PF February 2014
Pro Analysis

The current NSDL (formerly known as NFL) Public Forum resolution is **Resolved: The Supreme Court rightly decided that Section 4 of the Voting Rights Act violated the Constitution**. This topic will require debaters to consider complex legal and constitutional issues. Today, we're going to take a look at the pro side of this topic.

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

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 pro case? First, I want to start out by emphasizing a fact that will be easy for many debaters to miss. The central 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 "Section 4 unfairly singled out particular states for reasons that are no longer relevant." 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 10th amendment guarantees of state authority over elections, as well as the principle of equal state sovereignty." (Obviously, you should provide deeper analysis than my example).

A strong argument for the pro side is that courts have repeatedly acknowledged that the VRA was aggressive, infringed on principles of federalism, and for that reason was probably constitutionally borderline. When SCOTUS originally upheld the VRA in 1966 (South Carolina vs. Katzenbach), the majority opinion wrote "exceptional conditions can justify legislative measures not otherwise appropriate." Federal intervention into states' business was justified because of the very strong evidence that certain states would not uphold the 15th amendment on their own at that point in time. However, as we previously discussed, things in many states are now very different than they were 50 years ago. Parity in voter turnout and representation has increased, and states' obviously racially-motivated election laws (such as literacy tests) have been eliminated. Therefore, the Court decided, the 10th amendment intrusion into states' internal affairs was no longer clearly justified by more-urgent 15th amendment concerns.

Here is **evidence** on this point:

(Kevin Drum, political writer, "Justice Scalia and the Voting Rights Act," Mother Jones, Feb 28 2013, http://www.motherjones.com/kevin-drum/2013/02/justice-scalia-and-voting-rights-act)

Background first. The provision of the VRA at issue is preclearance, which requires certain states and counties with prior records of racial discrimination to get clearance from the Justice Department before they make changes to their election laws. My understanding is that there are two opposing constitutional interests here. First, under the principle of federalism, states have an interest in making and administering their own laws without getting prior permission from the federal government. Second, under the Fifteenth Amendment, the federal government has an interest in making sure that states don't abridge the right to vote based on race or skin color. When the Supreme Court upheld the VRA in *South Carolina v. Katzenbach*, it explicitly noted that preclearance tested the boundaries of federal authority:

This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate....Congress knew that some of the States covered by [] the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

In other words, Congress doesn't have the *inherent* power to approve or veto state election laws. In fact, normally it wouldn't have this power at all. But in this particular case, the court ruled, it had this authority because there were "unique circumstances" that caused the Fifteenth Amendment to trump the rights of the states. The misbehavior of the states in question had been so egregious, so longstanding, and so impervious to previous attempts to stop it, that Congress's extraordinary remedy in the VRA was justified.

> In other words, there really is a legitimate constitutional question here. Congress has the power to abrogate state authority only if suitably exceptional conditions apply, and it's a proper question for the Court to decide whether those exceptional conditions still exist. Given this, why would Scalia let loose with this Limbaugh-esque analysis of why Congress reauthorized the VRA in 2006?
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> I think it is attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement. It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes....And I am fairly confident it will be reenacted in perpetuity unless—unless a court can say it does not comport with the Constitution... [T]his is not the kind of a question you can leave to Congress.
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> Scalia here is making it sound as if Congress just flatly can't be trusted with this kind of decision. But why say something so outlandish when he has a perfectly conventional argument to make instead? Why not simply stick to the question of whether present-day circumstances remain exceptional enough to warrant such a significant intrusion into the customary right of states to make and enforce their own laws?

You may also want to check out the Court's opinion in Northwest Austin vs. Holder, where they acknowledged "serious constitutional concerns" with Section 4 and the preclearance requirement. Several dissenting justices in Shelby vs. Holder signed on to this decision, which may become relevant in some of your debates. To see why, read the Shelby vs. Holder majority opinion.

Remember: on the pro side of this debate, you do not want to become sucked into arguments about whether racial discrimination continues to be a problem in this country (that's not even debatable), whether the VRA was useful in reducing the effects of racism in voting laws (it did), or how future elections will be impacted by the rejection of Section 4 (remains to be seen). All of these issues are probably losers for the pro, but more importantly, *they aren't what the resolution is asking*.

Instead, carve out your offense in the debate about whether a narrow reading of the letter of the law constitutionally justifies Section 4. Your primary focus should be the tension between the 10th amendment and the 15th in this case, and why congress's failure to rewrite the formula for preclearance means the 10th amendment should win out.

Again, you are strongly, strongly encouraged to read both the majority opinion and the dissent written for Shelby vs. Holder by members of the actual Court. This will help you gain some insight into the constitutional reasoning used by both sides, which you will want to apply to your case.

One important argument that emerges from the Court's majority opinion is that the types of discrimination the Section 4 formula relied upon are not the same types of discrimination that people today are worried about. Section 4 was written to concern itself with direct barriers to being allowed to vote (such as poll tests), whereas today the biggest concerns are "second-generation barriers," which are not direct attempts to prevent voting, but rather arrangements that dilute the effects of minority votes (such as gerrymandering). "We cannot pretend that we are reviewing an updated statute," the Court writes, "or try our hand at updating the statute ourselves." So again, the Court is not arguing that there are no current problems with voting laws in certain states, but they are arguing that Section 4 is a nonsensical way to address these concerns (because it hasn't been updated since 1965 and isn't applicable to current conditions), and thus is not a justified federal intrusion.

Theories of constitutional analysis: If a con team attempts to negate without drawing on any constitutional analysis, you should have no trouble winning that round. But not everyone will miss the boat. You should prepare yourself for occasional **framework debates about what constitutional interpretation paradigm is best**. On the pro side, you will probably want to take a conservative, "letter of the law" approach.

You can find some excellent articles about the differences between theories of constitutional interpretation, as well as their respective strengths and weaknesses. Depending on your specific strategy, you may want to dedicate some time to this issue. A few of my picks for introducing you to these concepts are here and here.

Defense against con impacts: You may also want to lay down some defense by arguing that racially biased voting laws are not a major problem (such as by preparing arguments that laws accused

of being racist, for example voter ID laws, are not actually racist), by arguing that Section 4 was not effective at preventing discrimination, or by isolating some external problems Section 4 caused. However, as discussed before, it is important that you remember to always contextualize these within a constitutional framework for maximum strategic potential.

Here is some **evidence** arguing that current protections are sufficient and that politicians may abuse protections for political gain:

> *(The Wall Street Journal, "Voting Rights Rewind," Feb 3 2014, http://online.wsj.com/news/articles/SB10001424052702304757004579334914053577606?_outlook)*
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> That's an open door to political abuse that is a specialty of this Administration. The Departments of Justice and Housing and Urban Development have misused "disparate impact" statistical analysis to charge racism where none exists to extort money from businesses and override city zoning laws. This is also unnecessary because Section 3 of the Voting Rights Act is still in effect. Last month, a federal judge bailed in Evergreen, Alabama after recent violations.
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> The good news is that the bill, sponsored by Democratic Rep. John Conyers and Senator Pat Leahy and endorsed in his State of the Union by President Obama, specifically exempts voter ID laws from the actions that could be counted as a demerit against the state's voting-rights record. That's a repudiation of Attorney General Eric Holder's politically motivated campaign against voter ID, and perhaps that's why Mr. Sensenbrenner came on board.
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> But that concession isn't worth the broader political intrusion that the new proposal would allow. The Voting Rights Act's current provisions still provide ample federal enforcement when local politicians limit minority rights. Federal preclearance was an extraordinary exception to the Constitution's command of equal treatment under the law, and the country's racial progress shows it is no longer needed. Congress should let it die.

Another discussion you might like to explore is that Section 3 remains in effect. Section 3 allows the Department of Justice to "bail-in" individual jurisdictions (basically, make them subject to preclearance)

if it determines that major violations have occurred. You can use this to argue that, contrary to con claims, the VRA is *not* now effectively toothless. In fact, egregious violations can still bring areas back into preclearance.

Here is **evidence** on this:

> (Nicole Flatow, Deputy Editor of ThinkProgress Justice & J.D. from University of Virginia School of Law, "Court returns first city to federal oversight under Voting Rights Act," ThinkProgress, The Center for American Progress, Jan. 15 2014 http://thinkprogress.org/justice/2014/01/15/3164781/court-returns-city-federal-oversight-voting-rights-act/)
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> The Supreme Court's ruling in June invalidated the formula that determined which jurisdictions have a history of voting laws that disfavor minorities, and were thus subject to federal "preclearance" of any changes to their voting laws. That means that, while preclearance is still permissible, Congress would have to come up with a new formula for the key preclearance prong, Section 5, to have effect. But under Section 3, which was rarely used prior to the high court's June decision, the Department of Justice can move to individually bring jurisdictions back under federal preclearance through what is known as a "bail-in" if it determines that "violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred."
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> Evergreen, a town of 3,900 people between Mobile and Montgomery, has the sort of recent history of voting discrimination that would be the basis for a "bail-in." In the past few years, witnesses allege that black voters were systematically photographed going to the polls as a means of voter intimidation, that African Americans were improperly purged from the voter rolls using utility records, and that the city's voting map was redrawn to dilute black city council representation in the majority-black city.
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> Likely recognizing that continued litigation over these claims would not be to its benefit, the small city agreed to federal oversight of its elections. Because U.S. District Judge Callie V. S.

> Granade's order came out of an agreement between the parties, it does not predict much about what courts will do on several other motions to "bail in" states and localities. But it is the first signal that federal oversight of voting rights will live on in at least some form after the Supreme Court's ruling.

Be aware that, in this situation, the town in question agreed to voluntarily submit to federal oversight. We don't yet have a test case to gauge how courts might handle a situation where the jurisdiction does not consent and forcible oversight has to be implemented. Nevertheless, *the legal authority exists*, so it is reasonable to conclude that this possibility for protection will be viable.

Answering opponent arguments: Again, there's really no substitute to reading and considering the Court's opinion in Shelby vs. Holder (the case in question in this resolution; also linked above). In it, the majority directly addresses many of the arguments that your opponents will make, and explains why they are incorrect in the context of the constitution. You may want to cut cards from this, or at least borrow its logic in building your case.

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**.

That wraps it up for this month! Of course, there are always arguments you could make that are not discussed here. You are encouraged to do your own research, pursue your own ideas, and get creative. Hopefully this guide provided some solid ground on which to find your footing in this topic.

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!