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The devastating demise of crucial provisions in the Voting Rights Act of 1965

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By Charles R. Church

Part 1 of 2

During the post-Civil War era, the 15th Amendment became one of the most essential features of our governing document by ordaining that the right to vote “shall not be denied or abridged...on account of race, color, or previous condition of servitude.” Crucial to the amendment’s future effectiveness was its less renowned Section 2, which granted to Congress the “power to enforce [it] by appropriate legislation.”

But Congress, as Justice Ruth Bader Ginsburg wrote in 2013 while dissenting in *Shelby County (Alabama) v. Holder*, “learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task.” Voting suits are onerous to prepare and litigation has been exceedingly slow. Even when favorable decisions finally are obtained, some states work around them by devising discriminatory devices not prohibited by the federal judgments or have formulated difficult new tests that prolong the existing disparity between white and African-American registration. Or, local officials have defied and evaded court orders, or simply closed their registration offices to freeze the voting rolls. In sum, as Chief Justice John Roberts agreed in *Shelby County v. Holder*, “[t]he first century of congressional enforcement of the Amendment can only be regarded as a failure.”

It took the brilliant, complex and maddening Lyndon B. Johnson to sign into law a solution, the Voting Rights Act of 1965 (VRA), which Ginsburg called in her *Shelby County v. Holder* dissent “one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history.” In two crucial provisions of the VRA, Section 5 required “preclearance” by federal authorities before any state or subdivision deemed a “covered jurisdiction” — i.e., a jurisdiction with a history of racial discrimination when it came to voting rights — could change its voting practices or procedures. Section 4(b) set forth the “coverage formula” to determine which states and subdivisions maintained tests or devices as prerequisites to voting and had low voter registration or turnout in the 1960s and early 1970s. Together, these provisions finally put a stop to the evasions of jurisdictions with bad records on granting people of color an equal chance to

vote.

These special provisions originally were granted a life span of just five years, though Congress reauthorized them for another five years in 1970, seven years in 1975, 25 years in 1982 and 25 more years in 2006. Along the way, the list of jurisdictions covered was expanded and an additional category of discrimination was added.

But in 2013, in writing for the majority in a 5-4 decision in *Shelby County v. Holder* (Kennedy voted with the usual conservatives), Chief Justice Roberts eviscerated the VRA by holding that Section 4(b), which contained the “coverage formula,” was unconstitutional: “In 1965, the States could be divided into two groups: those with a recent history of voting tests and low registration and turnout, and those without those characteristics. Today, the Nation is no longer divided along those lines, yet the [VRA] continues to treat it as if it were.”

Justice Ginsberg wrote a passionate dissent including biting language (e.g. “Hubris is a fit word for today’s demolition of the VRA.”). But, despite my pain in seeing preclearance vanish, as least for now, I believe the Roberts majority had the better argument, identifying the chink in the armor for the constitutionality of those vital sections.

Prior to the 2006 reauthorization, as Ginsburg pointed out, the House and Senate “held 21 hearings, heard from scores of witnesses, and received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions.” When compiled, the legislative record amounted to over 15,000 pages. What’s puzzling, however, is that with all that labor, why did Congress not bother to recast the “coverage formula” when so much had changed? Instead, the 2006 VRA repeated word-for-word Section 4(b)’s 1965 “coverage formula,” supplemented by identical “coverage formulae” that took effect in 1968 and 1972, having already been added by prior renewals.

The preclearance mechanism, for now, lies dead in the water. Voting rights experts might continue to debate whether the Roberts majority or Congress is to blame (I point to Congress), the latter for not amending the criteria in the VRA’s “coverage formula” to comport with Roberts’ words: “[C]ongress did not use the record it compiled (from its lengthy sets of hearings) to shape a ‘coverage formula’ grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relationship to the present day.” We are now consigned to wondering why Congress has not fixed the problem, since in *Shelby County v. Holder* even the Chief Justice admitted that: “[V]oting discrimination still exists; no one doubts that.”

Next week, Church will examine why Congress has failed to amend the VRA to revitalize the critically important “preclearance” device. Beyond that, he will provide examples of post-Shelby County v. Holder discrimination based on race, and discuss briefly what might be done about them.

Charles Church is a human rights lawyer who resides in Salisbury.

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Voting Rights ... (Part 2)

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By Charles R. Church

Last week, Church examined how Congress erred in its 2006 renewal of the vitally important Voting Rights Act of 1965 (VRA), leading to the U.S. Supreme Court's gutting of one of its two crucial provisions described below. Now, he looks at why Congress has not fixed the statute since 2013, and at how the discriminatory practices in the states have changed significantly. Finally, he will touch upon what might be done.

When Congress conducted extensive hearings then voted to renew the VRA's special provisions in 2006, the tally was unanimous in the Senate (98 to 0) and 390 to 33 in the House. With all that labor and strong sentiment in favor of the measure, why did no one stop to consider whether perhaps the VRA's special provisions effectuating federal preclearance for changes in the voting rules by certain states with a history of race discrimination no longer were drawn correctly? The likely answer is that no one saw the need.

Roberts pointed to what had to be done: "Congress may draft another formula based on current conditions." Why, then, has Congress not followed that advice? Once Trump took office in 2017, the answer was clear. Given his evidently innate aversion for minorities, and the clear political personal disadvantage to creating more black voters, no doubt he would veto any amendment creating more such voters. But given that both houses have been dominated by Republicans during his tenure, he was never called upon to do that. Though the 2006 voting tally would create a veto-proof supermajority now, given present-day Republicans' near-universal weak-kneed behavior since Trump took over, not nearly enough of them are likely to vote to fix the VRA, even though it plainly is the right thing to do. Even before Trump, Sen. Mitch McConnell, the cleverly underhanded Majority Leader who captured that post in 2015, might well have thwarted any such effort. That would have given the Congress substantially less than a two-year window to conduct hearings and mend the VRA appropriately; not much time in those polarized times. So, it didn't happen.

Where did that leave us? Within hours of the *Shelby County v. Holder* decision, Texas announced a strict new photo ID law for voters. Two other states — Mississippi and Alabama — also began to enforce similar laws that had been barred on account of the VRA's preclearance requirement. According to a Nov. 2 report by the Brennan Center for

Justice at NYU Law School: “As Election Day 2018 approaches, citizens in 24 states are facing new laws making it harder for them to vote than it was in 2010. And in nine of those states, it’s harder to vote than it was in 2016.” Among these, North Carolina put into effect restrictions on early voting. Such restrictions particularly affect African-American voters, who may well be hourly-wage employees who find it especially difficult to get to the polls on Election Day. In North Dakota, Native Americans are required to produce an ID with a street address, even though on reservations many have only a P.O. Box.

Since *Shelby County v. Holder*, according to “Blocking the Ballot Box,” an Oct. 28 piece in *The New York Times Sunday Review*, “state and local governments that formerly had to approve their voting changes with the federal government, like Georgia and Texas, have closed 20 percent more polling places per capita than other states have, many in neighborhoods with large minority populations.”

“Purging” is the process by which election officials seek to remove ineligible names from voter registration lists. When done correctly, the result is salutary in that voting rolls become up-to-date and accurate. When done improperly, purges exclude legitimate voters. Another Brennan Center study found that, during the past five years, four states had engaged in illegal purges, and another four had put unlawful purge rules into place.

Various tactics are available for diluting the votes of racial minorities. So-called “second generation barriers” to minority voting attenuate the impact of minority votes rather than directly attempting to block access to the ballot. Racial gerrymandering is such a barrier, as is the adoption of at-large rather than district-by-district voting in cities with a sizable black minority. Or a city could dilute the effect of black votes by incorporating white majority areas into city limits.

Given the divided Congress we soon will have and a hostile president, what might be done to remedy this parlous situation? Perhaps nothing, a pessimist might say. But who knows what might be achieved with a strong Democratic majority in the House? As the Brennan Center’s Nov. 2 essay points out, “We faced even worse voter suppression schemes before the 1965 [VRA], and we responded by making our democracy stronger.” Can’t we do it again?

Charles Church of Salisbury is a human rights lawyer.

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