



## *Shelby County v. Holder* and the Future of the Voting Rights Act

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### INTRODUCTION



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Even for many who accurately predicted the result, the Supreme Court's 5 to 4 decision in *Shelby County v. Holder* striking down a key provision of the Voting Rights Act (VRA) was remarkable. To be sure, the writing for the decision had been on the wall for six years since the Court last considered, but ducked, a constitutional challenge to Section 5 of the VRA. Despite the warning signs, however, the striking down of a pillar of the Civil Rights movement, which had been reauthorized by a near-unanimous Congress in 2006, illustrated the muscularity of the Court in an arena where Congress had historically enjoyed great deference.

Both the oral argument and the Court's eventual resolution of the case emphasized that "times have changed" with respect to minority voting rights since the VRA's original passage. As to this basic fact, there is little argument, even if no consensus exists as to exactly "how far we have come." The question over which the Justices (and litigants) vehemently disagreed was whether these changes converted the VRA into an unconstitutional law. Even if the geographic pattern of voting rights violations was not as stark as it was in the 1960s, was it still strong enough to justify selective

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treatment of certain jurisdictions, mainly in the South? And how perfect did the fit of VRA coverage need to be to survive constitutional scrutiny, especially given that the law's mere existence and success would prevent the kinds of patterns and practices used originally to justify it?

To discuss the decision and prospects for reform, the Brookings Institution assembled leading scholars and practitioners of election law on July 1, 2013, less than a week after the Court handed down its decision. The group included lawyers involved in the case, minority voting rights advocates, election lawyers who have represented both Democrats and Republicans, and academics specializing in voting rights and election law. A webcast of the event, as well as a transcript, is available on the Brookings website at <http://www.brookings.edu/events/2013/07/01-voting-rights-shelby-holder>. What follows in this Policy Brief is a summary of the views expressed at the conference.

## I. The Decision and Dissent

We began with a discussion of the case and a summary of the Court's opinion. Shelby County, Alabama, filed its lawsuit in 2010, challenging the constitutionality of Sections 4 and 5 of the VRA. Together those provisions required certain covered jurisdictions to gain federal preclearance for any voting-related law or procedure, whether a redistricting plan, voter ID law or polling place change. The original coverage formula captured all jurisdictions that had operated a test or device (such as a literacy test) and had voter turnout below 50% in the 1964 election. Originally enacted in 1965 to target the South, it was later amended in reauthorizations of the VRA into the 1970s, but it had not been changed since 1975 and was not altered in the 2006 reauthorization. Unless jurisdictions "bailed out" from coverage by demonstrating a clean voting rights record for the preceding decade, they had been covered at least since the early 1970s.

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The focal point of controversy in the Shelby County case concerned the constitutionality of this age-old coverage formula given temporal and geographic changes in the threats to minority voting rights. Shelby County argued that the coverage formula was outdated, that Congress failed in 2006 to build a record that distinguished between the covered and noncovered jurisdictions, and that, in any event, the regime of federal permission-giving in Section 5 violated states' rights. The defenders of the VRA, however, urged deference to a near-unanimous Congress in its decision concerning

maintenance of coverage, and also argued that the 15,000 pages of testimony concerning the scope and location of threats to minority voting rights was ample justification for upholding the VRA as the Court had done in the past.

In an opinion joined by four other Justices, Chief Justice Roberts agreed with Shelby County that Section 4, as reauthorized, was unconstitutional and exceeded Congress' powers to enforce civil rights under the Fourteenth and Fifteenth Amendments. (Justice Clarence Thomas also concurred separately to emphasize that he considered the federal preclearance regime under Section 5 to be unconstitutional, in addition to the Section 4 coverage formula.) For the majority, the critical vacuum in the record justifying the law was its disconnect to the coverage formula itself. In other words, regardless of whether Congress may have found in 2006 that the covered jurisdictions happened to pose greater threats to minority voting rights (something the majority and plaintiffs doubted), nevertheless, there was no connection between such findings and the trigger for coverage (e.g., literacy tests and low voter turnout in 1964, 1968 or 1972). As one of Shelby County's lawyers colorfully put it at the conference, if Congress had picked jurisdictions out of a hat, the fact that they may have gotten the "right" jurisdictions by luck would not immunize the process by which those states were chosen. For the Court's majority, maintenance of the age-old coverage formula posed the same constitutional problems.

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Although the question of the proper standard of review for the reauthorized VRA was greatly debated in the lower courts in *Shelby County*, the Supreme Court majority did not settle that debate. Because Chief Justice Roberts' opinion considered the coverage formula as not "rationally", "logically", or "sufficiently" related to addressing present-day threats to minority voting rights, the VRA appeared to fail even the lowest level of constitutional review of exercises of federal power. In his words, echoing the earlier decision in *Northwest Austin*, the "current burdens" of the VRA did not match "current needs."

As a result of this disconnect, Section 4 of the VRA treated certain states differently than others without ample justification. It, therefore, violated the "equal sovereignty of states," according to the majority. Although the exact contours of that doctrine are unclear from the majority opinion, it would appear to suggest that, at least in a context such as Section 5, where the exercise of federal authority over states in the preclearance process may push the Tenth Amendment envelope by requiring prior federal approval,

disparate treatment of states requires special justification. As the Court put it in *Northwest Austin*, “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”

In her dissent, joined by Justices Breyer, Sotomayor and Kagan, Justice Ginsburg took issue with this application of the doctrine. For her, the equal sovereignty doctrine was not about discrimination against the states in policies such as the VRA. Rather, it was limited to the question of states’ admission to the Union.

Regardless of the scope of that doctrine, the dissent considered the record sufficient to justify the continued singling out of the covered jurisdictions. Whereas the majority found the legislative record unconnected to the coverage formula itself and highlighted progress particularly in the areas of voter turnout and minority office holding, the dissent emphasized Congressional findings of continued threats to minority voting rights in the covered areas (mainly in the South). In particular, it pointed to evidence of intentional discrimination against minorities, racial gerrymandering, racially polarized voting, vote dilution, disparate success rates of Section 2 lawsuits, and Department of Justice preclearance denials and requests for more information. Like the civil rights leaders at the conference, the dissent placed great importance on the effect of Section 5 in deterring discriminatory practices particularly at the local level, where voting changes might otherwise occur out of public view.

Given the applicable deferential standard of review, as the dissent saw it, such evidence was more than sufficient to justify what is admittedly an extraordinary (and heretofore extraordinarily successful) piece of legislation. Whether relying on the classic case of *McCulloch v. Maryland* or the case, *South Carolina v. Katzenbach*, which first upheld the VRA against constitutional challenge, the dissent argued that something akin to rational basis review applied. In other words, because the means were “rational,” “appropriate,” and “plainly adapted” to the end of addressing racial discrimination in voting, Sections four and five of the VRA were constitutional.

More to the point, the dissent would have found the *reauthorized* VRA constitutional. It emphasized the fact that such reauthorizations of laws previously upheld would likely pass constitutional muster yet again. In such admittedly rare cases, Congress assembled a record for the initial legislation, and it placed a time limit on the legislation itself. The continued success of the initial legislation, which would likely inhibit the development of a record of constitutional violations comparable to the original, should lower the

constitutional bar for the reauthorized version. For the dissent, the success of the law should not be held against it in the constitutional analysis. For the majority, such a position would create a perpetual license for excessive deference well after the original law had outlived its usefulness as a deterrent for unconstitutional action.

Finally, whereas the majority considered the coverage formula calcified and outdated, the dissent viewed other aspects of the law as guaranteeing constitutionally relevant flexibility. The law allowed covered jurisdictions to “bail out” and for courts to “bail in” uncovered jurisdictions pursuant to a finding of unconstitutional voting discrimination. Both of those provisions were important features for the dissent’s view that the law as a whole did not sweep so broadly as to be considered irrational.

These sharp differences between the majority and the dissent notwithstanding, William Consovoy, the lawyer for Shelby County at the conference, argued that the decision was actually modest, not revolutionary. First, although the precise standard of the review the majority applied may be unclear, it purports to be closer to *McCulloch*-style review than the more-restrictive *City of Boerne* standard, which would have required that the law be “congruent and proportional” to the constitutional evils it was trying to prevent or remedy. Second, it did not decide the constitutionality of the preclearance regime in Section 5. Third, according to Consovoy, the Court ruled against the coverage formula on grounds that it was not rational in theory—that it did not make sense to base the trigger on data from the 1960s and 1970s. The Court did not decide that the geographic scope of Section 4 was irrational in practice - meaning that it left for another day the question of whether congressional findings of discrimination could lead the exact same set of jurisdictions to be covered under an alternative formula. And fourth, by doing so, it gave Congress the opportunity to revisit the VRA. Others at the conference struck a similar tone, noting that the likely doctrinal and practical fallout from the decision was limited.

That conclusion, as applied to both doctrinal and practical effects, was hotly contested. Many argued that in spite of the language of moderation and reluctance, the decision marked a historic Court-imposed limitation on congressional power under the Fourteenth and Fifteenth Amendments and severely weakened Congress’ ability to focus federal resources to protect the voting rights of racial minorities.

## II. Possible Responses to *Shelby County*

In the weeks since the Court issued its decision, Congress has held hearings about ways to respond, and groups have mobilized with varied solutions. Some have suggested that

no new legislation is necessary, that Section 2 of the VRA, on its own, is a sufficient tool to combat racial discrimination in voting. Others argue for enacting a more contemporaneous coverage formula, while keeping the basic structure of Section 5 intact. Leaving aside, for the moment, the considerable political obstacles to any substantial reform, no consensus has yet emerged as to whether and how to address the Court's decision.

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For those urging reform, three questions seemed to present themselves at the July 1 conference.

First, should a new VRA continue, as its predecessors, to be focused on protection of the voting rights of racial minorities or should it expand its scope to more general election or democracy reform? Second, should such a reform maintain the same type of structure (geographical targeting and preclearance) of the existing Sections 4 and 5 or pursue a different model? Finally, given the focus of VRA litigation and the notoriety of preclearance denials concerning redistricting, should any future reform include redistricting within its ambit?

Of course, the decision tree over the future of the VRA begins at the branches "keep the status quo" or "reform the law." Those who believe the status quo is sufficient (or inevitable because of daunting political obstacles) point to other sections of the Voting Rights Act as tools to combat racial discrimination in voting. In particular they point to Section 2 of the VRA, a traditional plaintiff-initiated civil rights claim to address racially discriminatory voting practices. Others point to Section 3, a rarely used provision that allows plaintiffs to sue to subject a jurisdiction to a preclearance regime akin to Section 5. Still others point to state constitutions, which have proven fruitful in litigation seeking to strike down or constrain state voter ID laws, for example.

With respect to Section 2, many of the civil rights leaders at the July 1 conference argued that it is a poor substitute for Section 5. In particular, they note the incredible expense (lawyers, experts, etc.) involved in launching such a suit. Although preliminary relief is sometimes available, they also lamented that it often takes years to get a favorable disposition, which would only happen well after a new set of incumbents, for example, has been elected according to a discriminatory redistricting plan. And while Section 2, by its terms, is not limited to redistricting, virtually all of the successful lawsuits under that provision have been in the redistricting realm, while Section 2 lawsuits concerning felon disenfranchisement and voter ID, for example, have never succeeded.

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The specter of Section 3 “bail in” lawsuits, previously almost unheard of, has quickly become part of the legal landscape in the post-*Shelby* world. Civil rights groups as well as the Department of Justice (DOJ) have now moved to bail in Texas, and representatives of Native Alaskans have moved to bail in their state. “Bail-in” is a complicated procedure that has only happened to two states (Arkansas and New Mexico), six counties (Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County,

South Dakota; Charles Mix County, South Dakota), and one city (Chattanooga, Tennessee) throughout the entire history of the VRA. Victorious plaintiffs in voting discrimination lawsuits can ask that a court order the jurisdiction to submit to a preclearance-style regime with that court or the Department of Justice for a period of time. The scope of preclearance could be akin to the extant Section 5 of the VRA, but it is more frequently limited to particular types of voting regulations and particular types of governmental bodies (e.g., a city council redistricting).

Those who wish to enact a new Voting Rights Act tend to group into two camps: those who want to get as close as possible to the now-defunct Section 4 and 5 regime and those who want to use the policy window opened by *Shelby County* to expand what the VRA is *about*. At the threshold, then, is the question of whether the VRA will continue to be about the voting rights of racial minorities or whether it will be about election regulation more broadly (something in the mold of the National Voter Registration Act or the Help America Vote Act). Because voting rights advocates (among many others) tend not to view those other laws as comparably successful as the VRA, they understandably may be hesitant to embrace a more general reform (even if politically possible). Others argue that the areas of greatest concern and disparate impact for racial minorities (e.g., voter identification, restrictions on early voting, registration issues) also present more general questions of election administration applicable to non-minorities as well.

Regardless of how one answers that first question, the proposal can either *look like* the Section 5 regime or it could look like something else. The salient features of the Section 5 regime would be geographic targeting, preclearance, and a special federal (perhaps DOJ) role. If the new law is to be geographically targeted, then it runs into the requirements of *Shelby County* as well as the difficult policy problems of how to arrive at measures that delineate which areas of the country pose particular election-related dangers such that they need to be treated differently. With respect to federal preclearance, only

Justice Thomas has specifically suggested something akin to the extant Section 5 is unconstitutional, although others on the Court may well share his suspicions. If the new law will not hew close to the most notable features of the existing Section 5, then what alternatives might be possible? One possibility is a law, similar to Section 2, which falls into the traditional mold of a plaintiff-initiated civil rights claim. A second could be an administrative law model with a new or existing agency charged with drafting rules and providing oversight across some range of election-related issues. Other possibilities include, as NYU Law Professor Sam Issacharoff has argued, a regime similar to the one used for antitrust enforcement, which is also focused on information production as well as assessing liability. Or, as Yale Law Professor Heather Gerken has suggested, core features of the existing law could be retained, but the preclearance process could be triggered by objections raised by stakeholders in the affected jurisdictions. Most such reforms include a robust transparency requirement as a critical feature.

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Whether a proposed reform attempts to overrule *Shelby County* in as narrow a way as possible or seeks a bolder or different path, one critical question will concern its regulation of the redistricting process. As Republican redistricting lawyer, Mark Braden, maintained at the conference, the most controversial and high profile applications of the VRA (whether Section 2 or 5) have concerned state legislative and congressional redistricting. The role of the VRA in the creation and protection of majority-minority districts is well-known and undisputed, even if many debate the optimal way to

represent minority interests through the redistricting process. Whether and how a new VRA regulates redistricting could be a focal point for partisans concerned about who wins and who loses under any proposed reform.

## Conclusion

The Court's decision in *Shelby County* has opened a policy window of opportunity similar to that which occurred six years ago when Section 5 was set to expire. The course Congress took at that last juncture was to reauthorize the existing framework while overturning two court decisions advocates considered at odds with the statute's original intent. Whether Congress is willing and able to do the same this time or something more revolutionary is anyone's guess. In any event, they will need to contend with a new judicial interpretation of congressional power to enforce voting rights - one that will prevent a mere reenactment of the status quo ante.



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