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PRECLEARANCE AS A DETERRENT, NOT AS DETENTION

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INTRODUCTION

Following the “Bloody Sunday” attack on peaceful protestors in Selma, Alabama, Congress passed the Voting Rights Act of 1965, which “employed extraordinary measures” to combat the “extraordinary problem” of voting discrimination.¹

One section of the law required certain local governments “to obtain federal permission before enacting any law related to voting,” a regime known as preclearance.² In 2013, the Supreme Court in *Shelby County v. Holder* held that the preclearance regime, as written, was unconstitutional but invited Congress to create a new preclearance system that “speaks to current conditions.”³

So far, Congress has been unable to update the stricken preclearance formula. In future efforts, lawmakers should create a new preclearance framework that acknowledges the limits set by *Shelby County* and the virtues of largely decentralized elections.

SECTIONS 4 AND 5 OF THE VOTING RIGHTS ACT

The Voting Rights Act (VRA) of 1965 was designed to combat decades of voting disenfranchisement. Soon after the bill’s introduction, President Lyndon B. Johnson said the legislation would “help rid the Nation of racial discrimination in every aspect of the electoral process and thereby insure the right of all to vote.”⁴ Although past civil rights acts had been passed by Congress intended to promote voting access, the Johnson administration argued these laws “had only minimal effect” and were “too slow” in pushing back against generational voting discrimination.⁵ The VRA, on the other hand, was designed to work more quickly.

Most of the VRA’s sections had nationwide application. For example, Section 2 prohibited any election “standard, practice, or procedure” by any state or political subdivision that would “deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁶ Today, Section 2 allows both citizens and the federal government to challenge state voting laws in court.⁷

But Sections 4 and 5 had a narrower scope. These sections “provided for federal intervention in the electoral process—traditionally a matter for the states—in places where there was evidence that voting discrimination had occurred.”⁸ Section 4(b) provided a formula to determine which jurisdictions would be subject to greater federal scrutiny. Under the original formula, the covered jurisdictions were ones “that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election.”⁹ Under Section 4(c), literacy and educational tests, among other barriers, were defined as a “test or device.”¹⁰

Section 5 provided that states and jurisdictions that fell under the Section 4(b) formula were generally prohibited from enacting new “voting qualification or prerequisite to voting” without first obtaining prior federal approval—known as “preclearance.”¹¹ Covered states and jurisdictions could obtain preclearance by either (A) getting a declaratory judgment from a three-judge panel in the U.S. District Court for the District of Columbia or (B) approval by the Department of Justice (DOJ).¹²

To overcome preclearance through federal district court, a covered jurisdiction had to show that its proposed change in voting procedure would “not have the effect of denying or abridging the right to vote on account of race or color.”¹³ If preclearance was sought with the DOJ, the covered jurisdiction “can implement the change if the Attorney General affirmatively indicates no objection to the change or if, at the expiration of 60 days, no objection to the submitted change has been interposed by the Attorney General.”¹⁴ Since the VRA’s enactment, the vast majority of covered jurisdictions have sought the preclearance route through the DOJ,

because of its litigation cost savings and “specific deadlines governing the Attorney General’s issuance of a determination letter.”¹⁵

When first enacted in 1965, the VRA was intended to expire in five years. But the VRA was renewed again in 1970 and 1975, extending the coverage formula to jurisdictions with voting tests and less than 50 percent voter registration as of 1972.¹⁶ The VRA was renewed again in 1982 for 25 years, but the coverage formula was not updated. However, the 1982 renewal did expand how a jurisdiction could “bail out” from coverage.¹⁷ “Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a §2 suit, in the ten years prior to seeking bailout.”¹⁸ Some jurisdictions have been bailed out in the past, including local jurisdictions in Alabama, North Carolina, Oklahoma, Texas and Virginia. No state, though, has been bailed out of coverage.¹⁹

In 2006, the VRA was again reauthorized for another 25 years. Again, like the 1982 renewal, Congress did not update the coverage formula. But in the 2006 renewal, Congress did amend Section 5 to prohibit “voting changes with ‘any discriminatory purpose’ as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, ‘to elect their preferred candidates of choice.’”²⁰

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Four years later in 2010, Shelby County, Alabama—a covered jurisdiction under the VRA—sued in federal court, arguing that Sections 4(b) (the coverage formula) and 5 (preclearance requirements) of the VRA were unconstitutional.²¹ The District Court ruled against Shelby County. The Court of Appeals also rejected Shelby County’s argument but noted “that the issue presented ‘a close question.’”²² The Supreme Court granted certiorari soon after.

In a 5-4 decision, the Supreme Court ruled for Shelby County, concluding that Section 4’s coverage formula was unconstitutional. However, the Court did not touch Section 5.

Writing for the majority, Chief Justice John Roberts explained that—under the Tenth Amendment—states have “broad autonomy in structuring their governments and pursuing legislative objectives,” including how to regulate their elections.²³ Further, “[n]ot only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal sovereignty’ among the States.”²⁴ The VRA, Chief Justice Roberts argued, “departs from these basic principles” because covered jurisdictions “must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a [Section] 2

action.”²⁵ The Chief Justice further observed that—“despite the tradition of equal sovereignty”—this restriction “applies to only nine States (and several additional counties).”²⁶

The opinion next turns to why Section 4 survived constitutional scrutiny until now. When the Supreme Court first reviewed the VRA in 1966, it concluded that “[t]he ‘blight of racial discrimination in voting’ had ‘infected the electoral process in parts of our country for nearly a century.’”²⁷ The VRA’s coverage formula—Congress’s remedy of that blight—was limited to two areas “where Congress found ‘evidence of actual voting discrimination:’ election tests and devices, and a voting rate well below the national average.”²⁸ The formula, the Court determined then, was “rational both in practice and theory.”²⁹

But fifty years later, the Chief Justice observed, “things have changed dramatically.”³⁰ He cites that election “tests have been banned nationwide for over 40 years” and that “voter registration and turnout numbers in the covered States have risen dramatically in the years since.”³¹ He concedes that these improvements are “no doubt” in part because of the VRA.³² Yet, he argues, the VRA’s coverage formula continued to be reauthorized “as if nothing has changed.”³³

In finding the coverage formula unconstitutional, the Chief Justice writes that the Fifteenth Amendment, which says that a citizen’s right to vote “shall not be denied or abridged” by their race, “is not designed to punish for the past; its purpose is to ensure a better future.”³⁴ But the VRA’s most recent reauthorization fatally “reenacted a formula based on 40-year-old facts having no logical relation to the present day.”³⁵

The Chief Justice concludes that Congress’s reauthorization of the outdated coverage formula “leaves [the Court] with no choice but to declare [Section] 4(b) unconstitutional.”³⁶ But the opinion’s conclusion does give Congress another chance. Leaving both Section 2 and Section 5 intact (although temporarily inoperable), the Chief Justice welcomed Congress to create another coverage formula “based on current conditions.”³⁷

RESPONSES TO SHELBY COUNTY

The critical response to *Shelby County* was instant, the first by Justice Ruth Bader Ginsburg’s dissent in the case. In one of her most cited quips, Justice Ginsburg emphasized 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.”³⁸

The political response to *Shelby County* was similarly scathing. In a statement, President Barack Obama said he was “deeply disappointed” with the decision and asked Congress

to pass new legislation.³⁹ Attorney General Eric Holder, the titular defendant in *Shelby County*, called it “a serious setback for voting rights.”⁴⁰

After the *Shelby County* decision, a number of state legislatures passed new election laws, including in states that were previously covered by the VRA’s old coverage formula. Some new legislation, like online voter registration, have been mostly noncontroversial.⁴¹ Others—like changes to early and absentee voting and new voter-ID standards—have been more criticized.⁴² Today, without the burdens of Sections 4 and 5 of the VRA, every state legislature is considering new election-related legislation, touching on hot-button issues like voter identification and early voting as well as cementing temporary policies designed to make voting easier during the COVID-19 pandemic.⁴³

Back in Washington, there remain efforts to revise the VRA’s coverage formula. Bills introduced in the 113th and 114th Congresses would have updated the Section 4(b) formula, but none of the legislation passed either chamber.⁴⁴ More recently, H.R. 4, which was introduced in both the precedent and current Congress, has aimed to update the VRA’s coverage formula.⁴⁵ Both times the legislation has passed the House but has so far stalled in the Senate.

H.R. 4’s most recent iteration—now titled the John R. Lewis Voting Rights Advancement Act of 2021—makes several changes to the preclearance formula following the Supreme Court’s *Shelby County* decision.

To begin, a state would fall under the bill’s proposed coverage formula if, within the last 25 years, the state had:

- 15 or more voting rights violations within the state
- Ten or more voting rights violations, including one by the state itself, or
- Three or more voting rights violations within the state (and the state itself administers the elections in the State or political subdivision where the violation occurred)

Separately, a political subdivision would fall under the 10-year, rolling coverage formula if it independently had three or more voting rights violations in the last 25 years. Under the bill, a “voting rights violation” is defined to fall within five separate categories:

- A final judgment or preliminary relief (not reversed on appeal) where a court found a violation of the Fourteenth or Fifteenth Amendments
- A final judgment or preliminary relief (not reversed

on appeal) where a court found a violation of the VRA

- A final judgment denying a state or political subdivision request for declaratory judgment under Sections 3(c) or 5 of the VRA
- An objection by the Attorney General under Sections 3(c) or 5 of the VRA; or
- An agreement with the federal government that led to withdrawing or amending an alleged discriminatory voting practice

Each liable voting practice under these categories would count as one violation. But when it comes to redistricting plans, each violation found to discriminate against any minority group would count as an independent violation.⁴⁶

On top of this revision of the VRA’s preclearance formula, the bill would unprecedentedly create an additional “practice-based” preclearance process concerning certain election practices over each state and political subdivision in the nation. The “covered practices” that would fall under a nationwide preclearance regime include certain changes to jurisdictional boundaries, changes in voter ID laws, changes to hours or location of election places, and changes to the maintenance of voter registration lists.⁴⁷

H.R. 4’S PITFALLS

In considering the basic principles of federalism, the original purpose of the VRA, and guidance from the *Shelby County* decision, there are a few immediate pitfalls to Congress’s latest attempt to update the VRA’s coverage formula.

To begin, the practice-based preclearance regime envisioned in H.R. 4 would most likely be unconstitutional. As addressed in *Shelby County*, while the federal government does hold a vital role over federal elections, “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.”⁴⁸ Along with states’ “broad powers to determine the conditions under which the right of suffrage may be exercised. . . [d]rawing lines for congressional districts is likewise ‘primarily the duty and responsibility of the State.’”⁴⁹ A federal carte blanche to approve (or disapprove) any change to local election practice on issues like the relocation of a polling location, change in a voter ID law or tweak to jurisdiction boundaries would unlikely survive constitutional scrutiny.

Aside from individual state sovereignty, states are presumed to have equal sovereignty among each other. The original VRA and its geographic coverage formula was a proper exception to the norm. As *Shelby County* notes, the VRA

“employed extraordinary measures to address an extraordinary problem.”⁵⁰ But some aspects of H.R. 4 would violate the presumption of equal sovereignty without showing how the change “is sufficiently related to the problem that it targets.”⁵¹

For instance, one of the definitions of a “voting rights violation” under H.R. 4’s preclearance formula is a past DOJ objection to a state election practice under Section 5 of the VRA.⁵² But these past DOJ objections would only apply to states and political subdivisions previously under the old, unconstitutional formula struck down in *Shelby County*. As a result, these states would be on a shorter leash than the states (and municipalities) that did not fall under the old coverage formula for no reason other than their former status under a stricken formula.

In another example, the practice-based preclearance regime would require states that wanted to change their voter ID law after the enactment of the law to seek federal preclearance, but states that had the same law before enactment could avoid preclearance.⁵³ In other words, two states with the same desired law would be treated differently.

Another worry is the bill’s consideration of 25 years of past conduct when determining whether a state or political subdivision would fall under the new preclearance regime.⁵⁴ In *Shelby County*, Chief Justice Roberts emphasized that the Fifteenth Amendment was “not designed to punish for the past; its purpose is to ensure a better future.”⁵⁵ As a result, the Court challenged Congress to only single out jurisdictions “that makes sense in light of current conditions. It cannot rely simply on the past.”⁵⁶ With this lens, it is likely that the majority of the current Supreme Court—like the Court in 2013— will not be receptive to a preclearance regime that looks back a quarter-century for misconduct.

PRINCIPLES FOR PRECLEARANCE

Given the partisan divide in Congress, H.R. 4’s legislative success in the 117th Congress is grim. But legislative efforts to update the VRA’s coverage formula will continue. In future deliberations, lawmakers should avoid the pitfalls of past attempts and consider a narrower preclearance formula that acknowledges the limits set by *Shelby County* and the virtues of largely decentralized elections.

It must be remembered that preclearance is a significant burden, and seeking federal approval for policy changes is a weighty use of government resources, especially for smaller municipalities. While a systemic violation of federal law should warrant a penalty, like other punishments, the penalty should not be indefinite. Future revisions to the preclearance formula should limit the length local governments spend under the preclearance regime and offer more

sufficient ways to “bailout” of VRA coverage.

Policymakers should also avoid universal “practice-based” preclearance coverage. Such formulas violate state sovereignty and, at the local level, would likely stifle legislative innovation and calcify existing election systems.

Future revisions to the VRA should also scrutinize the DOJ’s outsized role in overseeing local elections. In the current version of the VRA and subsequent legislative proposals, the DOJ holds tremendous power over local governments’ ability to administer their elections or change current election policy. Future reforms should avoid authorities that could encourage the DOJ to strategically file suits against certain jurisdictions for partisan gain in order to enact certain policy preferences that are normally not obtainable at the federal level.

Lastly, policymakers at the state and federal levels should not ignore the other tools already available in the VRA. For example, Section 2 can be used to enjoin discriminatory election practices.⁵⁷ Section 3 allows a federal court to keep jurisdiction over a state or political subdivision for violating the Fourteenth and Fifteenth Amendments, by pausing changes to its election law.⁵⁸ Beyond the VRA, policymakers should consider local avenues in the state legislature, and the public has many avenues under both the federal and state constitutions.⁵⁹

CONCLUSION

In *Shelby County*, Chief Justice John Roberts reminds readers that “voting discrimination still exists; no one doubts that.” Congress’s challenge is to create a legislative formula that rightfully prevents systemic and discriminatory voting laws while balancing state sovereignty. The task is not easy, but it is worthwhile.

If Congress wishes to properly update the VRA’s preclearance formula, it should avoid the pitfalls of recent attempts and consider a narrow formula that recognizes the limits set by *Shelby County* and the benefits of largely decentralized elections.

ABOUT THE AUTHOR

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ENDNOTES

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