Precedent Background

The Court's decision in Shelby County v. Holder (2013) is entrenched in a long discussion of racial discrimination in voting. This case is closely connected to the Voting Rights Act of 1965 (VRA), which, under section 5 and section 4(b), stipulates that states under a certain jurisdiction, usually those with a long history of voting discrimination, must get preclearance for any changes made in their electoral law. Signed into law by President Johnson, the VRA acted as an enforcer for the 15th Amendment, which gave voting rights to Black men. The United States has a dark history of racial discrimination, and one place it is seen clearly is in the obstacles to voting that many minority populations face. The VRA hoped to stop such discrimination. The petitioner, Shelby County, Alabama, is one such place. They were fighting to convince the Court that the actions of section 5 and section 4(b) exceed Congress's authority and that, henceforth, should be eradicated. The Court ruled in favor of Shelby County. In the opinion, Chief Justice Roberts argues that the importance of these restrictions was real in the late 1960s and 70s when the Voting Rights Act was put into action, but that it no longer was needed and to continue its practice would be to infringe on state sovereignty (2013).

The main takeaways from the justification for the decision in the case were that one, the discrimination that ran rampant in certain Southern states was no longer evident, and two, it was unconstitutional for Congress to make these restrictions. The final decision in the case was 5-4. There is a clear ideological split, with the more conservative justices, Roberts, Scalia, Kennedy, Thomas, and Alito voting in the majority and the more liberal justices Ginsburg, Breyer, Sotomayor, and Kagan in the minority. Of the aforementioned Justices, 5 remain on the Court (Oyez A). An important function of the Voting Rights Act is that Congress conducts a deep examination after a set number of years to see if the preclearance requirements are still needed. In the dissenting opinion in Shelby County v. Holder, Justice Ginsburg shares that the most recent reassessment occurred in 2006 under the Bush administration, 7 years before the Shelby County decision, giving it another 25 years (2013). Now cut almost 2 decades short.

The Life of the Precedent

The life of this precedent can be examined in two lights, one in its legal impact and the other in its policy impact. Utilizing the Nexis-Uni's Shepard's, the Supreme Court citation record on this particular case can be gleaned. The lack of citations of Shelby in majority opinions over the years speaks to its strength. To calculate the 'vitality' of a case, subtract the negative citation treatments from the positive ones. The Shepard's data delivers a score of 0, with both positive and negative citations at the Supreme Court level being nonexistent. This, however, does not mean that the legal impact of Shelby County

was not staggering. This net-zero citation record meant that it did what it intended to do, which in this case was to declare that the Court no longer thought these issues needed to be reviewed by them.

Policy impacts paint a clearer picture. Much of the majority's explanation for their decision rested on the fact that the jurisdictions held responsible under this section had stopped engaging in practices that suppressed minority voters. An assessment that was quickly proven incorrect by the swift action of Southern states to take steps, ones theyhad previously been blocked from taking, in making voting harder for certain minority groups, such as requiring certain forms of identification, reflective or voting restrictions practiced in the Jim Crow era (Edwards, 2015). The 2018 midterm elections also paint a clear picture of the impacts of the Shelby ruling, 5 years into action. These elections featured many minority candidates running against white male opponents, and in a post-Shelby world, many minority voters saw their rights infringed upon. Take, for example, in Georgia, where over 200 polling locations were closed. Most of which were located in precincts with high levels of minority voters (Brown and Staggers, 2018).

Just as we saw Southern states rejoicing as they rushed to implement long-awaited legislation, outrage was also felt in many sectors. In a review of the Amicus briefs filed in favor of the respondent presented in this case, input ranged widely. The most notable backlash came from various civil rights organizations, which saw this decision as a major step backward in the progression of racial equality in this country. The brief presented by the Alabama Legislative Black Caucus and Alabama Association of Black County Officials highlights the voices of people entrenched in the fight to protect the interests of Black Alabamians. They fear that by ending the coverage of sections 5 and 4(b) over the state of Alabama, large amounts of the state's population, specifically the African Americans and Latinx citizens, would lose the very rights they had fought for centuries to establish (Blacksher, 2013). Instead of the Court addressing the racial discrimination that still persists under the VRA, they turned thr argument and stated that sections 5 and 4(b) were actually examples of racial discrimination and an attack on equality (Halewood, 2015).

Personal Strategy

I propose a slight modification to the original section 5 and 4(b). The Court stated that the way it was written was unconstitutional. So, a revisit to the original text is necessary. In this new edition, pre-clearance will apply to all states, not just the ones under its original jurisdiction. I find that this new arrangement tackles the Court's accusation that Congress was infringing on state sovereignty, and updates the outdated data set that the original sections 5 and 4(b) were operating under. If it becomes something that every state is beholden to, then it cannot be said that one state's sovereignty is being ignored over the

other. In addition, if all are included, then the outdated measures no longer apply because they aren't needed anymore to determine which states fall under the jurisdiction of sections 5 and 4(b). Obviously, to require all states to apply for clearance on any election-type laws would require a much larger judicial system to handle it, so hand in hand with the rewriting of sections 5 and 4(b), Congress would also have to deliver on more resoucres in the lower courts.

I predict that in the aftermath of this legislative action taken by Congress, a state like Alabama, which, under Shelby, was free of its preclearance requirements, would raise issue. In my hypothetical case, the plaintiff would be the state of Alabama, and the defendant would be the U.S. Government. I imagine that Alabama would call for all preclearance to be declared unconstitutional. With this, the legal question at hand would be clear. Congress has since accepted that their original writing of sections 5 and 4 (b) was unconstitutional, they have since rewritten it, and now are asking the Court if this adaptation is constitutional. Often in the discussion of sections 5 and 4(b), the bailout mechanism is ignored. This system has successfully adjusted the coverage of preclearance as needed over its many years in action and further proves that the jurisdictions themselves are really in control of their coverage status if they hold a clean record. This bailout system is one I would like to carry over into my proposal, hopefully allowing it to slowly wean out the states that truly don't need it from the ones that clearly do.

In the dissenting opinion on the original case, Justice Ginsburg cites many overlooked examples of how states still practice discriminatory voting procedures, such as in the case of Kilmichael, Mississippi, where an all-White board of alderman and Mayor went so far as to try and cancel a whole election in 2001 when it was revealed that multiple Black candidates were in the running (2013). It is in times like these that the Voting Rights Act was so vital in stepping up to block this. But, just as Justice Ginsburg pointed out, the discriminatory practices that were just nearly suppressed before Shelby, had the floodgates opened to them. As cited above, the evidence will come from before and after the Shelby County decision; states were proposing discriminatory voting practices prior to the decision, and in the aftermath, they implemented them in earnest. The Court in my hypothetical case will be able to see these instances and use them as backing for why they must approve Congress's new legislation.

Predicting Justices' Positions

It is unlikely that the current Court would follow through with the proposed case in overturning the Shelby County precedent. With a state being a party, it would fall under original jurisdiction, requiring the Supreme Court to hear it. It has been over 10 years since the case in question was decided, but the Court still holds 5 of the Justices who heard it. Of

those, Justices Robert, Alito, and Thomas all voted in the majority. By looking at similar decisions they've made since Shelby, their opinions have not undergone a significant change.

In analyzing recent cases from the Supreme Court Database that fall under the same issue of Civil rights under the Voting Rights Act of 1965 and its amendments, and the legal provisions of federal statutes regarding the voting rights of 1965 and its amendments, two stick out as indicators of the current standing with the Court. Abbott v. Perez (2018) was a conservative ruling with a 5-4 decision. A Texas district court was accused of racially gerrymandering in its drawing of the new congressional districts. The Court found that there was no evidence that Texas was acting with bad intentions and intentionally practicing any kind of discrimination (Oyez B). A second case, Brnovich v. Democratic National Committee (2021), resulted in another conservative decision, 6-3. Arizona presented two laws, one that restricted out-of-precinct voting and another regarding ballot collection. The Court found that neither of these actions violated the Voting Rights Act, even though the third-person ballot collection service they terminated allowed many Native American, Hispanic, and Black voters who lack transportation a way to get their ballots to a ballot box (Oyez C).

Consistently in both those cases, the justices who overlap from Shelby stay true to their original alignment, with the conservative Justices staying in the majority and the liberal justices in the minority. It is for that reason that a Court that would overturn this precedent could not consist of a conservative majority that still houses Justices Robert, Thomas, and Alito, or perhaps any kind of conservative majority, no matter the make-up. In a piece of research done by Charles Cameron and Jonathan P. Kastellec, they predicted that conservatives may hold control of the Court until the 2050s. They concluded this by running a simulation, making certain assumptions about the continuation of the existing structures and patterns of the Court, and calculating the probability that the presidents would be classified as either Democrat or Republican. With all of this and trusting that the nominated and approved justice was a reliable ideologue, they predicted that the justice representing the median of all the ideologies on the Court would remain on the conservative skewed until their forecasted year of 2050 (Cameron and Kastellec, 2021).

Post-Victory Predictions

Much of the literature on the topic asserts that one of the main reasons for the conservative decision in Shelby was that Southern states were seeing an increase in minority voters and minority candidates running and winning office (Brown and Staggers, 2018). The Democratic Party was hit hard when sections 5 and 4(b) were deemed unconstitutional, as it allowed Republican state governments to cement themselves in

power by making it harder and harder for people of color to vote in the South, voters who may have voted along certain ideological lines.

An Amicus brief filed in the case by the then-Senate Majority Leader Harry Reid states the importance of remembering that the 2006 action to reauthorize section 5 was not only bipartisan but also unanimous (Reid, 2013). As polarazation fiurtehr festers in this country, it is hard to imagine such a decision, but if it were possible, then perhaps there is hope that it can once again be possible in the future.

The impact seen with the successful execution of my proposed strategy to overturn the Shelby precedent won't undo the damage done in the intermediary years. All those election laws that were passed immediately following the Shelby decision do not become null and void. But it would be in the interest of potential litigants to bring into question those laws. Lower courts are likely to follow a ruling by the Supreme Court.

Conclusion

I was drawn to Shelby County v. Holder (2013) as a case I would like to tackle in this attempt to overturn something currently considered 'good law'. Having gotten to know this case as well as I have these past months, through listening to oral arguments, reading the differing opinions, and engaging in the literature, I feel like what I have proposed is something that is a logical path to combat voter discrimination from running rampant in this country. The suggestion was to choose a precedent that you would be happy to see overturned, and Shelby certainly fit the bill for me. From the get-go, the evidence was clear that sections 5 and 4(b) were protecting vital parts of this democracy, and new evidence is making itself known every election cycle. I find that time reveals all, and it certainly has done so in proving the Court made a mistake in their original ruling.