

ARC OF INJUSTICE: PRE- AND POST-DECISION
THOUGHTS ON *SHELBY COUNTY V. HOLDER*

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Challenges to the Voting Rights Act's constitutionality are not new. Beginning with *South Carolina v. Katzenbach*¹ in 1966, the year following its enactment, the Voting Rights Act has been subject to intense constitutional scrutiny.² *Shelby County v. Holder* is the most recent in the line of cases challenging Congress's power to enact the expansive remedial legislation that is the crown jewel of the civil rights movement. *Shelby County* is also the first case to succeed.

A confluence of factors contributed to this result. Some are elusive; but others are more evident. I identify three key factors here. In the nearly fifty years of the Voting Rights Act's existence, there has been (1) a substantial increase in minority voter turnout, (2) significant expansion of electoral successes for minority candidates, and, at the same time, (3) a heightened conservatism that has developed on the Supreme Court concerning race. The first two factors, arguably, both fueled and camouflaged the third. Indeed, as minority voter participation and electoral power began to flourish with the strong protection of the Act, an increasingly conservative Court routinely chipped away at the Act's protections. Many of these protections were fully or partially restored by Congress.³ Other missives directed at the Act left it more vulnerable.⁴ *Shelby County* is emblematic of this struggle. Yet, it remains to be seen whether Congress will come to the Act's rescue this time and resurrect a new version of the provisions that the Court's 5-4 majority held unconstitutional.

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¹ 383 U.S. 301, 327-28 (1966).

² See, e.g., *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009); *Riley v. Kennedy*, 553 U.S. 406 (2008); *Mississippi Republican Executive Opinion v. Brooks*, 469 U.S. 1002 (1984) (affirming the constitutionality of Section 2 of the Act by summary affirmance).

³ In *Mobile v. Bolden*, 446 U.S. 55 (1980), for example, the Supreme Court required that any constitutional claim of minority vote dilution must include proof of a racially discriminatory purpose, a requirement that was widely seen as making such claims far more difficult to prove. In 1982, however, Congress renewed the special provisions of the Act, triggered by coverage under Section 4 for twenty-five years. Congress also adopted a new standard, which went into effect in 1985, providing for jurisdictions to terminate (or "bail out" from) coverage under the provisions of Section 4. In addition, after extensive hearings, Congress amended Section 2 to provide that a plaintiff could establish a violation of the Section without having to prove discriminatory purpose. This amendment extended the reach of the Act exponentially.

⁴ See Anthony P. Farley, *Lacan and Voting Rights*, 13 YALE J. OF L. & HUMAN. 283, 288-90 (2001) (vividly describing Justice Sandra Day O'Connor's opinion in *Shaw v. Reno*).

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The three essays that follow, originally published as part of The Great Debate Series on Reuters, chart an arc of sentiments surrounding the *Shelby County* case when it was pending, once it was decided, and, later, as it was considered in historical context. The first, *Making Sure Race Is Considered*, forecasts the blow that would be dealt to deterring race discrimination in voting without an operable Section 5 and argues that discussing race in the rooms where voting decisions are made is integral to ensuring that discriminatory impacts do not harm minority voter participation. The post-*Shelby* restrictive voter ID measures advanced by the states of Texas, North Carolina, and Mississippi, among others, demonstrate that this fear was not unfounded.

The second essay, *The Cost of America's First Black President*, which followed the Supreme Court's decision, attributes the outcome, in part, to misguided assumptions about racial progress based on certain outlier electoral successes like Barack Obama's presidency. It acknowledges the valuable progress toward racial equality that has been achieved but critiques the attendant satisfaction that overlooks extant inequalities.

The third and final essay considers the Voting Rights Act and the effect of *Shelby County* in historical context against the backdrop of the March on Washington for Jobs and Freedom and Martin Luther King's vision of an inclusive, substantive, and transformative democracy. It is also a call to action for Congress, state lawmakers, and the citizenry at large to keep the dream of full democratic equality alive by reinstating the needed protections of the Act. Collectively, the essays chart the arc of injustice that the *Shelby County* decision represents. I have faith, nonetheless, that the competing "arc of the moral universe is long and bends toward justice."⁵

*Making Sure Race Is Considered*⁶

The Voting Rights Act has worked for almost 50 years to remove racial discrimination from the electoral process and prevent its return. Wednesday the U.S. Supreme Court is expected to hear oral argument on the constitutionality of Section 5, one of the Act's most powerful provisions. Section 5's work is done, this argument goes, and the provision has outlived its usefulness.

Yet some of Section 5's most important work lies beyond its technical application. Section 5 requires that jurisdictions with a documented history of racial discrimination in voting seek federal approval for any voting changes. The aim is to ensure that new voting laws will not "retrogress" — or harm — minority voting rights. It subtly and constructively inserts race into electoral decision-making — creating a

⁵ Martin Luther King Jr., *How Long, Not Long* (March 25, 1965).

⁶ This work was originally published on February 25, 2013, at <http://blogs.reuters.com/great-debate/2013/02/25/making-sure-race-is-considered/>.

race consciousness among decision-makers that can often preempt discrimination. This deterrent effect, and its impact on the discourse of race in elections, may be Section 5's most important — and unfinished — work.

Section 5 brings race into the room every time electoral decisions are made in covered jurisdictions. It is not only by Section 5's wording, however, that race is part of the discussion when politicians re-draw district lines, election administrators contemplate voting changes and judges incept new electoral schemes. Race has had a reserved seat at the table of American democracy since the nation's founding.

The well-documented evolution of voting rights underscores the destructive use of race to deny voting rights and political equality to minority citizens. The Supreme Court acknowledged in *Shaw v. Reno* that “the legislature is always aware of race” when it draws district lines.⁷

Section 5, however, has changed the discourse around race in backrooms and in courtrooms by requiring that electoral decision-makers be not only aware of race, but also be conscious of the racial impact of their actions and avoid racial harm. Indeed, Section 5's anti-retrogression standard directs jurisdictions subject to oversight either to advance, or, at minimum, protect minority voting rights. This framework also informs the voting rights discourse beyond Section 5 — suggesting that the only correct direction in which to move on racial equality in elections is forward.

Some critics of Section 5 argue that its effects cannot be determined, and, thus, congressional authority to enact Section 5 for deterrence purposes is suspect. Chief Justice John Roberts' quip during oral argument in *Northwest Austin Municipal Utility District Number One v. Holder* — that the effectiveness of a fictive elephant whistle could not be measured by the absence of elephants in the courtroom — illustrates this.⁸

Section 5's deterrent effect, however, is not an imponderable. As Morgan Kousser demonstrates in his article, *The Strange Ironic Career of Section Five of the Voting Rights Act, 1965-2007* for⁹ studies show that, even with Section 5's muscular pre-clearance requirement, rates of discriminatory conduct in jurisdictions subject to oversight are on par with, or even more prevalent than in non-covered jurisdictions. This suggests that, without Section 5, the jurisdictions subject to oversight would not maintain the same standards. It would leave only a *Shaw*-like awareness of race that would not help minority voters.

⁷ 509 U.S. 630, 646 (1993).

⁸ Transcript of Oral Argument at 28, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) (No. 08-322).

⁹ L. Morgan Kousser, *The Strange Ironic Career of Section Five of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667 (2008).

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More important, this data does not take into account the many ways Section 5's race consciousness has informed voting changes in covered jurisdictions. For example, officials in these areas routinely consult, formally and informally, with the attorney general about proposed changes — even before submitting pre-clearance requests. Their proposed changes are often modified. Indeed, countless revisions often occur as a result of the attorney general's requests for more information.

Covered jurisdictions also settle many lawsuits to avoid denial of pre-clearance. Joseph D. Rich, a former head of the Justice Department's Voting Section, noted that “the most important impact of Section 5 is its deterrent effect on discriminatory voting changes. ... [J]urisdictions will think long and hard before passing laws with discriminatory impact or purpose.”

Because pre-clearance denial exacts a financial toll on covered jurisdictions and delays implementation of new laws, lawmakers have good reason to get it right the first time. Section 5's influence here is not always captured in the data.

This is the nature of continuing legislation. As many have argued, the fact that the record of discrimination in covered jurisdictions has diminished is evidence that Section 5 is working — not that it has exhausted its usefulness.

The Supreme Court noted in the 2009 challenge to Section 5 that the congressional record supporting Section 5's reauthorization “demonstrat[ed] that Section 5 prevents discriminatory voting changes' by 'quietly but effectively deterring discriminatory changes.”¹⁰

Indeed, Congress reauthorized Section 5 in 2006 because of its continuing effectiveness in preventing discrimination - not because it had eradicated it. Even if Section 5's deterrent effect cannot be measured, Congress still has the authority to enact legislation like Section 5 for the purpose of deterring voting rights violations. By emphasizing race for constructive purposes, Section 5 remediates past and deters future racial discrimination consistent with Congress's enforcement powers under the 14th Amendment “both to remedy and to *deter* violation of rights .” Congress's power to deter necessarily requires a presumption of potentially immeasurable inaction or omission on the part of the targeted actors. To require otherwise would render Congress's power to deter meaningless.

Without Section 5, Section 2 of the Voting Rights Act would be one of the few remaining race-based remedies in elections. Section 2 allows action against any law or practice that infringes the right to vote because of race. Although powerful, Section 2 is

¹⁰ *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 205 (2009) (quoting the district court).

costly for litigants because they bear the burden of proving discrimination after it has occurred. This differs significantly from Section 5's prophylactic stance.

If the Supreme Court strikes down Section 5, the concept of retrogression and the do-no-harm spirit it embodies would disappear from the general lexicon of election law. Moreover, race would no longer have the same constructive presence in the rooms of electoral decision-making.

Instead, race would enter the rooms of some of this country's most troubled jurisdictions without the restraint of federal oversight — providing the opportunity, if not the invitation, for retrogression and retrenchment.

*The Cost of America's First Black President*¹¹

Barack Obama, America's first black president, can be credited with many milestones — a comprehensive federal healthcare bill, taking down the world's most wanted terrorist, signing the Fair Pay Act for gender pay equality, to name a few.

The obliteration of the Voting Rights Act, however, was certainly unintended. Despite the Justice Department's zealous defense of the Act's constitutionality in *Shelby County v. Holder* a divided Supreme Court voted 5-4 to strike down Section 4, the core of the Act, on the grounds that it is not justified by "current needs."¹² Substituting its judgment for Congress's, the Court ignored voluminous record of "current needs" that Congress relied on in 2006 when it reauthorized, with overwhelming support, the Act's challenged provisions¹³.

The *Shelby County* decision is the latest strike in a multi-front movement to restrict the vote precipitated by Obama's historic election. In the "post-racial" fog that rolled in with the 2008 elections, there have been sweeping attacks on minority voter participation. Most recently, Texas has waged high-pitched battles defending its discriminatory redistricting plans, Florida passed unprecedented voter registration restrictions, and Republican-led state legislatures across the nation have passed a contagion of voter ID laws.

The minority voting power that helped elect Obama, nonetheless, seems to have instigated a willful amnesia among the Court's conservative majority. Despite this flurry of recent voting restrictions, the Court found that there is no current justification for the Act's federal oversight of mostly Southern states with histories of virulent racism. Instead, the court ruled Tuesday that the Act's "coverage formula" — which

¹¹ This work was originally published on June 28, 2013 at <http://blogs.reuters.com/great-debate/2013/06/28/the-cost-of-americas-first-black-president/>.

¹² *Shelby Cnty. v. Holder* 133 S. Ct. 2612, 2627 (2013).

¹³ *See id.* at 2636 (Ginsburg, J., dissenting).

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designates which jurisdictions are to be covered by the law — violated the Constitution by treating some states differently than others.¹⁴

This newfangled equal treatment of states theory trumped the equal treatment of voters principle embodied in the Voting Rights Act and in the 14th and 15th Amendments. While many states may not treat all eligible voters equally, some have been undeniably worse at it than others.

What do we lose with Tuesday’s decision? Without the federal oversight formula intact, the Voting Rights Act has lost both its muscular force to prevent states and municipalities from enforcing discriminatory election laws and its subtler deterrent effect. States with a proven record of seeking to disenfranchise eligible voters will no longer confront the obstacle of a watchful Justice Department. Jurisdictions with a history of voting discrimination, many with recent records of election law violations, can regulate elections unleashed with no expectations that they will maintain the hard-fought racial progress that the Voting Rights Act’s anti-retrogression standard enforced.

Almost tongue-in-cheek, Chief Justice Roberts, writing for the majority, invites Congress to craft new legislation to replace the coverage formula he struck down.¹⁵ By punting to Congress, however, the Court has kicked the can down a road to nowhere. Today’s Congress, wracked by partisan division, has been largely ineffectual on crucial social issues. There is little reason to think that this critical issue, with its deep ideological and partisan dimensions, will be any different.

Nonetheless, today’s Congress owes it to the 89th Congress, which passed the Voting Rights Act in the shadow of Jim Crow, and the Congresses that reauthorized Section 5 four times since, to find a solution that protects against the venomous voting discrimination that has characterized most of American history.

Without the force of these key provisions, we run the risk of inviting discrimination in voting on a scale that we haven’t seen in nearly 50 years.

We will know in the months to come whether our lawmakers will rise to the challenge the court has set. It is now a test of the citizenry to demand from our elected officials the justice we have been unable to obtain from the Supreme Court.

Congress must devise a constitutional and comprehensive solution to protect minority voting strength from backsliding to days of old. States can play an important role in protecting our democracy by legislating against voting laws that have a disparate impact on minority voters and lack sufficient justification.

¹⁴ *See id.* at 2626 (discussing the principle of “equal sovereignty” among the states).

¹⁵ *See id.* at 2631.

The *Shelby County* decision lays down a gauntlet that Congress and states can perilously ignore out of partisan division or take up for patriotic interests to protect our democracy. If, indeed, we have paid for our first black president with rollbacks on the very legislation that produced the unique phenomenon of his election, we must ask whether we've received a sufficient return.

That answer will depend, in part, on whether efforts to bridge the racial gap in education and economic equality will continue to be blocked by a recklessly divided Congress and sidestepped by the Supreme Court¹⁶ or if Congress can enact a new federal oversight formula that fairly protects the equality of all voters.

If not, the price our democracy has paid in gutting the most effective piece of civil rights legislation in history is one we simply cannot afford.

*King's Deferred 'Dream' of Democracy*¹⁷

In the midst of current retrenchments on voting rights, the 50th anniversary of Martin Luther King Jr.'s "I Have a Dream" speech provides an important opportunity to consider whether his "dream" has been realized.¹⁸ Or, is it now, in the words of the famous poet Langston Hughes, a "dream deferred."¹⁹

In that speech and many others, King lays out a powerful vision of democracy "deeply rooted in the American dream . . . 'that all [persons] are created equal.'" King also articulated a three-pronged vision for American democracy — inclusive, substantive and transformative — throughout his struggle for civil rights.

The promise held in King's dream is to wake up one day to its reality — not to slumber while discrimination marches on. The immediate step we can take is to reverse the continuing assault on voting rights and expand participation in our democracy. Rehabilitating the Voting Rights Act of 1965, following the Supreme Court's recent decision in *Shelby County v. Holder*, which struck down one of the law's most important provisions, should be at the top of this agenda.²⁰

In June the Supreme Court dealt a death blow to the Act's requirement that the federal government pre-approve all election changes in specific districts or states with a history of racial discrimination in voting.²¹ No longer bound by this federal oversight, several jurisdictions with substantial records of discrimination rapidly began enacting laws that will undermine minority voters' ability to vote King envisioned that all

¹⁶ *Fisher v. Texas*, 133 S. Ct. 2411 (2013).

¹⁷ This work was originally published on August 28, 2013, at <http://blogs.reuters.com/great-debate/2013/08/27/kings-deferred-dream-of-democracy/>.

¹⁸ Martin Luther King Jr., I Have a Dream (Aug. 28, 1963) (text available at <http://www.archives.gov/press/exhibits/dream-speech.pdf>).

¹⁹ See LANGSTON HUGHES, MORTGAGE OF A DREAM DIFFERED (1951).

²⁰ 133 S. Ct. 2612 (2013).

²¹ See *id.* at 2631 (declaring section 4(b) unconstitutional).

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Americans, including racial minorities, would not only have unfettered access to vote, but, more important, have an urgent reason to go to the polls. “We cannot be satisfied,” King said, “as long as the Negro in Mississippi cannot vote and the Negro in New York believes he has nothing for which to vote.”

This view of both an inclusive and substantive democracy calls for access beyond the mere act of casting a ballot. It envisions informing the content of the ballot and demands access to the halls of power in government. The Voting Rights Act has served both these goals by eliminating direct barriers to the franchise and providing for more equitable redistricting and fairer election systems.

King knew the transformative power of democracy shouldn’t be underlying. In his 1957 speech “Give Us the Ballot — We Will Transform the South,” he paints a picture of the stronger, better and more democratic America that would emerge if diverse voices were included in the electorate and permitted to influence legislation and office-holders.²² He lamented that democracy in the South had stagnated, and insisted that the United States lagged behind European countries in social legislation because of the exclusion of African-Americans.

King envisioned the black vote as a means of advancing democracy in the South. “A new era would open to all Americans,” he said, that would “enlarge democracy for all people, in both the political and social sense.”

The March on Washington and King’s speech were clarion calls that marked an era of dramatic civil rights legislation, altering the nation’s political and social fabric. In the half-century since, we have passed innumerable milestones in the fight for racial equality in nearly every aspect of American society. The United States has witnessed greater inclusion, improved substance and notable transformation both within and as a result of its democracy.

The year after King’s speech, President Lyndon B. Johnson was able to pressure Congress to pass the Civil Rights Act of 1964. He followed this with the Voting Rights Act of 1965. This bill, in particular, was born out of profound violence and deep-seated resistance, which King described as a “century of terror and evasion.”

Not surprisingly, the Voting Rights Act has been amended numerous times over decades to account for the complexity of discriminatory tactics. It now protects not only against intentional discrimination, but also voting laws that *result* in the denial or curtailment of the right to vote on account of race. It also now includes provisions to protect Latinos and other language minorities — a crucial detail given the increasing diversity of our electorate.

The Voting Rights Act has remained a beacon of racial progress in a stormy sea of retrenchment. Several Supreme Court cases, however, have narrowed the legal

²² Martin Luther King Jr., Give Us the Ballot – We Will Transform the South (May 17, 1957).

advances that the civil rights movement had ushered in. A decade after the Act was passed, for example, *Washington v. Davis* ruled that even compelling evidence of a disproportionate racial impact is not sufficient to prove a race discrimination claim.²³ *Regents of University of California v. Bakke* ended the power of affirmative action to remedy past discrimination and set in motion the current evisceration of affirmative action policies.²⁴ Yet the Voting Rights Act remained remarkably resilient.

Beginning in the late the 1990s, however, threats to the Act went from rumored to real, culminating in the *Shelby County* decision. In striking down Section 4 of the Voting Rights Act, which provided a formula for deciding which jurisdictions with histories of virulent voting discrimination required federal oversight of any changes in their election law, the Supreme Court effectively ended automatic federal government pre-clearance in voting.

Indeed, King's view of disenfranchisement as a burden on democracy is lost on today's Supreme Court and lawmakers in far too many states. Already this year, at least 31 states introduced 80 restrictive voting laws.²⁵ By contrast, there have been only ten actual cases nationwide of impersonation fraud — which these new laws claim to prevent — among the more than 120 million voters.²⁶ Yet, this phantom bogeyman of voter fraud is the standard justification for these measures that mean a disproportionate number of minority, young, elderly and poor cannot vote.

Many of these measures originated in the South, with Texas, North Carolina and Florida leading the charge. Most pernicious are laws that require limited forms of voter identification, so older voters without a driver's license or students with only a college identification card cannot go to the polls.²⁷ But other tactics are also used, such as reducing early voting periods, which leads to overcrowding at the polls, and permitting voter roll purges, which has already resulted in the removal of legitimate registered voters.²⁸

These voting restrictions threaten the inclusion achieved through the Voting Rights Act — which is still far short of what could be achieved with automatic voter registration for all eligible citizens. Another key reform would be to abolish felon disenfranchisement, which has barred a generation of young African-Americans convicted under harsh drug laws that our attorney general recently called into question.

²³ 426 U.S. 229 (1976).

²⁴ 438 U.S. 265 (1978).

²⁵ See Brennan Center for Justice at New York University School of Law available at <http://www.brennancenter.org/election-2014>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

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Despite these obstacles, we've made tremendous progress as a nation since the March on Washington. The first black family's residence in the White House for two terms and the electoral gains that enabled President Barack Obama's historic wins are a testament to America's evolution as a society.

Sitting in the Oval Office, however, was never the end goal. King's tripartite dream of a democracy that is inclusive, substantive and transformative will not be fully realized until race and class have no correlation with access to the ballot — and until those two burdens on equality can be meaningfully addressed through the political process.

Commemorating King's speech and the March on Washington is a crucial step in bringing national attention to the aspects of King's dream that remain deferred. To quote the dreamer himself: "This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy."

We have lived with this charge for 50 years. It is now time to make King's deferred dream a reality and prevent the impending nightmare that this new wave of voting restrictions may well produce.