The Center on Race, Law and Justice presents

Book Talk with Gilda R. Daniels, Author of Uncounted: The Crisis of Voter Suppression in America

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Uncounted: The Crisis of Voter Suppression in the United States Excerpt
GILDA R. DANIELS

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She is also the Director of Litigation for Advancement Project’s National Office, which is a multi-racial civil rights organization. She supervises attorneys in four program areas: Power & Democracy (voting rights), Opportunity to Learn (education), Justice (policing and criminalization) and Immigrant Justice (immigration). She has drafted and participated in amicus briefs filed in the United States Supreme Court, frequently consults on voting rights issues, and is well published. Her scholarship focuses on the intersections of race law and democracy. Her law review articles have appeared in *Cardozo Law Review, Indiana University Law Review (Indianapolis), Denver Law Review, New York University Journal of Legislation and Public Policy*. Her writings have also been published in the *Huffington Post* and various other publications. She has been quoted in the *Washington Post* and interviewed for NPR’s *All things Considered*.

She is a sought after consultant and expert, as well as, a frequent contributor for media and conference panels. She lectures on voting issues on university campuses and various organizations ranging from the National Association for the Advancement of Colored People (NAACP), the American Constitution Society to her local church. Prior to beginning her voting rights career, Daniels was a staff attorney with the Southern Center for Human Rights representing death row inmates and bringing prison condition cases in Georgia and Alabama. She clerked in the United States Circuit Court of Appeals, Eleventh Circuit with the Honorable Joseph W. Hatchett. She is a graduate of New York University School of Law, where she was a Root Tilden Scholar, and Grambling State University. She has a website, [www.gildadaniels.com](http://www.gildadaniels.com) that promotes her scholarship and voter education.
Uncounted

The Crisis of Voter Suppression in the United States

Gilda R. Daniels
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History Repeats Itself

[All types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right is a tragic betrayal of the highest mandates of our democratic traditions and it is democracy turned upside down.
—Dr. Martin Luther King Jr.

In 1957, Dr. Martin Luther King Jr. used the term “conniving” in his “Give Us the Ballot” speech at the first March on Washington. While he referenced the Brown v. Board of Education\(^1\) Supreme Court decision, Dr. King especially stressed the need to ensure access to the right to vote.\(^2\) He argued that nondiscriminatory access to the ballot would alleviate the need “to worry the federal government about our basic rights.”\(^3\)

After all, if we could freely exercise the right to vote, then we could decide for ourselves how best to govern our communities. Almost a century later, the struggle for free and fair access to the ballot continues.

New-millennium methods, such as restrictive voter identification laws and voter purges, have the impact of hindering voters of color, the elderly, the disabled, and others from freely participating in the democratic process. Moreover, changing demographics—that is, the exponential growth of the Latinx and Asian American communities—create new challenges to the white-black binary and have spawned an expanded approach to disenfranchisement with proof of citizenship and punitive immigration laws. Indeed, the conniving methods of the twentieth century that Dr. King cautioned against continue to plague the voting process in the twenty-first century. As such, it is important to recognize the significance of history as it relates to the continuing and constant efforts to disenfranchise voters of color.
Efforts to suppress turnout among voters of color have been longstanding and persistent. Scholars can link these suppressive attitudes not only to the twentieth century and the effort to obtain the vote but to the nineteenth century and slavery’s impact on political sentiments in the South today. In a 2016 report, entitled *The Political Legacy of American Slavery*, scholars found a correlation between jurisdictions in the South that had extensive slavery in the 1800s and modern-day political attitudes towards African Americans. They were able to show that the local prevalence of slavery—an institution that was abolished 150 years ago—has a detectable effect on present-day political attitudes in the American South. Drawing on a sample of more than 40,000 Southern whites and historical census records, we show that whites who currently live in counties that had high concentrations of slaves in 1860 are today on average more conservative and express colder feelings toward African Americans than whites who live elsewhere in the South. That is, the larger the number of slaves per capita in his or her county of residence in 1860, the greater the probability that a white Southerner today will identify as a Republican, oppose affirmative action, and express attitudes indicating some level of “racial resentment.”

The efforts to enslave and depress the votes of people of color in the 1800s, 1900s, and 2000s have a strand that connects through the centuries; a consistency of geography and political party. The controlling parties worked incessantly to minimize the power of the democratic process in communities of color. In Dr. King’s speech,” he considered the efficacy of both predominant political parties, saying, “The Democrats have betrayed it by capitulating to the prejudices and undemocratic practices of the southern Dixiecrats. The Republicans have betrayed it by capitulating to the blatant hypocrisy of right wing, reactionary northerners. These men so often have a high blood pressure of words and an anemia of deeds.” Whether Democrat or Republican, keeping the black vote down was a central theme in Dr. King’s day and continues to strike a chord in the United States’ disenfranchisement soundtrack today. Dr. King’s vision and the stark revelation of the report agree that the disenfranchisement of people of color has historical relevance and contemporaneous consequences. When we look back to move forward, we can identify the cycles of voter suppression and develop methods to avoid the disenfranchising methods of the past to enjoy a true democratic existence in the future.

**That Was Then, This Is Now**

In this new millennium, Republicans have led the wave of suppressive voting and registration measures. Shortly after the 2000 presidential election and the calamitous concerns that it revealed, Republicans developed a contemporaneous conniving method—restrictive voter identification—in an effort to address what it felt was enemy number one: voter fraud. Yet it sought to address fraud using highly restrictive voter ID requirements primarily. Although restrictive voter ID does not address in-person voter fraud, jurisdictions across the country followed Indiana and Georgia in establishing such restrictions, along with other barriers to the ballot box, such as proof-of-citizenship laws and felon disenfranchisement. Today’s voter challenges are not unlike the 1960s courthouse-door challenges of Bull Connor. This century’s assault on voter registration is similar to registrars’ tactics of former days that established impenetrable demands meant to lock out voters of color from the electoral process.

An instance when historical methods met contemporaneous effects can be seen in one plaintiff’s plight in Pennsylvania. In 2011, the state of Pennsylvania passed legislation that required restrictive voter ID. After marching with Dr. Martin Luther King Jr. to obtain the right to vote, ninety-two-year-old Vivette Applewhite found that the new law required her to obtain a birth certificate to vote. Because of this new law, she was forced to fight the battle again to secure her right to vote. The complaint in *Applewhite v. Commonwealth of Pennsylvania* reads as follows:
Petitioner Vivette Applewhite, a registered voter in Pennsylvania, was a 92-year-old African-American woman born in 1919 in Philadelphia. A graduate of Germantown High School, Ms. Applewhite worked as a welder during World War II in the Sun Shipyard in Chester, Pennsylvania. She thereafter worked in hotels in Chicago and Philadelphia. Ms. Applewhite married and raised a daughter who for decades worked for various federal, Pennsylvania, and municipal government agencies. Now a widow, Ms. Applewhite has lived in Philadelphia for much of her life, including the past twenty years, and enjoys five grandchildren, nine great-grandchildren, and four great-great-grandchildren.

Voting is essential to Ms. Applewhite, and she has voted in nearly every election since at least 1960. Ms. Applewhite marched to support civil rights for African-Americans with Dr. Martin Luther King, Jr. in Macon, Georgia and traveled on several occasions to hear him preach in Atlanta’s Ebenezer Baptist Church.

Ms. Applewhite has never driven a car and thus has never had a driver’s license. Many years ago, her purse, in which she carried her important documents, was stolen. She has attempted on at least three occasions to order a birth certificate from Pennsylvania’s Division of Vital Records. Despite paying the fee to obtain a birth certificate, she has never received one. She recently engaged a lawyer, who is trying yet again to get her birth certificate from the Commonwealth of Pennsylvania.9

Mrs. Applewhite is a prime example of how conniving methods of the past converge with new-millennium disenfranchisement. We must confront the fact that although she marched with Dr. King to achieve voting rights in the twentieth century, it was in the twenty-first century that Mrs. Applewhite’s ability to participate in the electoral process was threatened by potentially disenfranchising methods. Imagine the frustration of voters who, like Mrs. Applewhite, lived through the insidious methods of the past, only to meet the new disqualifying methods that are leaner, more covert, but just as effective. Real people, such as my ninety-eight-year-old grandmother, live in this reality.

My grandmother was in her forties when she voted for the very first time. She recalls that she cast her first ballot in the 1960s, probably after the passage of the Voting Rights Act of 1965—not because she didn’t want to vote or perform her civic duty but because, as she says, “black people didn’t vote.” She was born in 1919 in Natchitoches parish, Louisiana, in an area known as “Cane River.” While not as famous as the Mississippi River, Cane River communities are rich in culture and history. My grandmother was born there, was baptized there, was married there, and worked there, and in 2019 we buried her there.

The plantation where her grandparents were slaves is now a national historic site where, when I visited years ago, the tour guides talked more about the architecture than the lives of the people (like my great-great grandparents) who toiled in the hot southern sun in the fields. MaDear (short for “Mother Dear”) grew up not far from that plantation and received the equivalent of an eighth-grade education. She married my grandfather and sharecropped in the parish until they realized that it would only lead to permanent servitude, because when they did well, they were lucky to break even. Throughout her adult life, she toiled as a sharecropper’s wife, a mother, and a domestic. Through all of this, my MaDear still believes in the United States and the right to vote. In fear, discouragement, and victory, she has seen how the opportunity to participate in the electoral process has allowed for victories in many other areas, such as removing the signs that served as clear demarcations of oppression, gaining access to buildings, water fountains, schools, and so on where, at one point in her productive life, access was denied.

In 1957, when Dr. King gave his “Give Us the Ballot” speech, my grandmother was nearly forty years old and had never cast a ballot due to her race and the many impediments in Louisiana that prevented her and other blacks from voting. In 2018, for health reasons, she moved to Kansas to live with my aunt. MaDear does not have a birth certificate in a state that is fighting to make it harder to vote through the passage of proof of citizenship laws.10 Without a birth certificate, she cannot prove citizenship. She does not have a passport or other citizenship certifica-
tion. Thus, in this new millennium, her right to vote could be jeopardized. It is through her almost one hundred years of living that we can chronicle the cyclical route to obtain the right to vote and note the critical stage in which our country currently finds itself embroiled.

The Cycles Begin: Free at Last

It is for us, the living, rather, to be dedicated here to the unfinished work... that this nation, under God, shall have a new birth of freedom—and that, a government of the people, by the people, for the people, shall not perish from the earth.

—President Abraham Lincoln, Gettysburg Address (1863)

The cycle of voter access and denial has served as an integral part of our country’s history from the Founding Fathers to the election of Barack Obama as president of the United States and beyond. Indeed, we can pinpoint as a pivotal part of this cyclical history the passage of the Civil War Amendments in the mid-1860s. In 1863, President Abraham Lincoln’s Gettysburg Address admonished listeners that dedicating the cemetery in Gettysburg was not enough to “consecrate” or commemorate the sacrifices that were made to secure the American ideal of one country under God, indivisible. In the midst of a war dividing the country, President Lincoln proclaimed that the ceremony to honor fallen soldiers and declare the land in Gettysburg hallowed would not serve as a sufficient action to complete the business that the soldiers set out to finish, that is, arguably, unifying the country. Neither the ceremony nor the president’s eloquent address ended the war. It continued, as did the efforts to emancipate enslaved people and solidify the Union. In an effort to unify the divided states of America, President Lincoln fought to pass the Thirteenth Amendment to the United States Constitution. After his death, the Fourteenth and Fifteenth Amendments, certainly symbols of his unfinished work, provided equal protection under the law and gave former slaves the right to vote.

After the passage of the Civil War Amendments, African Americans who were once slaves met their newfound freedom with an enthusiastic effort to participate in the voting process. They enjoyed electoral success and won seats in local, state, and federal elections in numbers that, in some respects, this nation has yet to see replicated. For example, until 1863 in Louisiana, where my great-great-grandparents lived on Cane River, the ability to register and vote was legally limited to white males. Once the state constitution was brought into alignment with the Fifteenth Amendment and former slaves were permitted to vote, Louisiana’s African American citizens accounted for almost 45 percent of its registered voters. Between 1870 and 1876 in the South, despite having a majority of black residents, only Mississippi elected two African American United States senators and one member of the House of Representatives. Most southern states, notwithstanding their high African American populations, elected only one African American to federal office. South Carolina was the lone exception with its African American representatives in the majority. The House of Representatives, as well as state and local elected officials, began to thrive once the freedom to vote through the Emancipation Amendments became effective. Although the federal amendments intended to provide security to the former slaves and especially their ability to participate in the franchise, it was not very long before disenfranchising efforts were effectively eliminating these historic political advances.

After the passage of the Fourteenth and Fifteenth Amendments and the end of the Civil War, former slaves got a taste of emancipation. The taste, however, was rather brief. President Lincoln’s successor, Andrew Johnson, vetoed the Civil Rights Act of 1866 that declared that “citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and
equal benefit of all laws and proceedings for the security of person and
property, as is enjoyed by white citizens.”17 Although Congress over-
rode President Johnson’s veto, the fight for racial equality had only
just begun and the assault on equal rights, particularly in voting, com-
menced. President Johnson’s veto embodied the sentiment that enough
progress had occurred regarding complete emancipation. Indeed, his
actions helped to invigorate efforts to destroy the promise of the Civil
War Amendments.

Free at Last, Not So Fast

While President Johnson was vetoing the 1866 Civil Rights Act, groups
on the state and local levels were developing a strategy to end the mirac-
ulous electoral progress that African Americans enjoyed by establishing
codes of conduct for the newly enfranchised citizens, known as the
“Black Codes.”18 Some firsthand accounts employed pleas for federal
intervention to allow African Americans an equal opportunity to par-
ticipate in the electoral process:

Calhoun, Georgia, August 25, 1867

General:
We the Colored people of the town of Calhoun and County of Gordon
desire to call your attention to the State of Affairs that now exist in our
midst.

On the 16th day of the month, the Union Republican Party held a
Meeting which the Colored people of the County attended en masse.
Since that time we seem to have the particular hatred and spite of that
class who were opposed to the principles set forth in that meeting . . . .

There has been houses broken open, windows smashed and doors
broken down in the dead hours of the night, men rushing in, curs-
ing and swearing and discharging their Pistols inside the house.

Men have been knocked down and unmercifully beaten, and yet the
authorities do not notice it at all. We would open a school here but
are almost afraid to do so, not knowing that we have any protection
for life or limb.

We wish to do right, obey the Laws and live in peace and quietude
but when we are assailed at the midnight hour, our lives threatened
and the Laws fail to protect or assist us we can but defend ourselves,
let the consequences be what they may. Yet we wish to avoid all such
collisions.

We would respectfully ask that a few soldiers be sent here, believing
it is the only way we can live in peace until after the Elections this fall.
[Twenty-four signatures]19

Only two years after Congress abolished slavery through the Thirteenth
Amendment, African Americans faced threats and violence when try-
ing to live true to the tenets of the United States Constitution and were
severely in need of federal protections.20 Additionally, freedmen were
met with poll taxes, literacy tests, grandfather clauses, and secret ballots
as mechanisms to thwart the act of voting.

During this time, I can imagine that my great-great-grandparents
were caught in quite a quagmire: excited about emancipation and con-
fused about whether equality was genuinely achievable. My grand-
mother remembers her grandparents talking about life as slaves on the
Oakland Plantation and, afterward, recalling only that “life was hard.”
African Americans were experiencing the pain and horror of discrimi-
nation and disenfranchisement. The United States Supreme Court par-
ticipated in eviscerating the African American vote when it used its
power to remove the semblance of order and protection that the pres-
ence of federal troops brought to the hearts and minds of those who
were once enslaved. In less than twenty years, the protective measures
that Congress passed to remedy the dark days and inequities of slav-
ery through the Civil War Amendments and other means were whittled
away and rendered impotent to stop the flood of state laws that prevented former slaves from exercising the franchise.

In 1883, the Supreme Court found the Civil Rights Act of 1875 unconstitutional in the Civil Rights Cases seeking equality in public accommodations. The Court held that the Fourteenth and Fifteenth Amendments did not apply to private individuals and organizations, greatly assisting state and local governments in establishing disenfranchising laws. In 1898, Louisiana legislators adopted the Grandfather Clause, which limited voting to those persons whose fathers or grandfathers were registered voters before January 1867, that is, before the passage of the Fifteenth Amendment. While my great-great-grandfather may well have voted during the twenty years after the Fifteenth Amendment, that experience came to a screeching halt, and it was only just the beginning of the many tactics that southerners would use to make sure that African Americans did not vote. The emancipation business would remain unfinished for almost a century.

Twentieth-Century Jim Crow

At the turn of the twentieth century, without federal protection to complete the unfinished work, southern segregationists sharpened the tools of voter suppression. In 1897, the last African American Reconstruction-era congressman from the South was elected, and he left Congress in 1901. At the dawn of the twentieth century, segregationists employed the country's most violent measures to ensure white political supremacy. In 1900, Senator “Pitchfork” Ben Tillman of South Carolina, who led that state's push for segregation, stated, “We have done our level best... We have scratched our heads to find out how we could eliminate the last one of them. We stuffed ballot boxes. We shot them... We are not ashamed of it.”

Southern whites, who were outnumbered by former slaves, realized that to allow African Americans to vote would permit the full-scale integration of former slaves into society and could eliminate the ability of whites to control elected bodies. This would provide an opportunity for African Americans to dictate political outcomes, which made segregationists uncomfortable and led to the enactment of various disenfranchising laws.

Segregationists began to “turn back the clock on the broadly progressive franchise provisions that had been etched into state constitutions.” The South enacted measures such as poll taxes, literacy tests, and all-white primaries that would limit the effect of the new and populous electorate. In early 1900s Louisiana, where now my great-grandfather Felix Helaire lived and toiled, the state not only utilized a grandfather clause but also imposed “educational and property qualifications for registration. These requirements combined to reduce black voter registration from approximately 135,000 in 1896 to less than 1,000 in 1907.” Likewise, in 1901, Alabamians adopted a state constitution that included a number of subjugating devices, including poll taxes, literacy tests, and grandfather clauses. These measures enabled drastic reductions in voter registration among newly enfranchised African Americans. In Alabama in 1890, 140,000 black men were registered to vote, but in 1906, only 46 black persons were registered to vote in the state.

The efforts to remove voters of color from the voter rolls were fueled by southern whites' fear of the potential voting power of newly enfranchised citizens. This process morphed into Redemption for the South, a devious strategy that involved violence, intimidation, and death for those former slaves who dared live as freed persons and, God forbid, as equals. Firsthand accounts of this period provide harrowing details of fear, violence, intimidation, and man's inhumanity to man:

From the onset of Redemption, Democrats in the eleven states of the former confederacy aggressively cultivated a culture in which voting Democratic equated race loyalty for whites. As Senator Tillman put it, “We organized the Democratic [P]arty with one plank, and only one plank, namely, that 'this is a white man's country and white men must govern
hundred years after the passage of President Lincoln’s unfinished work and many attempts to complete the promise of the Civil War Amendments, Congress finally realized that a comprehensive response to the brutality and widespread disenfranchisement was warranted.

Despite the passage of the Nineteenth Amendment to the United States Constitution, which gave women the right to vote in 1920, African American women, like my grandmother living in the South, could not register or vote because of their race. While my grandmother was age eligible to vote in 1940, the constant barrage of disenfranchising efforts required her to wait more than twenty additional years before casting her first ballot. In 1940, 3 percent of African American men and women were registered to vote in the South. Around that time in Orleans Parish, Robert Perry attempted to register in the Orleans Parish registrar’s office and was told that he could not register because he was African American. He worked for the Boy Scouts and went to the white supervisor, who told him to put on his Boy Scouts uniform and go back to the registrar. The white supervisor then called the registrar’s office and “vouched” for Mr. Perry. The supervisor told the registrar that he was “sending a negro down there and you are going to register him.” Mr. Perry was allowed to register. However, it would take Herculean efforts to advance the cause of voting equality and make it a reality for him and other African Americans in the South.

Voter registration in Montgomery, Alabama, during the late 1950s was unpredictable and discretionary. Myrtle Pless Jones moved to Montgomery in 1955, after she married an Alabama native, Robert F. Jones. Before relocating to Alabama, Mrs. Jones earned a bachelor’s degree from South Carolina State College and a master’s degree from Michigan State University. As a new resident of Alabama, Myrtle Jones felt it was her civic duty to register to vote. She and her husband were members of the Dexter Avenue Baptist Church. Pastored by Dr. Martin Luther King Jr., Dexter’s congregants were civically and socially engaged and supported Dr. King’s efforts to galvanize blacks to assert their democratic rights and privileges.
Mrs. Jones described her initial voting registration experience as one of intimidation. Alabama imposed a so-called literacy test, which election officials ostensibly designed to ensure that voters were able to read and write. Aware of the stereotypes about African Americans, she dressed professionally to go to the voter registration office. As a stay-at-home mother of two preschool-age daughters, Mrs. Jones did not have to take off work or risk being fired. At that time, Alabama required potential voters to read a passage of the Alabama Constitution out loud. After she read without error, the voting official then verbally asked, “How many bubbles are in a bar of soap?” Her answer, “over 100,” resulted in failing the Alabama voter literacy test that day. The second time she took the literacy test, no oral question was asked, and Myrtle Pless Jones became a registered voter.35

Additionally, my father-in-law, Rufus Daniels,36 graduated from high school in Dozier, Alabama, on the day that the United States Supreme Court announced Brown v. Board of Education.37 He attended segregated schools, like my parents and most African Americans of that era, particularly in the South. After graduating from high school, he studied at the historically black college Alabama State University in 1954. While attending Alabama State, he worshipped at Dexter Avenue Baptist Church, where a young Dr. Martin Luther King Jr. was the pastor, and participated in the Montgomery Bus Boycott. In 1958, he graduated from Alabama State and registered to vote in Montgomery, Alabama. He characterized his registration process as “a part of [his] settling down and becoming a real citizen.”38 He recollected being questioned but did not consider it rigorous. The registration office was downtown near what was colloquially called the “white house of the Confederacy,”39 the state capitol, which was approximately a block from Dexter Avenue Baptist Church. The proximity of these two institutions, one that stood for justice and freedom and the other for the permanence of racism, was not lost on my father-in-law. Dad Daniels recalls that his “registration to vote was between two pillars that were in absolute poles of each other.”40

Voter Suppression Tools

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The disenfranchising mechanism may change in name or have various nuances. However, the impact remains the same, that is, the disenfranchisement of voters of color. These voters are disproportionately impacted when voter suppression schemes are introduced into the electoral process.

Lift Every Vote

In the 1960s, the country was ripe for voting reform legislation and seemingly had reached the boiling point. The violence and discriminatory practices and procedures used to abolish the African American vote were extremely effective. Louisiana was exemplary of the types of measures that segregationists used to ensure that barriers to participation existed. The brutality in the South had received considerable attention; the plight of African Americans regarding public accommodations, freedom of assembly, and voting had seemingly come full circle.

Supreme Court

The landmark Supreme Court case Gomillion v. Lightfoot41 demonstrates the extent to which segregationists would go to disenfranchise African Americans. To yet again thwart democratic advances, the Alabama legislature used the redistricting process to eliminate African Americans from the districts to severely dilute their voting strength. According to
attorney Fred Gray, who represented Dr. Martin Luther King Jr. and the Southern Christian Leadership Conference throughout most of the civil rights movement, Macon County, Alabama, which is the county that includes the city of Tuskegee and the famed Tuskegee Institute, had long served as a site to challenge Jim Crow laws. Dr. C. G. Gomillion helped form the Tuskegee Civic Association, which mounted challenges, among other things, against segregated education, farm subsidies, and jury selection. He also served as lead plaintiff in *Gomillion v. Lightfoot*, which addressed a 1957 redistricting that notoriously changed the shape of the legislative district in Tuskegee, Alabama, from a square to a twenty-eight-sided figure and deliberately carved out all but approximately four black citizens from the predominantly black city.

The Supreme Court case *Gomillion v. Lightfoot* demonstrated the extremes that southern lawmakers who were determined to disenfranchise African American voters would endeavor. An exchange between the Supreme Court justices and attorney Fred Gray helps to illustrate the experiences of African American citizens before the passage of the VRA:

Mr. Fred D. Gray: [A] result of changing all of these boundaries not one white person as well as we've been able to ascertain has been excluded . . . (Inaudible). This action must be considered, we submit, in the light of the racial composition of Macon County and the history of Macon County. For example, Macon—the residence of Negroes in Macon County has had substantial difficulty in getting registered. Approximately, 78% of the persons in Macon County are Negroes, leaving only 18% white. A constitutional amendment to the Alabama Constitution now gives the Legislature the authority to abolish Macon County and divide its territory into the adjoining counties if the need arises. The complaint further alleges that Act 140 is another device in a continuing attempt on the part of the State of Alabama to disenfranchise Negro residents of Macon County of which Tuskegee is the county seat. The complaint further alleges that the admitted purpose of the Act was to assure continued white control of Tuskegee City election. Macon County had no [voter registrar] to qualify applicants for more than 18 months at the time this complaint was filed. And since that time, a registrar has been appointed in Macon County, but only three Negroes has been qualified, which means that over a period of some four years, only three Negroes has been able to become registered voters in Macon County. Justice: Is that at all affected? Is that result influenced by or affected by this redistricting?

Mr. Fred D. Gray: No more, Your Honor, than the few Negroes who still remained in Tuskegee who are not registered will have difficulty getting registered as—is illustrated by the difficulty that they've had over 30 years to get registered.

*Gomillion* helped to shine a spotlight on redistricting and other tactics used to ensure white domination in the electoral process, such as the coordinated and concerted effort not to register black voters through the use of literacy tests and other devices. The courts began to consider issues of racial discrimination in redistricting cases and not shy away from them in the name of politics. Additionally, repeated pleas from enforcement agencies, especially the US Civil Rights Commission and the United States Attorney General, implored Congress for a mechanism that could assist it in the effort to achieve unfettered access to the ballot for African Americans.

Almost ninety years after passage of the Fifteenth Amendment, Congress passed a civil rights bill that included some voting protections, including making voter intimidation a federal crime. Congress passed additional legislation in 1960 and 1964 that included voting rights provisions, but it used a jurisdiction-by-jurisdiction approach that was costly, time-consuming, and ineffective. Notwithstanding congressional intentions and the hard work of Department of Justice (DOJ) officials, the previous acts were admittedly widely ineffective in combating voter discrimination. This vacuum of meaningful voting rights legislation impacted real people like my great-grandfather Felix Helaire, whose pic-
ture is now prominently displayed in a slave-era house on the Oakland Plantation on Cane River in Bermuda, Louisiana. He and other courageous souls sought the ability to live freely and equally in the deep South, despite the dangers that were apparent. In 1963, he joined the National Association for the Advancement of Colored People (NAACP), a brave act, akin to joining the Black Lives Matter movement today. Most African Americans, despite being otherwise eligible, were not permitted to vote. The frustration and efforts of organizations like the Southern Christian Leadership Conference, led by Dr. Martin Luther King Jr., the National Association for the Advancement of Colored People (NAACP), the Congress of Racial Equality (CORE), and Voters’ League Associations, which were popular in Louisiana and other parts of the South, prompted a groundswell of opposition to the disenfranchisement of African Americans.

These organizations and the will of the disenfranchised typified United States Attorney General Nicholas Katzenbach’s petitions to Congress and President Lyndon B. Johnson to grant the DOJ more authority to combat the racial disparities in voter registration and the ghastly means used to intimidate black voters. In addition, while violence continued in the South, civil rights marchers were thwarted in their attempts to begin a march from Selma to Montgomery, Alabama, to bring awareness to the problems associated with the right to vote. In President Johnson’s speech on March 15, 1965, one week after the thwarted Selma march across the Edmund Pettus Bridge, designated as “Bloody Sunday,” he stated,

There is no cause for pride in what has happened in Selma. There is no cause for self-satisfaction in the long denial of equal rights of millions of Americans. . . . But about this there can and should be no argument: every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right. Yet the harsh fact is that in many places these countrymen and women are kept from voting simply because they are Negroes. For the fact is that the only way to pass these barriers is to show a white skin. We have all sworn an oath before God to support and to defend that Constitution. We must now act in obedience to that oath.53

The horrors of Bloody Sunday prompted President Johnson and Congress to give the federal government the tools it needed to combat the cunning methods of the South. One powerful weapon was the Voting Rights Act (VRA), proposed soon after the events in Selma.

In the VRA legislation, Congress wanted to preserve the progress of the past and hopefully “achieve full participation for all Americans in our democracy [that] will continue in the future.”54 President Lyndon B. Johnson declared that the VRA was a “triumph for freedom as huge as any ever won on any battlefield. . . . The act has attacked the shameful blight of voter discrimination.”55

The VRA opened the gates for free and fair access to the polls. The Voting Rights Act of 1965 is considered one of the most important and effective pieces of congressional legislation in United States history.56 It addressed the devious actions that legislators employed against the United States’ “unwanted voters.” The VRA outlawed practices such as literacy tests, empowered federal registrars to register citizens to vote, and gave the attorney general the power to bring extensive litigation instead of the piecemeal approach of the past. Congress gave the attorney general the authority to investigate and prosecute voting discrimination throughout the United States and its territories, conduct administrative review of changes in voting practices and procedures in certain jurisdictions, and monitor elections in various parts of the country. The act prohibits discrimination based on race, color, national origin, or language-minority status. Its impact was extensive, and the ability to provide federal registrars and observers in places like Louisiana, Mississippi, and Alabama helped to eliminate wide gaps between black and white voter registrations.

After enactment of the Voting Rights Act of 1965, much like after the passage of the Civil War Amendments, African American voter regis-
From 1970 to 2000, the number of African American elected officials increased from 1,469 to 9,040.67 One of those persons was my father, who ran for office after the passage of the Voting Rights Act and the parish’s first districting plan. In the mid-1970s, he ran to become a member of the Winn Parish Police Jury and was faced with the opportunity to help govern the parish.68 After winning and becoming the first African American elected to that position, he was met with hostility from his fellow jurors. He recalls “resentment from [white] police jurors”: “They tell you what you thought you could do and couldn’t do… They didn’t mind speaking their minds either, … [saying], ‘We ain’t never had no problems with nothing like that. And you come up here with that stuff.’ And they understood where I stood, and that’s what I went on. And that’s the way it was, and we did that all the way through. People resented me as a police juryman, but that didn’t matter; as long they kept their hands to themselves, everything was fine.”69 He never had any death threats or violence, but there were many nights when I lay in bed awake until he got home after hearing him discuss particularly contentious meetings. I inevitably knew that what he was doing was courageous and that it was not welcome in our segregated town. It is plausible that the resentment that he endured was shared among other newly elected officials of color.

Between 1973 and 2004, Latinx officeholders increased by 279 percent, from 1,280 in six states to 4,853.70 In fact, from my grandmother’s first vote in the 1960s to my father’s election as the first African American member of our parish’s Police Jury took less than twenty years, a feat that would not have been possible without effective voting rights legislation that eliminated barriers to equal participation.

On the federal level, in 1999, African Americans held thirty-seven seats in the United States House of Representatives, constituting 9 percent of the seats in the House. Only one African American governor, however, and two African American United States senators were elected in the twentieth century. At the end of the century, African Americans constituted only 2 percent of elected officials nationwide.71 In the 2005–7
Congress, there were forty-two African Americans in the House of Representatives and one in the Senate.72

Even with this success, elected officials of color still constituted a tiny percentage of total elected officials, as new restrictive devices were being erected. As President Johnson cautioned, merely removing the barriers did not eliminate the need for remedies. President Johnson could have easily referenced the battle of Gettysburg and the unfinished business of the Thirteenth Amendment. Although it took almost a century for such powerful legislation to become law, the Voting Rights Act was passed to remedy the large-scale disenfranchisement of people of color, particularly in the South and Southwest. President Lincoln’s “unfinished business” moniker is appropriately used to refer to the unfinished nature of the Voting Rights Act, which is grounded in the authority of the Fourteenth and Fifteenth Amendments and passed to ensure that the unfinished business of the Civil War was nearing completion. Even with this new progress, like that achieved after the Civil War Amendments, more was needed to nullify continued efforts to disenfranchise voters of color in the next one hundred years.

The Fire This Time

In 2000, my grandmother turned eighty-one years old. After living through Jim Crow laws, school segregation, sharecropping, and the civil rights movement, she witnessed the rapid decline of the electoral process evinced in the first presidential election of the twenty-first century. We all watched as election officials in Florida counted ballots after presidential candidates demanded recounts in a too-close-to-call contentious election. The Florida and United States Supreme Court proceedings and the daily ballot counts changed the way the United States approached the process of electing the president. The aftermath of the presidential election also significantly changed the way we access the right to vote.73

Since the 2000 presidential election, state and federal legislators have attempted to address the complicated task of correcting the many problems that were exposed, such as outdated voting machines, inaccurate voter removal (purges), and voter discontent. America watched as the courts, both state and federal, determined who would be president. While much attention was placed on Florida, voting irregularities, such as long lines and broken machines, occurred in states across the country and in more significant proportions. The stark realization that the 2000 election problems were not confined to Florida, but were symptomatic of issues across the nation prompted many legislators to act.74 On both the state and federal levels, legislators sought to remedy the myriad election administration dilemmas.

This newfound attention to voting rights had some unintended consequences. In some instances, instead of enlarging the right to vote, exercising the franchise became more cumbersome and restrictive. The proliferation of election administration legislation on the federal and state level since the 2000 presidential election resulted in thousands of legislative measures that, unfortunately, were often based on anecdote, innuendo, and rumor instead of empirical data.75

The Civil Rights Commission held hearings and collected data after the 2000 election calamity. It found that “[s]tatewide, based upon county-level statistical estimates, black voters were nearly 10 times more likely than nonblack voters to have their ballots rejected.”76 Additionally, it estimated that 14.4 percent of black voters in Florida had their ballots rejected, compared to 1.6 percent of nonblack voters in the state. Finally, black voters constituted 11 percent of voters in the state, but in the election, African Americans astonishingly cast more than half of the spoiled ballots, according to the precinct data in several counties.77

On the federal level, Congress sought to address the 2000 presidential election by implementing comprehensive changes to the United States’ election administration process. While admirable, some of the reforms had inadvertent consequences. In 2002, in response to the 2000 election catastrophe, Congress used its Elections Clause authority and passed the Help America Vote Act (HAVA),78 with the stated purpose of “establish[ing] a program Election Assistance Commission (EAC) to
assist in the administration of federal elections and to otherwise provide assistance with the administration of certain federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of federal elections, and for other purposes."

After HAVA, legislators began to adopt laws that were supposed to make voting easier and provide voters with the assurance that their vote would be counted. Unfortunately, in the decade that followed, many laws were passed that made voters even more suspicious about the accuracy and authenticity of the election process. Politicized secretaries of state, adoption and failure of electronic voting machines, and the emergence of a concerted effort to suppress votes, veiled as an attempt to destroy the invisible foe of voter fraud, caused many voters to revisit the lack of confidence that they had experienced in the aftermath of 2000. The adoption of voter fraud measures led to widespread acceptance of restrictive voting laws that made it harder for certain voters to participate in the process. Many of these voters faced obstacles that were less violent and obvious than the Jim Crow, Bull Connor, and Bloody Sunday eras, but were just as real.

Because of the 2000 presidential election debacle, many voters of color questioned the legitimacy and accuracy of the electoral system. The increased security and identity measures instituted after the 2000 election and September 11, 2001, terrorist attacks caused many Americans to become concerned about security and some reform methods. Just as other laws were meant to correct for widespread discrimination in voting and to open the gates to suffrage, new laws were passed to close those gates once again. Many states instituted voter ID laws, and in 2005, the state of Indiana passed the most restrictive law in the country, allowing only government-issued identification. The law was challenged, and the Supreme Court, in the spring before a historic presidential election, gave voter ID its blessing. *Crawford v. Marion* served as a watershed moment for voter suppression and efforts to make it harder to vote. After getting the green light from the Supreme Court, states began to pass more restrictive voting laws; much like after the Supreme Court ruling in 1883, the Court's implied imprimatur shaped the wave of restrictive laws that were soon to come.

The Supreme Court Strikes Again

The Voting Rights Act has endured many blows and challenges to its constitutionality, the first coming shortly after its passage and then for reauthorizations thereafter. A huge swing came in *Shelby County, Alabama v. Holder*, a challenge to the constitutionality of Section 5 of the VRA, one of the critical provisions of the act. Section 5 required certain “covered jurisdictions” to submit voting changes to the federal government for approval. Section 4 provided the coverage formula for Section 5 of the act. In *Shelby*, the Supreme Court held that the coverage formula was unconstitutional, which essentially meant that jurisdictions no longer must submit voting changes to the federal government for approval. Consequently, until Congress prescribes a new formula, those jurisdictions may implement any voting change without federal oversight. A world without Section 4 is effectively a world without Section 5, which has served as a valuable tool in achieving equality in voting. Similar to the Supreme Court’s action in the *Civil Rights Cases* in 1875, here its *Shelby* decision reinforced the state’s ability to impose disenfranchising devices. Additionally, since the *Shelby* decision, more than half of the formerly covered jurisdictions had new statewide voting restrictions in 2016, and more than 850,000 Latinx voters endured new stricter voter ID requirements in that election. Moreover, just one change in Fayette County, Georgia, threatened to impact more than 100,000 people.

The South Shall Rise Again

One of the major arguments for finding Section 4 unconstitutional was that limiting Section 5 to only certain jurisdictions stigmatized the South and violated the “equal sovereignty of the states.” This argument
is akin to those forwarded post-Reconstruction and during the height of the civil rights movement when opponents to integration argued that any federal intervention in voting infringed on states' rights, that is, the right of the state to impose any laws that it deemed necessary. It is ironic that the state of Alabama's Bloody Sunday served as the impetus for the Voting Rights Act and that Shelby County, Alabama, would serve as the force to severely limit it. Moreover, Alabama has remained at the epicenter for disenfranchisement and has maintained that status with help from the federal courts and Congress.

The movement and Supreme Court action to eliminate safeguards that protect voter access to the ballot and the overturning of Congress's authority to adopt legislation under the Fourteenth and Fifteenth Amendments to the United States Constitution is part of a political strategy to dismantle the gains of the past—indeed, gains that provided increases in people-of-color participation and representation. These actions are connected to Jim Crow and post-Reconstruction measures meant to make it more difficult for voters of color to participate in the electoral process. The suggested rationales—state sovereignty and postracialism—are very similar in scope to those of a previous era. While my grandmother has little interest in or knowledge of the names of actual Supreme Court cases, she recognizes that erosion of rights and freedoms is occurring in our country. In her mind, it appears that we are going backward, that is, moving away from doing better as a society and instead getting worse.

The United States has seen a world without federal oversight in the area of voting, the first coming shortly after Reconstruction, when Supreme Court decisions and congressional action removed the troops that protected the former slaves from violence and other shenanigans at the voting booth. At a time when minimal margins decide elections, placing more burdens on voters will adversely impact voter participation. The "conniving methods" of the new-millennium tools continue to affect voters of color disproportionately. If we don't pay attention to the many connections to past injustices, we may well regress to a painful time less than a century ago, when laws that promoted exclusion were the rule. In the oral argument of a Supreme Court case involving the 2006 challenge to the Voting Rights Act's constitutionality, Justice Anthony Kennedy voiced this possibility based on progress and the states' rights to govern, two popular rationales:

**Justice Kennedy:** Well, the overall historical record, Katzenbach said there had been unremitting and ingenious defiance, and that was certainly true as of the time of the Voting Rights Act. Democracy was a shambles in those—that's not true anymore, and to say that the States are willing to yield their sovereign authority and their sovereign responsibilities to govern themselves doesn't work. We've said in Clinton's New York that Congress can't surrender its powers to the President, and the same is true with reference to the States. Wouldn't you agree?

**Mr. Katyal:** That is correct. And here this Court has repeatedly said this isn't any sort of surrendering of power. It was justified because of the record of discrimination. South Carolina v. Katzenbach, Justice Kennedy, I don't quite think said that defiance was the precondition; rather it found that the onerous amount of case-by-case litigation itself wasn't enough. And I would caution this Court because this Court had examples before in which the historical record looked good at a narrow moment in time. If we think back 100 years to Reconstruction, 95 percent of African-Americans in the franchise, 600 black members in the State legislatures, 8 black members of Congress, 8 black justice[s] in the South Carolina Supreme Court. Things looked good, and that led this Court in the civil rights cases over Justice Harlan's lone dissent to say the era of special protection was over.

Despite these warnings, the United States Supreme Court opted to eliminate protective measures rather than empower, once again. This constriction of power, unfortunately, is very familiar to those who have
lived through periods of progress and regress. Accordingly, my grandmother has seen this kind of disenfranchisement before and is horrified that ghosts of Jim Crow have yet to be laid to rest. The unfinished business of protecting the integrity of elections and the free and fair access of all voters remains. The original Constitutional Convention was met with an effort to address the need to lessen the effect of having black bodies on southern soil and prohibiting their ability to have a voice in society through the three-fifths compromise. Importantly, the fall of Reconstruction and with it the demise of the great achievement of freedom abruptly ended the grand experiment. Indeed, President Lincoln's work remains unfinished.

2

The Voting Rights Act

Shelby, Lord, Shelby

In 1965, when the Voting Rights Act was passed, that gave us a great deal of hope. We began to come into the halls of the legislature, city councils, the mayor's races, all of these things happened. Had it not been for the Voting Rights Act, you would not see some of us sitting here today. Now you're putting back what many of us fought our lives for and gave our lives for... Forget all of the gains of the 20th century. That's what you're doing with this bill you are trying to pass tonight. I would ask you to take these 57 pages of abomination and confine it to the streets of hell for the rest of eternity.

—North Carolina Representative Henry McKinley “Mickey” Michaux (2013)

On August 6, 1965, President Lyndon Johnson signed the Voting Rights Act of 1965 (VRA) into law. Among other things, the VRA abolished literacy tests and poll taxes and provided voter registrars in recalcitrant jurisdictions throughout the South. While the cycle of progressive electoral engagement ebbed and flowed during the approximately fifty years after its passage, the VRA was heralded as an overwhelming success. Arguably, it was because of this success that the VRA experienced continual assaults on its ability to provide protection for access to the ballot.

Representative Michaux understood what happens in the minds of some elected officials when voters of color make too much progress at a speed that makes those in power uncomfortable. Indeed, North Caro-
lina has a history of adopting disenfranchising mechanisms. One of the bloodiest massacres occurred in 1898 in Wilmington, North Carolina. The Wilmington Riot occurred, in part, because the whites in power, who at that time were Democrats, refused to peacefully relinquish the local government to the newly elected Republicans. A massacre occurred that led to approximately one hundred African Americans losing their lives and countless others losing their land and livelihood. Many African Americans fled the city and the state seeking a safe harbor. It has been noted that “black political participation has alarmed racist white North Carolinians for far longer. Though it prompts ID laws, early voting restrictions, and roll purges today, 120 years ago, this fear sparked the deadliest race riot in state history. ‘The ultimate goal [of the 1898 Wilmington Riot] was the resurgence of white rule,’ historian LeRae Umfleet wrote in 2005. . . . Efforts to suppress black political power may have been bloodier before, but they are not new.”21

As a witness to history, Mr. Michaux watched as North Carolina involved itself in the cyclical and sickening swing from political progress to regress. From the 1898 Wilmington Riot to the 1990s, when Jesse Helms’s “White Hands” advertisement appealed to the fears of whites and, most pundits believed, led to Helms’s reelection against the civil rights pioneer and Charlotte mayor Harvey Gantt,2 to the first African American presidential candidate winning the state of North Carolina in 2008 and near parity in the voter registration and turnout rates of African Americans, to the omnibus voting legislation that sought to wipe all of those gains away. In the case challenging these measures, the court found that the North Carolina legislators were acting to preempt African American voting strength. In fact, the court found,

In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus, the asserted justifications cannot and do not conceal the State’s true motivation. “In essence, the State took away [minority voters’] opportunity because [they] were about to exercise it.”

This legislation served as a reminder to Mr. Michaux and others who had unfortunately experienced firsthand North Carolina’s appetite for destroying civil rights gains. In a spring 2017 interview with the Durham Voice, Mr. Michaux recalled, “I wrote a majority of the voting laws, like the first law opening up voter registration. Before, you had to get a registrar at the Board of Elections to register to vote. These registrars were mostly white people who didn’t want to register black people to vote. The bill I wrote opened up registration, so all they had to do was fill out a form and send it into the Board of Elections to verify.” He recounted in a 2016 interview, “It didn’t come easily and it didn’t come quickly. . . . But slowly, too slowly if you ask me, we made some progress.”

Understandably, Mr. Michaux reacted to his state’s response to reverse the gains he and others had fought diligently to obtain, calling his state’s legislation an “abomination” and damning it to hell. Notwithstanding his powerful attack, the Republican-led legislature pushed through the legislation that imposed strict voter ID regulations, cut early voting hours, eliminated same-day registration, and eliminated out-of-precinct voting and preregistration for sixteen- and seventeen-year-olds.6 The horrific legislation that served as a poor but not surprising response to the democratic gains of African Americans in the state was, in fact, a direct response to a crippling blow to voting rights protections. Representative Michaux understood that he could not look to the federal government for help due to the United States Supreme Court decision in Shelby County v. Holder.7 The Su-
When the Constitution Is Not Enough

In passing the VRA, Congress relied on its authority in the Civil War Amendments that opened the door for previously enslaved persons to enjoy the benefits of citizenship. The Thirteenth Amendment “freed” the slaves. It reads, “Neither slavery nor involuntary servitude, except as a punishment for crime of which the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” The Fourteenth Amendment ensured that all citizens would enjoy, among other things, equal protection under the law. Here the text says, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” Additionally, the Fifteenth Amendment to the United States Constitution granted the right to vote. The language reads, “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.”

However, these Civil War Amendments lacked potency in their ability to secure the right to vote. Indeed, the hard-fought effort to pass the Civil War Amendments to ensure the right to vote and fundamental personhood for former slaves was a significant milestone in this country’s history. Unfortunately, the promise of freedom was short-lived. During Reconstruction, the last African American congressperson was elected in 1897 and left in 1901. It took sixty-eight (or “nearly seventy”) years before African Americans from former slave states, William Clay Sr. from Missouri and Parren Mitchell from Maryland, would serve in the Congress of the United States of America.

Jim Crow laws and Black Codes were adopted at the beginning of the twentieth century and blocked access to the ballot. For nearly a century, these laws erased the hard-fought electoral gains made after the passage of the amendments. African Americans faced seemingly insurmountable challenges in the quest for freedom.

In that dark century of US history between ratification of the Civil War Amendments and passage of the Voting Rights Act, African Americans were subjected to violence, loss of employment, humiliation, threats, and death for attempting to register and/or to vote. The time period was stained with blood. It was clear that the Fifteenth Amendment was not enough, and it would take a civil rights movement and televised violence, primarily the events in Selma, Alabama, to secure the right to vote. In fact, it would take approximately one hundred years from the adoption of the Civil War Amendments to pass legislation that would enable African Americans to access the ballot. The law was needed to give the Civil War Amendments the power to effectuate real change. The onslaught of disenfranchising mechanisms was brutal in the evisceration of the right to vote. Thus, Congress had to provide an extraordinary measure to ensure that the path to the voting booth was barrier-free.

The Need for the Voting Rights Act

Almost a century after passage of the Fifteenth Amendment, Congress passed what is considered the most effective piece of legislation in the United States’ history, the Voting Rights Act of 1965. Congress passed the VRA after the historic march across the Edmund Pettus Bridge, marked forever in history as Bloody Sunday. On that day, marchers, led by John Lewis and Hosea Williams, were met with horses, tear gas, and billy clubs for attempting to march from Selma to Montgomery, Alabama, to demonstrate the atrocities to democracy that existed in Selma, Alabama, and throughout the South.

Civil rights advocates were pressing the federal government to acknowledge the issues facing African American citizens and their efforts to acquire the right to vote. This pressure was not persuasive; the vote was worth the battle. Disenfranchising devices like the poll tax, grand-
father clauses, and literacy tests achieved their desired objectives, that is, denying the right to vote on the basis of race. President Lyndon B. Johnson's preference was to wait for the right time to propose omnibus legislation. However, Bloody Sunday catapulted voting rights to the top of the legislative agenda.

Before passage of the VRA, African Americans faced seemingly insurmountable obstacles to obtaining the right to vote. Previous legislative solutions were found lacking in enforcement. For example, states and locales would merely reimplement any disenfranchising devices after the government or some other entity would bring a challenge. As disenfranchising devices became more prevalent and pernicious, the need for stopgap legislation was obvious. What was less obvious was the political will to proffer the legislation. The civil rights movement and its leaders provided the constant force and voice that ultimately convinced the leaders of the free world to relent and pass legislation. Derrick Bell has argued that it was less the civil rights icons and more how the United States looked to the rest of the world, particularly after Bloody Sunday, that genuinely informed and enabled passage of the VRA. The right to vote was cemented into US history in Selma, Alabama. After the VRA’s enactment, the yoke of disenfranchisement seemed to ease ever so slightly. Federal agents registered voters where local registrars refused, and descendants of former slaves were free at last to vote.

Congress passed the Voting Rights Act of 1965 to put an end to discrimination in voting. The act included two primary provisions: Section 2 and Section 5. As with any legislation, compromises were needed for passage, and one such compromise was the inclusion of temporary provisions that required periodic congressional reauthorization. For example, Section 5 of the VRA required certain jurisdictions, primarily but not exclusively in the South, that had low voter registration or used a disenfranchising device like a literacy test or poll tax to get permission from either the United States attorney general or a federal court in Washington, DC, before implementing law that affected the right to vote.

Section 5 of the VRA

The temporary provisions, such as Section 5, required periodic reauthorizations. These provisions were extended in 1970, 1975, 1982, and 2006. Congress, when determining whether to pass the 1982 amendments, discussed the importance of the VRA and wanted to make sure that "the hard won progress of the past [was] preserved and that the effort to achieve full participation for all Americans in our democracy [would] continue in the future." Consequently, at that time, Congress amended Section 2, extended the language-assistance provisions, and added a section governing assistance to voters who are blind, disabled, or illiterate. Likewise, in the 2006 reauthorization, Congress once again extended the temporary provisions of the act. In doing so, it renewed several essential provisions, provided for language assistance and Election Day monitors, and continued the requirement for Justice Department preapproval of voting changes. In 2006, the committee discussed the importance of the VRA and its protections:

The right to vote is the most fundamental right in our democratic system of government because its effective exercise is preservative of all others. Prior to the enactment of the VRA, parts of the United States condemned the unequal treatment of voters of color, including denying the most fundamental right of citizenship—the right to vote. The vestiges of such discrimination continue today. In enacting the VRA in 1965, Congress sought to protect the Nation's most vulnerable citizens' right to vote. In renewing and extending the VRA, Congress sought to ensure that even higher numbers of our citizens were protected, including citizens whose primary language is not English, and to ensure that all aspects of the right to vote are protected, including the right to cast a meaningful ballot.

During the deliberations, the House Judiciary Committee found that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining
the significant gains made by minorities in the last forty years.” Congress unequivocally found that considerable progress had been made but also stressed that the work of Section 5 and the VRA was unfinished, stating, “Substantial progress has been made over the last 40 years. Racial and language minority citizens register to vote, cast ballots, and elect candidates of their choice at levels that well exceed those in 1965 and 1982. The success of the VRA is also reflected in the diversity of our Nation’s local, State, and Federal Governments. These successes are the direct result of the extraordinary steps that Congress took in 1965 to enact the VRA and in reauthorizing the temporary provisions in 1970, 1975, 1982, and 1992.” Congress’s desire and authority to renew the temporary provisions were clear. It unmistakably sought to protect and continue the federal protections contained in Section 5 of the VRA. Notwithstanding this clear determination to extend the temporary provisions of the VRA and its impressive success in expanding the electorate, the VRA faced constant challenges to its existence.

Select Supreme Court Cases Affecting Section 5 of the VRA

South Carolina v. Katzenbach (1966)
This case challenged the constitutionality of Section 5.

The Court found that Congress appropriately gathered evidence of racial discrimination in voting and that its coverage formula “evolved to describe these areas [and] was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil” in the covered jurisdictions.

Namudno v. Holder (2009)
This case again challenged the constitutionality of Section 5; the United States Supreme Court had concerns about the Act. Nonetheless, it merely cautioned Congress, and expanded bailout provisions.

The Supreme Court expanded the ability to seek release from Section 5’s requirements through the use of the bailout provision. Since 1967, more than fifty jurisdictions have successfully “bailed out” of Section 5.

Shelby County, Alabama v. Holder (2013)
This case challenged the constitutionality of Section 4 of the act, which contained the formula that determined whether a jurisdiction had to comply with the requirements of Section 5; the United States Supreme Court admonished Congress and found Section 4 unconstitutional. This decision effectively ended Section 5 of the act and the requirement for jurisdictions to submit voting changes to the federal government.

The question presented in Shelby County was “[w]hether Congress’ decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.”

Shelby County, Alabama

If Selma, Alabama, serves as the birthplace of the VRA, Shelby County, Alabama, could certainly serve as its resting place. Shelby County, Alabama, is located in central Alabama near Birmingham. In 2010, its population was less than 200,000 persons. The African American community constituted approximately 12 percent, while the Hispanic population made up less than 6 percent of its residents. The county ranks fifth in population among Alabama counties. While small in stature, Shelby County has made a profound impact on the lives of all Americans. In 2013, the county challenged the United States’ ability to require jurisdictions to receive permission or preclearance before enacting voting changes. This was profound, not because it challenged the federal government’s authority, but serendipitously because the United States Supreme Court
was primed to rescind and reverse centuries of progress in the area of voting. The *Shelby County v. Holder* decision gave the green light to jurisdictions that had as their mantra to turn back the hands of time on the right to vote.

In 2013, the Court held in *Shelby* that the coverage formula contained in Section 4 of the Voting Rights Act of 1965 was outdated and constitutionally invalid. As such, the Court also immobilized Section 5 of the VRA, which required “covered jurisdictions” to obtain approval of any and all voting changes before implementation. Without Section 5, the attorney general and communities in previously covered jurisdictions lacked the power to prevent the application of discriminatory devices, receive notice of proposed and passed legislation, and send federal observers to jurisdictions within Section 5 coverage.

After numerous challenges to Section 5’s protections, the Court in *Shelby* found a way to destroy the VRA’s ability to preempt discriminatory voting changes in its holding that the coverage formula in Section 4 of the act was unconstitutional. For the majority, the progress made under the VRA demonstrated that the extraordinary measure of requiring some states to seek approval for voting changes was no longer needed. The majority ruled that the formula that determines which states must submit voting changes was outdated and stated that Congress must develop “another formula based on current conditions.” The Court spent a considerable amount of time stressing that requiring some states to submit changes and not others was a “dramatic departure from the principle that all States enjoy equal sovereignty.” The Court also stressed that the conditions that existed at the time the formula was devised were a thing of the past, stating, “There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”

### The Formula

The “outdated” formula contained in Section 4 of the VRA determined which states or other jurisdictions were “covered” under Section 5. Section 5 preclearance requirements applied to states and political subdivisions that maintained a “test or device” or had less than 50 percent voter registration or turnout in the 1964 presidential election. Congress had previously altered the formula through amendments, and the DOJ’s enforcement of Section 4’s bailout provision has allowed previously covered jurisdictions to remove themselves from the purview of Section 5. This view is consistent with Supreme Court precedent, as the formula continued to adapt to contemporary circumstances and ensured that the right to vote is not denied based on race, ethnicity, or English literacy.

### The Decision

According to Chief Justice John Roberts, “voting discrimination still exists, and no one doubts that.” Yet he and four other United States Supreme Court justices dismantled the protections contained in Section 5 of the Voting Rights Act. After numerous challenges to Section 5’s constitutionality, the Court in *Shelby* struck down Section 4 of the act, which provided the coverage formula through which Section 5 was implemented. Without Section 4, there is no Section 5.

The Court spent a considerable amount of time stressing that requiring some states to submit changes and not others was a “dramatic departure from the principle that all States enjoy equal sovereignty.” The Court also stressed that the conditions that existed at the time the formula was devised were a thing of the past, stating, “There is no denying, however, that the conditions that initially justified these measures no longer characterize voting in the covered jurisdictions.”

Incredibly, the Court opined that “[n]early 50 years later, things have changed dramatically. . . . [B]latant[ly] discriminatory evasions of fed-
eral decrees are rare. And minority candidates hold office at unprecedented levels." In fact, the decision in Shelby was a direct reaction to the 2008 presidential election, in which the United States elected the first African American president.

Just as in other eras of US history, the courts became complicit in condemning voters of color to second-class citizenship. Indeed, the Court’s actions in Shelby turned the hands of time backward on voting rights. Nationally, voter turnout had plummeted to the lowest level since 1942. In Texas and across the country, the electorate was older, whiter, and more conservative than in 2008 and 2012.37

Kareem Crayton,38 an elections law scholar and executive director of the Southern Coalition for Social Justice, a civil rights organization that specializes in voting rights litigation, believes that the Court’s decision in Shelby meant more than the loss of federal oversight. He maintains,

One of the main benefits of having Section 5 was that minority communities could get leverage and the development of power ... related to voting, without having to sue to do it—and all of the harm that comes with that, sending a lot of paper, wasting a lot of time, and not really being able to fundamentally change a structure but instead go piece by piece for policy-level improvements. I think the impact of Section 5 has always been the additional leverage that minority communities had no experience with, before Section 5, [particularly in areas] that had a very established record of denying and limiting political opportunity—and, more to the point, not just political opportunity but governance, in communities of color that have had a long experience of being excluded from power. Those are the spaces in which a genuinely changed system allows for partnerships to emerge, alliances to be built. And Section 5 was a tool to help that happen. It [represented] ... the difference between having zero influence and some influence.39

From Zero to Negative Fifty

Without Section 5, jurisdictions are free to implement changes without federal approval. In a typical year, the United States attorney general would receive approximately 5,000 Section 5 submissions that included between 14,000 and 20,000 voting changes.40 The gutting of Section 5 meant that those 20,000 changes will occur without the benefit of federal scrutiny to determine if the changes will have a discriminatory effect on voters of color. In fact, hours after the Shelby decision, former Section 5 jurisdictions announced that they would implement changes that in some instances had previously been found intentionally discriminatory.

Shortly after Shelby, United States Attorney General Eric Holder announced that the Justice Department was suing to block Texas's redistricting maps, which had been found intentionally discriminatory under Section 5. This was the department’s first action to protect voting rights following the Shelby decision.41 Prior to Shelby, the VRA would have mandated that covered states like Texas, Georgia, North Carolina, Louisiana, and South Carolina obtain approval for each voting change before they could implement the change. After Shelby, citizens lack notice of harmful changes until often too late. The need to have voting changes approved by the federal government was lost with the Supreme Court’s decision in Shelby County v. Holder. This decision has been compared to Pless v. Ferguson42 in its potentially far-reaching implications for the ability of people of color to exercise their freedom. Like Plessy’s denial that inequalities existed that the law was obligated to recognize, Shelby also ignored the realities of the right to vote and the efforts to strip the power of the vote from voters of color.

In many instances, courts have found these measures intentionally discriminatory and unconstitutional, under the Fourteenth and Fifteenth Amendments of the United States Constitution and Section 2 of the Voting Rights Act of 1965.43 These victories took years to attain. Importantly, after several appeals, states continue to argue that courts
should allow them to implement these discriminatory measures, primarily under a theory of states’ rights or preventing voter fraud. Neither theory has required a serious investigation into the impact of the proposed change. While statewide changes have received an inordinate amount of coverage, other changes such as limiting polling places or decreasing the number of voting machines in predominantly black jurisdictions have become regular disenfranchising tactics post-Shelby. In Randolph County, Georgia, election officials sought to close a majority of the polling places, blaming costs and American Disability Act compliance as neutral, nondiscriminatory rationales. A retired Randolph County school superintendent remarked “I think it was an effort to suppress the vote. . . . This is one typical strategy in the Republican playbooks.”

Section 2 of the VRA

While the effects of the loss of Section 5 were apparent in the lack of notice and immediacy of the implementation of voting changes, the section’s evisceration also lessened the ability to effectively and efficiently challenge those changes. Without Section 5, we are only left with Section 2’s nationwide prohibition against discrimination in voting. The Shelby decision left advocates with fewer tools to combat the onslaught of legislation and litigation proffered with the intent to weaken the democratic process and quash access to the ballot. As mentioned, Section 5 of the VRA served as a temporary provision to protect the right to access the franchise. A valuable tool that remains is the VRA’s Section 2, which provides a national prohibition against discrimination in voting. Opponents of Section 5 often point to this provision of the VRA as evidence that the need for Section 5 protections was overblown. Although Section 2 serves as a nationwide prohibition, it has limitations in enforcement. Moreover, the biggest impediment regarding Section 2, in contrast to Section 5, concerns its retroactive approach, as opposed to the proactive, preemptive approach included in Section 5. While Section 2 does apply nationwide, its cost and time to challenge legislation is retrospective and has little deterrent effect. The average cost for Section 2 litigation is approximately $1 million.

Section 2 litigation takes years to conduct, as compared to Section 5 review, which generally received a sixty-day review process to determine whether the submission should receive federal approval. As Dr. Crayton explains, “It is harder, more expensive, and takes a lot longer to get anything that looks like a remedy to what may be even a blatant problem. And so, in some ways, it’s a perverse incentive. It gives more encouragement to people who would like to use political power to weed out minority communities, to give it a shot. Because even if they’re wrong, it takes so long to get to a court order that says, ‘Okay it’s unconstitutional, don’t do it again.’ But you get all the benefit of it.”

Section 2 continues to survive as a valuable tool. However, from my years as a voting rights litigator, it is apparent that the lack of another primary tool, such as Section 5, impacts the ability to adequately address voting rights discrimination. The cost and time needed to investigate, file, and litigate Section 2 of the VRA violations are cost-prohibitive for many communities. Also, Section 2 does not have the same capacity as Section 5 in that Section 2 is reactive, that is, after the legislation has been enacted, whereas Section 5 was preemptive, freezing legislation until the federal government could preclear the proposed and, in many cases, legislatively passed changes. Section 5 could determine whether the practice or procedure would ever get implemented, whereas Section 2 can only attempt to stop the practice or procedure after it has become the law of the land. It is much harder to stop a moving train. It is much easier to hold the train at the station until you know that the path and tracks are clear, which was the genius and preventative nature of Section 5.

Many jurisdictions pass laws without federal approval, and advocacy groups engage in years trying to undo the legislation, while the legislature enjoys the spoils of its bounty. Justice Anthony Kennedy suggested that Section 2 was enough of a viable tool to combat racial discrimina-
tion in voting. However, as Crayton states, “Years later [after Shelby], you’ve got communities that have used a ton of energy and resources to arrive at an answer that basically sets you up for another opportunity to do the next crazy thing that [election officials or legislative bodies envision].” Further, he states, “What we see now is a plethora of litigation projects that have emerged in the South, but not a lot of undoing of many of these, I think, retrograde policies that make it more difficult for minority voters to participate. Frankly, what you’ve seen is a slight decline in certain cases.” Since Shelby, advocacy groups have attempted to combat disenfranchisement, but history has already demonstrated the need for more tools to ensure that the right to vote is not once again considered a fallacy for people of color.

The Impact of Shelby

While voting rights proponents have continued to fight nefarious voting changes that did not or would not have received Section 5 preclearance, the election in 2016 marked the first without the full protections of the Voting Rights Act. Many of the previously covered jurisdictions instituted new voting restrictions, such as closing polling places and mid-term redistricting without a sweeping and thorough review to determine whether the change violated federal state voting laws. Regarding impact, new voter ID laws were imposed on more than 850,000 Latinx voters, and Fayette County, Georgia, sought to affect more than 100,000 of its voters with a proposed discriminatory change. Also, in Sparta, Georgia, officials “systematically” questioned the eligibility of 20 percent of its African American citizens, which affected turnout and led to white candidates winning municipal elections. Before Shelby, Section 5 would have required the covered jurisdictions to submit the change and receive approval.

Case Study: North Carolina

The Supreme Court’s Shelby decision allowed states and municipalities—which for decades were required to request permission from the United States attorney general—to execute changes without federal approval or preclearance. North Carolina was once one of those jurisdictions covered by Section 5. Without this requirement, state legislatures were able to provide a nail in the coffin to the ability to vote free from discrimination and political imaginations.

North Carolina became the case study for what a post-Section 5 world would look like, a striking refutation of Chief Justice Roberts’s belief that voting discrimination was mainly a thing of the past and that Section 5 was no longer needed. Perhaps no jurisdiction was as explicit in its attempts to disenfranchise post-Shelby as the state of North Carolina. A week after the Shelby decision, hundreds of people packed into the Christian Faith Baptist Church. It was another week of the Moral Monday protests, as they came to be known.

The Moral Monday movement started in the same place where the 1960s civil rights movement began—in Greensboro, on the campus of North Carolina A&T University. Almost fifty years prior, four freshmen at A&T sat down at the lunch counter at Woolworth’s and refused to leave until they were served. The sit-ins spread throughout the state to Winston-Salem, Durham, Raleigh, and Charlotte. Two months later, the Student Nonviolent Coordinating Committee was founded at Shaw University in Raleigh. That was then; this time, the Moral Mondays started when Republicans in North Carolina, who controlled the legislature and the governorship in 2013, introduced the most stringent voting restrictions in the country. Much to Representative Michaux’s dismay, the Republican legislature was hell-bent on ensuring that the progress made in the previous election would be wholly undone for years to come.

North Carolina’s voting changes included, among other things, strict voter ID, cutting early voting, eliminating same-day registration during the early voting period, ending the $2,000 child dependency tax
deduction for parents whose college-student child votes where he or she attends school, and rescinding the automatic restoration of voting rights for ex-felons. North Carolina, where forty counties had previously been subject to Section 5, no longer had to have its voting changes approved by the federal government.

North Carolina Republicans used the same rhetoric to argue for those sweeping changes as their comrades in Texas and other jurisdictions, with claims of evidence of voter fraud and the ever present yet rarely detected potential risk of fraud.54 Those who defended North Carolina’s new laws also argued that the state was under no obligation to present specific evidence of voter fraud because of the United States Supreme Court’s Crawford v. Marion County Election Board voter ID decision.55 A states’-rights-focused reading of Crawford argues that before a state enacts a voter ID or any other type of voting procedure, if the interest that the state is trying to achieve is combating fraud, then it does not have to provide evidence that such fraud has been committed in the state.56

Unlike Texas, which ranked forty-eighth in voter turnout in 2012, North Carolina had the most progressive election laws in the South. The state had not always had this distinction. In 1996, North Carolina ranked forty-third in voter turnout. However, to expand voter participation, the state adopted electoral reforms, such as early voting in 2000, out-of-precinct ballots counting as regular ballots in 2005, and same-day registration during the early voting period in 2007. As a result, North Carolina skyrocketed from thirty-seventh in voter turnout in 2000 to eleventh by 2012. These reforms had a particularly beneficial impact on African American voters. Rev. William Barber II, the leader of the Moral Monday protests, stated, “North Carolina has the best election laws in the country. . . . We’ve had elections for 237 years without voter ID. And only after the massive turnout of African Americans, Latinos, progressive whites, students, and the elderly fundamentally changed the electorate in the South did false witness and distortion about fraud begin.”57

Indeed, three weeks after Shelby, the North Carolina Senate significantly toughened the House’s voter ID bill (HB 589), eliminating student IDs from public universities, out-of-state driver’s licenses, and county, municipal, and public employee IDs from the list of acceptable voter IDs. The bill was stricter than the Texas voter ID law that was blocked by the courts in 2012 under Section 5.58 A report comparing data in 2014 and 2016 found that “black voters constituted 11.4 percent of those voting in Texas in 2016 with ID but 16.1 percent of those voting without ID, which shows clear evidence of a disparate racial impact. Likewise, Latino voters made up 19.8 percent of those voting with an ID but 20.7 percent of those voters without an ID. So even if voter ID laws haven’t swung election outcomes, they can deny thousands of people their right to vote—denials that fall disproportionately on black and Latino citizens.”59 Likewise, millions of North Carolina citizens would be affected by the new restrictions. More than 2.5 million of them voted early in 2012, nearly 100,000 used same-day registration, 50,000 registered in high schools through preregistration in their civics classes, and 300,000 registered voters did not have government-issued IDs.

Congressional Inaction

In Shelby, the Supreme Court challenged Congress to act, and it has refused to do so. Thus far, Congress has made two feeble attempts to restore the protections lost in the Supreme Court decision. The Voting Rights Amendment and Advancement Acts, or VRAA, bills have not received hearings or a vote in the House of Representatives or Senate, despite bipartisan support.

In early January 2014, a day after Dr. Martin Luther King Jr.’s fifty-fifth birthday, Congressmen Jim Sensenbrenner and John Lewis introduced the Voting Rights Amendment Act of 2014 to restore Section 5 of the VRA. It was a modest bill, offering a new coverage formula, but it represented a promising start for a post-Shelby legislative fix.60

The Voting Rights Amendment Act evoked as its purpose, “To amend the Voting Right Acts of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act, and
for other purposes.”61 The key components included a new coverage formula in which a state would be subject to Section 5 preclearance if, among other things, it committed five voting violations in fifteen years. This new coverage formula, however, would cover only Georgia, Louisiana, Mississippi, and Texas.62 A political subdivision, like a county, parish, or city within a state, would be covered if it had three violations within a fifteen-year period or one violation and “persistent and extremely low minority voting turnout.”63 The bipartisan bill, which also included a process for jurisdictions to “bail in” under Section 3(c), provided limited notice and transparency and restored election observer coverage.64 While this attempt was significant, it did not go far enough. Unfortunately, the new coverage formula did not provide coverage for long-standing wrongdoers like North Carolina and Alabama.

Congress made another attempt a few months later with the Voting Rights Advancement Act. This bill updated the coverage formula to include more states as “covered jurisdictions,” such as Alabama, Arizona, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, and Virginia. It provided an expiration of federal approval or preclearance after ten years for states and local jurisdictions without violations. It also included a notice and transparency provision in requiring public notice of voting changes that occurred 180 days before an election, expanded a court’s ability to order preclearance as a remedy, and restored the federal observer program to its full capacity.

Voting Rights Amendment Act
Bipartisan bill introduced in House and Senate

Purpose
“To amend the Voting Right Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act, and for other purposes.”

Key Components
Coverage formula:
- A state would be subject to Section 5 preclearance
  1. if it commits five voting violations in fifteen years; and
  2. at least one of the violations is undertaken by the state itself.
- A political subdivision within a state would be covered if it has three violations within a fifteen-year period or one violation and “persistent and extremely low minority voting turnout.”
- Bail-in under Section 3(c).
- Includes notice and transparency components.

Voting Rights Advancement Act
Purpose
“To amend the Voting Right Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act, and for other purposes.”

Key Components
Updates the coverage formula:
- Includes Alabama, Arizona, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina South Carolina, and Virginia. Preclearance would expire after ten years for states and local jurisdictions without violations.
- Requires public notice of voting changes that occur 180 days before an election.
- Expands a court’s ability to order preclearance as a remedy.
- Restores the federal observer program.

Neither of these measures is sufficient, nor can they replace Section 5 of the VRA. They do not address modern-day disenfranchisement while also limiting the reach of federal oversight. What is needed is a more ex-
pansive and imaginative approach that requires any voting legislation to undergo extreme vetting to determine the impact on the ability to vote. Moreover, the Shelby decision allows jurisdictions to combat voter participation from every angle, for example, registration, residency, access to the ballot, IDs, and early voting. Since Shelby, voting measures are not subject to federal review unless the jurisdiction is under a separate court order. Otherwise, in most cases, it can move forward without anything other than anecdotal accusation.

Efforts to return to a time of federal oversight have been highly unsuccessful. However, this is not cause to abandon the attempt to eliminate racial inequalities in the area of voting. Crayton says,

I don’t think this means that we abandon the project of dealing with racial equality. Because I don’t think that’s been a completed project, as the court seems to believe is the case, but it doesn’t necessarily also mean that tools that we’ve used to correct this problem, i.e., Section 5, is the only tool that is equal to addressing [it]. Maybe it’s time to think creatively about a tool that takes race equity seriously in the political sphere, that doesn’t necessarily utilize the very same tools, to push the court to tell us what they really mean. If we need to have a new statute that addresses it, and perhaps even in a more ambitious way, let’s do it.66

The Way Forward

Derrick Johnson, president and CEO of the National Association for the Advancement of Colored People (NAACP), advocates for a more imaginative approach to restoring the protections of Section 5. He is concerned with “our overreliance on the Voting Rights Act.” He also encourages us to develop new strategies to protect the right to vote. He reiterates that we should not “give up on the Voting Rights Act . . . But the reality is it’s under attack, and if the Supreme Court goes the way that [he] believes it’s going . . . Section 2 will be the next thing on the chopping block. So we would have this shell of an act without the two most important sections in the act.”67

Just as at other points in our history, the deterioration of democracy requires a more aggressive and creative approach to maintain and advance racial equality. Although these times have some similarities to the past, what is different from the Jim Crow indignities that my grandmother experienced is that we now have more tools at our disposal concerning education and position. We are starting at different points than before. We are not mere years from slavery or the end of segregation. We recently experienced feats that my grandmother never thought that she would witness, for example, the election of an African American to the presidency of the United States.

Our quest for equality is difficult and full of obstacles such as the dismantling of Section 5 of the Voting Rights Act. Nonetheless, the forecast is brighter and more sure than past generations. My grandmother does not follow the Supreme Court, nor does she have any interest in reading its decisions. She does, however, feel that these days are feeling unfortunately familiar to a former time when violence, hate speech, and vulgarity ran rampant. Unfortunately, we will continue this cycle of progress to regress and liberation to oppression, if we do not imagine measures that advance the ability for all people to register and vote without regard to racial or ethnic identification.

While Congress attempted to return us to a modified version of Section 4, Chief Justice Roberts’s words suggested that the original formula did not go far enough. With rampant discrimination, the courts and legislatures should expand federal oversight to include all states and all changes affecting the right to vote. On previous occasions, I have advocated for a type of nationwide Section 5 that would require jurisdictions to provide a period of notice before making voting changes and for federal oversight to assess the impact of the change. It would determine and inform decisions, as well as communities, on the type of change and whether the change conformed with federal voting laws, while also evaluating the impact on voters and communities of color.
Years ago, I suggested that Congress adopt a new way to require jurisdictions to make sure that their laws were free of discrimination, through the use of Voter Impact Statement (VIS). Under what was previously Section 5 of the Voting Rights Act, the submitting jurisdiction was required to provide to the attorney general of the United States information regarding the nature of the change (i.e., the statutory or judicial authority for the change, copies of the previous ordinance or change, a statement explaining the reason for the change, and an explanation of the anticipated effect on racial or language minorities in the jurisdiction). Accordingly, on the statewide level, legislators hoping to offer legislation affecting the right to vote would have to first receive an opinion from either the attorney general's or the secretary of state's office finding that the proposed legislation does not abridge the right to vote. The state officials' statement would include the following: the former election practice, the proposed change, any alternatives considered, and any evidence of public involvement, including comments from disabled people, communities of color, and other underserved groups. The state or local official would have to certify that the proposed legislation does not run afoul of federal voting rights statutes. Moreover, the VIS would serve as a type of nationwide Section 5, requiring states to verify that voting changes would not unnecessarily make it harder to vote or discriminate against their citizens.

Congress has the power to regulate elections under the Elections Clause, Article I, § 4, of the United States Constitution, which reads, "the Congress may at any time by law make or alter . . . regulations." Under the Elections Clause, Congress has broad authority to regulate all aspects of elections, and it should use this power to implement prophylactic measures like VIS. Congress accessed its Elections Clause powers in passing the Help America Vote Act (HAVA). Accordingly, Congress could use this power to alter HAVA to require jurisdictions to adhere to VIS requirements for all election-related changes. It is easy to argue that as a democratic society, we should want the assurance that any and all changes that affect the right to vote do not do so in a way that discriminates. Courts have rightly held that Congress has the authority to regulate the election process, arguing from voter registration to ensuring that ballots cast are accurately counted consistent with the apparent wishes of the voter. In 1879, the Supreme Court found that Congress's power to regulate congressional elections "may be exercised as and when Congress sees fit to exercise it," and "when exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State necessarily supersedes them." In *Smiley v. Holm*, the Court wrote, "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."

In addition to the Elections Clause, Congress has also used its Spending Clause power to ensure that voter access is not impeded. In enacting the National Voter Registration Act and HAVA, Congress attached its allocation of funds to the requirement for providing voter registration opportunities under the NVRA and upgrading election equipment under the HAVA. Certainly, Congress could require jurisdictions to provide a detailed VIS that would include comments from affected communities in order to receive HAVA or other funding. This level of oversight is needed to ensure that states and local jurisdictions cannot adopt measures that discriminate or disparately impact their eligible voters' ability to cast a ballot or otherwise participate in the electoral process.

A mechanism such as the VIS would require states to explain the purpose and need for the proposed action. It would change the current practice of basing legislation on anecdote or unfounded assertions of voter fraud or threats to national security. The need for heightened scrutin for laws that affect voting serves as a constant refrain from those
Moving On

After Shelby, the fight to vote continues. Despite advocates' best efforts, the battle to vote continues. The courts no longer serve as a beacon of light in the darkness of discrimination. Instead of voting rights, it is essentially voting fights. We are fighting much more as opposed to arriving at consensus decisions in a nonlitigative posture that allows previously disenfranchised groups to influence policy. This post-Shelby process also involves courts much more than they claimed they wanted to be involved in resolving many of these conflicts.

Whereas embattled groups could once use the federal court system to expose hidden antidemocratic practices, no refuge exists anymore in the Supreme Court or in Congress. After Shelby, the hard-fought gains for voter equality are quickly eroding, but the battle continues. Efforts such as Moral Mondays and Representative Michaux's brave work and statements should encourage the people to respond with an even louder voice. While we may not currently hold power to damn the disenfranchising legislation to hell, we can fight to remove these types of measures from consideration and provide political consequences for those who support them. As Representative Michaux knows well, the "arc of the moral universe is long, but it bends toward justice."73 It is the bending process that mandates the hard work of thinking and acting creatively, in spite of the measures meant to stop people of color from participating fully in the political process.

Voter Identification

I want to see my vote counted. Let me be there. I wanna be there. I want to see that.
—Alberta Currie

Instead of "Can you hear me now?" taken from an early-millennium Verizon advertising campaign and the exasperated cries from numerous cell phone users with dropped or hard-to-hear calls in remote and suburban areas, in the voting rights spectrum, voter ID laws tend to ask, "Can you see me now?" Just like the immeasurable dropped calls, many voters, like Ms. Currie in the epigraph, find themselves dropped from the opportunity to participate in the election process.

In jurisdictions across the country, longtime voters like Alberta Currie, an African American who endured literacy tests in order to cast a ballot, found that sweeping voting changes would deny the ability to stand in a polling place and cast a ballot, as they desired.1 For many African American voters, who historically were shut out of the voting booth or who for decades were forced to enter places of business through the back door or not at all, this new-millennium requirement of identification in order to vote seemed strikingly similar to past measures affecting their right to vote and, as such, insulting to their democratic sensibilities. As my father explained, blacks could not enter through the front door in white-owned establishments, like restaurants, department stores, or the main floor of the movie theater. Further, in many places, they were invisible to whites. My grandmother describes this experience as "no 'count," which is short for "no account," meaning worthless. Because African Americans were relegated to second-class citizens on many levels, the right to vote held special pride, and many regarded vot-