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Subsequent History Omitted

Joel Heller*

Over the past year, the Supreme Court's decision in *Shelby County v. Holder*¹ has sparked debate over voting rights, race, history, and, surprisingly, footnotes. The legal database Westlaw instructs that citations to the Court's 1966 decision in *South Carolina v. Katzenbach*,² which upheld the same provision of the Voting Rights Act of 1965 (VRA) that *Shelby County* struck down, should carry the subsequent-history clause of "abrogated by *Shelby County v. Holder*." This characterization suggests that *Katzenbach* no longer has precedential weight and that its reasoning should no longer guide lawmakers, courts, and advocates.³ Yet the "abrogated" designation has not been widely adopted. None of the twelve judicial opinions and only ten of the sixty-seven law review articles to cite *Katzenbach* post-*Shelby County* contain

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1. 133 S.Ct. 2612 (2013).

2. 383 U.S. 301 (1966).

3. Westlaw has no official definition of *abrogated*. However, a Westlaw research attorney explained to the author that the label is essentially equivalent to *overruled*, except that the subsequent decision is made by the same court rather than a higher court. Westlaw has a panoply of negative subsequent-history labels, including *overruled*, *abrogated*, *called into doubt*, *declined to extend*, and *distinguished*.

Along with the damning "abrogated by" appendage, Westlaw displays a corresponding red-flag symbol on its page for *Katzenbach* indicating that the case is "no longer good for at least one point of law."

an “abrogated by” citation clause.⁴

The question of proper citation is not just one for footnote aficionados and law review editors. It represents a test of Westlaw’s authority and its influence on the development of the law. In addition, it goes to the continued viability of *Katzenbach* for both current and future voting rights legislation, because the issue of whether *Katzenbach*’s reasoning survives *Shelby County* has implications for recent attempts to revive § 5 of the VRA and for the vitality of other provisions of the VRA. Given the central role of history in both decisions, the question of how *Shelby County* and *Katzenbach* fit into each other’s history is particularly resonant.

I.

THE VOTING RIGHTS ACT AND THE COURT: *KATZENBACH* AND *SHELBY COUNTY*

Section 5 of the VRA outlines a process known as preclearance, which directs certain jurisdictions to submit any proposed voting “qualification, prerequisite, standard, practice, or procedure” to the federal government prior to enforcement for a determination that the policy has neither the purpose nor effect of abridging the right to vote based on race or color.⁵ As first enacted, the coverage formula that determined where § 5 applied provided that a jurisdiction was subject to preclearance if it required voters to comply with certain enumerated “test[s] or device[s]” and had registration and turnout levels under 50 percent in the 1964 presidential election.⁶

The Supreme Court rejected an early constitutional challenge to the VRA in *South Carolina v. Katzenbach*, holding that Congress had acted within its authority under the Fifteenth Amendment.⁷ As an initial matter, the Court announced that “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”⁸ Specifically, the Court held that Congress could target jurisdictions with a history of voting discrimination.⁹

Following these general principles, the Court determined that the coverage formula was reasonable, and thus constitutional, because it identified jurisdictions where federal courts and the Department of Justice had previously found substantial voting discrimination. The formula’s two criteria were relevant to this inquiry: tests and devices had consistently been used as tools of discrimination, and low turnout and registration rates reflected

4. These numbers are taken from a Westlaw search, conducted on October 19, 2014, of citing references for *Katzenbach* since June 25, 2013. The author recognizes the irony of using Westlaw as a research tool in a critique of Westlaw.

5. 52 U.S.C. § 10304(a) (2014).

6. Voting Rights Act of 1965, Pub. Law. 89-110, § 4(b), 79 Stat. 437 (1965).

7. *Katzenbach*, 383 U.S. at 308.

8. *Id.*

9. *See id.* at 328, 335.

disenfranchisement.¹⁰ Based on these findings, the Court dismissed South Carolina's challenge and upheld § 5 and the coverage formula.

The Court again addressed the constitutionality of the VRA forty-seven years later in *Shelby County v. Holder*. However, this time, the Court ruled that the coverage formula for § 5, which Congress had reauthorized in 2006, was unconstitutional.¹¹ Although the Court acknowledged that voting discrimination still existed, it nevertheless struck down the coverage formula on the grounds that it was no longer tied to "current conditions."¹² Specifically, the formula's focus on the use of tests and devices that were no longer in effect and on turnout rates from the 1960s and 1970s reflected "decades-old problems" and could no longer justify § 5's "federalism costs" and "disparate treatment of the states."¹³

The opinion recounted some of the tortured history of voting discrimination that had led to the enactment of the VRA in 1965, and noted that "[t]he Court invoked that history—and rightly so—in sustaining the disparate coverage of the Voting Rights Act in [*Katzenbach*]."¹⁴ Yet the Court faulted Congress for not sufficiently considering subsequent developments when it reauthorized the VRA. Presenting contemporary statistics from the covered jurisdictions, the Court announced that "things have changed dramatically" and "history did not end in 1965."¹⁵ The Court explained that if the preclearance regime of § 5 was to remain operational, Congress would have to amend its scope to reflect these "current conditions."¹⁶

II.

THE WESTLAW OF THE LAND?

When the *Shelby County* decision was issued on June 25, 2013, it was assigned to a Westlaw attorney editor for analysis and classification. Westlaw attorney editors read each new decision, write the headnotes and synopsis, and determine what labels to apply, including whether the new case abrogates any earlier decisions.¹⁷ A pronouncement of abrogation by Westlaw has no legal force, of course, but it does hold significant influence. Westlaw has thousands of subscribers, many of whom rely on the database and its Keycite function as a guide to the state of the law.

10. *Id.* at 819–20.

11. *Shelby County v. Holder*, 133 S.Ct. 2612, 2631 (2013). By the time of the 2006 reauthorization, the formula had been expanded to cover jurisdictions with low turnout and registration rates in 1968 and 1972. In the intervening years, the Court had again upheld § 5 and its coverage formula in *City of Rome v. United States*, 446 U.S. 156 (1980). Westlaw likewise labels *City of Rome* "abrogated by *Shelby County*."

12. 133 S.Ct. at 2629.

13. *Id.* at 2619, 2627–29.

14. *Id.* at 2628.

15. *Id.* at 2625, 2628.

16. *Id.* at 2631.

17. Telephone Interview with research attorney, Westlaw (Mar. 18, 2014).

Moreover, some courts have treated Westlaw's subsequent-history characterizations as authoritative.¹⁸ Even mistakes in how Westlaw characterizes a case have influenced judicial opinions. In *Ash v. Marshall*, for example, the court noted that the Ninth Circuit's treatment of a still-viable decision as overruled "appears to be an error, perhaps attributable to a mistake in Westlaw's 'Keycite' service," which had labeled the case "overruled."¹⁹ The courts in *Donoghe v. Westwood One, Inc.*²⁰ and *Niebur v. Town of Cicero*²¹ granted motions for reconsideration because the original opinions had relied on cases that were no longer good law, with both courts explaining that Westlaw had mischaracterized the overruled cases upon which the earlier decisions had relied. *Donoghe* observed that "at the time [the court] rendered its November 19, 2002 decision, Westlaw provided no indication that *Silverman* had been treated negatively by the S.E.C. or the Second Circuit,"²² and *Niebur* noted that an overruled case "shows up as good law on Westlaw's Keycite, and the relevant headnotes keyed to the pertinent propositions do not disclose the references to the contrary cases."²³ Relatedly, typographical errors on Westlaw have led courts to cite cases for propositions that they do not support.²⁴

The more that briefs and law review articles follow Westlaw's directive and append the "abrogated by" subsequent-history clause to *Katzenbach* citations, the more likely that the clause will find its way into court opinions and take on an official status. Alternatively, the "abrogated" label could chill further citations to the case entirely. Either outcome would be problematic, because Westlaw's characterization is mistaken—*Katzenbach* survives *Shelby County*.

III.

KATZENBACH LIVES

On the surface, Westlaw's designation of *Katzenbach* as an abrogated decision seems to make sense: after all, *Shelby County* appeared to strike down a provision that *Katzenbach* had held was constitutional.²⁵ Yet a closer

18. See, e.g., *In re Holmes*, 414 B.R. 115, 123 n.7 (Bankr. E.D. Mich. 2009) (discounting a case because "it is also 'red-flagged' by Westlaw, making citation to it dubious for any proposition").

19. No. CV 09-5491-SJO(E), 2010 WL 1734918, at *9 n.6 (C.D. Cal. Mar. 26, 2010).

20. No. 01 Civ.9325 LMM, 2003 WL 57928 (S.D.N.Y. Jan. 7, 2003).

21. 212 F. Supp. 2d 790 (N.D. Ill. 2002).

22. 2003 WL 57928, at *1 n.1.

23. 212 F. Supp. 2d at 798.

24. See *Acker v. Acker*, 904 So. 2d 384, 386–87 (Fla. 2005) (recounting the consequences of Westlaw's substitution of "his" for "her" in a family-law decision in a way that "entirely changed the meaning of the opinion").

25. Because § 5 is a time-limited measure that was reauthorized in 2006, the provision at issue in *Shelby County* was actually a different legislative enactment than the provision at issue in *Katzenbach*. Moreover, because of a VRA provision that allows jurisdictions otherwise subject to coverage to "bail out" if they meet certain criteria, 52 U.S.C. § 10303(a)(1) (2014), even though the language of the coverage formula was the same in 2006 as it was decades earlier, the operational scope of that formula had changed. See Justin Levitt, *Section 5 As Simulacrum*, 123 YALE L.J. ONLINE 151, 155–56 (2013).

inspection of *Shelby County* reveals that *Katzenbach* lives on in at least three consequential ways. First, *Shelby County* did not deny that *Katzenbach* was rightly decided at the time. Second, the Court neither invalidated § 5 itself nor rejected the idea that Congress could target particular jurisdictions for additional scrutiny, such that *Katzenbach*'s reasoning could support an amended VRA with a new coverage formula. Finally, despite suggestions of skepticism or even distaste, *Shelby County* did not abandon the proposition that, in the context of remedial legislation involving race, history matters. In these respects, *Katzenbach* retains enough vitality to escape the “abrogated” label.

A. *Shelby County States that Katzenbach was Rightly Decided*

A corollary to the judicial power “to say what the law is”²⁶ is the Court’s power to change its mind as to what the law is. With varying degrees of explicitness, the Court has reversed, amended, or reconceptualized several of its prior readings of the Constitution.²⁷ Indeed, the Court sometimes treats the constitutional provision in question as having undergone a sort of existential transformation. In such cases, the Constitution means, permits, and prohibits what the Court now determines that it means, permits, or prohibits—and always has—notwithstanding the Court’s earlier pronouncements to the contrary. The earlier decision is wrong now and was wrong then; the decision is as if it never was.²⁸

The Court made no such claim in *Shelby County*. Indeed, the opinion asserts several times that *Katzenbach* was correct when decided,²⁹ and does so in support of its conclusion that the coverage formula was now invalid. Because conditions in 1965 justified the coverage formula, Congress’s enactment of that formula was a proper exercise of its authority under the Fifteenth Amendment. Congress’s reauthorization of that formula in 2006 was not, the Court held, because those conditions had changed. Changed circumstances may render a case that was correctly decided at its time inapplicable to other factual circumstances, but not abrogated.

B. *Section 5 is Still Valid*

Further, *Shelby County* struck down the coverage formula that determined where § 5 applied, but did not invalidate § 5 itself.³⁰ Admittedly, the Court

26. *Marbury v. Madison*, 1 U.S. 137, 177 (1803).

27. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Tenth Amendment and Commerce Clause); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (Due Process Clause).

28. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today.”).

29. *See Shelby County v. Holder*, 133 S.Ct. 2612, 2625 (2013) (“At the time, the coverage formula . . . made sense.”); *id.* at 2628 (“The Court invoked that history—and rightly so—in sustaining the disparate coverage formula of the Voting Rights Act in [*Katzenbach*].”).

30. *See id.* at 2631 (“We issue no holding on § 5 itself. . . .”).

expressed significant concern with requiring states to obtain federal approval for their voting laws and treating some states differently than others.³¹ But the Court did not hold that Congress could never overcome those concerns, as Congress had done when first enacting the VRA in 1965. Nor did the Court contend that racial discrimination in voting no longer existed or that it was not a proper target of federal legislation. Because *Shelby County* did not rule otherwise, *Katzenbach*'s holding that § 5 is constitutional remains the law of the land. Congress has the power to require selected jurisdictions to submit proposed voting changes to the federal government for preclearance.

In fact, although *Shelby County* rendered § 5 inoperational, that status may be only temporary. A bipartisan group of lawmakers recently introduced the Voting Rights Amendments Act (VRAA), which, among other measures, crafts a new coverage formula for § 5.³² Under the VRAA, a jurisdiction is subject to preclearance if a federal court or the Attorney General finds that it committed a certain number of "voting rights violations" in the past fifteen years or if it commits one voting rights violation and has had "persistently, extremely low minority turnout during the previous 15 calendar years."³³ The bill defines "voting rights violation" as a violation of the Fourteenth or Fifteenth Amendment, a violation of § 2 of the VRA, or a denial of preclearance.³⁴ By updating the relevant time period and expanding the types of voting policies that would trigger coverage, these amendments respond to the *Shelby County* Court's reasons for striking down the old formula. With these concerns addressed, the broader reasoning in *Katzenbach* remains available as a means for defending § 5 against a renewed constitutional attack if Congress enacts the VRAA or a similar fix.³⁵

C. History Still Matters

Katzenbach also has continuing vitality in the broader conversation about the scope of Congress's power under the Reconstruction Amendments. Recognizing the importance of context, the *Katzenbach* Court held that the VRA "must be judged with reference to the historical experience which it reflects."³⁶ Its chastisement of Congress for "rely[ing] simply on the past"³⁷ notwithstanding, *Shelby County* never held that Congress could not look to history, only that it must also consider recent developments.

31. *See id.* at 2621, 2623–24.

32. H.R. 3899, 113th Cong. § 3 (2014).

33. *Id.*

34. *Id.*

35. Some critics contend that *Shelby County* established such a stringent standard that no coverage formula could satisfy it, and that the Court was essentially invalidating § 5 without saying so. *See, e.g.,* Richard Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714 (2014). Advocates of § 5 need not concede the point absent a more definitive ruling, however.

36. 383 U.S. 301, 308 (1966).

37. 133 S.Ct. 2612, 2629 (2013).

In addition to a revived § 5, *Katzenbach*'s recognition of the relevance of history and context for Fourteenth and Fifteenth Amendment jurisprudence has implications for other areas of voting rights law, such as § 2 of the VRA. Section 2 prohibits any "voting qualification or prerequisite to voting, or standard, practice, or procedure" that will "deny or abridge the right of any citizen of the United States to vote on account of race or color."³⁸ Like § 5, § 2 of the VRA invites a consideration of historical circumstances. When evaluating vote-dilution claims under § 2, courts consider "the history of voting-related discrimination" in the jurisdiction, as well as "the extent to which minority group members bear the effects of past discrimination . . . which hinder their ability to participate effectively in the political process."³⁹ Without *Katzenbach*'s holding that courts can and should consider "historical experience," such an analysis might be abandoned as irrelevant or impermissible; because plaintiffs bear the burden of proof in § 2 claims, their inability to rely on that evidence might make such claims more difficult to prove and undermine the provision's practical effectiveness. Dismissing *Katzenbach* as an abrogated decision thus could have serious consequences for both existing and future voting rights legislation.

CONCLUSION

In labeling *Katzenbach* "abrogated by *Shelby County*," Westlaw not only made an unwarranted value judgment, but also potentially swayed the course of the law. Advocates dissuaded from relying on *Katzenbach* could be robbed of a valuable tool for arguing in favor of a revived § 5 or defending other provisions of the VRA, and lower courts may refrain from citing the case. Yet proponents of § 5 and others who believe in the relevance of history should not lay down this tool before it is taken away by a more authoritative source than Westlaw. There is no need to wave the white flag (or, in this case, the red flag) just yet. Law review authors and editors should likewise hesitate before following Westlaw's instruction to label *Katzenbach* "abrogated by *Shelby County*." *Katzenbach*, especially its recognition of the relevance of the past, retains an important vitality. "[H]istory did not end in 1965,"⁴⁰ and it did not end in 2013, either. Because history lives, this purported subsequent history should be omitted.

38. 52 U.S.C. § 10301(a) (2014).

39. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425–26, 439–40 (2006). The Senate Report accompanying the 1982 reauthorization of the VRA identified these factors as relevant to § 2 claims. S. Rep. No. 97–417 (1982).

40. *Shelby County*, 133 S. Ct. at 2628.