



The Right Wing Takes Aim at Section 5 of the Voting Rights Act

*While the Roberts Court Considers Turning the Clock Black,
21st Century Progressives Need to Fight for Strong Democracy*

By Jamie Raskin

“The past isn’t dead. It isn’t even past.” --William Faulkner

The Voting Rights Act of 1965, the monumental statutory achievement of Congress in the last century, is under attack this week in the Supreme Court by Shelby County, Alabama, backed by much of the legal infrastructure of the American right.

When Chief Justice Roberts and his fellow “color blind” arch-conservatives take up the ominous *Shelby County v. Holder*¹ on Wednesday, hold your breath. Despite the painstaking rejection of Shelby County’s arguments below in the United States District Court for the District of Columbia and the United States Circuit Court of Appeals for the District of Columbia, the far right is salivating because Chief Justice Roberts, in a near-miss decision on the same subject in 2009, has already expressed the sentiment of his colleagues in the majority that the Act now “raises serious constitutional questions.”² Of course, John Roberts was never much of a fan--as a lawyer, he tried to kill the implementation of a “results” test for voting rights violations under Section 2 of the Voting Rights Act when it came up for reauthorization in 1982.

Today, the whole conservative movement is gunning for the pivotal Section 5 of the Act, which requires covered states and jurisdictions to “pre-clear” changes affecting voting with the Department of Justice or the federal district courts in Washington.³ Justice Clarence Thomas has already written that he would strike down Section 5 as unconstitutional. Right-wing ideologues at the Cato Institute who think that widespread disenfranchisement is “ancient history” and hardball Republican activists who seek to do nothing more subtle than depress the minority vote and reclaim their edge in completely or partially covered states with fast-changing demographics, like Virginia, Florida and Arizona, all agree that this case is their best chance to take down the most effective part of the strongest pro-democracy law in American history.



The case against Section 5 turns on neither constitutional text nor precedent nor the facts of political life on the ground, but on political and constitutional myth. Section 2 of the Fifteenth Amendment clearly gives Congress the “power to enforce” voting rights “by appropriate legislation,”⁴ and the Court has four times—in *South Carolina v. Katzenbach* (1966),⁵ *Georgia v. U.S.* (1973),⁶ *City of Rome v. U.S.* (1980),⁷ and *Lopez v. Monterey County* (1999)⁸-- rejected invitations by recalcitrant states to declare Section 5 as outside of Congress’ powers under the 14th and 15th Amendments. The lower courts in this case reviewed more than 15,000 pages of Congressional findings and testimony demonstrating the continuing need for preclearance to deal with the ingenious disenfranchising and diluting schemes in the covered areas, including voter photo ID laws, tightening restrictions on registration and at the polls, and racist gerrymanders.

But ideologues trying to cut out the heart of the Voting Rights Act skip over both law and facts in favor of this free-floating right-wing fallacy: that a nation which twice elects an African-American president simply cannot contain any states or counties where minority voters face actual barriers to participation. Backing up this *non-sequitur* intuition are constitutional myths: that Congress is not permitted to differentiate among the states because of Equal Protection principles and that the preclearance mechanism in the Voting Rights Act and its “coverage formula” impose far too high “federalism costs” on covered areas. All of these nebulous suggestions are supposed to lead the Court to find that Section 5 is no longer a “congruent” or “proportional” remedy, under either the Fourteenth Amendment or the Fifteenth Amendment, for threats to voting rights.

The arguments against Section 5 are as thin as the paper they are written on, but they appeal nicely to the long-suffering racial fatigue of Supreme Court arch-conservatives, who also seem set this Term to enlist Justice Kennedy in their driveto bring down the hammer on what is left of affirmative action in public higher education. You can feel in these dynamics the same kind of political and juridical undertow that washed away Reconstruction after the Civil War. But, if the decades-old Section 5 does fall, it forces progressives to rethink the political democracy agenda in creative ways and makes the development of universal voting rights and enforcement mechanisms a national imperative.

A Landmark Achievement Paid for in Struggle and Blood

The Voting Rights Act was paid for in blood by Medgar Evers, Mickey Schwerner, James Chaney, Andrew Goodman, Jimmie Lee Jackson, Viola Liuzzo, and many thousands of other civil rights heroes. The great Bob Moses, who defied the sheriffs and Ku Klux Klan to register voters in Mississippi in the early 1960s, was beaten nearly to his death when he walked an aspiring voter to a courthouse. Traveling the dusty back roads of Dixie, Moses developed the phrase “one person one vote” to express his conviction that politics belongs to everyone. The phrase reappeared in Justice William Douglas’ 1963 opinion in *Gray v. Sanders*, which struck down representation by county rather than people, and became the touchstone of the Supreme Court’s pivotal jurisprudence knocking down malapportioned legislative districts.⁹



But the ideal of a strong, participatory and universal democracy did not become anything close to reality until President Lyndon Johnson pushed Congress on March 17, 1965 to pass the Voting Rights Act, just days after “Bloody Sunday” when the Selma, Alabama police officers unleashed their fury on 600 civil rights marchers. By invalidating racist “devices” that thwarted voting rights across the country, the Act finally made the buried century-old promise of the Fifteenth Amendment (1870) come alive: the promise that “[t]he 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.”¹⁰ For the first time since the end of Reconstruction, the national government threw its weight behind the voting rights of disenfranchised African-American citizens.

Shifting the Burden: Section 5 and the Preclearance Breakthrough

The strong medicine provided by the Act was Section 5, which obligated the covered jurisdictions— all or specific parts of 16 states that had a history of both using discriminatory “devices” and disenfranchising a majority of citizens—to “pre-clear” any future changes in election administration, process and rights through the United States Department of Justice or the United States District Court for the District of Columbia.¹¹ Ever since, Alabama, Georgia, Louisiana, Arizona, Mississippi, South Carolina, Texas, Virginia and later Alaska (along with certain jurisdictions in California, Florida, Michigan, New Hampshire, New York, North Carolina and South Dakota) have had to prove that proposed changes in election laws do not disadvantage minority voters. Hundreds of plans and thousands of proposed changes have been rejected, preventing backsliding in the project of strong interracial democracy, even as more than 99% of submitted plans are approved routinely after submission.

What made Section 5 such a breakthrough event for American democracy was that it flipped the script on the endlessly inventive managers of electoral racism at the state and local level. Before, the lords of white power could respond to political pressure and successful civil rights litigation simply by introducing new and seemingly neutral techniques of electoral domination: grandfather clauses, literacy tests, character tests, constitutional quizzes, white primaries, Jaybird primaries, winner-take-all at-large elections, single-member districts gerrymandered to submerge the African-American vote with techniques of “packing, stacking, and cracking,” inaccessible registration procedures, limited registration hours, inaccessible and gerrymandered polling places, vote-stealing, shifts from elective to appointive office, and so on, *ad infinitum*. There was no way for African-Americans, Hispanics and other targets of electoral manipulation to keep up with and challenge, much less defeat, the versatile managers of public elections.

But the pre-clearance procedures of Section 5 meant that all of the madcap hijinks of Jim Crow politics were doomed because they had to be submitted *in advance* to federal judges or DOJ civil rights lawyers for approval. Rather than placing the burden on African-Americans and other minority voters to find lawyers and make the case against the government, the covered jurisdictions had to affirmatively show that their innovations were not discriminatory or “retrogressive.” As the Supreme Court put it approvingly in *South Carolina v. Katzenbach*, “After enduring nearly a century of systematic resistance to



the Fifteenth Amendment,” Congress chose “to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”¹²

The object of broad cross-partisan support until now, the Act has been reauthorized by Congress four different times, in 1970, 1975, 1982, and most recently in 2006, when no less a reactionary than President George W. Bush signed it into law for 25 years. In attendance at his signing ceremony on the South Lawn of the White House were not only many of the 98 Senators and 390 House Members who voted to reauthorize the Act, but Reverends Jesse Jackson, Al Sharpton and members of Martin Luther King’s family.

But, today, the right has turned on Section 5 and the Voting Rights Act with a vengeance, depicting it as a threat to racial neutrality, color-blindness and equal rights under law. Some of the activists, like Abigail Thernstrom, the neo-con Vice-Chair of the U.S. Civil Rights Commission, believe that Section 5 has given rise to “a rigid scheme of racial preferences.”¹³ The self-proclaimed “libertarian” Cato Institute says of “those who can’t forget Jim Crow” that “the South they remember is gone,” and the Koch Brothers-controlled think tank now seeks to dismantle “the segregated districts that racial gerrymandering creates.”¹⁴ (Has anyone seen a “segregated” district recently?) Many perceive in Section 5 a threat to the sovereignty of the southern states which are disproportionately covered by it. At a more practical level, hard-nosed Republican operatives despairing of the nation’s rapid demographic changes and the apparent racial and ethnic isolation of the Republican Party, are desperately seeking to depress the non-white vote and hope to remove Section 5 as an obstacle to their schemes.

Shelby County v. Holder: A Thin Legal Case

The meticulous legislative record assembled by Congress in 2006, which contains thousands of pages documenting ongoing threats to voting rights in covered jurisdictions, clearly refutes the claim that Section 5 of the Voting Rights Act is unnecessary. Just last year, the Department of Justice had to use its Section 5 powers to object to discriminatory voter identification laws in Texas and South Carolina, the rollback of early voting practices in Florida, and an egregious gerrymander of majority-minority districts and elected officials in Texas.

But the far right insists that the high rates of election of African-Americans to local and state offices in covered southern states prove that the Voting Rights Act and Section 5 are unnecessary. Of course, these significant gains have come about only *because* of the Voting Rights Act.

Moreover, even with the election of African-Americans from majority African-American districts, dramatic levels of racial polarization still exist in statewide, countywide and district-wide elections in covered areas. Whites vote overwhelmingly in Southern states for Republicans, and African-Americans vote overwhelmingly for Democrats. There are no African-American Governors or elected United States



Senators in the covered jurisdictions. Furthermore, even though southern legislatures are now integrated, since 2011 more than 95% of elected African-American state legislators in the South serve in the minority legislative party as white voters and legislators have deserted the Democrats. Thus, taking Alabama itself as an example, the State Senate today has 22 white Republican Senators and 12 Democratic Senators, seven of whom are African-American.¹⁵ The pre-1965 conditions of racial polarization are alive and well even if the Democrats and Republicans have traded places: those in power have an incentive to suppress the vote based on race in order to retain their hold on power. The more things change, the more they stay the same.

But the supporters of the petitioner in *Shelby County* argue that Congress may not differentiate among the states the way that the coverage formula does, suggesting that it somehow violates equal protection principles if Alabama has to pre-clear its voting changes but Minnesota, for example, does not. They say that this discriminatory treatment exacts “federalism costs” on covered areas that are far too high to be constitutionally sustainable. Thus, Section 5 no longer meets the *City of Boerne v. Flores* test of “congruence” and “proportionality” for remedial legislation under the Fourteenth and Fifteenth Amendments.

However, Equal Protection is a right that belongs to “persons” under the Constitution, not to states, which is why the Supreme Court has upheld on at least four different occasions direct attacks on application of the pre-clearance provision to selected covered states and jurisdictions. The word “federalism” does not appear in the Constitution, nor does the opaque and mysterious phrase “federalism costs,” so it is hard to know why mention of these words should override the clear enforcement powers that the Constitution assigns to Congress in Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. There is nothing non-congruent or disproportionate about Section 5 of the Voting Rights Act.

Even if the continuing use of the original coverage formula may not be a perfect way to ferret out the worst voting rights violators today, the Voting Rights Act has both meaningful “bail-out” procedures under Section 4(b), which allows jurisdictions that can show they have not violated voting rights for at least a decade to “bail out” of the preclearance process, and “bail-in” procedures under Section 3(c) for jurisdictions that become violators of voting rights.¹⁶ Increasing numbers of jurisdictions are asking for bail-outs from the Act, and not a single one has been turned down. The “bail-out” and “bail-in” provisions easily smooth over any incongruence that has crept into the statute over the years.

Indeed, the Supreme Court itself, in *City of Boerne v. Flores* (1997),¹⁷ invoked the finely tailored provisions of the Voting Rights Act to demonstrate what it considered the right way for Congress to enforce the Reconstruction Amendments. Justice Kennedy identified the limited geographic focus of the covered jurisdictions in the Voting Rights Act’s coverage formula, the limited time focus of the Act, the careful pre-clearance process, and the opportunity for covered jurisdictions to “bail out,” all as statutory features that make the Voting Rights Act a finely chiseled legislative enactment responding to



demonstrably profound threats to voting rights.¹⁸ Ironically, this week, it is the closely targeted application and narrow focus of the Voting Rights Act that the right-wing Justices on the Court are threatening to use as the basis upon which to strike the Act down.

After the Voting Right Act, Ambition for a Universal Democratic Agenda

To be clear, there is no need to make a fetish of Section 5 of the Voting Rights Act and there are doubtless many ways still to be written to enforce the voting rights of the people on a national basis. But this is a matter of public policy, not constitutional dictate. The Fourteenth and Fifteenth Amendments make it Congress' job to enforce Equal Protection and the voting rights of racial minorities.

The Roberts Court has shown no interest either in voting rights on the ground or in maintaining doctrinal coherence in constitutional law. It is interested in making grand ideological gestures. At least some and possibly all of the hard-right Justices may find it irresistible to decide that Section 5 is too "costly" to "federalism" or that the coverage formula in Section 4(b) is obsolete and discriminates against those poor states that once disenfranchised and discriminated but are now victims of overweening federal power. Such a decision would mesh well with the possible wipeout of college-level affirmative action in the Court. At a superficial level, it would be argued that, across the board, "neutrality" rules. What is really ruling is racial backlash.

A decision against Section 5 preclearance or the Section 4(b) coverage formula would likely spell the political demise of the Voting Rights Act, even if it is theoretically salvageable by an updated coverage formula or an even more relaxed preclearance procedure. Our paralyzed, deadlocked Congress will never come to terms on how to revive and renovate it if the Court knocks it down or puts it into a tiny little straitjacket.

Win, lose, or draw, progressives should reckon with the prospect that the days of this landmark statute might be numbered. This means that we need to take up an ambitious democracy and voting rights agenda of our own for the new century, this time with explicitly universalist aims and general terms that deal with the complex suppression of democracy today. The voting rights struggles of the new century relate not just to old-fashioned racial trickery in Alabama and Texas but new-age vote suppression in Florida, Pennsylvania and Ohio; they involve not just traditional vote dilution in the South but the increasingly untenable disenfranchisement of 600,000 Americans in Washington, D.C and 3.6 million Americans in Puerto Rico.

Many ideas have been floated as to what this democracy agenda would look like. Some are advocating for a constitutional amendment declaring that every citizen has a right to vote at every level of government over him or her. Some of the conversation involves the development of national vote-counting and electoral machinery standards. Several states have passed the National Popular Vote plan, which would ensure that the Electoral College result would reflect the actual popular vote. Other possible components of a democracy agenda include the transformation of political gerrymandering in



all of its guises. Our nation must have a thoughtful conversation on how to continue the effort to defend and expand our electoral democracy. In short, to continue the project of the activists, organizers, citizens, and leaders who dared to bring America the Voting Rights Act, we need to be thinking big right now, and engaging huge numbers of people to act to strengthen government “of the people, by the people, and for the people.”¹⁹ Democracy just can’t depend on that elusive fifth vote on the Roberts Court.

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¹ *Shelby County v. Holder*, 679 F.3d 848 (C.A.D.C. 2012).

² *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 193 (2009).

³ Voting Rights Act, 42 U.S.C. § 1973(c) (1965).

⁴ U.S. CONST. amend. XV, § 2.

⁵ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁶ *Georgia v. U.S.*, 411 U.S. 526 (1973).

⁷ *City of Rome v. U.S.*, 446 U.S. 156 (1980).

⁸ *Lopez v. Monterey County*, 525 U.S. 266 (1999).

⁹ *Gray v. Sanders*, 372 U.S. 368 (1963).

¹⁰ U.S. CONST. amend. XV, § 1.

¹¹ Voting Rights Act, 42 U.S.C. § 1973 (1965).

¹² *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

¹³ Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae In Support of Petitioner at 28, *Shelby County v. Holder*, 679 F.3d 848 (C.A.D.C. 2012) (No. 12-96).

¹⁴ Brief of Amicus Curiae Cato Institute In Support of Petitioner at 17, *Shelby County v. Holder*, 679 F.3d 848 (C.A.D.C. 2012) (No. 12-96).

¹⁵ Alabama State Senate, *Roster of the Alabama State Senate* (last visited Feb. 24, 2013) http://www.legislature.state.al.us/senate/senators/senateroster_alpha.html.

¹⁶ Voting Rights Act, 42 U.S.C. § 1973(b)-(c) (1965).

¹⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁸ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁹ President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).