Ralph Bunche Journal of Public Affairs

Volume 4
Issue 1 *2013 Supreme Court's adjudication on Section IV of the Voting Rights Act of 1965*

Article 3

Spring 2015

Antidiscrimination versus Nondiscrimination: Competing Perspectives on the Voting Rights Act

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The Voting Rights Act is perhaps the most successful civil rights law ever. Yet while one set of scholars regards the legislation's success as evidence that it remains necessary and appropriate, another set of scholars regards that success as a sign that the VRA is obsolete and inappropriate. In this article, I argue that disagreement about the VRA stems from two fundamentally different analytical approaches. The antidiscrimination paradigm focuses on how key indicators of political empowerment have progressed since 1965. The nondiscrimination paradigm focuses on how far those indicators are from what would be observed in the absence of racial discrimination. By identifying these two perspectives, this analysis illuminates sources of scholarly disagreement about the Voting Rights Act and clears a path both to resolving related debates within Congress and the courts, and to investigating the empirical impact of each interpretation on the sustainability of the VRA.

Considered the crown jewel of the Civil Rights Movement, the Voting Rights Act (hereinafter VRA) has yielded dramatic increases in voter registration, turnout, and representation among African Americans and other racial minorities since 1965 (Bai 1991; Bositis 2006; Bullock and Gaddie 2009; Davidson and Grofman 1994; Fraga 1992; Grofman and Handley 1991; Lublin 2009; Meier and Rutherford 2014; Thernstrom 2009). Yet, while some observers regard these outcomes as evidence that the law remains necessary and appropriate, another set of scholars regards them as proof that the law is obsolete and inappropriate.

How do we explain the discrepancy in interpretations? In this article, I argue that disagreement about the continued necessity and propriety of the VRA stems from two fundamentally different interpretative approaches. Those who believe the VRA is no longer necessary have adopted what I term an antidiscrimination perspective, while those who believe the VRA remains necessary have adopted a nondiscrimination perspective. The antidiscrimination perspective is grounded in a comparison of current voting rights outcomes with the historical reality of racial discrimination in American elections. For those

in the antidiscrimination school, the VRA was designed to remedy racial discrimination that was rampant in elections prior to the adoption of the law. The fact that there has been palpable progress on key voting rights indicators since 1965 is a sign that the law has worked as intended and can no longer be justified. The nondiscrimination perspective, meanwhile, is grounded in a comparison of current voting rights outcomes with a hypothetical and often unspoken standard of nondiscrimination. For those in the nondiscrimination school, the VRA was designed to eradicate racial discrimination and achieve an a priori state of equality. The fact that there continue to be racial disparities in key voting rights indicators is on this basis a sign that the law has not yet eradicated all vestiges of racial discrimination in elections. From this perspective, the VRA must be preserved in order to achieve the political outcomes that would be observed but for racial discrimination. The distinct assumptions, benchmarks, framing, and conclusions of the two paradigms become clear when we examine empirical data. Using racially disaggregated longitudinal voter registration, turnout, and office holding data, this article illustrates the distinctive elements of the antidiscrimination and nondiscrimination paradigms. The exercise affirms that interpretations matter as much as, if not more than, empirical data where perceptions of the Voting Rights Act are concerned.

The general patterns of scholarly disagreement that emerge from this article should be instructive for future studies of the VRA. The typology suggests how scholars can arrive at incompatible policy recommendations when judging policies on the basis of historical outcomes and when judging them based on ahistorical standards. In addition, the typology points to a potential source of disagreement about the VRA among policymakers in government. Traces of these two schools of thought can be found in recent Supreme Court decisions concerning the VRA.[1] As Congress debates how to respond to the Supreme Court's 2013 decision invalidating Section 4(b) of the VRA, recognizing the distinct implications of the antidiscrimination and nondiscrimination perspectives may help resolve partisan impasses and secure bipartisan support for a revised VRA in the future. For these reasons, the typology should be of interest to students of race politics, civil rights, Congress, and the courts.[2]

The Two Perspectives

The VRA has been an object of intense scholarly debate since it was first enacted in 1965. Scholars have examined Congress' intentions in devising certain provisions of the law (e.g. Abrams 1988; Hancock and Tredway 1985; Rivers 2006), the Supreme Court's rationale for rendering numerous judgments about the law (e.g. Hasen 2005; Karlan 1996), and the effects of the law on political participation and descriptive representation among people of color (e.g. Bai 1991; Bositis 2006; Bullock and Gaddie 2009; Davidson and Grofman 1994; Fraga 1992; Grofman and Handley 1991; Lublin et al. 2009; Meier and Rutherford 2014; Parker 1990).

Debate about the law's necessity and appropriateness has grown increasingly fervent and incisive as the law has been repeatedly renewed, and the battle lines have not neatly followed the left-right cleavage typical of other American political discourses. Instead, the conflict reflects more nuanced and ideologically transcendent distinctions between the ideas of "antidiscrimination" and "nondiscrimination." The former term denotes movement away from racial discrimination, while the latter denotes absence of racial discrimination. Arguably, the distinction between the two is a matter of grammatical tenses: one perspective emphasizes what has happened to key voting rights indicators since 1965, while the other

focuses on what would happen to those same indicators in the absence of racial discrimination in elections.[3] In point of fact, these linguistic tropes are indicative of other points of departure for the two interpretive perspectives. Scholars in each school also make different assumptions about the goals of the Voting Right Act, rely upon different quantitative benchmarks, and reach different conclusions about the appropriateness of the law in light of those benchmarks. Thus, "antidiscrimination" and "nondiscrimination" can be treated as terms not just for alternative rhetorical devices, but for alternative analytical paradigms. In this section, I describe the elements of these two paradigms and provide representative examples from previous scholarly commentaries on the Voting Rights Act.

Let us turn first to the antidiscrimination paradigm. This approach seems to assume that the goal of the original VRA and each of its progeny was to ameliorate historical racial discrimination. Adherents to this paradigm tend to emphasize political conditions that prevailed when the law was first enacted or last reauthorized and compare them with present conditions. Thus, for example, in an article published just prior to the 2006 reauthorization, Isaacharoff suggested that "the evolution of politics since the last extension of section 5 in 1982 has altered the conditions for its continued utility as a first-order mechanism to oversee minority participation in the political process" (2004, 1712). Similarly, Hasen argued that "[i]n 1965 and even in 1982, when Congress reenacted Section Five's preclearance through 2007, Congress could point to significant acts of intentional racial discrimination by covered states to support preclearance provisions. Today, Congress would be hard-pressed to find widespread evidence of such discrimination" (2005, 179). Critiques of the VRA like these take the political outcomes of the past, when there was widespread racial discrimination, as benchmarks against which current political outcomes can be measured. Assessments are often framed in the present past tense. For instance, Thernstrom observed that "[w]ith limited, marginal exceptions…the nation *has long since crossed* the boundary that separates Black exclusion and electoral opportunity" (2009, 17; emphasis added). In another representative article, Clegg and Chavez contend that "Congress has mistakenly ignored the data demonstrating clear achievements in ballot access with regard to race" and that "there is no crisis in voting rights compared to what there was in 1965" (2007, 564-566). Focusing on what *has happened* to racial inequality in voting over time is consistent with the notion that what matters to antidiscrimination analysts when judging the VRA is where key indicators of voting rights stand today relative to where they stood when the law was first adopted or last reauthorized. Although many in this camp regard the original VRA as a justifiable response to extraordinary miscarriages of justice perpetuated against nonwhite voters continually between Reconstruction and the Civil Rights Movement (e.g. Clegg and Chavez 2007, 580), some argue that more recent iterations of the law unfairly encroach upon the conventional authority of states and municipalities to regulate elections (Clegg and Chavez 2007; Hasen 2005; Isaacharoff 2004) or mete out special treatment to minority voters (Clegg and Chavez 2007; Thernstrom 1987).[4] These criticisms imply that renewing major provisions of the VRA can be justified only so long as the original injustices the law was designed to remedy persist. Hasen's remarks regarding renewal of the preclearance provision seem to encapsulate the prevailing view of the entire law among adherents to the antidiscrimination paradigm: "[t]he very fact that [it] has served as a good deterrent to [purposeful racial discrimination] complicates the task of renewal" (2005, 188).

From the antidiscrimination perspective, the fact that there has been palpable progress on key voting rights indicators since 1965 is a manifest sign that the VRA is no longer appropriate. As scholars in this school see it, "there is not much of a record of recent

state-driven discrimination" (Hasen 2005, 179), yet "the most radical provisions of the statute live on, addressing yesterday's problems" (Thernstrom 2009, 3). The view that the VRA has become outdated and counterproductive is especially pronounced in commentary about both Section 5, which requires certain jurisdictions to obtain preapproval of their election laws, and Section 4, which defines the conditions that trigger coverage under Section 5. Isaacharoff concluded shortly before the 2006 reauthorization that "section 5 has served its purposes and may now be impeding the type of political developments that could have been only a distant aspiration when the VRA was passed in 1965" amidst major obstacles to electoral access, a challenge he referred to as the "Bull Connor is Dead" problem (2004, 1731; cf McDonald 2012; Thernstrom 2012). Likewise, Thernstrom opined that "sections 4 and 5 of the Voting Rights Act were designed to deal with a world that by now has virtually disappeared" (Thernstrom 2009, 23). The implication of these claims is that the success of the preclearance and coverage provisions undermines arguments for their continuation. Adherents to the antidiscrimination paradigm object to administering the "strong medicine" of the VRA for a disease they believe has been largely, if not entirely, cured (e.g., Clegg and Chavez 2007; Howard and Howard 1983; Thernstrom 2009; see also Persily 2007). Many of them have, consequently, advocated congressional repeal or judicial invalidation of the law.[5]

The other type of critique of the VRA is less concerned with progress made on racial discrimination in US elections than with "whether the promise of *full participation* has been fulfilled," as the US Commission on Civil Rights put it in its decennial report on the 1965 VRA (1975, v; emphasis added). This approach takes as its analytical benchmark a state of affairs some believe should exist at all times: nondiscrimination. Those who advance the nondiscrimination critique seem to believe that, as one essay puts it, "a true remedy to the representational injury caused Blacks by discrimination involves restoring Blacks to the level of political power they would have enjoyed but for discrimination" (Howard and Howard 1983, 1615). These scholars are chary in their appraisal of voting rights history, focusing instead on what remains to be accomplished (Davidson and Grofman 1994; Grofman and Handley 1991; Lublin et al. 2009; Posner 2007; see also Ansolabehere, Persily, and Stewart 2013, 206). One of the best known volumes about the impact of the Voting Rights Act, *Quiet Revolution in the South* (Davidson and Grofman 1994), characteristically portrays the reality of voting rights as being far bleaker on the ground than it would be if there was no racial discrimination in US elections. A more recent analysis points to discrepancies between the "letter" of the VRA and the "spirit" of the law, embodied in both capricious executive branch enforcement and unforgiving judicial interpretation, to argue that the ideal of nondiscrimination continues to escape reality (King-Meadows 2011).

The benchmarks of the nondiscrimination paradigm vary somewhat according to the electoral measure of interest, but they all reflect a presumption that racial disparities would dissipate in the absence of racial discrimination. For voter registration and turnout rates, the benchmark seems to be equality. That is to say, according to nondiscrimination reasoning, Black and White voter registration and turnout rates should essentially be equal under completely nondiscriminatory electoral conditions. For office holding, the benchmark is proportionality (see, e.g. Grofman and Handley 1991; Parker 1990). This is the intuition behind Grofman and Davidson's (1994) "equity score," defined as the ratio of the Black share of officials elected to a given institution to the Black share of the corresponding constituency population. The score is used to measure the extent of descriptive

underrepresentation or overrepresentation of African Americans in government and ranges from zero, signifying complete lack of descriptive representation, to one, which signifies perfectly proportional representation. The score assumes that in a city that was 45 percent Black, for example, Blacks would constitute 45 percent of registered voters, 45 percent of voters who cast ballots in an election, and 45 percent of officials elected to public office if there were no racial discrimination. Armed with tacit benchmarks of equal access (registration), equal participation (turnout), and proportional representation (office holding) in different areas of political engagement, adherents to the nondiscrimination line of thought typically judge the success of the VRA by whether Blacks have achieved these absolute standards. Since such outcomes are often hypothetical rather than real, arguments from the nondiscrimination paradigm are often expressed in the conditional tense, as what Blacks "would have enjoyed but for discrimination" (Howard and Howard 1983, 1615).

But the nondiscrimination perspective is also aspirational, so that the absence of equality or proportionality on some measure is regarded as an impetus for the kind of "strong medicine" the VRA administers. Some worry that repealing all or part of the law would yield stagnation or decline in political access for people of color (McDonald 2012). In other words, from the nondiscrimination perspective, rescinding the law is tantamount to ending treatment of a disease that has not been cured. Other analysts in this camp have simply embraced the mantra "if it ain't broke, don't fix it." If the goal of the VRA is to raise minority political strength to a level indicative of nondiscrimination, the VRA is valuable from the nondiscrimination perspective so long as it has the potential to achieve that goal. Rescinding or amending the law is on this view tantamount to "fixing" something that is not broken.

Thus, in the words of W.E.B. Du Bois, "we have two great and hardly reconcilable streams of thought and ethical strivings" among observers of the Voting Rights Act ([1903] 2005, 196). Adherents to both of the two analytical perspectives recognize the progress that has occurred in terms of racial inequality in elections. But while those who advance to the antidiscrimination paradigm view such progress charitably, and as a sign that the VRA is no longer necessary or appropriate, their counterparts in the nondiscrimination school view such progress soberly, and as a sign that the law remains both necessary and appropriate.

Reckoning with Data

Having described the two different approaches to evaluating the Voting Rights Act, it is tempting to ask which is superior. Although a more thorough analysis is beyond the scope of this article, we can begin to answer this question by examining key indicators of Black political participation in the ways that antidiscrimination and nondiscrimination analysts would. Because the 1965 VRA was the federal government's response to practices affecting the ability of Blacks to register to vote, cast a ballot, and run for public office, empirical analyses of the VRA typically examine data on Black voter registration, turnout, and office holding (see, e.g. Grofman and Davidson 1994; Lublin et al. 2009; Thernstrom 1987, 2-3).[6] Accordingly, in this section I use longitudinal data on Black voter registration, turnout, and office holding to illustrate the distinct approaches of scholars in the antidiscrimination and nondiscrimination camps.

Antidiscrimination Paradigm

The antidiscrimination paradigm focuses on the distance voting rights indicators have travelled from their starting points prior to the adoption of the VRA to the present. Increases

in minority political engagement over time constitute evidence that the VRA has succeeded in its antidiscrimination mission. In point of fact, trends in Black registration, turnout, and office holding offer considerable support for the conclusion that the VRA has brought progress against the kinds of racial discrimination present when the law was adopted.

To begin, Black voter registration rates grew appreciably after 1965 and have slowly converged with White voter registration rates since. Figure 1(a) below plots the percentages of the Black and White voting-age populations that were registered to vote in federal elections held between 1964 and 2012. Figure 1(b) plots Black and White turnout, the percentage of the voting age population of each race that cast a ballot, in federal elections between 1964 and 2012. Registration and turnout data were culled from the biennial November supplements of the Current Population Survey. The figures isolate presidential election years because both registration and turnout rates tend to be lower during congressional elections than during presidential elections on average.[7]

The key to the antidiscrimination reading here is the *y-intercept*. If we draw a horizontal line where the Black voter registration line crosses the y-axis, indicating where Black voter registration levels were in 1964, we can see that rates have not intercepted that line since. Instead, they have remained away from it. The year after the original VRA was signed into law, 60.2 percent of Blacks of voting age in the United States reported being registered to vote, and this figure represents a roughly 60 percentage-point increase over the abysmal national Black registration rate in the year prior to the adoption of the VRA. The 2012 presidential election marked a new high point for Black voter registration nationally.[8] That year, 68.5 percent of African Americans reported being registered to vote. While uneven, the eight percentage-point increase in the national Black voter registration rate comports with the antidiscrimination reading of the VRA as an effective remedy to prior discrimination. The 2012 rate is an even more striking testament to the effectiveness of the VRA at combating discrimination given that the White voter registration rate was 1.8 percentage points lower that year. Analysts disposed to the antidiscrimination paradigm might argue on this basis that by 2012, the VRA had brought African Americans out of the shadows of racial discrimination in access to the ballot.

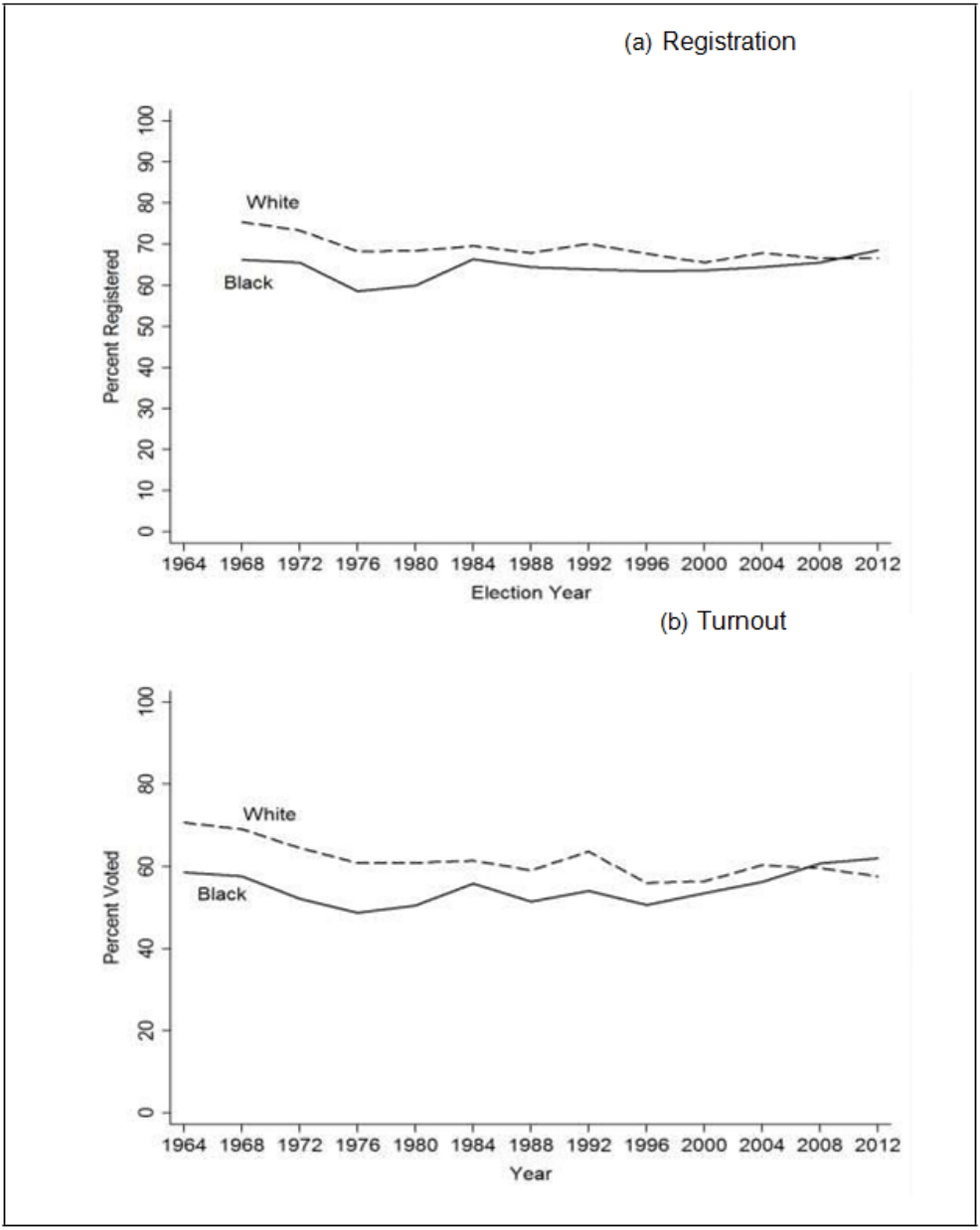
In figure 1(b), we see further evidence of an immediate and dramatic increase in Black political participation following the adoption of the VRA. Black voter turnout grew nearly eight percentage points from 1964, when 58.5 percent of registered Black voters are estimated to have cast a ballot, to 2012, when 66.2 percent of African Americans of voting age did. Indeed, during the 2012 presidential election, Black voter turnout exceeded White voter turnout for the first time in history, as African Americans were galvanized by the prospect of re-electing Barack Obama (File 2013). Notably, increased voter turnout has translated into increased political significance for the Black community. According to the Pew Center, President Obama would have lost the 2012 presidential election if Black turnout had been the same in 2012 as it was in 2008 (Taylor 2012).[9]

National trends in Black office holding further attest to the impact of the VRA on the Black electorate. According to data from the Joint Center for Political and Economic Studies, the total number of Black elected officials in the United States increased from 1,469 in 1970 to about 10,500 in 2012, equivalent to more than 700 percent growth (Figure 2). The number of African Americans elected to national offices, including the House of Representatives, the Senate, and the presidency, more than quadrupled, from 10 in 1970 to 45 in 2012. In statewide elected offices, including governorships, state assembly positions, and administrative offices such as state Secretary of State, the number of Black officials

increased from 169 in 1970 to 629 in 2012. Growth in Black office holding has been most pronounced at the local level, which includes offices like the mayoralty, city council, and school board. The number of Blacks elected to municipal offices increased from 623 in 1970 to 4,665 in 2002, the latest year for which data are available. Most of the local growth is attributable to increased Black representation on school boards: in 1970, only 362 African Americans served on school boards nationwide, but in 2002, 1,895 did. African Americans have also found increasing success in mayoral elections. Since 1966, when Springfield, Ohio, elected the nation's first Black mayor, more than 175 cities with populations greater than 50,000 have had Black mayors. The growth in Black elected officials has brought some institutions closer to proportional representation of racial minorities. At the national level, in particular, the combined growth in the number of Black elected officials and stagnation in the Black share of the American population has narrowed the racial representation gap that has existed at that level historically (Figure 3). As Figure 4 reveals, the VRA has played a critical role in the rise of Black elected officials. States that have been at least partly covered under Section 4(b) of the Voting Rights Act have seen both higher levels of and more pronounced growth in Black elected officials over time than their fully uncovered counterparts (Figure 4).

From the evidence presented above, we can see that Black voter registration, turnout, and office holding have increased dramatically since 1965. Some in the antidiscrimination camp concede that racial discrimination and inequality persist and that African Americans might have made even more progress after the Civil Rights Movement if state and local election rules were different (Thernstrom 2009, 11). Yet these scholars generally prefer to view Black registration, turnout, and office holding in light of where they stood prior to the adoption of the VRA, and from this perspective the changes look impressive. Combined with the election and re-election of the nation's first Black president, and the relatively high turnout of African Americans in the 2008 and 2012 presidential elections, the persistent increases in Black registration, turnout, and office holding lead adherents to the antidiscrimination paradigm to conclude that African Americans have been able to overcome many of the institutional barriers to political participation placed before them historically. Scholars in this camp consequently contend that relying upon the VRA to achieve more exacting categorical goals like proportional representation of Blacks or racially indiscernible registration and turnout rates unduly burdens state and local governments and foments racial division at a time when the nation appears to be moving beyond race as a barrier to political access and social interaction (Clegg and Chavez 2007).

Figure 1. Voter Registration and Turnout in the US by Race, 1966 – 2012



Source: US Census Current Population Surveys.

Figure 2. Total Number of Black Elected Officials in the US by Office Level, 1970-2012

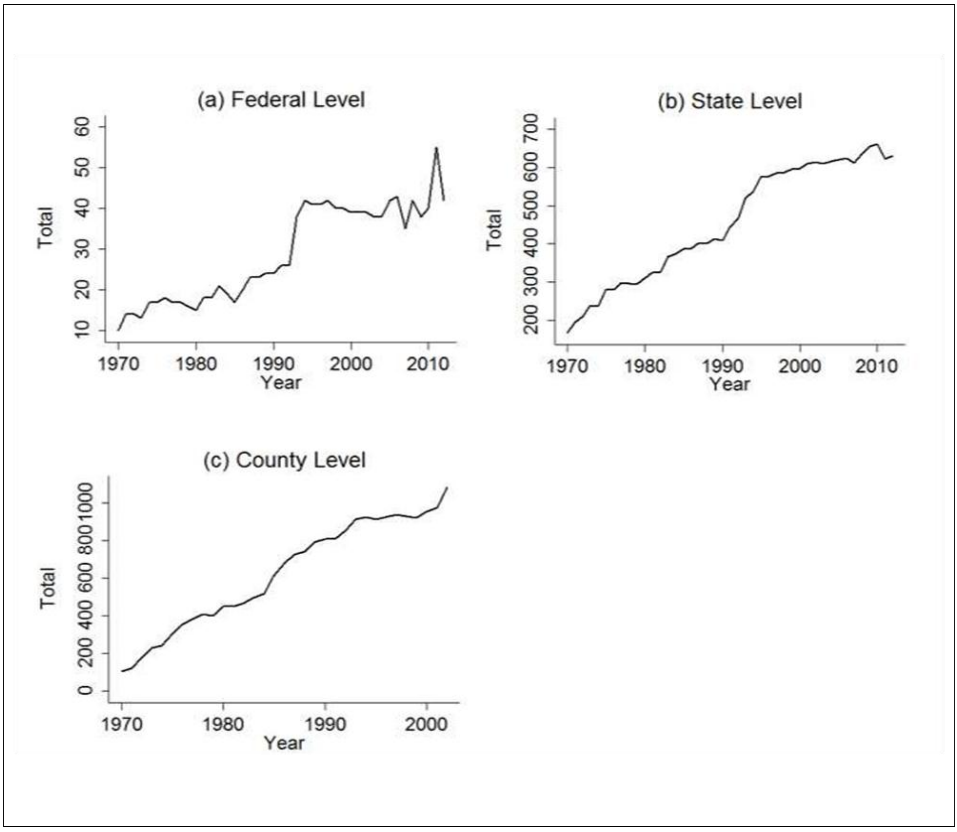


Figure 3. Average Number of Black Elected Officials in Covered and Uncovered States by Office Level, 1970-2012

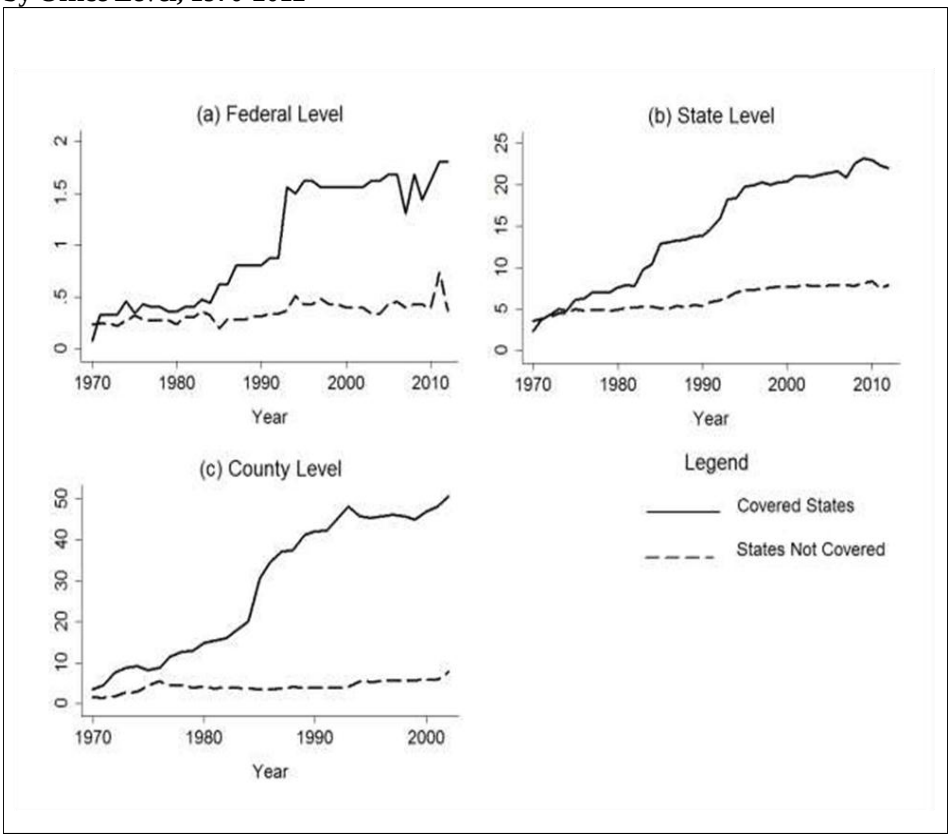
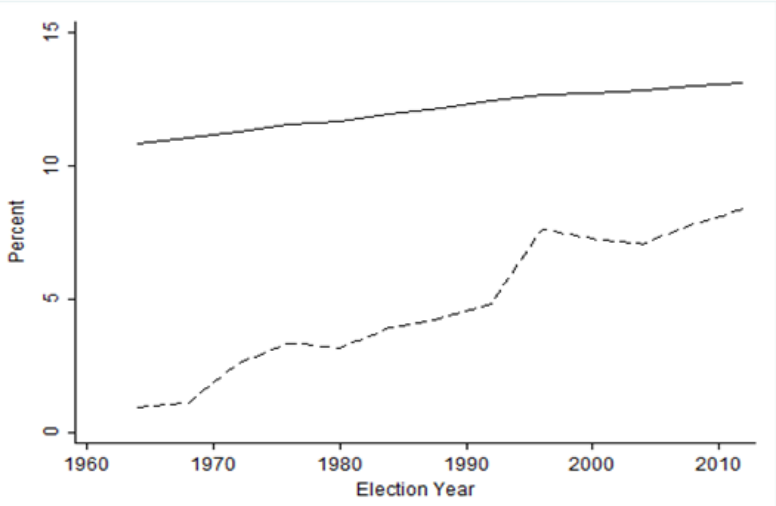


Figure 4. Change in Black Share of the US Population and Black Share of Federal Elected Officials



This figure shows a declining gap between the black share of the US population and the black share of federal office holders.

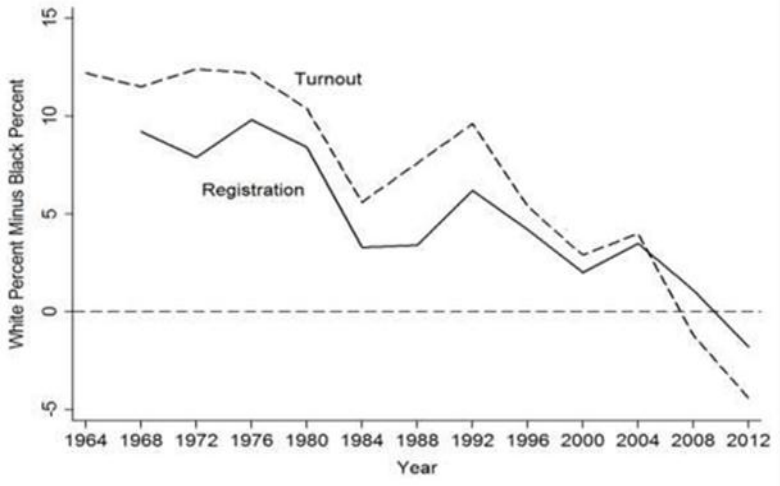
The Nondiscrimination Paradigm

Of course, the way the data are read by adherents to the antidiscrimination paradigm is not the only way to read them. Recall that the nondiscrimination critique of the VRA is concerned less with historical gains in voting rights than with the absolute levels of equality and discrimination that exist at any given time, because nondiscrimination is a timeless categorical imperative. Looking at the same data, nondiscrimination analysts would recognize several realities that do not meet the benchmarks against which they evaluate the VRA. Specifically, Blacks have typically registered and cast ballots at lower rates than Whites in federal elections, and the Black share of elected officials is typically much lower at every level of government than the Black share of the corresponding geographic population.

Figure 5 plots the racial disparity in voter registration and turnout rates, defined as the difference in the White rate of participation of a given type in a given year and the Black rate of participation in the same year, for all elections between 1964 and 2012.[10] Several things are notable from this graph. First, claims that the VRA has enhanced minority political access need to be qualified. Black voter registration rates have actually been lower during some of the presidential elections that have occurred since 1964 than they were in 1964 (see Figure 1). Second, the racial disparity in voter registration rates clearly has not yet met the threshold adherents to the nondiscrimination paradigm argue it would in the absence of discrimination. This is clear from the horizontal line at $y = 0$ in Figure 5, which represents the place where the racial disparity in voter registration and turnout would equal

zero. In the 24 presidential and congressional elections that have taken place since 1964, the Black-White gap in voter registration rates has broken this threshold only once: 2012. Thus, equality in registration rates is a recent development (predated most notably by the 2006 reauthorization of the Voting Rights Act). White voters routinely register at higher rates than Black voters in both presidential and off- year elections. Black and White registration levels were farthest apart in 1966, the year after the VRA was adopted. In midterm elections that year, 60.2 percent of Blacks and 71.7 percent of Whites reported being registered to vote. Black (65.5 percent) and White (66.6 percent) registration rates were closest in 2008, when a large number of African Americans were energized by the unique candidacy of Barack Obama. Finally, while racial disparities in voter registration and turnout are lower now, they have varied considerably over time, suggesting that they could reemerge under different historical conditions. All told, Figure 5 reveals that despite the purported success of the VRA at *improving* the political lot of African Americans, national-level political outcomes still do not meet the standard of racial parity that nondiscrimination analysts expect to observe when there is no racial discrimination.

Figure 5. Racial Disparities in Voter Registration and Turnout, 1964–2012



The lines in this figure were generated by subtracting the percentage of the black voting age population that reported registering to vote (solid line) or casting a ballot (dashed line) in each presidential election year from the percentage of the white voting age population that reported engaging in same activity in the corresponding election year.

Source: US Census Current Population Surveys.

A similar story emerges when racial disparities in voter turnout in national elections between 1964 and 2012 are examined. White and Black voter turnout rates were farthest apart in 1966, the congressional elections that followed the adoption of the VRA. Approximately 57 percent of registered White voters cast ballots in the election, while only

about 42 percent of Black registrants did. But note again the horizontal line at $y = 0$. This represents the line along which adherents to the nondiscrimination paradigm expect the difference in White and Black turnout rates to fall over time if there were no racial discrimination. Although Blacks have participated at increasing levels, something arguably continues to keep them from participating at the same level as their White counterparts.[11] The disparity may be a symptom of such things as mandatory voter identification laws, at-large elections, and racially polarized voting, which evidence suggests can disproportionately harm African Americans and other historically marginalized communities (Ansolabehere, Persily, and Stewart 2010; Barreto, Nuño, and Sanchez 2009; Lublin et al. 2009).[12] In other words, the persistent disparity in Black and White turnout rates can be treated as evidence of lingering racial discrimination in the electoral system from the nondiscrimination perspective.

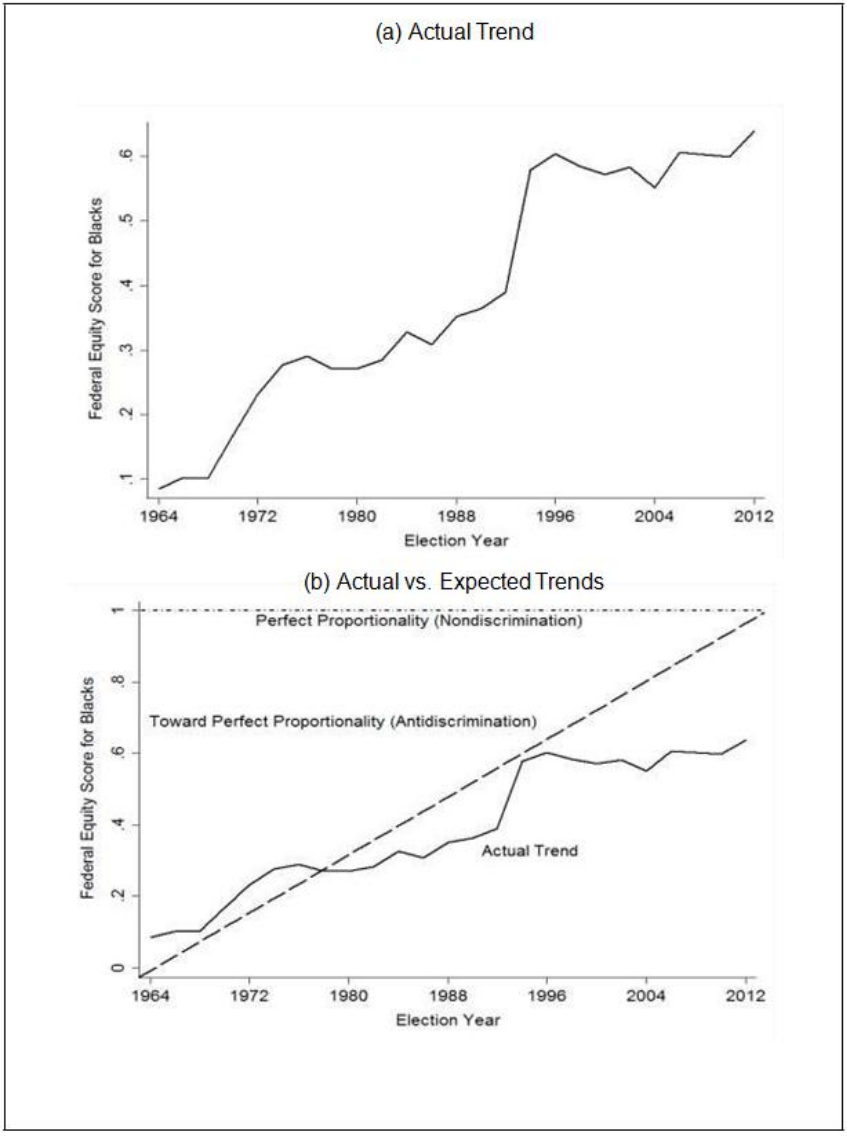
Finally, although Black representation in government has grown substantially, nondiscrimination analysts might point out that current levels of Black representation have not reached the ideal of proportionality that they would expect if there were no racial discrimination in American elections. Figure 6 provides a clear illustration of the underrepresentation of African Americans in the US government over time. I divided the Black share of all 538 federal elected officials by the Black share of the US population for all election years between 1964 and 2012 and plotted the points over time.[13] This "equity score" allows us to assess the extent of underrepresentation and overrepresentation of Blacks in the federal government (Grofman and Davidson 1994, 308 – 310). If we turn to panel (a), we can see that although African Americans today are closer to proportional representation at the federal level than they have been at any other time in history, they are still far from proportionally represented at the federal level. As of 2012, African Americans comprise 13.1 percent of the US population, but only 8.4 percent of all federal elected officials at that time, resulting in an equity score of 0.638. If Blacks were proportionally represented in the federal government at any point in time, the ratio of the Black share of the population to the Black share of the federal government would be one to one. Over time, this relationship of proportionality would produce the flat line at $y = 1$ that is illustrated in panel (b). Yet when the trend in equity scores is plotted alongside the hypothetical trend of perfect proportionality represented in panel (b), it is even more apparent that the current state of Black representation in the federal government is far from the level adherents to the nondiscrimination paradigm expect to observe under ideal conditions. Not only are African Americans more than 30 percentage points removed from proportional representation in federal elected offices even today, but they have not arrived at this point by dint of continual progress. If the federal government were becoming increasingly representative of African Americans, we would observe the straight diagonal line in Figure 6(b). But the trend in Black descriptive representation has been marked by peaks and valleys at different points in time. With persistent racial disparities between the Black share of the population and the Black share of federal elected officials, and variation in the size of the disparity, it is possible to appreciate how those who advance a nondiscrimination critique of the Voting Rights Act conclude that substantial racial discrimination persists in US electoral institutions and that the VRA remains necessary and appropriate to eradicate such discrimination.

In general, then, a look at national indicators suggests that voting rights outcomes have not reached the levels they would under a completely nondiscriminatory system. That racial inequalities and disproportionalities exist at all is sufficient reason for adherents to the nondiscrimination paradigm to question the success of the VRA and to demand its

continuation. Yet it is also true that voting rights outcomes have not always even moved away from the status quo of the past. Thus many adherents to the nondiscrimination paradigm temper applause for the ostensible growth in Black registration, turnout, and office holding since the Civil Rights Movement by acknowledging how far these indicators continue to deviate from the ideal of nondiscrimination.

The foregoing review of data on Black voter registration, turnout, and office holding has only described trends from each perspective. It has not attempted to predict these trends by accounting for potentially confounding factors like region, voters' socioeconomic status, or the number of African Americans who seek elected office. Therefore, the analysis does not enable us to draw statistical inferences or establish with confidence the superiority of the antidiscrimination and nondiscrimination paradigms. Yet this simple examination of the data is consistent with the reality that disagreement about the VRA stems not from scholars' reliance upon different data or methodological approaches but from the adoption of two fundamentally different interpretations of the same data. This is why adopting different assumptions about policy goals, employing different benchmarks of success, and framing outcomes in qualitatively different ways can lead analysts examining the same evidence to draw different conclusions about the necessity and propriety of the VRA. In short, these data reveal the real-world implications of the two paradigms. The antidiscrimination paradigm takes as its benchmark the voting rights inequities in existence when the VRA was adopted and assesses the extent to which the VRA has ameliorated those inequities. By contrast, the nondiscrimination paradigm treats nondiscrimination as a categorical benchmark and assesses whether the VRA has achieved this standard. Though antidiscrimination and nondiscrimination analysts often concede the merits of the opposing paradigm,[14] in part because the evidence is the same for both, they quietly disagree on the goals of the VRA, employ different benchmarks and framing language, and arrive at different conclusions about the continued need for and appropriateness of the law.

Figure 6. Descriptive Representation of Blacks in US Government, 1964–2012



Conclusion

The Voting Rights Act has been eminently successful at integrating African Americans into the American body politic, but it has not yet achieved the outcomes one might expect in the absence of racial discrimination. Emphasizing the former or the latter in assessing the success of the Voting Rights Act depends on whether one is oriented toward the concept of antidiscrimination or toward a principle of nondiscrimination. Scholarly critiques can thus be divided into two main categories reflecting the distinctive meanings of these terms. The

antidiscrimination paradigm emphasizes the progress of voting rights since the VRA was passed, while the nondiscrimination paradigm emphasizes the unrequited goals of the VRA. Focusing on what *has happened* to voting rights over time has led adherents to this first perspective to conclude that the law is no longer necessary or even just. Meanwhile, focusing on what *would happen* if there were no racial discrimination in elections may lead adherents to the nondiscrimination paradigm to conclude that the VRA remains necessary and proper. Disaggregating critiques of the VRA in this way enhances our understanding of the scholarly debate around this important piece of legislation.

The typology has implications beyond academe. There are echoes of the antidiscrimination and nondiscrimination paradigms in congressional and judicial debates about the VRA. For example, in *Beer v. US* (425 US 130, 1976), the Supreme Court upheld a New Orleans redistricting plan that some alleged represented "cracking" on the grounds that the plan would improve the electoral chances of African Americans beyond where they stood prior to the change. Most recently, the Court's decision to declare Section 4(b) of the VRA unconstitutional in *Shelby County v. Holder* (570 U.S. _, 2013) turned in large part on the Court's view "that the conditions that justified these measures no longer characterize voting in covered jurisdictions."[15] Similarly, the 2006 reauthorization of the VRA started from the premise that "significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, state legislatures, and local elected offices." Some existing legal scholarship suggests that the Supreme Court has historically favored the antidiscrimination paradigm in its readings of the law, while Congress has favored the nondiscrimination approach (Pitts 2003; Rivers 2006; cf Thernstrom 2009). The actual incidence of nondiscrimination and antidiscrimination arguments in the historical record has not yet been established. Fortunately, this is an empirical question that social scientists are in a position to answer using methodological techniques like content analysis. How the adoption of the antidiscrimination or nondiscrimination analytical perspectives might influence the outcomes of formal voting rights debates is also a question that is ripe for future research. Once scholars are able to establish the prevalence of the two different interpretive paradigms in the legislative and judicial history of the VRA, they can begin to investigate their impact upon support for the law. Can the recent invalidation of Section 4(b) be explained by the predominance of an antidiscrimination paradigm in the Supreme Court? Can the 2006 reauthorization of the VRA be explained by the predominance of a nondiscrimination paradigm in Congress? Evidence from previous empirical legal studies indicates that the choice of an interpretative lens influences the outcomes of Supreme Court cases. In one such study, Adam Winkler (2006) showed that laws subject to strict scrutiny, the highest standard of juridical proof, were significantly more likely to be declared unconstitutional in the Supreme Court. Establishing in a similar way whether and how the extent of adoption of these two analytical paradigms in Congress or the Supreme Court might have influenced the outcomes of legislative debates or court cases concerning the Voting Rights Act could go a long way toward resolving longstanding partisan and ideological impasses. The Supreme Court's *Shelby* decision has understandably prompted many to reexamine the practical and moral implications of the VRA, yet it is also worth it for scholars to acknowledge the possibly unconscious proclivities that color their own evaluations of the law. In the final analysis, the viability of the Voting Rights Act may well depend on the extent to which observers on opposite sides of the issue embrace certain interpretive lenses.

References

Abrams, Kathryn. 1988. 'Raising politics up:' Minority political participation and section 2 of the Voting Rights Act. *New York University Law Review* 63 (June): 449 – 531.

Ansolabehere, Stephen, Nathaniel Persily, and Charles Stewart III. 2013. Regional differences racial polarization in the 2012 Presidential Election: Implications for the constitutionality of Section 5 of the Voting Rights Act. *Harvard Law Review* 126 (April): 205 – 220.

Bai, Su Sun. 1991. Affirmative pursuit of political equality for Asian Pacific Americans: Reclaiming the Voting Rights Act. *University of Pennsylvania Law Review* 139 (January): 731 – 767.

Barreto, Matt A., Stephen A. Nuño, and Gabriel R. Sanchez. 2009. The disproportionate impact of voter ID requirements on the electorate: Evidence from Indiana. *PS: Political Science and Politics* 42 (January): 111 – 116.

Bositis, David A. 2006. Impact of the 'core' Voting Rights Act on voting and office holding. In *The Voting Rights Act: Securing the ballot*, ed. Richard Valelly. Washington, DC: CQ Press.

Bullock III, Charles S., and Ronald Keith Gaddie. 2009. *The triumph of voting rights in the South.* Norman, OK: University of Oklahoma Press.

Clegg, Roger, and Linda Chavez. 2007. An analysis of the reauthorized Sections 5 and 203 of the Voting Rights Act of 1965; bad policy and unconstitutional. *Georgetown Journal of Law and Public Policy* 5 (Summer): 561 – 582.

Davidson, Chandler, and Bernard Grofman. 1994. *Quiet revolution in the South: The impact of the Voting Rights Act, 1965-1990*, eds. Chandler Davidson and Bernard Grofman. Princeton, N.J: Princeton University Press.

Du Bois, W.E.B. 2005. *The souls of Black folk.* New York: Simon and Schuster.

File, Thom. 2013. *The diversifying electorate: Voting rates by race and Hispanic origin in 2012 (and other recent elections).* Washington, DC: United States Census Bureau.

Fraga, Luis R. 1992. Latino Political Incorporation and the Voting Rights Act. In *Controversies in minority voting: The Voting Rights Act in perspective*, eds. Bernard Grofman and Chandler Davidson. Washington, DC: The Brookings Institution.

Grofman, Bernard, and Chandler Davidson. 1994. The effect of municipal election structure on Black representation in eight Southern states. In *Quiet Revolution in the South: The impact of the Voting Rights Act, 1965-1990*, eds. Chandler Davidson and Bernard Grofman. Princeton, N.J: Princeton University Press.

Grofman, Bernard and Lisa Handley. 1991. The impact of the VRA on Black representation in Southern state legislatures. *Legislative Studies Quarterly* 14 (February): 111 – 128.

Hancock, Paul F., and Lora L. Tredway. 1985. The bailout standard of the Voting Rights Act: An incentive to end discrimination. *Urban Lawyer* 17 (Summer): 379 – 425.

Hasen, Richard L. 2005. Congressional power to renew the preclearance provisions of the Voting Rights Act after Tennessee v. Lane. *Ohio State Law Journal* 66 (1): 177 – 207.

Howard, Alan, and Bruce Howard. 1983. The dilemma of the Voting Rights Act: Recognizing the emerging political equality norm. *Columbia Law Review* 83

(November): 1615 – 1663.

Isaacharoff, Samuel. 2004. Is Section 5 of the Voting Rights Act a Victim of Its Own Success? *Columbia Law Review* 104 (October): 1710 – 1731.

Karlan, Pamela S. 1996. Still hazy after all these years: Voting rights in the post-*Shaw* Era. *Cumberland Law Review* 26 (January): 287 – 311.

King-Meadows, Tyson. 2011. *When the letter betrays the spirit: Voting rights enforcement and African American participation from Lyndon Johnson to Barack Obama.* Lanham, MD: Lexington Books.

Lublin, David, Thomas L. Brunell, Bernard Grofman, and Lisa Handley. 2009. Has the VRA outlived its usefulness? In a word, 'No.' *Legislative Studies Quarterly* 34 (November): 525 – 553.

Meier, Kenneth and Rutherford, Amanda. 2014. Partisanship, structure and representation: The puzzle of African American education politics. *American Political Science Review* 108 (May): 265-280.

McDonald, Laughlin. 2012. The Bull Connor is dead myth: Or why we need strong, effectively enforced voting rights laws. In *The Most Fundamental Right: Contrasting Perspectives on the Voting Rights Act.* ed. Daniel McCool. Bloomington, IN: Indiana University Press.

Parker, Frank R. 1990. *Black Votes Count: Political Empowerment in Mississippi after 1965.* Chapel Hill, NC: University of North Carolina Press.

Persily, Nathaniel. 2007. The Promise and Pitfalls of the New VRA. *Yale Law Journal* 117 (December): 174 – 253.

Pitts, Michael J. 2003. Section 5 of the Voting Rights Act: A once and future remedy? *Denver University Law Review* 81 (2): 226 – 258.

Posner, Mark A. 2007. Time is still on its side: Why Congressional reauthorization of Section 5 of the Voting Rights Act represents a congruent and proportional response to our nation's history of discrimination in voting. *New York University Journal of Legislation and Public Policy* 10 (January): 51 – 131.

Rivers, Christina. 2006. 'Conquered Provinces?' The Voting Rights Act and state power. *Publius: The Journal of Federalism* 36 (3): 421 – 442.

Taylor, Paul. 2012. The growing electoral clout of blacks is driven by turnout, not demographics. Washington, DC: Pew Research Center for the People and Press.

Thernstrom, Abigail. 2012. *Bull Connor is long dead: Let's move on. In the most fundamental right: Contrasting perspectives on the Voting Rights Act*. ed. Daniel McCool. Bloomington, IN: Indiana University Press.

Thernstrom, Abigail. 2009. *Voting rights-and wrongs: The elusive quest for racially fair elections*. Washington, DC: AEI Press.

Thernstrom, Abigail. 1987. *Whose votes count? Affirmative action and minority voting rights*. Cambridge, MA: Harvard University Press.

U.S. Department of Commerce. Bureau of the Census. 2013. Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: November 1964 to 2010. Washington, D.C.: Department of Commerce. Available at: http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html Last accessed: January 9, 2015.

Notes

[1] I am investigating these two analytical approaches within the legislative history and case law of the Voting Rights Act elsewhere. The results will be reported in future work.

[2] Shelby County v. Holder, 570 U.S. _ (2013).

[3] What I call the antidiscrimination paradigm is equivalent to what Ansolabehere, Persily, and Stewart refer to as the "look how far we've come" narrative (2013, 206). The nondiscrimination paradigm is equivalent to what they call the "see how much voting discrimination persists" narrative (Ibid).

[4] Expressing the first view, Isaacharoff wrote: "In practice, section 5 coverage denied local jurisdictions a customary range of political decisions—including districting, terms of office, and electoral systems—that were ordinarily subject to what Justice Souter would term the pulling and hauling of everyday politics" (2004, 1711; emphasis added). Expressing the second view, Thernstrom characterized Section 5 of the VRA as a "tool to combat White resistance to Black power" and, more bluntly, as "affirmative action" (1987, 1-10).

[5] For examples of such advocacy, see the legislative testimonies of Roger Clegg, Edward Blum, and Abigail Thernstrom at the May 17, 2006 and June 21, 2006 Senate Judiciary Committee hearings on the reauthorization of Section 5 of the Voting Rights Act (see also Clegg and Chavez 2007, 582).

[6] A number of studies have examined the impact of the Voting Rights Act on other racial minorities. For example, Fraga (1992) and de la Garza and DeSipio (1993) have examined the effect of the law on Latino participation, while Bai (1991) has examined the effect of the law on Asian voters (see also Shah, Marschall, and Ruhil 2013, 1). The findings from these studies are very similar to those reported for Black voters.

[7] Specifically, a comparison of presidential election years and off-year elections shows that registration rates tend to be about five percentage points higher in presidential elections (Δ = -4.925; t = -4.359; $p < 0.001$, one-tailed). Meanwhile, voter turnout rates tend to be about 15 percentage points higher in presidential elections than in off-year elections (Δ = 14.987; t = -10.396; $p < 0.001$, one-tailed).

[8] The previous high point of Black voter registration had been the presidential election of 1984, when Jesse Jackson ran for the first time and 66.3 percent of African Americans reported being registered to vote. The 2008 presidential election, which culminated in the election of the first Black American president, ranks a close third in terms of Black registration at 65.5 percent. It should be noted that the rates are not perfectly comparable across time because of changes in the way the Census has defined race. Nevertheless, they provide instructive estimates of the differences between races at any given point in time.

[9] In congressional elections between 1966 and 2010, Black voter turnout rates were largely stagnant, though these rates are undoubtedly much higher than they were in congressional elections that occurred prior to the adoption of the VRA. Figures for congressional elections are available upon request.

[10] For greater continuity over time, I used the "White" category in the Census that includes Hispanics to generate these disparity rates.

[11] One viable explanation is socioeconomic status. Studies of self-reported voter turnout find that racial differences in the likelihood of voting dissipate when socioeconomic differences are taken into account (e.g., Leighly and Vedlitz 1999). However, the fact that socioeconomic status is correlated enough with both race and voter turnout to attenuate the relationship between race and turnout (which those findings imply) may be an artifact of the

same political forces that contribute to the apparent racial disparities in mass turnout rates (on this point see Hero 2003). The question for proponents of nondiscrimination, then, is how far is appropriate to "dig" for causal factors.

[12] While several studies have linked at-large election systems to underrepresentation of Blacks and Latinos on city councils and school boards (e.g. Leal, Martinez-Ebers, and Meier and Rutherford 2004; Trebbi, Aghion, and Alesina 2008; Welch 1990), Meier's (2014) recent study finds that African Americans are currently better represented on school boards that use at-large election systems than on those that use district-based systems.

[13] This figure includes all 100 Senators, 435 Congressmen, the President, the Vice President, and the non-voting delegate representing the District of Columbia in Congress.

[14] For example, Abigail Thernstrom, a committed adherent to the antidiscrimination point of view, suggested that "[n]o one believes that racial inequality has ended" (2009, 11).

[15] For example, the majority cited Census data showing that "African American voter turnout has come to exceed White voter turnout in five of the six states originally covered by §5" in support of its conclusion that "the conditions that originally justified these measures no longer characterize voting in covered jurisdictions" (Shelby County v. Holder, 557 US, 2013). The Supreme Court made similar observations the last time it considered the constitutionality of the Voting Rights Act, writing, inter alia, "[t]he historic accomplishments of the Voting Rights Act are undeniable" (Northwest Austin v. Holder, 557 US 193, 2009). The appellate judge who heard Shelby before the Supreme Court also expressed skepticism of the compatibility of Section 4(b) with "current conditions," noting, for example, that "[c]overed jurisdictions have far more Black officeholders as a portion of the Black population than do uncovered ones" (697 F 3d. 848, 2012; emphasis in original).

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