After *Shelby County v. Holder*, Can Independent Commissions Take the Place of Section 5 of the Voting Rights Act?

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I. INTRODUCTION

In 2013 the Supreme Court, in *Shelby County v. Holder*, held that Section 4(b) of the Voting Rights Act[1] was unconstitutional.[2] Section 4(b) was a preclearance formula that considered a State's or county's past practices (for example discriminatory tests), and the effect of those practices (for example low voter registration), then determined which States and counties were required to obtain authorization from federal authorities before changing voting procedures.[3] Fast forward to 2013, the Supreme Court held in *Shelby County* that Section 4(b) was based on outdated data and therefore unconstitutional.[4]

At the time the *Shelby County* decision came down, voters and some States were already using "independent redistricting commissions"[5] as a way to combat partisan gerrymandering.[6] In the 2015 decision of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court held that the Elections Clause and 2 U.S.C. § 2a(c) (determining Congressional districts)

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1. 52 U.S.C. § 10301 (Westlaw through Pub. L. No. 114-316).
2. 133 S. Ct. 2612 (2013).
3. *Id.* at 2627.
4. *Id.* at 2631.
5. An independent commission "is a committee composed of appointed officials [usually private citizens] who assume responsibility for redistricting within a state." NAACP Legal Def. & Educ. Fund, *Independent Redistricting Commissions: Reforming Redistricting Without Reversing Progress Toward Racial Equality*, at 1, http://www.naacpldf.org/files/publications/IRC_Report.pdf (last visited Nov. 11, 2015).
6. *Gerrymandering*, *infra* note 67.

permitted the use of an independent commission to adopt congressional districts.[7] This gave the use of independent commissions more legitimacy in the voting process.

The Voting Rights Act is still needed in this country as more States are putting forth voting and election legislation that is facially neutral, but has a disparate impact on minorities' opportunity to vote.[8] Without some sort of preclearance or a "checks and balance" system, discriminatory voting laws will likely continue to pass in many States.[9] An independent commission can step into the shoes that Section 4(b) of the Voting Rights Act use to fill. Part II of this note will explore the history of the Voting Rights Act and independent redistricting commissions, as well as an explanation of the pertinent Supreme Court cases mentioned above. Then in Part III, this note will explain the feasibility and effectiveness of using independent commissions in creating and implementing voting laws and procedures.

II. HISTORY

A. Voting Rights Act of 1965

The Voting Rights Act (VRA)[10] was passed in 1965 to eliminate discriminatory election practices, such as literacy tests, as well as to minimize the overall resistance by state officials to enforce the Fifteenth Amendment.[11] The Fifteenth Amendment, one of the Reconstruction Amendments, granted African Americans the right vote in 1870.[12] Soon after the ratification of the Fifteenth

7. 135 S. Ct. 2652 (2015).

8. North Carolina offers a great example of a State putting forth new voting laws that have a disparate impact on minority voters: it passed discriminatory laws one month after the *Shelby County.* decision. Richard L. Hasen, *This Is Why the Voting Rights Act Is on Trial in North Carolina*, WASH. POST (July 31, 2015), https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/07/31/this-is-why-the-voting-rights-act-is-on-trial-in-north-carolina/.

9. Lopez, *infra* note 52.

10. 52 U.S.C. § 10301 (Westlaw through Pub. L. No. 114-316).

11. Dep't of Justice, *History of Federal Voting Rights Laws*, http://www.justice.gov/crt/history-federal-voting-rights-laws (last updated Aug. 8, 2015).

12. The Fifteenth Amendment provides "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

Amendment, blacks became very active in voting and were elected to office in both federal and state government. For example, in 1870, Hiram Rhoades Revels was elected to the U.S. Senate, becoming the first African American to sit in the U.S. Congress.[13] Along with Senator Revels, a dozen other black men served in Congress and more than 600 served in state legislatures soon after the ratification of the Fifteenth Amendment.[14] However, decades following the ratification of the Fifteenth Amendment, some states took great efforts to disenfranchise the black vote through Jim Crow laws.[15] African American voters across the South were now required to complete tasks like paying voting taxes, and passing literacy tests to vote.[16] These discriminatory practices effectively deterred and prevented blacks from voting.[17] Right around the ratification of the Fifteenth Amendment, sixty-seven percent of black adult men were registered to vote in 1867 in Mississippi. However, by 1892 only four percent of adult black men were registered to vote.[18] After decades of discriminatory practices, the Civil Rights Movement led to the enactment of the VRA in 1965.[19]

The VRA directly addressed the discriminatory practices used by the South to disenfranchise the black vote by granting oversight

13. *Fifteenth Amendment*, HISTORY.COM, http://www.history.com/topics/black-history/fifteenth-amendment (last visited Oct. 11, 2015).

14. *Id. See also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 58 (Vintage Books ed. 2004) ("Black voters under Radical Reconstruction elected hundreds of black officials to state and local office . . . . Throughout the South, Reconstruction governments extended the franchise to many men of both races by reducing property qualifications . . . the laws passed by the radical legislatures were therapeutic and long overdue").

15. *African Americans and the 15th Amendment*, CONSTITUTIONAL RIGHTS FOUNDATION, http://www.crf-usa.org/black-history-month/african-americans-and-the-15th-amendment (last visited Oct. 11, 2015). *See also Fifteenth Amendment*, *supra* note 13 ("In the ensuing decades, various discriminatory practices including poll taxes and literacy tests, along with intimidation and violence, were used to prevent African Americans from exercising their right to vote.").

16. *Id.*

17. *Fifteenth Amendment*, *supra* note 13.

18. *African Americans and the 15th Amendment*, *supra* note 15.

19. Dep't of Justice, *supra* note 11. It is incredibly important to point out that there is a long history of events that led to the passing of the VRA, and the brevity of that history in this Note is not to minimize the struggle that gave us the VRA. The VRA was enacted only after years of collective action, voting registration campaigns, and marches (including Bloody Sunday in Selma, Alabama on March 7, 1965). However, for the purposes of this section of the Note, the focus is mainly on the contents of the VRA.

power to the Attorney General of the United States.[20] Specifically, Section 2 of the VRA uses similar language as the Fifteenth Amendment, making it unlawful to prevent anyone from voting based on his or her race.[21] Section 4(b) provided a preclearance formula, in connection with Section 5.[22] Section 5 was designed to ensure that voting changes in covered jurisdictions could not be implemented until the Department of Justice gave their approval.[23] The preclearance formula of Section 4(b) originally consisted of two prongs. The first prong asked whether, on November 1, 1968, "the state maintained a 'test or device' restricting the opportunity to register and vote."[24] The second prong questioned whether "less than 50 percent of persons of voting age were registered to vote on November 1, 1964, or that less than 50 percent of persons of voting age voted in the presidential election of November 1964."[25] A third prong, added in 1975, asked whether the state had a "practice of providing any election information, including ballots, only in English . . . where members of a single language minority constituted more than five percent of the citizens of voting."[26] This multi-prong

20. *Fifteenth Amendment*, *supra* note 13.

21. Section 2 of the Voting Rights Act of 1965 further provides that:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301 (Westlaw through Pub. L. No. 114-316). *See also* U.S. CONST. amend. XV, § 1.

22. 52 U.S.C. § 10303(b) (Westlaw through Pub. L. No. 114-316).

23. 52 U.S.C. § 10304 (Westlaw through Pub. L. No. 114-316).

24. 52 U.S.C. § 10303(b). *See also* Dep't of Justice, *Section 4 of the Voting Rights Act*, https://www.justice.gov/crt/section-4-voting-rights-act (last updated Aug. 8, 2015). The original statue states November 1, 1964, but this was changed to 1968 during the 1970 reauthorization, and then to 1972 in the 1975 reauthorization. Act of June 22, 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400.

25. Dep't of Justice, *supra* note 24; 52 U.S.C. § 10303(b).

26. Dep't of Justice, *supra* note 24. *See also* 52 U.S.C. § 10303(b), (f) (Westlaw through Pub. L. No. 114-316).

preclearance formula subjected mostly Southern states, originally, to Section 5.[27]

After the Voting Rights Act passed, Courts were tasked with applying the language of the statue to voter discrimination cases. The Supreme Court in *South Carolina v. Katzenbach* addressed the constitutional limits of Congress enacting the Voting Rights Act, and requiring certain States (based on the preclearance formula in Section 4(b)) to obtain authorization from the Attorney General when implementing changes to the voting procedures.[28] The Court in *Katzenbach* adopted the following standard to address the balance of state and federal power in regards to voter discrimination:

> [T]he general rule . . . that States "have broad powers to determine the conditions under which the right of suffrage may be exercised." The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[29]

With this holding, the Supreme Court demonstrated that the VRA was a check on the States' suffrage power.[30] Section 2 and Section 5 of the VRA were crucial in providing the necessary protections against the disenfranchisement of minorities. States retained the

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27. The following states were subject to Section 5 preclearance based on the Section 4(b) formula: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Also certain areas/districts in Florida, Michigan, North Carolina, California, South Dakota, and New York were subject to Section 5 preclearance based on Section 4(b) formula. Dep't of Justice, *supra* note 24.

28. 383 U.S. 301, 323 (1966).

29. *Id.* at 325 (internal citations omitted). The Court held that:

> [T]he portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly "(t)he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Id. at 337.

30. *Id.*

power in regards to suffrage, but they could not run afoul the Fifteenth Amendment and the VRA.

B. Shelby County v. Holder

Less than fifty years after the passage of VRA, the Supreme Court substantially weakened the statute's power in *Shelby County v. Holder*.[31] The Court was presented with the question of whether the preclearance formula in Section 4(b) was constitutional.[32] The petitioner, Shelby County, Alabama, was a covered jurisdiction under Section 5, which means Shelby County had to get permission from the Attorney General before altering voting procedures.[33] In 2010, Shelby County sought a declaratory judgment that Sections 4(b) and 5 of the VRA were facially unconstitutional in the U.S. District Court for the District of Columbia.[34] The district court ruled against Shelby County, holding that the Sections of the VRA at issue were constitutional.[35] According to the district court, the evidence before Congress in 2006 when reauthorizing the VRA was sufficient to justify the continuing usage of the preclearance formula in Section 4(b).[36]

The D.C. Circuit Court of Appeals affirmed the judgment of the district court.[37] According to the D.C. Circuit, Section 2 litigation inadequately protected the rights of minority voters in covered jurisdictions, which is the conclusion that Congress came to in 2006.[38] Therefore, the D.C. Circuit ruled that Section 5 was still necessary.[39]

The Supreme Court disagreed with the district and circuit courts. The Court, in a 5-4 split, ruled that the preclearance formula, as

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31. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).
32. *Id.* at 2619.
33. *Id.* at 2621–22.
34. *Id.*
35. Shelby Cty. v. Holder, 811 F. Supp. 2d 424, 503–08 (2011).
36. *Id.* at 496–503.
37. Shelby Cty. v. Holder, 679 F.3d 848, 884 (2012). The D.C. Circuit considered numerous factors when coming to their decision, including the Attorney General's objections to voting changes, successful Section 2 suits in covered jurisdictions, and Section 5 preclearance suits involving covered jurisdictions. *Id.* at 873–83.
38. *Id.* at 873–83.
39. *Id.* at 873.

written, was unconstitutional.[40] Chief Justice Roberts, writing for the majority, cited numerous reasons why Section 4(b) was unconstitutional. One argument was that the preclearance formula was based on "decades-old data and eradicated practices . . . [t]he formula capture[ed] States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests ha[d] been banned nationwide for over 40 years."[41] Chief Justice Roberts' next argued that the Fifteenth Amendment was "not designed to punish for the past; its purpose is to ensure a better future."[42]

Furthermore, Chief Justice Roberts criticized Congress by saying that if Congress "is to divide the States—it must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past."[43] Finally, the Court points out that the formula in Section 4(b) was the true problem, not the concept of preclearance (Section 5), and Congress could still fix it.[44] Chief Justice Roberts gave Congress the following instructions:

> Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government[,]" . . . and while any racial discrimination in

40. *Shelby Cty.*, 133 S. Ct. at 2631.

41. *Id.* at 2627. As it could be imagined the oral argument was eventful and filled with jaw dropping moments, as is any oral argument when the issue at hand is a hot topic and/or involves Constitutional rights. During oral argument, Chief Justice Roberts questioned the Government and the respondent (defenders of the VRA) as to why all states were not subject to preclearance, since voter suppression occurs in both non-covered states as well as covered states. Transcript of Oral Argument at 42, Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96). *See also* Elizabeth Wydra, *Post-argument Commentary: Voting Rights Are an American Entitlement*, SCOTUSBLOG (Feb. 27, 2013, 4:18 PM), http://www.scotusblog.com/2013/02/post-argument-commentary-voting-rights-are-an-american-entitlement. Justice Scalia, however, provided the boldest statement at the oral argument when he "second-guessed Congress's motives for reauthorizing the Voting Rights Act in 2006, suggesting that it was 'perpetuation of a racial entitlement.'" Wydra, *supra*; Transcript of Oral Argument, *supra*, at 41.

42. *Shelby Cty.*, 133 S. Ct. at 2629.

43. *Id.*

44. *Id.* at 2631.

> voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.[45]

Therefore, Section 4(b) could be reinstated, as long as Congress used "current conditions" to create a preclearance formula.[46]

Justice Ginsburg wrote a very powerful dissent, stating that "the Court errs egregiously by overriding Congress' decision."[47] She explained that by striking Section 4(b) of VRA, the Court discounted "that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways."[48] The dissent also states that the Court did not "engage with the massive legislative record that Congress assembled" when coming to its decision.[49] Justice Ginsburg was shocked by the Court's failure to do so, since she "would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation."[50] Justice Ginsburg illustrated the problems with the majority holding stating, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[51]

Only a few hours after the *Shelby County* opinion was announced, Texas—formerly covered by Section 4(b)—implemented voter identification laws formerly blocked under Section 5 of the VRA.[52]

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45. *Id.*
46. *Id.* at 2631.
47. *Id.* at 2652 (Ginsberg, J., dissenting).
48. *Id.* at 2650 (Ginsberg, J., dissenting).
49. *Id.* at 2644 (Ginsberg, J., dissenting).
50. *Id.*
51. *Id.* at 2650 (Ginsberg, J., dissenting).
52. Tomas Lopez, *Shelby County: One Year Later*, THE BRENNAN CENTER FOR JUSTICE (June 24, 2014), http://www.brennancenter.org/analysis/shelby-county-one-year-later. Justice Ginsburg, after the Shelby County opinion was issued, stated that she was not "surprised that Southern states have pushed ahead with tough voter identification laws and other measures since the Supreme Court freed them from strict federal oversight of their elections." Mark Sherman, *Ginsburg Says Push for Voter ID Laws Predictable*, U.S. NEWS (July 26, 2013), http://www.usnews.com/news/politics/articles/2013/07/26/ginsburg-says-push-for-voter-id-laws-predictable. Furthermore, she indicated that "[t]he notion that because the Voting Rights Act had been so tremendously effective we had to stop it didn't make any sense to me . . . . And one really could have predicted what was going to happen." *Id.*

According to the Brennan Center for Justice, in less than a year after the Supreme Court's ruling of *Shelby County*, statewide and local voting laws were passed that likely would have been, and historically were, blocked by Section 5.[53] Examples include strict photo identification laws, significant limitations on early voting, and reduced time for voter registration.[54]

Since the Supreme Court's decision in *Shelby County*, Section 2 litigation ineffectively challenges voter discrimination and is more expensive, compared to Section 5.[55] Additionally, Section 2 litigation may allow plaintiffs "to establish a statistical disparity between minorities and whites as well as a material burden on voting—meaning that preclearance would have been denied—but will be unable to show the 'something more' required for Section 2 liability."[56] Therefore, Section 2 litigation is not producing the same results by preventing voter dilution in States that were formerly covered by Section 5. As a result, the VRA has been substantially weakened.

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53. Lopez, *supra* note 52, at 4–5.

54. *Id.* at 2–3, 5.

55. *Id.* at 2, 6. According to the Brennan Center for Justice, "[c]hallenging restrictive laws one by one under Section 2 or some other law is considerably more expensive than the administrative preclearance process these individual challenges now have to replace." Also, Section 5 no longer has enough of a presence to encourage accountability. Tomas Lopez says that,

> [b]ecause covered jurisdictions had to provide notice to the DOJ whenever they made a change to their voting systems, there was also a centralized method to monitor those changes before they were implemented. The public benefited from that accountability. Without Section 5, thousands of changes to voting procedures may go unnoticed.

Id. at 6–7.

56. Nicholas O. Stephanopoulos, *Article: The South After Shelby County*, 2013 SUP. CT. REV. 55, 110 (2013). Litigation under Section 2 and Section 5 are vastly different in regards to procedure and substance. Under Section 2, the plaintiff has the initial burden of proving that a policy is invalid/unlawful. *Id.* at 63. On the contrary, the jurisdiction has the initial burden under Section 5. *Id.* at 64. Also, a questionable voting practice stays in effect during the Section 2 litigation, unless the plaintiff can secure a preliminary injunction. Which is why addressing mass disenfranchisement with Section 2 is so difficult in comparison to Section 5. *Id.* at 60.

C. History of Independent Redistricting Commissions

Not only does the VRA prevent voter discrimination, but it also provides protections against discriminatory redistricting.[57] An Independent Redistricting Commission (IRC) is used by some states during the redistricting process.[58] The United States Constitution requires that seats of the House of Representatives be apportioned based on state population, according to the constitutionally mandated Census.[59] Every ten years, if the population changes in an individual state, in comparison to other states, then the number of seats in the House of Representatives for each state is adjusted.[60] This process is called "reapportionment."[61] The state is then divided into districts, with each district having a seat in the House of Representatives.[62] The districts are redrawn if it is determined that the population has changed within a district.[63] Redistricting is necessary so that each member of the House of Representatives is representing an "proportionate" amount of citizens."[64] This process occurs in both federal and state legislatures.[65]

Redistricting must comply with Section 2 of the VRA, in that the districts cannot be drawn in such a way as to essentially minimize or erase the vote of minorities, which is considered vote dilution.[66]

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57. NAACP Legal Def. and Educ. Fund, *supra* note 5, at 3.
58. *Id.*
59. U.S. CONST. amend. XIV, § 2; U.S. CONST. art. I, § 2, cl. 3.
60. NAACP Legal Def. and Educ. Fund, *supra* note 5, at 2.
61. *Id.* (the report explains that reapportionment occurs once every ten years, based on the results of the Census). *See also* 2 U.S.C. § 2a (1996) (explaining the process of the reapportionment of Representatives based on the Census' figures).
62. NAACP Legal Def. and Educ. Fund, *supra* note 5, at 2.
63. 2 U.S.C. § 2a.
64. NAACP Legal Def. and Educ. Fund, *supra* note 5, at 2.
65. *Id.*
66. 52 U.S.C. § 10301 (Westlaw through Pub. L. No. 114-316). This section states that:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

Id. See also AM. CIVIL LIBERTIES UNION, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT REDISTRICTING 6 (2001), https://www.aclu.org/files/FilesPDFs/ redistricting_

When vote dilution does occur, this is called gerrymandering.[67] In states that were subject to preclearance of the VRA, purposeful voter dilution through redistricting was usually prevented by the Department of Justice.[68]

However, voters in states that were not subjected to preclearance depended on Section 2 litigation[69] as a way to prevent or redress the harms that could occur as part of redistricting.[70] As explained earlier, Section 2 litigation is expensive and not as effective in addressing possible violations of the VRA.[71] Therefore, states and their citizens faced the task of using a different approach to combat gerrymandering. In the early 1960s, redistricting reform efforts were aimed at "substantial population equality among election districts,"[72] and began due in part to the historic "one person, one vote" principle from the 1963 Supreme Court ruling in *Gray v. Sanders*.[73] Starting at

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manual.pdf. Vote dilution is "the use of redistricting plans and other voting practices that minimize or cancel out the voting strength of racial and other minorities." *Id.*

67. Gerrymandering is "the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." *Gerrymandering*, BLACK'S LAW DICTIONARY (10th ed. 2014). Furthermore, racial gerrymandering is gerrymandering along racial lines, or with excessive regard for the racial composition of the electorate. *Id.* In one Supreme Court case holding a racial gerrymandering claim valid under the Equal Protection Clause, the Court

> conclude[d] that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

Shaw v. Reno, 509 U.S. 630, 649 (1993). Additionally, an Ohio district court noted that:

> Although courts are reluctant to provide relief on claims that a district has been gerrymandered to protect an incumbent's seat . . . this rule does not hold when the manipulations were conducted on a race-conscious basis. Like the Seventh Circuit, we see "little point . . . in distinguishing discrimination based on an ultimate objective of keeping certain white incumbents in office from discrimination borne of pure racial animus."

Armour v. Ohio, 775 F. Supp. 1044, 1061 (N.D. Ohio 1991) (internal citations omitted).

68. *See* Lopez, *supra* note 52.

69. However, due to the Supreme Court's decision in *Shelby County*, now voters in all states depend on Section 2 litigation.

70. *See* Lopez, *supra* note 52 and accompanying text.

71. *Id.*

72. J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL'Y REV. 543, 545 (2011).

73. 372 U.S. 368, 381 (1963) (holding that "[t]he conception of political equality from the

the turn of the twenty-first century, a movement began towards "redistricting reform on the state level."[74] IRCs emerged as a plausible solution.[75]

Currently, almost half the states use IRCs in some capacity.[76] The IRCs in most states include a member of the state's legislature, and possibly citizens appointed by the legislature. "[O]nly Arizona and California have IRCs that completely exclude elected officials from the process."[77] In Arizona and California, members of the Republican and Democratic Parties, as well Independent representatives, nominate individuals (citizens) to be part of the IRC.[78] By having both parties and independents select members to the IRC, the hope is that there will be greater transparency, citizen approval through direct democracy, and partisan and racial balance.[79]

In some states, the voters decided whether to use an IRC, either through an initiative or a referendum.[80] In Arizona, the districts drawn by the IRC created more competitive elections, in comparison to elections across the country.[81]

Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote," when addressing the issue of a state party primary election giving greater weight to votes of citizens from rural counties than to votes of residents of urban counties).

74. Herbet & Jenkins, *supra* note 72, at 556.

75. Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1817–21 (2012).

76. NAACP Legal Defense and Educational Fund, *supra* note 5 (explaining that IRCs have varying forms—some are a subset of the legislature; some serve as a fail-safe alternative if the legislature cannot agree; and others advise the legislature in its redistricting process).

77. *Id.*

78. *See generally* Cain, *supra* note 75 at 1821–37.

79. *See id.* The Arizona and California independent redistricting commissions have greater transparency in comparison to the decisions made by the government and political groups. Arizona and California's scheme embodies: "transparency, options for third-party map submissions, citizen approval through direct democracy . . . partisan and racial balance . . . a supermajority voting rule, and a proclivity towards so-called neutral criteria such as compactness, respect for city and county lines, and preserving communities of interest." *Id.* at 1812.

80. Cain, *supra* note 75 at 1830–33.

81. Sam Gringlas, *Success of Independent Redistricting Boards a Work in Progress*, NBC NEWS (July 27, 2015), http://www.nbcnews.com/politics/politics-news/independent-redistricting-boards-are-constitutional-how-effective-are-they-n399311. "According to a New York Times analysis, the 2001 and 2011 maps drawn by independent commission in Arizona produced some of the most competitive races in the country. In 2014, two Arizona

One criticism of IRCs is that they completely exclude elected officials from the process, which is unconstitutional.[82] The Arizona Legislature, in the 2015 Supreme Court case *Arizona State Legislature v. Arizona Independent Redistricting Commission*, argued that the Constitution's Elections Clause[83] prohibits a state from cutting the legislature out of the process of drawing new districts.[84]

D. Arizona State Legislature v. Arizona Independent Redistricting Commission

As previously stated, Arizona is one of two states that have IRCs that completely exclude elected officials from the process.[85] However, prior to 2000, "the Arizona State Constitution granted the State Legislature the ability to draw congressional districts."[86] After the 2000 Census, the Arizona voters passed Proposition 106, "an initiative aimed at the problem of gerrymandering,"[87] which amended the state constitution to remove the congressional redistricting power from the Legislature and vest it in the Arizona Independent Redistricting Commission.[88] The IRC was tasked with redistricting Arizona after the 2010 Census.[89]

In 2012, after the IRC approved a new congressional district map, the State Legislature sued the IRC, arguing that the IRC and its map

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congressional districts were among 29 nationwide where the race was decided by less than 5 percent of the vote." *Id.*

82. *See Arizona State Legislature*, 135 S. Ct. at 2658–59, 2670. *See also* Gringlas, *supra* note 81, at 3.

83. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

84. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015).

85. NAACP Legal Def. and Educ. Fund, *supra* note 5 at 3.

86. *Ariz. State Legislature*, 135 S. Ct. at 2658. *See also Arizona State Legislature v. Arizona Independent Redistricting Commission*, OYEZ, https://www.oyez.org/cases/2014/13-1314 (last visited Nov. 11, 2015). The Supreme Court in *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n* stated that past "redistricting plans adopted by the Arizona Legislature sparked controversy in every redistricting cycle since the 1970s, and several of those plans were rejected by a federal court or refused preclearance by the Department of Justice under the Voting Rights Act of 1965." 135 S. Ct. at 2661.

87. 135 S. Ct. at 2655.

88. *Id.*

89. *Id.*

violated the Elections Clause of the Constitution.[90] The Legislature argued, further, that by removing redistricting authority from the Legislature and giving authority to the IRC, the new district map was unconstitutional.[91] Along with preventing the State from adopting the IRC-approved district map, the State Legislature also requested that the district court "permanently enjoin" the IRC "from adopting, implementing, or enforcing the new congressional district map."[92] The IRC argued that, "for Elections Clause purposes, 'the Legislature' is not confined to the elected representatives; rather, the term encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves."[93] After determining that the Arizona State Legislature had standing to sue,[94] a three-judge district court panel rejected the State Legislature's complaint on the merits.[95] The Supreme Court "postponed jurisdiction" and took the case on appeal from the district court.[96]

The Supreme Court, in a 5-4 ruling, held that the "lawmaking power in Arizona includes the initiative process, and that both § 2a(c) and the Elections Clause permit use of the AIRC in congressional districting in the same way the Commission is used in districting for Arizona's own Legislature."[97] The Court examined previous cases that addressed the issue of redistricting, as well as the language of 2 U.S.C. § 2a(c).[98] Justice Ginsburg, writing for the majority, pointed

90. *Id.* at 2658–59.

91. *Id.* The Arizona State Legislature also argued that because "'Legislature' in the Elections Clause means [specifically and only] the representative body which makes the laws of the people, . . . the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting." *Id.* at 2659 (internal citation and quotation marks omitted).

92. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047, 1048 (D. Ariz. 2014). *See also* OYEZ, *supra* note 86.

93. 135 S. Ct. at 2659.

94. *Id.* In determining standing, the Supreme Court believed that Proposition 106 "strips the Legislature of its alleged prerogative to initiate redistricting. That asserted deprivation would be remedied by a court order enjoining the enforcement of Proposition 106." *Id.* at 2663. The Legislature had standing since Proposition 106, "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." *Id.* at 2665 (internal citation omitted).

95. *Id.* at 2659.

96. *Id.*

97. *Id.*

98. *Id.* at 2666–71.

out that "[r]edistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."[99] A proposed amendment to a state Constitution, and a referendum brought by the citizens are considered part of the "legislature."[100] This principle was established by *Ohio ex rel. Davis v. Hildebrant*, as Justice Ginsburg pointed out, "[f]or redistricting purposes . . . 'the Legislature' did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people."[101]

Next, the Court turned to the language of 2 U.S.C. § 2a(c).[102] Justice Ginsburg pointed out that the language of the statute allows for states to use five different methods for redistricting.[103] The Court held that the language of the statue "permits use of a commission to adopt Arizona's congressional district."[104] Therefore, since Arizona's IRC redistricted "in the manner provided by the law thereof," the redistricting plan became the "presumptively governing map."[105]

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99. *Id.* at 2668.
100. *Id.*
101. *Id.* at 2666 (citing Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 569 (1916)).
102. 2 U.S.C. § 2a(c) The statute states:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Id.
103. 135 S. Ct. at 2666, 2670.
104. *Id.* at 2668.
105. *Id.* at 2670.

Finally, the Court held that "the Elections Clause permits the people of Arizona to provide for redistricting by independent commission."[106] Justice Ginsburg first pointed out that the word "legislature" is defined in dictionaries as "[t]he power that makes laws," even in the dictionaries in "circulation during the founding era."[107] Using that meaning of legislature, the Court found that "initiatives adopted by the voters legislate for the State" have the power to make laws "just as measures passed by the representative body do."[108] Chief Justice Roberts, writing one of the dissents, argued that the Elections Clause's use of the word "legislature" should be read to mean "institutional body of representatives."[109] Nevertheless, defining "legislature" to mean "the power to make laws" gives voter initiatives and referenda a great deal of power.[110]

The Court based their holding on the principle that the government's power is derived from the people.[111] As a result, the Court held that "it would be perverse to interpret the term 'Legislature' in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in."[112] Justice Ginsburg explained that the people of the state have power, and an IRC, created through a referendum, is a check on the government.[113]

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106. *Id.* at 2671.
107. *Id.*
108. *Id.*
109. *Id.* at 2679 (Roberts, C.J., dissenting). Chief Justice Roberts goes on to argue that the term "legislature" is unambiguous: "[t]he unambiguous meaning of 'the Legislature' in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way." *Id.* at 2680 (Roberts, C.J., dissenting).
110. Howe, *infra* note 114.
111. Howe notes that:

> The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. As Madison put it: "The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted [sic] with it should be kept in dependence on the people."

Id. at 2674–75.
112. *Id.* at 2675.
113. *Ariz. State Legislature*, 135 S. Ct. at 2675 (*citing* Cain, *supra* note 75, at 1817).

One legal scholar argues that if the Court would have decided the opposite way, other voter initiatives would be in jeopardy, if not completely invalid.[114] The Court's holding in this case reaffirmed the power the people have over the government.[115] The next section of this note will address the practicability and possible impact an independent commission can have in deciding a state's voting practices and procedures.

III. ANALYSIS/PROPOSAL

Both Supreme Court cases, *Shelby County*[116] and *Arizona Independent Redistricting Commission*,[117] shed light not only on the sanctity of voting, but also on the numerous attacks on the right to vote. In order to protect the former and eliminate the latter, it is essential to devise a plan that is a reliable and non-partisan method to protect the right to vote. One way to do this is to put independent commissions in charge of voting and election procedures.

The purpose of the Voting Rights Act is to ensure that state and local governments do not pass laws or policies that deny American citizens the right to vote.[118] As discussed previously, the impact of the Supreme Court's holding that Section 4(b) of the VRA was unconstitutional was immediate.[119] States took the decision as an

114. *See* Amy Howe, *Independent Redistricting Commission Survives Challenge: In Plain English*, SCOTUSBLOG (Jun. 30, 2015, 3:37 PM), http://www.scotusblog.com/ 2015/06/ independent-redistricting-commission-survives-challenge-in-plain-english/ (arguing that interpreting "legislature" to mean "the power to make laws" leaves "a whole host of other voter initiatives, ranging from Ohio's ban on straight-ticket voting along party lines to a California law establishing permanent voter registration, in place."*)*.

115. *Ariz. State Legislature*, 135 S. Ct. at 2677.

116. 133 S. Ct. 2612 (2013).

117. 135 S. Ct. 2652 (2015).

118. Dep't of Justice, *supra* note 11.

119. Lopez, *supra* note 52. On the same day Shelby County was decided, Texas (a state previously subjected to the preclearance formula) stated it would implement stricter photo ID laws that were previously blocked by the VRA because of their racial impact. *Id.* The Texas photo ID law required voters to show an approved form of photo ID in order to vote, including: "a driver's license, a United States passport, a concealed-handgun license and an election identification certificate issued by the State Department of Public Safety." Erik Eckholm, *Texas ID Law Called Breach of Voting Rights Act*, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes. com/2015/08/06/us/appellate-panel-says-texas-id-law-broke-us-voting-rights-act.html?login =email&_r=0. Also, research by the Brennan Center showed that that "between 600,000 and

opportunity to implement voting laws and procedures that were either previously blocked by the VRA or may have been blocked by the VRA.[120] The result has been catastrophic. Since the *Shelby County* decision, the disenfranchisement of minorities has grown and the impact of the VRA continues to diminish.[121] In 2016, three years after *Shelby County* was decided, there were 868 fewer polling places for voters in numerous counties that were previously subjected to Section 5 preclearance.[122] It is also worth noting that before Arizona adopted an IRC, the Department of Justice rejected numerous redistricting plans created by the State's Legislature.[123] While Arizona was proactive in addressing the problematic plans well before the Supreme Court ruled that Section 4(b) was unconstitutional in *Shelby County*, it is easy to imagine how pervasive unequal redistricting will become in the absence of Section 4(b).

Chief Justice Roberts's ideal solution to the issue at hand would be for Congress to create a new preclearance formula based on more current data, if Congress decides to reauthorize the VRA.[124] However, that solution seems unlikely[125] and warrants the exploration of alternative solutions. If the United States is going to stay true to its democratic values and honor the sacrifices of those responsible for the Civil Rights Movement, immediate action needs to occur to rectify the disenfranchisement of minorities and restore the sanctity of voting.

While Section 2 can be used to address disenfranchisement and discriminatory voting laws, it lacks Section 5's preventive power. The Supreme Court discussed during the oral argument whether

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800,000 registered voters in Texas lacked [the required] photo ID, over 300,000 of them Latino." Lopez, *supra* note 52.

120. Lopez, *supra* note 52, at 2–3 (in addition to Texas, after the *Shelby County* decision North Carolina, Alabama, and Mississippi moved forward with stricter voting laws, and other States have attempted or proposed to pass statewide laws limiting voting).

121. Lopez, *supra* note 52, at 8.

122. Ari Berman, *There Are 868 Fewer Places to Vote in 2016 Because the Supreme Court Gutted the Voting Rights Act*, NATION (Nov. 4, 2016), https://www.thenation.com/article/ there-are-868-fewer-places-to-vote-in-2016-because-the-supreme-court-gutted-the-voting-rights-act/.

123. 135 S. Ct. at 2661.

124. *See Shelby Cty.*, 133 S. Ct. at 2629.

125. GOVTRACK, *infra* note 136.

Section 2 of the VRA would adequately address discriminatory practices if Section 5 were no longer enforceable.[126] It was clear from the oral argument, that Solicitor General Donald Verrilli and some of the Supreme Court Justices doubted that Section 2 was an adequate substitute.[127] This further supports the argument that the power of the VRA has diminished due to the Supreme Court's ruling in *Shelby County*. While the Fifth Circuit eventually held that the strict photo ID law implemented by Texas in 2013 was in violation of the VRA on Section 2 grounds,[128] the decision left uncertain whether states need to get permission before implementing certain changes to voting requirements/laws.[129] Without requiring states to seek some level of approval before implementing voting laws, the damage will already have occurred before the litigation process can begin.

The subsequent actions taken by several states after the *Shelby County* decision, as well as this country's history of discrimination, it is not difficult to understand why the act of voting can create issues and incite debates, especially when a minority group argues that a specific law or procedure results in vote dilution. Along with photo ID laws, different redistricting techniques are used to dilute the minority vote.[130] This is why IRCs that address discriminatory political gerrymandering are so vital to protecting the right to vote. The Supreme Court has recognized that the people have the "right to incorporate themselves into a State's lawmaking apparatus."[131] As a result of this holding, independent commissions have the legal authority to participate in lawmaking. Furthermore, it shed light on the fact that when citizens collectively act, change can occur. The voters of Arizona recognized the impact of political gerrymandering, and decided to take measures into their own hands. The same effort

126. Transcript of Oral Argument, *supra* note 41, at 55–56.

127. Transcript of Oral Argument, *supra* note 41, at 35–41.

128. Eckholm, *supra* note 119.

129. Lyle Denniston, *Texas Voter ID Law Ruled Invalid—In Part*, SCOTUSBLOG (Aug. 6, 2015, 9:55 AM), http://www.scotusblog.com/2015/08/texas-voter-id-law-ruled-invalid-in-part-2/ (a judge would need to find that the legislature acted with biased/discriminatory intent, in order to have the authority "to order Texas in the future to seek official federal approval in Washington, D.C., before it could put into effect any new election laws, of any kind.").

130. AM. CIVIL LIBERTIES UNION, *supra* note 66, at 6–7.

131. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2660 n.3 (citing Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912)).

could be used to correct the harms of *Shelby County*, and fill the void of Section 4(b).

When looking at the aftermath of the *Shelby County* decision, it is clear that politics and partisanship can lead to discriminatory laws. The success of the independent commissions in Arizona and other states alike in having more balanced and fair districts is very promising.[132] This leads to the question: what other responsibilities can independent commissions have in the voting process? It is worth noting that even after the Supreme Court decision of *Arizona Independent Redistricting Commission*, there are limits to the actions or responsibilities an independent commission can have in the creation of voting laws since it is highly unlikely that any court would allow the state legislature to be completely left out of deciding the state's voting procedures.

However, recognizing that there will be limits to the ability of independent commissions, there are still plenty of opportunities for more oversight and input in the voting laws and procedures. The Supreme Court did not rule Section 5 of the VRA unconstitutional,[133] which means that the Court believes that some form of oversight or "check" on state voting procedures is constitutional. Therefore, this responsibility could be shifted to an independent commission within a state.

If this shift is going to take place, there are several factors to consider. First, who decides if an independent commission is necessary in a certain state? Since *Shelby County* held Section 4(b) unconstitutional, with the primary complaint being that the preclearance formula used outdated data,[134] the determination of whether to implement an independent commission will have to be based on recent data. However, even with recent data, there's still that question of who within the state will determine that an independent commission is needed. One way to do this is to have the voters in the state make that decision, just like in Arizona, where the

132. *See* Cain, *supra* note 75, at 1827, 1832.
133. *Shelby Cty.*, 133 S. Ct. at 2631.
134. *Shelby Cty.*, 133 S. Ct. at 2627; *supra* text accompanying note 41.

decision to have an independent commission was adopted through an initiative.[135]

Leaving it up to the voters could work, but would more than likely require a grassroots type of engagement to educate the voters about the independent commission and the reasons why it is so necessary to add the commission to the voting process. However, as with Section 2 (VRA) litigation, this process could result in waiting for voters to initiate the referendum while or after the state implements practices/procedures that will have an adverse impact on minorities. Therefore, this would be an ex post reaction where the voters will recognize there's a need for an independent commission after the harm has been done. Nevertheless, a strong grassroots-type movement to push for a referendum that could be fruitful in certain states if the voters anticipate that the government will enact future discriminatory voting procedures.

Another option is to have congressional action requiring certain states to adopt an independent commission. However, this is an unlikely solution since Congress has yet to vote on several proposed bills aimed at fixing Section 4(b),[136] as suggested by the Supreme Court in *Shelby County*. The lack of congressional action is the very reason why an alternative solution is necessary to combat the harm done by the *Shelby County* decision.

If a grassroots type of action is best option to initiate an independent commission, the next determination is about membership in the commission. Using Arizona as the template for independent commissions,[137] members of the Republican and Democratic parties, as well as independents, can nominate state residents to the commission, as explained earlier.[138] This will ensure that no political party has a significant influence over the voting

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135. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658.

136. *See, e.g.*, Voting Rights Advancement Act of 2015, S. 1659, 114th Cong. (referred to S. Comm. on the Judiciary, June 24, 2015). *See also S. 1659—114th Congress: Voting Rights Advancement Act of 2015*, GOVTRACK, (Dec. 31, 2016) https://www.govtrack.us/congress/bills/114/s1659 (indicating that the Voting Rights Advancement Act of 2015 had a one percent chance of being enacted).

137. Gringlas, *supra* note 81. In the article, Arizona's independent redistricting commission is described as "one of the most transparent entities in Arizona history" and explained that the meetings were "live-streamed and transcribed for the public."

138. *See* Cain, *supra* note 75, at 1832–37; *supra* text accompanying note 78.

process. Additionally, the commission should be diverse. Even if there's equal representation of political parties, minorities and women are traditionally missing from the decision-making process.[139] This is something that needs to be considered if the commission is entrusted with deciding voting laws and procedures so as to not run afoul of the VRA.

The last factor to consider is what procedures will be in the control of the commission? In order to retain the sanctity of the VRA, it is imperative that the commission is in control of the logistics of voting that potentially results in discrimination. For instance, the commission would decide the location of polling places. Another responsibility for the commission would be to make decisions regarding early voting, possible photo identification requirements, and other voting procedures. Also, the commission would follow the lead of Arizona, and have control over redistricting. In states where an independent commission is created via a referendum, it may be best for the voters to decide the duties and tasks of the independent commission.

Regardless of responsibilities and make-up, all independent commissions created for the purpose of creating voting laws and procedures should have the obligations described above as a starting point. Also, oversight will be necessary throughout this process. However, since the success of Arizona's commission is partly attributed to the transparency during the decision-making process,[140] transparency will be important to the success of an independent commission for voting.[141]

Without having an example of an independent commission used in this way, it is difficult to affirmatively say that a commission will

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139. Steve Bickerstaff, *Making Local Redistricting Less Political: Independent Redistricting Commissions for U.S. Cities*, 13 ELECTION L.J. 419, 426–27 (2014). Bickerstaff also explains that "[o]ne common objective for selecting members of a commission is diversity among members of the redistricting commission . . . willing to put impartiality above partisan or faction allegiance." *Id.*

140. Gringlas, *supra* note 81; *supra* text accompanying note 137.

141. *See* Cain, *supra* note 75, at 1826. However, while transparency is missing in the political process, it can sometimes lead to higher scrutiny of the members of the independent commissions. *Id.* at 1812. While this may be true, any amount of transparency is in the best interest of the community at large, since that would put the necessary pressure on the independent commission to create non-discriminatory voting procedures.

effectively prevent common discriminatory voting practices. However, states with IRCs have seen great success in reining in gerrymandering. By using the models set forth in those states (for example Arizona and California), an independent commission for voting procedures should be just as successful.

IV. CONCLUSION

The Voting Rights Act is one of the most important civil rights statues we have in this country. The decades of protests, marches, and sacrifices resulted in a historic piece of legislation that worked. The Voting Rights Act was successful in ensuring that all citizens were able to vote without having to overcome certain barriers.[142] This changed in 2013 with the Supreme Court's decision in *Shelby County*.[143] The Supreme Court finding that Section 4(b) of the Voting Rights Act was unconstitutional in *Shelby County* had immediate repercussions.[144] The Texas Legislature enacting discriminatory voting laws only moments after the *Shelby County* decision is a clear indication of the previous effectiveness of Section 4(b). It is very evident that there is still a need for a check on states in regards to ensuring a citizen's right to vote. Congressional action seems unlikely, and Section 2 litigation is an inadequate alternative.

An adequate replacement for Section 4(b) is independent commissions. Currently, states that utilize independent redistricting commissions have been successful in eliminating the discriminatory practice of gerrymandering. The viability and validity of independent redistricting commissions was affirmed with the Supreme Court's decision in *Arizona Independent Redistricting Commission*, holding that the use of independent redistricting commissions is constitutional.[145]

The *Arizona Independent Redistricting Commission* decision offers a new and innovative way to determine who makes the decisions regarding voting laws and procedures. Commissions such

142. *See* 383 U.S. at 325; *supra* text accompanying note 29.
143. 133 S. Ct. 2612.
144. *See, e.g.*, Lopez, *supra* note 52.
145. *Ariz. State Legislature*, 135 S. Ct. at 2652.

as this can be used to protect important voting rights in the absence of Section 4(b) and the diminished effectiveness of Section 5 of the Voting Rights Act. Make no mistake, this is not an easy task. It will be up to the voters to make this decision, and to put forth the effort. While it may take a grassroots effort and a voter initiative (like a referendum) to establish an independent commission, the success of IRCs in Arizona and California is encouraging. The work of countless Americans who fought for the right to vote is in jeopardy. A possible solution is an independent commission, which will allow the people to restore and protect the right to vote for all.