



*SHELBY COUNTY AND THE  
VINDICATION OF MARTIN LUTHER  
KING'S DREAM*

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In a year when we mark the 50th anniversary of Martin Luther King's "I Have a Dream" speech, civil rights leaders and elected officials bemoan what they consider to be a huge setback in the fight for racial equality: the Supreme Court's recent decision in *Shelby County v. Holder*.<sup>1</sup> Rep. John Lewis (D-GA), who shed blood at Selma and helped organize the March on Washington, said at this summer's commemoration that he was "not going to stand by and let the Supreme Court take the right to vote away from us."<sup>2</sup> Earlier, President Obama had intoned that the ruling "upsets decades of

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<sup>1</sup> 133 S. Ct. 2612 (2013).

<sup>2</sup> See Trip Gabriel, *Following King's Path, and Trying to Galvanize a New Generation*, N.Y. TIMES, Aug. 25, 2013, at A18.

well-established practices that help make sure voting is fair.”<sup>3</sup> Hillary Clinton opined that “citizens will be disenfranchised, victimized by the law, instead of served by it.”<sup>4</sup>

You could be forgiven for thinking that *Shelby County* means that racial minorities are now disenfranchised. But all the Court did was ease out an emergency provision enacted in 1965 to provide temporary federal oversight of state elections based on that era’s racial disparities. While politicians and pundits irresponsibly liken the ruling to sanctioning Bull Connor’s dogs and the murder of Medgar Evers, it actually shows the strength of our protections for voting rights.

What the Supreme Court struck down was Section 4(b) of the Voting Rights Act, which is the “coverage formula” used to apply Section 5, a provision requiring certain jurisdictions to “preclear” with the federal government any changes in election regulations – even those as small as moving a polling station from a schoolhouse to a firehouse.<sup>5</sup> The Court found that this formula was unconstitutional because it was based on 40-year-old data, such that the states and localities subject to preclearance no longer corresponded to incidence of racial discrimination in voting.<sup>6</sup> Indeed, black voter registration and turnout is consistently higher in the formerly covered jurisdictions than in the rest of the country.<sup>7</sup>

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<sup>3</sup> See David Jackson, *Obama Disappointed in Court’s Voting Rights Decision*, USA TODAY (June 25, 2013, 1:22 PM), <http://www.usatoday.com/story/theoval/2013/06/25/obama-supreme-court-voting-rights-act/2455939>.

<sup>4</sup> See Mark Z. Barabak, *Hillary Clinton Laments Supreme Court Decision on Voting Rights*, L.A. TIMES (Aug. 12, 2013, 4:37 PM), <http://www.latimes.com/news/politics/la-pn-hillary-clinton-award-20130812,0,6541071.story>.

<sup>5</sup> Pub. L. No. 89-110, § 4(b), 79 Stat. at 438 (1965); Pub. L. No. 89-110, § 5, 79 Stat. at 439 (1965).

<sup>6</sup> *Shelby Cnty.*, 133 S. Ct. at 2630-31.

<sup>7</sup> *Id.* at 2618-19. See also *Shelby Cnty v. Holder*, 679 F.3d 848, 889-91 (D.C. Cir. 2012) (Williams, J., dissenting) (analyzing racial disparities in voter registration and turnout in covered and uncovered jurisdictions in the 2004 election, the last statistics

In other words, just as the Court was correct in 1966 to approve the constitutional deviation that preclearance represents as an “uncommon” remedy to the “exceptional conditions” in the Jim Crow South,<sup>8</sup> it was correct now in restoring the constitutional order. As Justice Clarence Thomas wrote in another voting rights case four years ago, disabling Section 5 “represents a fulfillment of the Fifteenth Amendment’s promise of full enfranchisement and honors the success achieved by the VRA.”<sup>9</sup>

This anniversary year, if any, shouldn’t we be marveling that Mississippi, then “a state sweltering with the heat of oppression,”<sup>10</sup> now has the best ratio of black-voter turnout to white-voter turnout?<sup>11</sup> And that the Magnolia State is one of a number of states where voter-registration rates are higher for blacks than for whites?<sup>12</sup>

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relevant to the 2006 reauthorization of § 5). For the raw data underlying that analysis, see U.S. Census Bureau, *Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004, tbl. 4a* in VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004—DETAILED TABLES, available by clicking the designated link at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html>. For the latest data, from the 2012 election, see U.S. Census Bureau, *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2012, tbl. 4b* in VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2012—DETAILED TABLES, available by clicking the designated link at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html>.

<sup>8</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

<sup>9</sup> *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2527 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>10</sup> Martin Luther King, Jr., *I Have a Dream*, Speech at the March on Washington (Aug. 28, 1963), available at <http://www.archives.gov/press/exhibits/dream-speech.pdf>.

<sup>11</sup> See Ilya Shapiro, *Voting Rights in Massachusetts and Mississippi*, CATO AT LIBERTY (Mar. 6, 2013, 1:55 PM), <http://www.cato.org/blog/voting-rights-massachusetts-mississippi>.

<sup>12</sup> *Id.*

Shouldn't we be celebrating that rather than lynching black people for trying to vote, we elected a black president and confirmed a black attorney general, our nation's chief law enforcement officer? And that these two were preceded by two black secretaries of state, including one who knew the schoolgirls killed in the Birmingham church bombing?<sup>13</sup> And that Section 5 states lead the nation in government officials who are racial minorities, including those elected statewide?<sup>14</sup> Instead, media and political elites focus on a Supreme Court ruling that, far from removing protections for racial minorities' voting rights, declares an end to the state of emergency that existed when those rights were systematically threatened.

The way that Chief Justice John Roberts began his opinion in *Shelby County* shows what was really at stake in the case. Although it doesn't explicitly state what the Court's ultimate ruling is, this preamble provides the key to the case and gives you all you really need to know about the modern Voting Rights Act—save one bit that I'll explain shortly after. To make this easier, I've divided Roberts's introduction into the logical points that he sequentially makes and then paraphrased them.

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<sup>13</sup> See, e.g., Patricia Sullivan, *Condoleezza Rice's Memoir Focuses on Her Family*, HOUSTON CHRONICLE, Oct. 31, 2010, at 17.

<sup>14</sup> For example, Thurbert Baker served as attorney general of Georgia from 1997 to 2011, having initially been appointed by Gov. Zell Miller and then winning three elections; Wallace Jefferson became the first black justice (2001) and chief justice (2004) of the Texas Supreme Court through appointments by Gov. Rick Perry, and was elected to a full term as chief justice in 2008. In the U.S. Senate, meanwhile, Ted Cruz and Marco Rubio were elected to represent Texas and Florida, respectively, and there is little doubt that appointed South Carolina senator Tim Scott will win his special election in 2014.

**POINT 1:**

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty.<sup>15</sup>

*Translation:* The Voting Rights Act provisions at issue here are really, really unusual, outside the normal constitutional framework, and require some sort of extraordinary factual basis to support their constitutionality.

**POINT 2:**

This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966). As we explained in upholding the law, “exceptional conditions can justify legislative measures not otherwise appropriate.” *Id.*, at 334.<sup>16</sup>

*Translation:* The really bad things going on in the Jim Crow South justified the Sections 4-5 constitutional deviation.

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<sup>15</sup> *Shelby Cnty*, 133 S. Ct. at 2618.

<sup>16</sup> *Id.*

**POINT 3:**

Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. *See* Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031.<sup>17</sup>

*Translation:* These were supposed to be temporary measures, so it's notable that they are still in effect nearly 50 years later and are due to continue for nearly 30 more years; Jim Crow must still be roaming the land.

**POINT 4:**

There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, “the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide.” *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 203-204(2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. *See* Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).<sup>18</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2618-19.

*Translation:* Actually, no, and indeed there doesn't seem to be any evidence that racial minorities, or at least blacks, are systematically disadvantaged versus whites in terms of the right to vote—certainly not in Section 5-covered jurisdictions.

**POINT 5:**

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin*, 557 U. S., at 203.<sup>19</sup>

*Translation:* Racial discrimination in voting hasn't been fully eradicated, of course, but does it really still exist in the same widespread, systemic way such that all those extra-constitutional measures—and the burdens they put on our federal structure—are still justified? After all, we've said repeatedly that remedies need to match wrongs.

After reading and digesting that framing, *Shelby County* becomes rather easy to understand: the Court must restore the constitutional order—the *status quo* that existed before the temporary Sections 4 and 5—because there's no longer systemic racial disenfranchisement. At the very least, there's no correlation between the coverage formula and racial discrimination in voting.<sup>20</sup>

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<sup>19</sup> *Id.* at 2619.

<sup>20</sup> Justice Ginsburg's dissent goes much more to the question of who gets to decide whether the facts on the ground justify continued application of Section 5, Congress or the courts. See *Shelby County*, 133 S. Ct. at 2632. (Ginsburg, J., dissenting). As a

In other words, the following questions are *completely irrelevant* to this case: Does racial discrimination still exist? Does racial discrimination in voting still exist? Is racial discrimination in voting more common in Section 5-covered jurisdictions than elsewhere?

Even if the answer to all those questions is yes – which it is to the first two but not the third – that’s not enough to uphold the Sections 4-5 preclearance regime. Instead, the only question that matters is whether the “exceptional conditions” and “unique circumstances” of the Jim Crow South still exist such that an “uncommon exercise of congressional power” is still constitutionally justified – to again quote the 1966 ruling that approved Section 5 as an emergency measure.<sup>21</sup>

The answer to that question must be no; to hold otherwise is to insult those who fought for civil rights against fire hoses, dogs, Klansmen, and segregation laws. At the very least, political conditions have changed such that the 40-year-old voting data upon which Section 4(b) relied now subjects a seemingly random collection of states and localities to onerous burdens and unusual federal oversight. As Chief Justice Roberts wrote for the Court the last time it looked at this law, the “historic accomplishments of the Voting Rights Act are undeniable,” but the modern uses of Section 5 “raise[] serious constitutional concerns.”<sup>22</sup>

Yet Congress renewed Section 5 in 2006 without updating the Section 4 formula, and it ignored the Court’s warning that “the Act imposes current burdens and must be justified by current needs.”<sup>23</sup>

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proponent of judicial review and engagement, I see the role of judges as saying what the law is rather than avoiding such rulings – but that debate is beyond the scope of this essay. See generally Clark Neily, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT* (2013).

<sup>21</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

<sup>22</sup> *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2505 (2009).

<sup>23</sup> *Id.* at 2512.

Accordingly, it should be no surprise that the chief justice, again writing for the Court, noted that “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”<sup>24</sup>

For example, on the measures originally used to determine which jurisdictions should be covered by Section 5—racial disparities in voting and voter registration—Massachusetts is the worst offender, while Mississippi is our national model.<sup>25</sup> As Chief Justice Roberts explained in *Shelby County*, even if one views the thousands of pages of congressional record related to the 2006 reauthorization in their best light, “no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.”<sup>26</sup>

Moreover—and this was the extra bit I alluded to earlier—it’s Section 2, the nationwide ban on racial discrimination in voting, that is the core of the Voting Rights Act, and it remains untouched.<sup>27</sup> Section 2 provides for both federal prosecution and private lawsuits, and allows prevailing parties to be reimbursed attorney and expert fees. As I described in the run-up to oral argument in *Shelby County*, there’s no indication that Section 2 is inadequate.<sup>28</sup>

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<sup>24</sup> *Shelby Cnty*, 133 S. Ct. at 2618.

<sup>25</sup> Oral Arg. Tr. at 32, *Shelby Cnty v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96). See also Shapiro, *Voting Rights in Massachusetts and Mississippi*, *supra* note 11. In the interest of full disclosure, I should note that I clerked for a Fifth Circuit judge in Jackson, Mississippi, and am a Boston Red Sox fan.

<sup>26</sup> *Shelby Cnty*, 133 S. Ct. at 2629 (quoting *Katzenbach*, 383 U.S. at 308, 315, 331; *Nw. Austin Mun. Utility Dist.*, 557 U.S. at 201).

<sup>27</sup> Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

<sup>28</sup> Ilya Shapiro, *Shelby County v. Holder: Section 5 of the Voting Rights Act Conflicts with Section 2, Which Provides the Proper Remedy for Racial Discrimination in Voting*, SCOTUSBLOG (Feb. 14, 2013, 12:20 PM), <http://www.scotusblog.com/2013/>

Sections 4 and 5, meanwhile, were supposed to supplement Section 2—and they succeeded brilliantly, overcoming “the conditions that originally justified these measures.”<sup>29</sup> Of course, the Court really should’ve gone further, as Justice Thomas pointed out in his concurring opinion.<sup>30</sup> The Court’s explanation of Section 4(b)’s anachronism applies equally to Section 5.

In practice, however, Congress will be hard-pressed to enact any new coverage formula, not simply due to current political realities, but because the “extraordinary problem” —the “insidious and pervasive evil” of “grandfather clauses, property qualifications, ‘good character’ tests,” and other “discriminatory devices”<sup>31</sup>—that justified a departure from the normal constitutional order is, thankfully, gone. Bringing us full circle, then, Chief Justice Roberts concluded his opinion on that point: “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.”<sup>32</sup>

*Shelby County* thus underlines, belatedly, that Jim Crow is dead, and that American election law is ready to return to normalcy.<sup>33</sup> Yet our political leaders are acting as if the last 50 years never happened. They’ve declared that *Shelby County* reverses the gains that have been made and enables “voter suppression” when actually it’s

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<sup>29</sup> *Shelby Cnty.*, 133 S. Ct. at 2618.

<sup>30</sup> *Id.* at 2631 (Thomas, J., concurring).

<sup>31</sup> *Katzenbach*, 383 U.S. at 309-14 (using these phrases to describe the Jim Crow South’s evasion of laws and judicial decrees protecting voting rights).

<sup>32</sup> *Shelby Cnty.*, 133 S. Ct. at 2631.

<sup>33</sup> See generally Hans A. von Spakovsky, *The Voting Rights Act after the Supreme Court’s Decision in Shelby County*, Testimony before the U.S. House of Reps. Comm. on the Judiciary, Subcomm. on the Constitution, July 18, 2013, available at [http://judiciary.house.gov/hearings/113th/hear\\_07182013/Hans%20von%20Spakovsk%207-18-13.pdf](http://judiciary.house.gov/hearings/113th/hear_07182013/Hans%20von%20Spakovsk%207-18-13.pdf).

a belated recognition that times have changed and that widespread, official racial discrimination in voting has disappeared. Attorney General Eric Holder has vowed to use “every tool” at his disposal to continue federal control, including joining a lawsuit against Texas’s redistricting plan and filing his own against Texas’s voter-identification laws.<sup>34</sup>

But the Justice Department’s lawsuits—against both Texas and North Carolina’s recent reforms<sup>35</sup>—prove the Supreme Court’s wisdom. They show that plenty of laws exist to combat racial discrimination in voting, and it’s the effectiveness of those laws that have obviated Section 5 (and its coverage formula).

For example, Section 2 of the Voting Rights Act grants both private parties and the federal government the right to go after state practices that constitute “a denial or abridgment of voting rights.”<sup>36</sup> It empowers citizens to challenge specific instances of discrimination and allows them to recover from defendants the costs of their lawsuits.

Section 3, meanwhile, gives courts the power to order federal supervision—including Section 5-style preclearance—over jurisdictions that have engaged in deliberate discrimination that violates voting rights and are likely to continue this conduct in the absence of that extreme remedy.<sup>37</sup>

The only difference from the Section 5 regime is that the federal government will now actually have to *prove* the existence of systemic discrimination. If it can meet that standard, it will undermine the

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<sup>34</sup> See Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES, July 26, 2013, at A1.

<sup>35</sup> See Josh Gerstein, *Justice Department Challenges North Carolina Voter ID Law*, POLITICO, (Sept. 30, 2013, 12:02 AM), <http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html>.

<sup>36</sup> Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

<sup>37</sup> Pub. L. No. 89-110, § 3, 79 Stat. 437 (1965).

administration's claim that the Supreme Court made it impossible to enforce voting rights. If it can't, isn't that a good thing?<sup>38</sup>

Of course, the attorney general and his allies believe that voter-identification laws (and related ballot-integrity tweaks) are themselves evidence of discriminatory conduct. But the Supreme Court, in an opinion by Justice John Paul Stevens – not exactly a right-wing hack – approved Indiana's voter-ID law just five years ago.<sup>39</sup> And there's no evidence that such laws keep minorities from voting; indeed, a *Washington Post* poll last year showed that 65 percent of blacks and 64 percent of Latinos support the measures.<sup>40</sup> When more than 30 states – plus “progressive” places like Canada, Germany, Holland, Sweden, and Switzerland – have such commonsense requirements, surely racism isn't the motivation.

In sum, while Justice Ginsburg compared getting rid of Section 5 to “throwing away your umbrella in a rainstorm because you are not getting wet,”<sup>41</sup> it's actually more like stopping chemotherapy when the cancer is eradicated.<sup>42</sup> There's more to be done to achieve

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<sup>38</sup> Indeed, it's axiomatic that plaintiffs in civil rights cases have to actually prove discrimination. Eric Holder doesn't seem to have a problem with the antidiscrimination provisions in our education, employment, housing, lending, and public accommodations laws, for example, even if one can quibble with how he uses those laws to go after disparate “impact” not just disparate treatment. See generally Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection, 2008-2009* CATO SUP. CT. REV. 53 (2009). That is just the way law works in the United States: having to prove liability (for racial discrimination or otherwise) in civil suits is equivalent to having to prove guilt in criminal prosecutions – and the evidentiary standard is easier to meet in the former.

<sup>39</sup> *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

<sup>40</sup> *Voter Identification Laws – Washington Post Poll July 7-9, 2012*, published in *Fear of Voter Suppression High, Fear of Voter Fraud Higher*, WASH. POST., Aug. 13, 2012, available at [http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/12/National-Politics/Polling/release\\_116.xml](http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/12/National-Politics/Polling/release_116.xml).

<sup>41</sup> *Shelby Cnty.*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

<sup>42</sup> For a longer treatment of *Shelby County* and what the case means for the future of the Voting Rights Act, see William S. Consovoy & Thomas R. McCarthy, *Shelby*

racial harmony in America, to be sure, but the best way to honor the heroes of 1963 is to build on their triumphs rather than pretend that we still live in their time.