The Voting Rights Act

In striking down the pre-clearance formula of the Voting Rights Act, the Supreme Court’s decision in *Shelby County v. Holder*\(^1\) made it possible for states to more easily discriminate against potential voters. This is because states can now enact discriminatory election laws that were previously blocked by the U.S. Attorney’s Office. Further, if ordered to change discriminatory laws by a court, states can now manipulate the process by enacting other discriminatory laws in its place.

The Voting Rights Act of 1965 (the “VRA”) was passed to remedy, at least in part, three problems. First, though a private citizen could bring suit against a State,\(^2\) this was prohibitively expensive – few of the people against whom there was discrimination could afford to bring suit, and the federal government could only bring so many on its own. Second, the cases were lengthy\(^3\) – by the time the suit had come to a close, the damage had been done. The last and main problem was that even if the plaintiff or the government managed to win against the State, the State would tweak the law to comply with the court’s order in a way that was still discriminatory, just in a different way.\(^4\)

To fix these and other problems, Congress passed the VRA. Part of Congress’ unique solution was to create a “pre-clearance” requirement for certain jurisdictions. Whether a jurisdiction would be required to pre-clear its voting practices with the

\(^1\) 133 S.Ct. 2612 (2013).
\(^2\) *Allen v. State Board of Elections*, 393 U.S. 544, 554-57 (1969) (recognizing a private right of action to seek injunctive relief against a State’s Section 5 violation).
\(^3\) *State of S.C. v. Katzenbach*, 383 U.S. 301, 314 (1966) (“Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings.”).
\(^4\) MYRNA PEREZ AND VISHAL AGRAHARKAR, IF SECTION 5 FALLS: NEW VOTING IMPLICATIONS, BRENNAN CENTER FOR JUSTICE 2 (“Even when DOJ or private plaintiffs succeeded in obtaining an injunction against a discriminatory practice, the defendants frequently adopted a different discriminatory procedure that would have to be challenged in another round of litigation.”).
judiciary depended on a formula in section 4(b) of the VRA.\(^5\) This coverage formula applied to jurisdictions that had a voting test or device as of November 1, 1964, and had less than 50% of citizens registered to vote, or that actually voted.\(^6\) If the jurisdiction was covered – that is, subject to the pre-clearance requirements – the jurisdiction had to pre-clear with the judiciary or the U.S. Attorney General’s office any changes to their election law that abridged a person’s right to vote. A change in election law abridged the right to vote if it diminished a person’s ability to elect their chosen candidate on account of race, color, or spoken language.\(^7\)

The VRA was challenged many times throughout the years, but was always deemed constitutional by the Court.\(^8\) However in 2013, the VRA was challenged in *Shelby County v. Holder*,\(^9\) and the Supreme Court held section 4(b) – the pre-clearance formula – unconstitutional. The Court found that Congress had failed to justify that the effect of the pre-clearance formula – based on “decades-old data and eradicated practices” – was actually justified by “current needs.”\(^{10}\) The Court stressed that other sections of the VRA – including the sections banning voting discrimination – were still intact and constitutional.\(^{11}\) Only the formula defining which jurisdictions are required to pre-clear any election law changes was deemed unconstitutional.\(^{12}\) The Court made clear that States can still be sued for any discriminatory practices, and that this day and age is different from the 1960’s because there are fewer discrimination practices now.

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\(^7\) *Id.* at 274.

\(^8\) See Katzenbach, 383 U.S. at 308 (holding the VRA constitutional); City of Rome v. U. S., 446 U.S. 156, 173 (1980) (holding the VRA constitutional).

\(^9\) 133 S.Ct. 2612 (2013).

\(^10\) *Id.* at 2627.

\(^11\) *Id.* at 2631.

\(^12\) *Id.*
As the Court says, a state can still be sued for a discriminatory practice. However, the worry after Shelby County is not that people will not be able to sue; it is that states may try to re-enact previously-blocked discriminatory election changes. In the 1960’s, succeeding in a discrimination suit against a state was a rare thing. First, one would have to have the money to seek injunctive relief against a State on their own, or convince the Attorney General’s office to bring suit. Then, the discriminated-against party would have to wait – years, in all likelihood – for their case to wind its way through the courts. During those years, if the injunction was not successful, the state could go about its business. Then, even if the plaintiff or the government managed to win, states manipulated the process by changing the law only enough to comply, or even changing it in an entirely new, but still discriminatory, way. Then, the entire process would begin again. These successful manipulations meant that States could essentially discriminate at will, and there was little that could be done to stop them.

For example, in Mississippi in the 1960’s, Whites, but not African-Americans, were receiving help in filling out voting forms, so the Fifth Circuit ordered the county to give African-American applicants the same assistance that White applicants received. Mississippi responded by withdrawing all help from all applicants. Though not facially discriminatory, requiring a person to be able to read was extremely discriminatory in effect against African-Americans, as more than two thirds of adult African-American

13 MYRNA PEREZ AND VISHAL AGRAHARKAR, IF SECTION 5 FALLS: NEW VOTING IMPLICATIONS, BRENNA CEN FOR JUSTICE 3
14 Warren M. Christopher, The Constitutionality of the Voting Rights Act of 1965, 18 STAN. L. REV. 1, 10 (1965) (“In the past those intent on denying the rights guaranteed by the fifteenth amendment have managed to avoid court decrees and legislation by contriving new stratagems.”); Katzenbach, 383 U.S. at 314 (“Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.”).
males were illiterate in the late 1960s.\textsuperscript{16} It is against these types of discriminatory-in-effect changes that the pre-clearance requirements were designed to protect.

Next, it could be argued that, as the Court said, there is no evidence that the discrimination that existed in the 1960’s exists now.\textsuperscript{17} However, there are plenty of examples showing that discrimination still exists in this modern age. From 1990-2012, almost 50 potential Georgia laws were disallowed by the U.S. Attorney General’s office.\textsuperscript{18} For example, in 2009, the Attorney General’s office called the Georgia’s proposed procedures for verifying voter registration information “seriously flawed.”\textsuperscript{19} Further, the Attorney General’s office went on to say that the proposed system “frequently subjects a disproportionate number of African-American, Asian, and/or Hispanic voters to additional and, more importantly, erroneous burdens on the right to register to vote.”\textsuperscript{20} That was not a law from the 1960s – that was a law that the state of Georgia attempted to pass no more than 5 years ago.

Almost everyone would agree that the pre-clearance formula of the VRA helped enormously towards the goal of eliminating racial discrimination in voting.\textsuperscript{21} However, without the pre-clearance requirements, there is a real danger that many laws that the

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\textsuperscript{16} Katzenbach, 383 U.S. at 311.
\textsuperscript{17} Shelby Cnty., 133 S. Ct. at 2631. (“no one can fairly say that [the record] shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that faced Congress in 1965 . . .”).
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textsc{Myrna Perez and Vishal Agrapharkar, If Section 5 Falls: New Voting Implications, Brennan Center for Justice} 9 (“Section 5 has been an enormously successful tool in the fight to eradicate racial discrimination in voting.”).
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government found to be discriminatory in the past will be passed by jurisdictions throughout the nation. While tools still exist to fight any discriminatory laws, the loss of the pre-clearance requirements make it a much more difficult battle – one that might be impossible to win.