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THE SECOND RECONSTRUCTION IS OVER

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When I learned about the U.S. Supreme Court's decision in *Shelby County v. Holder,* [1] my first thought was that America's Second Reconstruction had ended.

Our first experiment with Reconstruction faded into history when Congressional Republicans and southern Democrats conspired, in effect, to trade away the rights of the newly enfranchised former slaves in order to ensure the election of President Rutherford Hayes, a Republican. When federal troops ended the occupation of the repatriated Confederate States, the rights guaranteed to Black Americans living in the south by the Constitution and the Civil Rights Statutes were ended as well. In many of these states, former slaves and their offspring would not regain their right to vote until the 1965 Voting Rights Act[2] (VRA) became law.

Unlike the Compromise of 1877, when a Republican President abandoned the pretense of a federal commitment to the ideal of equality and civil status for former slaves and free blacks, the latter day Reconstruction has been dealt a fatal blow this time by the Supreme Court. The Court's decision in Shelby County, a federal withdrawal of another sort, has the potential to create an environment where, sadly, history could repeat itself.

Generally I am an optimist. But I worry. Is the nation on the precipice, at risk of revisiting the horrors that occurred following the end of the first Reconstruction? I wonder if America is capable of embracing the evils of apartheid a second time. Some may accuse me of being an alarmist, but history has shown people are most vulnerable when they are disenfranchised. Government is free to ignore the needs of those who cannot or do not vote. The right to vote is the key to holding elected officials accountable.

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1 Shelby Cnty. v. Holder, 133 S.Ct. 2612 (2013).

2 42 U.S.C.A. §1973 *et. seq*.

As in the 1800's, advances made through the use of the ballot box by Black Americans and others at society's margins are now in danger. Shelby County is just the most recent in a string of cases that cast doubt on the vitality of the right to vote for people of color. The Voting Rights Act has been under attack since it was enacted. Section 4(b) has been the particular focus of southern ire.[3] As passed in 1965, under the coverage formula in section 4(b) that the Court found unconstitutional, six states Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia were required to submit any changes in their voting laws to the Justice Department for approval. Subsequent amendments to the law by Congress added North Carolina, Alaska, Arizona, Texas and specific counties in California, Florida, Michigan, New York, South Dakota and Texas to the list of states which must obtain pre-approval before changes in their voting laws may take effect.

Politicians representing states singled out for heightened scrutiny under the VRA have argued that it is unfair to judge southern states, in particular those which made up the Old Confederacy, by their past. They go on to argue that things are different today. Black Americans now register and vote at a level similar to whites. These arguments persuaded five Justices who voted that section 4(b) of VRA is unconstitutional.

The Court is wrong. Those who advocated for an end to the scrutiny of states which have had a long history of employing tactics designed to disenfranchise black voters are wrong too. It is true that these states, particularly those in the south, no longer use literacy tests and poll taxes to determine voter eligibility. New impediments have taken the place of the earlier obstacles to the exercise of a right to vote.

I have been involved in voter protection since 2000. I have observed first-hand the lengths to which reactionary forces will go to prevent the young, elderly and people of color from either voting or having their vote counts. Many of these states now require possession of government issued photo identification prior to voting. The requirement that voters present government issued or approved photo identification before they will be allowed to vote discriminates against the poor, elderly and people living in large urban areas. Members of these groups are less likely to have a driver's license or passport.

Other states have done away with early and late voting and voting by mail. Both practices are known to be favored by working class people, who

[3] 42 U.S.C.A. §1973b(b).

find it difficult to cast their ballot during traditional voting hours of 7 AM to 8 PM. States covered by section 4(b) of VRA, have attempted through gerrymandering to dilute the voting power of communities of color, the working poor and those living in the cities. The efforts to disenfranchise these voters takes on even greater significance when you consider that this group of voters tends to have little economic clout.

Although Americans twice elected Barack Obama, a black man, President, this does not mean that the right to vote is secure for all. Given the large number of states, which have passed restrictive voting legislation since 2000, including laws that make it harder to register to vote, my fears are not irrational.[4]

The opposition to the VRA became more intense after the data from the 2000 and 2010 Censuses was processed and more fully understood.[5] It is not difficult to imagine a coalition of conservative Republicans, Tea Party members and insecure southern whites working together to take back what they believe to be "their" country. Some members of these groups have openly expressed a desire to return to a way of life which predated the signing of the 1965 Voting Rights Act. The goal of this new conservative coalition, like the forces which aligned to end the first Reconstruction, is to deny political power to members of groups historically excluded from participating in self-governance.

The first American Reconstruction (1853-1877) ushered in a level of freedom and political power for Blacks that was almost unimaginable. In addition to being freed from bondage, large numbers of Blacks voted for the first time. Seven African Americans were elected to the Congress. Hiram Rhodes was the first African American to serve in the Senate of the United States. The six Blacks elected to the U.S. House of Representatives were all from former Confederate States.

With the approval of the Thirteenth, Fourteenth and Fifteenth Amendments, Black Americans were guaranteed freedom from slavery, all the rights of white citizens under state and federal law, and the right to vote.

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[4] For a description of restrictive voting bills that have been introduced or passed in the states as well as the legislation that expands voting access see *Voting Laws Roundup 2013*, Brennan Center for Justice at New York University School of Law, http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup#5

[5] *See e.g.* The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections), Population Characteristics, Current Population Survey, U.S. Department of Commerce, Economics and Statistics Administration, United States Census Bureau, (May 2013). http://www.census.gov/prod/2013pubs/p20-568.pdf

All of these new rights were important, but the most sacred was the right to vote. The prospect of Black citizens, voting to advance their own interests, terrified many southern whites. Consequently, the erection of legal barriers to prevent the freed slaves from voting was almost inevitable. The Civil War brought freedom, but it did not alter the socio-economic condition of Black Americans. Their hard earned rights were built on quicksand, not solid rock. The First Reconstruction lasted a mere thirteen years.

As naïve as it may seem, the true surprise for me has been watching the Supreme Court lead the charge to turn back the hands of time on the right to vote. The conservative members of the Court have ignored the principles that constrain judges --like deference to Congress in this representative democracy or the principle of *stare decisis which should make them cautious in overruling prior decisions.* The decisions by the Court in the area of voter rights in the broader sense, has brought new meaning to the phrase "Judicial Activist."

Until *Shelby County v. Holder*, most of efforts to restrict rather than expand voter rolls was left largely to state legislatures. Since 2000, states hoping to restrict voting have enacted numerous laws reminiscent of poll taxes and literacy tests in their effect. Today the barriers to voting favored by the states seeking to purge voting rolls include photo identification laws, repeal of early voting, and gerrymandering by state legislatures of the boundaries of voting districts. Had *Shelby County v. Holder* been decided prior to the general elections of 2008 and 2012, if there had been no constraint on the restrictive measures being enacted by the states, it is probable that the voter turnout by communities of color, young voters, elderly voters and city dwellers would have been significantly lower.

2000, the Millennium year, and 2010 were census years. According to the data collected in each of these two census years, there have been dramatic changes in America's demographics. Census data shows that white Americans have become our nation's new minority. More people are living in American cities. About seventy-five percent of the people in the country now live in the large urban metropolises of the nation.

For those enamored with a whiter America, one like that portrayed in first season of the television series "Mad Men"[6] the sum and substance of the census data is a clarion call to action. Conservatives, who for many decades cared little about the cities, and even less about communities of color, are now confronted with a new political reality. Something had to be done to

[6] *Mad Men* (AMC Studios July 19, 2007 – present).

prevent a shift in political power to the historical "have not's" like that which occurred from 1860's through the 1870's.

The backlash caused by these changes in the national demographics and the success of the Democratic Party in electing a Black President should come as no surprise. The way in which the backlash manifested caught many people off guard. The handwriting was on the wall, however. It would be the Supreme Court riding to the rescue of conservatives. Over the past thirteen years, the United States Supreme Court has made it clear that the Second Reconstruction needed to end. Our Second Reconstruction began with the passage of the 1964 Civil Rights Act.[7] It ended when the Court issued its opinion in *Shelby County v. Holder*. In striking down of section 4(b) of VRA, the Court took the position that the states of the Old Confederacy should no longer be under the direct supervision of the federal government with regard to the right to suffrage for minority groups.

In support of this conclusion, the Court relies heavily on the fact that there appears to be parity in the percentage of blacks and whites who are enrolled to vote and who voted in recent elections.[8] The 5 to 4 majority, led by the conservative/libertarian wing of the Court, saw nothing so seriously wrong with the practices used by the enumerated states to justify continued federal supervision of elections taking place there.[9]

The majority concedes that things are not perfect, but argues the current situation is a vast improvement over what occurred in the past. To arrive at this conclusion, or more accurately stated, to make this leap of faith, the justices created an alternate reality. The Court ignored the fact that hundreds of lawsuits have been filed since 1965 against many of the states it declares no longer engage in voter suppression.

This tortured finding of facts should not have come as a surprise. The current Court or, more correctly, some members of it, have an ideological agenda that is so slanted that the Justices have abandoned traditional conservative values in the area of statutory interpretation. Those reading the Court's decisions related to voting in general must wonder what happened to notions such as giving deference to the will of the legislature, strict construction, s*tare decisis* and separation of powers?

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7 42 U.S.C.A. §2000a.

8 Shelby Cnty., 133 S. Ct. at 2625.

9 Shelby Cnty., 133 S. Ct. at 2630-2631.

Bush v. Gore[10] was the first of three key cases decided by the Court over a thirteen-year span, which neutralizes the political impact of a new electorate, that is majority minority. *Citizens United v. FEC*[11] and *Shelby v. Holder* provided additional tools for the old majority to continue their assault on the voting power of the new majority of Americans.

Between 2000 and 2013 the Court has ruled on thirty or more cases that related to voting. In *Bush v. Gore*, the Florida Supreme Court, consistent with its rules, ordered that 9000 ballots from Miami-Dade County be counted. These votes/ballots had not been included in the tally reported by county officials to Florida's Secretary of State. An issue arose as to whether any of the 9000 ballots were valid votes. Under Florida law, a valid vote is one where the intent of the voter can be readily determined from looking at the ballot. In *Gore v. Harris*[12], Florida's Supreme Court ordered that 9000 ballots, called "undervotes," be reviewed to determine if the voter had intended to cast a vote for one of the candidates. 9000 votes were enough to shift the outcome of the election from one side to the other. Governor Bush had a mere 1,747 more votes than Vice President Gore. A manual count was the only way to ascertain the actual intent of the voters. This process would have allowed additional votes to be included in the state's final tally. It would also have prevented a large number of voters from being disenfranchised.

The disputed ballots had not been tabulated because the voting machine had not pushed the chad completely through the ballot sheet. These machines had a history of undercounting votes. Many of those machines happened to be assigned to a county where large numbers of people of color lived and voted. Since the 1940's starting with the election of Franklin D. Roosevelt, a very high percentage of Black Americans have tended to vote for the democratic candidate seeking the presidency.

The legal team for Governor Bush filed suit with the United States Supreme Court asking them to stop the Florida recount. It was argued that Bush's Equal Protection rights, guaranteed under the Fourteenth Amendment, were being violated. Most legal scholars were surprised that the Court agreed to hear the matter. Many people were shocked at the outcome.

By a vote of 5 to 4 the Supreme Court agreed with candidate Bush. It ordered an end to the recount. President Bush won the 2000 election by the slimmest of margins. The Court's decision voided thousands of votes;

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[10]Bush v. Gore, 531 U.S. 98 (2000).

[11]Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

[12] 772 So.2d 1243 (2000), *cert. granted* 531 U.S. 1046 (2000), *rev'd* Bush v. Gore, 531 U.S. 98 (2000).

depriving those voters of the opportunity to have their votes count. It is likely that many of the voters who were deprived of the right to have their vote count were of African American ancestry.

The five Justices deciding *Bush v. Gore* clearly did not see the irony in resolving this matter using the 14th Amendment. The 14th Amendment was enacted to protect the rights of former slaves, including their right to vote. In *Bush v. Gore*, the Court used the very law intended to protect the voting rights of former slaves to disenfranchise their descendants. That was when I began to wonder whether the Second Reconstruction was in danger of being ended.

Citizens United v. Federal Election Commission [13] is yet another example of a decision by the Court undermining the voting strength of a majority minority electorate. From this author's viewpoint, the functional value of the Second Reconstruction was in the Court's cross-hairs. Eliminating campaign finance regulations could blunt the impact of voting by minorities. Corporations can't vote, but corporations can influence voting in a variety of ways, all of which cost money. The money funded campaigns that spread disinformation and distortions through negative advertising and dirty tricks designed to deter minority voters and voter fraud.

In *Citizens United*, five Justices of the Court opened the door to allow corporations, foreign and domestic, the opportunity to buy election results. Since Citizens United was decided, corporations are free to spend unlimited sums to get the outcome they desire in Federal, state and local elections. According to the Court, corporations have exactly the same First Amendment rights as human beings. Their right is absolute. According to the Court, neither the states nor federal government can tell corporations how to spend the money (or the money of their shareholders) as that would limit the corporations' right of free speech. Creating, or carving out, an unfettered right by corporations to engage in politics and allowing them to spend unlimited amounts, neutralizes the effectiveness of grassroots organizations which cannot compete against corporations on occasions when their interests collide.

Grassroots/community movements frequently advocate for people living on the margins, the working-poor. They are champions for positions which are often the polar opposite of those favored by big business. Grassroots/community groups have lead the fight against corporate lobbyists

[13] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

on issues like oil exploration and drilling in national parks, fracking or the extraction of gas from shale formations, gun control and the proliferation of Big Box stores like Walmart. These movements have frequently represented the interest of the poor and the working poor. Many members of grassroots/community movements are people of color. In a post-affirmative action America, class designations such " lower class" and "working poor", often serve as proxies for race. Corporations do not generally share the same values or interest of the poor.

Prior to *Citizens United*, campaign finance reform was achieved through Congressional action, legislation and regulations that created the possibility of a more level playing field in political struggles where corporate interests were being challenged. In a battle for hearts, minds and votes, if money is the determining factor, corporate entities will almost always win. The *Citizens United* case permits entities with easy access to wealth to flood the airways with messaging designed to drown out the speech of poorly funded entities like the typical citizen based grassroots/community movement.

The facts of the *Citizens United* case are helpful in understanding the breadth of the challenges faced by activists. Citizens United produced a 90 minute video which it attempted to distribute via "On Demand" television in states holding primary elections when Hillary Clinton was a candidate for President of the United States. The video was to be advertised in 20 and 30 second ads and sold to digital cable subscribers. The video disparaged candidate Clinton in a vile way. Citizens' United, a non-profit corporation was barred from running the video by the McCain-Feingold Act, otherwise known as the Bipartisan Campaign Reform Act of 2002.[14]

Citizens United filed its action against the Federal Election Commission (FEC) in the United States District Court for the District of Columbia in 2007. It asserted in its petition that section (1) of BCRA violated the entity's First Amendment right of free speech. The statute under attack prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is "electioneering" or speech that expressly advocates the election or defeat of a candidate for Federal Office. The law prevented Citizens United from airing a tawdry video on Hillary Clinton 30 days before a presidential primary.

Five Justices agreed that the non-profit's First Amendment right was violated. To accomplish this, as they did in *Bush v. Gore* and *Shelby County v.*

[14] 2 U.S.C.A. § 441 b.

Holder, a majority of the Court had to invalidate legislation and overturn two previous decisions. The principle of *stare decisis* fell to the wayside because the Court's conservative majority was determined to bend the law to fit their ideology. In the end *Austin v. Michigan Chamber of Commerce* [15] and *McConnell v. Federal Election Commission*[16], were overturned. The reasoning in those cases was that the electioneering law did not violate a corporation's rights because corporations had a vehicle to express their ideas. They could use political action committees.

According to the majority in *Citizens United*, we should not be concerned about regulating the infusion of large amounts of money into campaigns. Even if this fear is rational, it does not outweigh the First Amendment rights of corporations. Concerns about the integrity of the election process; a fear that unlimited sums of money could distort or corrupt the political process is not a legitimate governmental interest.

Citizens United was a body blow to those who had worked for campaign finance reform. There are no longer any limits on how corporations spend their money in elections. The Court has handed society's "1 percent" the chance to preserve the status quo. Stated another way *Citizens United* gave a blank check to corporations to buy elections and thus dilute the voting power of a majority minority citizenry.

Even after *Bush v. Gore* and *Citizens United*, there was hope for those who were the beneficiaries of the Second Reconstruction. How bad could things be? After all, a Black man was twice elected president. Money might make the contest difficult, but the right to vote provided a majority minority electorate a way to gain access to political power.

The *Shelby County v. Holder* decision, however, is a direct assault on the voting power of this electorate. For now we must take the Court at its word, when it implicitly tells us that the right to vote is sacred and will not be taken away by the states on their watch. In *Shelby County* the Justices concluded section 4(b) of the Voting Rights Act was unconstitutional. Several members of the majority, fervent believers in states' rights, also wanted to strike down section 5. Fortunately, that did not happen.

The Shelby County majority wants us all to believe our right to vote is secure. How does one explain the zeal with which many of the Justices

[15] 394 U.S. 692 (1990).

[16] 540 U.S. 93 (2003).

appear ready to dismantle a key portion of the Voting Rights Act? They have argued that the past is irrelevant to the future; the formula determining which states or political subdivisions will be subject to pre-clearance under §5 of the VRA is no longer necessary because the right to vote for people of color is secure throughout the land.

I am less certain about that. To me the Second Reconstruction is over. The only question remaining is whether the gains made since 1965 will disappear as they did 150 years ago when the First Reconstruction ended.