The Voting Rights Act in the 21st century: Reducing litigation and shaping a country of tolerance

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For 45 years, the Voting Rights Act (VRA) has protected the rights of millions of citizens across the country. Though the act is significant in its entirety, two sections stand out—Section 2 and Section 5. Section 2 of the act allows individuals and organizations across the country to challenge discriminatory or unjust election policies. Section 5 requires that specifically identified jurisdictions gain the approval of the U.S. Department of Justice or the District Court of the District of Columbia before implementing any changes to election laws or practices. Though Sections 2 and 5 have each worked to stop or prevent racially discriminatory policies, they do not share a uniform history. Legal challenges and congressional amendments have often affected one of the sections, while not directly changing the other. In this paper, I seek to determine the impact of federal and Supreme Court cases on the effectiveness of the Voting Rights Act as well as the extent to which the act enabled minorities and civil rights advocates to eliminate discriminatory policies without litigation. First, I used court documents, files from the Department of Justice, and a variety of other sources to build upon an extensive database of voting rights related legal incidents. Next, using this database along with a record of important federal voting rights cases, I compared the number of voting rights events before critical cases with the number of events after critical cases. I found that significant federal cases, as identified by political scientists and historians, had a large impact on the number and type of discriminatory policies employed by local jurisdictions. Finally, I used the database to analyze the distribution (by time and location) of “non-litigated successes” (NLSs) and found that the presence of successful voting rights act events in a given area, on average, led to a significantly larger number of NLSs in that area.

In 1870, in the midst of the Reconstruction Era, the Fifteenth Amendment to the Constitution was ratified, stating that “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” While the Reconstruction Congress attempted to quell violence, corruption, and other barriers to black enfranchisement, their efforts were largely ineffective. Opponents of black and minority enfranchisement circumvented the amendment through poll taxes, literacy tests, racial gerrymandering, and a variety of other Jim Crow tactics (Kousser 53).

These attempts to undermine the Fifteenth Amendment and to disenfranchise minority voters continued well into the 20th century. As the Second Reconstruction began, Congress passed the Civil Rights Acts of 1957 and 1960, however these acts also did very little to end voter disfranchisement.

It was not until 1965 that Congress passed the Voting Rights Act (VRA), the first piece of legislation powerful enough to enforce the Fifteenth Amendment. The VRA explicitly outlawed literacy tests and increased the tools available to both the government and to minority groups so that they could mount an effective legal strategy against discriminatory policies. Since its passage, the VRA has been renewed and modified four times to continue to protect the voting rights of minority groups.

Between each of these renewals and modifications, the VRA was the subject of several constitutional challenges and federal lawsuits. In this paper, I use an expansive database of voting rights litigation to determine, first, that the constitutional challenges to the VRA had a significant effect on the number and types of cases brought under the VRA, and second, that the presence of successful voting rights cases in a given area has led, on average, to a significantly larger number of settlements and non-litigated successes in that area.

Section 2 & Section 5

The database I used to reach my conclusions consisted of cases arising under two parts of the VRA—Section 2 and Section 5. Section 2 grants standing to minority groups and individuals across the country, as well as to the U.S. Department of Justice (DOJ), to challenge discriminatory voting laws and policies under more favorable procedures and standards than the Fourteenth and Fifteenth Amendments offer. Section 5 requires certain jurisdictions, principally in the Deep South, to file for preclearance with the DOJ or the U.S. District Court of the District of Columbia before they put changes in their election procedures into effect. This preclearance is designed to stop discriminatory policies before they can be implemented. If a districting plan, election policy or voting method is rejected by the Justice Department after it is submitted for preclearance, the covered jurisdiction must either modify its election policies or prove to a federal court that its policy is not discriminatory (both in its intent and its effect). In automatically scrutinizing every modification in election policy and in shifting the burden of proof to local jurisdictions, Congress’ policy, when enforced, functioned as an effective road block to discriminatory policies (Kousser 680).

More Information Requests

Though Section 5 objections issued by the DOJ have prevented many discriminatory policies, the objections themselves are not the only way in which Section 5 has influenced election policy. Changes are also caused by More Information Requests (MIRs) (Fraga). As part of the Section 5 objection process, the DOJ regularly issues MIRs when it does not have enough information to decide whether or not it should issue an objection. Often, MIRs telegraph the DOJ’s intention to issue an objection. Accordingly, many jurisdictions change their proposed policies to avoid an objection. These MIR-induced changes can take one of three forms: a jurisdiction could withdraw its proposed change, modify the change, or supersede the change by sub-
mitting a completely new proposal. Since 1980, the DOJ has issued thousands of MIRs, which has led to over one thousand MIR-induced changes.

**Previous Work**

Despite its success, Section 5 has been the subject of criticism and constitutional challenges since its inception. Some have argued that the Section violates the Fourteenth and Fifteenth Amendments, while others suggest that it violates states’ rights by allowing federal micromanagement of state policies. One of the more recent criticisms of Section 5 is leveled against its coverage scheme (Petitioner’s Brief in *NAMUDNO* 27). The current coverage scheme was constructed in 1965 and modified in 1970 and 1975. It covers any jurisdiction which used a literacy test and which had low voter turnout among minorities in the 1964 presidential election (Department of Justice). The coverage scheme was slightly modified in 1970 and 1975 when the act was renewed, but the basic formula has not changed in over 30 years (See Appendix C). Today, over 40 years later, some claim the coverage scheme is unfair because it does not take into account changes in the attitude or demographics of the county.

To that effect, one of the covered jurisdictions in Texas filed a lawsuit contesting the validity of the coverage scheme. In *North Austin Municipal District No. 1 v. Holder*, the Supreme Court unanimously decided to allow the district to opt out of the Section 5 requirement. At the same time, the opinion of the court questioned the validity of the coverage scheme, stating that “The evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions” (2009). In questioning Section 5, the Supreme Court was, in essence, suggesting that it might rule the coverage scheme unconstitutional in a future case if Congress does not modify it in the near future (Pildes).

Last year, as part of a previous study, I used files from the DOJ, the American Civil Liberties Union, the National Association for the Advancement of Colored People, and a variety of other sources to compile a comprehensive database of discriminatory incidents and policies in the field of voting rights. I used this database, along with census information from the past several decades, to create several alternate coverage schemes for Section 5 of the VRA.

**Purpose and Methodology**

Though *NAMUDNO* is the most recent challenge to the VRA and to Section 5, there have been many cases leveled against both Section 2 and Section 5 of the act. Although these cases have changed the effectiveness of the VRA over the years, no one has ever analyzed, quantitatively, the impact these cases have had on voting rights litigation or on the necessity of voting rights litigation. Using an expanded version of the database I built last summer, I wanted to determine the extent to which important voting rights cases influence litigation under the VRA. Additionally, I hoped to determine the extent to which the VRA enables civil rights activists to end or prevent voting discrimination without resorting to litigation. My hypotheses were first, that major voting rights cases, as identified by most political scientists and historians, would be associated with large changes in the number of litigated voting rights events, and second, that a large number of voting rights events under Section 2 and Section 5 of the VRA were non-litigated successes (NLSs).  

I tested these hypotheses in two steps. First, I used a variety of sources including a database of MIRs, private litigation and settlement records, and numerous academic texts on voting rights to add thousands of additional entries to the voting rights database. Next, using the extended database, as well as a statistical software package and mapping software, I analyzed the number and distribution of events, both litigated and non-litigated, under the VRA both before and after influential Supreme Court cases involving the VRA.
Fig. 3 Section 2 claims increased following a 1982 amendment that made it easier for plaintiffs to win cases by lowering the standard to prove the policy was discriminatory. Two years later, during the next major election year, there was an even larger increase. In 1986, the Supreme Court affirmed the constitutionality of Section 2 in Thornburg v. Gingles, leading to a record number of cases filed.

The Impact of Amendments to the VRA and Supreme Court Decisions
After cataloguing and assembling the extended database, I used the STATA statistical software package to conduct a preliminary analysis of the data to determine the distribution of claims among type and content (Figure 1, Figure 2). The types of claims were split roughly evenly between Section 2 cases, Section 5 cases, and MIR-induced changes. With respect to the content of each claim, nearly half of the claims were either challenges to at-large elections or to a proposed districting plan, while a quarter of the remaining claims were distributed across several categories.

Next, using STATA, I graphed the number of claims for Section 2 and Section 5 by year. By cross-referencing the number of claims by year with key events in the VRA’s litigation history, I found that the number and types of claims made under the VRA were highly responsive to significant legislative events and federal voting rights cases. Figure 1 shows the graph of claims by year for Section 2 of the act.

Though Section 2 of the VRA became law in 1965, there was very little Section 2 activity until the early 1980s. In 1982, during the act’s renewal, Congress amended the section to make it easier for plaintiffs to win cases. According to a plurality of the Supreme Court in the 1980 case of City of Mobile v. Bolden, plaintiffs could only win a Section 2 case if they could prove that the policy at the center of the lawsuit was implemented with an intent to discriminate against minorities. After the 1982 renewal, however, a plaintiff only needed to prove that the policy in question had a discriminatory effect, a standard which made it much easier for plaintiffs to win.3

As shown in Figure 3, the 1982 amendment was followed by a massive increase in the number of claims made under Section 2—the number skyrocketed from seven to sixteen. Two years later, during the next major election year, there were 61 cases filed. The next major development took place in 1986, when the Supreme Court affirmed the constitutionality of Section 2 in Thornburg v. Gingles. Following that ruling, the number of cases filed under Section 2 skyrocketed yet again. In 1986, there was a record 238 cases filed under Section 2.

We can see similar trends for Section 5 objections (Figure 4). First, there was a sharp increase in objections following the Supreme Court’s 1969 decision in Allen v. Board of Elections. In Allen, the Supreme Court held that Section 5 covers not only changes specifically involving the act of voting itself, but also changes to election structures—such as at-large elections, annexations, and redistricting.4 Next, there was a large increase of objections in 1975 after Texas was added to the list of areas subject to preclearance requirements. Finally, there was a sharp decrease in objections after the Supreme Court held in Shaw v. Reno and Miller v. Johnson that racial gerrymandering could not be used to assist minority voters (1993, 1995).

Litigated and Non-Litigated Success
Although the VRA enabled many minorities to challenge discriminatory election policies successfully in court, a staggering number of discriminatory voting rights policies have been altered, repealed, or replaced outside the judicial process because of the VRA. In the extended database, these NLSs came about in three ways: from Section 5 Objections, from MIR-induced
changes and legal settlements. Chart 1 in Appendix D shows the distribution of successes. Of all the successful events in the database, 2,164 were NLSs, representing 62% of all successful claims in the database. Figure 6 shows the density of MIR-induced changes by location while Figure 7 shows the density of settlements. The largest cluster of settlements lies in Alabama. Most of those settlements came from just one case—Dillard v. Crenshaw. After Dillard, 180 jurisdictions with similar election systems agreed to settle rather than go to court. Dillard is an example of how the VRA can lead to NLSs. By allowing plaintiffs to succeed in court, the Voting Rights Act allows minorities to affect policy without going to court. The fear of litigation as well as the high prospects of failure influence jurisdictions to change their policies without resorting to courtroom battles.

The extent to which the Voting Rights Act leads to Non-Litigated Successes can also be seen through the patterns surrounding MIR-induced changes. According to an unpaired t-test with significance level $\alpha = 0.05$, among areas with a similar number of MIRs, jurisdictions with at least one Section 5 objection were more likely to have MIR-induced changes than jurisdictions without any Section 5 objections. This makes sense—having received an objection, a jurisdiction would take extra care to avoid subsequent objections, and as such, they would be more responsive to MIRs. This trend shows another way in which the VRA influences jurisdictions to implement just election policies. Just as with legal settlements, the desire to avoid legal action causes jurisdictions to implement better policies of their own accord, without formal legal action.

**Conclusion**

Though the database contains thousands of litigated and non-litigated successes, it does not illustrate the full impact the VRA has on the construction of voting rights policy. Despite the large number of events included in the database, there are many events which will never be included in the database—there are events without paper trails, events which take place behind closed doors, in informal conversations, or even in the minds of policy makers and political operatives. These events are the true non-litigated successes—they are the policies which are cast aside, rejected before they are even proposed or, in many instances, before they enter conscious thought. The true success of the Voting Rights Act lies not with the cases in the database, but rather in the cases that don’t exist because of the cases in the database. Though discriminatory policies still exist, the Voting Rights Act, as well as the litigation and oversight mechanisms it created, changed the paradigm of thought among policy makers in local jurisdictions. Discriminatory policies that were once acceptable and commonplace don’t even enter the minds of policy makers. Still other policies are rejected immediately because of their discriminatory nature and inevitable failure. It is these cases, along with the powerful cases and events included in the database, which demonstrate the true power and potential of the Voting Rights Act.

Finally, while the Voting Rights Act has so far managed to outlast its critics, the entries in the database show that the future success of the Voting Rights Act is not guaranteed. To the contrary, the act has been and remains fragile. Accordingly, we see that supporters of the act must continue working to defend the act and to push for the continued support of Congress and the courts so that the act can continue to protect the rights of minorities and to maintain the integrity of America’s democracy.

**Future Studies**

Though I added many cases to the database, there are still many more events to track down and enter. Private litigation files, older scholarly works, additional MIR records, and a variety of other sources would, if added to the database, shed a lot of additional light on how the VRA functions. In addition to finding more sources of data, the database can be used to answer many questions which this study did not address. How have private lawyers affected the nature of voting rights litigation? Have private attorneys contributed to the increase and decrease of cases filed by the
DOJ? What factors make a case more likely to trigger settlements? Why was Dillard v. Crenshaw so successful? These and a variety of other questions can be answered with the database.

Notes
1. For the first several years after its passage, Section 5 of the Voting Rights Act was largely ignored by covered jurisdictions (Kousser 685).
2. For the purposes of this paper, an NLS is an MIR-induced change or VRA related settlement.
3. Senate Report 417(1982) contended that the Bolden plurality had misconstrued congressional intent, and that Section 2 had always been meant to ban laws or practices with a discriminatory effect, and further, that Congress had the power under the constitution to ban laws or practices with a discriminatory effect.
4. Direct changes in voting regulation include changes which implement policies which prevent minorities from voting such as poll taxes, literacy tests, or residency requirements. Structural changes allowed by the Allen decision include changes such as redistricting or staggered terms—changes which decrease the effectiveness of minority votes.

References

Adam Adler is a member of the Class of 2012 majoring in Mathematical and Computational Science. His interests include Number Theory and Constitutional Law, and Jurimetrics (the application of Math and Statistics to the Judiciary). Adam also enjoys writing satire and is the editor of Stanford’s satirical newsletter, The Stanford Flipside.