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## Shelby County v. Holder - Brief Contextualized

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# Shelby County v. Holder - Brief Contextualized

## **Abstract**

This paper begins with three major factors that set the stage for Shelby: first, a history of the VRA; second, an overview of Northwest Austin with a focus on how it led directly to Shelby; and finally, Shelby County's motivations for bringing the suit. An examination of racial demographics compared to statistics on voter registration and minority officeholders in Alabama and Louisiana—two states originally subject to preclearance—follows in light of the Court's claims on the matter. A conclusion will take a brief look at laws passed since Shelby with an eye towards a future critique. [*excerpt*]

## **Keywords**

Race, Law, Voting Rights, Supreme Court

## **Disciplines**

Fourteenth Amendment | Law | Law and Race | Legal

## **Comments**

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## Shelby County v. Holder — Brief Contextualized

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AFS 267-A  
Fall 2014

### Introduction

On June 25, 2013, the United States Supreme Court struck down §4(b) of the Voting Rights Act (VRA), which laid out the formula by which jurisdictions were subject to “preclearance,” mandatory review by the federal government, of changes to voting laws. In part, according to Justice Roberts’ opinion, this occurred because “coverage today is based on decades-old data and eradicated practices.”<sup>1</sup> Relatedly, in a 2009 case, *Northwest Austin Municipal Utility District No. 1 v. Holder*,<sup>\*</sup> the Court stated that “voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”<sup>2</sup> This claim was quoted heavily in *Shelby*.<sup>†</sup>

This paper begins with three major factors that set the stage for *Shelby*: first, a history of the VRA; second, an overview of *Northwest Austin* with a focus on how it led directly to *Shelby*; and finally, Shelby County’s motivations for bringing the suit.<sup>‡</sup> An examination of racial demographics compared to statistics on voter registration and minority officeholders in Alabama and Louisiana—two states originally subject to preclearance—follows in light of the Court’s claims on the matter. A conclusion will take a brief look at laws passed since *Shelby* with an eye towards a future critique.

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<sup>\*</sup> Henceforth to be referred to as *Northwest Austin* for the sake of time and space

<sup>†</sup> The other significant reason for striking down §4(b) has to do with the equal sovereignty of the states in the federal system and the reserved powers clause of the 10<sup>th</sup> Amendment, but this is better addressed through critique rather than context.

<sup>‡</sup> Informed through a discussion with Mr. Frank Ellis, the county lawyer assigned to the case.

## **Precursors to the Case**

### *History of the VRA*

The Voting Rights Act of 1965 has been one of the most significant pieces of civil rights legislation in the history of the United States.\* Section 2, which applies nationwide and remains intact, “forbids any ‘standard, practice, or procedure’ that ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.’”<sup>3</sup> However, the framers of the VRA saw fit to go to greater lengths to combat the South’s notorious Jim Crow laws. As such, they created §5—preclearance—and §4(b), the formula for coverage. At first, the states and jurisdictions subject to §5 must have “maintained a test or device as a prerequisite to voting...and had less than 50 percent voter registration or turnout in the 1964 Presidential election.”<sup>4</sup>

Though originally intended to expire, Congress regularly reauthorized and expanded the act over the years. §4(b) was last amended in 1975 to include jurisdictions with voting tests or devices and low turnout or registration in the elections of 1968 or 1972. It “also amended the definition of ‘test or device’ to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English,”<sup>5</sup> which brought many new states and jurisdictions into §4(b) coverage. In the most recent 25-year reauthorization in 2006, §5 was expanded as well.<sup>6</sup> So, it is evident that, for good or ill, both the coverage formula and preclearance provisions only became more stringent as conditions improved in the South, §4(b) in particular depending on statistics at least 40 years old. It is easy to see how an opponent of Sections 4(b) and 5 could see them as “punishing for the

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\* Upon its signing, President Johnson, political animal that he was, remarked that the Democratic Party had lost the South for a generation. It of course lost it for much longer, but regardless, if you’ve lost the South, you’ve almost definitely done something significant in the way of civil rights.

past,” whether such a claim is true or not. Certainly extraordinary measures, the Court had continuously upheld these provisions in light of, simply put, extraordinary conditions.

### *Northwest Austin*

Another important provision of the VRA not directly related to *Shelby* is that of bailout. According to the most recent (1982) iteration of this provision, in order to be removed from §5 requirements, “jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a §2 suit, in the ten years prior to seeking bailout.”<sup>7</sup> In 2010 when Shelby County filed their suit, it was not eligible for bailout. In years prior, however, the Northwest Austin Municipal Utility District No. 1 felt that it was. The Court’s say on the matter would go far beyond resolving a local issue, however, laying the groundwork for *Shelby*.

In terms of law that was actually changed by the case, the Court effectively expanded the ability to seek bailout to any political subdivision, including “the utility district that did not register its own voters.”<sup>8</sup> However, Northwest Austin did not simply want to be able to be bailed out. The utility district wanted §5 declared unconstitutional. The Court did not do this. Instead, it just said that “the historic accomplishments of the Voting Rights Act are undeniable, but the Act now raises serious constitutional concerns. The preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to our federal system...and must be justified by current needs. The Act also differentiates between the States in ways that may no longer be justified.”<sup>9\*</sup> This strong language, of course, would in effect be repeated in the reasoning in *Shelby*, but some political subdivision would need to take notice first.

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\* If this isn’t Justice Roberts just begging for the opportunity to gut the VRA, I don’t know what else would be.

## *Shelby County's Story*

Shelby County proved to be that subdivision.\* According to Mr. Frank “Butch” Ellis,<sup>†</sup> “Shelby County followed, with considerable interest, the...Court decision in *Northwest Austin*,” and though they had long thought that §4(b) and §5 were “unfair and unconstitutional,”<sup>‡</sup> they “simply could not afford the expense of traveling to Washington, DC to litigate that issue.”<sup>10</sup> However they came by the funds to pursue the action post-*Northwest Austin*, the opportunity presented itself and Shelby County took it all the way to the Supreme Court.

Beyond the typical federalism claims that VRA opponents use, Mr. Ellis mentioned several local matters that help explain why someone might see preclearance as unfair and unconstitutional. For instance, “Shelby County, and several of its cities, with white population ranging as high as ninety percent had elected African-American office-holders...A heavily white majority city had elected an African-American mayor in two successive elections over white candidates.”<sup>11</sup> Despite this perceived progress, §4(b) was not narrowed:

Shelby County still had to seek permission...when a group of its citizens wished to petition to form a Fire...or Medical Services District. When on the eve of an election one of our churches which served as an election site had to insist that we move across the street to another church due to a construction project...this could not be done without petitioning the Justice Department...<sup>12</sup>

Of course, just boiled down to local concerns like moving voting machines across the street, anyone might say that federal scrutiny was too much, but isolated anecdotes are generally not the best evidence. All things considered, though, whether one agrees with the views expressed by Shelby County or not, it is clear that they had a legitimate reason to sue the federal government. The gears turned from there, leading to legal analysis already performed.

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\* “Subdivision” is not the best word to use for dramatic effect, but these things happen.

<sup>†</sup> Son of Leven Handy Ellis, a leading Dixiecrat, but more on that in the critique

<sup>‡</sup> Mr. Ellis also made sure to mention that Shelby County is in full support of §2.

## Demographics and Data

It is one of Roberts' more general claims that "things have changed in the South."<sup>13</sup> This section is intended to check just how much by looking at white and Black voter registration rates (from 1965 and 2014<sup>\*</sup>) and descriptive representation of the Black population in national and state elected offices (in 2006/2007) in Alabama and Louisiana, which were in the original six states covered by §4(b). Overall, in both states, Black representation is better at the state legislature level as compared to national delegations. Local representation cannot be expressed as a percentage given the data available, but this level is the best numerically.

### *Alabama*

In 1965 Alabama, 69.2% of the white population and just 19.3% of the Black population were registered to vote, resulting in a 49.9% gap.<sup>14</sup> Today, according to census facts and voter registration statistics,<sup>†</sup> those percentages stand at 59.8% and 60.5% for white and Black respectively.<sup>15</sup> In terms of office holders, the Alabama's Black population (26.6%) remains underrepresented in Alabama's national delegation by 16.5%<sup>‡</sup> and in the state legislature by 3%.<sup>16</sup>

### *Louisiana*

Louisiana tells a rather similar story. Roberts' 1965 numbers show that 80.5% of the white population and 31.6%<sup>§</sup> of the Black population were registered to vote, an equally large gap of 48.9%.<sup>17</sup> This is compared to calculated rates of 63.9% for the white population and 61.5% of the Black population.<sup>18</sup> In both states, then, we have again verified the claim of parity

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<sup>\*</sup> Updated from Roberts' 2004 numbers on 133 S. Ct. 2626

<sup>†</sup> (White/Black Active Registered Voters)/[(Population, 2013 Estimate)\*(White alone/Black or African American alone, percent, 2013)] is the formula I used. Percentages are likely understated due to state residents under 18 factored into the third parenthetical. This is not an issue for descriptive representation.

<sup>‡</sup> 12.3% only accounting for 7 House members, of which one is Black

<sup>§</sup> I was not expecting this number to be as high as it was, though being registered to vote and actually being able to vote were and are two different things.

in voter registration, though data on turnout would be appreciated. The numbers of Black office holders in 2006 are similar to Alabama, though the disparity between population and representation is greater because of Louisiana's larger Black population (32.4%). Only one member of the state's 9 national delegates are Black, a 23.3% gap. The gap in the state legislature is 9.6%.<sup>19</sup> Though these numbers are surely "unprecedented" for the South, it is still underrepresentation.

## Conclusion

The story behind *Shelby County v. Holder* is an interesting one. While it is easy to sympathize with local concerns that had a hand in bringing the case into fruition, looking at state actions around the time of this case give a clearer picture: states under Republican control (which includes the great majority of states that were subject to preclearance) were passing controversial "voter ID" laws left and right. That states like Texas passed this kind of law immediately after being released from preclearance lends them a certain character.

This paper, though, is simply focused on telling a story as it may commonly be told. On the face, one might simply see conflicting views of federalism and an area of this country that just has a little more to go before everyone can call it equal. However, under that clean picture lies a persistent racism. I am eager to explore it in depth.

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<sup>1</sup> 133 S. Ct. 2627

<sup>2</sup> 557 U.S. 202

<sup>3</sup> 133 S. Ct. 2619

<sup>4</sup> Ibid.

<sup>5</sup> 133 S. Ct. 2620

<sup>6</sup> 133 S. Ct. 2621

<sup>7</sup> 133 S. Ct. 2620

<sup>8</sup> 557 U.S. 197

<sup>9</sup> 557 U.S. 193

<sup>10</sup> Frank Ellis, correspondence

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> 557 U.S. 202

<sup>14</sup> 133 S. Ct. 2626



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<sup>15</sup> “State & County QuickFacts: Alabama,” United States Census Bureau, “Elections: Voter Registration,” Alabama Secretary of State

<sup>16</sup> “Alabama,” The Gender and Multi-Cultural Leadership Project

<sup>17</sup> 133 S. Ct. 2626

<sup>18</sup> “State & County QuickFacts: Louisiana,” United States Census Bureau, “Election & Voting: Registration Statistics – Statewide,” Louisiana Secretary of State

<sup>19</sup> “Louisiana,” The Gender and Multi-Cultural Leadership Project

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