

# Ending the Cycles of Voter Suppression

By Gilda R. Daniels\*

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## INTRODUCTION

Voter suppression is real. If the right to vote is the singular most vital component of a democratic form of government,<sup>1</sup> then the Voting Rights Act of 1965 (VRA) serves as the singular piece of legislation that has made democratic participation a reality for a sizable portion of the United States population.<sup>2</sup> Indeed, in a democracy, the vote “is central, and elections must be conducted fairly, freely, and without discrimination.”<sup>3</sup> However, efforts to ensure that some Americans are blocked from accessing the ballot are as

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<sup>1</sup> See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (declaring the right to vote a “fundamental political right, because [it is] preservative of all rights”).

<sup>2</sup> See *infra* Part II.

<sup>3</sup> Gilda R. Daniels, *Democracy’s Destiny*, 109 CALIF. L. REV. 1067, 1105 (2021).

old as this nation.<sup>4</sup> In this century alone, we have witnessed an increase in suppressive legislation and court decisions.<sup>5</sup>

But this is all part of a pattern—our country has repeatedly endured cycles of voter suppression that involve periods of progress followed by the implementation of regressive laws.<sup>6</sup> For example, we have experienced landmark eras of legislation that have significantly changed the democratic landscape, such as the passage of the Civil War Amendments<sup>7</sup> and the Voting Rights Act of 1965.<sup>8</sup> Yet, progressive laws are often met with backlash driven by efforts to limit access to the ballot.<sup>9</sup> Our cycles of voter suppression tend to last approximately a hundred years: consider from the founding of our nation to the ratification of the Fifteenth Amendment (94 years),<sup>10</sup> or from the passage of the Fifteenth Amendment to the passage of the VRA (95 years).<sup>11</sup> The end of each cycle occurred with the passage of impactful legislation that massively added to the electorate. The passage of the Fifteenth Amendment led to the realization of the first multiracial democracy, not just in this country but in the world. However, the short-lived progress realized after the passage of the Civil War Amendments prompted restrictions on the right to vote that wiped away gains of the newly-enfranchised, heralding another cycle of voter suppression that continued well into the twentieth century.<sup>12</sup>

The Voting Rights Act of 1965 seemed to put an end to a century of voter suppression.<sup>13</sup> President Lyndon Johnson signed the VRA into law on August 6, 1965, calling it “one of the most monumental laws in the entire history of American freedom.”<sup>14</sup> The VRA, and particularly Section 5 of the Act, served to protect the right to vote by providing federal examiners to register voters in jurisdictions that previously refused to register

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<sup>4</sup> See *infra* Part I.

<sup>5</sup> See, e.g., *Voter Suppression*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voter-suppression> [https://perma.cc/25XC-QW24] (last visited Nov. 2, 2024).

<sup>6</sup> See *infra* Part I, II.

<sup>7</sup> See *infra* Part I. In this article, the Thirteenth, Fourteenth, and Fifteenth Amendments are referred to as “the Civil War” or “Reconstruction” Amendments.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See *infra* sections II.B, C.

<sup>10</sup> This period extends from the founding in 1776 to the ratification of the Fifteenth Amendment in 1870. *15th Amendment to the U.S. Constitution: Voting Rights (1870)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/15th-amendment> [https://perma.cc/8296-8X9K] (last updated May 16, 2024).

<sup>11</sup> This period extends from the ratification of the Fifteenth Amendment in 1870 to the passage of the Voting Rights Act in 1965. *Id.*; *Voting Rights Act (1965)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/voting-rights-act> [https://perma.cc/LYD8-NM7L] (last updated Feb. 8, 2024).

<sup>12</sup> See *infra* Part I.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965, at 841 (1966).

Black voters,<sup>15</sup> prohibiting racial discrimination in voting nationwide,<sup>16</sup> and requiring certain jurisdictions to receive approval before implementing new voting changes.<sup>17</sup> Despite the protections provided by the Reconstruction Amendments and the VRA, widespread suppression through legislation and the courts has risen to an extraordinary level in this century.<sup>18</sup> Barriers to the ballot box persist, and protections like the VRA have been significantly diminished.<sup>19</sup>

Sixty years ago, Attorney General Nicholas Katzenbach described the state of voting rights in America as one of “intimidation, discouragement, and delay.”<sup>20</sup> Unfortunately, this pernicious cycle continues: election integrity police forces in Florida,<sup>21</sup> the hurdles voters endure to register to vote,<sup>22</sup> and the use of the *Purcell* principle to stall justice,<sup>23</sup> are

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<sup>15</sup> Section 3 of the VRA authorized the court to appoint federal examiners to directly register voters. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437-46 (codified as amended at 52 U.S.C. § 10302). The 2006 Amendment to the VRA substituted “observers” for “examiners,” which is still used in the current version of the Act. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 3, 120 Stat. 577, 578-580 (codified as 52 U.S.C. § 10302).

<sup>16</sup> Section 2 of the VRA provided a national prohibition against the “denial or abridgement of the right . . . to vote on account of race or color.” Voting Rights Act of 1965 § 2 (codified as amended at 52 U.S.C. § 10301).

<sup>17</sup> Section 5 of the VRA required covered jurisdictions to submit voting changes to either the Attorney General of the United States or the District Court for the District of Columbia prior to implementation for preclearance or approval. Voting Rights Act of 1965 § 5 (codified as amended at 52 U.S.C. § 10304). The Supreme Court decision in *Shelby County v. Holder* struck down the coverage formula contained in Section 4 of the Act. *See* 570 U.S. 529, 557 (2013). Without a coverage formula, Section 5 has been rendered obsolete. *See id.* at 550 (noting that “[t]he provisions of § 5 apply only to those jurisdictions singled out by § 4”).

<sup>18</sup> *See infra* section II.C.

<sup>19</sup> *See* Sophia Lin Lakin, *Fifty-Seven Years After Its Enactment, the Voting Rights Act is in Peril*, AM. C.L. UNION (Aug. 5, 2022), <https://www.aclu.org/news/voting-rights/fifty-seven-years-after-its-enactment-the-voting-rights-act-is-in-peril> [https://perma.cc/5K6Z-URDE] (noting that in 2021 alone, states across the country introduced over 400 legislative measures that restricted voting rights).

<sup>20</sup> *Proposed Voting Rights Act of 1965: Hearing on H.R. 6400 Before the H. Judiciary Comm.*, 89th Cong. 5 (1965) (statement of Nicholas deB. Katzenbach, Att’y Gen. of the United States). In particular, Katzenbach’s statement focused on “[t]he story of Negro voting rights in Dallas County, Alabama.” *Id.*

<sup>21</sup> *See* Romy Ellenbogen, Justin Garcia & Lawrence Mower, *DeSantis’ Election Police Questioned People Who Signed Abortion Petitions*, TAMPA BAY TIMES (Sept. 6, 2024), <https://www.tampabay.com/news/florida-politics/elections/2024/09/06/florida-abortion-amendment-petition-signature-fraud-voters> [https://perma.cc/BW2Q-JXLG].

<sup>22</sup> *See, e.g.*, Amy Howe, *Justices Allow Arizona to Enforce Proof-of-Citizenship Law for 2024 Voter Registration*, SCOTUSBLOG (Aug. 22, 2024, 4:23 PM), <https://www.scotusblog.com/2024/08/justices-allow-arizona-to-enforce-proof-of-citizenship-law-for-2024-voter-registration> [https://perma.cc/PQJ5-MA67]; Megan Henry, *New Voter ID Requirements Put Out-of-State College Students “Between a Rock and a Hard Place,”* OHIO CAP. J. (Apr. 3, 2023, 4:55 AM), <https://ohiocapitaljournal.com/2023/04/03/new-voter-id-requirements-put-out-of-state-college-students-between-a-rock-and-a-hard-place> [https://perma.cc/MZ5L-ARYM].

<sup>23</sup> *See The Purcell Principle*, DEMOCRACY DOCKET, <https://www.democracydocket.com/purcell> [https://perma.cc/AG35-NKRR] (“The *Purcell* principle is the idea that courts should not change voting or election rules too close to an election in order to avoid confusion for voters and election officials alike.”) (last visited Nov. 2, 2024).

contemporary realities that hearken back to a darker past. While we have enjoyed great progress, the barrage of cases and legislation that make it harder for people to access the right to vote leaves us in a place of democratic regression.

For much too long, advocates have looked to the courts, and particularly the Supreme Court, for salvation, only to receive damnation. Even though courts continue to serve as an option for relief, they have also demonstrated numerous times in this century that they are not a viable solution due to their anti-democratic and anti-voter decisions.<sup>24</sup> Sanctioned by the Supreme Court's decisions in *Shelby County v. Holder*<sup>25</sup> and *Brnovich v. Democratic National Committee*,<sup>26</sup> state legislatures continue to disenfranchise eligible citizens with legislation that makes it harder for people to vote and easier for powerful candidates and legislatures to maintain political power.<sup>27</sup> The continued assault on the VRA in courts weakens voter protections and erodes the political power of minority groups.<sup>28</sup> These actions are emblematic of what legal scholar Atiba Ellis describes as "the voting rights paradox—that within American democracy, legislation from antidemocratic premises that value the right to vote for some over others continues to influence our democratic practices."<sup>29</sup> In 2025, we are in the midst of yet another 100-year cycle where progress in achieving a free and fair right to vote is met with regressive court decisions and state legislation.

However, all hope is not lost. Defending and maintaining democracy requires a multi-faceted approach. Admittedly, the country is not ready to tackle the many obstacles to realize a truly free democracy; thus, there is a need to provide strategic and steady opposition to voter suppression. It is important to know how we got here to develop a roadmap to traverse this difficult and long path to freedom and equality that awaits on the other side. This article will discuss the history of voter suppression and propose measures that can lead us to dismantle it once and for all.

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<sup>24</sup> See Gilda R. Daniels, *Democracy's Distrust*, YALE L.J.F. (forthcoming 2025).

<sup>25</sup> 570 U.S. 529 (2013).

<sup>26</sup> 594 U.S. 647 (2021).

<sup>27</sup> See, e.g., Lakin, *supra* note 19; *Voting Laws Roundup: September 2024*, BRENNAN CTR. FOR JUST. (Sept. 26, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-september-2024> [<https://perma.cc/N2QC-2L8J>] (noting that "[a]fter historic voter turnout in the 2020 election, baseless allegations of voter fraud and election irregularities sparked an unprecedented wave of legislation that made voting harder in early 2021" and that "2024 has been the second most active year for restrictive voting legislation in at least a decade").

<sup>28</sup> See, e.g., Nick Corasaniti, *How the Voting Rights Act, Newly Challenged, Has Long Been Under Attack*, N.Y. TIMES (Nov. 21, 2023), <https://www.nytimes.com/2023/11/21/us/politics/voting-rights-act-history.html>; see also Ramenda Cyrus, *Assaults on the Right to Vote*, AM. PROSPECT (Feb. 5, 2024), <https://prospect.org/civil-rights/2024-02-05-assaults-on-right-to-vote> [<https://perma.cc/5GL5-Q75R>].

<sup>29</sup> Atiba R. Ellis, *The Voting Rights Paradox: Ideology and Incompleteness of American Democratic Practice*, 55 GA. L. REV. 1553, 1583 (2021).

## I. THE CYCLE BEGINS: A BRIEF HISTORY OF VOTER SUPPRESSION

From the beginning, this country created a constitutional caste system. While espousing that “all men are created equal,”<sup>30</sup> the Founders also allowed for the enslavement of humans. Moreover, when faced with the decision of how to determine representation for the states in the newly formed federal government, the Founders determined that for the purposes of apportionment, those enslaved persons would count for far less than the Founders themselves. They established the Three-Fifths Compromise, which provided that for the purpose of determining the number of representatives, enslaved persons would count as three-fifths of a person, while white people were counted as whole human beings with the full benefits of citizenship and rights bestowed in the Constitution.<sup>31</sup> The Compromise gave the South an incredible advantage in the House of Representatives and the Electoral College for the first century of the country’s existence, leading to the outsized importance of the southern states.<sup>32</sup> While the decision may have initially united the states, the compromise over slavery certainly disunited the citizenry.<sup>33</sup> From the outset, “the black man’s freedom was subordinate to the white man’s independence.”<sup>34</sup>

It would take almost a hundred years before the nation would address disunity with a civil war and monumental amendments to the original constitution. The passage of the Reconstruction Amendments effectively repealed the Three-Fifths Compromise. The Thirteenth Amendment “freed” the slaves.<sup>35</sup> The Fourteenth Amendment ensured that all citizens would enjoy, among other things, equal protection under the law.<sup>36</sup> Finally, the

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<sup>30</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>31</sup> U.S. CONST. art. I, § 2, cl. 3. The Three-Fifths Compromise provided the following: “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” *Id.*

<sup>32</sup> Patrick Rael, *A Compact for the Good of America? Slavery and the Three-Fifths Compromise*, AFR. AM. INTELL. HIST. SOC’Y (Dec. 19, 2016), <https://www.aaihs.org/a-compact-for-the-good-of-america-slavery-and-the-three-fifths-compromise> [<https://perma.cc/3XQ9-FXP8>] (computing that “the three-fifths clause accounted for an 11% bonus in southern power” in the first Congress).

<sup>33</sup> See ELIZABETH R. VARON, *DISUNION!: THE COMING OF THE AMERICAN CIVIL WAR, 1789-1859*, at 32-33 (2008).

<sup>34</sup> GILDA R. DANIELS, *UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA* 149 (2020).

<sup>35</sup> U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime of which the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

<sup>36</sup> U.S. CONST. amend. XIV (“No 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 of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

Fifteenth Amendment granted the right to vote to newly freed Black men.<sup>37</sup> While this enfranchisement was historic, indigenous people,<sup>38</sup> women,<sup>39</sup> and other racial groups<sup>40</sup> were not permitted to exercise the franchise for several more decades. Indeed, even for Black men living in the South, the Fifteenth Amendment did not end the struggle for the franchise.

After passage of the Reconstruction Amendments, the newly enfranchised Black men registered, voted, and made significant advancements in the South. According to historian Eric Foner, Black men formed the overwhelming majority of Southern Republican voters, and these “[r]econstruction governments established the South’s first state-funded public school systems, sought to strengthen the bargaining power of plantation laborers, made taxation more equitable, and outlawed racial discrimination in public transportation and accommodations.”<sup>41</sup> In Louisiana, African Americans were nearly 45% of registered voters in 1896.<sup>42</sup> During the short period of Reconstruction,<sup>43</sup> the Black electorate was able to elect more than 1,500 Black men to local, state, and federal offices.<sup>44</sup> In Mississippi, newly enfranchised voters were able to elect two African Americans to the United States Senate.<sup>45</sup> It would take more than a century for African American voters to successfully elect another Black man representing a formerly confederate state to the Senate.<sup>46</sup>

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<sup>37</sup> U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”).

<sup>38</sup> *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (holding that Native Americans “not being . . . citizen[s] of the United States under the Fourteenth Amendment of the Constitution, ha[ve] been deprived of no right secured by the Fifteenth Amendment”).

<sup>39</sup> *Cf.* U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”). Even after ratification of the Nineteenth Amendment, Black and Brown women in the South and Southwest did not realize the right to vote until the passage of the Voting Rights Act of 1965. *See generally* MARTHA S. JONES, *VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL* (2020).

<sup>40</sup> Until the mid-twentieth century, all Asian immigrants were barred from becoming naturalized citizens and therefore could not vote. *See, e.g., Ozawa v. United States*, 260 U.S. 178, 198 (1922) (Japanese immigrants); *United States v. Thind*, 261 U.S. 204, 214-15 (1923) (Indian immigrants).

<sup>41</sup> Eric Foner, *Reconstruction*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Reconstruction-United-States-history> [<https://perma.cc/3MLZ-HUNA>] (last updated Sept. 16, 2024).

<sup>42</sup> Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill & Victoria M. Caridas-Butterworth, *Louisiana*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965–1990*, at 105 (Chandler Davidson & Bernard Grofman eds., 1994).

<sup>43</sup> The Reconstruction period spanned twelve years, from 1865 to 1877. *See* Foner, *supra* note 41.

<sup>44</sup> *See, e.g.,* ERIC FONER, *FREEDOM’S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION*, at xiv, xv (1996); *see also* ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 354-55 (1988) (noting that approximately 600 Black people were elected as legislators from 1868-1877, an incredible achievement a few years after the end of slavery).

<sup>45</sup> FONER, *FREEDOM’S LAWMAKERS*, *supra* note 44, at xiv.

<sup>46</sup> Reverend Raphael Warnock became the first African American elected to the Senate from Georgia. William Sturkey, *Warnock’s Win Was 150 Years in the Making—But History*

The progress of Reconstruction was met with a cacophony of congressional compromises, Supreme Court decisions, terroristic acts, violence, and state legislative maneuvers that effectively eliminated the gains of the short-lived multiracial democracy.<sup>47</sup> For example, one of the key events that marked the end of Reconstruction was the Hayes-Tilden Compromise.<sup>48</sup> As part of the compromise, the federal government agreed to remove union troops from the South in exchange for the South's agreement not to block Republican Rutherford Hayes' election to the presidency.<sup>49</sup> But the federal troops served an important role by providing security and safety to the formerly enslaved that allowed them to participate in the electoral process and access the full benefits of citizenship.<sup>50</sup> Without federal troops in the South, Southern Democrats quickly regained control of state legislatures.<sup>51</sup>

Southern whites, uncomfortable with being outnumbered by newly freed Black people, passed a series of laws that would thwart Black participation in the electoral process. At state constitutional conventions, for example, Southern Democrats openly argued for the discriminatory removal of African American voters.<sup>52</sup> In the Virginia convention, one delegate proclaimed, "Discrimination! . . . that, exactly, is what this Convention was elected for . . . with a view to the elimination of every negro voter."<sup>53</sup> Segregationists began to reverse Reconstruction-era provisions that expanded the franchise and adopted "poll taxes, cumulative poll taxes . . . literacy tests, secret ballot laws, lengthy residence requirements, elaborate registration systems, confusing multiple voting-box arrangements, and eventually, Democratic primaries restricted to white voters."<sup>54</sup> The impact of these state constitutional conventions would last for almost a century, disenfranchising Black and Brown voters with mechanisms intended to remove and keep them from the ballot box.<sup>55</sup>

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*Tells Us It Is Fragile*, WASH. POST (Jan. 18, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/01/18/warnocks-win-was-150-years-making-history-tells-us-it-is-fragile/>.

<sup>47</sup> See generally FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, *supra* note 44.

<sup>48</sup> See *id.* at 575–87.

<sup>49</sup> See *Compromise of 1877*, HISTORY, <https://www.history.com/topics/us-presidents/compromise-of-1877> [<https://perma.cc/5CDQ-A47P>] (last updated Nov. 27, 2019).

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See generally J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974) (providing a history of the southern constitutional conventions).

<sup>53</sup> 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA 3076 (James H. Lindsay ed., 1906).

<sup>54</sup> ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 111–12 (2000) (explaining that many of these measures "technically" did not violate the Fifteenth Amendment).

<sup>55</sup> See *id.* at 115.

At the same time, the Supreme Court weakened the force of the Fourteenth Amendment and, as a consequence, the freedoms afforded to the new citizens. In 1883, the Supreme Court held in the *Civil Rights Cases*, in which Black plaintiffs sued to access public accommodations, that the Civil Rights Act of 1875 was unconstitutional.<sup>56</sup> The Court held that the Thirteenth and Fourteenth Amendments did not apply to private individuals and organizations, legalizing the idea of racial segregation.<sup>57</sup> Dismissing the need to protect Black Americans from racial discrimination, the Court opined, “When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.”<sup>58</sup> By the end of the nineteenth century, the promise of racial equality and full citizenship that Reconstruction offered was left unfulfilled. Despite the passage of the Reconstruction Amendments, the disenfranchising efforts that followed ushered in another cycle of voter suppression.

## II. THE VOTING RIGHTS ACT STRIKES A BLOW AGAINST VOTER SUPPRESSION

### A. *The Voting Rights Act Ends a Century of Voter Suppression*

Throughout the Jim Crow period,<sup>59</sup> and despite the existence of the Fourteenth and Fifteenth Amendments, Black and Brown voters endured literacy tests, grandfather clauses, poll taxes, terroristic threats, economic terrorism, and death in their efforts to secure the right to vote.<sup>60</sup> A century after the passage of the Reconstruction Amendments, and through the endurance of the people involved in the Civil Rights Movement who fought to obtain the full rights of citizenship for people of color, the Voting Rights Act rose like a phoenix from the ashes of segregation. The VRA emerged from a crucible of struggle—a response to decades of voter suppression, intimidation, and violence against Black Americans seeking to exercise their constitutional right to vote. As President Lyndon Johnson noted:

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<sup>56</sup> The *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>57</sup> *Id.* at 24-25.

<sup>58</sup> *Id.* at 25.

<sup>59</sup> The Jim Crow period denotes the period between the end of the Civil War until 1968. *Jim Crow Laws*, HISTORY, <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [<https://perma.cc/7TXP-QMCY>] (last updated Jan. 22, 2024).

<sup>60</sup> See, e.g., Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HISTORY, <https://www.history.com/news/jim-crow-laws-black-vote> [<https://perma.cc/JD5L-HJRK>]; Roy Reed, *Alabama Police Use Gas and Clubs to Rout Negroes*, N.Y. TIMES, Mar. 8, 1965, at 1. For a brief overview of the obstacles to voting in the early 1960s period, see also S. REP. NO. 109-295, at 8-9 (last updated Aug. 8, 2023).

[T]he harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes. Every device of which human ingenuity is capable has been used to deny this right. The Negro citizen may go to register only to be told that the day is wrong, or the hour is late, or the official in charge is absent. . . . He may be asked to recite the entire Constitution, or explain the most complex provisions of State law. And even a college degree cannot be used to prove that he can read and write. For the fact is that the only way to pass these barriers is to show a *white skin*. . . . No law that we now have on the books . . . can ensure the right to vote when local officials are determined to deny it.<sup>61</sup>

The push for new voting rights legislation reached a turning point with the events of “Bloody Sunday,” which served as an unfortunate example of the violence that Black voters had endured for almost a century after the passage of the Fifteenth Amendment.<sup>62</sup> Proponents of the VRA wasted no time in pressuring Congress to pass the Act. President Johnson, for example, framed the need for voting rights legislation as an urgent one, proclaiming:

This time, on this issue, there must be no delay, no hesitation, and no compromise with our purpose. We cannot, we must not, refuse to protect the right of every American to vote in every election that he may desire to participate in. . . . We have already waited a hundred years and more, and the time for waiting is gone.<sup>63</sup>

Congressman John Conyers, the only African American representative serving on the House Judiciary Committee when it was considering the VRA, described the bill as one that is “vitally needed, long overdue, and has the complete support of the country.”<sup>64</sup> Attorney General Nicholas Katzenbach relayed the difficulties in addressing discriminatory practices in voting:

I could cite numerous examples of how delay and evasion have made it necessary for us to gauge judicial relief not in terms of months, but in terms of years. For the fact is that those who are determined to

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<sup>61</sup> Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965, at 282 (1966) (emphasis added).

<sup>62</sup> See *Bloody Sunday: Civil Rights Activists Brutally Attacked in Selma*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/mar/7> [<https://perma.cc/5PGN-YPNG>]. On March 7, 1965, which became known as “Bloody Sunday,” civil rights marchers led by John Lewis and Reverend Hosea Williams attempted to march from Selma to Montgomery, Alabama. *Id.* Police officers met them after crossing the bridge with horses, tear gas, and Billy clubs. *Id.* The beatings and violence were captured on national television. *Id.* Bloody Sunday is attributed with moving Congress and President Johnson to introduce and pass the Voting Rights Act of 1965. *Id.* (last visited Nov. 6, 2024).

<sup>63</sup> Johnson, Special Message to Congress, *supra* note 61, at 283-84.

<sup>64</sup> *The Voting Rights Act of 1965: Hearing on H.R. 6400 Before Subcomm. No. 5 of the H. Judiciary Comm.*, 89th Cong. 2 (1965) (statement of Rep. John Conyers, Jr., Member, H. Comm. on the Judiciary).

resist are able—even after apparent defeat in the courts—to devise whole new methods of discrimination. And often that means beginning the whole weary process all over again.<sup>65</sup>

He further explained:

What is necessary—what is essential—is a new approach, an approach which goes beyond the tortuous, often-ineffective pace of litigation. What is required is a systematic, automatic method to deal with discriminatory tests, with discriminatory testers, and with discriminatory threats. . . . [The Voting Rights Act of 1965] would not only, like past statutes, demonstrate our good intentions. It would allow us to translate those intentions into ballots.<sup>66</sup>

Ultimately, the VRA proved to be consequential. Prior to the passage of the VRA, voter registration and participation among Southern Black voters was essentially nonexistent. In 1940, 95% of Black adults living in the South were not registered to vote.<sup>67</sup> Even by March 1965, only 6.7% of Mississippi's Black voting-age population was registered to vote.<sup>68</sup> Attorney General Katzenbach brought up these dismal registration numbers during his testimony on the VRA:

In 1961, Dallas County [where Selma, Alabama is the county seat] had a voting age population of 29,515, of whom, 14,400 were white persons and 15,115 were Negroes. The number of whites registered to vote totaled 9,195—64 percent of the voting age total. The number of Negroes totaled 156—1.03 percent of the total.<sup>69</sup>

However, by 1968, three years after passage of the VRA, even Mississippi had registered nearly 60% of its voting-age African Americans.<sup>70</sup> In Alabama, where only 19.3% of eligible African Americans were registered to vote before the passage of the VRA, 74% of voting-age African Americans were registered by 2005.<sup>71</sup> The VRA transformed American democracy and led to a surge in voter registration among Black citizens, particularly in the South. African Americans and other people of color gained political representation, and barriers to their participation were dismantled.

The VRA contained two primary provisions: Section 2 and Section 5. Section 2 serves as the primary litigation provision and prohibits

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<sup>65</sup> Katzenbach, *supra* note 20, at 4.

<sup>66</sup> *Id.* at 9.

<sup>67</sup> See BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 22 (1992).

<sup>68</sup> See *id.* at 23.

<sup>69</sup> Katzenbach, *supra* note 20, at 5.

<sup>70</sup> David C. Colby, *The Voting Rights Act and Black Registration in Mississippi*, 16 *PUBLIUS* 123, 130 (1986).

<sup>71</sup> Michael E. Ross, *The Voting Rights Act Turns 40*, NBC NEWS (Aug. 4, 2005), <https://www.nbcnews.com/id/wbna8487686> [https://perma.cc/ZH3F-QHYN].

discrimination in voting nationwide.<sup>72</sup> Section 5 of the Act required certain “covered jurisdictions” to obtain approval or preclearance from either the United States Attorney General or the United States District Court for the District of Columbia when seeking to administer a new voting qualification or prerequisite to voting.<sup>73</sup> Additionally, the Act provided federal observers for troubled communities to ensure unfettered access to the ballot and federal registrars to register Black and Brown persons to vote in jurisdictions where the local registrar refused to comply with federal law.<sup>74</sup>

This piece of legislation has served as a shield and sword against discrimination in voting. Section 5 of the Act protected against and preempted discriminatory practices and policies in covered jurisdictions. This section required certain jurisdictions that met a coverage threshold to seek approval of voting changes prior to implementation.<sup>75</sup> It provided federal oversight, required notice of changes, and served as a deterrent for jurisdictions that considered returning to their old ways.<sup>76</sup> Section 4 of the Act banned literacy tests and other discriminatory devices that prevented citizens from exercising the right to vote, proving to be extremely beneficial in defeating Jim Crow tactics that prevented Black voters in the South from participating in the political process.<sup>77</sup> Importantly, Congress later amended the Act to also include mandatory language assistance<sup>78</sup> for certain jurisdictions and a provision that allows voters who need assistance to vote to choose the person who will provide them with such assistance.<sup>79</sup>

The VRA has existed for almost sixty years and has had a profound impact on our democracy by ensuring access to the ballot. But during these sixty years, the VRA has faced tremendous attacks that have undermined and crippled the effectiveness of this monumental law. As this article describes below, the cycles of voter suppression have continued well into this century.

### *B. Challenges and Setbacks*

Despite the need for the VRA to ensure access to the ballot, efforts to dismantle the Act began shortly after it was signed into law. Southern states considered it a federal overreach for the federal government to require states

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<sup>72</sup> See Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301(a)).

<sup>73</sup> See Voting Rights Act of 1965 § 5 (codified as amended at 52 U.S.C. § 10304).

<sup>74</sup> Voting Rights Act of 1965 § 3 (codified as amended at 52 U.S.C. § 10302).

<sup>75</sup> Voting Rights Act of 1965 § 5 (codified as amended at 52 U.S.C. § 10304).

<sup>76</sup> *Id.*

<sup>77</sup> Voting Rights Act of 1965 § 4 (codified as amended at 52 U.S.C. § 10303).

<sup>78</sup> See 52 U.S.C. § 10503. Known as Section 203, this provision mandates covered states or political subdivisions provide translated voting materials, such as notices, forms, instructions and ballots, to voters. *Id.*

<sup>79</sup> See 52 U.S.C. § 10508. Known as Section 208, this provision applies to voters who require voting assistance because of blindness, disability, or inability to read or write. *Id.*

to comply with the provisions contained in the law.<sup>80</sup> Nonetheless, in the 1966 case *South Carolina v. Katzenbach*, the Supreme Court found that the extraordinary measures of Section 5 and the other provisions were necessary to address the blatant discrimination that prevented access to voter registration and the ballot box.<sup>81</sup>

*South Carolina v. Katzenbach* was the first challenge to the VRA, but it was certainly not the last. For many years, Section 5 of the Act was the primary target.<sup>82</sup> While the Supreme Court has never found this section unconstitutional, the Court rendered a fatal blow to Section 5 in *Shelby County v. Holder* when it held that the formula in Section 4(b), which determined which jurisdictions were subject to federal approval or preclearance, was outdated and unconstitutional.<sup>83</sup> In the absence of a new formula, Section 5's preclearance system is, for all intents and purposes, inoperable. Writing for the majority, Chief Justice Roberts wrote that while the coverage formula was rational at the time of the VRA's passing, "[t]oday the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. . . . The [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of *current conditions*."<sup>84</sup> Unconvinced, Justice Ginsburg disagreed, warning that "[t]he Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, *history repeats itself*. . . . In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding."<sup>85</sup>

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<sup>80</sup> See, e.g., Brief of Plaintiff at 4, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22), 1965 WL 130083 at \*4 (arguing that the VRA "deprives South Carolina and certain other states of the rights to prescribe voter qualifications as reserved and guaranteed by Article I, Sections 2 and 4 of and by the Seventeenth Amendment to the Constitution of the United States").

<sup>81</sup> 383 U.S. 301, 337 (1966) (concluding that all challenged portions of the VRA were valid exercises of congressional power under the Fifteenth Amendment in light of "nearly a century of widespread resistance to the Fifteenth Amendment").

<sup>82</sup> See, e.g., *id.* at 329-30 (upholding Section 5 and finding the coverage formula "rational in both practice and theory"); *City of Rome v. United States*, 446 U.S. 156, 173 (1980) (upholding pre-1982 amendment version of Section 5 as constitutional); *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 707 (D.D.C. 1983) (rejecting county's assertion that the coverage formula was unnecessary because more than 50% of their citizens were registered to vote); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (applying the doctrine of constitutional avoidance to interpret the bailout provisions, which allow a political subdivision to seek an exemption from preclearance requirements, as allowing any covered jurisdiction to apply for a bailout).

<sup>83</sup> 570 U.S. 529 (2013).

<sup>84</sup> *Id.* at 551-53 (emphasis added) (citations omitted).

<sup>85</sup> *Id.* at 592-93 (Ginsburg, J., dissenting) (emphasis added).

Previously covered jurisdictions wasted little time before implementing practices that either the United States Attorney General or the United States District Court for the District of Columbia had found discriminatory. Indeed, Texas announced that it would implement a discriminatory restrictive voter identification law on the same day that the Court announced its decision in *Shelby County*.<sup>86</sup> Other jurisdictions followed suit, enacting restrictive voter ID laws that disproportionately affected minority communities.<sup>87</sup> Like the Hayes-Tilden Compromise,<sup>88</sup> the *Shelby County* decision has led to the withdrawal of federal protection of Black voters in the South. As a result, Section 2 of the VRA became the sole remaining and primary protection of the Act, and it was next on the chopping block.

### C. A Complicit Court Continues to Undermine Voting Rights

Over the past two decades, the Supreme Court has been complicit in allowing discrimination in voting to continue. In *Alexander v. South Carolina State Conference of the NAACP*,<sup>89</sup> the Court made it easier for states to get away with racial gerrymandering by upholding South Carolina's congressional map.<sup>90</sup> Justice Elena Kagan's dissent hearkens to a pre-VRA moment where states and localities were allowed to freely pass laws that disadvantaged and denied Black and Brown voters access to the ballot.<sup>91</sup> She lamented, "In the electoral sphere especially, where 'ugly patterns of pervasive racial discrimination' have so long governed, we should demand better—of ourselves, of our political representatives, and most of all of this Court."<sup>92</sup> With the Court's help, we find ourselves in yet another period of disenfranchisement.

If *Shelby County* was fatal to Section 5, then *Brnovich v. Democratic National Committee* has placed Section 2 on life support.<sup>93</sup> The case concerned a challenge to Arizona's out-of-precinct policy and its ban on

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<sup>86</sup> See Statement by Texas Attorney General Greg Abbott, ATT'Y GEN. OF TEX. (June 25, 2013), <https://texasattorneygeneral.gov/oagnews/release.php?id=4435> [<https://perma.cc/SL53-AFSG>] ("With today's decision, the State's voter ID law will take effect immediately. Redistricting maps passed by the Legislature may also take effect without approval from the federal government."). Initially, the Fifth Circuit held that Texas statute SB 14 was racially discriminatory in violation of the VRA. *Veasey v. Abbott*, 830 F.3d 216, 235-36 (5th Cir. 2016). However, the Fifth Circuit later upheld another Texas voter ID law, SB 5, allowing it to go into effect. *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

<sup>87</sup> See Jasleen Singh & Sara Carter, *States Have Added Nearly 100 Restrictive Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, BRENNAN CTR. FOR JUST. (June 23, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights> [<https://perma.cc/J9DV-3HHHC>].

<sup>88</sup> See *supra* Part I.

<sup>89</sup> 602 U.S. 1 (2024).

<sup>90</sup> *Id.*

<sup>91</sup> See *id.* at 99 (Kagan, J., dissenting).

<sup>92</sup> *Id.*

<sup>93</sup> 594 U.S. 647 (2021).

allowing anyone other than a family member or caregiver to collect an absentee ballot.<sup>94</sup> The plaintiffs argued that these laws disproportionately impacted minority voters in Arizona, especially people in indigenous communities, and thus violated the VRA.<sup>95</sup> The Supreme Court upheld the laws and instituted a new and more demanding standard for invalidating state voting laws. It held that the burden on voters was minimal and that the laws served legitimate state interests (such as preventing fraud) without requiring the state to provide evidence that fraud existed.<sup>96</sup> The Court's conservative majority took a narrower view of the VRA's protections and effectively made it harder to bring successful challenges under Section 2.<sup>97</sup> This ruling shrank the scope of Section 2, weakening safeguards against racially discriminatory voting laws and enabling states to enact suppressive measures.<sup>98</sup> Additionally, the Court introduced five new "guideposts" for assessing future vote-denial claims, making it more difficult for voters of color to both file and win such lawsuits.<sup>99</sup> This decision represents another blow to the ongoing fight against voter suppression.

Recently, in *Merrill v. Milligan*, a case challenging the congressional redistricting plan in Alabama, the Court allowed an election to go forward under a discriminatory redistricting plan.<sup>100</sup> It relied on the *Purcell* principle to proclaim that a challenge ten months before an election was too close and could cause chaos.<sup>101</sup> Yet, the Court utterly disregarded the need for voters to take part in free, fair, and democratic elections by finding that the redistricting decision was rendered too close to the candidate qualification

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<sup>94</sup> *Id.* at 654-55.

<sup>95</sup> *See id.* at 683-84 (The plaintiffs "called witnesses who testified that third-party ballot collection tends to be used most heavily in disadvantaged communities and that minorities in Arizona—especially Native Americans—are disproportionately disadvantaged.").

<sup>96</sup> *Id.* at 685-86 (holding, *inter alia*, that "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence").

<sup>97</sup> Madeleine Carlisle & Sanya Mansoor, *Supreme Court Upholds Arizona Voting Restrictions in Another Blow to Voting Rights Act*, TIME (July 1, 2021, 2:34 PM), <https://time.com/6077449/supreme-court-voting-rights/> [<https://perma.cc/4KXR-S3LS>] (noting that the *Bronovich* ruling "will make it much more difficult for people to challenge laws that appear to be 'race-neutral'").

<sup>98</sup> *See* Kaitlin Barnes, Note, *On the Road Again: How Brnovich Steers States Toward Increased Voter Restrictions*, 81 MD. L. REV. 1265, 1289 (2022).

<sup>99</sup> *Brnovich v. Democratic National Committee*, 594 U.S. 647, 666 (2021). The majority decided that the guideposts for determining whether a voting rule violated Section 2 would include: (1) the severity of the burden imposed by the rule, (2) whether the rule had been a long-standing practice, at least since 1982 when Section 2 was amended, (3) the extent of any disparity in the rule's impact on different racial or ethnic groups, (4) the availability of alternative voting methods in the state's overall voting system, and (5) the strength of the state's interest served by the rule, giving deference to the asserted interests. *Id.* at 668-72.

<sup>100</sup> *See* 142 S. Ct. 879, 880-83 (2022) (Kavanaugh, J., concurring).

<sup>101</sup> *Id.* at 880-81 (reasoning that, per the *Purcell* principle, "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences"). For the origins of the *Purcell* principle, see *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*).

period and allowing elections using the discriminatory districting scheme to move forward.<sup>102</sup> The Court saw voters' right to participate democratically as subordinate to the interests of the legislature.

It is important to note that this voting restriction law likely would not have been allowed if Section 5 of the VRA was still viable. Jurisdictions would have to meet the Section 5 preclearance standard before the voting restrictions could even be implemented.<sup>103</sup> Moreover, the National Voter Registration Act of 1993 prevents changes to voter registration rolls within ninety days of a federal election.<sup>104</sup> Nonetheless, several jurisdictions have boldly conducted voter registration removals and other voting changes that would have been subject to Section 5 preclearance.<sup>105</sup> For example, in *Republican National Committee v. Mi Familia Vota*, which concerned an Arizona law that requires voter registration applicants to show documentary proof of citizenship, the Supreme Court allowed the Arizona legislature to enforce the law less than ninety days before the 2024 election.<sup>106</sup> The Court thus seems to have no problem violating the *Purcell* principle, even at the risk of throwing the Arizona elections into chaos, to uphold a law that disenfranchises voters.<sup>107</sup>

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<sup>102</sup> See *Milligan*, 142 S. Ct. at 882 (Kavanaugh, J., concurring) (finding that “the plaintiffs cannot overcome even a more relaxed version of the *Purcell* principle” because they failed to show that the merits are clearcut in favor of plaintiffs and that the changes are feasible without significant cost, confusion, or hardship).

<sup>103</sup> Voting Rights Act of 1965 § 5 (codified as amended at 52 U.S.C. § 10304).

<sup>104</sup> National Voter Registration Act of 1993 § 8, Pub. L. 103-31, 107 Stat. 7752 (codified as amended at U.S.C. § 20507); see also *About the National Voter Registration Act*, U.S. DEPT. OF JUST., <https://www.justice.gov/crt/about-national-voter-registration-act> [<https://perma.cc/NC5X-88YQ>] (last updated Apr. 5, 2023).

<sup>105</sup> See, e.g., Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds> [<https://perma.cc/XBU8-G2CV>]. According to the Brennan Center's analysis of federal data, states previously overseen by Section 5 likely purged 1.1 million more voters than they would have been able to prior to *Shelby County*. *Id.* Astonishingly, “16 million voters were purged between the federal elections of 2014 and 2016,” amounting to “almost 4 million more names purged from the rolls than between 2006 and 2008.” *Id.*

<sup>106</sup> *Republican National Committee v. Mi Familia Vota*, No. 24A164 2024 WL 3893996, at \*1 (Aug. 22, 2024); see also Amy Howe, *Justices Allow Arizona to Enforce Proof-of-Citizenship Law for 2024 Voter Registration*, SCOTUSBLOG (Aug. 22, 2024, 4:23 PM), <https://www.scotusblog.com/2024/08/justices-allow-arizona-to-enforce-proof-of-citizenship-law-for-2024-voter-registration> [<https://perma.cc/DZG6-JXLV>].

<sup>107</sup> There is some debate over whether the Supreme Court's decision in *Mi Familia Vota* violates the *Purcell* principle. See Rick Hasen, *Supreme Court Ignores the Purcell Principle in Its Latest Voting Case on Arizona, Creating Confusion and Potential Disenfranchisement for Newly Registering Voters in the Period Before the Election*, ELECTION L. BLOG (Aug. 23, 2024, 10:05 AM), <https://electionlawblog.org/?p=145289> [<https://perma.cc/55E5-398N>]. But see Derek Muller, *Purcell is About Court-Ordered Changes to Election Administration—Not All Things That Affect Election Administration*, ELECTION L. BLOG (Aug. 26, 2024, 11:27 AM), <https://electionlawblog.org/?p=145316> [<https://perma.cc/S3EG-84Q2>] (responding to and disagreeing with Hasen's analysis).

### III. THE CYCLE CONTINUES: CONTEMPORARY FORMS OF VOTER SUPPRESSION

The Supreme Court's decade-long evisceration of the VRA has allowed states to institute a variety of new laws aimed at suppressing the vote. These restrictions are presented as necessary to prevent voter fraud,<sup>108</sup> but they evoke the same anti-democratic ideals that animated the voting restrictions of the Jim Crow era. In particular, voter identification laws and mass voter challenges have arisen as new forms of vote suppression.

As discussed in Part I, African Americans and other people of color were historically denied the ability to register and otherwise participate in the electoral system.<sup>109</sup> Traditionally, states used poll taxes to disenfranchise voters.<sup>110</sup> In this century, states have increasingly turned to restrictive voter identification laws as a substitute.<sup>111</sup> The parallels between the poll tax and restrictive voter identification are compelling. The costs of obtaining the underlying documents required by voter ID laws (e.g., driver's licenses, birth certificates, passports) preclude many Americans from voting.<sup>112</sup> According to a 2024 survey, nearly 21 million voting-age citizens do not have a current driver's license, with 28% of Black adult citizens and 27% of Hispanic adult citizens reporting that they do not have a current license.<sup>113</sup> The poll tax was once considered "the most effective instrumentality of Negro disenfranchisement,"<sup>114</sup> and although the name has changed, the outcome remains the same—millions of voters of color have been disenfranchised in order to promote partisan political agendas. In particular, voter ID laws have suppressed the votes of African Americans, the elderly, young voters, and those from lower socioeconomic backgrounds.<sup>115</sup> Yet,

<sup>108</sup> See, e.g., *Brnovich v. Democratic National Committee*, 594 U.S. 647, 685-86 (2021).

<sup>109</sup> See *supra* Part I; see also GILDA DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA 63 (2021).

<sup>110</sup> See *Disenfranchisement by Means of the Poll Tax*, 53 HARV. L. REV. 645, 645 (1940).

<sup>111</sup> DANIELS, *supra* note 109, at 64. Restrictive voter ID laws require registered voters to bring government-issued ID (e.g. driver's license, passport, military ID) to vote in person. *Id.*

<sup>112</sup> See Devon Hesano, *How ID Requirements Harm Marginalized Communities and Their Right to Vote*, DEMOCRACY DOCKET (Nov. 16, 2023), <https://www.democracymarket.com/analysis/how-id-requirements-harm-marginalized-communities-and-their-right-to-vote> [https://perma.cc/KYB3-RSDY]. For example, "[b]irth certificates average over \$50 and driver's licenses cost as much as \$89." *Id.*

<sup>113</sup> JILLIAN ANDRES ROTHCHILD, SAMUEL B. NOVEY & MICHAEL J. HANMER, CTR. FOR DEMOCRACY & CIVIC ENGAGEMENT, WHO LACKS ID IN AMERICA TODAY?: AN EXPLORATION OF VOTER ID ACCESS, BARRIERS, AND KNOWLEDGE 2-3 (2024), <https://cdce.umd.edu/sites/cdce.umd.edu/files/pubs/Voter%20ID%202023%20survey%20Key%20Results%20Jan%202024%20%281%29.pdf> [https://perma.cc/3Q9B-36WW].

<sup>114</sup> KOUSSER, *supra* note 52, at 66.

<sup>115</sup> See, e.g., *One Wis. Inst., Inc v. Thomsen*, 198 F. Supp. 3d 896, 902 (W.D. Wis. 2016) (describing an elderly voter who experienced several challenges due to restrictive voter ID laws); *Frank v. Walker*, 17 F. Supp. 3d 837, 855 (E.D. Wis. 2014) (finding that "a substantial number

proponents of voter ID laws claim that these laws are necessary to prevent voter fraud.<sup>116</sup>

The idea that voter ID requirements prevent voter fraud was echoed by the Supreme Court in *Crawford v. Marion County Election Board*.<sup>117</sup> In *Crawford*, the Court rejected a challenge to an Indiana statute that required all citizens to present a valid government-issued photo identification before voting in person.<sup>118</sup> Despite the severe burdens placed on those who lack proper identification, particularly the indigent, elderly, and disabled, the Court upheld the law as neutral and nondiscriminatory.<sup>119</sup> The Court's reasoning for upholding the law in *Crawford* is perhaps the most concerning aspect of the ruling. It contended that Indiana's interest in preventing voter fraud outweighed the petitioners' interest in casting a ballot without restrictions.<sup>120</sup> The Court accepted the state's rationale, even though no actual evidence of in-person voter fraud in Indiana was produced, suggesting that the mere *potential* for fraud justified the restrictions.<sup>121</sup> This decision is significant in that it marked the Supreme Court's first formal endorsement of the voter fraud myth, using it to justify restrictions on ballot access and thereby supporting measures that disenfranchise voters under the pretense of protecting election integrity. The Court has not only been steadily weakening the VRA, but it has also made it harder for voters to contest laws that infringe upon their constitutional right to vote guaranteed under the Fourteenth Amendment.

In recent years, election deniers have turned to mass voter challenges to attack citizens' right to vote.<sup>122</sup> Mass voter challenges refer to a series of coordinated complaints filed by activists who claim that voter registrations are inaccurate (e.g., voters' addresses are incorrect) in order to purge tens of thousands of voters from the voter rolls.<sup>123</sup> The stated rationale for these challenges is that "any inaccuracy in the voter rolls equates to fraud"—an unproven narrative that ignores the fact that election officials continuously

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of the 300,000 plus [Wisconsin] voters who lack an ID are low income" and that the burdens imposed by the legislation in question "must be assessed with reference to them rather than with reference to a typical middle- or upper-class voter"); see also Hesano, *supra* note 112.

<sup>116</sup> DANIELS, *supra* note 109, at 71.

<sup>117</sup> 553 U.S. 181 (2008).

<sup>118</sup> *Id.* at 185-86.

<sup>119</sup> *Id.* at 204 (holding that the state interests offered to justify the legislation were "neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute").

<sup>120</sup> *Id.* at 203-04. The Court also considered Indiana's two other stated interests—safeguarding voter confidence and election modernization—and found both to be legitimate. *Id.* at 191.

<sup>121</sup> *Id.* at 194 (noting that the legislation addresses "in-person voter impersonation at polling places" but conceding that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history").

<sup>122</sup> Nick Corasaniti & Alexandra Berzon, *Activists Flood Election Offices with Challenges*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/2022/09/28/us/politics/election-activists-voter-challenges.html>.

<sup>123</sup> *Id.*

update voter registration rolls.<sup>124</sup> After failing to prove widespread voter fraud in the 2020 election, election deniers have leveraged state voter challenge laws to “call into question the eligibility of large numbers of registered citizens at once,” and they have sued state election officials for failing to clean up their voter rolls.<sup>125</sup> For example, the Republican National Party (RNP) and North Carolina Republican Party (NCRP) filed a lawsuit against the North Carolina State Board of Elections challenging the procedure used by election officials to register 225,000 voters.<sup>126</sup> The RNP and NCRP claimed the registration forms were improperly color-coded.<sup>127</sup> They also argued that the election board failed to check the identification of nearly 225,000 prospective voters in violation of the Help America Vote Act and, as a result, allowed noncitizens to vote.<sup>128</sup> Although plaintiffs knew about the alleged error for months, they waited until two weeks before the start of voting to seek a court order removing a large portion of existing registered voters.<sup>129</sup>

In Georgia, efforts to cull voter registration rolls, while often legally frivolous, have nonetheless disenfranchised voters and burdened local election officials. For example, conservative activists pressured election officials to quietly remove voters from voter rolls without filing a formal legal challenge, a tactic which could deny voters the opportunity to defend their voting rights and hide the identities of those seeking their removal from the public.<sup>130</sup> In another example, Shannon Marietta, a Georgia voter, challenged the eligibility of 878 voters based on records found in the National Change of Address database.<sup>131</sup> Although county officials did not immediately remove these voters from the rolls, they planned to set hearings over eight days for the challenges, during which each voter must appear.<sup>132</sup> In fact, a ProPublica report examining the mass voter challenge of 100,000 voters in Georgia in 2022 found “that those few approved challenges imposed

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<sup>124</sup> CLINT SWIFT, SARA LOVING, JESSICA MARSDEN & ORION DANJUMA, PROTECT DEMOCRACY, UNRAVELING THE RISE OF MASS VOTER CHALLENGES 6 (2024), <https://protectdemocracy.org/wp-content/uploads/2024/06/Mass-Challenges.pdf> [https://perma.cc/XBK7-NR42].

<sup>125</sup> *Id.*

<sup>126</sup> *DNC Seeks to Intervene in GOP Lawsuit Challenging 225,000 Voter Registrations*, CAROLINA J. (Sept. 3, 2024), <https://www.carolinajournal.com/dnc-seeks-to-intervene-in-gop-lawsuit-challenging-225000-voter-registrations/> [https://perma.cc/U8P7-FLAH].

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Jeff Amy & Trenton Daniel, *In Georgia, Conservatives Seek to Have Voters Removed from the Rolls Without Official Challenges*, ASSOC. PRESS, <https://apnews.com/article/georgia-voter-removal-software-eagleai-266ead9198da7d54421798e8a1577d26> [https://perma.cc/36WL-3NRW] (last updated June 29, 2024, 12:02 AM).

<sup>131</sup> Laura Camper, *Board of Elections Sets Hearing for 878 Voter Challenges*, NEWNAN TIMES-HERALD (Sept. 3, 2024), [https://www.times-herald.com/news/board-of-elections-sets-hearings-for-878-voter-challenges/article\\_11a3429e-6a41-11ef-bdac-f7943f753099.html](https://www.times-herald.com/news/board-of-elections-sets-hearings-for-878-voter-challenges/article_11a3429e-6a41-11ef-bdac-f7943f753099.html) [https://perma.cc/F74J-3SZ7].

<sup>132</sup> *Id.*

significant barriers for this group of eligible voters, who were forced to appear at a hearing on a workday or otherwise prove their eligibility.”<sup>133</sup> The report told the story of one voter who decided not to contest his removal from the voter rolls due to the hardship of needing to appear for a 9 a.m. hearing on a day when he was working three jobs.<sup>134</sup>

And in Texas, conservative groups and individual activists have filed numerous baseless challenges seeking to remove tens of thousands of voters from voter rolls because they allegedly do not live in the county, are not citizens, or have died.<sup>135</sup> Election officials say these voter challenges burden the work they are doing to ensure that the voter rolls are up to date.<sup>136</sup> True the Vote, a Houston-based conservative group, has been leading mass voter challenges in Texas as well as targeting battleground states such as Pennsylvania, Arizona, and Georgia with similar challenges.<sup>137</sup> The organization Fair Fight sued True the Vote for a series of alleged voter intimidation efforts and mass voter challenges during the Georgia 2021 runoff election.<sup>138</sup> Fair Fight alleged that True the Vote’s “Validate the Vote” campaign included filing mass, baseless voter challenge claims, stoking public fear of voter fraud by implicating voters who were wrongfully challenged, organizing polling site surveillance, and incentivizing vigilante election policing.<sup>139</sup> The federal court hearing the case concluded that True the Vote’s voter list, which it used to facilitate a mass voter challenge, “utterly lacked reliability” and “verges on recklessness” due to their failure to take the time to create a quality list with the proper controls in place.<sup>140</sup>

These reckless voter challenges are not about preventing voter fraud but about denying eligible voters the right to vote. In a move that demonstrated the disingenuousness of their election integrity claims, since 2022, nine Republican-led states—including Texas—have withdrawn from the Electronic Registration Information Center, the best organization for reliably identifying cross-state double voting, because of conspiracy theories

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<sup>133</sup> Doug Bock Clark, *Close to 100,000 Voter Registrations Were Challenged in Georgia—Almost All by Just Six Right-Wing Activists*, PROPUBLICA (July 13, 2023, 7:00 AM), <https://www.propublica.org/article/right-wing-activists-georgia-voter-challenges> [<https://perma.cc/UF4K-H9TW>]; SWIFT ET AL., *supra* note 124, at 7.

<sup>134</sup> Clark, *supra* note 133.

<sup>135</sup> See Natalia Contreras, *Texas Election Officials Are Dealing with a Flood of Challenges to Voter Registrations*, TEX. TRIB. (Aug. 16, 2024), <https://www.texastribune.org/2024/08/16/voter-registration-challenges-texas/> [<https://perma.cc/H2SZ-5VWX>].

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; see also Curt Devine, Yahya Abou-Ghazala & Kyung Lah, *A Half-Million Records and One App: The Group Behind a Massive Effort to ‘Clean’ Voter Rolls*, CNN, <https://www.cnn.com/2024/07/29/politics/voter-rolls-ballot-challenges-true-the-vote-elections/index.html> [<https://perma.cc/B8M6-FCUW>] (last updated July 29, 2024, 12:02 AM).

<sup>138</sup> Fair Fight, Inc. v. True the Vote, 710 F. Supp. 3d 1237 (N.D. Ga. 2024).

<sup>139</sup> Brief in Support of Plaintiffs’ Motion for Summary Judgment at 1-2, Fair Fight, Inc. v. True the Vote, 710 F. Supp. 3d 1237 (N.D. Ga. 2024) (No. 2:20-CV-00302).

<sup>140</sup> *Fair Fight*, 710 F. Supp. 3d at 1274. The court ultimately held that the voter challenges did not constitute impermissible voter intimidation under Section 11(b) of the VRA. *Id.* at 1295.

attacking the bipartisan organization as having been funded by left-wing billionaire George Soros.<sup>141</sup>

#### IV. SOLVING VOTER SUPPRESSION

To stop voter suppression, a multifaceted approach is needed. We need a response that is not overly reliant upon the federal judiciary but builds on strengths in several areas. Accordingly, this proposal suggests utilizing congressional action, state level voting rights acts, civic engagement, and a constitutional amendment that includes an affirmative right to vote, to end America's cycles of voter suppression once and for all.

##### A. Congressional Action

*Shelby County v. Holder*<sup>142</sup> and *Brnovich v. Democratic National Committee*<sup>143</sup> significantly reduced the VRA's ability to protect American citizens from infringements on their right to participate in the political process.<sup>144</sup> In *Shelby County*, the Court invited Congress to adopt restorative legislation,<sup>145</sup> but Congress has thus far not had the will or the votes to pass new voting rights legislation. The John R. Lewis Voting Rights Advancement Act (JLVRA)<sup>146</sup> seeks to restore what was lost in *Shelby County* and *Brnovich*. It includes a private right of action, provides opportunities for jurisdictions to bail out of preclearance coverage requirements, contains a clear standard for vote dilution in gerrymandering and vote denial actions, and a cause of action for retrogression.<sup>147</sup>

One of the responses to *Brnovich* was that the extension of an enhanced retrogression standard for Section 2 matters.<sup>148</sup> Previously, retrogression served as the measure for determining whether Section 5 matters would receive preclearance.<sup>149</sup> The retrogression standard blocks any election law

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<sup>141</sup> Miles Parks, *Republican States Swore Off a Voting Tool. Now They're Scrambling to Recreate It*, NPR (Oct. 20, 2023, 5:00 AM), <https://www.npr.org/transcripts/1207142433> [<https://perma.cc/S3M2-53EW>]; see also Jen Fifield, *Documents Show Republican-led States Struggling to Clean Voter Rolls after Leaving ERIC*, VOTE BEAT (Dec. 13, 2023, 9:15 AM), <https://www.votebeat.org/2023/12/13/cleaning-voter-rolls-after-eric-election-security-voter-fraud/> [<https://perma.cc/VA45-RYKW>].

<sup>142</sup> 570 U.S. 529 (2013).

<sup>143</sup> 594 U.S. 647 (2021).

<sup>144</sup> See *supra* sections II.B, C.

<sup>145</sup> See *Shelby Cnty.*, 570 U.S. at 557 ("Congress may draft another formula based on current conditions.").

<sup>146</sup> John R. Lewis Voting Rights Advancement Act of 2024, S.4, 118th Cong. (2024).

<sup>147</sup> *Id.*

<sup>148</sup> See Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1963 (2018) ("In the years since *Shelby County*, plaintiffs have relied on section 2 of the VRA to challenge those retrogressive electoral practices that section 5 would have blocked.").

<sup>149</sup> See *Beer v. United States*, 425 U.S. 130, 141 (1976).

change that diminishes the electoral clout of minority voters relative to the status quo.<sup>150</sup> Under the existing version of Section 2, however, mere backsliding of minority voting rights is not sufficient to constitute a violation.<sup>151</sup> Under JLVRA's proposed amendment to Section 2, retrogression serves as a tool to use against legislative action attempting to racially discriminate for voting-related purposes.<sup>152</sup> It provides a cause of action against any legislative action that infringes on citizens' right to vote if the legislation "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to participate in the electoral process or elect their preferred candidates of choice."<sup>153</sup> This cause of action applies to any changes in qualification or prerequisite to voting or standards, practices, or procedures by state or local political divisions.<sup>154</sup> This measure could help voters and advocates of voting rights challenge the new generation of voter suppression laws.

As to vote dilution, the JLVRA allows voters to bring federal claims when state or local practices make it unduly burdensome or challenging for candidates preferred by minority voters to win.<sup>155</sup> The legal standard for Section 2 claims was established in *Thornburg v. Gingles* and included a review of the totality of the circumstances, *inter alia*, (1) the jurisdiction's history of official discrimination, (2) the extent of racial polarization in voting in the jurisdiction, and (3) the extent to which minority candidates have won elections in the jurisdiction.<sup>156</sup> The JLVRA codifies the *Thornburg* factors.<sup>157</sup>

The JLVRA also addresses the higher burdens for voters in vote denial cases and provides a cause of action that allows voters to bring federal action when restrictions result in minority voters having more difficulty casting a ballot than non-minority voters. To have standing for this cause of action, there only needs to be a "but-for cause of the discriminatory burden" or a "perpetuat[ion] [of] a pre-existing discriminatory burden."<sup>158</sup> Courts consider eight factors when making this determination, including, *inter alia*, the jurisdiction's history of voting discrimination, the extent of racial polarization in state and local voting elections, the extent of voter ID law burdens, the use of overt or subtle racial appeals in political campaigns pertaining to

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<sup>150</sup> See Noel H. Johnson, *Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Receive Preclearance Nationwide?*, 12 DUKE J. CONST. L. & PUB. POL'Y 1, 2 (2017).

<sup>151</sup> See *id.* at 2 (explaining that under Section 2, "the court looks to the totality of the circumstances and asks whether the challenged practice has the real-world result of denying minorities an equal opportunity to participate in the electoral process").

<sup>152</sup> See John R. Lewis Voting Rights Advancement Act of 2024, S.4, 118th Cong. § 102 (2024).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at § 101(b).

<sup>156</sup> *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

<sup>157</sup> See John R. Lewis Voting Rights Advancement Act of 2024, S.4, 118th Cong. § 101(b) (2024).

<sup>158</sup> *Id.* at § 101(c).

the adoption of new voting practices or procedures, and the lack of responsiveness by elected officials to the needs of minority groups deemed to be a protected class.<sup>159</sup>

In an effort to restore preclearance requirements for some areas, proponents of the JLVRA proposed including geographic and practice-related coverage. Geographic coverage is designed to combat the impact of the *Shelby County* decision.<sup>160</sup> The concept of geographic coverage would alter the previously criticized preclearance formula by requiring that all state and local coverage be assessed on the basis of data that present recent evidence of voting discrimination within the jurisdiction.<sup>161</sup> Similarly, practice-based coverage is a national-level proposed change that would classify particular types of state and local voting changes to be automatically subject to preclearance, when certain conditions are met, because the particular types of voting changes are so often linked to discriminatory purposes or results.<sup>162</sup> The voting changes that would require a jurisdiction to review before implementation include: (1) changes to the method of election, (2) changes to political subdivision boundaries, (3) changes through redistricting, (4) changes in documentation or qualifications to vote, (5) changes to multilingual voting materials, (6) changes that reduce, consolidate, or relocate voting locations, or reduce voting opportunities, and (7) new voter list maintenance processes.<sup>163</sup>

Although the JLVRA could go a long way in restoring and updating the features of the VRA that made the original legislation so powerful, more could be done to increase transparency, enhance accountability, and limit the need for time-consuming and expensive litigation. In 2008, I recommended a nationwide implementation of voter impact statements.<sup>164</sup> Voter impact statements would adopt some of the strengths of Section 5, such as providing notice to citizens regarding voting changes, requiring a period of review and comment, and placing the burden on the jurisdiction to demonstrate that it engaged in a thorough review of how the change would impact its constituency, including racial, economic, and geographic studies.<sup>165</sup> With a voter impact statement approach, prior to implementing a new voter ID law, the jurisdiction would have to establish how the legislation would combat fraud without impacting access to the polls. This places the burden squarely

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at § 104(a)(1); *The John R. Lewis Voting Rights Advancement Act*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/john-r-lewis-voting-rights-advancement-act> [https://perma.cc/EU8A-8DPC] (last updated Feb. 29, 2024).

<sup>161</sup> John R. Lewis Voting Rights Advancement Act of 2024, S.4, 118th Cong. § 104(a)(1) (2024).

<sup>162</sup> *Id.* at § 105.

<sup>163</sup> *Id.*

<sup>164</sup> Gilda R. Daniels, *A Vote Delayed Is A Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 59-60 (2008).

<sup>165</sup> *Id.*; see also Gilda R. Daniels, *Voting Realism*, 104 KY. L.J. 583, 601 (2016).

on state and local jurisdictions, not on the voters, to design laws that do not restrict the right to vote. Together, passage of the JLVRA and implementation of the voter impact statement approach would begin the process of undoing the damage *Shelby County* and *Brnovich* have done to voting rights.

### B. State Voting Rights Acts

As of October 2024, eight states have adopted state voting rights acts (State VRAs).<sup>166</sup> State VRAs assist in providing protections for voters. These actions are not necessarily a replacement for a weakened VRA, but they play a vital role in securing access to the ballot on the state level.<sup>167</sup> These laws can both complement federal protections and offer state-specific provisions. States should continue to pass and strengthen their own VRAs, even if federal legislation—like the JLVRA—is enacted.

According to the National Association for the Advancement of Colored People Legal Defense Fund, a State VRA should contain several key elements, including creating a preclearance mechanism; addressing vote denial and dilution; protecting voters from voter intimidation, deception, or obstruction; expanding language access; developing a statewide database for election and demographic data; and leveraging a democracy canon that “instruct[s] judges to interpret laws and rules in the most pro-voter, pro-democracy way possible.”<sup>168</sup> Moreover, State VRAs should clarify vote dilution standards, shift burdens from the people to the legislature, and incorporate remedial options beyond what is generally considered in standard litigation.<sup>169</sup> For example, State VRAs could incorporate independent commissions, preclearance requirements, arbitration-like systems, and preemptive components.<sup>170</sup> These and other options “could serve democracy by subverting municipal deference, constraining judicial discretion, and bolstering the plaintiffs’ role in remedial design.”<sup>171</sup> These strategies shift power toward vote dilution claimants, both at trial and—crucially—before it.

State VRAs have had success protecting voting rights. In Yakima County, Washington, for example, due to the county’s use of at-large elections, Latino candidates have rarely been elected to the County Board of Commissioners, even though Latinos make up at least 50% of the county

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<sup>166</sup> *State Level Voting Rights Acts*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/democracy-maps/state\\_level\\_voting\\_rights\\_acts](https://www.lgbtmap.org/democracy-maps/state_level_voting_rights_acts) [https://perma.cc/D9BE-QHL6]. California, Oregon, Washington, Minnesota, Illinois, New York, Connecticut, and Virginia have enacted state-level voting rights acts. *Id.* (last updated Oct. 17, 2024).

<sup>167</sup> See Rebecca Mears, *The Protection of Voting Rights Requires State Action*, CTR. FOR AM. PROGRESS (Mar. 25, 2024), <https://www.americanprogress.org/article/the-protection-of-voting-rights-requires-state-action/> [https://perma.cc/68YF-VD4U].

<sup>168</sup> *State Voting Rights Acts*, NAACP LEGAL DEF. FUND, <https://www.naacpldf.org/state-voting-rights-protect-democracy/> [https://perma.cc/MH48-L29C] (last visited Nov. 5, 2024).

<sup>169</sup> See *Recent Legislation*, 137 HARV. L. REV. 1789, 1789 (2024).

<sup>170</sup> *Id.* at 1795-96.

<sup>171</sup> *Id.* at 1796.

and 31% of the county's voting-eligible population.<sup>172</sup> After the Board of Commissioners initially failed to respond to the concerns of advocacy groups, these groups sued the Board under the Washington Voting Rights Act for suppressing Latino votes in the county.<sup>173</sup> Under the Washington Voting Rights Act, members of a protected class may sue local jurisdictions if the "method of electing the governing body of a political subdivision [is] imposed or applied in a manner that impairs the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice."<sup>174</sup> The Board eventually agreed to change its at-large system and implement a system in which county commissioners are elected in single-member districts.<sup>175</sup> The Washington Voting Rights Act therefore gives disenfranchised communities a tool to ensure voters have an equal and fair opportunity to elect the candidates of their choice.

Moreover, state VRAs can protect voting rights in ways the federal VRA cannot. For example, Virginia's Voting Rights Act criminalizes voter intimidation,<sup>176</sup> New York's Voting Rights Act provides expanded services to limited English speakers,<sup>177</sup> and Washington's Voting Rights Act includes a "democracy canon" that instructs courts to construe any voting-related laws and rules in favor of protecting the right to vote.<sup>178</sup>

Legal scholars Ruth Greenwood and Nicholas Stephanopoulos describe the ascent of State VRAs as voting rights federalism, which they define as "the adoption of [State VRAs] diverging from the baseline of the [federal VRA]."<sup>179</sup> While the majority of State VRAs have been adopted within the last decade,<sup>180</sup> Greenwood and Stephanopoulos note that State VRAs "can be far more impactful than the [federal VRA]."<sup>181</sup> Take the California Voting Rights Act (CAVRA), for example. Claims of racial vote dilution brought under CAVRA have been remarkably successful.<sup>182</sup> Such claims, as well as threats of such claims, "have caused almost 150 school districts and almost

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<sup>172</sup> *CLC Wins State Voting Rights Act Case in Historic Settlement*, CAMPAIGN LEGAL CTR. (Aug. 31, 2021), <https://campaignlegal.org/update/clc-wins-state-voting-rights-act-case-historic-settlement> [https://perma.cc/E4NR-64TQ].

<sup>173</sup> *Id.*

<sup>174</sup> WASH. REV. CODE §§ 29A.92.020, 29A.92.080.

<sup>175</sup> *CLC Wins State Voting Rights Act Case in Historic Settlement*, *supra* note 172.

<sup>176</sup> *See* VA. CODE § 24.2-1005.

<sup>177</sup> *See* John Lewis Voting Rights Act of New York (NYVRA), N.Y. ELEC. LAW § 17-208.

<sup>178</sup> WASH. REV. CODE § 29A.92.720; Mai Hoang, *WA Passed a 'Voting Rights Act 2.0' Bill. Here's What's in it*, CASCADE PBS (May 4, 2023), <https://www.cascadepbs.org/politics/2023/05/wa-passed-voting-rights-act-20-bill-heres-whats-it> [https://perma.cc/T3HB-FYWW].

<sup>179</sup> Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. 299, 301 (2023).

<sup>180</sup> In the last decade, the following states have passed State VRAs: Washington (2018), Oregon (2019), Virginia (2021), New York (2022) and Connecticut (2023). *Id.* at 301. California became the first state to enact its own State VRA in 2002. *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

100 cities in California to switch from at-large to districted elections,” while only one racial vote dilution action brought under the federal VRA has been successful in California in the last forty years.<sup>183</sup> State VRAs have the potential to provide voting protections that far exceed the floor provided by the federal VRA.

### C. Civic Engagement

Civic education and engagement serve as an especially important way to address voter suppression. The connection between civic education and democracy has grown in relevance in view of the extreme levels of polarization, lack of civility, misinformation, and disinformation that permeate the country. Civic education is defined as “contributing and working to make a difference in the public (or civic) life of our communities and developing the combination of knowledge, skills, values and commitment to make that difference.”<sup>184</sup> The National Democratic Institute views civic education as “the bedrock of a thriving democracy—it empowers citizens to engage, participate, and hold institutions accountable.”<sup>185</sup> Other organizations have placed a renewed focus on the root of the issue and seek to educate primary and secondary school students on the values of civics and democracy.<sup>186</sup>

A Carnegie Corporation report found that the United States invests only “50 cents in civic education for every 50 dollars that goes to education in the science, technology, engineering, and math (STEM) subjects.”<sup>187</sup> Further, an Annenberg Center study found that 15% of Americans could not name the three branches of government, and a majority of them could not name most of the rights protected by the First Amendment.<sup>188</sup> This lack of

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<sup>183</sup> *Id.* at 301-02 (citations omitted).

<sup>184</sup> *Civic and Democratic Engagement: A Brief Overview*, EDWARD GINSBERG CTR., <https://ginsberg.umich.edu/article/civic-and-democratic-engagement-brief-overview> [<https://perma.cc/GMB3-Y3VW>] (last visited Oct. 30, 2024).

<sup>185</sup> *See Civic Education Program Guidance*, NAT’L DEMOCRATIC INST. (Sept. 17, 2024), <https://www.ndi.org/publications/civic-education-program-guidance> [<https://perma.cc/9X9G-9NYF>].

<sup>186</sup> *See, e.g., What We Do*, CTR. FOR CIVIC EDUC., <https://www.civiced.org/about> [<https://perma.cc/UR8H-8N37>] (last visited Nov. 14, 2024). (“The Center for Civic Education helps students develop (1) an increased understanding of the institutions of constitutional democracy and the fundamental principles and values upon which they are founded, (2) the skills necessary to participate as competent and responsible citizens, and (3) the willingness to use democratic procedures for making decisions and managing conflict. Ultimately, the Center strives to develop an enlightened citizenry by working to increase understanding of the principles, values, institutions, and history of constitutional democracy among teachers, students and the general public.”).

<sup>187</sup> WILLIAM H. WOODWELL, JR., CARNEGIE CORPORATION OF NEW YORK, *CONNECTING CIVIC EDUCATION AND A HEALTHY DEMOCRACY* 3 (2024), [https://media.carnegie.org/filer\\_public/0b/ad/0bad8c66-e020-4ab9-ae05-72d968f17333/carnegie\\_civics\\_policy\\_2024\\_final.pdf](https://media.carnegie.org/filer_public/0b/ad/0bad8c66-e020-4ab9-ae05-72d968f17333/carnegie_civics_policy_2024_final.pdf) [<https://perma.cc/G9JS-ZT7U>].

<sup>188</sup> *Annenberg Civics Knowledge Survey*, ANNENBERG PUB. POL’Y CTR., <https://www.annenbergpublicpolicycenter.org/political-communication/civics-knowledge-survey/> [<https://perma.cc/NR6E-2PW9>] (last visited Oct. 30, 2024).

basic knowledge about how government works and what democratic principles are precipitates a devaluing of democracy. Indeed, some believe that if Americans had a better understanding of how government works, we could have avoided the January 6th insurrection.<sup>189</sup> The lack of knowledge about the electoral college and the role of the Vice President and Congress led to a moment in our history that cannot be erased. An emphasis on education can help ensure a basic understanding of how a representative democracy works and encourage participation and accountability.

Moreover, a deeper level of civic participation encourages people to work together to secure and protect democracy.<sup>190</sup> But in many states, state legislatures are attempting to make it harder for grassroots organizations to participate and assist voters.<sup>191</sup> Kansas, for example, passed a law restricting civic engagement efforts by preventing organizations from providing voters with mail ballot applications that are pre-filled with a voter's information, such as their name or address.<sup>192</sup> Although the district court hearing a challenge to the Kansas law blocked enforcement of the law,<sup>193</sup> the Kansas legislature's actions suggest that attacking nonpartisan civic engagement groups are a new frontier in the project to undermine American democracy. Any effort to stop voter suppression requires revitalizing civic education, promoting civic participation, and reversing the constraints state legislatures have placed on civic engagement groups.

#### D. *Constitutional Amendment: An Affirmative Right to Vote*

In *Bush v. Gore*, the Supreme Court emphasized that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States.”<sup>194</sup> This was a sobering reminder that the right to vote is extremely tenuous in this democratic republic. Although the

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<sup>189</sup> See, e.g., Katherine M. Robiadek, Carah Ong Whaley, John P. Forren & Lauren C. Bell, *Jan. 6 Hearings Show a Democracy in Crisis. Civic Education Can Help.*, WASH. POST (June 28, 2022), <https://www.washingtonpost.com/politics/2022/06/28/jan-6-house-committee-misinformation-education/>.

<sup>190</sup> See Jonathan Diaz, *Defending Nonpartisan Civic Engagement Groups Strengthens the Freedom to Vote*, CAMPAIGN LEGAL CTR. (Sept. 14, 2023), <https://campaignlegal.org/update/defending-nonpartisan-civic-engagement-groups-strengthens-freedom-vote> [<https://perma.cc/835R-8XK7>].

<sup>191</sup> See, e.g., *League of Women Voters of Ohio v. LaRose*, No. 1:23-cv-02414, 2024 WL 3495332, at \*22 (N.D. Ohio July 22, 2024) (striking down portions of Ohio election statute that restricted assistance to disabled voters to a small number of family members); *La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-0844, 2024 WL 4488082, at \*61 (W.D. Tex. Oct. 11, 2024) (striking down portions of Texas election statute that, *inter alia*, restricted compensated assistance with mail-in ballots); see also Diaz, *supra* note 190.

<sup>192</sup> *VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230, 1235 (D. Kan. 2023).

<sup>193</sup> *Id.* at 1254 (finding that Kansas' law prohibiting civic organizations from distributing personalized ballot applications violated the First Amendment, made applicable to the states by the Fourteenth Amendment).

<sup>194</sup> 531 U.S. 98, 104 (2000).

Constitution does not explicitly say that citizens have the right to vote,<sup>195</sup> the Constitution has more amendments that address the right to vote than any other constitutional right. The Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments have added protections to the right to vote, suggesting that such a right is implicit in the Constitution.<sup>196</sup> Yet, courts and state legislatures treat the right to vote as less than fundamental. In the absence of an express provision in the Constitution that grants an *affirmative* right to vote, the right to vote is left in a precarious position; local and state governments can take away the right on the basis of, for example, a citizen's mental competency, previous conviction of a felony, or ability to obtain a required form of identification.<sup>197</sup> An affirmative right to vote is therefore needed to ensure that *every* eligible citizen has the right to vote. An amendment could put an end to the cycles of voter suppression.

For example, Richard Hasen has argued that the lack of an affirmative right to vote in the U.S. Constitution has led to three major issues: (1) states imposing barriers to voting, such as restrictive voter identification laws, (2) the need for extensive election-related litigation and the resulting uncertainty, and (3) election subversion tactics, where state legislatures attempt to ignore voters' choices, as exhibited after the 2020 presidential election.<sup>198</sup> An affirmative right to vote would address some, if not all, of these issues.<sup>199</sup> Even in the absence of a fully protective VRA, an affirmative right to vote could discourage state legislatures from implementing new voter restrictions. Assuming states are willing to risk costly litigation, a fundamental right to vote could also arm voters with a constitutional sword and shield against state laws seeking to disenfranchise them.

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<sup>195</sup> Mac Brower, *What Does the Constitution Say About the Right to Vote?*, DEMOCRACY DOCKET (Feb. 3, 2022), <https://www.democracydocket.com/analysis/what-does-the-constitution-say-about-the-right-to-vote/> [https://perma.cc/C38U-WF6P].

<sup>196</sup> See *id.*; *Shelby Cnty. v. Holder*, 570 U.S. 529, 567 n.2 (2013) (Ginsburg, J., dissenting) (“The Constitution uses the words ‘right to vote’ in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact ‘appropriate legislation’ to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens.”).

<sup>197</sup> Daniels, *Voting Realism*, *supra* note 165, at 602-03.

<sup>198</sup> See Richard L. Hasen, *The U.S. Lacks What Every Democracy Needs*, N.Y. TIMES (Jan. 16, 2024), <https://www.nytimes.com/2024/01/16/opinion/voting-rights-constitution-28th-amendment.html>.

<sup>199</sup> See, e.g., *id.*; Tomiko Brown-Nagin, *Enshrine an Affirmative Right to Vote*, HARV. GAZETTE (Nov. 21, 2022), <https://news.harvard.edu/gazette/story/2022/11/enshrine-an-affirmative-right-to-vote-tomiko-brown-nagin/> [https://perma.cc/ZJ2M-Y25A] (“A constitutional amendment would directly address these questions [about the VRA] by enshrining an affirmative and universal right to vote—and Congress’s authority to enforce it—in the very text of the Constitution. The amendment process would demand civic engagement and force us to decide what kind of society we want to be. Its outcome would, I hope, demonstrate that a majority of Americans, when pushed to consider the alternatives, are committed to fair, free, and full political participation.”).

Moreover, a right to vote amendment is necessary now more than ever. After *Dobbs v. Jackson Women's Health Organization*, in which the Supreme Court found that a constitutional right to an abortion was not explicitly stated and did not exist under the Constitution,<sup>200</sup> it is unclear whether the current (or future) Court will hold that the right to vote is a fundamental right. For instance, scholar Bertrall Ross argues that “[u]nder the *Dobbs* methodology, the answer [to whether the Constitution protects the right to vote] will turn on whether the fundamental right to vote can be implicitly derived from a constitutional source and whether there is a history of protections for that right.”<sup>201</sup> Further, he argues that the right to vote is “vulnerable to challenge” and that the Supreme Court has not soundly stated the constitutional basis for the right.<sup>202</sup> He explains that “[e]arly opinions pointed to no constitutional source, later ones to the Fifteenth Amendment protection against racially discriminatory deprivation of the right to vote, and still others to Article I, Section 2’s grant of authority to the states to establish voter qualifications.”<sup>203</sup> Today, the Court primarily derives the fundamental right to vote from the Fourteenth Amendment’s Equal Protection Clause with no clear explanation for this doctrinal maneuver.<sup>204</sup> Given the shaky ground on which the fundamental right to vote rests, Ross argues that affirming the right to vote as fundamental is necessary.<sup>205</sup> An explicit statement in the Constitution declaring the right to vote as fundamental is the most straightforward way of doing so.<sup>206</sup> A right to vote amendment would secure the right, protect against partisan efforts to diminish the vote, and protect access to the ballot.

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<sup>200</sup> 597 U.S. 215 (2022).

<sup>201</sup> Bertrall L. Ross II, *Fundamental: How the Vote Became A Constitutional Right*, 109 IOWA L. REV. 1703, 1706 (2024).

<sup>202</sup> *Id.* at 1706-07.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> According to Ross:

At a time when American democracy is under considerable stress, the stakes associated with protecting the fundamental right to vote are very high. As a matter of constitutional doctrine, deeming the right to vote fundamental has protected against severe infringements on the right to cast ballots and candidate access to ballots. Perhaps more importantly, the fundamental right to vote has also served as the constitutional basis for protecting equal rights to participation through the one-person, one-vote requirement and prohibitions on vote dilution. Without a fundamental right to vote, republican government will be significantly threatened by partisan efforts to manipulate and distort it.

See *id.* at 1709-10.

<sup>206</sup> Through a historical analysis—and in the absence of a right to vote amendment—Ross argues that the right to vote is a fundamental right based on the Republican Form of Government Clause and historical protections of the right. See *id.* at 1707 (“[T]he Republican Form of Government Clause protects the fundamental right to vote. My constitutional textual claim is grounded in history, but one different from the founding-era history that originalists and the Court has previously relied upon. I deviate from that history for reasons consistent with originalism and the methodology employed in *Dobbs*.”). A right to vote amendment would hopefully eliminate the need to derive the fundamental right to vote from other clauses in the Constitution.

The process of amending the Constitution, however, is extremely difficult. Article V of the U.S. Constitution, which outlines the process for amending the Constitution, provides that either a two-thirds majority of both houses of Congress or a convention called for by two-thirds of state legislatures can propose amendments.<sup>207</sup> The proposed amendment must then be ratified by three-fourths of the state legislatures or three-fourths of conventions called in each state.<sup>208</sup> This is no easy feat, even as some scholars have suggested workarounds to the amendment process. For example, scholar Stephen Sachs suggests that we turn the process upside down, i.e., instead of starting the amendment process in Congress, the proposed amendment would undergo the vetting and approval process in the states.<sup>209</sup> “Once three-fourths of the state legislatures have agreed on common language, the proposal would then move to Congress, where each house would need the same two-thirds vote to ratify.”<sup>210</sup> In this polarized political environment, however, the odds of achieving agreement among three-fourths of state legislatures is just as—if not more—improbable as achieving a two-thirds majority in Congress.

Although passage would be difficult, scholars have suggested that a right to vote amendment could provide an opportunity for coalition building. For example, the amendment process itself could create an opportunity for civic engagement, pushing citizens to learn about what a democracy demands and to decide for themselves the type of democracy they want to live in.<sup>211</sup> Moreover, like the campaign to ratify the Equal Rights Amendment, which ultimately failed to garner sufficient votes in the late 1970s, a campaign to pass a right to vote amendment could give voting rights advocates a clear goal to rally around and an opening to start a national conversation about the importance of voting rights.<sup>212</sup> Specifically, “[a] Right to Vote Amendment would not supersede the many causes of the democracy movement, but it would give them a similar overarching mission, with the principle of full participation and universal suffrage at the forefront.”<sup>213</sup>

Ultimately, a constitutionally-enshrined right to vote could finally provide universal suffrage for citizens and address some of the widespread suppression tactics used against marginalized people of color. Universal suffrage refers to the right of all adult citizens to vote in elections, regardless

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<sup>207</sup> U.S. CONST. art. V.

<sup>208</sup> *Id.*

<sup>209</sup> Stephen Sachs, *Amendments Should Start with States*, HARV. GAZETTE (Dec. 5, 2022), <https://news.harvard.edu/gazette/story/2022/12/amendments-should-start-with-states-stephen-sachs/> [https://perma.cc/FC4R-E65F].

<sup>210</sup> *Id.*

<sup>211</sup> Brown-Nagin, *supra* note 199.

<sup>212</sup> Jonathan Soros, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY: A J. OF IDEAS (2013), <https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote/> [https://perma.cc/R693-MPSQ].

<sup>213</sup> *Id.*

of race, gender, social status, or wealth.<sup>214</sup> This principle is a cornerstone of democratic societies, ensuring that every eligible individual has an equal opportunity to participate in the electoral process and have their voice heard in the governance of their country.<sup>215</sup> Universal suffrage is essential for a truly representative democracy, as it ensures that the government reflects the will of the entire population, not just a privileged few. It is a goal for which we should strive by ending the cycles of voter suppression.

### CONCLUSION

At this point in history, we are sixty years into another cycle of voter suppression—a cycle that began with passage of the VRA, followed by decades of increasingly aggressive efforts to dismantle it. As we mark the VRA's sixtieth anniversary, we must recommit to its foundational principles, the same as those on which our country was founded: equality for all.<sup>216</sup> In order to end voter suppression once and for all, Congress must restore the VRA's principles of notice, transparency, and fairness, while also adapting it to address modern challenges. Enshrining an affirmative right to vote in the Constitution can help lead the way in expanding access to the ballot and ensuring every eligible citizen can vote freely. States must also step in to protect voting rights through state-level voting protections. Finally, we must revitalize civic education and promote civic engagement through grassroots organizations because the power of people has always been key to shaping this nation into a truly democratic country. As we work toward ending voter suppression, we must not forget that “[d]emocracy delayed is democracy denied.”<sup>217</sup>

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<sup>214</sup> See *Universal Suffrage*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/universal%20suffrage> [<https://perma.cc/2LUU-AJPQ>] (last updated Oct. 7, 2024).

<sup>215</sup> See, e.g., Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1450 & n.9 (2012) (“Everyone has the right to take part in the government of his country . . . .”) (quoting Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), art. 21 (Dec. 10, 1948)).

<sup>216</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>217</sup> Katzenbach, *supra* note 20, at 19.