Overview of *Shelby County v. Holder*

Shelby County v. Holder was a major 2013 Supreme Court decision that gutted the single most important piece of voting rights legislation in American history: the Voting Rights Act. Writing for a narrow 5-4 majority, Chief Justice John Roberts struck down section 4b of the Act, allowing states with a history of racially motivated voter suppression to enact discriminatory laws without any federal oversight. In a blistering dissent, Justice Ruth Bader Ginsburg blasted the majority for its "egregious" decision, famously writing that "throwing out preclearance when it has worked…is like throwing away your umbrella in a rainstorm because you are not getting wet." Today, countless voting requirements have been passed into law as a result of the decision in *Shelby*, ushering in a new era of voting ID requirements and other discriminatory practices.

Facts of the Case

After the Civil War ended, the Fifteenth Amendment was ratified. It prohibited racial discrimination in voting and gave Congress "the power to enforce this article by appropriate legislation." However, many states in the South defied the letter and spirit of the Fifteenth Amendment, passing into law racially motivated voting requirements such as literacy tests and poll taxes (among others).

A century later, Congress passed the Voting Rights Act (VRA) into law, hoping to end these discriminatory, race-based voting practices. Three sections of the VRA are of note:

- Section 2, which prohibits any "standard, practice, or procedure…imposed or applied…to deny or abridge the right of any citizen of the United States to vote on account of race."
- Section 5, which states that any change in state or local voting laws must be approved by either (a) the Attorney General, or (b) a 3-judge panel in the D.C. District Court. This process is known as "preclearance."
- Section 4b, which limits the preclearance requirements of §5 only to those states and counties that, prior to the 1964 presidential election, had a voting test in place and less than 50 percent voter registration. This is known as the "Coverage Formula." In 1965, covered states included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as 39 counties in North Carolina.

The Act was reauthorized in 1970, 1975, 1982, and 2006. Each time, the Act was challenged in Court under Article IV and the Tenth Amendment of the Constitution, which, taken together, give states the right to self-govern. Each time, however, the Supreme Court rejected these arguments, finding that the VRA was constitutional under the Fifteenth Amendment.

But in a 2009 decision called *Northwest Austin v. Holder,* the Court argued that the VRA should no longer get a free pass under the Fifteenth Amendment; rather, "...the Act imposes current burdens [that] must be justified by current needs." In other words, in future litigation, those defending the VRA would have to prove that the 50-year-old Coverage Formula continued to address current voting disparities. Thus, when *Shelby County* arrived at the Court, one, central question emerged: Do sections 4b and 5 of the VRA remain constitutional, or do they impose outdated burdens, thereby violating the 10th Amendment and Article IV of the Constitution?

The Majority Opinion (Chief Justice John Roberts)

Writing for the Majority, Chief Justice Roberts addresses Sections 2, 4b, and 5 of the VRA individually. Section 2, he explains, is not up for debate in this case, and remains an appropriate avenue for future litigation. The Coverage Formula in Section 4b, however, reflects 50-year-old realities rather than current ones, meaning that it is unconstitutional. As for Section 5, the preclearance standard, the Majority declines to rule on its legality, leaving open the possibility that a revised version of the VRA could be enacted if only the Coverage Formula were altered.

I. The Majority begins by recounting the Court's ruling in *Northwest Austin,* which (among other things) argued there is a "fundamental principle of equal sovereignty" among the States. In other words, each of the fifty states are to be treated equally by the Federal government. "The fundamental principle of equal sovereignty," the Majority continues, "remains highly pertinent in assessing subsequent disparate treatment of States," and only in extraordinary circumstances can it be permissible for states to be treated differently.

II. The Court compares 1965 to 2013. In 1965, the Majority explains that this different treatment was justified due to rampant voting discrimination in the South. Looking to the present day, however, the Majority notes that no such disparities exist: "In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were…"

    A. And this, the Majority reasons, is a problem. In *Northwest Austin,* the Court argued that "current burdens…must be justified by current needs," meaning that the Coverage Formula and idea of preclearance — which greatly detract from the principle of equal sovereignty among the states — would be legally permissible only if modern needs so require it. However, the Majority finds that there is no evidence that the VRA addresses "current needs" or current racial disparities.

III. As a result, the Majority writes, they have no choice but to strike down the VRA: "In 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so…but in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the Coverage Formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional."

The Dissent (Justice Ruth Bader Ginsburg)

In a dissent that runs nearly 15 pages longer than the Majority opinion, Justice Ginsburg methodically and powerfully dissects the Majority's reasoning. Leaning on Congress' impressive record of evidence, Justice Ginsburg explains that the Coverage Formula is actually well-suited for the present day, meeting the "current burden" standard from Northwest Austin. The extraordinary success of the VRA, she adds, is not a reason to throw out the most important of its provisions; rather, it provides all the more reason to preserve the Act in its entirety.

I. To begin, Justice Ginsburg argues that the Coverage Formula and preclearance remain relevant to this day. Congress, she notes, accumulated 15,000 pages in evidence over a span of two years before reauthorizing the VRA in 2006, and between the two most recent authorizations (from 1982 to 2006), the DOJ blocked a stunning 700+ proposed voting changes "based on a determination that the changes were discriminatory." In short, there was ample evidence that discrimination in voting remained in the covered districts.

II. But even then, Justice Ginsburg writes, there is a more pressing concern — namely, that it is foolish to get rid of a preventative mechanism simply *because* it has worked so well. As she puts it, "Throwing 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…The sad irony of today's decision lies in its utter failure to grasp why the VRA has proved effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself."

Ramifications of the Decision

The impact of *Shelby County* is simply staggering. Mere hours after the decision came down in 2013, Texas announced that it would implement a severe photo ID law. Across the country, polling places were shut down, and hundreds of thousands of voters were purged from the rolls. North Carolina offers a revealing case-study: after *Shelby,* the state "instituted a strict photo ID requirement; curtailed early voting; eliminated same day registration; restricted pre-registration; ended annual voter registration drives; and eliminated the authority of county boards of elections

to keep polls open for an additional hour. The litany of restrictions in this bill is possibly the most restrictive bill passed after the collapse of Section 5 protections due to *Shelby County*."[1]

But that is not to say that all is lost. The Court did not, importantly, strike down §5, leaving open the possibility that a new coverage formula could resuscitate the VRA. Indeed, recent legislation — most notably HR 4, the John Lewis Voting Rights Advancement Act — contains an updated coverage formula. In addition, a different section of the Act, Section 2, has not yet been gutted by the Court. While it is difficult to bring challenges under §2 of the VRA, it is not impossible; in June 2023, the Supreme Court ruled against a racially gerrymandered map in Alabama, finding that the map violated §2 of the VRA. Taken together, these realities suggest that one day, states might once again be held accountable for passing discriminatory voting laws.

[1] https://www.brennancenter.org/our-work/research-reports/effects-shelby-county-v-holder