racial motive. District lines often fail to conform to neat shapes because of geography and because populations are not spread evenly across geographical areas. Also, it seems unreasonable for the Court to use the Equal Protection Clause to void 15th Amendment protection. The purpose of the VRA is to prevent discrimination against minority voters. The VRA was not designed to protect white voters. However, at the crux of colorblind conservatism is the idea that whites should not be discriminated against by civil rights benefits granted to minorities, that is, that civil rights legislation includes whites thereby voiding any "special treatment" of blacks. The Court's decision here and in other cases directly applies colorblind conservatism to the enforcement of the VRA. These decisions change the purview of enforcement and hinder the potential for the enforcement of the Act to improve minority voting rights.

This was a significant departure from precedent,[268] but lawsuits like *Shaw* quickly became relatively commonplace—cases brought by white plaintiffs claiming to have suffered discrimination due to VRA enforcement—and the Court continued its interpretation of the VRA as a tool to protect white voters. Tellingly, white plaintiffs who

[266] *Shaw*, 509 U.S. at 655.
[267] Benson, Jocelyn F. "A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act," *Nebraska Law Review*, 88 (Jan. 2009): 133.
[268] *U.J.O. v. Carey*, 430 U.S. 144 (1977); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

lodged lawsuits against majority minority districts *were not required to meet the same standards* as were minority plaintiffs attempting to bring challenges to secure VRA relief. White plaintiffs were neither required to satisfy the *Gingles* criteria nor show injury due to the creation of majority minority districts to their voting power. The fact that the districts were drawn based on race was generally enough to justify the standing of residents to object.

In *Shaw*, the Court essentially ruled that race could be considered as a districting variable but that racial gerrymandering is unconstitutional. The Court did not make clear where the line between consideration and quotas lay, and it used the shape of the district analysis to avoid stating plainly that remedial action under the VRA was considered unconstitutional. [269] According to *Shaw*, any district considered strangely shaped by a federal court judge could be struck due to lack of compactness. Civil rights attorneys complained that *Shaw* chilled states' motivation to settle voting rights cases because the remedies being requested would violate *Shaw*. [270] Mark E. Rush argues that *Shaw* "was a call to Congress to clarify the vision of representation and voting rights that is manifested in the VRA." [271]

The Court continued to issue decisions narrowing the application of the VRA by limiting state action under the Equal Protection Clause, and by reducing the scope of Sections 2 and 5. The Court continued to tolerate suits by white plaintiffs without requiring that those individuals show injuries induced by DOJ-ordered VRA decrees. The shift in the Court's jurisprudence is similar to that which occurred with higher

[269] Rush, Mark E. "Shaw," p. 159.
[270] Grofman, Bernard. "*Shaw v. Reno* and the Future of Voting Rights", *PS Political Science and Politics*, 28 March 1995): p. 32.
[271] Rush, Mark E. "Shaw": 172.

education affirmative action case law. Schools once obligated to establish affirmative action policies to facilitate the admission of minority students were barred from considering race exclusively. Instead, under the *Bakke* line of cases, schools could consider race, but never exclusively, in making admissions decisions. Essentially, the "over-consideration" of race as part of an effort to cure past discrimination became unconstitutional. By the mid-1990s, state action under the VRA could take race into account, but it became unlawful to make race alone the primary consideration. The purpose of the VRA became inherently suspect in the eyes of the Court.

In *Holder v. Hall* (1994), the Court disallowed an increase in commissioner seats in a district where no black commissioner had previously had the opportunity to serve and simultaneously narrowed consideration for minority voters sought under a combination of Section 2 and Section 5.[272] The Court rejected the district court decision that the state of Georgia had a responsibility to increase the number of seats on a school board commission from one to five. In fact, the Court held that as a category, challenges to the size of a governing body are not cognizable under Section 2 of the VRA. The Court held respondents (black citizens) accountable for justifying the requested alternative—a five-member commission (the number approved by voters for consideration, but which was later voted down by ballot)—and complained that that there was no clear standard against which to measure the proper size of a commission. Under the pre-existing single-member commission system, solely white commissioners had controlled the county seat since 1912. But the Court held that "there [was] no principled reason why one size of a government authority should be selected over another."[273] The Court resisted opening

[272] *Holder v. Hall*, 512 U.S. 874 (1994).
[273] *Holder v. Hall*, 512 U.S. 874, 881 (1994).

minority office holding opportunities under the VRA. Furthermore, the Court in applying the *Gingles* standard did not consider that the black community qualified for relief under the Act.

In response to respondents' argument that the change in the size of a commission was reviewable under Section 5, and therefore also under Section 2, the Court averred that though it had indicated in the past that Sections 2 and 5 were essentially the same, the Court had not officially sanctioned the interchangeability of the causes of action pursuant to each. "We do not think that the fact that a change in voting practice must be precleared under Section 5 necessarily means that the voting practice is subject to challenge in a dilution suit under Section 2."[274] The Court went on to analyze the differences in the purposes of Section 2 and 5, starkly distinguished retrogression from dilution. The implication of the decision was that the purposes of the two sections did not overlap. The Court called the distinctions made between the two sections of the VRA "quite unremarkable."[275] Though the jurisprudence of Sections 2 and 5 has varied over time, the purpose of the VRA as a whole is to eradicate race-based voter discrimination. Barring claims arising under Sections 2 or 5 from consideration under the other section, inevitably limited and restricted the purview of the VRA.[276]

The Court did not go as far in *Holder v. Hall* as Justice Thomas would have. Thomas averred that the question should be considered from a statutory perspective. According to Thomas, the plain letter of the law does not cover the size of a commission because that aspect of a governing body is not a "standard, practice, or procedure" within

[274] *Holder v. Hall*, at 883.
[275] *Holder v. Hall*, at 884.
[276] The presidential administration was simultaneously encouraging the Voting Rights Section of the DOJ to divorce its consideration of Section 2 and Section 5 when considering preclearance applications.

the terms of Section 2.[277] More important, Thomas objected to voter dilution claims. He argued that they are impossible to adjudicate under Section 2 because the analysis demanded that judges apply political determinations about what constituted dilution.[278] Thomas quoted *Shaw v. Reno* to assert that the application of remedies under Section 2 resulted in the "racial balkanization of the Nation," and he cited Abigail Thernstrom to support his assertion that the VRA had been "converted from its original aim into a device for the regulation, rationing and apportioning of political power among racial and ethnic groups."[279]

The Court also increased the level of review of state action under the VRA, making VRA relief less secure. In *Miller v. Johnson* (1995) the Supreme Court overturned a districting plan designed under DOJ supervision under the VRA. In *Miller* the Court applied strict scrutiny to the state action taken pursuant to the VRA. Strict scrutiny was used according to the Court because "[r]ace was, as the District Court found, the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations." [280] Compliance with an order under the VRA, said the Court, was not valid unless it survived strict scrutiny. In *Miller,* the Court held that the districts at issue were created with an exclusively racial motive, and were therefore unconstitutional. The application of strict scrutiny to state action taken under the VRA served to nullify civil rights legislation designed to provide protection to minority voters.

[277] *Holder v. Hall*, at 892 (Thomas concurring).
[278] *Holder v. Hall*, at 894 (Thomas concurring).
[279] *Holder v. Hall*, at 893 (Thomas concurring).
[280] *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

The Court reiterated the strong distinctions between Sections 2 and 5 in *Reno v. Bossier Parish School Board* (1997).[281] There the Court held that a preclearance denial could not be based on a Section 2 violation. Retrogression must be present to justify a preclearance denial; further, since retrogression and vote dilution were not the same, the DOJ could not attempt to mitigate vote dilution as part of a preclearance petition. [282] The Court rejected the DOJs combining Section 2 into Section 5 consideration, as had become the norm in the DOJ Section 5 preclearance process.[283] The Court went on to further limit VRA application in *Reno v. Bossier Parish School Board II* (1999).[284] There, the Court held that Section 5 preclearance may not be denied to a school board plan adopted with discriminatory but non-retrogressive intent. The Court thereby instructed the DOJ that all apportionment plans were worthy of preclearance (approval) unless they were retrogressive in purpose or effect.[285] If a redistricting plan maintained the status quo or only modestly improved voting power, then it qualified as constitutional. "Under this new standard, the Department [could not] object to an ameliorative plan even in the face of 'smoking gun' evidence of racial animus on the part of the key decision-makers."[286]

In Georgia v. Ashcroft (2003), "[t]he Supreme Court narrowed the scope of sanctionable changes to election laws and procedures that could be found to be retrogressive, dramatically altering the established legal test for evaluating whether certain election laws had a harmful effect on minority voters.[287] Here, a Georgia plan replaced majority minority districts with "influence districts," districts where minority

[281] *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).
[282] Benson, Jocelyn. "Shared Existence," 134.
[283] Cunningham, Maurice. *Maximization*, 73.
[284] *Reno v. Parish School Board II*, 528 U.S. 320 (1999).
[285] Benson, Jocelyn. "Shared Existence," 135.
[286] McCrary, Peyton. *Review of Cunningham, Maurice T., Maximization, Whatever The Cost: Race, Redistricting, and the Department of Justice*. H-south, H-Net Reviews. February 2002.
[287] Benson, Jocelyn. "Shared Existence," 136.

voters cannot elect "a member of their group, but do have the opportunity to help choose the winner from among the white or Anglo (and sometimes other candidates) contesting that election."[288] The Court approved of influence districts as non-retrogressive. At the same time that the Court denied coverage for racial gerrymandering pursuant to the VRA, it approved political gerrymandering completed by parties based purely on political motives. But party competition, of course, is strongly tied to race. In a 2004 written ruling by Antonin Scalia, *Vieth v. Jubelier,* the Court ruled that the political gerrymandering alleged in the Pennsylvania case was not unconstitutional. Republicans newly in control of the state legislature redrew lines to assist the party politically and to punish Democrats who had politically gerrymandered the previous districting plan.[289]

VRA cases decided by the Rehnquist Court mark a pronounced shift toward the application of colorblind principles to VRA jurisprudence. During Rehnquist's tenure, the Court applied strict scrutiny to state action designed to comply with VRA orders. It voided remedial plans, narrowed the scope of the Act, and established a strong distinction between relief under Sections 2 and 5 of the VRA. The Court shifted away from the presumption that the VRA was designed to repair the poor state of minority voting and toward the theory, a colorblind one, that *no* voter should be impacted negatively due to the consideration of race in the voting process.

The Roberts Court. Colorblind conservatism has had a far greater foothold on the Court's decision making in the 2000s than in previous years. The liberal consensus has faded and colorblind conservative arguments against affirmative action are now

[288] Engstrom, Richard L. "Redistricting: Influence Districts — A Note of Caution and A Better Measure," *The Chief Justice Earl Warren Institute on Law and Social Policy*, UC Berkeley Law School, May 2011: 1-8.
[289] *Vieth v. Jubelier*, 541 U.S. 267 (2004).

respected. Never dismissed as camouflaged Jim Crow arguments, colorblind conservative assertions are considered a logical basis for a fair rendering of the Constitution. Chief Justice John Roberts and the other key conservative members of the current Supreme Court, Thomas, Scalia and Alito, subscribe to colorblind principles and apply colorblind logic on affirmative action legislation and programming. The conservative majority believes that affirmative action legislation is outdated and unconstitutional, including the important aspects of the VRA.

The balance between liberals and conservatives on the Roberts Court is the same as that on the Rehnquist Court, despite changes in personnel. George W. Bush replaced Justice Sandra Day O'Connor with Samuel Alito and Chief Justice Rehnquist with John Roberts, after the retirement and death of the former Associate Justice and Chief, respectively. The new conservatives joined the core of conservative justices already on the Court: Scalia and Thomas, and the conservative leaning moderates, Stevens and Kennedy (now the new swing vote after the departure of O'Connor). Barack Obama had the opportunity to maintain the preexisting number of justices on the liberal side, by appointing Sonia Sotomayor (2009) to replace Justice David Souter, and Elena Kagen (2010) to replace Justice John Paul Stevens. Sotomayor and Kagen joined Ginsburg and Breyer, preserving the five-to-four balance, conservative to liberal, on the Court in existence prior to the change in Court leadership.

The Roberts Court is a conservative one, and it is conservative on the VRA. Roberts came to the Court from a career steeped in conservative policy and jurisprudence. A member of the Federalist Society, Roberts clerked for conservative judges, including Justice Rehnquist in the 1980s, and served the Reagan and Bush

administrations in various capacities.[290] Roberts also served as a conservative member of the D.C. circuit court. Justices Thomas, Scalia, and Alito also subscribe to colorblind conservative principles, prioritize states' rights, and bring those considerations to bear on affirmative action legislation, including the VRA. Thomas has taken the lead in publishing opinions that claim that Section 5 is unconstitutional.

The Court's affirmative action agenda became clear early in Roberts' tenure. In the *Parents v. Seattle* case in 2006, an equal protection lawsuit, Roberts wrote for the Court to express his dedication to ending race-based remedies. The Court struck down the school districts' rule mandating the consideration of a student's race as a tiebreaker to determine student assignment to local schools due to overcrowding. Roberts relied on the precedent in *Brown v. Board of Education* (1954), which he described as a mandate to exclude race as a consideration in determining school admissions. Roberts asserted that *Brown* pronounced the end to the consideration of race in grade school assignments and that therefore that the Seattle school district acted unconstitutionally. Applying the precedent in *Adarand Constructors* (1994), the Court used strict scrutiny to evaluate the states' use of race as a prerequisite to school assignment and found it unlawful.[291] The state, said Roberts, had not engaged in the "narrowly tailored," good faith consideration of race neutral alternatives required under the 14th Amendment.[292] "The way to end

[290] The Federalist Society is a "a group of conservatives and libertarians interested in the legal order founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." See http://www.fed-soc.org/aboutus/. Samuel Alito, Antonin Scalia, and Clarence Thomas are also members of the Federalist Society.

[291] *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). In *Adarand*, the Court held that all racial classifications must pass strict scrutiny review. Furthermore, past injury does not prima facie show present or future injury. After *Adarand*, even racial classifications designed to remedy past discrimination are subject to the high bar posed by strict scrutiny review.

[292] In fact, the school district considered a number of non-racial factors before assigning a student to a school. The consideration of race was a tiebreaker measure designed to ensure that the racial composition

discrimination based on race is to stop discriminating on the basis of race,"[293] Roberts opined. "…[R]ace discrimination in public schools is unconstitutional."[294]

The Roberts Court has applied a similar logic to the Voting Rights Act. It has made significant progress at applying colorblind analysis to narrow VRA protection. In general, the Court has interpreted the law in a manner than does not favor minority voting rights. The Court's decision in *Parents* ended state mandated diversity when there was overcrowding in the Seattle School district. Similarly, the Court's interpretation of the VRA has been detrimental to the ability of the federal government to apply legislation to improve the voting power of minority voters. The Court has taken a hands-off approach to federal oversight of state action on voting law changes, even when those changes might weaken minority voting rights. This conservative approach has culminated in severe restrictions on the VRA's reach. When the Robert's Court struck the Section 4 coverage formula in *Shelby v. Holder* in 2013, it removed all states from Section 5 coverage and ended federal oversight of voting law changes under the VRA.[295]

The Roberts Court's interpretation of the VRA resulted in less protection for minority voters and ironically (or perhaps intentionally) greater protection for the Republican Party under the VRA. In a 2008 decision, *United Latin American Citizens v. Perry* (2008), the Court approved the "Delay" redistricting plan, despite its highly unusual timing — and the fact that it decreased the voting power of Democratic Latinos. The Court held that the political gerrymandering by Republicans, then in control of the

---

of the school was considered when overcrowding forced the assignment of students to schools other than those assigned to them geographically.

[293] *Parents v. Seattle*, 127 S.Ct. 2738, 2768 (2007).

[294] Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court*, (New York, NY: Anchor Books, 2008), 389.

[295] *Shelby v. Holder*, 133 S.Ct. 2612 (2013).

state legislature, was constitutional, despite the unorthodox timing and partisan redrawing of district lines just a few years after the decennial redistricting. The Court held that it was constitutional for Texas Republicans to redraw district lines to benefit the Party, even if it violated Section 2 of the VRA. The Court found a violation of Section 2 in a portion of the disputed Texas' districting plan where it decreased the percentage of Democratic Latino voting strength in the district in question. In that district, the Democratic representative was replaced by a Republican.

Voters seeking a majority minority district were rejected by the Court in *Bartlett v. Strickland* (2009). Based on a totality of the circumstances test, the Court held that district voters did not meet the threshold test in *Thornburg v. Gingles*, so that they might qualify to be considered for a majority minority district. According to the Court, the district was already a "*de facto*" majority minority district, since blacks could secure enough crossover votes to secure the election of their preferred candidate. The Court refused to take action to ensure the improvement of minority voting power. On the contrary, the Court reiterated its belief that Section 2 did not "require state officials to draw election district lines to allow a racial minority that would make up less than 50 percent of the voting age population in the redrawn district to join with crossover voters to elect the minority's candidate of choice."[296] In general, the Roberts Court has deemphasized relief for minority voters pursuant to the VRA.

In 2009, the Court announced its position that Section 5 of the VRA might not be constitutional, the first time a Supreme Court majority openly questioned the validity of the statute since it was passed. Filed in federal court six days after the conclusion of the 2006 reauthorization, but not argued until April 2009, the *Northwest Austin Municipal*

[296] *Bartlett v. Strickland*, 556 U.S. 1, 2 (2009).

Utility District No. One v. Holder (2009) (MUD) lawsuit was based on the presumption that the failure of Congress to amend Section 5 meant that there was a persuasive case to be made that the section was outdated and unconstitutional.

The MUD lawsuit was an action brought by a Texas utility district subject to Section 5 coverage because it was located in a covered state. Northwest Austin Municipal District challenged the constitutionality of Section 5, and in the alternative, asked the Court to rule that Northwest Austin Municipal District be allowed to bail out of Section 5 coverage independent of the state. The majority of the Court stopped short of holding that Section 5 was unconstitutional. But the Court did allow the district to bail out, independent of the state, essentially overturning the Court's decision in *City of Rome v. United States* (1980). The Court went on to explain that subdivisions like the utility district were eligible for bailout and that Section 5 was likely unconstitutional. The Court made clear that for Section 5 to achieve constitutional security, it would be necessary for Congress to revise Section 5 to reflect the significant improvement in voting rights in the covered states. The Court took the opportunity both to reveal its lack of respect for the VRA and state its intention to strike the most important provision in the law.

The Court was likely well aware that the possibility of a congressional compromise to amend Section 5 was impossible. The 2006 reauthorization had just been completed a short three years prior, and the Act, including Section 5, was renewed for twenty-five years. It was no secret that Congress intentionally did not amend Section 5 in 2006 because such an attempt would have made it impossible to pass the reauthorization. (See Chapter 3). The MUD decision was eight to one, including all but Justice Thomas in the majority. The liberal justices on the Court appear to have agreed to the decision in

MUD because it staved off consideration of the constitutionality of Section 5, and because it left the legislation intact and unchanged.[297] It is also possible that they overestimated the sanctity of the legislation's status as a crown jewel of the Civil Rights Movement, and like many, thought it unlikely that the Court would overturn the legislation. Clarence Thomas dissented in MUD to insist that the Court should have addressed the constitutionality of Section 5. He argued that that section was unconstitutional because it exceeded the powers of the 15th Amendment.

Thomas, a leader on the Court in publishing decisions that aver that Section 5 is unconstitutional, dissented again in *Perry v. Perez* (2012), to assert that Section 5 was unconstitutional. In that case, the Supreme Court vacated a proposed redistricting plan in Texas, but not to the benefit of minority voters because the original inclusive state district lines could not be re-imposed.[298] Texas district lines still needed to be redrawn after the Court's rejection of the districting plan, by legislators apparently committed to plans that minimized the power of minority voters. As such, the imposition of the preclearance requirement left voters insecure as to how their voting rights would be treated by the state of Texas. The Court ordered a plan that had "neither had the purpose nor [a potential] effect of denying or abridging the right to vote on account of race or color," but the state population had grown and the state legislature remained in control of revising district lines.[299] Justice Thomas dissented to say that Section 5 was unconstitutional and that the

[297] Serer, Adam. "'Demeaning Insult' in John Robert's Voting Rights Act Decision," March 19, 2014, *MSNBC*, accessed March 2015, http://www.msnbc.com/msnbc/demeaning-insult-chief-justice-john-roberts-voting-rights-act-decision.
[298] *Perry v. Perez*, 132 S. Ct. 934 (2012).
[299] 42 U.S.C. Section 1973c(a).

"duly enacted redistricting plans should apply…" free of any preclearance requirements.[300]

In *Shelby v. Holder* (2013), the Roberts Court got another opportunity to adjudicate the constitutionality of Section 5, and the Court went still further in its application of colorblind conservative principles.[301] The Court fundamentally restricted the power of the Act's temporary provisions in *Shelby*. Surprisingly, the Shelby Court refrained from holding that Section 5 was unconstitutional. But, the decision was nonetheless successful at removing the Section 5 preclearance power. The Court struck Section 4 of the VRA in *Shelby*. Section 4 outlined the formula by which states covered by Section 5 were identified. By voiding the Section 4 coverage formula, the Court removed all states from coverage, and therefore removed the federal government's power to preclear laws in those states under the VRA. The Court took this action in the face of a polarized Congress that even now remains unwilling and unable to revise the coverage formula. In *Shelby*, the Court removed the most powerful operating aspect of the VRA in preventing race discrimination in voting.

In the decision, Roberts wrote that states had significantly improved their voting records and that the Section 4 criteria no longer accurately identified states exercising discriminatory behavior in the voting arena. Furthermore, Roberts held that the VRA, by applying Section 5 to some states and not others, violated the tradition of "equal sovereignty of the states," singling out some states for federal oversight and not others. [302] Notably, *Shelby v. Holder* is the first decision since *Dred Scott* to invoke the doctrine of

[300] *Perry v. Perez*, at 945 (Thomas dissenting).
[301] *Shelby v. Holder*, 133 S. Ct. 2612 (2013).
[302] *Shelby v. Holder,* 133 S. Ct. at 2623.

equal sovereignty where the right to vote is involved."[303] By holding Section 4 unconstitutional, the Court was able to achieve its aim of disengaging the VRA without striking Section 5. With no states covered, the Section 5 power was rendered moot. The decision was a boon for the Chief Justice's anti-affirmative action agenda. Richard Hasen, calls "[t][he Chief Justice … a patient man playing a long game" [to end affirmative action].[304] The *Shelby v. Holder* decision removed the federal government's power over state voting laws and is the biggest conservative victory over the VRA Order to date.

Thomas, joined by Scalia, concurred with the majority that Section 4 was not constitutional and reiterated his opinion that he "would [also] find Section 5 of the VRA unconstitutional…" [305] According to Thomas, the plain discrimination that Section 5 was designed to circumvent no longer existed. It was therefore impossible to justify burdening covered states with responsibilities under and federal oversight pursuant to Section 5. "The extensive pattern of discrimination that led the Court to previously uphold Section 5 as enforcing the 15th Amendment no longer exists."[306] Thomas asserted that even though the Court was willing to leave Section 5 intact, Congress failed its burden to justify a current need for the provision and its expansion in 2006. [307] Thomas thought the Court should have ruled on the constitutionality of Section 5. He argued that "[b]y leaving the

[303] Blacksher, James and Lani, Guinier. "Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote Shelby County v. Holder," *Harvard Law and Policy Review* 8 (Month 2014): 39.
[304] Hasen, Richard. "The Chief Justices Long Game," *New York Times*, June 26, 2013.
[305] *Shelby v. Holder*, 2631 (2013) (Thomas concurring).
[306] *Shelby v. Holder*, 2632 (Thomas concurring).
[307] *Shelby*, Id. (Thomas concurring).

inevitable conclusion unstated, the Court needlessly prolong[ed] the [inevitable] demise of that provision."[308]

Ruth Bader Ginsburg dissented in *Shelby*, joined by Justices Breyer, Sotomayor, and Kagen. According to Ginsburg, Congress has the power to enforce the 14th and 15th Amendments by reauthorizing the VRA. Further, she held that Congress did so, correctly, in 2006, supported by a relevant and ample record. Ginsburg argued that the evidence presented at the 2006 reauthorization justified the reauthorization of the VRA and the constitutionality of Sections 4 and 5. She pointed out that the Court's majority decision disabled the federal government's power under Section 5 at a time when it is uniquely positioned to counter the impact of "second generation" voter discrimination, which is still ongoing in covered states including in Alabama.[309] Ginsburg argued that the law worked to prevent voter discrimination and that it protected against backsliding by states interested in limiting voting rights based on race. Ginsburg concluded that Section 5 coverage should be maintained as part of the continuing effort to maintain a voting system free of racial discrimination.[310] Furthermore, Ginsburg considered the Court's reliance on "equal sovereignty" to be improperly applied.[311] Ginsburg lamented that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[312]

Evidence of the damage of the *Shelby* decision to the power of the VRA was almost instantaneously apparent. States previously barred from implementing potentially

[308] *Shelby*, Id., (Thomas concurring).
[309] *Shelby*, at 2647 (2013) (Ginsburg dissenting).
[310] *Shelby*, at 2646, (Ginsburg dissenting).
[311] *Shelby,* at 2649, (Ginsburg dissenting).
[312] *Shelby,* at 2650, (Ginsburg, dissenting).

discriminatory voter ID laws by the DOJ under Section 5 immediately announced their intention to put those laws into action.[313] Texas and North Carolina both instituted laws previously denied preclearance shortly after the *Shelby* decision was published. Additional states were thus motivated to reinstate efforts to pass or enact voter ID laws and/or to impose laws frozen during the 2012 election. Without the Section 4 criteria to identify covered states, the DOJ is unable to bring Section 5 preclearance to bear on pending law changes in formerly covered states. The unique power provided by the VRA became inoperable.

Conclusion. The Roberts Court has driven the VRA to the precipice Richard Valelly theorized was impossible. The Court rendered the unique power of the VRA void and further challenged the hegemony of the VRA Order. The Court's shift to holding parts of the VRA unconstitutional developed out of slow incremental change. Initially the Court indicated full support of the spirit and intent of the VRA. But as early as the late 1960s and early 1970s, the Court shifted to partial support, and by the early 2000s, the Court had graduated to tacit non-support of the law's purpose and objective. The shift tracks the development of colorblind conservatism in the social and political spheres. Today, some support the liberal consensus and many others endorse colorblind conservative principles and consider the VRA to be detrimental to mainstream voters. The conservative siege against the VRA is making headway.

[313] Pinckney, Darryl. "Blackballed: The Black Vote and US Democracy*," New York Review of Books* (Month 2014): 62-3. The state of Texas instituted its voter ID law hours after the Shelby decision was announced.

Chapter 6
Conclusion: The End Game

The right to vote is fundamental to American democracy. When the franchise operates effectively, i.e., when people turn out and voice their opinion on issues or in the selection of elected officials *and* their votes are counted, voting is a method by which democratic action can take place. After a long history during which the country denied most blacks the right to vote and blocked their participation in the creation of policy or the election of public officials, the 1965 Voting Rights Act dramatically broadened the franchise in the United States to include minority voters. The passage of the VRA facilitated and supported the right to vote for blacks by empowering the federal government to require states to register voters, oversee state elections, and, in some cases, preclear state voting law changes before they could be put into effect. Under the effects of the law, a new racial voting order took root, dislodging the Jim Crow Order that had been in place since the end of Reconstruction

This dissertation has evaluated the influence of conservatism, mostly driven by Republican political imperatives, on federal efforts to enforce the Voting Rights Act. The VRA engendered resistance by those who resented the establishment of federal power over state functions left to the states under the Constitution and by virtue of long-established practice. Conservatives resisted the passage of the legislation during deliberations in 1965 and have continued to oppose the Act throughout the almost fifty years that it has been the law. Over time, the conservative long game against the VRA has influenced the federal government, weakening federal application and enforcement of the Act.

Because the VRA has had such a significant impact on voting in the United States, it came to be taken for granted as a new political order. By 1969, the VRA enabled more than eight hundred thousand blacks to register to vote in the seven states to which Section 5 originally applied.[314] The number of black elected officials also increased dramatically, "more than fivefold, rising from 1469 in 1970 to 7370 in 1990."[315] These developments in the electorate, combined with the ongoing application and reauthorization of the VRA's temporary provisions in 1970,1975,1982, and 2006, led many to believe that the remedy was permanent and not subject to erosion.

Yet in fact the law has suffered from the influence of conservatism on the federal government, and that has led to recent deterioration in the VRA Order. Contrary to Richard Valelly's optimistic conclusion in *The Two Reconstructions*, the research presented here shows that the VRA, often called the "crown jewel of the civil rights movement,"[316] did not secure enduring legitimacy in American jurisprudence.[317] Quite the contrary: the legislation is at risk of becoming impotent. As described in detail in Chapter 5, a major section of the law, Section 4, was voided in 2013.[318] That change resulted in a significant weakening of the VRA by undermining Section 5, which had granted the federal government authority to preclear voting law changes in any of the states identified under Section 4. The decision matters because Section 4 identified states in which voting laws still required oversight.

---

[314] U.S. Congress. Senate. Subcommittee on Constitutional rights of the Committee of the Judiciary. 1969 and 1970. "Bills to Amend the VRA of 1965." 91st Cong., 1st and 2nd session. Charles Mathias (R-MD).
[315] Joint Center for Political and Economic Studies. *Elected Officials 1990: A National Roster*. (Washington, D.C: Joint Center for Political and Economic Studies Press, 1991): 1.
[316] Gerken, Heather. "Goodbye to the Crown Jewel of the Civil Rights Movement: People died to pass Section 5 of the Voting Rights Act, but that Did not Save It from the Supreme Court," *Slate.com*, June 25, 2013.
[317] Valelly, Richard M. *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago, IL: University of Chicago Press, 2004), 19.
[318] *Shelby v. Holder*, 133 S.Ct. 2612 (2013).

This is not the first time in American history that anti-discrimination law designed to establish minority access to the franchise has become vulnerable. Lacking persistent support from the national government, the sweeping anti-discrimination provisions established after the Civil War to provide newly freed blacks the right to vote and to neutralize the power of states to deny the franchise eroded and collapsed quickly.[319] Initially these provisions were supported in Congress, where Radical Republicans passed the laws in large part to bolster the Republican Party in the South. But anti-discrimination laws were not backed by the executive branch, which prioritized the restoration of the Union. Nor were they supported by the Supreme Court, whose decisions undercut, voided, and ultimately rendered obsolete anti-discrimination law.[320] By the turn of the 20th century, the Jim Crow Voting Order was in force; states controlled the franchise, and blacks were denied the right to vote.

Reconsidering Voting Rights Act Scholarship

*Implications for Political Science Literature***.** My research contributes to political science literature, specifically to the study of American politics, public policy, and American political development. Most directly, this dissertation extends the scholarship of American political development and applies as its framework the principle of "intercurrence," a concept introduced by Karen Orren and Stephen Skowrownek. The development and enforcement of the VRA have been affected by "the awkward

[319] Valelly, *Two Reconstructions,* 19.
[320] *The Slaughterhouse Cases*, 83 U.S. 36 (1973). Beginning with *The Slaughterhouse Cases*, the Supreme Court decided a series of cases between 1873 and the 1880s that weakened anti-discrimination law post-Reconstruction.

overlapping of old and new orders, which produces friction and change."[321] Here, I show that intercurrence between the Voting Rights Act Order and the Colorblind Voting Order that vie for hegemony today have influenced the durability of the VRA Order. Political scientists and historians writing before me have largely overlooked this interaction when examining the VRA. Most literature written about the Act has assumed that the law is permanent and that outside forces are not actively eroding it. (To be fair, this decay has become much clearer over time.) My examination of the influence of conservatism on the national government's implementation of the VRA highlights the dynamics of intercurrence and reveals cracks in the VRA foundation that formerly went unrecognized.

My work also explores the relationships of the political parties to each other and to voting rights after the height of the civil rights movement. These connections were examined for the First Reconstruction period by V.O. Key and Paul Frymer. They demonstrate that the failure of either party to support black voting rights post-Reconstruction contributed to the development and maintenance of the Jim Crow Voting Order. In this dissertation I show that voting rights legislation in the modern era is better supported by the Democratic Party. Opposition to VRA-based minority voting rights is located primarily in the Republican Party. My dissertation exposes how Republican officials in all branches of government have argued against and taken action to limit the influence of the VRA.

Engaging historians on the VRA. My research also provides a historical analysis of the VRA. Historians have completed significant work that has analyzed the similarities between the First and the Second Reconstructions. Much of the insight of that writing relies on a framework that assumes that the Second Reconstruction succeeded whereas

[321] Orren, Skorownek. *The Search for American Political Development.*

the First did not. Historians such as C. Vann Woodward and Eric Foner have compared the Reconstructions to determine the causes for the decline of the First Reconstruction and the rise of Jim Crow laws. Foner ultimately posits a number of factors for the decline of anti-discrimination law post-Reconstruction; Woodward offers insight into the development of Jim Crow laws. As discussed in Chapter One, Woodward's work also established that the two periods were very similar, and he cautioned that the VRA Order could become subject to the same kind of deterioration that occurred in the late 1800s. He warned, in his 1981 Congressional testimony at reauthorization of the VRA, that a weakening of Section 5 might portend a revival of voter discrimination. In the aftermath of the *Shelby v. Holder* Supreme Court decision, Woodward's warning appears to have become fact.

My research extends the work of these historians on the VRA by exploring the near fifty-year life of the Act. From this perspective, it is possible to see that, despite the significant strength of the VRA Order and its successes, the Act is not unassailable. Besides confirming Woodward's warning, my analysis affirms Alexander Keyssar's thesis that voting rights in the U.S. are cyclical, that they expand and contract over time. Voting rights expanded in 1965 at the passage of the VRA; there has been a consistent and ongoing effort to contract those rights since.

Valelly's The Two Reconstructions. In my dissertation, I take issue with Richard Valelly's claim in his book, *The Two Reconstructions*, that the Second Reconstruction is a success in contrast to the First. Valelly focuses his work on explaining the relationship of party and jurisprudence building during the First and Second Reconstructions. He argues that the impacts of both party politics and judicial decisions during the second

reformation of discrimination law produced a voting order that is more or less permanent. Hence, in his view, the VRA became a durable piece of legislation that has done much to remedy inequality over the course of approximately forty years (he was writing in 2004), in contrast to legislation passed during the First Reconstruction, which was repealed within ten years. Valelly centers his comparison on political party strength and jurisprudence building, and the strategy is persuasive. His assessment assumes, however, that the fortuitous state of the Democrats' party building and jurisprudential support that existed in the 1960s and 1970s meant that the legislation has not been significantly threatened by time or other pressures. I argue that the conservative movement has undermined the law and that it has produced an effect that is akin to the activity that caused the end of similar legislation during the First Reconstruction. This time, the pressure was more subtle and took longer to have a negative impact.

In fact, in *The Two Reconstructions*, Valelly correctly points out a number of problems facing the VRA. I would argue that all of the challenges Valelly identifies are intertwined with conservative opposition, which is investigated here. However, Valelly does not consider the challenges fatal to the VRA Voting Order. Rather, he concludes that reauthorization of the Act in 2006 would be critical because the Second Reconstruction aims had not yet been achieved and because there was still a need for the remedy to continue to work as a "gradual solvent of economic and educational inequality."[322] Valelly ends his investigation confident that the legislation would be renewed, and that it would continue to exist until the aims of the VRA Order had been accomplished.

[322] Valelly, *Two Reconstructions*, 250.

Valelly cites three main issues faced by the VRA—he calls them "warts"—undermining the bipartisan political and judicial support that has heretofore upheld the VRA and its unique provisions.[323] First, he notes that since the passage of the VRA, the Republican Party has used it to mobilize the existing membership and to solicit new members in actual opposition to the Act and other remedies for black and other minority communities. Second, he argues that the GOP has abused the application of the law by using it to benefit white voters; and third, that the Supreme Court has become more conservative and narrowed the application of the Act. In response to the first two issues, Valelly explains that the VRA was indeed something of a "golden goose" for Republican Party mobilization. And he acknowledges that the GOP abused the VRA by the use of Section 2 to redistrict to benefit white voters. But he does not view these problems as potentially fatal to the VRA Order.

Valelly's third "wart" is related to jurisprudence. He argues that the Court had become more conservative and has narrowed the application of both Sections 2 and 5. Still, he is not "convinced that the Court's application of colorblind conservatism has harmed black voters," and he downplays Supreme Court opposition to the VRA as "relatively recent."[324] Valelly cites the twenty-five years of support for the Act following its passage, and the fact that the Court's support was critical to the establishment of a solid voting rights order that fundamentally changed the game for black voters, essentially to assert that trouble from the Supreme Court is unlikely.

Valelly's assumptions are reasonable. In 2004, when Valelly published his work, there had been no significant constitutional challenges to Section 5 at the Supreme Court

[323] Ibid., 234.
[324] Valelly, *The Two Reconstructions*, 237.

and the Congress had by then repeatedly reauthorized the legislation. Not only that, but, as he notes, when the Court had made changes to the Act that limited its application, Congress amended the VRA to overrule the Court. A direct challenge to Section 5 of the Act was not initiated until 2006, after Congress reauthorized the VRA for twenty-five years. Before the *North Austin Municipal District v. Holder* ruling in 2008, the Voting Rights Act Order did appear safe from desecration by the Supreme Court. From Valelly's perspective, as well as that of a majority of academics and politicos, a Court challenge of the VRA would not be fatal. Clearly, the defiance presented by Republican presidential enforcement (including the nomination of conservative justices) went unrecognized as a major threat to the VRA Order.

The problems are more serious than Valelly acknowledges. The passage of the VRA did provide the Republican Party with a strong issue on which to encourage membership based on race division. Since the 1970s, the Party has grown to include large numbers of whites, in and outside the South, with strong gains among married voters, men, and Catholics.[325] These have added strength to Republican voting rolls, and that strength has increased Republican control of state legislatures and governors' mansions. As a result, arguments generated by conservatives in Congress echo in state and local legislatures and have benefited the conservative long game against the legislation at the national and state levels.

In addition, Republican legislatures have used the VRA to draw district lines that benefit Republicans. The drawing of those lines in the 1990s led to a shift in the composition of state legislatures and subsequent moves to pass voter identification

[325] Abramowitz, Alan I and Kyle L Saunders. "Exploring the Bases of Partisanship in the American Electorate: Social Identity vs. Ideology" *Political Research Quarterly* Vol. 59, No.2 (Sage Publications on behalf of University of Utah), June 2006: 175.

legislation, beginning in the 2000s. In addition to using the legislation to maximize Republican voting strength, the VRA has also been used by white plaintiffs in voting discrimination lawsuits. The Supreme Court has tolerated these suits, which have resulted in relief for white voters and the denial of relief for voters of color under the law specifically designed to protect minority voters after a long history of voter discrimination.

The "relatively recent" challenges Valelly points to at the Supreme Court are revealed in this dissertation to have, in reality, been "a-long-time-a-coming." Although the Warren Court exercised clear support for the VRA, after 1970, the Court began to limit ever more consistently the application of the law, steadily strengthening the now fifty-year trend of diluting support for the Act and, inevitably, the Act itself. Valelly addresses concerns about the Court by relying on past support and experience. But, unlike past situations, there is no upcoming reauthorization where Congress might amend the Act to reverse Court decisions. Even if there were, Congress is far too polarized today to overrule *Shelby* on the floor. Congress made no changes to the VRA after the MUD decision, and it is highly unlikely to agree to reinstate Section 4. My dissertation shows that the problems Valelly addresses cursorily in his conclusion are far more important than they appear to him.

Review of the Dissertation Findings: Opposition to the VRA

Opposition to the VRA has centered on Section 5 of the Act. The Section 5 authorization of federal oversight over state voting law changes struck at the core of federalism relations under the Jim Crow voting order and has continued to offend states

rights' proponents since. Section 2 of the Act has also been contested, but it provides traditional relief, viz., litigation, and so is less a motivator of the intense pushback against the VRA than is Section 5. Section 5 was specifically designed to improve upon litigation as a form of relief, and its intrusion into state sovereignty recalls the passions of the nullification debates over the Alien and Sedition Act or the nation's late 1850s conflicts over slavery. Regardless of the section of the VRA being challenged, when people think VRA, they think Section 5.

Resistance in Congress. Congress passed the VRA in 1965 with strong bipartisan majorities, and it renewed the Act at every opportunity, in 1970 1975, 1982, and 2006. But the strong roll call records enjoyed by the VRA at reauthorization masked significant and ongoing dissent in Congress since 1965. Conservative opposition has been expressed in the form of arguments against the Act, attempts to neutralize the Act's provisions, and the exercise of delay and sabotage tactics during reauthorization hearings. Conservative dissent has existed as an important part of each reauthorization of the VRA.

Conservative dissent in Congress has been sustained but has resulted in few clear victories at limiting or repealing the law. Once, in 1970, representatives in the House were able to remove Section 5 from the legislation when the Mitchell bill passed, but the victory was short lived. The measure was replaced by a compromise bill generated in the Senate that included Section 5. On the other hand, Congressional contestation has helped to strengthen and engender public opposition to the VRA and to make it vulnerable to political and legal challenge outside Congress.

Early conservative argumentation against the VRA in Congress was relatively unpersuasive. Articulated in what was considered the outdated language of the traditional

Jim Crow Order, early opposition arguments did not resonate effectively with the liberal consensus of the 1970s, or with the cultural expectation that civil rights legislation would be enforced to democratize voting for many who had experienced discrimination. And, despite the vast improvements in voting fairness, by 1975 parity between white and black voters had not yet been achieved. Moreover, ongoing resistance to the VRA by states was well documented. In 1970 and 1975, proponents were able to show that the Act and its unique provisions should continue. Both reauthorizations resulted in legislation that was stronger than the original bill. In 1975, the legislation was expanded to include bilingual minorities. In both years, Section 5 remained intact. Conservative resistance, though present, was not successful in reversing the law or mitigating Section 5. It seems reasonable to characterize this opposition as the "last gasp" of Jim Grow, originating in the old Democratic Party but gradually becoming untethered from its partisan roots.

As I have observed, the locus and content of conservative opposition shifted during the 1980s and after. The GOP's Southern strategy, aimed at building a durable majority through a commanding margin among the white electorate, paid dividends over time. Conservative argumentation became not just more acceptable to the mainstream media, but also to a growing number of academics, and it became persuasive to large segments of an increasingly conservative white population by the 1980s. But it was still largely unsuccessful at the 1982 reauthorization. In the House, Henry Hyde, who led conservative resistance to the VRA, was won over by the presentation sponsored by VRA supporters. Hyde retreated from his anti-Section 5 proposals over the course of the hearings. In the Senate, Orrin Hatch's campaign against the amendment of Section 2 of the VRA also failed. Hatch made some inroads by associating VRA relief with

"proportional representation" and "quotas," concepts particularly objectionable to conservatives, but his campaign did not end the effort to amend Section 2 to ensure plaintiffs the latitude to bring lawsuits based on discriminatory effect. Senate opposition was successful at delaying the momentum of the reauthorization proceedings, and it did motivate an amendment that made it possible for some jurisdictions to bail out of Section 5 coverage independent of the covered state in which they were located. But in general, conservative arguments failed and opponents suffered from a lack of support from the executive branch, which they needed to counter the well organized and strong external support attained by the pro-VRA lobby.

Conservative dissent in Congress had the most impact in 2006, *because* Republican right-wing representatives failed, yet again, to repeal or amend Section 5. That year, there was a bipartisan agreement to pass the law without change. Post agreement, a faction of dissenters in the House argued vehemently on the floor against Section 5 and the bilingual ballot provisions of the Act, and waged what appeared at the time to be a near-fatal delay of the proceedings by causing an indefinite impasse in the deliberations. The impasse was broken, however, and the Act passed in the Senate, and the reauthorization was signed. As part of an effort to discredit the legislation, conservative senators who voted in favor of reauthorization nonetheless broke with tradition and issued a rare Senate Judiciary Committee report, without bipartisan input from Democratic senators, in which they decried the deliberations and the legislation. While these rebellions did not achieve legislative success, the failure to revise Section 5 provided the basis and momentum for the North Austin Municipal District challenge, which was filed a few days after Bush 43 signed the Fannie Lou Hamer, Rosa Parks,

Coretta Scott King and César Chávez Voting Rights Act Reauthorization and Amendments into law.[326] Thus, Congressional dissent succeeded to some degree in 2006 by serving up a bill that provided a basis for a Supreme Court challenge. For opponents to the VRA, it was an excellent time to send civil rights legislation to the Supreme Court.

Mixed Enforcement in the Executive Branch. The executive branch has exhibited uneven enforcement of the VRA. All of the presidents have enforced the law and all of them, including Lyndon Johnson, have been influenced by conservatism in the process. Johnson was the most enthusiastic in his support for the VRA. Some presidents who opposed the VRA were compelled to enforce it vigorously. Others supported the Act but were forced to exercise enforcement conservatively. Johnson administered the VRA and secured excellent results though his application of the law, but his administration of the law remained cautious. Johnson promoted the law and portrayed it publicly as a positive achievement. His administration registered voters and was responsible for a significant increase in newly registered black voters, whose numbers skyrocketed. Johnson also dispatched examiners and observers to supervise elections in some jurisdictions in the South. On the other hand, the numbers of dispatched examiners and observers was low, and they were reported to have provided little protection against discriminatory voting practices when they occurred at the polls. In addition, Johnson failed to create guidelines for Section 5 preclearance or to wield the remedy at all during his incumbency.

The moderate Republican presidents, Nixon and Ford, both served during VRA reauthorization years and both gave rhetorical support to the VRA even as they worked to weaken it. Both presidents, for example, attempted to limit the power of Section 5, when

[326] The Leadership Conference, accessed April 2015, http://www.civilrights.org/voting-rights/northwest-austin-mud/.

given the opportunity to do so during the 1970 and 1975 reauthorizations, as part of their program to entice white Southern voters to the GOP. Nixon was unable to limit the impact of the VRA legislation in 1970. Ford, in contrast, did force a decrease in the number of renewal years applied to the temporary provisions in 1975, but he also failed at limiting Section 5. On the other hand, both Nixon and Ford enforced the Act vigorously. The Nixon and Ford administrations issued the highest number of objections issued in Section 5 enforcement between 1965 and 2013, perhaps because a plethora of offending laws existed when Section 5 was first applied, and perhaps because the liberal consensus successfully demanded enforcement of the Act during its early years.

The conservative Republican presidents, Reagan and the two Bushes, cumulatively pushed VRA enforcement to the right. The Reagan administration waged a head-on challenge to civil rights ideology and the legislation and affirmative action programs established to promote civil rights. The Reagan administration opposed aspects of the VRA in 1982 when the Act was reauthorized, but the administration did not provide sufficient support for congressional conservative opposition to make gains. George H.W. Bush opposed the VRA and other civil rights laws but did so less wholeheartedly than Reagan because he was unwilling to provoke the same kind of resistance encountered by Reagan for his anti-discrimination law agenda.

Yet George W. Bush was successful at mitigating the impact of the VRA, using tactics introduced by Reagan. Bush 43 brought colorblind conservatism to bear on anti-discrimination law, the VRA in particular. While he did not instigate an amendment of the VRA or seek legislative limits on Section 5, his Justice Department used its enforcement power to counter the aims of the VRA. The Bush 43 DOJ refused to bring or

support VRA lawsuits on behalf of black plaintiffs, but it did do so on behalf of white voters. The Bush administration fostered an atmosphere of permissiveness for states under the legislation by decreasing enforcement and by replacing long-time employees, in sections of the federal government responsible for voting rights, with political appointees who did not promote the purpose of the Act. Bush 43 also increased the number of conservative justices on the Supreme Court and thereby contributed to an increase in conservative opinions, including opinions on the VRA.

Democratic presidents have supported and enforced the VRA. None of them served during a reauthorization of the VRA. The Carter and Clinton administrations enforced the VRA and attempted to protect minority voters. The Obama administration, despite its clear support for the VRA and attempts to enforce it, has been limited in what it can do. The Obama DOJ found it difficult to bring preclearance objections due to the pending challenges to Section 5 and the potential for lawsuits from states subject to objections. Several states threatened to bring Section 5 challenges in retaliation for executive enforcement of the VRA. More recently, the administration has found the legislation hard to use because Section 5 was rendered moot by the decision in *Shelby v. Holder*, holding that Section 4, which identified covered states, is unconstitutional. Without the power to object, the administration has less ability to prevent the enactment of discriminatory state voting laws.

Turnabout at the Supreme Court. The Supreme Court has made a 180-degree shift in its consideration of the VRA, from support to non-support, over the 1970-2013 period. Over the same period, the Supreme Court has become more conservative. George W. Bush's nominees to the Court, in particular, have helped to increase the number of

conservative decisions issued. Opinions interpreting the VRA today incorporate colorblind conservative principles and deem the purpose of the VRA to be out-of-sync with the needs of a "post-racial" society.

The quarter of a century of support by the Supreme Court cited by Valelly is more nuanced than he depicts. It is true that the Warren Court did approve the legislation and affirmed the constitutionality of Section 5, including its unique assignment of federal oversight of state voting power in covered states.[327] The Warren Court went on to establish a wide purview for Section 5 application when it held that "all voting law changes" were subject to Section 5.[328] But that level of support did not survive for anywhere near twenty-five years. After 1970, the Burger Court began to set limits on the law, limits that became incrementally greater over time. Prior to the Roberts Court, the justices respected the VRA and Congress's power to pass the VRA, but the Court brought conservatism to bear early, and continued to apply conservative principles over the life of the legislation. In 1982 and 2006, Congress amended the VRA to overturn what it considered to be overly conservative Supreme Court rulings made between reauthorizations. The Roberts Court has exhibited little respect for the legislation or Congress's power to pass it. The Court removed the underpinnings of the executive branch to exercise the unique power that long defined the VRA.

The Roberts Court brought colorblind principles directly to bear when evaluating recent direct challenges to Section 5, in *North Austin Municipal District No. 1 v. Holder* (2010) and *Shelby v. Holder* (2013). In *MUD,* a challenge to Section 5, the Court sent a strongly worded message to Congress that Section 5 was probably unconstitutional and

[327] *South Carolina v. Katzenbach,* 383 U.S. 301(1966).
[328] *Allen v. State Board of Election*, 393 U.S. 544 (1969).

that it would not survive a second challenge without amendment. The Court was aware that Congress would not be able to come to agreement to amend Section 5 because it was common knowledge that the failure to revise Section 5 was what made its reauthorization possible in 2006.

In *Shelby v. Holder*, the Court struck down an important provision of the VRA. It did not hold that Section 5 was unconstitutional, but it did void the equally important Section 4, the section that identifies those states covered by Section 5. By removing all states identified in Section 4 from coverage, the Court rendered Section 5 inoperable, despite the fact that the provision was not ruled unconstitutional. The Court determined that the Section 4 criteria for coverage were no longer relevant or necessary. The dissent, led by Justice Ginsburg, argued that Section 4 was not outdated but in fact provided important protection that helped to maintain fair voting laws and elections. Ginsburg dissented to argue that striking Section 4 was a mistake, and analogized the decision to getting rid of an umbrella in the middle of a rainstorm.[329]

Conclusions and Consequences

Conservative ideology and argumentation have consistently if quietly influenced the federal government's implementation of the VRA. In the case of the Supreme Court in particular, support for the law has decreased, and the Court's decisions have had a limiting impact on the VRA. The VRA has the potential to become irrelevant, now that the federal government is no longer able to block the implementation of racially discriminatory voting laws in covered states. Additionally, the moral imperative imposed by the law has been eroded. It is a testament to the persuasiveness and persistence

[329] *Shelby v. Holder*, 133 S.Ct. at 2650. (Ginsburg dissenting).

demonstrated by the conservative long game that the Supreme Court struck Section 5 of the VRA. As this dissertation reveals, however, it was not an abrupt shift.

In 2006, congressional supporters of the VRA attempted to protect Section 5 from the Supreme Court attack. Proponents presented extensive evidence to justify the reauthorization of Section 5. Because the measure was remedial in nature, contemporary law indicated that Congress had a constitutional power to pass it if the legislation was "congruent and proportional" to the problem it sought to address.[330] Thousands of pages of evidence were submitted alongside extensive testimony to show that Section 5 was still necessary, despite the passage of time since 1965. Members of Congress and academics heralded the 2006 evidence as satisfying that standard. As noted, the Court nevertheless struck Section 4 and removed all the states subject to Section 5 from its jurisdiction.

The end of the Section 5 preclearance power will result in a number of significant consequences. Covered states that have a history of voter discrimination are no longer obligated to submit voting law changes to the DOJ, which means that these laws will not be reviewed to determine if they discriminate against minority voters. The potential for uncovered states to come under Section 5 has vanished. Covered states are now able to implement voting laws that the DOJ previously cited as discriminatory. As discussed above, C. Vann Woodward warned Congress in 1981 that a weakening of the Section 5 preclearance provision might "open the door to a rush of measures to abridge, diminish,

[330] *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, the Court held that Congress could not pass laws that lacked "congruence and proportionality" with substantive rights the Court had not defined. There was some room, however, for Congress to pass laws of a remedial or prophylactic nature when those remedies were congruent and proportional to the problems they sought to address. The Court also held that it has exclusive power to determine what rights are protected by the 14th Amendment.

and dilute if not emasculate the power of the black vote in Southern states."[331] Woodward was convinced that if given the opportunity, states would pass racially discriminatory voting laws, ones they were prevented from passing while the VRA was in force. Indeed, in 2013, the states of North Carolina and Texas both promptly passed voter identification laws after the *Shelby* decision that previously had sparked objections from the Justice Department pursuant to Section 5.

States now have more freedom to enact and implement voter identification and similar laws without sanction by the federal government. This increases the potential for partisan redistricting (which the Court has approved) to the detriment of minority voters and the dilution and suppression of minority votes. Seeking to maximize its advantage among white voters, a declining share of the population, the Republican Party has largely abandoned any efforts to attract minority voters and opted instead to limit the electoral participation of minority, poor, and elderly voters. Republicans will seek to wrest presidential control from the Democrats and clearly hope that voter ID legislation will help to ensure that Republicans have a leg up in future elections.[332] In so-called battleground states, minority voters can be the critical margin of difference in an election.

---

[331] U.S. Congress, House of Representatives, Committee on the Judiciary, *Hearings before the Subcommittee on Civil and Constitutional Rights*, 97th Congress, First Session on the Extension of the VRA Serial No. 24, 1999-2001 (1981). (Testimony by Woodward, C. Vann, professor-emeritus, Yale University, New Haven, Conn.)

[332] In his speech on June 23, 2012 before fellow Republican Party lawmakers and supporters, Mike Turzai, Pennsylvania House Republican Leader, enumerated his party's successful steps toward attaining political power, transforming its platform into legislation, and passing new restrictive voter ID laws to gain voter advantage: "...[We have instituted] Voter ID, *which is gonna allow Governor Romney to win the state of Pennsylvania*: Done." [emphasis added] Apparently, Turzai felt comfortable enough among his peers to speak perhaps more truthfully as to the real intent of Voter ID and other minority voter-suppression measures. Indeed, one notes that in trumpeting Pennsylvania's Voter ID laws, Turzai's eschewed any mention of the Party's largely unsubstantiated justifications for such restrictive laws, i.e., supposed "massive voter fraud." See "Turzai: Voter ID Will Allow Romney to Win PA," *YouTube*, accessed March 2015, https://www.youtube.com/watch?v=EuOT1bRYdK8; Turkel, Amanda. "Mike Turzai, GOP Lawmaker Behind Controversial Voter ID Remark, Was Backed by Education Union. *Huffington Post*, accessed March 2015, http://www.huffingtonpost.com/2012/06/27/mike-turzai-gop-voter-id-education-union_n_1630969.html.

Republicans accordingly have pursued strategies to deter minority voters from going to the polls, seeking potentially decisive electoral advantages.

The VRA was specifically designed to expand the ability of minority voters to obtain relief from discriminatory voting practices and laws and to end the marginalization of the minority vote. To do this, the VRA provided an additional remedy so that options for relief would not be limited to litigation, always a costly, inefficient, and minimally effective recourse. The end of Section 5 coverage means that recovery under the VRA is limited to Section 2 litigation. The *Shelby v. Holder* decision therefore returned voting rights relief to pre-1965 levels. This is highly unfortunate when today the widespread adoption of voter identification and similar laws threatens to return the U.S. to a voting order that is similar to the JVO, one where the rights of minorities to vote are not guaranteed. Alexander Keyssar has noted the similarities between modern voter ID laws and laws passed during the late 1800s in contravention of the 15th Amendment.[333]

Today many have analogized voter identification laws to poll taxes (because voters need to obtain proper identification that in most states has a cost associated with it). In the last ten years, some states have been accused, not of violence and intimidation, but of mass misinformation about voting and polling places and procedures, which deters minority voters from casting ballots. Recently, it has been claimed that some states have not provided adequate voting stations and have administered the polls so that it takes many hours to vote,[334] which has strained working voters especially in states where

[333] Keyssar, Alexander. "Voter Suppression Returns: Voting Rights and Partisan Practices," *Harvard Magazine*, July-Aug 2012.
[334] Flatlow, Nicole. 2014. "New Rule Prohibits Voters in Miami-Dade County From Using the Restroom, No Matter How Long the Line." *Think Progress*, April 10. accessed March 2015, http://thinkprogress.org/justice/2014/04/10/3425252/new-rule-prohibits-voters-in-miami-dade-county-from-using-the-restroom-no-matter-how-long-the-line/.

absentee ballot provisions have been repealed. Other states have been alleged to have placed inadequate voting equipment in minority neighborhoods and to have failed to include all ballots in final tallies.[335] These offenses do not rise to the level of the Jim Crow Order, with its systematic and wholesale blocking of minority participation. Still, they do allow for race based partisan manipulation of access to the polls.

It is unlikely that Congress will be able to revive Section 4 of the VRA or establish new legislation that would effectively curtail voter discrimination as Congress was unable to revise Section 5 in 2006. Instead, the Obama administration has begun to investigate the possibility of obligating states to opt in to Section 5 coverage pursuant to Section 3 of the VRA. Section 3 allows a court to "bail-in" a jurisdiction to a preclearance regime similar to what was required under Section 5 before *Shelby*.[336] Under Section 3, jurisdictions are covered for limited time periods for specifically determined types of legal changes.

Congress could conceivably pass some new form of voting rights legislation, but this seems unlikely. Not only is Congress under conservative control, but also the Court has ruled that Section 4 of the Act is no longer necessary in today's so-called "post-racial" environment and barred race-based districting plans. The passage of a new remedy would require states to buy into federal oversight after their fifty years of trying to shed that obligation. Even if a new law had the support of the executive branch and Congress, the Court today has the power to strike the legislation quickly based on current precedent. Obviously, new legislation that did not rely on federal oversight might not

[335] Smith, Greg B."NYC Elections 2013: Broken Voting Machines, Mistranslated Ballot Measures Plague Low-Turnout Election." *Daily News*, November 5, 2013.
[336] Mills, Courtney." Is 3 the New 5? The New Focus on Section 3 of the VRA," *Fair Elections Legal Network*, July 30, 2013, accessed March 2015, http://fairelectionsnetwork.com/blog/3-new-5-new-focus-section-3-vra.

require the support of the national government, but traditionally minority voters have only been able to obtain relief from state-controlled discriminatory voting practices when the federal government became involved. Scholars and activists have begun to investigate the potential need for a Third Reconstruction. [337]

Importance to Current Events. In addition to its contribution to Political Science literature, the analysis provided by this dissertation is also directly relevant to the current socio-political environment in America. Voting rights remain an important, controversial, and often explosive, issue on the American political scene. Voter identification and similar laws are on the rise, and their purpose is to improve the Republican political advantage by impeding voting by minority, poor, and elderly voters. Voter discrimination will continue to be an important issue in the foreseeable future. Republicans are currently in control of both houses of Congress and the state legislatures and governors mansions in a significant number of states. Opposition to civil rights legislation, including the VRA, has been centered in the Republican Party at the state and national levels. The implementation of voter identification laws and redistricting might well challenge the power of minority voters and impact the outcome of electoral choices in the upcoming presidential and other elections. In the unlikely event that Congress bolsters the power of the VRA or grassroots campaigns are waged to create alternative remedies for the future, it is important, even essential, to understand what has occurred before and how conservatism affected the prior effort. In popular culture and in history books, the VRA is portrayed as effective legislation that took a struggle to obtain but which passed and is at

[337] "WATCH: America's Race Problem Will Require New Reconstruction to Solve." *The Nation Magazine,* accessed April 2015, .http://www.thenation.com/article/194553/watch-americas-race-problem-will-require-new-reconstruction-solve# (January 15, 2015).

work. The development of VRA resistance and its outcomes have not heretofore been adequately researched and presented.

Future Research. There are questions related to the history of the VRA, which this dissertation has not answered. Future research should, for example, evaluate the number of objections by the Department of Justice from 1965-2013 to assess the degree to which conservatism specifically affected the voting rights section of the DOJ in its administration of Section 5. Application of the VRA should also be evaluated to determine how thorough states have been about their Section 5 submissions over time. The number of objections under Section 5 has historically been extremely low. A possible reason for this is that federalism has constricted VRA enforcement throughout its life, i.e. the Department of Justice has been reserved in its enforcement. I would want to choose two states perhaps to evaluate for a research project such as this. It will also be important to evaluate the impact of the loss of Section 4. What is the discriminatory impact of laws passed in covered states that were in fact, or would potentially have been, objected to by the DOJ if Section 5 were applicable? This question would prove especially interesting if evaluated in conjunction with electoral returns from the 2016 presidential election. And, evaluation of the impact of the *Shelby* decision will do much to illuminate the positive influence of the VRA's unique remedy and/or possibly reveal that the law is no longer necessary.

Bibliography

Abramowitz, Alan I and Kyle L Saunders. "Exploring the Bases of Partisanship in the American Electorate: Social Identity vs. Ideology" *Political Research Quarterly* Vol. 59, No.2 (Sage Publications on behalf of University of Utah), June 2006: 175.

Adarand Constructors v. Pena, 515 U.S. 200 (1995).

Allen v. State Board of Elections, 393 U.S. 544 (1969).

John Atlas, "The Struggle Over Voting Rights and the Future of Progressive Politics," *Social Policy* 38 (Spring 2008): 11-17.

Babington, Charles. "GOP Rebellion Stops VRA: Complaints Include Bilingual Ballots and Scope of Justice Department Role in the South," *Washington Post*, June 22, 2006.

Ball, Howard, Dale Krane, and Thomas P. Lauth, *Compromised Compliance: Implementation of the Voting Rights Act*, (Westport, CT, Greenwooss,1982), 98.

Bartlett v. Strickland, 556 U.S. 1, 2 (2009).

Barton, David, "The History of Black Voting Rights," as reposted in Wall *Builders,* March 3, 2003*,* accessed March 2015, http://www.wallbuilders.com/libissuesarticles.asp?id=134.

Beer v. United States, 425 U.S. 130 (1976).

Benson, Jocelyn F. "A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act," *Nebraska Law Review*, 88 (Jan. 2009): p. 133.

Biskupic, Joan. "Rehnquist Left Supreme Court with Conservative Legacy," *USA Today*, September 4, 2005.

Blacksher, James and Lani, Guinier. "Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote Shelby County v. Holder," *Harvard Law and Policy Review* 8 (Month 2014): p. 39.

Boyd, Thomas M. and Stephen J. Markman, "The 1982 Amendments to the Voting Rights Act: A Legislative History," *Washington and Lee Law Review* 40 (Sept. 1982): 1351.

Brown v. Board of Education (1954).

Bullock III, Charles and Butler, Katherine Ingles ."*Voting Rights,*" *in The Reagan Administration and Human Rights*, ed. Tinsley E. Yarbrough (City, State: Praeger Publishers, 1985), 31.

"Bush Addresses NAACP Convention," *CQ Transcripts Wire*, *Wilson Quarterly*, July 20, 2006.

"The Bush Admin Takes Aim: Civil Rights Under Attack," *Leadership Conference on Civil Rights Education Fund*, 32.

"The Bush Legacy: The Supreme Court," January 12, 2009, *ABC News*, accessed March 2015, http://abcnews.go.com/TheLaw/BushLegacy/story?id=6597342&page=2.

"Bush Signs VRA Extension Amid Midterm Election Season," *Associated Press*, *USA Today*, July 7, 2006.

"Jimmy Carter," *Spartacus Educational*, accessed March 2015, http://www.spartacus.schoolnet.co.uk/USAcarterJ.htm.

"Jimmy Carter and Civil Rights," *Presidential History Geeks*, accessed March 2015, http://potus-geeks.livejournal.com/171526.html.

City of Boerne v. Flores, 521 U.S. 507 (1997).

Civil Rights Act of 1964.

The Civil Rights Cases, 109 U.S. 3 (1883).

City of Rome v. United States 446 U.S. 156 (1980).

Cobb, Thomas R.R. *An Inquiry into the Law of Negro Slavery in the United States of America* (Philadelphia: T. &T.W. Johnson and Co., 1858), 153, 163, 169.
Connor v. Johnson, 402 U.S. 690 (1971).

Corbett, John and Key, Valdimer Orlando. "Mapping Southern Politics," *Center for Spatially Integrated Social Science*, accessed March 2015, http://www.csiss.org/classics/content/42

Crawford v. Marion County Election Bd. 128 S.Ct. 1610, 1613 (2008).

Crawford v. Marion County Election Bd. at 1620, Brief for the United States as Amicus Curiae, *Brennan Center for Justice*, accessed March, 2015, https://www.brennancenter.org/sites/default/files/legacy/Democracy/CrawfordvMarionCountyElectionBoard%20-%2012-10-07%20Amicus%20Brief%20of%20the%20United%20States.pdf, 20.

Cunningham, Maurice T. *Maximization, Whatever the Cost: Race, Redistricting and the Department of Justice*, (Westport, CT, Praeger, 2001), 20.

Devins, Neal. "Reagan Redux: Civil Rights Under Bush," *Notre Dame Law Review* 68 (January 1993): 958.

Engstrom, Richard L. "Redistricting: Influence Districts- A Note of Caution and A Better Measure," *The Chief Justice Earl Warren Institute on Law and Social Policy*, UC Berkeley Law School, May 2011.

Ex parte Yarbrough, 110 U.S. 651 (1884).

Executive Order no. 9981, *Desegregation of the Armed Forces*, (1948).

Executive Order no. 11478, Section 1, *Equal Opportunity in the Federal Government* (Aug. 8, 1969).

Flatlow, Nicole. 2014. "New Rule Prohibits Voters in Miami-Dade County From Using the Restroom, No Matter How Long the Line." *Think Progress*, April 10. accessed March 2015, http://thinkprogress.org/justice/2014/04/10/3425252/new-rule-prohibits-voters-in-miami-dade-county-from-using-the-restroom-no-matter-how-long-the-line/.

Fleisher, Richard and John R. Bond. "The Shrinking Middle in the US Congress," *British Journal of Political Science* 34 (July 2004): 429-451.

Foner, Eric. *Reconstruction: Americas Unfinished Revolution*, *1863-1877* (New York: Harper and Row, 1988), 603.

Ford, Gerald, "Letter to the Senate Minority Leader Urging Extension of the Voting Rights Act of 1965," *The American Presidency Project*, March 2015, http://www.presidency.ucsb.edu/ws/index.php?pid=5097.

42 U.S.C. Section 1973c(a).

Frymer, Paul. *Uneasy Alliances* (Princeton, NJ: Princeton University Press, 1999), chap. 2 and 49–86.

Fund, John. "How Do You Address A Problem they Insist Doesn't Exist?" *National Review, accessed* March 2015, http://www.nationalreview.com/article/375021/dems-voter-fraud-denial-john-fund.

Gaskins, Keesha and Sundeep Iyer. "The Challenge of Obtaining Voter Identification,' *Brennan Center for Justice*, accessed March 2015, http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf, 1.

Gaston County v. United States, 395 U.S. 285 (1969).

Georgia v. Ashcroft, 539 U.S. 461 (2003).

Gerken, Heather. "Goodbye to the Crown Jewel of the Civil Rights Movement: People died to pass Section 5 of the Voting Rights Act, but that Did not Save It from the Supreme Court," *Slate.com*, June 25, 2013.

Gomillion v. Lightfoot, 364 U.S. 339 (1960).

Greenburg, Jan Crawford, "The Bush Legacy: The Supreme Court," *ABC News*, accessed March 2015, http://abcnews.go.com/TheLaw/BushLegacy/story?id=6597342.

Grofman, Bernard. "*Shaw v. Reno* and the Future of Voting Rights", *PS Political Science and Politics*, 28 March 1995): 32.

Grovey v. Townsend , 295 U.S. 45 (1935).

Guinn v. United States, 238 U.S. 347, 358 (1915).

Hancock, John. *Essays on the Elective Franchise*; or *Who Has the Right to Vote*? (Philadelphia: Merrihew & Son, 1865), 22-23.

Hannah, John A., et al., *U.S. Commission on Civil Rights, Political Participation* (Washington D.C.: U.S. Government Printing Office, 1968).

Hasen, Richard. "The Chief Justices Long Game," *New York Times*, June 26, 2013.

Hench, Virginia E. "The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters" *Case Western Reserve Law Review* 48 (1998): 727, 752.

Herbert, J. Gerald. *An Assessment of the Bailout Provisions of The Voting Rights Act, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power,* ed. Ana Henderson (Berkeley, CA: Berkeley Public Policy Press 2007), 261.

Holder v. Hall, 512 U.S. 874 (1994).

——, 512 U.S. 874 (1994) (Thomas concurring).

Hulse, Carl. "By A Vote of 98-0, Senate Approves 25-Year Extension of the Voting Rights Act," *The New York Times*, July 21, 2006.

——,"Rebellion Stalls Extension of the VRA" *The New York Times*, June 22, 2006.

——, "House Delays Renewal of Voting Rights Act," *New York Times*, June 21, 2006.

An Investigation into the Removal of Nine U.S. Attorneys in 2006, US Department of Justice Office of the Inspector General &Office of Professional Responsibility, Sept. 2008.

J. Morgan Kousser, "The Strange Iconic Career of Section 5 of the Voting Rights Act, 1965-2007," *Texas Law Review* 86, (March 2008), 687.

Jordan, Barbara; Hearon, Shelby. *A Self Portrait by Barbara Jordan*, (Garden City, NY: Doubleday & Company, 1979), 209.

Karlan, Pamela. "Lessons Learned," *Duke Journal of Law and Public Policy* Vol. 4:17 (Month, 2009): 18.

"John Kennedy and Civil Rights," *History Learning Site*, accessed March 2015, http://www.historylearningsite.co.uk/john_kennedy_and_civil_rights.html.
Joint Center for Political and Economic Studies. *Elected Officials 1990: A National Roster*. (Washington, D.C: Joint Center for Political and Economic Studies Press, 1991): 1.

Keyssar, Alexander. *The Right to Vote: The Contested History of Democracy in the United States* (New York, Basic Books, 2000).

——, "What Struggles Over the Right To Vote Reveal About American Democracy," *Scholars Strategy Network*, accessed March 2015, http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_keyssar_on_right_to_vote_0.pdf

——, "Voter Suppression Returns," "Voter Suppression Returns: Voting Rights and Partisan Practices," *Harvard Magazine*, July-Aug 2012.

Key, Valdimer Orlando. *Southern Politics and Nation* (New York, NY: Vintage Books, 1949).

Kotlowski, Dean J. *Nixon's Civil Rights*: *Politics, Principle and Policy* (Cambridge: Harvard University Press, 2001), 71, 95.

Kousser, J. Morgan. "The Voting Rights act and the Two Reconstructions," *Author's Library Cal Tech*, accessed March 2015, http://authors.library.caltech.edu/41064/1/Brook.pdf), 2.

——, *The Strange Iconic Career*, 754-6, 761.

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

Laney, Garrine P. *The Voting Rights Act of 1965, as Amended*: *Its History and Current Issues* (Nova Science Publishers, Inc., New York, 2008), 19.

The Leadership Conference, accessed March 2015, http://www.civilrights.org/voting-rights/northwest-austin-mud/.

Liptak, Adam. "The Memo That Rehnquist Wrote and Had to Disown*", New York Times Week in Review*, September 11, 2005. In 1952, while a clerk for former Justice Jackson, Chief Justice Rehnquist, wrote a memo arguing against the ultimate decision in *Brown v. Board of Education*.

May, Gary. *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* (City, ST: Duke University Press, 2014), 204.

McCrary, Peyton. *Review of Cunningham, Maurice T., Maximization, Whatever The Cost: Race, Redistricting, and the Department of Justice*. H-south, H-Net Reviews. February 2002.

Miller, James A. "An Inside Look at Eisenhower's Civil Rights Record," *The Boston Globe*, Nov. 21, 2007.

Miller v. Johnson, 515 U.S. 900, 920 (1995).

Mills, Courtney." Is 3 the New 5? The New Focus on Section 3 of the VRA," *Fair Elections Legal Network*, July 30, 2013, accessed March 2015, http://fairelectionsnetwork.com/blog/3-new-5-new-focus-section-3-vra

Mobile v. Bolden, 446 U.S. 55, 62 (1980).

Nixon v. Herndon, 273 U.S. 536 (1927).

Nixon v. Condon, 286 U.S. 73, 82 (1932).

North Austin Municipal District No. 1 v. Holder, 557 U.S. 193 (2009).
North Austin Municipal District No. 1 v. Holder, 129 S.Ct. 2504 (2009).

Orren, Karen and Skorownek, Stephen. *The Search for American Political Development*, (Cambridge, UK: Cambridge University Press, 2004)

Panetta, Leon E. and Gall, Peter. *Bring Us Together: The Nixon Team and the Civil Rights Retreat* (Lippincott, first edition, 1971), 106.

Parents v. Seattle, 127 S.Ct. 2738, 2768 (2007).

Pear, Robert. "Justice Department Challenges its Civil Rights Division," *The New York Times*, January 1, 1993.

Perkins v. United States, 422 U.S. 358, 368 (1975).

Perry v. Perez, 132 S. Ct. 934 (2012).

——, at 945 (Thomas dissenting).

Persily, Nathaniel. "The Promise and Pitfalls of the New Voting Rights Act," *Yale Law Journal* 117 (December 2007): 89.

Plass, Stephen. "Exploring the Limits of Executive Civil Rights Policy Making," *Oklahoma Law Review* 61 (Month 2008): 176.

Plessy v. Ferguson, 163 U.S. 537 (1896).

——, dissent by Justice John Marshall Harlan.

Parker, Frank R. "*Shaw v. Reno*: A Constitutional Setback for Minority Representation", *PS: Political Science and Politics* 28 (March 1995): 47.

Pinckney, Darryl. "Blackballed: The Black Vote and US Democracy*," New York Review of Books* (Month 2014): 62-3. The state of Texas instituted its voter ID law hours after the Shelby decision was announced.

President William J. Clinton. "The Unfinished Work of Building One America," Message to Congress, January 15, 2001.

Presley v. Etowah County, 502 U.S. 491, 509 (1992).

Reno v. Bossier Parish School Board, 520 U.S. 471 (1997).

Reno v. Bossier II, 528 U.S. 320 (2000).

Janet Reno, Attorney General, to Heads of Departments and Agencies that Provide Federal Financial Assistance, July 14, 1994, Office of the Attorney General, Memorandum, re: Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964.

Reynolds v. Sims, 377 U.S. 533 (1964).

William Bradford Reynolds, "The Reagan Administration and Civil Rights: Winning the War Against Discrimination, response to Selig," *University of Illinois Law Review*. 4

Richmond, v. *United States,* 422 U.S., Brennan, dissenting, 379-388.

Roberts, John. "Talking Points For White House Meeting on Voting Rights Act," January 26, 1982, *Government Archives*, accessed March 2015, http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf.

Rogers v. Lodge, 458 U.S. 613 (1982).

"The Riot in New Orleans," *Harper's Weekly*, Aug. 25, 1866.

Rush, Mark E. "*Shaw v. Reno* to *Miller v. Johnson*: Minority Representation and State Compliance with the Voting Rights Act", *Publius* 25 (Summer 1995): 172 fn. 78.

Selig, Joel L. "The Reagan Justice Department and Civil Rights: What Went Wrong," *University of Illinois Law Review* 4 (1986).

"Senate Enrolled Act No. 483," *In Gov Legislative Bills*, accessed March 2015, http://www.in.gov/legislative/bills/2005/SE/SE0483.1.html.

Serer, Adam. "'Demeaning Insult' in John Robert's Voting Rights Act Decision," March 19, 2014, *MSNBC*, accessed March 2015, http://www.msnbc.com/msnbc/demeaning-insult-chief-justice-john-roberts-voting-rights-act-decision.

Shatz, Adam. "Thernstrom's in Black and White," *The American Prospect*, December 10, 2001.

Shull, Steven A. *American Civil Rights Policy from Truman to Clinton: The Role of Presidential Leadership* (Armonk, NY: ME. Sharpe, 1999), 51-52.

Slotnick, Elliot E. "Lowering the Bench: Affirmative Action and Judicial Selection During the Carter Administration," 1 *YALE & L. POL'Y REV*. 270, 275 (1983).

Smalley, Eugene V. *A Brief History of the Republican Party: From its Organization to the Presidential Campaign of 1884* (New York: John Alden Publishing, 1884), 49-50.

Smith v. Allwright, 321 U.S. 649, 664 (1944).

Smith, Kathy B. *The White House Speaks*, (Westport, CT: Greenwood Publishing Group, 1994).

Smith, Greg B."NYC Elections 2013: Broken Voting Machines, Mistranslated Ballot Measures Plague Low-Turnout Election." *Daily News*, November 5, 2013.

Shaw v. Reno, 509 U.S. 630 (1993).

Shelby v. Holder, 133 S. Ct. 2612 (2013).

Skrentny, John Davis. *The Ironies of Affirmative Action: Politics, Culture and Justice in America* (Chicago, IL: University of Chicago Press, 1996), 190.

The Slaughterhouse Cases, 83 U.S. 36 (1873).

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

——, Black, dissenting at 359.

Sunstein, Cass. 2005. "Justice Breyer's Judicial Pragmatism," *John H. Olin Law & Economics Working Paper Series* 267, November 2005, accessed March 2015, http://www.law.uchicago.edu/Lawecon/index.html.

Title 42, Chapter 20, Subchapter I – A, U.S. Code Section 1973, "…*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

Thernstrom, Abigail. *Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections,* (Washington, DC: American Enterprise Institute Press, 2009).

Thernstrom's theories are echoed and supplemented by others, including Carol Swain and Carl Van Spavorsky of the *National Review*, and Timothy O'Rourke and Hugh Davis Graham.

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

Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court*, (New York, NY: Anchor Books, 2008), p. 389.

Truman, President Harry S. "Special Message to the Congress on Civil Rights, February 2, 1948," *The American Presidency Project*, accessed March 2015, www.presidency.ucsb.edu/ws/?pid=13006.

Turkel, Amanda. "Mike Turzai, GOP Lawmaker Behind Controversial Voter ID Remark, Was Backed by Education Union. *Huffington Post*, accessed March 2015, http://www.huffingtonpost.com/2012/06/27/mike-turzai-gop-voter-id-education-union_n_1630969.html.

"Turzai: Voter ID Will Allow Romney to Win PA," *YouTube*, accessed March 2015, https://www.youtube.com/watch?v=EuOT1bRYdK8

U.S. Congress. Senate. "Affirmative Action and Equal Protection." Committee on the Judiciary. Hearings before the Subcommittee . 97th Cong., 1st Sess. (May4, June 11, June 18, July 16, 1981), 69.

US Const. amend. XV.

——, amend. XIV.

United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977).

United States v. Noxubee County Dem. Exec. Comm., 494 F. Supp. 2d 440 (S.D. Miss. 2007).

U.S. v. Reese et al., 92 U.S. 214 (1876).

U.S. Congress, House of Representatives, Committee on the Judiciary, "Hearings before the Subcommittee on Civil and Constitutional Rights," 97th Congress, First Session on

the Extension of the VRA Serial No. 24, 1999-2001 (1981). (Testimony by Woodward, C. Vann, professor-emeritus, Yale University, New Haven, Conn.).

U.S. Congress. Senate. "Affirmative Action and Equal Protection." Committee on the Judiciary. Hearings before the Subcommittee . 97th Cong., 1st Sess. (May4, June 11, June 18, July 16, 1981), 69.

——. Subcommittee on "Constitutional Rights of the Committee on the Judiciary." 1969 – 1970, Mrs. Frankie Freeman; Bills to Amend the VRA of 1965. 91st Cong., 1st and 2d Sess.,30.

——. Subcommittee on "Constitutional Rights of the Committee on the Judiciary United States," Civil Rights Division, 579 Senate 94th Congress, "Hearings on S. 407, S.903, S. 1297, 1409 and 1443," 1975. (Testimony of J. Stanley Pottinger, Assistant Attorney General).

——. House Subcommittee on Constitutional Rights of the Subcommittee on Constitutional Rights, 94th Congress 1st Session, "Hearings on S.407 S.903 S1297 S1409 and S1443," 1975, 45. (Testimony of Clarence Mitchell).

——."1982 Voting Rights Act." Subcommittee on the Constitution of the Committee on the Judiciary. 1982 Voting Rights Act. 97th Cong., 2d Sess., HRG-1982-SJS-0071, 3.

United States Civil Rights Commission on Civil Rights (USCCCR), A Report of the Civil Rights Commission on Civil Rights (USCCCR), "A Bridge to One America: The Civil Rights Performance of the Clinton Administration," Washington, DC: (April 2001):4.

——, A Report of the Civil Rights Commission on Civil Rights, "The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination and Ensuring Equality," Washington, DC (September 1999)

——, "Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Opportunity Commission's Enforcement Efforts," Washington, DC (September 2000).

——. Subcommittee on Constitutional rights of the Committee of the Judiciary. 1969 and 1970. "Bills to Amend the VRA of 1965." 91st Cong., 1st and 2nd session. Charles Mathias (R-MD).

Valelly, Richard M. *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago, IL: University of Chicago Press, 2004), 7.

Vieth v. Jubelier, 541 U.S. 267 (2004).

"Voting Rights Act, Nixon Administration Proposal," *Congressional Digest*, Vol. 48 Issue 11 (Nov. 1969): 288.

"WATCH: America's Race Problem Will Require New Reconstruction to Solve." *The Nation Magazine*.http://www.thenation.com/article/194553/watch-americas-race-problem-will-require-new-reconstruction-solve# (January 15, 2015).

White v. Regester, 412 U.S. 755, 769 (1975).

Wicker, Tom. "Johnson Urged Congress at Joint Session to Pass Law Insuring Negro Vote," *New York Times*, March 15, 1965.

Williams v. Mississippi, 170 U.S. 213 (1898).

Woodward, C. Van. *The Future of the Past* (New York, NY: Oxford University Press, 1989), 199.

—— *The Strange Career of Jim Crow* (New York, NY: Oxford Univ. Press, 1974), xii.

—— "The Danger of Retreating from the Second Reconstruction," *Southern Changes*, accessed March 2015, http://beck.library.emory.edu/southernchanges/article.php?id=sc04-1_003

—— "The Danger of Retreating from the Second Reconstruction in Southern Changes." *Southern Changes*: The Journal of the Southern Regional Council. Vol. 4 No. 1 (1981): 13-15.

Zietlow, **Rebecca E.** "The Judicial Restraint of the Warren Court (and Why it Matters)" *Ohio State Law Journal* 69 (2008): 259.