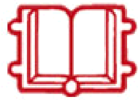 HARVARD POLITICAL REVIEW

Beyond the Sensationalism

By: Matthew Weinstein – May 18, 2013

Soon after the Supreme Court heard oral arguments in *Shelby County v. Holder* last February, NBC Nightly News declared the Court was "considering whether or not to strike down the Voting Rights Act." Other media outlets have portrayed similar gravity about the fate of the VRA. Yet, the real issues at stake in *Shelby* are more narrow and less consequential.

Enacted in 1965 and reauthorized four times since, the VRA is credited with significantly reducing voter discrimination with respect to race. Rather than making a binary decision to uphold or strike down the law, the Court will answer two key questions in *Shelby*: whether discrimination today is pervasive enough to warrant continued federal intrusion into states' rights, and what measures Congress should use to identify likely sources of voter discrimination.

Individual Enforcement Will Remain

The most important part of the VRA is Section 2, which prohibits states, counties, and cities from enacting voting procedures that racially discriminate. The federal government, and specifically the Department of Justice, has power to enforce Section 2 through litigation. The DOJ may ask courts for preliminary injunctions to prevent enactment of discriminatory voting procedures, and private individuals can also bring Section 2 lawsuits. Between 2000 and 2009, the DOJ brought only 26 lawsuits under Section 2, yet the threat of litigation is often enough to pressure jurisdictions into election reform. However, Section 2 is not at issue in *Shelby*, and the DOJ and individuals will retain their power regardless of the Court's decision.

Section 2, combined with the Constitution's 14th (equal protection) and 15th (universal male voting rights) Amendments provides a basic level of federal protection of minority voting rights. Further, political pressures constrain elected state and local officials from enacting discriminatory legislation. Abigail Thernstrom, vice chair of the U.S. Commission on Civil Rights and the author of two books on the VRA, noted this political constraint to the HPR, explaining, "it is politically impossible in America today to come off as racially uncaring." Voter backlash against the Republicans' recent immigration reform proposals is an example of this practical check, something Democrats are quick to highlight.

Is Voter Discrimination Still a Problem?

The Court in *Shelby* will instead analyze the merits of Sections 4 and 5 of the VRA. Section 5 requires that select jurisdictions receive prior DOJ approval, or "preclearance," before enacting any changes to their election procedures. Preclearance provides an early check for the DOJ to ensure that certain jurisdictions do not enact racially

discriminatory voting procedures. Voting changes requiring preclearance include redistricting, moving of polling stations, redrawing precinct lines, purging voters, changing bilingual voting methods, amending candidate qualifications, and altering voter registration procedures. Section 5 was originally intended to be a temporary, five-year remedy. However, since 1965, Congress has extended it four times, most recently until 2031.

Section 5 is widely considered a vast expansion of federal power, necessary to prevent voter discrimination in the 1960s. Nevertheless, preclearance significantly intrudes upon traditional state powers to set voting standards. Such an intrusion may no longer be justified in light of reduced levels of discrimination. Ilya Shapiro, senior fellow of constitutional studies at the Cato Institute, described preclearance to the HPR as "a big blunt intrusion" into state powers that was "outside the constitutional norm and originally justified by … the exceptional conditions on the ground."

In *Shelby*, the Court will determine whether the discriminatory conditions present in 1965 persist to an extent large enough to warrant continued federal intervention in core state affairs. As Kent Greenfield, professor of constitutional law at Boston College, explained to the HPR, "There must be a close fit between the exercise of [federal] power and … the potential violations of constitutional rights." If the Court believes that substantial discrimination still exists, then it will likely uphold federal preclearance, but if it determines that modern discrimination tactics are neither prevalent nor effective enough to significantly impact minorities' constitutional rights, then Section 5 will likely fall.

Supporters of Section 5 argue that, while the most heinous forms of voter discrimination are relics of the past, minority voter suppression still exists. Tactics such as unexpected changes to voting locations, voter ID laws, and the selective enforcement of criminal background checks by registration officials all constitute what Justice Ruth Bader Ginsburg has called "second generation devices." While not as overt as poll taxes or literacy tests, these newer devices may be equally effective in suppressing minority voting. Bernard Simelton, chairman of the Alabama NAACP, explained the importance of voter ID laws to the HPR: "True, we aren't facing the same things we were facing in the '60s," he said. "But nevertheless it still achieves the same result: you don't vote." Supporters fear that if the Court strikes down Section 5, there will be no remaining constitutional check on these tactics.

Opponents of Section 5 claim that race relations have sufficiently improved to render preclearance obsolete and there is no longer any justification for the time and resources that the DOJ uses to process the 20,000 preclearance cases it handles each year. Further, opponents say the relics of voter discrimination that may still exist do not warrant the broad federal intrusion into core state powers. They are skeptical that subtler methods of modern discrimination produce the same undesirable effects as those pre-1965. These skeptics often cite the following statistics: among the 11 former Confederate states, eight have smaller disparities between white and black voter turnout than the national average, and among the eight states nationally that have a higher percentage of black than white voter turnout, four are former Confederate states.

How Should Congress Identify Voter Discrimination?

The Court in *Shelby* will also determine the validity of measures that identify jurisdictions suspected of voter discrimination. Section 4 of the VRA establishes several

tests to identify suspect jurisdictions. These jurisdictions must submit all proposed voting changes for DOJ preclearance. The *Shelby* case focuses on the Section 4 requirement that preclearance applies to any jurisdiction where fewer than half the voting age residents either (a) are registered or (b) turned out to vote. However, instead of using current census data, the VRA uses data from the 1972 presidential election. Section 4 captures nine states, as well as isolated counties and municipalities in seven other states. Thus, a key question in Shelby is whether 1972 voting data is applicable to measuring racial discrimination today and in the future.

Supporters of Section 4 argue that determining the proper identification method is a legislative decision in which the Court should not intervene. In 2006, Congress reauthorized Section 4, and its reliance on 1972 voting data, for 25 additional years by overwhelming bipartisan votes of 98-0 in the Senate and 390-33 in the House. According to Greenfield, these votes show that "Congress has given a clear answer" about whether to update the methodology. Similarly, Mr. Simelton said that in 2006, Congress "had significant evidence that this [method] needs to stay like it is." In effect, supporters argue the Court should respect the separation of powers doctrine and defer to Congress.

However, despite the Congressional vote, Section 4 has become antiquated. Nationwide, voter registration is 59.8 percent. Applying the Section 4 registration requirement to 2010 census data, only Hawaii would be subject to statewide preclearance. Meanwhile, voter registration in the nine states currently subject to preclearance ranges from Louisiana, with the third highest state voter registration of 73.2 percent, to Texas, with the fifth lowest state voter registration of 53.2 percent. Overall among these nine states, voter registration is just 0.4 percent lower than the national average.

Pre-cleared states generally have a smaller gap between white and black registration than the rest of the country. Of the five states that have a higher percentage of blacks than whites registered, three are subject to preclearance. Meanwhile, of the 13 states with the smallest disparity between white and black voter registration, seven are subject to preclearance. Finally, while the gap between white and black registration is 8.2 percent nationwide, the gap is only 3.5 percent among the nine pre-cleared states.

Congress would never consider basing environmental or fiscal policy on 40-year-old data. Opponents of Section 4 say that federal policies on voting discrimination are no different.

Possible Court Outcomes
The Court largely has three options in deciding *Shelby*. First, it may find that voter discrimination based on race remains pervasive and that Section 4 provides an appropriate method to identify offending jurisdictions. This ruling would simply maintain the status quo. Second, it may find that discrimination is no longer prevalent enough to warrant federal preclearance. Under this ruling, individuals and the DOJ would retain the power to fight voter discrimination through Section 2 litigation, but the DOJ could not pre-clear states' voting changes. Third, the Court may reason that voter discrimination is still significant enough to justify federal intervention, but that the current identification mechanism is outdated. This ruling would require Congress to utilize more current data to identify jurisdictions that discriminate.

Unfortunately, the public's understanding of the *Shelby* case has fallen victim to media sensationalism. Like many cases that reach the Court, *Shelby* is more nuanced than a sound bite or newspaper headline. Contrary to general perceptions, a decision to strike down Sections 4 and 5, would not be an invitation to reestablish Jim Crow laws. Instead,

the Court would recognize the tremendous progress the country has made in reducing voter discrimination and call on Congress to develop a relevant model, with current data, to continue this progress into the future. America's ignominious history of racism and its current preoccupation with political correctness make it extremely difficult to debate any deficiencies of the VRA in a rational manner. However, both sides of this debate should view *Shelby* not a referendum on the VRA, but as an opportunity to determine the most effective ways to continue improving race relations in America.