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## REPUBLICANS AND THE VOTING RIGHTS ACT

Michael T. Morley<sup>†</sup>

JESSE H. RHODES, *BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT* (STANFORD UNIVERSITY PRESS 2017). PP. 280. HARDCOVER \$90.00. PAPERBACK \$27.95.

The Voting Rights Act of 1965<sup>1</sup> is one of the most important federal laws of the Twentieth Century. It swept away restrictions used throughout the South to disenfranchise African-Americans,<sup>2</sup> tightened federal antidiscrimination provisions concerning voting rights,<sup>3</sup> and authorized federal officials to monitor elections<sup>4</sup> and even register voters<sup>5</sup> in southern states. The Act also imposed preclearance requirements on states with a history of racial discrimination to prevent them from devising new ways to discriminate.<sup>6</sup> Complementing these provisions expanding access to the ballot, the statute simultaneously enhanced federal protections against fraudulent voter registrations,<sup>7</sup> thereby preventing legitimately cast ballots from being diluted or nullified by fraudulent ones.<sup>8</sup>

Until recent Supreme Court rulings revisiting its constitutionality,<sup>9</sup> the Voting Rights Act had long been regarded as a superstatute, part of the firmament of American law that helped shape the backdrop against which ordinary legislative and political

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1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 [hereinafter “VRA”].

2. *See, e.g., id.* § 4(a), 79 Stat. at 438; *cf. id.* § 10, 79 Stat. at 442 (authorizing Attorney General to bring constitutional challenges against poll taxes).

3. *Id.* §§ 2, 11(a)–(b), 12(a), (c)–(e), 15, 79 Stat. at 437, 443–45; *see also id.* § 3(b), 79 Stat. at 437.

4. *Id.* § 8, 79 Stat. at 441.

5. *Id.* §§ 3(a), 6–7, 9, 79 Stat. at 437, 439–42.

6. VRA § 5, 79 Stat. at 439; *see also id.* § 3(c), 79 Stat. at 437–38. A jurisdiction subject to preclearance requirements is prohibited from changing any election-related policies, practices, or procedures unless either the U.S. Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia concludes the modification will not reduce minority participation in the electoral process. *See Beer v. United States*, 425 U.S. 130, 141 (1975).

7. *Id.* § 11(c)–(d), 79 Stat. at 443.

8. *See Anderson v. United States*, 417 U.S. 211, 226 (1974) (holding that a person has the constitutional right to have his or her vote be “given full value and effect, without being diluted or distorted by the casting of fraudulent [or otherwise ineligible] ballots”); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

9. *See Shelby Cty v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009).

decisions were made.<sup>10</sup> Within two years of the law's enactment, a majority of voting-age African-Americans were registered to vote in every southern state,<sup>11</sup> primarily as a result of the Act's suspension of literacy tests throughout the region and deployment of federal examiners to register new voters.<sup>12</sup> Over the decades that followed, African-American participation in the electoral system has come to equal that of whites,<sup>13</sup> the African-American community has evolved into a cornerstone of the Democratic Party's coalition,<sup>14</sup> and African-Americans have held office at every level of government including, of course, the Presidency.<sup>15</sup>

Numerous histories have been written specifically about the Voting Rights Act,<sup>16</sup> and it plays an important role in broader histories of voting rights in the United States.<sup>17</sup> Professor Jesse H. Rhodes adds to this literature with *Ballot Blocked: The Political Erosion of the Voting Rights Act*.<sup>18</sup> The book's main thesis is that Republican officials "adopted a sophisticated long-term strategy" of publicly supporting the Voting Rights Act while surreptitiously attempting to weaken and undermine it.<sup>19</sup>

Relying on extensive primary source research, the author argues that Republicans repeatedly voted to adopt, reauthorize, and expand the Act over the course of several decades because those actions received substantial public attention<sup>20</sup> and they feared political backlash if they appeared to oppose voting rights for minorities.<sup>21</sup> At the same time, Republicans "craft[ed] esoteric administrative rules," "exploit[ed] bureaucratic procedures," hired conservative attorneys in the U.S. Department of Justice's ("DOJ") Civil Rights Division, and nominated conservative Supreme Court Justices "to weaken the act on their behalf."<sup>22</sup> Republicans relied on such techniques, the author maintains, because bureaucratic decisions and judicial appointments generally do not receive the same public attention and scrutiny as congressional debates over the Voting Rights Act.<sup>23</sup> Thus, Rhodes concludes, Republicans could disingenuously "limit federal voting rights

10. WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 117–18 (2010).

11. U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 12–13 (1968).

12. Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702 (2006).

13. U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES: 2018 STATUTORY REPORT 200 (registration rates), 211 (turnout rates).

14. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter; The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1427 (2015).

15. Janai S. Nelson, *Defining Race: The Obama Phenomenon and the Voting Rights Act*, 72 ALB. L. REV. 899, 900–02 (2009).

16. See, e.g., ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2016); CHARLES S. BULLOCK III, ET AL., THE RISE AND FALL OF THE VOTING RIGHTS ACT (2016); see also Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7 (Bernard Grofman & Chandler Davidson, eds. 1992); Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903 (2008).

17. See, e.g., ALEXANDER KEYSAR, THE RIGHT TO VOTE 211–16, 221–23, 226–46 (rev. ed. 2009).

18. See JESSE H. RHODES, *BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT* (2017).

19. *Id.* at 3, 18, 59, 95.

20. *Id.* at 16–17.

21. *Id.* at 14–15, 95.

22. *Id.* at 3.

23. RHODES, *supra* note 18, at 16–17, 107.

enforcement . . . while simultaneously maintaining the electorally useful appearance of fealty to the ideal of racial equality.”<sup>24</sup> Through this deceptive strategy, Republicans “eroded the promise of American democracy by rendering the voting rights of people of color and minority-language speakers more vulnerable.”<sup>25</sup>

The book presents a lively and interesting overview of the Voting Rights Act’s history over the past half-century. In particular, it adds to the literature criticizing the Act’s implementation under Republican administrations, particularly that of President George W. Bush.<sup>26</sup> I believe the author overstates his conclusions, however, and his evidence and analysis fall short of establishing them. Nevertheless, this work highlights the important issues that arise in attempting to implement a somewhat vague, politically charged, expressly race-conscious law that regulates the electoral process and, by extension, the allocation of political power in this country.

Part I of this Review explores the book’s pervasive tendency to present most Republicans from across all branches of government throughout a period of over fifty years as acting in an almost monolithic fashion to achieve their supposedly shared goal of surreptitiously undermining the Voting Rights Act. Part II argues that important evidence the book did not consider might lead to different conclusions. At a minimum, the record could be read as showing that Republican administrations did not attempt to undermine the Voting Rights Act, but rather interpreted and enforced it somewhat differently than Democratic administrations—a common occurrence with many statutes. Ironically, Republican interpretations sometimes led to broader enforcement of the Act. Additionally, several of the considerations Rhodes cites as evidence of an alleged Republican strategy to secretly erode the Act apply equally to Democratic administrations. Part III briefly concludes.

#### I. ANOTHER “VAST RIGHT-WING CONSPIRACY”?

As noted above, the book centers around Rhodes’s argument that, from the enactment of the Voting Rights Act through the present day, Republican officials across all branches of government have “adopted a sophisticated long-term strategy” of supporting the Act in public while simultaneously attempting to dismantle it through less visible channels.<sup>27</sup> The book appears to treat almost any action relating to the Act over the course of the past half-century by any Republican—whether a Member of Congress, Senator, President, Department of Justice official, or even Supreme Court Justice—as furthering this plan. He implies that hundreds of Republicans across all branches of government, including the judiciary, cooperated in some sense to allow the party to publicly support the Voting Rights Act while working to undermine it just out of public

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24. *Id.* at 4.

25. *Id.* at 3.

26. See, e.g., Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL’Y 17, 27 (2009); Sen. Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL’Y REV. 211 (2008); see also OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESP., U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (July 2, 2008).

27. RHODES, *supra* note 18, at 3, 18, 59, 95.

view.<sup>28</sup>

The book's empirical evidence does not support such sweeping conclusions, for three main reasons. First, Rhodes's evidence of Republican legislators' subjective intentions and goals is tenuous and speculative. Whenever most Republican legislators voted in favor of the Voting Rights Act, Rhodes contends, it is because they were outfoxed by the civil rights community and pressured or shamed into it.<sup>29</sup> Whenever Republicans voted to adopt or reauthorize the Act, Rhodes contends, they did so "grudgingly,"<sup>30</sup> "unenthusiastic[ally],"<sup>31</sup> or despite "deplor[ing]" it.<sup>32</sup> Yet the book offers very little empirical evidence concerning the purported subjective intent, feelings, and motives of hundreds of Republican legislators throughout several decades. Rhodes relies primarily on the fact that, before voting to adopt the VRA or its reauthorizations, many of them—like many Democrats—had voted in favor of alternatives<sup>33</sup> or amendments that would have narrowed the law in certain respects or, ironically, expanded its geographic applicability.<sup>34</sup>

Legislators often have diverse motives for supporting or opposing legislative amendments, however,<sup>35</sup> particularly amendments they know will not pass. The fact that they may have preferred a different version of a bill does not suggest hostility to the version that was ultimately enacted. In any event, attempting to infer the intent of a large group of legislators based on the legislation they enact is a precarious enough endeavor.<sup>36</sup> Going even further by attempting to infer their supposed subjective preferences, motives, and desires based on voting patterns concerning failed amendments merely exacerbates the speculation.

Moreover, the book offers no evidence that Members of Congress or Senators considered the possibility of Republican appointments to either DOJ or the Supreme Court when deciding whether to adopt or reauthorize Act. In other words, there is no affirmative evidence that any Members of Congress or Senators viewed their votes as merely the public-facing part of a broader plan to ultimately undermine the very measures they were approving. Indeed, the vast majority of people voting on the Act—Members of the U.S. House of Representatives—were not even in a position to participate in the confirmation processes concerning senior DOJ officials or Supreme Court Justices.

Second, Rhodes's evidence that Republican Supreme Court Justices sought to aid Republican elected officials in a strategy to surreptitiously undermine the Voting Rights Act is even more tenuous. The central question his book presents is, "Why did key

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28. *Id.* at 4 (describing the "partisan coalition" to use "administrative and judicial institutions . . . to advance cherished but controversial programmatic objectives"); *id.* at 141 (discussing "[t]he stark divergence in behavior between Republican elected officials acting in high-profile and politically open arenas and Republican political and judicial appointees operating in more opaque and impermeable venues").

29. *See, e.g., id.* at 95, 107, 131.

30. *Id.* at 16, 108; *see also id.* at 76.

31. *Id.* at 70.

32. RHODES, *supra* note 18, at 17.

33. *Id.* at 68.

34. *Id.* at 76, 103, 151.

35. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 40-41 (1991).

36. *See* John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423, 438 (2005).

conservative Republican officials consistently adopt administrative and judicial decisions that undermined the very legislation they previously endorsed?”<sup>37</sup> But Republican legislators, of course, did not “adopt” any “judicial decisions.” And Supreme Court Justices played no role in enacting or “endors[ing]” the Voting Rights Act. Rhodes maintains that elected Republicans “deliberately and repeatedly invite[d] . . . [and] empower[ed] unelected allies to weaken or overturn” the Act,<sup>38</sup> “delegat[ing] to the Court the task of terminating the [Act’s] preclearance regime.”<sup>39</sup> In Rhodes’s view, when Republican Justices ruled in Voting Rights Act cases, they did so on “behalf” of the Presidents who appointed them.<sup>40</sup> Republican Justices may be surprised to learn they had received any such delegations or assignments.

Similarly, the book contends that, by having the courts narrow and invalidate parts of the Voting Rights Act, “Republican elected officials retained ‘plausible deniability’ of responsibility.”<sup>41</sup> What the book presents as plausible deniability is, from a constitutional perspective, separation of powers.<sup>42</sup> One of the Court’s main functions is to act as a check on Congress, rather than acting consistently with Congress’ publicly declared positions.<sup>43</sup> Thus, Rhodes’s conceptions of the relationship between the legislative and judicial branches, as well as the judiciary’s role with regard to the Voting Rights Act, are misguided.

Third, Rhode suggests Republican Presidents selected Justices with an eye toward their likely attitudes toward the Voting Rights Act.<sup>44</sup> But the book does not provide any evidence that concerns about the Act led Republican Presidents or Senators to modify their approach toward the judicial nomination process. To the contrary, since President Reagan’s failed nomination of Judge Bork to the U.S. Supreme Court,<sup>45</sup> the nomination process has focused primarily on judicial philosophy: whether nominees are textualists or originalists and believe judges should attempt to neutrally “call balls and strikes,”<sup>46</sup> or instead embrace a “living Constitution” and approach cases with “empathy” toward

37. RHODES, *supra* note 18, at 3.

38. *Id.* at 4.

39. *Id.* at 160; *see also id.* at 18 (arguing that Republican officials pursued their “narrow vision of federal voting rights enforcement” in the “judicial arena”); *id.* at 131 (discussing Republicans’ “strategic delegation to the Court of the unpopular business of weakening federal voting rights safeguards”).

40. *Id.* at 3.

41. *Id.* at 19.

42. Of course, some commentators have argued that the rise of political parties has dampened the willingness of the various branches to actually check party members in other branches. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2317–19 (2009).

43. To the extent Congress disapproves of the Court’s rulings, it retains a wealth of powers with which to respond. *See* Michael T. Morley, *Spokeo: The Quasi-Hohfeldian Plaintiff and the Non-Federal Federal Question*, \_\_\_ GEO. MASON L. REV. \_\_\_, at 17 n.124 (2019) (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2946482](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946482) (identifying constitutional mechanisms for congressional control over federal courts).

44. RHODES, *supra* note 18, at 3 (arguing Republican Presidents “empowered conservative justices . . . to weaken the act on their behalf”); *id.* at 9 (contending Republicans “obstructed implementation of the VRA through . . . the courts”); *id.* at 19 (alleging Republicans “exploited” the judicial nomination process “to circumscribe federal voting rights enforcement”).

45. *See* ROBERT BORK, *THE TEMPTING OF AMERICA* 267–345 (1990).

46. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Hon. John G. Roberts, Jr.).

particular litigants.<sup>47</sup> While judicial appointments undoubtedly had consequences for the Act, there is little evidence they were viewed and treated as a component of a comprehensive fifty-year-long Republican strategy to covertly undermine the Act while publicly supporting it. It is also worth noting that, according to Rhodes's data, three out of President Richard Nixon's four appointees to the Supreme Court voted for the ostensibly "liberal" position in the majority of VRA cases they confronted.<sup>48</sup>

In short, there are definitely stories to be told about the differing approaches the Democrat and Republican parties have adopted toward the electoral process, the Voting Rights Act, and judicial appointments. The conclusions that Rhodes seeks to draw, however, far outstrip the underlying evidence. Despite Rhodes's commendably extensive primary source research, the book relies too much on speculation and overgeneralization to draw unsupported connections.

## II. REPUBLICANS, DEMOCRATS, AND THE VRA

Rhodes presents a narrative of Republicans attempting to undermine, weaken, frustrate, and erode the Voting Rights Act over more than fifty years.<sup>49</sup> If the historical record is viewed in greater context, however, a competing narrative—one familiar from administrative law—may emerge. As with many broadly written laws, Democratic and Republican administrations simply adopted different interpretations of the Act. In some cases, Republican administrations construed it more broadly than their Democratic counterparts.

Agencies such as DOJ "often exercise broad discretion with respect to enforcement of the statutes and regulations they administer."<sup>50</sup> They "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"<sup>51</sup> Many of the Voting Rights Act's most important provisions are written in generalities,<sup>52</sup> and it is not immediately apparent from their plain text exactly how they apply to situations that do not involve intentional discrimination, particularly redistricting decisions in which an effectively infinite number of outcomes are generally possible. DOJ often must weigh numerous considerations that may sometimes be in tension with each other. Election laws with disparate racial impacts raise serious questions under § 2,<sup>53</sup> yet states must protect the right to vote equally for all citizens,<sup>54</sup> regardless of race, and racially proportional representation is generally not required.<sup>55</sup> One scholar explains, "The combination of the change in the focus of the Voting Rights Act from official discriminatory policies to

47. Press Release, The White House, Remarks by the President on Justice David Souter (May 1, 2009), at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-justice-david-souter>; see also Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

48. RHODES, *supra* note 18, at 85.

49. *Id.* at 3.

50. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 683 (2014).

51. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

52. See, e.g., VRA, *supra* note 1, §§ 2, 5, 79 Stat. at 437, 439.

53. 52 U.S.C. § 10301(a); see *Thornburg v. Gingles*, 478 U.S. 30, 43–44 (1986).

54. See *Bush v. Gore*, 531 U.S. 98 (2000).

55. 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

discriminatory results, coupled with the shift to a more polarized national political environment created ‘enforcement space’ . . . . Each new administration is able to determine the type of voting rights violations that will take priority.”<sup>56</sup>

DOJ’s Office of the Inspector General has concluded that, despite their differences, both President George W. Bush’s and President Barack Obama’s Administrations implemented the Voting Rights Act appropriately. It explained that, while “some changes in enforcement priorities” accompanied changing administrations, “our review generally did not substantiate the allegations we heard about partisan or racial motivations and did not support a conclusion that the Voting Section has improperly favored or disfavored any particular group of voters in the enforcement of the Voting Rights laws.”<sup>57</sup>

At least three examples demonstrate how differences between Democrat and Republican administrations cannot simply be reduced to questions of greater or lesser enforcement of the Act. First, President George W. Bush’s Justice Department launched *United States v. Brown*, the first-ever § 2 case against an African-American defendant for discriminating against white voters.<sup>58</sup> Its decision to pursue the suit triggered enormous controversy. Many career attorneys within the Voting Section opposed the suit, primarily on the grounds § 2 could not or should not be enforced against minority defendants.<sup>59</sup>

In *Brown*, the DOJ sued the Noxubee County Democratic Executive Committee (“Democratic Committee”); its chairman, Ike Brown, who was African-American; and the county election commission for violating § 2.<sup>60</sup> Noxubee County’s population was 70% African-American; 93% of its elected officials, as well as the majority of the county’s Democratic Party, were African-American, as well.<sup>61</sup> The Democratic Committee was almost exclusively responsible for running the party’s primary elections in Noxubee County, and Brown exercised tremendous influence and control over the committee’s operations.<sup>62</sup>

Following a bench trial featuring dozens of witnesses, the district court declared it was “convinced that Ike Brown, and the [Democratic Committee] under his leadership, have engaged in racially motivated manipulation of the electoral process in Noxubee County to the detriment of white voters.”<sup>63</sup> It further explained, “[T]here is no doubt from the evidence presented at trial that Brown, in particular, is firmly of the view that blacks,

56. Donald Campbell, *Partisanship, Politics, and the Voting Rights Act: The Curious Case of U.S. v. Ike Brown*, 29 HARV. J. RACIAL & ETHNIC JUST. 33, 58 (2013).

57. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION 113 (Mar. 2013).

58. See *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007) [hereinafter “*Brown I*”], *aff’d* 561 F.3d 420 (5th Cir. 2009) [hereinafter “*Brown II*”].

59. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 44 (explaining that multiple staff attorneys in DOJ’s Voting Section “did not believe the Voting Section should pursue cases on behalf of White victims”); see also William R. Yeomans, *The Politics of Civil Rights Enforcement*, 53 WASHBURN L.J. 509, 532 (2014) (discussing the “enormous tension” *Brown* generated within the Voting Section).

60. See *Brown I*, 494 F. Supp. 2d 440. The Government also sued Noxubee County and the county clerk for violating § 11 of the VRA, but those defendants entered into a consent decree. *Id.* at 440 n.1. Section 11 makes it a federal offense for any person acting under color of law to refuse to allow a qualified voter to cast a ballot or to refrain from counting such votes. 52 U.S.C. § 10307(a).

61. *Brown I*, 494 F. Supp. 2d at 443.

62. *Id.*

63. *Id.* at 449.



being the majority race in Noxubee County, should hold all elected offices, to the exclusion of whites; and this view is apparently shared by his ‘allies’ and ‘associates’ on the [Democratic Committee], who, along with Brown, effectively control the election process in Noxubee County.”<sup>64</sup>

The court determined that, as chairman of the county Democratic party, Brown recruited African-Americans from outside the county to run against the few white county officials.<sup>65</sup> He then excluded the two white members of the Democratic Committee’s executive committee from a hearing concerning the eligibility of one of those candidates.<sup>66</sup> Prior to a 2003 election, Brown also issued a press release identifying 174 white voters whom he intended to challenge at the polls.<sup>67</sup> Most were constituents of the only white member of the county commission.<sup>68</sup> At trial, he could provide no evidence that most of those people were ineligible to vote, or that he had performed any investigation into their eligibility.<sup>69</sup>

The court further found that Brown and members of the Democratic Committee “intentionally selected a nearly all-black work force primarily as a means of facilitating a scheme to disenfranchise and dilute white voting strength by pushing through absentee ballots that had been collected by Brown’s people.”<sup>70</sup> As party chair, the court explained, Brown hired and paid notaries to assist only black voters in completing and submitting absentee ballots, including people ineligible to vote absentee under state law. In at least one case, the notary actually completed the ballots, deciding the candidates for whom they would be cast.<sup>71</sup> Brown also oversaw the counting of absentee ballots, directing poll workers to ignore statutory requirements and procedures.<sup>72</sup> The court found that he instructed poll workers to disregard any challenges to absentee ballots and prohibited them from rejecting absentee ballots from African-American voters that were invalid under state law.<sup>73</sup> At the same time, he ordered poll workers to reject some white voters’ absentee ballots, despite allowing ballots with similar defects from African-Americans to be counted.<sup>74</sup>

The incredulous district court declared, “While the Government’s theory in this regard, that Brown and his ‘associates’ and ‘allies’ orchestrated such a scheme, may seem improbable, having thoroughly reviewed and considered the evidence, the court has come to the firm and definite conclusion that there is substance to the Government’s position.”<sup>75</sup> It concluded, “If the same facts were presented . . . on behalf of the rights of black voters,

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64. *Id.*

65. *Id.* at 452–53; *Brown II*, 561 F.3d at 429–30.

66. *Brown I*, F. Supp. 2d at 454–55. Brown also admitted to making a false charge of racial discrimination against a white county supervisor to try to get him voted out of office. *Id.* at 455; *Brown II*, 561 F.3d at 429.

67. *Brown I*, 494 F. Supp. 2d at 474–77; *Brown II*, 561 F.3d at 429, 433–34.

68. *Brown II*, 561 F.3d at 429.

69. *Id.*

70. *Brown I*, 494 F. Supp. 2d at 463; *see also Brown II*, 561 F.3d at 428, 433.

71. *Brown I*, 494 F. Supp. 2d at 459–60; *Brown II*, 561 F.3d at 427–28.

72. *Brown I*, 494 F. Supp. 2d at 464–65; *Brown II*, 561 F.3d at 428.

73. *Brown I*, 494 F. Supp. 2d at 457, 461, 464–65.

74. *Brown I*, 494 F. Supp. 2d at 469–70; *Brown II*, 561 F.3d at 428, 434–35.

75. *Brown I*, 494 F. Supp. 2d at 457.

this court would find that Section 2 was violated.”<sup>76</sup> The court refused to afford white voters any less protection, despite defendants’ insistence that whites had neither experienced an extensive history of racial discrimination nor faced ongoing discrimination elsewhere in the state.<sup>77</sup> The U.S. Court of Appeals for the Fifth Circuit affirmed,<sup>78</sup> and commentators have since debated the case.<sup>79</sup>

During the Obama Administration, Attorney General Eric Holder expressed opposition to such “reverse-discrimination” suits, declaring that he did not wish “to expand the use of the power of the Civil Rights Division in such a way that it would take us into areas that, though justified, would come at . . . the cost of people [that the] Civil Rights Division had traditionally protected.”<sup>80</sup> Likewise, when Deputy Assistant Attorney General Julie Fernandes was asked about the possibility of pursuing a Section 2 case against a black defendant, she instructed Section attorneys that they “should focus on ‘traditional civil rights’ cases and . . . political equality for racial and ethnic minorities.”<sup>81</sup> Consistent with these policies, the Obama Administration did not bring any lawsuits under the Voting Rights Act against African-American defendants. To the contrary, shortly after the transition, the Obama Administration dropped almost all claims in a lawsuit the Bush Administration had already won (through default judgments) against the New Black Panther Party for voter intimidation during the 2008 election.<sup>82</sup>

A second example of the parties’ differing interpretations of the Voting Rights Act concerns the need for majority-minority districts under § 5 of the Act. The issue arose in connection with Georgia’s 2001 redistricting plan for its state senate. The state’s previous legislative map included ten districts with a voting-age population (“VAP”) that was more than 50% black, as well as eight other districts with VAPs that were between 30-50% black.<sup>83</sup> The Georgia legislature, controlled by Democrats, sought to increase the number of Democrat senators by spreading African-American voters among more districts.<sup>84</sup> It adopted a map including 13 districts with VAPs that were more than 50% black (an increase of three), another 13 districts with VAPs that were 30-50% black (an increase of five), and 4 other districts with VAPs that were between 25-50% black.<sup>85</sup> Republicans in the legislature unanimously opposed the plan and President George W. Bush’s Justice

76. *Id.* at 486.

77. *Id.*

78. *Brown II*, 561 F.3d at 438.

79. Compare Cody Gray, *A New Proposal to Address Local Voting Discrimination*, 50 U. RICH. L. REV. 611, 640 n.169 (2016) (“[*Brown*] was certainly justifiable on a legal basis . . . .”); Denny Chen, Note, *Section 2 of the 1965 Voting Rights Act and White Americans*, 2 U.C. IRVINE L. REV. 453, 477 (2012) (“[C]ourts should interpret Section 2 of the Voting Rights Act as applicable to any citizen; such an interpretation best effectuates the purpose of the VRA—protecting the voting rights of all Americans.”); with Karlan, *supra* note 26, at 28 (citing *Brown* as one of several factors demonstrating that “a politicized Department of Justice cannot perform its tasks fully and fairly”); Campbell, *supra* note 56, at 66 (arguing the *Brown* case “demonstrates the unique problems that arise when using the [VRA] . . . against African Americans”); Yeomans, *supra* note 59, at 532 n.168 (“[T]here remains a question of whether § 2 can properly be applied in many instances to protect white voters.”).

80. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 52.

81. *Id.* at 75.

82. See Amanda C. Leiter, *Soft Whistleblowing*, 48 GA. L. REV. 425, 454–58 (2014); see also Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 366–67 (2010).

83. *Georgia v. Ashcroft*, 539 U.S. 461, 470 (2003).

84. *Id.* at 469.

85. *Id.* at 470–71.

Department refused to pre-clear it under Section 5 of the VRA.<sup>86</sup>

The Government argued, and the district court found, that the plan violated Section 5 because it reduced the black VAPs of three districts (Districts #2, 12, and 26) from between 55.43% and 62.45% to slightly over 50%.<sup>87</sup> These reductions in black voting strength diminished the opportunity of black voters in those districts to elect candidates of their choice.<sup>88</sup> The Government and district court believed § 5's anti-retrogression principle prohibited the Government from jeopardizing those districts' status as "safe" majority-minority districts.

The Supreme Court reversed, holding that Section 5 does not require states to maintain a consistent number of majority-minority districts.<sup>89</sup> Rather, the Court held, Section 5 leaves states free to choose between preserving majority-minority districts in which minorities are able to elect the candidates of their choice, or instead establishing districts with lower proportions of minority voters, who may either enter into coalitions to elect the candidates of their choice or impact the political process in other ways.<sup>90</sup>

Rhodes presents *Georgia v. Ashcroft* as yet further evidence of how conservative Supreme Court Justices worked behind the scenes, away from public view, to undermine the Voting Rights Act.<sup>91</sup> He claims the *Georgia* majority watered down Section 5, "demoting the ability of minority voters to elect a candidate of choice to only one of a number of factors to be evaluated in determining whether a redistricting plan was retrogressive."<sup>92</sup> The ruling, he argued, "made it more probable that minority voters . . . would be subjected to the dilution of their voting power, at least as traditionally understood."<sup>93</sup> It "furthered the conservative project . . . of limiting the potential of the Act to protect majority-minority districting."<sup>94</sup>

The book does not explain, however, that President George W. Bush's Justice Department objected to the redistricting scheme at issue in *Georgia*, effectively rejecting the theory the Supreme Court ultimately adopted.<sup>95</sup> It likewise does not mention the fact that Georgia Democrats—including virtually all black members of the legislature—were the ones who crafted the map the Court upheld.<sup>96</sup> And some voting rights scholars, such as Samuel Issacharoff, have suggested the *Georgia* Court's holding enhances the ability of African-Americans voters to participate in coalition politics and expand their political influence far beyond what an exclusive focus on majority-minority districts would allow.<sup>97</sup>

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86. *Id.* at 471.

87. *Id.* at 472–73.

88. *Georgia*, 539 U.S. at 474.

89. *Id.* at 482–83.

90. *Id.*

91. RHODES, *supra* note 18, at 140.

92. *Id.*

93. *Id.* at 141.

94. *Id.*

95. *See Georgia*, 539 U.S. at 472.

96. *Id.* at 471.

97. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004) (arguing that the traditional understanding of § 5 prior to *Georgia* could cause "mischief . . . in stalling coalition politics" involving African-Americans); *see also* Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1557–58 (2002); Cameron, Epstein, & O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in*

Thus, while the book uses *Georgia v. Ashcroft* as evidence supporting its narrative, it overlooks the many ways in which the case actually cuts against it.

Finally, Republican administrations enforced provisions of voting rights law that Democratic Administrations allowed to languish. For example, the Bush Justice Department brought several suits to enforce Section 8 of the National Voter Registration Act (“NVRA”),<sup>98</sup> which requires jurisdictions to update voter registration lists to eliminate outdated records to reduce the possibility of mistake, double voting, or absentee ballot fraud.<sup>99</sup> Under the Obama Administration, in contrast, Deputy Assistant Attorney General Fernandez announced to Voting Section staff attorneys she “‘did not care about’ or ‘was not interested’ in pursuing Section 8 cases.”<sup>100</sup>

In many other respects, Democrat and Republican administrations’ records of enforcing the Voting Rights Act are comparable. Republican President Nixon’s Attorney General largely continued Democrat President Johnson’s enforcement policies.<sup>101</sup> Rhodes acknowledges that both Republican President Gerald Ford’s Attorney General, Edward H. Levi, and President George H.W. Bush’s Attorney General, Richard Thornburgh, enforced the Voting Rights Act vigorously.<sup>102</sup> With regard to Section 2, DOJ’s Office of Inspector General found the George W. Bush and Obama Administrations’ records comparable:

[W]e found it significant that following the change in administrations in 2009, there was no surge in new Section 2 cases as might be expected if valid cases had been suppressed or discouraged in the prior administration. Indeed, the number of Section 2 enforcement actions dwindled to just four matters from 2009 through 2012.<sup>103</sup>

Rhodes criticizes the low rate of Section 5 objections during George W. Bush’s administration, claiming “key provisions of the Act went into administrative hibernation.”<sup>104</sup> Yet the first term of the Obama Administration (prior to *Shelby County*)<sup>105</sup> had the same rate.<sup>106</sup> And the volume of voting rights litigation that Obama’s DOJ pursued never exceeded that of the Bush Administration (and, indeed, was less than during Bush’s first term).<sup>107</sup>

The book sometimes seems to offer diametrically opposite assessments when different administrations adopt substantially similar policies. For example, when the Bush Administration pursued majority-minority districts, it was facilitating the election of white Republicans in neighboring districts;<sup>108</sup> when Assistant Attorney General Deval Patrick did so in the Clinton Administration, he was making “voting rights enforcement a top

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*Congress?*, 90 AM. POL. SCI. REV. 794, 806 (1996).

98. 52 U.S.C. § 20507(a)(4).

99. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 94.

100. *Id.* at 100.

101. RHODES, *supra* note 18, at 3.

102. *Id.* at 81–82, 111.

103. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 25.

104. RHODES, *supra* note 18, at 137.

105. *See Shelby Cty. v. Holder*, 570 U.S. 2 (2013) (invalidating § 4(b) of the Voting Rights Act, which identified the jurisdictions subject to preclearance requirements under § 5).

106. RHODES, *supra* note 18, at 169.

107. *Id.* (quoting Michael L. Selmi, *The Obama Administration’s Civil Rights Record: The Difference an Administration Makes*, 2 J. L. & SOC. EQUALITY 108, 120 (2013)).

108. RHODES, *supra* note 18, at 112.

priority,” with no assessment of potential political motivations or consequences.<sup>109</sup> Likewise, when Republican administrations—even apart from George W. Bush—sought to hire conservative attorneys in the Voting Section who shared the administration’s view of the Voting Rights Act, they were inappropriately politicizing the office.<sup>110</sup> Yet when the Obama Administration hired almost exclusively from left-wing groups, it was faithfully implementing the Act.<sup>111</sup>

### III. CONCLUSION

The history of the Voting Rights Act—and federal election law more broadly—is more complicated and nuanced than Rhodes’s central narrative suggests. Rather than Republican administrations secretly trying to weaken and undermine the Act, there is ample reason to conclude Democratic and Republican administrations both faithfully enforced it, albeit according to their differing interpretations and priorities. These differences sometimes lead to broader or more aggressive enforcement of various voting rights provisions by Republican administrations.

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109. *Id.* at 118.

110. *See id.* at 79, 108, 133–34.

111. *Id.* at 166–67.