

## 6 *Explainer: A brief introduction to the Voting Rights Act*

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### HISTORY

With the end of the Civil War in 1865, equal rights for African Americans were formally recognized in the U.S. through the passage of the 14th and 15th Amendments to the Constitution. These events initially led to a surge of African American voter registration and to the election of Black representatives, but the gains were quickly rolled back. By the late 1870s, a series of Supreme Court decisions, political deals, and legislative actions spelled the end of the Reconstruction Era and the dawn of Jim Crow, the long period of legal repression of Black civil rights coupled with violent intimidation campaigns. Historians typically bracket the Jim Crow Era from 1877, when the federal troops who were enforcing anti-discrimination laws were withdrawn from the South, to 1965, with the passage of the Voting Rights Act.



The Voting Rights Act of 1965 (VRA) reflects “Congress’ firm intention to rid the country of racial discrimination in voting” (in the words of Justice Earl Warren) and was one of the most important pieces of legislation passed during the Civil Rights era. Before the passage of the VRA, less than one-third of Black adults were registered to vote in Southern states, while White voter registration was closer to 75 percent. The decades following the VRA’s passage coincided with a 30-fold expansion in the number of Black elected officials, from about 300 in 1964 to 9,430 in 2002 (see Figure 1 for a visualization).<sup>1</sup> The number of elected Hispanic officials saw similar growth in the decades since the VRA was passed.

The VRA was passed in the wake of a methodical, courageous, and at times bloody campaign led by John Lewis, Martin Luther King, Jr., Ella Baker, and other civil rights leaders. After World War II, the campaign against Jim Crow and voter suppression

<sup>1</sup>The Census Bureau cites the latter figure in [perma.cc/Q8UT-DP3C](https://perma.cc/Q8UT-DP3C).

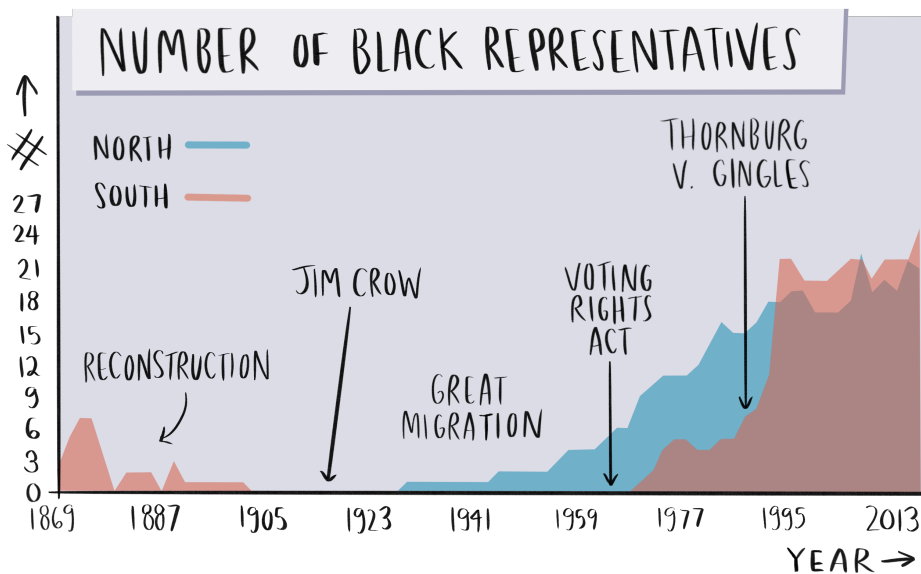


Figure 1: Number of Black representatives in the U.S. Congress by year, split by North and South. Adapted from a figure created by Mira Bernstein.

picked up momentum. Organizations like the Student Nonviolent Coordinating Committee sent young people to the South to help to register and educate Black residents; civil rights leaders adeptly used the media to draw public attention to discrimination in the South; and large events—like the march across the Edmund Pettus bridge in Selma, Alabama, in March of 1965, in which Representative John Lewis and others were badly beaten by local police—helped to force the federal government to act.

The violent attacks in Selma created an urgency that propelled Congress and President Johnson to push for new legislation. Just days after the Selma attacks, President Johnson addressed the nation on television, echoing the words used in the civil rights movement by calling on southern jurisdictions to “[o]pen your polling places to all your people,” and to “[a]llow men and women to register and vote whatever the color of their skin.” Five months later, Johnson signed the Voting Rights Act of 1965 into law. The VRA was amended and reauthorized by Congress five times—1970, 1975, 1982, 1992, and 2006. It was in the 1975 reauthorization that “language minorities” were added, opening the door to claims on behalf of Latino, Asian, and Native American plaintiffs. Over the years, the core provisions of the Act remained largely the same, but these important clarifications and expansions of scope—passed with strong bipartisan majorities—helped keep the law in sync with shifting American racial realities.

## KEY PROVISIONS

The 1965 Act included a number of provisions that drastically expanded the ability of the federal government, and the executive branch specifically, to address discrimination in voting rights. The Act has five sections: Section 1 is just the name of the Act; Section 2 is a powerful and detailed restatement of the promises of the 15th Amendment to provide equal access to voting; and Sections 3-5 collectively describe a stronger set of rules called “preclearance” under which jurisdictions with a history of discrimination would face sustained scrutiny. In particular, Section 3 explains how some jurisdictions might “bail in” to covered status, Section 4 details “bail out” and also lays out the “formula” or system for deciding which states and localities would be covered. Section 5 requires covered jurisdictions to submit any proposed changes to their election procedures to the Attorney General or U.S. District Court of D.C. for approval, so as to prevent any election changes that might have a discriminatory impact or be based on discriminatory intent. Let’s review some of this in more detail.

### SECTION 2

The strong provisions of Section 2 prohibit any “voting qualification or prerequisite to voting or standard, practice, or procedure” that is “imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...” Part b of Section 2 further states that a violation “is established if, based on the **totality of circumstances**, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by... citizens protected by [Section 2] in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” (emphasis added). Taken as a whole, Section 2 is a tool to prevent not only vote denial, but, much more broadly, structures and practices that *dilute* voting strength.

In its early years, it was unclear whether Section 2 prohibited just intentional discrimination or whether it could also be read to prohibit practices and procedures just on the basis of discriminatory effect. In 1980, in *Mobile v. Bolden*, a case challenging the practice of a municipality electing its city council members at large, the Supreme Court held that a successful Section 2 claim required a finding of intentional discrimination, and that establishing a practice’s discriminatory effect on minority voters was not enough. The finding of the Supreme Court dealt a major blow to the ability of advocates to use the VRA to attack and rout out discrimination in electoral practices. However, just two years later, Congress responded to the decision in *Mobile* by amending the VRA to expressly allow for “effects” or “results” claims – i.e., to allow plaintiffs bringing claims under Section 2 to succeed without establishing any intent to discriminate, but just on the basis of outcomes.

In amending the VRA, Congress used its investigatory powers to hold hearings, then ultimately drafted what would become known as the “Senate Report.” It “elaborates on the nature of Section 2 violations,” essentially codifying the totality-

of-the-circumstances standard from the text of the Act. The Senate Report listed out numerous elements that courts should consider in assessing a claim under Section 2. These factors include: the history of voting-related discrimination in the state or political subdivision; the extent to which voting in the elections of the state or political subdivision is racially polarized; the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Reviewing these today, we might be surprised at some of these inclusions—for instance, bullet voting (or the practice of listing just one name on a ballot designed for choosing multiple candidates) sounds race-neutral on its face, but it had become an organizing tactic for gaining Black voting power and so was expressly prohibited in certain White-controlled jurisdictions. The Report stresses, however, that this list of factors is not comprehensive and that courts may also consider additional factors.

These Senate Factors are broad and interdisciplinary, and today there will often be historians brought in as expert witnesses to speak to some of these issues in a particular locality. But the second Senate Factor, the presence of racial polarization in voting, would soon be elevated to a quantitatively specific threshold test, bringing new clarity to VRA litigation. A few years after *Mobile* and the 1982 amendments, another key case interpreting the VRA was decided by the Supreme Court. In *Thornburg v. Gingles*, the Supreme Court delineated a short checklist—now known as the “Gingles factors” or “Gingles preconditions”—which plaintiffs must complete in order to advance a claim of vote dilution under Section 2. These are:

**Gingles 1.** the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district”;

**Gingles 2.** the minority group is “politically cohesive”; and

**Gingles 3.** “the white majority votes sufficiently as a bloc to enable it... usually to defeat the minority’s preferred candidate.”

The first condition is essentially established by drawing a suitable demonstration plan, that is, a plan with an additional majority-minority district that still adheres to traditional principles.<sup>2</sup> The second and third require a showing that members of different racial groups vote differently in a way that thwarts the minority from electing candidates of choice.

<sup>2</sup>Importantly, this is the *only* role for majority-minority districts in current VRA case law; you don’t have to draw one at the end of the day, but just have to show that one *could have been* drawn in order to launch your lawsuit.

The *Thornburg* decision holds that, if plaintiffs satisfy these three preconditions, then the court must conduct “a searching practical evaluation of the ‘past and present reality,’”—that is, the totality of the circumstances—to learn “whether the political process is equally open to minority voters.”

Over the years, the statistical inference machinery to establish Gingles 2-3 has become sufficiently standardized that, taken together, the Gingles factors have introduced some sense of routine to the holistic endeavor of proving vote dilution, making it more legally manageable. This helps explain the big uptick in Black representation that coincides with the *Thornburg* decision (Figure 1).

## SECTION 5

As we heard above, Section 5 of the VRA requires covered jurisdictions to submit any proposed changes to their election procedures to the Attorney General or U.S. District Court of D.C. for preapproval.

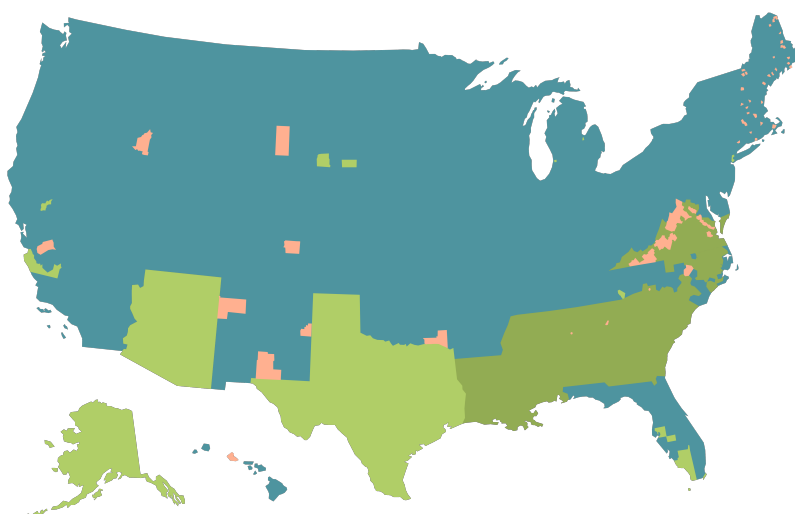


Figure 2: Map of preclearance regions, adapted from the New York Times. Dark green areas were covered from 1965, light green areas were added in 1970 or 1975, and orange areas were released from coverage by a court (“bailed out”).

The map in Figure 2 shows areas formerly covered by Section 5. The original list was built through a “formula” involving measures of low Black voter registration and turnout disparities between Black and White voters. In some cases, entire states were covered, as in Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Other states were only covered in part, such as California, Florida, New York, North Carolina, South Dakota, and Michigan. Certain jurisdictions were “bailed out” under Section 4(a) of the VRA after convincing the courts that preclearance was no longer needed.

In the decades after the VRA was passed, Section 5 proved one of the most effective

tools for preventing voter discrimination, especially under the emerging standard prohibiting “retrogression”—in other words, minority electoral opportunity in covered jurisdictions should not get worse over time. The U.S. Department of Justice (DOJ) denied more than 3,000 voting changes between 1965 and 2013, including over 500 proposed redistricting plans, due to the discriminatory or retrogressive effect of those changes.<sup>3</sup> Besides a districting plan, a preclearance review could be triggered by many other kinds of rule changes, such as the size of an elected body, the system of election, the availability of early voting, and so on.

However, on June 25, 2013, the Supreme Court issued its opinion in *Shelby v. Holder*, finding Section 4(b) unconstitutional because the formula determining coverage was said to be outdated. As a result, while Section 5 technically remains in place, it now applies to an emptied list of locations.<sup>4</sup> Restoring the promise of the VRA will require new Congressional action to develop an updated model for coverage. But the protection of voting rights has now become divisive and gridlocked, so that a change to Senate rules might be needed to even squeak voting legislation through Congress today—in marked contrast to the strong bipartisan support the VRA enjoyed throughout its first 50 years.

Today, the VRA is under new threat. As of February 2022, the Supreme Court has stepped in to hit the brakes on a routine voting rights case in Alabama and seems poised to declare that racial fairness in elections must be secured in a race-blind way. We are all watching to see the next act of the Voting Rights Act.

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<sup>3</sup>See Posner, Mark A. “The real story behind the Justice Department’s implementation of Section 5 of the VRA: Vigorous enforcement, as intended by congress.” *Duke J. Const. L. Pub. Pol’y* 1 (2006): 79.

<sup>4</sup>After the list was emptied, Pasadena, TX got “bailed in,” so it is now a lonely member of the preclearance list.