ELECTORAL SILVER LININGS AFTER SHELBY, CITIZENS UNITED AND BENNETT

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I. Introduction

Many election law scholars, myself included, have read the recent decisions from the Supreme Court holding their breath, perhaps thinking that while, “damage has been done, it could have been worse.” Yet despite these recent setbacks in the Court, I will argue in this short paper that the glass is still half full in election law jurisprudence.

According to public opinion polling, a growing share of the American public disapproves of the U.S. Supreme Court.1 A possible explanation for the Court’s dip in popular support is its recent conservative election law jurisprudence typified by 5-4 decisions over fiery dissents.2 In particular, the Court has displayed tone-deafness for real world power relations3 when it

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3 2013’s Shelby is similar in its formalism to Giles v. Harris, where Justice Oliver Wendell Holmes refused to come to the aid of black voters who were being purged from the voter rolls in Alabama. Giles v. Harris, 189 U.S. 475, 488 (1903) (“relief from a great political wrong, if done, as alleged,
invalidated Section 4 of the Voting Rights Act (VRA), 4 poked holes in Arizona’s public financing law, 5 and expanded the ability of corporations to spend in American elections. 6

The culmination of these decisions from the high court is an unstable electoral landscape where moneyed interests and racism might combine to harm whole categories of vulnerable voters. 7 A vision of what’s to come can be seen in North Carolina where big money appears to be behind voter suppression legislation. 8 If we care about electoral fairness 9 we must worry that the Supreme Court has done some real harm in these decisions to the democratic process. 10 And the truly troubling thing is that the Court does not appear to have any end point in sight for its methodically unraveling good election laws case by case. 11

by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.”).

7 Laleh Ispahani, The Most Powerful Tool to Defend Minority Voting Rights Is Gone, Open Society Foundations, July 3, 2013, http://www.opensocietyfoundations.org/voices/most-powerful-tool-defend-minority-voting-rights-gone (“Together with unprecedented efforts to suppress the minority vote and the flood of money into state judicial elections, the Shelby decision also underlines the need to keeping our state courts fair and impartial and to keep the interests of a wealthy few from suppressing the votes of racial minorities.”).
9 John Paul Stevens, The Court & the Right to Vote: A Dissent, N. Y. REV. OF BOOKS, Aug. 15, 2013, http://www.nybooks.com/articles/archives/2013/aug/15/the-court-right-to-vote-dissent/ (“Not only is Congress better able to evaluate the issue than the Court, but it is also the branch of government designated by the Fifteenth Amendment to make decisions of this kind.”).
11 David H. Gans, Roberts at 10: Campaign Finance and Voting Rights: Easier to Donate, Harder to Vote, CONSTITUTIONAL ACCOUNTABILITY CENTER (2014), http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Easier-to-Donate-Harder-to-Vote.pdf (“John Roberts has started down that path, rewriting our Constitution’s system of
That's the bad news. But is there any good news hidden among the three decisions Shelby County v. Holder (invalidating Section 4 of the VRA); Arizona Free Enter. Club’s Freedom Club PAC v. Bennett (invalidating sections of Arizona’s public financing system); and Citizens United v. FEC (invalidating sections of the BCRA and FECA to allow corporate money into elections)? There is. The silver linings of these cases lie in the parts of the opinions where most of the statute under scrutiny was upheld through severability. This short paper will review some of the progressive aspects of election laws that remain viable for States and Congress despite the Supreme Court picking apart these laws.

A. Shelby Left the Voting Rights Act Intact

After Shelby was decided, Professor Heather Gerken lamented to NPR that "[t]he Supreme Court has just struck down the crown jewel of the Voting Rights Act..."12 While some banner headlines in the press in the summer of 2013, bemoaned the fall of the Voting Rights Act in Shelby,13 the Court's ruling was actually narrow in scope.14 In Shelby County v. Holder, while the Supreme Court invalidated the coverage formula in the Voting Rights Act’s Section 4, which determines which states and localities are covered by Section 5 preclearance,15 the Court left Section 5 preclearance intact.16 As

democracy to give outsized influence to corporations and the wealthy while undercutting our Constitution's promise of a multiracial democracy open to all.

15 Shelby Cnty. v. Holder, 133 S. Ct. at 2631. (“Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b)
Chief Justice Roberts wrote for the Court, “We issue no holding on § 5 itself, only on the coverage formula.”

The Supreme Court left the door open to Congress to fix the coverage formula in Section 4. As the *Shelby Court* admonished:

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.” Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

At the time that this piece is being written, Congress has failed to act to fix the VRA and without the coverage formula, there is no preclearance process.

The Court also left Section 2 alone, which allows plaintiffs to litigate discrimination in election and voting procedures. And finally, the Court did not have occasion in *Shelby County* to disturb Section 3’s “bail-in” provisions. Section 3 allows plaintiffs and/or the DOJ to bail-in jurisdictions to preclearance if discrimination is demonstrated. While somewhat rare, the bail-in procedure is not unprecedented. Texas is now the subject of a “bail in” lawsuit.

unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.”

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16 Id.
17 Id.
18 Id.
19 Id. (internal citations omitted).
21 Shelby Cnty., 133 S. Ct. at 2619. (“[VRA] Section 2 is permanent, applies nationwide, and is not at issue in this case.”); Id. at 17 (“Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.”).
22 Lyle Denniston, *Preclearance Requirement Sought for Texas on Voting*, SCOTUSBLOG, July 25, 2013, http://www.scotusblog.com/2013/07/preclearance-sought-for-texas-on-voting/ (“That could only be done now, in the wake of the Supreme Court’s ruling last month in *Shelby Cnty. v. Holder*, by having a court apply the so-called ‘bail-in’ provision of the 1965 law’s Section 3. That provision was left intact by the Supreme Court.”).
23 42 USC § 1973a(c) (also known as “Section 3 bail-in”).
The Shelby majority never addressed the issue of severability of the law; it merely excised Section 4 applying a power that the Court has held in reserve since Marbury v. Madison to strike one portion of a federal law. So while the loss of Section 4 is troubling, the rest of the Voting Rights Act stands and provides some meaningful avenues to police discriminatory bad actors. Namely, instead of the administrative pre-clearance process,

http://www.acslaw.org/sites/default/files/Gans_and_Wydra__A_Close_Look_at_Shelby_County_v._Holder_0.pdf (Likewise, bail-in has been used to impose certain preclearance obligations on a number of jurisdictions who have engaged in a host of discriminatory voting practices. For example, in the last 25 years, federal courts bailed in Arkansas and New Mexico — two states in which there has been a lot of litigation to enforce the nationwide provisions of the Voting Rights — as well as numerous local governments, including Los Angeles County, California, Bernalillo County, New Mexico, Buffalo County, South Dakota, Charles Mix County, South Dakota, and the City of Chattanooga, Tennessee.).

25 Texas v. Holder, Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH) (Defendant-Intervenors’ Motion For Leave To File Amended Answer And Counterclaim), (D.D.C. July 3, 2013), http://electionlawblog.org/wp-content/uploads/241-motion-sec-3redux.pdf (Movants seek an order from this Court subjecting the state of Texas to a preclearance requirement, under Section 3(c), 42 U.S.C. § 1973a(c), for all voting-related changes enacted by the state—a remedy that is necessary to protect minority voters in the state from the pattern of discriminatory actions persistently taken by the State in attempt to disenfranchise and diminish the voting strength of voters of color.); U.S. Statement of Interest at 6-22, Perez v. Perry, 5:11-cv-360 (W.D. Tex. July 25, 2013) (Dkt. No. 827); Attorney General, Eric Holder Delivers, Remarks at the National Urban League Annual Conference, July 25, 2013, http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html (the Justice Department will ask a federal court in Texas to subject the State of Texas to a preclearance regime similar to the one required by Section 5 of the Voting Rights Act. This request to ‘bail in’ the state — and require it to obtain ‘pre-approval’ from either the Department or a federal court before implementing future voting changes — is available under the Voting Rights Act when intentional voting discrimination is found. Based on the evidence of intentional racial discrimination that was presented last year in the redistricting case, Texas v. Holder — as well as the history of pervasive voting-related discrimination against racial minorities that the Supreme Court itself has recognized — we believe that the State of Texas should be required to go through a preclearance process whenever it changes its voting laws and practices”); Jillian Rayfield, Why the DOJ Picked Texas First, SALON, July 25, 2013, http://www.salon.com/2013/07/25/why_the_doj_picked_texas_first/.

26 Instead severability is only brought up by Justice Ginsburg’s dissent as another reason why a facial challenge was inappropriate in this case. Shelby Cnty., slip op at 34 (“The VRA’s exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§ 4(b) and 5 of the VRA…”).

27 David H. Gans, Severability as Judicial Lawmaking, 76 GEORGE WASHINGTON L. REV. 639, 639 n.1 (Apr. 2008) (“The severability [doctrine] is implicit in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which invalidated one particular section of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, leaving the remainder in place.”).


29 Wendy R. Weiser, Before the Senate Judiciary Committee Hearing on “From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act”, July 17, 2013,
litigation will become the primary tool to mitigate racial and language discrimination in elections. This is problematic, in part, because bad actors can frequently out maneuver the courts’ plodding procedures. In the future, voting rights litigation will likely suck up more resources of the victims of discrimination who have lost the prophylactic protections of preclearance. Hopefully, foundations and legal nonprofits will have the resources to pay for VRA litigations necessary to keep discrimination at bay.

B. Bennett Left Public Financing Intact

The VRA has had a considerable impact on who can vote and under what conditions. Meanwhile another key ingredient in the democratic soup is who can afford to run for office. Two Supreme Court decisions in the last three years have changed the campaign finance calculus for candidates. The first is the widely criticized Citizens United decision and the other is the barely noticed Bennett decision. Citizens United allows independent groups


30 Atiba R. Ellis, Shelby Cnty. v. Holder: The Crippling of the Voting Rights Act, ACS BLOG, June 27, 2013, http://www.acslaw.org/acsblog/shelby-co-v-holder-the-crippling-of-the-voting-rights-act (“With Section Five now ineffective, all bets are now off. The door is now open to more voter suppression, more voting wars, more racial balkanization in voting -- rather than less. And Voting Rights Act litigants would be left with only Section Two litigation, which, in comparison to the government’s ability to proactively supervise election laws, will prove costly and time consuming to plaintiffs and will rely on retroactive court decisions that come long after the harm.”).
31 Shelby Cnty., 133 S. Ct. at 2634. (Ginsburg, J., dissenting) (“Congress learned from experience that laws targeting particular electoral practices or enabling case by case litigation were inadequate to the task.”).
33 Niki Jagpal, Philanthropy’s Opportunity to Protect the Right to Vote, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY BLOG, June 28, 2013, http://blog.ncrp.org/2013/06/philanthropys-opportunity-to-protect.html (“In addition to Congress needing to reinstate the key provisions of the VRA, it is imperative that nonprofits working on voting rights issues be provided with the kinds of support they need to complement the hoped-for statute.”).
including multinational corporations to spend unlimited amounts of money on political ads attacking or boosting a candidate. 38 Meanwhile, Bennett changed the structure of public financing in Arizona. 39

Before the Bennett decision, publicly financed “clean” candidates in Arizona that were either running against a deep-pocketed privately-funded opponent or were targeted by privately-funded negative ads, were given matching public “rescue” funds so that they could keep up with the privately-funded attacks. 40 The Court found Arizona’s “triggered matching funds” unconstitutional in Bennett. 41

But this case did not invalidate public financing in Arizona or elsewhere. 42 In fact the Supreme Court in Bennett made clear that public financing was constitutional. 43 Reaffirming Buckley v. Valeo, which upheld presidential public financing in 1976, Chief Justice John Roberts wrote for the Bennett majority, “We have said that governments ‘may engage in public financing of election campaigns’ and that doing so can further ‘significant governmental interest[s],’ such as the state interest in preventing corruption.” 44

Although the Court unceremoniously removed the triggered matching funds from Arizona’s public financing law, neither the majority nor the dissent discussed the severability of the law at issue. 45 Bennett had a limited impact because only a few states and cities at the time had public financing that were structured exactly like Arizona’s. 46 Consequently only a few

38 Ciara Torres-Spelliscy, Corporate Political Spending & Shareholders’ Rights: Why the US Should Adopt the British Approach in RISK MANAGEMENT AND CORPORATE GOVERNANCE (2011).
41 Arizona Free Enter. Club’s Freedom Club PAC v. Bennett, 131 S.Ct. 2806, 2813 (2011) (“We hold that Arizona’s matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.”).
43 Arizona Free Enter. Club’s Freedom Club PAC, 131 S.Ct. at 2828.
44 Id. (citing Buckley, 424 U. S., at 57, n. 65, 92–93, 96).
45 The dissent did have lots to say about the logical flaws in the case. For example, Arizona Free Enter. Club’s Freedom Club PAC, 131 S.Ct. at 2835 (Kagan, J., dissenting) (“If an ordinary citizen, without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct… [T]o invalidate a statute that restricts no one’s speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.”).
jurisdictions had to retrofit their laws in response to Bennett. In fact, in Connecticut in the 2014 general election, both candidates for governor and over 80% of legislative candidates utilized that state’s public financing system.

The good news for campaign finance reformers is Bennett leaves the door wide open for public financing to be adopted across the country, including at the federal level. On the heels of corruption scandals in Albany, New York State’s legislature came tantalizingly close to passing a public financing bill in 2013. In the wake of this legislative defeat, Gov. Andrew Cuomo appointed the Moreland Commission to Investigate Public Corruption to gather information about campaign finance flaws in New York. This issue is still a live one in New York.

C. Citizens United Left FECA Intact


H.R. 269 Fair Elections Now Act was introduced in the House by Rep. John Yarmuth (D-KY) on January 15, 2013. This bill would provide public financing to Congressional candidates.

Editorial, Corruption in Albany, NEW YORK TIMES, May 6, 2013, (“For all the talk among Gov. Andrew Cuomo and other leaders about cleaning up New York’s rancid state government, it is the F.B.I. that is doing the cleaning — indictment by indictment.”).


Finally, the Grand Poobah award for outrageous election law decisions has to go to *Citizens United*, a case so imprecise, it was argued twice. Here the Supreme Court undid federal laws going back over sixty years and state laws going back over a century that had banned corporate involvement in elections. In particular, the Court invalidated 2 U.S.C. § 441b’s restrictions on corporate independent expenditures. And after *Citizens United*, outside spending in Congressional races spiked upwards. This sea change of a decision did leave one important thing intact: the rest of the Federal Election Campaign Act (FECA). Again, this might not be clear from the text of the decision, since it purports to reject an invitation to sever the law according to the Congressional back-up definitions in the law, and then goes ahead and blue pencils the statute in an entirely different way not contemplated by Congress.

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58 *Citizens United*, 130 S.Ct. at 917.


61 *Citizens United*, 130 S.Ct. at 891 (“The Government suggests we could find BCRA’s Wellstone Amendment unconstitutional, sever it from the statute, ... There is no principled basis for doing this without rewriting Austin’s holding.”).

62 *Citizens United*, 130 S.Ct. at 913 (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).
Citizens United is clear that federal disclosure requirements challenged by the plaintiff remain in effect. Picking up on the themes articulated in the Sunlight Foundation’s amicus brief before the Court, six of nine Justices in Citizens United stated that disclosure laws are perfectly constitutional. This means that localities, states and Congress have a free hand in drafting campaign finance disclosure laws. And the case was particularly expansive in its discussion of accountability to shareholders, which opens the door to disclosure that is specifically tailored to this constituency.

What’s less obvious is that the remainder of federal campaign finance laws outside of the invalidated corporate expenditure ban also remained intact the day Citizens United was announced. The corporate ban was just one strand in a fabric of campaign finance regulation created by Congress starting in 1907 that included disclosure laws, aggregate and specific contribution limits for individuals, parties and PACs, public financing for presidential candidates, as well as bans on direct contributions from corporations and union, and bans on money from foreign nationals.

In addition to upholding disclosure laws, the Citizens United Court speaks approvingly of Buckley’s approach to contribution limits: “Buckley first upheld § 608(b), FECA’s limits on direct contributions to candidates. The

64 Citizens United, 130 S.Ct. at 917.
66 Citizens United, 130 S Ct. at 916 (“[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”); Ciara Torres-Spelliscy, The SEC and Dark Political Money: An Historical Argument for Requiring Disclosure (Corporate Reform Coalition 2013).
67 It should be noted that the Court struck down another part of FECA that imposed aggregate contribution limits in the McCutcheon case in 2014, which could indicate that the Supreme Court is just taking its time in dismantling this law. See McCutcheon v. FEC, 133 S. Ct. 1434 (2014).
68 FEC, The FEC and the Federal Campaign Finance Law (updated Jan. 2013), http://www.fec.gov/pages/brochures/fecfec.shtml (“Essentially, the Court’s [Citizens United] ruling permits corporations and labor organizations to use treasury funds to make independent expenditures in connection with federal elections and to fund electioneering communications. The ruling did not affect the ban on corporate or union contributions or the reporting requirements for independent expenditures and electioneering communications.”).
Buckley Court recognized a ‘sufficiently important’ governmental interest in ‘the prevention of corruption and the appearance of corruption.’ This followed from the Court’s concern that large contributions could be given ‘to secure a political quid pro quo.’” 69 And the Citizens United Court specifically sidestepped addressing the campaign finance restrictions on foreign nationals.70

Conclusion

So while there are some democratic legitimacy problems with the Supreme Court blue penciling71 Congressional and state statutes—including that what remains is a law that no one in the legislature voted for72—this approach does leave in place other parts of beneficial election laws that can help voters and candidates.73

As explained in miniature here, many aspects of the Voting Right Act remain in full force and effect to protect voters. As Attorney General Holder said the day the Shelby decision was handed down:

Finally, we need to be clear about what happened today. Part of the Voting Rights Act, but not all of it, was struck down. The constitutionally protected voting rights of all Americans remain fully intact. And the right to vote, free from discrimination based on race or language, requires our vigilant protection. We know from many decades of long, hard struggle that the best way to defend a right is to go out and exercise it. So no one should conclude that today’s unfortunate decision has rendered

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69 Citizens United, 130 S.Ct. at 901.
70 Citizens United, 130 S.Ct. at 911 (“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to ‘foreign national[s]…’).
71 Dada v. Mukasey, 554 U.S. 1, 27 (2008) (J. Scalia dissenting) (“Of course it is not unusual for the Court to blue-pencil a statute in this fashion, directing that one of its provisions, severable from the rest, be disregarded.”).
72 Ciara Torres-Spelliscy, How Much Is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act, 16(1) CHAPMAN L. REV. 71, 101 (Spring 2012) (“Consequently, what was left after the Supreme Court’s handiwork was a law that no one in Congress had voted for, nor what President Ford signed.”).
73 David Gans, Severability as Judicial Lawmaking, 76 Geo. Wash. L. Rev. 639 639 (2008) (“Severability doctrine ... allows a court to excise any unconstitutional clauses or applications from a statute, leaving the remainder in force if the legislature would prefer that result to the statute’s total invalidation.”); Id. at 644 (“[Severability] preserves legislative prerogatives, foreclosing the possibility that a statute will be invalidated in toto because of a minor defect.”).
her or his voting rights invalid, or has made attempting to cast a ballot on Election Day futile.\textsuperscript{74}

And the Department of Justice has shown that it is taking its role as guardian of voting rights seriously by litigating to ‘bail’ Texas back in.\textsuperscript{75}

Meanwhile rumors of campaign finance’s death have been greatly exaggerated.\textsuperscript{76} Several important tools remain in place to mitigate the role of private money in elections—including disclosure regulations, contribution limits and bans, as well as public financing.\textsuperscript{77} Transparency allows voters to see the source private money in elections and hold politicians accountable. Contribution limits ensure that more than the super-rich can participate in funding campaigns. As Second Circuit Judge Calabresi once put it, contribution limits are needed because of widespread income inequality in America:

The wider the economic disparities in a democratic society, the more difficult it becomes to convey, with financial donations, the intensity of one’s political beliefs. People, who care a little will, if they are rich, still give a lot. People, who care a lot must, if they are poor, give only a little. Jesus's comment about the rich donors and the poor widow says it all. Today, the amount of an individual’s campaign contribution reflects the strength of that individual’s preferences far less than it does the size of his wallet.\textsuperscript{78}


\textsuperscript{75} Editorial, \textit{A New Defense of Voting Rights}, N.Y. TIMES, July 27, 2013 (“This is why Mr. Holder’s decision to rely on Section 3 in the Texas case is so significant. Section 3 — also known as the ‘bail-in’ provision — may be the most promising tool we have to protect voting rights after Shelby. It allows courts to identify jurisdictions that are passing intentionally discriminatory voting laws and then ‘bail’ them in as needed — that is, require them to get permission before establishing new voting rules.”).


\textsuperscript{78} Ognibene v. Parkes, 671 F.3d 174, 199 (2d Cir. 2011) (Calabresi, J., Concurring).
Meanwhile, public financing gives candidates an oasis away from private spending. Much like the voting rights area, money in politics protections are not self-executing. Legislatures and administrative agencies have to act to make these protections real and meaningful. As the New York experience shows, this can be a heavy lift. But like the bail-in suit against Texas, the effort in New York to protect our democratic mechanisms is necessary because the ideals at stake are central to who we are as a people. We need elections where voters feel welcomed at the polls and more than billionaires can run for office.

The alternative is just too bleak to contemplate. We don’t want to slide into the corruption of the Gilded Age or the racial Nadir when minority voters were effective shut out of the democratic process for decades. Perhaps, it is mere historical coincidence that massive corruption and massive disenfranchisement of blacks happened at the same time. Let’s hope neither despicable practice is resurrected or repeated.

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