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The Law of Democracy at a Crossroads: Reflecting on Fifty Years of Voting Rights and the Judicial Regulation of the Political Thicket

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INTRODUCTION

THE LAW OF DEMOCRACY AT A CROSSROADS: REFLECTING ON FIFTY YEARS OF VOTING RIGHTS AND THE JUDICIAL REGULATION OF THE POLITICAL THICKET

FRANITA TOLSON*

The fiftieth anniversary of the Voting Rights Act of 1965 presents an opportunity to reflect, not only on what the U.S. Supreme Court has done in the area of election law, but also to chart a path forward. This symposium issue, which includes contributions from some of the best and brightest scholars in the field,¹ reflects on the aspirations, ideals, and goals of our political system after five decades of meaningful voting rights and political participation. The substantive critiques and proposals presented by each author are especially timely given that we are in the midst of a presidential election year that has forced the average American to confront the question of who we are as a polity. This question encompasses more than just asking who can vote and in what election; it also includes the contested issue of whether the rules and regulations governing our elections lead to the selection of individuals who best reflect our collective political identity.²

Despite the abstract nature of the question of how we should define the body politic, it is clear that this is the very issue that the Supreme

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2. See, e.g., *State ex rel. Schwerdtfeger v. Husted*, No. 16 CV-2346 (Ct. C.P. Franklin Cty. Ohio Civ. Div. 2016), <https://mgtvwcmh.files.wordpress.com/2016/03/judge-fryes-final-opinion.pdf> (reinstating an Ohio law that allowed seventeen-year-olds to vote in the Ohio primary election if they will be eighteen by Election Day); *Veasey v. Perry*, 71 F. Supp. 3d 627, 703 (S.D. Tex. 2015) (holding that Texas’ voter identification law violates section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the U.S. Constitution), *stay granted*, 769 F.3d 890, 896 (5th Cir. 2014), *vacatur denied*, 135 S. Ct. 9, 9 (2014), *aff’d in part, rev’d in part sub nom.* *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015) (affirming the section 2 violation but vacating and remanding on the Fourteenth and Fifteenth Amendment claims). The Fifth Circuit recently decided to hear *Veasey v. Abbott* en banc. See *Veasey v. Abbott*, No. 14-41127, 2016 WL 929405 (5th Cir. Mar. 9, 2016).

Court has struggled with for more than half a century. In *Reynolds v. Sims*, the Court defined the polity as one of political equals, represented by elected officials who are responsive and indebted to all, not just some, voters. To further this principle of broad inclusion, the Court declared that all state legislative and congressional districts must be of equal population—one person, one vote.³ Similarly, in *Harper v. Virginia State Board of Elections*, the Court declared that, not only are we political equals, indistinguishable by wealth or class, but the State cannot adopt regulations that infringe on the fundamental right to cast a ballot.⁴ In many of the cases that followed *Reynolds*, *Wesberry*, and *Harper*, the Court strictly scrutinized state regulations that made it more difficult for individuals to have an effective and meaningful voice in the political process.⁵ Likewise, the Court upheld regulations that limited the amount of money in politics in order to prevent candidates from feeling beholden, not to the voters, but to the wealthy donor class.⁶ In doing so, the Court recognized that the undue influence of money in politics can be just as corrosive of individual political participation as outright restrictions on the right to vote itself.⁷

In embracing a more pluralistic view of our political system, the Court also gave Congress broad leeway to enact federal legislation that protected the right to vote.⁸ In 1965, Congress passed the Voting Rights Act (“VRA” or “the Act”),⁹ which is one of the most successful federal civil rights statutes in history. The most controversial provisions of the Act—sections 4(b) and 5—suspended all voting laws in certain jurisdictions, mostly in the deep South, and required that any changes be precleared with the federal government before going into effect.¹⁰ In *South Carolina v. Katzenbach*, the Court upheld section 5 of the Act on the grounds that the law was an appropriate means of

3. *Reynolds v. Sims*, 377 U.S. 533, 559-60 (1964); see also *Wesberry v. Sanders*, 376 U.S. 1, 7-9 (1964).

4. 383 U.S. 663, 665-66, 672 (1966) (applying strict scrutiny to restrictions on the right to vote).

5. See, e.g., *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965).

6. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 395, 398 (2000); *Buckley v. Valeo*, 424 U.S. 1, 103-04, 108 (1976).

7. See, e.g., *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659-60 (1990).

8. The Fourteenth Amendment protects the right to vote as a fundamental interest, *Harper*, 383 U.S. at 670, and the Fifteenth Amendment prohibits abridgment or denial of the right to vote on the basis of race, color, or previous condition of servitude, U.S. CONST. amend. XV, § 1. Congress has the authority to enact legislation to enforce both of these Amendments. See U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

9. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered section of 52 U.S.C. (Supp. II 2014)).

10. Voting Rights Act of 1965, §§ 4(b), 5 (codified as amended at 52 U.S.C. §§ 10303, 10304 (Supp. II 2014)).

carrying out the objectives of the Fifteenth Amendment.¹¹ *Katzenbach* recognized that unprecedented federal action was necessary to ensure that the right to vote was extended equally to all individuals; the VRA was therefore a foreseeable consequence of the southern states' unapologetic denial of basic voting rights to African Americans.¹²

In subsequent decades, and with more conservative judicial appointments, the Court became less willing to adopt an interpretation of the right to vote that, in its view, unduly infringed on the states' sovereignty over elections. To limit these federalism concerns, the Court altered the standard of review in voting rights cases from strict scrutiny to a balancing test that weighed "the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" ¹³ Notably, in *Anderson v. Celebrezze*, the Court used this balancing test to strike down a restrictive state law that limited the ability of presidential candidates to get on the Ohio ballot.¹⁴ In practice, the manner in which the Court applied the balancing test in *Anderson* was nearly identical to *Harper's* strict scrutiny standard, but in later cases, the Court took advantage of the flexibility inherent in "balancing" so as to be more deferential to the states' authority over elections.

In *Burdick v. Takushi*, for example, the Court was unwilling to closely scrutinize the State's rationale for its ban on write-in voting, accepting at face value the State's interest in "avoiding the possibility of unrestrained factionalism at the general election" without requiring proof that the write-in ban furthered this interest.¹⁵ *Crawford v. Marion County Election Board*, like *Burdick*, was also overly deferential to the State. In *Crawford*, the Court applied the *Anderson* balancing test in rejecting a claim that Indiana's voter identification law unduly burdened the right to vote,¹⁶ and the Court demanded very little evidence from Indiana to vindicate its interest in preventing voter fraud.

The Court's retreat from broad protection for the right to vote coincided with its increasing scrutiny of congressional efforts to enforce the mandates of the Fourteenth and Fifteenth Amendments. In reviewing the constitutionality of federal civil rights legislation, the Court

11. 383 U.S. 301, 325, 337 (1966).

12. See *id.* at 310-15; see also *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (striking down New York's English literacy requirement to the extent that it was inconsistent with section 4(e) of the VRA).

13. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

14. 460 U.S. 780, 789, 806 (1983).

15. 504 U.S. at 439 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986)). But see *id.* at 448-49 (Kennedy, J., dissenting) (arguing that the State had failed to justify the ban "under any level of scrutiny" because the ban does not serve the State's interest in preventing sore loser candidacies).

16. *Crawford*, 553 U.S. at 190, 209.

adopted the congruence-and-proportionality test, which requires that Congress establish a pattern of intentionally discriminatory behavior on the part of the states before it can legislate a remedy pursuant to Section 5 of the Fourteenth Amendment.¹⁷ While it is unclear whether the Court will apply the congruence-and-proportionality test or take a broader view of congressional authority in assessing the constitutionality of federal legislation enacted pursuant to Section 2 of the Fifteenth Amendment,¹⁸ the Court has been increasingly receptive to the state sovereignty objections lodged against the VRA, circumscribing the Act's reach in a series of decisions.¹⁹

The Court finally addressed the federalism issues head-on in *Shelby County v. Holder*, invalidating the coverage formula of section 4(b) of the VRA because Congress relied on forty-year-old data and long-eradicated practices such as literacy tests and poll taxes in selecting the states that had to ask "permission to implement laws that they would otherwise have the right to enact and execute on their own."²⁰ Since the formula resulted in mostly southern jurisdictions being subject to the preclearance requirement, but not northern states that have equally problematic voting rights records, the Court held that section 4(b) violated the constitutional principle that the states enjoy equal

17. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). To determine whether there is a fit between the remedy imposed by Congress and the evil to be addressed, the Court will first "identify with some precision the scope of the constitutional right at issue," and then the Court will "examine whether Congress identified a history and pattern of unconstitutional . . . discrimination . . ." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 368 (2001).

18. Although Congress originally enacted the VRA pursuant to its authority under the Fifteenth Amendment, it reauthorized various provisions of the Act under both the Fourteenth and Fifteenth Amendments over the last four decades. *See Shelby Cty. v. Holder*, 679 F.3d 848, 855-56 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594, 594 (2012) (granting petition for a writ of certiorari and acknowledging that the preclearance regime is based on dual sources of constitutional authority), *rev'd*, 133 S. Ct. 2612, 2631 (2013). The Court has yet to resolve this issue. *See Shelby Cty.*, 133 S. Ct. at 2622 n.1 (stating that *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), "guides [the Court's] review under [the Fourteenth and Fifteenth] Amendments in this case" although that decision never resolved whether the congruence and proportionality standard applies to Fifteenth Amendment claims).

19. *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (avoiding the constitutional question but suggesting that section 5 is potentially unconstitutional on federalism grounds); *Bartlett v. Strickland*, 556 U.S. 1, 25-26 (2009) (holding that the State was not obligated to protect a minority influence district where doing so would violate state law because minorities were less than fifty percent of the voting population in the district and therefore had no cognizable claim under the VRA); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (holding that the Department of Justice could not deny preclearance to a plan that was discriminatory but nonretrogressive because this would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts" (quoting *Lopez v. Monterey Cty.*, 525 U.S. 266, 282 (1999))).

20. 133 S. Ct. at 2624.

sovereignty.²¹ In its view, Congress did not build a sufficient record, based on current conditions, to justify legislation that distinguished between the sovereign states.²²

Shelby County stands in marked contrast to a case that took an expansive view of congressional authority, decided just eleven days earlier. In *Arizona v. Inter Tribal Council of Arizona*, the Court held that the National Voter Registration Act preempted Arizona's proof of citizenship requirement that was a prerequisite for voter registration in all elections.²³ But the Court's concern about state power lurked in the background of the decision, and it used this pro-federal power opinion to vindicate state authority, holding that Congress's power under the Elections Clause is limited to setting the "Times, Places, and Manner of holding elections" and confers no authority on Congress "to make or alter" voter qualifications.²⁴ Instead, these qualifications are linked to the state franchise by various provisions of the Constitution, including Article I, Section 2 and the Seventeenth Amendment.²⁵

Notably, concerns about state sovereignty have not extended into the area of campaign finance in recent years. In *Citizens United v. FEC*, the Court invalidated a federal law that prohibited corporations from engaging in independent expenditures to elect candidates for public office,²⁶ and in the view of some commentators, ushered in an era of unlimited campaign spending. *Citizens United* was closely followed by *American Tradition Partnership, Inc. v. Bullock*, which overturned a one hundred-year-old state ban on corporate spending on First Amendment grounds.²⁷ These two decisions stand for the proposition that the government's goal to combat corruption, broadly defined, and keep excessive amounts of money from distorting the political marketplace are insufficient to justify infringing upon the First Amendment rights of corporations. Unlike the federal ban at issue in *Citizens United*, Montana's ban was passed in response to actual, documented corruption in state politics, but this fact was not enough to persuade the Court to uphold the law.²⁸

21. *Id.*

22. *Id.* at 2629.

23. 133 S. Ct. 2247, 2258-60 (2013).

24. *Id.* at 2265 (quoting U.S. CONST. art. I, § 4, cl. 1).

25. *Id.* at 2267 (citing U.S. CONST. art 1 § 2, cl. 2).

26. 558 U.S. 310, 372 (2010).

27. 132 S. Ct. 2490, 2491 (2012).

28. See Michael T. Morley, *Contingent Constitutionality, Legislative Facts, and Campaign Finance Law*, 43 FLA. ST. U. L. REV. 679 (2016). As Professor Morley observed, the state likely did not show that "the evidence before the [Montana Supreme C]ourt was sufficient to justify a prohibition on independent expenditures." *Id.* at 712. Nonetheless, "If the [Supreme] Court wished to categorically preclude any governmental entity from limiting independent expenditures as a matter of law, without regard to the existence of extrinsic facts,

More recently, in *McCutcheon v. FEC*, worries about the First Amendment rights of donors led the Court to invalidate the aggregate contribution limits to national party and federal candidate committees.²⁹ By adopting a very narrow view of the government's authority to combat corruption in elections, all of these decisions stand in stark contrast to cases decided in the last twenty years that gave the government substantially more leeway to regulate contributions by individuals, coordinated spending by political parties, and independent expenditures by corporations and unions. And, ironically enough, it is unclear that the campaign finance regulations that remain in place actually prevent corruption in any meaningful sense,³⁰ a fact that highlights the divide on the Court and in the legal scholarship about what effective campaign finance regulation should look like.

Given the limitations on their authority to determine how elections are financed, most states have used their power over voter qualifications, which is significantly broader in the wake of *Shelby County*, to sharply define and limit who can participate in elections.³¹ In the last few years alone, states have enacted dozens of laws that make it considerably harder to vote,³² and courts have had to weigh in on the validity of these regulations, often on the eve of scheduled elections.³³ These newest restrictions on the right to vote raise fundamental questions about the law of democracy that we must confront if we hope to

then it should have framed its conclusion . . . as a purely legal assertion, rather than a factually contingent holding." *Id.* at 713-14.

29. 134 S. Ct. 1434, 1462 (2014).

30. For example, one of the contributions to this symposium argues that the limitations on coordinated expenditures, upheld by the Court, violate the Constitution because they can be circumvented by sophisticated actors and do not prevent corruption. See Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 FLA. ST. U. L. REV. 399, 421 (2016).

31. See Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 575 (2016) (noting the "troublesome tendency" of states to apply a "cartoonish" version of the Voting Rights Act and view it "through the lens of a revisionist retrograde stereotype" by packing minorities into districts that dilute real minority political power, an approach which threatens the constitutionality of the Act).

32. See, e.g., Richard Fausset, *North Carolina Exemplifies National Battle over Voting Laws*, N.Y. TIMES (Mar. 10, 2016), <http://www.nytimes.com/2016/03/11/us/north-carolina-voting-rights-redistricting-battles.html?rref=collection%2Fsectioncollection%2Fus&action=click&contentCollection=us®ion=rank&module=package&version=highlights&contentPlacement=1&pgtype=sectionfront> (discussing pending litigation against North Carolina's voter identification law, various voting changes, and the gerrymandering of local races); see also Michael C. Herron & Daniel A. Smith, *Race, Shelby County, and the Voter Information Verification Act in North Carolina*, 43 FLA. ST. U. L. REV. 465, 468 (2016) (arguing that North Carolina's omnibus voting legislation disproportionately affects African-Americans, who utilize early voting, take advantage of pre-registration for sixteen and seventeen year olds, and tend to lack the requisite identification needed to vote as compared to their white counterparts).

33. See Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 443-44 (2016) (arguing that courts should be willing to issue emergency stays to halt the implementation of laws that disenfranchise voters, even if the stay would effectuate a last minute change in election rules).

retain robust electoral participation across race, class, and gender lines: Has our political system become one in which the Supreme Court and Congress “govern” by crisis,³⁴ or does Congress still have broad authority to address voting rights violations after *Shelby County*?³⁵ Are states trying to innovate in ways that result in better-run and better-functioning elections,³⁶ or are they simply making it harder to vote and to be a candidate for elected office?³⁷ When a state government is unwilling or unable to pass nonpartisan election administration regulations, do the citizens of a state have the power to address the ills of the political system directly?³⁸ Have litigants learned from the lessons of the past in challenging the rules and regulations that govern state and federal elections in this new political environment?³⁹ Are courts receptive to creative arguments and theories as we confront new challenges to the right to vote?⁴⁰

34. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (ending the manual recount of ballots cast in Florida for the 2000 presidential election on equal protection grounds); Hasen, *supra* note 33.

35. See Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433 (2015) (arguing that Section 2 of the Fourteenth Amendment expands Congress’s authority to address voting rights violations pursuant to its authority under Section 5 of the Fourteenth Amendment).

36. See Joshua A. Douglas, *A “Checklist Manifesto” for Election Day: How to Prevent Mistakes at the Polls*, 43 FLA. ST. U. L. REV. 353 (2016) (proposing a checklist that poll workers should follow in order to avoid Election Day errors that can lead to voter confusion and post-election litigation).

37. See Wendy R. Weiser & Erik Opsal, *The State of Voting in 2014*, BRENNAN CTR. FOR JUST. (June 17, 2014), <http://www.brennancenter.org/analysis/state-voting-2014> (stating that, since 2010, twenty-two states have passed new voting restrictions); Herron & Smith, *supra* note 32. *But see* Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611 (2016) (arguing that residency requirements help states run elections effectively by identifying the relevant constituency and also by ensuring that those who are elected are residents who have an incentive to further the policy preferences of their specific geographic district).

38. *Compare* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015) (upholding an Arizona ballot initiative that delegated the state legislature’s authority to draw congressional districts to an independent commission in order to address partisan gerrymandering), *with* Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717 (2016) (examining several historical sources, including congressional adjudication of election disputes, and concluding that the Elections Clause contains a nondelegation principle that prohibits voters from divesting the state legislature of the power to set the “Times, Places and Manner” of federal elections via direct democracy).

39. See Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741 (2016) (arguing that the nonretrogression test of Section 5 of the Voting Rights Act, which asks whether the proposed change has the purpose or effect of making minorities worse off than under the prior law, should be incorporated into litigation brought under Section 2 of the VRA, which prohibits any law that abridges the right to vote on the basis of race).

40. See Steve Kolbert, *The Nineteenth Amendment Enforcement Power (But First, Which One is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507 (2016) (pointing to the Nineteenth Amendment as a source of congressional power to combat election laws that have a disproportionate effect based on sex); Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763 (2016) (arguing that the balancing test that the Supreme Court cur-

The contributions to this symposium suggest answers to these questions and others, and lay the foundation for a discussion that must continue if we are to live in a more inclusive political system in which our elected officials are accountable to all voters.⁴¹ It is clear from both the caselaw and current political debates that this symposium occurred at a time in which the law of democracy is at a crossroads, where it is unclear whether our polity will be defined by the progress that has been made or the significant gains that have been lost. Hopefully, the voters will have a starring role in a story that is still being written, a narrative that is based on broad inclusion and access in the political system for everyone.

rently employs in assessing burdens on the right to vote must account for the close connection between voting and the First Amendment right of expressive association because many election rules make it difficult for political outsiders to join together and express their views).

41. Indeed, one of the basic principles of our system—one person, one vote—was under attack in a case that the Supreme Court decided this Term. *See* *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (rejecting the plaintiffs' claim that the Constitution requires one person, one vote to be equalized based on registered voters and total population instead of just total population).