Formulating Equality

The Voting Rights Act and the Supreme Court

BY JAN TEGLER

ON JUNE 25, 2013, THE U.S. SUPREME COURT RULED on a case known as *Shelby County v. Holder*. The decision marked the most significant change to the landmark 1965 Voting Rights Act (VRA) since it was enacted, touching off a passionate debate encompassing civil rights, federalism, and politics.

Shelby County in Alabama, a jurisdiction covered under the VRA's "preclearance requirement," challenged two key provisions of the act: Section 5, which requires nine states (primarily in the South) and local governments to obtain federal preclearance before implementing any changes, no matter how minor, to their voting laws or practices; and Section 4, which describes the coverage formula that determines which jurisdictions are subjected to preclearance based on their histories of discrimination in voting.

In a 5 to 4 ruling, the court declared Section 4 unconstitutional on the grounds that the formula for determining which parts of the country must have changes to their voting laws cleared by the federal government or in federal court is outdated.

Writing the majority opinion, Chief Justice John Roberts noted that, though Congress most recently renewed the VRA in 2006, it failed to update the Section 4 formula.

"Congress did not use the record it compiled to shape a coverage formula grounded in current conditions," he wrote. "It instead re-enacted a formula based on 40-year-old facts having no logical relationship to the present day."

The coverage formula therefore violates the sovereignty of the affected states under the U.S. Constitution, Roberts maintained. The court's ruling left intact all other provisions of the VRA, including the Section 5 preclearance requirement, adding that Congres "may draft another formula based on current conditions."

Reaction to the decision was swift. Critics charged that with the Section 4 formula ruled unconstitutional, Section 5 cannot be enforced, at least for the time being. That, they argue, will have an immediate impact on states covered under Section 5 seeking to "bail out" of federal oversight, clearing the way for them to enact voter ID laws and conduct redistricting, which may deter minorities from voting.

Writing the dissent for the court's minority, Justice Ruth Bader Ginsburg said that Section 5 is now effectively "immobilized" without a working coverage formula.

"The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective," Ginsburg added. "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."

Thus, the formula for determining coverage under Section 4, and its implications for preclearance, is at the heart of the debate. The court's decision, split along ideological lines, reflects the wider public discussion of the *Shelby County v. Holder* case – a 2011 Rasmussen poll found that 75 percent of likely voters "believe voters should be required to show photo identification, such as a driver's license, before being allowed to vote"– and what the future holds for the VRA.

To understand the path to the Supreme Court's ruling, it's useful to look back to 1965.

The Voting Rights Act

The VRA, signed into law on Aug. 6, 1965, by President Lyndon B. Johnson, was enacted to "enforce the fifteenth amendment to the Constitution" which, under Section 1, 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."

Ratified on Feb. 3, 1870, the 15th Amendment had been routinely and systematically flouted by state and local governments across the post-Confederate South for almost a century. Obstacles to African-American voting were erected in many forms including poll taxes, literacy

Scenes from a rally in front of the Supreme Court where it was hearing oral arguments on the Voting Rights Act, Washington, D.C., Feb. 27, 2013.

SEIU PHOTO BY DAVID SACHS

tests, and bureaucratic restrictions. Black voters also faced harassment, intimidation, economic reprisals, and even physical violence when they tried to register or vote.

The result was minority voter registration rates less than a third of those for white voters in Southern states. Though the 15th Amendment guaranteed the right of all citizens to vote, practically speaking, African-Americans had little political power at local and national levels.

As the civil rights movement gained momentum in the 1950s and 1960s, it brought with it a renewed focus on voting rights. From the mid-1950s through the early 1960s, Congress passed a series of legislative measures that incorporated voting-related provisions including the creation of the Civil Rights Division within the Department of Justice and the Commission on Civil Rights.

Further provisions permitted federal courts to appoint voting referees to conduct voter registration following a judicial finding of voting discrimination. Crucially, the attorney general was given authority to intervene in and institute lawsuits seeking injunctive relief against violations of the 15th Amendment.

The new laws and court decisions against 15th Amendment violations made it more difficult for Southern states to disenfranchise black citizens, but the need to challenge violations on a case-by-case basis proved to be of limited success in jurisdictions where they occurred and did nothing to spur voluntary compliance in jurisdictions that were not sued.

Moreover, as it became clear that minority registration could no longer be suppressed, some states began to change political boundaries and election structures to minimize the impact of black re-enfranchisement, a practice known as "racial gerrymandering."

Sadly, violence was the spark that ultimately lit the fire that led to the Voting Rights Act. The murder of voting rights activists in Mississippi and an attack by state troopers on peaceful marchers in Selma, Ala., gained national attention, causing public outcry and persuading Johnson and Congress to initiate effective national voting rights legislation.

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Adhering to the language of the 15th Amendment, Section 2 of the act applied a nationwide prohibition against the denial or abridgment of the right to vote on the literacy tests on a nationwide basis. The act also contained special enforcement provisions targeted at those areas of the country where Congress believed the potential for discrimination to be the greatest.

Under Section 5, states covered by these special provisions could not implement any change affecting voting until the attorney general or the U.S. District Court for the District of Columbia determined that the change did not have a discriminatory purpose and would not have a discriminatory effect.

The attorney general was also granted the power to appoint a federal examiner to review the qualifications of persons who wanted to register to vote in jurisdictions covered by these special provisions. In those counties where a federal examiner was serving, the attorney general could request that federal observers monitor activities within the county's polling place.

Challenge and Renewal

It didn't take long for the VRA to face constitutional challenges relating to Section 5 and the range of voting practices that required Section 5 review. In 1966, the Supreme Court heard *South Carolina v. Katzenbach* in which South Carolina argued that the VRA's preclearance provisions were unconstitutional.

The Supreme Court rejected the challenge, finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."

At the same time, the court acknowledged that the VRA's Section 5 was an "uncommon exercise of congressional power" justified by the "exceptional conditions" and "unique circumstances" of the Jim Crow South. Section 5 was to be enacted for a period of five years to address those "exceptional conditions."

In 1970, Congress extended the "temporary" Section 5 provision for another five years, then for a further seven years in 1975. After testimony was heard regarding voting discrimination suffered by Hispanic, Asian, and Native American citizens, the 1975 amendments also added protections from voting discrimination for language minority citizens.

The VRA's special provisions were renewed again in 1982 for a period of 25 years. Additionally, a new standard went into effect (Section 4a), detailing how jurisdictions could terminate or "bail out" from coverage under the provisions of Section 4 while Section 2 was amended to provide that a plaintiff could establish a violation of the section without having to prove discriminatory purpose.

The VRA was most recently renewed in 2006 with Congress leaving intact most of its provisions while adding select amendments. Key among them was Section 4's coverage formula.

As noted in *Shelby County v. Holder* – first in its consideration by the U.S. Court of Appeals, then by the U.S.

TRITON COLLEGE PHOTO

Triton College's Black Heritage Council, in conjunction with the Triton College Student Association and Triton College Program Board, encouraged eligible students to register to vote in preparation for the 2012 U.S. presidential election while emphasizing the history and importance of voting, Sept. 17, 2012.

Supreme Court – in each of the reauthorizations, "the coverage formula in Section 4b remained the same, based on the use of voting-eligibility tests [or devices] and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include 1968 and eventually 1972."

Thus, the basic coverage formula for preclearance in the covered states/jurisdictions – preclearance requirements for any state or political subdivision of a state that "maintained a voting test or device as of Nov. 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 presidential election" – has not been updated in four decades.

A 2009 case, *Northwest Austin Municipal Utility District No. One v. Holder*, in which a small utility district (an entity that does not register voters) in Austin, Texas, sought to bail out of Section 5, set the stage for renewed consideration of Section 5's constitutionality.

The U.S. Supreme Court ruled by unanimous decision that the district was eligible to bail out and identified two "serious questions" about Section 5's continued constitutionality, namely, whether the "current burdens" it imposes are "justified by current needs," and whether its "disparate geographic coverage is sufficiently related to the problem that it targets."

These questions were central to *Shelby County v. Holder* when the county filed its final appeal with the Supreme Court, "reiterating its argument that, given the federalism costs Section 5 imposes, the provision can be justified only by contemporary evidence of the kind of 'unremitting and ingenious defiance' that existed when the Voting Rights Act was originally passed in 1965."

The court's decision on June 25, 2013, only partially addressed these questions as Section 4 was the only provision singled out for change. Narrowly focused as it appears, however, the ruling touched off an intense discussion.

Debate and Aftermath

Janai S. Nelson, Ph.D., professor of law, associate dean of faculty scholarship, and associate director of the Ronald H. Brown Center for Civil Rights and Economic Development at St. John's School of Law, and Hans A. von Spakovsky, manager, Election Law Reform Initiative and senior legal fellow in the Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies, have each spoken passionately against and in support of the court's ruling respectively. Both agree, however, that the VRA has been a huge success.

"We accomplished something very great due to the Voting Rights Act and the Civil Rights Act," von Spakovsky said. "In basically two generations, we changed this country and its attitude from one of accepting legalized discrimination, to

one today where everyone considers any kind of discrimination not just to be legally wrong, but morally repugnant."

"Section 4, which very few people had heard of before last year, played such a significant role in terms of ensuring the fairness of our electoral system, particularly in Southern states," Nelson said, "but also in many other areas of the country where there has been a significant history of virulent discrimination based on race, language, and ethnicity."

The two have very different reactions to the court's ruling, though. Nelson called the decision "a devastating blow to all of the progress and advancement that we've made as a society in the past 50 years to try to have a more diverse and fair electoral process."

Von Spakovsky supports the decision, pointing out that the core permanent provision of the VRA, Section 2, remains in place prohibiting racial discrimination in voting nationwide. Section 5, he noted, was not intended as a permanent provision.

"It was considered an emergency provision," he explained, passed because "at that time, there was systematic widespread, official discrimination in places like Georgia and Mississippi. This was considered the fastest way to stop that."

Nelson argued that with the Section 4 formula in limbo, states formerly covered under Section 5 will be freed to enact discriminatory voting laws.

"Many of the actors who had formerly been policed by Section 4 of the act have now been unleashed with no check. We see that manifesting itself in the proliferation of voter ID laws and restraints on voter registration, changes in voting periods, limiting early voting, and limiting many of the features of our election system that enabled minority voters to participate on equal footing."

Von Spakovsky maintains that because the other provisions of the VRA have been left intact there is more than sufficient deterrence to disenfranchisement and further contends that a rapid movement to enact voter ID laws in the wake of the *Shelby County* decision and other restraints on registration is a false narrative.

"Most of the voter ID laws, the strict photo ID laws around the country, were passed prior to the *Shelby County* decision," he said. "That's true in states including Indiana, Mississippi, Texas, South Carolina, and North Carolina. All of those laws were passed prior to *Shelby County*. Challenges to Indiana's 2005 law went to the Supreme Court in 2008 with the court ruling the law constitutional. Arizona passed its ID law through a referendum process back in 2004. Kansas passed its photo ID law [2011] and it's been in place for over two years."

Voter ID laws requiring strict photo ID or non-photo identification are now in place in 34 states according to the National Conference of State Legislatures (NCSL). States having introduced voter ID legislation that is pending due to challenges by the Department of Justice include Wisconsin, South Carolina, and Texas. Voter ID laws in the states mentioned were approved or proposed (Texas, Wisconsin, South Carolina) prior to the *Shelby County* ruling. NCSL data shows the number of proposals to create new voter ID requirements or amend existing voter ID laws has dropped over each of the last four years.

Nelson acknowledged that the ID laws mentioned were in place or awaiting approval prior to the ruling but asserts that any change to Section 4 makes it easier to enact them and harder to challenge them.

"It's true that many of these laws predated the *Shelby County* decision, but it doesn't mean that Section 4 and Section 5 together did not have an effect on stopping more from being created or influencing the way in which those laws were actually constructed – the content of those laws."

The fear Nelson shares with opponents of the ruling is that new voting requirements will suppress minority voting. "What is a fact is that voter ID laws impose a burden on voters to exercise a fundamental right. That is what is incontrovertible. It is an additional step that a voter must take to exercise her right to vote and one that is not justified by any significant evidence of any in-person voter fraud."

But von Spakovsky maintains that there is no evidence that stricter modern voting requirements, including voter ID laws, discourage minority voting. He pointed to studies done following the presidential elections in 2008 and 2012 in Georgia and Indiana (where strict voter ID laws were in place) by George Mason University, American University, and the Joint Center for Political and Economic Studies, which show substantial increases in minority turnout.

"When the Supreme Court had the *Shelby County* decision in front of it," von Spakovsky said, "it was faced with the fact that not only are registration and turnout rates of blacks on par with whites – in some of these states, they exceed it.

"Georgia is an example," he explained. "After every federal election the Census Bureau puts out a report on turnout across the country which breaks down by race by state. There's a table in the data that shows the survey-reported turnout of blacks, whites, Hispanics, and Asians. In Georgia, during the 2012 election with one of the strictest photo ID laws in the country, blacks voted by 1 percentage point higher than whites. In Indiana, where the photo ID law went all the way to the Supreme Court, blacks out-voted whites by 10 percentage points."

On the issue of redistricting in states required to submit to preclearance, von Spakovsky maintains that one of the most negative outcomes of Section 5 has been "the way it has made race the predominant factor in redistricting, because under Section 5, the rule in place is that you have to take race into account when doing redistricting."

That's why both political parties love Section 5, von Spakovsky said. Why? "Because the attitude of the Justice Department was that you had to create majority minority districts where black voters, for example, are a majority and can elect their candidate of choice.

"In Georgia, for example, when a Democratic legislature controlled the state, they would create 60, 70, 80 percent black districts in the cities, guaranteeing Democratic congressional seats," he added. "But by doing that, they drained Democratic and/or black voters from surrounding districts. That created easy Republican districts. That's an example of why both parties continue to vote for Section 5. It has everything to do with creating racially gerrymandered seats that benefit individual members of Congress of both parties."

Nelson contends that upcoming redistricting that occurs without the protection of Section 5 will "necessarily be fraught."

"We have had the protection of Section 5 for quite some time and even with that protection have still had many battles to ensure that minority voter representation was

Participants at a rally to protect the Voting Rights Act, Washington, D.C., Feb. 27, 2013.

JUSTICE & WITNESS MINISTRIES PHOTO

on equal footing with all other voters," she argued. "It is something that required a great deal of vigilance and maintenance and without that additional check, I suspect we will have to use other tools and continue to be even more vigilant and determined to ensure equality in our electoral system."

The other "tools" Nelson mentioned may include a bill introduced in early 2014 by Congressman Jim Sensenbrenner, R-Wis., known as the Voting Rights Amendment Act of 2014. Among the legislation's principal amendments is a new coverage formula for Section 4.

The new formula would require states with five violations of federal law to their voting changes over the past 15 years to submit future election changes for federal approval. Local jurisdictions would be covered if they commit three or more violations or have one violation and "persistent, extremely low minority turnout" over the past 15 years.

Von Spakovsky maintains that the Sensenbrenner bill is flawed in part because it does not require a comprehensive national review of current VRA data regarding violations, voter registration, and voter turnout.

"If you read the Voting Rights Act Amendment, you'll notice that it doesn't require that," he said. "The reason is that the differential in turnout has pretty much disappeared. Let's assume for a second that in 2006 Congress had said that it would update the coverage formula so that anybody with a turnout of less than 50 percent among minorities in the 2004 election will now be covered – the only state in the country that would have been covered would have been Hawaii, which is a strongly Democratic state. That's the reason they didn't update the coverage formula to be based on turnout from recent elections."

With midterm elections due in fall 2014, congressional action on the Sensenbrenner bill is unlikely in the near term. Von Spakovsky said that there is no need for the bill, arguing that Sections 2 and 3 of the VRA are sufficient for enforcing the act and administering preclearance if the Justice Department can produce evidence that it's needed in specific jurisdictions.

"That is a much fairer way of imposing a preclearance requirement, basing it on specific evidence in a specific jurisdiction [rather] than putting on a blanket requirement for 12,000 jurisdictions, I believe, when you include all of the states, towns, counties, and political subdivisions that were covered," he concluded.

"What's very important to underscore about the *Shelby County* decision is that Section 5 is still intact," Nelson stressed. "But in terms of what was being challenged – the concept of preclearance – the concept of federal oversight in specific jurisdictions is not one that is anathema to the court. Instead, it invited Congress to revamp the formula for coverage and I hope that Congress responds quickly." ■