

Ten Years after *Shelby County*: The Effect of Ending Preclearance on Voting Rights

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In 2013, a divided Supreme Court held in *Shelby County v. Holder*¹ that Section 4(b) of the Voting Rights Act of 1965 was unconstitutional, ending its preclearance requirement in states with a history of discriminatory voting practices. The decision was widely viewed by its critics as having gutted the Voting Rights Act. In the majority opinion, Chief Justice Roberts found that so much progress had been made in securing voting rights from 1965 to 2013 that there was no longer a need to impose special restrictions to protect voting rights in states with a history of discrimination. In her dissent, Justice Ginsburg acknowledged the progress but made a compelling case that the protections were still needed, memorably concluding that: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”² Now, a decade later, we are able to look at what has happened since the Court’s decision and begin to assess who was right. Ten years after the Supreme Court threw away the umbrellas, are voters getting wet?

This review will begin with a brief overview of the Voting Rights Act and the *Shelby County* decision, followed by a discussion of what has happened to voting rights since *Shelby County* in jurisdictions that were subject to the preclearance requirements of the Voting Rights Act before the Court’s decision.³

¹ 570 U.S. 529 (2013).

² *Id.* at 590.

³ Though highly interrelated, the topic of gerrymandering is subject to its own rapidly-changing legal standards, and is beyond the scope of the post.

A. Voting Rights Act Overview

The Voting Rights Act of 1965 was enacted to enforce the right to vote free of racial discrimination, an aim which remained elusive for almost 100 years after the 1870 ratification of the 15th Amendment. Section 2 of the Act broadly prohibited *all* state and local governments from adopting standards, practices and procedures that result in the “denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”⁴ Two other provisions—the ones at issue in *Shelby County*—applied only to state and local subdivisions with a history of racial discrimination in voting. These provisions, Sections 4(b) and 5, taken together, required such states and subdivisions to obtain advance approval from the Attorney General—known as “preclearance”—of new voting standards, practices and procedures.⁵ Section 4(b) contained the criteria for determining whether a jurisdiction was subject to the preclearance requirement, referred to as the “formula.” The formula was based on recent use of practices such as literacy tests and requirements that voters have others vouch for them.⁶ Section 5 required that covered states obtain preclearance of any new voting

⁴ 52 U.S.C. § 10301(a).

⁵ 42 U.S.C. §§ 1973b(b),1973(c).

⁶ Section 4(b) applied in any state or political subdivision which met two requirements. First, on November 1, 1964, the state or subdivision must have maintained “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.” 42 U.S.C. § 1973b(c). Second, fewer than fifty percent of the residents of voting age were required to be registered to vote on November 1, 1964, or to have voted in the November 1964 presidential election. *Id.* § 1973b(b).

standards or procedures.⁷ The preclearance provisions were to expire in five years, but Congress reauthorized the Act four times, each time extending the preclearance requirement.⁸

When *Shelby County* was decided, nine states were covered in their entirety by the preclearance requirement—all southern states except Alaska and Arizona.⁹ Some jurisdictions in other states were also covered, among them a substantial part of North Carolina and a small number of counties and subdivisions in California, Florida, Michigan, New York, and South Carolina.

B. *Shelby County v. Holder*

In 2010, Shelby County, Alabama filed suit against the Attorney General seeking a declaration that the preclearance provisions in Sections 4(b) and 5 of the Act, as reauthorized in 2006, were facially unconstitutional because they subjected some jurisdictions but not others to the preclearance requirement. The district court held that the provisions were justified by the substantial body of evidence unearthed in Congress’s extensive investigation before reauthorizing the Act in 2006. The D.C. Circuit affirmed.

In the Supreme Court, Chief Justice Roberts, writing for the majority, found that Section 4(b), the formula for determining which jurisdictions were subject to preclearance, was unconstitutional. He acknowledged that, when the statute was enacted in 1965, the preclearance requirement had been justified to address the pervasive racial discrimination in the electoral process that had persisted long

⁷ The reauthorizations of the Act expanded the definition of the conduct prohibited by the Act. For example, the Act was amended to forbid voting changes with “any discriminatory purpose,” as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, “to elect their preferred candidates of choice.” 42 U.S.C. §§ 1973c(b)-(d).

⁸ Each extension updated the period to which the coverage formula was applied. The effect of these updates was to require preclearance for some additional jurisdictions and to relieve others of the preclearance requirement.

⁹ The nine states covered in full were Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.

after ratification of the 15th Amendment.¹⁰ But the coverage formula was still based on the same “decades-old data and eradicated practices,”¹¹ even though voter turnout and registration rates approached parity, candidates of color were increasingly successful, and, “[b]latantly discriminatory evasions of federal decrees are rare.”¹² The Court held that the coverage formula was no longer based on current conditions, and Section 4(b) therefore exceeded Congress’ authority under the 14th and 15th Amendments. The effect of finding the coverage formula unconstitutional was to eliminate the preclearance requirement.

In her dissent, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, emphasized Congress’s findings in 2006 that the substantial gains achieved since 1965 had been preserved because discriminatory practices, though often proposed, did not obtain preclearance, or were not pursued because of the need for preclearance.¹³

Shelby County left intact Section 2 of the Voting Rights Act, under which lawsuits may be brought to remedy discriminatory practices. But such litigation is expensive, takes time to resolve, and can only remedy violations after they occur.¹⁴ With the preclearance requirement eliminated, nothing stood in the way of the initial implementation of new practices.¹⁵

¹⁰ 570 U.S. at 545 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

¹¹ *Id.* at 551.

¹² *Id.* at 547 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

¹³ 570 U.S. at 571.

¹⁴ See Christopher S. Elmendorf and Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143 (2015).

¹⁵ *Shelby County* did not foreclose Congress from amending the coverage formula to make it consistent with current conditions. But it is not clear what formula the Court would find acceptable, if any, and as a practical matter, there has been little chance that a polarized Congress would coalesce to enact such significant civil rights legislation.

C. The Immediate Aftermath of *Shelby County*

It didn't take long after the decision was issued on June 25, 2013, to see evidence of its impact. At least four states announced plans to enact new measures curtailing voting rights or began to enforce existing ones within two days of the decision.

1. **Texas.** In 2012, Texas had enacted a restrictive voter ID law, but the law had not survived the preclearance process and had never been implemented. *Within two hours of the announcement of the Shelby County decision*, then-Texas Attorney General Greg Abbott announced on Twitter, "With today's decision, the State's voter ID law will take effect immediately."¹⁶ The law was struck down by the U.S. District Court for the Southern District of Texas under the 1st, 14th, 15th, and 24th Amendments and Section 2 of the Voting Rights Act due to its racially discriminatory impact.¹⁷ But the district court's decision striking it down was stayed, and the law remained in effect during Texas's appeals, including during midterm elections in 2014 and the presidential primary elections in 2016. Only then, after appellate courts affirmed the findings of discriminatory intent, did the plaintiffs obtain relief that limited the effect of the statute.¹⁸ According to the Fifth Circuit's *en banc* decision in July 2016, more than 600,000

¹⁶ See https://twitter.com/GregAbbott_TX/status/349532390336643075; see also "How Shelby County v. Holder Broke Democracy," Legal Defense Fund, <https://www.naacp.org/shelby-v-holder-impact> ("LDF 1"); "Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder" at 65, Legal Defense Fund, Oct. 6, 2021, https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf ("LDF 2").

¹⁷ *Veasey v. Perry*, 71 F.Supp.3d 627, 684-707 (S.D. Tex. 2014). The court found that the voter ID law violated the 1st and 14th Amendments by interfering with the right to vote; the 14th and 15th Amendments by discriminating against African American and Hispanic voters; and the 14th and 24th Amendments by imposing a poll tax. Most of these grounds also supported the finding that the law violated Section 2 of the Voting Rights Act.

¹⁸ LDF 2 at 65-66.

registered Texas voters and one million eligible Texas voters, disproportionately Black and Hispanic, lacked acceptable photo IDs under the law.¹⁹

2. **Mississippi.** A severely restrictive photo ID law had been enacted in Mississippi and was awaiting preclearance when *Shelby County* was decided. *On the day of the decision*, Mississippi's secretary of state announced that he would move forward immediately to implement the law.²⁰ There were reports that hundreds of voters could not vote in the 2014 mid-term election because of the photo ID law.²¹
3. **Alabama.** A restrictive Alabama photo ID law enacted in 2011 eliminated forms of voter ID that were previously accepted for both in-person and absentee voters, such as Medicaid, Medicare, and Social Security cards and birth certificates. The state never sought preclearance and delayed implementation of the 2011 law. *The day after the Supreme Court's decision*, Alabama announced that it would begin enforcing the photo ID law for the 2014 election cycle. According to expert testimony in an action challenging the law, 118,000 registered voters lacked an acceptable voter ID under the law. Notwithstanding the problems with the law, it was ultimately upheld by a divided panel of the Eleventh Circuit.²²
4. **North Carolina.** *The day Shelby County was announced*, the lead sponsor of a North Carolina voter ID law said that he would move ahead with the measure because *Shelby County*

¹⁹ *Veasey v. Abbott*, 830 F.3d 216, 250 (5th Cir. 2016) (*en banc*). One study found that nearly thirteen percent of registered voters with the required ID stayed home during the 2014 midterm elections because they thought they lacked proper photo ID. LDF 2 at 66.

²⁰ *See* https://web.archive.org/web/20130910095122/http://www.sos.ms.gov/news_press_release.aspx?id=517.

²¹ *See* LDF 1; LDF 2 at 43.

²² *Greater Birmingham Ministries, et al. v. Sec'y of State for Alabama*, 966 F.3d 1202 (11th Cir. 2020); *see also* LDF 2 at 8.

eliminated the need for preclearance.²³ Within two months, the governor of North Carolina had converted the single-measure bill into an omnibus anti-voter bill that became known as the “monster law.”²⁴ The law’s provisions that disproportionately affected black and Hispanic voters included a much stricter voter ID requirement, which eliminated the use of forms of state-issued ID used predominantly by African Americans but did not require photo ID for absentee ballots, used primarily by white voters. The law also eliminated same-day voter registration and reduced the early voting period, both of which disproportionately affected voters of color. Litigation challenging the law ended up in the Fourth Circuit, and in a 2016, the court held that “the new provisions target African Americans with almost surgical precision” and that “the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent.” The Fourth Circuit instructed the district court to enjoin enforcement of the challenged provisions.²⁵

D. Further Restrictions of Voting Rights in Formerly Covered Jurisdictions

These examples are especially clear evidence of election laws enacted or enforced because of the Court’s decision. But they are not alone. Changes in state and local voting laws continued and were numerous and varied. The following changes account for a few of the additional types of restrictions.

²³ See, e.g. WRAL News, “NC voter ID bill moving ahead with Supreme Court ruling,” June 25, 2013, <https://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/>.

²⁴ Countless news reports, commentaries, and other sources refer to the North Carolina Law by this moniker. An article in the *Washington Post*, for example, explained, “Critics dubbed it the “monster” law — a sprawling measure that stitched together various voting restrictions being tested in other states.” W. Wan, *Inside the Republican creation of the North Carolina voting bill dubbed the ‘monster’ law*, *Washington Post*, Sept. 2, 2016, https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html.

²⁵ *NC State Conf of NAACP v. McCrory*, 831 F. 3d 204, 214 (4th Cir. 2016).

1. Purging Voter Rolls

Purging voter rolls can serve the lawful purpose of cleaning up lists to exclude voters who, for one reason or another, are no longer eligible to vote in a jurisdiction. But purges have frequently been used, particularly in formerly covered jurisdictions, to disenfranchise eligible voters. A 2018 Brennan Center report comprehensively studied the use of voter purges for such improper purposes before and after *Shelby County*.²⁶ The report found that before 2013, covered and uncovered states had comparable purge rates. After 2013, the purge rate in formerly covered jurisdictions increased by two percent while the rate in uncovered jurisdictions remained steady. Two million more voters were purged in formerly covered jurisdictions between the 2012 and 2016 presidential elections than if those jurisdictions had purged voters at the same rate as the rest of the country.²⁷

Some purges were carried out without sufficient notice. Others were based on poorly defined criteria subject to abuse, such as mental capacity.²⁸ Still others were based on unreliable information, as in a 2016 case in Arkansas where lists used to purge voters because of felony convictions included people who had never been convicted or whose voting rights had been restored.²⁹

²⁶ Brennan Center for Justice, *Purges: A Growing Threat to the Right to Vote* (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf.

²⁷ Between 2012 and 2016, formerly covered jurisdictions removed a total of 9 million voters from voting rolls in formerly covered jurisdictions. *Id.* at 3-4. Between 2014 and 2016 alone, almost four million more names were purged than between 2006 and 2008. The increased purge rate was particularly notable in Georgia, Texas, and Virginia. *Id.* at 4-5.

²⁸ Another problem was that the criteria for removal varied. For example, the definition of mental incapacity was different from state to state. And the procedures used when voters were purged often provided for insufficient notice, and sometimes allowed secret purchases without any notice. *Id.* at 1.

²⁹ *Id.* at 1. Additionally, in April 2016, thousands of eligible Brooklyn voters found their names missing from the voter lists when they tried to vote in the presidential primary. According to a later investigation by the New York attorney general, New York City's Board of Elections had improperly deleted more than 200,000 names from the voter rolls. LDF 2 at 45.

2. Relocating and closing polling places and limiting voting hours

After *Shelby County*, more polling places were closed in formerly covered jurisdictions than in the rest of the country. One example: Counties in Georgia closed a higher percentage of voting locations than in any other state, leaving seven counties with only one polling place serving hundreds of square miles. In a February 2015 memo, the office of then-Secretary of State, now-Governor Brian Kemp encouraged counties to consolidate voting locations and specifically stated, in bold font, that “as a result of the Shelby [County] Supreme Court decision, [counties are] no longer required to submit polling place changes to the Department of Justice for preclearance.”³⁰

Closing or moving polling places used by minorities not only burdens voters by causing overcrowding and long waits at the remaining polling places, but it prevents some voters from voting altogether. Voters may be unable to vote because they lack transportation, are not permitted to take off from work sufficient time to travel to their polling places, or must wait in long lines at overcrowded polling places.³¹

3. Voter ID Laws

In addition to the four states that adopted or began to enforce voter ID laws immediately after *Shelby County*, South Carolina and Virginia later required voter IDs with photos.³² Many of their voters, disproportionately people of color, lacked qualifying IDs.

³⁰The Leadership Conference and Education Fund, *Democracy Diverted*, Sept. 2019, at 18, <https://civilrights.org/democracy-diverted/>.

³¹ Not all relocations and closures are discriminatory, in purpose or effect. Before *Shelby County*, covered jurisdiction were required to obtain preclearance, and those that were demonstrated not to be discriminatory were permitted to take effect. After *Shelby County*, of course, no preclearance was required. After the decision, however, nothing required public announcement of closures and relocations, except in South Carolina, where state law requires disclosure.

³² LDF 2 at 61, 80.

4. Other practices

These are just examples of the most common means of creating barriers for voters of color that were increasingly implemented in covered jurisdictions after *Shelby County*. Others include reducing or eliminating early voting, which black and Hispanic voters historically tended to use more frequently; reducing or prohibiting out-of-precinct voting; limiting registration by rejecting applications on pretextual grounds; and others.

E. Effect on Registration and Turnout

It is clear that Justice Ginsburg's dissent in *Shelby County* had it right: formerly covered jurisdictions adopted measures previously blocked by preclearance to limit black and minority voting. That might seem like the end of the matter. Given the increased burden on voters of color that these measures imposed, it might seem obvious that minority voting would decrease. But the evidence on this point is limited. It is more difficult to measure the impact of *Shelby County* on *voting* than on *practices intended to prevent voting* for numerous reasons, including that registration and turnout data often does not include race; data is maintained differently from state to state; and there are countless factors other than discrimination that affect voter registration and turnout trends.

There have been two statistical analyses of national data concerning trends in voter participation in formerly covered and uncovered jurisdictions after *Shelby County*. One found a very small *increase* in black and Hispanic registration and voting in formerly covered jurisdictions.³³ The other found a decrease in turnout in census blocks with a high percentage of black residents, where

³³ M. Komisarchik and A. White, *Throwing Away the Umbrella: Minority Voting after the Supreme Court's Shelby Decision*, Sept. 21, 2022, https://arwhite.mit.edu/sites/default/files/images/vra_post_shelby_current.pdf.

black voter turnout decreased by roughly one percent in covered jurisdictions relative to uncovered jurisdictions.³⁴ Both studies acknowledged the need for more analysis.

Although the studies reached different results, neither found a substantial impact on black and Hispanic voting, at least when compared to the pervasiveness of discriminatory measures. The authors of the first study hypothesized that this counterintuitive result was explained by increased counter-mobilization by organizers intended to counteract the expected impact of *Shelby County*.³⁵ Such counter-mobilization may have reduced or eliminated the impact of increased barriers to minority voting.

If further research bears out that hypothesis, should we conclude that the majority was right after all? To the contrary, it remains important to develop effective legal mechanisms that prevent the imposition of greater burdens on voters of color than on the rest of the population. The mere fact that many voters of color *are succeeding* in overcoming the greater barriers they face is not good enough. The Fifteenth Amendment prohibits discriminatory voting measures without regard to the ability of determined voters to overcome them. Until those barriers are lifted, a fundamental constitutional protection, applicable to all Americans since 1870, remains unfulfilled.

³⁴ Stephen B. Billings, Noah Braun, Daniel B. Jones, and Ying Shi, *Disparate Racial Impacts of Shelby County v. Holder on Voter Turnout*, Dec. 2022, <https://docs.iza.org/dp15829.pdf>.

³⁵ Komisarchik, *supra*, at 23-24.