



“I am a registered voter. I have a valid state ID. I speak reasonably well. I present myself reasonably well, and I got challenged for early voting. [...] my address was correct. It matched my ID. And the woman said to me, ‘Well, are you sure this is all correct?’”

–Testimony from Cynthia Spooner, former sworn deputy voter registrar and election precinct judge, about her experience voting in Harris County, Texas. (Texas NCVR hearing)

CHAPTER 3

What Has Been Lost as a Result of *Shelby County v. Holder*

This chapter provides an overview of the remarkable and enormous impact Section 5 of the Voting Rights Act (VRA) has had on the opportunity of minority citizens to participate in our Nation's political processes. Thus, this chapter provides insight into what has been lost as a result of the Supreme Court's decision in *Shelby County v. Holder*. This chapter also discusses *Shelby County's* effect on the Department of Justice (DOJ)'s federal observer authority under Section 8 of the VRA.

I. SHELBY COUNTY AND SECTION 5'S IMPACT ON MINORITY ELECTORAL OPPORTUNITY

The termination of Section 5 preclearance is having and will continue to have an immense impact on minority voting rights. As discussed in Chapter 1, Section 5 was focused on those states and localities with two defining characteristics: first, these jurisdictions had a long and pervasive history of voting discrimination; and second, these jurisdictions evidenced an ongoing pattern of voting discrimination after they became covered under Section 5. In other words, Section 5 was focused on the areas of the country where voting discrimination had been and continues to be most prevalent.

From 1965 until June 25, 2013 when *Shelby County* was handed down, Section 5 objections by DOJ and preclearance denials by the federal district court in Washington, D.C. prevented thousands of discriminatory voting changes from being implemented. Moreover, covered jurisdictions left other potentially discriminatory practices on the drawing board as a result of Section 5's deterrent effect. And the flow of Section 5 submissions to DOJ enabled DOJ, minority voters, and civil rights advocates to monitor in real time the status of voting practices in the areas where voting discrimination has most often occurred.

After *Shelby County*, Section 2 of the VRA remains as a nationwide prohibition on voting discrimination. While Section 2 provides important and considerable safeguards against discrimination, it does not provide the same level of protection that Section 5 afforded minority voters.

Section 5 Preclearance Denials

By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes.¹ This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems).² Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.³

Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits.

The application of Section 5 to Texas is illustrative. When Section 5 coverage began in 1975, the Attorney General interposed objections (in December 1975 and January 1976) to several state laws, including one that would have required all registered voters in the State to re-register in order to continue to be eligible to vote and another that sought to redraw the districts for the State House of Representatives.⁴ When Section 5 coverage was nearing its end, the federal court in Washington, D.C. issued decisions in August 2012 denying preclearance to Texas' photo identification (ID) requirement for in-person voting,⁵ and the State's redistricting plans for Congress, the State House of Representatives, and the State Senate (finding that two of the plans were intentionally discriminatory and that the third showed signs of discriminatory intent).⁶ In the years in between, DOJ interposed scores of objections to voting changes adopted by Texas and by its counties, cities, school districts, and special districts, particularly to discriminatory methods of election and redistricting plans.⁷

Section 5's Deterrent Effect: South Carolina's Photo ID Law and North Carolina's Voting Restrictions

Section 5's impact on minority electoral opportunity was not limited to the hundreds of preclearance denials: Section 5 also deterred the enactment of many other potentially discriminatory changes. South Carolina's adoption of a photo ID law in 2011, and the State's subsequent development of administrative rules for implementing that law, provides a good illustration of this preventative power.

Prior to 2011, South Carolina had a voter ID requirement for in-person voting but not a photo ID requirement. Voters were required to present either their voter registration card (automatically distributed to all registered voters) or a South Carolina driver's license or state ID card. The 2011 law (known as R54) deleted reference to the registration card as a polling place ID, and specified a limited set of photo IDs instead (a South Carolina driver's license or state ID card, passport, military ID, or a new photo registration card that could be obtained only by visiting a county office). The 2011 law also exempted voters from having to present photo ID if the voter had encountered a "reasonable impediment" to obtaining that ID.⁸

South Carolina sought preclearance from DOJ, and in December 2011 the Department objected.⁹ DOJ explained in its determination letter that the data presented by the State indicated that African-American voters were significantly less likely than white voters to have the photo ID specified by the 2011 law, and that the law's "reasonable impediment" exemption did not mitigate the negative effects of changing to a photo ID requirement because it was unclear what the exemption covered.

South Carolina then sought preclearance from the federal court in Washington, D.C. After trial, the district court agreed that African-American voters were less likely to possess photo ID than white voters, and that voters would encounter significant burdens in attempting to obtain a photo ID.¹⁰ However, South Carolina clarified and significantly expanded the scope of the "reasonable impediment" exemption while the litigation was ongoing. As a result, the district court found that the exemption would "permit voting by registered voters who have the non-photo voter registration card [used for voting under the pre-2011 law], so long as the voter states the reason for not having obtained a photo ID,"¹¹ which could be "any reason" that was not untrue.¹² Thus, the court concluded that "Act R54 will deny no voters the ability to vote and have their votes counted if they have the non-photo voter registration card..."¹³



Nikkey Finney, an award-winning American poet and South Carolina resident urged attendees to "Please get involved, don't be silent."

Based principally upon the State's inclusion of the "reasonable impediment" provision in the 2011 law and the State's subsequent interpretation of what it would allow, the district court precleared the 2011 law for elections held after 2012.¹⁴ However, the court denied the State's request to preclear the law for use in the November 2012 election because the State did not have sufficient time to properly implement the "reasonable impediment" provision before the election, and thus mitigate the otherwise retrogressive effect of the law.¹⁵

U.S. District Judge Bates, joined by District Judge Kollar-Kotelly, wrote separately to underscore the central role Section 5 played in the process that led to the State seeking to implement a nondiscriminatory, rather than a discriminatory, photo ID law:

[O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been more restrictive. Several legislators have commented that they were seeking to structure a law that could be precleared... The key ameliorative provisions were added during that legislative process and were shaped by the need for pre-clearance. And the evolving interpretations of these key provisions of Act R54, particularly the reasonable impediment provision, subsequently presented to this Court were driven by South Carolina officials’ efforts to satisfy the requirements of the Voting Rights Act...

The Section 5 process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of Act R54 demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging nondiscriminatory, changes in state and local voting laws.¹⁶

In contrast, the situation in North Carolina, discussed in more detail later in this chapter, illustrates what could occur now that Section 5 deterrence does not play a role in decision making. In 2013, as *Shelby County* was pending before the Supreme Court, the North Carolina General Assembly was considering a photo ID bill whose future was uncertain. After the *Shelby County* decision, the General Assembly immediately moved to enact not only a photo ID requirement but a host of other voting restrictions, including a reduction in early voting, a prohibition on same-day voter registration as part of early voting, a prohibition on pre-registration of 16 and 17 year olds, and a prohibition on counting ballots cast in the correct county but the wrong precinct.

Section 5 and Transparency

An important but less obvious aspect of Section 5 was that it provided a comprehensive, up-to-date inventory of voting changes in the covered jurisdictions. Each week, DOJ published a notice (available on its website) that listed all new Section 5 submissions, identifying the affected jurisdiction and the types of voting changes being submitted.

Accordingly, DOJ, citizens residing in the covered jurisdictions, and civil rights advocates could track the current status of election practices in these areas, make informed evaluations of what was happening, and then respond as appropriate. There is no other source for this

information since no other federal law requires states or localities to identify or report voting changes, and it does not appear that any state requires this either.

With the *Shelby County* decision and the loss of this information, it is now less likely that minority voters will learn of discriminatory voting changes before implementation is imminent or even underway. For example, if a polling place is moved or closed in a discriminatory manner, minority voters might not find this out until it is too late before an election to protest to election officials or challenge the change in court.

In testimony to the NCVR, Alabama State Senator Hank Sanders called Alabama's new photo ID law "the literacy test of the 21st century." Sanders noted that the law was enacted in 2011, but the state avoided seeking Section 5 preclearance because it expected DOJ would object. After *Shelby County*, photo ID is now being implemented in the State.

Changes Blocked by Section 5 that Now Are Being Implemented

Augusta-Richmond, Georgia

The consolidated city and county of Augusta-Richmond, Georgia is one location where a voting change blocked by Section 5 is now being implemented in the aftermath of *Shelby County*. In 2012, the Georgia General Assembly amended a statewide law so as to move the election date for Augusta-Richmond from November of even-numbered years to the date in even-numbered years when county primary elections are conducted. On December 21, 2012, DOJ interposed a Section 5 objection.¹⁷

DOJ determined that the change in the election date would have a retrogressive effect on minority voters and that the State had not carried its burden of showing the absence of a discriminatory purpose. With regard to effect, the Department reviewed turnout data for Augusta-Richmond for county primary elections and November elections, and found that while both African Americans and whites turned out at a lower rate on the primary date, the drop-off for African-American voters had been substantially larger. With regard to purpose, the Department found that the reasons offered for the change were pretextual and that Augusta-Richmond's governing board had actually opposed the change. DOJ further noted that it had previously interposed a Section 5 objection to a similar election-date change for Augusta-Richmond.^{17a} DOJ also found it particularly significant that African Americans constitute a slight majority of the jurisdiction's voting age population and thus, in the context of racially polarized voting, "electoral outcomes are particularly dependent on voter turnout."¹⁸

In 2014, with Section 5 no longer in effect, the Augusta-Richmond government prepared to hold its election on the county primary date. African-American residents sued claiming that *Shelby County* only applied prospectively, and that Section 5 therefore continued to prevent the date change from being implemented.^{18a} A federal district court disagreed,¹⁹ and the election was held on the county primary date.²⁰ African-American candidates did quite well in the first election, allaying immediate concerns about the effect of this change. However, time will tell whether future elections are more in line with the historical voter turnout patterns. More generally, the federal court's decision appears to have removed any lingering doubt about the retroactive applicability of the *Shelby County* decision to post-2006 preclearance denials.

Beaumont Independent School District, Texas

Another such example involves the Beaumont Independent School District (ISD) in Texas. The events involving the ISD also illustrate how advances made in recent years may now be reversed after *Shelby County*.

In 1985, a federal court in a school district desegregation case ordered the ISD to change from a system of five districts and two at-large seats ("5-2") to a system of seven single-member districts. In 2011, however, the ISD held an initiative election in which voters authorized the ISD to return to the 5-2 system. The change back to 5-2 was submitted for preclearance and, on December 21, 2012, DOJ interposed a Section 5 objection to the change.²¹

In its objection letter, the Department explained that a 5-2 system would lead to a retrogression in African-American electoral opportunity. Under the pre-existing system of seven districts, African Americans had the opportunity (in the context of racially polarized voting in ISD elections) to elect a majority of the board members; under the 5-2 system, DOJ's analysis showed that minority voters would have the opportunity to elect only three of the seven board members (African Americans would likely have an electoral opportunity in three of the new five districts but not in elections for the at-large seats).^{21a} DOJ also found "overwhelming evidence that both the campaign leading to the [2011 initiative] election as well as the issue itself carried racial overtones with the genesis of the change and virtually all of its support coming from white residents."²²

With the demise of Section 5, the ISD is once again planning to implement the 5-2 system. The 5-2 system is being challenged in a Section 2 lawsuit.²³

Texas photo ID requirement

Litigation regarding Texas' photo ID law is discussed in detail in Chapter 6. This requirement was enacted in 2011, but because Section 5 preclearance was denied (first by DOJ and then

by the court in Washington, D.C.) it was not implemented in the 2012 elections. After *Shelby County*, Texas has begun implementation while Section 2 lawsuits challenging the law are moving forward.

Why Section 2 Does Not Adequately Compensate for Section 5's loss

After *Shelby County*, case-by-case litigation is now the only tool for challenging discriminatory voting changes. Section 2 is the principal federal law that may be used for this purpose, although litigation also may be brought under Sections 4(e) and 203 of the VRA to challenge language-assistance restrictions.

As discussed in Chapter 1, Congress determined in 1965 that case-by-case litigation is inadequate to address ongoing voting discrimination in the areas of the country where this discrimination has been most prevalent, i.e., the areas identified by the Section 4 coverage formula. In 2006, Congress again considered this question and, in deciding that Section 5 is still needed, reaffirmed that case-by-case litigation is “ineffective to protect the rights of minority voters” in the specially covered areas.²⁴

While Section 2 does offer a potentially powerful remedy, there are a number of significant difficulties inherent to it, and Section 2 clearly does not afford the same level of protection to minority voters that Section 5 did. To paraphrase Chief Justice Warren’s observation in *South Carolina v. Katzenbach* (quoted in Chapter 1), the *Shelby County* decision has essentially shifted the advantage of time and inertia back to the perpetrators of voting discrimination.



Voting Rights Attorney Robert Rubin testified about the impact of the loss of Section 5 at the California NCVR hearing. “Without Section 5,” stated Rubin, “it would be extremely difficult to challenge discriminatory voting changes before these go into effect.” PHOTO CREDIT: ANDRIA LO

A key distinction between the Section 2 and Section 5 remedies is the nature of the review process. Preclearance reviews were essentially automatic (since jurisdictions were required to submit all voting changes, and generally had become accustomed to doing so by the time *Shelby County* was decided). In addition, preclearance was largely handled by DOJ through an administrative process that did not involve litigation. In order to bring a Section 2 challenge, on the other hand, the minority community or DOJ must first become aware of the voting practice in question. The purpose and effect of the change must then be investigated and analyzed, and minority plaintiffs or DOJ must have the resources needed to pursue litigation.

Section 2 litigation is often complex and can be slow, time-consuming, and expensive. For example, as noted by the D.C. Circuit when it decided *Shelby County*, the legislative history for the 2006 reauthorization included “a Federal Judicial Center study finding that voting rights cases require nearly four times more work than an average district court case and rank as the fifth most work-intensive of the sixty-three types of cases analyzed.”²⁵ That court also noted that Congress heard testimony “from witnesses who explained that ‘it is incredibly difficult for minority voters to pull together the resources needed’ to pursue a section 2 lawsuit, particularly at the local level and in rural communities.”²⁶

A second important distinction between Sections 2 and 5 is that the covered jurisdictions had the burden of proof in Section 5 preclearance reviews whereas minority plaintiffs and DOJ have the burden of proof in Section 2 cases. It is generally understood that the party bearing the burden of proof faces a higher level of difficulty in prevailing.

Third, Section 5 required pre-implementation review of voting changes but, when a Section 2 case is filed, the jurisdiction is free to implement the disputed voting change while the litigation is ongoing, unless plaintiffs are able to obtain a preliminary injunction. Thus (as noted above), Texas has enforced its photo ID requirement in several elections in 2013 and 2014 although the requirement is being litigated under Section 2. Texas did not implement the requirement before *Shelby County* because preclearance had not been granted.

Obtaining a preliminary injunction in a Section 2 case is burdensome, challenging, and uncertain, even in the most meritorious cases. Moving for such relief requires plaintiffs to bear the expense of litigation, and to delay requesting relief until the evidence is sufficiently developed. In addition, in order to obtain a preliminary injunction, plaintiffs often must demonstrate that they have a substantial likelihood of prevailing at trial, and even with that, they must also satisfy several other conditions in order for an injunction to be granted.²⁷ Furthermore, obtaining preliminary relief may require plaintiffs to overcome a judge’s disinclination to grant an injunction before the court has been able to evaluate all the relevant information at trial.²⁸ The reluctance of federal courts to delay a scheduled election or order an interim remedy into place via

a preliminary injunction is particularly impactful as that is the only realistic way to stop some changes (such as redistricting) where the pre-existing practice can no longer be used.

The Section 2 suit that was litigated against Charleston County, South Carolina's at-large election system illustrates the difficulty of obtaining preliminary relief in a voting case. After filing suit in January 2001, DOJ moved for a preliminary injunction in advance of the June 2002 primary for the County Council, and the district court denied the request.²⁹ DOJ then moved for partial summary judgment, and in July 2002 the court found that the Department had proven all three of the *Gingles* preconditions for demonstrating a Section 2 violation;³⁰ the court thus concluded that the central elements of a Section 2 violation were present, and this indicated that it was highly likely the Department would prevail at trial. Yet, when DOJ moved again for a preliminary injunction in advance of the November 2002 general election, the court again refused to grant relief.³¹ In 2003, the district court ruled in favor of DOJ after trial,³² and in 2004 the Fourth Circuit Court of Appeals affirmed that ruling.³³

This Charleston County example also highlights how Section 2 and Section 5 differ. In 2003, after the district court's ruling that the County Council's at-large system violated Section 2, the county school district adopted the same at-large method. DOJ initially responded by requesting additional information, and then interposed a Section 5 objection less than nine months after the initial submission. Thus, this change was blocked by Section 5 before it could be implemented and without years of costly litigation.³⁴

Lastly, the Section 5 "effect" standard was specifically aimed at preventing backsliding (retrogression), whereas the results standard employed by Section 2 focuses on equal electoral opportunity. The Section 2 standard is broader in one sense, in that it allows plaintiffs to challenge practices that are discriminatory but not retrogressive. On the other hand, the results standard may require a more complex analysis to stop retrogressive changes than did the relatively straightforward Section 5 standard.

II. SHELBY COUNTY AND THE FEDERAL OBSERVER PROGRAM

Since 1965, federal observers have played a key role in voting rights enforcement. As discussed in Chapter 6, the presence of federal observers may deter misconduct by election officials and others at the polls. Furthermore, if problems do arise on Election Day when observers are present, the observers are required to promptly inform DOJ of what is happening so that DOJ can immediately contact the responsible election officials to attempt to remedy the situation. In addition, if problems identified by observers are not resolved and

are significant and ongoing, the post-election written reports provided by the observers can provide the basis for DOJ litigation.

As discussed in Chapter 1, DOJ's principal authority for sending observers was provided by Section 8, which authorizes observers in areas covered under Section 4, but DOJ's continuing ability to rely upon that section is in doubt because of *Shelby County*. The Department has not sent observers to any of the Section 4 areas since the Supreme Court's decision and DOJ apparently has concluded that the decision effectively has terminated the Section 8 observer program.

After *Shelby County*, DOJ still has the authority to send observers to jurisdictions designated by federal courts that made use of the Section 3(a) remedy in voting rights litigation (where those remedies have not expired). The Section 3(a) designations have been ordered in lawsuits brought by DOJ to enforce the VRA's language assistance requirements.

Case Spotlight

North Carolina 2013: The Post-*Shelby* World in a Microcosm

2000 - 2010, North Carolina is a Leader in Increasing Voter Participation: Reforms enacted in North Carolina led to increasing voter participation rates in North Carolina, making the state a model for the country in creating a voting system that brought new voters into the process. For example, in 2001 the state implemented early voting³⁵ followed by the implementation of same-day voter registration in 2007.³⁶ In 2009, the legislature passed a bill that allowed for pre-registration of 16 and 17 year-olds with overwhelming bi-partisan support.³⁷

During this time, the voter participation percentage in North Carolina increased steadily from 54.2 percent in the 2000 presidential election to 60.4 percent in the 2004 presidential election.³⁸ The state witnessed another increase in voter participation in the 2008 presidential election when the rate increased to 69.6 percent. Although the voter participation decreased slightly during the 2012 presidential election (68.3 percent) the voter participation rate of African Americans in North Carolina was the highest of any state at 70.2 percent.³⁹

And Then Shelby County Came Down...: The decision in *Shelby County v. Holder* in 2013 opened the door for a new legislature to completely reverse course, passing a bill that eliminated much of the voting rights progress made over the prior decade.⁴⁰ The process behind the turnaround and the passage of the most comprehensively restrictive law in the country makes North Carolina the perfect case study for what the *Shelby* decision means.

Before *Shelby County*, only a voter identification bill was being contemplated in North Carolina, and, Speaker Thom Tillis assured voters that the process of drafting would be a “deliberative, responsible and interactive approach” and “slow walk...through the House.”⁴¹ Additionally, House Elections Committee Chairman David Lewis called for open negotiations in the legislative process for a stand-alone voter ID bill. The original H.B. 589 was indeed filed as a stand-alone voter ID bill that allowed for a wide range of acceptable identification, including student and employee IDs.⁴² It was introduced on April 4, 2013 and passed the House on April 24, 2013. At that point, the 16 page bill was moved from the North Carolina State House to the North Carolina Senate.

However, no action would be taken for months—in fact, until one month after the decision in *Shelby County*. The reason for the delay was no secret: according to Senator Tom Apodaca, Chair of the Senate Elections Committee, the Senate did not want “the legal headaches of having to go through pre-clearance [under the Voting Rights Act] if it wasn’t necessary and having to determine which portions of the proposal would be subject to federal scrutiny.”⁴³

Accordingly, on July 23, 2013, two days before the end of the legislative session, the Senate revealed a new, heavily amended H.B. 589. The bill had evolved from a stand-alone voter ID

bill to an omnibus bill, packed with multiple voting restrictions. The Senate version, now 56 pages long, reduced early voting by one week, eliminated Sunday voting, eliminated same day registration, prohibited the counting of out-of-precinct provisional ballots and eliminated pre-registration for 16-17 year olds.⁴⁴ Additionally, the new bill limited the forms of acceptable photo ID to (1) a North Carolina driver's license; (2) a special (non-operator's) ID issued by the North Carolina DMV; (3) a U.S. passport; (4) military ID; (5) veteran's ID; (6) a tribal ID (from a federally or state-recognized tribe); and (7) a driver's license or non-operator ID issued by another state but only if the voter had registered within 90 days of the election.⁴⁵

During hastily held hearings in the Senate, opponents of the bill both testified and produced evidence that the restrictive changes would have a damaging effect on African American voters. Despite the concerns raised by legislators opposed to the new omnibus bill, the new H.B. 589 passed the Senate and the House without a single supporting vote from an African American legislator.⁴⁶ It was signed into law by Governor McCrory on August 12, 2013.⁴⁷

The Upshot: Without Section 5 in its way, the North Carolina legislature was able to pass measures that clearly threatened, and indeed were likely designed, to reverse a historic rise in voter engagement in one fell swoop, without having to provide any justification for the measures or any meaningful review. The new law is now being challenged in Section 2 litigation, and may not be fully addressed until after the 2014 election.

PHOTO CREDIT: ERIC PRESTON



“As elections administrator for Guilford County for 25 years, I never found a compelling public interest that justified the voter ID requirements of House Bill 589 nor any of the other rollbacks of voting opportunities that had been granted voters during the past 20 years...”

–Testimony from George Gilbert, economist and former director of elections for Guilford County, NC at the NCVR North Carolina hearing

Without Section 5 in its way, the North Carolina legislature was able to pass measures that clearly threatened, and indeed were likely designed, to reverse a historic rise in voter engagement in one fell swoop, without having to provide any justification for the measures or any meaningful review. The new law is now being challenged in Section 2 litigation, and may not be fully addressed until after the 2014 election.