

Northern Illinois University Law Review

Volume 34 | Issue 3

Article 2

7-1-2014

Vol. 34, no. 3, Summer 2014: Table of Contents

Northern Illinois University Law Review

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Recommended Citation

Northern Illinois University Law Review (2014) "Vol. 34, no. 3, Summer 2014: Table of Contents," *Northern Illinois University Law Review*. Vol. 34: Iss. 3, Article 2.

Available at: <https://huskiecommons.lib.niu.edu/niulr/vol34/iss3/2>

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Northern Illinois University Law Review

Volume 34

Summer 2014

Number 3

ARTICLES

Introduction to the Northern Illinois College of Law 2014 Symposium *Shelby County v. Holder*: A New Perspective on Voting Rights

Marissa Liebling507

The introduction of state level voting laws in recent years is arguably unprecedented in both quantity and content, at least since the turn of the last century. This Article provides a background on legislative trends in order to give context to the thoughtful articles in this issue. First, the Article sets forth the types of recent laws that may serve as a barrier to voting, including felon disenfranchisement, proof of citizenship requirements, limits on voter registration drives and other registration practices, and voter identification laws. It next describes the countervailing trend towards increased legislation that expands voting opportunities and modernizes our election system. These proposed laws and reforms include online voter registration, Same Day Registration, electronic (also known as automated) and portable registration, and multi-state information sharing programs like ERIC. This Article highlights some of the primary elements, concerns, and controversies related to these recent voting laws, while posing the overarching question “what is it that we, as a society, want our election laws to resolve, promote, or protect?”

To Make Freedom Happen: *Shelby County v. Holder*, The Supreme Court, and the Creation Myth of American Voting Rights

Aderson Bellegarde Francois.....529

There has never been a moment in American history when federal intervention, supervision, or enforcement was not necessary to guarantee full and meaningful voting rights for African Americans. Yet, since ratification of the Fifteenth Amendment, providing that states shall not deny the right to vote on the basis of race, the United States Supreme Court, when deciding questions of the legitimacy of federal enforcement of voting rights, has always reached for a narrative of federalism that cast federal intervention as a historical aberration at best and a constitutional perversion at worst. Since passage of the Voting Rights Act of 1965 and its pre-clearance

provisions, requiring covered states to submit for federal approval any changes to their election laws, the Court’s federalist narrative of federal supervision as a constitutional trespass upon state sovereignty has become even more entrenched. Shelby County v. Holder may be the final coda in the story of federal power as interloper upon state sovereign control of voting rights, but in truth the Supreme Court began to tell the tale almost as soon as the Fifteenth Amendment was ratified. This Article offers an alternative narrative —a narrative that focuses on the fact that the entire purpose of the American federalist project was not to protect the dignity of more or less random geographical demarcations on a map but rather to safeguard individual liberty, human freedom, and personal dignity; a narrative that gives life to the human characters who were instrumental in the passage of the Voting Rights Act, including those individuals from the Student Nonviolent Coordinating Committee (SNCC), the Congress for Racial Equality (CORE), the National Organization for the Advancement of Colored People (NAACP), the Council of Federated Organizations (COFO), the Mississippi Freedom Democratic Party (MFDP), and Freedom Schools throughout the Deep South. The Article concludes with a few of their personal stories in order to show that without these anonymous young people the Voting Rights Act would not have existed, and that now that the Shelby decision has caused the preclearance provisions of the Act to pass into legend, their work remains the one true narrative of American voting rights.

A Doctrine of Sameness, not Federalism: How the Supreme Court’s Application of the “Equal Sovereignty” Principle in *Shelby County v. Holder* Undermines Core Constitutional Values

Samuel Spital561

In Shelby County v. Holder, the Supreme Court eviscerated section 5 of the Voting Rights Act, a powerful remedy that applied to certain states and localities, which were identified by Section 4(b) of the Act. The Court held that section 4(b) violated “the principle that all States enjoy equal sovereignty.” I submit that Shelby County conflates sameness with equality, and that it constitutes a radical departure from precedent in three areas: (a) separation of powers; (b) federalism; and (c) the rules of adjudication for facial challenges. The decision is a major setback to civil rights. Ironically, it also provides an incentive for Congress to impose greater intrusions on state sovereignty in future legislation.

Towards a Post-*Shelby County* Section 5 Where a Constitutional Coverage Formula Does Not Reauthorize the Effects Test

Joshua P. Thompson.....585

In Shelby County v. Holder, the Supreme Court struck down the decades-old coverage formula that triggered section 5 of the Voting Rights Act. Before the ink was dry on that opinion, efforts were

underway to breathe new life into section 5. Calls for a legislative solution were immediate, and soon after that legislation creating a new coverage formula was proposed. Additionally, the Department of Justice brought a lawsuit that, if successful, will require the State of Texas to once again submit to preclearance. Thus, the issue that the Supreme Court avoided in Shelby County – the constitutionality of section 5 – could soon reappear.

This Article addresses that eventuality and takes aim at only the most controversial aspect of section 5—the effects test. The effects test requires preclearance denial where a voting change will have an unequal impact on racial groups. The effects test is unconstitutional for two reasons. First, because the effects test stands independent from section 5’s ban on intentionally discriminatory voting practices, it is not a congruent and proportional means of enforcing the Fifteenth Amendment. Second, because the effects test is used almost exclusively to gerrymander districts along racial lines, it violates the Equal Protection Clause.

If section 5 is to remain a tool to eliminate discrimination in voting, then updating the coverage formula to address contemporary discrimination is only the first step. Equally important is ensuring that it is used to eliminate intentional discrimination in voting. Recognizing that the effects test perverts that prohibition could avoid the legal challenges that are sure to come.

NOTE AND COMMENT

“Whoa”-ing Equine Clones’ Registration: Establishing Procompetitive Benefits to Counter the Anticompetitive Argument Against American Quarter Horse Association’s Ban on Clones.

Alyssa Freeman607

This Note examines Abraham and Veneklasen Joint Venture v. American Quarter Horse Association, in which a United States district court ruled that the American Quarter Horse Association’s rule banning clones of registered quarter horses from also being registered violated section 1 of the Sherman Antitrust Act. The author explores potential procompetitive justifications that AQHA has established for its rule, including the negative impact clones would likely have on the genetic variation of the breed and genetic diseases. The author argues that the district court erred by overlooking the plausibility of the justifications and that the rule of reason analysis should have been conducted. Finally, the author concludes that AQHA, like other associations that essentially create the “product” in question, must be afforded the opportunity to present procompetitive benefits and have these benefits considered by the court.

Modern Private Data Collection and National Security Agency Surveillance: A Comprehensive Package of Solutions Addressing Domestic Surveillance Concerns

Shaina Kalanges643

Each day as we add cell phone apps, adopt trending tweets, or ask Siri for assistance, our information is being captured, stored, and even analyzed for repackaging in a profile. Private companies are working very hard to find the best ways to read consumers in the digital world to target them for advertisement. Meanwhile, the National Security Agency (NSA) is working very hard to stay connected to these big data collection methods to find the best way to target individuals for surveillance. This Comment provides insight into modern methods of NSA surveillance through examining section 215 USA Patriot Act and section 702 Foreign Intelligence Surveillance Act (FISA) surveillance practices. Part I uncovers data collection and surveillance controversies that emerged in the media in 2013, sparking global privacy concerns about section 702 warrantless surveillance and section 215 mass domestic and foreign business communication records collection. In Part II, this Comment delves into the history of NSA surveillance, developing case law, and proposed legislation. Part III explores how big data surveillance works and reveals the connections between NSA surveillance and private companies. Part IV discusses the Federal Trade Commission (FTC) and emerging policy on big data collection in the private realm. Part V forms a comprehensive package of solutions by merging NSA and FTC proposals to remedy past and future surveillance issues. Finally, Part VI concludes with the author's top suggestions for the legislature, judiciary, and executive to preserve domestic privacy in an era of big data collection.