POLITICS

How *Shelby County v. Holder* Broke America

In the five years since the landmark decision, the Supreme Court has set the stage for a new era of white hegemony.

VANN R. NEWKIRK II JULY 10, 2018

Solicitor General Thurgood Marshall testifies before the Senate Judiciary Committee in his confirmation hearing for the Supreme Court (ASSOCIATED PRESS)

Thurgood Marshall spent much of his career dissenting. Tasked with helping the Supreme Court bridge the gap between Jim Crow and whatever came next, the first black justice and the man whom President Lyndon B. Johnson once called "an advocate whose lifelong concern has been the pursuit of justice for his fellow man" was often forced to write that road map to justice in opposition to his colleagues.

The dissent became Marshall's canvas, and none was more essential than his partial dissent in the famous 1978 *University of California v. Bakke* ruling, which upheld affirmative action and the use of race in college decisions, but struck down more radical measures such as quotas. "The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups," Marshall

wrote. "These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination." Marshall envisioned a Court whose mandate necessitated that it reach through time, destroying the foundation of white supremacy on which the Court itself had been built.

Marshall never truly got the Court he wanted. But his vision did help pull the body into its modern role as an institutional check on white power. Last month, however, the Supreme Court finally closed the book on that vision. Just five years after the landmark *Shelby County v. Holder* decision, it's become clear that the decision has handed the country an era of renewed white racial hegemony. And we've only just begun.

Shelby County has been discussed constantly in *The Atlantic*, and in my work especially. That's for good reason. In that 2013 decision, the Supreme Court invalidated a decades-old "coverage formula" naming jurisdictions that had to pass federal scrutiny under the Voting Rights Act, referred to as "preclearance," in order to pass any new elections or voting laws. Those jurisdictions were selected based on their having a history of discrimination in voting. The decision also left it to Congress to come up with new criteria for coverage, which hasn't happened and probably won't happen soon. In practice, the decision means that communities facing new discriminatory voting laws have had to file suits themselves or rely on Justice Department suits or challenges from outside advocates—sometimes after the discriminatory laws have already taken effect. Under Attorney General Jeff Sessions, the department hasn't been interested in filing such suits, meaning that citizens have been on their own.

The results have been predictable. Voter-identification laws, which experts suggest will make voting harder especially for poor people, people of color, and elderly people, have advanced in several states, and some voting laws that make it easier to register and cast ballots have been destroyed. For many of the jurisdictions formerly under preclearance, voting became rapidly more difficult after the *Shelby County* decision, particularly for poor and elderly black people and Latinos.

Elections have been influenced, and voters have been disenfranchised, since 2013, but that's all just the preliminary fallout from *Shelby County*. The real damage can

be found in Chief Justice John Roberts's reasoning in the Court's decision:

> A statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." The coverage formula met that test in 1965, but no longer does so.
>
> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.

Ignoring that deep racial disparities *do* still exist in every phase of voting, especially in the precincts formerly covered by the Voting Rights Act, Roberts's legal analysis boils down to the fact that preclearance was very effective in reversing disenfranchisement, so the country no longer needs it. In her dissent, Justice Ruth Bader Ginsburg pointed out the apparent paradox of that reasoning, writing that "throwing 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."

The contrast between these two different views of the Court's duty to protect voting rights took a back seat to considerations over the practical effects of the decision. After all, *why* the Supreme Court invalidated the preclearance coverage formula, or what that means for future voting-rights-related decisions, hasn't mattered much. It hasn't even mattered that the decision was technically limited, not rejecting the concept of preclearance at all, but sending the matter back to Congress to come up with new criteria. What has mattered in the proliferation of a test round of new laws that make voting more difficult is that Congress currently does not wish to do so. There is functionally now no preemptive federal oversight of state and local voting laws. This will likely be the status quo for the foreseeable future.

Journalists now commonly say that the Court "gutted" the Voting Rights Act. The more appropriate terminology might be to say that it defanged federal enforcement of that act. But looking deeper, it might be even more appropriate to say that the

Shelby County v. Holder decision committed violence against the Fourteenth Amendment itself, of which the Voting Rights Act is a distant descendant. That much has been made clearer as the Court, following a thread of reasoning established in 2013, has taken on additional voting-rights cases, and furthered Roberts's mandate to distance the federal judiciary from Thurgood Marshall's vision of those bodies as active watchdogs for the Fourteenth and arbiters for America's racial injustices.

In June, as the Court closed what would turn out to be the last term of Justice Anthony Kennedy's career, America suddenly got a glimpse of what Roberts's mandate in *Shelby County* will mean for voting rights going forward. First, in *Husted v. A. Philip Randolph Institute*, the Court essentially gave its seal of approval to Ohio's system of voter purges, in which the state uses a failure to vote as a trigger to begin the multistep process of taking people off voter rolls. As my colleague Garrett Epps has written, the decision was ostensibly made on a narrow statutory analysis of two laws with texts that might seem to be in conflict in this issue, the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002. But as Epps also notes, the decision by the Court to essentially allow a loophole creating a legal method of voter-purging challenges both the intent of the NVRA—another pro-voting statute intended to advance access to the ballot among disadvantaged people—and again marks the retreat of the Court from the role Marshall tried to create for it.

Sensing the winds of change, Justice Sonia Sotomayor—who has become the Court's dissenter in residence—sounded the alarm in her dissent. "The Court errs in ignoring this history and distorting the statutory text to arrive at a conclusion that not only is contrary to the plain language of the NVRA but also contradicts the essential purposes of the statute, ultimately sanctioning the very purging that Congress expressly sought to protect against," Sotomayor wrote. She continued: The Court's majority "entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate." In her ominous warning about the Court's turn, Sotomayor appealed to state politicians, communities, and voting-rights advocates, praising their vigilance but also indicating that they're now on their own.

Despite her warnings, just a few weeks later the Supreme Court doubled down, providing yet another blow against the VRA and the Fourteenth Amendment. Five years to the day after *Shelby County v. Holder*, the Court for the most part rejected a lower court's finding that the Texas Republican Party had intentionally diluted black and Latino votes in legislative and state maps that it had redrawn after racial gerrymandering challenges in 2011. In writing for the majority, Justice Samuel Alito held that the lower court had erred in requiring the Texas GOP to prove that it had purged its discriminatory intent in its new maps, establishing that the legislature had to be presumed in good faith in its current actions, even if recent history detailed a clear record of discrimination and racism. "The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination," Alito wrote.

That language extends Roberts's 2013 logic. As the elections and voting-rights expert Rick Hasen at the University of California at Irvine told NPR, "This decision is going to make it very, very difficult to put any state back under federal preclearance ... by setting a standard that puts the thumb on the scale that favors states, by saying you have to presume the good faith of the legislature."

With the addition of these new pieces of jurisprudence, the Court has established that not only are the legacies of Jim Crow no longer a valid justification for proactive restrictions on states, but the Court doesn't necessarily have a role in advancing the spirit of the franchise. Furthermore, with Alito's gerrymandering decision, the Court holds that past discrimination by states—even at its boldest and most naked—is not really a consideration in assessments of current policies. This part is crucial, because in an era where crafty state politicians have moved toward race-neutral language that clearly still seeks to disenfranchise people of color, a certain default suspicion by federal courts and the Department of Justice based on those state politicians' histories has been the main protective force for the minorities' voting rights.

That suspicion is gone now, as are all vestiges of Marshall's intended vigilance. The full text of the Voting Rights Act may or may not be in danger depending on the nature of the challenges that arise for the next generation of justices, but the damage has already been done. If the act represented a commitment by the federal government to ensure the true fulfilment of the Fourteenth Amendment's right to

due process and the Fifteenth Amendment's erasure of race-based disenfranchisement, then Roberts's Court has all but dismantled that commitment.

Marshall donned his robes just after the official close of a 100-year period of white hegemony, during which the Court, in decisions such as *Plessy v. Ferguson*—which established segregation as legal—acted as a collaborator with white supremacy. As he wrote in his 1978 *Bakke* opus, "In the words of C. Vann Woodward: 'By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights.'" Not even close to a century has passed, but this iteration of the Court is very busy whittling.

We want to hear what you think about this article. Submit a letter to the editor or write to letters@theatlantic.com.