

# Voter Suppression Post-*Shelby*: Impacts and Issues of Voter Purge and Voter ID Laws\*

## I. INTRODUCTION

The old adage that history repeats itself is no truer than when considered in the context of contemporary voting and election law. The history repeating itself within a new wave of legislation is voter suppression that mirrors many issues in the voting rights history of the United States. Since the landmark *Shelby County v. Holder*<sup>1</sup> case in 2013, there has been a marked increase in the passage of new voting laws as well as corresponding court challenges to these laws. Unlike the discriminatory tactics and laws of the Jim Crow era that were banned and declared unconstitutional after the enactment of the Voting Rights Act of 1965,<sup>2</sup> contemporary voter suppression has taken on a more subversive and facially neutral quality.

Instead of outright intimidation and tactics like poll tests and taxes, voters are now facing restrictive voter identification (ID) laws, strategic and overactive purging of voter registrations, discriminate closures of polling locations, underfunding of training and equipment for polling locations, and other citizenship-based hurdles to registration and voting. Many of these current voting obstacles have the same or similar effects as those in the past. Because laws enabling these types of voter suppression are often facially neutral, their total disenfranchising effect is not fully realized until the laws have been enacted, operated in real election environments, and then challenged in court. In recent years, responsive challenges to restrictive state voting laws by minority,

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1. 570 U.S. 529 (2013).

2. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314 (2019)).

citizen, and voting rights organizations have had some success. But as the enacting Congress of the Voting Rights Act and dissenters of the decision in *Shelby* knew all too well, the litigation process is far too slow to effectively combat newly suppressive laws enacted as soon as others are struck down.<sup>3</sup> By the time a court has found a particular voting law to have suppressive or discriminatory impacts on voters, countless voters have already been prevented and discouraged from exercising their right to vote.

Research into these individual forms of voter suppression shows that suppressive voting laws have an overwhelmingly disproportionate effect on the ability of poor, minority, and immigrant citizens of the United States to exercise their fundamental democratic right to participate in elections.<sup>4</sup> The problem of discriminatory and suppressive voting laws, combined with inconsistent judicial and legislative response, has also detrimentally fostered an environment of voter confusion already recognized by the Supreme Court of the United States as a form of voter disenfranchisement.<sup>5</sup> In order to combat these contemporary voting rights laws and tactics moving forward, it is important to understand their origins, their impacts, and the progress of current litigation challenging them.

This Comment explores two main areas of controversial voting laws that have been subject to important legal challenges across several states and the future implications of these challenges. Laws that govern the forms of identification allowed for a person to register and vote, as well as laws that govern the removal of persons from voter registration rolls, have both been challenged for their unconstitutional, discriminatory burden on the right to vote on the basis of race, economic status, and citizenship. What these two areas have in common is that, after *Shelby*, these laws were enacted and enforced at an alarming rate across state legislatures, especially those who were already aware of their discriminatory effect, and that the state legislatures that have supported and championed these laws have consistently cited voter fraud, which these legislatures already had knowledge did not exist. First, this Comment will proceed by briefly detailing events that led to the proliferation of these laws and any major changes. This Comment

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3. 570 U.S. at 559–61 (Ginsburg, J., dissenting).

4. See UNITED STATES COMM'N ON CIVIL RIGHTS, An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Enforcement Report (2018) [hereinafter USCCR], [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf).

5. Kira Lerner, *The Powerful Role Confusion Plays in American Elections*, TALKING POINTS MEMO (Dec. 28, 2018), <https://talkingpointsmemo.com/feature/the-powerful-role-confusion-plays-in-american-elections>; see *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

will then discuss some of the most recent and controversial challenges to these laws, followed by an analysis of potential implications of these recent challenges.

II. *SHELBY COUNTY V. HOLDER*: UNDOING THE PROTECTIONS OF THE VOTING RIGHTS ACT OF 1965.

In response to the Fifteenth Amendment<sup>6</sup> granting voting rights to all citizens, regardless of race, states began to institute various voting measures intended to prevent Black citizens from voting.<sup>7</sup> Much like some of the newer voting laws we are experiencing today, new suppressive practices and laws were popping up as soon as others were struck down by slow and expensive litigation. Congress eventually decided to combat this rampant practice of voter disenfranchisement with the Voting Rights Act of 1965 (VRA).<sup>8</sup>

Sections 4(b) and 5 of the VRA<sup>9</sup> were two of the most important and controversial provisions. Section 5 provided that a jurisdiction meeting the criteria for "coverage," as determined by the 4(b) coverage formula,<sup>10</sup> could not pass voting legislation without "preclearance" from federal authorities.<sup>11</sup> To gain clearance, a jurisdiction had to show that the proposed change had neither the purpose nor effect of denying voting rights based on race.<sup>12</sup> The purpose of this section was "to prevent the enactment of discriminatory laws, in part, to preventively solve voter disenfranchisement instead of after-the-fact with costly litigation."<sup>13</sup>

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6. U.S. CONST. amend. XV.

7. *Shelby*, 570 U.S. at 536.

8. *Id.*

9. 52 U.S.C. §§ 10303–10304 (2019).

10. Section 4(b) outlined a formula that would determine which jurisdictions or sub-jurisdictions would be required to comply with the process outlined in Section 5. The formula was intended to isolate jurisdictions which had previously passed and operated discriminatory voting laws and tactics that had intentionally disenfranchised Black voters, in order to prevent them from imposing newer tactics with the same purpose. If a jurisdiction met the criteria for coverage under 4b, they were then required under section 5 to get approval from the Department of Justice before new electoral changes could be made. The purpose of the "preclearance" procedure was to prevent discriminatory practices and tactics from becoming law before they could discriminate against or disenfranchise voters. See Keesha M. Middlemass, Ph.D, Symposium Essay, *The Need To Resurrect Section 5 Of The Voting Rights Act Of 1965*, 28 J. CIV. RTS. & ECON. DEV. 61, 64–66 (2015).

11. *Shelby*, 570 U.S. at 537.

12. *Id.*

13. Matthew Murillo, Comment, *Did Voter Suppression Win President Trump the Election?: The Decimation of the Voting Rights Act and the Importance of Section 5*, 51 U.S.F. L. REV. 591, 594 (2017).

In 2010, a covered jurisdiction, Shelby County, Alabama, was denied preclearance for a new voting law.<sup>14</sup> The county then sued the Attorney General, seeking declaratory judgment and injunctive relief on the grounds that the preclearance provisions of Section 4(b) and Section 5 of the Voting Rights Act were facially unconstitutional.<sup>15</sup> The Supreme Court later granted certiorari to consider the provisions.<sup>16</sup>

In its 2013 *Shelby v. Holder* ruling, the Supreme Court held that the formula in section 4(b) used to determine which jurisdictions were "covered" under the Act was unconstitutional.<sup>17</sup> The ruling effectively gutted the preventive measures of the VRA. Without a valid statute determining which jurisdictions are covered, there could be no jurisdiction that required preclearance. The Court concluded that "things have changed dramatically" in the almost fifty years since Section 5 was originally enacted making its provisions outdated and irrelevant.<sup>18</sup> Unfortunately, for the same classifications of voters who were disenfranchised before the VRA was enacted, racism and racially discriminatory efforts had not changed dramatically enough not to put them back in similar positions of vulnerability absent oversight. Looking to specific areas like voter ID laws and voter purges, the efforts subsequent to the ruling in *Shelby* show how very little things have changed and how relevant and necessary oversight still is.

### III. VOTER ID LAWS

From the time the Voting Rights Act was passed until 2008, states have used various informal and formal ways to identify voters at the polls, including matching signatures, voter registration cards, photo identification, and even checking themselves off on a voter roll. The Help America Vote Act (HAVA),<sup>19</sup> enacted in 2002, seemed to signal a new wave of voter laws focused on voter identification.<sup>20</sup> HAVA requires voters to show ID upon registering or voting for the first time in a jurisdiction.<sup>21</sup> The Act still allowed for a broad range of permissible ID forms, as well as a back-up provisional voting mechanism for those who did not have an accepted form of ID, at the polling location on election

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14. *Shelby*, 570 U.S. at 540.

15. *Id.*

16. *Id.* at 542.

17. *Id.* at 557.

18. *Id.* at 531, 535 (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

19. Pub. L. No. 107-252, 116 Stat. 1666 (2002).

20. 52 U.S.C. § 21083 (2019).

21. *Id.*

day.<sup>22</sup> HAVA, however, leaves within the authority of the states the decision of whether to count the provisional ballots, as well as to enact more restrictive voter ID legislation.<sup>23</sup>

From 2000 to 2016, thirty-four states enacted voter ID laws further specifying the allowable methods of identification for voters, with variations on how and whether the provisional ballots under HAVA are to be counted.<sup>24</sup> The first state voter ID law, enacted in Indiana, requiring state-issued photo identification to vote, was unsurprisingly met with a constitutional challenge in 2008.<sup>25</sup> The challenge brought on behalf of "elderly, disabled, poor, and minority voters" claimed that requiring photo identification for in-person voting violated their Fourteenth Amendment<sup>26</sup> rights, as it "[I]s neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification."<sup>27</sup>

*A. Setting the Stage: A Pre-Shelby Ruling on Voter ID law.*

The resulting Supreme Court decision in *Crawford v. Marion County Election Board*<sup>28</sup> weighed the burden on voters of having to comply with the photo ID law against the state's interest, and ultimately upheld Indiana's Voter ID law.<sup>29</sup> The Court cited prevention of potential voter fraud as weighing in favor of legitimate state interests but noted that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."<sup>30</sup> In addressing the concerns of voters, the Court asserted that most people have government IDs and that the burdens were no greater than any previous burdens to vote.<sup>31</sup> However, the Court did make a note of the limited record available to establish the burdens on voters, hinting that under certain circumstances such laws could be unconstitutional if the burdens were placed on particular classes of voters.<sup>32</sup>

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22. USCCR, *supra* note 4, at 86.

23. *Id.* at 87.

24. *Id.* at 88.

25. 553 U.S. 181 (2008).

26. U.S. CONST. amend. XIV.

27. *Crawford*, 553 U.S. at 187.

28. *Id.* at 181.

29. *Id.* at 202–03.

30. *Id.* at 194.

31. *Id.* at 198.

32. *Id.* at 200–02.

While the court left open the possibility for voters to challenge voter ID laws as applied, this case made challenging voter ID laws much more difficult.<sup>33</sup> Not only did the decision in *Crawford* foreclose the possibility of facial challenges to voter ID laws, but challenges to the laws as applied raise issues of mootness, standing, and resources to litigate claims as barriers.<sup>34</sup>

What makes *Crawford* unique is that the ruling was handed down in 2008, five years before the decision in *Shelby* undid the voting rights mechanism that had been holding back the more onerous and overly discriminatory voter ID laws. Because states were no longer required to have their laws screened for discrimination, many were able to pass far more restrictive ID laws with impunity.

*B. They Just Couldn't Wait: Voter ID Law Post-Shelby*

Justice Ginsburg, in her dissent of *Shelby*, likened the invalidation of the preclearance provision to "[T]hrowing away your umbrella in a rainstorm because you are not getting wet."<sup>35</sup> The *Shelby* ruling was handed down as the conclusion to a series of other political events that led to effectively gerrymandered Republican state legislatures. After the 2010 census, the redrawing of house district maps in 2011 and Congressional races in 2012 led to vastly impermeable, Republican-controlled state houses.<sup>36</sup> These same legislatures pushed suppressive voting and election laws across the nation at an alarming rate immediately after the Supreme Court's ruling in 2013.<sup>37</sup> Some voting legislation that went into effect were the exact same laws that the Department of Justice had preventively struck down using Section 5 of the VRA. New voting ID requirement laws were among the most

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33. USCCR, *supra* note 4, at 90–91.

34. *Id.*

35. *Shelby*, 570 U.S. at 590 (Ginsburg, J., dissenting).

36. David Daley, *Understanding Congressional Gerrymandering: It's Moneyball Applied to Politics*, NAT'L PUB. RADIO (June 15, 2016), <https://www.npr.org/2016/06/15/482150951/understanding-congressional-gerrymandering-its-moneyball-applied-to-politics>.

37. There is some argument to be made that conservative appointments made by George W. Bush also contributed to the outcomes regarding voting rights litigation during this period. Notably, Chief Justice Roberts, who wrote the majority opinion in *Shelby* along with Justice Alito, for the majority, were both conservative appointees of George Bush. See Supreme Court Nominations, present–1789, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.shtml>; "By nominating John Roberts, Harriet Miers, and Samuel Alito in 2005, George W. Bush sought to select the 'most conservative possible Supreme Court Justice.'" Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court Into a Partisan Court*, 2016 SUP. CT. REV. 301, 339 (2016).

prominent, racially discriminatory, and effective of these trends. As of 2015, when many of these laws were being passed, 25% of Black people and 16% of Latino people lacked government-issued identification, compared with only 8% of White people.<sup>38</sup>

Texas, having previously challenged provisions of the VRA, displayed the most egregiously discriminatory post-*Shelby* behavior. In Texas, where Republicans already had control of the state legislature prior to the 2010 census, the changes to voting laws came only hours after the ruling. Texas took advantage by effectuating a strict voter ID law and a 2011 redistricting map, which had both been struck down by the Department of Justice (DOJ) under the now-defunct preclearance function of the VRA.<sup>39</sup> Federal judges had previously declared the law to be a strict and unforgiving burden on the poor, believing it to be the most stringent in the country at the time.<sup>40</sup> Senate Bill 14<sup>41</sup> required in-person voters to use one of only five accepted forms of ID, all of which were government-issued and required to have a photo of the voter.<sup>42</sup> Those requirements were in stark contrast to the previous code, which permitted voters to use various forms of either photographic or nonphotographic identification.<sup>43</sup>

State legislators and Governor Greg Abbott continued to defend the law with debunked theories of voter fraud, for which there was no substantiated evidence.<sup>44</sup> As the court noted, contrary to the State's position that the law does not intentionally discriminate against minority voters,<sup>45</sup> the legislature rejected several proposed amendments

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38. *Case Update: LDF Files Lawsuit to Challenge Alabama's Racially Discriminatory Photo ID Law*, NAACP LDF (Dec. 2, 2015), <https://www.naacpldf.org/update/ldf-files-lawsuit-challenge-alabamas-racially-discriminatory-photo-id-law/>.

39. USCCR, *supra* note 4, at 60.

40. *Federal Court Rules Texas Voter ID Law Is Discriminatory*, TALKING POINTS MEMO (Aug. 30, 2012, 8:50 AM) [hereinafter TALKING POINTS MEMO], <https://talkingpointsmemo.com/muckraker/federal-court-rules-texas-voter-id-law-is-discriminatory>.

41. S.B. 14, 82d Leg., Reg. Sess. (Tex. 2011).

42. *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *overruled by Shelby Cty. v. Holder*, 570 U.S. 529 (2013). The new law even prohibited use of a voter's registration certificate issued by a county registrar. *Id.*

43. *Id.*

44. Manny Fernandez & Erik Eckholm, *Federal Court Rules Texas' ID Law Violates Voting Rights Act*, N.Y. TIMES (July 20, 2016), <https://www.nytimes.com/2016/07/21/us/federal-court-rules-texas-id-law-violates-voting-rights-act.html>.

45. "Texas urges us to draw three conclusions: (1) photo ID laws ultimately prevent very few people from voting; (2) photo ID laws have no disproportionate effect on racial

to the law intended to decrease burdens on the State's minority population.<sup>46</sup> Further, the State's own data showed Hispanic voters were 120% more likely not to possess the requisite types of identification enumerated in the law.<sup>47</sup> In denying the State's motion for declaratory judgment prior to *Shelby*, the United States District Court for the District of Columbia stated that "record evidence demonstrates that, if implemented, SB 14 will likely have a retrogressive effect."<sup>48</sup> Yet, this was the very same legislation that was pushed through immediately after *Shelby*, showing that Texas knew that the law would likely have discriminatory effects on minorities but enacted it anyway.

While Texas was the first and most blatant example of how state legislatures reacted to *Shelby*, it was not alone. The day after the ruling, the North Carolina General Assembly, another previously covered state, "[E]nacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans."<sup>49</sup> The responsive challenge to the law resulted in an opinion from the United States Court of Appeals for the Fourth Circuit that painstakingly detailed how blatantly discriminatory the legislative scheme was.<sup>50</sup> The newly enacted legislation had pinpoint accuracy in disenfranchising minority voters, which the district court concluded was undeniably the legislative intent.<sup>51</sup> Data requested and reviewed by the General Assembly itself, prior to passing the law, showed that African American voters had disproportionately

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minorities; and (3) disparate ID possession rates have little effect on turnout." *Holder*, 888 F. Supp. 2d at 128.

46. Elizabeth Resendez, *Article: In the Aftermath Of Shelby County: An Analysis On Why Texas Should Be Required to Pre-Clear All Voting Changes*, 17 SCHOLAR 1, 18 (2015).

47. TALKING POINTS MEMO, *supra* note 40.

48. *Holder*, 888 F. Supp. 2d at 113, 115. "Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote in the next election. This is retrogression." *Id.* at 141.

49. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

50. The opinion in *N.C. State Conference of the NAACP v. McCrory* gave extensive detail and insight into the intent and actions that led to enactment of the North Carolina voting laws and distinguished it from the Supreme Court's ruling in *Crawford*. The Court reversed and remanded the district court's ruling of "no discriminatory results under § 2, no discriminatory intent under § 2 or the Fourteenth and Fifteenth Amendments, no undue burden on the right to vote generally under the Fourteenth Amendment, and no violation of the Twenty-sixth Amendment." 831 F.3d at 219. Contrarily the Fourth Circuit held "that the challenged provisions of SL 2013-381 were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act." *Id.* at 204.

51. *Id.* at 226.



higher usage rates of voting services, which were severely restricted under the new law.<sup>52</sup> Speaking specifically to voter ID's "[a]fter *Shelby County*, with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans[.] [a]s amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess."<sup>53</sup> In a theme seen in other states enacting similar legislation, the General Assembly cited voter fraud, but like Texas, "the State [] failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina."<sup>54</sup> In a telling opinion by the Fourth Circuit court, the speed and proximity in which the law was passed after *Shelby* "bespoke" a certain purpose that was nowhere near as innocuous as the State had attempted to make the "omnibus legislation" seem.<sup>55</sup>

South Carolina, yet another previously covered jurisdiction, passed a similar voter ID law, also previously rejected upon review by the DOJ in 2011. In the same resounding echo of many states attempting to justify the changes in voting laws, South Carolina cited a nonexistent fight against voter fraud.<sup>56</sup> However, the State failed to submit "any evidence or instance of in-person voter impersonation or some other kind of fraud that could be deterred by the new requirement."<sup>57</sup> What the State data did show was that the law was 20% more likely to disadvantage minority voters who lacked the required identification.<sup>58</sup>

These few examples speak to the larger picture that racial discrimination in voting rights was not cured by the VRA, as the Court in *Shelby* suggested. The forewarning of the dissent came to fruition hours after the ruling and the states who could not immediately take advantage of the ruling did so after control of more state legislatures

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52. *Id.* at 216–18.

53. *Id.* at 215.

54. *Id.* at 235.

55. The Fourth Circuit noted:

[T]he General Assembly's eagerness to, at the historic moment of *Shelby County's* issuance, rush through the legislative process the most restrictive voting law North Carolina has seen since the era of Jim Crow—bespeaks a certain purpose. Although this factor, as with the other *Arlington Heights* factors, is not dispositive on its own, it provides another compelling piece of the puzzle of the General Assembly's motivation.

*Id.* at 229.

56. Charlie Savage, *Justice Dept. Cites Race in Haling Law Over Voter ID*, N.Y. TIMES (Dec. 11, 2011), <https://www.nytimes.com/2011/12/24/us/justice-department-rejects-voter-id-law-in-south-carolina.html>.

57. *Id.*

58. *Id.*

was gained by the Republican party. Data collected since *Crawford* and *Shelby* has shown that voter ID laws do have a racially discriminatory effect. Voter data shows that people in states with strict photo ID laws were twice as likely not to vote due to lack of identification, with Black and Latino voters more likely not to possess the requisite ID than others.<sup>59</sup> In addition to lack of income to pay for IDs or access to transportation, a voter's inability to obtain the necessary ID can also be due to the lack of access to the underlying documents required to get the ID, as well as other socioeconomic factors that make learning about the requirements and how to fulfill them more burdensome for minority and low-income voters.<sup>60</sup> Even more concerning is that the discriminatory nature of voter ID laws extends beyond the impact to the purpose and intent of the legislatures in enacting them in the first place. Restrictive voter ID laws tend to be introduced in states with "[A] larger share of African American persons, noncitizen populations, and higher minority voter turnout, as well as in states where both minority and low-income turnout recently increased."<sup>61</sup> As this area of law continues to develop, voter data on the actual effects of these laws is continually collected as vitally important evidence to be used in future legal challenges.

#### IV. VOTER PURGES

Another central theme of recent discriminatory practices and laws is voter registration maintenance laws, also known as voter purges. Several states have seen challenges to the practice of discriminatory purging of voter registration lists according to enacted voting laws.<sup>62</sup> While these laws have been enacted with facially neutral purposes like the prevention of ineligible persons from voting, voter purges have often had the effect of clearing eligible voters from state registration lists and in a manner that tends to discriminate by race and nationality. As the Fair Fight Action in Georgia and elsewhere shows, the practice of aggressive list purging effectively unregisters many unsuspecting, eligible voters who don't become aware until they show up to the polls on election day. Purges are particularly effective at disenfranchising voters who find their registrations have been purged at the polls and

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59. USCCR, *supra* note 4, at 97.

60. *Id.*

61. *Id.* at 98.

62. Specifically, Georgia, Missouri, Texas, and Ohio. See *Fair Fight Action v. Crittenden*, No. 1:18-cv-05391-SCJ (N.D. Ga. Nov. 27, 2018), *Texas LULAC, et al. v. Secretary of State David Whitley*, No. 5:19-cv-000740-FB (W.D. Tex. Feb. 1, 2019), *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

must then go through some burdensome process of reregistering with the possibility that their vote will not count at all.

*A. Voter Purging Gains National Attention in Georgia*

Georgia's hotly contested governor's race in 2018 exposed many of the trends in voter suppression used by states no longer accountable to the preclearance arm of the VRA. Stacey Abrams, a Democrat from the House of Representatives in Georgia, ran against Brian Kemp, the Secretary of State and Chief Election Officer. As polls opened, the Abrams campaign began receiving a flood of complaints from voters finding their polling place had been closed or relocated, that polling locations were understaffed and insufficiently equipped, leading to long lines and wait times for voting, or that there was some defect to their registration due to the State's exact match or purge policies.<sup>63</sup> Challenges casting a ballot in the race were experienced disproportionately by areas and people of color, further raising voter alarm. Several lawsuits were filed against the Secretary of State's Office, both before and after the election, seeking injunctive and declaratory relief from the policies making voting burdensome for many voters and preventing others from voting at all.

After Kemp became Governor by a margin of only about 55,000 votes,<sup>64</sup> Abrams<sup>65</sup> and Fair Fight Action, a voting rights organization, filed suit against the Secretary of State's Office, asserting that Georgia voters were denied their constitutional right to vote as a result of gross mismanagement of the election process, discriminatory policies and procedures, and known voter suppression tactics.<sup>66</sup>

The practices and policies enacted in Georgia, alleged to have resulted in the discriminatory denial of suffrage to minorities, were all

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63. Fair Fight Action v. Crittenden, No. 1:18-cv-05391-SCJ (N.D. Ga. Nov. 27, 2018).

64. See *Georgia Election Results*, WASH. POST, (Last updated Apr. 6, 2019 3:27 AM), <https://www.washingtonpost.com/election-results/georgia/>.

65. Abrams refused to concede stating that while she acknowledges the legal sufficiency of the result, a concession would make her complicit in voter suppression, setting the stage for her current fight against all voter suppression. See Rebecca Klar, *Stacey Abrams responds to RNC chairwoman: 'Concession means to say that the process was fair'*, THE HILL (Aug. 19, 2019, 11:09 AM), <https://thehill.com/homenews/campaign/457934-stacey-abrams-responds-to-rnc-chairwoman-concession-means-to-say-that-the>.

66. "The Secretary of State and State Election Board ("Defendants") grossly mismanaged an election that deprived Georgia citizens, and particularly citizens of color, of their fundamental right to vote. This Complaint describes the serious and unconstitutional flaws in Georgia's elections process—flaws that persist today." Complaint for Declaratory and Injunctive Relief at 2, *Fair Fight Action v. Crittenden*, No. 1:18-cv-05391-SCJ (N.D. Ga. Nov. 27, 2018).

areas in voting that the U.S. Commission on Civil Rights (USCCR) identified in its comprehensive review of post-*Shelby* legislation that would likely not have passed under preclearance due to its discriminatory effect on minority voters.<sup>67</sup> Georgia was the only of the previously covered jurisdictions to enact legislation in each identified area of restrictive legislation.<sup>68</sup>

The Fair Fight Complaint cited Georgia's "use it or lose it" policy<sup>69</sup> as a tool to disenfranchise voters through the purging of voter rolls.<sup>70</sup> Notably, Kemp, in his official capacity as Secretary of State, purged 250,000 to 665,000 voters from the rolls each election year that he ran for office.<sup>71</sup> In years where he did not run, less than 100 voters were purged from the rolls using the policy.<sup>72</sup> However, this is only a fraction of the disenfranchising behavior experienced by Georgia voters and cited as part of the Fair Fight claim. The Complaint also points to violations of citizens' rights as a result of discriminate closing or relocating of polling locations, discriminate lack of staff and voting equipment to Black and minority polling locations causing excessively long wait times, and the discriminate use of another State policy called "exact match."<sup>73</sup> This case is at the discovery phase in Federal Court, as

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67. *Id.* at 7–8.

The U.S. Commission on Civil Rights, a bipartisan, independent agency, found that among the states previously subject to preclearance by the Voting Rights Act, Georgia was the only state that had implemented voting restrictions in every category the Commission examined: strict requirements for voter identification; documentary proof of U.S. citizenship; purges of voters from voter registration rolls; cuts to early voting; and a raft of closed or relocated polling locations.

*Id.* See USCCR *supra* note 4 at 83–199.

68. Complaint for Declaratory and Injunctive Relief at 7–8, *Fair Fight Action v. Crittenden*, No. 1:18-cv-05391-SCJ (N.D. Ga. Nov. 27, 2018).

69. "Use it or lose it" is another name for codified purge policies that remove voters from the registration rolls. The Georgia policy is codified at O.C.G.A. § 21-2-234. A similar purge policy in Ohio was at issue in the 2018 Supreme Court ruling, *Husted v. A. Philip Randolph Institute*, where the policy was declared constitutional. 138 S. Ct. 1833 (2018). At issue in Georgia, however, is not just the policy as differentiated by *Husted* but the intent and impact of the purges and the discriminate use of the policy by the Secretary of State in the years that he ran for office.

70. Amended Complaint for Declaratory and Injunctive Relief at 28–32, *Fair Fight Action v. Crittenden*, No. 1:18-cv-05391-SCJ (N.D. Ga. Feb. 19, 2019).

71. *Id.*

72. *Id.*

73. Complaint for Declaratory and Injunctive Relief at 19–22, *Fair Fight Action v. Crittenden*, No. 1:18-cv-05391-SCJ, (N.D. Ga. Nov. 27, 2018).

of Fall 2019, after the claim survived a vigorous motion to dismiss from the state this past summer.<sup>74</sup>

On February 1, 2019, the League of United Latin American Citizens filed suit against Texas's Secretary of State David Whitley and Attorney General Ken Paxton seeking injunctive and declaratory relief against a discriminatory voter purge of naturalized citizens from voter rolls.<sup>75</sup> David Whitley publicly announced on January 25, 2019, that 98,000 non-citizens were suspected to be registered voters and that 58,000 had voted in past elections of the last twenty years.<sup>76</sup> Whitley gave a list of the suspected "non-citizen" names to the county registrar, advising them to send notice to those persons, who if they did not send letters verifying their citizenship within thirty days, would be purged from the voter rolls.<sup>77</sup> Paxton and Republican Governor Greg Abbott praised Whitley claiming that the list was evidence of voter fraud and called for stricter registration laws.<sup>78</sup>

The list cited by Whitley was a Department of Public Safety record that had not accounted for people who had obtained their license or state ID prior to becoming naturalized citizens.<sup>79</sup> Not only was the 98,000 figure grossly exaggerated, but tens of thousands on the list were later found to be citizens, and hundreds were simply duplicates.<sup>80</sup> The Secretary of State's actions purposely targeted and threatened Hispanic citizens and spread false information on a national level. The suit sought to enjoin the corresponding voter purge program announced by Whitley, citing violations of Texas citizens' Fourteenth Amendment Equal Protection rights as well as prohibitions against discriminatory practices and procedures under the VRA. The complaint alleges that the Secretary of State knew the law was discriminatory, as a Federal District Court in Florida struck down a "nearly identical program" as

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74. Amended Scheduling Order, *Fair Fight Action v. Crittenden*, No. 1:18-cv-05391-SCJ (N.D. Ga. July 11, 2019).

75. First Amended Class Action Complaint for Injunctive and Declaratory Relief, *Texas LULAC, et al. v. Secretary of State David Whitley*, No. 5:19-cv-000740-FB (W.D. Tex. Feb. 1, 2019).

76. Roque Planas, *Texas Republicans Hit with Another Lawsuit Over 'Unfounded Voter Purge'*, HUFFINGTON POST, (Feb. 2, 2019 12:16 PM) [https://www.huffpost.com/entry/texas-republicans-voter-purge-lawsuit\\_n\\_5c54d296e4b00187b550fa08](https://www.huffpost.com/entry/texas-republicans-voter-purge-lawsuit_n_5c54d296e4b00187b550fa08).

77. *Id.*

78. *Id.* The President, Donald Trump, then parroted the claims of voter fraud on Twitter, drawing nationwide attention.

79. *Id.*

80. *Id.*

discriminatory and unlawful in 2012.<sup>81</sup> On April 26, 2019, the parties agreed to a settlement ordering Texas to pay \$450,000 in attorney's fees as well as the immediate withdrawal of the purge initiative.<sup>82</sup> As a result of public outrage, Whitley lost the support necessary to be confirmed by the State Senate,<sup>83</sup> but before the official Senate vote, Whitley submitted his letter of resignation, containing no mention of the voter-purge program or the surrounding controversy.<sup>84</sup>

Recent cases of voter suppression have not just come from enacted bills that were likely to have a suppressive impact on their face, then were subsequently found to have that suppressive effect. In some states, like Georgia and Ohio, voter list maintenance legislation was either precleared or didn't require preclearance and went unnoticed as to its effect until the laws were later strictly and intentionally enforced before key elections. Ohio adopted a voter list maintenance mechanism in the 1990s but did not start using it to aggressively purge voters from its lists until 2014.

In 2016, civil rights organizations sued Ohio alleging that an Ohio voter list maintenance procedure known as the "supplemental process"<sup>85</sup> violated provisions of the National Voter Registration Act of 1993 (NVRA).<sup>86</sup> Congress enacted the NVRA to promote voter registration for federal elections and to ensure accurately maintained

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81. First Amended Class Action Complaint for Injunctive and Declaratory Relief at 2, *Texas LULAC, et al. v. Secretary of State David Whitley*, No. 5:19-cv-000740-FB (W.D. Tex. Feb. 1, 2019).

82. *ACLU Statement: Agreement Between Civil Rights Groups and State Elections Officials Ends Lawsuit Over Voter Roll Purge That Discriminated Against Non-Citizens*, AMERICAN CIVIL LIBERTIES UNION, (Apr. 26, 2019), <https://www.aclu.org/press-releases/settlement-reached-end-texas-voter-purge-and-protect-voting-rights>; Settlement Agreement at 12, *Texas LULAC, et al. v. Secretary of State David Whitley*, No. SA-19-CA-074-FB (W.D. Tex. Apr. 26, 2019).

83. At the time of the voter purge announcement, David Whitley, an appointee of Governor Greg Abbott, had not yet been confirmed by the Senate which was set for the 2019 Legislative Session. However, outrage over the attempt to disenfranchise eligible voters and the discovery that 78% of the of voters to be purged voters lived in counties that had voted for democrats in the 2018 Senate election, led to all twelve Democratic Senators (who had the 2/3 of the vote required to block Whitley's confirmation). Nick Visser, *Texas Secretary Of State Resigns After Failed Effort To Purge Voter Rolls*, HUFFINGTON POST (May 28, 2019, 12:37 AM), [https://www.huffpost.com/entry/david-whitley-texas-secretary-of-state-resigns\\_n\\_5cec6063e4b00e036573425a](https://www.huffpost.com/entry/david-whitley-texas-secretary-of-state-resigns_n_5cec6063e4b00e036573425a).

84. *Id.*

85. As distinguished from the Ohio's Primary Process for list maintenance, not at issue in the case.

86. Pub. L. No. 103-31, 107 Stat. 77 (codified at 52 U.S.C. § 20501-20511); the Fair Fight Complaint in Georgia also has claimed under the NVRA, specifically the amended 2002 Help America Vote Act.

voter registration rolls. The NVRA prohibits the removal of registered voters outside of five permissible categories, requires states to implement a program that removes ineligible voters, and prescribes the way in which states can go about removing ineligible voters from the list.<sup>87</sup>

At issue in the challenge was an Ohio process by which the plaintiffs claimed eligible voters were being removed from the list for having not voted in recent elections, not because they were ineligible to vote. The NVRA prohibits the purging of registrations for "failure to vote," while including change of residence as a permissible category for registration removal.<sup>88</sup> Ohio's combination of these two features within its maintenance procedure is what created the interpretative conundrum that the Supreme Court attempted to clarify with its 2018 ruling. The procedure presumes that if people have not voted in two years, then they are no longer within the district and are therefore ineligible to vote, enabling their registration to be purged from the list of voters.<sup>89</sup> The problem is that not only did eligible voters who voted in recent elections still erroneously receive notice that they have failed to vote, the greater impact and suppressive nature of these "use or lose it" purge policies is a gravely concerning tactic among other attacks on voting rights.<sup>90</sup>

The Supreme Court in *Husted v. A. Philip Randolph Institute*<sup>91</sup> narrowly interpreted the provisions of the NVRA to only prohibit purging of eligible voters on the *sole* basis of voter inactivity.<sup>92</sup> The ruling allows for states to purge voter registrations for failure to vote as long it is listed with at least one other basis. As the dissent and plaintiffs argued, not responding to a mailed notice is not indicative that a person has moved, and even if they did change addresses, it is equally possible that they moved within the district as it is that they moved outside of the district.<sup>93</sup> Thus, the ruling rolled back yet another voting rights protection enacted by Congress using a technical, convoluted interpretation not concerned with the burden placed on

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87. *Id.*

88. *Husted*, 138 S. Ct. at 1838–40.

89. *Id.* at 1838.

90. Nina Totenberg, *Supreme Court Upholds Controversial Ohio Voter-Purge Law*, NAT'L PUB. RADIO (June 11, 2018 10:30 AM), <https://www.npr.org/2018/06/11/618870982/supreme-court-upholds-controversial-ohio-voter-purge-law>; see *Husted*, 138 S. Ct. 1833, 1856–57, (Breyer, J., dissenting), 1863 (Sotomayor, J., dissenting).

91. 138 S. Ct. 1833.

92. *Id.* at 1842.

93. See *id.* at 1856–57 (Breyer, J., dissenting).

citizens to vote according to the purpose of both the VRA and the NVRA. On August 30, 2019, the Ohio Democratic Party filed suit against the Ohio Secretary of State in an attempt to block thousands more voters set to be purged ahead of the upcoming primary elections on September 10th.<sup>94</sup>

*B. Upcoming Elections: Fever Pitch of Purging*

A large motivating factor for the current voting rights litigation is to attain some resolution prior to contingent electoral races. What voters and their representative groups face is the retroactive nature in which they must respond to voter purges being effectuated at alarming rates and conspicuously near state elections. While the Help America Vote Act limits the ability of state legislatures to purge voter rolls prior to federal elections, states have no such restriction on purges before state races.<sup>95</sup> The USCCR gave discrete themes for how purge policies have been used among several states.<sup>96</sup> Purges have recently been based on alleged voter ineligibility, registration discrepancies, voter inactivity, and felony convictions.<sup>97</sup> An emerging theme that could potentially see wider use in future elections is the private-voter challenge. In North Carolina, the NAACP and a group of private citizens won a permanent injunction that prevented the state election board from using mass challenges by private parties to purge voters in contravention of the NVRA.<sup>98</sup> The law at issue allowed for a single person to file hundreds of challenges at a time, with little to no support.<sup>99</sup> How the state law operated to purge the challenged registrations, without the proper waiting period and notice requirements of the NVRA, was found to be an impermissible violation of federal voter protections.<sup>100</sup>

While this method has not been challenged with the same frequency as others, Lauren Groh-Wargo, Chief Executive Officer (CEO) of Fair

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94. The judge later denied injunctive relief and the plaintiffs dropped the suit, instead raising awareness on social media.

95. 52 U.S.C. § 21083.

96. USCCR, *supra* note 4, at 145–157.

97. *Id.*

98. Memorandum Opinion, Order, And Judgment at 27, *N.C. State Conference of the NAACP v. N.C. State Bd. of Elections*, No. 1:16-cv-01274-LCB-JLW (M.D.N.C. Aug. 08, 2018).

99. *Id.* at 2–3.

100. *Id.* at 8, 11. The NVRA supports the maintenance of voter rolls by allowing a person to be removed by reason of ineligibility for having changed districts provided that the district seeking to remove voters has given prior notice, has waited the requisite period before removal, and is not systematically removing voters 90 days before a federal election.



Fight Action, believes that partisan activist groups will exploit state laws that still allow for mass voter challenges with increased regularity in upcoming elections.<sup>101</sup> This type of purge is an extension of voter challengers, people who by law are permitted to challenge the eligibility of other voters on election day. Research on voter challenger laws by the Brennan Center for Justice, a nonpartisan law and policy institute, shows that the people targeted by voter challengers are disproportionately people of color, and the laws that permit this form of voter intimidation have historical origins in discrimination.<sup>102</sup> As of the 2012 report on issues with "voter challengers," more than twenty states still allow private citizens to challenge a voter's eligibility.<sup>103</sup> For example, a member of the Harris County Republican Ballot Security Committee went to an Austin Texas registration office and challenged 4,000 voter registrations in July of 2018. Despite the challenge's failure to comply with state law, it still managed to land 1,700 of those voters on a suspended registration list.<sup>104</sup>

#### IV. ANALYSIS

##### *A. Importance of Current Voting Rights Litigation*

Recent litigation of voting rights has begun to hit a crescendo as many upcoming general elections approach. As seen in the 2018 elections, many voting rights groups were able to mobilize quickly to sue for injunctive relief in order to minimize the impact of laws that would have disenfranchised many voters on Election Day. Some cases have had a full resolution, while others are still in the course of litigation, with temporary injunctive relief in place pending final disposition. What those challenging restrictive and discriminatory legislation have learned in the course of these last few years will likely guide how future challenges are litigated.

Themes beginning to emerge within these court challenges have been the theories under which the challenges are being brought, the development of a detailed record and use of voter data as supporting

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101. Telephone Interview with Lauren Groh-Wargo, CEO, Fair Fight Action (Sep. 27, 2019).

102. Nicholas Riley, *Voter Challengers*, BRENNAN CENTER FOR JUSTICE (2012), at 7, 11, [https://www.brennancenter.org/sites/default/files/legacy/publications/Voter\\_Challengers.pdf](https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf).

103. *Id.* at 5.

104. Dana Liebelson, *One Republican Official Challenged Thousands of Voter Registrations In His County. It Could Happen Elsewhere*, HUFFINGTON POST (Sep. 17, 2018), [https://www.huffpost.com/entry/republican-challenge-voter-registration-houston\\_n\\_5b9fb69ce4b046313fbd65d3](https://www.huffpost.com/entry/republican-challenge-voter-registration-houston_n_5b9fb69ce4b046313fbd65d3).

evidence, and public outreach and media usage as an influence on transparency and accountability for state legislatures. For example, in the Fair Fight Action case in Georgia, the Plaintiffs asserted violations of their Constitutional First, Fourteenth, and Fifteenth Amendment rights as well as violations under the Help America Vote Act and Section 2 of the Voting Rights Act. These claims are mirrored in other voting rights claims, like that of the recently appealed Alabama Voter ID suit but with differing results. The Alabama case, brought under all the same claims except for the HAVA, was dismissed for failure to establish the requisite intent, motivation, and discriminatory effect in January of 2018.<sup>105</sup> What challenges under the same types of claim can show others is the success of varying types of evidence and arguments, as well as what a state's arguments and strategies will likely be, the types of motions they will raise in opposition, and where they will find weaknesses. The order dismissing the Alabama case exposed the weaknesses of the expert testimony and data on the law's discriminatory effect and where the evidence fell short of establishing the requisite intent and motivation of the legislature.<sup>106</sup> In Georgia, the success of Fair Fight Action in refuting challenges of mootness in the face of newly enacted legislation, which was intended to quash their claims but leave unaffected the actual results, was key in surviving their motion to dismiss stage.<sup>107</sup>

As many of the legal challenges seek injunctive and declaratory relief, the development of a strong factual record has been key to the success of these claims. Injunctive relief by its very nature requires a showing of actual harm, making data illustrating how the population has been burdened by suppressive laws more than just important, but vital. As evidenced in Georgia, Ohio, and especially North Carolina,

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105. Memorandum of Opinion at 69, *Greater Birmingham Ministries, et al. v. Merrill*, 2:15-cv-02193-LSC (N.D. Ala. Jan. 10, 2018).

106. *Id.* at 54.

107. On January 28, 2019, the Fair Fight Action complaint was met with a Motion to Dismiss on grounds that plaintiffs did not have the requisite standing, necessary parties had not been joined, the preclusive effect of the Eleventh Amendment, legislative immunity, failure to state a claim for the counts under the Fourteenth and Fifteenth Amendments of the US Constitution, and finally, that the case was moot as a result of newly passed laws and amendments. Judge Jones, after thorough application of the doctrine of mootness to each element of the asserted complaint as it relates to new laws enacted in the 2019 legislative session, determined that Plaintiff's claims were largely unaffected. With the District Court's ruling the suit progressed to discovery stage and will likely go to trial in the Spring of 2020. Even if the case does not reach resolution prior to the 2020 Election, injunctive relief previously granted to enjoin enforcement of exact match and aggressive voter purges will likely still be in place. *See Order, Fair Fight Action v. Crittenden*, No. 1:18-cv-05391-SCJ (N.D. Ga. June 28, 2019).

courts rely on the facts, data, and incident-based findings to prevent elections from moving forward with the burdensome policies in place. Interestingly enough, some of the most damaging data in recent cases, have come from the state itself. As seen in *N.C. State Conference of the NAACP v. McCrory*,<sup>108</sup> it was the detailed record from the State legislature and the data that they requested on voting in the State that largely supported the finding of discriminatory intent.<sup>109</sup>

Because the plaintiffs have an extremely high burden of demonstrating the impact of the laws as well as the discriminatory motivations and intent behind passing them, a poorly developed or purely anecdotal record is unlikely to be sufficient in combatting a state's typical assertions of legitimate interests. As seen in Texas, Georgia, South Carolina, Alabama, and Ohio, the State's two main counterarguments of legitimate purpose, especially for voter ID and purge laws, are going to be voter fraud and voter registration maintenance. However, courts like those in *Crawford*, have been unable to identify from any records, any actual instances or occasions of intentional voter fraud, especially not one that would be committed in person. If plaintiffs in these challenges focused more on the lack of potential or actual voter fraud as a legitimate state purpose despite assertions, they might be able to turn the rationale of *Shelby* in their favor.

The Court in *Shelby* argued that because there was no longer evidence of discrimination and that we have come so far as a country, likely due to provisions of the VRA, that the preclearance part was no longer an important public need.<sup>110</sup> Plaintiffs could argue similarly that there has been and is no evidence of voter fraud, making strict voter ID policies and aggressive voter purges highly unnecessary and with no legitimate state purpose that could rationally be defended with laws shown to have discriminatory effects. Likewise, the correlation between the lack of voter fraud and the consistency with which it is being used as supporting purpose in states enacting the most restrictive laws could be used to show that a State lacks legitimate intent in passing and enforcing these laws outside of racially motivated factors. As an Eleventh Circuit case cited by the dismissing court in Alabama stated, "[A] tenuous explanation for [the practice] is circumstantial evidence that the system is motivated by discriminatory purposes."<sup>111</sup>

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108. 831 F.3d 204.

109. *See id.*

110. 570 U.S. at 550–51.

111. *Greater Birmingham Ministries*, No. 2:15-cv-02193-LSC, at 42 (quoting *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984)).

Another important potential benefit of the widespread collection of voting data among states is the ability for that record to later be amassed in support of future Federal legislation aimed at a comprehensive solution to many of the consistently enacted restrictive and discriminatory voting laws. A substantial record of voter suppression and voting data is what it required to pass the original Voting Rights Act in 1965 as well as to bolster the Act when it was reauthorized by Congress in 1970, 1975, and 1982.<sup>112</sup> As litigation continues, state and plaintiff-parties alike will conduct research as to the effects of contemporary voting law. With the upcoming 2020 census, there will be even more data available to understand the demographics of the United States and gather important voting data that could later be used as evidence of the discriminatory impacts individual voting rights challenges hope to show. Should the data support what these voting rights groups are asserting in their claims, Congress will hopefully be persuaded to make amendments strengthening the Voting Rights Act to reflect issues faced by voters today.

Voting rights groups are not, however, just trying to get the attention of Congress and state legislatures, they are working to keep the intention and investment of the voting public. There is a role that litigation plays in alerting the general public of the effect of its laws and the intentions of their legislatures to disenfranchise its citizens. Public shame and the fear of voter retribution has proved to be an effective tool which is curbing subversive discriminatory tendencies in legislation. As seen in Texas, with the resignation of its newly appointed Secretary of State this year and the controversy that continues to embroil now Georgia Governor Kemp, even after the end of his term as Secretary of State, public awareness and outrage can affect how a State will proceed in making and challenging restrictive voting laws. Further, public involvement could make it possible for future proposed referenda that take certain election issues from the purview of politicians incapable of operating fair elections. Referenda of this nature are already being proposed in the area of partisan gerrymandering as a state solution.<sup>113</sup> Continued publicity showing that state legislatures are intentionally making it harder for their citizens to vote on account of race and citizenship could fare badly for incumbents at upcoming elections and also allows citizens and groups to arm

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112. Voting Rights Act, Pub L. No. 89-110, 79 Stat. 437, 547-549 (codified as amended at 52 U.S.C.S. §§ 10301-10314 (2019)).

113. Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, (Nov. 7, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/citizen-and-legislative-efforts-reform-redistricting-2018>.

themselves with knowledge on how to surmount the burdens in place to exercise their right to vote. Attention to these issues also ensures that problematic policies don't go unchecked and unnoticed. This has been especially true in the area of voter purging. For example, Ohio was again in the news for a September 2019 voter purge list that was charged with containing about 20% eligible voters, amounting to about 40,000 people.<sup>114</sup>

### *B. Contemporary Solutions to Contemporary Problems*

The variety of suppressive measures currently being used to disenfranchise voters on the basis of their race, socioeconomic status, and nationality and citizenship is in direct conflict with the Supreme Court's proclamation in *Shelby* that fifty years of oversight was enough to combat this country's even longer history of racism and discrimination. Unfortunately, there is no switch to undo *Shelby* now that it is becoming clear how relevant and necessary state oversight in voting law still is. Further, there was some merit to the argument that Sections 4 and 5 place an ongoing and heightened burden on the executive and judiciary branches to oversee State voting legislation. So how then do we restore voting rights and confidence in the election process, while avoiding arduous, expensive, and continuous litigation against the same or similar types of suppressive tactics? The most likely solutions to these issues are amending the existing VRA or new state or federal voting rights legislation.

Few states<sup>115</sup> have been proactive in enacting expansive voting rights legislation with redistricting reforms, same-day or automatic voter registration, and reinstatement of voting rights. Unsurprisingly, states most likely to pass expansive laws are not those with a history of discrimination,<sup>116</sup> leaving the citizens most at risk in a perpetually vulnerable position. Further, in such a politically influenced area of law, any expansive legislation can still be adversely amended, as was seen in Florida, where a landmark law restoring rights was quickly and controversially rolled back.<sup>117</sup>

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114. Nicholas Casey, *Ohio Was Set to Purge 235,000 Voters. It Was Wrong About 20%*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/us/politics/ohio-voter-purge.html>.

115. For example: Michigan, Nevada, and California.

116. For example, those who had been covered under the VRA.

117. In 2018, voters in Florida approved a constitutional amendment that automatically restored voting rights to individuals with felony convictions. In March of 2019, the Florida legislature proposed legislation that would largely undo the effect of the restorative bill. The bill, signed by Governor Ron DeSantis, was met with public and political criticism for its lack of respect of the voter amendment. The criticism apparently

Federal legislation, another potential solution, would indeed avoid the inconsistent and fluctuating nature of state law. Congress could start with something as straight forward yet effective as barring the acting secretary of state, an elected official, from overseeing voter registrations and elections.<sup>118</sup> But getting bipartisan support for state oversight is likely to meet the same hurdles and challenges as the VRA did, explaining why there has yet to be any comprehensive solution to the controversial practice of political gerrymandering.

#### VI. CONCLUSION

The concerted attack on the fundamental right to vote cannot be solved with responsive challenges alone, even though litigation has been critical to exposing new voter suppression tactics and providing redress to policies and practices that disenfranchise citizens. Elections and voting are a necessary and consistent function of a democratic government and must be protected regardless of the race, income, or political affiliation of the persons impacted. The immense gap in the protection of this right left by *Shelby* must be filled, whether that be with state or federal solutions or both. But what is as apparent as it was before the implementation of the provisions that led to *Shelby* is that litigation is still too uncertain, unobjective, and inefficient to combat voter suppression and protect our elections from those who, despite their charge to uphold the Constitution for all citizens, choose to do so discriminately and only for those who look like them.

**Lydia Hardy**

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had little effect on the Governor's decision. In a letter to the Secretary of State on June 28, 2019 explaining his signing of the bill, DeSantis stated that voters made a "mistake" restoring rights to violent offenders, according to the amendment that they voted into law. Daniel A. Gross, *The Fight for Voting Rights in Florida Isn't Over*, THE NEW YORKER (May 10, 2019), <https://www.newyorker.com/news/news-desk/the-fight-for-voting-rights-in-florida-isnt-over>; *Voting Rights Restoration Efforts in Florida*, BRENNAN CENTER FOR JUSTICE (May 31, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida>.

118. As could have avoided the policies and abuses of policies seen in Georgia and Texas.