

## *Shelby* and the Sisyphean Struggle for Black Enfranchisement

By Rick Valelly

In the blockbuster of 2013, *Shelby v. Holder*, the Supreme Court's conservative majority washed its hands of a half century of voting rights jurisprudence. Previously, the Court often revised parts of the statute, but always with the premise that the statute's building blocks are constitutional. Actions by the Court in turn would set the agenda of Congress. Congress would respond to judicial decisions when it brought the Act up for renewal (in 1970, 1975, 1982, and 2006.) On those occasions, Congress strengthened or ratified those judicial alterations that improved the Act, and Congress overrode judicial adjustments that Congress saw as weakening the Act. Either way, Congress and the Court collaboratively perpetuated the Act with a minimum of inter-branch conflict. Neither side fundamentally re-thought or rejected the statute. The Court accorded deference to Congress because the Constitution plainly states that Congress enforces the 14<sup>th</sup> and 15<sup>th</sup> Amendments to the Constitution, which are the foundation of national voting rights law. But that consensus and collaboration are now gone.

The Court's conservative majority has thus changed the agendas and political tasks of other players with a stake in voting rights. They include liberal voting rights lawyers affiliated with such organizations as the NAACP-Legal Defense Fund and the Lawyers' Committee for Civil Rights. But the most consequential player is the Democratic party - the party that largely developed the Voting

Rights Act. It now faces the problem of how best to make good on its 2012 party platform stance: “We believe the right to vote and to have your vote counted is an essential American freedom...Democrats have a proud history of standing up for the right to vote.”<sup>1</sup> The problem is that a major (and unacknowledged) *partner* in establishing and perpetuating the Voting Rights Act – the Republican party -- is no longer available.

Republicans hardly oppose minority voting rights in principle. But they are now committed to screening the eligible electorate through tests and devices that supposedly prevent in-person voter fraud in registration and voting. These go under the catchall term of “voter ID” legislation. Republicans appear to believe that registration and voting are vulnerable to fraudulent management of voter registration drives by groups that affiliate with Democrats, such as the now defunct advocacy group ACORN (Association of Community Organizations for Reform Now.)

During its first term, the Obama Administration correctly insisted on federal scrutiny of voter ID in states that are covered by the Voting Rights Act, such as South Carolina and Texas. Under the language of the statute, “tests and devices” that affect registration and voting cannot go into effect if there is credible evidence that they may impair the right to vote. But that enforcement effort by the Obama Administration had a political cost. It stripped the VRA of bipartisan support. Suddenly brought to bear against voter ID, the VRA metamorphosed – or so it seemed to Republicans -- into a partisan instrument.

Republicans consequently have little appetite for joining with Democrats to find some way to overrule the Supreme Court's *Shelby* decision. In 2006, both political parties joined forces to renew the VRA. Republicans and Democrats agreed so much, in fact, that they overruled two previous Court decisions that had narrowed how the VRA regulated the drawing of voter districts.

Now most congressional Republicans – and certainly all Southern Republicans -- are too invested in their party's vigorous effort to reduce the risk of voter fraud in American elections. Although in-person voter fraud hardly exists in the United States, Republicans insist that the electoral process must not have any hint of such fraud. Often pointing to opinion surveys that back them, they hold that the public wants voter ID because citizens want to be absolutely certain of the integrity of the electoral process.

As the 2012 Republican platform stated, "Honest elections are the foundation of representative government... we applaud legislation to require photo identification for voting and to prevent election fraud, particularly with regard to registration and absentee ballots. We support State laws that require proof of citizenship at the time of voter registration to protect our electoral system against a significant and growing form of voter fraud. Every time that a fraudulent vote is cast, it effectively cancels out a vote of a legitimate voter. Voter fraud is political poison. It strikes at the heart of representative government. We call on every citizen, elected official, and member of the judiciary to preserve the integrity of the vote. We call for vigorous prosecution of voter fraud at the State

and federal level. To do less disenfranchises present and future generations.”<sup>2</sup>

Democrats, for their part, regard voter ID as transparently intended to help Republicans win elections by selectively disenfranchising voters that are likely to vote Democratic. Many voters currently lack the resources to meet the new requirements and procedures that are being rolled out in voter ID states, and in the more restrictive states – such as North Carolina and Texas – certain groups of voters, such as college students and African-Americans -- will find it impossible to register and to vote as they done previously. They may well be able to adjust their plans or to acquire the documentation that they need. But in the meantime they are being asked to bear the costs of making the electoral process as “pure” as possible – and that strikes Democrats as outrageous.<sup>3</sup> Thus the voting rights section of the 2012 presidential platform further stated, “During the Obama administration, the Justice Department has initiated careful, thorough, and independent reviews of proposed voting changes, and it has prevented states from implementing voter identification laws that would be harmful to minority voters. Democrats know that voter identification laws can disproportionately burden young voters, people of color, low-income families, people with disabilities, and the elderly, and we refuse to allow the use of political pretexts to disenfranchise American citizens.”

### How The Stalemate Highlights American Exceptionalism

In short, *Shelby* and its aftermath compose a complex standoff. The Supreme Court elevated the constitutional priority of protecting federalism -- and it simultaneously demoted both the priority of voting rights protection and the scope of congressional power to implement the 14<sup>th</sup> and 15<sup>th</sup> Amendments. The Court effectively rebuked Congress for not knowing how to do its job under the enforcement provisions of the 14<sup>th</sup> and 15<sup>th</sup> Amendments to the Constitution. The Court could not have broken off its long-standing partnership with Congress to make the Voting Rights Act work in a more spectacular way.

But new disagreements between the political parties about election administration and voter qualifications clearly signify that bipartisan cooperation to override the Court – which had always been available earlier and as recently as 2006 – is not in the cards. Voter ID and the VRA have become intertwined. Meanwhile, a host of state legislative changes have generated considerable uncertainty about whether voters in previously covered states will have their access to the ballot impaired in 2014 and 2016.

In comparative perspective, this is all quite astonishing. The United States pioneered mass suffrage in the 1820s, foreshadowing similar change in other regimes in both the Old World and the New. The prospect of peering into the future brought Tocqueville to America, and led to one of his masterpieces, Democracy in America.

But the United States also pioneered voting rights *politics* – that is, a politics of

picking winners and losers in who has access to the ballot box. The 1820s saw the simultaneous disfranchisement of both women and free African-Americans even as state legislatures engineered the enfranchisement of property less adult white males. Nearly two centuries later Americans are still divided by voting rights politics.

Indeed, the U.S. might be considered an unusual case: in cross-national perspective it is *both an early and a late developer* in universal voting rights. The road that led to *Shelby* – and the consequences that the decision has already had – underscore this central truth about American voting rights politics. The United States is still struggling with universal suffrage.

“Voting wars” – to use Rick Hasen’s superb term – are not unique to the United States.<sup>4</sup> But our current “voting war” is remarkably robust. And the risk that it poses to African-Americans’ and other minorities’ voting rights, while hardly as great as in the past, is nonetheless non-trivial. Given the length of the struggle for black enfranchisement, and the fact that the struggle has left its imprint on the Constitution in three places – the 14<sup>th</sup>, 15<sup>th</sup>, and the 24<sup>th</sup> Amendments – this continued uncertainty in the security of the black vote is self-evidently remarkable.

In the rest of this essay, I sketch the evolution of the Voting Rights Act with particular attention to how it became vulnerable to a decision like *Shelby*. Then I describe the majority opinion in the case, drawing out its very strong emphases on the requirements of federalism and its depiction of the 2006 renewal as

irrational. The Court's *minority* opinion, which Justice Ruth Bader Ginsburg wrote, warned that the majority was making a mistake in picturing Congress as botching voting rights enforcement. Congress knew what it was doing, and the Court did not. For supporters of the voting rights struggle, Ginsburg's suggestion appears to have been vindicated by ensuing events in previously covered states. Controversial and widely publicized voter ID responses to the decision have emerged in North Carolina and Texas.

I conclude with reflections on how *Shelby* illuminates the development of American democracy. Whether we need to seriously doubt American democracy's development clearly seems alarmist. But American political history certainly suggests that *some* concern about what may happen next to the democratic gains brought about by the Voting Rights Act is not misplaced. Given everything that has happened with the struggle for black enfranchisement that fact is, not to put too fine a point on it, simply astounding.

### **The Design and Evolution of the Voting Rights Act**

When Congress enacted the VRA in 1965 it implemented two parts of the Constitution. It enforced the 15<sup>th</sup> Amendment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." The VRA also enforced the first section of the 14<sup>th</sup> Amendment, which forbids

states from denying citizens “the equal protection of the laws.” This prohibition has come to mean that legislation infected with animus against a minority is impermissible. Evidence of such animus can consist of either invidious statements of purpose by legislators, or by administrators who apply a law, or a clear showing that the law or rule systematically disadvantage minorities. With respect to election law, the bottom line is that state and local governments cannot impair, much less block, the right to vote of minorities.

But here is where policy design was crucial. Constitutional principles are one thing, giving them teeth is another. In 1965 Congress wanted to devise a statute that would work immediately in stopping Southern state and local governments from discriminating against black voters – and that would also *keep* working regardless of how these governments tried to get around the Act. The 1957 and 1960 Civil Rights Acts, which were voting rights statutes, had turned out to be easy for Southern state and local governments to get around because the enforcement of those statutes fell to government lawyers. They went to the federal courts to block discriminatory behavior by local elections officials. Government lawyers tried to prove that local registrars in a Deep South state deliberately discriminated against black voters. They might succeed in persuading a judge – they might. But most of the judges had been selected by southern Democratic U.S. senators, thanks to senatorial courtesy in federal judicial appointments, and thus were generally hostile to the government lawyers. And even if the lawyers from Washington won in a local federal district



court or on appeal to the circuit court for the South, the Fifth Circuit, local registrars would then simply do something new. To give a hypothetical scenario, a county registrar might add hours of operation, in response to a judicial order. But simultaneously he might *also* require all voters on the county rolls to prove that they actually lived where they said they lived, and in the meantime he would purge the voting rolls and require re-registration, allowing him to challenge black voters as they tried to re-register.

So Congress needed to figure out some system for stopping such constant moving of the goal posts. What it decided to do was to create an *administrative* system run out of the Department of Justice (DOJ) -- and to require jurisdictions that had a history of discriminating against minorities to send any proposed changes to Washington or the federal district court for the District of Columbia -- either one would do -- for what came to be called *pre-clearance*. This is the scheme established by Section 5 of the VRA. It is known as "Section 5 pre-clearance."

Under pre-clearance, proposed changes to the rules would be sent to Washington, and the Department of the Justice or the Washington court would have a certain amount of time to review the change sent to it. If there was something objectionable about the change then DOJ or the court would ask for more information about it. If it was quite clear that a discriminatory scheme was afoot then DOJ or the court would block the change and put the burden on the jurisdiction of explaining to a 3-judge federal court what its intentions were, with

the Justice Department having the option, if it lost at that level, of immediate review by the Supreme Court.

Meanwhile, the United States directly registered thousands of black voters in 1965 and 1966 and it sent elections observers to watch elections. Right away there was considerable change on the ground -- and the surge in black voter registration was permanent because states and local governments no longer could turn to clever new rules that would roll back the registration gains.

This system of supervising most of the South was initially meant to be *temporary* – the plan would work, it was thought, in five years. But it was renewed in 1970 and again in 1975 – and then again in 1982. During such renewals two new things happened. One was that Native-American and Latino voters were brought into the preclearance system, so parts of South Dakota and all of Texas, for example, got added to the list of covered jurisdictions, as did New York City.

Also in 1982 Congress said that voters in the jurisdictions that were covered by the Act were entitled to have elected officials that they preferred. It did so by amending and expanding Section 2: “A violation...is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by...this section in that its members have less opportunity than other members of the electorate to participate in the political process *and to elect representatives of their choice.*”

[emphasis added] The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”<sup>5</sup> This change was meant to curb what was called “vote dilution.” A local jurisdiction in the South might be majority white but also have a very large black minority population -- and thus very likely have a long history of racial tension. If all of the seats for its representative bodies were elected “at large” and if whites voted in a bloc, then the school board, county commission, or city council would always be dominated by whites. But the Act now said that minority voters were entitled to remedies for such vote dilution.

Section 2, which is permanent, interacted with Section 5 preclearance. Via the pre-clearance process, many covered jurisdictions changed over to elections by wards or precincts. Additionally, state legislative and congressional districts had to be drawn by state legislatures in ways that gave minority voters genuine influence in state-legislative and U.S. House elections. Vote dilution in these elections had often been accomplished by such devices as “cracking” and “packing:” that is, creating districts that allocated small fractions of black voters among many districts (cracking) or stuffing black voters into districts (packing), thereby ensuring at most token representation in the state legislature or the U.S. House. These practices disappeared, and instead state legislatures, civil rights interest groups, election lawyers and the Department of Justice collectively

negotiated plans that were fairer. There were inevitable disagreements about what fairness actually required – and even whether this was a kind of affirmative action program for state legislatures and the U.S. House.<sup>6</sup> But the overall intention of amending Section 2, which was to disrupt a white racial monopoly on office holding, was fulfilled.

### **The 2006 Renewal of the Voting Rights Act**

In short, the VRA's evolution is a clear success story. Black voting increased and so did black office holding. In fact, black office holding became normal by the 1990s. Its normalization was a pre-condition for the successful presidential candidacy of Barack Obama.

Yet such success by itself inevitably raised the possibility that the Act was obsolete. A more subtle way in which the Act's evolution generated the appearance of obsolescence lay in the renewals. Let me now return to the renewals -- 1970, 1975, 1982, and most recently 2006 – a cycle which the reader has surely remarked.

Why the renewals? Recall that in principle the Act is temporary. The default setting behind the Act's special provisions is *state* control over electoral qualifications. But that can only happen if Congress concludes that there is no need for federal supervision. In 1970, 1975, 1982, and 2006, Congress focused on whether there was strong evidence of continuing problems for minority voters in the covered jurisdictions. In all cases it found enough evidence of resistance to

minority voting rights to generate bipartisan coalitions in favor of renewal. In each case, a Republican president agreed with the congressional determination.

In 2006, when Congress renewed the Act again for another 25 years, it did so by large majorities. The vote on final passage in the U.S. House was 390-33, and the Senate passed it without any dissent, 98-0. When he signed the 2006 renewal, President George W. Bush stated, "In four decades since the Voting Rights Act was first passed, we've made progress toward equality, yet the work for a more perfect union is never ending. We'll continue to build on the legal equality won by the civil rights movement... Today, we renew a bill that helped bring a community on the margins into the life of American democracy. My administration will vigorously enforce the provisions of this law, and we will defend it in court. This legislation is named in honor of three heroes of American history who devoted their lives to the struggle of civil rights: Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. And in honor of their memory and their contributions to the cause of freedom, I am proud to sign the Voting Rights Act Reauthorization and Amendments Act of 2006."<sup>7</sup>

Yet there was *also* great skepticism in the air about whether the 2006 renewal was symbolic, that is, a case of both parties wanting to conspicuously show that they stood for minority voting rights. Abigail Thernstrom, who is today vice-chair of the United States Civil Rights Commission, had long taken the view that the Act over-regulated the electoral process. In an article published by the Federalist Society, a conservative legal advocacy group, Thernstrom criticized

the Act, claiming that the renewal was done in a “clear political panic.”<sup>8</sup> More surprising was the sharp discontent of such liberal election lawyers as New York University’s Richard Pildes. About a year after Thernstrom’s essay, Pildes wrote: “Congress largely avoided facing the difficult policy issues...it ratified a regionally specific status quo that had been in place for the last twenty-five years, then locked that status quo into place for another twenty-five years to come...I have always thought that unanimous legislation is, paradoxically, the most problematic; it frequently signifies either that Congress is engaged in little more than credit-claiming, symbolic legislation, or when serious issues *are* at stake, that Congress has simply crafted a way to evade them.”<sup>9</sup>

One source of such misgivings was the recycling of the coverage formula that Congress created in 1975, that it retained in 1982, and that it retained yet again in 2006. The original 1965 coverage formula singled out jurisdictions that employed a “test or device” for voter registration, such as a literacy test, and that registered fewer than 50% of the voting age adults (as determined by the Director of the Census) or in which fewer than 50% of voting age adults voted in the November, 1964 presidential elections. At the 1970 renewal the benchmark election date was changed to the 1968 presidential election. In 1975, the benchmark date became the 1972 presidential election. After that, the coverage formula did not change, either in 1982 or in 2006.<sup>10</sup> Small wonder that commentators such as Pildes could see this decision as avoiding the difficult task of updating the statute.

Those who approved of the 2006 renewal argued, however, that the old coverage formula was still needed even though the covered jurisdictions seemed quite different. The Voting Rights Act only *looked* obsolete. In fact there was considerable evidence, they believed, that the Section 4 formula prevented backsliding. Also, the Constitution is clear: Congress enforces the 14<sup>th</sup> and 15<sup>th</sup> amendments “by appropriate legislation.”

The key term in doubt, of course, was “appropriate.” But who decided appropriateness? The answer seemed to be Congress. Soon, however, the Supreme Court spoke up as well.

### **The Invitation From the Court That Congress Declined**

In a 2009 case from Texas, an unimportant political subdivision with an elected board, the Northwest Austin Municipal Utility District Number One (or NAMUDNO), challenged the constitutionality of Section 5. NAMUDNO was a covered district required to submit to preclearance. It objected to the requirement, for it had no history of racial discrimination in its elections. It simply happened to be covered under Section 4. The anti-VRA lawyers who brought the case before the Court wanted a way to clearly demonstrate the Act’s obsolescence.<sup>11</sup>

Writing for the Court, and also attracting 7 other justices to the opinion, the Chief Justice established that Section 5 was an unusually powerful intrusion into the prerogatives of subnational governments. That intrusion in fact had always

raised constitutional concerns among members of the Court. Section 5 tampered with the “equal sovereignty” of the states and raised “federalism concerns.” Moreover, the coverage formula appeared out of date, and Congress had ignored warnings that it was out of date (and here Chief Justice Roberts cited the congressional testimony of Richard Pildes.) However, the 15<sup>th</sup> Amendment “empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is needed...” The Court ought not to overstep itself. Because it was possible to find a *statutory* basis for resolving the case – and thus avoid reaching the question of Section 5’s constitutionality – the Court was obliged to do that. To be sure, this meant re-casting and amending Section 4 so that NAMUDNO could avail itself of what is known as “bail-out.” That is, NAMUDNO could escape future Section 5 pre-clearance obligations by demonstrating that it had no record of invidious electoral administration. Under the circumstances, it made sense for the Court to coalesce behind this “amend the meaning of Section 4” option – even though Associate Justice Clarence Thomas urged the Court (in his lone dissent) to reach the constitutional question.

This was a startling signal from the Court. As the Yale law professor Heather Gerken wrote, “Yesterday the Supreme Court wrote a cliffhanger of an opinion on the constitutionality of Section of the Voting Rights Act...the Court raised serious questions about Section 5’s future, but it didn’t pull the trigger. The question is how the story will end.”<sup>12</sup> Eight out of 9 justices essentially agreed that it was quite possible that the statute was obsolete. But because there was a



way for the Court to then avoid judging whether the 2006 renewal was in fact “appropriate legislation” the Court would take that less controversial path forward.

Informed observers took the ruling to be a plain suggestion to Congress that it ought to revisit the 2006 renewal, or at least to come up with amendments or legislative solutions that addressed the Court’s concerns. After all, the Constitution gives Congress the power, not the Court, to enforce the Act. It should do just that – especially when a decision is an 8-1 decision.

But Congress did nothing in response. Why? Those who dislike the 2006 renewal hold that Congress could not revisit the Act because in reality there was no bipartisan consensus for fundamentally revising and updating it. During the 2006 renewal the lack of a substantive consensus on how best to modernize the Act was papered over. The liberal civil rights groups and election lawyers who were satisfied with, indeed deeply invested in, the status quo essentially wrote the renewal for Congress -- and neither political party had a mind to challenge their handiwork. At least the civil rights establishment offered a plan forward in 2006 with the renewal, and everyone was happy to accept the plan. Everyone preferred some renewal to the awkwardness of no renewal, so they held their noses and voted more or less unanimously for a poorly done job.

Such an analysis goes over well with those who think Congress is a bankrupt institution, deservedly despised by the American public. But of course Congress is not a bankrupt institution. One can easily think of two good explanations for

why Congress did not act. The first is that the congressional consensus in favor of the renewal was not simply a feel-good hurrah for black voting rights but instead a considered decision. The second is that Congress was extremely busy in 2009 with the Democratic party's reform agenda, which included health care reform and financial regulatory reform, to say nothing of the required agenda of authorization and appropriations for existing federal programs.

In the end, Congress did *not* act. But supporters of the Voting Rights Act remained quite nervous. On its face, Section 4 relied on criteria for targeting jurisdictions that were, in 2009, 34 years old, and dated to the 1975 renewal. In turn, these 1975 yardsticks captured political realities that existed in 1972. Were the covered jurisdictions really frozen in political amber? Four years later, as Chief Justice Roberts' opinion for the Court in *Shelby* proved, supporters of voting rights were right to be nervous about the glare of obsolescence that Section 4 appeared to give off.

### **The Shelby Decision**

Shelby County had sued the Attorney General in the Federal District Court in Washington, DC for objecting to election law changes that it had made, and it asked the District Court to declare that the coverage criteria of Section 4 and Section 5 were "facially unconstitutional." Writing again for the Court in a major voting rights case, Chief Justice Roberts briskly got down to suggesting that nothing less than a proper relationship between federalism and the enforcement

of voting rights was at stake.<sup>13</sup> Section 5 of the Voting Rights Act was “a drastic departure from the basic principles of federalism.” Also Section 4 applied Section 5 to some states but not others, making it “an equally dramatic departure from the principle that all States enjoy equal sovereignty.” Thus two key sections of the Act conflicted with the normal practice of federalism. When Congress first wrote the Act such exceptions were urgently needed. Congress then renewed the statute in 1970, 1975, and 1982, and the Court supported “each of these reauthorizations.” But then came the 2006 renewal – and *NAMUDNO*, that is, the case in which “we expressed serious doubts about the Act’s continued constitutionality.” These doubts, expressed in 2009, were due to the “substantial federalism costs” and to the prospect of continued differentiation among the states despite the cardinal principle of “equal sovereignty.” “Eight members of the Court subscribed to these views...” At that time the Court concluded that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” That perspective governed, Roberts wrote, how the Court viewed the claim brought by Shelby County, Alabama. Roberts then proceeded to discuss the virtues of federalism – in particular how it “secures to citizens the liberties that derive from the diffusion of sovereign power” – and *re-emphasized*, yet again, the equal sovereignty of the states and their customary control of election law. He repeated, as well, that the Voting Rights Act was “extraordinary legislation otherwise unfamiliar to our federal system.”

Having emphasized federalism as essential to American democracy, Roberts then turned to the Act's necessity. It was in keeping with the needs of the time. "Nearly 50 years later, things have changed dramatically." Voter turnout and black office holding in "covered jurisdictions" were robust, "in large part *because* of the Voting Rights Act." [emphasis in the original] "The Act has proved immensely successful at redressing racial discrimination and integrating the voting process...Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula...along the way...These extraordinary and unprecedented features were reauthorized as if nothing had changed." Roberts proceeded to dissect and dismiss the federal government's defense of the reauthorization. "But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year old facts having no logical relation to the present day." Roberts proceeded then to rebuke the dissenters from the majority opinion (led by Justice Ruth Bader Ginsburg), pointing out that two of them had joined the majority in the *NAMUDNO* decision, and to the decision's expression of concerns about the Act. He noted that "the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin's* emphasis on its significance." He reiterated that the Court, in 2009, voiced "concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional. The

formula in that section can longer be used as a basis for subjecting jurisdictions to preclearance.”

Justice Ginsburg opened her dissent by pointing out that the issue at stake was “who decides whether, as currently operative, §5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments ‘by appropriate legislation.’” Congress renewed the Act by large majorities, and its decision that the Act should be continued was “well within Congress’ province to make and should elicit this Court’s unstinting approbation.” Ginsburg emphasized the care that Congress had taken in renewing the Act and also underscored the importance of deference to Congress – deference grounded in the enforcement clauses of the 14<sup>th</sup> and 15<sup>th</sup> Amendments. Moreover, Congress found considerable evidence of continued resistance to minority voting rights in the covered jurisdictions. Yes, times have changed. But discrimination – and the potential for subtle forms of discrimination – had not truly disappeared in the covered jurisdictions – and Ginsburg proceeded to illustrate these claims in great detail. Under the circumstances, “Hubris is a fit word for today’s demolition of the VRA.” Indeed, the majority’s “unprecedented extension of the equal sovereignty principle outside its proper domain – the admission of new States – is capable of much mischief...In my judgment, the Court errs egregiously by overriding Congress’s decision.”

### What To Make of *Shelby*?

Is the majority opinion in *Shelby* good or bad? If one worries that government regulation can often go too far, then this was a good decision. After all, the VRA created a regulatory system that seemed to keep growing and going. On this view, the Court's sensible reading of what seems obvious to everybody – that America is a different country than 1965, and that the clearest evidence is in the White House – then *Shelby* stops regulation that was no longer necessary. And if one likes federalism – and surveys show that the public wholeheartedly likes federalism – then the majority's emphasis on protecting federalism from irrational federal intrusions will seem not just useful but actually innovative. If, on the other hand, one thinks that racial discrimination and the potential for its recrudescence are continuing and serious problems in American democracy, then one will think that Chief Justice Roberts wrote an opinion that was out of touch with what everybody knows about America: that the first-class civic status of African-Americans is a hard-won achievement which requires continued protection.

The United States has in fact had two major reconstructions of African-American voting rights. The First Reconstruction, during the late 19<sup>th</sup> century, was a magnificent failure that ended in tragedy – that is, in a more or less total reversal of a democratic revolution. The Second Reconstruction, which has been unfolding since the mid-1940s, is still largely a success. But, plainly enough, the Second Reconstruction now faces considerable judicial opposition.

The First Reconstruction of Southern electoral politics – particularly the decade between military reconstruction of the ex-Confederacy by a Republican-controlled Congress (1867) and the immediate aftermath of the 1876 presidential election (early 1877) – saw the astonishing rise of biracial electoral and party politics in a region where African-Americans had been enslaved for over two centuries.

As is well known, this democratic revolution created a fierce backlash. By the time of the 1876 presidential election, most of the biracial Southern governments, controlled by the Republican party, had been replaced by white Democratic party formations that were committed to weakening African-American and Republican influence on state-level public policy and on state and local institutions. In the immediate aftermath of the 1876 election, the parties bargained over who would become President in March, 1877. The upshot was the installation of the Republican candidate, Rutherford B. Hayes.

But Hayes' predecessor, President Ulysses S. Grant, also allowed the remaining Republican governments in Florida, Louisiana, and South Carolina to collapse. The Louisiana and South Carolina governments were actually under military guard. Their rivals were functioning simultaneously under paramilitary protection. Federal troops were told to go home, and the Republican governments in Louisiana and South Carolina fled for safety.

Yet African-Americans continued to hold office and to vote at remarkably high rates. The complete dissolution of the First Reconstruction thus occurred

much later than is commonly known -- toward the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century. The year 1877 is typically taken as the end of bi-racial democracy in the South for nearly 100 years – but this is not true. Bi-racial democracy only died after a two-decade process of pushing African-Americans out of electoral politics and office-holding had fully run its course. Black disenfranchisement began in 1889 in Florida and ended in 1907 in Georgia.

When the process of black disenfranchisement ended, something quite unusual in the history of Western democratic development had occurred. First, a very large social group once entirely outside the political system had been rapidly and fully politically incorporated, namely, black adult males in the ex-Confederacy. But then they had been pushed all the way back out of democratic politics, to the very margins of the polity in which they had been central actors for 35 years.

This rollback happened by quasi-democratic means. The process was not associated with a large-scale regime change. The Constitution of 1787 was still in force; American democracy was still in place. A one-party, semi-authoritarian sub-national system had been built inside the overall democratic system. There is no comparable example of such de-democratization in world history.<sup>14</sup>

The disestablishment of that subnational one-party system required a *second* reconstruction of Southern electoral and party politics – a struggle that began in earnest after World War II and that led to the Voting Rights Act of 1965 and to the renewals and expansion of the Voting Rights Act in 1970, 1975, 1982, and



2006. But now the pace and force of that Second Reconstruction has changed. This hardly means that minority voting rights are actually *deeply* insecure. But the Second Reconstruction of minority voting rights – an extended process that dates to the Court’s 1944 abolition of the Southern “white primary” – has taken a new turn that not too long ago was literally unthinkable. For those who lived through the civil rights movement, the idea that black voting rights now have a question mark over them at this late date is nothing less than an historical crime. At any rate, we must now hold our breath as we watch what may – or may not -- happen to minority voting rights. The Obama Administration is forcefully using what remains of the Voting Rights Act to address voter ID legislation that it considers invalid under Section 2 of the Act. Whether it succeeds is not obvious as of this writing. Nor is it clear yet just how much trouble voter ID will actually cause to minority voters in the 2014 and 2016 elections. Either way, there is a disturbingly Sysiphean quality to the struggle for black enfranchisement.

#### ENDNOTES

---

<sup>1</sup> Democratic Party Platforms: “2012 Democratic Party Platform,” September 3, 2012. Online by Gerhard T. Peters and John T. Woolley, *The American Presidency Project* <http://www.presidency.ucsb.edu/ws/index.php?pid=101962#ixzz2jVfmHHaG>

<sup>2</sup> Republican Party Platforms: “2012 Republican Party Platform,” August 27, 2012. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=101961>.

<sup>3</sup> For one review of the state of play, see “Everything That’s Happened Since Supreme Court Ruled on Voting Rights Act,”

---

<http://www.propublica.org/article/voting-rights-by-state-map>. See also, <http://www.naacpldf.org/case/shelby-county-alabama-v-holder>

<sup>4</sup> Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* (New Haven: Yale University Press, 2012)

<sup>5</sup> [http://www.justice.gov/crt/about/vot/42usc/subch\\_ia.php#anchor\\_1973](http://www.justice.gov/crt/about/vot/42usc/subch_ia.php#anchor_1973)

<sup>6</sup> For a lively and insightful treatment of the issues, see Tinsley E. Yarbrough, *Race and Redistricting: The Shaw-Cromartie Cases* (Lawrence: University Press of Kansas, 2002).

<sup>7</sup> <http://georgewebush-whitehouse.archives.gov/news/releases/2006/07/20060727.html>

<sup>8</sup> Abigail Thernstrom, "Reviewing (and Reconsidering) the Voting Rights Act," *Engage* 7 (October 2006): 23-26 at <http://www.thernstrom.com/pdf/Engage.pdf>

<sup>9</sup> Richard H. Pildes, "Political Avoidance, Constitutional Theory, and the VRA," *Yale Law Journal Online* December 9, 2007, at <http://yalelawjournal.org/the-yale-law-journal-pocket-part/election-law/political-avoidance,-constitutional-theory,-and-the-vra/>

<sup>10</sup> [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php](http://www.justice.gov/crt/about/vot/misc/sec_4.php)

<sup>11</sup> For material relating to *Northwest Austin Municipal District Number One v. Eric Holder* (2009), see [http://www.oyez.org/cases/2000-2009/2008/2008\\_08\\_322](http://www.oyez.org/cases/2000-2009/2008/2008_08_322)

<sup>12</sup> Heather K. Gerken, "An Uncertain Fate For Voting Rights," *The American Prospect*, June 23, 2009, at <http://prospect.org/article/uncertain-fate-voting-rights>

<sup>13</sup> [http://www.supremecourt.gov/opinions/12pdf/12-96\\_6k47.pdf](http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf)

<sup>14</sup> This is a point repeatedly emphasized in Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: University of Chicago Press, 2004).