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The Voting Rights Act After *Shelby County v. Holder*: A Potential Fix to Revive Section 5

Thomas L. Brunell and Whitney Ross Manzo

1 The Voting Rights Act of 1965 (VRA) was called "one of the most monumental laws in the entire history of American freedom" at the time of its passage (*Public Papers of the Presidents, 1965*: 840-43). Its effects were immediate: six months after implementation, more than 300,000 new black voters had been added to the registration rolls of its covered areas. Additionally, by 1970, there were 711 elected black officials in the thirteen states of the traditional South ; just five years earlier, before the VRA, that number had been 72 (Garrow, 1990:377-398). The VRA continued to protect minority voting in the United States up to and including the 2012 election, when several states were blocked by the courts from implementing strict voter ID laws and cutting back early voting due to probable disproportionate impact on minority and elderly voters (Liptak, 2012).

2 However, in 2009, the Supreme Court indicated in *Northwest Austin Municipal Utility District No. 1 v. Holder* (557 U.S. 193) that they questioned the continued use of the VRA. The Court was especially concerned about Section 5, the section which mandated that areas covered under Section 4 of the Act "preclear" any changes in local or state election law through the Department of Justice (DOJ) or the D.C. Circuit Court. This preclearance is necessary to changes concerning "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting..." (42 USC § 1973c). During oral argument of the *Northwest Austin* (NAMUDNO) trial, Chief Justice Roberts wondered why this section did not apply to all 50 states: "Are Southerners more likely to discriminate than Northerners?". More tellingly, Justice Kennedy asked the government's lawyers: "Is the sovereignty of Georgia entitled to less respect than the sovereign dignity of Ohio? Does the United States take that position today?" (Savage, 2009).

3 It seemed to many Court watchers that the Court was ready to strike down at least part of the VRA due to these federalism concerns - that Section 4, which contained the formula that categorized states covered or not covered by Section 5 - was outdated and unfairly divided the states based on history instead of current events. In the *NAMUDNO* ruling, however, the Court did not actually strike anything down ; because they could rule on the question at hand without broadening their scope to the VRA, the Court only mentioned that perhaps the VRA should be updated by Congress. Congress declined to do so- most likely because updating the coverage formula of Section 4 was politically untenable since no representative would want their own state covered under the new formula (Liptak, 2012)- and thus the issue of the constitutionality of Sections 4 and 5 was brought before the Supreme Court again in *Shelby County v. Holder* (570 U.S._ (2013)).

4 Shelby County, part of the covered portion of Alabama, sued the Justice Department in 2011 asking for declaratory judgment that Sections 4 and 5 of the VRA were unconstitutional. In particular, Shelby County argued that Congress' reauthorization of the VRA in 2006 for 25 years exceeded its authority under the 15th Amendment, because Congress did not produce enough evidence that the VRA was still necessary, and also violated the reserved powers guaranteed to the states in the 10th Amendment. Many other states and jurisdictions subject to the preclearance condition filed amicus briefs siding with Shelby County ; most of them argued that the application of the VRA was extremely uneven, because the preclearance standards are ambiguous, and that they were put on unequal footing with their neighbors that were not covered by the VRA, which violates federalism (using nearly the same language the Court had used in *NAMUDNO*). Amicus briefs supporting the VRA argued that the very fact that the VRA was still being used prior to the 2012 election indicated its necessity, and that any "federalism costs" referred to by the petitioners were worth it when compared to the importance of protecting the right to vote for minority groups and the elderly (*Shelby County* v. *Holder*).

5 Both the U.S. District Court in Washington, D.C. and the U.S. Court of Appeals for the D.C. Circuit upheld the VRA, claiming that they trusted Congress' determination that the Act was still needed. However, the Court of Appeals acknowledged that "the extraordinary federalism costs imposed by Section 5 raise substantial constitutional concerns," and the lone dissenter, Judge Stephen F. Williams, argued that "the coverage formula completely lacks any rational connection to current levels of voter discrimination" (Liptak, 2012). Ultimately, the Supreme Court agreed with Judge Williams and reversed the rulings of the lower courts, holding that Section 4(b), the equation that determined which jurisdictions would be subject to preclearance, was unconstitutional. The majority wrote:

6 "In 1966... the coverage formula... made sense. The Act was limited to areas where Congress found 'evidence of actual voting discrimination,' and the covered jurisdictions shared two characteristics: 'the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average'...Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were... The Fifteenth Amendment is not designed to punish for the past ; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." (*Shelby County* v. *Holder*).

7 This is exactly what the Court warned Congress would happen if it did not update the VRA in the *NAMUDNO* opinion. The Court did not rule on the constitutionality of Section 5, but with Section 4 thrown out, Section 5 lost all of its teeth. Many in the civil rights community immediately issued statements of dismay and outrage, and President Barack Obama urged Congress to pass legislation to fix Section 4 (Jackson, 2013). Meanwhile, several Southern states moved to pass the stringent (and probably discriminatory) voter ID laws that had previously been blocked by the Justice Department, and Texas Governor Rick Perry signed new Congressional district maps heavily favoring the Republican party that probably would have not have passed preclearance before the ruling in *Shelby County* (For republicans, 2013). Republican leaders in Congress were more circumspect about the ruling - Georgia Senator Johnny Isakson said he hoped "everyone will sit back and take a deep breath" - but many remained skeptical that a new coverage formula could be passed considering that, according to high-ranking RNC Committee member Henry Barbour, "these other states don't want this scrutiny [preclearance] coming to them" (*Ibid.*).

8 Meanwhile, several Southern states moved to pass the stringent (and probably discriminatory) voter ID laws that had previously been blocked by the Justice Department. Texas' voter ID law, for example, had been deemed by a federal court in Washington to "almost certainly have retrogressive effect: it imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty" (de Vogue, 2012). Also in Texas, Governor Rick Perry signed new Congressional district maps heavily favoring the Republican Pparty that probably would have not have passed preclearance before the ruling in *Shelby County* (For republicans, 2013). These maps were previously deemed problematic by another federal court for intentionally discriminating against minorities by "cracking" (separating) the Hispanic population of south Texas - which usually votes Democrat- into several Republican-leaning districts instead of drawing one majority-Hispanic district in order to avoid election of Democrats (Tomlinson and Yost, 2013).

What's at Stake

9 Section 5 of the VRA was wildly successful. When it was implemented, there is no doubt that it was necessary as jurisdictions intent on discriminating against minorities were able to move from one method of vote dilution to another if the government saw fit to stop whatever it was that the jurisdiction had been relying upon. Things have changed since that time. These changes have been well documented (Bullock and Gaddie, 2009). At the same time, it is hard to ignore the fact that two southern states reacted nearly instantaneously to the Shelby County decision by passing laws that certainly would not have been pre-cleared had Section 4 not been stuck down by the Court.

10 It is important to understand that Section 5 still exists. While Justice Thomas is on record as to believing that Section 5 itself ought to be struck down, it is not clear that there would be five votes to go this far, though it certainly is in the realm of the possible. Chief Justice Roberts is being credited/blamed for taking his time and using circuitous decisions to dismantle federal law (Liptak 2013). So rather than striking down Section 5 directly, if the Court vacates section 4, it has nearly the same effect. In reality, these two paths are not functionally equivalent due to the other provisions of the VRA. More specifically, states and localities can be covered by Section 5 through a

"bail-in" process that is spelled out in Section 3 of the VRA. A lawsuit can be filed asking a federal court to require a state, or some part of a state, to be covered by Section 5. Thus, there are ways for Section 5 to be effective regardless of whether Section 4 exists or not..

11 In the face of Congressional inaction on revising Section 4- which makes the VRA less powerful because it does not have a way to determine which jurisdictions need to be monitored for discrimination and suspect voting devices - the Obama Administration appears to be relying on Sections 2 and 3. Section 3 can be used to bail in jurisdictions not under the Section 4 coverage formula which have been determined to be violating the VRA to Section 5 coverage ; this provision, sometimes called the "pocket trigger," has been used in the past to apply the VRA to Arkansas, New Mexico, and counties in California, Florida, Nebraska, and South Dakota (Crum, 2010).

12 In addition, the creation of majority minority districts stems from Section 2 of the VRA, as interpreted by the Supreme Court in *Thornburg v. Gingles* (478 US 30 (1986)) and related cases, and it remains a critical component of sustaining minority representation in the U.S. Congress. As Lublin and his colleagues demonstrate, the VRA has not outlived its usefulness (Lublin, 1997 ; Lublin and al, 2009). The overwhelming majority of members of Congress and state legislatures around the country that are non-white are elected from districts in which racial minorities comprise a majority of the voting age population.

13 Looking at the current demographics of the U.S. House of Representatives, we found 42 African American members, 30 Latino, eight Asian, and two Native American members of Congress. Out of these 84 districts all but 10 are majority minority. Of the 10 districts with majority non-Hispanic White, six are represented by Republicans and four by Democrats. Thus, the overwhelming majority of minority members of Congress continue to be elected from districts in which racial minorities comprise a majority of the population. All but three majority minority districts that elect minorities are represented by Democrats. There are three Latino Members of Congress who represent districts with a minority non-Hispanic White population and are also Republicans. So some in-roads continue to be made by minorities in terms of being elected by White Americans, but even in 2013 the most likely district in which we would expect to see minorities represented descriptively is one in which a majority of the voting age population is non-White.

Table 1. Minority Members of 113th U.S. House of Representatives by Party and District Type

District Demographics	Race of Member of Congress			
	African American	Hispanic	Asian	Native American
Majority Minority District	38 Dem 0 Repub	22 Dem 3 Repub	7 Dem 0 Repub	0 Dem 0 Repub

Majority White District	3 Dem 1 Repub	0 Dem 5 Repub	1 Dem 0 Repub	0 Dem 2 Repub

*Entries indicate the number of members of the U.S. House of Representatives in the 113th Congress by Party, race, and whether the district demographics are majority White or majority minority (African American, Hispanic, etc.).

An Administrative Approach as a Substitute for Section 5

14 The U.S. Supreme Court, in *Shelby County v. Holder*, declared section 4 of the Voting Rights Act unconstitutional. While this decision was popularly interpreted as gutting Section 5, it remains valid, though the coverage of Section 5 has been severely cut back. Creating a new and updated coverage formula would be relatively straightforward. However, getting 218 votes in the House and a majority (or super-majority) in the Senate is highly unlikely. No state would want to be covered- preclearance is a major administrative headache- so everyone could devise slightly different tests for inclusion of coverage with their state left uncovered.

15 Since no one wants to be covered by Section 5, we need a politically palatable method that would still provide additional protection for minority groups beyond what is available through Section 2. Our recommendation is to use a notification system in which a state or locality has to notify the Department of Justice 60-90 days prior to any change in election law. Perhaps the notification could also include some preliminary analysis that indicates the change would not adversely affect minority voters. Since the burden will be significantly lower than the preclearance under the old Section 5, the trigger mechanism could be quite simple and the scope of states covered could also change, even increase. Perhaps the trigger requiring notification could be something as simple as a minimum percentage of non-white residents based on the most recent census data -– perhaps something like 25 percent. Congress would have to agree on a level and which data to use (total population, voting age population, etc.). Moreover, rather than framing the trigger in terms of which states would be covered, write the law in such a way that all states, counties, municipalities are covered, but some places are exempt because the minority population is below 25 percent. The two are functionally equivalent, but the latter is more palatable in the sense that rather than states feeling singled out to be covered by this law, all states are covered but some are exempt because they have a relatively low minority population.

16 This approach is somewhat similar to what Heather Gerken recommends, though her approach has more teeth on the back end of the process (Gerken, 2006). She endorses an administration notification system like we do, but then if interested minority groups object to some portion of the change and try to negotiate but remain dissatisfied with the outcome, they can file a formal civil rights complaint with the DOJ that would trigger an investigation. We think Gerken's approach has merit as well, though it likely remains politically unfeasible since it is still burdensome on the states that are subject to this process. We know that Section 4, given the *Shelby County* ruling, needs to be drastically changed and we argue that Section 5, given the current political climate, may have to be watered down in order to get the requisite majority in Congress to pass

it. Moreover, the question is not just what kind of law can get Congress approve, but also what the Supreme Court will do in the face of the new statute. By reducing the burden on states and localities we think, like Grofman and Brunell, that this reduces the likelihood of the Court deciding to go ahead and kill Section 5 directly (Grofman and Brunell, 2006).

17 The Voting Rights Act, particularly Section 2, is still relevant and necessary in modern American politics. The case for Section 5 is more difficult to make, though we are not willing to cast it aside completely, as it was still being used to successfully protect minority and elderly voting up to our most recent presidential election. Forcing states and local governments to think about the impact of a voting law on minority populations is important. Requiring those areas with significant minority populations to submit a notice to the DOJ with some sort of preliminary analyses that indicates no adverse effect for minorities is likely to have nearly the same substantive impact as the more burdensome Section 5 had, with less of a headache for covered states. Litigation via Sections 2 and 3 is always an option, though it clearly is more expensive and more time consuming than the old Section 5 preclearance regime.

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ABSTRACTS

The passage of the Voting Rights Act of 1965 (VRA) was a momentous occasion for minority voters in the United States, and its positive effects could be measured immediately. However, when Section 4 of the VRA was declared unconstitutional in *Shelby County v. Holder* (2013), the ability of the VRA to continue its protection of minority voters was called into question. We argue that the VRA is still necessary and propose an administrative notification system that could fix the issues with Sections 4 and 5.

Le vote au Congrès en 1965 de la loi sur les droits de vote (Voting Rights Act) fut un événement historique pour les minorités aux Etats-Unis et ses effets furent immédiats. Cependant, en 2013, la Cour Suprême dans l'arrêt *Shelby County c. Holder*, déclara qu'une de ces dispositions était inconstitutionnelle. Des lors la capacité de la loi à protéger le droit de vote des minorités a été remise en question. Dans cet article nous expliquons que le Voting Rights Act est toujours nécessaire et proposons un système de notification administrative afin de résoudre les problèmes soulevés par les Sections 4 et 5.

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