

2017

Beyond Shelby County

Anthony Gonzalez

Follow this and additional works at: <http://commons.emich.edu/honors>



Part of the [American Politics Commons](#)

Recommended Citation

Gonzalez, Anthony, "Beyond Shelby County" (2017). *Senior Honors Theses*. 560.
<http://commons.emich.edu/honors/560>

This Open Access Senior Honors Thesis is brought to you for free and open access by the Honors College at DigitalCommons@EMU. It has been accepted for inclusion in Senior Honors Theses by an authorized administrator of DigitalCommons@EMU. For more information, please contact lib-ir@emich.edu.

Beyond Shelby County

Abstract

In the aftermath of the 2016 elections there is ample data to examine trends in voter turnout across the states. This election cycle also provided the first national election in fifty years without the full protections of the Voting Rights Act (VRA). Previously covered states and jurisdictions were no longer required to obtain preclearance in the enactment of voting legislation. This thesis will seek to answer which interest was being served by the new voting laws in several states and whether the gutting of the Voting Rights Act by the U.S. Supreme Court had an impact on voter turnout. It begins with an examination of the Supreme Court's decision in *Shelby County v. Holder* (2013) and the restrictive voting legislation enforced for the first time in the 2016 elections. Next, voter identification laws will be discussed as a restrictive form of legislation that has had some impact on voter turnout in states. Subsequently, popular vote totals from the 2012 elections will be compared with the 2016 elections to determine whether turnout increased or decreased in certain states. This will be followed by a legal analysis of the Court's decisions to examine how the Court reached its result. Finally, legislative alternatives to the VRA will be examined as this thesis seeks to answer what effect the weakening of the VRA by the U.S. Supreme Court had on turnout.

Degree Type

Open Access Senior Honors Thesis

Department

Political Science

First Advisor

Beth Henschen

Second Advisor

Jeffrey Bernstein

Keywords

Voting Rights Act, Voting Rights, Shelby County

Subject Categories

American Politics

BEYOND SHELBY COUNTY

By

Anthony Gonzalez

A Senior Thesis Submitted to the

Eastern Michigan University

Honors College

in Partial Fulfillment of the Requirements for Graduation

with Honors in Political Science

Approved at Ypsilanti, Michigan, on this date April 11, 2017

Acknowledgements

Justice Thurgood Marshall once remarked that “None of us got where we are solely by pulling ourselves up by our bootstraps. We got here because somebody - a parent, a teacher, an Ivy League crony or a few nuns - bent down and helped us pick up our boots”. I consider myself privileged to have personally benefited from the mentorship and guidance of several professors in the Political Science Department at Eastern Michigan University. These individuals have made great contributions to my academic development and without their support, I would not be writing this thesis today. Some of these individuals who deserve mentioning include Professors Jeffrey Bernstein, Barry Pyle, and Edward Sidlow. There is not enough that can be truly said about how much these individuals meant to me as a student. A special thank you goes to Professor Beth Henschen, who has sponsored my undergraduate research and passion for voting rights from its earliest stages. This long journey with voting rights began my sophomore year in 2014, in a course titled: Law & Policy in a Constitutional Democracy. I am grateful for Professor Henschen’s support in the completion of this thesis, her meticulousness, her mentorship, and the continual reminder that just like the world, in Political Science, nothing is ever truly black and white.

Abstract

In the aftermath of the 2016 elections there is ample data to examine trends in voter turnout across the states. This election cycle also provided the first national election in fifty years without the full protections of the Voting Rights Act (VRA). Previously covered states and jurisdictions were no longer required to obtain preclearance in the enactment of voting legislation. This thesis will seek to answer which interest was being served by the new voting laws in several states and whether the gutting of the Voting Rights Act by the U.S. Supreme Court had an impact on voter turnout. It begins with an examination of the Supreme Court's decision in *Shelby County v. Holder* (2013) and the restrictive voting legislation enforced for the first time in the 2016 elections. Next, voter identification laws will be discussed as a restrictive form of legislation that has had some impact on voter turnout in states. Subsequently, popular vote totals from the 2012 elections will be compared with the 2016 elections to determine whether turnout increased or decreased in certain states. This will be followed by a legal analysis of the Court's decisions to examine how the Court reached its result. Finally, legislative alternatives to the VRA will be examined as this thesis seeks to answer what effect the weakening of the VRA by the U.S. Supreme Court had on turnout.

Keywords: Voting Rights Act, Voting Rights, Shelby County

Beyond Shelby County:

The Effects of a Weakened Voting Rights Act

Introduction

In 2013, the U.S. Supreme Court granted certiorari in *Shelby County v. Holder*, 570 U.S. ___ (2013) a facial challenge to the Voting Rights Act of 1965 (VRA). The Court certified the following question: Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c, under the pre-existing coverage formula of Section 4(b) of the VRA, 42 U.S.C. 1973b (b), exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

Congress passed the VRA at a time when discrimination in voting was rampant, mostly in the South, and voter registration numbers in certain areas were low. In response, Congress passed a statute that could effectively deal with the problem by targeting states and jurisdictions with histories of racial discrimination. Section 4 of the Act established a coverage formula to target these jurisdictions based on two criteria. 1) Did the state or political subdivision maintain a "test or device" restricting the opportunity to vote. 2) Could it be determined that less than fifty percent of persons of voting age were registered to vote on November 1st 1964, or that less than fifty percent of those of voting age voted in the 1964 Presidential Election. If the state or covered jurisdiction satisfied either of these criteria, any changes to voting legislation would require preclearance (Sec. 5) from the federal government.

The coverage formula was intended to remain for only five years, but Congress renewed it for an additional five years in 1970, while also updating the registration date to November of 1968. In 1975, Congress extended the formula for an additional seven years while also using the registration date from November of 1972 to determine its coverage. The Act's special provisions were due to expire in 1982 but Congress decided to extend the formula for 25 years, while also declining to update the registration date from 1972. During its most recent reauthorization in 2006, Congress decided to extend the coverage formula of Sec 4(b) for an additional 25 years.

Nearly a decade after the VRA's reauthorization, the Supreme Court in a 5-4 decision declared the coverage formula unconstitutional. The Court reasoned that the federalism and cost burdens imposed on states must be justified by current needs. Sec. 5 (Preclearance) would remain but without the coverage formula of Sec. 4(b), it remained powerless. Without federal oversight the "floodgates" opened in 2013, and laws that could not be proved as discriminatory under Sec. 2 of the VRA would survive. Since 2013, states have introduced voting legislation to serve one of two purposes: enhancing access to the ballot box, or restricting access. According to the Brennan Center for Justice in 2013, 92 restrictive bills were introduced in 33 states (brennancenter.org).

In 2016, the first general election in half a century took place without the full enforcement of the VRA. Without such protections, some individuals were concerned that voter turnout may have decreased, specifically in states that were previously covered under the Act. Voter turnout in this past election cycle was most likely affected to some degree due to legislation passed in previously covered states. To that end, this thesis will primarily address two

research questions. 1) What interest is being served by these new voting laws? 2) Did the gutting of the Voting Rights Act by the Supreme Court have an impact on voter turnout?

First, a summary of restrictive voting legislation in place for the 2016 elections will be examined to determine how the legislation would be used to limit access. Second, voter identification laws will be examined, an example of “restrictive” legislation used in several states. Three states, North Carolina, Texas, and Wisconsin will be examined to chronicle the litigation surrounding the laws and to determine whether the law’s enforcement affected turnout in the respective state. Third voter turnout data from the 2016 general election will be examined. That election will be discussed considering the factors surrounding turnout and political participation. This focus will consider whether voter turnout increased or decreased in states with strict legislation, and states that were previously covered under the VRA. Fourth, a legal analysis will be provided with three areas of focus to include voter ID precedent under *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the doctrine of equal footing, and the test applied by the Court in *Shelby County*. Finally, the thesis will conclude by examining legislative alternatives to the coverage formula/preclearance, and ultimately examining what lies beyond *Shelby County*.

Strict Voting Legislation First Used in 2016

Proponents of restrictive legislation reason that these laws are necessary to maintain the integrity of the ballot box. This argument is rejected by opponents of restrictive legislation who argue that such measures serve to disenfranchise minorities and the poor, and to assist Republican Party candidates. Both arguments merit consideration; however it is clear that state

legislatures responded to the Supreme Court's decision in *Shelby County*. Miller writes that legislatures might accept court decisions or they could ignore them (Miller, 235). States that have adopted restrictive voting legislation very likely supported the Supreme Court's decision, and were merely acting to implement legislation it viewed as constitutional.

The Brennan Center for Justice has identified fourteen states¹ that would have new voting restrictions enforced in the 2016 elections. While this thesis devotes a considerable focus to voter identification laws adopted in three states, other measures have been used that have served to limit access to the ballot box. Arizona has adopted a unique measure that places limits on mail-in ballot collection, legislation that makes it a felony for organizers to knowingly collect and turn in another voter's completed ballot. Arizona voters were previously able to request early ballots and organizers would deliver their ballots to election stations (de Vogue, 2016).

Kansas adopted a measure that required documentary proof of citizenship to register as a voter in the state. The Court of Appeals for the Tenth Circuit blocked the law, allowing citizens who previously registered on a national form to vote in the elections. Nebraska and Ohio were examples of states that limited their early voting period which had previously served to enhance access to the ballot box. These measures are just a few examples of laws that were successfully enforced during the 2016 election, and may have served to limit access to the ballot box. These fourteen states identified by the Brennan Center will be used in the succeeding sections to examine whether there was an increase or decrease in voter turnout in this past election cycle.

¹ Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

It is worth noting that when the Brennan Center published a similar report detailing restrictive legislation enacted for the 2012 elections, only six states had laws enforced. The actions affecting the 2016 elections reflected the willful action of fourteen legislatures to respond to the Supreme Court's decision a mere three years earlier with restrictive laws. It is worth mentioning, however, that states have also responded with legislation that has enhanced ballot access for all. This legislation includes the easing of voter ID laws, modernized registration access, restoring voting rights for those with criminal convictions, and the early registration of high school aged students to vote. Future studies may examine how legislation that enhances access increases voting turnout, and if so, how it compares to previous election cycles. Voter identification laws have received considerable attention in the past few years, and focus on their enforcement will serve as a focus to analyze the impact of these laws on voter turnout.

Voter Identification Laws

According to the Brennan Center for Justice, voting laws either enhance access or restrict access to the ballot. States have adopted a wide variety of mechanisms to regulate the ballot box and for purposes of this research, voter-identification laws will be examined. Currently, 34 states request or require that voters present some form of identification at the polls (Underhill). Proponents of these regulations argue that voter identification laws offer a safeguard against voter fraud and ensure that each vote counts equally. In one of the earliest cases concerning these regulations, the requirement of an ID to vote is likened to the requirement of an ID for air travel *Common Cause/Georgia v. Billups*, 554 F.3d 134- (11th Cir. 2009).

(Figure 1 About Here)

States have adopted these regulations as a prophylactic measure. The evidence, however, suggests this method is addressing a problem that doesn't exist. Loyola Law Professor Justin Levitt has tracked credible allegations of in-person voter fraud and has only discovered 31 incidents between 2000 and 2014 (Levitt, 2014). A similar report issued by Levitt found incident rates of voter fraud between 0.0003 and 0.0025 (2007). The earliest voter identification requirements began after 2000 and these laws can be described as "non-strict"; they did not mandate photo ID. Georgia became one of the first states to adopt a "strict" photo identification requirement at the polls. Opponents of the law contended that the law, as applied, imposed a poll tax depriving Georgia voters of equal protection. While litigation in this matter was pending in the Court of Appeals for the Eleventh Circuit, the Supreme Court heard arguments in *Crawford v. Marion Cty. Election Bd.* (2008), a challenge to a similar provision enacted in Indiana. The state proffered three interests: (1) deterring and detecting voter fraud, (2) election modernization, (3) safeguarding voter confidence. The Court upheld the law under a flexible standard reasoning that Indiana's interests far outweighed any limitation imposed on voters. Adopting the logic from this decision, the Eleventh Circuit upheld the enforcement of the Georgia law in *Billups* (2009). Both courts noted that while there were few cases of voter fraud, the state had a legitimate interest in the regulation of elections.

A 2005 report, "Building Confidence in Elections" (Report of the Commission on Federal Election Reform), recommended that states adopt a photo ID requirement at the polling place. The report also noted that states should play an affirmative role in reaching out to non-drivers, provide photo IDs free of charge, and adopt a single uniform ID (Report, 2005). In the years following *Crawford*, several states have enacted strict photo ID laws that require limited

forms of identification before casting an in-person ballot. These laws have become more relevant in the aftermath of the Supreme Court's decision in *Shelby County v. Holder* (2013), which effectively gutted the Voting Rights Act of 1965 (VRA). Without the coverage formula of Sec. 4, the nine states previously covered would not need to obtain the permission of the federal government before changing their election laws. A mere 24 hours after the Court's decision in 2013, five states moved forward with voter ID laws that would have been rejected previously under the VRA². (Childress, 2013) Three years have passed since *Shelby County*; the first national election has been held without the full protections of the VRA since 1964. In the aftermath of this election, these laws can be examined to determine if their enforcement affected turnout. Proponents of these laws allege that there must be reasonable protection against voter fraud, while opponents argue they have a disparate impact on minority voters. To examine the effect of these laws three states will be examined: North Carolina, Texas, and Wisconsin. One of these states- North Carolina- had been previously covered under Sec. 4 of the Voting Rights Act.

North Carolina

Not all of North Carolina was previously covered under Sec. 4 of the Voting Rights Act, but several jurisdictions within the state were covered. At issue was HB 589, recognized as one of the strictest voting regulations in the nation. In addition to a photo ID requirement, the state shortened the early voting period from 17 to 10 days, eliminated pre-registration for 16 and 17-year olds and ended same-day voter registration (Blake, 2013). During the 2012 election, 2.5 million people voted early and 300,000 residents lacked the proper form of identification

² Texas, South Carolina, Alabama, Virginia, Mississippi

(Berman, 295). Concerning the North Carolina law, UC Irvine Law Professor Rick Hasen noted: “I have been trying to think of another state law passed since the 1965 Voting Rights Act to rival this law but I cannot” (as quoted in Berman, 298). Before the District Court trial, lawmakers amended the law permitting residents to cast a provisional ballot if they could indicate a reasonable impediment to securing a photo identification. The law was upheld by the United States District Court for the Middle District of North Carolina in April of 2016, and then struck down by the Circuit Court of Appeals for the Fourth Circuit in July, reasoning that the law was enacted with discriminatory intent. A deadlocked Supreme Court denied the stay in August of 2016, meaning that the law would not be enforced for the 2016 election.

HB 589 was left in place for the 2014 midterm election, and it appears that this law did affect turnout in the Tar Heel state. It should be noted, however, that midterm elections usually encounter lower turnout and the 2014 cycle was no different. One study noted that the limitations of the law and polling place problems led to a reduction of at least 30,000 voters in North Carolina (Gutierrez & Hall, 2015). Interestingly, the 4th Circuit’s opinion recognized that African-American voter turnout increased by 1.8% during the 2014 election. At issue for the panel were the out-of-precinct ballots that were not counted, and the thousands of African American voters who would have been able to vote but for the elimination of same-day registration. In addition, the issue with the photo ID provision, according to the 4th Circuit, was that it was “too broad” and enacted irrational restrictions to combat voter fraud.

The North Carolina State Board of Elections has noted that 68.98% of voters participated in 2016, compared to 68.40% in 2012. Based on the evidence in 2014, it is reasonable to speculate that turnout would have decreased if all of the provisions of HB 580 were enforced.

Voters in North Carolina were spared of the act's enforcement, which leaves many unanswered questions about turnout in this state. One interesting result was the 8.7 % decline in early-voting among African-American voters in the state—a deficit non-existent in southern states with the same provision (Roth, 2014). A brief examination of the political factors in 2016 that may have shaped turnout in North Carolina and across the United States will be explained below. For now, it can likely be reasoned that a photo identification provision did not have a substantial effect on voter turnout in the 2016 election.

Wisconsin

The state of Wisconsin was not covered under Sec. 4 of the Voting Rights Act, and stands out as a Midwestern state with a “strict” photo identification requirement. In 2011, Gov. Scott Walker signed Wisconsin Act 23, requiring voters to present one of eight forms of ID including military identification, passport, a signed student ID, veteran's health card, and identification issued by a federally recognized Indian tribe (ncsl.org). Unlike the state of North Carolina, Wisconsin allows voters who lack a driver's license to obtain a free photo identification. The litigation began in December of 2011, as the question before the court considered the act's constitutionality as applied to a certain class of voters. The law was initially struck down at the trial level and later reversed by the U.S. Court of Appeals for the Seventh Circuit.

Following the Supreme Court's decision to vacate the stay in 2014, the law was not enforced for the 2014 election. Two years later, plaintiffs alleged that the law was unconstitutional for those who lacked the proper form of identification. District Court Judge Lynn Adelman's opinion ordered the state to allow voters who lacked the proper form of

identification to cast a ballot after completing an affidavit. The 7th Circuit issued an order staying an injunction issued by the District Court reasoning that the lower court had been too lenient in its decision.

While the state does allow its residents to participate in an early-voting period, permitting registration and the casting of an early ballot, the primary issue is related to providing identification. The record before the District Court indicated that nine percent of Wisconsin voters lacked the proper form of ID (Berman, 2016). Journalist Ari Berman offers one example of the problems in Wisconsin, when Zach Moore, a 34-year-old African American, attempted to get the proper ID at the DMV in September of 2016. Moore had recently moved from Chicago to Madison and brought his Illinois photo ID, Social Security Card, and a paystub, but he did not have his Illinois certificate. The state did not provide him a credential to vote and instead offered him one of two options: go to Illinois and get his birth certificate, or enter an ID petition process which could take six to eight weeks to finally get the proper photo ID (2016). Mr. Moore's case is not an isolated incident, as other minority citizens in the state were still unable to obtain IDs. (Bauer and Richmond, 2016)

The political winds of 2016 led to Donald Trump winning the state, the first time a Republican presidential candidate had won the state since 1984. Headlines in the aftermath of the election supported a narrative that as many as 300,000 voters in Wisconsin were denied access to the ballot due to a lack of proper identification. According to election officials in the state, turnout had dropped 41,000 votes from the 2012 total in areas where lack of identification had been an issue (Wines, 2016). While the metric of 300,000 voters being turned away was circulating on the web, there is no data at this time to indicate that so many voters were turned

away at the polls due to a lack of identification. Political Scientist Barry Burden remarked "There is no evidence that 300,000 people were turned away in the November 2016 election". (Kertscher, 2016). Post-election analyses suggest that Donald Trump's victory in Wisconsin can be attributed to a strict photo ID law enforced in the 2016 election. Yet it is far too early to determine a causal link, though this research supports the notion that turnout in some areas may have decreased because of this new law. Any causal link between the statute's enforcement and voter turnout must cautiously consider the political factors surrounding the 2016 election.

Texas

In 2011, Gov. Rick Perry signed into law a new voter ID bill as a mechanism to deter voter fraud within the state. The new law required voters to provide government issued ID cards which included passports, military IDs, driver's licenses, and personal IDs issued by the Department of Public Safety (www.texastribune.org). Texas also accepted a concealed handgun permit, but would not accept student identifications or expired driver's licenses, as do the states of Indiana and Georgia (Berman, 257). A year later, the Texas law did not survive the preclearance of Sec. 5 of the Voting Rights Act. The same day the Supreme Court announced its decision in *Shelby County v. Holder* (2013), the state announced it would implement the previously-blocked law.

Opponents of the law challenged its enforcement before the 2014 election, filing suit in the United States District Court for the Southern District of Texas, alleging that it had been adopted with "an unconstitutional discriminatory purpose and amounted to a poll tax." District Court Judge Nelva Ramos agreed and issued an injunction against the law, only to be reversed

by the U.S. Court of Appeals for the Fifth Circuit. The Supreme Court affirmed that decision in an emergency application, allowing the law to remain in place for the 2014 elections. Justice Ginsburg's six-page dissent argued that as many as 600,000 Texans may be prevented from voting due to the law's enforcement. In the 2014 election cycle the number of votes cast in Texas was down by 271,000 votes from the total in 2010 (Ramsey, 2014). The turnout for the 2014 election was low across all states, yet opponents of the law argue that this is a result of the Texas voter ID law.

In the months leading up to the presidential elections, many observers wondered whether the law would be enforced in 2016. The 5th Circuit issued a surprising 9-6 ruling striking down a law described as discriminatory in impact. District Court Judge Ramos, who had previously heard the case in 2014, entered an order approving a plan to allow voters without ID to cast a ballot after signing a declaration and presenting a broader set of documents, including bills and bank statements (brennancenter.org). The Supreme Court declined to re-hear the case in January 2017, allowing the decision of the 5th Circuit to remain. Chief Justice Roberts's order indicated that the discriminatory purpose claim would be remanded for further consideration.

The Texas Voter ID law, following an agreement at the District Court level, remained in place for the 2016 elections. Estimates have noted that more than 800,000 citizens voted in the 2016 general election when compared to Texans who voted in the 2008 or 2012 elections (Whyte & Daniel 2016). Based on the trend that occurred in 2014, it can be reasonably argued that the full enforcement of the law affected turnout in that election cycle. While the law was left in place for 2016, there is no evidence to support the claim that the law led to a decrease in turnout in this latest election cycle, especially as turnout in Texas increased.

The Fragile Balance

Voting ID laws weigh two competing interests: the interest of the voter against the interest of the states. States have a legitimate interest in increasing confidence in public elections, but at what cost? The cases of voter-fraud are few and there is no concrete evidence to support the narrative that voter-fraud is reduced by such burdensome restrictions. The very measure intended to increase confidence in elections may decrease turnout, since it can be argued that stricter voting laws impose a substantial burden upon voters—most often minorities and the poor. Most of the literature supports the premise that stricter photo ID laws actually decrease turnout by about 2 percent as a share of the registered voting population (Silver, 2016).

Statistician Nate Silver argues that while these laws can impact turnout, several factors must also be taken into account. Many voters who lack identification are not registered to vote, and if they are registered, they are unlikely to vote. Cases in Pennsylvania, for example, indicated that 750,000 voters lacked the proper form of ID, but this did not account for database matching problems, inactive registrations, and voters who have other forms of ID. State laws have often offered voters more than one method of voting, which can include but are not limited to, an early voting period and a provisional ballot.

It has been nearly ten years since the Supreme Court has certified a question concerning the constitutionality of voter identification laws. The makeup of the Court has changed, the evidence is different, and the Court is awaiting a replacement for a reliable fifth conservative vote. When the Court decided *Crawford* in 2008, it adopted the balancing test first used in *Anderson v. Celebreeze*, 460 U.S. 780 (1983), weighing the character and magnitude of the injury against the precise interests offered by the state. The injury imposed on voters may be

greater than that present in 2008 and as such, the state has a heavy burden to justify enforcing these laws. This evidence is by no means conclusive, but as the three states examined demonstrate, voter ID laws have some effect on turnout.

Voter Turnout Data 2016

One of the questions this research attempts to answer is whether the weakening of the Voting Rights Act impacted voter turnout in the 2016 elections. While 2014 was the first election cycle in fifty years without the full protections of the VRA, the focus here is on 2016 since the data from a general election provides a more accurate picture of the electorate. Data from the 2012 general election will be compared with the 2016 general election to answer two basic questions: (1) did voter turnout increase/decrease in covered states and (2) did voter turnout increase/decrease in states that enacted restrictive voting legislation. As noted by the Brennan Center for Justice, fourteen states had enacted restrictive voting legislation in time for the 2016 elections³ (brennancenter.org). Of these fourteen states, six were previously identified as covered states under Sec. 4(b) of the Voting Rights Act.

Before addressing the data, a foundation must be established by discussing the context surrounding the elections of 2016. In the Republican field, seventeen candidates sought the nomination, including former governors, legislators, and two political “outsiders”. The Democratic field had only six candidates, five with political experience and one political “outsider”. It is far too early to discuss whether this election was historic and yet, there were

³ Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. For a summary of legislation enacted in recent years, see “New Voting Restrictions in America” (March 1, 2017) brennancenter.org

several aspects about this election cycle that made it unique. Establishment favorite Hillary Clinton mounted her second official run for the Presidency by announcing her candidacy in April of 2015. The presumed coronation of the second Clinton presidency would be challenged by Senator Bernie Sanders (VT-I), an anti-establishment favorite advocating for a political revolution. The Republican field began to grow following Sen. Ted Cruz's announcement of a presidential bid in March of 2015. By June 16th, former Gov. Jeb Bush and several other establishment favorites announced their candidacy in a field of opponents with no clear frontrunner. On June 16th, businessman Donald Trump announced his candidacy for office, pledging to "Make America Great Again". It was a candidacy few pundits and pollsters took seriously.

During the campaign, the Democratic field quickly narrowed, allowing Secretary Clinton and Senator Sanders to emerge as the front-runners. Under the party's rules, the nominee would be selected in a series of caucuses and primaries and the candidate with 2,383 delegates would clinch the nomination. Party rules also provided for superdelegates, party loyalists who were free to support either candidate, even if their vote differed from the voters of their states. Superdelegates overwhelmingly favored Clinton (602) in comparison to Sanders (48), raising questions for many about the legitimacy of the process (realclearpolitics.com). To some, Sanders was the victim of a rigged system that favored Secretary Clinton and would ensure her nomination. Leaked emails from the Democratic National Committee (DNC) by WikiLeaks during the summer of 2016 indicated that the party organization favored Clinton, and may have worked against the candidacy of Sanders.

The 2016 cycle also raised questions about foreign intervention, and whether such intervention may have been used to influence the outcome. In January of 2017 a classified assessment, Background to “Assessing Russian Activities and Intentions in Recent US Elections” concluded that “Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election,” with the specific goal of harming Hillary Clinton’s “electability and potential presidency” (Gillsinan & Calamur 2017). Regarding the DNC hacking, the report concluded that Russian intelligence gained access to the DNC networks, and material acquired from the DNC was given to WikiLeaks.

The email controversy of the 2016 election was not limited to Russia and WikiLeaks, as Secretary Clinton was also under fire for action taken as Secretary of State. During her tenure at the State Department, Clinton set up a private email server, and used this email for all her correspondence—both work-related and personal (Zurcher, 2016). According to Clinton, the personal email was established for convenience, leading many to question whether her actions violated a long-standing policy regarding email use at the State Department. The Inspector General of the State Department held that there had been a violation of State Department policy, noting that she did not receive prior permission before establishing the private email server. In the aftermath of this report, a separate FBI investigation concluded in July 2016 that “no reasonable prosecutor would bring such a case” against Clinton. Despite the FBI’s statement, many questions about deleted emails and the private server would continue to plague Clinton. In late October of 2016, a separate investigation resulted in additional Clinton emails being discovered, leading the FBI to re-open the investigation, eleven days before the election. While

the investigation concluded, with nothing relevant revealed before the election, it is very likely that damage had been done to the Clinton campaign.

To say that Donald Trump ran a non-traditional campaign is an understatement. With a promise to “Make America Great Again,” the New York billionaire sought the nation’s highest political office. Early polls indicated that he did not stand a chance, yet in the weeks and months that followed, the Trump campaign began to gain momentum. The second-place finish in the Iowa caucuses and primary victories that followed indicated that it was not impossible for Donald Trump to secure the GOP nomination. By July of 2016, Donald Trump was declared the Republican Presidential nominee, joined on the ticket by Indiana Governor Michael Pence. Trump did not have the blessing of the GOP establishment, and as a result, he would rely on unconventional campaign tactics and outside advisors. And while much of the criticism directed against Trump was based on a lack of political experience, it was also noted that Trump was not regarded as a favorable candidate.

A Gallup Poll conducted a few days before the election captured the national dislike for Trump, noting that he received a 61% un-favorability rating (gallup.com). One single factor cannot be used to explain the lack of approval of Donald Trump. There are a few factors, however, worth consideration. Trump’s use of Twitter, while likely effective in reaching out to his base, may have repelled potential voters who were giving him consideration. Without a political background to be scrutinized, the GOP nominee was forced to defend the Trump organization and his business record. And since Trump was in the public eye, any of his past comments received coverage and any negative coverage only served to damage his image and threaten his candidacy. The “October Surprise” of the Trump campaign came in the form of an

Access Hollywood tape, a recording of Mr. Trump having a crude conversation about women while also admitting to action that qualifies as sexual harassment. In the days that followed, several women came forward, accusing Mr. Trump of sexual assault and misconduct. Despite these accusations, he did not withdraw from the race.

The Trump victory was shocking to many, and it is far too early to determine what led to it, but there are a few factors worth noting. For many voters disenchanted with both candidates, the election became a question of voting for the “lesser of two evils”. Secretary Clinton was criticized by many for not presenting a platform as progressive as Senator Sanders, while Mr. Trump’s platform adopted a more populist tone. The confirmed interference of the Russian government and the scandals that plagued Hillary Clinton, combined with a high un-favorability rating (52%), also helped Mr. Trump secure a surprising victory. To many, Donald Trump’s candidacy represented a rejection of establishment politics, evident by a campaign message of “drain the swamp”.

In the context of the 2016 election, this information has been offered as a preface to the voter data. Historians will one day determine whether this past election cycle was truly historic, but it was surely significant. Political winds shifted in 2016, but the floodgates were opened by the Court only four years earlier. Without context, it would be far too simplistic an explanation to say that voter turnout either increased or decreased because of Clinton or Trump. Instead of reaching a determination based solely on political factors, the inquiry turns to the effects of the judiciary’s actions; court decisions have consequences. Bearing this in mind, voter data from 2012 and 2016 will be used to answer two important questions.

The Brennan Center for Justice identified 14 states in which new voting restrictions were in place for the 2016 election. While most of the focus is traditionally devoted to voter identification laws, restrictions on in-ballot collection and the early voting period were other examples of legislation enacted in these states. Voting legislation that is described as “strict” makes it harder for individuals to vote, and may decrease voter turnout in some states.

Methodology

Voting data from both 2012 and 2016 was derived from a list titled: National Popular Vote Tracker, a spreadsheet compiled by David Wasserman, a House editor for the Cook Report. Statistician Nate Silver has remarked that “Wasserman's knowledge of the nooks and crannies of political geography can make him seem like a local” (cookpolitical.com). Wasserman’s spreadsheet lists turnout data based on presidential candidate and state, as well as a total of the national popular vote. The popular vote totals from 2012 and 2016 will be used as a metric for voter turnout, providing a reliable measure of how many voters from that respective state cast a ballot. The year 2012 was the last election cycle in which the full protections of the VRA were in place, while 2016 was the first election in over half a century without the full protections. As such, data from both election cycles of specific states will be compared.

1. Did voter turnout increase/decrease in states with “strict” voting legislation?

There is data to indicate that only a small number of eligible voters cast ballots in 2016, compared with either of the previous two presidential elections (Bialik, 2016). However, in terms of raw numbers, about 1.4 million more Americans voted than in the 2012 election (Bialik, 2016). Based on the 14 states examined, 11 states experienced an increase in voter turnout, while

only three experienced a decrease in voter turnout. Two of the states, Mississippi and Wisconsin, enacted a voter ID law that may have imposed burdens on some voters. The remaining state, Ohio, eliminated the early voting period while also modifying the rules for absentee and provisional ballots. In total, eleven states voted Republican in the Presidential race, including the three states that witnessed a decrease in voter turnout.

(Figure 2 About Here)

2. Did voter turnout increase/decrease in states that were previously covered under the preclearance requirement of the VRA?

When Congress passed the VRA in 1965 it was intended to be a remedial piece of legislation to curb the tide of racial discrimination in voting. Under Sec. 4 of the Act, a coverage formula was established to identify the areas where discrimination was rampant. To determine coverage two questions were raised: (1) Whether the state or political subdivision maintained a “test or device” restricting the opportunity to register and vote, and (2) Were less than 50% of persons of voting age registered to vote or did less than 50% of persons of voting age participate in the 1964 presidential election. In 1965, six states were selected for coverage based on the coverage formula, and eventually nine states were covered in their entirety. Under the preclearance requirement of Sec. 5, covered areas were required to obtain permission from the United States District Court for the District of Columbia or by the Attorney General before making any change that affected voting.

In the aftermath of the Supreme Court’s decision in *Shelby County v. Holder* (2013), these states would be free to enact voting legislation without obtaining preclearance from the federal

government. The Voting Rights Act was focused on discrimination in voter registration, but the statute also focused on voter turnout in covered states. While registration in covered states has increased since 1965, there was some concern that if covered states were free from preclearance, the legislation that followed could affect turnout.

Popular vote totals from the 2012 and 2016 elections will be used to determine if turnout increased or decreased in previously covered states. Based on the nine covered states under consideration, eight of the nine experienced an increase in voter turnout. The only state examined here where voter turnout decreased from the 2012 to 2016 Presidential election was the state of Mississippi. Except for Virginia, all the previously covered states voted Republican in the Presidential race. Seven of the nine previously covered states enacted some form of voting legislation that would be in place for the first time in 2016. Based on this data it is evident that while states responded to the Court's decision in *Shelby County* with new legislation, it did not have a substantial effect on turnout, and there is little evidence to support that a claim that the legislation caused a decrease in voter turnout.

(Figure 3 About Here)

Ari Berman, writing for *The Nation*, notes that "We'll likely never know how many people were kept from the polls by restrictions like voter-ID laws, cuts to early voting, and barriers to voter registration" (Berman 2016). While there is some evidence to suggest that voter turnout increased nationally, it may not explain why minority voter turnout decreased in some states. While this thesis is not focused specifically on how minority voters fared in the 2016 election, such a question is worth future consideration. Black and Latino voters did not turnout for the

Democratic nominee (Clinton) in the same numbers as they had for President Obama. (Regan, 2016). Two possible explanations for the decrease in minority turnout are (1) the dissatisfaction with both Presidential candidates, or, perhaps (2) the implementation of new voting legislation in certain states. Only additional research can consider what effect, if any, new voting legislation had on minority voters.

Limitations of Research Questions

The data examined to answer both research questions was gathered from a list titled: National Popular Vote Tracker, a spreadsheet compiled by David Wasserman. Within the spreadsheet popular vote totals were listed while also offering a number based on turnout of individual states. Perhaps a different metric from the 2016 election will indicate that voter turnout in covered states decreased in 2016, or that in “strict” states voter turnout also decreased. Based on the measurement of voter turnout provided and the states examined, the results provided can be deemed reliable.

Legal Analysis

Coverage Formula

Section 4 of the Voting Rights Act of 1965 (VRA) established a coverage formula to identify areas where discrimination in voting was prevalent and voter registration numbers were low. The coverage formula contained a two-tier question to determine if a state or jurisdiction would be covered. (1) Did the state or political subdivision maintain a “test or device” restricting the opportunity to vote? (2) Were less than 50 percent of persons of voting age registered to vote on Nov. 1 1964, or did less than 50 percent of persons of voting age vote in the 1964 presidential

election? Based on these criteria, seven states in their entirety became covered jurisdictions while in other jurisdictions, political subdivisions were covered. Under Sec. 5 of the Act, states and localities would be required to obtain “preclearance” from the Attorney General or a 3-judge panel before making changes to voting laws.

States are constitutionally empowered to regulate the time, place, and manner of holding elections (U.S. Const., Art. I § 4 cl. 1). The Voting Rights Act was enacted as remedial legislation designed to combat the problems related to discrimination in voting. Federalism concerns would surely be raised as the national interest for fair elections would be weighed against the sovereignty of the individual state.

***South Carolina v. Katzenbach* 383 U.S. 301 (1966)**

In 1966, South Carolina filed suit claiming that the Voting Rights Act exceeded the scope of Congress’s legislative authority. The Court recognized in *South Carolina v. Katzenbach* (1966) that Congress has full remedial powers “to effectuate the constitutional prohibition against racial discrimination in voting”. South Carolina invoked a familiar legal test in its petition, the doctrine of the equality of states.

As the Supreme Court has explained, our nation “was and is a union of States, equal in power, dignity and authority.” *Coyle v. Smith*, 221 U.S. 559, 567 (1911). This argument was rejected in *Katzenbach* for it only applied to “the terms upon which states were admitted to the union, not to remedies for local evils”. Under the VRA, states would be effectively placed in a prior restraint before enacting any legislation related to voting. By 2013, the Court accepted the equal footing doctrine as invoked by Shelby County, a covered jurisdiction in the state of

Alabama. Chief Justice Roberts distinguished the Court's prior decision in *Katzenbach*, reasoning that at the time the remedy was justified, but it must now be tailored to current needs. Under the Court's analysis, the extension of the Voting Rights Act represented a departure from basic principles of federalism by requiring states/jurisdictions to apply for preclearance and by treating states differently.

The Legacy of Equal Footing and Voting Rights Jurisprudence

In 1965, Congress intended Sec. 5 of the VRA to only remain for five years, but its provisions would be extended four more times (1970, 1975, 1982, 2006). *Shelby County* prevailed on an argument where South Carolina had previously lost, equal sovereignty demands that states be treated equally. Since racial discrimination in voting had been largely dealt with, the Court reasoned that any burden imposed would need to be justified by current remedial needs. The Voting Rights Act was intended as a remedy against voting discrimination but the larger issue was low registration numbers in the covered jurisdictions. In addition to registration, there were "first generation problems" such as literacy tests that were almost non-existent by the time the Court granted certiorari in *Shelby County*.

Four years prior to this case, in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009), the Court held that a departure from the principles of equal sovereignty requires evidence that coverage is related to the targeted problem. Dissenting in *Shelby County*, Justice Ginsburg rejected the Court's application of the equal sovereignty test by reaffirming a central holding in *Katzenbach*, noting that its application is limited to the terms upon which states were admitted to the union. Rejecting what she deems "dictum" from

Northwest Austin (2009), Ginsburg noted that federal statutes treating states differently is hardly novel and in support of this proposition, several statutory provisions are cited.

Some commentators believe the Court in *Shelby County* relied more heavily on the principle of equal sovereignty than case law. (Molitor 2014) This principle has been referred to as “equal dignity”, “equal footing” and the equality of states, but its basic principle remains the same; states should be treated equally. The Court recognized that Shelby County was not selected by an independent determination of Congress, rather it was covered as a jurisdiction located in the state of Alabama. It is hardly surprising that a conservative majority of the Roberts Court facially invalidated Sec 4(b) of the Voting Rights Act primarily on federalism grounds. In a case concerning the right to vote, the word “fundamental” is invoked more often to defend the principle of equal sovereignty instead of describing voting as fundamental. In a different context, Seventh Circuit Judge Richard Posner rejects this principle altogether, instead remarking that “[Equal sovereignty] is a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle (Molitor 2014). The willingness of the Court to strike down remedial legislation will likely lead to problems in future cases as the courts struggle to balance the core functions of the state against the asserted interests of Congress. The enforcement power of Congress would be one constitutional basis for the Voting Rights Act, and the Court would address the scope of this power in a separate case.

Rational Basis/Congruence & Proportionality Test

In 1997, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court outlined the test to determine whether Congress had exceeded its Sec. 5 enforcement powers under the

Fourteenth Amendment. Writing for the majority, Justice Kennedy held that “there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne*, 521 U.S. 507, 508. Nearly twenty years later, during oral argument in *Shelby County*, Justice Kennedy asked about the methodology of targeting specific states, and whether it is congruent and proportional.

The Brief for the Attorney General in *Shelby County* cited the District Court record which noted that the rational basis review, previously adopted in VRA cases, was distinct from the standard adopted in *Boerne* (Brief for Attorney General as Appellee, p:8). Under rational basis review, a Court will uphold a statute if it is rationally related to a legitimate government interest. In considering the constitutionality of the 2006 authorization, the United States District Court for the District of Columbia first identified the scope of the issue, that is, the right to vote. The evidence to support the VRA’s proportionality were disparities between white and minority voter registration, and the underrepresentation of minorities in elected positions in covered jurisdictions. Additionally, the number of lawsuits filed under Section 5 and objections raised under Sec. 2 were cited as evidence to sustain the VRA’s constitutionality.

The Department of Justice sought a rational basis review under the proposition that rational basis applies when legislation is enacted to prohibit racial discrimination. As early as *Katzenbach* and as recently as *Northwest Austin*, the Court held that the coverage formula was “rational in both practice and theory”. To sustain Sec. 4 and Sec. 5, the government also argued that the bail-in and bail-out provisions would ensure the list of covered jurisdictions was not static. During oral argument in *Shelby County*, Justice Alito raised a similar question to the one raised by Justice Kennedy, “Why didn’t Congress make a new determination of coverage under

the standard of *City of Boerne v. Flores* (1997)?” The Solicitor General argued that the amount of Sec. 2 litigation in covered jurisdictions was sufficient evidence for upholding the Act’s coverage. To understand why the government sought a rational basis review, the Court’s holding in *Boerne* must be closely examined.

By all accounts, the Court’s decision in *Katzenbach* greatly enhanced Congress’s amendment-enforcing power. (Epstein 176) The record confronting Congress and the Court was sufficient to sustain the Act’s constitutionality over time, and in *Boerne*, the Court identified the VRA as meeting the standard for “congruence and proportionality” (Epstein 177). This standard would set a higher bar than a rational basis test and as such, it would be more difficult for the government to prevail on the merits. Based on the scholarly research, one can conclude that if the Court followed precedent and applied a rational basis test, the Court would have found for the government in *Shelby County v. Holder* (2013), thereby sustaining the VRA’s constitutionality.

The Court based its decision striking down Sec. 4 in *Shelby County* upon the proposition that “current burdens must be justified by current needs”, language that resembles the test for congruence and proportionality. Instead of assuming Congress had a legitimate interest in re-authorizing the Voting Rights Act, the burden would now shift to the government to prove that the coverage formula was congruent and proportional. In applying this determination, the Court relied heavily on the federalism issue and did not devote a substantial amount of the opinion to the asserted injury. Greenbaum, Martinson, and Gill reasoned that if the Court fully applied the *Boerne* framework it would have weighed heavily in favor of constitutionality on behalf of two rights: the right to vote and the right to be free of racial discrimination (814). The Court’s

majority declined to adopt a test resembling rational basis and instead adopted a test analogous to the *Boerne* framework.

Congruence and Proportionality is Applied

The Court made its determination for congruence based upon the coverage formula, a metric based on old data and first generation devices that were no longer present. Congress amassed a 15,000-page legislative record in favor of reauthorization, a history and pattern necessary to sustain the statute. Despite the evidence before the Court, it applied a standard approaching congruence and proportionality in striking down Sec. 4 of the Voting Rights Act. The rational basis (means) standard previously applied by the Court would have dictated a different result.

Justice Ginsburg's dissent in *Shelby County* makes mention of the standard the Court has applied when considering the constitutionality of the VRA. As identified in *Katzenbach*: "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." She expands upon this holding noting that: "legislation reauthorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test." In *City of Rome v. United States*, 446 U.S. 156 (1980), the Court also recognized that Congress could have rationally upheld the previous reauthorization of the VRA based on attacking areas with histories of racial discrimination.

In considering rationality, the Court would have first considered the judgement of Congress to reauthorize the Voting Rights Act for an additional 25 years. By a margin of (98-0) in the Senate and (390-33) in the House, Congress deemed it necessary to continue the

preclearance requirement of Section 5 of the Voting Rights Act. The 15,000-page legislative record, congressional hearings, and evidence from investigators were all used as evidence to sustain the Act's reauthorization in 2006. Much of the progress has been made since the original enactment of the Act but the existence of "second-generation" devices and objections raised under Sec. 2 of the VRA should have led the Court to consider that Congress was employing rational means.

There is some disagreement as to whether the Court applied congruence and proportionality or applied its own version of the rational basis test. Chief Justice Roberts mentions rationality in only two contexts: (1) citing the Court's prior decisions in considering the rationality of the Voting Rights Act, and (2) to argue that if Congress had started from scratch in 2006 it could not have enacted the current coverage formula for it would have been irrational to do so. The Court does not make mention of the rational basis test, instead adopting an analysis analogous to congruence and proportionality in striking down the Act. Justice Ginsburg's dissent notes that "both precedent and logic dictate that the rational means test should be easier to satisfy" for it would have placed the burden on the statute's challenger. The Court ignored over 45 years of precedent in order to reach a preferred result, for if the Court considered the full scope of Congress's enforcement powers under the Fifteenth Amendment and interest in protecting a suspect class's right to vote (Burns, 2012). It would have determined that Congress had adopted legitimate ends.

Legislative Alternatives

Four years have passed since the Supreme Court's decision in *Shelby County*, and we have yet to see a successful replacement to the coverage formula of the Voting Rights Act. In the

legislative context, the nature of the Court's decision provides the context for legislative action. (Miller, 236). The Court could have issued its ruling on narrow statutory grounds but instead, the decision was one that was constitutionally based. Chief Justice Roberts's majority opinion acknowledged the Court's action, while also issuing a cue to the legislative branch: "Congress may draft another formula based on legislative conditions". The Voting Rights Act remained in function; the only provision that was invalidated was the coverage formula of Section 4. Replacing the coverage formula would not prove easy, for as Miller acknowledges, constitutional decisions are generally much harder for the legislature to overturn than a statutory decision (Miller, 237). Several legislative alternatives have been proposed in the aftermath of the Court's decision and these measures are worth consideration.

During oral argument in *Shelby County*, Justice Alito raised an interesting question "Why wasn't it incumbent on Congress under the congruence and proportionality standard to make a new determination of coverage?" If Congress determined there was sufficient evidence to reauthorize the Voting Rights Act for an additional 25 years, a new formula could have been adopted that would identify similar or different jurisdictions. Congressman Charles Norwood (R-Ga.) proposed a bill that would subject states to Sec. 5 if it held a discriminatory test in place or voter turnout was less than 50% in any of the past three presidential elections (Terkel, 2013). The amendment failed by a margin of 96-318.

One of the first pieces of legislation to be introduced in the aftermath of the Court's decision in 2013 was the Voting Rights Amendment Act of 2014. This bill would have established a new coverage formula for Sec. 4 and would be based on a rolling calendar with a fifteen-year period to exempt states which are no longer discriminating or add new ones.

(Berman, 2013) As of 2017, the bill has been referred to the House Judiciary's Subcommittee on the Constitution and Civil Justice. Congressional Democrats introduced the Voting Rights Advancement Act of 2015, legislation that would force any state that has fifteen or more voting rights violations in the last 25 years to be subject to preclearance. As of 2017, a motion was filed to discharge the House Committee on the Judiciary from the consideration of the bill. Congress has attempted to update the coverage formula in the years following *Shelby County*, but as the legislative record suggests, these efforts have been unsuccessful. The Supreme Court allowed the preclearance measure of Section 5 to remain in place but without a mechanism to identify states/jurisdictions, it is essentially powerless.

It is far too early and beyond the scope of this project to conclude whether the weakening of the Voting Rights Act by the Supreme Court had an impact on election results. Generally, the literature demonstrates that strict voting legislation aids Republican candidates, while hindering Democratic candidates. Subsequent research will be able to examine whether the absence of the VRA assisted Donald Trump in the 2016 elections, as well as Republican candidates throughout the nation. However, the research question in this project was related to voter turnout, not election results. The raw data provided in the preceding pages demonstrate that in at least three states, voter turnout has decreased. These three states had also enacted strict legislation that would be enforced for the first time in the 2016 elections. Based on the data examined here, it can be argued that without the full protections of the VRA, voters were affected to some degree.

Limitations

The scope of an undergraduate research project means that there will be questions that will be unanswered. One consideration is that the data examined included raw numbers and not a percentage of the qualified voters of the state. Of course, raw voting totals do not tell the whole story of turnout. Turnout is often expressed as a percentage of the voting-age population. Indeed, an additional, and perhaps even more useful measure is the calculation of turnout as a percentage of the vote-eligible population—the number of people who are eligible (entitled) to vote in an election. Furthermore, a single analysis of a few states cannot provide a comprehensive picture. Results that were derived from the election commission of the respective states may be important to examine. Thus it is far too early to argue how impactful these laws were on a state-by-state basis. Future research should also examine how turnout changed in partially covered jurisdictions between 2012 and 2016, not in fully covered states. Another question for consideration is whether expansive voting legislation affected turnout, and if so, to what degree? Questions about voter turnout are never black and white and rely on several factors including political efficacy, voting legislation, and political cycles.

Conclusion

In the three opinions in *Shelby County v. Holder* (2013), the word fundamental is more often used to describe the power of the state and is less likely used to discuss the interest of the voter. Questions of fundamental rights will weigh two competing interests, the individual vs. the state. The individual has an interest in casting a meaningful in-person ballot free of any burdensome regulation. Similarly, the state has an important interest in the regulation of

elections as well as the prevention of any problems it can foresee. In this struggle between the individual and the state, the ultimate question is: Who Wins?

As the record demonstrates, voting rights have changed vastly since 2013, but time does not have to stand still. Legislatures can pass laws that make it easier for voters, or pass legislation that will increase the burden. States can proffer a multitude of reasons to justify legislation. When responding to a non-existent issue like in-person voter fraud, however, the remedy must be justified. If there is no alternative adopted before future elections, it is possible that there could be an even greater effect on voter turnout. Only time will tell. Any legislation, whether at the state or federal level, must confront this reality: the right to vote is fundamental.

The story of voting rights in the United States is complicated, and reflects the efforts of many individuals who tirelessly fought so that all could have a voice in our democratic system. *Shelby County* is not the end of voting rights, but is another chapter that presents an even greater opportunity. For example, Congress can start with a clean slate and expand ballot access to an even greater degree. It can deal with these “second-generational” issues and ensure that the legislation will survive a challenge in the courts. Whatever path is adopted, it must be recognized that “No right is more precious in a free country than that of having a voice in the election of those who make the laws” *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). It is abundantly clear, that there is much that lies ahead Beyond Shelby County.

Appendix

Figure 1

Voting Identification Laws by State

Voter Identification Laws in Effect in 2016

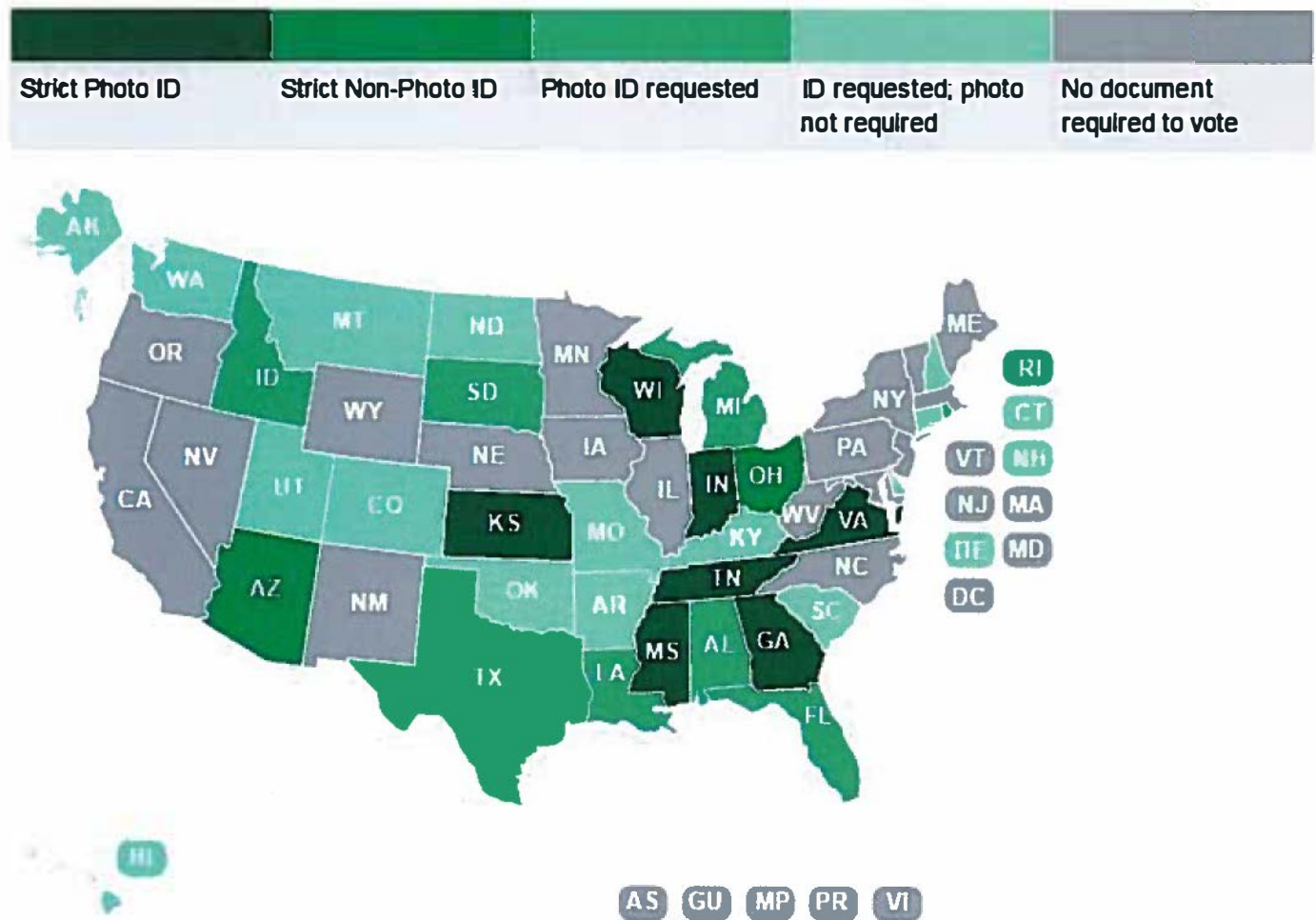


Figure 1. Source: <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>

Figure 2

National Popular Vote Tracker- Restrictive States with Voting Legislation in the 2016 Elections

Restrictive States	2012	2016
Alabama	2,074,338	2,123,372
Arizona	2,299,254	2,573,165
Indiana	2,624,534	2,734,958
Kansas	1,159,971	1,184,402
Mississippi	1,285,584	1,209,357
Nebraska	794,379	844,227
New Hampshire	710,972	744,158
Ohio	5,580,840	5,496,487
Rhode Island	446,049	464,144
South Carolina	1,964,118	2,103,027
Tennessee	2,458,577	2,508,027
Texas	7,993,851	8,969,226
Virginia	3,854,489	3,982,752
Wisconsin	3,068,434	2,976,150

Figure 2. Sources: David Wasserman, Compiled from official sources by: David Wasserman @Redistrict, Cook Political Report @CookPolitical http://cookpolitical.com/file/2016_vote.pdf

Figure 3

National Popular Vote Tracker- Previously Covered States Under the VRA

States Covered under VRA	2012	2016
Alabama	2,074,338	2,123,372
Alaska	300,495	318,608
Arizona	2,299,254	2,573,165
Georgia	3,900,050	4,092,373
Louisiana	1,994,065	2,029,032
Mississippi	1,285,584	1,209,357
South Carolina	1,964,118	2,103,027
Texas	7,993,851	8,969,226
Virginia	3,854,489	3,982,752

Figure 3. Sources: David Wasserman, Compiled from official sources by: David Wasserman @Redistrict, Cook Political Report @CookPolitical http://cookpolitical.com/file/2016_vote.pdf

Works Cited

- Bauer, Scott, and Todd Richmond. "Wisconsin says it's fixed voter ID problems at DMV offices." *www.usnews.com*, 8 Oct. 2016, fortune.com/2016/10/08/wisconsin-voter-id-problems/.
- Berman, Ari. "Congressional Democrats Introduce Ambitious New Bill to Restore the Voting Rights Act." *www.thenation.com*, 24 June 2015, www.thenation.com/article/congressional-democrats-introduce-ambitious-new-bill-to-restore-the-voting-rights-act/.
- . *Give us the Ballot*. New York, Farrar, Stratus, Giroux, 2015.
- . "Members of Congress Introduce a New Fix for the Voting Rights Act." *www.thenation.com*, 26 Jan. 2014, www.thenation.com/article/members-congress-introduce-new-fix-voting-rights-act-test/.
- . "Wisconsin Is Systematically Failing to Provide the Photo IDs Required to Vote in November." *thenation.com*, 24 Jan. 2016, www.thenation.com/article/wisconsin-is-systematically-failing-to-provide-the-photo-ids-required-to-vote-in-november/.
- Bialik, Carl. "Voter Turnout Fell, Especially In States That Clinton Won." <https://fivethirtyeight.com/>, 11 Nov. 2016, fivethirtyeight.com/features/voter-turnout-fell-especially-in-states-that-clinton-won/.
- Blake, Aaron. "North Carolina governor signs extensive Voter ID law." *www.washingtonpost.com*, 12 Aug. 2013, www.washingtonpost.com/news/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/?utm_term=.2c8ef0ee0033.

Brennan Center for Justice.

"https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf
." *www.brennancenter.org*, 1 Mar. 2017,
www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf.

Childress, Sarah. "With Voting Rights Act Out, States Push Voter ID Laws." *pbs.org*, 26 June 2013, www.pbs.org/wgbh/frontline/article/with-voting-rights-act-out-states-push-voter-id-laws/.

Did Putin Direct Russian Hacking? And Other Big Questions. 6 Jan. 2017,
www.theatlantic.com/international/archive/2017/01/russian-hacking-trump/510689/.

Epstein, Lee, and Thomas Walker. *Constitutional Law: Rights, Liberties and Justice 8th Edition (Constitutional Law for a Changing America) 8th Edition*. 8th ed., Thousands Oaks, Sage, 2016.

Gallup Polling. "Trump and Clinton Finish With Historically Poor Images." *gallup.com*, 8 Nov. 2016, www.gallup.com/poll/197231/trump-clinton-finish-historically-poor-images.aspx.

Greenbaum, Jon, et al. "Shelby County v. Holder: When the Rational Becomes Irrational." *Howard Law Journal*, vol. 57, no. 3, 2014. *Howard Law Journal*, lawyerscommittee.org/wp-content/uploads/2015/07/0477.pdf.

Gutierrez, Isela, and Bob Hall. "Alarm Bells from Silenced Voters." <http://nc-democracy.org>, June 2015, nc-democracy.org/downloads/SilencedVoterAlarm.pdf.

Kertscher, Tom. "Were 300,000 Wisconsin voters turned away from the polls in the 2016 presidential election?" *politifact.com*, 7 Dec. 2016,

www.politifact.com/wisconsin/statements/2016/dec/07/tweets/were-300000-wisconsin-voters-turned-away-polls-201/.

Levitt, Justin. "A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast." *Washington Post*, 6 Aug. 2014. *Washington Post*, www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.0f391238425a. Accessed 6 Aug. 2014.

---. "The Truth About Voter Fraud." <http://www.brennancenter.org/>, 2007, www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf.

Lowrey, Wesley. "Congressional Democrats to introduce new Voting Rights Act fix." *www.washingtonpost.com*, 23 June 2015, www.washingtonpost.com/news/post-politics/wp/2015/06/23/congressional-democrats-to-introduce-new-voting-rights-act-fix/?utm_term=.39452a6649a5.

Miller, Mark C. *Judicial Politics in the United States*. Boulder, Westview Press, 2015.

Molitor, Abigail B. "Understanding Equal Sovereignty." *University of Chicago Law Review*. *University of Chicago Law Review*, lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/81_4/08%20Molitor_CMT.pdf. Originally published in *University of Chicago Law Review*, vol. 81, no. 4, 2014, pp. 1839-82.

- Ramsey, Ross. "Turnout Down in Texas, and Democrats Claim a Reason: Voter ID Law." *nytimes.com*, 8 Nov. 2014, www.nytimes.com/2014/11/09/us/turnout-down-in-texas-and-democrats-claim-a-reason-voter-id-law.html.
- Real Clear Politics. "Election 2016 — Democratic Delegate Count." *realclearpolitics.com*, 2016, www.realclearpolitics.com/epolls/2016/president/democratic_delegate_count.html.
- Regan, Michael D. "What does voter turnout tell us about the 2016 election?" *pbs.org*, 20 Nov. 2016, www.pbs.org/newshour/updates/voter-turnout-2016-elections/.
- Roth, Zachary. "North Carolina's voter ID law on trial." *nbcnews.com*, 7 Nov. 2016, www.nbcnews.com/storyline/2016-election-day/black-turnout-down-north-carolina-after-cuts-early-voting-n679051.
- Shelby County v. Holder and the Voting Rights Act: Getting the Right Answer with the Wrong Standard*. Vol. 62, no. 1, 2012. *Catholic University Law Review*, scholarship.law.edu/cgi/viewcontent.cgi?article=1030&context=lawreview.
- Silver, Nate. "Measuring the Effects of Voter Identification Laws." *nytimes.com*, 15 July 2012, fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws/.
- Terkel, Amanda. "Voting Rights Act: Congress Rejected Major Changes To Section 5 In 2006 — But Not Without A Fight." <http://www.huffingtonpost.com>, 11 Mar. 2013, www.huffingtonpost.com/2013/03/11/voting-rights-act-congress_n_2829246.html.
- Texas Tribune. "TRIBPEDIA: Voter ID." <https://www.texastribune.org>, ND, www.texastribune.org/tribpedia/voter-id/about/.

Underhill, Wendy. "Voter Identification Requirements | Voter ID Laws." *http://www.ncsl.org*,

NCSL, 28 Mar. 2017, www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

Vogue, Ariane de. "Supreme Court allows Arizona 'ballot collection' law." *cnn.com*, 5 Nov.

2016, www.cnn.com/2016/11/04/politics/arizona-ballot-collection/.

Wasserman, David. "2016 National Popular Vote Tracker." *http://cookpolitical.com*,

cookpolitical.com/file/2016_vote.pdf.