

The Battle at the Ballot: Voting Rights Act Today A Talk with Samuel Issacharoff

I. Historical Context of Voting Rights Act (VRA)

- A. Jim Crow era
 - 1. Ratified in 1870, the 15th Amendment guarantees that 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.”
 - 2. Nonetheless, in the post-Civil War era, many states employed measures to prevent blacks from voting.
 - 3. Some Southern states amended their constitutions to institute facially neutral laws that disproportionately disenfranchised black voters.
 - 4. Jim Crow laws included poll taxes and literacy tests designed to keep blacks from voting.
- B. Historical context of VRA
 - 1. President Johnson signed the Voting Rights Act into law on August 6, 1965.
 - 2. The VRA reaffirms the 15th Amendment's guarantee that no person in the U.S. shall be denied the right to vote on account of race or color.
 - 3. It imposes more stringent requirements in places with a history of severe vote suppression.

II. VRA Key Provisions and Cases

- A. Section 2¹
 - 1. Section 2 of the VRA prohibits voting practices or procedures that discriminate on the basis of race, color, or certain language minority status. Voting practices include redistricting and voting restrictions.
 - 2. Section 2 applies a nationwide prohibition against the denial or abridgment of the right to vote on literary tests on a nationwide basis.
- B. Section 4²
 - 1. Section 4(a) provided a coverage formula to determine which states and local governments fell under Section 5 of the Act. These places were required to put in place more stringent remedies if appropriate.
 - a. The coverage formula first asks whether on November 1, 1964, the jurisdiction maintained a practice that restricted the opportunity to register and vote. At the time, the following states were covered under Section 5: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.
 - i. In 1970, Congress amended the date to November 1968 and renewed the special provision for another 5 years.

¹52 U.S.C. § 10301 – Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation:

<https://www.law.cornell.edu/uscode/text/52/10301>

² 52 U.S.C. § 10303 – Suspension of the use of tests or devices in determining eligibility to vote:

<https://www.law.cornell.edu/uscode/text/52/10303>

- ii. Since then, Congress has renewed the special provision several times, the last time in 2006 for 25 years.
 - b. The formula determines whether the jurisdiction had less than 50% of voting age people registered to vote on November 1, 1964.
 - 2. Section 4 also provides bailout from coverage as a way to remedy possible over-inclusiveness.
 - a. A 1984 amendment provides an objective measure to determine bailouts. The jurisdiction must show, among other things, that in the last 10 years no test or device has been used within the jurisdiction for the purpose of voting discrimination; all voting practice changes were reviewed under Section 5; no adverse judgments in suits alleging voting discrimination; and no violation of Constitutional, federal, state, or local laws with regard to voting discrimination.
 - 3. The Attorney General or the D.C. District Court must review, under Section 5, any change made by a covered area affecting voting.
- C. Section 5³
- 1. Section 5 requires that certain covered jurisdictions obtain preclearance by the D.C. District Court or the Attorney General before any changes to its voting practices can be made. This requires proof that the proposed change does not abridge the right to vote on account of race, color, or membership in a language minority group.
 - 2. The Attorney General can also designate jurisdictions covered by these special provisions for the appointment of a federal examiner to review the qualifications of persons who wanted to register to vote. The Attorney General can request that federal observers monitor activities within the county's polling place.
 - 3. Section 5 targets states with a history of discriminating against minorities.
- D. Subsequent amendments
- 1. In 1970, Section 5 was extended for 5 years. In 1975 it was extended for 7 years.
 - 2. In 1982, Congress renewed the special provisions of the act, triggered by coverage under Section 4 for 25 years.
 - 3. Congress also adopted a new standard, in effect in 1985, providing how jurisdictions could end coverage under Section 4 provisions.
 - 4. Congress amended Section 2 to provide that a plaintiff could establish a violation of the Section without having to prove discriminatory purpose.
 - 5. In 2006, Congress renewed the special provisions of the Act and eliminated the provision for voting examiners.
- E. *South Carolina v. Katzenbach* (1966)⁴
- 1. VRA prevented states from using a "test or device" to deny citizens the right to vote.
 - 2. Addressed whether the VRA violated state's rights to implement/control elections.
 - 3. SCOTUS upheld the VRA, stating that Congress had "full remedial powers" to enforce the 15th Amendment and prevent racial discrimination in voting.

³ 52 U.S.C. § 10304 – Alteration of voting qualification; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates:

<http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section10304&num=0&edition=prelim>

⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)

4. SCOTUS said that the VRA was a “legitimate” response to the “insidious and pervasive evil” which was occurring when individuals of color were unable to vote.
- F. *Shelby County v. Holder* (2013)⁵
1. Shelby County in Alabama filed suit in district court and sought declaratory judgment that §§ 5 and 4(b) were unconstitutional.
 2. The Supreme Court struck down Section 4 of the VRA.
 3. In a 5-4 decision, the court noted “things have changed dramatically” in the South in the nearly 50 years since the VRA was signed in 1965 and that the formula used to establish preclearance requirements resulting in disparate treatment of the states were no longer justified.

III. Voter Suppression and Voter ID

- A. Purging voter rolls
1. The state secretary purges voter rolls by removing a voter’s name from the rolls if the individual moved out of the jurisdiction, is deceased, or is listed twice.
 2. Purging voter rolls ensures that voter rolls are accurate and up-to-date.
 3. Issues arise when an eligible registered voter is removed from the voter rolls and as a consequence is unable to vote. Purging rolls prior to an election requires erroneously removed individuals to re-register on the eve of an election.
- B. Voter ID laws
1. Voter ID laws require prospective voters to show an accepted form of ID before casting a ballot.
 2. Many opponents of Voter ID laws call it a form of voter suppression and argue that it decreases voter turnout.
 3. Proponents argue that Voter ID laws are necessary to minimize voter fraud and protect the integrity of election. They argue that there is no established correlation between Voter ID laws and voter suppression and that the people most likely to be affected by Voter ID laws generally do not vote, so it is difficult to actually assess the effect Voter ID laws have on these small segments of the population.
- C. *Crawford v. Marion County Election Board* (2008)⁶
1. In 2005, the Indiana Legislature passed a law requiring all voters who cast a ballot in person to present a state photo ID or a form of ID issued by the federal government.
 2. The issue is whether a law that requires voters to present either a state or federal photo identification unduly burdens citizens' right to vote.
 3. In a 6-3 decision, the Supreme Court upheld Indiana’s Voter ID law. The Court ruled that the photo ID requirement was closely related to Indiana's legitimate state interests in preventing voter fraud.
- D. *Applewhite v. Commonwealth* (2014)⁷

⁵ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)

⁶ *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)

⁷ *Applewhite v. Commonwealth* (Pa. Cmwlth. January 17, 2014):
<http://moritzlaw.osu.edu/electionlaw/litigation/documents/1-17-14opinion.pdf>

1. Pennsylvania enacted a Voter ID law that required a voter to present a valid photo ID with an expiration date, such as a driver's license, state-issued photo ID, passport, military ID, or the like, which was at the time considered one of the most restrictive Voter ID laws. The ACLU filed suit alleging that the law would disenfranchise pockets of the population.
 2. A Pennsylvania Commonwealth Court judge struck down the law, finding that it unduly burdened the right to vote.
- E. *Bush v. Gore* (2000)⁸
1. In the 2000 presidential election, Florida Supreme Court ordered, among other things, a statewide manual recount of all ballots which did not indicate a vote for president. Governor Bush sought an emergency petition for a stay of the Florida Supreme Court's decision.
 2. In a per curiam decision, the Supreme Court ruled that the Florida Court's recount system was unconstitutional in this present case because the record indicated that different standards applied in different counties.
- F. In *Obama for America v. Husted* (2012)⁹
1. Ohio law established a 6pm Friday deadline for in-person early voting for non-Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) voters, eliminating the final three days before Election Day from the voting calendar. Plaintiffs filed suit alleging that imposing different early voting deadlines for UOCAVA and non-UOCAVA voters is violative of the Equal Protection Clause of the 14th Amendment.
 2. The District Court judge granted the plaintiffs motion of summary judgment and issued a permanent injunction. The Court found unconvincing Ohio's stated interest in establishing the deadline and that the deadline greatly burdened Ohio voters' rights.

IV. Reforms and Technological Advancements

- A. Reforms
1. A massive nationwide overhaul in voting processes is long overdue and slow to come because voting practices in the U.S. varies by jurisdiction.
- B. Help America Vote Act (HAVA) of 2002¹⁰
1. HAVA created a new federal agency to serve as a clearinghouse for election administration information, provided funds to states to improve election

⁸ *Bush v. Gore*, Oyez, <https://www.oyez.org/cases/2000/00-949>

⁹ *Obama for America v. Husted*, Case No. 2:12-cv-636 (S.D. Ohio) (June 11, 2014):

https://scholar.google.com/scholar_case?case=16553178842714536207&hl=en&as_sdt=6&as_vis=1&oi=scholar

¹⁰ "Help America Vote Act of 2002, HAVA | The U.S. Election Assistance Commission (EAC)." *Help America Vote Act of 2002, HAVA | The U.S. Election Assistance Commission (EAC)*. N.p., n.d. Web. 08 Apr. 2016.

- administration and replace outdated voting systems, and created minimum standards for states to follow in several key areas of election administration.
2. HAVA provided a simple, one-time technological solution with a 10-year lifespan.
- C. Technological improvements in voting
1. Some states have begun allow voter registration online, and others have begun to digitize their paper records and link them to specific voter files.
 2. There's a slow move away from punch cards, lever machines, and paper ballots towards optical scan systems and electronic systems with voter verification.