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VOTING RIGHTS AT A CROSSROADS

The Supreme Court Decision in *Shelby* Is the Latest Challenge in the 'Unfinished March' to Full Black Access to the Ballot

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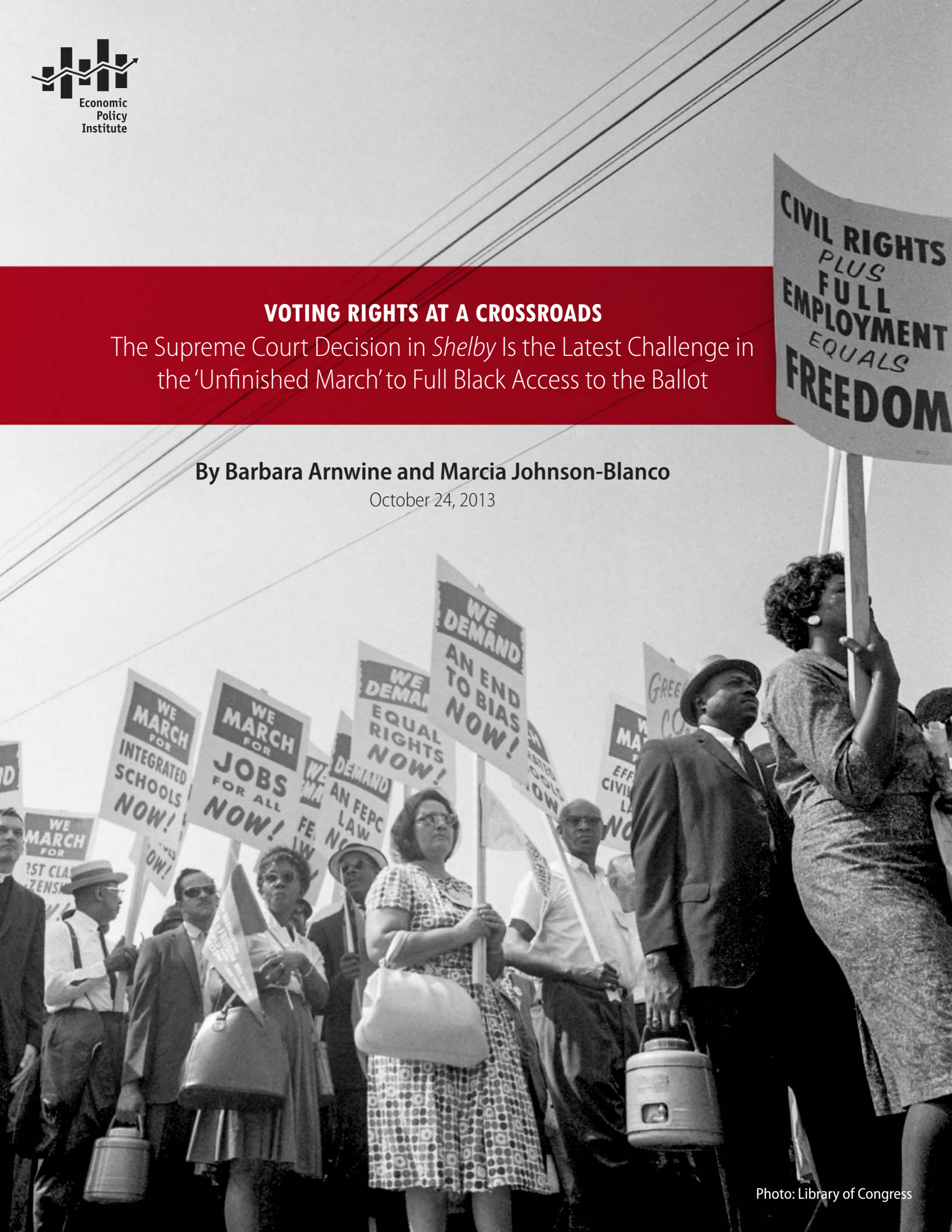

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Introduction

African Americans secured the right to vote in 1870 with the ratification of the 15th Amendment of the U.S. Constitution, the third of what is known as the Civil War or Reconstruction Amendments. Yet despite the 15th Amendment's clear language prohibiting discrimination in the vote "on account of race, color or previous condition of servitude," 95 years would pass before the Voting Rights Act of 1965 gave African Americans the right to vote in a meaningful way.

The battle to ensure that the language of the 15th Amendment was not just empty sentiment began well before the 1963 March on Washington for Jobs and Freedom, a pivotal event in American history. However, the success of the march inspired civil rights leaders to pursue a meaningful right to vote for African Americans—and other rights long denied—with renewed vigor. Their determined campaign resulted in the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, seminal pieces of legislation that transformed American democracy (National Commission on the Voting Rights Act 2006, 2).

This paper discusses the struggle to achieve voting rights in the decades before and after the 1963 March on Washington and the present day uncertainty over retaining the rights that have transformed American democracy given the recent Supreme Court nullification of Section 5, one of the most important provisions of the Voting Rights Act (Hill 2013).

Specifically, as this paper explains:

- In the near century between when African Americans won the right to vote in 1870 and the March on Washington for Jobs and Freedom, poll taxes, literacy tests, and other restrictive local and state laws consistently prevented African Americans from being able to vote.
- In 1962, the year before the march, only 1.4 million of the more than 5 million blacks of voting age living in the South's 11 states were registered to vote.
- In 1964, in the five southern states of Alabama, Georgia, Mississippi, North Carolina, and South Carolina, only 22.5 percent of voting-age African Americans were registered to vote. Particularly troubling, in Mississippi, only 5.1 percent of voting-age African Americans were registered, compared with 94.9 percent of whites.
- In 1965, only 1.9 percent of eligible blacks in Selma, Alabama, were registered to vote.
- The organizers of and participants in the March on Washington for Jobs and Freedom were fully aware the right to vote was not only an end in itself but critical to the economic goals of the march, as limited political representation responsive to their needs exacerbated their already-great inequalities in employment and education.
- The March on Washington demonstrated the massive support for the passage of civil rights legislation that would remove the barriers faced by African Americans, including those that denied their right to vote. The struggle for the right to vote would result in the passage of the Voting Rights Act of 1965.
- The Voting Rights Act of 1965 (the VRA) transformed American democracy. Section 2, which prohibits voting laws that are discriminatory in intent or in practice nationwide, has resulted in hundreds of successful challenges to discriminatory election procedures or structures in counties across the country. For example, Section 2 litigation transformed at-large election districts that denied minority voters the opportunity to elect their candidates of choice into

single-member districts that allowed for such opportunity. Section 5, the "preclearance provision" which requires that jurisdictions with a history of discrimination (as determined by a "coverage formula") obtain federal approval before changing any voting laws, has blocked thousands of racially discriminatory voting changes before they came into effect. The Supreme Court noted in the recent decision striking down the Voting Rights Act's coverage formula (*Shelby Cnty., Ala. v. Holder*) that the Voting Rights Act played a large part in boosting voter registration and turnout in the covered jurisdictions. However, the court also acknowledged that discrimination in voting continues to exist.

- Today, 68.4 percent of African Americans are registered to vote.
- One area in which the VRA has not been successful is in addressing the disproportionate impact of the nation's felony disenfranchisement laws on minorities. Of the 5.85 million Americans who have lost their right to vote because of a felony conviction, 2.2 million (37.6 percent) are African American (Chung 2013, 1–2). In contrast, African Americans make up 13 percent of the total U.S. population (U.S. Census Bureau 2012). Overall, 7.7 percent of African Americans are disenfranchised because of felony convictions, compared with 1.8 percent of non–African Americans (Uggen et al. 1–2).
- The 2013 Supreme Court decision (*Shelby Cnty., Ala. v. Holder*) striking down the coverage formula that determines which states are subject to Section 5 imperils African Americans' hard-fought access to the ballot. Congress must pass bipartisan legislation that ensures that the goals of the Voting Rights Act are fulfilled. As U.S. Attorney General Eric Holder has noted, many pieces of state legislation concerning election administration or the creation of electoral districts that were previously subject to the "potent tool" of preclearance review to ensure that there was no racially disproportionate impact now go unchecked.

When Barack Obama was elected president of the United States, many prematurely heralded the arrival of post-racial America. But the disproportionate impact of suppressive voting laws, such as felony disenfranchisement laws, on African Americans, coupled with the response by some states to the recent gutting of essential provisions of the Voting Rights Act, mean that the quest for full voting rights continues.

Voting rights in the decades leading up to the march

After the 15th Amendment was ratified in 1870, some state legislatures, primarily in the South, began to pass laws preventing African Americans from voting. These laws included poll taxes, literacy tests, understanding tests, requirements that a white citizen serve as a reference for voter registration, or requirements that disenfranchised anyone of "bad character." Additionally, in states such as Louisiana, the "White Citizen Council" purged registered African Americans for any paperwork irregularities (Keyssar 2000, 207). Whites were generally exempted from these laws through the applic-

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ation of grandfather clauses, which applied to citizens registered to vote before the laws were passed as well as their descendants (U.S. Commission on Civil Rights 1965, 7).

In 1915, the Supreme Court struck down grandfather clauses as a violation of the 15th Amendment. The case, *Guinn v. United States*, dealt with a challenge to an amendment to the Oklahoma state constitution that added a literacy test for voting, but exempted those who were entitled to vote on January 1, 1866, or their lineal descendants.[1]

In response to the *Guinn* decision, the Oklahoma legislature passed a voter registration law that limited registration to the period between April 30 and May 11, 1916, with an extension to June 30, 1916, for those who met certain conditions. Those who failed to register during this 12-day period permanently lost the right to register and accordingly, to vote.[2] In 1939, "reluctantly" striking down this law in *Lane v. Wilson*, the Supreme Court noted that the 15th Amendment "nullifies sophisticated as well as simple-minded modes of discrimination . . . ."[3]

In 1944, the Supreme Court struck down a Texas law that prohibited blacks from voting in primary elections, stating that "[t]he United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race."[4]

Despite these rulings, states steadfast in their determination to deny blacks the right to vote continually undermined the promise of the 15th Amendment with laws imposing poll taxes, literacy tests, and other discriminatory voting requirements. By the mid-1950s it was clear that even if a discriminatory state law was overturned by successful litigation, the state would just replace it with another discriminatory law. Therefore, federal legislation was needed to prohibit such laws from being enacted or implemented.

The first attempt at such a law was the passage of the Civil Rights Act of 1957. In his 2002 book *Master of the Senate*, Robert Caro noted that then–Senate Majority Leader Lyndon Johnson determined that passage of civil rights legislation that struck down voting barriers would serve his presidential ambitions.[5] Johnson was successful in convincing Congress to pass a compromise civil rights bill with voting rights provisions that prohibited intimidation of voters, gave the U.S. attorney general the authority to bring cases against discrimination in federal court, and provided free counsel to any person "cited for an alleged contempt under the Act" (P.L. 85-315). However, these provisions proved ineffective at stopping voting discrimination, and several courts found the 1957 act unconstitutional.[6] Although court decisions finding the act unconstitutional were later overturned by the Supreme Court (*United States v. Raines* and *United States v. State of Ala.)*, federal litigation enforcing the provisions of the act continued to be a slow and frustrating process.[7]

Congress enacted the 1960 Civil Rights Act to address the limitations of the 1957 Act. The 1960 act required the retention of election records; gave the U.S. Commission on Civil Rights, created under the 1957 act, the authority to administer oaths; and made states liable for the actions of state officials. Some successful litigation resulted from the passage of the 1960 law, but again, the process was slow, expensive, and limited.[8]

The March for Jobs and Freedom and the road to the Voting Rights Act

On the eve of the March on Washington for Jobs and Freedom, it was clear that despite legislation to secure voting rights and litigation chipping away at the barriers to vote, African Americans were consistently denied access to the ballot. Indeed, in the year before the march—when the Student Nonviolent Coordinating Committee (SNCC) started

its Voter Education Project—only 1.4 million of the more than 5 million blacks of voting age living in the South's 11 states were registered to vote (Wexler 1993, 197).[9]

In 1964, in the five southern states of Alabama, Georgia, Mississippi, North Carolina, and South Carolina, only 22.5 percent of voting-age African Americans were registered to vote. In comparison, white voter registration rates in these states were upwards of 80 percent (including Alabama and Mississippi at over 90 percent) and 65 percent across the South. Particularly troubling, in Mississippi, only 5.1 percent of voting-age African Americans were registered, compared with 94.9 percent of whites.[10] (Davidson and Grofman 1994)

Due in part to the limited political representation responsive to their needs, African Americans also suffered great inequalities in employment and education. A 1963 Census report found that African Americans' economic status had deteriorated since World War II (Graham 1990, 101).[11] Similarly, despite the Supreme Court ruling in *Brown v. Board of Education* that segregation in schools was unconstitutional, progress in integrating schools stalled (Zelden 1999, 471).[12]

To bring attention to the inequalities suffered by Negroes, as African Americans were called at the time, union leader A. Philip Randolph revived his 1941 call for a March on Washington.[13] The idea appealed to the civil rights leaders of the day, and the resulting March for Jobs and Freedom refueled the civil rights movement's resolve to pass a voting rights law that delivered on the promise of voting rights for all. The over 200,000 marchers who converged on the mall in Washington, D.C., were fully aware that the right to vote was inextricably tied to overcoming the socioeconomic problems they endured.

Following the march, civil rights groups joined forces to launch a campaign to bring attention to longstanding efforts to disenfranchise blacks and counter the suggestion that blacks were unregistered because they did not want to vote. The Mississippi Freedom Summer Project recruited volunteers from across the country to help blacks in Mississippi register to vote. During the campaign, three volunteers were murdered and became symbols of the price that those who fought to overcome discriminatory laws sometimes paid. Andrew Goodman, James Chaney, and Michael Schwerner were captured and killed while driving through Philadelphia, Mississippi, when working to register voters (Wexler 1993, 198–200). Their deaths in June 1964 gained nationwide attention and illustrated the vicious resistance to the struggle for the right to vote. The following month, Congress passed the Civil Rights Act of 1964, which prohibited discrimination in voting rights, public accommodations and facilities, education, employment, and federally assisted programs. It also amended the procedures and duties of the U.S. Commission on Civil Rights. However, although the act outlined how literacy tests should be administered for voting in federal elections, much more was needed to end voting discrimination.

In January 1965, the Southern Christian Leadership Conference (SCLC) under the leadership of Martin Luther King Jr. joined forces with the SNCC and its dynamic president, John Lewis, to raise awareness of widespread voter discrimination. This new coalition decided to focus the nation's attention on Selma, Alabama, and its dismal record of voting rights as indicated by the fact that only 1.9 percent of eligible blacks were registered to vote. The events in Selma would prove pivotal to the passage of the Voting Rights Act. (Kotz 2005, 255)

On March 7, 1965, as they began a march from Selma to Alabama's capital, Montgomery, Lewis and other civil rights leaders in the front found themselves "trapped between the six hundred protesters behind them and the troops who now

swept over them, nightsticks flailing" (Kotz 2005, 283). A horrified nation watched the brutal beating of the marchers on television and, in the days that followed, waited for the country's leaders to respond.

On March 15, in a special message to Congress on the right to vote, President Johnson called on Congress "to discharge the duty authorized in Section 2 of the 15th Amendment 'to enforce this Article by appropriate legislation'" (Johnson 1965). On March 19, Johnson sent proposed voting rights legislation to Congress. Meanwhile, civil rights leaders in Selma determined to accomplish their goal were finally able to march after U.S. District Court Judge Frank Johnson revoked his earlier order against the march. On Sunday, March 21, the marchers began again the 54-mile, five-day journey from Selma to Montgomery, reaching that city on Thursday, March 25, where they were greeted by over 30,000 other civil rights demonstrators. (Kotz 2005, 316–17, 323)

On August 3, Johnson's bill passed the House by a vote of 328 to 74, and the following day it passed the Senate by a vote of 79 to 18. A new era had begun.

Brief history of the Voting Rights Act

The Voting Rights Act of 1965 (VRA) transformed American democracy. The act contained both permanent and temporary provisions. Section 2 is a permanent nationwide prohibition against voting discrimination. It also suspended the use of "tests and devices" when registering for five years, created federal voter registrars, and allowed for federal observers at polling places.[14] The Voting Rights Act also contains temporary provisions, including the Section 4 coverage formula and the Section 5 "preclearance provision," which required that jurisdictions with a history of discrimination (as determined by a "coverage formula") obtain federal approval before implementing any voting change. At first the coverage formula applied to Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and 40 counties in North Carolina. These states and localities had to submit their voting changes for review by the federal district court in the District of Columbia or the U.S. attorney general.[15] During the 1975 reauthorization, Texas, Arizona, and Alaska were added to the states covered by Section 5 after the meaning of "test and device" was amended to include the use of English-only voting materials in jurisdictions where over 5 percent of the population were members of a language minority group.[16] Of all the act's provisions, this "preclearance provision" best addressed the inadequacy of case-by-case litigation. Prior to preclearance, states would merely substitute one form of discrimination with another after the original discriminatory law was struck down in the courts.[17]

Following the enactment of the VRA, South Carolina challenged its constitutionality and the Supreme Court upheld the law in 1966, finding that it "was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."[18] (Section 5 would later survive other attempts to declare it unconstitutional.[19]) As discussed later in this paper, while Shelby County, Alabama, sought to declare Section 5 unconstitutional, the Supreme Court ultimately did not reach that question, and instead declared only the coverage formula unconstitutional.

The initial focus of the VRA was on improving voter registration, and the Section 5 preclearance provision was not applied for almost five years (Davidson 1994, 32). Then, in 1969, the Supreme Court ruled Section 5 applied to all voting changes proposed by covered jurisdictions.[20] This ruling opened the door for review of laws that involved not only denial of voting rights but also laws that diminished minority vote opportunity, known as vote dilution (Davidson 1994, 32). (The Department of Justice had not objected to the vote dilution voting changes before this decision.) This

broader scope allowed the Department of Justice to review a wide range of voting laws, including redistrictings, methods of elections, and annexations.

The difference in the operation of sections 2 and 5 is that under Section 5, voting changes are reviewed prior to their implementation, and the jurisdiction is required to show that the law is not discriminatory, in fact or in effect. Under Section 2, the laws are in effect and challengers to the laws bear the burden of proof. Under Section 2, it may take years of complex litigation before the challenged law is enjoined.

Successes and work ahead under the Voting Rights Act

The Voting Rights Act has yielded remarkable results both through litigation under Section 2 and the preclearance regime in Section 5.

Through Section 2 litigation, at-large election districts that denied minority voters the opportunity to elect their candidates of choice became single-member districts that allowed for such opportunity (Engstrom et al. 1994, 117–128). For example, between 1970 and 1989, 42 of the 48 Alabama cities with populations greater than 6,000 changed from at-large to single-member districts or mixed electoral systems (Grofman and Davidson 1994, 306–307). Section 5 has blocked thousands of racially discriminatory voting changes before they came into effect. Each time the VRA has been reauthorized, Congress and the courts have acknowledged these successes (Davidson 1994, 36).

One area in which the VRA has not been successful is in addressing the disproportionate impact of the nation's felony disenfranchisement laws on minorities. In her groundbreaking work, *The New Jim Crow*, Michelle Alexander discusses the devastating impact of the criminal justice system on African Americans and their right to vote. Of the 5.85 million Americans who have lost their right to vote because of a felony conviction, 2.2 million are African American (Chung 2013, 1–2). Overall, one of every 13 African Americans has lost the right to vote. In three states, Florida, Kentucky, and Virginia, more than one in five African Americans are disenfranchised (Chung 2013, 10). There are about 30 million African Americans in the United States, approximately 13 percent of the population (U.S. Census Bureau 2012). And while the Supreme Court has found that some disenfranchisement laws are enacted with the intent to discriminate, (*Hunter v. Underwood* 1985), courts have been reluctant to find that the disproportionate impacts of these laws on blacks violate the Voting Rights Act (see, for example, *Farrakhan v. Gregoire* 2010).[21]

In 2006, Congress again took up the reauthorization of the temporary provisions of the Voting Rights Act. It developed an extensive record of voting rights violations that included the findings of the National Commission on the Voting Rights Act (NCVRA).[22] The commission determined that "[t]he evidence demonstrates unfortunately that the persistence, degree, geographic breadth, and methods of voting discrimination are substantial and ongoing. The voting discrimination that Congress intended to eliminate by enacting and reauthorizing the Voting Rights Act remained. The temporary provisions of the Act, in fact, have prevented and remedied such discrimination. They continue to do so today" (Lee 2006). The commission issued a report, *Protecting Minority Voters: The Voting Rights Act at Work 1982 – 2005,* which found that more than 1,000 voting changes were denied preclearance under Section 5 during the period reviewed. The report also found that there were 635 successful Section 2 cases affecting election procedures or structures in 825 counties (Lee 2006). Overall, in its review of over 15,000 pages, the House of Representatives determined that "findings of continued efforts to discriminate against minority citizens in voting demonstrate that despite substantial improvements, there is a demonstrated and continuing need to reauthorize the temporary provisions" (U.S. House of

Representatives 2006, 53). The Senate incorporated the record developed by the House and had additional hearings. Finally, in July 2006 both houses of Congress reauthorized the temporary provisions of the VRA by large bipartisan margins (390-33 in the House and 98-0 in the Senate) with the passage of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.[23]

Recent constitutional challenges to the Voting Rights Act

On August 4, 2006, eight days after President George W. Bush signed the reauthorized provisions of the VRA, a municipal utility district filed a constitutional challenge to the reauthorization in the U.S. District Court for the District of Columbia, as well as a statutory claim seeking release from the preclearance requirement. In *Nw. Austin Mun. Util. Dist. No. One v. Holder*, the Supreme Court avoided the constitutional issue by allowing the municipal district to bail out of the preclearance requirements. However, the court noted that the reauthorized Voting Rights Act raised "serious constitutional concerns."[24]

Following this decision, several jurisdictions challenged the constitutionality of the reauthorized VRA. The challenge filed by Shelby County, Ala., in April 2010 was the first to reach the Supreme Court. Once again, it was a county in Alabama that would focus the nation's attention on discrimination in voting. Shelby County argued that Congress exceeded its enforcement authority and violated the principle of "equal sovereignty of the states."[25] The plaintiff, Shelby County, also took issue with the fact that there was reauthorization of the VRA without any amendment to the preclearance provisions despite advances in both voter registration and voter turnout in covered jurisdictions.[26] Both the lower courts rejected this argument and found the reauthorization constitutional. (For more on the *Shelby* case, see the below section entitled *The future of voting rights.)*

The response to the election of the first African American president

During the period between the reauthorization of the VRA and the constitutional challenges that followed, Americans elected the first African American president. Because of this victory, many erroneously believed the days of voting discrimination were over. While Barack Obama garnered 95 percent of the black vote, he also got 43 percent of the white vote and 67 percent of the Latino vote (Roper Center for Public Opinion Research 2008). Commentators rushed to declare his victory evidence of a post-racial America (Hoagland 2008). However, many overlooked the racial polarization of the vote, particularly the vote in the states that were covered by Section 5 of the Voting Rights Act. In fact, Republican presidential candidate John McCain defeated Obama in all but one (Virginia) of the states fully covered by Section 5, even in states where white Democrats were elected to statewide office (Clarke 2009, 246–247). The data showed that racial polarization transcended partisan choice.

Following the 2010 elections, conservative lawmakers quickly began passing restrictive voting laws (Lawyers' Committee for Civil Rights Under Law 2012, 3). These laws included voter ID laws and limitations on early voting and voter registration drives. States passing restrictive voter ID laws claimed these laws were needed to combat voter fraud, but offered no proof of such a threat. Rather, as an earlier 2006 survey had shown, up to 25 percent of African Americans did not have the required identification (Brennan Center for Justice 2006).

Litigation under the Voting Rights Act highlighted the impact of these restrictive state voting laws on minority voters and helped prevent some of these laws from going into effect before the 2012 elections. For example, in 2011, Texas

passed one of the country's most restrictive voter identification laws. The law required voters to show a limited number of government-issued identification documents in order to vote. As a jurisdiction governed by Section 5, Texas was required to submit the law for review. It first submitted the law to the Department of Justice. The U.S. attorney general objected to the law. As was its right, Texas then sought review before the federal district court in Washington, D.C. That court again denied approval, finding in *Texas v. Holder* that the law was one of the most stringent in the country and that the implicit costs of obtaining the required identification would fall disproportionately on the poor, of which a high percentage were the state's African American and Hispanic voters.[27] Similarly, in another separate review of the state's redistricting laws, the court rejected Texas's redistricting plans for the state legislature and Congress. The court found that the congressional redistricting plan was not only retrogressive, but that it also had a racially discriminatory purpose.[28]

Additionally, Section 5 review mitigated the discriminatory effect of South Carolina's voter identification law and Florida's reduction of early voting hours.[29]

The future of voting rights

Despite the spate of restrictive voter legislation leading up to the 2012 elections, African American voters defied expectations, endured long lines[30] and turned out in record numbers (Census Bureau 2013).

However, there is now great uncertainty about voting rights given the U.S. Supreme Court's recent decision in *Shelby* and states' continued pursuit of voting laws that create barriers to the polls (Lee 2013).

On June 25, 2013, in a 5-4 decision, the U.S. Supreme Court acknowledged that the Voting Rights Act "has proved immensely successful at redressing racial discrimination and integrating the voting process" yet struck down the coverage formula that determined which states were subject to Section 5. It determined that the formula "imposes current burdens that are not justified by current needs" and that the extensive record compiled by Congress "played no role in shaping the statutory formula before us today."[31] In effect, a majority of the Supreme Court substituted its judgment for that of Congress and determined that the coverage formula that had kept jurisdictions with an ongoing history of discrimination in voting from imposing new discriminatory laws was no longer needed. It also gave great emphasis to the principle of equal sovereignty of the states, referring substantially to its discussion of this principle in *Northwest Austin*, the 2009 challenge to the 2006 reauthorization.[32] Equal sovereignty is based on the principle that all states have an equal amount of authority to govern the internal affairs of their state and therefore, the federal government may not treat states differently. The court in *Shelby* stated that the Voting Rights Act's "covered jurisdictions" is a prime example of a violation of the principle of equal sovereignty because the federal government treated covered jurisdictions differently by imposing more regulations on them than on non-covered states. However, as seen in the 1966 decision, *Katzenbach*, rampant voting discrimination constituted an "exceptional condition" that overcame the equal sovereignty principle. According to the court, this exception no longer exists because of the dramatic progress made in the area of voting rights.

However, as Justice Ruth Bader Ginsburg pointed out in the dissent to the court's opinion, the principle of equal sovereignty of the states had previously been "*applie[d] only to the terms upon which States are admitted to the Union,* and not to the remedies for local evils which have subsequently appeared."[33] Instead, the dissent focused on the evidence upon which Congress relied and determined that "[t]he number of discriminatory changes blocked or deterred by the pre-

clearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy."[34]

Justice Ginsberg noted that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[35]

Indeed, at the beginning of the Shelby decision, the Supreme Court noted that the covered jurisdictions had better rates of voter registration and turnout, when compared with the rest of the nation. The court also noted that black voter turnout actually exceeded white voter turnout in some covered jurisdictions. However, the court ignored both the congressional record from the 2006 reauthorization and the recent spate of suppressive voter legislation.

Today, state legislatures persist in enacting laws that would disadvantage if not outright disfranchise minority voters.

As those who care about voting rights did 50 years ago, the nation must now rise up against the Supreme Court decision that has greatly undermined the law that finally brought about the promise of the 15th Amendment. Despite a court finding that its voter identification law was "the most stringent in the country and impose[d] strict unforgiving burdens on the poor" who were disproportionately racial minorities, Texas announced hours after the *Shelby* decision was announced that it would implement this voter identification law (McCumber 2013). On August 22, 2013, the Department of Justice filed a lawsuit against the Texas voter ID law, citing violations of the 14th and 15th amendments as well as Section 2 of the Voting Rights Act. In announcing the lawsuit, U.S. Attorney General Eric Holder noted that "[w]e will not allow the Supreme Court's recent decision to be interpreted as open season for states to pursue measures that suppress voting rights" (U.S. Department of Justice 2013a). The Lawyers' Committee for Civil Rights Under Law as well as other civil rights groups have also filed lawsuits against the Texas voter ID law.

Prior to this filing, the Department of Justice asked the district court considering a challenge to the congressional and state House redistrictings in Texas to find that the passage of the new electoral boundaries was intentionally discriminatory and that Texas should once again be subject to a preclearance regime (U.S. Department of Justice 2013b). On the very day of this filing, North Carolina's legislature passed laws that restricted the types of photo identification used in order to vote, shortened early voting, ended same-day voter registration, and prohibited preregistration that allowed high school students to register to vote before their 18th birthday (Tackett and Mattingly 2013). The Department of Justice filed a lawsuit against the North Carolina voter ID law, with Attorney General Holder noting that "'[a]llowing limits on voting rights that disproportionately exclude minority voters would be inconsistent with our ideals as a nation. And it would not be in keeping with the proud tradition of democracy that North Carolinians have built in recent years.'" (Gerstein 2013)

Additionally, Florida reinstated a program to purge voters that had been halted by lawsuits seeking enforcement of Section 5 of the Voting Rights Act.[36] The program compares the state's registered voters against the Department of Motor Vehicles' database as well as a federal database that contains names of noncitizens. Registered voters who are identified as noncitizens are then purged from voter rolls. In early October 2013, Florida Secretary of State Ken Detzner began what has been described as a "purge tour": his effort to explain what he called "Project Integrity" to the state's Supervisors of Elections and to get their input about the campaign (News Service of Florida 2013). Supervisors had indicated that they did not trust the list that the state had provided (Smith 2013).

The civil rights community and the public must now apply a heightened level of vigilance to ensure that the gains of the past 50 years are not lost, and to continue the historic trajectory of ensuring access to the ballot for all eligible voters. Citizens must become engaged in their communities and ensure that their elected officials are aware that they are being watched and that attempts to roll back hard-fought gains will not be tolerated. Just as importantly, citizens must call on their members of Congress to pass bipartisan legislation that creates a new infrastructure to prevent discriminatory voting changes[37] and ensures that the goals of the Voting Rights Act are fulfilled.

About the authors

Barbara R. Arnwine, president and executive director of the national Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) since 1989, is internationally known for contributions on critical justice issues including the passage of the landmark Civil Rights Act of 1991 and creation of the renowned 2011 voting rights "Map of Shame." A graduate of Scripps College and Duke University School of Law, she continues to champion civil rights and racial justice issues nationally and internationally in the areas of housing and lending, community development, employment, voting, education, and environmental justice.

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Endnotes

1. Guinn v. United States, 238 U.S. 347 (1915) at 368. The court noted that while the amendment did not expressly exclude voters because of race, color, or the condition of servitude, it clearly was enacted to counter the prohibition against discrimination in the 15th Amendment.

2. Lane v. Wilson, 307 U.S. 268 (1939) at 271

3. Lane, 307 U.S. at 274

4. Smith v. Allwright, 321 U.S. 649 (1944) at 664

5. Johnson determined that "[t]he way to end the indignities Negroes had to suffer was to give them the power to end them, and in a democracy, power comes from the ballot box. Give Negroes the vote—give them power—and they could start doing the rest for themselves. The liberals wanted to change so many laws: housing laws, transportation laws, public accommodations laws, private accommodation laws, school desegregation laws—all those laws that were covered in [the proposed civil rights legislation]" (Caro 2002, 892).

6. *United States v. Raines*, 172 F. Supp. 552 (M.D. Ga. 1959) held the act unconstitutional because it allowed the attorney general to seek an injunction against a private citizen for an individual act divorced completely from state action as inappropriate legislation under the 15th Amendment; *United States v. State of Ala.*, 171 F. Supp. 720 (M.D. Ala. 1959) aff'd, 267 F.2d 808 (5th Cir. 1959) held that the State of Alabama was not a person under the terms of the Civil Rights Act of 1957, and as such, could not be sued.

7. United States v. Raines, 362 U.S. 17 (1960); United States v. State of Ala. 362 U.S. 602 (1960)

8. As the U.S. Commission on Civil Rights noted at the time, "The Government, under present laws, must still proceed slowly, suit by suit, county by county. Each suit, moreover, is expensive and time consuming; and although the Civil Rights Division has been repeatedly increased in size and budget, and has concentrated its efforts in the voting field, it has not been able to prepare and file all the suits that appear warranted. While it can be truly said that present laws have proved to be effective tools to deal with discrimination in voting, the tools are limited in scope. *There is no widespread remedy to meet what is still widespread discrimination*" (U.S. Commission on Civil Rights 1961, 100).

9. The goal of the VEP was to focus on voter registration drives.

10. Chapters in *Quiet Revolution in the South* (Davidson and Grofman 1994) cite the black voting rates noted here and cite the white voting rates as 91 percent in Alabama (McCrary et al. 1994, 66); 83.8 percent in Georgia (McDonald, Binford, and Johnson 1994, 102); 94.9 percent in Mississippi (Parker, Colby, and Morrison 1994, 154); and 83 percent in South Carolina (Burton et al. 1994, 232) but give no figure for North Carolina, so an average of these states could not be computed. The white voter registration rate across the South comes from Alt (1994, 366). The black voting rate across the five southern states cited in the paragraph comes from Davidson (1994).

11. The report noted that African American income was about 55 percent of that of whites. It attributed the difference to the nature of the work available to most African Americans: agricultural (15 percent of African Americans compared with 5 percent of whites) or household jobs (15 percent of African Americans compared with 2 percent of whites) (Graham 1990, 101). Additionally, there were racial quotas that limited the number of African Americans hired for particular jobs (Graham 1990, 103).

12. Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954). Further, the 1960 Census reported that while more than 40 percent of adult whites had high school diplomas, only 23 percent of African Americans did. And only 3.1 percent of African Americans were college graduates (U.S. Commission on Civil Rights 1961).

13. In 1941, in response to the resistance to give jobs to African Americans, Randolph called for a March on Washington to highlight this discrimination. He dropped his call for a march after President Roosevelt issued an executive order banning discrimination by defense contractors.

14. In 1980, the Supreme Court ruled that Section 2 applied only to intentional discrimination (*City of Mobile v. Bolden* 1980). In 1982, Congress amended this provision to apply not just to laws that were intended to discriminate, but also to laws whose results were discriminatory.

15. Section 5 was reauthorized in 1970, 1975, 1982, and 2006.

16. Additionally, the literacy test was permanently abolished in the 1975 reauthorization of the Voting Rights Act.

17. "[C]ase-by-case litigation proved wholly inadequate. Justice department attorneys were spread thinly among numerous lawsuits in many different jurisdictions. The government had the burden of proof, and massive resources were required to document discrimination in each case. By the time a court enjoined one scheme, the election had often taken place, local officials had

devised a new scheme, or both had occurred. The enforcement of the law could not keep up with the violations of the law" (U.S. Senate 1982).

18. The court discussed the failures of earlier civil rights acts and determined that Congress acted appropriately in enacting a law that addressed the "unremitting and ingenious defiance of the Constitution" (South Carolina v. Katzenbach, 383 U.S. 308 (1966)). Another important decision in 1966 struck down another barrier to voting. In *Harper v. Virginia Board of Elections*, the Supreme Court outlawed the poll tax, holding that the payment of a fee or tax as a condition to vote violates the Equal Protection Clause of the 14th Amendment and that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax."

19. Georgia v. United States, 411 U.S. 526 (1973); City of Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterey County, 525 U.S. 266 (1986); and Northwest Austin Municipal Utility District No. 1 v. Holder, 557 U.S. 193 (2009). (In this case, the Supreme Court applied the doctrine of constitutional avoidance and did not address the question of Section 5 constitutionality. Instead, it based its decision on statutory interpretation of whether the challenging jurisdiction could bail out of Section 5 coverage.) Also Shelby County v. Holder, 133 S.Ct. 2612 (2013).

20. "The legislative history, on the whole, supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way" (*Allen v. State Board of Election* 1969, 566).

21. Hunter v. Underwood, 471 U.S. 222 (1985); Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010).

22. Realizing that, unlike in past reauthorizations, the U.S. Civil Rights Commission would not review the current record of discrimination, the Lawyers' Committee of Civil Rights Under Law and other members of the civil rights community organized the National Commission on the Voting Rights Act. The eight-member bipartisan commission consisted of prominent academics, governmental and policy officials, and civil rights practitioners. The commission conducted 10 hearings across the nation and heard from more than 100 witnesses consisting of voting rights practitioners, academics, politicians, and community activists.

23. Pub. L. No. 109-246 (2006)

24. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) at 203, 211

25. Shelby Cnty., Ala. v. Holder 2011 at 427

26. Shelby Cnty. Compl. ¶¶ 22–26

27. Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) *vacated and remanded,* 133 S. Ct. 2886 (U.S. 2013)

28. Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2012) *vacated and remanded,* 133 S. Ct. 2885 (U.S. 2013)

29. South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012); Florida v. United States, 885 F. Supp. 2d 299 (D.D.C. 2012)

30. Relative to other groups, African American voters waited in the longest lines in 2012, waiting an average of 23 minutes to cast a ballot, compared with an average of 12 minutes for white voters and 19 minutes for Latino voters (Stewart 2013).

31. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) at 2626, 2629

32. Shelby Cnty., Ala. v. Holder 2013 at 2618, 2621–2624, 2629

33. Shelby Cnty., Ala. v. Holder 2013 at 2648 (emphasis in original)

34. Shelby Cnty., Ala. v. Holder 2013 at 2640

35. Shelby Cnty., Ala. v. Holder 2013 at 2650

36. See Mi Famila Voter v. Detzner, Civil Action No. 8:12-cv-1294-T-24 (July 27, 2013).

37. A report by the Brennan Center for Justice (Perez and Agraharka 2013) discussed the consequences of the Supreme Court striking down Section 5. While the court did not strike down the law, its decision prohibiting application of the existing coverage formula in effect stalled the application of Section 5, and thus the concerns highlighted in the report remain valid.

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