Black Empowerment in Contemporary America:
The Voting Rights’ Act Decision as a Case Study

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Abstract

“Black Representation in the South: The Voting Rights Act and the Supreme Court”

This paper assesses the Supreme Court decision in Shelby County v. Holder (2013) that voided Section 4 of the Voting Rights Act which deprived Section 5 of its enforcement powers. The paper presents an overview of conditions leading to the adoption of the Voting Rights Act in 1965. It reviews the Act’s effectiveness, a point agreed to by all. It briefly looks at the impact of a black man in the White House on racial attitudes and sketches the current economic and social changes affecting African Americans.

The paper then introduces the Supreme Court decision and traces in particular the philosophic and ideological Court precedents that underlay the Court majority’s decisionmaking. It moves on to look at efforts to restrict black and other minority election participation prior to the Court majority’s decision and then such efforts in the aftermath of the decision.

It concludes by questioning the Court majority’s argument that the society had changed to the extent the Voting Rights Act was no longer needed. It then asks what the proper role of the Supreme Court is in a democratic society and which branch of government, the Court of the Congress, should legitimately decide such issues as electoral representation. This in turn brings into relevance the question of what should be the Supreme Court’s role.

The underlying theme is a question as to what constitutes adequate representation in a democratic society.’
Introduction

The struggle over black empowerment has been the longest running, most violent, and most divisive in the nation’s history. The efforts to overcome a racist heritage and realize the full rights of citizenship, guaranteed through constitutional amendment in the Reconstruction era, has had reverberations that continue to this day. (Hacker, 2003; Dawson, 1994; Tate, 1993).

This is not to say that much has not changed. Yet in the persistent party-based effort to restrict voting rights, in the residual views of an influential faction of the white-majority population and in the economic disparity in racial living conditions and the political gains from ingrained racist appeals in politics, the view that much remains to be done verges on the obvious. The real question may revolve around whether the full acceptance of black political and social economic rights within the culture can be achieved. This, of course, is not how most in the society see the issue. The difference in these regards between the races in such perceptions, as with other issues, is major. (Bullock, 1975; Gilens, 2012; Bartels, 2008; King-Meadows, 2011).

There has been an evolution of the controversies surrounding the experience of African-Americans from the Reconstruction period through a series of attempts through the ages to overcome a subservient role in the nation’s politics to the present. The obstacles faced were enormous. Historian Eric Foner writes in reference to the political and economic restrictions enforced by the southern states post-Reconstruction on African Americans:
...these measures were enforced by a flagrantly biased political and legal system in which African Americans had no voice, and by all-white police forces and state militias (often composed of Confederate veterans still wearing gray uniforms).

The real significance of the Black Codes and other measures adopted by the state governments established by [President] Andrew Johnson lay not in their effectiveness... but in what they showed about the determination of the South’s white leadership to ensure that white supremacy and plantation agriculture survived emancipation. (Foner, 2005; 96)

The post-Reconstruction decades up through the 1960s were not significantly different in the South in particular (although racism permeated all aspects of the society) in the effective use of legal power and extra-legal reliance on violence, community pressure and economic penalization to remove blacks from an effective role in political decision-making. The institution of a one-party Democratic monopolization of regional politics, ingenious in its own way, was to serve well a white economic elite. (Key, 1949). The story is long and less known in contemporary times. The efforts to empower blacks can be taken as a vindication of America’s democratic ethos. Or it can be seen in the century preceding the adoption of the Voting Rights Act of 1965 as a discouraging and difficult to comprehend rejection of what the nation chose to believe are its founding values and what is in reality what it represents. (Myrdal, 1944).

Adoption of the Voting Rights Act

Real change in the status of blacks then did not come until the 1960s with the advent of the mass civil rights movement; the attacking and killing of activists, black and white alike; the burning of African American churches; and the beating of demonstrators, all captured by the national media and through television brought into American homes.¹ “Bloody Sunday” in Selma, Alabama and related events in other southern cities and the forceful resistance by state
officials to Supreme Court-mandated school integration were to make the full dimensions of the racial problem evident to all. (Garrow, 1978).

The blatant disregard for the law, the violence of the events occurring and an aroused public eventually forced a reluctant federal government to act. President Dwight D. Eisenhower was to send troops to Little Rock to force the integration of its high school; President John F. Kennedy was, in time, to commit to the struggle and came to recognize its fundamental moral nature; and President Lyndon B. Johnson was to move the most forcefully and prove the most effective in attacking the roots of racial discrimination in politics. (May, 2013).

The defining moment, the crucial breakthrough in the civil rights struggle, came with President Lyndon B. Johnson’s sponsorship of the Voting Rights Act in 1965 and its overwhelming passage by the Congress (Table 1).

Table 1 goes here

Johnson’s “We Shall Overcome” speech to the Congress on behalf of the act ranks among the most moving of any president:

I speak tonight for the dignity of man and the destiny of Democracy. I urge every member of both parties, Americans of all religions and of all colors, from every section of this country, to join me in that cause. At times, history and fate meet at a single time in a single place to shape a turning point in man’s unending search for freedom....

There is cause for hope and for faith in our Democracy... For the cries of pain and the hymns of protests of oppressed people have summoned into convocation all the majesty of this great government – the government of the greatest nation on earth. Our mission is at once the oldest and most basic of this country – to right wrong, to do justice, to serve man. In our times we have come to live with the moments of great crises. Our lives have been marked with debate about great issues, issues of war and peace, issues of prosperity and depression.

... rarely in any time does an issue lay bare the secret heart of America itself. Rarely are we met with a challenge, not to our growth or abundance, or our welfare or our security, but rather to the values and the purposes and the meaning of our beloved nation. The issue of equal rights for American Negroes is such an
issue. And should we defeat every enemy, and should we double our wealth and conquer the stars, and still be unequal to this issue, then we will have failed as a people and as a nation....

There is no Negro problem. There is no Southern problem. There is no Northern problem. There is only an American problem.....

... We shall overcome.

There was a reaction and it was substantial enough to threaten the Democratic party’s political dominance nationally and the social welfare state created during the New Deal/Great Society. (Scher, 1997; Clark and Prysby, eds. 2004). The adoption of the Voting Rights Act (VRA) was followed by an appeal in the 1968 presidential election by President Richard M. Nixon to a white southern and largely Democratic constituency angered by events and a federal government decision to take an activist role in enforcing the Act’s provisions. The election appeal was based along implicitly racial lines and its success regionally and nationally was to refashion the Republican party and with it the nation’s political alignments well into the indefinite future. (Lublin, 2004). Ronald Reagan in his 1980 presidential campaign solidified the white southern alliance with a more explicit racial position that promised to withdraw federal intervention in states’ rights issues (racial politics) and leave these to state jurisdictions. It was a campaign promise he was to keep.

The Impact of the Voting Rights Act

The effectiveness of the Voting Rights Act in fundamentally increasing levels of black political participation, overcoming the post-Civil War Reconstruction era’s legacy, fulfilling the promise of the Fourteenth and Fifteenth Amendments to the Constitution and recasting the role of African Americans in the country’s politics and society more generally was not in dispute. Both sides, those pro-Act and those opposed to its continuation specified to its impact. The Voting Rights Act of 1965 was to prove the most important and most effective voting rights legislation in American history. (Keyssar, 2000; Bulloch and Gaddie, 2009; Carcio
The conditions endured by African Americans as second class citizens in southern states up to the Act’s adoption are difficult to envisage today for those who did not live through the era. Historian Gary May attests to this in introducing his study of the Act’s importance as a marking point in America’s democratic evolution.

An American citizen voting – surely there is nothing remarkable about that. But for an African American living in the Deep South in the 1960s ... it was a forbidden act, a dangerous act. There were nearly impossible obstacles to overcome: poll taxes, literacy tests, and hostile registrars. If a person succeeded and was allowed to vote, his name was published in the local newspaper, alerting his employers and others equally determined to stop him. The black men and women who dared to vote lost their jobs, their homes, and, often, their lives. ¹

And yet as May recounts, they persevered, leading in time to the Voting Rights Act which “transformed American democracy and in many ways was the last act of emancipation.”²

Neither side then questioned the Act’s success. Minority political participation had been transformed in the South and as an extension, in the country as a whole. The two parties’ coalitions had been restructured as had the nation’s political agenda. The Republican party’s white-based political dominance from Nixon/Reagan onwards had been established and ushered in a new conservative era based on Neoliberal economic principles.

Minority registration and voting levels in the states specifically targeted by the 1965 VRA improved substantially to the point that by the 21st century in the proportion of blacks voting (if not in equivalent numbers) it approached and essentially equaled that of the white electorate. (Gans and Mulling, 2011).

A report of the U.S. Commission on Civil Rights published in 1968 demonstrated the immediacy of the Act’s impact. While still trailing that of the white majority, most pronouncedly where the size of the minority population raised the greatest potential threat to whites, the five Deep South states, the short-term gains were impressive. An average of 22.7 percent pre-VRA to 54.8 percent post-Act by the 1968 election (with Mississippi the most extreme of the southern states moving from 6.7% to 59.8 % in black registration totals). Black voting proportionately in these states continued to trail that of whites.
In the remainder of the southern states, the peripheral south, a transformation was also taking place, if not as dramatic as in the Deep South. Beginning from a higher proportionate registration rate, 58.2 percent, blacks increased more marginally to 61.0 percent (less Texas which did not report any enrollment data and is not included in the results). (U.S. Commission on Civil Rights, 1968).

By the 2008 election and using the same alignment of states, the Deep South as against the Border South, the registration totals are shown in Table 2.

Further a new-found voting presence in the southern states helped ensure the election of blacks to public office. The results in this regard, while clearly an improvement over pre-VRA days, are less striking, due to a number of complicating factors (black population concentrations, gerrymandering of state legislative and congressional districts, an available pool of candidates, campaign resources, etc.).

As an example, the Joint Center for Political and Economic Studies reported that African Americans holding public office in the states fell well short of whites, in itself not surprising, in the year examined, 2001. (Table 3).

The data presented are clearly limited in time and scope. Assuming they are roughly indicative of the ratios of officeholders by race, much remains to be done.

Such findings as to black political involvement could be used to support the argument, as the Supreme Court majority did, that the VRA had met its objectives and given this was no longer needed. Mission accomplished!

They could also be used to argue the need to ensure, as the Supreme Court minority did, that the current levels of black registration and voting continue and that they need protection against disenfranchisement efforts. These are now occurring under shadow of law. Such attempts need to be subjected to strict review and termination as required. The VRA was critical in this regard, its work was not done. In essence, it preserved the rule of law and
provided equal voting opportunities for all, its historic function and the judgment also reached by the Congress.

In short, the battle was not over.

A Black Man in the White House

African Americans (as shown) have more fully engaged in political affairs since Johnson’s address to the nation. The election of an African American to the presidency in 2008 (in particular) and his reelection in 2012 was seen by some as the beginning of a “post-racial politics” in America. It did not happen. (Crotty, 2009, 2013; Ansolabehere et al. 2013a, 2013b).

A racial purging of party politics was a level of expectation that went well beyond any sense of the American historical experience. (Black and Black, 1987). The burden placed on essentially one campaign (2008); its idiosyncrasies; the emergence of the most long-shot of potential challengers to win the nomination; the collapse of the campaign of the frontrunner largely conceded the nomination; and, in the general election, the Republicans candidate’s burden in defending one of the most unpopular presidencies in modern history and in overcoming the political consequences of the Great Recession whose full impact was felt during the fall campaign, do more to account for the final results than any negative or positive considerations of race. Every presidential election was unique as 2008 (and later 2012) was to prove again. To carry the mantle of resolving complex prejudices bred over the centuries was to engage in an escape from reality that must have been as reassuring as it was delusional.

Some however, including the Supreme Court’s majority, chose to use the election results as reassurance that an equity had been achieved in politics between the races, voiding the necessity of continuing the legislation that had assumedly led to the outcome.

Taking a closer look at the election results in both 2008 and 2012 indicates the pivotal role of a racial polarization (more extreme with the candidacy of a black but not out-of-line with previous party divisions) in determining the results. An overwhelming number of black voters (90% or better) voted for Obama and a majority of white voters voted for Barack Obama’s opponent in 2008 and, after a rocky, controversy-riddled four years in office, again in 2012.
Michael Tesler and David O. Sears in analyzing the role of race in the 2008 presidential election concluded:

… we can say with a great deal of confidence that the election of our first black president was not a post-racial moment. Rather, racial attitudes were heavily implicated in every aspect of Barack Obama’s quest for the White House. From Americans’ earliest evaluations of Candidate Obama to their primary voting to their general election vote choice, Obama was heavily judged in terms of his racial background. Racial attitudes were strongly associated with both support for and opposition to Obama throughout the election year … many mistakenly took his victory as a sign that race no longer mattered in American politics. Behind such success in the primaries and general election, however, lay perhaps the most racialized presidential voting patterns in American history. (2010, 259).

Gerald M. Pomper in assessing the 2012 presidential race writes:

... racial polarization was clearly more evident in 2012 than in 2008. Rather than Obama’s 2008 election marking a historic turn to a ‘post-racial’ America, the opinions of the two races have become more distinct. The ‘racial gap’ increased to a 54 percent difference between blacks and whites (93-39 percent, even larger than the gigantic chasm of 2008, 95-43 percent)... [The] differences between the voting preferences of whites and [Latino] minorities [32 percent in 2012 compared to 22 percent in 2008], both men and women, resulted almost entirely from fewer Democratic votes by whites. (2013, 48). (italics added).

Pomper added that the decline in Obama’s support was greater in the nation as a whole (2.3 percent) than in the South (1.1 percent).

The Economic and Social Context

In a broader context, national polls have found somewhat mixed results. Black identity politics have remained strong in support of the Obama presidency. In an early Pew Research Poll they felt more positive about their racial and economic progress (2010). In a later Washington Post/Kaiser/Harvard University poll among others, blacks indicated a high level of dissatisfaction with their greatest concern jobs, health care costs and rising prices. Their economic condition had not improved and there was a degree of disappointment with the Obama administration’s record on civil rights, more pronounced among members of the Black Caucus in the Congress. Not surprisingly, the polls showed no support (5%) for budget deficit
reduction and efforts to curtail social welfare policy. In this context, and again not surprisingly, blacks were among the minorities hardest hit by the Great Recession and slowest to recover from its effects. (Fletcher and Cohen, 2011; Economic Policy Institute, 2008).

On another level, and closer to the views found in the presidential elections, racial attitudes had not improved: “... in the four years since the United States elected its first black president ... a slight majority of Americans now express prejudice toward blacks whether they recognize these feelings or not” (Pasek et al. 2012).

The fight for economic empowerment, an objective the Rev. Martin Luther King, Jr. had turned attention to before his assassination, continues to be a problem. The degree of difficulty in reaching economic goals increases in difficulty in an era of restricted budgets and targeted social programming. (Swain, 1995; Tate, 2004). The National Urban League in a comprehensive assessment (2013) looked at the improvements that have taken place and the difficulties at present in a divided America.

Among the pluses over the last fifty years:
- The high school completion gap has closed by 57 percentage points
- More than triple the number of blacks are enrolled in college
- For every college graduate in 1963, there are now five
- The percentage of blacks living in poverty has declined by 23 points
- The percentage blacks who own their own home has increased by 14 points

Among the continuing problems:
- There has been considerably less progress in closing the equality gap between the races
- In the past 50 years, the black white income gap has closed by only 7 points (now at 60%)
- The unemployment rate gap has only closed by 6 points (now at 52 percent)
- As in 1963, the black/white unemployment ratio is still about 2-to-1 – regardless of education, gender, region of the country or income level
- And unemployment remains the biggest barrier to equality in our country.
The National Urban League’s summation:

...blacks are no longer barred from living, learning, and earning where they want because of their race;

... Taken alone, these achievements would be hailed as good progress in the pursuit of full equality, but against the backdrop of the larger society, the sad fact is while the African American condition has improved, these improvements have occurred largely within our own community. Economic disparities with whites persist and cast doubt on what we thought of as real and meaningful change.

...[and many would use] their shiny veneer of progress to justify the elimination of affirmative action in education and employment; to roll back voting rights protections and relegate the precious franchise to increasingly partisan legislatures; and to cut back on social investments that can help current and future governments survive and thrive in a fast-changing economy." (2013, 9)

Politics relates to and reflects economic power. It has not worked to advantage blacks. Racial divisions in politics continue to be a problem. Not only did whites vote for the white candidate in 2012 but if blacks had not turned out in large numbers (i.e., participated at a more traditional rate as seen in the 2004 election) in the election and voted virtually unanimously for another black, the Republican candidate, Mitt Romney, would likely have won the presidential race.

The Supreme Court Decision in Shelby County, AL v. Holder (2013)

Black turnout in turn has become a favorite target of those who would limit minority electoral involvement to increase partisan advantage. The most telling appraisal of the current status of attitudes toward black participation may well be found in the 2013 Supreme Court decision. As argued, the Voting Rights Act proved to be the most powerful instrument for integrating minorities into, and for ensuring the fair representation of all, in an open political system of any in American history. Passed in 1965, it was to undergo re-examinations and renewals over time: in 1970 and 1975 for five year periods; in 1982; and in 2006 it was reauthorized for another 20 years with a provision for review after 14 years, overwhelmingly, by a vote of 390 to 33 in the House and unanimously in the Senate.
The Act, while effective, and largely due to its impact and the partisan advantage gained, was to come under sustained attack. Led by the Republican party, and in particular its Southern wing, a series of court challenges were to follow. Over time, and in the wake of successful efforts in Florida by the Bush campaign to limit minority voting in the 2000 presidential campaign and later in Ohio in 2004, the drives to weaken or nullify the Voting Rights Act gained momentum (Hansen, 2012; Wang, 2012). In 2013, they were to reach the Supreme Court for decision in *Shelby County, Alabama v. Holder*. Considered by some a longshot given the increasing strong congressional support for the legislation and its objectives, the Court nonetheless took up the issue and ruled in 2013.

Speaking on behalf of the Court’s conservative majority (Chief Justice John G. Roberts, Clarence Thomas, Antonin Scalia, Anthony M. Kennedy, Samuel A. Alito), Roberts recognized the law was needed at the time it was adopted to address “an insidious and pervasive evil” but that times had changed. The essence of his argument was that the South had changed, racial discrimination in voting was no longer the problem it once had been and the law was no longer needed. He pointed out that blacks proportionately outnumbered whites in five of the southern states to be covered by the Act and held power in many former bastions of racial prejudice. Specifically, he contended that Section 4 of the legislation in identifying the states the Act would apply to (all of Alaska, Arizona, Louisiana, Mississippi, and South Carolina and parts of Alabama, California, Florida, Georgia, Michigan New York, North Carolina, South Dakota, Texas, and Virginia) had been based on outdated information from 1975 that was no longer accurate. This interpretation in turn undermined Section 5 and its enforcement powers (Justice Thomas argued that this section too should be declared unconstitutional) and effectively voided the essence of, and most fundamentally important enforcement powers, in the Act.

In sum, it was Roberts’ contention that the “strong medicine” contained in the original act had been necessary in the 1960s given the state of racial affairs, but that it had been effective and since then “our nation has made great strides” thus making the legislation obsolete. Despite congressional judgment to the contrary and overwhelming support for the Act, the Court’s conservative majority therefore declared the act unconstitutional.
Justice Ruth Bader Ginsburg, writing for a more centrist to liberal minority (Sonia Sotomayor, Stephen G. Breyer, Elena Kagan, and herself), argued that the Congress had held extensive hearings prior to reauthorizing the Act; that it found racial discrimination in voting to be a continuing problem and had assembled a substantial record in support of its position; that the legislation rationally served the purpose of the Civil War constitutional amendments intended to protect minority voting rights and specifically giving the Congress the authority to enforce such provisions, the standard that she argued should be applied in deciding its relevance; that voiding the act would encourage backsliding and a return to discriminatory practices; and that the Court’s decision raised a basic constitutional issue as to who should decide on the Act’s value and legitimacy, the Congress or the Court.

The value of the Act in confronting discrimination as indicated was not in question by either side. It was the Congress’s judgment said Ginsberg that “racial discrimination [remained] serious and pervasive.” She concluded:

For half a century a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made. The court errs egregiously by overriding Congress’ decision.

Thinking Like the Court’s Majority

Michael Tolley is a constitutional scholar who studies the Supreme Court and has a number of significant works to his credit. I asked him if he could identify the basics of the Court’s majority’s decision and its genesis. He did. His argument is that the basis for the majority’s thinking are two, it should be said, long discredited lines of reasoning used in an effort to overturn an earlier Court’s ruling in favor of the Voting Rights Act. (Katzenbach, 1966). These are the “equal state sovereignty” doctrine and the “anti-commandeering rule” introduced by the Rehnquist Court as part of its emphasis on what it referred to as “constitutional federalism.”
The “equal state sovereignty” concept first appeared in the Supreme Court’s decision in Coyle v. Smith in 1911 [Coyle v. Smith, Secretary of State of the State of Oklahoma, 221 U.S. 559 (1911)]. The majority opinion stated:

[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

The first major challenge post-adoption to the constitutionality of the Voting Rights Act of 1965 came in South Carolina v. Katzenbach (383 U.S. 301) in 1966. An argument used by South Carolina was the equal sovereignty rule. The Court rejected it and ruled its applicability was confined to the conditions of states set by the Congress for entering the Union (Coyle ruled against requirements set by the Congress for Oklahoma’s entry):

[The Voting Rights Act] intentionally confines these remedies to a small number of States and political subdivisions .... This, too, was a permissible method of dealing with the problem .... The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See Coyle v. Smith, and cases cited therein. (Katzenbach, 1966).

The decision effectively nullified the rule (with the exception of the area cited). The Rehnquist Court, led by Justice Sandra Day O’Connor proved intent on resurrecting it. Initially in a dissent in Garcia v. San Antonio Metropolitan Transportation Authority in 1986 and in her majority opinion in New York v. United States (1992). In this she wrote:

While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions. See Coyle v. Oklahoma. (1911).
In a voting rights case in 2009 the Supreme Court avoided the main constitutional issues in the challenge to the Voting Rights Act, Chief Justice Roberts laid out a future course of action.

The Act also differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty.” Distinctions can be justified in some cases. “The doctrine of the equality of States … does not bar … remedies for local evils which have subsequently appeared.” … But 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. (Northwest Austin Municipal Utility, 2009).

Roberts then used the argument to declare the geographic base of the VRA’s Section 4 unconstitutional, therefore of course disempowering Section and the Act’s enforcement provisions.

The separate perceptions appeared in the amici curiae briefs filed in relation to Shelby. The relevance of such briefs in directly influencing a Court’s thinking is of course questionable. In an unusually high number of submissions for a constitutional case, 47 percent of the 18 conservative briefs from such groups as the CATO Institute, the Southeastern Legal Foundation and the Judicial Education Project etc. cited the “equal sovereignty” argument. None of the 29 briefs submitted by such organizations as the Brennan Center for Justice, the Congressional Black Caucus, Voting Rights Bar, etc. mentioned it. The use of the concept among opponents Tolley sees as “carefully orchestrated campaign” by the Right that succeeded. “The Roberts Court’s revival of the equal sovereignty principle may be viewed as the addition of a new voussoir stone in the modern arch of constitutional federalism which underwent construction during the Rehnquist Court years.” (Tolley, 2013, 6).

The new approach to constitutional federalism developed during the 1990s by the Rehnquist Court of, in addition to the Chief Justice, O’Connor, Scalia, Kennedy and Thomas (the latter three also part of the Roberts Court) asserted state sovereignty limits on Congress’ power to tax, spend and regulate interstate commerce. This approach was used to challenge much of what had originated in the New Deal and included new interpretation of the 10th, 11th and 14th Amendments to the Constitution. The end result was to challenge Congress’ power to regulate interstate commerce and its enforcement powers under the 14th Amendment. It was referred
to as the “anti-commandeering” rule in application could be said (particularly if coupled with
the “equal sovereignty” principle as it has been) something of a revolution in American
government. It has been used to declare unconstitutional environmental and gun control laws
and health reform efforts.

Finally, in Shelby the Roberts Court called on the “equal sovereignty” principle in
particular. In reaction to this in her dissent, Justice Ruth Bader Ginsburg argued:

Katzenbach, the Court acknowledges, “rejected the notion that the [equal
sovereignty] principle operates[s] as a bar on differential treatment outside [the] context [of the admission of new States].” But the Court clouds that once clear
understanding by citing dictum from Northwest Austin to convey that the principle
of equal sovereignty “remains highly pertinent in assessing subsequent disparate
treatment of States.” If the Court is suggesting that dictum in Northwest Austin
silently overruled Katzenbach’s limitation of the equal sovereignty doctrine to
“the admission of new States,” the suggestion is untenable.

Tolley concluded his assessment that the Court’s new conception on federalism might
be “used to cast doubt on all the laws that routinely treat the states differently.” (2013, 6).
Given the expansiveness of what we are talking about, such arguments could effectively serve
to limit the powers of the federal government and given the context in which they have been
applied the essence of what remains of the social democratic state in addition to the voting
rights of citizens.

A Side Note: I went to graduate school and taught in the South in the 1960s. For all
practical purposes, black history and politics was a minor. I took an extensive (for the times)
number of courses relevant to the issues involved and rationalizations advanced to justify an
apartheid society; conducted a survey in Durham, N.C. of black political attitudes as part of a
much broader study of black and white political attitudes and activities in the South; and taught
an abbreviated course on polling at a black college. I say this as prelude to the point I am going
to make.

My reading of the Supreme Court decision in Shelby and the legal doctrines (“equal
sovereignty” and “anti-commandeering”) arguments is that they embody the thinking and
legal/philosophic theorizing used to justify and, more directly, protect, segregation in the South
prior to the Civil War. This may be a strong statement but it all appears quite familiar. Whatever the Civil War did, or did not do, for black emancipation, it would appear it did not end this strain of reasoning (in truth, largely discredited though reasserted in the Rehnquist and more forceably Roberts courts) on race.

Efforts to Restrict Minority Participation Pre-Decision

Keith G. Bentele and Erin E. O’Brien have published an inclusive and sophisticated study of the factors associated with both the proposed and adopted restrictions on voter participation between 2006-2011, a period preceding the Supreme Court’s decision in Shelby.5

The authors’ stated objectives were to get to the roots of the efforts to restrict voting (who or which groups advocated such activities) and what correlated with success for implementing legislation. In their words: “… we provide a comprehensive analysis of the legislative developments by examining the state-level partisan, electoral, demographic and racial factors most strongly associated with more frequent proposal and passage pf these voter restrictions within states.”6 (Bentele and O’Brien, 2013, 1989).

Democrats and liberals see the proposed rules as efforts to decrease black and minority voting for the Democratic party; Republicans and conservatives argue they are needed for fraud prevention.

We begin with no assumptions about the veracity of any claim. What we found was that restrictions on voting derived from both race and class. The more that minorities and lower-income individuals in a state voted, the more likely such restrictions were to be proposed. Where minorities turned out at the polls at higher rates the legislation was more likely enacted.

More specifically, restrictive proposals were more likely to be introduced in states with larger African-American and non-citizen populations and with higher turnout in the previous presidential election. These proposals were also more likely to be introduced in states where both minority and low-income turnout had increased in recent elections. A similar picture emerged for the passage of these proposals. Stats in which minority turnout had increased since the previous
presidential election were more likely to pass restrictive legislation. (O’Brien, 2013, 1).

Also associated with passage: an increase in the proportion of Republicans in the state legislature; the election of a Republican governor; larger Republican legislative majorities and greater competition in the preceding presidential election; Republican control of both the governor’s office and the state legislature; a projection as to becoming a future swing state in elections; large proportions of African-Americans in the state; and an increase in minority turnout. Passage also increased in states with a greater number of allegations of electoral fraud, although the association was considerably weaker than those based on race or partisanship. The heaviest concentration of such proposed or enacted limitations on the franchise occurred in Ohio and the South (extending to New Mexico) with additional efforts in several Midwestern and Plain states, upper New England and the West. (Figure 1).

- Figure 1 goes here -

O’Brien concluded in summarizing the results of the research that the outcome demonstrated both a “predictable partisan pattern [and] ... also an uncomfortable relationship to the political activism of blacks and the poor.” (O’Brien, 2013, 2). Based on their analysis, the authors challenged the Supreme Court majority’s declaration that federal preclearance as provided in the Voting Rights Act was no longer necessary. “Our findings call such assertions into question and, more broadly, suggest the challenges to the implementation and passage of voter access legislation are indeed merited on the grounds of racial bias. (O’Brien, 2013, 2).

This overview while staying close to the reasoning and conclusions of the original is necessarily abbreviated. The study merits serious attention and while maintaining its electoral focus, moves into other areas of broader consequence. These include the vulnerability of the safety net; the immigration issue; the economic, policy and partisan polarization underlying a hyper-partisan and race-oriented politics; the disparities in the incarceration of blacks and whites; and the consequences of all of this for a minority culture and for the society more generally.
There has been other research along much the same lines with similar results. To call on one in particular that clearly frames the efforts at limiting a black/minority vote as a weapon in partisan competition. Electoral analyst Richard L. Hansen writes that “all I needed to know I learned in Florida” (that is Florida, 2000, the Bush-Gore presidential race). (Hansen, 2012, 11-40; See also Wang, 2012, Berman, 2011). For him and others the state government’s manipulation of electoral procedures in favor of the Republican party and more directly George W. Bush proved a primer on how to engage in such practices and regrettably how to succeed with minimal post-election consequences.

Hansen relates studies such as his, Bentele’s and O’Brien’s and others to the broader implications they hold for a democratic society.”

When belief in election integrity is lacking, bad consequences follow: people think their leaders do not serve the popular will or common good but the interests of some faction; they doubt their leaders’ legitimacy and thus the legitimacy of their laws and executive actions; and they are apt to believe that if one group is working to fix elections, it’s not only acceptable but necessary for others to do as well. A lack of faith in elections becomes a self-fulfilling prophecy that undermines faith in democratic governance itself. (Hansen, 2012, IX).

In summary, “gaming” electoral rules becomes acceptable; voting fraud is both tolerated and expected; and such electoral corruption comes to erode the nation’s moral fiber, its politics and its representative capacity.

In such a scenario, the decision on the Voting Rights Act and the enactment of restrictions to advance partisan and/or racial ends assumes an even greater significance.

Efforts to Restrict Minority Participation Post-Decision

In the aftermath of Shelby there was a rush to introduce proposals to limit participation by blacks, minorities, the young and low income voters. Many of the proposals had either been voided under the Voting Rights Act’s powers or held in waiting pending the Supreme Court’s decision.
The “gold standard” for the initial wave of electoral restrictions proved to be North Carolina. A once moderate state, it met the conditions operative in explaining such cases identified by Bentele and O’Brien. Its distinction rested on its commitment to enacting the worst of the voter repression laws in the country. These included: photo identification provisions; a shorter electoral voting period; the elimination of absentee ballots; an end to same-day registration; an end to the preregistration of 16 and 17 year olds, all used successfully to increase black and low income turnout and products of a different, more tolerant era in the state. As an example of the racial targeting involved, 70 percent of blacks voting in 2012 used the now banned early voting option. The restrictions are under challenge from the NAACP and supportive, pro-vote groups. (Hair, 2014, 2).

Within hours of the decision Texas implemented a voter id law previously blocked by a federal court and Alabama did the same. As indicated, Republicans in North Carolina passed an extreme set of voting restrictions; Virginia followed by purging 38,000 names from its voting rolls; Mississippi announced it would begin applying its voter id law in the next election; South Carolina introduced a stricter voter id requirement; and Florida Governor Rick Scott again attempted to purge voters from the registration rolls (he had been stopped earlier from doing this under Section 5 of the VRA. All of these states had been under the VRA’s jurisdiction. At the local level, and less visible, localities moved along the same line. These efforts have not been well documented to date. In two that have received attention, Galveston County, Texas eliminated all black-held or Latino-held constable and justice positions, a move previously voided under Section 5; and Jacksonville, Florida moved the polling station in the heaviest black turnout area in the state to one not close to public transportation. More can be expected.

Overall, 53 percent of the states that had been covered by the VRA passed voter restriction laws after the decision as against 9 percent of the states previously not covered passing such restrictions. Less noticed perhaps, and possibly less relevant, some states have continued to improve and simplify voting regulations, an emphasis after the Florida 2000 debacle.

The Voting Rights Act is estimated to have been used to block approximately 700 voting limitation efforts between 1982 and 2006.
With Republicans projected to prove the likely winners of the majority of Senate races in the 2014 election and thus gain control of the Senate, conditions are not likely to change. There are many reports of such developments in particular states and localities, with a general emphasis on the southern states with large black populations presently under Republican party control. The Brennan Center for Justice, an authoritative voice in the area, has kept a running account of such efforts. It reported that since 2010 new voting restrictions are scheduled to be in place in 22 states for the 2014 election unless blocked (six states are facing court challenges). “Voters in nearly half the country could find it harder to cast a ballot in the 2014 midterm election than they did in 2010. The new laws range from photo id requirements to early voting cutbacks to voter registration restrictions. Partisanship and race were key factors in this movement. Most restrictions passed through GOP-controlled legislatures and in states with increases in minority turnout.” (Weiser and Opsal, 2014).

The Brennan Center emphasized the same factors found to explain the source of prohibitions in the Bentele and O’Brien analysis. Its report went on to describe the state-by-state efforts, with the greatest attention given to those that succeeded at minimizing the turnout of blacks, Latinos, the young and the poor.

In sum, the expected happened. The consequence is to restructure the electoral landscape in the most impacted states with the intention of driving down what often is a low minority vote. Such developments would appear to counter the Supreme Court majority’s reasoning.

Conclusion

An act to amend the Voting Rights Act and address the concerns raised by the Supreme Court was introduced in the Congress on January 16, 2014 by Rep. James Sensenbrenner (R, MI), Chair of the House Judiciary Committee, Senator Patrick Leahy (D, VT), Chair of the Senate Judiciary Committee and Rep. John Conyers (D, MI) and others. The efforts were aimed at finding a way around the Supreme Court decision and restoring in some amended form the essential powers of the Voting Rights Act.
Basically while the Sensenbrenner, Leahy, Conyers et al. proposed legislation covered a number of provisions, many technical, in the original Act, with the intent of modernizing procedures, appealing to Republicans (the downgrading of the issue of voter id requirements) and passing Court inspection (believed to be problematical), it revised the criteria for determining which states and localities are subject to Section 4, the provisions of which were crucial for resurrecting the enforceability of the Act.

As described by The Hill’s Congress Blog:

This bill seeks to repair the damage done by the Court and restore the heartbeat of the Voting Rights Act (VRA), an important bipartisan move by Congress and the first step in the process to ensure the right to vote is protected.

A primary goal of this legislation is to go beyond a static, geographically based formula that governed application of preclearance requirements under VRA prior to the court's decision. Instead, the legislation … includes a rolling preclearance mechanism that is flexible, forward-looking and focuses on recent discrimination. At the outset, some jurisdictions with the worst records of discrimination will be subjected to a new preclearance formula, but the legislation also provides new tools to ensure an effective response to race discrimination … These include an expanded judicial bail-in provision for a voting violation found to have a discriminatory result as well as intent; new public notice and disclosure requirements for jurisdictions of proposed voting changes, particularly those that could have a meaningful impact on minority voters; enhanced preliminary relief when challenging certain types of voting changes that are likely to be discriminatory; and the additional ability of the Department of Justice to deploy federal observers in places where there is evidence of possible race and language minority discrimination that would interfere with the right to vote. (ACLU, 2014).

Rather than being based on violations dating over many decades and potentially outdated as argued by the Supreme Court, preclearance would be decided by violations occurring within a fifteen year cycle. Five or more state-level violations would invoke preclearance; three or more for a locality; or in both cases evidence of “persistent, extremely low minority turnout.” The enforcements would be reviewed with the objective of removing states which complied with federal voting provisions and punish those who adopted practices to restrict participation.

The major controversy involved the treatment of voter identification laws, believed to discourage minority, student and low income voting in general, a staple of the Republican,
conservative efforts to, allegedly, address voter fraud, the actual incidence of which is negligible. Voter id laws or practices would not count as violations unless proven to be discriminatory in a federal court.

The proposed legislation, allowing for reservations as to the voter id provisions, was well received.

More than likely, it would be one of the initial attempts to preserve the objectives, review and enforcement provisions of the original Act as a standard of the political landscape. The outcome, of course, is uncertain.

Discussion

A number of issues are raised by the Supreme Court’s decision in Shelby. Among these are the following:

First, is the Voting Rights Act needed or not, the specific point in contention in the case? Do discrimination efforts against blacks and other minorities continue to be of concern or not? Is the Voting Rights Act’s extension the preferred or best way to deal with such problems should they exist? Has the nation changed and the discriminatory practices of the past ended to the extent that voting laws and regulations intended to empower blacks and overcome past (or present) discrimination are no longer necessary, a product of a different age? And, more basically, is the United States and its politics “color blind” as often hoped and set as the judicial and political standard for the nation?

The Congress, and actually a succession of Congresses, decided the Voting Rights Act was necessary. The Supreme Court’s majority said it was not.

This brings up a second issue. While not discounting the necessity of full and fair participation in a democratic state or efforts to achieve a racial justice long denied, is which institution, the Congress, an elected body, or the Supreme Court, a small, and unelected number of political activists with lifetime appointments, should legitimately make such decisions. The Court is a product of a time and the social order prevalent when the individual appointments were made and the political agenda and ideology of the president who made
them. Most often these are out-of-touch with a changing society. Yet the Court claims
authority to pass final judgment on all social and political issues that arise. The stronger
argument I believe would favor placing such decisionmaking in the Congress, in former Justice
Stephen G. Breyer’s words “the people’s representatives.” Again Justice Breyer: “Congress,
being a political body, expresses the people’s will far more accurately than does an unelected
Court.” And it might be added in the present case “the most activist Supreme Court in history.”
(2004). It may also be among the most repressive in modern times with an expressed distrust of
the Congress and of election processes (Bush v. Gore (2001, Citizens United (2010) and Shelby
(2013) as examples), justified by a constitutional constructivism well out of the judicial
mainstream combined with a disregard for precedent or much of anything that falls outside
their immediate value structure. Taking this to another level, if a reasonably correct assessment
what does this say about a fundamental standard for a democratic state, for the rule of law?
James MacGregor Burns (2009) puts the issue well:

...the court has far more often been a tool for reaction, not progress. Whether in
the Gilded Age of the late nineteenth century or the Gilded Age at the turn of the
twenty-first, the justices have most fiercely protected the rights and liberties of
the powerful and the propertied. Americans cannot look to the judicial branch for
leadership. They cannot expect leadership from unelected and unaccountable
politicians in robes.

The consequence, as Burns puts it, is a “continuing struggle over leadership in American
democracy.”

... deference to a court with extra constitutional powers to summarily settle
controversies over constitutional values has too often sapped our democracy of
its vitality. It has too often muted the voice of the people ... It has closed off
avenues to desperately need change.
... it is emphatically the province and duty of the American people, not of the nine
justices of the United States Supreme Court, to say what the Constitution is. A
national reappraisal of the all-powerful court chosen by judicial roulette is crucial
if American democracy is to meet the rising challenges of the twenty-first century.
(252, 250, 259).

The issues of course, racial justice and respect for and obedience to the public’s will, are
of fundamental concern to a democratic society. The prospect of a resolution of such issues
within a fuller conception of a liberal democratic state is not achievable under such an arrangement as now exists with the Court.
Notes


3. This section closely follows Professor Michael Tolley’s development in his paper “Shelby Co. v. Holder and the Principle of ‘Equal Sovereignty’ Among the States,” delivered at the Northeastern Political Science Association panel on the Supreme Court’s decision on the Voting Rights Act, Philadelphia, PA, November 15, 2013.

4. The alignment of group pro and con on the issue of voter fraud is predictable: the Heritage Foundation, the Republican National Lawyers Association, and so on claiming fraud to be a major electoral concern. The ACLU, Brennan Center, U.S. Department of Justice, Center for American Progress, etc. claiming proposed anti-fraud legislation is intended to dilute minority participation. The most in-depth treatment making the pro-fraud case is Tracy Campbell’s Deliver the Vote (New York: Carroll and Graff, 2005). In opposition see: U.S. Election Assistance Commission, Election Crimes: An Initial Review and Recommendations for Further Study (2006); U.S. Department of Justice, Voting Fraud and Voter Intimidation (2006); U.S. Department of Justice, “Fact Sheet: The Department of Justice Corruption Efforts” (2008); and Justin Levitt, The Truth About Voter Fraud (New York: Brennan Center for Justice, 2007).

6. Among the independent variables in the study were: partisan (% Republican) control of the state legislature; divided state government; electoral competition, identified as level of state party competition and party vote differential in last presidential election; minority turnout and change in turnout; class-based turnout and changes in it; total state turnout; percent of population African American; percent non-citizen (immigrant); percent over 65; reported voter fraud cases; electoral legislation in contiguous state; previously adopted photo ID or proof of citizenship; no-excuse absentee and/or early voting availability; and per capital state revenue. I go through the list to how the thoroughness of the approach.

References


http://www.rollingstone.com/politics/news/the-gop-war-on-voting-20110830


Election.” AP Poll conducted with researchers from Stanford University, the University of Michigan and NORC at the University of Chicago. 


Table 1

Congressional Support for the Voting Rights Act, 1965 and 2006

I. Adoption 1975

<table>
<thead>
<tr>
<th>Party Vote</th>
<th>House</th>
<th>Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dem. 217-54</td>
<td>Rep. 111-20</td>
</tr>
<tr>
<td>Adoption</td>
<td>328-74</td>
<td></td>
</tr>
</tbody>
</table>

II. 2006 Renewal for 25 Years

<table>
<thead>
<tr>
<th>Party Vote</th>
<th>House</th>
<th>Senate</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Dem. 197-0</td>
<td>Rep. 102-33</td>
</tr>
<tr>
<td>Adoption</td>
<td>390-33</td>
<td></td>
</tr>
</tbody>
</table>
Table 2

2008 Election

I. Deep South (5 states)

<table>
<thead>
<tr>
<th></th>
<th>Black</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>75.2</td>
<td>74.6</td>
</tr>
</tbody>
</table>

II. Border States South (6 states)

<table>
<thead>
<tr>
<th></th>
<th>Black</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>67.1</td>
<td>64.2</td>
</tr>
</tbody>
</table>
Table 3

Percent Blacks Holding Public Office as Proportion of the Electorate (2001)
(*In percent*)

<table>
<thead>
<tr>
<th>I. Deep South (5 states)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>17.2</td>
</tr>
<tr>
<td>Georgia</td>
<td>9.3</td>
</tr>
<tr>
<td>Louisiana</td>
<td>13.9</td>
</tr>
<tr>
<td>Mississippi</td>
<td>18.9</td>
</tr>
<tr>
<td>South Carolina</td>
<td>13.5</td>
</tr>
<tr>
<td>X</td>
<td>14.5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>II. Border South (6 states)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>6.0</td>
</tr>
<tr>
<td>Florida</td>
<td>4.3</td>
</tr>
<tr>
<td>North Carolina</td>
<td>8.4</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2.6</td>
</tr>
<tr>
<td>Texas</td>
<td>1.7</td>
</tr>
<tr>
<td>Virginia</td>
<td>7.9</td>
</tr>
<tr>
<td>X</td>
<td>5.1</td>
</tr>
</tbody>
</table>
Figure 1

States with higher black turnout are more likely to restrict voting

Count of Restrictive Voter Provisions Passed, 2006-2011

One bill was passed in Alaska; Hawaii did not pass any such legislation