State Notes

TOPICS OF LEGISLATIVE INTEREST

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The Voting Rights Act Ruling, Preclearance, and Michigan
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The U.S. Supreme Court recently made a landmark ruling in *Shelby County* v *Holder* [1], striking down a key section of the Voting Rights Act (VRA)[2]. Section 4b, at issue in the case, was part of a measure that was aimed only at the worst-offending states and local governments with regard to voter discrimination. If a state or local government qualified under a formula spelled out in Section 4b, that government had to get preclearance through the Federal government before it could change any voting policies. In *Shelby County*, the Court found that the formula was so severely outdated that it had become unconstitutional.

It is important to note that the Court did not address Section 2 of the VRA, which provides for a nationwide ban on any discriminatory voting practices based on race or color. These practices are still illegal under the VRA.

Under Section 5, states and local governments that qualified under the preclearance formula had to apply for any voting policy changes through the U.S. Department of Justice. The application had to prove that the proposed changes would not deny the right to vote on the basis of race, color, or language-minority group status. Although the Court struck down the Section 4b preclearance formula, it did not invalidate the preclearance requirements that are in Section 5. However, with the Section 4b trigger removed, the Section 5 preclearance requirements do not apply to any area. In *Shelby County*, the Court was clear that it had left Section 5 intact, and Congress could develop a new formula for preclearance mandates.

In the 1970s, the Section 4b formula was updated, and it brought two Michigan townships under the Federal mandate: Clyde and Buena Vista. As a result of *Shelby County*, and after nearly 40 years of being covered by VRA preclearance requirements, the rules for any local or State election policies that cover these two areas have changed.

From a purely economic and administrative standpoint, the effects of *Shelby County* will be positive for State and local government. The ruling will have very limited immediate effects, if any, for the governments of Clyde and Buena Vista Townships. It will have a minor impact on Allegan and Saginaw Counties, the counties that contain these townships, and the greatest effects will be felt at the State level.

The VRA: A Brief History

Enactment: 1965

As a result of the civil rights movement, the Voting Rights Act was enacted in 1965. Problems with minority voter registration and turnout were serious in some states, primarily in the Deep South. For example, in Alabama in 1965, only 19.3% of eligible black residents were registered to vote, while 69.2% of eligible white residents were registered to vote.[3] The worst-offending states often ignored Federal voting laws, required various voter registration tests that were specifically designed to exclude black voters, moved minority-dominant polling places without notice in order to make voting burdensome or impossible, and crafted other illegal methods to keep minorities away from the polls.

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1 *Shelby County* v *Holder*, U.S. Supreme Court (2013 Slip Opinion, retrieved from http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf).
2 42 U.S.C. 1973 to 1973aa.
3 *Shelby County* at 15.

Case-by-case litigation had proven slow to respond to the problems facing minorities, and made it difficult to stop illegal election practices until after an election had taken place. If a state was stopped from one illegal practice, it simply started another, resulting in "whack-a-mole" litigation. The Federal government could not keep up.

Congress responded with the VRA, using its power under the 15th Amendment to the U.S. Constitution, which guarantees that the right to vote must not be denied to citizens on account of race or color, and grants Congress the authority to enforce this right through "appropriate legislation". In an exercise of power that was without precedent, Congress included the preclearance provisions within the VRA. These were originally scheduled to expire in 1970.

The Section 4b formula enacted in 1965 included two factors to determine whether a state or political subdivision qualified for preclearance. The first was whether the state or political subdivision required a literacy test, which was a practice commonly used in the 1960s to prevent minorities from voting. The second was whether less than 50% of an area's eligible voters were registered, or had actually voted, in the 1964 presidential election. If an area qualified under this formula, the Federal government had the final say over any changes to any voting policies.

Supreme Court Challenge: *Katzenbach,* 1966

In mandating preclearance for only some states, Congress had set rules to treat states differently, and regulate local elections, potentially in violation of state sovereignty principles. Under the U.S. Constitution, the states must be treated equally, and have the power to regulate their own elections. Nonetheless, in the 1966 landmark decision *South Carolina* v *Katzenbach*, 383 U.S. 301, the U.S. Supreme Court upheld the VRA. The Court held that temporarily singling out repeat-offender states was reasonable given the circumstances of the times.

Preclearance Amendments: Extensions, Updates, the Inclusion of Michigan Townships

In 1970, Congress extended preclearance for five years, and updated the Section 4b formula to reflect levels of voter registration and participation in the 1968 presidential election. In 1975, Congress extended the VRA for seven years, and updated the formula to reflect the 1972 presidential election. In both 1982 and 2006, Congress extended the preclearance provisions for 25 years. Neither of these extensions modified or updated the formula; voter statistics in the 1972 presidential election have remained the basis for the preclearance formula since 1975.

The 1975 formula took into account discrimination against language-minority citizens. This brought the Michigan townships of Clyde and Buena Vista under the preclearance mandate. Both townships had high Spanish-speaking populations.

***Shelby County*: VRA Challenge and Holding**

In *Shelby County*, the Supreme Court indicated that the preclearance formula had failed to keep up with modern times, and was no longer reasonable. The Court focused on the following key facts in reaching this conclusion: 1) the difference between voter registration and turnout in preclearance areas has dramatically declined over the past several decades; 2) preclearance application denials have dropped significantly; 3) there has been a significant increase in the number of minorities who hold elected office in preclearance areas; and 4) discriminatory voter tests, the first factor in the formula, have been illegal for about the last half century.

The Court also took issue with Congress's recent 25-year extension of the preclearance provision. If the Court had upheld the Section 4b formula, statistics from the 1970s would determine voting policies in 2030, which the Court found unacceptable. What started out as a short-term remedy justified by clear and current problems facing minority voters, according to the Court, had become a long-term remedy based on decades-old facts.

Shelby County Sets the Bar: The Future Prospects of Preclearance

The Court emphasized the need for the Section 4b formula to reflect current political conditions. Although the Court made clear that Congress can still update the formula to require preclearance in the future, the Court offered some telling criteria that suggested preclearance may be a thing of the past.

Shelby County emphasized the differences between the U.S. in the 1960s, and the nation as it exists today. For example, the opinion referred to the infamously violent and oppressive 1965 "Bloody Sunday" in Selma, Alabama, before observing that the Selma of today has a black mayor. The Court reflected, "In 1965, the States could be divided into two groups: *those with a recent history* of voting tests and low voter registration and turnout, *and those without* those characteristics…[T]he Nation is no longer divided along these lines, yet the Voting Rights Act continues to treat it as if it were."[4]

The takeaway is that Congress has to look at today's world to prove that a problem exists. Current registration and poll data do not demonstrate a problem similar to that of the 1960s, and literacy tests have been abolished for decades, so Congress will have to find another indicator if it chooses to enact a new preclearance formula. Finding an acceptable indicator will likely be very difficult. In deciding the original 1966 VRA challenge, the *Katzenbach* Court held the following (which the *Shelby County* decision directly quoted):

> Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread discrimination must inevitably affect the number of actual voters.[5]

If widespread discrimination *must* result in lower voter registration or turnout, and voting rates are not low, there is little potential for a new and acceptable preclearance formula. Current voting rates do not mirror past rates that showed racial disparity. As noted above, in 1965 Alabama, only 19.3% of eligible black residents were registered to vote. In contrast, in 2004, 72.9% of eligible black residents were registered to vote (compared to 73.8% of white residents).[6]

Further, the terms used throughout the *Shelby County* opinion shed some light on the scrutiny that a new formula likely would face from the Court. Regarding voter discrimination in the 1960s, the Court referred to it as a "blight", an "extraordinary problem", "entrenched", "flagrant", "rampant", "widespread", and an "insidious and pervasive evil", and said that it presented "exceptional and unique conditions". When considering the preclearance formula, the Court referred to it as an "unusual" and "stringent" remedy, and "extraordinary legislation otherwise unfamiliar to our federal system", distinguishing preclearance from virtually every other law on the books. The Supreme Court's use of this language raises a red flag that future legislation will be held to a high bar.

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[4] *Shelby County* at 18 (emphasis added).
[5] *Shelby County* at 19.
[6] *Shelby County* at 15.

Perhaps this statement by the Court is the most telling: "If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula."[7] Since the Court did not find an entrenched blight of voter discrimination that was based on current data, and any Congressional attempts to make a new formula must start from scratch, it is difficult to imagine an acceptable basis for a future preclearance formula.

Going Forward: *Shelby County*'s Effects in Michigan

The immediate effect in Michigan as a result of the *Shelby County* ruling is that Buena Vista and Clyde Townships, Saginaw County (home to Buena Vista), Allegan County (home to Clyde), any related school districts, and the State no longer must submit for preclearance voting policy changes that affect Buena Vista or Clyde Township.

With regard to the Clyde and Buena Vista Township government, there will be little immediate effect. Most voting changes take place at the county or State level. For example, according to the Allegan County Clerk, Clyde Township has not attempted changes that have needed preclearance, but some changes at the county level have necessitated it. The Clyde Township Clerk's office indicated that no proposed changes to election policies have been stalled or discarded because of preclearance concerns.

At the county level, the effects will be more pronounced. Previously, in Allegan or Saginaw County, any county-wide election policy change was subject to preclearance, since the change would affect Clyde or Buena Vista Township. According to the Allegan County Clerk, the process created additional costs and administrative burdens, and was complex and cumbersome. Allegan County staff had to prepare materials to satisfy the Federal government's application requirements, which resulted in opportunity cost. Significant applications were required, for example, when the county merged the offices of the Register of Deeds and the County Clerk, modified apportionment, and modified judgeships. The county even hired an attorney to ensure that the applications were proper. This reflected the inexperience that many Michigan officials had with preclearance procedures; since only two townships qualified, an official who was uncertain of the rules could not call a neighboring jurisdiction for guidance. Preclearance compliance cost Allegan County an estimated $1,000 to $2,000 a year.

There also was a culture gap. Nationwide, because other covered jurisdictions had been excused from the preclearance requirements, Buena Vista and Clyde Townships remained the only non-state and non-county areas covered by preclearance. The U.S. Department of Justice was unfamiliar with Michigan's structure of government and power distribution, which is unusual in comparison to many other states. According to the Allegan County Clerk, this was a significant barrier for some applications.

Michigan will see the most changes at the State level, but any positive effects will likely be limited to less opportunity cost and faster implementation of new plans. Any statewide electoral changes had to have preclearance and, according to the Department of State, Michigan saw an increase in preclearance applications over the last several years, likely due to shifts in political dynamics. The number of applications per year also varied based on how many changes the State made to voting policies. As at the county level, personnel and other resources that were spent on preclearance compliance can now be shifted to other areas.

Since preclearance was a potential barrier to certain State policy decisions, *Shelby County* may have somewhat cleared the path for future initiatives. However, while the State no longer has to prove that

[7] *Shelby County* at 23.

changes will not harm minority voters' rights before enacting new statewide election or redistricting laws, Section 2 of the VRA still outlaws intentionally discriminatory voting practices.

Nevertheless, there are significant differences between preclearance and a Section 2 challenge. Under preclearance, the state or local government had the burden to prove to the U.S. Department of Justice, usually the Attorney General, that a policy would not have a discriminatory impact, regardless of its intent. Section 2 challenges, on the other hand, are reviewed in Federal court. The burden of proof is on the person challenging the state or local policy, and requires that person to prove that the policy was intended to discriminate on the basis of race or color. Proving discriminatory intent can be very difficult.

An example of the difference is what occurred in 2007 when Michigan's Secretary of State pursued plans to close a branch office in Buena Vista Township. The Department of Justice denied the request, finding that the State did not prove that closure would not have discriminatory impact. The branch provided a significant number of voter registrations, and the closest office was 90 minutes away. Post-*Shelby County*, the State can close the branch without preclearance, and any challenge under Section 2 would have to prove that the branch closure was intended to disenfranchise minority voters.

Shifting to more current policy initiatives, the Buena Vista School District is experiencing financial distress and has had a number of problems. Some have suggested dissolution of the school district, or emergency manager control. Proposed expansions of the Educational Achievement Authority also could apply to Buena Vista Schools. Under preclearance, any of these actions could have required Federal approval, resulted in complex litigation, or both. Without the preclearance requirement – unless Congress updates the Section 4b formula, and it applies to Michigan – these actions can be taken without the need for Justice Department approval.