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Preclearance Without Statutory Change: Bail-In Suits Post-*Shelby County*

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INTRODUCTION

In *Shelby County, Alabama v. Holder*[1] the Supreme Court found unconstitutional a key portion of the Voting Rights Act of 1965 (VRA or "the Act").[2] The Court struck down the VRA's "coverage formula"—located in § 4 of the Act. If a jurisdiction was covered under the formula, it was required to submit any voting law changes to the federal government for approval.[3] The formula itself relied on a jurisdiction's history of implementing tests for voting, discrimination against language minorities, and voter registration and turnout numbers in elections prior to the Act's passage.[4] The *Shelby County* Court found the existing formula to be imprecise and out of date.[5]

Disappointment with the Court's decision quickly led to calls for reform. Some called for a constitutional amendment.[6] Others pushed for statutory

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1. 570 U.S. ___, 133 S. Ct. 2612 (June 25, 2013). Slip opinion available at http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf.
2. Codified at 42 U.S.C. § 1973 *et seq.* (2006), *available at* http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap20-subchapI-A-sec1973.pdf.
3. *Id.* § 1973c (a), *available at* http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap20-subchapI-A-sec1973c.pdf.
4. *Id.* § 1973b (b), *available at* http://docs.uscode.justia.com/2010/title42 /USCODE-2010-title42/pdf/USCODE-2010-title42-chap20-subchapI-A-sec1973b.pdf.
5. *Shelby Cnty.*, slip op. at 17-18.
6. John Nichols, *SCOTUS Voting Rights Act Decision Means We Need "Right To Vote" Amendment*, NATION (June 25, 2013, 11:13 AM), http://www.thenation.com/blog/174968/scotus-voting-rights-act-decision-means-we-need-amend-constitution#.

change—including a revised coverage formula[7] or universal coverage for all jurisdictions (eliminating the need for a coverage formula at all).[8]

On the surface, statutory amendments post-*Shelby County* may appear possible. As recently as 2006, Congress expressed wide support for remedial voting legislation, reauthorizing the VRA by a vote of 390-33 in the House and 98-0 in the Senate.[9] But some are less than optimistic that the current Congress will be able to move forward with reform. Longtime civil rights activist and congressmen, John Lewis, stated the Court's decision "put a dagger in the heart of the [VRA]," but when questioned about reform remarked, "in 2006 we had the ability and capacity to come together in a bipartisan fashion to renew the [VRA]. I'm not so sure whether we have the will to do what we must do and should do."[10]

With statutory change uncertain, the logical alternative is to look for increased opportunities to enforce provisions of the VRA unaffected by the Court's ruling. The Court, while striking down the coverage formula of the Act, left intact the § 5 preclearance requirement. It additionally left untouched a lesser know provision contained in § 3(c) of the Act—sometimes called the "bail-in" procedure or the "pocket trigger" provision.[11] That provision states in relevant part:

> If in any proceeding instituted by the Attorney General or an aggrieved person . . . the court finds that violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief have occurred . . . the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prereq-

7. Myrna Perez, *After Supreme Court, Congress Must Move on Voting Rights Act*, CHRISTIAN SCI. MONITOR (June 25, 2013), http://www.csmonitor.com/Commentary/Opinion/2013/0625/After-Supreme-Court-Congress-must-move-on-Voting-Rights-Act.

8. Aaron Zelinsky, *The Fifty State Solution to* Shelby County, CONCURRING OPINIONS (June 25, 2013, 4:45 PM), http://www.concurringopinions.com/archives/2013/06/the-fifty-state-solution-to-shelby-county.html.

9. 152 Cong. Rec. H5207 (daily ed. July 13, 2006), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2006-07-13/pdf/CREC-2006-07-13-pt1-PgH5207-2.pdf; 152 Cong. Rec. S8012 (daily ed. July 20, 2006), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2006-07-20/pdf/CREC-2006-07-20-pt1-PgS8012-2.pdf.

10. Jeff Zeleny, *John Lewis: Court's Decision Puts "Dagger in Heart of Voting Rights Act,"* ABC NEWS (June 25, 2013, 12:16 PM), http://abcnews.go.com/blogs/politics/2013/06/courts-decision-puts-dagger-in-heart-of-voting-rights-act/.

11. *See* Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1997 (2010).

> uisite, 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, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title . . . .[12]

The bail-in process allows a court, upon finding a violation of the Fourteenth or Fifteenth Amendment, to impose a system similar to the § 5 preclearance structure on the offending jurisdiction.

The bail-in procedure has been infrequently examined by both courts and scholars.[13] Only one reported case exists analyzing the standards for bailing-in a jurisdiction.[14] This piece attempts to provide an analysis of bail-in suits post-*Shelby County* by examining the advantages of bail-in litigation, as well as its challenges.

I. ADVANTAGES AND DISADVANTAGES OF BAIL-IN LITIGATION

The bail-in procedure's primary advantage is that it provides a nearly identical structure to the previous preclearance model under § 5, and at the same time is likely to pass constitutional scrutiny. In particular, the bail-in procedure satisfies the *Shelby County* Court's chief concern with the § 4 formula: respect for the equal dignity of the states.[15] According to the Court, states—like people—have the right to be treated by the federal government equally.[16] Just as the federal government may not single out classes of persons for disfavored treatment, it similarly may not make distinctions amongst the states. Section 5 intrudes on this equality principle by forcing certain states to "beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."[17]

The limited number of states that the § 4 formula reached (nine states in full and various other counties) further highlighted the lack of equality between states under the law.[18] The Court acknowledged that it had previously upheld this differing treatment because of "[t]he 'blight of racial discrimination in voting' [that] had 'infected the electoral process in parts of our country for nearly a

12. 42 U.S.C. § 1973a (c) (2006), *available at* http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap20-subchapI-A-sec1973.pdf.

13. Crum, *supra* note 13, at 1997.

14. *See id.* at 2007 n.87 (citing Jeffers v. Clinton, 740 F. Supp. 585, 600 (E.D. Ark. 1990)).

15. Shelby Cnty., Ala. v. Holder, 570 U.S. ___, 133 S. Ct. 2612, slip op. at 9 (June 25, 2013), *available at* http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf.

16. *Id.* at 9-10.

17. *Id.* at 11.

18. *Id.*

century.'"[19] However, the Court found that because the formula had remained static—subjecting states to preclearance based on voter registration data from previous decades—the formula was no longer constitutional.[20]

The § 3 bail-in provision does not rely on the § 4 formula, or any other legislative calculation. Rather, jurisdictions become subject to preclearance under § 3 upon an individualized determination by a court, and only after the jurisdiction has been found in violation of the Fourteenth or Fifteenth Amendment.[21] In this way, the § 3 bail-in process is more likely to satisfy constitutional concerns. A jurisdiction bailed in via § 3 can hardly complain it is not being treated equally by the federal government, since it will have had an opportunity to independently litigate before a neutral arbiter whether it should be subject to preclearance. Further, if a jurisdiction is bailed in, its future voting changes will be submitted to the court imposing preclearance.[22] This too is different than § 5, where jurisdictions were forced to choose between the Department of Justice (DOJ) and the District of Columbia District Court. The choice between submitting changes to two different federal decision makers, both located in the District of Columbia, has been a point of contention since § 5's enactment. The ability of states to litigate their § 3 preclearance requests in the federal court located in their state cures this concern.

The § 3 process also permits temporal limitations to be placed on the review process. Courts can order review for only a limited duration of time.[23] This is unlike the indefinite § 5 process which can only be terminated if a jurisdiction institutes its own suit, requesting it no longer be subject to review.[24] This strengthens the argument that the bail-in process satisfies constitutional requirements by treating states with equal dignity.

There are still a number of hurdles to increased § 3 litigation post-*Shelby County*. The most significant is establishing a violation of the Fourteenth or Fifteenth Amendment. For § 3 to apply, it is insufficient that a jurisdiction be found to have violated the VRA or another voting rights statute. Rather, a specific finding must be made that the jurisdiction violated the Constitution.[25] This is a demanding requirement, and will likely necessitate proof that a jurisdiction intended to discriminate on the basis of race.[26] The § 3 process is also at the

19. *Id.* at 12 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

20. *Id.* at 18.

21. 42 U.S.C. § 1973a (c) (2006), *available at* http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap20-subchapI-A-sec1973.pdf.

22. *Id.*

23. *Id.*

24. *Id.* § 1973b (a)(1), *available at* http://docs.uscode.justia.com/2010/title42/USCODE-2010-title42/pdf/USCODE-2010-title42-chap20-subchapI-A-sec1973b.pdf.

25. *Id.* § 1973a (c).

26. *See* City of Mobile, Ala. v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion) ("[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.").

mercy of the federal judiciary. Litigants will have to convince a federal judge not only that a violation has occurred, but also that the court should require the jurisdiction to submit future voting changes to the court. Again, this is a challenging burden for litigants, since some judges will prefer to stay out of state political affairs.

However, even with these challenges in mind, it is clear the bail-in process represents the remedial structure most similar to the previously enforced § 5 process, and, as we will see, provides advantages over other VRA alternatives.

II. Bail-In Advantages Over § 2 Suits

Another portion of the VRA left intact post-*Shelby County* is § 2. Section 2 permits the government or any aggrieved party to bring suit against any jurisdiction for violations of the VRA.[27] Since the VRA's adoption, § 2 has been utilized to enforce voting rights in jurisdictions not covered by the preclearance requirement. Post-*Shelby County*, § 2 suits are likely to become more prevalent. Indeed, the day after *Shelby County* was released, a group of plaintiffs filed a § 2 suit against Texas's voter ID law,[28] which had previously been the subject of § 5 litigation.

However, § 2 has significant limitations compared to preclearance review. First, the burden in a § 2 suit is placed on the government or the private party suing the jurisdiction. The plaintiff must establish that the voting practice in question is discriminatory.[29] In contrast, the preclearance requirement places the burden on the jurisdiction, and forces it to justify the change.[30] The § 2 standard therefore makes it significantly more difficult to establish a violation, when compared to litigating preclearance cases. As former Acting Assistant Attorney General William Yeomans said following the *Shelby County* decision, "[i]t's a much more labor-intensive and time-consuming process . . . . With the same resources, it's going to be difficult to do the same job."[31] Second, § 2 suits generally take place after a violation has occurred. By the time § 2 litigants file

27. 42 U.S.C. § 1973(a) (2006), *available at* http://www.gpo.gov/fdsys/pkg /USCODE-2010-title42/pdf/USCODE-2010-title42-chap20-subchapI-A-sec1973.pdf.

28. Complaint at ¶ 50, Veasey v. Perry, 2:13CV00193 (S.D. Tex. June 26, 2013).

29. 42 U.S.C. § 1973(a).

30. *Id.* § 1973a (c) (providing that, if a suit is bailed in, "no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds 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").

31. Todd Ruger, *DOJ Denounces Voting Rights Act Decision*, Nat'l L.J. (July 1, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202608968847&slreturn=20130530100405.

suit, new election laws are often in effect and in some cases an intervening election has already occurred. Even if litigants are able to prove the illegality of the law, candidates have been chosen in an election with the new law in effect. Furthermore, jurisdictions found in violation of § 2 are free to immediately enact new laws that, while not identical to the previously struck down law, similarly discriminate. It is well documented that this was the case in many states prior to the adoption of the original preclearance requirement in 1965.[32] Preclearance remedies this failure by preventing a new law from taking effect until the jurisdiction satisfies its burden of establishing the law will not have a discriminatory effect.[33]

For these reasons § 2 suits standing alone fail to fill the void left in the wake of *Shelby County*. In order to fully realize the promises of the VRA, § 2 litigants should, in addition to their statutory grievances, pursue violations of the Fourteenth and Fifteenth amendments where they exist. If a court finds a violation of the Constitution, it may utilize § 3 to bail-in the jurisdiction and impose preclearance requirements.[34] In this way, § 2 litigants can realize their own goals of holding jurisdictions accountable for past and ongoing voting rights violations, while at the same time protecting future voters by barring jurisdictions from replacing old discriminatory laws with new ones.

III. Bail-in Suits Historically

The bail-in procedure has been utilized sparingly since the VRA's adoption. Today, with § 4 eliminated, it is important to observe any trends in the limited number of bail-in cases available, in order to determine § 3's reach.

Since the VRA's adoption, eighteen jurisdictions have been bailed-in.[35] Two of the bail-ins were for preclearance of an entire state (New Mexico and Arkansas),[36] while the rest were individual counties or cities.[37] No time period stands

32. *See* Beer v. United States, 425 U.S. 130, 140 (1976) (recognizing the "'common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down'" (quoting H.R. Rep. No. 94-196, at 57-58 (1975))).

33. 42 U.S.C. § 1973c (2006).

34. Section 2 is not the only statute that could be used in this fashion. Section 3 allows a court to impose preclearance requirements when it finds a constitutional violation in a proceeding brought "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." *Id.* § 1973a (c). I have concentrated here on § 2 because it is the most prevalent statute in this area, and is used to combat a wide range of voting violations. I do not discount that other statutes may also be used in this manner.

35. Brief for the Federal Respondent Appendix A, Shelby Cnty. v. Holder, 570 U.S. ___, 133 S. Ct. 2612 (June 25, 2013) (No. 12-96), 2013 WL 315242.

36. *Id.* at 1a-2a (citing Sanchez v. Anaya, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984) (bailing in New Mexico); Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. May 16, 1990) (bailing in Arkansas).

37. *Id.* at 1a-3a.

out for bail-ins. The first two bail-ins came in 1979.[38] The most recent came in 2006.[39] The rest are spread out fairly consistently over the remaining years.[40] No area of the country dominates the list either. Bailed-in jurisdictions come from all regions, not just the Deep South.[41]

Jurisdictions bailed-in have not been subject to the preclearance requirement indefinitely. They are often only subject to the requirement for a certain category of election law changes, and only for a set period of time.[42] For example, New Mexico was bailed in after its 1980 redistricting plan was found unconstitutional.[43] The state was subject to the preclearance requirement for the next decade, and then removed from the preclearance roster.[44] Jurisdictions have also consented to the bail-in process by means of a consent degree in order to avoid litigation.[45]

In viewing the bailed-in jurisdictions, one cannot help but notice the list satisfies many of the concerns raised by the *Shelby County* Court. The jurisdictions were bailed in at different time periods and by different courts, establishing the dynamic nature of § 3 compared to the more stagnant § 4. The jurisdictions are geographically diverse, alleviating concerns regarding the dignity of each state, and the characterization that § 4 singled out the South. Similarly, the fact that jurisdictions have consented to the bail-in mechanism in lieu of trial demonstrates a benefit to states engaged in protracted litigation. Lastly, the limited duration that jurisdictions are subject to preclearance eases the harsh impact of the requirement.

38. *Id.* at 1a (citing United States v. Thurston Cnty., C.A. No. 78-0-380 (D. Neb. May 9, 1979) (bailing in Thurston County, Nebraska); McMillan v. Escambia Cnty., C.A. No. 77-0432 (N.D. Fla. Dec. 3, 1979) (bailing in Escambia County, Florida)).

39. *Id.* at 3a (citing United States v. Village of Port Chester, C.A. No. 06-CV-15173 (S.D.N.Y. Dec. 22, 2006) (bailing in the Village of Port Chester, New York)).

40. *Id.* at 1a-3a.

41. *Id.* (identifying Port Chester, New York, Alameda County, California, Alexander County, Illinois, and other jurisdictions not in the Deep South but bailed in through § 3).

42. *See* Crum, *supra* note 13, at 2016 ("The section 3 preclearance regimes imposed by district courts have targeted preclearance for only certain voting changes and set a sunset date for coverage.").

43. Richard Pildes, *One Easy, But Powerful, Way To Amend the VRA*, ELECTION L. BLOG (June 28, 2013, 6:53 AM), http://electionlawblog.org/?p=52349.

44. *Id.*

45. *See* Crum, *supra* note 13, at 2014 (citing Kirkie v. Buffalo Cnty., No. 03-CV-3011, 2004 U.S. Dist. LEXIS 30960 (D.S.D. Feb. 12, 2004) (consent decree)).

IV. BAIL-IN SUITS POST-SHELBY COUNTY

Following *Shelby County*, Attorney General Eric Holder made clear that his office would continue to aggressively enforce the provisions of the VRA unaffected by the Supreme Court's decision.[46] One can expect this enforcement effort will include an increased utilization of § 3. Additionally, private actors are likely to pursue more suits involving § 3 as a remedy, with the hopes of placing violating jurisdictions under supervision.

Challenges to voting laws under the Fourteenth and Fifteenth amendments are ongoing as of this writing. Trial is scheduled in November of 2013 for challenges to Wisconsin's voter identification law.[47] A challenge to Ohio's early voting changes is in the discovery phase, with the District Court set to make a decision on a permanent injunction later this year.[48] Neither of these jurisdictions were covered under § 4. However, it seems likely that constitutional claims against previously covered jurisdictions will increase in the immediate future. This is particularly true of states recently the subject of prolonged § 5 litigation—including Florida,[49] Texas,[50] and South Carolina.[51] These three states battled with the DOJ over voting changes in the last three years, with the DOJ largely the victor—successfully blocking a number of changes from being implemented. The successes of those efforts are now reduced to a nullity—since any recent denials of preclearance were voided by the *Shelby County* decision. Texas announced just hours after the *Shelby County* decision that it would move forward with its controversial voter photo identification law,[52] which was

46. *See* Ruger, *supra* note 33.

47. Order, Frank v. Walker, No. 11-CV-01128 (E.D. Wis. July 30, 2013), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/FrankOrderSettingSch.pdf. *See also* Frank v. Walker, ELECTION L. @ MORTIZ (July 31, 2013, 9:16 AM), http://moritzlaw.osu.edu/electionlaw/litigation/Frank.v.Walker.php (providing links to the court filings in the case).

48. Preliminary Pretrial Order, Obama for Am. v. Husted, No. 2:12-cv-636 (S.D. Ohio Feb. 21, 2013), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/PreliminaryPretrialOrder_001.pdf. A preliminary injunction was already granted and affirmed by the Sixth Circuit. Obama for Am. v. Husted, 697 F.3d 423, 425 (6th Cir. 2012).

49. *See* Florida v. United States, 885 F. Supp. 2d 299 (D.D.C. 2012) (approving and denying preclearance to various new provisions of Florida election law).

50. *See* Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) (denying preclearance to Texas's voter identification requirement), *vacated,* 133 S. Ct. 2886 (June 27, 2013).

51. *See* South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012) (preclearing voter identification law for future elections, but finding it could not be properly implemented in the 2012 election).

previously denied preclearance by the District Court for the District of Columbia.[53] It should be expected that the DOJ or private litigants will continue to pursue these cases, and attempt to halt the implementation of the changes previously denied preclearance. It is much too early to predict if they will succeed. But emphasis in the litigation should be placed on establishing how the changes violate the Constitution. If the government or private litigants are successful on the merits, they should seek to employ the bail-in provision so that the jurisdictions will once again be subject to the demands of preclearance.

CONCLUSION

In sum, voting rights advocates should remain cautiously optimistic that § 3 can fill the void left open by the Court's rejection of § 4. Although statutory change may still be possible and desirable,[54] immediate attention should be paid to provisions currently in effect and capable of instant application. The bail-in provision satisfies the constitutional requirements laid out by the *Shelby County* Court, is immediately available, and, if utilized, represents the remedial option closest to the previously utilized § 5 preclearance structure.

52. Matt Vasilogambro, *That Was Quick: Texas Moves Forward with Voter ID Law After Supreme Court Ruling*, NAT'L L.J. (June 25, 2013), http://www.nationaljournal.com/politics/that-was-quick-texas-moves-forward-with-voter-id-law-after-supreme-court-ruling-20130625.

53. *See* Texas v. Holder, 888 F. Supp. 2d 113.

54. Some have suggested that § 3 could be amended to be more effective. *See* Pildes, *supra* note 45 (suggesting reforms including applying § 3 to violations of statutes and not just the Fourteenth and Fifteenth Amendments). I do not rule out this possibility, but since this paper is geared towards alternatives to statutory change I do not discuss those proposals here.