

STILL FIGHTING AFTER ALL THESE YEARS: MINORITY VOTING RIGHTS 50 YEARS AFTER THE MARCH ON WASHINGTON

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I. Introduction

In August 2013, we celebrated the 50th Anniversary of the March on Washington and Dr. Martin Luther King, Jr.'s "I Have A Dream" speech. On August 28, 1963, over 250,000 people converged on the National Mall to fight for "jobs and freedom." A central demand of the marchers was the passage of meaningful civil rights legislation, including laws to end discrimination in voting and to free African Americans from the chains of "political and economic slavery."¹ The march culminated with Dr. King's "I Have A Dream" speech in which he pronounced: "[w]e cannot be satisfied as long as the Negro in Mississippi cannot vote, and the Negro in New York believes he has nothing for which to vote."² The Voting Rights Act of 1965³ was passed just two years after the March, helping to usher in a new age of African American political participation. The Act's success is remarkable and undeniable. Indeed, its enactment was a turning point in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote."⁴ But, the progress of the past 50 years has effectively come to a halt. The United States Supreme Court's decision in *Shelby Cnty v. Holder*⁵ is the latest and perhaps most potent attack on equal political participation. *Shelby* neuters one of the most effective tools in our arsenal against political repression, empowering jurisdictions to once again erect barriers to minority voting.⁶ Fifty years

¹ John Lewis, Speech at The March on Washington, August 28, 1963.

² Martin Luther King Jr., "I Have a Dream," Speech at the March on Washington, August 28, 1963.

³ 42 U.S.C. §1973.

⁴ *Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 1240 (2009).

⁵ 133 S.Ct. 2612 (2013).

⁶ In fact, many already have. Within hours of the Supreme Court's *Shelby* decision, Texas Attorney General Greg Abbott announced that Texas would immediately resurrect a voter ID law that was previously rejected by a federal court, *available at* http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html; <http://www.theatlanticwire.com/national/2013/06/supreme-court-texas-voter-id-law/66663/>. Florida and North Carolina also quickly resurrected voter ID laws that were previously struck down under Section 5. See <http://bigstory.ap.org/article/reaction-court-decision-voting-rights-act-0>.

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after the March on Washington, citizens of color have nominal freedom, but true equal citizenship remains elusive.

II. Discussion

It is difficult to overstate the impact of the Voting Rights Act of 1965. When it was first passed, Congress had concluded that nothing short of a prophylactic remedial scheme would succeed in eradicating the “insidious and pervasive evil[,] which had been perpetuated in certain parts of our country.”⁷ That prophylactic remedial scheme, the heart of the Voting Rights Act, is Section 5, which prohibits “covered” jurisdictions from implementing new voting standards, practices or procedures unless the proposed change has been “pre-cleared” by the Department of Justice or the United States District Court for the District of Columbia.⁸ Congress devised a formula to cover those states and political subdivisions that it determined had a deep and continuing history of discrimination against minorities, placing the burden on those covered jurisdictions to prove that any proposed changes will not limit the voting rights of people of color.

In *Shelby County v. Holder*, Shelby County—a covered jurisdiction—challenged the constitutionality of Section 5.⁹ Although the Court did not strike down Section 5 itself, it did strike down Section 4(b), which identified the 15 political jurisdictions that were subject to Section 5 preclearance.¹⁰ Therefore, while Section 5 is technically in force, the Court’s opinion in *Shelby* renders it ineffective by removing any means of determining what jurisdictions are subject to Section 5’s preclearance requirements.¹¹

In challenging the Voting Rights Act, Shelby County insisted that the Act’s pre-clearance provisions are no longer needed because the Act has already succeeded in removing all barriers to equal political participation.¹² And the Act has indeed been successful. Yet it is a paradoxical result indeed that Section 5’s success in achieving unprecedented levels of African American voter participation would be used to undermine the Act; as though there were no longer any risk that covered jurisdictions would seek a return to the bad old days without adequate supervision.

⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

⁸ 42 U.S.C. §1973(c)(a).

⁹ 133 S.Ct. at 2622.

¹⁰ *Id.* at 2631.

¹¹ See 133 S.Ct. at 2648 (Ginsberg, J., dissenting).

¹² Brief for Petitioner, *Shelby Cnty v. Holder*, 2012 WL 6755130 (2012).

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The Supreme Court embraced Shelby County's position. At the heart of the Supreme Court's opinion in *Shelby* lies the unfounded belief that our history of voting rights has been one of consistent progress; that we have reached the point where equal voting rights are guaranteed; and that eliminating Section 5 will not cause us to regress. That conclusion is simply not supported by the extensive 15,000-page record of electoral discrimination Congress considered when it reauthorized Section 5 in 2006. Congress found that:

voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions, relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements.¹³

The truth is that while considerable progress has been made in the nearly five decades since the Voting Rights Act's passage, the Act's goal of enforcing the Fifteenth Amendment has not been fully realized. Barriers to equal political participation persist; minority citizens are still denied access to the ballot and have had to struggle through increasingly ingenious discriminatory roadblocks. Across the country, political jurisdictions continue to enact practices and procedures that infringe upon minorities' constitutional right to vote. The harms that Section 5 was designed to counter continue, and the law is as critical now as it has ever been. Shelby County's recent history offers a cautionary tale. In 2006, the City of Calera, which lies within the County, enacted a discriminatory redistricting plan without securing Section 5 preclearance, leading to the loss of the city's sole African-American councilman, Ernest Montgomery. In compliance with Section 5, however, Calera was required to draw a nondiscriminatory redistricting plan and conduct another election in which Mr. Montgomery regained his seat.¹⁴ Shelby County itself offers a stark example of what could

¹³ H.R. Rep. No. 109-478 (2006), at 36; *see also* S. Rep. No. 109-295 (2006), at 15.

¹⁴ *See* NAACP Legal Defense and Educational Fund, Inc., Fact Sheet: Shelby Cnty, Alabama v. Holder (November 2010), *available at* http://www.naacpldf.org/files/case_issue/Shelby%20County%20Fact%20Sheet.pdf.

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happen without the power of preclearance.

And Shelby County is not alone. Within hours of the Supreme Court's *Shelby* decision, Texas Attorney General Greg Abbott announced that Texas would immediately resurrect a voter ID law that was previously rejected by a federal court.¹⁵ Florida and North Carolina also quickly resurrected voter ID laws that were previously struck down under Section 5.¹⁶

In the past 25 years, over 1,000 discriminatory voting changes have been blocked pursuant to Section 5.¹⁷ Alabama, where Shelby County is located, offers a good example. From 1990 to 2006, Alabama received a shocking 84 pre-clearance objection letters from the Department of Justice.¹⁸ In 2003, an all-white group called Concerned Citizens of Chilton County pressured the Chilton County Commission to reduce "the size of the commission to four; restore the probate judge as *ex officio* chair; repeal cumulative voting; and thus end any opportunity for African Americans to elect a candidate of their choice."¹⁹ The Attorney General refused to grant preclearance citing the evident discriminatory purpose and potential discriminatory effects.²⁰

The case of Hale County, Alabama, is also illustrative of Section 5's crucial role in fighting discrimination. In 1992, State Senator Bobby Singleton had to physically intervene when white voting officials attempted to prevent African American voters from entering the polling sites.²¹ White workers closed the doors and held them shut during election hours to block African American voters.²² The Department of Justice was compelled to provide election observers at future elections to prevent the intimidation of African American voters.²³

¹⁵http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html;
<http://www.theatlanticwire.com/national/2013/06/supreme-court-texas-voter-id-law/66663/>.

¹⁶ See <http://bigstory.ap.org/article/reaction-court-decision-voting-rights-act-0>.

¹⁷ NAACP Legal Defense and Educational Fund, Inc., "Protecting Voters of Color in the Wake of the Supreme Court's Ruling in *Shelby Cnty, Alabama v. Holder*: Key Points," July 2013, available at

http://www.naacpldf.org/files/case_issue/Key%20Points%20&%20Action%20Items,%20Shelby%20County,%20Alabama%20v.%20Holder.pdf.

¹⁸ Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary, 109th Cong. (March 8, 2006) at 2561.

¹⁹ *Id.* at 53.

²⁰ *Id.*

²¹ See *Id.* at 83, 182-183.

²² *Id.* at 183.

²³ *Id.*

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Recently, two Alabama state representatives were reprimanded for “having ulterior motives rooted in naked political ambition and pure racial bias” in connection with their involvement in a “State house vote-buying case.”²⁴ *McGregor* involved allegations of a bribery and extortion conspiracy. Purportedly to help the FBI’s investigation into the conspiracy, state officials agreed to wear recording devices.²⁵ Judge Thompson found that the elected officials’ actions in aiding the FBI were aimed at decreasing African American voter turnout rather than curtailing bribery because the representatives believed the referendum’s absence on the ballot would decrease African American voter participation and “demonstrat[ed] a deep-seated racial animus and desire to suppress black votes by manipulating what issues appeared on the 2010 ballot.”²⁶

Despite the overwhelming evidence of ongoing discrimination, the Court could not look past the progress that we have made to the potential for retrenchment if Section 5 was declared. In this, the Supreme Court is not alone. People often point to President Barack Obama’s historic election as proof that voting discrimination, and racism in general, is a thing of the past; they have lost their sense of urgency around protecting the right to vote. It is true that the election of Barack Obama as our country’s first African-American President showcased the progress the Voting Rights Act helped to usher in, but his election also showcased the continuing animosity towards minority participation in our electoral process.²⁷ The *Shelby* opinion comes during an historic attack on voting rights. For example, in response to increased political participation by minority voters, seven of the eight states

²⁴ United States v. McGregor et al., 2011 U.S. Dist. LEXIS 121794 *9 (M.D. Ala. Oct. 20, 2011).

²⁵ *Id.* at *7-8.

²⁶ *Id.* at 12-13. For example, Senator Beason expressed agreement with warnings that “if [a pro-gambling] bill passes and we have a referendum in November, every black in this state will be bused to the polls.” And, “[e]very black, every illiterate’ would be ‘bused on HUD financed buses.” *Id.* at 10.

²⁷ We cannot ignore that the recent changes to voting practices and procedures were enacted against a backdrop of increasing racial animosity brought about by the election of an African-American President. Following President Obama’s election, covered jurisdictions were littered with billboards, signs, t-shirts, and bumpers stickers with messages such as “I do not support the nigger in the white house” and “don’t renig [sic] in 2012.” Two individuals were removed from the Republican National Convention after throwing nuts at an African American camerawoman and shouting: “this is how we feed the animals.” Empty chairs, symbolizing President Obama, were lynched in Texas and Virginia. This is not a new narrative in our political history; as racial animosity rises, elected officials and campaigns can respond by appealing to racist sentiment. Brief for the Honorable John Lewis as Amicus Curiae in Support of Respondents and Intervenor-Respondents, 2013 WL 476051 at 21. In August 2013, protestors outside of President Obama’s speech in Arizona sang “Bye Bye Black Sheep” and held placards urging Congress to “Impeach the Half-White Muslim,” available at http://www.huffingtonpost.com/2013/08/07/obama-protesters-arizona_n_3719050.html.

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fully covered under Section 5 passed legislation in the last two years designed to restrict voting rights and access to the polls.²⁸ Indeed, in the 2012 elections, the country saw a coordinated effort to dilute and prevent minority voting through discriminatory photo identification laws, reduced early voting opportunities, and discriminatory redistricting plans.²⁹

III. CONCLUSION

Although the Supreme Court may have grown fatigued by the ongoing need to struggle for racial equality, those committed to equal citizenship do not have that luxury. We cannot simply wish discrimination away; progress will not continue on its own accord. As Congressman John Lewis has explained: “the danger of accepting the argument that we have made so much progress that we no longer need the very tool that made all that progress possible is that we will forget one of the most important lessons history has to teach us, namely: that revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward . . . [.]”³⁰ The acknowledged success of the VRA is not proof that Section 5’s usefulness has expired. In fact, it is evidence that Section 5’s powerful medicine was working. The risk to minority voters is still real.

²⁸ Brief for the Honorable John Lewis as Amicus Curiae in Support of Respondents and Intervenor-Respondents, 2013 WL 476051.

²⁹ *Id.*

³⁰ Brief for the Honorable Congressman John Lewis, 2013 WL 476051 at 8.