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JULIAN MAXWELL HAYTER

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ABSTRACT

This piece situates the current fight over voting rights and the Voting Rights Act of 1965 into historical context. More specifically, Hayter argues that current contention over minority voting dates to 1965 itself. Resistance to the Voting Rights act is not only older than many people know, but the continuity of that resistance also forces us to question telling the story of the American Civil Rights Movement as a triumph narrative.

AUTHOR

Dr. Julian Hayter is a historian whose research focuses on modern U.S. history, urban history, and the American Civil Rights Movement. He earned his Ph.D. in modern U.S. history from the University of Virginia. Hayter is the author of *The Dream is Lost: Voting Rights and the Politics of Race in Richmond, Virginia*. He has written for the Washington Post, Bunk History, has been featured on prominent national news television outlets, and regularly contributes to national and local print media.

COMMENTARY

REIMAGINING RESISTANCE: THE VOTING RIGHTS ACT'S
IMMEDIATE RESISTANCE*Julian Maxwell Hayter*[†]

*Since the franchise was first guaranteed to Negroes, there has been a history in the South of efforts to render the guarantee meaningless. As devices have been struck down, others have been adopted in their place. An understanding of this history is relevant to an understanding of the progress of Negroes in the South*¹

ABSTRACT

This piece situates the current fight over voting rights and the Voting Rights Act of 1965 into historical context. More specifically, Hayter argues that current contention over minority voting dates to 1965 itself. Resistance to the Voting Rights act is not only older than many people know, but the continuity of that resistance also forces us to question telling the story of the American Civil Rights Movement as a triumph narrative.

I. THE VOTING RIGHTS ACT AND THE LEGACY OF MINORITY VOTING RIGHTS

The Voting Rights Act of 1965 (VRA) revolutionized American and Southern politics. The VRA not only helped bring an end to nearly a century of Jim Crow-era disenfranchisement, but it also initiated a complex revolution in politics beneath the Mason–Dixon line that continues to this day.² The VRA was the culmination of African-Americans'

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¹ U.S. COMM'N ON C.R., POLITICAL PARTICIPATION 1 (1968).

² See JULIAN MAXWELL HAYTER, *THE DREAM IS LOST: VOTING RIGHTS AND THE POLITICS OF RACE IN RICHMOND, VIRGINIA* 62 (2017).

demands for full citizenship during the American Civil Rights Movement.³ They found allies in Washington. By the mid-1960s, Lyndon Baines Johnson's administration, the Department of Justice, and Congress resolved to pass a voting rights bill that, once and for all, neutralized direct disenfranchisement.⁴ Despite containing both punitive and preventative measures (i.e., rules that punished and prevented instances of disenfranchisement), it met firm resistance.⁵ The VRA was, until recently, the most full-bodied civil rights bill in American history.

In *Shelby County v. Holder*, the Supreme Court struck down a vital portion of the VRA—a measure that supervised covered jurisdictions with a history of disenfranchisement.⁶ This measure, commonly known as both Section 4 and the coverage formula, gave federal officials the power to supervise local elections (particularly in the South, which had established a decades-long pattern of blanket disenfranchisement).⁷ In striking Section 4 down, the Court “ended close scrutiny of the conduct of state elections” and argued further “that each state in the union enjoys ‘equal sovereignty.’”⁸ By “equal sovereignty,” the Court meant that Washington (i.e., the federal government) cannot single out states for differential treatment.⁹ The rationale? The Court held that unprecedented numbers of Black voters and elected officials in the South meant that the VRA's coverage formula was no longer relevant.¹⁰

Resistance to minority voting rights has a long, tortured history in the United States. In fact, most people, at some point in American history, were disallowed from participating in the political process—from unpropertied White men during the Revolutionary Era, to people of color during and

³ DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 63–64 (Kermit L. Hall et al. eds., 2d ed. 2020).

⁴ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

⁵ See JESSE H. RHODES, BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT 24–57 (Keith J. Bybee ed., 2017).

⁶ *Shelby County v. Holder*, 570 U.S. 529, 537, 557 (2013).

⁷ See *id.* at 529, 537.

⁸ CHARLES S. BULLOCK III ET AL., THE RISE AND FALL OF THE VOTING RIGHTS ACT 151 (Justin J. Wert & Kyle Harper eds., 2016).

⁹ *Id.* at 163.

¹⁰ *Id.* at 162.

after slavery, and onto women until the early twentieth century.¹¹ We know now that resistance of voting rights crests not in times of low minority voter turnout but when minorities vote in record numbers.¹² I have written elsewhere: “The political abuses of electoral reforms have been a continuous and unfortunate feature of U.S. political history, and politics following the VRA was no exception to this rule. The United States, experts contend, often sways back and forth between greater political access and more political restrictions.”¹³ This pendulum has been a defining characteristic of American political development.¹⁴ In the case of African-Americans, there are no better examples of this trend than the Reconstruction Era—where recently emancipated African-Americans transformed American politics after the ratification of the Fifteenth Amendment—and the era immediately following the passage of the VRA.¹⁵ The latter has been almost entirely forgotten.¹⁶

This piece seeks both to illuminate the post-VRA legacy of opposition to the franchise and to illustrate, albeit briefly, how that resistance nearly subverted what was, at that time, the “toughest[] voting rights bill” in American history.¹⁷ Telling the story of the American Civil Rights Movement as a triumph narrative exclusively belies the eruption of

¹¹ RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 1–3* (Benjamin I. Page ed., 2004). *See generally* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (rev. ed. 2009) (discussing unpropertied White men and the franchise); VALELLY, *supra* (discussing African-American disenfranchisement); *THE WOMEN’S SUFFRAGE MOVEMENT* (Sally Roesch Wagner ed., 2019) (discussing women and voting).

¹² VALELLY, *supra* note 11, at 52–55. *See generally* sources cited *supra* note 11.

¹³ HAYTER, *supra* note 2, at 11.

¹⁴ *See* TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS’ RIGHT TO VOTE xv–xvi* (2012). *See generally* RACE AND AMERICAN POLITICAL DEVELOPMENT (Joseph Lowndes et al. eds., 2008) (discussing the inextricable relationship between race and American political development); WANG, *supra* (discussing how American political development ebbs and flows).

¹⁵ *See generally* ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* (Henry Steele Commager & Richard B. Harris eds., updated ed. 2014) (discussing Reconstruction and Jim Crow); ADOLPH L. REED, JR., *THE SOUTH: JIM CROW AND ITS AFTERLIVES* (2022) (discussing Reconstruction and Jim Crow).

¹⁶ *See generally* sources cited *supra* note 15.

¹⁷ ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 15 (1987).

resistance to voting rights that emerged immediately after 1965.¹⁸ The Court, we know now, spent the better portion of the 1970s strengthening the VRA, not for its own sake, but to meet the challenges of vote dilution.¹⁹

II. MEETING THE DEMANDS OF DILUTION

While the Fifteenth Amendment guaranteed African-Americans' right to vote by law, disenfranchisement (and Washington's refusal to police Jim Crow segregation) during the Jim Crow Era often rendered it obsolete.²⁰ In fact, Southerners spent the better portion of the late nineteenth and early twentieth centuries drafting laws and rewriting state constitutions to undermine the Amendment.²¹ While some African-Americans participated in the electoral process, disenfranchisement mechanisms such as literacy tests, poll taxes, threats of violence, economic reprisal, and intimidation at polling stations kept the majority of African-Americans from ballots.²² Take Virginia: in 1901 and 1902, the Commonwealth enacted a post-Reconstruction constitution that used poll taxes and other disenfranchisement activities to decrease African-Americans' registration to 15% and Whites' registration to 80% of the voting ranks.²³ The \$1.50 poll tax all but ensured that Virginia had the lowest voter turnout rate in the United States and one of the lowest voter turnout rates of any free democracy in the world for most of the early twentieth century.²⁴ However, Virginia was not alone. Prior to 1965, only 6.7% of Mississippi's voting-age African-Americans were registered to vote.²⁵ That number was 19.3% in

¹⁸ See generally HAYTER, *supra* note 2 (discussing backlash to the Voting Rights Act (VRA)); RHODES, *supra* note 5, at 58–93 (discussing the continuity of backlash to the VRA).

¹⁹ See generally MINORITY VOTE DILUTION 1–17 (Chandler Davidson ed., 1984) (discussing the various mechanisms of disenfranchisement once votes have been cast).

²⁰ See NIEMAN, *supra* note 3, at 110–13. For a discussion of the relationship between Black Americans and the Constitution, see *id.* at 117–52.

²¹ See V.O. KEY, JR. WITH THE ASSISTANCE OF ALEXANDER HEARD, SOUTHERN POLITICS IN STATE AND NATION 537–39 (new ed. 1984).

²² See NIEMAN, *supra* note 3, at 82, 91–93, 107–08.

²³ See, e.g., Harper v. Va. State Bd. of Elections, 383 U.S. 663 (Virginia poll tax); HAYTER, *supra* note 2, at 71–73.

²⁴ WANG, *supra* note 14, at 60, 175 n.23; see HAYTER, *supra* note 2, at 71–72.

²⁵ See HAYTER, *supra* note 2, at 67.

Alabama and 27.4% in Georgia.²⁶ In 1956, roughly only 20% of voting-age African-Americans had registered to vote in the South.²⁷ The VRA seemed to be the death knell for direct disenfranchisement.

President Johnson signed the VRA on August 6, 1965, which proved to be one of the strongest civil rights bills in American history.²⁸ Containing both punitive and preventative measures, the VRA differed from earlier civil rights bills.²⁹ First, the VRA suspended discriminatory tests and devices as conditions for voting in federal elections (i.e., grandfather clauses, literacy tests, etc.).³⁰ Section 2 prohibited voting qualifications, practices, and provisions that inhibited voting.³¹ Policymakers, namely Attorney General Nicholas Katzenbach, then gave federal supervisors the ability to oversee and register voters in areas that violated the law.³² More specifically, this provision, detailed in Section 4, contained what became known as the triggering formula.³³ The triggering formula contained two devices that strengthened supervision.³⁴ These areas would also be subject to preclearance if less than half of voting-age adults had registered or voted on or after November 1, 1964.³⁵ Section 5, the Preclearance Clause, covered areas in violation of Sections 2 and 4.³⁶ “The coverage formula in [S]ection 4 . . . applied to all elections—federal, state, and local.”³⁷ Furthermore, the VRA forbade voting laws or election-based changes in states and subdivisions that fell under the triggering mechanism.³⁸ The Preclearance Clause in Section 5 required direct approval from the Department of Justice “(the DOJ had sixty days to determine whether the changes were

²⁶ *Id.*

²⁷ *Id.* at 48.

²⁸ *Id.* at 65–66.

²⁹ *Id.* at 66.

³⁰ *Id.*; see also Julian Maxwell Hayter, *From Intent to Effect: Richmond, Virginia, and the Protracted Struggle for Voting Rights, 1965–1977*, 26 J. POL’Y HIST. 534, 538 (2014).

³¹ Hayter, *supra* note 30, at 538.

³² See *id.* at 539; U.S. COMM’N ON C.R., *supra* note 1, at 154.

³³ Hayter, *supra* note 30, at 538–39, 550.

³⁴ See *id.* at 538–59.

³⁵ *Id.* at 538.

³⁶ *Id.* at 539; HAYTER, *supra* note 2, at 66.

³⁷ HAYTER, *supra* note 2, at 66.

³⁸ Hayter, *supra* note 30, at 538–39.

discriminatory) or from the district court of the District of Columbia.”³⁹ Put simply, the VRA prohibited covered jurisdictions from making any electoral changes without explicit approval from Washington.⁴⁰

The VRA transformed Southern politics. In the years following the bill’s ratification, Black Southerners began to vote in record numbers.⁴¹ By the spring of 1967, the Department of Justice estimated that roughly 416,000 African-Americans had registered to vote.⁴² Blacks’ registration immediately rose to more than 50% of the voting-age population in every state covered by the VRA.⁴³ Mississippi jumped to roughly 60% and Georgia rose from 27% to 53%.⁴⁴ These numbers led to material outcomes. In 1966, there were 159 Black elected officials in the South.⁴⁵ That number rose to over 200 by 1967.⁴⁶ In Virginia, African-Americans elected seven men to the General Assembly, and in Richmond, the Commonwealth’s capital, they elected three African-Americans (B.A. Cephas, Henry Marsh, and Winfred Mundle) to the city council.⁴⁷ Mundle, in fact, was elected to the vice-mayoralty.⁴⁸ These gains, though, were quickly met by firm resistance.⁴⁹

Resistance to minority voting rights survived segregation.⁵⁰ The United States Commission on Civil Rights argued in its 1975 report: “The story of the progress in voting rights and of the persistence of some old discriminatory practices and development of new ones is more than the story of the Voting Rights Act. But the Voting Rights Act is central to developments of the last 10 years”⁵¹ The dramatic uptick in African-American voting after 1965 led to innovative resistance, namely vote

³⁹ HAYTER, *supra* note 2, at 66.

⁴⁰ *Id.*

⁴¹ U.S. COMM’N ON C.R., *supra* note 1, at 12.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 15.

⁴⁶ *Id.*

⁴⁷ HAYTER, *supra* note 2, at 79.

⁴⁸ *Id.*

⁴⁹ See generally *id.* at 63–109 (discussing the frenzy of resistance that followed the ratification of the VRA and the federal government’s cataloguing of that resistance).

⁵⁰ See U.S. COMM’N ON C.R., THE VOTING RIGHTS ACT: TEN YEARS AFTER 2 (1975).

⁵¹ *Id.*

dilution.⁵² In 1968, the United States Commission on Civil Rights compiled a report, *Political Participation*, assessing the state of Southern voting in the years following the VRA.⁵³ The report weighed in at roughly 250 pages.⁵⁴ Of those 250 pages, however, more than half were dedicated to the rise in White resistance to Black voter turnout and electoral results.⁵⁵ Between 1965 and 1969, Whites attempted to maintain control over the vestiges of political power by combining Black and White districts and merging polling stations and relocating them to White neighborhoods, etc.⁵⁶ Violence, too, continued.⁵⁷ Indeed, Washington often did not have enough federal supervisors to oversee the explosion of resistance.⁵⁸ Yet, federal officials eventually clamped down on direct disenfranchisement mechanisms in the immediate years after 1965.⁵⁹ Southerners, who believed that African-Americans lacked the capacity for governance, resorted to even craftier political machinations.⁶⁰

Nothing was to prove more pernicious to Black voting rights than the Machiavellian frenzy of vote dilution that began to characterize Southern politics after 1965.⁶¹ Realizing that direct disenfranchisement mechanisms failed to stem the tide of Black political participation, White Southerners resolved to undermine Black ballots after they had been cast.⁶² In fact, they diluted the strength of minority votes by annexing predominantly White suburbs, switching from single-member district systems to at-large elections, and redrawing district boundaries that all but ensured the election of White officials.⁶³ For instance, in Richmond, Virginia, a specially

⁵² See *MINORITY VOTE DILUTION*, *supra* note 19, at 1–20 (discussing methods of vote dilution).

⁵³ U.S. COMM’N ON C.R., *supra* note 1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 25–35, 80–82.

⁵⁷ See *id.* at 97–130 (detailing the continuity of disenfranchisement after 1965).

⁵⁸ *Id.*

⁵⁹ See U.S. COMM’N ON C.R., *supra* note 50, at 155–70 (detailing the continuity of disenfranchisement after 1965).

⁶⁰ *Id.*

⁶¹ See *MINORITY VOTE DILUTION*, *supra* note 19, at 1–20.

⁶² See *id.*

⁶³ See *id.*

appointed three-judge panel annexed a predominantly White portion of Chesterfield County (a suburb contiguous to Richmond) to preclude African-Americans, who made up most of the capital city's population, from assuming a city council majority.⁶⁴ In 1969, the annexation added roughly 44,000 Whites to the city's population and all but ensured a White majority of Richmond's nine-member city council.⁶⁵ In fact, Henry Marsh was the only African-American left on city council after the election of 1970.⁶⁶ After 1965, these types of initiatives became common practice. During the late 1960s and the early 1970s, a veritable flood of litigation (upwards of fifty cases) concerning vote dilution overwhelmed state and federal courts.⁶⁷ Southerners, who despised the practice of preclearance because they believed it impinged upon states' right to govern their own elections, often failed to comply with the Preclearance Clause.⁶⁸ In many instances, especially before 1970, they simply refused to report voting-related changes.⁶⁹ In fact, African-Americans were not only largely responsible for suing localities that violated preclearance,⁷⁰ but between 1966 and 1970, Southern jurisdictions submitted only 255 voting-related changes for preclearance.⁷¹ That number jumped to 5,337 between 1971 and 1975.⁷² Here's why.

In time, both the Warren and Burger Courts recognized that sustained resistance to minority voting rights undermined the VRA and, more importantly, subverted the democratic process altogether.⁷³ In other words, Washington recognized Southern disenfranchisement was again

⁶⁴ See HAYTER, *supra* note 2, at 63–150 (detailing the anti-dilution litigation after 1965 and the Court's growing preference for majority-minority district in Virginia and beyond).

⁶⁵ See *id.* at 63–109.

⁶⁶ *Id.* at 63, 97.

⁶⁷ *Id.* at 12.

⁶⁸ See *id.* at 111–50 (detailing the anti-dilution litigation after 1965 and the Court's growing preference for majority-minority district in Virginia and beyond).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ VALELLY, *supra* note 11, at 215.

⁷² *Id.*

⁷³ See *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (explaining the growing issue of not merely resistance to the VRA but vote dilution). *Allen* extended the federal government and people's capacity to seek preclearance in issues of vote dilution. *Id.*

jeopardizing American democracy. The Warren Court set the tone, and the Burger Court went further. In a now monumental case, *Allen v. State Board of Elections*, the Warren Court addressed the growing matter of vote dilution.⁷⁴ *Allen* consisted of four appeals where localities in Mississippi and Virginia failed to submit voting-related changes.⁷⁵ The plaintiffs argued that the changes to local elections fell under the purview of Section 5 of the VRA.⁷⁶ The Court agreed, 7–2.⁷⁷ The majority held that the qualification of candidates, the switch from elective to appointive offices, and conversions to at-large systems from single-member districts fell under Section 5.⁷⁸ In fact, Chief Justice Warren’s majority opinion held that Section 5 applied to changes in voting procedures even if, facially, there was no direct connection to voter registration or voting itself.⁷⁹ The Court recognized that the practice of vote dilution often involved machinations and mechanisms that were not, on their face, explicitly racial.⁸⁰ Warren was specifically thinking about matters such as annexations that, on their face, looked race-neutral but had real racial implications.⁸¹

The Supreme Court struggled to meet the challenges of vote dilution but it eventually met these demands by first relying on an equality of results standard and, ultimately, what became known as the totality of circumstances test.⁸² Richard Nixon appointed Chief Justice Warren Burger to the Court in 1969 to curtail the judicial permissiveness that characterized

⁷⁴ *See id.* at 569.

⁷⁵ *Id.* at 547.

⁷⁶ *Id.* at 550.

⁷⁷ *See id.* at 547–97 (discussing the growing issue of not merely resistance to the VRA but vote dilution). *Allen* extended the federal government and people’s capacity to seek preclearance in issues of vote dilution. *Id.*

⁷⁸ *Id.* at 565–66.

⁷⁹ *Allen*, 393 U.S. at 548.

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (regarding the equality of results standard and disparate impact analysis). The Court held that even if there was no discriminatory intent, employers cannot use job requirements that functionally discriminate against a certain race, especially if it has no relation to measuring performance because said requirements might have disparate impacts on minorities. *Id.* at 429–30, 432.

Earl Warren's Court.⁸³ In terms of voting rights, however, the Burger Court staged no counter-revolution to *Allen*.⁸⁴ In *Griggs v. Duke Power Company*, it held that race-neutral policies might disparately impact minorities because of a historical record of discrimination.⁸⁵ The Court eventually applied this analysis to voting rights—the Court held, 8–1, in *Perkins v. Matthews* that ostensibly race-neutral procedural changes (e.g., annexations, at-large elections, and redistricting) not only fell under Section 5 of the VRA, but these electoral changes might dilute the power that voters had prior to the changes in question.⁸⁶ Southerners, the Court found, often used multiple mechanisms to cancel minorities' votes once they had been cast.⁸⁷ Over the course of the 1970s, it found that a presence of factors made it less likely for minorities to elect candidates of their choice.⁸⁸ The solution? In cases where a “totality of circumstances” influenced electoral outcomes, federal courts resolved to mandate majority-minority districts that allowed minority voters to elect candidates free from White interference.⁸⁹ In time,

⁸³ THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 3 (Bernard Schwartz ed., 1998).

⁸⁴ *Contra id.*

⁸⁵ HAYTER, *supra* note 2, at 134–35.

⁸⁶ *Id.* at 135–36.

⁸⁷ *Id.* at 136.

⁸⁸ See, e.g., *White v. Regester*, 412 U.S. 755, 765 (1973) (holding that multimember districts are not unconstitutional per se but they may be when used maliciously in combination with other factors that dilute votes); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (holding that local jurisdictions often used several factors to prevent minority votes from influencing elections—vote dilution can be established upon proof of the existence of aggregate factors). More specifically, the totality of circumstances test relied on four primary and four enhancing factors. The four primary factors were characterized by instances that demonstrated a lack of access to the slating process, unresponsive legislators to the needs of minorities, state policies that maintained at-large systems, and a legacy of discrimination that prohibited minority participation in the political process. The enhancing factors were at-large election districts, majority-vote requirements, a lack of residency districts, and anti-single-shot voting provisions. For more on the establishment of majority-minority districts, see HAYTER, *supra* note 2, at 143–44. See generally J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999) (arguing that gerrymandering after 1965 is often deeply color-conscious and does so by outlining litigation post-1965).

⁸⁹ HAYTER, *supra* note 2, at 142–44.

Washington mandated that dozens of jurisdictions implement these districts, including the capital of the Commonwealth: Richmond, Virginia.⁹⁰

Legal resistance to minority voting rights continued throughout the twilight of the twentieth century.⁹¹ As African-Americans continued to vote in record numbers and elect candidates in local, state, and federal elections, Southerners and their allies devised litigation strategies to prohibit majority-minority districts and, eventually, key provisions of the VRA itself.⁹² They eventually found allies on the High Court: namely, William Rehnquist's Court, but in time, John Roberts's Court as well.⁹³ During the late 1970s, African-American residents in Mobile, Alabama, held that elected city-commissioners at-large diluted the strength of Black votes.⁹⁴ The Court ruled in *Mobile v. Bolden* (1980) that the Fifteenth Amendment did not protect minorities' rights to electoral outcomes and that at-large elections only violated the Fourteenth Amendment if they were "conceived or operated as a purposeful device to further racial discrimination."⁹⁵ Thirteen years later, in *Shaw v. Reno*, the Court determined it was possible that a North Carolina reapportionment plan was ostensibly race-neutral but district lines were so tortuous that it divided voters based on race, thus violating the Fourteenth Amendment's Equal Protection Clause.⁹⁶ Yet, in lieu of ruling in favor of the plaintiffs, the Court (5–4) remanded the case to a lower district court to decide the plan's fate.⁹⁷

Leading voting rights scholars hold that anti-VRA sentiment (namely, antipathy to Section 5 of the VRA and majority-minority districts) culminated in *Shelby*.⁹⁸ *Shelby* considered the legality of the triggering

⁹⁰ *Id.* at 111–50 (describing the Burger Court's growing preference for majority-minority districts as a response to vote dilution).

⁹¹ See generally KOUSSER, *supra* note 88.

⁹² RHODES, *supra* note 5 (describing the growth of anti-VRA litigation and the reorganization of the Justice Department and Supreme Court by the Republican Party after 1965).

⁹³ *Id.* at 90–93.

⁹⁴ *Id.* at 91.

⁹⁵ *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980); see also HAYTER, *supra* note 2, at 292–93.

⁹⁶ *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

⁹⁷ *Id.* at 630, 658.

⁹⁸ See, e.g., KOUSSER, *supra* note 88 (arguing that gerrymandering after 1965 is often deeply color-conscious and does so by outlining litigation post-1965); RHODES, *supra* note 5

mechanism in Section 4 and if that provision exceeded Congressional authority under the Fourteenth Amendment, Tenth Amendment, and Article IV of the Constitution.⁹⁹ The answer? The provision exceeded Congressional authority, 5–4.¹⁰⁰ More specifically, the Court held that the triggering mechanism in Section 4 no longer applies to covered jurisdictions.¹⁰¹ Even more specifically, the Court concluded that while these rules made sense in the 1960s and 1970s, the number of African-American voters and elected officials essentially render the VRA's supervisory mechanism obsolete for covered jurisdictions.¹⁰² Indeed, recent failures to update the VRA's triggering formula made *Shelby* more likely.¹⁰³ In fact, voting rights advocates themselves struggled to legally connect segregation-era disenfranchisement to the continuing need for preclearance and regional scrutiny.¹⁰⁴ Yet, in the end, in stripping Section 4 of the VRA, the Court essentially ended direct preclearance (Section 5) over state and local elections.¹⁰⁵ The Court is currently considering a case, *Merrill v. Milligan*, that could gut the VRA further.¹⁰⁶ This case questions whether Alabama—a state where African-Americans make up approximately one-quarter of the population, yet have only one majority-black voting district¹⁰⁷—should consider race in drawing district boundaries altogether.¹⁰⁸

(describing the growth of anti-VRA litigation and the reorganization of the Justice Department and Supreme Court by the Republican Party after 1965); VALELLY, *supra* note 11 (describing the resistance to the VRA immediately after 1965).

⁹⁹ *Shelby County v. Holder*, 570 US 529 (2013).

¹⁰⁰ *Id.* at 532.

¹⁰¹ *Id.* at 557.

¹⁰² *Id.* at 551.

¹⁰³ BULLOCK ET AL., *supra* note 8, at 96–150 (outlining the ratification of the VRA, subsequent litigation strengthening the act, and the eventual gutting of Section 4 of the VRA).

¹⁰⁴ *Id.*

¹⁰⁵ See *Shelby County v. Holder*, 570 U.S. 529, 534–35, 556–57 (2013) (ruling that the formula under Section 4(b) of the VRA is unconstitutional).

¹⁰⁶ *Allen v. Milligan*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/merrill-v-milligan-2/> (last visited Feb. 28, 2023).

¹⁰⁷ Pete Williams, *Supreme Court Allows Alabama Voting Maps That Advocates Say Disenfranchise Black Voters*, NBC NEWS (Feb. 8, 2022, 12:48 PM), <https://www.nbcnews.com>

III. THE PATH FORWARD?

In coming to terms with the legacy of the VRA and the sustained resistance to it, history matters. For roughly ten years after the VRA's ratification, Congress, the Court, and the Department of Justice struggled to meet the challenges of vote dilution—or, more bluntly, the anti-democratic machinations that have so often characterized Southern politics.¹⁰⁹ In time, the continuity of backlash shaped the Warren and Burger Courts' defenses of minority voting rights.¹¹⁰ By the late twentieth and early twenty-first centuries, momentum for minority voting rights had significantly declined.¹¹¹ If the story of the VRA tells us anything, it is that backlash and minority political participation can exist simultaneously.¹¹²

In terms of political participation, the United States is arguably more democratic now than it has ever been.¹¹³ In many ways, the widening of the franchise represents nothing short of democratic progress.¹¹⁴ But progress and retrogression can exist at the same time.¹¹⁵ In fact, the record demonstrates that American political development resembles a pendulum

/politics/supreme-court/supreme-court-allows-alabama-voting-maps-advocates-say-disenfranchise-rcna15162.

¹⁰⁸ See Jeff Neal, *Supreme Court Preview: Merrill v. Milligan*, HARV. L. TODAY (Sept. 23, 2022), <https://hls.harvard.edu/today/supreme-court-preview-merrill-v-milligan/>.

¹⁰⁹ See U.S. COMM'N ON C.R., *supra* note 50 (outlining resistance to the VRA in the years immediately following 1965).

¹¹⁰ HAYTER, *supra* note 2, at 132–50 (outlining the Court's growing preference for majority–minority districts in response to vote dilution).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Elaine Kamarck, *Voter Suppression or Voter Expansion? What's Happening and Does It Matter?*, BROOKINGS (Oct. 26, 2021), <https://www.brookings.edu/blog/fixgov/2021/10/26/voter-suppression-or-voter-expansion-whats-happening-and-does-it-matter/> (describing instances of contemporary voter suppression and how it influences electoral outcomes).

¹¹⁴ See VALELLY, *supra* note 11 (describing resistance to the VRA and how it exists on a longer trajectory of disenfranchisement following Reconstruction).

¹¹⁵ HAYTER, *supra* note 2 (discussing the history of the VRA in Richmond, Virginia, and the South largely).

rather than a linear arc.¹¹⁶ Moments of political permissiveness are often followed by eras of political restrictions.¹¹⁷ There is, to this day, no federally guaranteed right to vote in the Constitution.¹¹⁸ Voting is also not guaranteed in the Bill of Rights.¹¹⁹ Not even the VRA guarantees the right to vote as a constitutional privilege.¹²⁰ But for those who have won the right to vote, history demonstrates that the right needs protection.¹²¹ From unpropertied White men before the mid-nineteenth century to women and racial minorities, the right to vote has been hard-fought.¹²² The history of American disenfranchisement is older than our storied, yet often mythologized, history of open democracy.

¹¹⁶ See Wang, *supra* note 14, at xv–xvi. See generally RACE AND AMERICAN POLITICAL DEVELOPMENT, *supra* note 14 (discussing the inextricable relationship between race and American political development).

¹¹⁷ See WANG, *supra* note 14 (discussing how American political development ebbs and flows between greater access and more restrictions).

¹¹⁸ See Jonathan Soros, *The Missing Right: A Constitutional Right to Vote*, 28 DEMOCRACY: J. IDEAS (2023), <https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote/> (describing why there is no constitutional right to vote and how this has developed over time).

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See generally sources cited *supra* note 11.

¹²² See generally sources cited *supra* note 11.