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BACKSLIDING: THE UNITED STATES SUPREME COURT, SHELBY COUNTY V. HOLDER AND THE DISMANTLING OF VOTING RIGHTS ACT OF 1965

BRIDGETTE BALDWIN*

*“[If a system] is contaminated by bias, prejudices and preconceived notions,
that system cannot function fairly.”¹*

This essay takes the backdrop of *Shelby County v. Holder* to examine the persistent consequences of race in shaping the politics of voting for the 21st Century. Opponents of preclearance regulations have argued, in the most general way, that this case is about states’ rights, that certain southern states receive unequal treatment, targeted for discriminatory practices in earlier decades, which no longer exist. This essay counters that argument in *Shelby County v. Holder*. The pre-clearance provisions of the Voting Rights Act does not address past discrimination but is needed to attend to present day voting irregularities and acts of discrimination in the electoral process. Today, as in the past, voter suppression is manifested in legislation that makes voting difficult or impossible for many minority voters who have no way to register, a persistent climate of violence targeting racial minorities, strategic disenfranchisement through the criminal justice system and stagnant political representation for citizens of color both in federal and state political offices.

Seven months after the SCLC and Reverend Martin Luther King launched a program from Selma, Alabama to persuade Congress to pass the Voting Rights Act, and five months after participants in the March from Selma to Montgomery, Alabama were brutally attacked on Bloody Sunday, the Voting Rights Act was signed into law and labeled a “triumph for freedom”

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¹*States and Black Incarceration in America*,
http://www.gibbsmagazine.com/blacks_in_prisons.htm (Discussing prison statistics reported in an article in Mother Jones)(last visited Feb. 27, 2014).

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by President Lyndon Baines Johnson.² The Voting Rights Act prohibited state lawmakers from imposing barriers in the form of procedures or voter disqualifications which denied citizens, particularly African Americans, the right to vote.³

The Voting Rights Act has been described as “one of the most consequential, efficacious and amply justified exercises of the federal legislative power in our Nation’s history.”⁴ Of particular importance were Sections 2, 4 and 5, which generally prohibited states from enacting procedures which denied the right to vote on the basis of race.⁵ More specifically, state and local governments which had a history of adopting procedures designed to suppress voter registration by Blacks were required to gain approval for any changes in voting laws before the state could implement such changes.⁶ Section 5 only applied to political subdivisions where at least half of the population was not registered to vote.⁷ In the four times that the Voting Rights Act has been renewed,⁸ Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia and various counties dispersed throughout the United States, have been included as “covered” jurisdictions.⁹

In the forty-eight years of its existence, the Voting Rights Act was instrumental in changing discriminatory voter suppression practices that run rampant in the Southern States.¹⁰ The controversy surrounding the current renewal and application of the Voting Rights Act centers on the claim that southern states no longer need to be penalized for the transgressions of their forefathers and their past discriminatory voting laws and practices.¹¹

² President Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 Pub. Papers 394 (Aug. 6, 1965).

³ 42 U.S.C.A §§ 1973 to gg-10 (2007 & Supp. V 2012).

⁴ *Shelby Cnty v. Holder*, 133 S. Ct. 2612, 2634 (2013) (Ginsberg, J., dissenting).

⁵ 42 U.S.C.A §1973. *See also* *South Carolina v. Katzenback*, 383 U.S. 301, 308 (1966) (“The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.”).

⁶ *Id.* §1973(c).

⁷ *Id.* §1973(a).

⁸ The Voting Rights Act has been renewed four times in 1970, 1975, 1982, and 2006.

⁹ *Shelby Cnty v. Holder*, 133 S. Ct. 2612, 2620-2621 (2013).

¹⁰ *Shelby Cnty*, 133 S. Ct. at 2633 (Ginsberg, J., dissenting).

¹¹ *See generally*, DAVID J. GARROW, *PROTESTS AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965* (1978).

Shelby County v. Holder was primarily framed as another example of the Federal overreaching and encroachment on State power.¹² Chief Justice Roberts, who wrote the majority opinion, reminds Congress that in a prior case “We explained that §5 ‘imposes substantial federalism costs’ and ‘differentiates between states, despite our historic tradition that all states enjoy equal sovereignty.’”¹³ He further notes that “...States retain broad autonomy in structuring their governments and pursuing legislative objectives.”¹⁴

Republicans have argued, in the most general way, that this case is about states’ rights, that certain southern states are being unequally targeted for unfair practices decades earlier which no longer exist.¹⁵ However, this case is not about righting past wrongs, but attending to present day voting irregularities and acts of discrimination in the electoral process. As Justice Ginsburg noted in her dissent, “[c]ontinuation [of the Voting Rights Act’s coverage formula] would facilitate completion of the impressive gains thus far made.”¹⁶ A coverage formula and a preclearance requirement are still needed to address current discriminatory voting practices.¹⁷

Some argue that the discriminatory voting practices of yesteryear are gone and that the justifications for continued oversight by the Justice Department is no longer valid. This essay offers a lens through which to examine the persistent consequences of race in shaping the politics of voting for the 21st Century. Without the preclearance requirement,¹⁸ voter ID laws will be implemented in many states, voting districts will be gerrymandered or a system of at large voting adopted to dilute black voting power. These have often been referred to as “second generation” barriers.¹⁹ Are these not simply a refashioning of past voter suppression strategies? I agree with Justice

¹² *Shelby County*, 133 S. Ct. at 2619. “The question is whether the Act’s extraordinary measures, including its disparate treatment of States, continue to satisfy constitutional requirements.”)

¹³ *Id.* at 2621.

¹⁴ *Id.* at 2623.

¹⁵ The Republican platform of 2012 in Texas specifically targeted the Voting Rights Act. “Voting Rights Act- We urge that the Voter Rights Act of 1965 codified and updated in 1973 be repealed and not reauthorized.” <http://www.tfn.org/site/DocServer/20...pdf?docID=3201> Retrieved October 1, 2013.

¹⁶ *Shelby Cnty*, 133 S. Ct. at 2634.

¹⁷ *Id.* at 2639-2641. Justice Ginsburg’s dissent set out multiple overtly discriminatory changes in voting law or procedures blocked by §5 preclearance requirement dating from 1990 - 2006.

¹⁸ This author recognizes that section 5 has not been declared unconstitutional, but instead argues that without Section 4, Section 5 has no enforcement power. As Justice Thomas noted in his concurring opinion, “While the Court claims to ‘issue no holding on §5 itself,’ [b]y leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision.” *Shelby Cnty.* 133 S.Ct. at 2632 (Thomas, J., concurring).

¹⁹ *Id.* at 2634.

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Ginsberg that although the Voting Rights Act “has wrought dramatic changes” it “surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens.”²⁰

While it is true that the identical racial indiscretions, which prompted the enactment of the Act in 1965 no longer exist, the legacy of racial discrimination still permeates our society. Today voter suppression is manifested in the persisting climate of violence targeting racial minorities, strategic disenfranchisement through the criminal justice system and stagnant political representation for citizens of color both in federal and state political offices.

Hate Crimes

Crimes committed against minorities on the basis of race existed before the United States was formed.²¹ The law provided little or no protection for enslaved Africans. Despite the legal pronouncement for slaves in the Emancipation Proclamation, the adoption of the Civil War Amendments²² and enactment of the Civil Rights Acts²³, the Jim Crow era still ushered in brutal acts of racial violence and discrimination against the African American community.²⁴ Nor did the Voting Rights Act²⁵ stop the continuous physical harassment of African American citizens. In fact, even with the renewal of the Voting Rights Act in 2006, citizens of color still navigate a country with high hate crime rates. According to a special report created by the U.S. Department of Justice in March 2013, 54% of the crimes committed between 2007–2011 were motivated by racial bias.²⁶

²⁰ *Id.* at 2634.

²¹ See WILLIAM FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA 1880 – 1930*, 1993; Caroline Petrocino, *Connecting the Past to the Future: Hate Crimes in America in CRIMES OF HATE: SELECTED READINGS*, (Phyllis B. Gerstenfeld and Diana R. Grant, eds 2004).

²² The 13th, 14th and 15th Amendments, which abolished slavery, gave black men the right to vote.

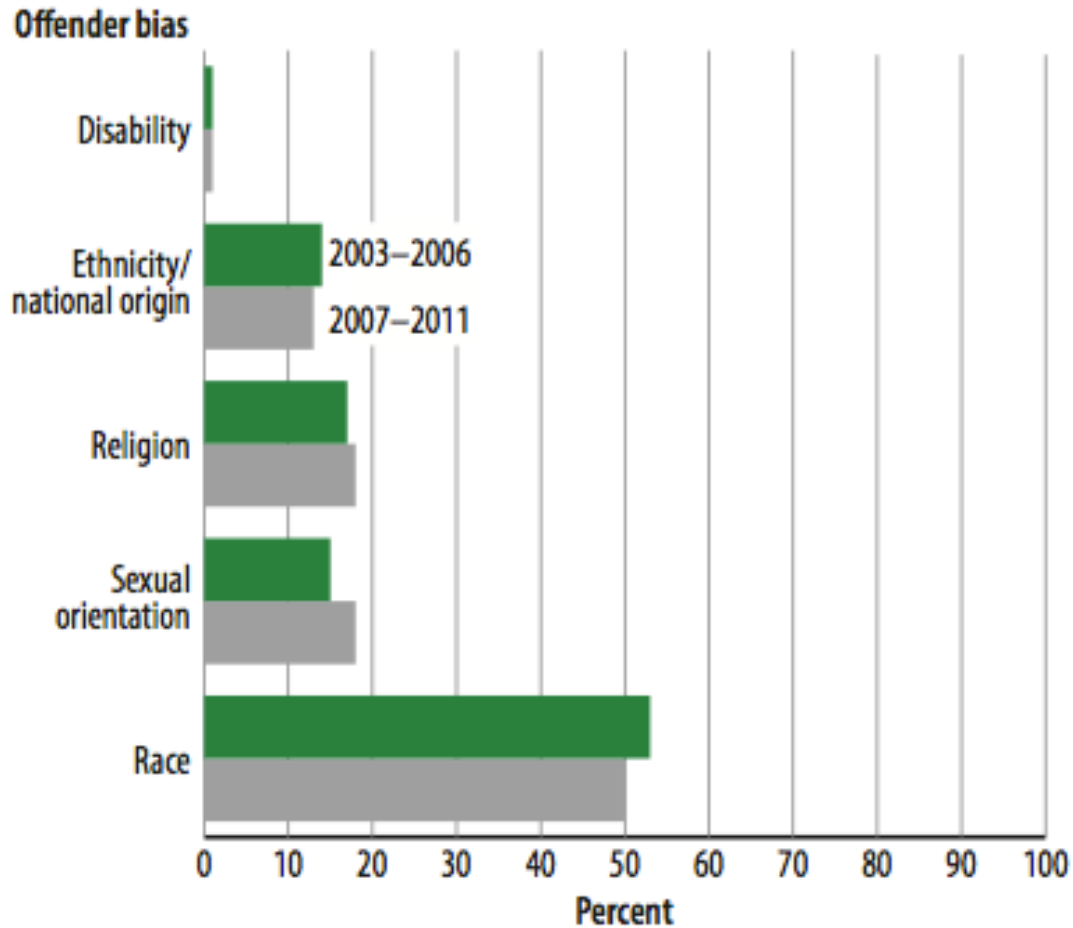
²³ 42 U.S.C.A. §1981 prevents discrimination on the basis of race in making contracts and filing lawsuits. 42 U.S.C.A. 1982 prohibits discrimination in property transactions. 42 U.S.C.A §1983 authorizes a private civil action against a state actor who intentionally violates the individual civil rights. 42 U.S.C.A. § 1985 Conspiracies to Interfere With Civil Rights prohibits conspiracies by individuals designed to prevent officials from carrying out their duties, individuals from participating in the judicial process, by example as a juror or witness and deny equal protection and immunities under the law.

²⁴ See *e.g.*, WILLIAM FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA 1880 – 1930*, (1993).

²⁵ 42 U.S.C. § 1973 (2006).

²⁶ Nathan Sandholtz, Lynn Langston, Michael Planty, *Hate Crimes Victimization 2003 – 2011*, 1 U. S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Special Report, p. 1, March 2013. (hereinafter Hate Crimes Victimization).

Offender bias in hate crimes recorded in official police records, 2003–2006 and 2007–2011



Note: In the Uniform Crime Reporting Program (UCR), a victim can include a person, business, institution, or society as a whole.

Source: Bureau of Justice Statistics, based on files provided by the FBI, Uniform Crime Report, Hate Crime Statistics, 2003–2011.

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While the Special Report represents this as a decline in the number of incidents of hate crimes motivated by racial animus,²⁷ the resulting percentage is still alarmingly excessive.²⁸ During this time Latino and African American men consistently had a greater frequency of violent hate crime committed against them.²⁹ Additionally, after the renewal of the Voting Rights Act in 2006, the percentage of white males engaging in violent hate crimes increased from 37% to 53%.³⁰ As the data as represented in the chart above from the Bureau of Statistics, indicated that in over half of the hate crimes reported, the impetus for the criminal act was based on the perceived race of the victim.³¹ Therefore, while racial tensions may not match the climate of the Jim Crow era, present day America is not one devoid of race-based discrimination and violence. This data reveals a version of race relations in the UN.S. that requires the maintenance, not the elimination, of legal protections against racial bias.

To be sure, hate crimes today, just as those that occurred during Reconstruction, many times are directly tied to voter suppression. In fact, when evidence was presented to Congress during the 2006 reauthorization of the Voting Rights Act, there was “an ‘avalanche of case studies of voting rights violations in the covered jurisdictions,’ ranging from ‘outright intimidation and violence against minority voters.’”³² In the state of Texas, state “covered” by the Voting Rights Act, a hate crime was committed against a staff member working for a black candidate running for sheriff. Historian Vernon Burton testified at the Southern Regional Hearing for the National Commission on the Voting Rights Act and noted that while she was inside her home, an African American candidate’s employee’s house was set on fire.

“[H]er husband, a former county commissioner,” was inside, “and got [out] only because the dog was barking. And she had just received

²⁷ Another report published by the Bureau of Statistics noted that two thirds of hate crimes were not reported between the years of 2007 – 2011.

<http://www.bjs.gov/content/pub/press/hcv0311pr.cfm>, Retrieved October 1, 2013.

²⁸ Hate Crimes Victimization, *supra* note 26, at 8.

²⁹ Hate Crimes Victimization, 2003 – 2011 *supra* note 26, at 7.

³⁰ *Id.* at 8 (Between the years of 2003 – 2006 the violent hate crimes committed by white males represented 37% of all hate crimes committed. Between the years of 2007 – 2011 the violent hate crimes committed by white males represented 53% of all hate crimes committed.).

³¹ *Id.* at 10.

³² *Shelby Cnty v. Holder* 133 S.Ct at 2641. *See also*, Nat'l Comm'n on the Voting Rights Act, Highlights of Hearings of the National Commission on the Voting Rights Act (2005) (Sample of discriminatory voting rights cases in covered jurisdictions).

threatening calls saying what would happen to her if she did not get [that]—and we won't use the N word—sign out of her yard.”³³

To ignore the present day realities of race-based voter suppression and intimidation does a disservice to those who struggled so hard to ensure that black Americans would have a voice in the political process. The reality of these statistics suggest that perhaps America, despite the public discourse asserting that the U.S. has “transcended race” by electing an African American President, has not come quite as far as we think. In addition to hate crimes, violence against African Americans, it is in the politics surrounding rates of incarceration that we see race continue to shape voter suppression.

Incarceration Rates

There is no question that one of the best methods of political disenfranchisement is a criminal conviction. Twelve states currently take away the right to vote on a permanent basis if a person has been convicted of a particular crime.³⁴ The prison population in the United States has steadily increased since the early 1970s.³⁵ This rise is due, for the most part, to a disproportionate increase in the number of African Americans and Latino males who have been incarcerated.³⁶

These alarming numbers seem to suggest that African Americans simply have a higher propensity to commit crimes. However, the evidence simply does not corroborate this popular assumption. African Americans are not more prone to criminal acts than any other ethnic or racial group, but Black communities are heavily policed with higher rates of police surveillance, which results in a greater number of arrests. Black and Latino men are the victims of sentencing disparities, receiving longer sentences for similar crimes, such as the disparity in sentencing for crack and powder cocaine. According to the Bureau of Justice Statistics data, for every six men in the population, one will be incarcerated.³⁷ For every 100,000 residents in their

³³ Nat'l Comm'n on the Voting Rights Act Highlights of Hearings of the National Commission on the Voting Rights Act 4 (2005). Taken from Vernon Burton, Southern Regional transcript, 94 – 95 (2005).

³⁴ <http://felonvoting.procon.org/view.resource.php?resourceID=286> Retrieved 10/28/13.

Additionally, ten states ban those convicted of certain misdemeanors from voting.

³⁵ Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, BUREAU OF JUSTICE STATISTICS (2006).

³⁶ *Id.*

³⁷ THOMAS D. BONCER, *Prevalence of Imprisonment in the United States Population, 1974 – 2001*, BUREAU OF JUSTICE STATISTICS, (2003).

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respective communities, roughly 2200 African Americans and 700 Latinos are incarcerated as compared to roughly 400 white people.³⁸

Just one year before the renewal of the VRA in 2006, Alabama had a black incarceration rate of 1916 for every 100,000 residents, Alaska had 2163, Florida 2625, Georgia 2068, Louisiana 2452, Mississippi 1742, South Carolina 1856, Texas 3162, Arizona 3294 and Virginia, 2331. These are the states, which fell under Section 4 and 5 preclearance requirements before *Shelby County v. Holder*. Therefore, for every 100,000 there were 23,609 African Americans being held in prisons within these targeted states. While there are other states with higher rates of incarceration for African Americans,³⁹ the numbers for preclearance states are extraordinary when compared with the rate of incarceration for white Americans. By example, in Alabama where the black incarceration rate is 1916 per 100,000, the incarceration rate for white Americans is 524. According to analysts Marc Mauer and Ryan King, “more than 1% of African Americans in 49 states and the District of Columbia are incarcerated, there is not a single state in the country with a rate of incarceration rate that high for whites.”⁴⁰ These numbers certainly reveal that the high incarceration rates for minorities reduce significantly the participation and influence of African Americans in electoral politics.

In states specifically covered by the VRA, the black-to-white ratio of incarceration is greater than three to one.⁴¹ The higher rates of incarceration of American and Latino American males is that are incarcerated ultimately disenfranchises not just the men but entire communities. So while we do not have the same publicly condoned and institutionalized tactics of physical intimidation deployed well into and even beyond the 1960s to suppress voting in these communities, we do have a pattern of targeting these communities, incarcerating the men who live there and thereby obstructing the participation of black communities in the political process. Just because the types or patterns of suppression have changed, does not mean that disenfranchisement is not race based.

³⁸ Prisoners in 2005, *supra* note 35, at 11.

³⁹ South Dakota incarcerates 4710 African Americans per 100,000, Wisconsin has an incarceration rate of 4416 per 100,00 and Iowa has an incarceration rate of 4200.

⁴⁰ Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* 7, The Sentencing Project, July 2007
http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (Uneven Justice).

⁴¹ *Id.* at 11.

If societal structures have the ability to disproportionately impact high proportions of the community to the extent that they are denied participation in the political process, something has to be wrong. Moreover, there is no correlation between crime control, crime prevention or crime deterrence and participation in the electoral process. So then why do we strip convicted felons of their right to vote in addition to the prison term they serve? There is but one answer, to suppress the right to vote in these communities who have higher concentrations of incarcerated minority males.

On an international level, the United States ranks first in the world for incarceration rates.⁴² But if we simply peruse the list of states covered by the preclearance section, the numbers are even more astonishing. Louisiana, which has an African American population of 33%, has an African American prison population of 76%. Likewise, Mississippi has an African American population of 36% but an African American prison population of 75%.⁴³ While there have not been any studies which demonstrate a direct correlation between voter suppression and rates of incarceration, the reality is that these policies target communities of color and were part of the voter suppression strategies used in the post reconstruction, Jim Crow south. The states have replaced literacy tests and property ownership with mass incarceration, enhanced sentencing, racially discriminatory stop and frisk policies.

In the case of the 2000 George Bush/Al Gore presidential campaign, approximately 12,000 largely black and Hispanic voters were incorrectly identified as having felony convictions and hence excluded from voting in the state of Florida.⁴⁴ So in cases like these, more not less, oversight is needed.

Representation in Government

African Americans did not become fully protected citizens until the 41st Congress,⁴⁵ their representation as public office holders remains sporadic at best. As Justice Ginsburg noted in the dissent, “A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote...’the blight of racial discrimination in voting’ continued to ‘infect the

⁴² *Id.* at 1.

⁴³ Texas African American population is 11% prison population is 44%, Florida African American population is 14%, prison population is 54%, Georgia African American population is 29%, prison population is 64%, Alabama African American population is 26%, prison population is 65%, Tennessee African American population is 16%, prison population is 53%, South Carolina African American population is 30%, prison population is 69% and Virginia African American population is 20%, prison population is 68%., *Uneven Justice supra* note 40, at 6.

⁴⁴ Ari Berman, *Florida GOP Takes Voter Suppression to a Brazen New Extreme*, ROLLING STONE MAGAZINE, May 30, 2012.

⁴⁵ African Americans members of the United States Congress 1870 – 2012, 3.

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electoral process in parts of the country.”⁴⁶ Between the period of 1901 – 1931, the 57th through the 71st Congress, African Americans did not occupy any voting seat in the House or Senate.⁴⁷ The Voting Rights Act ushered in more African Americans into the electoral process. However, since the 1965 Voting Rights Act, there has only been 133 African Americans in Congress.⁴⁸ There were 6 African American Members of Congress between 1965–1967. In 2006, there were 43.⁴⁹ This is an astonishing 600% increase of African American representation in Congress.⁵⁰ However, there are 435 voting seats in the House of Representatives and 100 voting seats in the Senate. Therefore African Americans represent only 8% of the members in Congress, despite representing approximately 14% of the total population.⁵¹ In short, the African American presence in Congress has been significantly limited.

It has been reported that in 2011 there were only three states where African Americans had been elected to the U.S. Senate. Up through the 2010 election, 26 states had never elected an African American to the House of Representatives.⁵² From 1986 up through 2012, 23 states have never elected an African American to Congress.⁵³ In the states covered by the VRA preclearance section, the percentage of African Americans holding office ranges from 2% to 29% of the electorate. This is particularly significant in states that have substantial African American populations compared to the national average. Despite a history of Jim Crow and two major migrations to the North, the South is still home to significant numbers of African Americans. Yet, they still struggle to establish even close to proportional levels of political representation. For example, in the state of Mississippi, the 2010 Census reported that African Americans make up 37% of the population, yet represent only 29% of the Legislators in that state.⁵⁴ Without the voter preclearance protections provided by the VRA, the populations of color most

⁴⁶ *Shelby Cnty v. Holder*, 133 S. Ct. at 2624, (Ginsberg, J., dissenting) (quoting from *South Carolina v. Katzenback*, 383 U.S. 301, 308 (1966)).

⁴⁷ African American Members of the United States Congress 1870 – 2012, p.3.

⁴⁸ Ten of those members were members before the Voting Rights Act was passed. U.S. Congress, House, Office of History and Preservation, *African Americans Members of the United States Congress: 1870 – 2012* (Washington: GPO, 2012).

⁴⁹ <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/> Retrieved 10/1/2013.

⁵⁰ U.S. Congress, House, Office of History and Preservation, *African Americans Members of the United States Congress: 1870 – 2012* (Washington: GPO, 2012), p1.

⁵¹ U.S. Census Bureau <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>. Retrieved 10/23/2013.

⁵² http://blog.lib.umn.edu/cspg/smartpolitics/2011/01/african_american_still_dreami.php.

⁵³ African American Members of the United States Congress 1870 – 2012, 58 - 60.

⁵⁴ U.S. Census 2010, <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>, Retrieved 10/23/2013.

likely to expand the pool of representatives that reflect their interests, will face greater challenges in getting minorities elected to both state and federal legislatures. While there has been an increase in African American political representation, African Americans are still disproportionately underrepresented in both the U.S. Congress and State Legislatures. Additionally, a study conducted by Ellen Katz (the Katz Study) on litigation involving §2 noted that 85 lawsuits were filed in the federal court alleging some form of obstruction for African American candidates in getting elected.⁵⁶ These numbers reveal that African Americans still face extreme levels of disenfranchisement and limited political representation.

State⁵⁵	Total Seats	Total African American	Percent of Total Seats
Alabama	140	35	25%
Alaska	60	1	2%
Arizona	90	2	2%
Georgia	236	53	22%
Louisiana	144	26	18%
Mississippi	174	50	29%
South Carolina	170	32	19%
Texas	181	16	9%
Virginia	140	14	10%

Conclusion

The Voting Rights Act was a sword and shield for under-represented minority groups to participate in the political process. The *Shelby County v.*

⁵⁵2009 Total Representation of African American in State Legislature
<http://www.ncsl.org/research/about-state-legislatures/african-american-legislators-in-2009.aspx>
 Retrieved 10/23/2013.

⁵⁶Ellen Katz, “Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act since 1982,” 10,
https://www.law.berkeley.edu/files/kats_discrimination_in_voting.pdf (Retrieved October 1, 2013).

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Holder case states, “The grand aim of the act is to secure to all in our polity equal citizenship stature, a voice in democracy undiluted by race.”⁵⁷

Significant barriers continue to impact the voting rights of U.S. citizens of color. The Voting Rights Act was meant to be a solution to the problem of race-based discrimination and voter suppression, but it did not address all of the strategies that are used to suppress the black vote. Racial discrimination exists as evidenced by the sheer volume of hate crimes committed that both (1) have little connection with and (2) are directly tied to voter intimidation. Further, voter disenfranchisement as a result of felony and even misdemeanor convictions has a disparate impact on communities of color due to various acts of uneven policing and prosecution, which have racial consequences. Evidenced by the incarceration rates, it is more likely that an African American male will be incarcerated and denied participation in the electoral process than be elected to the U.S. Congress. The Voting Rights Act does not reach hate crimes or law enforcement policies and disparate sentencing standards. Still, if the court wants to consider the legacy of slavery and the persistence of racism, this is information that is relevant. So too is the fact that within the realm of formal politics, even in voting districts where citizens of color are the majority, we find embarrassingly low numbers for those very same citizens within the legislature. “[If a system] is contaminated by bias, prejudices and preconceived notions, that system cannot function fairly.”⁵⁸

⁵⁷ *Shelby Cnty v. Holder*, 133 S. Ct. at 2651 (Ginsberg, J., dissenting).

⁵⁸ *Mauer and King*, *supra* note 40, at 7.