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Race & the Voting Process in Modern Day Society

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I. Introduction

158. The 2016 presidential election ended among allegations of “rigging” made by all candidates, including then-President-elect Donald Trump. According to investigative reporter Greg Palast, “the nasty little secret of American Democracy is that, we don’t count all the votes.”² The Supreme Court of the United States has alluded to the validity of this statement by explaining the creation of the Electoral College. The Court confirms that the votes of every citizen were never expected to determine the President of United States. Instead the President should be decided by the most knowledgeable members of the community, as to prevent the decision being made by misinformed masses.³

159. What Mr. Palast was referring to was not the rationale behind the creation of the Electoral College. He was specifically addressing the mass voter suppression culture that has engulfed the nation since the 2000 Presidential election. Palast acknowledges that the intent of the founding fathers was not to have a President decided by popular vote,

1 Danny Jacobo was born and raised in Miami, FL. He always had a passion for elections and even worked along side Organizing for America in 2012 to change certain historically red districts across South Florida to blue for the first time. While attending Stetson University College of Law, under the mentorship of Professor Judith Scully, Social Justice Advocate, he was able to refine his passion for voting rights.

2 GREG PALAST, [THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS](#) (2016).

3 See *Evenwel v. Abbott*, [136 S. Ct. 1120, 1130](#) (2016).

however he argues that they never intended for the Presidency to be decidedly taken away from the American people.⁴

160. This voter suppression culture has morphed the way officials approach elections. Politicians are no longer concerned with winning the most votes. They now understand that by suppressing the most votes a victory is almost certain. And in today's society, where there is such disconnect between elected officials and their constituents, it is easier for politicians to pass laws that prevent their opponents supporters from voting rather than trying to win over their votes.

161. There have been multiple studies and post election surveys done over the past few decades that indicate minorities tend to vote more democratic.⁵ Minority voters are no longer targeted because of the color of their skin. Republicans are now targeting minorities because of the color of their vote.

162. This paper is divided into five sections. Part I to this paper has served as an introduction. Part II explores the impact the 2000 Presidential Election has had on modern day disenfranchisement. In Part III, this paper focuses specifically on the Voting Rights Act of 1965 and where it stands today. The following section, Part IV Hope for Reform, examines recent court cases, proposed legislation and local movements as a way to adjust the voting process to create a fair and free election system. Finally, Part V serves as the conclusion by capturing all the main points discussed throughout this paper.

II. New Wave of Voter Disenfranchisement

163. In 2000, the presidential election came down to just one state: Florida. Previous elections were plagued by many issues, but most were never discussed until the widespread attention garnered by the 2000 election. Two such issues were Hanging Chads and confusing ballot designs. A "Hanging Chad" is the result of a mechanical error where the Chad, the small piece of paper that is normally punched out of the ballot to indicate a voting choice, remains attached by a corner and that vote is not counted. An example of poor ballot design causing confusion occurred in Palm Beach, Florida, where thousands of voters thought they were voting for one candidate but were actually voting for another. The "butterfly ballot" design that was used placed candidates on opposing sides of the ballot with the selection for each in the middle. According to

⁴ See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1130 (2016).

⁵ GREG PALAST, *THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS* 10, 25 (2016).

journalist Ari Berman, “the widespread and wrongful purging of registered voters was the most consequential — and least discussed — aspect of the Florida election.”⁶

164. The margin of victory for Bush in 2000 was so small in Florida that it triggered a statewide automatic recount. Due to the importance of the result, many attorneys went to Florida during the recount process. Ben Ginsberg, National Counsel for the Bush campaign, even went as far as to call it “Woodstock for constitutional attorneys.” Eventually, Bush was declared the winner of Florida’s 25 electoral votes and therefore the winner of the election making him the 43rd President of the United States.

165. Soon after he was elected, Bush removed several attorneys in the Civil Rights Division of the Justice Department and replaced them with ultraconservatives. This switch resulted in the Justice Department, for the first time, approving a strict voter-ID law in Georgia. Bush’s administration also helped pass the Help America Vote Act (HAVA), fired several U.S. Attorneys and made voter fraud a higher priority than defending the Voting Rights Act (VRA) of 1965. Bush also appointed Supreme Court Justices that shared in his view that “it should not be so easy to prove violations of the VRA.” This shift in the Court led to the approval of Indian’s voter-ID law, even though there was no evidence that the law would prevent voter impersonation. The decision implied that States could pass new voter restrictions by simply justifying them necessary to fight voter fraud. The Court even went as far as holding a key portion of the VRA unconstitutional in *Shelby County v. Holder*, significantly reducing minorities’ right to vote.⁷

166. After the 2000 Presidential election, politicians began to understand the true importance of disenfranchisement in modern elections, where the races had become very competitive. Politicians were discovering that the days where elections were won by the candidate that received the most votes were gone and that elections would now be won by the candidate that prevented the most people from voting. As U.S. Commission on Civil Rights Chair Mary Frances Berry accurately summarized, “Elections aren’t stolen in the vote count—they’re stolen in the no count.”⁸

Bush v. Gore

167. The 2000 election prompted the Supreme Court’s first ever direct involvement in determining the outcome of a presidential election.⁹ Al Gore, the democratic candidate,

6 Ari Berman, *How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement*, [THE NATION](#) (July 28, 2015).

7 See *Shelby County, Ala. v. Holder*, [570 U.S. 529](#) (2013).

8 GREG PALAST, [THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS](#) (2016).

9 See Scott Bomboy, *When Does the Supreme Court Get Involved in Settling Presidential Elections?*, [CONSTITUTION DAILY](#) (July 14, 2016).

filed a complaint contesting the results in Florida. The District Court of Appeals sent the case to the Florida Supreme Court, which held that 9,000 ballots were not counted due to the voting machines not registering a vote, and a manual recount was required. George Bush, the republican candidate, then filed an appeal to the U.S. Supreme Court for an emergency stay of the recount.

168. The U.S. Supreme Court issued a per curiam opinion, stating that because there was no uniform standard to determine the intent of the voter, the recount led “to unequal evaluation of ballots in various respects” and held that the recount was a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court went on to conclude that there was no appropriate remedy available and would have to consider the matter closed, effectively making Bush the President.¹⁰

NAACP v. Florida

169. Around the same time that Bush v. Gore was being decided, the NAACP was getting ready to file a lawsuit against Florida officials. The lawsuit alleged that Florida election supervisors violated the Voting Rights Act by illegally purging thousands of minority voters. Purging refers to the process of removing ineligible voters, like felons and illegal immigrants, from the list of registered voters. In the United States, Florida is one of only six states with laws restricting a felon’s right to vote. In the 2000 Presidential election, Florida election officials decided to expand their felon law to include individuals that had been convicted of a felony anywhere in the U.S., even though most States allowed felons the right to vote. This resulted in approximately 40,000 Floridians not being allowed to vote because of convictions in other states before they moved to Florida.

170. Florida used a private company called Database Technology (DBT) to create a “purge list” to identify Florida residents who were labeled felons in any state, and subsequently removed from the eligible voter list. In order to maximize the effectiveness of the list so that the greatest number of felons were removed from the voting rolls, Florida officials instructed DBT to use broad parameters.¹¹

171. The biggest concern the NAACP had was that the process was too broad and therefore would include too many legal (non-felon) voters. For instance, Joe Johnson a resident of Florida would be seen as Joseph Johnson a resident of Colorado, even though Joe Johnson had never been to Colorado. Although the names were not an exact match, due to the broad parameters, the match was close enough that DBT would add Mr. Johnson to the purge list. The idea expressed by Florida officials was that election supervisors

¹⁰ *Bush v. Gore*, 531 U.S. 98, 101-03, 106, 111 (2000).

¹¹ Ari Berman, *How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement*, [THE NATION](#) (July 28, 2015).

of each individual voting district would review the list to verify no voters were incorrectly labeled felons. Unfortunately, this verification did not take place and in fact at least one local official found their name on the purge list. “Voters were deemed guilty until proven innocent.”¹²

172. As far back as 1988, Steve Barber, former University of Evansville professor, recognized purge laws as being riddled with serious civil rights issues making them violations of the VRA. One of the biggest issues Barber discusses is the burden of reregistering that falls on the individual being purged, since most jurisdictions are not required to provide notice.¹³ Therefore it was the voters’ job in 2000, to make sure they were not placed on this purge list and also their responsibility to get themselves removed if they were. In most cases, voters were only made aware of their status as a felon on Election Day, when after waiting in line for hours at the polling station they were turned away.

173. In addition to filing a suit against Florida, the NAACP had also filed suit against Choice Point, the company that eventually bought DBT. This suit was settled once Choice Point agreed to conduct an investigation into the 2000 purge list. The preliminary results of the investigation revealed that at least 12,000 voters were wrongfully placed on the purge list and 44% were African American.¹⁴ In Florida, Bush’s final margin of victory was only 537 votes. It had become apparent that this list disproportionately targeted people of color, adding significant pressure for Florida officials to resolve the suit without a trial.

174. The NAACP and Florida eventually reached a settlement agreement 2 years after the election on September 3, 2002, before going to trial. In the view of the NAACP, the settlement meant that Florida officials were finally recognizing “the need to correct past election problems.” Florida officials agreed to improve the election process by restoring voters that were wrongfully purged, improving voter roll maintenance, improving voter registration and improving communication among polling stations.¹⁵

Aftermath of 2000 Election

175. These two lawsuits brought to the nation’s attention the need to improve the ways elections were being held in the U.S. This created a “fog of voter distrust” amongst

12 Ari Berman, *How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement*, [THE NATION](#) (July 28, 2015).

13 Steve Barber, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HAR. CIV. RIGHTS-CIV. LIBS. L. REV. 483 (1988).

14 Ari Berman, *How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement*, [THE NATION](#) (July 28, 2015).

15 Lloyd Vries, *Presidential Election Lawsuit Ends*, [CBS NEWS](#) (Sep. 4, 2002).

the American people. Several polls were conducted in the aftermath of the election, all showing a sweeping distrust in the election process. The Bush Administration was pressured to respond to these concerns that elections were not being run properly. And on October 29, 2002, approximately a month after the NAACP's lawsuit against Florida settled, President Bush signed into law the Help America Vote Act (HAVA). The main objective of HAVA was to improve the voting process for federal elections by creating federal voting guidelines, incentives, and requirements.¹⁶

HAVA

176. HAVA was created with three major provisions. The first provision, otherwise known as the voter ID provision, required certain citizens to present a valid ID in order to vote. This requirement only applied to individuals that registered to vote by mail after January 1, 2003 and had never voted in a federal election before. The reasoning behind this provision was that the government wanted to have a way to confirm the identity of first time voters. It was not meant to prevent citizens from voting. In fact, the provision did not apply to individuals that mailed some other valid form of identification with their registration form, like a utility bill that showed their name and address. The second major provision of HAVA created a nation-wide provisional ballot requirement. Up until the enactment of HAVA only select States had implemented the use of provisional ballots. These ballots were to be used when a voter, required to present ID, arrives to vote with the incorrect form of identification. Instead of issuing the voter a regular ballot, they are issued a provisional ballot. A provisional ballot was only counted if election officials could verify the voter's eligibility to vote. This provision also required States to advise voters of their right to vote provisionally.

177. HAVA's final provision dealt with financial incentives for States that were willing to replace their old voting systems with newer more modern technology. This provision was aimed at eliminating the issues of Hanging Chads and confusing ballot designs, where the voter's intent could not easily be determined.¹⁷

Issues with HAVA

178. Although HAVA has been described as "the most important voting rights bill since the passing of the Voting Rights Act," it has also been characterized as "a grouping of clumsy subsections and clauses." One of the biggest concerns HAVA has raised among scholars is the additional requirement of the voter ID provision, which mandated every

16 Benjamin O. Hoerner, *Unfulfilled Promise: Voting Rights for People With Mental Disabilities and the Halving of HAVA's Potential*, 20 *TEX. J.C.L. & C.R.* 89, 90-91, 95 (2015).

17 Benjamin O. Hoerner, *Unfulfilled Promise: Voting Rights for People With Mental Disabilities and the Halving of HAVA's Potential*, 20 *TEX. J.C.L. & C.R.* 89, 96 (2015).

state create and maintain a registration list of all eligible voters within the state. HAVA calls for this list to be computerized and requires each State to be in charge of verifying eligibility of all voters.¹⁸ Some critics have argued that this provision provides election officials overwhelming discretion, because it allows them the right to decide how to purge this list or more specifically who to purge from the list. In previous years, States have purged illegal immigrants from their eligible voter list and in some cases convicted felons too.¹⁹ However in 2016, this voter ID provision allowed various States the ability to purge voters based on the allegation that they were voting in multiple jurisdictions. In North Carolina alone, it has been estimated that over 40,000 people were purged and accused of double voting, which is considered a form of voter fraud and therefore a felony punishable by five years in prison. North Carolina used a process called Interstate Crosscheck, a program similar to DBT, to match the names of residents to known felons to create a purge list.

179. Unlike the Florida purge list in 2000, North Carolina's list was filled with legal (non-felon) voters that just had the same name as someone else in a different jurisdiction. Instead of comparing the names of residents with a known felon list, the names were compared to other registration lists. For instance, if there was a Maria Hernandez legally registered to vote in North Carolina and there just so happened to also be a Maria Hernandez legally registered to vote in Kansas, Crosscheck would consider both to be the same person. Both, Maria Hernandez of Kansas and Maria Hernandez of North Carolina would be purged and accused of attempting to commit voter fraud.

180. Similarly to DBT in 2000, Crosscheck used broad parameters meaning that Maria Isabella Hernandez and Maria Christina Hernandez were still considered the same person even though their middle names did not match. The program would also not consider father and son combinations, where both shared the same name except one was Sr. and the other Jr. An estimated 1 million voters were purged using Crosscheck before Election Day, November 8, 2016 and the overwhelming majority of the names on the list were minority voters.²⁰

Voter ID Laws

181. Although the voter ID provision was fairly limited and only applied to a certain number of voters, another unfortunate result from the enactment of HAVA has been the

18 Benjamin O. Hoerner, *Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of Hava's Potential*, 20 *TEX. J.C.L. & C.R.* 89, 96 (2015).

19 GREG PALAST, *THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS* (2016).

20 GREG PALAST, *THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS* (2016).

alarming increase in new more restrictive voter ID laws. These new voter ID laws are considered to be facially race-neutral. In the same manner, literacy tests enacted in the Jim Crow Era were once also considered facially race-neutral, because they apply to all voters equally. However, in practice both laws result in disparate impact and disparate treatment. The election officials of each State determine what form of ID will be considered appropriate and also determine the methods for obtaining the proper ID.²¹ These State officials can gear the law to favor any particular group of voters or, like has been common practice since the 2000 election, to prevent a group of voters from voting. This results in a noticeable disparate impact.

182. In Alabama, election officials in 2015 decided to close certain driver's license offices, even though the State the year before passed a law which requires a driver's license or special photo ID in order to vote. The Alabama legislature claimed that these closures were mostly due to budget issues. Interesting enough, the offices that were closed included offices in every county where African Americans made up more than 75% of registered voters. These closures affected 8 out of the 10 counties with the highest non-white registered voter population. These counties were also reported as voting for president Obama in the 2012 election.²² Showing once again that it is not necessarily the color of the voter's skin officials are concerned about, but rather the color of their vote.

183. Nevertheless, in the end local officials are free to enforce the law however they see fit. This grant of ultimate discretion inevitably creates disparate treatment come election time. It is the local official that ultimately decides whether or not to ask for ID from a voter and the local official determines the adequacy of that ID. In 2012, a survey of young voters found that in States with voter ID laws African American youth "were asked for ID at a rate ten percentage points higher than were white youth."²³ The study indicated that these new voter ID laws are being used to disenfranchise undesirable voters, in the same manner that literacy tests did in the Jim Crow Era.

Voter Fraud

184. With all the stunningly noticeable similarities between these new voter ID laws and past literacy tests, many scholars wonder how these laws are being proposed, passed, enacted and upheld with such astonishing success. The simple answer is voter

21 See Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter Id Laws Recreate Literacy Tests*, 45 *COLUM. HUM. RIGHTS L. REV.* 362, 365 (2014).

22 John Archibald, *Alabama Sends Message: We Are Too Broke to Care About Right and Wrong*, *AL.COM* (September 30, 2015).

23 See Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter Id Laws Recreate Literacy Tests*, 45 *COLUM. HUM. RIGHTS L. REV.* 362, 366 (2014).

fraud. Election officials have been able to create mass voter fraud hysteria.²⁴ Republican politicians began justifying their election loses by claiming that incredible amounts of individuals were committing voter fraud. When asked about this allegation, Mike Baker, former CIA officer and recurring guest on Fox News, responded with:

Whether they admit it or not, the Democrats need lawbreakers such as illegal aliens—who are being illegally registered as Democrats—and killers, rapists, and robbers in order to increase their base of far-left voters.

185. In the United States, voter fraud is a felony. If an individual is considered an illegal voter and registers to vote, that individual has just committed voter fraud. According to former Florida Attorney General Bob Butterworth, out of over 90,000 Florida residents who were found to have illegally registered to vote in 2000, only six cases were open, all of which were eventually discovered to be a result of error and dropped. The purging done by Florida officials in 2000 resulted in zero voter fraud convictions. A study conducted by Rutgers University professor Dr. Lorraine Minnite found only six voter fraud convictions a year among 170 million voters. Dr. Minnite concluded that “the claim of widespread voter fraud is itself a fraud.”²⁵

186. The issue of voter fraud is so minimal that in 2006, Bush’s administration decided to fire eight out of the 93 U.S. Attorneys. Among those fired was David Iglesias, U.S. Attorney for New Mexico. Iglesias was a Captain in the Navy Reserve and was initially fired for absenteeism because he received active duty orders from President Bush to address War Crimes in Bosnia. Later, the Bush Administration stated that the firing was due to poor performance evaluations, despite having a 95% conviction rate and being deemed a promising new up and coming attorney by multiple nationwide news outlets.²⁶

187. Upon hearing of these new allegations, that he did not perform his duties effectively, Iglesias decided to reach out to the other seven U.S. Attorneys that were fired. From these interactions, Iglesias discovered that the other attorneys were also facing similar false allegations. He was able to determine that the common factor between all 8 U.S. Attorneys was the lack of voter fraud convictions. Iglesias had been instructed to focus his efforts on the mass voter fraud epidemic that the nation was facing. And in 2014 he created a voter fraud task force. Following more than 100 complaints being brought to his office, Iglesias found that only 1 case may had been actual voter fraud.

24 GREG PALAST, [THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS](#) 97 (2016).

25 GREG PALAST, [THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS](#) 99-101 (2016).

26 GREG PALAST, [THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS](#) 105, 107 (2016).

However, after further investigation he found the case lacked sufficient evidence to receive a conviction.²⁷ Despite both the FBI and the Justice Department agreeing with the lack of evidence, the Bush administration saw it as a failure to perform his duties as a U.S. Attorney.

III. Voting Rights Act of 1965

188. When discussing voting rights in the United States, it is impossible to ignore the importance of the Voting Rights Act. The Fifteenth Amendment of the U.S. Constitution ensures that the right to vote shall not be denied or abridged based on race, color or previous servitude, and Section Two of this Amendment entrusts Congress with enforcement, through appropriate legislation.²⁸ Under the authority of this Amendment, Congress passed the VRA, which states:

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.²⁹

189. The Voting Rights Act was passed in 1965 as a result of the long and hard uphill battle known as the Civil Rights movement. “It is widely regarded as enabling the enfranchisement of millions of minority voters and diversifying the electorate and legislative bodies at all levels of American government.”³⁰ The VRA was not meant to be a permanent solution. However, due to the great success the VRA has had, Congress has reauthorized it four times since its enactment, with the latest reauthorization taking place in 2006. Two of the most influential sections of the VRA are Section 2 and Section 5. Section 2 states that a violation occurs when a member of a protected class of citizens can establish, through the totality of the circumstances, the election process used was not equally open to the members of that protected class.³¹ Section 5 establishes a preclearance requirement for all jurisdictions that fall under Section 4³² of the

27 GREG PALAST, [THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS](#) 106, 111 (2016).

28 U.S. CONST. [amend. XV](#).

29 52 U.S.C. [§ 10101](#) (2004).

30 Tom Murse, *Voting Rights Act of 1965*, [THOUGHTCO](#).

31 52 U.S.C. [§ 10301](#) (1982).

32 Any State that had a test or device that restricted the opportunity of citizens to register and vote on November 1, 1964 and where the Director of the Census determined that less than 50% of the citizens

VRA, which covered the following states: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and parts of Arizona, Hawaii, Idaho, and North Carolina. Preclearance required any covered jurisdiction to receive approval from the Justice Department before enacting any law affecting the voting process.

190. These Sections were both designed with the purpose of protecting the right of minorities to vote. Each Section provides completely different approaches. For instance, unlike Section 2, where the burden of proof falls on the plaintiff, the burden under Section 5 is on the jurisdiction. The jurisdiction must prove that the law was not created with the purpose of discriminating against any protected class and that it would not have any discriminating result.

191. Another distinction between the two is that a Section 2 violation is brought after the discrimination has already occurred and the right to vote has already been infringed. Section 5 is meant to prevent discrimination from ever occurring. The proposed law only comes into effect until after it has been determined to not be discriminatory and receives the approval of the Justice Department. The biggest difference between both Sections deals with the protection of the right to vote during the process of litigation. The discriminatory law under Section 2 would remain in effect until the conclusion of the litigation. Conversely, a Section 5 proceeding effectively freezes the proposed law, prohibiting its application and restoring the prior laws.³³ Due to these distinctions, the application of Section 5 was considered more efficient and cost effective and therefore preferred over Section 2. Unfortunately, since the Shelby court decision essentially froze the application of Section 5, attorneys have been forced to rely more on Section 2.

Shelby County v. Holder

192. The *Shelby County* opinion begins with a shocking conclusion. Chief Justice Roberts begins the opinion implying racism is no longer an extraordinary problem. Roberts intentionally choose to begin this opinion by demonstrating how the VRA no longer applies in modern day society. Roberts declares this premise by opening the opinion with, “The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem.”³⁴

193. Some scholars believe that the *Shelby* decision was due at least in part to the Color-blindness movement, where voter discrimination based on race is no longer considered an extraordinary problem. Barnes explains how the Shelby opinion reflects a “then and

eligible to vote were registered or actual voted.

33 52 U.S.C. § 10304 (2006).

34 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 534 (2013).

now” approach to racism. Barnes is referring to the way Justice Roberts began the opinion by stating how terrible things were back then but shortly follows up that statement with, “There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”

194. Roberts acknowledges that in 1965 the issue of race was a serious one that demanded “strong medicine.” He identifies how this serious issue justified the extreme Preclearance requirement of Section 5, which greatly infringed on States’ rights. He goes on to suggest that this issue no longer exists as it did back then and therefore no longer justifies the strong protections afforded to minorities under the VRA.³⁵ Justice Roberts does not go as far as to conclude that racism is no longer a problem, just it no longer rises to the level of extraordinary that justified infringing on States’ rights.³⁶ Justice Scalia during oral arguments, referred to the modern day use of this VRA protection as simply, “racial entitlement.”

195. Justice Roberts advances two main arguments in the Shelby opinion, first that “things have changed in the South” and second that the Preclearance formula of Section 4 is obsolete because voter discrimination occurs throughout the U.S.³⁷ Roberts proceeds to explain how the Preclearance formula was altered by Congress the first two times it was reauthorized in order to expand the covered jurisdictions.³⁸ Roberts then notes that Congress has left the formula unaltered since 1975, even though Congress reauthorized the VRA in 1982 and again in 2006. In a prior Court decision,³⁹ Justice Roberts explains that the Court found “things have changed in the South,” and questioned whether the Preclearance formula still covered the jurisdictions that the VRA was meant to address. He argues that the VRA departs from the idea that all States shall have equal sovereignty because it requires certain States to have to wait years and waste a great deal of State funds in order to enact a law, whereas, neighboring States are allowed to put similar laws into effect almost immediately. Roberts again acknowledged that this departure from equal sovereignty was justified due to the issue of discrimination in 1966.

196. “Nearly 50 years later, things have changed dramatically.” Roberts goes on to validate this claim by referencing the fact that more minorities hold office than ever before, that voter turnout and voter registration are nearly equal, and that test or devices that blocked minority voters, such as literacy tests have been prohibited nationwide for over

35 *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).

36 Mario L. Barnes, “The More Things Change . . .”: New Moves for Legitimizing Racial Discrimination in A “Post-Race” World, 100 MINN. L. REV. 2043, 2079-80 (2016).

37 *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).

38 The States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions.

39 *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193(2009).

40 years.⁴⁰ He points out that Congress came to the same conclusion when they reauthorized the VRA in 2006.

197. Justice Roberts then turns to a discussion of the Preclearance formula. He concludes that, “Coverage today is based on decades-old data and eradicated practices.” He affirms the government’s assertion that the Fifteenth Amendment provides Congress with the authority to pass the VRA. However, he argues that it does not give Congress the ability to punish States for the past. Roberts explains that the nation can no longer be divided in such a way suggested by the formula. He goes on to note that the data used to create the formula no longer applies today. Although Roberts acknowledges that the government provided sufficient evidence of racial discrimination to still justify the coverage of the formula, he excludes it from consideration because none of the current evidence was used when Congress last revised Section 4 in 1975. The *Shelby* Court concluded that because the formula was based on data from 40 years prior, the use of the formula was unconstitutional.⁴¹

198. The Court understood that this holding would effectively render the use of Section 5 void and therefore did invite Congress to create and implement a new formula based on current data in order to effectively address the needs of modern day society. This ruling led to the first presidential election in over 50 years without the full protection of the Voting Rights Act. Since the *Shelby* decision, fourteen states have enacted restrictive voting laws that went into effect just in time for the 2016 presidential election.

IV. Hope for Reform

199. The years since Bush was elected President can be seen as a step back in the fight for fair and free elections for every citizen. However, due to sudden rise of the level of racial discrimination, the passion of activists working to combat it has doubled. Recent court cases, proposed legislations, and local movements provide hope that this new wave of disenfranchisement will not last much longer.

Recent Court Cases

200. In recent years, since the *Shelby* court decision in 2013, States that were previously under the jurisdiction of Section 5 of the Voting Rights Act have moved quickly to enact restrictive voting laws. The Republican lead legislatures of these States have justified these measures as necessary to fight voter fraud. Fortunately, there have been

⁴⁰ *Shelby County, Ala. v. Holder*, 570 U.S. 529, 539, 544-45 (2013).

⁴¹ *Shelby County, Ala. v. Holder*, 570 U.S. 529, 549, 553, 557 (2013).

several court decisions that seem to “suggest a growing judicial suspicion of the wave of voting-restriction legislation passed in recent years.”⁴²

Evenwel v. Abbott

201. The Supreme Court recently held “based on constitutional history, this Court’s decisions, and longstanding practice, that a State may draw its legislative districts based on total population.” In the 2016 *Evenwel v. Abbott*⁴³ case, the Court further defined the One Person — One Vote rule as requiring states to draw congressional districts with populations within a 10% deviation of each other. The central issue in *Evenwel* was the method used to determine the population equality, and whether Texas should have used total population or eligible/registered voter population. The Appellant argued the Equal Protection Clause of the 14th Amendment required Texas to use a Citizen’s of Voting Age Population (CVAP) in order to equalize districts.⁴⁴

202. In 2013, Texas adopted a new permanent Senate map based off the total population numbers of the 2010 census. The population deviation between districts is distinctly different depending on which type of population is used. Using total population the deviation is 8%, well within the allowable 10% limit discussed by the Court. However, if the map is reviewed using registered/eligible voters as the population baseline the population deviation between districts is 40%. The Court only ruled on whether the Texas map violated the one person, one vote rule, which they determined it did not. The Court failed to properly address which population baseline should be used according to the Equal Protection Clause of the 14th Amendment. Both Justice Alito and Justice Thomas in concurrent opinions, argue that either baseline can be seen as permissible and that the choice of baseline is left up to the States to decide.⁴⁵

203. There were many that saw this case as a “big win for fair representation.”⁴⁶ However, according to James Delong, journalist for American Thinker, a daily internet publication, the most important outcome of this case is not the protection of the one person, one vote rule. Instead he explains how the narrow holding allows for the possibility for States to use either total population or registered/eligible voter population to determine district equality. Delong argues this is a win for voter equality because in some

42 Robert Barnes and Ann E. Marimow, *Appeals Court Strikes Down North Carolina’s Voter-ID Law*, [THE WASHINGTON POST](#) (July 9, 2016).

43 [136 S. Ct. 1120](#) (2016).

44 *Evenwel v. Abbott*, [136 S. Ct. 1120](#) (2016).

45 See *Evenwel v. Abbott*, [136 S. Ct. 1120, 1123-25, 1142](#)(2016).

46 *Evenwel v. Abbott* Amicus Brief, [BRENNAN CENTER FOR JUSTICE](#) (April 4, 2016).

jurisdictions, total population could lead to voter dilution⁴⁷ if illegal immigrants are included. He references a case in California⁴⁸ where the result of using total population led to District 1 having 707,651 eligible voters, while District 3 had 1,098,663. This essentially meant that voters in District 1 would have more weight given to their vote than voters in District 3, where officials would need a higher turnout to get a majority. Officials will now be able to use the appropriate baseline for the State, in order to ensure that every vote has the same weight.⁴⁹

North Carolina State Conference of NAACP v. McCrory

204. In North Carolina, the State legislature ratified SL 2013–381, which was quickly signed into law by the governor on August 12, 2013. On that same day, multiple organizations, including the League of Women Voters and the North Carolina State Conference of the NAACP, filed suit claiming that the law violated Section 2 of the Voting Rights Act and the Fourteenth and the Fifteenth Amendments. They argued that the law restricted early voting, eliminated same-day registration and out of precinct voting as well as reduced the amount of acceptable photo ID, all in order to discriminate against minorities.⁵⁰ The three-judge panel, of the U.S. Court of Appeals for the 4th Circuit, struck down this law stating:

Indeed, the law’s purpose cannot be properly understood without these considerations. The record makes clear that the historical origin of the challenged provisions in this statute is not the innocuous back-and-forth of routine partisan struggle that the State suggests and that the district court accepted. Rather, the General Assembly enacted them in the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting.⁵¹

205. The court found that the result of the enacted law disproportionately affected minorities, since minorities were more likely not to have the proper ID required and were more likely to vote early. The holding of this case effectively allows lower courts the opportunity to consider a State’s history of racial discrimination when reviewing a Section 2 violation. “The unanimous decision . . . was an overwhelming victory for the Justice Department and civil rights groups.”⁵²

47 A voter suppression technique referring to constructing voting districts to weaken the voice of a particular group of voters, e.g., breaking up a community of nonwhite voters into two different districts so that the nonwhite voters are no longer the majority.

48 *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990).

49 James V. DeLong, *Evenwel v Abbott: A Good Day for Democracy*, *AMERICAN THINKER* (April 10, 2016).

50 See *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 218 (4th Cir. 2016).

51 See *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 226 (4th Cir. 2016).

52 See *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 226 (4th Cir. 2016).

Proposed Legislation

206. As a response to the new wave of disenfranchisement, certain members of Congress have proposed three new Bills; the Voter Empowerment Act, the Voting Rights Advancement Act of 2015, and Automatic Voter Registration. The Voter Empowerment Act and the Automatic Voter Registration Bill would amend the National Voter Registration Act of 1993 (NVRA). The Voting Rights Advancement Act of 2015 would amend the current Voting Rights Act. These Bills are meant to help the nation continue making progress towards achieving a fair and free election system.

207. The Voter Empowerment Act would require each state to have same day voter registration, online registration, and allow individuals under the age of 18 to register to vote. The Act would also make hindering, interfering with or preventing voter registration a crime. The Automatic Voter Registration Bill would add on the requirement that any citizen that provides necessary documentation to the State Motor Vehicle Department would automatically be registered to vote.⁵³ This Bill would eliminate the need for citizens to register to vote separately.

208. The most important of the Bills in front of Congress right now is the Voting Rights Advancement Act of 2015 (VRAA). As an immediate response to the Shelby decision, Senator Patrick Leahy worked with Republicans to introduce the Voting Rights Amendment Act of 2014. The understanding behind the bipartisan effort was that collaborating together would ensure support from both sides. Senator Leahy drafted the 2014 Bill in way that would gain Republican support in order to get it passed quickly, and he promised by the Republican Majority leader of the House that a vote on the Bill would take place as long as he kept it the way it was. The 2014 Bill was never voted on, and as a result, Senator Leahy created the VRAA of 2015 to reflect the need to fully restore the VRA.⁵⁴

209. The VRAA of 2015 is a stronger Bill than the one proposed in 2014. The 2015 Bill grants more authority to the VRA than the 2014 Bill would have. The 2015 Bill restores Section 5 of the VRA by establishing a new formula. Any State that has 15 VRA violations in the past 25 years or 10 violations if at least one was statewide, would be subject to Section 5. The coverage would last for a 10-year period and would initially cover thirteen states, whereas the 2014 Bill would have only initially covered four.⁵⁵

53 Voter Empowerment Act of 2017, [H.R. 12, 115th Cong.](#) (2017).

54 Ari Berman, *Congressional Democrats Introduce Ambitious New Bill to Restore the Voting Rights Act*, [THE NATION](#) (June 24, 2015).

55 Ari Berman, *Congressional Democrats Introduce Ambitious New Bill to Restore the Voting Rights Act*, [THE NATION](#) (June 24, 2015).

210. All three Bills are currently awaiting further action in Congress. Due to increased pressure from their constituents, these Congressmen are likely to continue working on and proposing new legislation, should these Bills fail.

Local Movements

211. The suspicion that these new restrictive voting laws are actually nothing more than modern day Jim Crow laws is not exclusive of government officials. The number of local movements fighting voter discrimination has drastically increased. John Wellington Ennis, American filmmaker turned civil rights activist, proved how influential a well organized local movement can be.

212. Following the turmoil of the 2000 presidential election, Ennis investigated the settlement agreement that was reached between the NAACP and Florida and learned of mass voter suppression in American elections. In 2004, he witnessed a similar mass voter suppression movement in Ohio that ensured Bush's re-election. It was at this point that he decided that he could no longer stand by doing nothing.

213. In Ohio for the 2006 midterm election, Ennis partnered with multiple local groups in order to establish the VideotheVote movement. The objective of this movement was to promote accountability and provide a sense of transparency in the election process.⁵⁶ The idea was that Ennis and others would go out and train groups of people throughout the State of Ohio to record incidents of voter suppression. They would then live stream the videos online. Any Ohio citizen was able to participate, regardless if they never received the proper training, by simply uploading their video online. As long as they attached the hash tag #VideotheVote, it would be received and used by the local movement. This also provided local activists with real time complaints of voter suppression, meaning that the local activists would be able to provide real time responses; such as ensuring that the polling stations had a sufficient number of working voting machines and that no one was illegally turned away.

214. The 2006 VideotheVote movement proved so successful that Ennis created a film in 2008 documenting the experience to educate the public about this new wave of voter disenfranchisement by exposing all of the irregularities that occurred in both the 2000 and the 2004 presidential election.⁵⁷

⁵⁶ *Video the Vote Movement' Gains Momentum*, [NOW](#) (Nov. 3, 2006).

⁵⁷ John Wellington Ennis, *FREE FOR ALL! One Dude's Quest to Save Our Elections*, [SAVEOURELECTIONS](#) (2008).

215. Thankfully, the success of the VideotheVote movement has had a noticeable ripple effect across the nation. This is especially encouraging since this movement still lacks the funds and capacity needed to have a nationwide impact on a presidential election. As a result various other local movements have formed across the nation like TurboVote.

216. TurboVote has primarily focused on making registration easy for all citizens. It provides links to each state's voter registration website, absentee ballot information, and provides citizens with notifications (including via text message) of when local, state, and national elections take place. TurboVote has partnered with various other organizations to create The Turbo Vote Challenge, aimed at helping America reach 80% voter turnout.⁵⁸

V. Conclusion

217. Democracy is one of the most sacred things in America. Having the ability to hold the government accountable is a fundamental right that all citizens should possess. In the past 16 years, the importance of the election process has been highlighted like never before.

218. The 2000 presidential election marked a significant change in the way officials approach elections. The lawsuit brought by the NAACP against Florida as a result of that election, has brought to light the fact that voter suppression is real. Voting rights activists now know that officials are using the voter fraud hysteria, they created, in order to justify suppressing the votes of millions of minorities nationwide.

219. The *Shelby* decision was engineered to pave the way for a level of voter suppression that the nation has not experienced in over 50 years. Mario Barnes argues that the *Shelby* Court should have focused on whether racism still exists in society as strongly as it did back in 1965. Instead of basing their decision on if there has been a decrease in the same exact type of vote discrimination that led to the enactment of the Voting Rights Act.⁵⁹ When reauthorizing the VRA in 2006, Congress did state that "significant progress has been made in eliminating first generation barriers experienced by minority voters."⁶⁰ Unfortunately, the *Shelby* Court failed to consider that despite progress being made, Congress still found the overwhelming need to reauthorize the VRA.

58 Democracy Works, Inc., *The Turbo Vote Challenge*, [TURBOVOTE](#).

59 Mario L. Barnes, "The More Things Change . . .": New Moves for Legitimizing Racial Discrimination in A "Post-Race" World, 100 MINN. L. REV. 2043, 2082 (2016).

60 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 547 (2013).

220. Despite all the recent victories for voter suppression at the cost of minorities, the resolve of voting rights activists only strengthens. Activists are fighting back against this new wave of voter disenfranchisement through the judicial branch with lawsuits, the legislative branch with proposed Bills and locally through various movements.

221. Elections in the past few years have shown the need to continue the progress the VRA has made because there is still more progress to be achieved. The American people deserve a free and fair election system. And in the words of Reverend Jesse Jackson, “We’ve marched too long, we’ve worked too hard, and died too young to let them steal our vote.”⁶¹

⁶¹ GREG PALAST, [THE BEST DEMOCRACY MONEY CAN BUY: A TALE OF BILLIONAIRES & BALLOT BANDITS](#), 246 (2016).