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Voting Realism

Gilda R. Daniels¹

Since Shelby County v. Holder, the country has grown accustomed to life without the full strength of the Voting Rights Act. Efforts to restore Section 4 have been met with calls to ignore race conscious remedies and employ race neutral remedies for modern day voting rights violations. In this new normal, the country should adopt “voting realism” as the new approach to ensuring that law and reality work to address these new millennium methods of voter discrimination.

INTRODUCTION

The 2016 Presidential election is lining up to be the first without the protections of Section 5 of the Voting Rights Act of 1965 (“VRA”).² In fact, in 2016, we will witness the first election where United States Attorney General Loretta Lynch³ will have less power to protect voting rights than Attorney General Katzenbach⁴ did in 1965. The Court’s decision in *Shelby County*⁵ continues to

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² Section 5 of the Voting Rights Act of 1965 required covered jurisdictions to submit voting changes to either the Attorney General of the United States, or the District Court for the District of Columbia prior to implementation for approval. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5 79 Stat. 437, 439 (1965) (codified as amended at 42 U.S.C. § 1973 (2014)). The Supreme Court decision in *Shelby County v. Holder* struck down the coverage formula contained in Section 4 of the Act. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). Without a coverage formula, covered jurisdictions under Section 5 do not exist. Accordingly, Section 5 has been rendered obsolete. *See id.* at 2627.

³ Loretta Lynch serves as the first African American female Attorney General for the United States. Athena Jones, *Loretta Lynch Makes History*, CNN (Apr. 27, 2015, 1:27 PM), <http://www.cnn.com/2015/04/23/politics/loretta-lynch-attorney-general-vote/>. A monumental achievement; yet, she has fewer tools at her disposal to address voting discrimination than her esteemed counterpart of fifty years ago. *See Meet the Attorney General*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/ag/meet-attorney-general> (last visited Aug. 24, 2016) for more information about Ms. Lynch.

⁴ Nicholas Katzenbach served as United States Attorney General in 1965 at the passage of the Voting Rights Act. *See* Statement by Attorney General Nicholas deB. Katzenbach before the House Judiciary Committee on the Proposed Voting Rights Act of 1965 (1965), <http://www.justice.gov/ag/ahistory/katzenbach/1965/03-18-1965.pdf>; *see also Attorney General: Nicholas Debelleville Katzenbach*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/ag/bio/katzenbach-nicholas-debelleville> (last visited Aug. 22, 2016).

⁵ *Shelby Cty.*, 133 S. Ct. at 2612.

have irreparable effects on the right to vote. Prior to the *Shelby County* decision, covered jurisdictions across the nation were required to seek approval for changes that affected the right to vote, such as moving polling places, candidate qualifying, or congressional redistricting, pursuant to Section 5 of the Voting Rights Act.⁶ The breadth of the protection was massive.⁷ It enabled voters to access the right to vote and have a level of assurance that the proposed voting practice or procedure has been subjected to an assessment of whether minority voters would suffer retrogressive effects.⁸ The benefits of notice, preclearance, and other prophylactic measures have been lost.⁹ We currently live in a world where burdens have shifted; difficult and costly voting seems to be the new normal.

With Capitol Hill gridlock, many have abandoned a federal solution and look fervently at state constitutions and legislative bodies to protect the right to vote. While victories in Pennsylvania and other states¹⁰ could plausibly lead advocates to this conclusion, this type of piecemeal litigation sets voting rights back half a century.¹¹ Some members of Congress have attempted to address the void that

⁶ See, e.g., Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended, 28 C.F.R. §§ 51.1–51.67 (2012); Samuel Issacharoff, Essay, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1711 (2004); Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 629 (2005) (explaining congressional and statewide redistrictings); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 199–202 (2007) (arguing that Section 5 deters covered jurisdictions from adopting overtly discriminatory legislation); Victor Andres Rodriguez, Comment, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CALIF. L. REV. 769, 806–11 (2003); Glenn Kunkes, Note, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J.L. & POL. 357, 373 (2012) (“[T]he first generation barriers of intentional discrimination relied on by Congress in 1965 to justify Section 5 are the main evidence needed to warrant the retention of the preclearance obligation.”).

⁷ See, e.g., 28 C.F.R. §51.28; *Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/notices-section-5-activity-under-voting-rights-act-1965-amended> (last visited Aug. 22, 2016); *The Voting Rights Act: Protecting Voters for Nearly Five Decades*, BRENNAN CTR. FOR JUSTICE (Aug. 22, 2016), <http://www.brennancenter.org/analysis/voting-rights-act-protecting-voters-nearly-five-decades>.

⁸ See *Beer v. United States*, 425 U.S. 130, 141 (1976).

⁹ See, e.g., William Yeomans, et al., *The Voting Rights Amendment Act of 2014: A Constitutional Response to Shelby County*, AM. CONST. SOC'Y FOR L. & POL'Y, May 8, 2014, https://www.acslaw.org/sites/default/files/Yeomans_Stephanopoulos_Chin_Bagenstos_and_Daniels_-_VRAA_1.pdf.

¹⁰ See, e.g., *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006) (ordering preliminary injunction based on risk of placing undue burdens on the fundamental right to vote); *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211, at *3 (Pa. Commw. Ct. Oct. 2, 2012) (ordering preliminary injunction based on risk of voter disenfranchisement).

¹¹ See *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 313 (1966) (“The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process The Act creates stringent new remedies for voting discrimination . . . and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country.”).

Shelby County left through the Voting Rights Amendment Act¹² and the Voting Rights Advancement Act.¹³ The notice and oversight that Section 5 gave to millions of citizens and thousands of communities across the country is not an easy vacuum to fill.

What is left of the Voting Rights Act, and where do we go from here? Must we abandon the quest for racial equality or hope to achieve this objective through less overt means? Should we eliminate race conscious legislation and ignore the racially disparate effects? Is such a task even possible? Scholars have written about abandoning the race-conscious response embedded in the VRA for a race-neutral solution.¹⁴ Indeed, they have posited that the VRA's days were numbered, and that its most effective days are in the past. Moreover, they offer that modern day controversies are the product of partisan concerns and are not race-related.¹⁵ Further, scholars argue that the Fourteenth and Fifteenth Amendments¹⁶ should serve as the primary tools used to dismantle voter suppression.¹⁷ In fact, years ago, I wrote an article suggesting that Congress use its Elections Clause power to adopt Voter Impact Statements as a requirement for passage of voting changes.¹⁸ However, while the Elections Clause continues to serve as a viable option, the VRA and its "racially aware" components should continue to serve as a basis for protection. Additionally, though partisanship remains the leading indicator for

¹² Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong. (2015); *see also* Paul Lewis, *Congress Makes Bipartisan Push to Restore Parts of Voting Rights Act*, *GUARDIAN* (Jan. 16, 2014, 7:24 PM), <http://www.theguardian.com/world/2014/jan/17/congress-makes-bipartisan-push-to-restore-parts-of-voting-rights-act>.

¹³ Voting Rights Advancement Act of 2015, H.R. 2867, 114th Cong. (2015); *see discussion infra* Part III.

¹⁴ *See, e.g.*, Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 *HARV. L. REV.* 95, 100 (2013) (arguing that the Elections Clause provides an approach that can "potentially be more effective than the VRA approach"); *see also* Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 *HOW. L.J.* 741, 744 (2006).

¹⁵ *See, e.g.*, Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Voting Rights Law and Policy in Transition*, 127 *HARV. L. REV. F.* 243 (2014), <http://harvardlawreview.org/2014/04/voting-rights-law-and-policy-in-transition/>; Jamelle Bouie, *Voter ID's Real Roots: Is it Racism or Hyper-Partisanship?*, *SLATE MAG.* (Oct. 14, 2014, 5:39 PM), http://www.slate.com/articles/news_and_politics/politics/2014/10/voter_id_s_real_roots_is_it_racism_or_hyper_partisanship.html.

¹⁶ The Fourteenth Amendment prohibits states from denying "any person within [their] jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fifteenth Amendment grants the right to vote to citizens of the United States regardless of "race, color, or previous condition of servitude." *Id.* amend. XV, § 1. These amendments give Congress enforcement power through "appropriate" legislation. *Id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

¹⁷ Cody Gray, *A New Proposal to Address Local Voting Discrimination*, 50 *U. RICH. L. REV.* 611, 620–21, 626–27 (2016) (implementing a "fire-alarm" system instead of the current "police-patrol" method would allow citizens to bring voting rights cases through *inter alia*, the assistance of local legal aid offices).

¹⁸ Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 *U. LOUISVILLE L. REV.* 57, 99–100 (2008) [hereinafter Daniels, *A Vote Delayed is a Vote Denied*].

determining whether suppressive voting laws are implemented,¹⁹ the racial *impact* of these laws cannot be ignored. Moreover, in this new millennium, more than ever, race is used as a proxy for party.²⁰

This Article suggests that not only should we pursue so-called race neutral measures, but we must also recognize the need for racially aware legislation that corrects for past historical discrimination that continues to have contemporaneous effects on the right to vote. Drawing from two definitions of racial realism,²¹ this article contends that in order to address the gap between the racial reality that we currently live in and the rampant attempts to limit voter access requires a dose of what I call “voting realism.”²²

Voting realism requires (1) acknowledging that race has significance and usefulness and (2) developing more imagination in how we achieve racial equality. Voting realism recognizes that race and racism influence the voting process. In fact, party identification throughout the voting process is often synonymous with race.²³ Further, policies that are adopted include this recognition, whether stated or unstated or whether authorized pursuant to the Elections Clause or the Fourteenth Amendment. Voting realism allows legislators to think imaginatively about what the laws should be without ignoring the role that racism plays in the process. It suggests that instead of abandoning racially aware remedies, we should acknowledge the impact that the existing laws have on racial and ethnic minorities and their ability to access the ballot to develop laws that address concerns. Voting realism highlights that race neutral laws can and often do have racial effects and adversely impact groups that happen to be minority. It has become normative behavior. However, voting realism offers that racial effects should serve as a key consideration in any legislation affecting the right to vote. Yet, it also challenges us to think more imaginatively about restoring Section 4. The answer may well lie beyond a reboot of the Voting Rights Act or a re-enforcement of the National Voter Registration Act. Voting realism attempts to envision the possibilities of a system that is free from race discrimination, yet does the work of mitigating its influence.

¹⁹ See Richard L. Hasen, *How to Save the Voting Rights Act*, SLATE MAG. (Aug. 4, 2015, 11:04 AM) (“Today, Republicans see the Voting Rights Act as protection for Democrats, not racial minorities.”),

http://www.slate.com/articles/news_and_politics/politics/2015/08/how_to_save_the_voting_rights_act_voting_rights_shouldn_t_rely_on_parsing.html.

²⁰ See Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1270, 1279–80 (2015).

²¹ See *infra* Part I.

²² Voting realism is offered as a theoretical approach to the current state of voting rights and hopefully challenges advocates to expand coverages and protections. Admittedly, this approach may garner more questions than answers, but the framework for achieving a system that protects and encourages voter participation must yield to a more expansive discussion than race and party.

²³ See Frank Newport, *Democrats Racially Diverse; Republicans Mostly White*, GALLUP (Feb. 8, 2013), <http://www.gallup.com/poll/160373/democrats-racially-diverse-republicans-mostly-white.aspx>. See generally Chris Tokita, *A Glance at Race and Political Affiliation: Independents Represent!*, ALL TRUISMS (June 16, 2015), <https://christophertokita.wordpress.com/2015/06/16/a-glance-at-race-and-political-affiliation-independents-represent/> (showing racial composition of each political affiliation).

Part I of this Article explores two very different conceptualizations of racial realism and offers a perspective for voting. Part II discusses the purpose of the Voting Rights Act and the impact of *Shelby County*. Part III explores responses to *Shelby County* and describes the racial impact of these measures. Part IV offers a new approach that I call “voting realism” to serve as a framework for combating voter discrimination. This approach suggests that the focus should not limit “remedies” to an either/or approach, but begin to think imaginatively about the type of democracy not only that we currently live in, but the type of democracy we can aspire to create.²⁴

I. DEFINING VOTING REALISM

With the *Shelby County* decision, the shifting burdens, the exorbitant costs of Section 2 litigation, and the abundance of voting law changes, it is easy to become despondent. Yet, the need continues to develop legal and policy approaches that continue to fight the good fight against race discrimination in voting. While most articles discuss whether courts and legislators should embrace party or race, the Elections Clause, or the Fourteenth Amendment, it becomes possible to ignore the larger issue of creating a system that allows every American the opportunity to fully and freely participate in the electoral process.²⁵ Voting realism offers a theoretical approach for discussion. It suggests that we must acknowledge our present reality. It adheres to the belief that it is time to think creatively and redefine goals regarding what it means to have assurances that the right to vote is protected from discrimination. The approach is loosely derived from two divergent theories regarding racial realism from Professors Derrick Bell²⁶ and John Skrentny,²⁷ who,

²⁴ Part IV, *infra*, begins a discussion on an imaginative way to achieve universal suffrage through passage of a right to vote amendment. This law review article is not meant to dispositively discuss this often debated issue, but merely to present it as an example of the type of imaginative thinking that Professor Bell would endorse.

²⁵ See, e.g., Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 Harv. L. Rev. F. 58 (2014).

²⁶ Professor Derrick Bell is considered one of the founders of Critical Race Theory. *Scholarship*, DERRICK BELL OFFICIAL SITE, <http://professorderrickbell.com/scholarship/> (last visited Oct. 9, 2016). He was the first tenured African American faculty member at Harvard Law School. Fred. A. Bernstein, *Derrick Bell, Law Professor and Rights Advocate, Dies at 80*, N.Y. TIMES (Oct. 6, 2011), http://www.nytimes.com/2011/10/06/us/derrick-bell-pioneering-harvard-law-professor-dies-at-80.html?_r=0. He authored several books on the subject. See, e.g., DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (6th ed. 2008); DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2005); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (reprint 1993) (1992); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1989).

²⁷ John Skrentny is a professor of sociology and director of the Center for Comparative Immigration Studies at the University of California, San Diego. *Faculty Profiles: John D. Skrentny*, U.C. SAN DIEGO DEPT SOC., <https://sociology.ucsd.edu/people/profiles/faculty/john-skrentny.html> (last visited Oct. 9, 2016); *Co-Directors and Staff*, U.C. SAN DIEGO CTR. FOR COMP. IMMIGR. STUD.,

despite coining the same phrase of “racial realism,” certainly had different applications. However, parts of both these theories can assist in developing an approach to voting rights and the new reality.

A. Imaginative Thinking.

Professor Derrick Bell’s article *Racial Realism* provided the harsh conclusion that the quest for racial equality was futile and that racism is permanent.²⁸ Despite his many contributions to overcome racial discrimination in many areas as an attorney, law professor, and law school dean, this derogatory proclamation could leave advocates hopeless. Professor Bell witnessed landmark victories and debilitating defeats. He offered that despite “herculean efforts [l]egal precedents we thought permanent have been overturned, distinguished, or simply ignored.”²⁹ His position on the permanence of racism has been thoroughly critiqued.³⁰ He chastises activist reliance on a model of striving towards the goal of racial equality as elusive.³¹ He points out that once the overt signs of racial inequality were removed through the adoption of laws that dismantled Jim Crow laws, “more subtle” forms of discrimination appeared.³² Rejecting his position on

<http://ccis.ucsd.edu/people/staff/index.html> (last visited Oct. 9, 2016). He is the author of several books, on this subject. *See, e.g.*, JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (Belknap Press, 2002); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1st ed. 1996).

²⁸ Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) [hereinafter Bell, *Racial Realism*]. Bell’s core message was as follows:

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary “peaks of progress,” short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on to adopt policies based on what I call: “Racial Realism.” This mind-set or philosophy requires us to acknowledge the permanence of our subordinate status. That acknowledgement enables us to avoid despair, and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.

Id. at 373–74.

²⁹ *Id.*

³⁰ *See, e.g.*, John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533, 544–45 (1992) (describing Bell’s thesis as full of despair and ignoring significant gains); Jonathan K. Stubbs, *Perceptual Prisms and Racial Realism: The Good News About A Bad Situation*, 45 MERCER L. REV. 773, 775–76 (1994) (critiquing Bell’s thesis through the prism of how judicial decisions are made); John D. Skrentny, *Have We Moved Beyond the Civil Rights Revolution?*, 123 YALE L.J. 3002, 3010–11 n.36 (2014) [hereinafter Skrentny, *Civil Rights Revolution*].

³¹ *See* Bell, *Racial Realism*, *supra* note 27, at 374 (“Despite our successful effort to strip the law’s endorsement from the hated “Jim Crow” signs, contemporary color barriers are less visible but neither less real nor less oppressive.”).

³² *See id.* at 373–74 (“What was it about our reliance on racial remedies that may have prevented us from recognizing that abstract legal rights, such as equality, could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form?”).

the eternalness of racism is easy; but realizing that the task of undoing centuries of discrimination is devastating.³³ This is all a bit too depressing.

Interestingly, however, Professor Bell seems to slightly change course in his article and encourages a “resistance to oppression,” but warns that it will reap minimal results.³⁴ Nonetheless, deep within his soliloquy resides a declaration to redefine goals of racial equality and opportunity, based on the assumption of the permanence of racism.

B. *Race 2.0.*

Conversely, John Skrentny describes a new type of racial realism that is focused on employment. He proposes that how we think about race has evolved, and that it has a positive connotation in many respects. He writes:

A [sic] strategy of managing racial difference is what I call *racial realism*. With this strategy, employers perceive race as something real and relevant to the functioning of their workplaces, and believe the effective management of racial difference can improve organizational operations and (for private employers) potentially increase profits. My use of the term “realism” here is meant to emphasize employer perception of the ontological reality of race, rather than the jurisprudential tradition of legal realism.³⁵

Skrentny argues that “[t]he goal of racial realists is not equal opportunity or justice, but organizational effectiveness.”³⁶ He distinguishes his definition from Professor Bell, and acknowledges that the positions are starkly different.³⁷ Unlike Professor Bell, Professor Skrentny believes that the use of race, in employment, law, and politics has usefulness and significance.³⁸ He points out that in the political realm, voters use racial realism in choosing candidates,³⁹ and elected officials also use it to their political advantage.⁴⁰

³³ See *id.* at 378 (“The Racial Realism that we must seek is simply a hard-eyed view of racism as it is and our subordinate role in it. We must realize, as our slave forebears, that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome.”).

³⁴ See *id.*

³⁵ Skrentny, *Civil Rights Revolution*, *supra* note 29, at 3010 (citation omitted).

³⁶ *Id.* at 3011.

³⁷ *Id.* at 3010–11 n.36 (“My use of racial realism therefore has little in common with that of Derrick Bell, who used the same phrase to refer to a philosophy or mentality that saw racial equality as an unattainable goal in the United States. Bell argued for acknowledgement of the subordinate status for people of color and skepticism toward civil rights laws and policies.” (citing Bell, *Racial Realism*, *supra* note 27, at 373–74)).

³⁸ See generally JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE (2013) [hereinafter SKRENTNY, AFTER CIVIL RIGHTS].

³⁹ Skrentny, *Civil Rights Revolution*, *supra* note 29, at 3020 (“The People themselves appear to use racial realism when voting for elected officials . . . Whites tend to elect whites, and nonwhites elect nonwhites.”) (citation omitted).

⁴⁰ *Id.* at 3022 (“Democratic presidents still use racial realism when making appointments, from Bill Clinton’s efforts to have a cabinet that ‘looks like America’ to Barack Obama’s strategic appointment of

Skrentny's model proposes that race and how society views it, in some realms, has evolved. His position, that racial realism has both usefulness and significance, challenges notions of race neutrality and race consciousness. In a jurisprudential sense, law has not evolved at the same pace. While the Supreme Court can acknowledge that race discrimination in voting continues, it does not offer a remedy.⁴¹ Voting realism is the recognition that race and racism influence the voting process. Policies that are adopted include this recognition, whether stated or unstated, or whether they are authorized pursuant to the Elections Clause or the Fourteenth Amendment. Indeed, the demise of Section 5 and the new millennium laws that restrict access to the ballot, such as voter ID and proof of citizenship laws, mirror Bell's apocalyptic prophesy and could lead to ultimate despair. Nonetheless, it is imperative that the work continues and that we begin to think inventively about not just restoring Section 4, but envisioning a broader reality where discrimination in voting does not exist, and access to the ballot is unfettered. Because racism continues to exist in voting laws,⁴² one cannot ignore its existence and hope to cure it without ever providing the proper medication that can heal the disease. It is imperative that we acknowledge the existence of racism, but it is also imperative that we not allow that reality to debilitate the quest to overcome it.

While the VRA was and continues to be an extraordinary piece of legislation, Bell's critique challenges us to ask for more. The VRA was exceptional in its ability to level the playing field in many respects. The goal of equality, however, remains elusive. I do not agree with Professor Bell that this reality requires us to abandon the quest. Indeed, the act of overcoming necessitates imaginative thinking that includes accepting that ignoring race will not lead to a comprehensive approach to mitigate, if not eliminate discrimination from the act of voting.

Voting realism allows legislators to think take into account about what the laws should be without ignoring the role that racism plays in our society. Voting realism would argue that instead of restoring Section 4, we should ask how to move beyond it. Voting realism advocates that the right to vote is fundamental and demands full protection. It does not run away from racially aware statutes, but seeks to embrace and improve them. It goes beyond a declaration of equality, addresses systemic problems, and develops a systematic approach to overcoming the ills of voter suppression and inequality. This approach suggests that the focus should not limit "remedies" but begin to think imaginatively about the type of democracy not only that we currently live in, but the type of democracy that we can aspire to have.

Sonia Sotomayor to the Supreme Court. Yet Republican presidents use racial realism as well") (citations omitted).

⁴¹ See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2 *Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.*") (emphasis added).

⁴² See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2619 (2013) ("[V]oting discrimination still exists; no one doubts that.").

II. BEING *SHELBY COUNTY*

In *Shelby County*, the Supreme Court dared Congress to change the coverage formula that determined which jurisdictions would be subject to federal oversight of voting changes under Section 5 of the Voting Rights Act.⁴³ It had cautioned Congress that the life of the VRA was subject to execution if it did not act in a previous case, *Northwest Austin Municipal Utility District Number One v. Holder*, (NAMUDNO).⁴⁴ Congress did nothing. In the *Shelby County* decision, the Court indicated that it was forced to act stating, “[Congress’s] failure to act leaves us today with no choice but to declare §4(b) unconstitutional.”⁴⁵ Further, the Court posited that the “country has changed” and the formula did not address “current conditions.”⁴⁶ While it acknowledged that the VRA is responsible in large part for increasing voter registration for black voters and the number of minority elected officials, it essentially proclaimed that enough was enough.⁴⁷ Essentially, the Court gave the impression that it viewed Section 5 as medicine for a disease that was no longer at epidemic proportions while refusing to allow a targeted and effective remedy to currently infected areas. Thus, a majority of the justices, without doubt, believed that the “current conditions,” like fewer disparities in voter registration, for example, merited the removal of all life-sustaining legislation.⁴⁸ It challenged Congress to act, but had little appreciation for the historical significance and modern day usefulness.

⁴³ *See id.* at 2630–31. (“There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done. . . . Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.”)

⁴⁴ *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUNDO)*, 557 U.S. 193 (2009). The Court did so by noting that:

More than 40 years ago, this Court concluded that ‘exceptional conditions’ prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.

Id. at 211 (citation omitted).

⁴⁵ *See Shelby Cty.*, 133 S. Ct. at 2631.

⁴⁶ *Id.*

⁴⁷ *See id.* at 2526–28.

⁴⁸ *See id.* at 2629 (“Congress did not use the record it compiled to shape a coverage formula rounded in current conditions.”).

A. Purpose and Need for the VRA.

We have seen this before. In 1883, the Supreme Court found that the Civil Rights Act of 1875, which sought to make former slaves full and equal citizens, was unconstitutional.⁴⁹ This marked a turning point in the United States' journey of becoming a nation where all men were truly created equal. Less than twenty years after passage of the Fifteenth Amendment, the last African American gave up his seat in Congress due to disenfranchisement and racial tensions.⁵⁰ States had implemented barriers to the franchise, such as literacy tests, grandfather clauses, and felon disenfranchisement laws.⁵¹ It would take seventy years before an African American would return to Congress from a former Confederate state, and almost a century from the passage of the Fifteenth Amendment before Congress would provide the nation with tools to combat massive and violent disenfranchisement in passing the 1965 VRA.⁵² This Act was “a response to the ‘unremitting and ingenious defiance’ of the command of the Fifteenth Amendment for nearly a century by State officials in certain parts of the Nation.”⁵³ The VRA is commonly referred to as “the most successful piece of civil rights legislation ever adopted by the United States Congress.”⁵⁴ The dismantling of disenfranchising methods that had existed almost a century prior to its enactment justifies this title. The historical import of the Act cannot be overstated. It included two primary provisions: Sections 5 and 2, each discussed in turn.

1. *Section 5*—Section 5 of the VRA was enacted to protect the voting process from historically debilitating race discrimination.⁵⁵ The VRA was needed in large part due to the widespread and successful efforts to ban blacks from the ballot. Mechanisms such as the poll tax, literacy test, and the grandfather clause kept the

⁴⁹ See generally *The Civil Rights Cases*, 109 U.S. 3, 31–32 (1883).

⁵⁰ George Henry White, a Republican member of the United States House of Representatives, first elected in 1896, was the last African American to leave Congress during the period of Reconstruction. See *George H. White (George Henry), (1852-1918)*, DOCUMENTING THE AM. S., <http://docsouth.unc.edu/nc/whitegh/bio.html> (last updated Mar. 2 2016).

⁵¹ See Rayford W. LOGAN, *THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 212 (First Collier Books ed. 1965) (1954); Steve Mintz, *Winning the Vote: A History of Voting Rights*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights> (last visited Oct. 9, 2016).

⁵² See *Hathorn v. Lovorn*, 457 U.S. 255, 268 (1982) (explaining that the VRA embodied Congress's “firm intention to rid the country of racial discrimination in voting”).

⁵³ *McCain v. Lybrand*, 465 U.S. 236, 243 (1984) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

⁵⁴ See, e.g., *Introduction to Federal Voting Rights Laws*, U.S. DEPT OF JUST., <http://www.justice.gov/crt/introduction-federal-voting-rights-laws-1> (last updated Aug. 6, 2015).

⁵⁵ See *City of Rome v. United States*, 446 U.S. 156, 202 (1980) (Powell, J., dissenting).

rate of voter registration for African Americans at negligible levels.⁵⁶ The VRA declared that enough was enough.

Under what was previously Section 5 of the VRA, 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 on the anticipated effect on racial or language minorities in the jurisdiction).⁵⁷ Section 5 further suggested that demographic information and evidence of publicizing the change to the community would assist in its review.⁵⁸ Accordingly, the VRA banned disenfranchising mechanisms like the literacy test and poll taxes while institutionalizing federal oversight in the registration and the procedural context.⁵⁹

This recognition of the Act's genesis to prohibit race discrimination is of great meaning, particularly since efforts to restore the VRA tend to focus on race-neutral ways to address existing discrimination in voting.⁶⁰ Contrary to Professor Bell's admonition and despite scholarly assertions that the race-conscious method should be abandoned, ignoring the historical significance and the contemporary effects that remain calls for a different solution. While race-neutral statutes like the National Voter Registration Act,⁶¹ the Help America Vote Act,⁶² and the Uniformed and Overseas Citizens Absentee Voting Act⁶³ have made great progress, the effects of modern day disenfranchising practices and procedures continue to have a racially discriminatory impact.⁶⁴

Since the *Shelby County* decision, our nation has lacked the vigilant oversight of the Department of Justice regarding voting changes, particularly in areas that were known for passing and attempting to implement legislation that infringed on

⁵⁶ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 62–63, 77–80, 84–93 (2000) (documenting myriad efforts to disenfranchise African Americans and others including poll taxes, literacy tests, violence, and criminal exclusion laws). *Cf. Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50–54 (1959) (holding that literacy tests, if applied equally across all races, did not contravene the Constitution). The VRA subsequently outlawed literacy tests. 52 U.S.C. § 10302(b) (2014) (suspending tests or devices which deny or abridge the right to vote).

⁵⁷ Required Contents, 28 C.F.R. § 51.27 (2015).

⁵⁸ *See id.*

⁵⁹ Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified as amended at 42 U.S.C. § 1973 (2014)).

⁶⁰ *See supra* Part I.

⁶¹ National Voter Registration Act of 1993, 42 U.S.C. § 1973gg (2012) (codified at 52 U.S.C. §§ 20501–11 (2014)).

⁶² Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (2014).

⁶³ Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–11 (2014).

⁶⁴ *See, e.g.,* JODY HERMAN, ET AL., *A REVIEW OF ACADEMIC LITERATURE ON THE EFFECTIVENESS OF THE NATIONAL VOTER REGISTRATION ACT 5–6* (Project Vote/Voting for America, Inc. 2009), <http://www.projectvote.org/wp-content/uploads/2009/07/NVRA-Literature-Review-FINAL.pdf> (finding that discrepancies among implementation of the National Voter Registration Act disproportionately impacts poor citizens).

a minority's right to vote.⁶⁵ While Section 5 of the VRA had certainly endured many challenges,⁶⁶ the most recent challenge in *Shelby County* thus far seems the most fatal.⁶⁷ Although *Shelby County* did not find Section 5 of the Act unconstitutional, it obliterated the coverage formula.⁶⁸ As Justice Ginsburg observed, "without that formula, § 5 is immobilized."⁶⁹ Jurisdictions could immediately enact voting changes without regard to its impact on voters.

The *Shelby County* decision invigorated state Attorney Generals' efforts to make voting more difficult.⁷⁰ Indeed in Texas, a few short hours after the *Shelby County* decision was announced Attorney General Abbott ordered its voter ID law effective immediately, despite a court ruling that the law discriminated against Hispanic and African American voters.⁷¹ Since then, a federal court has held that the Texas voter ID law is intentionally discriminatory, finding that approximately 608,470 registered voters, or 4.5% of all registered voters in Texas, lacked the requisite ID, and that a disproportionate number of these voters were African-American or Hispanic.⁷² The Fifth Circuit rearticulated the district court's findings:

(1) [the voter ID law] specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it; (2) a disproportionate number of Texans living in poverty are African-Americans and Hispanics; and (3) African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination.⁷³

⁶⁵ See *Ala. Legis. Caucus v. Alabama*, 135 S. Ct. 1257, 1272–74 (2015).

⁶⁶ See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 200–01, 211 (2009) (holding that Section 5 was constitutional, but cautioning Congress regarding the constitutionality of Section 5 and expanded bail-out provisions); *South Carolina v. Katzenbach*, 383 U.S. at 317, 337 (1966) (holding that Section 5 of the VRA was constitutional).

⁶⁷ See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (chastising Congress' inaction and finding Section 4(b) of the VRA unconstitutional, thus invalidating the formula for determining what jurisdictions needed preclearance from the federal government). Since the preclearance remedy in VRA Section 5 is based on the formula in Section 4, the *Shelby County* decision essentially stripped Section 5 of its power. See *id.* at 2632 n.1 (Ginsburg, J., dissenting).

⁶⁸ See *id.* at 2631 (majority opinion).

⁶⁹ *Id.* at 2632 n.1 (Ginsburg, J., dissenting).

⁷⁰ See, e.g., *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 229 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 1735, (2015) (finding that "North Carolina began pursuing sweeping voting reform" the day after *Shelby County* was handed down); *Davis v. Abbott*, 781 F.3d 207, 212 (5th Cir. 2015) ("The day after *Shelby County* came down, on June 26, 2013, then-Governor Rick Perry signed the bill repealing the 2011 plan, . . . and making the [new Senate] plan immediately effective.").

⁷¹ Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, FRONTLINE (June 26, 2013), <http://www.pbs.org/wgbh/frontline/article/with-voting-rights-act-out-states-push-voter-id-laws/>.

⁷² *Veasey v. Perry*, 71 F. Supp. 3d 627, 659, 702 (S.D. Tex. 2014).

⁷³ *Veasey v. Abbott*, 796 F.3d 487, 512–13 (5th Cir. 2015) (quoting *Veasey*, 71 F. Supp. 3d at 664).

Notwithstanding these and other findings, Texas implemented its voter ID requirement in the 2014 midyear election.⁷⁴ Other jurisdictions making a speedy transition to a world without Section 5 include North Carolina and Virginia, which both introduced redistricting plans, while North Carolina also introduced a voter ID law considered at the time to be the most restrictive in the country.⁷⁵

The country cannot wait almost a century, as it did between the passage of the Fifteenth Amendment and the 1965 VRA, before Congress realizes that action is needed to protect the democratic process, election integrity, and access to the ballot.

2. *Section 2*—Although Section 5 was effectively dismantled in the *Shelby County* decision, Section 2 of the VRA remains a viable tool to combat discrimination in voting.⁷⁶ Courts have noted similarities between the Section 5 and Section 2 inquiries.⁷⁷ Since *Shelby*, the primary tool for eradicating voting discrimination has been Section 2 of the VRA. Section 2, while a powerful tool, differs from Section 5 in four key ways: it is reactive instead of preemptive; litigation is more expensive than preclearance; the burden of proof shifts from the state to the petitioner; and federal oversight and notice.⁷⁸ Because of *Shelby County*, the many voting changes that once were subject to Section 5 preclearance were now free to be implemented without federal approval or consideration.

⁷⁴ Texas Attorney General Abbott also pressed forward “redistricting maps legislators drew up in 2011 that ‘show[ed] a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote,’ according to a court ruling that blocked the maps.” Childress, *supra* note 70.

⁷⁵ See Penda D. Hair, *Note to Politicians: Think It’s Open Season on Voters? Think Again!*, HUFFINGTON POST (Oct. 7, 2013, 2:31 PM), http://www.huffingtonpost.com/penda-d-hair/note-to-politicians-think_b_4058275.html; see also Childress, *supra* note 70. Having previously had voter ID laws blocked by the Justice Department and the federal courts, South Carolina Attorney General Alan Wilson called the VRA an ‘extraordinary intrusion’ on its sovereignty,” and said “South Carolina can now move forward with ‘reasonable election reforms’ including its voter ID law.” *Id.*

⁷⁶ See *Thompson v. Attorney Gen. of Miss.*, No. 3:15-CV-620-JEG-DPJ-CWR-FKB, 2015 WL 5254150, at *3–4 (S.D. Miss. Sept. 9, 2015).

⁷⁷ See *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 241–42 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 1735, (2015) (“Further, as the Supreme Court noted, ‘some parts of the [Section] 2 analysis may overlap with the [Section] 5 inquiry.’ . . . Both Section 2 and Section 5 invite comparison by using the term ‘abridge[.]’ Section 5 states that any voting practice or procedure ‘that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or *abridges* the right to vote.’ Section 2 forbids any ‘standard, practice, or procedure’ that ‘results in a denial or *abridgement* of the right of any citizen of the United States to vote on account of race or color. . . .’ The Supreme Court has explained that “[t]he term “abridge,” . . . whose core meaning is “shorten,” . . . necessarily entails a comparison. It makes no sense to suggest that a voting practice “abridges” the right to vote without some baseline with which to compare the practice.” (citations omitted) (emphasis added)).

⁷⁸ See, e.g., Yeomans, et al., *supra* note 9, at 3–4. See generally Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928 (2013).

Although Section 2 remains a powerful tool to combat discrimination in voting, it too is currently under attack.⁷⁹

Section 2 of the Voting Rights Act is a nationwide prohibition against voting practices and procedures that discriminate on the basis of race, color or membership in a language minority group.⁸⁰ In the landmark case *Thornburg v. Gingles*, the Court reasoned “that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”⁸¹ A Section 2 inquiry, then, differs based on the type of alleged discrimination. In a case challenging a voting configuration, such as a districting claim or a challenge to a large voting district such as an at-large system, the Court will not only consider the three *Gingles* factors (compactness, political cohesiveness, and legally significant bloc voting), but will also conduct a thorough assessment of the extent that historical efforts may have caused the vast disparities between racial minorities and the majority race.⁸² In order to successfully show a Section 2 violation, the petitioner must demonstrate not only the three *Gingles* prerequisites, but discrimination under the totality of the circumstances.⁸³ The Court will also consider the factors set out in the *Gingles* case, commonly referred to as the “Senate Factors”⁸⁴ or the totality of the circumstances analysis. This

⁷⁹ Guy-Uriel E. Charles, Response, *Section 2 Is Dead: Long Live Section 2*, 160 U. PA L. REV. 219, 220–21, 221 n.8 (2012) (prophesying that the United States Supreme Court could strike down Sections 2 and 5 of the Voting Rights Act in the next two to five years.); Roger Clegg & Hans A. von Spakovsky, “Disparate Impact” and Section 2 of the Voting Rights Act, HERITAGE FOUND.: LEGAL ISSUES (March 17, 2014) at 1, 2 (arguing that it would be unconstitutional to read Section 2 to prohibit voting practices that have a disparate *impact* on minority groups, and that section 2 should be read only to prohibit voting practices with disparate *treatment*); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 748–49 (2016) (stating that Section 2 is in the crosshairs).

⁸⁰ Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2014)).

⁸¹ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

⁸² *See id.* at 35–46.

⁸³ *Id.* at 43.

⁸⁴ *Id.* at 44–46. The Senate Factors include:

1. [T]he . . . history of official [voting-related] discrimination in the state or political subdivision . . . ;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used . . . voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. . . . whether members of the minority group have been denied access to [the candidate slating processes];
5. the extent to which members of the minority group . . . bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterizes by overt or subtle racial appeals; [and]
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 44–45 (footnotes omitted).

totality assessment allows the court to put the action in context. Reviewers are not required to find any particular number of the Senate Factors.⁸⁵

Courts have found two types of cases under Section 2: vote dilution and vote denial. Vote dilution cases involve the full *Gingles* analysis, including demonstrating the ability to draw a majority minority district as part of a remedial plan and primarily challenge whether her ballot is counted equally as other voters. In the *Gingles* analysis, plaintiffs have the burden of proving that the practice or procedure dilutes the vote and prevents the opportunity to have her vote counted equally. In a vote denial case, the plaintiff does not have to demonstrate the three *Gingles* prerequisites, *per se*, but the existence of the totality of circumstances. Vote denial cases are brought to challenge provisions such as felon disenfranchisement, voter id, demonstrate that the right to cast a ballot or participate equally in the electoral process has been hindered by the existence of the discriminatory practice or procedure.

In a recent vote denial case, *League of Women Voters of North Carolina v. North Carolina*, the court addressed whether North Carolina's elimination of same day registration, as well as out of precinct voting, discriminated against its African American citizens.⁸⁶ The court explained that in Section 2 vote denial cases, one must undergo a two-step process that involves whether the bill imposes a discriminatory burden,⁸⁷ and whether a causal link exists.⁸⁸

B. Fighting the Good Fight.

Since *Shelby County*, the VRA has been fighting with one arm, unable to block blows from jurisdictions implementing legislation without federal oversight. In

⁸⁵ *Id.* at 45. Under Section 2, “[a] violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the *State or political subdivision* are not equally open to participation by members of a class of citizens.” 52 U.S.C. § 10301(b) (2014) (emphasis added). Courts make “an intensely local appraisal of the design and impact of [electoral administration] . . . in the light of past and present reality, political and otherwise” *Gingles*, 478 U.S. at 78.

⁸⁶ *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 1735, (2015).

⁸⁷ *Id.* at 245. (“There can be no doubt that certain challenged measures in House Bill 589 disproportionately impact minority voters. The district court found that Plaintiffs ‘presented un rebutted testimony that [African American] North Carolinians have used [same-day registration] at a higher rate than whites in the three federal elections during which [same-day registration] was offered’ and recognized that the elimination of same-day registration would ‘bear more heavily on African-Americans than whites.’”). The district court also “accepted the determinations of Plaintiffs’ experts” that African American voters disproportionately voted out of precinct and that “the prohibition on counting out-of-precinct provisional ballots will disproportionately affect [African American] voters.” *Id.* at 233.

⁸⁸ *Id.* at 245 (“Second, we must determine whether this impact was in part ‘caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.’”) Furthermore, the court must determine whether members of the protected class “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* (quoting 52 U.S.C. § 10301).

some instances, after the statute has been implemented and subsequently found to discriminate against minority voters, the Court has continued to allow implementation despite its effect on voting access. Since 2010, twenty-one states have enacted new laws that tend to make voting more difficult.⁸⁹ In fact, fifteen states will have new rules in place affecting the right to vote in the 2016 presidential election.⁹⁰

Race-neutral laws, like voter ID, continue to have a racial impact. Undeniably, scholars believe that the voter ID laws and other restrictive measures have some impact on voter turnout. In the 2014 midterm elections, voter turnout was exceptionally low; the lowest in seventy-two years.⁹¹ However, many variables exist that can affect turnout, such as, weather, quality of candidates, work schedules, etc. Regarding close elections, however, voter ID and other laws may have attributed to suppressed turnout. In Texas, Democratic officials believe that the voter ID laws were part of the reason that the state had some of the lowest voter turnout in the country.⁹² In October, a study by the Government Accountability Office found that voter ID laws contributed to lower voter turnout amongst minorities, young people, and poor people in the 2012 elections in Kansas and Tennessee.⁹³

III. ONWARD

As previously discussed, efforts to restore Section 4 are greatly needed, while at the same time, protecting what remains of the Voting Rights Act is of paramount importance. In an attempt to respond, a bipartisan group of Congresspersons filed the Voting Rights Advancement Act of 2015 (VRAA),⁹⁴ which had the stated purpose of “amend[ing] the Voting Rights Act of 1965 to revise the criteria for determining which states and political subdivisions are subject to section 4 of the Act. . . .”⁹⁵ The VRAA posits a new nationwide coverage formula that would

⁸⁹ *Voting Laws Roundup 2015*, BRENNAN CTR. FOR JUST. (June 3, 2015), <https://www.brennancenter.org/analysis/voting-laws-roundup-2015>.

⁹⁰ *Id.*

⁹¹ Jose A. DelReal, *Voter Turnout in 2014 Was Lowest Since WWII*, WASH. POST (Nov. 10, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/11/10/voter-turnout-in-2014-was-the-lowest-since-wwii/>.

⁹² Ross Ramsey, *Turnout Down in Texas, and Democrats Claim a Reason: Voter ID Laws*, N.Y. TIMES (Nov. 8, 2014), <http://www.nytimes.com/2014/11/09/us/turnout-down-in-texas-and-democrats-claim-a-reason-voter-id-law.html>.

⁹³ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 51–52 (2014).

⁹⁴ Voting Rights Advancement Act of 2015, H.R. 2867, 114th Cong. (2015).

⁹⁵ *Id.* The coverage formula provides that states are subject to certain requirements if:

- (i) 15 or more voting rights violations occurred in the State during the previous 25 calendar years; or
- (ii) 10 or more voting rights violations occurred in the State during the previous 25 calendar years, at least one of which was committed by the State itself (as opposed to a political subdivision within the State).

determine whether a state would be subject to Section 5 preclearance.⁹⁶ The act limits the types of changes that would be subject to preclearance to changes affecting elections, redistricting, and the qualifications to vote.⁹⁷ Under these new criteria, coverage would last for ten years and would cover thirteen states.⁹⁸

Congress may create legislation that imposes a limit on the states “broad powers to demine the conditions under which the right of suffrage may be exercised.”⁹⁹ These powers, given to Congress under the Fourteenth and Fifteenth Amendments, “are to a degree restrictions of State power.”¹⁰⁰ While the Elections Clause of the United States Constitution gives Congress the ability to determine the qualifications of electors,¹⁰¹ states must do so consistent with the guarantees of the Fourteenth and Fifteenth Amendments that prohibits states from imposing qualifications for voting that discriminate on the basis of race, language, or minority status.¹⁰²

In his book, *After Civil Rights: Racial Realism in the New American Workplace*,¹⁰³ Skrentny uses the term “racial realism” to refer to the way that race has changed in society since the passage of another landmark piece of legislation, Title VII of the 1964 Civil Rights Act.¹⁰⁴ Title VII and the VRA made Jim Crow level race discrimination illegal.¹⁰⁵ Skrentny posits that although race during the Jim Crow and Civil Rights eras were used as a mechanism to discriminate and to negatively impact African Americans, employers often have legitimate, nonracial reasons for choosing a person of color.¹⁰⁶ He argues that America is different in how we treat race today, and that while many support colorblind classical liberalism

Id. § 4. These criteria would subject Alabama, Arkansas, Arizona, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, Texas and Virginia to preclearance requirements. *Fact Sheet: Voting Rights Advancement Act of 2015*, LAW COMMITTEE FOR C.R. UNDER L., <http://lawyerscommittee.org/wp-content/uploads/2015/07/VRAA-Fact-Sheet-2015.pdf> (last visited Aug. 24, 2016).

⁹⁶ *Id.* § 4.

⁹⁷ *Id.* § 4A.

⁹⁸ H.R. 2867; *Fact Sheet: Voting Rights Advancement Act of 2015*, *supra* note 93.

⁹⁹ See *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959)).

¹⁰⁰ *Ex parte Virginia*, 100 U.S. 339, 346 (1879).

¹⁰¹ See U.S. CONST. art. I, § 4, cl. 1.

¹⁰² See *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966) (upholding Section 4 of the VRA); see also *City of Rome v. United States*, 446 U.S. 156, 175 (1980) (“[U]nder the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect”).

¹⁰³ See generally SKRENTNY, *AFTER CIVIL RIGHTS*, *supra* note 37.

¹⁰⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (“It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .”).

¹⁰⁵ *Id.*

¹⁰⁶ See SKRENTNY, *AFTER CIVIL RIGHTS*, *supra* note 37, at 10–18. Skrentny argues fundamentally that race in the employment sector has “significance” and “usefulness.” *Id.* at 10.

and would argue for the elimination of racial classifications, support can also be found for racial realism and race consciousness.¹⁰⁷

A. Voting Realist Approaches.

Likewise, while great gains have been made in the area of voting rights, classical colorblind liberalism would advocate for a race-neutral approach to this issue that would ignore racial classifications. However, in the voting rights era, it has been demonstrated that a race-neutral legislation can have racial effects.¹⁰⁸ For example, the National Voter Registration Act, while race neutral, tremendously increased the number of persons on the voter rolls.¹⁰⁹ Registrations at social services departments greatly increased minority registrations numbers. Moreover, the need for race-conscious legislation remains because discrimination based on race remains. As Professor Bell lamented, laws like the VRA and Title VII, which were once safe havens, have become relics of the past.¹¹⁰ Yet, instead of discussing restoration, maybe resurrection is the more appropriate way to consider providing protection against suppressive and discriminatory practices. Instead of advocating for the elimination of racial classifications, an alternative focus would be to completely eliminate discrimination of any kind. Accordingly, the existence of race discrimination should serve as the appropriate impetus to craft legislation that will assist in the long held objective.

In this new reality where people of color are making great gains and the demographics of the electorate are rapidly changing,¹¹¹ it is imperative that we do not choose to ignore race, but instead acknowledge it as a consideration in naming societal wrongs and developing remedies. While Skrentny considers racial realism as applied to employment law, critical race theorist Derrick Bell first coined the phrase and defined it as a means to redefine goals of racial equality.¹¹² Bell's racial realism not only acknowledges societal gains, but also argues that today's barriers are "less visible but [not] less real nor less oppressive."¹¹³ Moreover, while Skrentny

¹⁰⁷ See *id.* at 4. Skrentny defines color-blind classical liberalism as the view that "immutable differences such as race or ancestry should not determine opportunities or outcomes." *Id.*

¹⁰⁸ Jody Herman et al., *A Review of Academic Literature on the Effectiveness of the National Voter Registration Act*, PROJECT VOTE 2 (2009), <http://www.projectvote.org/wp-content/uploads/2009/07/NVRA-Literature-Review-FINAL.pdf>.

¹⁰⁹ J. Mijin Cha, *Registering Millions: The Success and Potential of the National Voter Registration Act at 20*, DEMOS 1–2 (May 20, 2013), <http://www.demos.org/sites/default/files/publications/RegisteringMillions-NVRA-Demos.pdf>.

¹¹⁰ See Bell, *Racial Realism*, *supra* note 27, at 374 ("Legal precedents we thought permanent have been overturned, distinguished, or simply ignored Despite our successful effort to strip the law's endorsement from the hated 'Jim Crow' signs, contemporary color barriers are less visible but neither less real nor less oppressive.")

¹¹¹ Dante Chinni, *Changing Demographics Tilt Toward Democrats—Eventually*, NBC NEWS (Nov. 3, 2015, 10:52 AM) <http://www.nbcnews.com/meet-the-press/changing-demographics-tilt-toward-democrats-eventually-n455036>.

¹¹² See generally Bell, *Racial Realism*, *supra* note 27.

¹¹³ *Id.* at 374.

asks us to look at race through a twenty-first century lens,¹¹⁴ Bell suggests that we rely less on racial remedies.¹¹⁵ The answer for voting rights lies in the middle—it is important to redefine goals of racial equality and develop strategies that acknowledge difference and the historical and contemporaneous consequences and address current race based inequities.

1. *Thinking Beyond*—In a previous article, I advocated for Voter Impact Statements as a means of providing Section 5-like coverage by utilizing Congress’s authority under the Elections Clause.¹¹⁶ While a need exists to require legislators to vet legislation that effects the right to vote prior to passage is sorely needed, in a post-*Shelby County* world, perhaps this lacks the requisite imagination that Professor Bell invoked.¹¹⁷ Skrentny contends that a “gap” exists “between everyday practice and the law, and that we should consider reforming the law to bring the two into sync, so as to ensure that we act in accordance with our most fundamental values.”¹¹⁸ How to fill the gap between those who advocate for race neutrality and race consciousness is a tall order. However, it is important to remember that the VRA was a product of the reality of race in America. While the reality present in 1965 was much different from our present day reality, race continues to serve as a factor in the accumulation of power, wealth, and voting rights in society. To that end, scholars have suggested the use of the Elections Clause in an effort to align with the current Supreme Court’s jurisprudential view of race.¹¹⁹ However, the debate over Elections Clause or Fourteenth Amendment could expand with consideration over adopting a constitutional amendment that recognizes the universal need for reform that address racial inequities and eliminates barriers. Accordingly, a voting realist approach would include advocating for an affirmative right to vote in the United States Constitution.

¹¹⁴ SKRENTNY, *AFTER CIVIL RIGHTS*, *supra* note 37, at 10. (“Given its emphasis on instrumental market logics and employer discretion, along with its downplaying of rights and justice, racial realism is an apt strategy for managing race in the ‘neoliberal’ era.”).

¹¹⁵ Bell, *Racial Realism*, *supra* note 27, **Error! Bookmark not defined.** at 375 (“Clearly we need to examine what it was about our reliance on racial remedies that may have prevented us from recognizing that these legal rights could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in more subtle though no less discriminatory form.”).

¹¹⁶ See generally Daniels, *A Vote Delayed Is a Vote Denied*, *supra* note 18. I also suggested that the VIS should include data regarding the current need and purpose, list alternative proposals, and allow for public comment. This action would allow the public and the elected body to thoroughly vet the proposed action. *Id.* at 106–09.

¹¹⁷ See *supra* Part II.

¹¹⁸ SKRENTNY, *AFTER CIVIL RIGHTS*, *supra* note 37, at 3.

¹¹⁹ See, e.g., Conner Johnston, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post- Shelby County*, 62 UCLA L. REV. 236 (2015) (advocating that Congress pass voting rights legislation based on the Elections Clause instead of the Fourteenth and Fifteenth Amendments).

2. *Right to Vote Amendment*—A Right to Vote (RTV) Amendment abolishes the discussion regarding race conscious versus race neutral approaches to securing voting rights to eligible citizens and demonstrably illustrates Derrick Bell's admonition to think imaginatively. Nonetheless, many Americans are unaware that the United States Constitution does not contain an affirmative right to vote. In an effort to think beyond the limits of the Voting Rights Act, an RTV amendment would secure the fundamental right to all eligible citizens and mitigate, if not eliminate many of the barriers to voting.¹²⁰ Accordingly, the Voting Rights Act nor any other federal legislation includes an explicit right to cast a ballot in an election. While an effort to restore Section 4 could address any new efforts to make voting harder, the preexisting conditions would continue to spread the disease of discrimination in the act of voting, without the salve of an affirmative right to vote enshrined in the United States Constitution.

While the United States Constitution contains more amendments that address the right to vote than any other right,¹²¹ it does not, however, contain an affirmative right to vote. The Supreme Court reminded us in *Bush v. Gore*,¹²² “the individual citizen has no federal constitutional right to vote for electors for the President of the United States.”¹²³ In a democratic society, the ability of the people to choose its leaders is integral to the political institution.¹²⁴ The inability to do so, makes outcomes suspicious and undermines this fundamental right.¹²⁵ To grant this power to other entities, such as the Electoral College, weakens the confidence in the system and appears suspect.¹²⁶ Without a precise statement in the United States Constitution granting, the right to vote is given and taken from groups of people based on various circumstances, inter alia, mental competency, previous

¹²⁰ Advocacy organizations have championed this approach. See *In Pursuit of an Affirmative Right to Vote: Strategic Report*, ADVANCEMENT PROJEKT 1 (July 2008), http://b.3cdn.net/advancement/ae94ce5ad8686f5760_27m6vr0j7.pdf. See also *Why We Need a Right to Vote Amendment*, FAIR VOTE, http://www.fairvote.org/right_to_vote_amendment#why_we_need_a_right_to_vote_amendment (last visited Dec. 23, 2016).

¹²¹The Constitution prohibits discrimination in the act of voting based on race, sex, and establishes an age barrier to casting a ballot. See, e.g., U.S. CONST. amend. XV, § 1 (prohibiting race discrimination in voting); U.S. CONST. amend. XIX (prohibiting discrimination based on sex); U.S. CONST. amend. XXIV (prohibiting poll taxes); U.S. CONST. amend. XXVI (prohibiting the denial of the right to vote to citizens over eighteen).

¹²² *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

¹²³ *Id.* at 104.

¹²⁴ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (declaring that the right to vote is fundamental “because [it is] preservative of all rights”).

¹²⁵ The 2016 election cycle fueled suspicions that the election system was “rigged” and unworthy of trust. See, e.g., Edward-Isaac Dovere, *Fears Mount on Trump's Rigged Elections Rhetoric*, POLITICO (Oct. 16, 2016, 9:09 AM), <http://www.politico.com/story/2016/10/donald-trump-rigged-elections-republicans-229846>; see also *Election Questions Leave U.S. Distrustful, Like Other Nations*, FORTUNE (Dec. 18, 2016, 4:25 PM), <http://fortune.com/2016/12/18/election-distrust-united-states/>.

¹²⁶ The electoral college took on added significance in the 2016 Presidential election. See e.g., *Donald Trump Completes Final Lap, Electoral College, to White House*, N.Y. TIMES (Dec. 19, 2016), http://www.nytimes.com/2016/12/19/us/politics/electoral-college-vote.html?_r=0.

conviction of a felony, or ability to obtain a required form of identification. An RTV amendment could serve as a race neutral, innovative and forward thinking approach to achieving voting realism.

The RTV amendment approach, however, is not without its detractors. Some scholars question whether an RTV amendment could achieve any tangible results.¹²⁷ Most argue that the existing constitutional amendments provide a right to vote and protects citizens from discrimination.¹²⁸ This argument, however, tends to ignore that the act of voting involves thousands of entities across the country to determine voter eligibility, such as age, residence, citizenship in some states, felon status, etc. Moreover, just as the constitutional amendment prohibits states from prohibiting an eighteen year old from voting, an RTV amendment could help ease the numerous barriers that currently exist. Federal legislators have offered perennial legislation that offers a RTV amendment.¹²⁹ Securing the right to vote to all persons through a constitutional amendment would allow greater access to the franchise and embolden the idea that the right to vote is indeed fundamental.¹³⁰

Additionally, an RTV amendment that simply guaranteed citizens an explicit constitutional right to vote would rise to the level of other protected rights such as the right to free speech and to practice the religion of your choice. An explicit right makes it much harder for states to employ divisive tactics that inhibit the exercise of the franchise. An RTV amendment eliminates the massive differences in accessing the ballot that occur across the country. The “crazy quilt” of felon disenfranchisement requirements would no longer exist if the RTV amendment

¹²⁷ Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL RTS. J. 11 (2014) (expressing concern over whether an amendment is worth the costs involved or would be considerably better than the current protections); *see also* Keith Ellison et al., *Room For Debate: Should Voting Be a Constitutional Right?*, N.Y. TIMES (Nov. 3, 2014), <http://www.nytimes.com/roomfordebate/2014/11/03/should-voting-in-an-election-be-a-constitutional-right>.

¹²⁸ Scott Lemieux, *The Big Problem with the Constitutional Right to Vote Amendment*, THE WEEK (Nov. 14, 2014), <http://www.theweek.com/articles/442548/big-problem-righttovote-constitutional-amendment>.

¹²⁹ For example, Representative Keith Ellison cosponsored the Pocan-Ellison Right to Vote Amendment in the 114th Congress, which would provide “Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides.” H.R.J. Res. 25, 114th Cong. (2015). Former Congressman Jesse Jackson, Jr. was a staunch supporter of the RTV. His RTV was proposed in 2001, 2003, 2005, 2007, and 2009, and not only gave eighteen year olds the right to vote, but also imposed upon Congress to establish the applicable laws that would govern election administration, e.g., voter id, proof of citizenship. *See, e.g.*, H.R.J. Res. 72, 107th Cong. § 2 (2001); (“Each State shall administer public elections in the State in accordance with election performance standards established by the Congress.”); H.R.J. Res. 28, 108th Cong. § 2 (2003) (same); H.R.J. Res. 28, 110th Cong. § 2 (2005) (same); H.R.J. Res. 28, 110th Cong. § 2 (2007) (same); H.R.J. Res. 28, 111th Cong. § 2 (2009) (same); H.R.J. Res. 28, 112th Cong. § 2 (2011).

¹³⁰ *See Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (finding the right to vote fundamental in a poll tax case). *But see* Joshua A. Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J.L. & PUB. POL’Y 143, 145 (2008) (arguing that the Supreme Court treats the right to vote as less than fundamental when it applies various levels of review).

granted the right to vote to all citizens.¹³¹ A RTV amendment could serve as a big, bold step towards ensuring that the right to vote is held in high esteem. It could serve as the first step in creating a process that is free, fair, and accessible to all Americans. If the country can move towards a system that allows all of its citizens to participate in the electoral process, the next logical step is to provide a procedure that places citizens in the posture to access the franchise.

The idea that we must choose between a race-conscious or race-neutral approach is, as Spencer Overton suggests, a “false choice.”¹³² To think imaginatively, as Professor Bell encourages, we must move beyond Section 4 and onto ideas, such as universal suffrage. A multiplicity of ideas is presently being offered as options to improve the voting process.¹³³ Professor Bell would posit that these offerings in the present political climate have little chance of moving forward.¹³⁴ Nonetheless, the determination to create fair, free, nondiscriminatory methods to access the ballot must endure.

CONCLUSION

Race still matters. Race-based solutions can cure race discrimination. Society does not have to choose between race-neutral and race-conscious solutions. Though great progress has been made, race discrimination in the area of voting continues to exist. In spite of the constant reminders that race still matters, we are bombarded with propaganda that it should not or it does not because we are post-racial. When proponents press this argument, they inevitably point to the election of President Barack Obama. This school of thought leads proponents to believe that the country no longer has a need for not only racial classifications, but for civil rights and its protective capacities. The 2016 election with its dog whistle politics may have convinced former post racial proponents that more work certainly needs to occur before we are truly free from discrimination. In spite of the election outcome, most citizens believe in the right to be treated equally and to be free from discrimination in various settings, including education, employment, housing, voting, and criminal justice. As previously stated, voting realism requires (1) acknowledging that race has significance and usefulness, and (2) being more imaginative in how we achieve racial equality. With this approach, the Voting Rights Act and the Elections Clause are merely starting points, not where progress

¹³¹ See, e.g., Jonathan Soros & Mark Schmitt, *The Missing Right: The Constitutional Right to Vote*, 28 DEMOCRACY, Spring 2013, <http://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote/>.

¹³² Spencer A. Overton, *The Future of Voting Rights: Remarks of Spencer A. Overton*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 637, 657 (2014).

¹³³ See, e.g., *Voting Reform Agenda*, BRENNAN CTR. FOR JUSTICE, <http://www.brennancenter.org/issues/voting-reform-agenda> (last visited Dec. 23, 2016); *The Voting Rights Act: Protecting Voters for Nearly Five Decades*, BRENNAN CTR. FOR JUSTICE (Aug. 22, 2016), <http://www.brennancenter.org/analysis/voting-rights-act-protecting-voters-nearly-five-decades>.

¹³⁴ See Bell, *Racial Realism*, *supra* note 27, at 374–75.

ends. It is imperative to think broadly about rights, not to narrow our gaze. An RTV amendment and other innovative measures will help expand the franchise and hopefully, begin to operate as if the right to vote is truly fundamental.

