The Court at the Ballot Box:
Shelby County v. Holder and the Voting Rights Act

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Voting serves as a mechanism to allow for individual expression of opinion in choosing a government, and is therefore integral to any democratic society. The citizenry's right to cast a ballot, then, must be enshrined and defended at all costs. The history of voting rights in the United States is a tumultuous affair characterized by contentions of race and gender. While African Americans and women were ultimately successful in securing *de jure* enfranchisement, it took many years for these rights to solidify. In the case of African Americans, it was not until the enactment of the *Voting Rights Act* (VRA) in 1965 before their democratic rights were properly guaranteed, and the Fifteenth Amendment brought into full force.[1] The Act prevented Southern states from discriminating against voters on the basis of race, thereby ensuring that all Americans could execute their constitutionally assured right.

However, the 2013 Supreme Court decision in *Shelby County v. Holder* – to reject fundamental provisions in the Act – has once again brought the issue of voting rights to the forefront of the public sphere. What then are the implications of the decision? Is racist, discriminatory policy still evident in the South, or have states evolved to full inclusivity? In order to determine the effects of this ruling, it is necessary to undertake an extensive analysis of the history of the case, the arguments on either side, and ultimately the opinions of the Court. Through this examination it will be illuminated that the Supreme Court of the United States has an enormous influence in national policy and operates outside of the realm of public opinion. Moreover, it will be indicated that the decision reached in *Shelby County* has the potential to disproportionately reduce African American turnout in Southern States; this must then serve as an impetus for policy makers in

Washington to adopt new enforceable provisions of the *Voting Rights Act*.

Before discussing the way in which the case rose to the Supreme Court, it is necessary to engage in a brief discussion of the political and adjudicative history of voting rights in the United States. Despite the Fourteenth and Fifteenth Amendment's provisions that prevent voter discrimination, many African Americans in Southern states were disenfranchised through literacy tests and other "voter qualifications."[2] Early in his presidency, Lyndon B. Johnson expressed his disdain over the fact that "the [local] registrar is the sole judge of whether [an African American]" is entitled to vote.[3] To correct this, he pushed Congress to enact the *Voting Rights Act* (1965).[4] The Act itself "outlawed any 'voter qualifications or prerequisite to voting,'" and Section 5 implemented "preclearance requirements"[5].

If states with a history of voter discrimination wished to change voter laws, they needed to gain approval from either the Attorney General of the United States or a trio of D.C. District Court justices.[6] It is the differential treatment of states under the VRA that caused Southern states to vehemently oppose the law. Indeed, Section 4(b) set "forth a formula for determining if a [particular] jurisdiction" is subject to Section 5's requirements, which some states believe violates their sovereignty.[7] While the intent of the preclearance requirements are clearly to ensure that states who previously have discriminated against voters do not revert to form, it is evident how these provisions could be misconstrued as contrary to state sovereignty.

Various states have consistently challenged the constitutionality of Sections 4(b) and 5 throughout the near fifty-year history of the *Voting Rights Act*. In order to conceptualize the basis of these challenges, it is first necessary to understand that the VRA is formally "emergency legislation," and that these key provisions of the Act require frequent Congressional extension.[8]

The *Voting Rights Act* has faced its most stringent opposition at these times of reauthorization; numerous states and counties have challenged the Act before the Supreme Court of the United States. The VRA's preclearance requirements and coverage formula were first challenged in *South Carolina v. Katzenbach* (1966), where the Court decided that "covered jurisdictions" had been rationally singled out, and therefore, that the provisions were necessary to enforce the Fifteenth Amendment.[9] This paved the way for the full introduction of the Act, and subsequently, the realization of enfranchisement for many Americans. Congress reauthorized the VRA's preclearance requirement in 1970, 1975, and again in 1982, prompting two Supreme Court challenges in *Georgia v. United States* (1973) and *City of Rome v. United States (1980)*; neither of which were successful.[10] The number of early challenges by the states is emblematic of the intensely federal system in the United States, whereby individual states seek to enhance their own jurisdictional powers, subsequently reducing federal influence.

In recent years, the Supreme Court of the United States has refined the *Voting Rights Act*, thereby reducing its effectiveness. The VRA was first curtailed in *Georgia v. Ashcroft* (2003), and further diminished in *Northwest Austin v. Holder* (2009), which found that Section 5 "must be 'justified by current needs'" and that Section 4(b) must clearly indicate that targeting of specific states "is sufficiently related" to racial disenfranchise-ement.[11]

These consistent court challenges are also emblematic of the way in which other contentious legislation has been challenged. Unquestionably, proponents of particular concerns see the Court as a body capable of shaping policy, outside of the realm of electoral politics. The latest challenge to the VRA occurred earlier in 2013 in, *Shelby County v. Holder*, and resulted in the most impactful Supreme Court decision on voting rights. In 2006, Congress had extended preclearance requirements for an additional twenty-five years in a near unanimous Senate and House vote (Ewald, 2009: 84). Shelby County took issue with this extension, and saw that the

Supreme Court had left key questions unanswered in *Northwest Austin*; they "sought a permanent injunction" to "cease enforcement of Sections 4(b) and 5"[12] Shelby County lost its bid in the D.C. District Court, and the U.S. Court of Appeals for the D.C. Circuit also upheld the constitutionality of the two sections, ideating "that Congress did not exceed its powers" through the 2006 reauthorization, as the formula "is still relevant to the issue of voting discrimination".[13] As a result, Shelby County appealed to the Supreme Court, which heard oral arguments on February 27, 2013.[14]

In *Shelby County v. Holder* (2013), the Supreme Court of the United States was faced with contending constitutional arguments from both parties. A writ of Certiorari was issued to address the question: "Does Congress' decision in 2006 to reauthorize Section 5 of the VRA under the pre-existing coverage formula of Section 4(b) [exceed] its authority under the Fifteenth Amendment and thus [violate] the Tenth Amendment and Article IV of the U.S. Constitution?"[15] The Respondents, U.S. Attorney General Eric Holder and the Department of Justice (DOJ), sought to advance the idea that the Fifteenth Amendment provided the inherent justification for the Voting Rights Act. Shelby County, however, believed that the preclearance requirement violated states' rights.

In order to contextualize these arguments, it is necessary to understand their constitutional premise. Firstly, Article IV, Section 1 of the U.S. Constitution grants "Full Faith and Credit" to every state, and Section 2 enshrines a right for all citizens to be equal in each state.[16] Similarly, the Tenth Amendment stipulates that "powers not delegated to the [federal government]" are to be delegated "to the states respectively".[17] From these two provisions, it is apparent how Shelby County believed that preclearance requirements in the *Voting Rights Act* transcended congressional power, as elections are typically ceded to the states. However, this neglects key provisions of the Fifteenth Amendment, which

stipulates that the right to vote must not be "abridged… on account of race," but also that "Congress shall have power to enforce [this right] by appropriate legislation".[18] In the case of the Fifteenth Amendment, the VRA's constitutionality is seemingly apparent, but unquestionably there is a key contradiction between the relevant constitutional clauses.

Numerous amici briefs supported the Petitioner in its claims that the VRA was unconstitutional. Alabama – the state in which Shelby County resides – submitted an amicus, suggesting that the state had changed a great deal since 1965, and that due to "a new generation of leaders with no connection to [voter discrimination]," there is no longer a necessity for preclearance of voting laws.[19] In fact, they suggested that the preclearance requirement not only inhibits their full participation in the Union, but that Section 5 creates a burdensome process that prevents "much-needed reforms" from materi-alizing.[20] As evidence, they cite a recent instance in which the state legislature undertook an effort to modernize residency requirements, but was forced to contend with a laborious process to gain approval; a process that non-covered states would not have had to undergo.[21] Such assessments illuminate the potential violation of the "Full Faith and Credit" clause, which seeks to ensure equality among the states. These briefs, written by "states and other counties" who were subject to the Section 4(b) coverage formula, formed the foundations of the argument in *Shelby County.*[22] They contended that preclearance creates a non-uniform standard of voting law reform within the Union, and that state sovereignty is thereby violated through federal domineering of election laws.[23] The Petitioner also compounded this by declaring "that Congress [had] failed to [provide] an evidentiary record sufficient to justify renewing the VRA," as they had based Section 4(b)'s formula on 1964, 1968, and 1972 "election data".[24] Additionally, they took issue with the D.C. Circuit's ruling as it "would [essentially] justify preclearance in perpetuity" – thereby rejecting the emergency intent of the Act – and also with the coverage formula, suggesting that it was

inapplicable today.[25] The opinions presented in the amici and the oral arguments delivered, created a strong case for the repeal of Sections 4(b) and 5.

The Respondents also presented a compe-lling case for VRA preclearance necessity, and were similarly supported by amici curiae. In an amicus brief filed on behalf of Dr. Patricia Broussard and her law students, a case is made to suggest that, "Section 5 [of the VRA] does not run contrary to the Tenth Amendment," as the Fourteenth and Fifteenth Amendment restricts any state interference of the right to vote; simultaneously it grants the federal government the ability to enact "parameters around states' behaviour".[26] Further to this, Broussard suggests that Section 5 was reauthorized based on "statistics, judicial findings, and first-hand accounts of discriminatory action," all compiled into a 15 000 page document.[27] Finally, it is suggested that the Court should examine all behaviour – past, current, and potential – discussing the way in which 700 000 minority voters could be disenfranchised by "photo ID laws".[28] This amici attempted to showcase the contemporary applicability of preclearance provisions in protecting enfranchisement, thereby legitimating Sections 4(b) and 5 through the Fifteenth Amendment. Further amici curiae briefs examined the Supreme Court's history of supporting the VRA, thereby suggesting that *stare decisis* had set the Act as well within the confines of the Fifteenth Amendment.[29] The Attorney General furthered the argument, by discussing how significant "evidence of racial [voter] discrimination" was found in "covered jurisdictions… such as objections to preclearance requests," thereby solidifying the importance of Section 5.[30]

In response to Shelby County's formula concerns, Holder asserted that the coverage formula is not actually "the focus of Congress' concerns," and that whether or not the formula is flawed, it is "relevant" due to its identification of "specific areas that Congress wishes to subject to preclearance requirements".[31] This is an interesting argument as it contends that the Fifteenth

Amendment grants Congress full powers to prevent racial voter discrimination. Yet, this begs the question, does the Amendment give Congress blanket power to implement preclearance, regardless of factual data? To address this, the Attorney General suggested that "bailout" and "bail-in" provisions prevent state disparity, in that "jurisdictions may either be added or removed from the preclearance requirement, depending on whether it is shown that, for the past ten years, they have not violated the VRA".[32] In essence, the Respondents' argument can be summarized in that preclearance is essential for the maintenance of equal voting rights, and that specific jurisdictions continuing to exhibit elements of voter discrimination must be monitored until they can demonstrate otherwise.

In a 5-4 decision, the Supreme Court of the United States found Section 4(b) of the *Voting Rights Act* to be unconstitutional; Chief Justice John Roberts wrote the majority opinion and was joined by Justices Scalia, Kennedy, Alito, and Thomas.[33] The Court found that while "voting discrimination" still exists, "the conditions which originally justified these measures no longer characterize voting in the covered jurisdictions.[34] The Chief Justice also explained that Sections 4 and 5 were initially intended as temporary measures, and that in the 8-1 *Northwest Austin* decision, the Court raised serious questions about the constitutionality of the sections, and the "[differentiation] between the states" that it promotes.[35] The decision further explores the immense tradition of states' rights within the United States, and declares that equality amongst the states is integral "to the harmonious operation" of "the Republic".[36] This emphasizes the role that maintaining a strong federal system – whereby states enjoy a great deal of individual sovereignty – plays in constructing the Court's opinions. In explaining why Sections 4(b) and 5 were originally validated, Roberts discussed the *Katzenbach* precedent by which "'legislative measures not otherwise appropriate' could be justified by 'exceptional conditions'".[37] This underscores the principle that preclearance was originally enacted as an emergency mechanism,

and therefore, it reasons that an emergency cannot exist in perpetuity.

The Court also contended that while the coverage formula was originally rational – as it focused on the region with the largest discrimination – today, things have changed.[38] It suggested that in "covered jurisdictions," voter registration and subsequent voting rates are equal, if not higher, to those in non-covered regions. Therefore Congress' decision to reauthorize Section 5, based on an antiquated coverage formula, is not effective in curtailing voter discrimination.[39] The majority also critiqued Holder's defense, suggesting that the assertion that "there need not be any logical relationship between the criteria and the reason for coverage," is elementary, and does not provide justification for targeting Southern states today.[40] The Court purported that Congress must, "if it wishes to divide the States," create a new logical formula; subsequently it criticized Congress for its failure to act in addressing the questions raised in *Northwest Austin*.[41] Given these conditions, Roberts eloquently reiterated how, "striking down an Act of Congress 'is the gravest and most delicate duty that [the] Court is called on to perform,'" but that it must "declare Section 4(b) unconstitutional".[42] Justice Thomas joined the majority, but declared in his concurring opinion that Section 5 should also be found unconstitutional, as the conditions that precipitated the statute in 1965, are no longer visible today.[43] The Supreme Court decision in *Shelby County v. Holder* clearly emphasized the limitations of the Fifteenth Amendment, and the emphasis on state equality.

As with any contentious case, there was a compelling argument constructed to criticize the majority's decision. Justice Ruth Bader Ginsburg wrote the dissent, and was joined by Justices Breyer, Sotomayer, and Kagan.[44] Firstly, Ginsburg emphasized the VRA's necessity in ensuring the actual implementation of the Fourteenth and Fifteenth Amendment, after a Century of persistent voter discrimination.[45] As to why preclearance was still applicable

today, the dissent argued that there had been many recent instances where the Attorney General had "declined to approve," voting law changes.[46] As evidence, Ginsburg presented Congressional findings that there were in fact 626 Department of Justice objections from 1982 to 2004, as opposed to 490 objections from 1965 to 1982.[47] This suggests that voting discrimination is still a dominant issue, and that many states still attempt to advance policies that would effectively disenfranchise some. Ginsburg also argued that the 390 to 33 House vote, and 98 to 0 Senate decision in the 2006 reauthorization of Section 4(b) clearly indicated the rationality of the coverage formula.[48]

In addressing the constitutionality of preclearance, the dissent argued that, "the Constitution vests broad powers in Congress to protect the right to vote," – through the Fourteenth and Fifteenth Amendments – and that Congress has a responsibility to use these powers, so as to ensure de facto implementation "of the Civil War Amendments".[49] This is emblematic of the way in which the two Amendments seemingly give Congress full power to secure their enactment, and do not textually place any limitations on this ability. The dissent focused on the fact that improvement of Southern voting rights' can be directly correlated with the *Voting Rights Act* and therefore expressed concern that historical disenfranchisement could return in the absence of preclearance.[50] It subsequently emphasized that "when political preferences" are influenced by race, it can result in "natural inclinations of … ruling parties" to construct a "predictable outcome," a particular concern with voter identification laws.[51] Ultimately, Ginsburg criticized the Court's inability to recognize that improved Southern voter rights are directly pursuant to the preclearance requirement in Section 4(b).[52] Furthermore, where there is "greater racial polarization in voting," there is also a greater need for "measures to prevent purposeful race discrimination."[53]

The decision in *Shelby County* reveals much about how constitutional philosophies impact the justices' decisions, and also

the way in which the Court operates. The majority's opinion is of particular interest, as there seems to be contradiction within the ruling itself. In a way, the reversal of Section 4(b) on the grounds that it is no longer applicable today – given current voting trends – seems to reflect an evolving constitutional view. That is to say that while the Court initially upheld the constitutionality of the *Voting Rights Act* in *Katzenbach,* based on the provisions contained within the Fifteenth amendment, it reversed that decision in *Shelby County*. This was adjudicated on the predication that Southern states had evolved, and no longer expressed blatant voter discrimination; in other words, society had morally progressed to a point where a Constitutionally recognized Act was no longer necessary. Justices of the majority would contend, however, that the Court had in fact only permitted the emergency extension of such powers in order to rectify an immediately pertinent issue. Nonetheless, it is interesting to observe that there is no provision within the Fifteenth Amendment that restricts Congressional action to only temporary.

Structuralism is the most dominant philosophy in the opinion and the majority uses it to suggest that the coverage formula is unconstitutional as it creates inequity among the states, and enhances federal interference. This therefore contradicts the primacy of states' rights and state sovereignty, a central theme throughout the U.S. Constitution, and history of the Union. The decision also reveals a great deal about the internal makeup of the Court, and the way in which the 5-4 split is characteristic of the politics of the Court. Indeed, the four-justice coalescence behind Ginsburg's dissent "[underscores] their profound disagreement with the direction of the Court".[54] Finally, the decision also indicates that the Supreme Court has an ability to mould policy, and operates outside of the realm of public opinion. For instance, despite the VRA's popularity with large portions of the population – in particular minorities, youth, and the impoverished – the Court struck down the coverage formula.[55] This clearly distinguishes the Judiciary from the Legislative, as Justices do not worry about their

public approval or popularity, due to their unelected stature.

The 2013 decision is also highly impactful for minority voters, and these implications must serve as an impetus to enact a new coverage formula. Following the decision, Attorney General Holder expressed his deep disappointment in the decision, and acclaimed voting discrimination to be a real, contemporary issue that must continue to be addressed.[56] Such a blatant condemnation of the Court's decision, by the top-ranking legal official in the country nonetheless, evidences the level of disagreement with the Supreme Court decision. Ilya Sharpiro, however, – in his article for a New York law journal – advances his support of the decision, agreeing with Justice Thomas' concurring opinion that both Sections should have been found unconstitutional, as they ignore the progress made in the last fifty years.[57] This of course dismisses both Ginsburg's dissent and the conception that the greater enfranchisement of minorities today, is a direct result of the *Voting Rights Act.* Perhaps the largest implication will be that, while discriminatory voter laws can still be challenged – such as voter ID provisions – the "laws will go into effect," before "the legal battle is fought out".[58] This could therefore pave the way for the enactment of similar laws, ultimately reducing minority turnout and impacting the political nature of the nation. It is for this reason that President Obama has called on Congress to enact a new formula, thereby rendering Section 5 useful once again.[59] Unquestionably, Congressional action is necessary to protect and secure the voting rights of all Americans.

In conclusion, the Supreme Court of the United States has an enormous amount of influence over public policy, operating outside of the realm of political opinion. In *Shelby County v. Holder* they struck down a key provision of the *Voting Rights Act* that helped to ensure African American voter rights were protected in the South. In so doing, they revealed a number of things about their compos-ition, and their judicial theory, showcasing the way in which the Court can extrapolate on certain Constitutional

themes to support its opinion. Moreover, overturning the preclearance coverage formula in Section 4(b) has major implications for minority voters in the United States. It means that states with a history of racial voter discrimination will now be free to introduce changes to their voter laws, without federal approval. Although conditions have certainly improved in the South, many of these improvements have been a direct result of the VRA. As Justice Ginsburg said, "throwing out preclearance … is like throwing out your umbrella in a rainstorm because you are not getting wet".[60] The Court's decision has placed the onus on Congress to enact a new rational formula, in order to protect the voting rights of all Americans in 2014 and beyond.

Notes

[1] Alec C. Ewald, *The Way We Vote: The Local Dimension of American Suffrage* (Nashville: Vanderbilt University Press, 2009).
[2] Ewald, *The Way We Vote,* 2009.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Jeremy Amar Dolan and Zemlin Zachhary, *Shelby County v. Holder*, Cornell Legal Information Institute, 2013. http://www.law.cornell.edu/supct/cert/12-96.
[7] Ibid.
[8] Ewald, *The Way We Vote*, 2009.
[9] Dolan and Zachhary, *Shelby County v. Holder*, 2013.
[10] Ibid.
[11] Ibid.
[12] Dolan and Zachhary, *Shelby County v. Holder*, 2013.
[13] The Oyez Project, *Shelby County v. Holder*, 2013. http://www.oyez.org/cases/2010-2019/2012/2012_12_96.
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[15] Dolan and Zachhary, *Shelby County v. Holder*, 2013.
[16] *Constitution of the United States*, Legal Information Institute, Cornell University Law School. http://www.law.cornell.edu/constitution/overview.
[17] Ibid.
[18] Ibid.
[19] Office of the Alabama Attorney General, *Brief of State of Alabama as Amicus Curiae Supporting Petitioner,* January 2, 2013. http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_soa.authcheckdam.pdf
[20] Ibid.
[21] Office of the Alabama Attorney General, *Brief of State of Alabama as Amicus Curiae,* 2013.
[22] Dolan and Zachhary, *Shelby County v. Holder*, 2013.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Patricia A. Broussard, Sabrina Collins, Stacy Hane, Akunna Olumba and Named Students and Organization of Florida A&M University College of Law, *Brief of Amici Curiae in Support of Respondents,* 2013. http://goo.gl/W0QcDU.

[27] Broussard et al., *Brief of Amici Curiae*, 2013.
[28] Ibid.
[29] Dolan and Zachhary, *Shelby County v. Holder*, 2013.
[30] Ibid.
[31] Ibid.
[32] Dolan and Zachhary, *Shelby County v. Holder*, 2013.
[33] Supreme Court of the United States, *Shelby County v. Holder*, 570 U.S. 12-96, 2-2013. http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf.
[34] Ibid., para. 2.
[35] Ibid., para. 4, 6-7.
[36] Ibid., para. 9-11.
[37] Ibid. para. 11-12.
[38] Supreme Court of the United States, *Shelby County v. Holder*, 2013, para. 13-4.
[39] Ibid., para. 13-4, 18.
[40] Ibid, para. 18-9.
[41] Ibid., para 20, 24.
[42] Ibid., para. 24.
[43] Ibid., para. 2-3.
[44] Ibid., Ginsburg dissenting, para. 1.
[45] Supreme Court of the United States, *Shelby County v. Holder*, para. 3-4, 2013.
[46] Ibid., para. 5.
[47] Ibid, para. 13.
[48] Ibid., para. 6-7.
[49] Ibid., para. 9-12.
[50] Ibid., para. 18-9.
[51] Ibid., para. 21.
[52] Supreme Court of the United States, *Shelby County v. Holder*, 2013, para. 36.
[53] Ibid., para. 21.
[54] David M. O'Brian, *Storm Center: The Supreme Court in American Politics* (New York: W.W. Norton & Company Ltd. 2011).
[55] Bill Barrow, "GOP Has Tough Choices on Voting Rights Act," *AP Big Story*, July 5, 2013. http://bigstory.ap.org/article/gop-has-tough-choices-voting-rights-act-0.
[56] Eric Holder, *Attorney General Eric Holder Delivers Remarks on the Supreme Court Decision in Shelby Count v. Holder*, Department of Justice, June 25, 2013. http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130625.html.
[57] Ilya Shaprio, "Shelby County and the Vindication of Martin Luther King's Dream," *NYU Journal of Law and Liberty* 8, no.1 (2013).
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http://www.npr.org/2013/06/25/195599353/supreme-court-up-to-congress-to-fix-voting-rights-act

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[60] Supreme Court of the United States, *Shelby County v. Holder*, 2013, para. 33.