THE VOTING RIGHTS ACT UNDER REVIEW: *SHELBY COUNTY V. HOLDER* AND THE CONSEQUENCES OF CHANGE

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I. INTRODUCTION

The right to vote is one of the quintessential rights held by a citizen of the United States. Voting not only decides who will be elected President, but also effects changes to people's healthcare, welfare, security, and ability to make the world a better place for future generations. Because the practice of voting and the right to vote are so important to people's lives, it was astonishing to discover in the summer of 2013 that the Supreme Court of the United States dealt a detrimental blow to the long-standing protection of minority voting rights.[1]

The Voting Rights Act of 1965 ("VRA") was enacted nearly fifty years ago in order to protect minorities' rights to vote in the United

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1. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

States.[2] The Supreme Court's recent decision in *Shelby County, Alabama v. Holder*, to render the Act's most potent protection mechanisms useless, violated the Court's long-standing position of deference when reviewing congressional legislation such as the VRA.[3] States that are no longer regulated by the VRA are enacting voting laws that will seriously hinder minorities' ability to cast their vote in a post-*Shelby County* environment.[4]

Part II of this Note outlines the enactment and substance of the Voting Rights Act in 1965 and reviews the numerous challenges to its constitutionality, which culminated in the *Shelby County* case in 2013.[5] Part III analyzes the decision in *Shelby County* with regard to the standard of review used by the Court, as well as the effects on voting laws after the *Shelby County* decision and the effectiveness of the remaining enforcement tools in the VRA.[6] Finally, Part IV of this Note concludes that voting rights will be hindered by the *Shelby County* decision, but aggressive use of other enforcement measures and congressional willpower may restore that fundamental and unabridged right to vote once again.[7]

II. BACKGROUND

A. The Voting Rights Act of 1965

The Fifteenth Amendment was enacted after the Civil War to guarantee racial minorities the right to vote in elections.[8] However, many state officials across the country did not enforce that guarantee.[9] "The extension of the franchise to black citizens was strongly resisted"[10] by southern officials, which led to disenfranchisement laws such as poll

2. 52 U.S.C.A. §§ 10301–10702 (West 2014).

3. *Shelby Cnty.*, 133 S. Ct. at 2631.

4. *Voting Laws Roundup 2013*, BRENNAN CENTER FOR JUSTICE (Dec. 19, 2013), http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup.

5. *See infra* Part II.A–D.

6. *See infra* Part III.A–C.2.

7. *See infra* Part IV.

8. U.S. CONST. amend. XV. The Fifteenth Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." *Id.*

9. *NAACP History: Voting Rights Act*, NAACP, http://www.naacp.org/pages/naacp-history-voting-rights-act (last visited Nov. 3, 2013).

10. *Before the Voting Rights Act*, DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_a.php (last visited Nov. 3, 2013).

taxes and literacy tests.[11] Congress passed the VRA in 1965 to overcome the southern intransigence and enacted a complex set of procedures and safeguards to effectively combat racial discrimination in voting.[12]

Section 10301 adopted the basic language of the Fifteenth Amendment by stating, "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[13]

The VRA contained two primary enforcement mechanisms to ensure the language of § 10301.[14] The first mechanism is found in § 10301(a), which applies to all states.[15] This section allows the Department of Justice ("DOJ") to enforce the statute against any state or political subdivision seen as denying the franchise to vote, and if a court finds any infringements, they have the power to enjoin the practice or procedure.[16] This mechanism serves the purpose of enforcing voting rights after a state has already enacted a disenfranchisement law.[17]

The second mechanism, which is at the heart of this Note, relates to §§ 10303–10304.[18] Section 10303(b) created a "formula" to determine if certain states or political subdivisions needed extra attention when it came to enforcing minority-voting rights.[19] The formula stipulated that if a jurisdiction both maintained a "test" or "device"[20] that abridged voting

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11. *Id.* A particularly vile example of using literacy as a device for disenfranchisement took place in South Carolina in the late 19th century. *Race, Voting Rights, and Segregation Direct Disenfranchisement: Techniques of Direct Disenfranchisement, 1880-1965*, UNIVERSITY OF MICHIGAN, http://www.umich.edu/~lawrace/disenfranchise1.htm (last visited Jan. 11, 2014). South Carolina created the "eight-box ballot," which meant that a voter would have to place each ballot for specific offices into corresponding boxes or else his vote would not count. *Id.* The poll workers would often shuffle the different boxes around so that illiterate voters would not be able to read which box to put their respective ballots in. *Id.* Because African-American voters were more likely to be illiterate at the time, they were disproportionately affected by this device and therefore disenfranchised from voting. *Id.*

12. *Before the Voting Rights Act*, *supra* note 10.

13. 52 U.S.C.A. § 10301(a) (West 2014).

14. *Id.* §§ 10301–10304.

15. *Id.* § 10301(a).

16. *Id.*

17. *Id.* § 10302(b).

18. *Id.* § 10303–10304.

19. *Id.* § 10303(b).

20. *Id.* § 10303(b)–(c). A test or device is defined as:

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his

rights in 1964, and less than 50% of the voting public in that jurisdiction were registered to vote in 1964, that jurisdiction would be considered "covered."[21] A covered jurisdiction would be subject to the provisions in § 10304.[22] Section 10304 lays out the "preclearance" requirement of covered states prohibiting the enactment of a new law or change to an existing law related to voting without pre-clearing it with the DOJ or the U.S. District Court for the District of Columbia.[23] This section allows for prophylactic enforcement measures to prevent covered states from enacting discriminatory voting laws.[24] Despite the seemingly progressive and positive enactment of the VRA, there have been numerous challenges to its constitutionality.[25]

B. Landmark Decisions on the Voting Rights Act

1. South Carolina v. Katzenbach

The first challenge to the VRA to reach the United States Supreme Court was *South Carolina v. Katzenbach* in 1966.[26] Congress had enacted the VRA to combat "an insidious and pervasive evil . . . in certain parts of [our] country."[27] This "evil" was the direct and indirect use of devices or tests to disenfranchise poor African-American voters.[28]

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qualifications by the voucher of registered voters or members of any other class.

Id. § 10303(c).

21. *Id.* § 10303(b); *Coverage Under the Special Provisions of the Voting Rights Act*, DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Nov. 3, 2013). States that fell under the covered jurisdiction formula included Alabama, Georgia, Alaska, Louisiana, Mississippi, Virginia, and South Carolina. *Id.* Furthermore, many political subdivisions in North Carolina, Arizona, Hawaii, and Idaho were covered. *Id.* During subsequent re-authorizations of the VRA, more states were covered including Texas and the entire state of Arizona. *Id.*

22. 52 U.S.C.A. § 10304.

23. *Id.* The covered jurisdiction may bring an action in the D.C. federal district court for a declaratory judgment that the potential voting law at issue does not have the purpose or effect of denying the right to vote. *Id.* § 10304(a). Alternatively, the jurisdiction can send the proposed voting change to the DOJ and have it approved or denied outside of the court. *Id.*

24. *Id.*

25. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966), *abrogated by* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013); City of Rome v. United States, 446 U.S. 156 (1980).

26. *Katzenbach*, 383 U.S. at 301.

27. *Id.* at 309.

28. *Race, Voting Rights, and Segregation Direct Disenfranchisement: Techniques of Direct Disenfranchisement, 1880-1965*, *supra* note 11. There were numerous examples of direct voter disenfranchisement in the years leading up to the passage of the VRA. *Id.*

The State of South Carolina, which was a covered jurisdiction under § 10303 and therefore subject to § 10304 restrictions, challenged both sections as unconstitutional, based on Congress's enforcement power under the Fifteenth Amendment and federalism concerns.[29] The Court found that, in enforcing the Fifteenth Amendment, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[30] "The Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Fifteenth Amendment]."[31] The Court rejected South Carolina's claim that the VRA exceeded the scope of Congress's enforcement power under the Fifteenth Amendment.[32]

Katzenbach then addressed whether the specific provisions, §§ 10303–10304, were rational legislative measures taken by Congress to enforce the Fifteenth Amendment.[33] The Court held that the "coverage formula" provisions under § 10303 were constitutional and that Congress had a rational basis to determine that the formula was needed to combat

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One of the main vehicles for disenfranchisement was states' enactment of the poll tax. *Id.* Most southern states would create a "poll" tax requiring voters to pay back taxes (usually only a few dollars worth) before being permitted to vote in the election. *Id.* While the amount was small, this led to poor African-American sharecroppers and farmers (who did not usually deal in cash) not being able to cover the poll tax and therefore not allowed to vote. *Id.* The other primary test used to disenfranchise voting was the "literacy test." *Id.* Southern states would make citizens pass a literacy test before being allowed to vote. In 1890, 40-60% of African-Americans were illiterate (compared to only 8-18% of whites) and therefore disproportionately affected by the literacy test. *Id.* Furthermore, many states included grandfather clauses in the test that allowed people who could not pass the test to vote if their grandfather had been eligible to vote. *Id.* This indirectly would allow illiterate whites to still vote because their grandfathers likely had the right to vote, while not allowing the illiterate African-Americans to take advantage of the grandfather clause because their grandfathers may have been slaves, and therefore did not have the right to vote. *Id.*

29. *Katzenbach*, 383 U.S. at 317. South Carolina challenged the VRA, claiming that the law exceeded Congress's enforcement power under the Fifteenth Amendment, as well as encroached on an area of law (elections) usually reserved for the states. *Id.* at 323.

30. *Id.* at 324.

31. *Id.* at 326.

32. *Id.* at 327. The Fifteenth Amendment states that "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2. Enforcement of the article refers to the prohibition on racial discrimination in voting, and the appropriate legislation being challenged in *Katzenbach* was the VRA. The Court found that the VRA fell within the enforcement powers of the Fifteenth Amendment because the states have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Katzenbach*, 383 U.S. at 325. It further reasoned that states may have laws insulated from federal regulation for wholly determined state interests, but not when that interest is used to circumvent a federally protected right, in this case, universal suffrage among minorities. *Id.*

33. *Id.* at 328.

the "pervasive evil" of racial discrimination in voting.[34] *Katzenbach* reasoned that using existing devices and tests, because of their "long history as a tool for perpetrating the evil,"[35] as well as the inherent relationship between low voter registration numbers and voter disenfranchisement, were rational factors to be used in the coverage formula.[36] With respect to the challenge on § 10304, the Court found that, while "uncommon," the preclearance requirement was rational.[37] "Congress knew that some of the States covered by [§ 10304] . . . had resorted to the extraordinary stratagem of contriving new rules . . . for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees [under § 10301]."[38] Congress, wanting to avoid states effectively maintaining disenfranchisement through small tweaks to their state laws, created § 10304 as a prophylactic remedy.[39] The Court concluded that "under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."[40]

2. City of Rome v. United States

The next landmark decision regarding the VRA came before the Supreme Court fourteen years later in *City of Rome v. United States*.[41] The City of Rome, Georgia challenged numerous aspects of the VRA after its re-authorization in 1975.[42] First, the City claimed that § 10304 only prohibits voting laws that have a discriminatory purpose, and not laws that only have discriminatory effect.[43] The Court found that both

34. *Id.* at 329–30.
35. *Id.* at 330.
36. *Id.*
37. *Id.* at 334–35. The Court found that the preclearance requirement was an "uncommon" use of federal enforcement power because it essentially forced certain states to get federal approval before passing laws or regulations in an area of law, elections, which was typically an area reserved for the states to enforce. *Id.* at 335. "[B]ut the Court recognized that exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 334. Notwithstanding the "uncommon" nature of the VRA preclearance requirement, the Court found that the combination of the inadequacy of § 10301 powers to prevent disenfranchisement before the fact, with southern states explicit defiance of established norms with respect to minority voting, as being exceptional conditions making appropriate the preclearance requirement. *Id.* at 235.
38. *Id.* at 335.
39. *Id.*
40. *Id.*
41. 446 U.S. 156 (1980).
42. *Id.* at 172.
43. *Id.*

congressional intent and the plain language of the provision clearly indicated that § 10304 applies to both purpose and effect.[44]

Subsequently, the City claimed that Congress exceeded its enforcement power under the Fifteenth Amendment when it enacted VRA provisions that prohibited laws that have both discriminatory purposes *and* effects.[45] The Court held that "the [VRA] ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that [§ 1] of the [Fifteenth] Amendment prohibits only intentional discrimination in voting."[46]

The City next challenged the VRA on federalism grounds.[47] The Court found that the Fifteenth Amendment was "specifically designed" to intrude on state sovereignty in order to protect racial minorities.[48] Furthermore, Congress "had the authority to regulate state and local voting through the provisions of the Voting Rights Act."[49] Even if the VRA was considered "appropriate" to enforce the Fifteenth Amendment, the City further claimed that it was no longer necessary after it was re-authorized in 1975.[50] Congress, while acknowledging progress due to the VRA, still found it necessary to extend the VRA for seven additional years in 1975.[51] In particular, Congress foresaw that as minority-voting power increased, "other measures may be resorted to which would dilute increasing minority voting strength," and therefore, the preclearance provision was still proper to combat potential discrimination.[52] The Court upheld the extension of the VRA as a constitutional exercise of Congress's power as necessary to "promote further amelioration of voting discrimination."[53]

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44. *Id.* at 173.
45. *Id.*
46. *Id.* at 177.
47. *Id.* at 178. The City basically asked the Court to overturn the decision in *Katzenbach*, which found that Congress had the ability to enforce the VRA based on its Fifteenth Amendment enforcement powers. *Id.* The City argued that because a previous Court decision had found that Congress overstepped its enforcement power as applied to the Commerce Clause, it should be equally denied with respect to the VRA. *Id.* The Court was not willing to overturn *Katzenbach* and found that the state's power under federalism principles is "necessarily overridden by the power to enforce the Civil War Amendments [i.e., the Fifteenth Amendment] 'by appropriate legislation.'" *Id.* at 179.
48. *Id.* at 179.
49. *Id.* at 179–80.
50. *Id.* at 180.
51. *Id.* at 181.
52. *Id.*
53. *Id.* at 182.

C. Precursor to Change: Northwest Austin Municipal Utility District Number One v. Holder

Signs of discontent among the Supreme Court Justices regarding certain provisions of the VRA came to light in the 2009 case *Northwest Austin Municipal Utility District v. Holder*.[54] This case was brought after the 2006 re-authorization of the VRA by Congress.[55] The plaintiff was a municipal entity created to provide city services to citizens in Texas and brought suit for relief under the VRA's "bailout" provisions;[56] it also alleged that the VRA § 10304 preclearance provision was unconstitutional.[57]

The Court found that "many of the first generation barriers to minority voter registration and voter turn-out that were in place prior to the [Voting Rights Act] have been eliminated."[58] Voter turnout and registration among minorities was nearing parity with white voters in 2009, and explicit defiance of federal orders regarding disenfranchisement was no longer common.[59] While acknowledging that the improvements in minority voting were "no doubt due in significant part to the Voting Rights Act itself,"[60] the Court expressed "serious misgivings about the constitutionality of [the § 10304 preclearance requirement]."[61] In reference to the VRA's intrusion on state and local policymaking, the Court developed a new standard for reviewing provisions of the VRA.[62] *Northwest Austin* found that the VRA was imposing current (and real) burdens on specific states' abilities to enact voting legislation, and the VRA therefore "must be justified by current needs."[63]

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54. 557 U.S. 193 (2009).

55. *Id.* at 199.

56. *Id.* at 200. Section 10303(a) allows for a "[s]tate or political subdivision" to withdraw or "bailout" from the preclearance requirements under § 10304. 52 U.S.C.A. § 10303(a) (West 2014). To successfully bail out of the requirements, the entity must seek a declaratory judgment from the district court in Washington D.C., show that it hasn't used any prohibited test or device for the past ten years, and not been found in violation of the preclearance requirement. *Nw. Austin*, 557 U.S. at 199.

57. *Nw. Austin*, 557 U.S. at 199.

58. *Id.* at 201.

59. *Id.* In addition, minority candidates were holding public office at "unprecedented levels." *Id.*

60. *Id.* at 202.

61. *Id.*

62. *Id.* As seen with the discussions in *Katzenbach* and *City of Rome*, the *Northwest Austin* Court addressed the ubiquitous federalism principle and its interplay with the various provisions of the VRA. *Id.* at 202–05, 224.

63. *Id.* at 203. This new standard seems to be shifting the burden to decide whether or not the coverage formula and preclearance provision of the VRA are constitutional. *Id.* In

After quickly speculating that the current political conditions may not justify the current burdens of the VRA provisions, the Court decided to deliver a narrow opinion.[64] The Court found that the district had the ability to bail out of the VRA but did not decide the constitutional question regarding the preclearance requirement.[65] That question would be answered only four short years later.[66]

D. Big Change in Shelby County

In *Shelby County v. Holder*, the County challenged the constitutionality of the coverage formula and the preclearance requirement just as the previous cases did, but this time resulting in a much different outcome.[67] The Court in *Shelby County* stated that the coverage formula's "'current burdens' must be justified by 'current needs'" in order to remain constitutional.[68] *Shelby County* stated that the coverage formula was no longer necessary because voting tests and devices had become extinct, and voting percentages among whites and African-Americans were near parity in all of the covered jurisdictions.[69] The Court opined that "history did not end in 1965," and the current need of a coverage formula and preclearance system in 2013 cannot be based on 1965 factors that have effectively been "erased."[70]

Despite the long-standing precedent for the Court to defer to Congress's decisions regarding the enforcement of the Fifteenth Amendment, *Shelby County* abrogated *Katzenbach* and found that the

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Northwest Austin, the Court went further than previous Courts in that the justifications of those provisions at the time the VRA was passed combined with Congress's rational determination to re-authorize those provisions no longer seemed to be enough to pass constitutional muster. The Court in *Northwest Austin* demanded that the provisions of the VRA meet "current" needs of minority voter protection. *Id.*

64. *Id.* at 203–04. The Court did not decide which standard of review to use in determining whether the VRA's current burdens justify the current needs. *Id.* at 204. The plaintiff argued for the heightened standard laid out in *City of Boerne v. Flores* "that there must be a congruence and proportionality between the injury to be prevented . . . and the means adopted to that end," while the government argued that the VRA should be reviewed to determine if Congress used a "rational basis" when it enacted the law, which historically has been the review applied when looking at the constitutionality of the VRA. *Id.*; City of Boerne v. Flores, 521 U.S. 507 (1997).

65. *Nw Austin*, 557 U.S. at 204.

66. *See infra* Part II.D.

67. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

68. *Id.* at 2627.

69. *Id.* at 2627–28.

70. *Id.* at 2628–29. The Court relied on the fact that "[i]n the covered jurisdictions '[v]oter turnout and registration rates now approach parity. [And b]latantly discriminatory evasions of federal decrees are rare.'" *Id.* at 2625.

§ 10303 coverage formula was unconstitutional as a violation of federalism principles.[71] The majority disregarded the voluminous record that Congress prepared when it decided to re-authorize the VRA coverage formula in 2006.[72] Further, the majority dismissed the potential for "second-generation barriers,"[73] such as re-drawing legislative districts along racial lines, which could affect the weight of minority votes and therefore can have a discriminatory effect on voting.[74] By holding

71. *Id.* at 2631. The Court in *Shelby County* started from the premise that states have "broad power to determine the conditions under which the right of suffrage may be exercised." *Id.* at 2623 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)). The Court drew from the discussion in *Katzenbach* regarding the VRA preclearance requirement as its starting point for its own federalism discussion. *Shelby Cnty.*, 133 S. Ct. at 2623. The Court in *Katzenbach* found that the preclearance requirement did not violate federalism principles even though it was an "uncommon" requirement because it was an appropriate measure considering the racial discrimination that had "infected" the electoral process in the southern states at the time the VRA had been passed. *Id.* at 2624. The Court in *Shelby County* found that preclearance "made sense" in 1966, but not in 2013. *Id.* The Court found especially persuasive the fact that voter turnout approaches parity among African-American and white voters and the tests and devices used to disenfranchise had been banished for nearly 40 years. *Id. Shelby County* found that preclearance in its current form was no longer "appropriate" as a legislative measure and violated federalism principles because the conditions for its original constitutionality no longer existed. *Id.*

72. *Id.* at 2628-29. When debating whether to re-authorize the VRA in 2006, Congress "amassed a sizeable record." *Id.* at 2635 (Ginsburg, J., dissenting). "The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, [and] received a number of investigative reports . . . of continuing discrimination in covered jurisdictions." *Id.* at 2636. The legislative record created was more than 15,000 pages and presented "examples of 'flagrant racial discrimination' . . . [and] systematic evidence that 'intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance [or § 10304] is still needed.'" *Id.* After this review, Congress determined that "without the continuation of the Voting Rights Act of 1965 protections, racial . . . minority citizens will be deprived of the opportunity to exercise their right to vote . . . undermining the significant gains made by minorities in the last 40 years." *Id.* (internal quotation marks omitted).

73. *Id.* at 2635. There are numerous types of second-generation barriers. One common type is "racial gerrymandering," which occurs when a voting district is re-drawn to segregate certain races for discriminatory purposes. *Id.* Another second-generation barrier occurs when there is an enactment of at-large voting in a district instead of district-by-district in a minority-majority city. *Id.* This would allow for the overall majority to "control the election of each city council member, effectively eliminating the potency of the minority's votes." *Id.*

74. *Id.* at 2629. The Court dismissed the threat of second-generation barriers to voting because they involved the dilution of voting power by minorities, and not their access to the ballot. *Id.* The Court stated that even if the preclearance requirement remained, it would "not cure the problem" of vote dilution, and therefore the argument to keep preclearance to combat second-generation barriers is unfounded. *Id.* However, a new phenomenon has occurred over the past few election cycles to disenfranchise and suppress certain classes of voters, which will be discussed in depth in Part III of this

§ 10303 unconstitutional, the Court rendered useless the preclearance requirement under § 10304.[75] After *Shelby County*, no states will fall under the now-defunct coverage formula and therefore will not be subject to the restrictions of preclearance.[76] The Court gave Congress the option to rework the coverage formula to update it to "current needs," but considering the epic dysfunction in Congress,[77] the chances of its legislative update is near zero.[78]

III. ANALYSIS

A. Congress or Judiciary?

One of the quintessential questions in constitutional jurisprudence involves decision-making powers. Who is better equipped to decide if a federal law is appropriate to enhance the lives of the American people: the democratically elected Congress, or the un-elected nine-member Supreme Court of the United States? The Court in *Shelby County* decided that they were better suited.[79]

When reviewing whether the provisions of the VRA were constitutional, the Supreme Court had historically employed the rational basis test as the standard of review.[80] The rational basis test can be summed up as such: if Congress had a rational basis in enacting a law—specifically to enforce the Civil Rights Amendments such as the Fifteenth Amendment—then the judiciary will defer to Congress's

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Note. More and more states post-*Shelby County* are passing legislation to indirectly suppress the vote of certain groups of people, specifically minority voters. *Voting Laws Roundup 2013*, BRENNAN CENTER FOR JUSTICE (Dec. 19, 2013), http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup.

75. *Shelby Cnty.*, 133 S. Ct. at 2631.

76. *Id.*

77. Lauren Fox, *The 5 Temper Tantrums That Defined Washington Dysfunction This Year*, U.S. NEWS & WORLD REPORT (Dec. 23, 2013, 7:00 AM), http://www.usnews.com/news/articles/2013/12/23/the-5-temper-tantrums-that-defined-washington-dysfunction-this-year. For example, in just the past couple years, the government was shut down for sixteen days over partisan jousting regarding healthcare, the Senate could not approve a number of judges and appointees due to constant filibustering by the minority party, and it took three years to pass a farm appropriations bill that used to be a model of bipartisan cooperation. *Id.*

78. Editorial, *A New Defense of Voting Rights*, N.Y. TIMES (July 27, 2013), http://www.nytimes.com/2013/07/28/opinion/sunday/a-new-defense-of-voting-rights.html.

79. *See Shelby Cnty.*, 133 S. Ct. at 2631.

80. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966); City of Rome v. United States, 446 U.S. 156 (1980).

judgment and find the law constitutional.[81] In reference to voting rights, Justice Ginsburg stated, "When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height."[82] The majority in *Shelby County*, however, implicitly used a higher standard than rational basis to make its decision.[83] Using the language from *Northwest Austin*, the Court made its own determination of whether the current burdens of the VRA's formula and preclearance provisions were justified by current needs.[84] The Court decided to review the congressional record and make its own conclusions instead of deferring to Congress's findings.[85]

The Court determined that because voting registration among different races was near parity, devices used to discriminate were long gone, and the congressional record did not show discrimination today as "pervasive" as it was in 1965, the coverage formula was not justified in placing the current burdens on the covered states.[86] But, as even the majority acknowledged, the improvements in voting rights were "in large part *because* of the Voting Rights Act."[87] The contradiction is summed up by Justice Ginsburg's analogy that "[t]hrowing 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."[88]

There were a number of reasons why Congress's decision to re-authorize the VRA satisfies the minimal rational basis standard.[89] First, Congress already had a full record on the original legislation, as well as the records for the previous authorizations, to review and determine if there needed to be any updates or changes to the statute.[90] Second, the fact that there was a re-authorization process showed that Congress built in a temporary limitation to the VRA provisions so that they could be reviewed from time to time as well as to consider new evidence.[91] While judicial review may be necessary to make sure Congress used reasonable

81. *Shelby Cnty.*, 133 S. Ct. at 2637 (Ginsburg, J., dissenting).
82. *Id.* at 2636.
83. *Id. at* 2619. The Chief Justice used the "current burdens" language he developed in the *Northwest Austin* case. *Id.*
84. *Id.* at 2622.
85. *Id.* at 2625.
86. *Id.* at 2631.
87. *Id.* at 2626.
88. *Id.* at 2650 (Ginsburg, J., dissenting).
89. *Id.* at 2638.
90. *Id.*
91. *Id.*

means, it is not supposed to "substitute its judgment for that of Congress,"[92] which it clearly did in *Shelby County* when the Court decided that the coverage formula re-authorized by Congress in 2006 was not a proper formula for the VRA.[93]

Congress chose to re-authorize the VRA in 2006 because its findings determined that it was still necessary to prevent discrimination in voting.[94] In evaluating the effectiveness of the preclearance requirement, Congress found that since the last re-authorization in 1982, the DOJ had blocked over 700 voting changes submitted by covered states because they were discriminatory.[95] Congress also determined that § 10301 actions were not nearly as efficient as preclearance because of the costs and time associated with the § 10301 action.[96] To determine if the coverage formula under § 10303 was still viable, Congress looked at all § 10301 suits in both covered and non-covered jurisdictions.[97] Section 10301 suits were successful in covered jurisdictions 56% of the time, while the covered jurisdictions were only 25% of the population, signaling that voting abuses remained more concentrated in covered jurisdictions.[98]

Despite the congressional record, the Court struck down the coverage formula, rendering the preclearance requirement moot against the previously covered jurisdictions.[99] Disregarding the proper standard of review,[100] the majority took legislative matters into its own hands and decided that Congress was not able to correctly do its job.[101] While the *Shelby County* case was decided less than two years ago, previously covered states' legislatures have wasted no time in enacting new voting laws that take a big step back from the goals sought by the Voting Rights Act.[102]

B. Consequences of Shelby County

After the Supreme Court decision in *Shelby County*, many states that had been previously constrained by the coverage formula and

92. *Id.*
93. *Id.* at 2631.
94. *See supra* note 72; *Shelby Cnty.*, 133 S. Ct. at 2621.
95. *Shelby Cnty.*, 133 S. Ct. at 2639 (Ginsburg, J., dissenting).
96. *Id.* at 2640.
97. *Id.* at 2642.
98. *Id.* at 2643.
99. *Id.* at 2631.
100. *See* South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966); City of Rome v. United States, 446 U.S. 156, 177 (1980).
101. *Shelby Cnty.*, 133 S. Ct. at 2631; *see supra* notes 71–72.
102. *Voting Laws Roundup 2013*, *supra* note 4.

preclearance requirement of the VRA decided to introduce new voting and election laws.[103] Many of the previously covered jurisdictions, including Mississippi, Alabama, South Carolina, Florida, and Arkansas have already enacted or intend to enact new voting laws in 2013 and 2014.[104] But two formerly covered states, North Carolina and Texas, have been getting even more attention than the rest because they are being sued by the DOJ for violating the VRA.[105]

1. North Carolina: House Bill 589

Based on its history of racial discrimination, North Carolina had 41 of its 100 counties covered by the § 10303 formula of the VRA, and therefore covered by the preclearance requirement of § 10304.[106] However, because the Supreme Court in *Shelby County* found the coverage formula of the VRA unconstitutional, North Carolina was no longer subject to preclearance.[107] "Immediately following the Shelby decision, the lead sponsor of the state's voter ID law said that he would move ahead with the measure as a result of the ruling."[108] The North Carolina legislature then passed new voter laws in 2013, including a number of specific provisions that are the subject of the DOJ lawsuit.[109] The DOJ claimed that North Carolina violated § 10301 of the VRA because its new voter law had both a discriminatory purpose and effect on minority voting.[110] In its claim for relief, the DOJ sought an injunction to stop enforcement of the law and also requested the court to subject

103. *Id.*

104. *Id.*; *How Formerly Covered States & Localities Are Responding to the Supreme Court's Voting Rights Act Decision*, NAACP (Dec. 6, 2013), http://www.naacpldf.org/files/case_issue/States%27%20Responses%20to%20Shelby%20decision%20as%20of%2012.6.2013.pdf.

105. Eric Holder, *Remarks as Prepared for Delivery by Attorney General Eric Holder on the Lawsuit Against the State of North Carolina*, DEP'T OF JUSTICE (Sept. 30, 2013), http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130930.html; *Justice Department to File New Lawsuit Against State of Texas over Voter I.D. Law*, DEP'T OF JUSTICE (Aug. 22, 2013), http://www.justice.gov/opa/pr/2013/August/13-ag-952.html.

106. Complaint at 5, United States v. North Carolina (M.D.N.C. Sept. 30, 2013) (No. 13-cv-861).

107. *Id.*

108. *How Formerly Covered States & Localities are Responding to the Supreme Court's Voting Rights Act Decision*, *supra* note 104.

109. Charlie Savage, *Justice Department Poised to File Lawsuit over Voter ID Law*, N.Y. TIMES (Sept. 30, 2013), http://www.nytimes.com/2013/09/30/us/politics/justice-department-poised-to-file-lawsuit-over-voter-id-law-in-north-carolina.html?_r=0.

110. Complaint, *supra* note 106, at 1.

North Carolina to a preclearance requirement under the seldom-used § 10302(c) of the VRA.[111]

The first provision enacted in the bill decreased the number of early-voting days from seventeen to ten.[112] According to the DOJ, African-Americans disproportionately used early voting days to cast their votes, and more specifically, African-Americans disproportionately used the earliest seven days to cast their votes in recent elections.[113] The second provision eliminated same-day registration, registering to vote on the same day as casting the vote, for citizens who voted before Election Day itself.[114] It is worth noting that in the past two election cycles, 2008 and 2012, African-Americans were twice as likely to use same-day registration as white voters.[115] Finally, the law required citizens to provide an appropriate personal identification—which had not been the case before 2013—before being allowed to cast their vote.[116] The law requires a citizen to present an acceptable form of government identification, such as a driver's license, passport, or special form[117] from the Division of Motor Vehicles.[118]

In the DOJ's complaint against the state of North Carolina, it alleged that House Bill 589 was enacted with a discriminatory purpose and will have a discriminatory effect, in violation of § 10301.[119] The combined effect of fewer early voting days, dismissal of same-day registration, and voter identification requirements, all of which disproportionately affect African-Americans ability to vote, will "operate in concert, resulting in unequal access for African-American voters in the political process."[120] Furthermore, the DOJ alleged that House Bill 589's purpose was discriminatory based on the combination of North Carolina's history of racial discrimination, the legislature's knowledge that the law would disproportionately affect minorities' ability to vote, and the decision to greatly expand the law's scope after the *Shelby County* decision without

111. *Id.* at 28, 31.
112. *Id.* at 6–7.
113. *Id.* at 8.
114. *Id.* at 11.
115. *Id.*
116. *Id.* at 13.
117. *Id.* While the DMV waives the fee to receive the special form for identification, it does not waive the fees that voters may incur for recovering the additional documentation that must first be presented to the DMV to obtain the waiver. *Id.*
118. *Id.* The only classes of registered voters exempted from presenting a voter I.D. are voters who have a religious objection to being photographed, voters who had recently been victim to a natural disaster, and disabled voters who have permission to vote outside of the voting center. *Id.*
119. *Id.* at 21–28.
120. *Id.* at 21–23.

passing amendments meant to mitigate the voter suppression.[121] The suit is currently working its way through the judicial process.[122] The federal judge has set a trial date for July 2015.[123]

2. Texas: Senate Bill 14

Much like the reaction in North Carolina, within hours of the *Shelby County* decision, the Texas Attorney General announced that Texas's "voter identification law, previously rejected by a federal court as the most discriminatory measure of its kind in the country, would 'immediately' go into effect."[124] And again, like in North Carolina, the DOJ brought suit to enjoin the Texas law as a violation of the VRA.[125]

The Texas Legislature had passed Senate Bill 14 before the *Shelby County* decision had been rendered and attempted to get approval from the DOJ in 2011 under its preclearance requirement.[126] The Attorney General objected to Senate Bill 14 after review because it "failed to show that the law 'will not have a retrogressive effect'" and could have a discriminatory effect.[127]

After the *Shelby County* decision, Texas Senate Bill 14 was back and could not be stopped from implementation by the DOJ.[128] The law focused on the requirement of voters to present an approved piece of voter identification before being able to vote.[129] Like in North Carolina, the Texas voter identification law required citizens to present a certain form of government identification, including a driver's license or a waiver form from the Department of Public Safety ("DPS") offices.[130] However, many of the counties in Texas do not have DPS offices, and

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121. *Id.* at 25–28.

122. Robert Lopez, *Judge Tells State to Answer Requests in N.C. Voter-Law Case*, NEWS & RECORD (Feb. 21, 2014, 11:49 PM), http://www.news-record.com/news/article_a29a0b16-9b30-11e3-b1f2-0017a43b2370.html.

123. *Id.*

124. *How Formerly Covered States & Localities Are Responding to the Supreme Court's Voting Rights Act Decision*, *supra* note 104.

125. *Justice Department to File New Lawsuit Against State of Texas over Voter I.D. Law*, *supra* note 105.

126. Complaint at 9, United States v. Texas (S.D. Tex. Aug. 22, 2013) (No. 2:13-cv-00263).

127. *Id.* at 10. In addition to being rejected by the Attorney General, the district court in Washington D.C. also rejected Senate Bill 14 because it "'ignor[ed] warnings that SB 14 . . . would disenfranchise minorities and the poor' and rejected . . . ameliorative amendments." *Id.* at 11.

128. *See How Formerly Covered States & Localities Are Responding to the Supreme Court's Voting Rights Act Decision*, *supra* note 104.

129. Complaint, *supra* note 126, at 3.

130. *Id.*

some voters would be required to travel over 200 miles to the nearest office.[131] To obtain the waiver, the potential voter would be required to pay fees to procure the proper documentation to be eligible for the waiver.[132]

The stated purpose of Senate Bill 14 by its proponents was to protect the integrity of elections from voter fraud, even though the same proponents cited "virtually no evidence during or after enactment of SB 14" of voter fraud.[133] The DOJ argued that the law had a discriminatory purpose because the state should have known that minorities disproportionately lacked the approved forms of identification, as well as disproportionately lacked the transportation and funds to obtain the waiver form in order to vote.[134] As in North Carolina, the DOJ also alleged that the Texas Legislature "consistently rejected" amendments intended to ameliorate the burdens on minorities in order to comply with the new law.[135] Further, the result of Senate Bill 14 will be discriminatory against minorities, who will be more likely disenfranchised by this law than white voters because minorities are disproportionately more likely to not have the approved identification or the ability to receive a waiver.[136] The DOJ is currently seeking relief under § 10301 of the VRA and trying to require preclearance for voting laws in Texas based on the "bail-in" provision of § 10302(c).[137]

*C. Enforcement of the VRA in a Post-*Shelby County *World*

1. Section 10301: After-the-Fact Powers

Section 10301 of the VRA remains intact even after the *Shelby County* decision.[138] It allows the federal government to bring suit for any abridgment of a person's right to vote.[139] As previously discussed, the provision has been used in the federal government's lawsuits against North Carolina and Texas.[140] While § 10301 has been successful in overturning discriminatory voting laws after they have already been enacted, it does not possess the versatility and quickness that the

131. *Id.* at 4.
132. *Id.* Costs of obtaining the proper documents ranged from $22 to $345. *Id.*
133. Complaint, *supra* note 126, at 6.
134. *Id.*
135. *Id.*
136. *Id.* at 7.
137. *Id.* at 14; *see infra* Part III.C.2.
138. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).
139. 52 U.S.C.A. § 10301 (West 2014).
140. *See supra* Part III.B.1–2.

preclearance requirement under §10303 and § 10304 maintained before their demise.[141] Case-by-case litigation under § 10301, on its own, is not enough to stop disenfranchisement of minorities.[142] It takes thousands of hours to prepare the suit and by the time the plaintiff can receive any relief against a discriminatory law under the VRA, it is likely that an election has already occurred incorporating the very same discriminatory law.[143] Congress had determined that the only truly effective way to prevent discrimination in voting was to enact the preclearance provisions in order to stop bad laws before they could affect the voting population.[144]

2. Section 10302(c): Backdoor Preclearance

Another enforcement provision left alone by the *Shelby County* majority was § 10302(c), a previously seldom-used provision that allows the U.S. Attorney General to request a federal court bail-in[145] states to a preclearance requirement that the states had not previously been subjected to.[146] "If the federal court[] . . . find[s] that the State . . . should be covered by Section [10302(c)], then the State would be required to submit voting changes to the U.S. Attorney General . . . prior to implementation to ensure that the changes do not have a discriminatory effect or . . . purpose."[147] This recently dusted-off provision seems to be the new tactic used by the DOJ to try to prevent discriminatory laws before they can be effective, as seen in both the North Carolina and

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141. Nicholas Stephanopoulos, *The Future of the Voting Rights Act*, SLATE (Oct. 23, 2013, 4:37 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/section_2_of_the_voting_rights_act_is_more_effective_than_expected_new_research.html.

142. *Shelby Cnty.*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting). Section 10301 actions also shift the burden to the plaintiff to prove that the law was discriminatory, instead of the state having to prove that the law is not, as was the case for previously covered jurisdictions. *The Voting Rights Act Was Gutted, but It's Not Yet Dead*, MSNBC (Oct. 7, 2013, 6:18 PM), http://www.msnbc.com/rachel-maddow-show/the-voting-rights-act-was-gutted-it.

143. *Shelby Cnty.*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting).

144. *Id.* at 2634. "Congress learned from experience that laws . . . enabling case-by-case litigation were inadequate to the task [of preventing racial discrimination in voting]." *Id.* at 2633.

145. 52 U.S.C.A. § 10302(c) (West 2014). This provision can be applied toward any state in order to require preclearance of all of their voting laws by the Department of Justice. *Id.* It has the same effect as § 10304 preclearance, but is not based on the coverage formula under § 10303. *Id.*

146. *Id.*

147. *Justice Department to File New Lawsuit Against State of Texas over Voter I.D. Law*, *supra* note 105.

Texas lawsuits.[148] The *New York Times* has said this provision may be "the most promising tool we have to protect voting rights after Shelby."[149] While not as strong as § 10304 in its ability to preemptively stop discriminatory voting laws, it seems to be the best option remaining, and certainly more powerful than § 10301.

Section 10302(c) does not subject specific states to preclearance solely based on a history of disenfranchisement, which was an uncomfortable fact for the *Shelby County* majority, rather it subjects any jurisdiction that is determined by a federal judge to have enacted a discriminatory voting law to a preclearance requirement similar to § 10304.[150] Further, the amount of time a jurisdiction would be subject to preclearance under this provision is decided by the federal judge, and a state can be removed from preclearance as soon as it has been determined that the discriminatory voting procedures no longer exist.[151]

The current legal landscape post-*Shelby County* is shifting to determine the best way to protect voting rights in the future. While § 10301 and § 10302(c) protections can be used effectively to promote universal suffrage, neither can replace the massive void left by the now-toothless preclearance provision under § 10304 because they are unable to prevent racially discriminatory voter laws before they are enacted.

3. Voting Rights Amendment Act of 2014

On January 16, 2014, the House and Senate each introduced amendments to the VRA in response to the *Shelby County* decision.[152] One of the most important aspects within each bill is the re-introduction of the coverage formula, which would lead to a resurgence of the preclearance requirement as well.[153] The new coverage formula would work in the following way: any state that has five violations of federal voting laws, such as a § 10301 violation, over the past fifteen years would be "covered" and must receive preclearance under § 10304 for

148. Complaint, *supra* note 106, at 5; Complaint, *supra* note 126, at 9.

149. Editorial, *supra* note 78. The editorial discussed the Department of Justice's use of § 10302(c) in its lawsuit against the State of Texas regarding Senate Bill 14. *Id.*

150. *Id.*

151. *Id.* While § 10302(c) contains some prophylactic measures to stop discrimination in voting, it is only triggered if the federal judge determines the states' laws have a discriminatory intent, which may be harder to show for the plaintiff. *Id.*

152. Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, THE NATION (Jan. 16, 2014, 11:53 AM), http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act#.

153. *Id.*

any future voting law changes.[154] The amended formula would be more flexible than the original coverage formula because there would be a re-assessment every fifteen years to determine if new states would be covered or to exempt covered states that were no longer discriminating, thus creating a useful deterrent for covered states to cease discrimination.[155]

While the new amendments are much preferred to the status quo, there is one unfortunate exception to the proposed coverage formula.[156] Any DOJ objection to voter identification laws, as seen in North Carolina and Texas, alleging a violation of federal voting laws would not be considered a violation for coverage formula purposes.[157] Therefore, one of the major vehicles for potential voter discrimination, voter identification laws, would be exempt from formula consideration in most instances.[158] Notwithstanding the voter identification exception, the amendments overall would greatly enhance the protection of voting rights in the United States. While it is questionable if Congress would be able to enact into law the new amendments to the VRA, the proposed amendments themselves represent a laudable start toward restoring voting rights for all citizens.

IV. CONCLUSION

The Voting Rights Act was the most effective piece of legislation in U.S. history toward protecting voting rights for all citizens. Unfortunately, one of the Act's most powerful tools to preserve those rights, § 10303, was declared unconstitutional by the Supreme Court in *Shelby County*.[159] The Court was misguided in its decision by disregarding Congress's re-authorization of the VRA, even though Congress, based on a vast legislative finding, had determined that re-

154. *Id.* If these amendments were enacted today, four states would be considered "covered" under the new formula. The states include Louisiana, Georgia, Mississippi, and Texas. *Id.*

155. *Id.* The formula is based on hard data that is not geographical in order to satisfy the Supreme Court in any future challenge to the amendments. *Id.*

156. *Id.*

157. *Id.* It seems that the voter I.D. exception was a compromise in order to get some support from Republicans in both chambers of Congress. Ryan J. Reilly et al., *Lawmakers Unveil Proposal Broadening Voting Rights Act*, HUFFINGTON POST (Jan. 25, 2014, 4:01 PM), http://www.huffingtonpost.com/2014/01/16/voting-rights-act-2014_n_4611113.html?utm_hp_ref=email_share.

158. Berman, *supra* note 152. While a DOJ objection would not count as a violation, a decision by a federal judge that the voter I.D. law violated federal voting laws would count as a violation in consideration of the coverage formula. *Id.*

159. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013).

authorization was proper and rational.[160] The unelected Court mistakenly decided to conduct its own analysis of the Act's rationality, while ignoring Congress.[161]

Because the Court decided to show no deference to Congress's decision and thereby discarded the VRA's coverage formula, states like Texas and North Carolina wasted no time in enacting voter laws that disproportionately suppress minorities' ability to cast their vote.[162] The DOJ has responded to these new voting laws by using the enforcement mechanisms that remained intact after the *Shelby County* decision.[163] While § 10301 and § 10302(c) may stop voting discrimination in the future, they currently remain unable to prevent discriminatory voting laws from taking effect and abridging minorities' voting rights.[164]

There remains hope that Congress will work together and pass new amendments to the VRA that re-introduce and update the coverage formula and preclearance provision.[165] Unfortunately, the limited enforcement powers the DOJ has to prevent voting infringement, coupled with Congress's inability to legislate on a scale needed to resurrect the VRA, does not lend itself to an optimistic outlook for supporters of voting rights. With all of the discontent brought on by the *Shelby County* decision, it is important to remember that the problems regarding the protection of voting rights today can spur community engagement and participation between citizens and their political representatives to find solutions to those problems and work together in supporting a strong and vibrant VRA.

160. *Id.* at 2629–31; *see supra* Part III.A.
161. *Shelby Cnty.*, 133 S. Ct. at 2629–31.
162. *See supra* Part III.B.1–2.
163. *See supra* Part III.B–C.2.
164. *See supra* Part III.C.1–2.
165. Reilly et al., *supra* note 157.