

FREDERICK DOUGLASS ON *SHELBY COUNTY*

OLYMPIA DUHART*

“Again, I want the elective franchise, for one, as a colored man, because ours is a peculiar government, based upon a peculiar idea, and that idea is universal suffrage.”

--Frederick Douglass, *What the Black Man Wants*¹

Introduction

It was a simple answer to a provocative question.

In his 1865 speech delivered in Boston at the annual meeting of the Massachusetts Anti-Slavery Society, the abolitionist Frederick Douglass offered a brief but biting answer to the question raised in his speech. The question is framed in the title of his address: “What the Black Man Wants.”² The answer was clear and unmistakable: The right to vote. But the realization of Douglass’ dream for black Americans has proven to be just as elusive today as it was almost 150 years ago, when Douglas first made his demand.

Indeed, the protection of voting rights for black people took a major hit last year when the Supreme Court of the United States ripped the heart from the Voting Rights Act of 1965. In *Shelby County v. Holder*, the Court found that Section 4 of the Act, which advances a formula for subjecting jurisdictions to preclearance, is unconstitutional.³ Chief Justice Roberts, who delivered the majority opinion of the Court, described the “extraordinary measures” of the VRA to address an “extraordinary problem.”⁴ Roberts is correct that the problem and the remedy are both extraordinary. But he fails

* Professor of Law at Nova Southeastern University, Shepard Broad Law Center. Many thanks to Professor Anthony Farley for his invitation to join the discussion. I also thank my research assistants Gal Rosenzweig, Tal Harari and Alessandra Villaraos. I am also indebted to my colleague Professor Mitchell Silverman for his assistance with this essay.

¹ FREDERICK DOUGLASS, *What the Black Man Wants*, in NARRATIVE OF THE LIFE 180 (1845).

² *Id.* Despite the title of Douglass’s address, he explicitly states in the essay that suffrage should be extended to both men and women. “I hold” that women, as well as men, have the right to vote [Applause], and my heart and voice go with the movement to extend suffrage to women; but that question rests upon another basis than which our right rests.” *Id.*

³ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625 (2013).

⁴ *Id.* at 2618.

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to recognize a point that Douglass consistently articulated during his work as an abolitionist and activist. Through his essays and speeches, we can see today that Douglass understood then what the Court ignores now. Significantly, Douglass revealed that the majority in *Shelby* missed the obvious: voting rights and universal suffrage are inextricably bound to the realization of full citizenship for black Americans. Specifically, Frederick Douglass's writings demonstrate that *Shelby* misapprehends in dangerous ways the dilution of the Voting Rights Act will impair black Americans. Douglass made clear that protection of voting rights is paramount for advancing representative government and eradicating the stigma of inferiority for black Americans.

Shelby County v. Holder

Shelby County, Alabama is a predominantly white suburb of Birmingham, Alabama.⁵ In 2010, Shelby County filed a lawsuit in federal court asking that Section 5 of the Voting Rights Act be declared unconstitutional.⁶ Section 5 – which was originally enacted in 1965 – requires that certain states and municipalities obtain federal preclearance for all voting changes before they are implemented.⁷ Section 4 applied that requirement only to some states, primarily those located in the South and Southwest.⁸

Originally enacted in 1965, Section 5 is a key provision of what has been called “the most effective civil rights law enacted by Congress.”⁹ The Voting Rights Act was one of three key pieces of legislation that emerged from the civil rights movement.¹⁰ In its June 2013 decision, the Court did not disturb Section 5.¹¹ However, the Court did find Section 4 unconstitutional, which

⁵ *Shelby Co. v. Holder*, THE LAWYERS' COMMITTEE FOR CIVIL RIGHT UNDER LAW, http://www.lawyerscommittee.org/projects/voting_rights/page?id=0073

⁶ *Id.*

⁷ 42 U.S.C. § 1973c (a) (2006).

⁸ See 42 U.S.C. 1973 §4. Section 2 of the Act, which allows voters to pursue voting discrimination claims through other provisions, is still in place. *Shelby County*, 133 S. Ct. at 2619. “Now it is up to voters to challenge voting laws by filing lawsuits under Section 2 of the Voting Rights Act, which prohibits racial discrimination.” Kara Brandeisky & Mike Tigas, *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 1, 2013, 12:24 PM), <http://www.propublica.org/article/voting-rights-by-state-map>.

⁹ *Shelby Co. v. Holder*, *supra* note 5.

¹⁰ See Chris Dutton, *The United States Supreme Court Contributing to the Downfall of Civil Rights Starting With the Voting Rights Act of 1965* (unpublished manuscript) (on file with author). Along with the Civil Rights Act and the Fair Housing Act, the Voting Rights Act was intended to foster equality and justice. *Id.*

¹¹ “We issue no holding on Section 5 itself, only on the coverage formula.” *Shelby Cnty.*, 133 S. Ct. at 2631.

effectively rendered the preclearance provisions worthless unless and until Congress drafts another coverage formula.¹²

The Court relies on the “change” in the country to justify invalidating the coverage formula. At the end of this majority opinion, Justice Roberts says “Our country has *changed*, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”¹³ In his concurring opinion, Justice Clarence Thomas also announces: “Today, our Nation has *changed*.”¹⁴ The message is a not-so-subtle evocation of President Barack Obama’s 2008 campaign mantra—“Change.”¹⁵ (The obvious question is whether Roberts and Thomas, consciously or subconsciously, believe that the election of an African-American president is enough “change” to declare the country post-racial and no longer in need of curative remedies to guard against racial discrimination.)

But more directly, the Court relies too heavily on its understanding of equal sovereignty to justify its dismissal of the historical record and current practices.¹⁶ The court noted that the coverage formula “made sense” in 1966.¹⁷ The Court went on to say that almost “50 years later, things have changed dramatically.”¹⁸ It mentions “rare” instances of blatant discrimination and the presence of minority candidates¹⁹ as evidence that the coverage formula is a no-longer-necessary, unconstitutional relic that can no longer be justified. Furthermore, and perhaps more egregiously, the Court ignored the proliferation of “second-generation barriers.”²⁰ Chief Justice

¹² *Id.* “The provisions of §5 apply only to those jurisdictions singled out by §4. We now consider whether that coverage formula is constitutional in light of current conditions.” *Id.* at 2627. See also Dutton, *supra* note 10.

¹³ *Shelby Cnty.*, 133 S. Ct. at 2631 (emphasis added).

¹⁴ *Id.* (emphasis added).

¹⁵ See Barack Obama, *The Blueprint for Change*, at http://www.ontheissues.org/Blueprint_Obama.htm.

¹⁶ *Shelby County*, 133 S. Ct. at 2622-24.

¹⁷ *Id.* at 2625.

¹⁸ *Id.*

¹⁹ *Id.* at 2621.

²⁰ *Id.* at 2629. “Second generation barriers” are those subtle obstacles erected by states to suppress voting rights. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. & THE NAACP, DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA 10, available at http://naacp.3cdn.net/67065c25be9ae43367_mlbrsy48b.pdf. Beyond outright discrimination, states have passed laws to “prevent African-American participation in voting, enabling county councils and school boards to use at-large elections to submerge newly-registered minority voters within white majorities, draw racial gerrymanders, close or secretly move polling stations in minority neighborhoods, and employ countless other strategies to minimize or to

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Roberts insisted that he did not ignore the record; nevertheless, in his opinion he took deliberate steps to minimize, distance and dismiss its overwhelming evidence of bias. He also blamed Congress for not updating the coverage formula.²¹ While explicitly recognizing the existence of “electoral arrangements that affect the weight of minority votes,”²² effectively voter dilution measures, the majority still struck key provisions from the strongest piece of federal legislation in place to protect full voting rights for minorities.

Justice Ruth Bader Ginsburg, in sharp contrast, correctly relied on the record produced by Congress in her dissenting opinion to demonstrate that voting rights are still actively threatened by obstructionist measures. She made a compelling case for why the Section 4 provisions are still critical to protect the right to vote. In her 37-page dissent, Ginsburg echoed the rationale first asserted by Frederick Douglass for the protection of voting rights. Rather than allow the Voting Rights Act to be “a victim of its own success,”²³ Ginsburg defends the necessity of the Voting Rights Act and its key provisions as essential tools in eradicating bias at the polls: “Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination.”²⁴

Advancing Representative Government

The promise of a representative government that reflected and responded to the new identity of the black American citizen was one that defined in many ways the work of Frederick Douglass. Following the Civil War, one of the issues that commanded much of Frederick Douglass’s attention was his quest for black suffrage.²⁵ As Douglass stated:

I have had but one idea for the last three years to present to the American people, and the phraseology in which I clothe it is the old abolition phraseology. I am for the “immediate, unconditional, and universal”

cancel out minority voting strength. *Id.* Other modern-day tactics include misinformation campaigns and the manipulation of registration records. FRANCES FOX PIVEN, LORRAINE C. MINNITE & MARGARET GROARKE, *KEEPING DOWN THE BLACK VOTE, RACE AND THE DEMOBILIZATION OF AMERICAN VOTERS* 164-203 (2009).

²¹ *Id.*

²² *Id.*

²³ David Schultz, *William Faulkner and the Dilemmas of Shelby County*, 12 *ELECTION L.J.* 341, 341 (2013).

²⁴ *Shelby County*, 133 S. Ct. at 2643 (Ginsburg, J., dissenting).

²⁵ DAVID B. CHESEBROUGH, *FREDERICK DOUGLASS: ORATORY FROM SLAVERY* 67 (1998).

enfranchisement of the black man, in every State in the Union. [Loud applause.] Without this, his liberty is a mockery; without this, you might as well almost retain the old name of slavery for his condition; for in fact, if he is not the slave of the individual master, he is the slave of society, and holds his liberty as a privilege, not as a right. He is at the mercy of the mob, and has no means of protecting himself.²⁶

Douglass's essay, *An Appeal to Congress for Impartial Suffrage*, opens with the thought that "[a] very limited statement of the argument for impartial suffrage, and for including the negro in the body politic, would require more space than can reasonably be asked here."²⁷ He cited "participating in the production and operation of government"²⁸ as a fundamental requirement of impartial suffrage. He then moved to the nitty-gritty details that lay out the work before Congress in 1867 when he wrote. He says: "It is to save the people of the South from themselves, and the nation from detriment on their account."²⁹ Douglass made a case for congressional action to supplant "the evident sectional tendencies of the South by national dispositions and tendencies."³⁰

Likewise, Justice Ginsburg defends the Voting Rights Act as but one tool to assist Congress's efforts to cure the South of its "sectional tendencies". In her dissent, she described the Voting Rights Acts as "one of the most consequential, efficacious, and amply justified exercises of federal legislative powers in our Nation's history."³¹ Justice Ginsburg then methodically laid out the case for the continued applicability of the coverage formula and preclearance provisions. She detailed the numerous obstacles that have been erected as a breed of "second-generation" barriers to full voting rights for blacks.³²

Among those more subtle barriers to voting rights highlighted by Justice Ginsburg in her *Shelby* dissent are:

²⁶ DOUGLASS, *supra* note 1.

²⁷ FREDERICK DOUGLASS, *An Appeal to Congress for Impartial Suffrage*, in NARRATIVE OF THE LIFE AND OTHER WRITINGS, *supra* note 1, at 186.

²⁸ *Id.*

²⁹ *Id.* at 193.

³⁰ *Id.* at 186.

³¹ *Shelby Cnty.*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting).

³² *Id.* at 2635. (Ginsburg, J., dissenting).

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- A proposed redirecting plan in in the city of Albany, Georgia following the 2000 census that was designed to limit increased black voting strength, to return it to previous levels.
- The proposal of an at-large voting mechanism for a school board in Charelston County, South Carolina in 2003 after African-Americans won a majority of its seats for the first time.
- A threat by Walker County, Texas in 2004 to prosecute two black students after they announced their intention to run for office.³³

As Justice Ginsburg noted: “The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy.”³⁴

And even as he dismantled the greatest protection in place for full voting rights, Justice Roberts conceded: “At the same time, voting discrimination still exists; no one doubts that.”³⁵

The ink had barely dried on the *Shelby* opinion when states began crafting legislation intended to suppress the minority vote.³⁶ “The Supreme Court decision unleashed all manner of new efforts to suppress minority voting — and a new batch of legal challenges.”³⁷ New measures aimed at suppressing the black vote³⁸ that have emerged since *Shelby* include: limiting early voting, stricter voter identification requirements; restrictions on voter registration; and gerrymandering minority voters by dispersing them into white-controlled districts.³⁹ “In short, the practices grouped as ‘second

³³ *Id.* at 2541 (Ginsburg, J., dissenting).

³⁴ *Id.* at 2540 (Ginsburg, J., dissenting).

³⁵ *Id.* at 2619.

³⁶ See e.g., Lyle Denniston, *New Texas Voting Disputes*, SCOTUSBLOG (July 3, 2013 7:05 PM), <http://www.scotusblog.com/2013/07/new-texas-voting-disputes/>.

³⁷ Richard L. Hasen, *Voter Suppression's New Pretext*, N.Y. TIMES (Nov. 15, 2013), <http://www.nytimes.com/2013/11/16/opinion/voter-suppressions-new-pretext.html?emc=eta1&r=0>. (opinion).

³⁸ Though this essay focuses on the negative impact voter suppression measures will have on black voters, voter suppression measures will clearly harm all minority voters. See, e.g., NAT'L PUB. RADIO, *Do New Voting Laws Suppress Fraud? Or Democrats?*, <http://www.npr.org/2011/09/17/140539204/do-new-voting-laws-suppress-fraud-or-democrats>. Based on my efforts to situate this discussion in the context of Frederick Douglass's call for black voting rights, I have elected to limit my discussion to the harms on black voters. The new measures will also impact young voters and democratic voters. See Hasen, *supra* note 37.

³⁹ Hasen, *supra* note 37.

generation' are not unrelated to the concerns that first animated Congress to enact the VRA."⁴⁰

Because Frederick Douglass recognized that only full voting rights could ensure the success of black Americans, he rallied fiercely for both the abolition of slavery and the extension of voting rights for black Americans. His writings consistently demonstrate his belief in the necessity of an absolute guarantee of representative government—free of both first and second-generation barriers.

Eradicating the Stigma of Inferiority

In addition to the tangible problems created by structural defects that impair representative government, the suppression of voting rights also works an intangible harm on the hearts and minds of those affected. Voter suppression worsens the stigma of inferiority. Douglass was clear about the psychological harms wrought by the denial of universal suffrage. A former slave who spent his first 21 years in captivity⁴¹ before he escaped and distinguished himself as a writer and activist,⁴² Douglass recognized the cycle fueled by stigma.

According to Douglass, voting rights are critical where “universal suffrage is the rule, where that is the fundamental idea of the Government.” Ruling blacks out of the voting process is to “make us an exception, to brand us with the stigma of inferiority, and to invite to our heads the missiles of those about us; therefore, I want the franchise for the black man.”⁴³ Douglass adamantly refused to accept a brand of inferiority: “I utterly deny, that we are originally, or naturally, or practically, or in any way or any important sense, inferior to anybody else on this globe.”⁴⁴

Douglass's self-awareness was correct: Blacks and whites are indeed created equal. Yet the psychological harm inflicted by oppression of the black community in America is well-documented. Scholars have pointed, for instance, to the systemic oppression of blacks as a means of explaining the

⁴⁰ Ellen Katz, *What Was Wrong with the Record?*, 12 ELECTION L.J. 329, 331 (2013).

⁴¹ Frederick Douglass was likely born sometime in 1818 to a slave woman, Harriet Bailey, in Talbot County, on the eastern shore of Maryland. Harriet Bailey's fourth child was a boy she named Frederick Augustus Washington Bailey. CHESEBROUGH, *supra* note 25, at 3. “The father of the infant was an unknown white man.” *Id.*

⁴² See generally CHESEBROUGH, *supra* note 25, at 4.

⁴³ DOUGLASS, *supra* note 1.

⁴⁴ *Id.* at 182.

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persistent educational disparities between blacks and whites.⁴⁵ Some have specifically noted the psychological injury identified in *Brown I*⁴⁶ and the ensuing legacy of such injury contributes to inferiority complexes and challenges that plague many black Americans.⁴⁷

The flip side of the coin, of course, is the mythology of white exceptionalism. This narrative has been a long-standing keystone in the oppression of black Americans.⁴⁸ White exceptionalism fuels the narrative of white greatness in education, business, politics, sports and the arts.⁴⁹ “In a world where Whites hold most of the power – financial, legal, political, social– and where the tenets of racism remain firmly entrenched in the consciousness and unconsciousness of those Whites, being deemed White counts for a lot.”⁵⁰ Douglass recognized the reinforcement of white exceptionalism and black inferiority as a tried and true tactic more than 100 years ago. “This charge of inferiority is an old dodge,” Douglass wrote in 1865. “It has been made available for oppression on many occasions.”⁵¹

In the voting booth, the mythology of white exceptionalism and the stigma of inferiority are especially pernicious. Together, they can cement both negative and inflated views of the self. They could also further entrench racial divisions. Professor Anthony Farley points out: “Voting is a way that this colorlined society binds itself together in a vast white skin.”⁵²

Douglass articulated the ways in which measures designed to impair voting rights could stigmatize black Americans. In *An Appeal to Congress for Impartial Suffrage*, Douglass wrote:

⁴⁵ See Camille Lamar Campbell, *Getting at the Root Instead of the Branch: Extinguishing The Stereotype of Black Intellectual Inferiority in Secondary Education*, A Long-Ignored Transitional Justice Project (unpublished manuscript) (on file with author). Professor Lamar argues that the Court’s failure to fashion an appropriate remedy tailored to the Constitutional violation accounts for the de facto segregation that continues in American public schools. *Id.*

⁴⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁴⁷ See Campbell, *supra* note 45. The psychological injury identified in *Brown I* was the “stereotypes of black intellectual inferiority that supported a racially segregated educational system.” *Id.* Despite the “acknowledgement of Jim Crow’s psychological damage by imbuing Black students with a badge of inferiority” the Court failed to fashion a “remedy to address widely-held societal attitudes of Black intellectual inferiority.” *Id.* Professor Lamar specifically identifies this deficiency as a “crucial remedial failure.” *Id.*

⁴⁸ See Thomas Ross, *The Unbearable Whiteness of Being*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* at 251-257 (Francisco Valdes et al. eds, 2002).

⁴⁹ See, e.g., Olympia Duhart, *Multiracial Streetcar Named Desire Revival Stirs Controversy on the Great White Way*, HUFFINGTON POST (June 19, 2012), http://www.huffingtonpost.com/olympia-duhart/streetcar-named-desire-broadway_b_1610533.html.

⁵⁰ Ross, *supra* note 48, at 251, 253.

⁵¹ DOUGLASS, *supra* note 1, at 182.

⁵² Anthony Farley, *Lacan and Voting Rights*, 13 YALE J.L. & HUMAN. 283, 285 (2001).

Exclude the negroes as a class from political rights—teach them that the high and manly privilege of suffrage is to be enjoyed by white citizens only—that they may bear the burdens of the states, but that they are to have no part in its direction or honors—and you at once deprive them of one of the main incentives to manly [sic] character and patriotic devotion to the interest of the government; in a word, you stamp them as a degraded caste—you teach them to despise themselves, and all others to despise them.⁵³

In her dissent, Justice Ginsburg warns against the Court's demolition of the Voting Right Act: "Hubris is a fit word for today's demolition of the VRA."⁵⁴ She recognizes that gutting key provisions of the VRA undermines one of its highest aims: "to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race."⁵⁵ The dilution of voting rights—whether achieved by overt, first-generation barriers, or subtler, second-generation barriers – contributes to the badge of inferiority that has been branded on many black Americans. Rather than enable Congress to properly exercise its duties to fulfill the promise of the Fifteenth Amendment,⁵⁶ *Shelby County* blocks Congress' mission. It also derails the path laid out by Douglass to help black Americans eradicate the stigma of inferiority.

Conclusion

Douglass's life was fueled by aspirations to meet the challenges and responsibilities of citizenship in every arena. His writings reflect lofty objectives – denunciations of slavery, eradication of discrimination and the guarantee of unconditional voting rights. He called for political rights for black Americans, and explained why, absent those rights, full participation by black Americans in representative government is impossible. Active, on-going protection of full voting rights through the Voting Rights Act is an essential step toward advancing representative government and eradicating the stigma of inferiority for black Americans.

⁵³ Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, in NARRATIVE OF THE LIFE AND OTHER WRITINGS, *supra* note 1, at 180.

⁵⁴ *Shelby Cnty.*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting).

⁵⁵ *Id.* at 2651 (Ginsburg, J., dissenting).

⁵⁶ *See id.* at 2636 (Ginsburg, J., dissenting).

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The missiles Douglass saw directed at his head were no metaphors. Gerrymandering, at-large voting, voter intimidation, stricter voter identification and voting requirements are not actually poll taxes. But such measures tax voters, and representative government itself. As Douglass correctly predicted more than 100 years ago, the demand for impartial suffrage is one of the battle lines drawn between the races. Frederick Douglass's call for unconditional voting rights highlights the failings of *Shelby* and the urgency of the work still ahead. Said Douglass: "I fear that if we fail to do it now...we may not see, for centuries to come, the same disposition that exists at this moment. Hence, I say now is the time to press this right."