



The Voting Rights Playbook

Why Courts Matter Post-*Shelby County v. Holder*

By Joshua Field January 2014

Introduction and summary

Voting is more than simply deciding which candidate to support; it is an experience. Depending on where you live, the laws of your state, your ease of access to transportation, and the ways your county administers elections, this experience—from registration to actually casting a ballot—differs greatly between counties and is largely dependent on the actions and laws passed by local officials.

Unsurprisingly, those in power seek to maintain the status quo because that is what put them into power in the first place. Lawmakers can use their power to create laws crafted to their self-preserving advantage and make it harder for new populations—who are often viewed as threats to the status quo—to participate in the democratic process. Often termed “the tyranny of the majority,” our nation’s founders grappled with this problem of protecting the status quo,¹ which could be used to limit the power that new demographic populations have to participate in our democracy.

Our nation is currently experiencing a demographic sea change.² Starting in 2012 through 2016, the number of Hispanic citizens eligible to vote is projected to rise nationwide by 17 percent—or by more than 4 million new voters.³ From 1996 to 2008, the number of Asian American citizens eligible to vote increased by 128 percent; Asian Americans were 3 percent of the electorate in 2012.⁴ While Asian Americans and Hispanics make up an increasingly larger proportion of the electorate, the proportion of eligible white voters has decreased.⁵ The increasingly diverse pool of eligible voters is overturning the status quo and traditional voting blocs in our nation.

In response to new voting populations, nervous leaders have enacted a slew of new procedural hurdles that make it more difficult to register to vote, harder to prove one’s residency, and significantly reduce voting opportunities. These actions are often taken under the guise of combatting voter fraud and ensuring election integrity.⁶ Unsurprisingly, as a *Washington Post* article recently pointed out, “the more that minorities and lower-income individuals in a state voted, the more likely” a state was to propose such restrictions.⁷

Although the voter fraud that these leaders claim they are guarding against is virtually nonexistent,⁸ the effects of voting law restrictions dramatically impact the ability of citizens to participate in the democratic process.⁹ Again, unsurprisingly, these restrictive measures have been found to have a disproportionate effect on people of color, those for whom English is a second language, young people, the indigent, and the elderly.¹⁰

With the vast majority of voting-related laws and administration implemented at the state and local level, federal law has played a large role in protecting against state and local voting-related discrimination. One piece of federal legislation, the landmark Voting Rights Act of 1965, or VRA, is widely hailed as the nation's most effective civil rights law. The combination of Sections 4(b) and 5 of the VRA provided the strongest protections against discriminatory state action by requiring states and localities with a history of voting discrimination to “preclear” changes in voting-related laws to ensure that they did not have a discriminatory effect.¹¹ While our federal courts played a role in enforcing these protections, a great deal of preclearance-related enforcement occurred within the administrative structure of the Department of Justice, or DOJ.

In 2013, however, the U.S. Supreme Court struck down Section 4(b) of the VRA with its *Shelby County v. Holder* ruling.¹² The Court, in a 5–4 decision, declared that the formula stipulated in Section 4(b) to determine which states were subject to “preclearance” was unconstitutional. The ruling effectively gutted Section 5 of the law, which actively protected voters from purposeful vote dilution, overly restrictive voting procedures, and voter intimidation, among other acts of discrimination.¹³

The largest consequence of *Shelby County* was the effective end of preclearance and, as President Obama noted in his 2014 State of the Union Address, a “weakened” Voting Rights Act.¹⁴ Now, instead of offending states having to prove that changes to voting law are not discriminatory, ordinary citizens and advocacy groups—often with the help of the Department of Justice—are left with the expensive and time-consuming burden of proving via Sections 2 and 3 of the VRA that state action discriminates against minority voters. Instead of efficient DOJ administrative enforcement that was available via Section 5, those claiming discrimination now have the burden of filing suit in our nation's federal district courts.

The burden switch that resulted from *Shelby County* was not lost on state lawmakers seeking to implement restrictive voting-related laws. Knowing that the burden is no longer on the states to prove that their laws do not discriminate, in the wake of *Shelby County*, many states have been busy making changes to voting laws that the Department of Justice argues will have discriminatory effects on the voting population and would not have survived Section 5 preclearance scrutiny.¹⁵ In the case of Texas, these changes came within hours of the ruling.

So what protection is left for voters? Moreover, what must advocates, litigators, and lawmakers do to ensure that new, organized attempts to make it harder for some citizens to freely cast their ballot are properly countered? How should Democrats and Republicans in Congress meet President Obama's call to "stand up for everyone's right to vote" by "working together to strengthen" the Voting Rights Act?¹⁶

In addition to addressing the aggressive tactics that states have taken post-*Shelby County*, this report will detail the following:

- The importance and power of Section 5 preclearance.
- The tools that remain to combat voting-related discrimination.
- The significant role our nation's federal courts and judges will play in defining which protections the VRA will now provide.
- Suggestions on what Congress can do to strengthen to the VRA, given the recent bipartisan proposal to legislatively revive Section 5 of the VRA.¹⁷

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