The Weakening of the Voting Rights Act: A Proposal for Modernizing Preclearance

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I. INTRODUCTION

Exercising the right to vote is often considered to be the foundation of democracy and a fundamental right. However, considering America’s history of disenfranchising minority voters, is voting a fundamental right? Following the end of the Civil War, the South issued legislation, known as Jim Crow laws, that sought to bar African Americans from the right to vote. In an aim to deny this right, the South enacted poll taxes, literacy tests, and voter intimidation to make the process of voting infeasible. However, while such procedures are not in practice today, thanks to the passage of the Fifteenth Amendment and Voting Rights Act (VRA) of 1965, voter suppres-

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ion continues to plague the United States’ system of voting. In fact, many current voting laws and procedures are covert in their attempt to discriminate and to target minority voters, which will later be explained.

Despite these landmark pieces of legislation being passed, the Supreme Court continues to hinder progress made towards restoring and protecting voter rights. Since 2005, the United States Supreme Court has been under the guiding direction of Chief Justice John Roberts. The “Roberts Court” has ushered in an era of judicial restraint, which acknowledges the limited power of the Court. As such, the Court has used a narrow and strict interpretation of the Constitution in making critical decisions. Such an approach has greatly affected the legacy of the Voting Rights Act. The VRA is commended as a pivotal piece of federal legislation, issued during the Civil Rights Movement. Furthermore, it works to outlaw discriminatory voting practices and reinforces the Fifteenth Amendment, which prohibits denying individuals the right to vote based on race or color. Recently, however, such legislation has been at the center of political debate as the Supreme Court has limited the scope and power of the VRA.

Section 5 of the Voting Rights Act requires states with a history of discriminatory practices to receive approval, called “preclearance,” from the U.S. District Court for the District of Columbia or the Attorney General regarding any changes made to their electoral


Preclearance ensures that proposed changes do not deny or curtail the right to vote based on race or color. However, such safeguards were challenged in *Shelby County v. Holder*. The case was presented to the Court, and *Shelby County* argued that Section 5 should be deemed unconstitutional. They stated that Congress exercised inappropriate authority in 2006 when they renewed Section 5 for an additional 25 years. Furthermore, it was also argued that the formula violated the principle of equal sovereignty. However, the Court did not issue an opinion on the constitutionality of Section 5, but they did assert that Section 4(b), which determines which jurisdictions must receive preclearance, was unconstitutional. Former Supreme Court Justice Ruth Bader Ginsburg issued a dissenting opinion, stating that the Court erred in overriding Congress’ previous decision to reauthorize preclearance and its coverage formula in 2006 in which Congress “designed both to catch discrimination before it causes harm, and to guard against a return to old ways.”

The question remains, What is the impact of having no current coverage formula and what should be done to modify the formula? This article argues that the lack of a modernized coverage formula disregards the rights of minority voters and hinders progress towards enfranchising vulnerable voting populations. Since the coverage formula works in tandem with preclearance, this article

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10 See Jeffrey M. Schmitt, *In Defense of Shelby County’s Principle of Equal State Sovereignty*, 68 Okla. L. Rev. 209 (2016). The principle of equal sovereignty is laid out in the Tenth Amendment and states that powers not explicitly delegated to the United States by the Constitution are reserved to the states. However, regarding *Shelby County v. Holder*, Congress can limit a state’s sovereign power if they can “demonstrate that the statute’s limited geographic reach is sufficiently related to the problem the law is addressing.”

proposes the creation of a new coverage formula that meets current voting conditions.

II. BACKGROUND

Curtailing voting discrimination was achieved through 4(b) of the VRA, which outlines a coverage formula for states with a history of discriminatory voting practices. The coverage formula was based on literacy tests, voter registration, and voter turnout in the 1960s and 1970s. If a state met any of the conditions laid out in the formula, it would then be considered a covered jurisdiction. Historically, the coverage formula was extended for years as it was identified that the provision was still necessary based on current conditions. However, this formula was struck down in *Shelby County v. Holder*. It was determined that the formula’s “current burdens” did not meet the “current needs,” meaning that the coverage it extended no longer related to the problem it targeted: discrimination. The Court ruled that it met that condition in 1965, but currently, it no longer meets that test due to significant increases in voter registration and turnout numbers.

Section 4(b) is not only necessary because it identifies historically discriminatory areas, it also lays the foundation for Section 5

12 The coverage formula is comprised of two main elements. The first element is whether the jurisdiction put forth “tests” or “devices” to make the process of voting burdensome. Section 4(b) clearly defines a “test” or “device” as a method in which applicants are required to pass a literacy test, assert whether they are of good moral character, or demand another registered voter to vouch for their identity or qualifications if election information is provided only in English, all while individuals of a single language minority comprise more than five percent of residents who are of voting age. The second element is whether there were less than 50 percent of residents, who are of voting age, who were either registered to vote or who voted in the presidential election.


of the VRA. Section 5 concerns the provision of preclearance, which states that any area identified as a “covered jurisdiction” needs preclearance for any proposed election or any voting law changes, including redistricting maps. However, since the coverage formula is no longer in effect, no determination can be made as to which states are covered. This currently allows for states with a history of discriminatory practices to pass potentially discriminatory laws freely without any oversight. This can further be seen in a report by the American Civil Liberties Union from 2021, where over 400 anti-voter laws and practices were introduced by states that would target and burden voters of color.\textsuperscript{15} Without any safeguards in place, when voting or election laws and redistricting attempts are deemed discriminatory, it is too late and must be addressed after the fact. Such a retrogressive approach to preventing voting discrimination does not hold states accountable.\textsuperscript{16} Thus, not having preventative measures in place could potentially burden the Court as they must address cases that could have been handled before reaching their docket. It is important to note that not only is this a lengthy process, but while cases are being reviewed, the discriminatory law or district map is still in practice and is negatively affecting communities and vulnerable populations. The cost of not having a coverage formula and preclearance is significant, and a lack of such safeguards compromises the legitimacy of democracy and individuals’ guaranteed


\textsuperscript{16} \textit{See} Durbin Delivers Opening Statement at “Jim Crow 2021” Hearing on Voting Rights in America, U.S. SENATE COMMITTEE ON THE JUDICIARY (Apr. 20, 2021), https://www.judiciary.senate.gov/press/releases/durbin-delivers-opening-statement-at-jim-crow-2021-hearing-on-voting-rights-in-america. Dick Durbin, Senate Majority Whip and Chair of the Senate Judiciary Committee, expressed his concern for proposed legislation that would suppress minority voters, stating “[In 2021], more than 360 bills with restrictive voting provisions have been introduced in 47 states. These new pieces of legislation may not involve literacy tests, or counting the number of jelly beans in a jar, like the original Jim Crow. But make no mistake: they are a deliberate effort to suppress voters of color.”
right to vote; a guarantee that is not currently being upheld or even supported by the Court.

Another key aspect to understanding the significance of Section 4(b) is its relation to the Fifteenth Amendment. Section 1 of the Fifteenth Amendment states that the right to vote cannot be denied on account of race or color. Thus, one must consider the implications of the suspension of preclearance. States who have a history of unjustly burdening communities of color in their ability to vote and who continue to pass strict voting laws are likely to continue this process, considering there is no threat of federal intervention. Furthermore, Section 2 of the Fifteenth Amendment states that Congress has the power to enforce the Fifteenth Amendment through enacting “appropriate legislation.” Thus, the current weakening of the provisions of the VRA could potentially be remedied through Congressional action. However, due to the polarizing nature of voting and election laws, there has been a standstill in enacting such legislation.

Moreover, the aim of the coverage formula in Section 4(b) is also closely aligned with Section 2. Section 2 prohibits voting procedures, practices, and prerequisites that would deny individuals access to voting on the basis of race or color. As such, Section 2 also applies to redistricting maps since districts must be representative in nature. This means communities of color should not be thinly spread out amongst districts or even assigned to a single district. Such practices are examples of voter dilution, which Section 2 works to combat. Voter dilution is a form of gerrymandering that weakens the vote of a group, as districts do not reflect their proportion of the community. Thus, without the coverage formula in place to allow for preclearance, states across the country have proposed and enacted restrictive voting laws that have been found to significantly burden minority voters.

Since the striking down of Section 4(b), the Voting Rights Act has remained under attack, being slowly weakened by the Court. The Court has argued that progress has been made in minority voter turnout, and there have been fewer instances of discriminatory

17 U.S. Const. amend. XV, § 2.
practices. However, this disregards the significant progress made through the VRA and fails to consider that discrimination is still ongoing regardless of the frequency in which it occurs. The findings of this paper demonstrate that the Supreme Court is negligent in its narrow statutory interpretation of the tenets of the Voting Rights Act of 1965, which includes voting laws and redistricting plans. As such, the Court sets no clear precedent for future cases and threatens the integrity of voting for all Americans. A new coverage formula should be enacted to strengthen the VRA and its ability to prevent discriminatory practices.

III. PROOF OF CLAIM

A. The Precedent Set by Shelby County v. Holder

1. Denial of Current Discrimination

In reviewing the Court’s decisions following the landmark case Shelby County v. Holder, the right to vote and access to voting has not been safeguarded. The decision made in light of Holder marks the beginning of the “gutting” of the Voting Rights Act, in which it has become increasingly difficult to block or counteract discriminatory practices before they are enacted. In the Court’s opinion issued by Justice Roberts, he states that the United States is no longer divided by racially discriminatory practices when he says, “Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.” The Court argued that due to progress being made in curtailing voter discrimination and increases in voter turnout in covered jurisdictions, it demonstrated that the coverage formula was no longer relevant.

However, much of the progress described by Justice Roberts was made possible through the passage of preclearance. This was made evident in a study conducted by Desmond Ang which sought to

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evaluate the effects of federal oversight under the Voting Rights Act. In the study, Ang found that protections offered through preclearance boosted long-term voter turnout from 4 to 8 percent.\textsuperscript{21} Therefore, it is difficult to ignore the relevance of a coverage formula that has allowed for such success in promoting equal access to voting. The dissenting opinion given by Justice Ruth Bader Ginsburg highlights this further: “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.”\textsuperscript{22} This demonstrates that although the Court has claimed that such discrimination today is “rare,” it does not negate the fact that legislation, specifically a new coverage formula, is needed to address current challenges to voting.

2. A Lack of Coverage Formula Leading to Further Regression

Another key aspect to consider regarding the Court’s determination that such racial divisions are not reflected in today’s voting is the direct impact the striking down of Section 4(b) had on vulnerable populations. In many of the covered jurisdictions, stricter voting laws that were previously blocked by preclearance were passed directly after the coverage formula was deemed unconstitutional. North Carolina, one of many previously covered jurisdictions, enacted a voting bill, HB 589, which sought to pass restrictive photo ID laws. However, the requirements of the bill exceeded photo ID requirements, and shortened the early voting period, as well as removed the option


of same-day voter registration. The state of North Carolina was sued, and it was decided three years later by the Fourth Circuit Court of Appeals that the bill was enacted to exclude African American voters. The bill has been referred to as a “monster” voter suppression law. The Fourth Circuit Court of Appeals stated that HB 589 was perhaps one of the worst voter suppression laws since Jim Crow. Despite the Supreme Court’s opinion in *Holder* that sufficient progress has been made in promoting equal voting rights, disregarding current discriminatory laws only enables suppression and discrimination to persist.

3. A Retrogressive Approach to Curtailing Voting Discrimination

Not only will discriminatory practices and procedures persist without a renewed coverage formula, a lack of such formula will create a reliance on Section 2 of the Voting Rights Act.

As a result of *Holder*, many have looked to Section 2 of the Voting Rights Act as a promising substitute and viable avenue for challenging discriminatory voting procedures. Section 2 provides both private citizens and the federal government the right to challenge state voting laws. However, Section 2 does not provide such relief for plaintiffs, seeing that the burden of proof that must be met is both significant and costly. Filing such cases requires the plaintiff to meet the burden of proof, time, and expense, which is a serious divergence from Section 5, as it requires the state and locality to bear this burden. Thus, those looking to file Section 2 claims face hundreds of thousands, if not millions, of dollars in legal fees. Alongside

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the significant financial burdens are serious time considerations. As mentioned previously, Section 2 claims address procedures after they have already been passed. As such, when these claims are resolved, many elections may have occurred in which the procedure being challenged was still in effect. Overall, Section 2 is a much more expensive route than Section 5 and does not provide injunctive relief. Thus, creating a “vibrant” Voting Rights Act that can meet the challenges of current discrimination is necessary and critical in protecting minority voters.\textsuperscript{26}

\textbf{B. Modernizing Coverage Formula}

The John Lewis Voting Rights Advancement Act, which as of this writing has been stalled within the Senate, seeks to propose a modernized coverage formula. As such, it proposes the following, as outlined by the Brennan Center for Justice\textsuperscript{27}:

1) States will be covered by preclearance if, within the past 25 years, they or their localities committed at least 10 voting rights violations and at least one violation was by the state, or localities within the state committed at least 15 voting rights violations.
2) Subdivisions in noncovered states will be covered if they committed at least three voting rights violations in the previous 25 years.
3) Voting rights violations are determined on the basis of (1) court judgments under the Constitution or the Voting Rights Act; (2) preclearance denials; and (3) consent decrees, settle-


ments, or agreements undoing voting changes, in which the jurisdiction admitted liability.
4) The Department of Justice (DOJ) decides whether a matter counts as a violation and whether a jurisdiction is covered.
5) A covered jurisdiction will be subject to preclearance for 10 years, after which it will exit coverage as long as it no longer has qualifying violations during the preceding 25 years (the review period is rolling).
6) A jurisdiction may also exit coverage if it has no violations within the prior 10 years.

Such provisions meet the challenge the Court posed to Congress to enact appropriate legislation to remedy voter discrimination. As such, the newly proposed coverage formula does away with “dated” election data that the Court stated the formula in 1965 unconstitutionally argued for. As such, a new coverage formula would allow for voting rights to be further secured and the legislative process to be preemptive rather than retrogressive, which has currently proven to be ineffective at addressing such claims.

While the newly proposed coverage formula works to address voter discrimination, it is important to recognize that due to the legislation being stalled other avenues must also be considered. Therefore, it is also proposed that a constitutional amendment be created that guarantees the right to vote. While the Supreme Court’s jurisprudence has asserted that voting is a fundamental right, it is not explicitly stated in the Constitution as such. Thus, proposing such an amendment would help to create a standard for the Court’s decision as they commonly use a narrow and strict interpretation of the Constitution, which would make it challenging to deny such a right is guaranteed to all citizens.

IV. Conclusion

In conclusion, preclearance under the Voting Rights Act is an inoperable shell of legislation, and without a newly proposed coverage formula, discriminatory practices are likely to persist. Furthermore, addressing voting discrimination is a complex issue involving a considerable analysis of cost and burden. As such, current identification of discrimination is inadequate and addresses such injustices after they have already occurred. The current system of relying on Section 2 of the VRA places serious time costs on the Court’s docket while harming minority voters in the process, as no protection can be offered.

This paper offers prescriptions to strengthen the Voting Rights Act, which is essential in upholding the foundation of democracy. Most importantly, the newly proposed coverage formula meets the conditions of relevancy outlined in Holder. Thus, current voting turnout and associated data would be used to ensure that preclearance is appropriately mandated to states in which discrimination is a significant burden on minority voters. This new formula will provide necessary federal oversight that will incentivize state accountability and compliance with maintaining voting practices and procedures that are not discriminatory in effect.