

# Widener University Delaware Law School

---

From the Selected Works of Alan E Garfield

---

February 25, 2013

## Tools to Fight Voter Suppression Still Are Needed

Alan E Garfield



Available at: [https://works.bepress.com/alan\\_garfield/78/](https://works.bepress.com/alan_garfield/78/)

# Tools to fight voter suppression still are needed

The 15th Amendment, enacted after the Civil War, provides that the right to vote shall not be denied on account of race or color.



**BENCH PRESS**  
**ALAN GARFIELD**

You might think that would have ended attempts to bar African-Americans from voting.

But you would be underestimating the enduring power of racial prejudice.

Even after the amendment was ratified, states employed an arsenal of devices to disenfranchise black voters. Some states used poll taxes, and some used literacy tests. Some, like Delaware, used both. States and municipalities also manipulated electoral districts to dilute the black vote.

Fortunately, the 15th Amendment empowered Congress to enact laws to enforce the amendment.

But following Reconstruction, it took Congress almost a century to muster the political

will and the moral fortitude to take meaningful action.

The result was the Voting Rights Act of 1965. Section 2 of the Act forbids any "standard, practice, or procedure" that denies individuals the right to vote based on race or color. This section is permanent and applies nationally. It is enforced through lawsuits in which a challenger must show that a government action is discriminatory.

Section 5 of the act, a temporary provision, goes even further to protect voter rights. It creates a prophylactic rule for those parts of the country with a history of flagrant voter discrimination. These "covered" jurisdictions, which include many of the states in the old South, are forbidden from making any changes affecting voting rights without first getting preclearance from either the Justice Department or a federal court in Washington.

Today, nearly a half-century later, this preclearance procedure is still in effect (in 2006, Congress reauthorized it for another 25 years). But its continued existence is the subject

of a case being heard before the Supreme Court on Wednesday.

Those challenging the procedure say that it is no longer justified by Congress' 15th Amendment enforcement power. They say that Congress' power is limited to preventing violations of minority voting rights and that there is no evidence the covered states still engage in widespread discrimination.

The challengers contend that the preclearance procedure interferes with the covered states' sovereignty and violates the principle that all states should be treated equally.

They find it demeaning that non-covered states like Indiana and Pennsylvania can enact voter identification laws without having to get federal approval but covered states like Texas and South Carolina cannot.

Chief Justice John Roberts expressed considerable sympathy with the challengers' position in a Supreme Court opinion issued just four years ago. He noted that "[t]hings have changed in the South" –

black and white voter registration and turnout "approach parity" and minority candidates hold office at "unprecedented levels."

He said it was a "difficult constitutional question" whether current conditions still justified the preclearance procedure. But he declined to reach the issue.

That time has now come. And Roberts' words loom ominously over the fate of the preclearance procedure.

A major question is whether the record Congress considered in reauthorizing the procedure demonstrated that discrimination is still more pervasive in covered states than in non-covered. If it didn't, the Court probably will find the differential treatment of covered states unconstitutional.

However the Court decides the case, it will not change the fact that voter suppression remains a significant problem. Perhaps today voter suppression is as likely to occur in Pennsylvania as Texas, and in that sense treating these states differently is illogical. Yet wherever it occurs, it threat-

ens our democracy.

Examples are plentiful: unsubstantiated claims of voter fraud used to justify cumbersome voter identification laws; gerrymandered legislative districts designed to reduce the influence of urban voters; laws disenfranchising criminal offenders, even after they have served their time; excessively long lines at voting booths.

If we want a government "of the people, by the people, for the people," we must stop these assaults on the right to vote.

We should honor every citizen's franchise. Politicians should focus on winning votes, not suppressing them.

And the Supreme Court should give the right to vote the robust protection it deserves.

Seen in this light, the preclearance procedure is just one more tool for protecting the right to vote. Perhaps its greatest flaw is not that it applies to some states but that it doesn't apply to all.

Alan Garfield is a professor at Widener University School of Law.