

TOURO LAW JOURNAL OF RACE, GENDER, & ETHNICITY &
BERKELEY JOURNAL OF AFRICA-AMERICA LAW & POLICY

**ONE STEP FORWARD, TWO STEPS BACKWARD: HOW THE
SUPREME COURT'S DECISION IN *SHELBY COUNTY V. HOLDER*
EVISCERATED THE VOTING RIGHTS ACT AND WHAT CIVIL
RIGHTS ADVOCATES SHOULD DO ABOUT IT**

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The Voting Rights Act,¹ enacted in 1965 and renewed as late as 2006 after several previous renewals, prohibits state governmental practices that impermissibly interfere with protected classes of individuals' ability to vote based on race and color.²

In the name of federalism, the Supreme Court in *Shelby County v. Holder*³ declared Section 4 of the VRA unconstitutional. Section 4, containing the "preclearance coverage" formula, was applied to determine which states and political subdivisions had to have changes in their voting laws pre-approved by the federal government. The section provided, in pertinent part:

To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such

¹ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973aa-6 (2006)).

² *Id.*

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

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subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section.⁴

In part, the Supreme Court's rationale in *Shelby County*⁵ was grounded on the theory that the covered jurisdictions had ceased engaging in practices that violated the voting rights of people of color, ignoring the fact that the reason these jurisdictions ceased engaging in these practices was the VRA and the Justice Department's oversight. According to the majority opinion written by Chief Justice Roberts,

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.⁶

The majority took Congress to task for failing to incorporate a method of determining if a state was currently discriminating against voters of color, instead of relying on historic data when renewing the VRA. However, as Justice Ginsburg wrote in her dissent, "The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. . . . The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed." Justice Ginsburg's opinion further notes that the

⁴ Suspension of the use of tests or devices in determining eligibility to vote, 42 U.S.C. §1973(b).

⁵ *Shelby Cnty v. Holder*, 133 S.Ct. 2612 (2013).

⁶ *Id.* at 2618-19.

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majority used a stricter basis than the “rational basis test” to reach its conclusions that Section 4 was unconstitutional without announcing the change.

These jurisdictions have quickly returned to practices that make it more difficult for certain groups to vote. For example, Texas and North Carolina took immediate steps to enact laws requiring voters to show particular forms of identification in order to vote. Requiring voter identification is a historic method of preventing people of color, the poor, students, and the elderly from voting.⁸ One of the less violent ways to engage in voter suppression was to require identification. Many people in my generation remember the stories of our parents and grandparents discussing the humiliation they suffered when they went to the polls in the South during the early years of the Civil Rights era. Poll watchers laughed and sneered when they could not produce “proper” identification.

“Just two hours after the Supreme Court [issued its opinion that] reasoned that discrimination is not rampant enough in Southern states to warrant restrictions under the Voting Rights Act, Texas advanc[ed] a voter ID law and a redistricting map blocked last year for discriminating against black and Latino residents.”⁹ The Justice Department had previously prevented Texas from implementing these laws under Section 5.¹⁰ In North Carolina, a bill requiring voters to present one of several forms of state-issued photo ID starting in 2016 had cleared the state House prior to the *Shelby County*, but it had been sitting in the state Senate until the *Shelby County* decision was issued.¹¹

Studies have shown that many people do not have state issued identification,¹² including the aforementioned groups. One challenge facing civil rights groups attempting to register voters so they can exercise their franchise is the Supreme Court’s decision in *Crawford v. Marion County Election Board*, which upheld the use of voter identification laws to prevent voter fraud, despite the burden it places on certain segments of the voting population and despite the lack of evidence of voter fraud in Indiana.¹³ The majority opinion does, however, leave room for a challenge by voters who could provide evidence that their rights had been impaired.¹⁴ Civil rights groups should begin to compile this evidence if they have

⁹ Aviva Shen, *Two Hours After The Supreme Court Guttled The Voting Rights Act, Texas AG Suppresses Minority Voters*, ThinkProgress.org (June 25, 2013), <http://thinkprogress.org/justice/2013/06/25/2212281/two-hours-after-the-supreme-court-guttled-the-voting-rights-act-texas-ag-suppresses-minority-voters/>.

¹⁰*Id.*

¹¹ Mathew Burns, *NC Vote ID Bill Moving Ahead With Supreme Court Ruling*, Wral.com (June 25, 2013), <http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/>.

¹² See, e.g., *Crawford v. Marion County Election Board*, 553 U.S. 181, 232, (2008). (Souter, J., dissenting).

¹³ See, e.g., *id.* at 198-99.

¹⁴*Id.*

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not begun to do so already.

In some cases, states implemented such voter suppression practices as early as 2011 according to the ACLU:

Over 30 states considered laws that would require voters to present government-issued photo ID in order to vote. Studies suggest that up to 11 percent of American citizens lack such ID, and would be required to navigate the administrative burdens to obtain it or forego the right to vote entirely.

Three additional states passed laws to require documentary proof of citizenship in order to register to vote, though as many as 7 percent of American citizens do not have such proof. Seven states shortened early voting time frames, even though over 30 percent of all votes cast in the 2008 general election were cast before Election Day. Two state legislatures voted to repeal Election Day registration laws, though Election Day registration increases voter turnout by 10-12 percent.¹⁵

Attorney General Eric Holder has publicly reaffirmed “his commitment to protecting people of color against elections discrimination and said not to view the Supreme Court’s weakening of the Voting Rights Act ‘as a defeat for the cause of voting rights, but as an opportunity to ensure that modern protections are adequate to the challenges of the 21st century.’”¹⁶ With the current status of the VRA, it will be difficult, however, for the Justice Department to prevent suppression of the vote in communities of color. Civil rights groups will have to be proactive in ensuring that their constituents can satisfy the new requirements. This will not be easy, however. Because of past discrimination and segregation many people of color do not have birth certificates, the most common document required to get identification cards in many states. Elderly African Americans did not have access to hospitals when they were born and the record keeping in segregated areas left much to be desired. If there are other records that can be used to get birth certificates or used in lieu of birth certificates in the individual states, such as birth records maintained in family bibles, census records, doctor or midwife files, etc., civil rights organizations should conduct voter education programs to provide people of color with this information. Also, these groups should arrange transportation to get their constituents to the designated state office to get the requisite state identification. Although some states

¹⁵DEFENDING THE FREEDOM TO VOTE, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/fighting-voter-suppression> (last visited Sep.27, 2013).

¹⁶ Brentin Mock, HIGHLIGHTS FROM CONGRESSIONAL BLACK CAUCUS LEGISLATIVE CONFERENCE, COLORLINES.COM, http://colorlines.com/archives/2013/09/highlights_from_congressional_black_caucus_legislative_conference.html (last visited Sep.27, 2013) (citation omitted).

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charge for these identification cards, some states issue them for free. Texas issues non-drivers' identification cards; although a host of documents can be used, it's not likely that the very poor or elderly would have them. The list includes:

(1) Primary identity documents include:

Texas driver license or Texas identification card not expired more than 2 years

Proof of citizenship will be required if not previously established

Unexpired U.S. passport book or card

U.S. Certificate of Citizenship or Certificate of Naturalization (N-560, N-561,

N-645, N-550, N-55G, N-570 or N-578)

Unexpired Department of Homeland Security or U.S. Citizenship and Immigration Services document with verifiable data and identifiable photo, such as one of the following:

U.S. Citizen Identification Card (I-179 or I-197)

Permanent Resident Card (I-551)

Foreign passport with attached temporary I-551 (immigrant visa endorsed with ADIT stamp)

Temporary Resident Identification Card (I-688)

Employment Authorization Card (I-766)

U.S. Travel Document (I-327 or I-571)

Advance Parole Document (I-512 or I-512L)

I-94 stamped Sec. 208 Asylee with photo

I-94 stamped Sec. 207 Refugee with photo

Refugee Travel Letter with photo, stamped by Customs and Border Protection

American Indian Card (I-872)

Northern Mariana card (I-873)

Unexpired U.S. military ID card for active duty, reserve or retired personnel

with identifiable photo

Foreign passport with attached visa and Form I-94

Individuals who do not have a primary document can present two secondary documents. No other documents are required to verify identity if two secondary documents are provided.

(2) Secondary identity documents include:

Original or certified copy of a birth certificate issued by a State Bureau of Vital Statistics or equivalent agency from a U.S. state, U.S. territory, the District of Columbia or a Canadian province

For U.S. citizens born abroad—Certificate of Report of Birth (DS-1350 or FS-545) or Consular Report of Birth (FS-240) issued by the U.S.

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Department of State

Original or certified copy of a court order with name and date of birth indicating a name and/or gender change from a U.S. state, U.S. territory, the District of Columbia or a Canadian province Individuals who do not have a primary document or two secondary documents can provide one secondary document (from the list above) and two supporting documents.

(3) Supporting identity documents include:

Social security card

Form W-2 or 1099

Driver license or ID card issued by another U.S. state, U.S. territory, the District of Columbia or Canadian province (unexpired or expired less than two years)*

Texas driver license or ID card that has been expired more than two years

Temporary receipt for a Texas driver license or ID card

School records* (e.g., report cards, photo ID cards)

Military records (e.g., Form DD-214)

Unexpired U.S. military dependent identification card

Original or certified copy of marriage license or divorce decree (if the document is not in English, a certified translation must accompany it)

Voter registration card*

Pilot license*

Concealed handgun license*

Professional license issued by a Texas state agency

ID card issued by a government agency*

Consular document issued by a state or national government

Texas Inmate ID card or similar form of ID issued by Texas Department of Criminal Justice

Texas Department of Criminal Justice parole or mandatory release certificate

Federal inmate identification card

Federal parole or release certificate

Medicare or Medicaid card

Selective Service card

Immunization records*

Tribal membership card from federally-recognized tribe

Certificate of Degree of Indian Blood

Unexpired foreign passport

Unexpired insurance policy valid for the past two years (e.g., auto, home or life insurance)

Current Texas vehicle registration or title

Current Texas boat registration or title

Veteran's Identification Card from the U.S. Department of Veterans Affairs

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Hospital-issued birth record*

NUMIDENT record from the Social Security Administration

“NUMI-lite” letter from the Social Security Administration

*The document must be issued by an institution, entity or government from a U.S. state, a U.S. territory, the District of Columbia or a Canadian province.¹⁷

North Carolina accepts similar documents as proof of identity.¹⁸

Civil rights organizations should also make a push to register people who, against all odds, have the requisite documentation. As you can see if the above list, report cards and school identification can be used as “supporting” documentation. Those organizations that conduct voter registration drives on college campuses can reach out to students as they are more likely to have a birth certificate and a school record or two.

Of course, Congress can rectify the problems identified by the majority in *Shelby County* and amend the VRA. Given Congress’ current dysfunctional state, it is difficult to imagine any new legislation under after the 2014 midterm elections. On the other hand, Senator Patrick Leahy of Vermont, chairman of the Senate Judiciary Committee, recently expressed the idea that the VRA could be amended before the end of 2013:

We must restore the vital protections that were weakened by the Supreme Court’s ruling. We must provide additional remedies for states and counties anywhere in the nation that not only have a history of discriminating against their voters but continue to do so. We must extend the reach of these protections to states that commit serious voting rights violations in the future. We must amend the existing provisions of the Act to make those protections more effective. And we must provide greater transparency for changes to voting procedures so that voters are made aware of these changes.¹⁹

Civil rights groups immediately should begin to contact the Congressional delegation from their state and put pressure on them to amend the VRA. If members of their state delegations do not support the VRA, more progressive individuals should be drafted to replace their current members of Congress. And, last, but not least, civil rights groups should begin to prepare databases cataloging any attempts

¹⁷IDENTIFICATION REQUIREMENTS, TEX. DEP’T OF PUB. SAFETY (2011), *available at* <http://www.txdps.state.tx.us/driverlicense/identificationrequirements.htm>.

¹⁸Acceptable Requirements, North Carolina Division of Motor Vehicle (2012), *available at* <http://www.ncdot.gov/dmv/examples/>.

¹⁹Brentin Mock, Congress May Fix The Voting Rights Act This Year. Here’s Why, http://colorlines.com/archives/2013/09/congress_may_fix_the_voting_rights_act_this_year_heres_why.html (last visited Sep. -27, 2013) (citation omitted).

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at voter suppression in their states in preparation for litigation.

These databases show voter suppression tactics that are currently legal²⁰; for example, members of the Republican Party have called people they believed were Democrats to tell them there was no need to vote because a certain candidate has already won, Election Day was postponed, or otherwise trying to ensure a low turnout in communities of color.²¹ This strategy is not illegal but it should be.

In summary, civil rights advocates have to get creative to fight State voter suppression laws in the face of renewed attacks on the rights of people of color.

²⁰See, e.g., *supra* note 17.

²¹See, e.g., Sherrilyn A. Ifill, Black Voters Told, "Relax, Don't Vote", TheRoot.com, http://www.theroot.com/articles/politics/2011/12/blackvoter_suppression_misleading_robotcalls_is_an_example.html (last visited Nov. 24, 2013) (Campaign manager of former Republican governor of Maryland guilty of election fraud based on robocalls he authorized on behalf of his candidate).