



2014

# The Voting Rights Umbrella

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## Recommended Citation

Clinton, William Jefferson (2014) "The Voting Rights Umbrella," *Yale Law & Policy Review*: Vol. 33: Iss. 2, Article 3.  
Available at: <http://digitalcommons.law.yale.edu/ylpr/vol33/iss2/3>

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## YALE LAW & POLICY REVIEW

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### The Voting Rights Umbrella

*William Jefferson Clinton\**

The right to vote is both fundamental to individual liberty and to the proper functioning of representative democracy. When voting rights are denied, diluted, or restricted, the ability of government to respond to our challenges and increase our opportunities is impaired, and its legitimacy in doing so is diminished.

A major theme of American history is the steady expansion of the right to vote. Once restricted to white male property owners, the franchise has been extended to include all citizens from their eighteenth birthday on. Fifty years ago, the Voting Rights Act of 1965 sought to end practices like literacy tests that made it more difficult for African Americans to vote.

The Voting Rights Act was the result of years of struggle, paid for with the blood, sweat, and tears of Americans black and white, young and old. It was made possible by people like John Lewis, who absorbed blow after blow on Selma's Edmund Pettus Bridge, and by the elected officials led by President Johnson willing to enact laws allowing us to live up to our founding principles.

The Voting Rights Act was designed to ensure that everyone's right to vote was protected in reality and not just in theory, by eliminating the obstacles to voting that existed in 1965, and by preventing future, yet to be devised mechanisms to restrict the vote. The Act sought to accomplish these objectives through two major provisions: Section 2 prohibited any unfair voting practice that would prevent a person from exercising his or her right to vote based on race; and Section 5 required certain specially covered jurisdictions with a history of discrimination, determined by a formula in Section 4(b), to obtain federal preclearance before implementing any voting changes.

Its effects were immediate. By removing exclusionary tactics like literacy tests, and providing federal examiners and observers to monitor registration and elections, the number of African Americans registered to vote rose dramatically across the South. By 1968, the percentage of registered African Americans in Mississippi had increased from 6.7 to 59.8; in Alabama from 19.3 to 51.6; and in Louisiana from 31.6 to 58.9. The number of African Americans holding office

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at the local, state, and federal levels has also increased from fewer than 1,000 to more than 10,000 over the last fifty years.

Congress has strengthened and extended the Voting Rights Act several times over the last five decades, always in a bipartisan fashion, and most recently in 2006 when the extension was approved 390-33 in the House and 98-0 in the Senate. There was also an increasing nationwide effort to make it easier for people to register and cast their votes. The National Voter Registration Act of 1993, which I signed into law, required all states to make it possible for eligible voters to register when applying for a driver's license. States made it easier to vote by increasing the number of days and polling places for advanced voting, improving access for people with disabilities, making it easier to vote by mail, and allowing Election Day registration. In spite of these advances, there has been no evidence of increasing voter fraud. Until recently, our nation was on a clear path toward making our democracy more inclusive and more representative.

Unfortunately, over the last few years, for the first time since the Voting Rights Act was passed, it is becoming harder, not easier, for people to exercise their constitutionally guaranteed right to vote.

Since 2011, nearly two dozen states have passed laws making it harder to cast a ballot. They range from cutbacks on early voting (in eight states including Ohio and North Carolina), to a repeal of Election Day registration (Maine), to harsh rules requiring specific types of government-issued photo identification to vote (in eleven states including Wisconsin and Tennessee). Florida even cracked down on nonpartisan voter registration drives, forcing the League of Women Voters to close down its operations. Throughout the 2012 election cycle, courts both state and federal, including both conservative and progressive judges, blocked or blunted these measures.

Unfortunately, the Supreme Court moved sharply in the other direction. In one of the most radical departures from legal precedent in my lifetime, the Supreme Court decided in 2013's *Shelby County v. Holder* that the Act had been so effective in blocking discriminatory voting practices in the covered jurisdictions identified by Section 4(b), that it was no longer fair to hold those places to a different standard. The majority found that the formulas determining these preclearance jurisdictions were outdated, even though Congress had renewed them by overwhelming margins just seven years earlier.

Congress' decision to extend the Voting Rights Act—including Sections 4 and 5—was based in part on the fact that more than 1,000 proposed voting changes in covered areas were blocked as discriminatory between 1982 and 2006. Cases brought under Section 2 of the Voting Rights Act were also more than four times more likely to succeed in covered jurisdictions than in non-covered jurisdictions, suggesting that voters in these places with a history of discrimination needed continued special protections.

In her dissent in *Shelby County v. Holder*, Justice Ginsburg warned that weakening the Voting Rights Act because it was working was “like throwing away your umbrella in a rainstorm because you are not getting wet.” How right she was.

The consequences of *Shelby County v. Holder* have been dramatic. The decision has enabled states to implement voting changes that had previously been blocked by Section 5, and further emboldened others across the country that had been moving forward with their own voting restrictions since 2010, including passing strict photo identification laws, cutting early voting periods, and requiring more stringent documentation for registration. The Brennan Center for Justice has found that race appears to be a significant motivating factor in states that have introduced such restrictive laws since 2010. Seven of the eleven states with the highest African-American turnout in 2008 have implemented new restrictions, as have nine of the twelve states with the largest Hispanic population growth from 2000 to 2010. North Carolina, for example, experienced a 111% increase in Hispanic population growth and a twenty-one percent increase in African American population growth between 2000 and 2010. Within months of *Shelby County v. Holder*, the state legislature passed new legislation to cut the early voting period, eliminate same-day registration and voting during the early voting period, and set strict voter identification requirements.

Texas offers one of the most extreme examples of voter suppression in the wake of *Shelby County v. Holder*. In 2011, the state passed the nation's harshest law requiring people to show photo identification in order to vote. The law seemed carefully crafted to slice the electorate: it would not allow a University of Texas ID to be used for voting, but would, however, recognize a concealed handgun license. The law was then blocked from implementation under Section 5 of the Voting Rights Act. Within hours of the Supreme Court's decision in *Shelby County v. Holder*, the state announced it would put the restrictions into effect. The Justice Department and voting rights groups challenged the law. After a nine-day trial, federal judge Nelva Gonzalez Ramos issued a powerful 147-page opinion. The law, she ruled, "creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African-Americans, and was imposed with an unconstitutional discriminatory purpose. The Court further holds that [the Texas law] constitutes an unconstitutional poll tax." She found that 608,000 voters simply did not have the required form of ID. Despite this powerful factual record, the Supreme Court emailed out an early Saturday morning decision allowing it to remain in effect for the 2014 election in an emergency ruling.

It is worth noting that the new voting requirements coincide with aggressive efforts in some states to use redistricting practices—designed to ensure that African American voters had the opportunity to elect some officials of their own race—to dilute the impact of their votes by concentrating them so heavily in a few districts that as a practical matter they can influence *only* elections in districts dominated by their own race. This compounds already existing problems with gerrymandering and redistricting. For example, in 2012, the total votes for Democrats in the House of Representatives exceeded the total votes for Republicans in North Carolina and Virginia. But North Carolina's congressional delegation had nine Republicans and four Democrats, while Virginia's had eight Republicans and four Democrats. In 2012, Democratic House candidates won more votes in Pennsylvania, but the legislature drew electoral lines so

Republicans won thirteen of eighteen U.S. House seats. That same year, President Obama won Ohio, but Republicans won twelve of sixteen House seats.

The Supreme Court's ruling in *Shelby County v. Holder* and the restrictive voting laws it has enabled and encouraged are a stark reversal of nearly fifty years of progress. Congress should restore the provisions of the Voting Rights Act struck down by the courts and resume our historic march toward expanding the franchise.

Vast numbers of voters are disenfranchised—often by accident—by the nation's ramshackle voting system. Today at least 50 million eligible citizens are not registered. Many fall off the rolls when they move, as people so frequently do in our mobile society. To make the right to vote real today requires modernization of voter registration and our election systems. Here, there is considerable room for optimism. The bipartisan Presidential Commission on Election Administration, chaired by the counsels for the Obama and Romney campaigns, put forward an array of reforms that could improve voting without partisan rancor. For example, the Commission recommended that states should adopt online voter registration, audit polling places for accessibility, and create statewide standards for training poll workers.

In February 2015, Oregon enacted a new law to automatically register anyone who renews a driver's license or state identification card. Hundreds of thousands were registered in the first week. This could truly mark a paradigm shift, with government assuming the responsibility to ensure that every eligible citizen is able to vote. Such digital reforms also make it harder to commit the already rare crime of voter fraud.

One more step can make a huge difference. A lasting legacy of Jim Crow-era laws is felony disenfranchisement. Many of these provisions were imposed in the 1890s, as southern states found ways to make it impossible for African-American former slaves to vote. I believe that people who have paid their debt to society, many of whom are working and paying taxes, should have the right to vote. In 1977, as Attorney General of Arkansas, I sponsored one of the first laws reforming this practice since the end of Reconstruction. Now, there is a growing bipartisan consensus to end felony disenfranchisement. We should join the democratic community in reforming these laws.

America's tremendous diversity can make us the world's leading force for peace and prosperity for generations to come. But in order to give our children and grandchildren the future they deserve, we must remove barriers to participation and opportunity, not erect them. As a nation, we owe it to the many heroes of the Civil Rights Movement who made our past progress possible, and to all those whose future progress depends on it.