ABSTRACT

The Voting Rights Act and *Shelby County v. Holder*:
An Examination of Federalism and Reconstruction

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The Fifteenth Amendment ratified during Reconstruction ensured that no man would be denied equal access to the ballot based on the color of his skin. Although it took nearly a century to realize the full mandates of Reconstruction, the Voting Rights Act of 1965 put the nation towards a path of a great experiment—multiracial democracy. The Act signified a federal government committed to an inclusive democracy. Intact for forty-eight years, the VRA made impressive gains in combatting laws and procedures that sought to disenfranchise or dilute the minority vote with incredible variety and persistence. In 2013, the United States Supreme Court ruled in the case of *Shelby County v. Holder* the VRA's coverage formula to be unconstitutional. This thesis evaluates the problems with the Court's ruling and argues for an intact, undiminished VRA. The first chapter describes the history and inception of the VRA, as well as the pertinent provisions of the Act and majority and dissenting opinions in *Shelby County*. The second chapter explores the relationship of federalism to the Reconstruction Amendments and argues that deference is owed to Congress in enacting this legislation. The third chapter explores two constitutional standards the Court could have observed when determining the Act's constitutionality. Finally, the fourth chapter seeks to address voting barriers enacted post-*Shelby.* Ultimately, this thesis argues that in light of the current conditions, Congress was right to reauthorize the VRA in 2006 based on a pattern of ongoing discrimination that remained concentrated in the areas covered by the coverage formula. The evidence shows that the coverage formula captures those areas with the most voting discrimination and is as well tailored as a nationwide regulatory scheme could be.

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The Voting Rights Act and *Shelby County v. Holder*: An Examination of Federalism and Reconstruction

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TABLE OF CONTENTS

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She is the best mother a son could ever ask for.

CHAPTER ONE

The Origins, Provisions, and Debate Surrounding the Voting Rights Act and *Shelby County v. Holder*

> "The vote is the most powerful instrument ever devised by man for breaking down injustice."[1]
>
> –Lyndon Baines Johnson

The Origins of the Voting Rights Act

No less than fifty-five years ago, civil rights activists pressed forward with a series of nonviolent protests to pressure the federal government into securing their fundamental right to vote. Although a series of civil rights acts were recently signed into law, southern state legislatures still disenfranchised entire swaths of their African American population. This mass resistance to voting rights resulted in persistent nonviolent direct action by activists of the Dallas County Voters League, Southern Christian Leadership Conference, and Student Nonviolent Coordinating Committee.[2] Led by future Congressman John Lewis of SNCC, the march that would be known as Bloody

[1] Lyndon Baines Johnson, "Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act," (speech, Washington DC, Aug. 6, 1965), The Capitol Rotunda.

[2] "We Shall Overcome --Selma-to-Montgomery March," National Parks Service (U.S. Department of the Interior, n.d.), (https://www.nps.gov/nr/travel/civilrights/al4.htm).

Sunday intended to bring attention to the abridgement of their constitutional rights.[3] The inevitable clash between the some six-hundred civil rights marchers and local and state authorities came to a pinnacle of confrontation on March 7th, 1965.[4] Originally, these peaceful protesters embarked on a march that would take them from Selma to Montgomery, Alabama.[5] As they crossed the Edmund Pettus Bridge, chaos ensued. They were clubbed by police batons and sprayed with tear gas. Alabama State Police charged into the crowd on horseback. Dallas County Sheriff Jim Clark and his deputies used barbed-wire bullwhips.[6] Lewis was beaten within an inch of his life and still wears the scars from that day. These images were broadcast around the country and the international community. They shocked the nation and spurred support for the voting rights campaign.

The White House in particular had seen enough. President Lyndon Baines Johnson demanded that Attorney General Nicholas Katzenbach and others in the Department of Justice craft the "the goddamndest, toughest voting rights act that you can."[7] Although the Civil Rights Act of 1964 had some voting provisions, it simply was not enough to combat the rampant, widespread, invidious forms of discrimination that

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[3] Quotation in Ibid.

[4] Ibid.

[5] Ibid.

[6] Carol Anderson, *One Person, No Vote: How Voter Suppression Is Destroying Our Democracy* (New York: Bloomsbury Publishing USA, 2018), 21.

[7] Ibid.

persisted in the South. Katzenbach followed suit on Johnson's demands and devised a Voting Rights Act that, "targeted southern jurisdictions that had a tradition of discrimination against African Americans."[8] Congressional hearings noted the ineffectiveness of prior legislation such as the Civil Rights Act of 1957. The House Committee on the Judiciary stated:

> The litigation in Dallas County [Alabama] took more than four years to open the door to the exercise of constitutional rights conferred almost a century ago. The problem on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today.[9]

The promise of the 15th Amendment, which prohibited the federal government and the states from abridging the right to vote on account of race, was finally fully realized nearly one-hundred years later as the Voting Rights Act of 1965 passed both the House of Representatives and the Senate. It was then signed into law by President Johnson on August 6th, 1965.

Carol Anderson, the Charles H. Candler Professor and Chair of African American Studies at Emory University posits the law as a, "seismic shift in thought, action, and execution for the U.S. government when compared with the Civil Rights Act of 1957 and its equally enfeebled companion legislation of 1960."[10] She continues, stating that the, "…race-neutral machinations were over; the years of relying on long, drawn-out, costly

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[8] Ibid

[9] Quoted in Ibid.

[10] Ibid.

and often ineffective litigation to address the disfranchisement changed in 1965.[11] The federal government now safeguarded African American voters in the old Confederacy for the first time since Reconstruction.[12] The Voting Rights Act targeted jurisdictions with the most flagrant history of voting discrimination and ensured that any voting change they wished to make be approved by either the Department of Justice or the United States District Court for the District of Columbia. This process under Section 5 of the VRA was otherwise known as "preclearance."[13] Now, the nation was finally on a path towards full realization of a great experiment—democratic representation for every citizen, regardless of race.

The ensuing sections of this chapter illustrates the provisions of the VRA in 1965 and its subsequent reauthorizations in 1970, 1975, 1982, and 2006. Then I will articulate the opposing views put forth regarding the constitutionality of the Act in the 2013 Supreme Court case, *Shelby County v. Holder*. I will highlight the arguments in the majority opinion, authored by Chief Justice John Roberts, and the dissenting opinion, authored by Justice Ruth Bader Ginsburg.

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[11] Ibid.

[12] The Reconstruction Amendments of the Constitution include the Thirteenth, Fourteenth, and Fifteenth Amendments. For the purpose of this thesis, the "Reconstruction Amendments" refers only to the Fourteenth and Fifteenth Amendments.

[13] Carol Anderson, *One Person, No Vote: How Voter Suppression Is Destroying Our Democracy*, 22.

The Provisions of the VRA, 1965-2006

For the purpose of clarity and context, this section will discuss the pertinent provisions of the 1965 Voting Rights Act[14] and its subsequent reauthorizations before delving into the majority and dissenting opinions presented in the 2013 Supreme Court case of *Shelby County v. Holder*.[15] Provisions considered will include Section 2, Section 4, and Section 5—all relevant sections of the VRA with regard to *Shelby County.*

Section 2: 1965 Enactment and 1982 Reauthorization

Section 2 of the 1965 VRA stated that "no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[16] This section was a general provision within the law. In other words, the entirety of the U.S. was covered under Section 2, which was essentially a reiteration of the Fifteenth Amendment. Section 2 is also permanent and has no expiration date.[17] Furthermore, during the 1982 reauthorization of the VRA, Congress amended Section 2 slightly, now that it had seventeen years of litigation history to observe. In 1980, the Supreme Court ruled that Section 2 was a restatement of the

[14] Voting Rights Act. Public Law 89–110. U.S. Statutes at Large 79 Stat. 437, codified at U.S. Code 42 U.S.C. 1973(a).

[15] *Shelby County, Alabama, v. Holder, Attorney General, et al.*, 570 U.S. ___, (2013).

[16] 42 U.S.C. § 1973(a) 10101.

[17] "Section 2 Of The Voting Rights Act." The United States Department of Justice, September 14, 2018. https://www.justice.gov/crt/section-2-voting-rights-act#sec2.

protection afforded by the Fifteenth Amendment in the case of *Mobile v. Bolden*.[18] Under the Court's standard, plaintiffs had to prove that the voting law at hand had an intentionally discriminatory purpose. During the 1982 reauthorization, Congress recognized this standard and amended it so that a plaintiff could establish a violation of Section 2 under what is known as a "results test."[19] Under this new standard set by Congress, plaintiffs could assert a violation of Section 2 if a standard, practice, or procedure, had a discriminatory effect irrespective of whether the law was enacted with an invidious purpose. In practice, most of the cases under Section 2 involve challenges regarding at-large election schemes although the section applies a nationwide prohibition to any "standard, practice, or procedure…to deny or abridge the right of any citizen of the United States to vote on account of race or color."[20]

Section 4 (a), "Bailout" Clause: 1982 Reauthorization

During the 1982 reauthorization, Congress also liberalized the "bailout" procedure of the VRA in Section 4 (a). A covered jurisdiction could now opt out of the Section 4-Section 5 preclearance scheme by proving to the U.S. District Court of the District of Columbia that they have met the following conditions for the previous ten years:

[18] Ibid.

[19] Ibid.

[20] 42 U.S.C. § 1973(a) 10101.

> (1) It has not used a discriminatory test or device for voter registration;
> (2) No court has found it to have denied or abridged voting rights;
> (3) It had complied with the preclearance requirement of Section 5 by submitting all election-law changes for federal review;
> (4) There has been no federal objection to any election law change submitted under Section 5;
> (5) No federal examiners have been assigned to the jurisdiction;
> (6) It has fostered political participation by minority citizens; and
> (7) It can present evidence of minority registration, voting and other political participation.[21]

Moreover, as long as the submitting jurisdiction was not involved in ongoing litigation, it was free to apply for termination of coverage. Congress also allowed covered jurisdictions to submit for bailout irrespective of whether their parent state was covered. Since the 1982 reauthorization to the 2013 *Shelby County* decision, forty-two jurisdictions had "bailed out" of Section 4 (b) coverage.[22]

Section 4 (b) Coverage Scheme: 1965 Enactment, 1970 and 1975 Revisions

If a jurisdiction is subject to the Section 4 (b) coverage formula, they are bound by the administrative enforcement provisions, namely Section 5, of the Act. The 1965 enactment of Section 4 (b) is as follows:

> The provisions…shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.[23]

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[21] 42 U.S.C. § 1973aa-1a.

[22] "Section 4 Of The Voting Rights Act." 2017. The United States Department of Justice. December 21. https://www.justice.gov/crt/section-4-voting-rights-act.

[23] 52 U.S.C. § 10303(b).

The subsequent reauthorizations of 1970 and 1975 utilized the identical test but used the presidential elections of 1968 and 1972 as the date of reference to determine if there was a test or device, levels of voter registration, and electoral participation.[24] Additionally, Congress deemed a device to also include jurisdictions where ballots were printed in English only where at least 5 percent of the voting-age citizens spoke a single language other than English.[25]

In practice, the original formula covered the following states in their entirety: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. In addition, certain political subdivisions in four other states (Arizona, Hawaii, Idaho, and North Carolina) were covered.[26] Section 5's enforcement provision targeted what Congress believed to be those areas of the nation that had engaged in the most voter discrimination and therefore those with the most potential for ongoing discrimination.

In 1982, Congress extended Section 5 for twenty-five years but adopted no new Section 4 (b) coverage formula.[27] The coverage formula from the 1975 reauthorization is what remained and what was at hand during *Shelby County.* The following picture illustrates the states and counties covered by Section 4 (b) over the duration of the VRA from 1965-2013.

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[24] "Section 4 Of The Voting Rights Act." 2017. The United States Department of Justice. December 21. https://www.justice.gov/crt/section-4-voting-rights-act.

[25] Ibid.

[26] Ibid.

[27] Ibid.

Jurisdictions covered by the VRA (1965-2013)[28]

Covered since 1965 (Dark Purple)

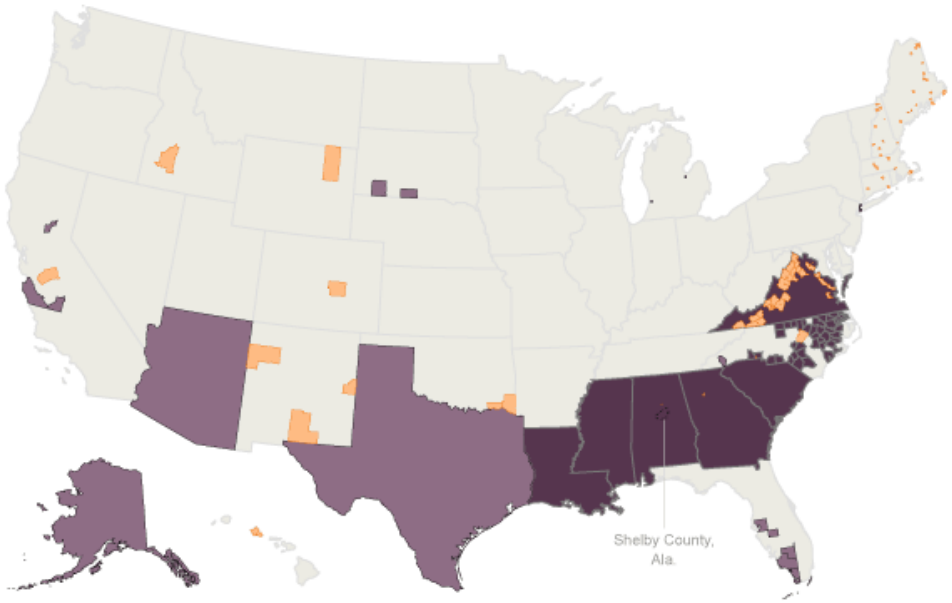
Coverage was applied to places that had employed a test or device or had turnout and electoral participation rates below 50 percent of the voting-age population in November 1964.

Added in 1970 or 1975 (Light Purple)

On renewal, the law used the identical test of its 1965 counterpart but used the presidential elections of 1968 and 1972, respectively, as the date of reference. Congress also defined a "device" as English-only ballots in jurisdictions where at least 5 percent of the voting-age citizens spoke a single language other than English.

Bailed out (Tan)

Places that had been free of any voting discrimination for ten years could be released from coverage by a court.



[28] "The Formula Behind the Voting Rights Act." *The New York Times*. June 22, 2013. https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/23/us/voting-rights-act-map.html.

Section 5 Preclearance: 1965 Enactment and 2006 Revision

Perhaps the most aggressive and important provision of the VRA is Section 5. The Section 5 provision was enacted with the primary purpose to stop election practices or procedures before they encroached on Fifteenth Amendment rights. This provision states the following:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in Section 4 (a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the *purpose and will not have the effect* of denying or abridging the right to vote on account of race or color…[29]

This provision stipulates that any covered state or political subdivision must submit its respective electoral change to either the Justice Department for an administrative review, or the U.S. District Court of the District of Columbia for a judicial review.[30] The Congressional Research Service also asserts that Section 5 not only necessitates federal preclearance for changes in election law, but also laws that set up "electoral systems as well."[31] For instance, this gives the Justice Department agency in determining whether a city or town's electoral system is racially discriminatory. Electoral systems can include at-large and district-by-district voting. In practice, the Justice

[29] 42 U.S.C. § 1973c.

[30] Ibid.

[31] Garrine P. Laney, *The Voting Rights Act of 1965, As Amended: Its History and Current Issues*. *The Voting Rights Act of 1965, As Amended: Its History and Current Issues* (Congressional Research Service, 2008), 10.

Department has objected to "methods of election, urban annexations, and electoral redistricting."[32] The proposed changes were deemed objectionable by the Justice Department because they would have resulted in, "abridging or 'diluting' the voting power of blacks, Hispanics or other protected minority voters."[33]

On the judicial side, the U.S. Supreme Court interpreted the "discriminatory effect" language of Section 5 in the case of *Beer v. U.S*. (1976). The Court held that for a voting change to have a discriminatory effect it must result in "retrogression."[34] Under this standard, a procedural voting change that results in discrimination, but does not result in more discrimination prior to the electoral change is permissible. Furthermore, the Court strengthened this notion of "retrogression" in the case of *Reno v. Bossier Parish* (2000) by interpreting that any holding for a voting change to have a "discriminatory purpose" under Section 5, the change must have been implemented for a retrogressive purpose.[35] Therefore, a voting change intended to discriminate against a protected minority was tolerated under Section 5 insofar as the change did not surpass existing discrimination. During the 2006 reauthorization, Congress overturned these cases that endorsed the retrogression standard.[36]

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[32] Ibid.

[33] Ibid.

[34] *Beer v. United States*, 425 U.S., 130 (1976).

[35] *Reno, Attorney General v. Bossier Parish School Board*, 528 U.S., 320 (1980).

[36] "Section 5 Of The Voting Rights Act." The United States Department of Justice, December 4, 2017. https://www.justice.gov/crt/about-section-5-voting-rights-act.

Congressional Findings: Extending Section 4- Section 5 Coverage, 2006

Congressional findings during the 2006 reauthorization process led Congress to conclude that the provisions of the Act proved to be immeasurably helpful in enforcing the dictates of the Fifteenth Amendment; however, they observed that four decades of the VRA was not enough to combat one-hundred years of voting discrimination. Congress described that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."[37] They asserted that present-day evidence of ongoing discrimination could be found in the Congressional Record that elaborated on the history of Section 2 and Section 5 litigation filed to ensure the free exercise of minority voter participation and prevent dilutive measures meant to hamper the minority vote. Congress emphasized that a discontinued VRA would jeopardize the significant gains made by minorities over the last forty years. Lastly, Congress eliminated the provision for federal examiners and renewed the special provisions of the Act for another twenty-five years.[38]

Shelby County v. Holder

On February 27, 2013, the Supreme Court heard arguments between Bert W. Rein, representing Shelby County, Alabama, and Solicitor General Donald B. Verrilli, Jr., representing the federal government of the United States. The case heard, *Shelby County v. Holder*, would determine the constitutionality of Section 4 and Section 5 of the Voting Rights Act. Although it was just one case on a slate of dozens for the 2012-2013 term, it

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[37] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. Public Law 109-246. U.S. Statutes at Large 120 Stat. 577, codified at U.S. Code 5 U.S.C. (2006)

[38] Ibid.

represented much more than that. The debate at hand pitted the issues of federalism and voting rights—and by extension, race—against each other. It served as a microcosm of an ongoing debate of what was and is the federal government's role in combatting racial discrimination, the role of federalism in shaping this debate, and how the promises of the Reconstruction Amendments fit into this examination. The majority and dissenting opinions lay out these opposing arguments.

Majority Opinion

Chief Justice Roberts, writing for the court's majority, voiced grave concern over the coverage formula of Section 4. He articulated in multiple instances that as, "the greater burdens imposed by Section 5 the more accurate the coverage scheme must be."[39] Justice Roberts noted the potency of the VRA when it was enacted in order to combat an "extraordinary problem."[40] He singled out two issues with the Act: one, that Section 4 of the Act applied to only some States, and two, Section 5 required that States get federal permission before enacting any voting laws.[41] He asserted that these two stipulations in the law violate the equal sovereignty doctrine and "drastically depart from basic principles of federalism."[42] The robust, remedial nature of this law was required due to

[39] *Shelby County* (Roberts, J., for the Court), 1.

[40] Ibid.

[41] Ibid.

[42] Ibid.

the persistent, diverse forms of voting discrimination; however, he asserted that this coverage scheme is still in effect and unjustifiably so.

Justice Roberts opposed the coverage formula in Section 4 that dictated which states were to undergo federal preclearance via Section 5. He stated that the, "coverage formula is based off of 40-year-old facts that have no logical relation to the present day."[43] At the crux of this argument are two primary concerns. Chiefly, the racial gap in voter registration and voter turnout has significantly decreased or even closed in the majority of the covered states.[44] Second, the use of tests and devices, such as literacy and knowledge tests, poll taxes, and the like have been eradicated from the covered states for decades. Justice Roberts did not have a presumption of good faith in subsequent Congressional reauthorizations since 1965, but rather was alarmed that the Act had been amended to, "prohibit more conduct than before."[45] For instance, he noted the 2006 reauthorization now forbade any, "…voting change that had 'any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, 'to elect their preferred candidates of choice.'"[46] In this vein, Roberts viewed each reauthorization, especially 2006's, not as a vehicle of remedial justice, but as a coverage scheme that only exacerbated the principles of federalism and

[43] *Shelby County* (Roberts, J., for the Court), 22.

[44] *Shelby County* (Roberts, J., for the Court), 2.

[45] *Shelby County* (Roberts, J., for the Court), 5.

[46] *Shelby County* (Roberts, J., for the Court), 6.

complicated the equal sovereignty of the States. In his view, if the VRA were to continue the current burdens on jurisdictions must be justified by current needs. He argued that if Congress were to continue this Act, it must, "identify those jurisdictions to be singled out that makes sense in light of current conditions."[47] In essence, if Congress wishes to keep a robust, fully intact VRA, its Section 4 (b) coverage formula must reflect a present-day United States, not one of 1972. In doing so, the majority declared Section 4 (b) coverage unconstitutional but issued no holding on the constitutionality of Section 5.

Dissenting Opinion

Justice Ruth Bader Ginsburg, writing for the dissent, laid out two primary reasons for an undiminished VRA. First, she asserted that continuance facilitates impressive gains over the last forty years, and it would guard against "backsliding."[48] She noted the variety and persistence of voting discrimination prior to the VRA. It is for this very reason that Section 5's preclearance scheme is necessary.[49] The jurisdictions covered are the most egregious abusers of minority voting rights. Second, voting suits are some of the most difficult to prepare. Without the Section 5 preclearance requirement it would be incumbent on minority citizens to have the manpower and financial means to bring suit. Section 5 removes this burden.[50]

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[47] *Shelby County* (Roberts, J., for the Court), 20.

[48] *Shelby County* (Ginsburg, J., dissenting), 1.

[49] *Shelby County* (Ginsburg, J., dissenting), 2.

[50] *Shelby County* (Ginsburg, J., dissenting), 3.

Furthermore, she noted that although gains have been made due to the Voting Rights Act, not all vestiges of discrimination have been erased. Present day, there are second generation barriers to the equal access of the ballot such as at-large election schemes and discriminatory annexations. She argued that although the times of poll taxes, literacy tests, or outright intimidation are now vanquished, more discrete measures are being taken to eliminate equal access to the ballot. For instance, she stated that the congressional record makes pronounced judgments that there are "countless examples of flagrant racial discrimination since the last reauthorization."[51] Moreover, she cited, that intentional racial discrimination remains a serious problem in covered jurisdictions. Due to this continuing, pervasive form of discrimination it is well within Congress's authority to remedy these constitutional abridgements.[52] Ginsburg conveys that, "the stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States."[53] She then continues this vein of thought by saying, "we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end."[54]

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[51] *Shelby County* (Ginsburg, J., dissenting), 7.

[52] *Shelby County* (Ginsburg, J., dissenting), 8-9.

[53] *Shelby County* (Ginsburg, J., dissenting), 10.

[54] Ibid.

Practically, she recommends that a rational basis test[55] should be used for the statute at hand.

Furthermore, Ginsburg described that Congress is in a catch twenty-two. If the statute is working, then consequently there is less discrimination.[56] Opponents could argue not to renew it. If it was not successful, there would be plenty of evidence of discrimination and thus no reason to renew it. She infers that this qualm can be resolved based on two assertions. First, she points to the number of discriminatory objections made by the Justice Department between 1982-2006 which amassed to over seven hundred.[57] These objections were based on the fact that the proposed changes intended on keeping minority voters from fully participating in the political process. Second, she deems that Congress, not the Court, is the institution best equipped to handle the questions posed with regard to racial discrimination in voting.[58]

In sum, Justice Ginsburg's dissent argued that deference should be given to Congress for reauthorizing the VRA as it has power to enforce both the Fourteenth and Fifteenth Amendments through a vehicle like this legislation. She remarked that Congress is empowered to target state abuses, even if this power is not unlimited.

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[55] Under the rational basis standard, a court must determine whether the law at hand is rationally related to a legitimate government interest, and under this standard of review, the challenged statute is "presumptively" constitutional.

[56] *Shelby County* (Ginsburg, J., dissenting), 2.

[57] *Shelby County* (Ginsburg, J., dissenting), 13.

[58] Ibid.

Conclusion

In this next chapter, I will examine the historical and legal foundation for Roberts's and Ginsburg's analyses. Namely, I will challenge Roberts's notion of federalism and posit that the events of Reconstruction adjusted the federalism calculus. This then empowered Congress to enact remedial legislation such as the VRA and in this instance, deference should be owed to them by the Court.

CHAPTER TWO

Federalism, Reconstruction, and Congressional Deference

> "The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from the basic principles of federalism. And §4 of the Act applied that requirement only to some States—an equally drastic departure from the basic principles of federalism."
>
> –Chief Justice John Roberts, majority opinion in *Shelby County v. Holder*

> "When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height."[1]
>
> –Justice Ruth Bader Ginsburg, dissenting opinion in *Shelby County v. Holder*

In the above statements from the majority and dissenting opinions from the landmark Supreme Court case of *Shelby County v. Holder*, Chief Justice Roberts and Justice Ginsburg provide two distinct views of the constitutionality of the VRA: one advocating that the Act departs from the principles of federalism and the other sponsoring the institutional deference that Congress is owed. This chapter explores the underpinnings of Roberts's majority argument and Ginsburg's dissent. First, when Roberts asserts that the Act "imposes substantial federalism costs" why does he not explore the substantive nature of these costs? Is this but a truism? At the very least, Roberts must be specific in identifying these costs and preferably weigh them with the benefits of combatting racial discrimination in voting. Next, it is undeniable that the federalism calculus readjusted the

[1] *Shelby County* (Ginsburg, J., dissenting), 8.

relationship between the Tenth Amendment and the Reconstruction Amendments[2]—in the context of this thesis, specifically the Fifteenth Amendment—in the aftermath of the Civil War. The Court needs to address the new dynamic between the two and how it relates to the principles of federalism and racial anti-discrimination in voting, both of which are endorsed by the Constitution. Lastly, Ginsburg rightly asserts that there is an institutional competence that the legislative branch possesses when dealing with inherently political and democratic questions such as voting discrimination. Although these legislative judgments do not warrant a blank check of deference, she reaches a viable conclusion that in this case, the legislature—not the judiciary—holds an apt role to make these judgments.

Roberts's Argument: Defining and Clarifying Federalism Costs

Roberts begins his inquiry into the constitutionality of Section 5 of the VRA by explaining that it "imposes federalism costs and differentiates between the States, despite our historic tradition that all States enjoy equal sovereignty."[3] Likewise, Roberts frames Section 4 in these terms when he reiterates the Court's opinion in *Northwest Austin*: "the fundamental principle of equal sovereignty remains highly pertinent in assessing

[2] The following provides the relevant portions of the Fourteenth and Fifteenth Amendments needed to comprehend the context of the argument. Attention will be briefly paid to Section 1 of the Fourteenth Amendments, in particular the portion that forbids a state to "deny to any person within its jurisdiction the equal protection of the laws." Close attention will be paid to the entirety of the Fifteenth Amendment which is as follows: "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." Lastly, Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both state that "the Congress shall have the power to enforce this article by appropriate legislation." These sections are both known as the "enforcement clauses."

[3] *Shelby County* (Roberts, J., for the Court), 1.

subsequent disparate treatment of States."[4] Although Roberts exercises valid concerns when discussing these costs, he must frame them in explicit terms. Does Roberts mean that the Act is too broadly sweeping? Did the Section 4-Section 5 tandem scheme set Congress as the perpetuating overseer of the States? Or is he referring to Judge Stephen Williams's dissent in the D.C. Circuit Court's decision in *Shelby County* insofar that "in the vast majority of cases…. the overall effect of §5 is merely a delay in the implementation of a perfectly proper law."[5] Or perhaps Roberts is referring to his prior concerns in *Northwest Austin* which are as follows:

> Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by the authorities in Washington D.C. The preclearance requirements applies broadly, and in particular to every political subdivision in a covered State, no matter how small.[6]

What is puzzling is that Roberts reiterates concerns of federalism costs, but never *weighs* these costs. A viable concern that he does voice is that the VRA coverage scheme under Section 4 (b) has a disparate geographic coverage on the states. He is correct to question this and to ponder whether this statutory scheme violates the basic principles of equal sovereignty amongst the states; however, it seems that his analysis is too simplistic and does not posit how and if the Court should weigh these federalism costs against the

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[4] *Shelby County* (Roberts, J., for the Court), 11.

[5] *Shelby County v. Holder, Attorney General*, 679 F.3d 848, 886 (D.C. Circuit 2012) (Williams, J., dissenting).

[6] *Northwest Austin Municipal Utility District Number One v. Eric H. Holder, Jr., Attorney General, et al.*, 557 US ___, (2009).

purported benefits of the VRA. The question and reasoning that follows should not be that since there are federalism costs exacerbated by the coverage, Section 4 must be unconstitutional. Rather, the question that needs to be answered is how the Court should weigh these costs. For instance, Roberts stresses that "outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing their legislative objectives." He goes on to state that the Tenth Amendment specifically reserves these powers not granted to the federal government to the States.[7] Roberts then cites *Bond v. U.S.* by clarifying that this "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States."[8] Albeit true assertions, the logic employed seems to allege the following argument: that the coverage and preclearance scheme has *always* imposed substantial federalism costs.[9] A rational assumption of this reasoning is that the VRA limits local autonomy and presumptively imposes federalism costs that make it unconstitutional.[10]

It is no secret that the Section 4-Section 5 statutory scheme requires covered jurisdictions to submit changes of their local election procedures to the Department of Justice or the D.C. District Court, no matter how miniscule. This process requires that any election procedure undergo what is known as "preclearance." The change is submitted to the federal authorities, reviewed for any potential discriminatory purpose or

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[7] *Shelby County* (Roberts, J., for the Court), 9.

[8] Ibid.

[9] Guy-Uriel E. Charles and Luis Fuentes-Rohwer, "Race, Federalism, and Voting Rights," *University of Chicago Legal Forum* (January 1, 2015): 127.

[10] Ibid.

effect and, then, either cleared or rejected, with a "temporary delay of less than sixty days before the covered jurisdiction can implement its law."[11] The preclearance requirement compels the disclosure and is an "information-eliciting" process.[12] If the Court stated that the federal government cannot compel the states to provide information on how their electoral changes would impact racial and ethnic minorities, then that would have been a rational way for them to address the issue of federalism rather than just waving an umbrella term of "substantial federalism costs" without speaking to the specifics of these costs or weighing the benefits. By doing this, the Court would encounter that both federalism and racial non-discrimination are both constitutional commands. And when these two encounter each other head on—such as in a statutory scheme like the VRA—they can then answer which one trumps the other, or if they can be balanced.

Addressing the Tension between the Tenth Amendment and Reconstruction Amendments

What is perhaps the most concerning aspect of Roberts's opinion, is that he does not address the inherent tension between the Tenth Amendment and the Reconstruction Amendments. In the context of voting rights cases, both the equal protection clause of the Fourteenth Amendment and the totality of the Fifteenth Amendment have been applied. Prior to *Shelby County v. Holder*, the VRA's constitutionality was heard a number of times before the Court, one of the first being *Katzenbach v. Morgan* (1966*).*[13] The heart

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[11] Charles and Fuentes-Rohwer, "Race, Federalism, and Voting Rights," 128.

[12] Ibid.

[13] *Nicholas deB. Katzenbach, Attorney General et al. v. Morgan, et ux.,* 384 U.S. 641 (1966).

of the *Katzenbach* ruling stated that it authorized Congress with permission from the Fourteenth Amendment to rein in the states and limit federalism when necessary to guard against racial discrimination in the realm of voting.[14] This is not to say that the States do not retain any power whatsoever with regard to determining voting qualifications. The Tenth Amendment explicitly affirms "the powers not delegated to the United States…are reserved to the States respectively, or to the people."[15] Additionally, Section Four of Article One of the Constitution conferred to the states the explicit power to administer and conduct elections.[16] They cannot do so, however, in a manner that runs contrary to dictates of the Fourteenth and Fifteenth Amendments of the Constitution. It is imperative that Roberts address this tension between the Tenth and Fourteenth and Fifteenth Amendments.

In *Younger v. Harris* (1971), the Court made an observation on the nature of federalism that is germane to this case. The Court explained that federalism is:

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[17]

Charles and Fuentes-Rohwer say it best in the article "Race, Federalism, and Voting Rights" published by the University of Chicago Legal Forum. They argue that

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[14] Charles and Fuentes-Rohwer, "Race, Federalism, and Voting Rights," 128.

[15] U.S. Constitution, amend. 10.

[16] U.S. Constitution, art. I, § 4.

[17] *Younger v. Harris*, 401 US 37 (1971).

"federalism does not mean that courts must blindly defer to the states, nor does it place control of all-important policy questions in the national government. Power is centered in neither sphere but balanced appropriately."[18] In essence, federalism is a pendulum. Sometimes it swings too far in one direction, to the states, or in the other, to the federal government. Therefore, a consideration must be made by Roberts. Did the Reconstruction Amendments reallocate this federalism balance and tip it one direction or the other?

It is not implausible to suggest that Reconstruction reset the federalism calculus. The relationship between the states and the federal government was altered in the aftermath of the Civil War in 1865 and the passage of the Reconstruction Amendments shortly thereafter. Despite the Court almost immediately minimizing these amendments in the *Slaughterhouse Cases*[19] (1873) and *Plessy v. Ferguson*[20] (1896), judicial history of the last seven-plus decades has shown that the Reconstruction Amendments have been interpreted broadly and applied to circumstances more than just to freed slaves. Although Congressional consensus at the time of the passage of the amendments is unknown, the framer of the first section of the Fourteenth Amendment, Congressman John A. Bingham of Ohio, intended that the amendment also nationalize the Federal Bill of Rights by making it binding upon the states.[21] Once this history is considered, Roberts and the

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[18] Charles and Fuentes-Rohwer, "Race, Federalism, and Voting Rights," 134.

[19] *Slaughterhouse Cases*, 83 US 36 (1873).

[20] *Plessy v. Ferguson*, 163 US 537 (1896).

[21] "Teaching with Documents" The National Archives and Records Administration and the National Council for the Social Studies, 1998, 40.

majority can properly determine the VRA's constitutionality in accordance with the changing dynamic between the federal and state governments.

What is puzzling in Roberts's opinion is that this consideration is not made. Roberts cites the Tenth Amendment as his reasoning to deem the coverage formula unconstitutional.[22] The Tenth Amendment should not be treated as a reverse Uno card, securing victory or legitimacy in this argument. Instead, he should have weighed the aspects of the Fourteenth and Fifteenth Amendments, especially the latter, in coming to a conclusion of whether the VRA's statutory scheme is constitutional. By not doing this, he implicitly infers that the Reconstruction Amendments should not change our understanding of the Tenth Amendment. If the Fourteenth and Fifteenth Amendments did not confer power to the federal government in constitutionally permissible instances, then why were these amendments ratified in the first place? Does Section Five of the Fourteenth Amendment and Section Two of the Fifteenth Amendment not allow Congress to make such judgments? At the very least, the Court must argue that the Fourteenth and Fifteenth Amendments did not alter the voting landscape, rather than simply "trot out the Tenth Amendment as a trump card."[23] In the context of voting legislation, the Tenth Amendment must be discussed in concert with the Reconstruction Amendments. Then, and only then, can the Court come to a conclusion of whether these amendments play a role in our understanding of federalism with regard to voting discrimination. The Court has to address this issue or risk appearing foolish by

[22] *Shelby County* (Roberts, J., for the Court), 10.

[23] Charles and Luis Fuentes-Rohwer, "Race, Federalism, and Voting Rights," 136.

downplaying the importance of the history of the Civil War and Reconstruction on our constitutional fabric.

In the infamous *Slaughterhouse Cases* (1873), the majority, led by Justice Samuel Miller, held that the privileges and immunities clause of the Fourteenth Amendment concerned the relationships associated with national citizenship and not state citizenship. The majority voiced that the intention of the Fourteenth Amendment was not to, "transfer the security and protection of all the civil rights… from the States to the federal government."[24] They also rhetorically asked "where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?"[25] Conversely, Fields's dissent viewed the newly added amendments in a different light. He claimed in the following that:

> It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection and was so intended by the Congress which framed and the States which adopted it.[26]

Roberts's opinion seems to adhere to the former's understanding of Reconstruction rather than the latter.

Nevertheless, even a narrow reading of the Reconstruction Amendments in conversation with the *Slaughterhouse Cases* would buttress Congressional authority. Miller's majority opinion endorses a narrow reading of the Reconstruction Amendments.

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[24] *Slaughterhouse Cases*, (Miller, J., for the Court).

[25] Ibid.

[26] *Slaughterhouse Cases*, (Fields, J., dissenting).

Evidenced in the aforementioned statements, Miller was hesitant to see the Reconstruction Amendments as giving Congress broad discretionary powers for all forms of discrimination and all state regulations of rights. In this vein, he implicitly endorses congressional authority to prevent and remedy racial discrimination. After all, the plaintiffs in the case were Anglo-American butchers who equated a monopolized slaughterhouse operation to involuntary servitude.[27] Even a narrow reading of Congressional enforcement of the Reconstruction Amendments limits the scope of legislative powers to cover only the bounds of racially remedial or preventative statutes and thus leaves federalism intact. This is precisely what the VRA accomplishes. Authorized by the explicit protections of the Fifteenth Amendment, it is well within Congress's purview to regulate and propose legislation that wades into the realm of racial discrimination in voting.

Congress's Institutional Competence and Deference Owed to Them

In failing to address tensions between the Tenth and Reconstruction Amendments from the start, Roberts's inquiry into the constitutionality of the VRA was prematurely misguided. The Act certainly exacts costs on state sovereignty, even though Roberts failed to weigh these costs. The question posed by the Court, however, should have been whether the Reconstruction Amendments, specifically the Fifteenth Amendment, authorize Congress to impose these costs, and if so, were the means adopted by Congress rational and appropriate? Undoubtedly, these federalism costs exist. The States do have to ask the federal government whether they can change their respective election laws and procedures. The nexus of this debate then needs to boil down to this analysis: does

[27] *Slaughterhouse Cases*, 83 US 36 (1873).

Congress have the authority and is it reasonable in exercising this power conferred to it when they reauthorized the VRA?

When *Shelby County* is framed in this manner, the Court can then determine if the VRA's 2006 reauthorization was a constitutional exercise of the powers conferred to them in the enforcement clauses of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. The VRA has undergone a number of challenges to its constitutionality, one of the first being *Katzenbach v. Morgan (1966).*[28] In that case, a different Section of the VRA, Section 4 (e) was at hand. This section ensures a "guarantee the right to register and vote to those with limited English proficiency."[29] This case was argued under the context of the relationship between the equal protection and enforcement clauses of the Fourteenth Amendment and the powers reserved to the states under the Tenth Amendment. The Court stated in *Katzenbach* the following:

> Section 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees. The test of *McCulloch v. Maryland* is to be applied to determine whether a congressional enactment is "appropriate legislation" under § 5 of the Fourteenth Amendment.[30]

Much like the enforcement clause of the Fourteenth Amendment, the enforcement clause of the Fifteenth Amendment confers power to Congress to enact legislation that is in accordance with Fifteenth Amendment guarantees.

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[28] *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[29] 42 U.S.C. § 1973b(e).

[30] *Katzenbach,* (Brennan, J., for the Court).

Conversely, one might argue that Congress's institutional competence does not mean it has a blank check to legislate under the powers of the Fourteenth and Fifteenth Amendments. One might point to the case of *Boerne v. Flores,* where the Court ruled Congress exceeded its Fourteenth Amendment enforcement powers by enacting the Religious Freedom Restoration Act (RFRA), which, in part, subjected local ordinances to federal regulation.[31] This can be compared to the VRA. Does the VRA not subject local ordinances to federal regulation? The Court ruled that while Congress has the power to enact such legislation, it cannot determine the manner in which states enforce the substance of it.[32] In other words, Congress under the RFRA tried to restrict states' freedom to enforce the law they deem most appropriate. Most importantly, there was no evidence to suggest that the city of Boerne's historic preservation ordinance favored one religion over another that was rooted in a hostility for free religious exercise. For instance, if Congress wished to implement this law, Justice Anthony Kennedy noted that "while preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieve."[33] One might argue that Congress had exceeded its authority under the VRA as an intrusion into the manner a state is able to deal with voting procedures. Comparing the decision of *Boerne* to *Shelby County* is tempting, but ultimately futile.

In *Boerne,* Congress through the RFRA attempted to control how a local ordinance dealt with the freedom of religious exercise. The issue with this is that even

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[31] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[32] Ibid.

[33] *Boerne,* (Kennedy, J., for the Court), 530.

during the hearings for the RFRA individuals noted that "deliberate persecution is not the usual problem in this country" and that "laws directly targeting religious practices have become increasingly rare."[34] Moreover, during the law-making process for RFRA, Congress had not compiled an intensive legislative record showcasing "examples of modern instances of generally applicable laws passed because of religious bigotry."[35] The record mentioned no episodes detailing religious bigotry in the last forty years.[36] This process is in direct contrast with the VRA's 2006 reauthorization process which "amassed more than 15,000 pages of evidence regarding ongoing voting discrimination in covered jurisdictions."[37] Additionally, when applied to the City of Boerne, the town had no tradition of hindering the free exercise of religion. The history of religious freedom unburdened by governmental intrusion is a long-standing tradition in this nation although the U.S. has had periods of animus towards religious groups. For example, with Catholics in the 1920s, intermittent hostility towards Jews, and to an unfortunate extent, opposition against Muslims in the post 9/11 era. For the most part, our nation has not engaged in systemic, pervasive discrimination against religious groups. The same, however, cannot be said about race. It is safe to say that the one continuing, persistent social irritant within the U.S. is the subject of race relations. The nation has fought a Civil War over the idea of black freedom. The promises of Reconstruction for black political and legal equality

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[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] *Shelby County* (Ginsburg, J., dissenting), 7.

were not fully realized for freedmen and women until nearly a century after the Civil War, in large part thanks to the VRA. And even today, the subject of race relations dominates our national politics.

Moreover, the Fifteenth Amendment makes explicit guarantees in combatting racial discrimination in the realm of voting. Section 1 of the Amendment 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."[38] Section 2 declares that "Congress shall have the power to enforce this article by appropriate legislation."[39] Again, this does not give Congress a blank check to authorize any legislation it deems fit in the realm of racial discrimination in voting; however, it is the branch that possesses the most wisdom to make an apt decision regarding this ongoing, pernicious problem. Congress chose two means to combat what it deemed an "ongoing, continuing problem."[40] The means it had chosen to combat this problem from 1965-2013 had been the coverage formula in Section 4(b) and the preclearance requirement in Section 5 of the Act. There is an institutional competence that comes with Congress being the legislative branch. Its ability to understand and make judgments, especially political judgments with regard to voting rights legislation, should grant it a sense of deference when making these decisions. The means it employs, however, must

[38] U.S. Constitution, amend. 15 § 1.

[39] U.S. Constitution, amend. 15 § 2.

[40] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. Public Law 109-246. U.S. Statutes at Large 120 Stat. 577, codified at U.S. Code 5 U.S.C. (2006).

be judged by the Court to determine if Congress exceeds its authority under the Fifteenth Amendment.

Outlined in both Respondent's oral and written arguments is the notion that Congress—not the Court—should reasonably make the judgment that there is a continuing need for Sections 4 and 5. The Respondent states that, "when examining Congress's exercise of its authority to enforce the Fifteenth Amendment's guarantees, this Court has repeatedly stated that 'Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.'"[41] Subjecting Congress to a motive analysis would be inappropriate, Verrilli argued, but rather, the Court should be able to ascertain judgments based off the standards developed in *NW Austin*. The Respondent argued that during the 2006 reauthorization Congress maintained a prudent course in order to ensure the protection of a fundamental right, through appropriate legislation, as guaranteed by the Constitution. Moreover, Congress's institutional competence cannot be understated as it is the branch of government able to make judgments with regard to "empirical assessments of social conditions" therefore "these judgements should receiver great deference."[42]

Justice Ginsburg and the position of this thesis are in agreement with the Respondent's assessment. Ginsburg, writing for the dissent, brings attention to the enforcement clause of the Fifteenth Amendment[43] and compares it to the late Chief

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[41] Donald B. Verrilli, Brief for Federal Respondent, 17-18.

[42] Ibid., 9.

[43] As a reminder, the enforcement clause of the Fifteenth Amendment is as follows: Congress shall have the power to enforce this article by appropriate legislation.

Justice John Marshall's analysis of the scope of Congress's power under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and the spirit of the constitution, are constitutional."[44] In other words, did Congress choose the most appropriate method in order to uphold the Constitutional commands of the Fifteenth Amendment? It is essential that, "we ask not whether Congress has chosen the means most wise, but whether congress has rationally selected means appropriate to a legitimate end?"[45] When Congress is confronted with a record of systemic, pervasive violation of a constitutionally given right, its "power to act is at its height."[46] Under the existing constitutional structure "Congress holds the lead rein in making the right to vote equally real for all U.S. citizens"[47] precisely because the Reconstruction Amendments empower them to do so.

[44] *McCulloch* (Marshall, J., for the Court), 9.

[45] *Shelby County* (Ginsburg, J., dissenting), 10.

[46] *Shelby County* (Ginsburg, J., dissenting), 6.

[47] *Shelby County* (Ginsburg, J., dissenting), 9.

Conclusion

This chapter explored the deference Congress is owed by the Court with regard to the enforcement clause of the Fifteenth Amendment. Congress should be trusted in making political judgments that fall under the umbrella of protections guaranteed by the Fifteenth Amendment. It is well within its constitutional right to do so, however the means by which they employ must be judged if they are "rationally appropriate to a legitimate end?" The following chapter will explore the standards by which the Court should have ruled: the rational basis test or the congruence and proportionality test. When determining whether Congress was able to employ specific provisions of the VRA, the Court could have used a rational basis review with accordance to precedent. The Court could have also determined if Congress exceeded its enforcement powers under the Fifteenth Amendment by the lessons derived from *Boerne* and ask the following: was the coverage formula congruent and proportional to the ongoing problem of racial discrimination in voting? Since Roberts issued no holding on the constitutionality of Section 5, the subsequent chapter will explore Section 4 (b)'s coverage formula, which was deemed unconstitutional. Ultimately, the following chapter will hope to answer this question: was the formula still a relevant measuring stick in capturing which jurisdictions had engaged in the most discrimination.

CHAPTER THREE

The VRA: A Constitutional Exercise of Prophylactic Legislation

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and the spirit of the constitution, are constitutional."[1]

–Chief Justice John Marshall, majority opinion in *McCulloch v. Maryland*

"While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment."[2]

–Justice Anthony Kennedy, majority opinion in *City of Boerne v. Flores*

Above all, Ginsburg was right in her constitutional analysis because she insisted on the need for judicial deference. Historically, this is the principle the Court has judged under with respect to Fourteenth and Fifteenth Amendment cases. The only question that remains is what level of deference is owed to Congress? The following standards articulated, the rational basis review and the congruence and proportionality review, will hope to shed light on what "test" the Court could have employed. Nevertheless, the VRA passes both.

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[1] *McCulloch* (Marshall, J., for the Court), 9.

[2] *Boerne,* (Kennedy, J., for the Court), 519-520.

The above quotes illustrate two judicial standards of review. Although Justice Marshall certainly did not create the rational basis test, his statement in *McCulloch* refers to the need for judicial deference to Congressional judgements that Ginsburg is trying to channel throughout her argument. In this context, the Court must find that the law at hand "must [use] rationally selected means appropriate to a legitimate end."[3] The second quote underscores the consequential test that originated from the *Boerne* decision: the congruence and proportionality test. This test states that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[4] In other words, this test requires that Congress must demonstrate that first, the problem they are addressing is violative of the Fifteenth Amendment, and second, that the Section 4 (b) coverage formula is also proportional to achieving the said legislative purpose. This chapter will argue that Chief Justice Roberts and the majority in *Shelby County* could have maintained course with the manner the rational basis review was applied to prior decisions that upheld the formula, such as *South Carolina v. Katzenbach*[5] (1966) and *City of Rome v. U.S.*[6] (1980). Second, if the rational basis review was not to be applied in this manner, it was imperative that Roberts applied the *Boerne* standard of review. In the *Boerne* standard, he would have found that the Section 4 (b) coverage formula was both congruent and proportional in addressing ongoing racial discrimination

[3] *Shelby County* (Ginsburg, J., dissenting), 10.

[4] *Boerne*, (Kennedy, J., for the Court), 508.

[5] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

[6] *City of Rome v. United States*, 446 U.S. 156 (1980).

in voting. Although both tests require different levels of deference, the VRA passes constitutional muster under either test.

Rational Basis Review

The rational basis review, so fervently advocated by Justice Ginsburg in her dissent, was applied to the constitutionality of the coverage formula; however, the manner of how it was applied by Roberts runs contrary to both precedent and Congress's theory behind the coverage formula. Many scholars have questioned whether Roberts consistently applied rational basis review or whether he effectively altered the "test" in this case to arrive at the holding he does. For example, Jon Greenbaum, Alan Martinson, and Sonia Gill, of the Lawyers' Committee for Civil Rights Under Law, assert that "the reasoning and analysis in the Supreme Court majority opinion in *Shelby County* simply cannot be reconciled with… how rational basis was applied in *Katzenbach* and *City of Rome.*"[7] First, an alarming application of Roberts's rational basis review is that when he moves towards a standard of "current needs must justify the current burden"[8] he disregards the prior rational basis standards' applied. In both *Katzenbach* and *City of Rome,* two prior cases upholding the constitutionality of the VRA, the Court acknowledged a relevance of the legislative record when evaluating the constitutionality of the statute. For instance, Greenbaum et al., note that in *Katzenbach* the Court stated the "constitutional propriety of the Voting Rights Act of 1965 must be judged with reference

[7] Jon Greenbaum, Alan Martinson and Sonia Gill, "*Shelby County v. Holder*: When the Rational Becomes Irrational," Howard Law Journal (Vol. 57 No.3, 2014): 837.

[8] *Shelby County* (Roberts, J., for the Court), 2.

to the historical experience which [the legislation] reflects."[9] When Roberts does not adopt this framework, it gave him a license to disregard the majority of the evidence Congress had compiled during its 2006 reauthorization principally because the coverage formula was based off of first-generation metrics of voter registration, turnout, and the use of tests or devices whereas the legislative record at hand indicated a significant amount of second-generation vote dilution evidence.[10] The problem with this approach is that the Court in *City of Rome* (1980) identified vote dilution as a type of voter discrimination, irrespective of the fact that the coverage formula was based off of first-generation barriers. For example, in *City of Rome*, Justice Thurgood Marshall, writing for the majority, points to the Congressional record and claims that "as registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength."[11] In not adhering to the rationale in *Katzenbach* and *City of Rome*, Roberts's standard of "current needs must justify current burdens" also departs from precedent in failing to give consideration to the breadth of the legislative record and findings compiled by Congress to justify the renewal of the VRA when evaluating its constitutionality.

A valid concern by opponents of the rational basis review is that nearly every statute could be justified as it is rationally related to advance a legitimate governmental interest. The principles of federalism rightfully inhibit this obliteration. For instance, the

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[9] *Katzenbach* (Warren, J., for the Court).

[10] Greenbaum et al., "Shelby County v. Holder: When the Rational Becomes Irrational," 838-840.

[11] *City of Rome* (Marshall, J., for the Court).

principles of federalism were used by the Court to strike down the Gun-Free School Zones Act of 1990. Congress's rationale in enacting this legislation was that gun possession in school zones impaired educational environments—and by extension—inhibited interstate commerce. In *U.S. v. Lopez*[12] the Court struck down this Act. By Congress's logic, the power conferred to them under the commerce clause gave them additional latitude in regulating everything under the sun if it affected interstate commerce—even in an ancillary way. In this circumstance, the Court was right to point out that there was no limiting principle in Congressional enforcement power. This is hardly the case with respect to the VRA in *Shelby County*. The Constitution does not grant Congress the express-written authority to regulate commerce in this manner. Conversely, as mentioned in chapter two, the Constitution is very explicit in the language of the Fifteenth Amendment. It gives Congress a rather wide latitude in enacting remedial or preventative legislation with regard to racial discrimination in voting. Roberts must view the Amendment in this light when conducting his rational basis review.

A secondary issue of Roberts's application of the rational basis review is that he misinterprets Congress's coverage formula theory during the 2006 reauthorization. Roberts was right to note that the coverage formula theory was "reverse-engineer[ed] to describe in objective, voting-related terms the jurisdictions Congress had already determined it wanted to cover based on evidence of actual voting discrimination."[13] However, this was true of Congress's enactment of the VRA in 1965, not in their

[12] *United States v. Lopez*, 514 U.S. 549 (1994).

[13] Donald B. Verrilli, Brief for Federal Respondent, 3.

reauthorization of it in 2006. The Circuit Court in *Shelby County* recognized this when they stated:

> "Congress chose the section 4(b) criteria [in 1965] not because tests, devices, and low participation rates were all it sought to target but because they serve as accurate proxies for pernicious racial discrimination in voting. The question, then, is not whether the formula relies on old data or techniques, but instead whether it, together with bail-in and bailout, continues to identify the jurisdictions with the worst problems. If it does, then even though the formula rest on decades-old factors, the statute is rational in theory because its 'disparate geographic coverage' remains 'sufficiently related to the problem that it targets.'"[14]

In this same vein of thought, the federal respondent argued in their brief that "…the distinctions drawn among states by section 4(b) are based on the respective records of voting discrimination, not on the enumerated statutory proxies."[15] Fittingly, the respondent also highlighted that from the first reauthorization of the Act, Congress emphasized that an improvement in the criteria in the coverage formula alone would not "serve as a criterion for determining when the discriminatory efforts of covered jurisdictions had been sufficiently eradicated to warrant removing the safeguards which made the improvement possible."[16]

With this being said, Congress's 2006 reauthorization of the coverage formula was rational in theory, despite the fact that the specific metrics articulated hinged on decades-old issues. Congress's theory behind the coverage formula was for it to capture counties and states that had both historical and present records of voter discrimination against racial minorities. When Congress examined the totality of the legislative record, and

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[14] *Shelby County v. Holder*, 679 F.3d 848, 879 (2012).

[15] Donald B. Verrilli, Brief for Federal Respondent, 49.

[16] Ibid.

compared national indicators, such as Section 2 lawsuits, they found that minority voters remained worse off in jurisdictions covered by the Section 4-Section 5 preclearance scheme than those who were uncovered. Precisely because the coverage formula was still sufficiently relevant and accurate in determining which jurisdictions exacted the most voting discrimination, Congress extended the Act for another twenty-five years. The facts pointing to the continuing relevance of the coverage formula are even more overwhelming if Roberts adopted the congruence and proportionality review.

Congruence and Proportionality Review

When weighing the constitutionality of Congress's enforcement powers under the Fourteenth and Fifteenth Amendment, the Court first embraced a rational basis standard of review. This standard gave Congress broad powers to eliminate the scourge of flagrant voting discrimination that remained an ongoing problem. Starting in *South Carolina v. Katzenbach* (1966), the Court employed the rational basis standard of review and did so until *Boerne v. Flores* (1997). Although *Boerne* ruled the Religious Freedom Restoration Act (RFRA) exceeded Congress's Fourteenth Amendment enforcement powers, the Fourteenth and Fifteenth Amendment's enforcement powers are co-extensive[17]. When the congruence and proportionality review was applied to *Boerne* this implied that the test extended to the Fifteenth Amendment's enforcement clause, as well. As aforementioned, the congruence and proportionality test means that Congress must first show the Court that significant unconstitutional conduct violative of the Fifteenth Amendment is

[17] Essentially, whatever rulings apply to the Fourteenth Amendment's enforcement clause will also apply to the Fifteenth's as well in future cases. In this context this meant the congruence and proportionality "test." These two clauses are interpreted in the same manner.

occurring by the state, and second, that the means Congress chooses to combat this violative conduct is "congruent and proportional" in remedying these constitutional abuses. Fearful of the congruence and proportionality test extending to the VRA under a court challenge, Congress amassed a 15,000-page legislative record demonstrating both the ongoing nature of voting discrimination and the concentration of it in the jurisdictions covered by the Section 4 (b) coverage formula.[18] It was then mystifying that Roberts does not cite *Boerne* once nor does he undertake any sort of effort to apply a congruence and proportionality review to the coverage formula that he repeatedly derides. If Roberts applied a congruence and proportionality standard of review to *Shelby County*, he would have observed that Congress reauthorized a formula that was as "narrowly tailored and precisely targeted as a large nationwide regulatory scheme could be."[19]

The district and circuit court in *Shelby County* took a prudent approach in their reasoning to apply a congruence and proportionality review. In a case only a few years prior, Roberts raised concern over the coverage formula in *Northwest Austin Municipal Utility District v. Holder*[20] (2009). Although the Court issued no holding regarding the constitutionality of Section 4 or 5 in the case, the Chief Justice voiced that the coverage formula was becoming more difficult to justify. In this case, it is when we first hear Roberts state that the coverage scheme must illustrate that there are "current

[18] "An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report," U.S. Commission on Civil Rights, 2018, 8.

[19] J. Morgan Kousser, "Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in *Shelby County*?" Transatlantica (August 13, 2015): 17.

[20] *Northwest Austin Municipal Utility District Number One v. Eric H. Holder, Jr., Attorney General, et al.,* 557 US ___, (2009).

burdens…justified by current needs and [that] disparate geographic coverage is sufficiently related to the problem."[21] With these two principles in mind, it was only logical that the district court and subsequently, the circuit court, used the congruence and proportionality review.

If this standard was applied by the Court, then three prongs must be observed. First, the Court, must identify the constitutional right at issue. All parties are in agreement that the Fifteenth Amendment's protections and Congress's ability to enforce them are the issues at hand. Second, the Court must determine that the conduct exercised by the states runs contrary to the Fifteenth Amendment. The Chief Justice admits that "voting discrimination exists, no one doubts that."[22] Both parties concede that voting discrimination remains an ongoing issue; however, he does not believe that it is primarily concentrated in the south and southwest. During oral argument, Roberts challenges Solicitor General Verrilli to compare the minority voter turnout statistics of Mississippi to Massachusetts.[23] This impasse leads us to the crux of the review: the third prong. Third, and likely the most contentious question, is the behavior concentrated in the covered jurisdictions, and if so, was the statutory scheme an appropriate response? If the Court rules in the affirmative in the third step, then the coverage formula can be deemed constitutional. What is unfortunate, by avoiding this standard of review, Roberts is able to disregard the massive legislative record that demonstrates a continued pattern of ongoing discrimination in the areas targeted by the coverage formula. The nature of a congruence

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[21] *NAMUD* (Roberts, J., for the Court), 8.

[22] *Shelby County* (Roberts, J., for the Court), 20.

[23] Oral Argument, *Shelby County v. Holder*, February 27, 2013.

and proportionality review necessitates that the Court grapple with the history and pattern of unconstitutional conduct in the states and counties. For instance, in a laborious eighty-four-page opinion, federal district court judge John Bates cited an immense amount of evidence, including but not limited to the following:

> significant disparities between non-Hispanic white and minority registration rates in several covered states; the under-representation of African Americans in state legislatures of covered states based on percentage of population; the more than 700 Section 5 objections lodged by the Attorney General between 1982 and 2006, including more than 400 based on discriminatory purpose; the couple hundred voting changes between 1982 and 2006 that were withdrawn after the Department of Justice issued a written request for more information; the twenty-five unsuccessful judicial preclearance suits between 1982 and 2006; the 105 successful Section 5 enforcement suits between 1982 and 2006, which led jurisdictions to submit changes or abandon them; the tens of thousands of federal observers that were sent to monitor elections between 1982 and 2006; and fourteen reported Section 2 cases between 1982 and 2006 where courts made findings of intentional discrimination.[24]

Although a copious list of ongoing and concentrated discrimination might be convincing to some and superfluous to others, a visual representation might prove to be more illuminating to illustrate that Section 4 (b) sufficiently targets the areas with the most voting discrimination in the nation to warrant a disparate geographic coverage.

J. Morgan Kousser, the William R. Kenan, Jr. Professor of History and Social Science at the California Institute of Technology demonstrates in his paper "Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in Shelby County?"[25] that the coverage formula aptly covered the necessary jurisdictions. Through a series of visual

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[24] Greenbaum et al., "*Shelby County v. Holder*: When the Rational Becomes Irrational," 830.

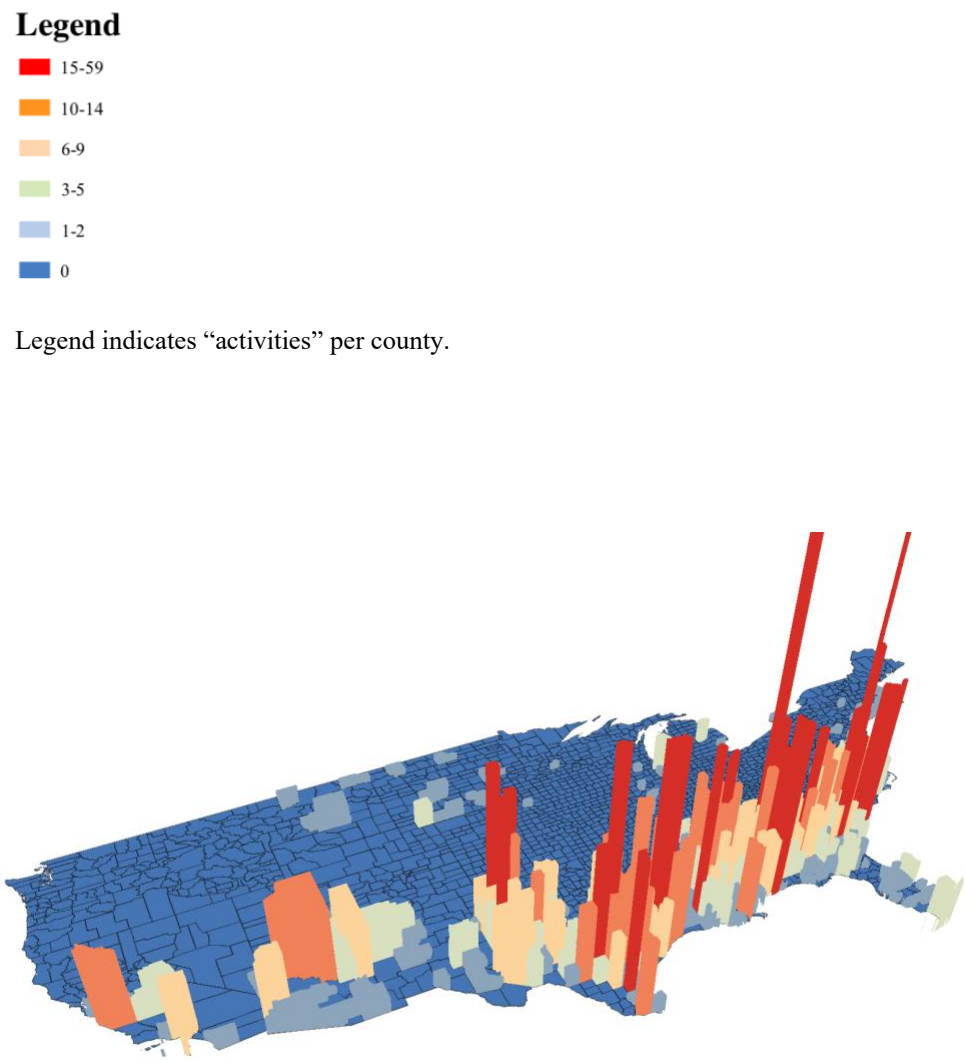
[25] J. Morgan Kousser, "Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in *Shelby County*?".

representations, he articulates that the relationship between discrimination and the coverage formula remained congruent and proportional. Kousser displays on maps of the United States the number of voting rights "events," per county, between the 1982 and 2006 congressional reauthorizations. Kousser defines events to include any "successful or unsuccessful case, published or not, decided or settled; Section 5 objections and 'more information requests' by the Department of Justice; and election law changes that manifestly took place as a result of the threat or reality of legal challenges."[26] Map 1 highlights the of voting rights events that transpired predominantly in the covered jurisdictions. Map 2 serves as a helpful reminder of the states and counties covered at the time of *Shelby County.*

[Maps on next page.]

[26] J. Morgan Kousser, "Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in *Shelby County*?" 4.

Map 1: Voting Rights Activity Still Concentrated in the Covered Jurisdictions, 1982-2005[27]

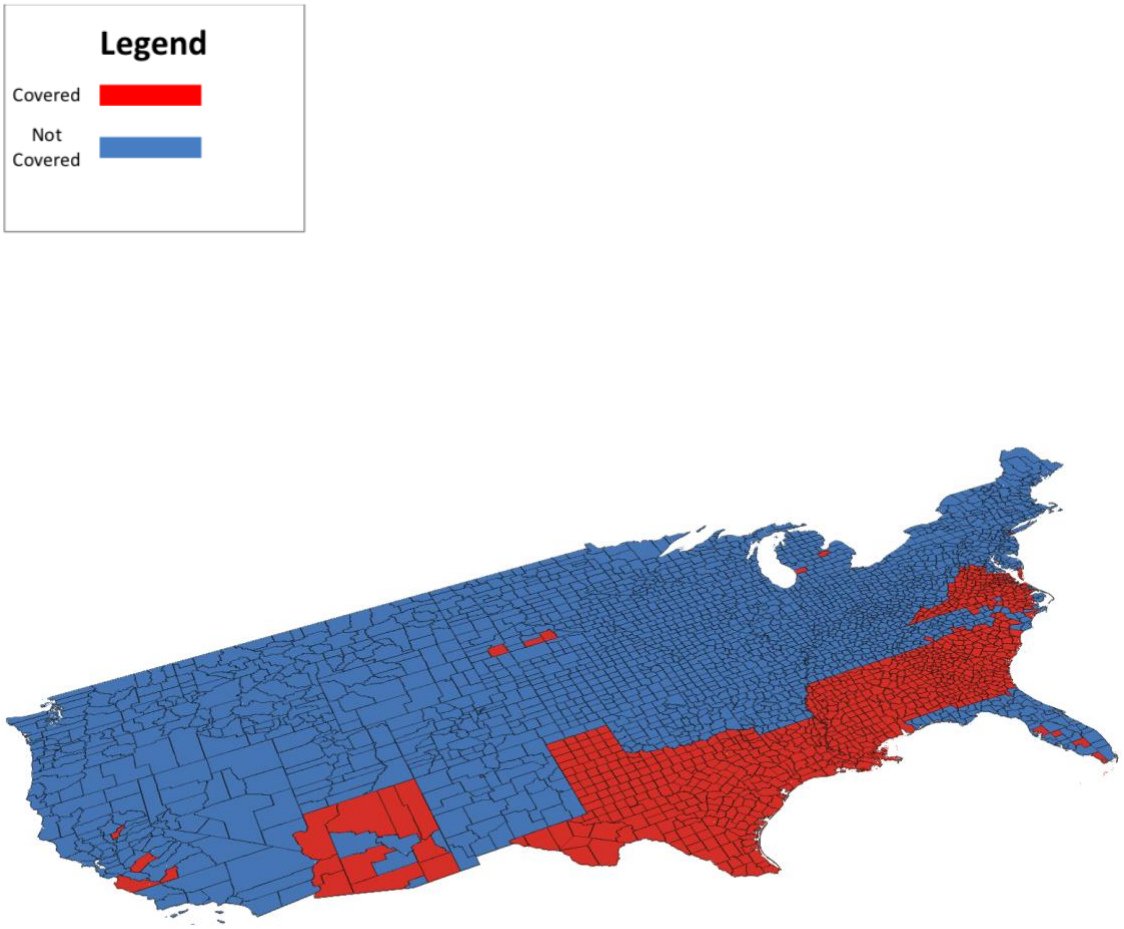


Legend indicates "activities" per county.

[27] J. Morgan Kousser, "Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in *Shelby County*?" 16.

Map 2: Counties Covered Under Section 4 at the Time

of *Shelby County v. Holder* (2013)[28]



Kousser makes note of several "activities" that should be excluded in the name of objectivity when evaluating the true concentration of events. For instance, it would be unfair to include "more information requests" by the Justice Department in the dataset

[28] Ibid., 7.

since they are both relatively insignificant and can only occur in the covered areas. When removing all 1,051 "more information requests," which accounted for a quarter of all voting rights activities, the "percentage of events that took place in covered jurisdictions…falls from 93.8 to 91.5"[29] which still demonstrates accuracy of the coverage formula. To further this inquiry and maintain objectivity, Kousser then removed all events relating to Section 5 in addition to the "more information requests" from the data set as these can only happen in the covered areas. When these events are removed, only Section 2, Section 203 (language discrimination suits), Fourteenth, and Fifteenth Amendment events remain.[30] These events can occur in any part of the country. At this point, he discovered that still 83.4% of the total number of successful events occurred in the coverage area.[31] It might be argued that the bulk of racial minorities reside in the mentioned region, therefore it is only sensical that racial discrimination in voting occurs at disproportionately higher rates. This is not quite the case. To add additional context to this examination, covered jurisdictions contain "less than 25% of the nation's total population, and nine of the fully covered states contain only 32% of the nation's African American population and 28% of the nation's Hispanic population.[32] In sum, the coverage formula is shown to denote areas with the most voting discrimination remarkably well.

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[29] Ibid., 29.

[30] Ibid.

[31] Ibid.

[32] Donald B. Verrilli, Brief for Federal Respondent, 51.

Conclusion

It is easy, and quite frankly lazy, to categorize the entirety of the South and parts of the Southwest in monolithic stereotypes—as racist, as the old confederacy still being unfairly punished for its sins. The South's history cannot be consigned to the past. Its history is paramount in understanding the nature of voting discrimination today, however, with regard to legislation as aggressive, potent, and remedial as the VRA, these stereotypes must be tempered. Instead, the evidence must speak for itself. Rationally, the evidence shows that the coverage formula captures those areas with the most voting discrimination and is as well tailored as a nationwide regulatory scheme could be. Furthermore, the bailout mechanism of Section 4 (a) mentioned in chapter one operates as a limiting principle for the formula. Covered states and counties have opted out with greater frequency after Congress liberalized the procedure in 1982. Although it is unfortunate that voting discrimination remains highly concentrated below the Mason-Dixon line, it lends credence to the need for a continued, unabated VRA. Roberts would have uncovered that for himself whether he adopted a rational basis review or congruence and proportionality review in his inquiry.

CHAPTER FOUR

The Post-*Shelby* Reality

"Give us the ballot, and we will no longer have to worry the federal government about our basic rights. Give us the ballot and we will no longer plead to the federal government for passage of an anti-lynching law; we will by the power of our vote write the law on the statute books of the South and bring an end to the dastardly acts of the hooded perpetrators of violence. Give us the ballot and we will transform the salient misdeeds of bloodthirsty mobs into the calculated good deeds of orderly citizens."[1]

–Martin Luther King Jr.

Since the *Shelby County* decision in 2013, a number of electoral statutes and regulations have passed in the formerly covered areas. Within days of the *Shelby County decision*, Mississippi, Alabama, and Texas began enforcing strict photo ID laws that had previously been denied federal pre-clearance.[2] Within two months, North Carolina also enacted its version of voter ID.[3] Since *Shelby County*, perhaps no other voting-related measure has been as fiercely debated and contested as the passage of voter-ID laws. Simply put, voter-ID laws vary state-to-state and require eligible voters to typically present a form of photo identification in the form of a government issued ID such as a driver's license or state-issued ID. States with less strict voter-ID laws allow eligible voters to present documents that verify their name and address such as a bank statement

[1] Martin Luther King., "Give Us the Ballot Speech at the Prayer Pilgrimage for Freedom Gathering," (speech, Washington D.C., May 17, 1957), The Lincoln Memorial.

[2] Jaime Fuller, "How Has Voting Changed Since *Shelby County v. Holder*?" *New York Times*, July 7, 2014.

[3] Ibid.

or utility bill. Other options they might permit are the choice to sign an affidavit attesting to their identity or for a poll worker to vouch for the identity of the individual. This chapter will discuss why proponents advocate so intensely for these laws and why opponents resist them so fiercely. Then I will discuss the most recent landmark research on the subject that demonstrates why the laws do not accomplish what proponents hope for or what opponents fear. Nevertheless, I will argue that the laws certainly have the potential for voter suppression and are bad optics for our democratic republic that ostensibly prides itself on being a beacon of democracy. Lastly, I will close this thesis with some concluding remarks.

Arguments for Voter-ID

Proponents of voter-ID laws have long rejected that these regulations operate as thinly-veiled statutes littered with racial animus. Instead, they maintain that the laws are necessary to prevent in-person voter fraud and bolster confidence and integrity in the electoral process. At face value, this a worthy cause, however, their intent is shaky at best. Advocates employ a number of arguments to justify the need of voter-ID laws. Often cited is the recommendation from the bipartisan Carter-Ford National Commission on Federal Election Reform that was borne in the wake of the chaotic 2000 presidential election recount. The Commission stated that due to 43 million Americans moving around each year that some form of identification is needed.[4] Moreover, in a similar report, they made the following assertion that: "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity

[4] "To Assure Pride and Confidence in the Electoral Process: Task Force Reports," National Commission on Electoral Reform, August 2001, 6.

of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important."[5] Advocates of voter-ID laws must be aware of two caveats from these suggestions. First, the voter-ID requirement was meant to be restrained and malleable unlike the statutes currently in place. It was supposed to be limited only to those who had registered by mail.[6] Additionally, the requirement was also supposed to allow "a range of documents by which a citizen could verify his or her identity, including employee ID's, student ID's, and paychecks, as well as driver's licenses."[7] The Carter-Ford Commission itself also provided an important warning: "as many as 19 million potential voters nationwide did not possess either a driver's license or a state issued photo ID."[8]

Second, advocates usually claim that widespread voter fraud has occurred or at least has the potential for occurring. A common argument, as represented by the conservative think-tank the Heritage Foundation is that "the reality is, election fraud often goes undetected; even when it is discovered, investigators and prosecutors often opt to take no action."[9] By their own metrics, from 2004-2017 they only found thirteen cases of voter impersonation in their own public database on electoral fraud.[10] Although the

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[5] "Building Confidence in U.S. Elections," Commission on Federal Election Reform, September 2005, 18.

[6] Carol Anderson, *One Person, No Vote: How Voter Suppression Is Destroying Our Democracy*, 52.

[7] Ibid.

[8] Ibid.

[9] "To Assure Pride and Confidence in the Electoral Process: Task Force Reports," 6.

Heritage Foundation acknowledges that its database is not exhaustive, at face-value it does not appear as widespread as it is purported to be.

Arguments against Voter-ID

Critics of voter-ID laws vehemently oppose the laws as they describe them as a form of voter suppression meant to target people of color and the economically disadvantaged. Ari Berman, author of *Give Us Ballot*, even goes as far to characterize these laws as "old poison, new bottles"[11] as to infer they are reminiscent of vote-suppressive measures of the Jim Crow South before the inception of the Voting Rights Act. Moreover, opponents of the laws cite the costs associated with obtaining an ID. Critics also point to the alleged fact that since in-person voter fraud is a rare occurrence, the laws are targeting a problem that is essentially non-existent. For the purpose of this thesis, I will singularly focus on the argument of in-person voter fraud as this overlaps with what proponents ostensibly advocate for in preventing by employing these laws.

The requirement of voter ID at the polls is meant to prevent in-person voter fraud, also known as voter impersonation. A series of studies conducted illustrate the negligible rates of impersonation fraud. In an Arizona State University study, researchers found ten cases of voter impersonation nationwide between 2000-2012.[12] The researchers found

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[10] "Voter Fraud Map." The Heritage Foundation. Accessed November 9, 2019. https://www.heritage.org/voterfraud.

[11] Ari Berman, *Give Us the Ballot: The Modern Struggle for Voting Rights in America* (New York: Farrar, Straus and Giroux, 2015), 245.

[12] Sami Edge and Sean Holstege, "Voter Fraud is not a Persistent Problem," Arizona State University Carnegie-Knight News21, Aug. 20, 2016.

there have been 2,068 cases of alleged election fraud nationwide since 2000. The most frequent type of fraud was absentee ballot fraud, representing 491 cases at 24 percent of all cases.[13] This study lends credence to the fact that voter-fraud does exist; however, the numbers are so insignificant, and voter-ID is also obsolete when preventing the most common type of fraud, absentee ballot fraud. The Brennan Center for Justice at the New York University School of Law has stated that given this insignificant incident rate for voter impersonation fraud, it is more likely that an American "will be struck by lightning than that he will impersonate another voter at the polls."[14] Conversely, even if this type of voter fraud is so low, the state still maintains the right to secure elections. Presumably, states that utilize these laws are actively trying to prevent future threats of electoral fraud. Nevertheless, the issue in its present form is not as prevalent as it may be made out to be. Although claims of voter fraud have been increasingly peddled the last several election cycles, its legitimate occurrence is astonishingly rare. With a trove of data illustrating the miniscule factor that voter fraud truly plays in elections, it is unreasonable to enact voter identifications laws that have the potential to adversely affect voters when they are wholly ineffective in addressing their purported end. Due to this, Congress ought to have a right to oversee the adoption of these laws as they strike a nerve awfully close to the mandates of the Fifteenth Amendment.

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[13] Ibid.

[14] "Trump Says Election Will Be 'Rigged' — Facts Say Otherwise," *Brennan Center for Justice*, August 3, 2016.

Research on Strict Voter-ID Laws

The National Bureau of Economic Research recently published a working paper series on strict voter-ID laws. The paper, titled, "Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2016" was published in February of this year.[15] Economics professor, Enrico Cantoni, from the University of Bologna, and Vincent Pons of Harvard Business School outline several findings. The paper notes that "the panel covers the vast majority of the U.S. voting-eligible population in the 2008, 2010, 2012, 2014, and 2016 general elections, resulting in a total of about 1.3 billion observations."[16] Based off of these observations, Cantoni and Pons found that the strict voter-ID laws have:

> …no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation. These results hold through a large number of specifications and cannot be attributed to mobilization against the laws, measured by campaign contributions and self-reported political engagement. ID requirements have no effect on fraud either – actual or perceived. Overall, our results suggest that efforts to reform voter ID laws may not have much impact on elections.[17]

The study notes that from 2006-2016, eleven states adopted strict voter-ID measures.[18] The study illustrates that thus far the strict ID requirements have not acted as a barrier to the ballot box for historically disenfranchised populations; however, it also demonstrated that they have "no significant impact on fraud or public confidence in election

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[15] Enrico Cantoni and Vincent Pons, "Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2016," *National Bureau of Economic Research* (February 2019).

[16] Ibid., 5.

[17] Ibid., 1.

[18] Ibid., 2.

integrity."[19] This result weakens advocates' arguments for adopting these laws. In sum, Cantoni and Poms warned that these results should be interpreted lightly due to the relatively new adoption of these laws. They hypothesize that they could become more stringent as political polarization increases. For the time being, they state that "our results suggest that efforts both to safeguard electoral integrity and enfranchise more voters may be better served through other reforms."[20] In light of these findings, it would not be unreasonable to claim that there is potential for voter suppression. Furthermore, the mere existence of these laws is superfluous, has the potential to create a barrier for voters, and creates bad optics for the idea that is American democracy.

Concluding Remarks

The error of Roberts's opinion is that he grossly underestimates the effects of the Reconstruction Amendments—namely in this context, the Fifteenth Amendment, —had on the nature of federalism. It flies in the face of historical intent and legal interpretations of the Amendment. Principally, it seems that Roberts obviates the racial component that is so critical in the reading of the Fifteenth Amendment. Roberts believes that the VRA was only justified under the extraordinary circumstances that forbade an entire class of American citizens access to their constitutional right to vote. Furthermore, he is comprehending federalism as it applies not to the 1960s, or even the 1860s, but to the understanding of this principle before the Civil War. The wholesale purpose of the Fifteenth Amendment was to reasonably prioritize federal enforcement of anti-

[19] Ibid.

[20] Ibid., 5.

discrimination in voting over the principles of federalism and state sovereignty. It cannot be reconciled with prior voting rights decisions and the express written mandates of our constitutional order. Now that the nature of voting rights is rooted in a post-*Shelby* reality, Congress is justified in reviewing post-Shelby barriers such as the litany of strict voter-ID laws that would fail the stricter standard of review: the congruence and proportionality "test."

In 1982, President Ronald Reagan signed the Congressional reauthorization of the Voting Rights Act. During this ceremonial event, he stated that "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished."[21] In 2013, the Roberts Court diminished the luster of this crown jewel and consigned one of the nation's proudest legislative achievements to the backburner of history.

[21] Ronald Reagan, "Remarks on Signing the Voting Rights Act Amendments of 1982," (address, Washington D.C., June 29, 1982), The White House.

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