

Seven Years after Shelby County V Holder

Blog Introduction

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With the 2020 elections quickly approaching, often lost in the background are all the events that have led us to where we are. You may have read about voters having issues with long lines at polling places, being unregistered without their knowledge, having to navigate strict voter ID requirements, and many others recently. Lost in all this coverage has been the connection to the Supreme Court's gutting of the Voting Rights Act through the *Shelby County v. Holder* decision in 2013. In the seven years since this decision, which effectively ended the provision of "preclearance," many states that previously needed federal approval for changes to their voting systems have implemented policies to make it harder to vote for people of color. I hope that through this analysis of the events leading to *Shelby County v. Holder*, the negative impacts since, and the potential policy solution currently in the United States Senate, we will be reminded of what exactly is at stake in this election. The removal of preclearance has had monumental impacts already, and should they continue down this path, we will undo decades of civil rights activism and advocacy.

Multiple Streams Framework

First introduced by political scientist John Kingdon (1995), Multiple-Streams-Framework (MSF) examines the connection between "streams" of the policy process (i.e., problems, policies, and politics) and the implementation of policy solutions. When the identified "streams" conjoin, they open a "policy window," which signals the potential for policy implementation to occur (Kingdon, 1995). Utilizing MSF and under the backdrop of the upcoming 2020 elections, this paper will delve into the history of the Voting Rights Act of 1965, the problems created by *Shelby County v. Holder* (2013), the current policy solutions available, and the political debate around the implementation of these solutions

In February of 2019, Congressperson Terri Sewell (D-AL) and Senator Patrick Leahy (D-VT) introduced The Voting Rights Advancement Act (VRAA) (i.e., H.R.4 and S.562) to help curtail some of the detrimental impacts of the landmark *Shelby County v. Holder* (2013) decision. With over 200 cosponsors, the VRAA passed through the United States House of Representatives in December of 2019; however, since its introduction in the Senate, it has gained little to no traction. Nearing the seventh anniversary of the *Shelby County* decision, this paper using MSF will revisit the circumstances surrounding the case, the impact invalidating preclearance has had, and what solutions currently exist to return the protections that it provided. Additionally, we will explore the role of the 2020 elections in opening a potential policy window for the implementation the VRAA as a solution.

The Voting Rights Act

Under Kingdon's (1995) MSF, we will first identify the problem stream by exploring the history of voting rights in the United States. The celebration around the abolishment of slavery by the 16th president of the United States, Abraham Lincoln, is often devoid of context. A common theme among the enfranchisement of African Americans is the meeting of any progress with immediate attempts to curtail that progress. Even after the infamous Emancipation Proclamation, Lincoln and his successors openly refused African Americans the right to vote. Disenfranchisement was also not just a southern issue as places like New York imposed wealth standards for freed blacks to vote, which did not apply to their White counterparts (Davidson, 1993).

After the end of the Civil War, conservative Whites employed several tactics to dilute the political power of African Americans (e.g., gerrymandering, at-large-elections, violence, and terrorism) (Davidson, 1993). At the time, the passage of the VRA in 1965 was the culmination of a long struggle. The VRA imposed some of the strictest regulations to protect the voting rights for people-of-color ever seen at the time. It placed the enforcement capacities strictly on the executive branch and eliminated states abilities to mediate cases of misconduct individually. Included in these restrictions was Section 5 of the VRA, more commonly referred to as "preclearance".

Preclearance required that states with a history of discrimination in their voting practices attain federal approval for any changes to their election structure. Embedded within Section 4 of the VRA was the formula to identify states that fell under the preclearance clause. The preclearance requirement was one of the primary protections for people-of-color in the VRA. It blocked states from engaging in the same suppression tactics that had effectively denied people-of-color the right to vote for decades. The protections of the VRA and preclearance had significant positive impacts on minority voter turnout and electoral representation (Knickrehm & Bent, 1988).

The Problem Stream: Shelby County v. Holder

In the years since enacting the VRA Section 5 has been reauthorized multiple times from 1970 through 2006. There have been some changes and amendments along the way, but the core provisions had remained in place. While it was the *Shelby County v. Holder* (2013) decision that effectively ended preclearance, it was the 2009 decision in *Northwest Austin Municipal Utility District No. One (NAMUDNO) v. Holder*, which laid the groundwork for the eventual invalidation (Crowley, 2013). NAMUDNO, a political subdivision in Austin, Texas, attempted to "opt-out" of the preclearance standard in 2009 by filing a federal suit.

The case eventually landed on the United States Supreme Court's docket, where the plaintiffs argued that the election of 44th President Barack Obama signaled a significant change in race relations. Even with the court upholding the constitutionality of preclearance with an overwhelming majority (i.e., 8-1), the opinion written by Chief Justice Roberts called into question it's long-term viability. Chief Justice Roberts identified the closing voter-gap between Whites and African Americans, and the outlawing of many tactics that people-of-color faced

before the VRAs passage. Crowley (2013) argued that this opinion opened the door for others to challenge the VRA in the future.

These fears would come to fruition just four short years later when the Supreme Court of the United States ruled in *Shelby County v. Holder* (2013) that the formula found in Section 4 of the VRA was unconstitutional. This ruling effectively invalidated Section 5 as well because if there is no formula to identify states, then no states are subject to Section 5. Chief Justice Roberts, in his majority opinion, cited his own words from *NAMUDNO v. Holder* (2009), identifying the closing racial gap in voter registration and turnout to justify the need for Section 4(b) (i.e., the formula) to be changed. Furthermore, Chief Justice Roberts argued that under its original passage, some clauses within the VRA, such as preclearance, were considered "extraordinary measures," always meant to be temporary.

In addition to identifying a changing racial climate and the labeling of Sections 4 and 5 as "extraordinary" and "temporary," Chief Justice Roberts also pointed to the concept of state sovereignty. As he explained, Section 5 of the VRA violated states abilities to govern themselves in an equal way as only certain states had to adhere to preclearance while others did not. Justice Roberts again cited his language in *NAMUDNO v. Holder* (2009), where he identified that Section 5 of the VRA came with costs to federalism and created separate standards among states violating the long-held United States tradition that all states are equally sovereign.

Justice Ruth Bader Ginsburg, in her dissenting opinion, cited the progress made under preclearance and congress' overwhelming support for its reauthorization. Additionally, Justice Ginsburg pointed out the hypocrisy of using evidence of how Section 5 has worked as reasoning for its invalidation. Putting eloquently, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet" (*Shelby County v. Holder*, 2013, pg.33).

In the days before *Shelby County v. Holder* (2013), many warned about the potential negative impacts of losing Section 5 of the VRA. The Brennan Center for Justice, a nonpartisan think-tank, identified that if preclearance were to be invalidated, states could move to reenact discriminatory laws that had previously been blocked by Section 5 of the VRA (e.g., Section 5 blocked 31 proposals from 2006 to 2013 alone). Additionally, states could reintroduce changes that they had withdrawn when the United States Department of Justice asked questions about them (i.e., there were 153 such occurrences between 1999 and 2005). Furthermore, the Brennan

Center for Justice feared states could adopt new discriminatory policies, implement discriminatory policies that were initially blocked by Section 5 but remained on the books, or adopt discriminatory policies that were awaiting review while Section 5's status was up in the air (Perez & Agraharkar, 2013).

Unsurprisingly, in the aftermath of *Shelby County v. Holder* (2013), many discriminatory policies were enacted and have had detrimental impacts on communities of color (Lopez, 2014). Many southern states (e.g., Alabama, Mississippi, Texas) implemented strict voter-ID laws within the first year after the decision. Laws that had either previously been blocked by Section 5 or would have been blocked by it in the future. Texas passed its voter-ID law on the very same day of the *Shelby County v. Holder* (2013) decision, which was previously blocked by the courts using Section 5 by citing its detrimental impact on people-of-color (Lopez, 2014). Additionally, in Florida, they attempted to purge thousands of voters from their registration rolls, citing them as "non-citizens," and Arizona proposed asking for proof of citizenship to vote in federal elections (Lopez, 2013).

Overall, in the first year after *Shelby County v. Holder* (2013), at least 10 of the 15 states previously covered under Section 5 introduced new legislation that would make it harder for people-of-color to vote. Additionally, seven states passed laws in the year before *Shelby County v. Holder* (2013), which were in holding patterns while a final decision on Section 5 was made (Lopez, 2014). The detrimental impacts of these policies on minority voters cannot be understated. In 2019 the Racial Equity Anchors Collaborative (REAC) conducted hearings in select states where many of these discriminatory policies were enacted. Witnesses in states like Alabama, Florida, Georgia, and Texas described having to wait in long lines to cast votes, being denied bilingual ballots or language assistance while voting, and being illegally purged from active voter rolls (Daniels, King-Meadows, & Henderson, 2019).

Voters taking part in the REAC hearings spoke to increases in the number of voting rights violations, the amount of burden associated with voting, evidence of voter discrimination, and the cost-prohibitive nature of litigating VRA violations (Daniels, King-Meadows, and Henderson, 2019). The experiences described by voters identified the ongoing voter suppression efforts which the majority opinions written by Chief Justice Roberts of *Shelby County v. Holder* (2013) and *NAMUDNO v. Holder* (2009) described as issues that had been largely eradicated.

The history of voter discrimination in the United States and the loss of preclearance protections conjoin here to create the problem stream of the MSF.

The Policy Stream: The Voting Rights Advancement Act

Next, under the MSF framework, we delve into the policy solutions that currently exist to reenact Section 5 of the VRA. In February of 2019, the VRAA companion bills were introduced in both chambers of the United States Congress. The VRAA would establish a new formula for Section 4(b) of the VRA to identify states that were subject to preclearance provisions. Many of the VRA's original formula's requirements are present in some form, including protections for language-barriers, and expected practices for states meeting thresholds of minority groups in their populations. Additionally, the VRAA's coverage formula mandates that any states with 15 or more voting rights violations in the previous 25 years will be subject to preclearance for ten years.

Congressperson Terri Sewell (D-AL), the VRAA's chief cosponsor in the House of Representatives, stated that in the years since *Shelby County v. Holder* (2013), more than 30 states had implemented stricter requirements for voting. Additionally, that there had been many elections which later found intentional discrimination in their practices (Nilsen, 2019). The VRAA passed the in the House of Representatives in December of 2019 almost exclusively along party lines (i.e., of 228 congresspeople to vote in favor of passage 227 were Democrats and of the 187 to vote opposed 186 were Republican) (Roll Call 654, 2019).

The VRAA's companion bill in the Senate, introduced by chief cosponsor Senator Patrick Leahy (D-VT), has not seen nearly as much success at its counterpart, seeing little to no movement since its introduction. Since its passage in the House of Representatives, many have called for Senate majority leader Mitch McConnell (R-KY) to call for a vote on the VRAA (Bhojwani, 2019; Schumer & Abrams, 2019). Unfortunately, given the polarized positions on the VRAA, the Republican-controlled Senate up until this point has taken no action to restore the protections of preclearance. Under the policy stream of MSF, the VRAA provides a potential policy solution that has already been introduced within the legislature, and a possible resolution with widespread support amongst Democrats.

The Political Stream: Political Dynamics

MSF identifies the third "stream" of the policy window as politics. The politics stream can mean a multitude of different things, such as political-will, administration priorities, and

public attitudes (Kingdon, 1995). We will define the political dynamics around preclearance by exploring the state of the current political debate, and influential leaders or as MSF would identify them "policy entrepreneurs". Policy entrepreneurs are individuals who are involved in the policy process and attempt to advance their self-interests through either trying to sway public opinion or push policy solutions they believe in (Kingdon, 1995).

Political Debate

The current political discourse is mainly along political party lines (i.e., Democrats and Republicans). This dynamic is illustrated by the passage of the VRAA in the House of Representatives, with only one Republican voting in favor of passage (Roll Call 654, 2019). The Democratic side aligns with Supreme Court Justice Ginsburg's dissenting opinion of the *Shelby County v. Holder* (2013) decision. Democrats have advocated for keeping the protections of preclearance in place. Upon the VRAAs passage in the House of Representatives, several prominent Democratic congresspeople (e.g., House of Representatives Speaker Nancy Pelosi (D-CA), Representative John Lewis (D-GA)) spoke in support of the bill (Oprysko, 2019; Stolberg & Cochrane, 2019).

Conversely, after near-unanimous opposition to the VRAA by the Republican party, the ranking member of the House of Representatives' Judiciary Committee, Congressperson Doug Collins (R-GA), argued that VRAA would become a "political weapon" (Stolberg & Cochrane, 2019). Collins fear is related to a typical Republican argument for policies such as voter identification, which Texas passed on the day of the *Shelby County v. Holder* (2013) decision. This is the argument of voter fraud, a claim which current President Donald Trump repeatedly made during his 2016 election campaign. President Trump even went as far as to promise voters that there would be an investigation into the alleged "millions of people" that voted illegally ("Trump pledges' major investigation into voter fraud," 2017).

The claim of millions of illegal voters has been thoroughly debunked since it was made by President Trump, including by the chair of the Federal Election Committee (FEC) (Farley, 2016; Edelman, 2019). Collins' argument, in this case, is that increased federal oversight would be "weaponized" to allow more people to vote illegally for Democrats. The research on this claim overwhelmingly points to its inaccuracy (Goel et al., 2017; Edge & Holstege, 2016; Cottrell, Herron, & Westwood, 2016). Additionally, the Brennan Center for Justice reviewed voter fraud cases and found that the overwhelming majority of them can be attributed to human

error (e.g., clerical errors, inadequate matching procedures, and mistakes made on ballots) rather than actual fraud (Levitt, 2007).

The second part of the argument made by Republicans, which was also expressed in Collins' remarks after the passage of the VRAA, is that discrimination is no longer a significant problem in elections (Stolberg & Cochrane, 2019). Democrats have countered this argument by highlighting how policies have detrimental impacts on people-of-color. A prominent example of this occurred in Georgia's 2018 gubernatorial election. Gubernatorial candidate, Stacey Abrams, after narrowly losing, brought to light tactics (e.g., closed polling locations and voter registration purges), which she felt negatively impact minority-voters and caused her to lose the election (Barron-Lopez, 2019).

Furthermore, The Leadership Conference Education Fund analyzed polling place closures since 2012 in many of the southern states previously covered by preclearance (e.g., Texas, Georgia, Mississippi, Alabama). They found over 1,000 polling place closures in jurisdictions previously covered under preclearance even with higher voter turnouts between 2014 and 2018 ("Democracy Diverted," 2019). Additionally, in an analysis of Texas, it was found that counties with the highest populations of Latinx and African American voters saw the highest number of closures (Salame, 2020). Texas was also the state with the most polling place closures in the country.

Another critical part of the argument made by Republicans in opposition to the VRAA can be found in Chief Justice Roberts' majority opinion of *Shelby County v. Holder* (2013). Chief Justice Roberts explained that under this "fundamental principle," the government should not intrude in states' abilities to govern themselves; however, if it must, it should do so in an "equal" way. For Democrats, they need not go further than this same majority opinion written by Chief Justice Roberts when finding a counterargument as he explained that under the VRAs original passage, legislators cited "extraordinary" circumstances. As Senate minority leader Chuck Schumer (D-NY) and former congressperson Stacey Abrams (2019) argued, these same extraordinary and discriminatory circumstances still exist today.

Policy Entrepreneurs and the Policy Window

In November of 2020, the United States will elect a President as well as decide which party will make up the majority of both chambers of Congress. This majority is imperative because the majority party controls the agenda. Currently, the House of Representatives is

controlled by the Democrats while the Republicans control the Senate. The "270toWin" forecast indicates that the House of Representatives will more than likely remain in control of the Democrats even with all 435 possible seats up for grabs ("2020 House Election", 2020). The Senate will have 35 seats up for election in 2020, of which members of the Republican party currently hold 23. The "270toWin" election forecast lists three seats as "toss-ups" (i.e., Colorado, North Carolina, and Maine), which will likely decide control of Senate ("2020 Senate Election", 2020).

In the context of these elections, regaining control of the Senate for Democrats while maintaining control of the House of Representatives will be an essential step in opening a potential policy window for the VRAA. If Democrats can seize control, the responsibility to prioritize the VRAA on the policy agenda and, dependent on who wins the presidency, create pressure on the executive branch to prevent VRAA from being vetoed will fall on a select few. The first is Senate minority leader Chuck Schumer (D-NY), who oversees the Democratic agenda in the Senate. Additionally, we will highlight former Congressperson and current lawyer/activist Stacey Abrams and current Senate majority leader Mitch McConnell (R-KY).

The identified policy entrepreneurs currently wield the most power and influence over any debate that will take place over the VRAA. While not presently an elected official, Stacey Abrams has catapulted her gubernatorial campaign in Georgia during the 2018 midterm elections into a movement for the protection of voting rights. In the two years since former Congressperson Abrams narrowly lost in Georgia, she has become one of the most popular and respected political figures in America (Haltiwanger & Hickey, 2019). Abrams and Schumer (2020), penned an opinion voicing their support for the VRAA and advocating for its passage through the Senate. Abrams' support will be vital for growing public advocacy for the VRAA.

Finally, there is Senate majority leader and self-proclaimed "grim reaper" of all Democratic legislation, Mitch McConnell (D-KY) (Montoya-Galvez, 2019). McConnell currently controls the Senate's agenda and has stonewalled all legislation passed by the Democratic-controlled House of Representatives (Montoya-Galvez, 2019). Should Republicans remain in control of the Senate, McConnell would present an insurmountable obstacle that would emphatically close any policy window. Conversely, should power be flipped to the Democrats in the Senate during the 2020 elections, Senator Chuck Schumer (D-NY) would assume control of the agenda. He would be responsible for prioritizing the VRAA. In conjunction with leadership

from Speaker Nancy Pelosi (D-CA), in a Democratic-controlled House of Representatives, all the pieces to push the VRAA forward would be in place.

Conclusion

With the upcoming 2020 elections, voting rights and many other issues are on the ballot. It can be easy to overlook down-ballot races for the House of Representatives and Senate during presidential election years. However, as has been eluded to these races is a vital part of the policy process, overlooking them can have dire consequences. The invalidation of preclearance was primarily made possible by the elections of Republican candidates. Not just Presidents, who appointed conservative justices, but also congresspeople who helped confirm these justices and block others from potentially taking seats on the Supreme Court. As we prepare to head to the polls this in the upcoming weeks, it has never been more important to remember all that is at stake in this election.

In the seven years since *Shelby County v. Holder* (2013), and thousands of polling places have been closed, states have purged tens of thousands of voters from rolls without their knowledge. Additionally, multiple states have enacted stricter voter ID laws and changed registration policies to make it more difficult to vote. Without a swing in leadership, changes such as these may only be the beginning of a long road to undo all the progress made on voting rights over the past several decades. The VRAA is just one of the available solutions to curtail these impacts. By opening a policy window by way of the 2020 election, we could return the protections that disenfranchised voters of color so desperately need.

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