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Voting Rights Jurisprudence in America

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URBAN RESEARCH AND RESOURCE CENTER (URRC)

at Texas Southern University

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Who are to be the electors ...? Not the rich more than the poor, not the learned, more than the ignorant, not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

The Federalist No. 57 (J. Madison)

Introduction

There is no explicitly stated constitutional right to vote in the United States.¹ The United States' Constitution has been amended 27 times in the past 200 years. Seven of the last 17 constitutional amendments² dealt directly with the way US Citizens vote.³ Yet, despite the constitutional amendments and the Bill of Rights, the right to vote is not constitutionally mandated. From a strict constructionist point of view, there is no affirmative 'right to vote' in the United States because the 'right to vote' is not explicitly mentioned in the United States Constitution except as it being referred to in the 15th, 19th, 24th, and 26th Amendments. These four amendments mentioned that "voting rights" cannot be denied or abridged based on "race, color, or previous condition of servitude,"⁴ "on the account of sex,"⁵ "by reason failure to pay any poll tax or other tax for federal elections,"⁶ and "who are eighteen years of age or older, to vote, shall not be denied or abridged by the United States or by any state on account of age."⁷

However, American politics and judiciary have commonly recognized the right to vote as a fundamental constitutional right.⁸

¹ Bush v Gore, 531 U.S. 98 (2000); Joseph W. Little, Election Disputes and the Constitutional Right to Vote, 13 U.Fla.J.L. & Pub.Pol'y 31 (Fall 2001); Joshua A. Douglas, State Judges and the Right to Vote, 77 Ohio St. L.J. 1(2016);

² Excusing the Bill of Rights.

³ Fair Vote For A More Perfect Union "Right to Vote Amendment" available at https://www.fairvote.org/right_to_vote_amendment

⁴ U.S. Const. Amend XV, 1870.

⁵ U.S. Const. Amend XIX, 1920.

⁶ U.S. Const. Amend XXIV, 1964.

⁷ U.S. Const. Amend XXVI, 1971.

⁸ Harper v. Va. State Bd of Elections, 383 U.S. 663, 670 (1966); Yick Wo v. Hopkins, 118 U.S. 356,370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886) referring to ...voting as a fundamental political right, because preservative of all rights and see Atiba R. Ellis, Tiered Personhood and the Excluded Voter, 90 Chi.-Kent L.Rev. 463, 480 (2015) citing Scholars may ultimately contest whether the right to vote is truly treated as "fundamental." See e.g., Joshua A. Douglas, *Is the Right to Vote Really Fundamental*, 18 Cornell J. L. & Pub. Pol'y 143 (2009); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663 (2001); Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 Ala. L. Rev. 261 (2005). However, the Court has nonetheless made voting fundamental, at least rhetorically, in its jurisprudence.at n. 99

The general theory may best be described here:

“...the scope of the right to vote is not described in the Constitution, like the right to free speech, the right against self-incrimination, or the right to just compensation for a taking of property. To the extent that the right to vote is defined in the original text of the Constitution, it is defined with reference to the qualifications for voting as dictated by the states. At the same time, the Constitution, via the Elections Clause, allocates power not only to the states to define voting regulations, but also to the federal government to provide oversight of those regulations. Thus, the Constitution does not define the content of the right to vote, but it does set up a framework by which the right to vote may be regulated. Of course, implicit in this explanation is the second reason why the right to vote is distinguishable from other fundamental rights. Third, from the founding of the republic, the right to vote was defined by each state’s legislative and administrative boundaries. Thus, unlike these other rights, which are designed to protect the individual from intrusion into their personal sphere by governmental interference, the right to vote of each individual citizen does not become extant without the government’s provision of a structure through which the vote might be cast”.⁹[footnotes omitted]

However, the focus of this paper is not to address the constitutional right to vote but instead to review major voting rights jurisprudence as it relates to the African American voter principally and to other disenfranchised Americans generally.

Prohibiting Illegal Discrimination

Since the “right to vote” is not explicitly stated in the U.S. Constitution except in the 15th, 19th, 24th, and 26th Amendments and only in reference to the fact that the franchise cannot be denied or abridged based solely sex, race, and age; the “right to vote” is perhaps better understood, as only prohibiting certain forms of illegal discrimination in establishing qualifications for suffrage.

While the 15th, 19th, 24th, and 26th Amendments provide that ‘voting rights’ cannot be dispensed on the basis of race, gender, failure to pay poll tax, and age – there remain other legally recognized limitations on voting including age, residency, ID requirement, criminal history, homelessness, disabilities, and special interest election.¹⁰ The legal ways that the “right to vote” may be denied depend entirely on whether the action violates the United States Constitution's protection against certain rights and discrimination, not on whether they prevent citizens from voting.

⁹ Ellis, supra n. 8 at 482

¹⁰ School board elections for example.

At the end of the Civil War, two constitutional provisions “protected” the right of African Americans to vote; the 14th Amendment which guaranteed equal protection of the laws, and the 15th Amendment which provided:¹¹

- 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.
- The Congress shall have power to enforce this article by appropriate legislation.

During the Reconstruction era, statutes were enacted to safeguard the rights of the formerly enslaved. Amongst the statutes passed is the Military Reconstruction Acts of 1867 (MRA) which “mandated that the southern states, as a condition of readmission to the Union, adopt new constitutions providing suffrage rights for African American males.”¹² Under the protection afforded by the Military Reconstruction Acts of 1867, approximately 700,000 blacks, mostly the formerly enslaved, registered to vote.¹³

Congress also passed the Enforcement Act of 1870 (EA) to enforce the “Rights of Citizens of the United States to vote in the several States of this Union, and for other Purposes.”¹⁴ The act “mandated that any citizen, otherwise qualified to vote, shall be entitled to vote without distinction to

¹¹ U.S. Const. amend. XV

¹² *United States Commission on Civil Rights*, “Voting Rights and Political Representation in the Mississippi Delta,” accessed March 5, 2019, available at <https://www.usccr.gov/pubs/msdelta/ch3.htm> citing Chandler Davidson, “The Recent Evolution of Voting Rights Laws Affecting Racial and Language Minorities,” in *Quiet Revolution in the South*, eds. Chandler Davidson and Bernard Grofman (Princeton, NJ: Princeton University Press, 1994), p. 21.

¹³ Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944–1969* (New York: Columbia University Press, 1976), p. 2.

¹⁴ Enforcement Act of 1870, 16 Stat. 140 (1870). The Act did not extend to women who were denied the right to vote until the 19th amendment. See *Minor v. Happersett*, 88 U.S. 162; 21 Wall. 162 (1874) where the United States Supreme Court unanimously ruled that the Constitution of the United States does not guarantee to women the right to vote in federal elections even as it found that citizenship was not necessarily a condition precedent to voting so that men of foreign birth could vote in states including Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, Missouri and Texas.

race, color, or previous condition of servitude.¹⁵ It also provided penalties for obstruction of the right to vote by election officials or other citizens.¹⁶

The Military Reconstruction Acts of 1867 and the Enforcement Act of 1870 protected African Americans' ability to vote and elect representatives of their choice. However, in two cases – *United States v. Reese*, 92 U.S. 214 (1875) and *United States v. Cruikshank*, 92 U.S. 542 (1875)¹⁷ – the U.S. Supreme Court took away the protections afforded African Americans under the Enforcement Act by limiting its use.¹⁸ By “1894 Congress repealed many of the remaining sections of the Enforcement Act. The only provisions of the act that survived were two sections creating civil liability on the part of persons who interfered with the right to vote (now 42 U.S.C. §§ 1983, 1985) and two sections imposing criminal sanctions for hindering a citizen in the exercise of the right to vote (now 18 U.S.C. §§ 241, 242).”¹⁹

In *United States v. Reese*, the Supreme Court considered whether the Enforcement Act of 1870 was a valid exercise of Congress' power to enforce the Fifteenth Amendment.²⁰ The case involved two election inspectors, Hiram Reese and Matthew Foushee, who refused to receive and count the vote of William Garner, an African-American, in a municipal election in Lexington, Kentucky.²¹ In an 8-1 decision, the Court ruled that: the Fifteenth Amendment to the Constitution “does not confer the right of suffrage,” but “it invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of

¹⁵ *Id.*

¹⁶ Enforcement Act of 1870, 16 Stat. 142 (1870).

¹⁷ *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Cruikshank*, 92 U.S. 542 (1875). *United States Commission on Civil Rights*, “Voting Rights and Political Representation in the Mississippi Delta,” accessed March 5, 2019, available at <https://www.usccr.gov/pubs/msdelta/ch3.htm>

¹⁸ For e.g. see *Williams v. Mississippi*, 170 U.S. 213 (1898) where the plaintiff challenged the Mississippi constitutions of 1890 and code of 1892 requiring a literacy test as a prerequisite to voting. The Court ruled that mere possibility of discrimination was not grounds for invalidating the provisions.

¹⁹ *United States Commission on Civil Rights*, “Voting Rights and Political Representation in the Mississippi Delta,” accessed March 18, 2019, available at <https://www.usccr.gov/pubs/msdelta/ch3.htm>

²⁰ *United States v. Reese*, 92 U.S. 214, 215 (1875).

²¹ *Id.*

servitude, and empowers Congress to enforce that right by appropriate legislation.”²² The Court held, however, that the Congressional Act was not confined in their operation to unlawful discrimination on account of race, color, or previous condition of servitude and therefore had exceeded the authority granted to it by the fifteenth amendment.”²³ This narrow construction of the fifteenth amendment empowered southern states to enact oppressive voting rights legislation in ways that met the narrow construction of the amendment.

In another blow to voting rights for African Americans, the United States Supreme Court held the Bill of Rights did not apply to private actors or to state governments despite the adoption of the fourteenth amendment.²⁴ Following convictions based on a thirty-two counts indictment for conspiracy for banding together, with intent ‘unlawfully and feloniously to injure, oppress, threaten, and intimidate’ two citizens of the United States, ‘of African descent and persons of color,’ ‘with the unlawful and felonious intent thereby’ them ‘to hinder and prevent in their respective free exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose’ and other charges, the defendants appealed. The charges arose from the Louisiana’s governor’s race in 1872 when dozens of black people and three white people were killed in what was called the Colfax massacre. The federal charges were brought against several white insurgents under the Enforcement Act of 1870, which prohibited two or more people from conspiring to deprive anyone of their constitutional rights. The court found that the charges in the indictment did not constitute cognizable offenses within the jurisdiction of the courts of the United States and were only subject to state tribunals despite the filing under a Congressional act. The Court justified its decision by claiming that the Enforcement Act’s creation of offenses and penalties exceeded Constitutional authority. Ruling that neither the First Amendment nor the Second

²² *Id.*

²³ *Id.* at 215.

²⁴ *United States v. Cruikshank*, *supra* n. 17.

Amendment applied to states' or individual actions, but only to the National government, the Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were inapplicable. This ruling had the effect of empowering white terrorists who had little to fear of reprisals from their state officials.

Congress did not address the issue of voting rights again until the late 1900s, thus prior to the enactment of the Voting Rights Act of 1965, the only avenue used to protect African Americans' right to vote was to bring legal actions under the Constitutional provisions that prohibited states from discriminating on the account of race, sex, or age. Specifically, litigation was brought under the equal protection clause of the 14th Amendment and the 15th Amendment.²⁵

In *Guinn v. United States*,²⁶ the United Supreme Court considered the constitutionality of an amendment to the Oklahoma Constitution which established a literacy test as a condition for registering to vote or for voting, but exempted from the requirement people who had been entitled to vote before January 1, 1866, and their lineal descendants (known generally as a grandfather clause). The Court found that there could be no reason for the grandfather clause other than to create a standard of voting that revitalized conditions existing prior to the adoption of the 15th Amendment. Thus, the clause was void under the 15th Amendment to the Constitution. The Court also held that the literacy test itself was so connected to the grandfather clause that the unconstitutionality of the latter rendered the entire amendment invalid.

Guinn was followed by *Nixon v. Herndon*,²⁷ the case in which the Supreme Court held unconstitutional under the 14th Amendment a Texas statute that barred blacks from voting in Democratic Party primary elections. Although the statute was challenged under both the 14th and 15th

²⁵ *United States Commission on Civil Rights*, "Voting Rights and Political Representation in the Mississippi Delta," accessed March 18, 2019, available at <https://www.usccr.gov/pubs/msdelta/ch3.htm>

²⁶ 238 U.S. 347 (1915).

²⁷ 273 U.S. 536 (1927).

Amendments, the Court did not consider the 15th Amendment claim because it found it “hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment].”

In a setback to voting rights advocates, the United States Supreme Court in *Grovey v. Townsend*,²⁸ a case overruled by *Smith v. Allwright, Election Judge*,²⁹ upheld a resolution adopted by the Texas Democratic Party at its state convention that restricted membership in the party and participation in its deliberations to white citizens of Texas. Based on this resolution, the African American plaintiff was denied a ballot in the primary election. The Supreme Court held that action by the party’s state convention was not state action under the 14th or 15th Amendments, and denial of the right to vote in a primary, versus a general election, was merely refusal of party membership and did not violate the Constitution.

Poll tax was the subject in *Breedlove v. Suttles*,³⁰ a case that was later overruled by *Harper v. Virginia State Board of Elections*.³¹ In this case, the Supreme Court considered the constitutionality of a Georgia poll tax of \$1, which applied to all inhabitants of the state between the ages of 21 and 60, but not to blind persons or to women who did not register to vote. Payment of the tax was required in order to register and vote in any election. A white male challenged the statute as unconstitutional under the equal protection and privileges and immunities clauses of the 14th Amendment and the 19th Amendment. The Court upheld the poll tax and found it violated neither the 14th nor the 19th Amendments.

The United States Supreme Court in *Smith v. Allwright, Election Judge*,³² overruled its previous decision in *Grovey v. Townsend* and held that the right to vote in primary elections was protected by

²⁸ 295 U.S. 45 (1935).

²⁹ 321 U.S. 649 (1944).

³⁰ *Tax Collector*, 302 U.S. 277 (1937).

³¹ 383 U.S. 663 (1966).

³² 321 U.S. 649 (1944). During this same period, Native Americans fought for the right to vote, which was not granted, in part, until 1948 in *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948) when the Supreme Court of Arizona found that the state’s rejection of the plaintiff’s registration to vote violated their constitutional rights.

the Constitution. At issue was the Texas Democratic Party's resolution that restricted membership to white citizens of Texas. The Court now found that primary elections were conducted by the party under state statutory authority and were a part of the machinery for choosing officials. Although recognizing that generally membership in a party was not a concern of the state, the Court held that when membership was a qualification for voting in a primary to select nominees for the general election, it became an action of the state, and in this case violated the 15th Amendment.

Texas's commitment to suppressing the rights of African American voters was reviewed again in *Terry v. Adams*³³. The Supreme Court yet again considered the voting procedures of the Democratic Party in Texas. The Jaybird Association, a county political organization, excluded blacks from its membership and from its primaries. The Jaybirds held elections each year to select candidates for county offices to run for nomination in the official Democratic primary, but these elections did not use any state machinery or funds. For 60 years, the Jaybird candidate entered the Democratic primary without opposition and eventually won the general election. The Court held that the combined election machinery of the Jaybird Association and the Democratic Party deprived petitioners the right to vote because of their race, in violation of the 15th Amendment.

In *Harper v. Virginia State Board of Elections*,³⁴ the United States Supreme Court considered a challenge to the constitutionality of Virginia's poll tax. The Court held that a state violates the equal protection clause of the 14th Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard, expressly overruling its opinion in *Breedlove v. Suttles, Tax Collector*.

In addition to challenging devices used to prevent the exercise of franchise rights by African Americans through litigation, litigation was also used to challenge the size and shape of voting districts that diluted African American votes.

³³ 345 U.S. 461 (1953).

³⁴ 383 U.S. 663 (1966).

In *Colegrove v. Green*,³⁵ the Supreme Court considered an action brought by citizens of Illinois alleging that because of substantial changes in population, congressional districts in the state lacked compactness of territory and equality of population. The Court affirmed the decision of the district court dismissing the complaint, holding that Congress had exclusive authority to secure fair representation by the states in the House of Representatives and the [c]ourts would not enter the political thicket.³⁶

*Gomillion v. Lightfoot*³⁷ involved Black residents of Alabama who brought their action under the 14th and 15th Amendments of the Constitution challenging a legislative action that changed the boundaries of the city of Tuskegee from a square to an irregular 28-sided figure. This change resulted in removing from the city's boundaries all but four or five of its 400 black voters. The district court dismissed the action on the grounds that it had no authority to change the boundaries of a municipal corporation established by a state's legislative body. The Supreme Court reversed, holding that although the exercise of a state's power wholly within the domain of state interest is insulated from federal judicial review, that insulation "is not carried over when state power is used as an instrument for circumventing a federally protected right."³⁸

In *Baker v. Carr*³⁹ the citizens of Tennessee brought an action claiming they had suffered a debasement of their votes, in violation of the equal protection clause of the 14th Amendment. These allegations were based on the state's continued application of a 1901 reapportionment act, and its failure to account for the fact that the population of Tennessee had grown substantially and been redistributed. The district court, relying primarily on *Colegrove*,⁴⁰ had dismissed the claim based on lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted. The Supreme Court

³⁵ 328 U.S. 549 (1946).

³⁶ Id. at 555.

³⁷ 364 U.S. 339 (1960).

³⁸ Id. at 347.

³⁹ 369 U.S. 186 (1962).

⁴⁰ Supra n 35

reversed, rejecting the notion that this was a nonjusticiable political question, and held that the allegation of a denial of equal protection presented a justiciable constitutional cause of action.

Reynolds v. Sims was another dilution of voting power case.⁴¹ Here, the Supreme Court considered whether the apportionment by the Alabama Legislature deprived citizens of their rights under the equal protection clause of the 14th Amendment. The 1900 census continued to form the basis of the Alabama legislative apportionment at that time, despite the fact that populations in some counties had grown substantially more than in others. The Court held the equal protection clause requires the seats in both houses of the State Legislature be apportioned on a population basis. The Court recognized the right to vote can be infringed by dilution of voting power in a way that results effectively as an absolute prohibition on voting and held any dilution of a person's right to vote in comparison with someone living in another part of the state violates the equal protection clause. This case is commonly referred to as the "one person, one vote" case.

Congressional Action



Litigation, although a powerful weapon to challenge and destroy discriminatory voting practices, requires a great deal of time and money. Thus, litigation alone could not bring about the changes needed to secure African Americans' right to vote. To help the matter, Congress began to pass civil rights legislation containing provisions addressing voting rights. Following the assassination of President John F. Kennedy⁴² in November 1963 and "Bloody

⁴¹ 377 U.S. 533 (1964).

⁴² "President John F. Kennedy had sent the civil rights bill to Congress in 1963, before the March on Washington, the bill had stalled in the Judiciary Committee due to the dilatory tactics of Southern segregationist senators such as James Eastland, a Democrat from Mississippi." Paul S. Boyer, *Promises to Keep: The United States since World War II* (Boston, MA: Houghton Mifflin, 1999), 237.

Sunday” in 1965⁴³, President Lyndon B. Johnson signed the Voting Rights Act of 1965⁴⁴ into law. The Voting Right Act of 1965 (VRA) was signed into law on August 6, 1965 to eliminate barriers to black enfranchisement in the South, by, among other things, banning poll taxes, literacy tests, and other measures that effectively prevented African Americans from exercising their rights to vote under the 15th Amendment to the U.S. Constitution. The VRA is by far the most significant legislation addressing the right to vote.⁴⁵ The VRA:⁴⁶

- Prohibited the use, by any state or political subdivision, of any qualification or prerequisite to voting, or any standard, practice or procedure, to deny or abridge the right of any citizen to vote on account of race or color.⁴⁷
- Provided authority to the courts, in any proceeding instituted by the Attorney General to enforce the 15th Amendment, to suspend the use of any test or device that the court had found to have been used to deny or abridge the right to vote.⁴⁸
- Provided for the automatic suspension of literacy tests and other devices for five years in states and subdivisions where such tests and devices were maintained on November 1, 1964, and where less than 50 percent of the voting-age population was registered or had voted in the presidential election of 1964. Any state or subdivision could be

⁴³ “Peaceful participants in a Selma to Montgomery march for voting rights were met by Alabama state troopers who attacked them with nightsticks, tear gas and whips after they refused to turn back.” History.com Editors., “*Selma to Montgomery March*”, available at <https://www.history.com/topics/black-history/selma-montgomery-march>

⁴⁴ Most likely the most comprehensive civil rights legislation ever enacted by Congress.

⁴⁵ The Voting Rights Act does not specifically confer a right to vote. It states, in pertinent part: This is an “act to enforce the fifteenth amendment to the Constitution”. Sec 2 provides: No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. Sec.4 (a) “assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State...(e)(1) (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.”

⁴⁶ *United States Commission on Civil Rights*, “Voting Rights and Political Representation in the Mississippi Delta,” accessed March 18, 2019, available at <https://www.usccr.gov/pubs/msdelta/ch3.htm>

⁴⁷ 42 U.S.C. § 1973 (1994).

⁴⁸ 42 U.S.C. § 1973a (b) (1994).

exempted from this provision by obtaining a declaratory judgment that such tests or devices had not been used to accomplish discrimination in the preceding five years.⁴⁹

- Required that covered states and political subdivisions submit to the Attorney General any new or changed voting requirement. The Attorney General then had 60 days to interpose any objections. Alternatively, the state could enforce the new requirement by obtaining a declaratory judgment that it did not have the purpose or effect of denying or abridging rights protected by the 15th Amendment.⁵⁰
- Declared Congress' finding that the collection of a poll tax as a precondition to register or to vote in state or local elections denied the constitutional rights of citizens and authorized the Attorney General to institute actions against the enforcement of any requirement of the payment of a poll tax.⁵¹
- Provided for the appointment of federal election examiners and poll watchers upon the order of a court or the Attorney General.⁵²
- Contained criminal penalties for any official who abridged the right to vote or failed to count the vote of any person, or for anyone who intimidated or threatened any person attempting to vote.⁵³

Additionally, the VRA “provided for federal oversight of voter registration in areas where less than 50 percent of the non-white population had not registered to vote and authorized the United States Attorney General to investigate the use of poll taxes in state and local elections.”⁵⁴

⁴⁹ 42 U.S.C. § 1973b (1994).

⁵⁰ 42 U.S.C. § 1973c (1994).

⁵¹ 42 U.S.C. § 1973h (1994).

⁵² 42 U.S.C. §§ 1973a, 1973b (1994).

⁵³ 42 U.S.C. § 1973i (1994).

⁵⁴ History.com Editors., “*Selma to Montgomery March*”, available at <https://www.history.com/topics/black-history/selma-montgomery-march>

In recognizing that voting discrimination continued despite the Act, Congress repeatedly amended the Act to reauthorize special provisions. Since its enactment, the Act was amended five times: in 1970, 1975, 1982, 1992 and 2006 in order to ensure the fair treatment of American voters. The following provisions reflect some of the changes made to the Voting Rights Act of 1965:

(1) Prohibit the enactment of any election law to deny or abridge voting rights on account of race or color;

(2) Suspend all literacy tests in states and counties that used them and where less than 50% of adults had voted in 1964;

(3) Prohibit the enforcement of new voting rules or practices until federal reviewers determine if their use would continue voting discrimination;

(4) Assign federal examiners to list qualified applicants to vote and to serve as poll watchers;

(5) Authorize the Attorney General to institute civil actions to seek enforcement of the act; and

(6) Prohibit any person acting under color of law or otherwise from intimidating or denying any eligible person from voting.⁵⁵

The new Act survived challenges for almost fifty years.

Jurisprudence after The Voting Rights Act of 1965 is signed

In addition to Congress' effort to eliminate voting discrimination, following the enactment of the Voting Rights Act, the courts also acted. In 1966, in *South Carolina v. Katzenbach*, the United States Supreme Court held that Congress was justified in limiting the operation of the Voting Rights Act of 1965 to only a handful of states because the record indicated that actual voter discrimination occurred in these states.⁵⁶ The Court found that the temporary suspension of voter qualifications, such as literacy tests, were not unconstitutional because the record indicated that such tests were traditionally used to disenfranchise minorities and their suspension was a legitimate response to the problem. The

⁵⁵ Garrine P. Laney, "The Voting Rights Act of 1965, As Amended: Its History and Current Issues" available at https://www.everycrsreport.com/files/20080612_95-896_301af1b9828fb8e5201323a94ee64e4b93eff65a.pdf

⁵⁶ 383 U.S. 301 (1966)

Court also found that the suspension of new voter qualifications pending review was constitutional because the record indicated that states often enacted new laws to perpetuate discrimination in the face of adverse federal court decrees. In *Katzenbach v. Morgan*⁵⁷, the United States Supreme Court held that states have no power to grant or withhold the franchise on conditions that are forbidden by the United States Constitution. Moreover, the Court held that while the states may establish qualifications for voting for state officers, the state legislature also determines who may vote for United States Representatives and Senators. However, the Court ruled that states may not issue conditions contradictory to the United States Constitution.

In *Pitts v. Black*⁵⁸ the United States District Court for the Southern District of New York considered a New York law that defined “residence” so strictly that homeless persons were effectively denied the right to vote. Relying on *Dunn v. Blumstein*⁵⁹, the court found that limitations on the exercise of the franchise must be subjected to strict judicial scrutiny and the burden of justification for

⁵⁷ 384 U.S. 641 (1966)

⁵⁸ 608 F. Supp. 696 (1984); the court concluding, in part, “The exercise of the right to vote is a fundamental right, which is preservative of all other rights in a democracy, and deserves the strictest constitutional protection. See *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381, 12 L. Ed. 2d 506 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 1071, 30 L. Ed. 220 (1886).

Each citizen has “a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction”. *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 1000, 31 L. Ed. 2d 274 (1972) (citing *Evans v. Cornman*, 398 U.S. 419, 421-22, 426, 90 S. Ct. 1752, 1754-55, 1756, 26 L. Ed. 2d 370 (1970); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626, 89 S. Ct. 1886, 1889, 23 L. Ed. 2d 583 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S. Ct. 1897, 1900, 23 L. Ed. 2d 647 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665, 86 S. Ct. 1079, 1080, 16 L. Ed. 2d 169 (1966); *Carrington v. Rash*, 380 U.S. 89, 93-94, 85 S. Ct. 775, 778-779, 13 L. Ed. 2d 675 (1965); *Reynolds v. Sims*, 377 U.S. at 562, 84 S. Ct. at 1381.

The court also found compelling, the testimony of the plaintiff’s expert who testified: fifteen years ago it would have been relatively simple to define the homeless population because they were a rather homogeneous group of white males in the mid to late fifties, a third of whom had severe drinking problems and who generally resided on the Bowery “as a sort of cheap, degrading retirement.” About a third of this population occasionally worked, the balance subsisted on pensions, handouts and the municipal shelters. In the late 1960’s and early 1970’s as a result of the destruction of cheap housing stock due to urban renewal projects, the character of the homeless population changed. By the mid-1970’s, in New York City, the homeless were primarily black males who were jobless and by the end of the decade, forty percent of those seeking public shelter stated the lack of a job as the primary reason for their impoverishment. Another addition to this group were women and families, ninety percent of whom by 1973, were rehoused in public housing or welfare hotels. In sum, Mr. Hopper testified that a census of the homeless in New York City would show: [M]en and women of all ages, they are predominantly minority, many of them have worked. Usually some dislocating event occurred, loss of a job as in Mr. Dyer’s instance, almost invariably a number of intermediate arrangements are tried, being put up with friends or family is the most common one, but as I think, the City’s most recent survey showed, the precipitating event leading to homelessness is eviction, formal or informal in most of the cases.” footnotes omitted

⁵⁹ 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).

restrictive measures must be borne by those who would impose such limitations. Finding that the defendants' actions violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, the court permanently enjoined the defendants from refusing to allow homeless people to register to vote on the ground that they failed to inhabit traditional residences.

Similar challenges in *Collier v. Menzel*⁶⁰ and *Walters v. Weed*⁶¹ interpreted "residence" for purpose of voter registration. In *Menzel*, a Santa Barbara District Court held that a county clerk's decision to reject voter registrations that identified a public park as the applicant's residence denied a citizen the right to vote in violation of the fourteenth amendment's equal protection clause. The court held that a residence could be a certain location rather than a specific address.

In *Walters*, the California Supreme Court ruled that when a person leaves his former place of residence and has not settled in another, then he may vote in the precinct of his former residence.

In an effort to stop vote dilution, the Supreme Court found in *Thornburg v. Gingles*⁶² that districts of the North Carolina General Assembly⁶³ were invalid on the basis that the districts impaired the ability of black voters to elect candidates of their choice.⁶⁴ Furthermore, the Supreme Court held that the districting plan violated Section 2 of the Voting Rights Act, ruling that the assembly's plan diluted the minority vote by apportioning black voters into districts where white voters would defeat their preferred candidates.⁶⁵

⁶⁰ 176 Cal.App.3d 24 (1985)

⁶¹ 45 Cal.3d 4(1988)

⁶² *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986).

⁶³ "In 1982, the North Carolina General Assembly enacted a redistricting plan for the state legislature. Black citizens of North Carolina challenged seven of these districts, one single-member and six multi-members. The citizens brought suit in federal district court, challenging the districts on the grounds that the planned districts impaired their ability to elect representatives of their choice in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth amendments of the United States Constitution. Before the trial, Congress amended Section 2 of the Voting Rights Act to clarify that discriminatory effect by itself (as opposed to intent) was enough to prove a violation." Justia.com, "*Thornburg supra n. 57 at 31*"

⁶⁴ *Id.*

⁶⁵ *Id.* In 2016, the United States Supreme Court considered the question whether the Equal Protection Clause of the 14th Amendment require voter redistricting plans to take into account the number of voters rather than the total population. White

The VRA has protected minority voters since 1965. Specifically, Section 5 to the VRA has protected minority voters in numerous states since the enactment of the VRA. Simply put, the VRA eliminated the discriminatory practices that were in place in 1965 and Section 5 ensured that states could not simply replace them with new discriminatory provisions. Section 5 to the VRA “requires jurisdictions with significant histories of voter discrimination to “pre-clear” any new voting practices or procedures, i.e., get federal approval from the Department of Justice, and show that they do not have a discriminatory purpose or effect.”⁶⁶ Prior to 2013, Section 5 of the VRA fully applied to Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. It applied to certain counties in California, Florida, New York, North Carolina, Michigan and South Dakota.⁶⁷

Since the enactment of the VRA, Section 5 successfully blocked voter-ID laws, prohibited the reduction of early-voting periods, and barred certain redistricting of maps. Because of Section 5’s power to prohibit new discriminatory voting practices, Section 5 has been a target of attack by those who say it is outdated, discriminates against Southern states and unconstitutional. In 2013, enforcement under the Voting Rights Act suffered a major setback in *Shelby County v. Holder*.⁶⁸

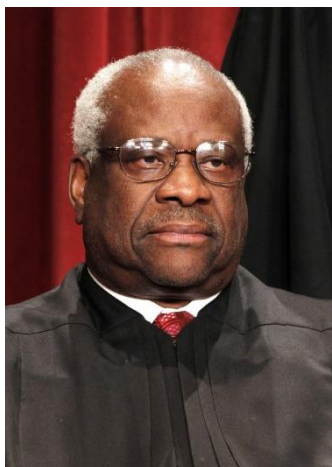
rural citizens claimed that the state’s use of total population in redistricting gave more voter power to the urban citizen than the rural ones. In its unanimous decision in *Evenwel v. Abbott*, 578 US __, 136 S.Ct. 1120, 194 L.Ed.2d 291 (2016), the court held that constitutional history, judicial precedent, and consistent state practice all demonstrate that apportioning legislative districts based on total population is permissible under the Equal Protection Clause.

⁶⁶ American Civil Liberties Union “The Voting Rights Act” available at <https://www.aclu.org/issues/voting-rights/voting-rights-act>

⁶⁷ The United States Department of Justice “Jurisdictions Previously Covered By Section 5” available at <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>

⁶⁸ *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

In *Shelby County*, the United States Supreme Court considered the constitutionality of the



Justice Clarence Thomas, one of the justices who struck down voting rights provisions in a 5-4 decision

Voting Rights Act. Shelby County, Alabama, challenged §§ 4(b) and 5 of the Voting Rights Act of 1965, in a suit against the Attorney General in Federal District Court in Washington, D. C., claiming that the Act was unconstitutional because it required some, but not all, states and counties to obtain preclearance from federal authorities in Washington, D. C.—either the Attorney General or a three-judge court—before they could change voting procedures.⁶⁹ Both the district court and the U.S. Court of Appeals for the District of Columbia Circuit upheld the Act as constitutional.⁷⁰

The Supreme Court, however, struck down the Act holding that the coverage formula used by Section 5 of the VRA was unworkable. The Supreme Court found that § 4(b) of the Act was unconstitutional because it was based on a formula that used 40-year-old facts that had no logical relation to the present day, and held that the formula could not be used as a basis for subjecting jurisdictions to preclearance by federal authorities.⁷¹ The Court made it clear in its opinion that its ruling in no way affected the permanent, nationwide ban on racial discrimination in voting found in § 2 of the Act, and the Court issued no holding on § 5 itself, only on the coverage formula.⁷² The Court justified its holding by saying that “our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”⁷³

Chief Justice Roberts made a technical point in the Court’s opinion by pointing out that the Court left that part of Section 5 that describes how preclearance works – intact. Instead, the Court struck

⁶⁹ *Id.* at 529-30.

⁷⁰ *Id.* at 541.

⁷¹ See *Id.* at 550-51.

⁷² *Id.* at 556-57.

⁷³ *Id.* at 557.

down Section 4, which identifies *which* states and localities are subject to preclearance. In other words, if Congress amends Section 4, ostensibly using current data, the Justice Department could start enforcing Section 5 again.⁷⁴ However, by finding Section 4 of the VRA unconstitutional, it inadvertently paralyzed the VRA and left minority voters vulnerable to discrimination. Section 5 of the VRA, which protected minority voters since 1965, is unenforceable without Section 4, so that the Court’s ruling effectively left it to the states to implement discriminatory election and voting procedures. Many will argue that is exactly what happened.

Illustrating the impact of the Voting Rights Act and the 2013 Shelby ruling on minority voter turnout in counties once subject to federal oversight.

Since the Supreme Court’s ruling, states that had been covered under Section 5, as well as some originally not covered, have implemented numerous changes to

procedures regarding elections and voting. For example, “within 24 hours of the Shelby ruling, Texas announced that it would implement a strict photo ID law. The law had earlier been rejected on the ground that Texas had been unable to prove that the law would not discriminate against African American and Latinx voters.⁷⁵ However, after the Shelby ruling, Texas sought to implement the rejected law.⁷⁶ The Texas NAACP filed a lawsuit that successfully blocked implementation of the new law.⁷⁷ The state responded by amending the law, which amended law was upheld by the Fifth Circuit Court of Appeals.⁷⁸

Two other states, Mississippi and Alabama, also began to enforce photo ID laws that had previously been barred because of federal preclearance.”⁷⁹ North Carolina followed when it enacted ‘a far-reaching and pernicious’ voting bill HB 589. “HB 589 instituted a strict photo ID requirement;

⁷⁴ Kara Brandeisky, Hanqing Chen and Mike Tigas “Everything That’s Happened Since Supreme Court Ruled on Voting Rights Act” available at <https://www.propublica.org/article/voting-rights-by-state-map>

⁷⁵ *Texas v Holder*, 570 U.S. 928, 133 S.Ct. 2886, 186 L.Ed.2d 930 (2013)

⁷⁶ See statement by Texas Attorney General Greg Abbott, June 13, 2013 available at <https://perma.cc/SL53-AFSG>. Greg Abbott became governor of Texas in 2015.

⁷⁷ *Texas NAACP v. Steen*, 830 F.3d 216 (5th Circ, 2016) (which was consolidated with *Veasey v. Abbott*)

⁷⁸ *Veasey v. Abbott*, 888 F.3d 792 (5th Circ. 2018)

⁷⁹ The Brennan Center for Justice “The Effects of *Shelby County v. Holder*” available at <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder>

curtailed early voting; eliminated same day registration; restricted pre-registration; ended annual voter registration drives; and eliminated the authority of county boards of elections to keep polls open for an additional hour.”⁸⁰

In 2016, the U.S. Court of Appeals for the Fourth Circuit struck down HB 589 in *N.C. State Conference of the NAACP v. McCrory*.⁸¹ The court found that HB 589 violated Section 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment because it targeted “African Americans with almost surgical precision.”⁸² Prior to the *Shelby* ruling, Florida – which was covered by Section 5 of the VRA – was prohibited from purging its voter rolls using the federal SAVE.⁸³ SAVE is the Department of Homeland Security database which helps government agencies check the immigration statuses of people applying for government benefits like drivers’ licenses, housing assistance, or Medicaid.”⁸⁴ In response to Florida’s request to use SAVE to remove non-citizens from its voter rolls, the Department of Justice wrote Florida’s Secretary of State acknowledging that SAVE is not an accurate device to determine the citizenship because SAVE is not “a comprehensive and definitive listing of U.S. citizens,” especially since it doesn’t include data about people born in the United States.⁸⁵ Many of the suspected non-citizens subject to being purged from Florida’s voter rolls were actually able to prove their citizenship.⁸⁶ However, after the Supreme Court ruling, Florida acted to remove “non-citizens” from its voter rolls using the federal SAVE database.

Following its *Shelby* ruling, the Supreme Court made another significant ruling in *Arizona v. Inter-Tribal Council of Arizona*.⁸⁷ In this case, the court considered a 2004 initiative was embodied in

⁸⁰ *Id.*

⁸¹ 831 F.3d 204 (4th Cir. 2016).

⁸² *Id.* at 214.

⁸³ SAVE is the acronym for Systematic Alien Verification for Entitlements

⁸⁴ Kara Brandeisky, Hanqing Chen and Mike Tigas “Everything That’s Happened Since Supreme Court Ruled on Voting Rights Act” available at <https://www.propublica.org/article/voting-rights-by-state-map>

⁸⁵ *Id.*

⁸⁶ Ashley Lopez, Florida Center for Investigative Reporting “Florida Secretary Of State Prepares New Voter Purge” available at <https://fcir.org/2013/08/06/rick-scott-voter-purge/>

⁸⁷ 570 U.S. 1, 133 S. Ct. 2247 (2013)

Ariz. Rev. Stat. Ann. § 16-166(F) requiring county recorders to reject any application for registration to vote that was not accompanied by satisfactory evidence of United States citizenship.⁸⁸ A group of Arizona residents and a group of nonprofit organizations challenged § 16-166(F), claiming that it was preempted by the National Voter Registration Act of 1993 (NVRA).⁸⁹ The NVRA requires States to “accept and use” a uniform federal form to register voters for federal elections.⁹⁰ The “Federal Form,” developed by the Federal Election Assistance Commission (EAC) does not require documentary evidence of citizenship and rather, it requires only that an applicant aver, under penalty of perjury, that (s)he is a citizen.⁹¹ The Court ruled that Arizona – formerly covered by Section 5 – “could not unilaterally require voters to show proof of citizenship before registering to vote in a federal election because Arizona’s evidence-of-citizenship requirement was pre-empted by National Voter Registration Act of 1993 (NVRA).⁹² Arizona could sue the Election Assistance Commission to get the federal voter registration form amended to require proof of citizenship and may seek judicial review of the EAC’s decision under the Administrative Procedure Act.”⁹³ Since the ruling both Arizona and Kansas petitioned the EAC to include in the Federal Form, each of these states’ proof of citizenship procedures, and also filed a lawsuit against EAC asking the courts to compel EAC to grant their petition requests.

The EAC rejected the state’s petition on the grounds that requiring registration applicants to provide documentary proof of citizenship is not necessary to insure that noncitizens do not attempt to register to vote. Following the EAC’s decision to decline to amend the Federal Form, the U.S. District Court for the District of Kansas issued a decision holding that the EAC lacked the authority to evaluate the states’ petitions. The EAC appealed. The Tenth Circuit reversed the district court, relying on the Supreme Court’s decision in the Inter Tribal Council case. The United States Supreme Court denied

⁸⁸ Id. at 2249.

⁸⁹ Id.

⁹⁰ 42 U. S. C. §1973gg-4(a)(1).

⁹¹ 570 U.S. 1, 133 S. Ct. 2249 (2013).

⁹² Id.

⁹³ Id. at 2260.

the states' petition for writ of certiorari, thereby allowing the Circuit Court's ruling that the states may not force applicants using the federal voter registration form to show documents proving citizenship when registering to vote in federal races to stand as the final decision.⁹⁴

More post-Shelby legislation

Several of the 35 states which were not subject to Section 5 of the VRA have since moved to create harsh voting rules following the *Shelby* ruling. For example, “in 2017, the Arkansas legislature passed a new voter ID law that required verification of voter registration. Voters without ID may cast a provisional ballot with a sworn affidavit attesting to being registered in the state. If the voter returns with a valid photo ID or the board of election commission does not determine that the ballot is invalid, the provisional ballot will be counted.”⁹⁵ The law was struck down by a district court in April 2018 when it found that some of the qualifications for voting were not found in the Arkansas Constitution however, the state supreme court allowed the law to be in effect for the May 2018 primary. In October 2018, the Arkansas Supreme Court ruled that the law will remain in effect during the 2018 midterm election. And in November 2018, Arkansas' constitution was amended to add a requirement that photo identification be shown in order to cast a ballot.

⁹⁴ *Kobach v. U.S. Election Assistance Commission*, 772 F.3d 1183 (2014) and see Lawyers' Committee for Civil Rights overview at <https://lawyerscommittee.org/project/voting-rights-project/litigation/kobach-v-u-s-election-assistance-commission/>

⁹⁵ See National Conference of State Legislatures “Voter Identification Requirements | Voter Id Laws” available at <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>

Indiana took two actions since the *Shelby* ruling. First, the state enacted a law which requires “officials to check voter rolls for individuals registered to vote in other states.”⁹⁶ Second, “Indiana began the process of purging inactive voters by sending postcards to all registered voters.”⁹⁷ For any marked undeliverable, the state will attempt a second post card before deeming voters inactive.



If the voter doesn't vote in the next two federal elections, he or she will be struck from voter rolls. The state has so far moved almost 700,000 voters to its “inactive” list.”⁹⁸

Nebraska passed LB 271 which shortened the early voting period by 20 days. Tennessee took a more aggressive approach by passing a bill which restricts the kind of IDs that may be used to vote. Previously, Tennessee allowed voters to use student IDs, library cards, out of state IDs, or any other forms of IDs issued to counties or municipalities. With the new bill, “only photo IDs issued by the state of Tennessee or the federal government are acceptable.”⁹⁹

Conclusion

The United States Constitution, as amended, prohibits denying citizens the right to vote based on race, color, previous condition of servitude, and gender. Notwithstanding, the constitutional bar, America has suffered a long history of violating the voting rights of African American citizens by employing various voter suppression laws and techniques. In 1965, the United States Congress passed the Voting Rights Act of 1965 which became law on the signature of then President Lyndon

⁹⁶ See Kara Brandeisky, Hanqing Chen and Mike Tigas “Everything That's Happened Since Supreme Court Ruled on Voting Rights Act.”

⁹⁷ See *Indiana NAACP and League of Women Voters of Indiana v. Lawson*, 1:2017cv02897

⁹⁸ Id.

⁹⁹ Id.

Johnson. The law withstood years of challenges and helped to ensure voting rights for African Americans. In 2013, the United States Supreme Court ruled that the Section 4 coverage formula that determined which jurisdictions were required to “preclear” changes to their election rules with the federal government before implementation, was out of date. The ruling rendered Section 5 preclearance useless and opened the floodgates to laws designed to suppress the African American vote.¹⁰⁰ Within hours after the Shelby decision, states began passing and implementing laws in order to disenfranchise African American voters. In a nation of the people, by the people and for the people, it is time for the people to act, to demand that Congress restore sections 4 and 5 of the Voter Rights Act. “For a more perfect union, Restore the Voting Rights Act”.¹⁰¹

¹⁰⁰ Alex Seitz-Wald, Fla. Republican: We wanted to suppress black votes, Salon, July 2012 available at https://www.salon.com/2012/07/27/fla_republican_we_suppressed_black_votes/. In 2013, Jim Greer, the former Florida Republican chairman who made the suppression admission, pleaded guilty to five felonies and was sentenced to 18 months in prison.

¹⁰¹ Rep. Terri Sewell (D-Ala), For a more perfect union, Restore the Voting Rights Act, The Hill, Feb. 26, 2019 available at <https://thehill.com/blogs/congress-blog/politics/431509-for-a-more-perfect-union-restore-the-voting-rights-act>