PF February 2014
Con Analysis

The current NSDL (formerly known as NFL) Public Forum resolution, **Resolved: The Supreme Court rightly decided that Section 4 of the Voting Rights Act violated the Constitution**, gives PF debaters a unique opportunity to act as legal scholars. Today, we're going to take a look at the con side of this topic.

In this resolution, the con side must defend that the Supreme Court (SCOTUS) made the wrong decision when they decided to overturn Section 4 of the Voting Rights Act (VRA). More specifically, the con must win that this decision was *incorrect on a constitutional basis*, not simply that the decision was harmful in some way. Confused? Don't worry—we're going to break it all down.

If you have already read our pro side topic guide, you can safely skip to page 4.

What is Section 4 of the Voting Rights Act?: The Voting Rights Act is a piece of legislation passed by President Lyndon B. Johnson in 1965, during the height of the Civil Rights Movement. It was designed to prevent racial discrimination in voting laws. It does this by establishing federal authority over state election laws.

Section 4 of the VRA was a provision requiring 9 states (most of them in the South) and several jurisdictions to receive advance federal approval before changing their election laws, due to these areas' historical issues with discriminatory voting laws. Without Section 4, these places (and indeed all of the United States) are still subject to the rest of the VRA, but any challenges to their voting laws will

have to be conducted *after the fact*, instead of requiring *prior federal approval*. In other words, if someone believes a law is racist, they will now have to take the state (or jurisdiction, or whatever) to court after the rule change takes effect, instead of the state being required to prove in advance that the change is not racially discriminatory before implementing it.

The types of changes to voting law that were affected included things like moving polling places or changing polling place hours, or redrawing electoral districts. This is because opponents of these types of alterations say they often designed to either make voting more difficult for minority communities (by confusing them about when/where to vote, by not having enough voting locations available so lines become unmanageably long, etc.) or to "water down" the electoral impact of minority areas with more white votes.

Not every state was subject to Section 4. Its authority was limited to states with a clear history of racially discriminatory voting laws. Those states were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, Texas, Arizona, and Alaska. A number of smaller jurisdictions, such as counties or townships, were also included. These were chosen on the basis of their historical laws (such as literacy tests for voter registration), as well as minority registration and turnout statistics.

It is relevant to note that statistically (although by no means universally) people of color are more likely to vote Democratic, whereas white people are more likely to vote Republican. This means that there are high stakes for both sides in terms of how electoral laws are written. That is what people mean when they discuss the "political motivations" of various actors in this debate. However, since the resolution is asking about *constitutionality*, this should not become tremendously important to most debates.

What did the Supreme Court decide about it?: In the case of Shelby County vs. Holder, the SCOTUS struck down Section 4 in June of 2013. The decision was a very close 5-4, split along ideological lines. The justices typically considered to be conservative (Roberts, Scalia, Thomas, Alito, plus swing-vote

Kennedy) ruled to overrule Section 4, while the more liberal justices (Ginsburg, Breyer, Kagan, and Sotomayor) dissented.

The majority opinion stated that **"things have changed dramatically"** since the Act was passed nearly 50 years ago, and that **the formula used to determine whether areas were subject to preclearance was outdated**. "There is no doubt that these improvements are in large part because of the Voting Rights Act," the majority opinion stated. "The Act has proved immensely successful at redressing racial discrimination and integrating the voting process." Therefore, it is no longer necessary to single out particular states for extra scrutiny, at least not for the same reasons as in 1965.

The court encouraged congress to "draft another formula based on current conditions" if they remain concerned about certain states or townships. **There is already a bipartisan effort within congress to rewrite the formula**. You are encouraged to watch how that effort progresses during your debates on this topic.

It is important to understand that the court did *not* strike down Section 5, which is the part of the Voting Rights Act that establishes the concept of preclearance. Rather, they struck down Section 4, which is the section containing the formula for determining the states held subject to Section 5. That means Section 5 is currently considered toothless, since it has no states to apply to. If that is confusing to you, consider this example: if I say "Part A: I will give free candies to everyone listed in Part B," but Part B is absent, I am effectively giving free candies to no one. The same is true with the preclearance requirement of the Voting Rights Act without Section 4.

The key takeaway for debaters should be that **SCOTUS decided to overturn Section 4 because they determined that the formula used for deciding which states would be held to preclearance scrutiny was outdated**. This is due to the law's continued reliance on metrics that are nearly 50 years old. If the formula was rewritten, the remainder of the VRA would be unaffected. Congress is currently looking into doing just that.

So how should I build my con case? First, it is critical that you understand that question of the resolution is "does Section 4 of the VRA violate the constitution?" and *NOT* "is Section 4 of the VRA desirable/good/beneficial." In other words, the framework for the round must be constitutionality, not the ex post facto impact debates you are probably used to. **Your arguments will need to be grounded in constitutional analysis**. That does not mean that the social and political ramifications of the decision are not important. However, for maximum strength, these kinds of impacts need to be supported by their relationship to the constitution.

So, you don't just want to say "without section 4, certain states have already passed voting laws that will hurt minority access to polls." You want to make that argument (or any other argument), *and then attach it to a constitutional justification*. So, the second half of that argument would be "this violates the 15th amendment, which guarantees that no citizen will be denied the right to vote based on race." Of course, you will want your analysis to be deeper than my blippy example.

It is also important for you to be aware that courts have ruled several times that the VRA (and Section 4 provisions in particular) closely skirted the line in terms of acceptable federal intervention into state processes (protected by the 10th amendment). In South Carolina vs. Katzenbach, the first time SCOTUS heard a challenge to the VRA in 1966, the majority opinion acknowledged this tension, but that "exceptional conditions can justify legislative measures not otherwise appropriate." In other words, in 1966, the situation (especially in states affected by Section 4) was racially discriminatory enough to warrant federal intervention that would normally be prohibited by the constitution. But history has progressed since then. That means debating this resolution requires a delicate weighing of two competing constitutional concerns. Are current conditions still "exceptional" enough to warrant strong federal oversight? You want to argue "yes."

What all of this means is that your best route as a con team is to argue that the situation continues to be problematic enough that the VRA is still needed to ensure 15th amendment rights. One way to do this would be to identify some laws that were blocked prior to the decision that have now gone into effect,

and prove that they will disenfranchise minority voters. Then, don't forget to link these examples back to their constitutional grounding (the 14th and especially 15th amendments).

You are strongly, *strongly* encouraged to read both the dissent and the majority decision written by members of the actual Court. It is Shelby vs. Holder, available here. This will help you gain some insight into the constitutional reasoning used by both sides. You would be wise to build your case on the argumentation of the SCOTUS.

One obvious argument made in the dissent is that eliminating Section 4 will lead to **backsliding**, because laws that may have been blocked before will now be able to be implemented. This argument can be leveraged as an answer to pro allegations that "things are different now" and "the formula is no longer valid because progress that has been made." The progress has only been sustained, you can answer, because the law continues to be in effect. Without it, the progress will be lost.

There is **evidence** to support this, as a number of states and jurisdictions have already enacted voting changes that disenfranchise minority communities:

> (Jotaka L. Eaddy, Senior Director for Voting Rights, Senior Advisor to the President, and CEO of the NAACP, "Voting Rights is on Us," Huffington Post, Feb. 3 2014, http://www.huffingtonpost.com/jotaka-l-eaddy/voting-rights-is-on-us_b_4712561.html)
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> In some parts of the country, state laws cutting early voting opportunities and implementing misguided voter purges have deterred citizens from the ballot box. In other regions, poor election administration has left people standing in line for hours in order to vote.
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> Nationwide, voting rights protections suffered a significant setback with the Supreme Court's decision to invalidate a key portion of the Voting Rights Act in *Shelby County v. Holder*. Immediately after the decision, the floodgates holding back discriminatory voting laws were officially open. Within hours, officials in Mississippi and South Carolina announced they would be moving forward with previously delayed discriminatory voting laws. In Texas, the 2012

gerrymandered district map that was thrown out for discrimination, along with a strict voter identification law, were immediately accepted as law. In Pasadena, Texas, a new amendment will change how districts are allocated in the city. This move could impact Pasadena's communities of color, particularly Hispanics and Latinos, in future elections.

Localities in Georgia are also a part of the fray. The city of Athens considered closing nearly half of its 24 polling places. Morgan County closed about a third of its polling places and considered placing one at a local police station. Augusta, however, considered moving elections all together--to the summer months when the city's black turnout has typically been lower.

You will want to be prepared to answer pro objections that these laws are not directly racially discriminatory, because they are not legal barriers to minorities accessing the ballot. "Decreasing polling places, though it may create long lines, is not the same as not letting someone register to vote because of their race," they will probably argue. One good response to these arguments is that voter literacy tests also did not explicitly contain a racial ban, but in practice they were used to disenfranchise minorities, and thus they were illegitimate. Similarly, closing numerous polling places in minority-dominated areas may not *de jure* prevent people of color from voting, but *de facto* it does (because almost no one is going to wait in line for 5 hours to vote). Moreover, you should argue disenfranchising minority voters is often *the entire point of the law*. Thus, just like literacy tests, these kinds of racially-motivated changes can be understood as a violation of the 15th amendment. There is substantial argumentation within the dissent supporting this claim.

Additionally, you may want to point out that the U.S. Attorney General has recently dismissed a large amount of proposed changes by jurisdictions previously subject to the preclearance requirement, because the proposed changes were found to be discriminatory. This indicates that the problem persists, and is only solved by Section 4. This is bolstered by the previous point that, since overturning Section 4, a number of racially distortive laws have gone into effect. Again, see the dissent for more on this argument.

Another important argument from the minority opinion is that **preclearance is critical because, without it, areas that want to discriminate will simply pass endless similar laws.** Although each of these laws will eventually be struck down as discriminatory, each challenge will be expensive and time-consuming,

since it will have to travel all the way through the appeals process and up to the SCOTUS. This was historically true prior to the passage of the VRA, which was one of the main reasons it was implemented. The dissent states "Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place." So, voter suppression will never really be eradicated, because jurisdictions will just keep passing endless new discriminatory laws.

The cost of bringing a lawsuit is important here, too. If you are not already, it would be helpful to familiarize yourself with the process by which a case makes it in front of the Supreme Court. It is expensive, requires extensive legal labor, and often takes years. SCOTUS also has the option to decline to review a case at all (which they do; they only accept 100-150 out of some 7,000 annual requests). That means plaintiffs from small, unimportant jurisdictions (such as a tiny township) who lack vast amounts of time, funding, and attorney muscle, will have a very difficult time challenging discriminatory election laws without the preclearance requirement.

Here is **evidence** about this:

> (Adam Ragusea, GPB Macon site director, "Loss Of Key Voting Rights Act Section Most Keenly Felt In Local Elections," GPB News, Georgia Public Broadcasting, Feb 6 2014, http://www.gpb.org/news/2014/02/06/loss-of-key-voting-rights-act-section-most-keenly-felt-in-local-elections)
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> So if you want to see how the demise of Section 5 is affecting elections across the country, look at races for Mayor and City Council, not President and Congress.
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> For example, around this time last year, Republican legislators in Georgia made a tweak to local elections in Macon – a solidly Democratic, majority black city. A few months earlier, people there voted to consolidate with surrounding Bibb County (itself slimly majority black).
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> The charter voters had just approved for themselves called for partisan elections with a primary in July and a general in November, as the city had prior to consolidation. But GOP legislators

decided to change the game. They passed a bill converting Macon-Bibb to nonpartisan elections. With no need for a party primary, there would now be just one election (barring a runoff) in July.

During the floor debate in the state House, Democratic Rep. Nikki Randall of Macon said she knew what her GOP colleagues were up to.

"In light of the fact that Bibb County is clearly a Democratic-performing county," she said sardonically, "could this measure be an attempt to give the minority party more control, even if it means deceiving the citizens that they represent?"

Republicans—most prominently Macon state Rep. Allen Peake—said they were merely trying to get Macon-Bibb in line with Georgia's other consolidated city-county governments, all of which have nonpartisan elections.

Regardless of the GOP's true intent, the scenario Randall describes could well be the effect. Elections held outside the traditional voting month of November tend to have much lower turnout among poor and minority voters, said Chris Grant, professor of political science at Mercer University in Macon.

"When you vote at unusual times it's not as well publicized as when you vote at a regularly scheduled time," he said. "[Odd-month voting] was actually one of the mechanisms that was used back before the Voting Right Act was passed…because it was found to have a discriminatory effect, so that only certain people knew the election was coming up, and it could be campaigned for in a private way."

That's exactly why a year ago the Justice Department blocked a similar election calendar change in Augusta, Ga. It looked as though the feds would intervene in Macon too, until the Supreme Court deprived them of that power.

In the odd-month election that followed, some competitive black candidates for mayor and commission seats lost to white opponents.

"There's certainly a lot happening in Macon-Bibb County," said Gilda Daniels, a former attorney in the Justice Department's Civil Rights Division and now a law professor at the University of Baltimore.

"I can certainly see a Section 2 challenge based on the change in election date," she said.

And yet, no one has filed the viable lawsuit that Daniels envisions – not the Democratic Party, not the NCAAP, not the Justice Department.

Not even the losing candidates are feeling litigious over this one. C. Jack Ellis (who lost the mayoral race to Robert Reichert) and Henry Ficklin (who lost a much tighter commission race to

> Larry Schlesinger) said they've both contemplated a Section 2 challenge, but it hasn't evolved beyond the theoretical.
> Daniels thinks she knows at least one reason why they're all sitting on the sidelines, she said. "It's so expensive, it is very expensive to bring Section 2 cases, which is the big difference between Section 2 and Section 5."
> "Section 5 was proactive and preemptive. [The state] would not have been able to change the election date without DOJ approval," she said.
> But to convince a judge to reverse the new law after the fact, a plaintiff would have to come up with years of voting records to prove minority turnout was negatively affected. They'd have to hire lawyers, expert witnesses – it could all cost millions, Daniels said.

Finally, the dissent also makes the argument that **the constitution provides broad powers to congress in terms of protecting the right to vote**, so the infringement on the 10th amendment is not really so significant, because this federal intervention is one grounded in constitutional authority.

As you may remember, **the most significant argument made by the majority opinion in this case is that the formula used to decide which jurisdictions are subject to the preclearance requirement is outdated**, and therefore illegitimate. You will need to be ready to answer this claim. Many of the arguments discussed above will help you with this, because you should be able to establish that new laws that would successfully suppress minority votes both were being blocked up until Section 4 was overturned, and that several of these laws have gone into effect since. Therefore, the old formula was clearly still doing its job. Moreover, the current law provides insufficient recourse against racist voting policies, so bad laws are more likely to stick.

Theories of constitutional analysis: If you opponent fails to discuss the constitution at all, you should have no trouble winning that round. But not everyone will miss the boat. You should also prepare yourself for **framework debates about what paradigm for constitutional interpretation is best**. On the con side, you will probably want to take a more liberal, "living document" approach.

You can find some excellent articles about the differences between theories of constitutional interpretation, as well as their respective strengths and weaknesses. You will not necessarily have to discuss this in every debate, but depending on your specific strategy, you may want to dedicate some time to researching the issue. A few of my picks for introducing you to these concepts are here and here.

That should cover the highlights of what you need to know to successfully debate this topic. Just remember: in these rounds, you are taking on the role of a constitutional lawyer, not a politician. Instead of only discussing why policy helps or hurts people, you need to also discuss why it is or isn't legal (according to the constitution).

Frequent readers of these guides will notice that this month's paper includes fewer cards than usual. This is because your focus on this topic should not be spewing out as many cards that agree with you as you can. Instead, you should focus on crafting a nuanced legal argument based on constitutional analysis and court precedent. On both sides, investing your speech time in explaining why your case is legally correct will be much more fruitful than just reading a bunch of "section 4 good/bad" cards on this topic. You can and should reference the Court opinions in this case (and others). But I'm not cutting those cards for you, because I think it is *so important to your preparedness* that you read them yourself.

Now you should be ready to go craft an excellent case and win all of your pro debates! As always, you can email completed cases to **Rachel.Stevens@NCPA.org** for a free case critique. Don't forget to also join the discussion in the comments below, and keep checking back for more Debate Central postings about this month's PF topic. Good luck!