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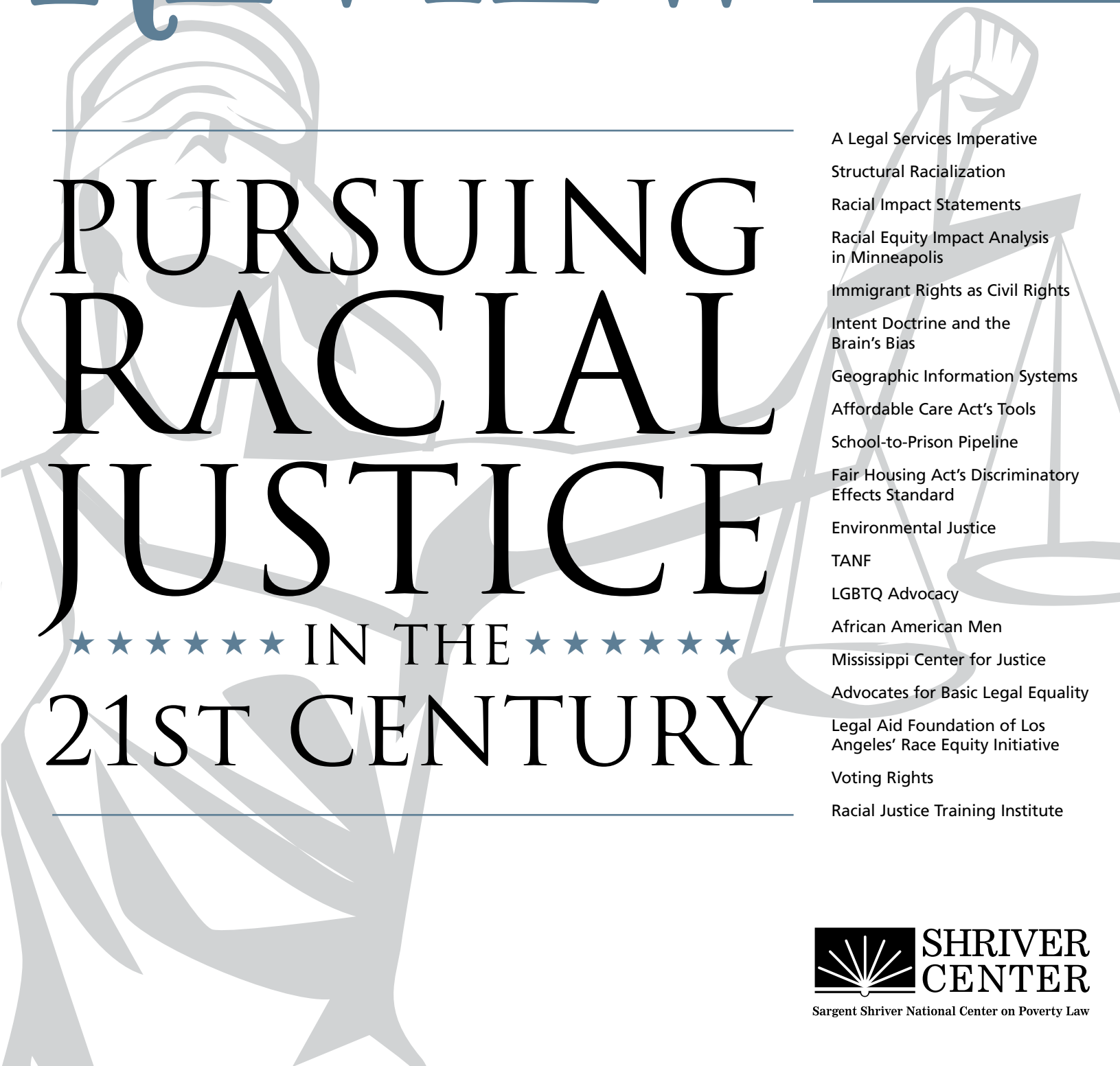
PURSUING RACIAL JUSTICE IN THE 21ST CENTURY



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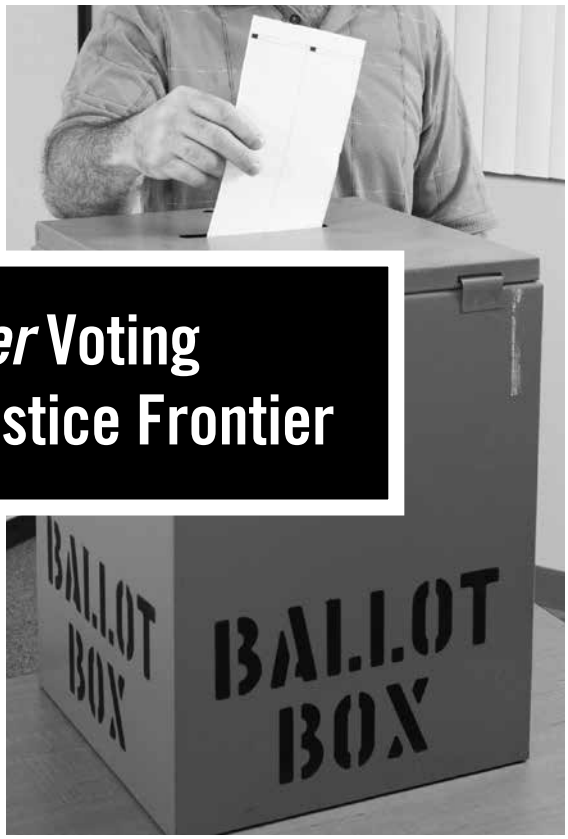

After *Shelby County v. Holder* Voting Rights Are Again a Racial Justice Frontier

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On June 25, 2013, as authors were submitting their articles for this special issue of Clearinghouse Review, the U.S. Supreme Court issued a momentous decision with vast racial justice implications. In *Shelby County v. Holder* the Court held, forty-eight years after Congress passed the Voting Rights Act and seven years after Congress extended it until 2031, that the formula set out in Section 4 of the Act was unconstitutional because "[n]early 50 years later, things have changed dramatically."[1]

The Voting Rights Act applies nationwide and prohibits all jurisdictions from abridging voting rights due to race.[2] Section 4 zeroed in on jurisdictions that, as of November 1, 1964, imposed tests or other prerequisites to voting and had less than 50 percent voter turnout or registration in the 1964 presidential election. These jurisdictions, largely in the South, had historically erected a variety of barriers to prevent voting by African Americans and have been referred to as the "covered jurisdictions."[3] In reauthorizing the Act several times, Congress added jurisdictions outside the South and expanded the group of voters whom the Act protects, especially to include language minorities. Section 5 of the Act required covered jurisdictions to obtain permission from federal authorities, either the attorney general or a three-judge court, before implementing any changes in their voting procedures—a procedure known as preclearance. The Court left Section 5 standing and passed the ball back to Congress to "draft another formula based on current conditions."[4] For the moment, however, Section 5's preclearance requirement is ineffectual absent Section 4's identification of jurisdictions to which preclearance applies.

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[1] *Shelby County v. Holder*, 133 S. Ct. 2612, 2625 (2013).

[2] Voting Rights Act, 42 U.S.C. § 1973.

[3] U.S. Department of Justice, Section 5 Covered Jurisdictions (n.d.), http://1.usa.gov/ev04cJ.

[4] *Shelby County*, 133 S. Ct. at 2631.

In a passionate dissent Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, lambasted the majority for "making no genuine attempt to engage with the massive legislative record that Congress assembled [for its 2006 reauthorization of the Act].... One would expect more," she wrote, "from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation."[5] Justice Ginsburg went on to accuse the Court of "hubris" in its "demolition of the [Voting Rights Act]."[6]

The right to vote is without question an issue of racial justice. Justice Ginsburg noted that "[t]he [Voting Rights Act] addresses the combination of race discrimination and the right to vote, which is 'preservative of all rights.'"[7] Indeed, the assertion that African Americans had the right to vote was the very foundation of the civil rights movement and explained much of the rabid violence against civil rights workers. Advocates of segregation and the status quo of the time understood full well the threat that a truly universal franchise posed to the existing system.

Both the majority and dissenting opinions in *Shelby County* agreed that the Voting Rights Act had succeeded in eliminating the "first generation barriers" to voting that had prevailed in covered jurisdictions in 1965. They parted company, however, on the extent to which "second generation barriers"—techniques that are more subtle but still effective in limiting voting access in communities of color—remain a threat.

Covered jurisdictions wasted no time in the wake of the *Shelby County* decision. With the preclearance requirement out of their way, several moved quickly to implement changes in voting procedures that the U.S. Department of Justice had barred. First out of the gate was Texas, where within hours of the decision officials announced plans to enforce a photo identification requirement that "had been blocked by a federal court on the ground that it would disproportionately affect black and Hispanic voters."[8] In August the Justice Department announced plans to challenge Texas' move under Section 2 of the Voting Rights Act and seek relief under Section 3, the so-called bail-in provision, which essentially allows a federal court to reinstate the preclearance requirement if the Justice Department can show that the right to vote has been abridged on the basis of race.[9] Alabama and Mississippi announced plans to enforce laws that had not yet received preclearance.[10] And North Carolina was the first state in the wake of *Shelby County* to pass new legislation that, advocates contend, will make voting harder for people of color. Advancement Project and private attorneys are challenging the North Carolina legislation in federal court; they contend that the legislation violates Section 2 of the Voting Rights Act.[11]

Voting rights has not traditionally ranked high among the priorities of many legal aid programs. And some in programs funded by the Legal Services Corporation (LSC) may have the impression that their programs are prohibited from representing clients on voting rights matters. This belief is incorrect. LSC regulations prohibit only "provid[ing] voters with transportation to the polls or ... similar assistance in connection with an election," voter registration activity, and representation in litigation related to redistricting.[12] Ad-

[5]*Id*. at 2644.

[6]*Id*. at 2648.

[7]*Id*. at 2636 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

[8]Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, New York Times, July 5, 2013, http://nyti.ms/1aNjA9K.

[9]Press Release, U.S. Department of Justice, Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law (Aug. 22, 2013), http://1.usa.gov/19zRn3s.

[10]Cooper, *supra* note 8.

[11]*North Carolina NAACP v. McCrory*, No. 13:1-635-c8v-658 (M.D.N.C. filed Aug. 12, 2013) (challenging H.B. 589, Session 2013 (N.C. 2013), http://bit.ly/18eyBwH (signed Aug. 12, 2013)).

[12]Prohibited Political Activities, 45 C.F.R. § 1608 (2013), particularly 1608.6(b); Redistricting, 45 C.F.R. § 1632 (2012).

vocates in LSC programs are otherwise free to represent clients in asserting their rights to vote. This advocacy might range from challenging barriers like photo identification requirements and the disfranchisement of people with criminal records, to working to expand early voting options or opposing policies such as at-large electoral districts that make candidates from communities of color less likely to prevail. Litigation brought under the Voting Rights Act is explicitly permitted by 45 C.F.R. § 1632.3(b), and 45 C.F.R. § 1608.7 has been interpreted since 1976 to permit representation in voting rights cases.[13]

As the civil rights community strategizes to respond to the *Shelby* decision, where do legal aid programs fit on this fundamental question of racial justice? Following *Shelby*, voting-related activity surged on both ends of the spectrum. Jurisdictions freed from preclearance requirements seek to reinstate barriers to voting that have a disproportionate impact in communities of color while others are adopting requirements such as photo identification requirements that arguably make voting more difficult for certain groups such as low-income people, people of color, students, and seniors. Advocates are not only pushing back against these restrictions (e.g., Advancement Project's challenge to North Carolina's legislation) but also seeking to expand the right to vote in other ways, such as restoring the franchise to formerly incarcerated people and modernizing voter registration systems.[14] For antipoverty advocates who want to ramp up their racial justice work, the field of voting rights after *Shelby County* offers multiple opportunities.

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[13]45 C.F.R. § 1632.3(b); 45 C.F.R. § 1608.7; E-mail from Alan Houseman, senior fellow and former executive director, Center for Law and Social Policy, to Marcia Henry (Sept. 3, 2013). Houseman is widely regarded as a national expert on the Legal Services Corporation Act and regulations and constraints governing LSC programs.

[14]Both the NAACP and the Mexican American Legal Defense and Educational Fund focus on voting rights among other matters, and the NAACP raised the question of restrictions on voting within the United States before the United Nations in 2012 (see Melanie Eversley, *NAACP Presses U.N. Panel in Geneva on Voting Rights*, USA Today, March 14, 2012, http://usat.ly/195HCHf). The Brennan Center has prepared a comprehensive set of recommendations for modernizing voting procedures (see Jonathan Brater, Brennan Center for Justice at New York University School of Law, Testimony: Presidential Voting Commission Can Modernize Elections (Sept. 4, 2013), http://bit.ly/1eiK7fh).

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