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### Pardon Me: Sovereignty as a Pretext

Sara Johnson

*Trinity College, Hartford Connecticut, sara.johnson@trincoll.edu*

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## Pardon Me: Sovereignty as a Pretext

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Sara Johnson

*Shelby County v. Holder* (2013) was a landmark decision in which the Voting Rights Act of 1965 (VRA) was rendered essentially ineffective. The two sections of the Act that were under question were Section 5 and Section 4(b). Section 5 established the policy of preclearance, that certain jurisdictions must seek federal approval before changing their electoral laws, and Section 4(b) established the coverage formula that determined which jurisdictions preclearance applied to. This case came to trial when Shelby County, Alabama brought suit against then United States Attorney General Eric Holder, claiming that these two sections were unconstitutional. The Supreme Court ruled 5-4 in favor of Shelby County, deciding that the coverage formula in Section 4(b) was unconstitutional, thereby reducing Section 5 to empty words. Justice Roberts delivered the majority opinion in which he reasoned that the coverage formula was outdated and undermined state sovereignty. He also claimed there were no longer any persistent examples of racial discrimination in the electoral systems of the South to justify preclearance. Contrary to Justice Roberts' opinion, I argue that the critics of the ruling were right to suggest that it was not within the power of the Court to combat Congress' legislative authority and that the full effect of Sections 4(b) and 5 of the VRA are necessary for the continued protection of voting rights in the United States.

The central claim in Justice Roberts' ruling was that the coverage formula, as it stood in Section 4(b), was outdated and even prejudiced. The government's acknowledgement that the coverage formula was strategically engineered to encompass the relevant jurisdictions was enough for Justice Roberts to claim that the formula and the reason for coverage had no "logical

relationship” (*Shelby County v. Holder*, 2013). He felt as though the Southern states were being targeted by a formula that was no longer relevant to the current state of America. This feeling was only exacerbated by the fact that the formula had remained unchanged for 40 years. In essence, the majority opinion claimed that the coverage formula unfairly singled out the Southern states and was no longer reflective of current racial and social circumstances.

In her dissent, Justice Ginsburg contested the idea that the VRA had remained static and unchanged. She emphasized the existence of the bailout mechanism within the VRA that ensures that the covered status is “neither permanent or over broad” and enables jurisdictions with a clean record to “terminate coverage” (*Shelby County v. Holder*, 2013). She further highlighted that almost 200 jurisdictions had been successfully removed from the preclearance requirement of Section 5 (*Shelby County v. Holder*, 2013). These numbers prove that even with the full operation of the Sections 4(b) and 5, the jurisdictions that showed a clear effort to eliminate racially discriminatory electoral law no longer had to comply with preclearance. Consequently, the remaining jurisdictions were still covered as a result of their own actions rather than any bias on the part of the federal government. If these jurisdictions had proven their commitment to fair voting regulations, they would have won their bailouts and been freed from the preclearance requirement.

Critics of the Court’s decision also suggest that it was not the Court’s place to determine the continued relevance or efficacy of the coverage formula – it was Congress’. The standard of review presented in *South Carolina v. Katzenbach* established that Congress could use “any rational means to effectuate the constitutional prohibition of racial discrimination in voting” (*South Carolina v. Katzenbach*, 1966). By invalidating Section 4(b) of the VRA, the Supreme Court ignored this precedent and substituted its judgement for Congress’. Justice Ginsburg wrote

that the Court's role should have been "to determine whether the legislative record sufficed to show that 'Congress could rationally have determined that [its chosen] provisions were appropriate methods'" (*Shelby County v. Holder*, 2013). If that were the case, the Court would have had no choice but to hold according to the actions of the legislature. Not only had Congress amassed decades worth of legislative records of voting discrimination and the VRA's efficacy, but they also continuously reauthorized the act by exceptionally large margins every time; the most recent 2006 reauthorization was no exception. With records this extensive in support of the VRA, the Court had no reason to claim it was an inappropriate method of enforcing the 15<sup>th</sup> amendment. As aptly noted by Kim Wehle, a tenured law professor at the University of Baltimore, the Court took liberties with the desires of the people; their voice was represented in Congress and the reauthorization of the VRA, and the Shelby decision directly opposed their choice (Rosen, 2021).

Justice Roberts made his initial claim invalidating the coverage formula largely to assert and protect his understanding of state sovereignty. In his decision, he emphasized the fact that election law is relegated to the states under the 10<sup>th</sup> amendment, implying that the federal government did not and does not have the power to enact the VRA to its full extent (*Shelby County v. Holder*, 2013). However, he makes no attempt to claim that the VRA was unconstitutional from its conception. Instead, he argues that Section 4(b) and 5 were only intended to be temporary emergency measures and that the time for extreme government intervention has passed (*Shelby County v. Holder*, 2013). Ed Blum, a conservative legal strategist, hailed the Court's decision as restoring an "important constitutional order" to our government "which requires that all fifty states are entitled to dignity and sovereignty" (Berman, 2015).

To the critics of the decision, myself included, this rhetoric is dangerous. The principle of equal state sovereignty is, as journalist and author Ari Berman wrote, “rooted in the darkest chapter of American history” (2015). He refers specifically to the Dred Scott case where the doctrine of equal sovereignty was invoked to prevent Black people from voting, as it would have “[violated] the equal sovereignty of the slave states” (Berman, 2015). This rhetoric, along with the similar rhetoric of state’s rights, is incredibly racially charged and has long been a method of enforcing otherwise questionable laws that deviate from federal precedent. It is also important to note that previous precedent, established in *South Carolina v. Katzenbach*, asserted that the principle of equal sovereignty or state sovereignty “applies only to the terms upon which States are admitted to the Union, and not to the remedies for local dissenting evils which have subsequently appeared” (*South Carolina v. Katzenbach*, 1966). Thus, equal sovereignty does not apply to states’ election laws. Congress and the Department of Justice are well within their power, as established by the 15<sup>th</sup> Amendment and reaffirmed by *Katzenbach*, to enforce the voting rights of Black people. Despite the Southern States’ exploitation of the doctrine of equal sovereignty, the federal government has a right to act against deviant state voting regulations.

The final, and most inflammatory, claim of Justice Roberts’ decision was that there was no longer an issue of voter suppression or discrimination in the United States drastic or pervasive enough to warrant the continuance of Section 5. To prove this and invalidate the State’s oral presentation, Justice Roberts spoke about the voter turnout in Massachusetts and Mississippi to represent the distinction between states that are free from the preclearance requirement and those that are not. He claimed that Massachusetts, a notoriously blue state and one that was not covered by the coverage formula, had the worst White to Black voter turnout ratio in the United States. Not only was this false, as Massachusetts was ranked 26<sup>th</sup> in Black voter turnout

compared to Mississippi ranked 8<sup>th</sup>, it was misleading based on the populations. At the time, only 8 percent of Massachusetts' population was Black while Mississippi had a population of 37 percent Black people. Additionally, despite the large number of Black people in Mississippi, the voters had never elected a Black official to statewide office, suggesting that Black voters were, and still are, being disenfranchised and further proving the continued need for Section 5's power (Berman, 2015).

Black people in states like Mississippi are still subject to discriminatory voting regulations, especially obstacles that are labeled as second-generation barriers. To paraphrase Justice Ginsburg, second-generation barriers are efforts to reduce the impact of minority votes rather than directly blocking access to the ballot (*Shelby County v. Holder*, 2013). In his opinion, Justice Roberts discounts second-generation barriers as highlighting the "irrationality of continued reliance on the Section 4 coverage formula" and argues that they cannot be considered discrimination, at least under the Court's current understanding of the VRA (*Shelby County v. Holder*, 2013).

Despite this opinion, there remains considerable evidence of continuing voter suppression in the United States and that Section 5 and 4(b) played an important role in limiting it. In her dissent, Justice Ginsburg cited a study which revealed that even though "covered jurisdictions account[ed] for less than 25% of the country's population... they accounted for 56% of successful Section 2 litigation since 1982" (*Shelby County v. Holder*, 2013). This data confirms that racial discrimination persisted in the jurisdictions that were singled out for preclearance, supporting both the coverage formula and the continued need for the fully enacted VRA.

Since the Shelby decision, many states have come out with harsher voting restrictions, providing further evidence that Sections 5 and 4(b) were still relevant and necessary. Just three

weeks after the Shelby decision, the North Carolina senate significantly strengthened a proposed law that was already dubbed “Screw the Voter Act” and represented “the toughest voting restrictions in the country” (Berman, 2015). Along with many other restrictions, the law eliminated same day registration and voter-registration drives, while also limiting poll hours and early voting. As soon as they were able, even the notoriously moderate Southern states like North Carolina started pushing the limits on voting restrictions. Even now, several years later, states continue to enact restrictive legislation. Georgia enacted the Election Integrity Act in March of 2021 (Corasaniti & Epstein, 2021). The act established strict voter ID requirements, limited absentee voting, limited drop boxes and voting centers, and made it impossible to cast a provisional ballot if an individual attempts to vote at the wrong precinct (Corasaniti & Epstein, 2021). The law even made it a misdemeanor to offer food or water to the voters in line (Corasaniti & Epstein, 2021).

In my opinion, this law, and legislation like it, transcends second-generation barriers and becomes clear voter suppression. Voter ID requirements have been notoriously racially charged as minority voters are less likely to have ID and the finances to afford ID. The laws are also often enforced along racial lines, with minority voters being questioned about ID more frequently than White voters (*Oppose Voter ID Legislation - Fact Sheet*, n.d.). Beyond ID, location-based restrictions are also racially charged as many polling places are strategically placed in predominately White districts, confusing and discouraging Black and other minority voters (Berman, 2015).

The impact of the Shelby decision is enough to prove that the VRA should still have preclearance requirements. Without them, once covered jurisdictions have introduced unnecessarily restrictive voting laws that remain unchecked. The only method of contesting these

laws is Section 2 of the VRA which requires individuals to bring their case after the laws have already been put into effect. It is a much slower process, allowing many voters to be disenfranchised while their cases fully advance through the courts. Ultimately, the court should have deferred to the opinions and authority of Congress, as Sections 4(b) and 5 were the only effective means of VRA enforcement. Without them the United States has regressed in its protection of voting rights.

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