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DESTRUCTION OF DEMOCRACY: EXAMINING VOTING IN THE WAKE OF *SHELBY COUNTY*

PUBLIC POLICY AND LAW HONORS THESIS

BY HENRY R. BUTLER

**Fall 2016-Spring 2017
Trinity College, Hartford, CT**

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CHAPTER ONE: HISTORY OF VOTING IN THE UNITED STATES, THE VOTING RIGHTS ACT, AND ITS IMPACTS

While America has a rich history filled with many successes, it has often struggled to maintain equality amongst all of its citizens. One of the issues that the United States has had difficulty with is equity in voting. There are many factors that contribute to why America has continuously struggled with voting rights, but America's cultural and normative values during the time that the Constitution was being written contributed to the inequalities in voting rights that even today characterize the American electoral system.

I. The Constitution and Slavery

The nature of American society was entirely different from what it is today, and this was because different cultural customs were commonly practiced; most prominent among them slavery. Although the founding fathers stated in the Declaration of Independence on July 4, 1776 that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," this declaration did not accurately apply to all Americans when the Constitution was written. The denial of racial equality had long-term effects on voting.¹ The Constitution did not give slaves the right to vote, and moreover did not grant them the same fundamental rights as other people because the Constitution stipulated that they were three fifths of a person.² Specifically, the Constitution reads:

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers,

¹ "Declaration of Independence: A Transcription." *National Archives*, July 4, 1776. Accessed May 8, 2017. <https://www.archives.gov/founding-docs/declaration-transcript>.

² U.S. Const. art. I § 2, cl. 2

which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”³

The “Three-Fifths” clause determined that slaves were not fully equal to white men. By denying slaves free personhood, African-American slaves became a subclass of humans who were denied the rights reserved for white men. In addition to African-American men being established as a subclass, women were also not given the right to vote by the Constitution.

II. Reconstruction Laws and Amendments

Slavery, rooted in the denial of fundamental human rights to African-American men was one of the leading causes of the Civil War. The Civil War, which was won by the northern states that had abolished slavery, did not resolve the underlying legal status of African-Americans at the end of the war in 1865. Consequently, Republicans in Congress knew that legislation was needed to be passed in order to ensure that the rights, which had previously been denied to African-Americans, be ensured for the future. This resulted in new legislation spearheaded by the Johnson administration in cooperation with Congress. This action was manifested in four reconstruction acts and three Constitutional amendments, those amendments being the Thirteenth, Fourteenth, and Fifteenth Amendments.⁴

The Thirteenth Amendment states: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁵ The Thirteenth Amendment made

³ U.S. Const. art. I § 2

⁴ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act of 1965: Background and Overview*, by Kevin J. Coleman. R43626. 2015.

⁵ U.S. Const. amend. XIII

slavery illegal, in theory, eliminating the second-class status that many enslaved African-American persons had.

The Fourteenth and Fifteenth Amendments expanded civil rights for generations to come. The Fourteenth Amendment expanded civil rights by adding the following clause to the Constitution:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁶

What this guaranteed for citizens, and newly freed slaves, was equal protection under the law, something that had been absent from legal language in the past. Similarly, the Fifteenth Amendment was explicitly focused on equal voting protections, and expanded rights to freed slaves by saying: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”⁷ These new protections were intended to protect the rights first and foremost freed slaves, but to extend to everyone in the United States.

As discussed earlier, a series of four reconstruction acts were also passed by Congress in order to ensure that these new voting practices would be implemented in the states that had formerly belonged to the Confederacy. “The first Reconstruction Act of 1867, enacted on March 2, noted that ‘no legal State governments or adequate protection for life or property now exists in the former rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and ... it is necessary that peace and good

⁶ U.S. Const. amend. XIV

⁷ U.S. Const. amend. XV

order should be enforced in said States until loyal and republican State governments can be legally established.”⁸ This required formerly confederate states to reexamine their own state Constitutions so that they would be consistent with the United States Constitution.⁹ The most critical provision of this act required that states would undertake these examinations under the supervision of an army officer with “sufficient military force to enable such officer to perform his duties and enforce his authority.”¹⁰ Finally, in order to reexamine each state’s Constitution, “States were called on to hold a convention to adopt a new Constitution that conformed to the U.S. Constitution; extend voting rights to black males and include protections in the state Constitution; submit the Constitution for approval by voters; and approve the proposed Fourteenth Amendment in the legislature elected under the new Constitution.”¹¹ The Second Reconstruction Act of 1867 described the process of holding the state convention and approving a new Constitution.¹²

Because of a disagreement between Congress and President Johnson, and because the previous two acts were insufficient in achieving their goals, Congress enacted the Third and Fourth Reconstruction acts to clarify the original two acts’ intent.¹³ “The Third Reconstruction Act, passed on July 19, 1867, asserted the authority of the military commanders in the affected states and clarified the role and responsibilities of the boards of registration. The Fourth Reconstruction Act, passed on March 9, 1868, concerned the details of elections to accept or reject the new state Constitutions and defined who was eligible to vote in such elections.”¹⁴

⁸ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 4

⁹ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 4

¹⁰ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 4

¹¹ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 4

¹² U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 4

¹³ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 5

¹⁴ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 5

Furthermore, in order to prevent southern confederates from discriminating against newly freed slaves, “the act stipulated that proposed Constitutions could be approved by a majority of voters, rather than a majority of those registered, thereby preventing efforts by some to disrupt the process by boycotting it.”¹⁵

In the immediate aftermath of the implementation of these laws, there was a nearly instantaneous increase in African-American enfranchisement in the political process. This manifested itself in voter registration and in the election of African-American leaders to political office. By the time that the Second Reconstruction Act had been passed on March 23, 1867, 703,000 freedmen and 627,000 whites registered to vote.¹⁶ Additionally the first African-Americans took office in Congress in 1870, and “in the years that followed, black officials were elected at all levels of government...blacks took office as ambassadors, Census officials, customs appointments, U.S. Marshalls and Treasury agents, and mail agents and Post Office officials.”¹⁷

However, this increase in participation amongst African-American voters precipitated a sense of resentment towards African Americans and the new power that they gained. That resentment gave rise to opposing political forces and social hate groups whose primary objective was to suppress African-American participation in the political process.

Once the federal government stopped its enforcement policies, hate groups, such as the Klu Klux Klan (KKK) unleashed a “reign of terror” across the South against former slaves and Republican Party leaders. “White Southerners expected to do by extralegal or blatantly illegal means what had not been allowed by law: to exercise absolute control over blacks, drive them

¹⁵ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 5

¹⁶ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 4

¹⁷ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 5

and their fellows from power, and establish ‘white supremacy.’”¹⁸ To complement those efforts being facilitated by hate groups like the KKK, Southern states began passing restrictive voting initiatives that would remove them from the political process, one of the first being due to the Compromise of 1877.

The Compromise of 1877 has been acknowledged as one of the significant historic events that ended the reconstruction era in American history. The compromise was rooted in the contested 1876 election. “The Democratic nominee, Samuel J. Tilden, defeated Republican candidate Rutherford B. Hayes by more than two hundred and fifty thousand votes.”¹⁹ In order to contextualize the political factions that those candidates represented, the Republican Party was still the party of Lincoln, and the Democratic Party represented many of the lingering confederate interests. “In the electoral tabulations, Tilden earned 184 votes out of a possible 369, one shy of the required majority. Hayes took 165 electoral votes, with twenty electoral votes in dispute. Those disputed electoral votes came from three southern states—Louisiana, South Carolina, and...Florida. Both sides alleged fraud.”²⁰ The types of fraud that the two sides alleged were quite different from one another: “The Democrats accused the Republicans of tossing ballot boxes in bodies of water and smearing Tilden ballots with black ink so as to make them illegible. The Republicans countered that Democrats had intimidated and used physical force to prevent blacks from participating in the election.”²¹ There were also disputes over the specific electors

¹⁸ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 7

¹⁹ Madonna, G. Terry and Richard Glenn. “The Compromise of 1877: Insights on Electoral Disputes, December 2000”. Accessed May 08, 2017.

<https://www.fandm.edu/uploads/files/572286188725069010-the-compromise-of-1877.pdf>

²⁰ Terry and Glenn, “The Compromise of...”

²¹ Terry and Glenn, “The Compromise of...”

who were going to be casting votes; there was one swing voter in Oregon who could've handed the election to one of the candidates.²²

Because Louisiana, South Carolina, and Florida's votes were highly contested, Congress established an electoral commission to determine the victor of the election.²³ "The commission awarded all three sets of electoral votes to Hayes on a party-line vote. Faced with possible violence and controversy over the legitimacy of the Hayes presidency, Republican operatives and southern Democrats negotiated an unwritten, informal agreement that became known as the Compromise of 1877."²⁴ Importantly, "[u]nder the agreement, the government removed from the South all federal troops, which had provided at least limited protection to blacks who went to the polls to vote. The latter part of the 19th century was marked by a reversal in political dominance as Reconstruction ended and Democrats imposed racial boundaries to subvert the civil rights laws and Civil War amendments that had briefly transformed the region."²⁵

Immediately following The Compromise, disenfranchisement grew dramatically. Nearly all of the black representatives who were elected to Congress during the reconstruction period did not get reelected past the period of reconstruction.²⁶ Additionally, southern states immediately rushed to pass laws that would explicitly undermine equal voting. "A number of states called Constitutional conventions for the express purpose of enacting the means to prevent blacks from voting. Disenfranchisement schemes included poll taxes, literacy tests, and grandfather and old soldier clauses."²⁷ Enforcement of the Fifteenth Amendment in order to

²² Terry and Glenn, "The Compromise of..."

²³ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 8

²⁴ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 8

²⁵ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 8

²⁶ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 6

²⁷ Jost, Kenneth. "Voting Controversies." *CQ Researcher* 24, no. 8 (February 21, 2014): 169-92. <http://library.cqpress.com/cqresearcher/cqresrr2014022100.>; Arnwine, Barbara, and Marcia

prevent many of these laws that were passed with discriminatory intent “can only be regarded as a failure.”²⁸ There were no legal mechanisms in place in order to ensure that the language of the Fifteenth amendment would be upheld. In the wake of the compromise, at least eleven states had passed some sort of restrictive voting measure between the years of 1890 and 1918; this equates to more than one in every five states, as there were 42 states in 1890, and 48 states in 1918.²⁹

In addition, “Jim Crow” laws were passed, which were targeted at perpetuating disenfranchisement of black voters by trying to remove them all from all of public life, not just the political arena. This was done through legislation that normalized segregation in public life, and some examples of these include poll taxes, grandfather clauses, old soldier clauses and literacy tests.³⁰ This segregation was Constitutionally upheld in the Supreme Court case *Plessy v. Ferguson* where in a 7-1 decision, the majority opinion wrote that: “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it...”³¹ From this point forward, “separate but equal” became the law of the land.

Johnson-Blanco. "Voting Rights at a Crossroads: The Supreme Court Decision in Shelby Is the Latest Challenge in the 'Unfinished March' to Full Black Access to the Ballot." October 25, 2015. Accessed May 08, 2017. <http://www.epi.org/publication/voting-rights-crossroads-supreme-court-decision/>.

²⁸ *Shelby County v. Holder*, 570 US __ (2013), page 2, Opinion of the Court

²⁹ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 9; US Census Bureau, Census History Staff. “1890 Fast Facts - History - U.S. Census Bureau.” Accessed May 8, 2017.

https://www.census.gov/history/www/through_the_decades/fast_facts/1890_fast_facts.html; US Census Bureau, Census History Staff. “1910 Fast Facts - History - U.S. Census Bureau.” Accessed May 8, 2017.

https://www.census.gov/history/www/through_the_decades/fast_facts/1910_fast_facts.html

³⁰ Rusk, Jerrold G. *A Statistical History of the American Electorate* (Washington, DC: CQ Press, 2001), pp. 33-35.

³¹ *Plessy v. Ferguson* 163 U.S. 537 (1896)

There are many statistics that illustrate how grave the conditions became for African-American voters in the first half of the twentieth century;

By the turn of the 20th century, black registration and voting in the South had been greatly reduced, despite the guarantees of the Fifteenth Amendment, and the social circumstances of black citizens were severely restricted under a regional network of Jim Crow laws and an underlying culture of intimidation and outright violence, despite the proclamations of the Fourteenth Amendment... Even as the country was fighting fascism abroad in 1944, fewer than ‘5 percent of the adult Negro population [,] had voted in the southern states within the previous five years.’³²

III. The Civil Rights Era and the Voting Rights Act

With the violence, restrictive voting measures, and disenfranchising growing amongst marginalized African Americans, a solution was needed in order to establish equity guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments. This gave rise to the civil rights movement in the United States in the twentieth century. The civil rights movement was comprehensive, and stood for more than equal voting protections. In other words, it was centered on guaranteeing equal rights to all Americans residing in the United States by focusing on a variety of issues. Some of the issues that the movement stood for included segregation that had been present in public spaces such as schools, hotels, bars, restaurants, trains, and public transportation which the Jim Crow laws had enabled.³³ Again, this movement encompassed equal voting rights.

There were many key events in the movement that led to progress on the issue of equal voting, but the most effective one that changed public perception on the issue was the Selma march. According to Ari Berman, “the Selma march... [was] widely regarded as the climax of the

³² U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 10

³³ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 10

civil rights movement.”³⁴ The first Selma march took place on March 7th, 1965, when 600 peacefully-protesting marchers attempted to walk from Selma, Alabama to Montgomery, Alabama, “to protest the death of 26 year old Jimmie Lee Jackson who was shot by the police while trying to protect his mother after Alabama state troopers attacked a nighttime civil rights demonstration.”³⁵ “A coalition of civil rights groups, led by the Student Nonviolent Coordinating Committee (SNCC), had targeted the states of the Deep South for voter registration efforts in previous years, which met with widespread, violent resistance. This most recent police shooting gave the movement the ammunition it needed to take the issue of voting equity to the people.”³⁶ During the protest, the “marchers came face-to-face with an army of blue-helmeted Alabama state troopers” who “put on their gas masks, and, [charged] into the crowd, and brutally clubbed the marchers.”³⁷

It should also be noted that “[t]hree civil rights workers involved earlier in the campaign were murdered in Neshoba County, Mississippi, in 1964, in addition to 80 beatings and 65 bombings of homes, churches, and other buildings. The 54-mile march was intended to draw attention to the violent resistance to black voter registration efforts that had, after several years, added only 335 new voters (of 30,000 eligible) in Dallas County, where Selma is located.”³⁸ It is noteworthy that “[i]n 1965, only 1.9 percent of eligible blacks in Selma, Alabama, were registered to vote.”³⁹

³⁴ Berman, Ari. *Give Us The Ballot: The Modern Struggle for Voting Rights in America*. New York: Picador/Farrar, Straus and Giroux, 2016. Page 10.

³⁵ Berman, *Give Us The Ballot*, page 4

³⁶ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 11

³⁷ Berman, *Give Us The Ballot*, page 5

³⁸ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 11

³⁹ Arnwine, “Voting Rights at a Crossroads...”

During the protest on March 7th, ABC interrupted its primetime programming “to show 15 minutes of the horrific footage from Selma to 48 million Americans.”⁴⁰ The national broadcasting of the police brutality against peaceful protestors who wanted the right to vote sparked a change and forced political leaders to take notice. “Two days later, Martin Luther King, Jr. led a second march that turned back at a police barricade at the bridge. The march was eventually completed after President Lyndon Johnson federalized the Alabama National Guard to protect the marchers, whose numbers had swelled to approximately 25,000 by the time they reached Montgomery” on March 25, 1965.⁴¹ In a presidential address to the nation, Johnson said: “There is no cause for pride in what has happened in Selma. There is no cause for self-satisfaction in the long denial of equal rights of millions of Americans.”⁴²

Since the issue of inequality with regards to voting was largely concentrated in the Southern United States, the televised broadcast of the protest shed light on an issue that many Americans had not understood. With the newfound media attention that changed public perception of the issue, politicians had no choice but to act. “Eight days later, President Johnson introduced the Voting Rights Act before a joint session of congress.”⁴³

The Voting Rights Act of 1965 (VRA) was a monumental piece of legislation that was unlike any other legislation of its kind in terms of scope and enforcement structure. For example, “[i]n contrast to earlier laws that relied on legal options to challenge southern intransigence, the bill called for direct, federal intervention to register eligible voters and imposed criminal

⁴⁰ Berman, *Give Us The Ballot*, page 5

⁴¹ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 11

⁴² “Transcript of the Johnson Address on Voting Rights to Joint Session of Congress,” *The New York Times*, March 16, 1965, p. 30

⁴³ Berman, *Give Us The Ballot*, page 9

penalties for voter interference.”⁴⁴ The VRA “abandoned that measured approach and called for certain states and jurisdictions to demonstrate progress, while submitting to federal oversight of voting changes. It was intended ‘[t]o enforce the Fifteenth Amendment to the Constitution of the United States, and for other purposes.’”⁴⁵ It was the first time that the federal government had a mechanism to implement, oversee, and punish states that violated the intention of the reconstruction amendments.

Several sections of the act imposed new, stringent federal conditions on laws overseeing the electoral process in several states that had most undermined the voting rights of African Americans. Section 2 of the Voting Rights Act states: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁴⁶ This was significant because it established the burden of proof as the responsibility of the state if there was any alleged denial of equal voting. The Voting Rights Act under Section 4(b) also provided federal oversight in states according to a formula outlined in the act in addition to requiring any state that wished to change their voting laws. The act stipulated “no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges.”⁴⁷ Additionally under Section 5 of the act, “a jurisdiction could obtain such ‘preclearance’ only by providing that the change had neither the ‘purpose [nor] the effect of denying or abridging the right to vote on account of race or color.’”⁴⁸

⁴⁴ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 12

⁴⁵ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 12

⁴⁶ Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

⁴⁷ *Shelby County v. Holder*, 570 US __ (2013), page 4, Opinion of the Court

⁴⁸ *Shelby County v. Holder*, 570 US __ (2013), page 4, Opinion of the Court

The Act was passed with overwhelming support, largely due to the Selma march. “The roll call vote in the House was 328-74 to adopt the conference report on S. 1564 (H. Rept. 711), and the roll call vote in the Senate was 79-18. President Johnson signed the VRA into law on August 6, 1965.”⁴⁹ Another factor that contributed to the Voting Rights Act’s legislative popularity was that the law was “scheduled to expire five years after it was enacted.”⁵⁰ With the newfound legal language that established a burden of proof on States, the formula that determined how States would be covered if they violated the Act, and the section on preclearance, America had for the first time a mechanism that guaranteed equal voter protections.

What was observed in the aftermath of the passage of the Voting Rights Act was monumental. Most significant was how quickly changes were made as a result of the VRA. The entire nation witnessed increases in the number of elected officials running for public office, in the number of registered voters, and in the increases in voter turnout in elections. It is in these ways that the Voting Rights Act improved the commitment that the Fifteenth Amendment makes to the American people.⁵¹ In Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia, between 1956 and 1966, one year after the Voting Rights Act became law, every state saw at least 15 to 40 percent increase in voter registration amongst African Americans.⁵² “Nearly 1 million black voters were registered within four years of passage,⁵³ including over 50% of the black voting age population in every

⁴⁹ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 12

⁵⁰ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 13

⁵¹ *Shelby County v. Holder*, 570 US ___ (2013), page 15, Opinion of the Court

⁵² Hanes Walton, Jr., *Black Politics: A Theoretical and Structural Analysis* (New York: J.B. Lippincott Company, 1972), p. 44.

⁵³ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 12, citing “Guide to U.S. Elections, 6th ed., vol. 1 (Washington, DC: CQ Press, 2010), p. 33

southern state.⁵⁴ Furthermore, the number of black elected officials in the South more than doubled, from 72 to 159, after the 1966 elections.”⁵⁵

Moreover, the success of the law was sustained. “In the subsequent decades, the number of black registered voters in the South increased from 31 percent to 73 percent; the number of black elected officials increased from fewer than 500 to 10,500 nationwide; the number of black members of congress rose from 5 to 44.”⁵⁶ However, the passage of the Voting Rights Act did not eliminate the resentment against federal intervention that southern states felt.

Despite the progress that was being made, many southern states continued to try to pass legislation with discriminatory intent. Specifically, “[i]n the years since the VRA was enacted, the U.S. Department of Justice has pursued actions against numerous states and jurisdictions in enforcing the law. The department has also reviewed more than half a million voting changes submitted under Section 5”.⁵⁷

Due to those discriminatory measures passed by states covered by the new law, federal legislators emphasized the importance of the Voting Rights Act to protect equal voting. As mentioned earlier, the Voting Rights Act was passed with broad support, but was only intended to be temporary. Although that was the original intent of the law, the VRA with bipartisan support, “has been extended and amended five times, most recently for 25 years in 2006.”⁵⁸ The

⁵⁴ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 12, citing: United States Commission on Civil Rights, *Political Participation: A Report of the United States Commission on Civil Rights* (Washington, DC: U.S. Government Publishing Office, 1968), p. 13

⁵⁵ Garrow, David J. *Protest at Selma: Martin Luther King, Jr, and the Voting Rights Act of 1965*. New Haven: Yale University Press, 1978, p. 190.

⁵⁶ Berman, *Give Us The Ballot*, page 6

⁵⁷ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 12

⁵⁸ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 13

Voting Rights Act was expanded in 1970, 1975, 1982, 1992, and 2006.⁵⁹ In 1970, H.R. 424, “The Voting Rights Acts Amendments of 1970” passed 64-12 via roll call vote in the Senate and the House approved the bill on a roll call vote of 272-132.⁶⁰ The reauthorization in 1975 passed 77-12 in the Senate and passed 346-56 in the House, which made permanent many components of the Act.⁶¹ In 1982, the VRA extended Section 5 for an additional 25 years, and the House approved with a 389-24 vote where it was passed with amendments in the Senate with an 85-8 vote, where the House approved the Senate-amended version by unanimous consent.⁶² In 1992, the VRA was again reauthorized with popular support to extend bilingual voting assistance with a vote of 237-125 in the House and a 75-20 vote in the Senate.⁶³ Finally, most recently in 2006, the VRA was reauthorized by a vote of 390-33 in the House, and by a 98-0 vote in the Senate where the law was extended for an additional 25 years and with the broadest support the Act has ever had.⁶⁴ What was so significant about the most recent renewal of the Voting Rights Act was the fact that it included a summary of findings that supported the need for the Act to be renewed.

That summary found:

A continued need for the law, based on evidence of discrimination against minority voters and the reduced effectiveness of the law due to U.S. Supreme Court decisions ‘which have misconstrued Congress’ original intent in enacting the Voting Rights Act of 1965,’ and ‘evidence before Congress [that] reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the Fifteenth Amendment’⁶⁵

⁵⁹ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 13

⁶⁰ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 19

⁶¹ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 20-21

⁶² U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 21

⁶³ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 22

⁶⁴ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 22

⁶⁵ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 23

Critics of the Voting Rights Act, both during the time of the Act's passage and in the subsequent years that followed, often argued that the Act was only targeting "southern states" or states with a reputation of being "conservative." However, before 2013, "nine states were wholly covered (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and six more were covered in part (California, Florida, Michigan, New York, North Carolina, and South Dakota).⁶⁶ In this context, "covered in part" means that there are individual counties within the state that were subject to the preclearance requirement. Note that many of those states are not identified as "conservative," such as California and New York.

IV. Conclusion

As discussed above, the struggle for equal voting has been a challenge for the United States since its earliest days as a constitutional republic. Yet, in the wake of the reconstruction era amendments to the Constitution, more work was needed in order to guarantee equal voting for all Americans. The civil disobedience of the Selma march in the 1960's propelled popular support behind the Voting Rights Act of 1965. The observations of the immediate aftermath of that legislation were extraordinary leaps and strides towards complete equality with regards to voting, the most fundamental right in any democracy. Although the Act made significant progress and had popular legislative support, there were still opponents of the legislation who tried to dismantle the functionality of the law. Supporters of the Act and opponents of the legislation came face-to-face in a landmark Supreme Court decision in 2013, the case of *Shelby County v. Holder* (570 U.S. ___).

⁶⁶ U.S. Library of Congress. Congressional Research Service. *The Voting Rights Act...* page 17

CHAPTER TWO: *SHELBY COUNTY V. HOLDER (570 U.S. __)*

This chapter will analyze the consequential decision made in the Supreme Court case of *Shelby County v. Holder (570 U.S. __)*. In *Shelby County*, “Petitioner Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General in Federal District Court in Washington, D. C., seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional, as well as a permanent injunction against their enforcement.”⁶⁷ The petitioners argued that they should not have needed to obtain a bailout (a formal request to be released from coverage under the Voting Rights Act) under Section 5 in order to have autonomy over their own elections without federal oversight. They argued this by highlighting how the formula outlined in Section 4(b) was written in 1965, and how that nearly 50-year-old formula did not accurately represent which states or political subdivisions needed federal oversight. They also cited the increases in voter participation, voter turnout, and elected officials from minority communities in their jurisdiction.

The Court held that that Section 4(b), the section containing the formula that determines which states need to be subject to preclearance under Section 5, was unconstitutional. By doing so, the Court also nullified Section 5; the section that outlines how covered jurisdictions under the Voting Rights Act need to obtain preclearance if the state or political subdivisions wish to make changes to their voting laws or elections. Before analyzing the Majority Opinion and the Dissenting Opinion in the *Shelby County* decision, this chapter will both contextualize the role the Voting Rights Act played in restoring equity in voting practices, and also describe the legal struggle to keep the Voting Rights Act in place. This chapter explains how the Court broke from nearly all historical precedent when holding Section 4(b) as unconstitutional, and nullified

⁶⁷ *Shelby County v. Holder*, 570 US __ (2013), page 2, Syllabus

Section 5. It is important to note that most academics and scholars who study voting rights are almost entirely agree that Sections 4(b) and 5 were the most effective parts of the law in terms of ensuring equal voting rights.

I. Background of the Voting Rights Act

While the Voting Rights Act has been reauthorized and expanded five times, initially the support was not entirely as deep as the reauthorizations would suggest. A key issue that challenged legislators was solving the problem of overseeing unequal, unfair elections without overstepping federal power. In other words, opponents of the original bill worried that it would remove too much power from states that traditionally have the authority to carry out their own elections. Those opponents, unsurprisingly, were also from states with histories of racial discrimination. However, in order to serve as a compromise, the bill was made temporary, and intended to remain in effect for only five years. As discussed in the previous chapter, the Selma march created popular support around the issue, and led to the strong legislative support that ensured the VRA's smooth passage in Congress. Furthermore, as discussed in the previous chapter, Congress noted in each successive reauthorization that the VRA was successful. More specifically, the formula outlined in Section 4(b) that determined which states would need to be subject to the preclearance provision in Section 5 and the provision that outlined how covered jurisdictions trying to change their voting procedures would need to submit those changes to the Department of Justice was effective. Its success could be measured by the monumental gains in voter turnout, voter registration, and minority elected officials. However, over time, as opponents mobilize, reauthorizations of the Voting Rights Act were met with legal challenges.

II. Legal Challenges

The Court addressed challenges in several cases. Shortly after the Voting Rights Act was enacted, it was first challenged in the Supreme Court in the case of *South Carolina v. Katzenbach* (383 U.S. 301). In *Katzenbach*, “South Carolina filed a bill of complaint seeking a declaration of unconstitutionality as to certain provisions of the Voting Rights Act of 1965 and an injunction against their enforcement by defendant, the Attorney General.”⁶⁸ South Carolina objected to the preclearance provision of the Voting Rights Act, and sought to remove that provision from the Act. In *Katzenbach*, the “Supreme Court sustained the constitutionality of section 5, holding that its provisions ‘are a valid means for carrying out the commands of the Fifteenth Amendment.’”⁶⁹ The *Katzenbach* case established the standard that the Court would use when evaluating the constitutionality of the law, and that standard was a rational means test: “‘As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.’”⁷⁰ This test was used in the future challenges to reauthorizing the Voting Rights Act, including the cases of *Georgia v. United States* (411 U.S. 526) (1973), *Briscoe v. Bell* (432 U.S. 404) (1977) *City of Rome v. United States* (446 U.S. 156) (1980), and *Lopez v. Monterey County* (525 U.S. 266) (1999). In each one of those cases, the Court held that Congress was using rational means when reauthorizing the law.

The Court entertained alternative interpretations of the Voting Rights Act for the first time after the 2006 reauthorization of the Voting Rights Act. This was in the case *Northwest Austin Municipal Utility District No. One v. Holder* (129 S. Ct. 2504) (2009), and it was in this

⁶⁸ *Shelby County v. Holder*, 570 US __ (2013), page 2, Syllabus citing, *South Carolina v. Katzenbach* (383 U.S. 301)

⁶⁹ *Shelby County v. Holder*, 11-5256 (D.C. Cir. 2012), page 3

⁷⁰ *Shelby County v. Holder*, 570 US __ (2013), page 11, Dissenting Opinion citing *Katzenbach*

case that, “the Supreme Court raised serious questions about the continued constitutionality of section 5 of the Voting Rights Act of 1965... The Supreme Court warned that the burdens imposed by section 5 may no longer be justified by current needs and that its geographic coverage may no longer sufficiently relate to the problem it targets.”⁷¹ This is important because this decision heavily influenced the way that the Supreme Court decided in the *Shelby County* decision.

After the case was argued at the D.C. District Court:

The District Court upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing Section 5 and continuing Section 4(b)’s coverage formula. The D. C. Circuit affirmed. After surveying the evidence in the record, that court accepted Congress’s conclusion that Section 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, that Section 5 was therefore still necessary, and that the coverage formula continued to pass constitutional muster.⁷²

The D.C. Circuit Court came to this conclusion by considering:

...six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful section 2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, section 5 preclearance suits involving covered jurisdictions, and the deterrent effect of section 5. After extensive analysis of the record, the court accepted Congress’s conclusion that §2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that §5 was therefore still necessary.⁷³

However, on appeal, the Supreme Court reversed the decision of the D.C. District Court, and held on June 25th, 2013, in a 5-4 decision that, “Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis for subjecting jurisdictions to preclearance.”⁷⁴

⁷¹ *Shelby County v. Holder*, 11-5256 (D.C. Cir. 2012), page 3

⁷² *Shelby County v. Holder*, 570 US ___ (2013), page 2, Syllabus

⁷³ *Shelby County v. Holder*, 570 US ___ (2013), page 7-8, Majority Opinion

⁷⁴ *Shelby County v. Holder*, 570 US ___ (2013), page 7-8, Majority Opinion

III. Legal Question and Standard in *Shelby County*

The Supreme Court in this decision evaluated Sections 4(b) and 5 quite differently from historical precedent. Under review was the formula in Section 4(b), which stipulated the following:

The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964. A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.⁷⁵

That formula, nullified Section 5 of the Voting Rights Act, which mandated that:

“Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.⁷⁶

⁷⁵ Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

⁷⁶ Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

By Shelby County seeking to bail out of Section of Section 4, they sought a declaratory judgment in their favor. However, on appeal and taking aim at the heart of the Voting Rights Act, the Supreme Court addressed a broader legal question when evaluating this case: Did “the renewal of Section 5 of the Voter Rights Act under the constraints of Section 4(b) exceed Congress' authority under the Fourteenth and Fifteenth Amendments, and therefore violate the Tenth Amendment and Article Four of the Constitution?”⁷⁷

This case was decided differently from those before it because of the different standard applied in the case. Chief Justice Roberts, who wrote the Opinion of the Court, explained the standard that the Court used. The standard was from the *Northwest Austin* decision, and Chief Justice Roberts explained: “In *Northwest Austin*, we stated that ‘the Act imposes current burdens and must be justified by current needs’...And we concluded that ‘a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets’...These basic principles guide our review of the question before us.”⁷⁸

This differs from the way that courts have evaluated voting cases since the Voting Rights Act was implemented. The conventional standard, as mentioned earlier, was in the *Katzenbach* case, and asks the court whether or not Sections 4(b) and 5 are a valid means of carrying out the purposes of the Fifteenth Amendment. The *Katzenbach* standard is what informed the opinion of the *Shelby County* dissenters, leading them to come to strikingly different conclusions.

⁷⁷ Chicago-Kent College of Law at Illinois Tech. "Shelby County v. Holder." Oyez. <https://www.oyez.org/cases/2012/12-96> (accessed May 8, 2017).

⁷⁸ *Shelby County v. Holder*, 570 US __ (2013), page 9, Opinion of the Court

IV. Majority Opinion

The Majority Opinion primarily held that Voting Rights Act imposed burdens on Shelby County that could not be justified by current means and that “Section 4’s formula is unconstitutional in light of current conditions.” In other words, they determined that the formula in Section 4(b) was outdated, deeming it unconstitutional under the *Northwest Austin* standard.

The majority opinion began by explaining why the Court was setting a national precedent when trying to respond to the declaratory judgment sought by Shelby County. Chief Justice Roberts wrote: “[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case...Concluding that ‘underlying constitutional concerns,’ among other things, ‘compel[led] a broader reading of the bailout provision,’ we construed the statute to allow the utility district to seek bailout. In doing so we expressed serious doubts about the Act’s continued constitutionality.”⁷⁹ According to the Court, the circumstances of today warrant a narrower interpretation of the constitutionality of the Act, leading the Court to deem them not suitable for present means.

Chief Justice Roberts continues to make the point that these procedures have costs on federalism, and such costs are in violation of the 10th and 4th Amendments, again due to the lack of evidence supporting the current need for such preclearance. He wrote that, “Section 5 ‘imposes substantial federalism costs’ and ‘differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty’. We also noted that ‘[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented

⁷⁹ *Shelby County v. Holder*, 570 US __ (2013), page 6, Majority Opinion

levels.”⁸⁰ Chief Justice Roberts continues by saying that the enforcement of equal sovereignty is not properly implemented because southern states must meet a special standard. He writes:

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding ‘not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.’⁸¹

Additionally he explains why the *Katzenbach* ruling was constitutional at the time of the Act’s passage and not currently by saying it was “stringent” and “potent” then to address the inequalities in voting, but it was no longer necessary in 2013.⁸² The Court “recognized that it ‘may have been an uncommon exercise of congressional power,’ but concluded that ‘legislative measures not otherwise appropriate’ could be justified by ‘exceptional conditions.’”⁸³ At the time of passage, the court, “concluded that ‘the coverage formula [was] rational in both practice and theory.’ It accurately reflected [that] those jurisdictions [were] uniquely characterized by voting discrimination ‘on a pervasive scale,’ linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement.”⁸⁴ But since the time of the Voting Rights Act’s passage, it was the Court’s view that the status of inequality has, with regards to voting, changed so much that: “In the covered jurisdictions, ‘[v]oter turnout and registration rates

⁸⁰ *Shelby County v. Holder*, 570 US ___ (2013), page 6-7, Majority Opinion

⁸¹ *Shelby County v. Holder*, 570 US ___ (2013), page 11, Majority Opinion

⁸² *Shelby County v. Holder*, 570 US ___ (2013), page 11, Majority Opinion

⁸³ *Shelby County v. Holder*, 570 US ___ (2013), page 12, Majority Opinion

⁸⁴ *Shelby County v. Holder*, 570 US ___ (2013), page 13, Majority Opinion

now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”⁸⁵

Justice Roberts acknowledged that there have been many improvements with regards to voting inequalities in this country. However, he questions whether the evidence presented in the case merited continued support of the Voting Rights Act in its entirety because it had the intended public policy effect, or whether it was time to deem Sections 4(b) and 5 unconstitutional due to the lack of a pressing need. Almost all other courts have ruled on the side of the continued need for the formula being renewed in its entirety. Nevertheless, Chief Justice Roberts argues that a new approach is needed:

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of Section 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should Section 5 be struck down. Under this theory, however, Section 5 would be effectively immune from scrutiny; no matter how “clean” the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior. The provisions of Section 5 apply only to those jurisdictions singled out by Section 4. We now consider whether that coverage formula is constitutional in light of current conditions.⁸⁶

He argues that the policy was reversed-engineered, and does not adequately meet the needs of the current time. Furthermore, “the Government’s reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to ‘extraordinary legislation otherwise unfamiliar to our federal system’—that failure to establish even relevance is fatal.”⁸⁷

⁸⁵ Shelby County v. Holder, 570 US __ (2013), page 13-14, Majority Opinion

⁸⁶ Shelby County v. Holder, 570 US __ (2013), page 17, Majority Opinion

⁸⁷ Shelby County v. Holder, 570 US __ (2013), page 19, Majority Opinion

Finally, he asserts that Congress' renewal of the Section 4(b) formula was not adequately based on the research that they had collected. Moreover, he said, a,

Fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on 'second-generation barriers,' which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the Section 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution... Contrary to the dissent's contention... we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.⁸⁸

In other words, Congress had no rational reason to require the same coverage formula that was needed in 1965 because the facts of the present day have changed dramatically. The Court felt that Congress' formula should have accounted for those changes. "If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done."⁸⁹

Once again, the conclusion of Chief Justice Roberts' Opinion of the Court only answers why Section 4(b) of the Voting Rights Act is unconstitutional. He writes, "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."⁹⁰ The Court did not address how Section 5 becomes impossible to enforce without the implementation formula

⁸⁸ Shelby County v. Holder, 570 US ___ (2013), page 21, Majority Opinion

⁸⁹ Shelby County v. Holder, 570 US ___ (2013), page 23, Majority Opinion

⁹⁰ Shelby County v. Holder, 570 US ___ (2013), page 24, Majority Opinion

outlined in Section 4(b). However, the concurring opinion written by Justice Clarence Thomas explains why, in his view, Section 5 is unconstitutional.

Justice Thomas wrote a Concurring Opinion, in which he argued that the same rationale used to justify Section 4(b) as unconstitutional should also be applied to Section 5. Again, the standard used for this evaluation in Justice Thomas' view relies on the current need of Section 5. Thomas wrote: "While the Court claims to 'issue no holding on Section 5 itself,' its own opinion compellingly demonstrates that Congress has failed to justify 'current burdens' with a record demonstrating 'current needs'...By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court's opinion, I would find Section 5 unconstitutional."⁹¹

V. Dissenting Opinion

The Dissenting Opinion primarily held that Congress acted within its authority when reauthorizing the Voting Rights Act in 2006 for another 25 years. By virtue of Congress' analysis, and by the overwhelming vote to reauthorize the Act by a vote of 390-33 in the House and a 98-0 vote in the Senate, the Dissent understood that there was still a need to uphold the Act in its entirety.

In response to the Majority and Concurring Opinions, Justice Ruth Bader Ginsburg delivered the Dissent. In her dissent, Ginsburg cites a number of reasons including empirical evidence, legal precedent, and strong rhetoric that all contribute to her argument that the Court decided this case incorrectly. In addition to the standard outlined by the majority, the dissenting justices relied upon the rationale in both *McCulloch v. Maryland* (17 US 316) (1819) and again

⁹¹ *Shelby County v. Holder*, 570 US __ (2013), page 3, Concurring Opinion

in *South Carolina v. Katzenbach* and articulated another standard. The additional standard that was outlined was the following: “‘As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting’ . Faced with subsequent reauthorizations of the VRA, the Court has reaffirmed this standard. . . . Today’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed ‘rational means.’”⁹² By this, Justice Ginsburg argues that the Court should use a rational means test to determine if Congress was acting within their authority when reauthorizing the VRA.

Justice Ginsburg begins her dissent by writing about the large number of second generation barriers that states have tried to implement in order to prevent individuals from equal voting access. Second generation barriers to voting access are more subtle ways in which states can discriminate. For example, instead of states deliberately imposing a poll tax or literacy test, an example of a second-generation barrier would be strict voter identification laws that require certain minority populations to go through a number of steps in order to obtain the requisite identification. She makes this point in order to emphasize the unique ability of the Voting Rights Act, using the preclearance provision, to prevent the imposition of these barriers. Two examples that Justice Ginsburg discusses are racial gerrymandering and at-large voting procedures instead of district-by-district elections in populations where there are sizable black minorities.⁹³ She writes: “Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.”⁹⁴ She makes this point in order to emphasize why the Voting Rights Act

⁹² *Shelby County v. Holder*, 570 US ___ (2013), page 11, Dissent

⁹³ *Shelby County v. Holder*, 570 US ___ (2013), page 5, Dissent

⁹⁴ *Shelby County v. Holder*, 570 US ___ (2013), page 6, Dissent

was reauthorized several times and that the Court had upheld those reauthorizations each time. Again, during the most recent reauthorization, she noted that the Act passed with 390 yeas to 33 nays in the House of Representatives and 98 to 0 in the Senate. Notably: “President Bush signed it a week later, on July 27, 2006, recognizing the need for “further work . . . in the fight against injustice,” and calling the reauthorization “an example of our continued commitment to a united America where every person is valued and treated with dignity and respect.””⁹⁵ She argues that the Voting Rights Act reauthorization was passed with the utmost care, and received large bipartisan support. In her view, this broad consensus reaffirms the ongoing need for the Act:

The overall record demonstrated to the federal lawmakers that, ‘without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years’ . . . Based on these findings, Congress reauthorized pre clearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. . . . The question before the Court is whether Congress had the authority under the Constitution to act as it did.⁹⁶

Confirming that the action by Congress and subsequently by the President was lawful, she again addresses the standard previously applied, and says, “The question meet for judicial review is whether the chosen means are ‘adapted to carry out the objects the amendments have in view.’”⁹⁷ In conclusion, she says:

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress’ prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute’s challenger should be higher, when what is at issue is the reauthorization of a remedy that the

⁹⁵ Shelby County v. Holder, 570 US __ (2013), page 7, Dissent

⁹⁶ Shelby County v. Holder, 570 US __ (2013), page 8, Dissent

⁹⁷ Shelby County v. Holder, 570 US __ (2013), page 12, Dissent

Court has previously affirmed, and that Congress found, from contemporary evidence, to be working to advance the legislature’s legitimate objective.⁹⁸

Justice Ginsburg then explains why Congress reauthorized preclearance. To say that the evidence would overwhelmingly persuade Congress to act in the way that it did would be an understatement. “Congress found there were more DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490).”⁹⁹ She continues.

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory...and that the changes blocked by preclearance were ‘calculated decisions to keep minority voters from fully participating in the political process.’ On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the Section 5 preclearance requirements.¹⁰⁰

Moreover, she emphasizes that in addition to the data suggesting that the formula was needed, Congress also received evidence saying that Section 2 of the Voting Rights Act was not sufficient enough to substitute preclearance.¹⁰¹ She asserts, “An illegal scheme might be in place for several election cycles before a Section 2 plaintiff can gather sufficient evidence to challenge it.”¹⁰² Additionally, court fees place a heavy financial burden on minority voters, and “preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a Section 2 claim, and clearance by DOJ substantially reduces the likelihood that a Section 2 claim will be mounted.”¹⁰³ Justice Ginsburg provides eight different examples of the ways in which lawmakers have intentionally tried to do this, and notes that the Voting Rights Act was singularly effective at stopping those

⁹⁸ *Shelby County v. Holder*, 570 US ___ (2013), page 12, Dissent

⁹⁹ *Shelby County v. Holder*, 570 US ___ (2013), page 13, Dissent

¹⁰⁰ *Shelby County v. Holder*, 570 US ___ (2013), page 13, Dissent

¹⁰¹ *Shelby County v. Holder*, 570 US ___ (2013), page 14, Dissent

¹⁰² *Shelby County v. Holder*, 570 US ___ (2013), page 14, Dissent

¹⁰³ *Shelby County v. Holder*, 570 US ___ (2013), page 14-15, Dissent

restrictive initiatives from becoming law. Justice Ginsburg concludes that section of her dissent by saying the following:

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it... But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made... Facing such evidence then, the Court expressly rejected the argument that disparities in voter turnout and number of elected officials were the only metrics capable of justifying reauthorization of the VRA.¹⁰⁴

It was because of Congress' extensive research that they decided to maintain the same formula that was created in 1965, because: "of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by 'current needs.'¹⁰⁵ Through its research, Congress determined that: "Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study [the report that Congress used to learn about these conditions] revealed that they accounted for 56 percent of successful Section 2 litigation since 1982... Controlling for population, there were nearly four times as many successful Section 2 cases in covered jurisdictions as there were in noncovered jurisdictions."¹⁰⁶

Explaining the data, Justice Ginsburg provided reasoning as to why that would be the case. She wrote:

A governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive 'will inevitably discriminate against a racial group.' Just as buildings in California have a greater need to be earthquake proofed, places where there is greater racial polarization in voting have a greater need for

¹⁰⁴ Shelby County v. Holder, 570 US ___ (2013), page 18, Dissent

¹⁰⁵ Shelby County v. Holder, 570 US ___ (2013), page 18, Dissent

¹⁰⁶ Shelby County v. Holder, 570 US ___ (2013), page 20, Dissent

prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic literature.¹⁰⁷

Justice Ginsburg therefore provides evidence to counter the Opinion of the Court and that would instead support the need for the Act to be upheld. She concludes this section of her argument by saying that while many jurisdictions have been unable to bail out of the provisions outlined in the formula, it was due to the congressional judgment that they were rightfully subject to preclearance.¹⁰⁸ And, in her view, congressional judgment deserves deference.

Justice Ginsburg's final point in the dissent is that the Court did not properly evaluate this case for specific reasons. In her view, the Court did not outline an adequate standard of review in this case, they did not address the facial challenge implication this has on the efficacy of the Voting Rights Act, and they ignored the information that Congress collected when reauthorizing the Voting Rights Act when reviewing this case.¹⁰⁹ She notes in this final section of the dissent,

the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.¹¹⁰

Justice Ginsburg places Shelby County in the context of Alabama's record with regard to She notes that

Between 1982 and 2005, Alabama had one of the highest rates of successful Section 2 suits, second only to its VRA-covered neighbor Mississippi. In other words, even while subject to the restraining effect of Section 5, Alabama was found to have 'deni[ed] or abridge[d]' voting rights 'on account of race or color' more frequently than nearly all other States in the Union... Alabama's sorry history of Section 2 violations alone provides sufficient justification for Congress'

¹⁰⁷ Shelby County v. Holder, 570 US ___ (2013), page 21, Dissent

¹⁰⁸ Shelby County v. Holder, 570 US ___ (2013), page 23, Dissent

¹⁰⁹ Shelby County v. Holder, 570 US ___ (2013), page 23, Dissent

¹¹⁰ Shelby County v. Holder, 570 US ___ (2013), page 23, Dissent

determination in 2006 that the State should remain subject to Section 5's preclearance requirement.¹¹¹

In effect, Justice Ginsburg argues that Shelby County, and the state of Alabama have continued their efforts to restrict voting rights in a discriminatory way in the country, and therefore deserve to be subjected to the formula approved by Congress.

She also notes that racial discrimination is present in state politics, and that the Voting Rights Act is in place to eliminate those discriminatory concerns. Justice Ginsburg refers to an FBI investigation as a case in point. She says,

Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African-Americans as 'Aborigines' and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African-American voter turnout... These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010... The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the 'recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem' in Alabama. Racist sentiments, the judge observed, 'remain regrettably entrenched in the high echelons of state government.'¹¹²

What was critical to this point, and the reason why Justice Ginsburg presumably raised this is that enforcement of the Voting Rights Act and all elections is usually the responsibility of the states. Justice Ginsburg's point speaks to the persistent problem of racism that afflicts state politicians, and if they cannot effectively and fairly carry out free and fair elections, then Congress has the authority and duty to regulate them. She concludes the section by saying that "Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability

¹¹¹ Shelby County v. Holder, 570 US __ (2013), page 24-25, Dissent

¹¹² Shelby County v. Holder, 570 US __ (2013), page 27-28, Dissent

provision, the Court’s opinion can hardly be described as an exemplar of restrained and moderate decision-making. [In fact the opposite was happening.] Hubris is a fit word for today’s demolition of the VRA”.¹¹³ Justice Ginsburg does this to show how the Court has stopped “any application of Section 5 by holding that Section 4(b)’s coverage formula is unconstitutional.”¹¹⁴

Justice Ginsburg concludes the entire dissent by arguing that, “Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress’ bailiwick.”¹¹⁵ She provided several examples of this throughout the dissent but concludes the dissent in the following way:

After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that ‘40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution’ . . . determination of the body empowered to enforce the Civil War Amendments by appropriate legislation’ merits this Court’s utmost respect. In my judgment, the Court errs egregiously by overriding Congress’ decision.¹¹⁶

In conclusion, the slim majority decided a monumental and landmark Supreme Court case that not only broke from legal precedent, but also had major public policy implications for the future of this country. In the subsequent chapters I will use the State of North Carolina as a case study to demonstrate the way that states, in particular states that had been covered under Sections 4 and 5 before the *Shelby County* decision, responded to their newfound freedom to alter their state’s voting and electoral laws.

¹¹³ *Shelby County v. Holder*, 570 US ___ (2013), page 30, Dissent

¹¹⁴ *Shelby County v. Holder*, 570 US ___ (2013), page 30, Dissent

¹¹⁵ *Shelby County v. Holder*, 570 US ___ (2013), page 33, Dissent

¹¹⁶ *Shelby County v. Holder*, 570 US ___ (2013), page 37, Dissent

CHAPTER THREE: A CASE STUDY OF NORTH CAROLINA

In the immediate aftermath of the *Shelby County* decision, Democratic politicians across the country expressed their deep alarm about the way in which the Court decided the case. They were concerned about the implications that this decision could have on elections, specifically ability of individual states or political subdivisions to pass laws with discriminatory intent.

Notably, President Obama had the following reaction:

I am deeply disappointed with the Supreme Court’s decision today. For nearly 50 years, the Voting Rights Act – enacted and repeatedly renewed by wide bipartisan majorities in Congress – has helped secure the right to vote for millions of Americans. Today’s decision invalidating one of its core provisions upsets decades of well-established practices that help make sure voting is fair, especially in places where voting discrimination has been historically prevalent.¹¹⁷

The concerns expressed President Obama were also shared by other Democratic politicians, civil rights activists, academics, and experts on voting rights. Their concerns ended up becoming reality in the following months and years. As Justice Ruth Bader Ginsburg predicted in her dissent, without the preventative measures written into the Voting Rights Act, states immediately took to writing new laws that were passed with discriminatory intent in order to limit access to voting.

After the *Shelby County* decision, Republican legislatures in formerly covered states under Sections 4(b) and 5 rushed to pass new legislation restricting voting access.

Within hours [of the Supreme Court’s decision], Texas officials said that they would begin enforcing a strict photo identification requirement for voters, which had been blocked by a federal court on the ground that it would disproportionately affect black and Hispanic voters. In Mississippi and Alabama, which had passed

¹¹⁷ “Statement by the President on the Supreme Court Ruling on *Shelby County v. Holder*.” *Whitehouse.gov*, June 25, 2013. <https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/statement-president-supreme-court-ruling-shelby-county-v-holder>.

their own voter identification laws but had not received federal approval for them, state officials said that they were moving to begin enforcing the laws.¹¹⁸

While these are only a few examples of States that responded directly after the *Shelby County* decision, they are certainly not the only states that passed more restrictive legislation.

According to the Brennan Center for Justice, the *Shelby County* decision had three major impacts: “Section 5 no longer blocks or deters discriminatory voting changes as it did for decades and right up until the Court’s decision; challenging discriminatory laws and practices is now more difficult, expensive, and time consuming; the public now lacks critical information about new voting laws that Section 5 once mandated be disclosed prior to implementation.”¹¹⁹

The Brennan Center’s observations were reality because by the 2014 elections, seven states had legal challenges to new laws that had been passed since the *Shelby County* decision just one year earlier, and while that is a large number of states, there is high potential, in this new era of voting in the United States, for many laws to be passed without them being challenged.¹²⁰ Among these states passing restrictive voting measures was the State of North Carolina, a previously covered jurisdiction under Section 5 of the Voting Rights Act. Since North Carolina’s case is currently under review, it will serve as a case study to describe the national narrative of what happened in the United States.

I. Why North Carolina?

North Carolina serves as the case study in this thesis for several reasons, the first of which being the fact that it was a previously covered jurisdiction under Sections 4(b) and 5 of the

¹¹⁸ Cooper, Michael. “After Ruling, States Rush to Enact Voting Laws.” *The New York Times*, July 5, 2013. <http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html>.

¹¹⁹ Brennan Center: “Shelby County: One Year Later”

¹²⁰ Fuller, “How has voting...” (WaPo)

Voting Rights Act. It is important for this thesis to demonstrate how previously covered jurisdictions had responded to the new freedom that they had received from the *Shelby County* decision. Another reason is that while there were many formerly covered jurisdictions that could have served as case studies, North Carolina was particularly appropriate due to the amount of national media attention the proposed election law change received, especially with regard to the perceived discriminatory intent of the State Legislature. The North Carolina chapter of the NAACP challenged the constitutionality of the omnibus election change law in the case *NAACP v. McCrory* (McCrory was the Governor at the time of the bill's passage). Two different courts have decided the case differently, and it is important to explain the two arguments that challenge the new voting laws. Finally, North Carolina has also emerged as a politically important state in federal elections due to changing voter demographics and increasing voter participation in marginalized communities. This factor affects the types of laws that states, especially politically divided states, have passed in the wake of the *Shelby County* decision.

II. Facts and Background of the North Carolina Case (*NAACP v. McCRORY*)

Before the *Shelby County* decision, the Legislature in North Carolina had been working on an omnibus election law bill, and waited until after the *Shelby County* decision to pass this legislation. The law passed on April 25th, 2013 in the State Senate where it remained in the Senate Rules Committee until after the *Shelby County* decision in June.¹²¹ The very next day after the *Shelby County* decision, the Chairman of the Senate Rules Committee announced: “‘I think we’ll have an omnibus bill coming out’ and...that the Senate would move ahead with the

¹²¹ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 42

‘full bill.’”¹²² Within the following weeks, an omnibus bill was passed that restricted voting in the following ways: by implementing a new voter identification requirement, the elimination of one of week of early voting, the elimination of same-day registration, the elimination of an out-of-precinct voting provision (where those who vote in the right county, but not the right precinct, their votes would have been counted), and the elimination of preregistration (such as when people who get their driver’s license also are able to register to vote). When constructing the language for the law, and, “before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.”¹²³

On the same day that the bill, SL 2013-381, was passed in the General Assembly, the bill was challenged by the Department of Justice, League of Women’s Voters, and the North Carolina Chapter of the National Association for the Advancement of Colored People (NAACP) joined by other organizations.¹²⁴ All of these challengers argued that the State Legislature in North Carolina passed the omnibus election law with discriminatory intent. The plaintiffs, in the case that became *NAACP v. McCrory*, requested a preliminary injunction before the 2014-midterm elections as the case was awaiting a proper trial.¹²⁵ That was denied by the District Court, so the law was in place for the 2014-midterm elections.¹²⁶

On April 25th, 2016, nearly three years after the State Legislature passed SL2013-381 *NAACP v. McCrory* finally made its way to the District Court and the Court held that the

¹²² NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 14

¹²³ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 10

¹²⁴ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 10

¹²⁵ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 20

¹²⁶ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 20

omnibus law was constitutional. One factor that persuaded the court was the record of gains that African Americans had made in turnout in the 2014-midterm elections. The court held: “In the end, Plaintiffs rely on aggregate turnout data when it is expedient, but eschew it when it is not. Plaintiffs are correct that the 2014 turnout data are not dispositive. But, as the Supreme Court has recognized, it is highly probative, and the court considers it along with all the other data offered into evidence in assessing the totality of the circumstances.”¹²⁷ However, while the data on turnout from the 2014 midterm elections was a factor that contributed to the Court’s decision in *NAACP v. McCrory*, the primary conclusion was focused on how SL 2013-381 made voting less convenient, but that a mere lack of convenience did not violate the Constitution. The Court held:

In short, North Carolina has provided legitimate State interests for its voter-ID requirement and electoral system that provides registration all year long up to twenty-five days before an election, absentee voting for up to sixty days before an election, ten days of early voting at extended hours convenient for workers that includes one Sunday and two Saturdays, and Election Day voting. Plaintiffs oppose this system because they preferred one that they say was even more convenient - which they used disproportionately during certain elections – and point to some fraction of voters who did not vote or register. Plaintiffs’ contention that such voters did not do so because of vestiges of historical official discrimination is rebutted by the facts. There is strong evidence that some other reason is at play for the failure of these persons to register and/or vote. The unprecedented gains by African Americans in registration and turnout, both during and even in 2014 after SL 2013-381, bolster this conclusion. While the consideration is clearly local and practical in nature, based on North Carolina’s unique facts, it would no doubt bear relevance if North Carolina were seeking to return to an electoral system that was not in the mainstream of other States. It is not.¹²⁸

However, to the surprise of many observers, this decision was reversed on appeal at the Fourth Circuit, which is generally regarded as conservative in composition.

¹²⁷ *NAACP v. McCrory*, 1:13CV658 (M.D. North Carolina. 2016), page 196

¹²⁸ *NAACP v. McCrory*, 1:13CV658 (M.D. North Carolina. 2016), page 475-6

III. Legal Question and Standard used by the Fourth Circuit

At the Fourth Circuit, the following legal question was raised when evaluating *NAACP v. McCrory*: Was the facially neutral law motivated by discriminatory intent, thus violating Section 2 of the Voting Rights Act under the 14th and 15th Amendments? When the court was evaluating that legal question, they did so by primarily using the standard established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, (429 U.S. 252 (1977)). In *Arlington Heights*, “the Court recognized that a facially neutral law, like the one at issue here, can be motivated by invidious racial discrimination.”¹²⁹ The standard established was one of a sensitive inquiry to determine whether or not a facially neutral law was passed or created with discriminatory intent, and in order to carry out the sensitive inquiry, the Supreme Court in *Arlington Heights*: “set forth a nonexhaustive list of factors to consider in making this sensitive inquiry. These include: ‘[t]he historical background of the [challenged] decision;’ ‘[t]he specific sequence of events leading up to the challenged decision;’ ‘[d]epartures from normal procedural sequence;’ the legislative history of the decision; and of course, the disproportionate ‘impact of the official action -- whether it bears more heavily on one race than another.’”¹³⁰ That standard guided the Circuit Court’s reasoning, and the judges unanimously held that SL2013-381 was passed with discriminatory intent. They said this passionately, declaring “the new provisions target African Americans with almost surgical precision.”¹³¹

¹²⁹ *NAACP v. McCrory*, 16-1468 (4th Cir. 2016), page 24

¹³⁰ *NAACP v. McCrory*, 16-1468 (4th Cir. 2016), page 25

¹³¹ *NAACP v. McCrory*, 16-1468 (4th Cir. 2016), page 9

IV. Reasoning

The Fourth Circuit’s reasoning was broken into sections that the sensitive inquiry explored. On all counts, the Court unanimously held that the State Legislature acted with discriminatory intent violating Section 2 of the Voting Rights Act under the Fourteenth and Fifteenth Amendments to the Constitution. Since Sections 4(b) and 5 no longer apply in a court of law, Section 2 is the primary clause in the Voting Rights Act that establishes whether or not a law was passed with discriminatory intent. This is particularly significant because there is now a higher burden of proof on petitioners that needs to be met under Section 2 of the Voting Rights Act. “In its current form, § 2 of the Act provides: No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...”¹³² This is something that is very hard to prove in a Court of law, as courts have noted that racism today is much less deliberate and much more subtle than it used to be. And, in addition to the rigors of trying to prove racial discrimination, the higher burden of proof has other implications as well, such as how expensive cases can become and the amount of resources needed in order to meet the higher threshold under Section 2. Despite all of these newfound challenges imposed on petitioners in the aftermath of the *Shelby County* decision, the Court still unanimously held that the North Carolina State Legislature passed the omnibus election law with discriminatory intent.

¹³² NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 12

IV (a). Reasoning: Historical Background of Voting in North Carolina

The first part of the *Arlington Heights* standard utilized in the case implored the Court to examine the historical background of the challenged decision. In other words, how does the actual history of voting in the State of North Carolina inform an interpretation of SB2013-381. The Court found countless claims of evidence supporting the fact that this history of voting in North Carolina has not always been equal. In particular, the Court found that North Carolina has a history of racial discrimination with regards to voting, that the history of the issue is both longstanding and current, and that race in North Carolina is closely linked with party affiliation.

The Court noted that, “unquestionably, North Carolina has a long history of race discrimination generally and race-based vote suppression in particular.”¹³³ Although the Court stipulated that the history of the issue in the state should not be the most important factor when determining whether or not the law was passed with discriminatory intent, the judges noted, “because the legislation came into being literally within days of North Carolina’s release from the preclearance requirements of the Voting Rights Act, that long-ago history bears more heavily here than it might otherwise.”¹³⁴

But more than that, the Court held that North Carolina’s history of limiting access to voting is ongoing: “The record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans.”¹³⁵ Moreover, “The record reveals that, within the time period that the district court found free of ‘official discrimination’ (1980 to 2013), the Department of Justice issued over fifty objection letters to proposed election law changes in North Carolina—including several since

¹³³ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 31

¹³⁴ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 32

¹³⁵ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 33

2000—because the State had failed to prove the proposed changes would have no discriminatory purpose or effect,” and that 27 of those 50 objections originated in the General Assembly.¹³⁶ In the past, laws motivated by discriminatory intent could be stopped by the Justice Department before ever becoming law precisely due to Sections 4(b) and 5 that required states to obtain preclearance before implementing a voting change.

In addition to the recent documented historical struggles in the State of North Carolina, it also became clear that race and party are intrinsically linked. Data indicated that

In North Carolina, African-American race is a better predictor for voting Democratic than party registration.’ For example, in North Carolina, 85% of African American voters voted for John Kerry in 2004, and 95% voted for President Obama in 2008. In comparison, in those elections, only 27% of white North Carolinians voted for John Kerry, and only 35% for President Obama.¹³⁷

And what became clear after the State Legislature requested data on voter demographics that “whether the General Assembly knew the exact numbers, it certainly knew that African American voters were highly likely, and that white voters were unlikely, to vote for Democrats. And it knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers” leading to the success of Democratic candidates overcoming historical barriers with regards to elected officials.¹³⁸ It was for those reasons that the Court concluded that:

“These contextual facts, which reveal the powerful undercurrents influencing North Carolina politics, must be considered in determining why the General Assembly enacted SL 2013-381. Indeed, the law’s purpose cannot be properly understood without these considerations. The record makes clear that the historical origin of the challenged provisions in this statute is not the innocuous back-and-forth of routine partisan struggle that the State suggests and that the district court accepted. Rather, the General Assembly enacted them in the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting. The district court

¹³⁶ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 33-34

¹³⁷ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 37-38

¹³⁸ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 38

clearly erred in ignoring or dismissing this historical background evidence, all of which supports a finding of discriminatory intent.”¹³⁹

By the Court’s standards, SB2013-381 did not pass this crucial part of the *Arlington Heights* standard.

IV (b). Reasoning: Sequence of Events leading up to the Law and how that was different from the Normal Procedural Sequence

The next prong of the *Arlington Heights* standard forced the Court to study the specific sequence of events leading up to the challenged decision and the departures from normal procedural sequence. This required determining what steps were taken by the State Legislature to pass SB2013-381, and how the steps that they took differ from the usual way in which the Legislature enacts legislation. The most important conclusion that the Court decided upon from their sensitive inquiry was the speed by which the Legislature acted in order to pass this legislation. More specifically, the bill was stricter than previously discussed versions, and the version passed was rushed through the General Assembly.

“The record shows that, immediately after Shelby County, the General Assembly vastly expanded an earlier photo ID bill and rushed through the legislative process the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965.”¹⁴⁰

Moreover,

The very next day [after Shelby County], the Chairman of the Senate Rules Committee proclaimed that the legislature ‘would now move ahead with the full bill,’ which he recognized would be ‘omnibus’ legislation. After that announcement, no further public debate or action occurred for almost a month. As the district court explained, ‘[i]t was not until July 23 . . . that an expanded bill, including the election changes challenged in this case, was released’.¹⁴¹

¹³⁹ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 40

¹⁴⁰ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 41

¹⁴¹ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 42

After discovering those facts about the speed with which the legislation was passed, the Court held that:

“...the General Assembly did not simply wait to enact changes to its election laws that might require the administrative hassle of, but likely would pass, preclearance. Rather, after Shelby County it moved forward with what it acknowledged was an omnibus bill that restricted voting mechanisms it knew were used disproportionately by African Americans, and so likely would not have passed preclearance. And, after Shelby County, the legislature substantially changed the one provision that it had fully debated before. As noted above, the General Assembly completely revised the list of acceptable photo IDs, removing from the list the IDs held disproportionately by African Americans, but retaining those disproportionately held by whites. This fact alone undermines the possibility that the post-Shelby County timing was merely to avoid the administrative costs. Instead, this sequence of events -- the General Assembly’s eagerness to, at the historic moment of Shelby County’s issuance, rush through the legislative process the most restrictive voting law North Carolina has seen since the era of Jim Crow -- bespeaks a certain purpose.”

Again, by the Court’s standards, SB2013-381 did not pass this prong of the *Arlington Heights* standard.

IV (c). Reasoning: Legislative History of SB2013-381

The next facet of the *Arlington Heights* standard required the Court study the legislative history of the bill to determine how this specific piece of legislation evolved over time (separately from the procedural sequence). This short section of the Opinion described that there were no minutes for any legislative meetings at which the bill was discussed, and the judges again noted that the data requested by the Legislature before the writing of the bill included racial breakdowns on very specific parts of the law, including which sorts of identifying

documents African Americans—and only African Americans—were more or less likely to possess.¹⁴²

After a more careful analysis of the types of data that the Legislature requested, the Court held:

...members of the General Assembly requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting. This data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID. Not only that, it also revealed that African Americans did not disproportionately use absentee voting; whites did. SL 2013-381 drastically restricted all of these other forms of access to the franchise, but exempted absentee voting from the photo ID requirement. In sum, relying on this racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans. When juxtaposed against the unpersuasive non-racial explanations the State proffered for the specific choices it made...cannot ignore the choices the General Assembly made with this data in hand.¹⁴³

The judges concluded that after receiving that data, the legislature wrote a law using that information in order to suppress turnout amongst African American voters. Because of that, again by the Court's standards, SB2013-381 did not pass this facet of the *Arlington Heights* standard.

IV (d). Reasoning: The Disproportionate Impact of the Official Action

The final section of the reasoning behind the Court's holding in *NAACP v. McCrory* was focused on the last prong of the *Arlington Heights* standard, being the disproportionate impact of the official action. The judges must determine whether it bears more heavily on one race than another and whether it has a disproportionate impact. What was abundantly clear from the Court's holding in this section is that it found a severely disproportionate impact on different

¹⁴² *NAACP v. McCrory*, 16-1468 (4th Cir. 2016), page 47

¹⁴³ *NAACP v. McCrory*, 16-1468 (4th Cir. 2016), page 48-49

racism, and that African Americans were affected exponentially more than their white counterparts. Additionally, the Court found that the policy “solutions” that the Legislature formulated in response to the problems that they identified in their argument did not actually solve the problems.

Remarkably, the Court held that the five provisions of the omnibus bill *did not solve any problems that the State identified*. In fact, the Court held that they only created more problems for African Americans, and that the totality of the five provisions disproportionately affected African Americans much more severely. For example, the judges concluded that

...the photo ID requirement inevitably increases the steps required to vote, and so slows the process. The early voting provision reduced the number of days in which citizens can vote, resulting in more voters voting on Election Day. Together, these produce longer lines at the polls on Election Day, and absent out-of-precinct voting, prospective Election Day voters may wait in these longer lines only to discover that they have gone to the wrong precinct and are unable to travel to their correct precincts. Thus, cumulatively, the panoply of restrictions results in greater disenfranchisement than any of the law’s provisions individually.¹⁴⁴

Furthermore, the Court identified the sad truth about the North Carolinian electorate, namely that “African Americans . . . in North Carolina are disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health.”¹⁴⁵ By identifying those particular characteristics of how African Americans are disproportionately affected in North Carolina separately from voting, the Court holds that out of necessity African Americans used the provisions that were eliminated or made more challenging for them with the passage of SB2013-381.

These socioeconomic disparities establish that no mere ‘preference’ led African Americans to disproportionately use early voting, same-day registration, out-of-precinct voting, and preregistration. Nor does preference lead African Americans to disproportionately lack acceptable photo ID. Yet the district court refused to

¹⁴⁴ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 51-52

¹⁴⁵ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 55

make the inference that undeniably flows from the disparities it found many African Americans in North Carolina experienced. Registration and voting tools may be a simple ‘preference’ for many white North Carolinians, but for many African Americans, they are a necessity.¹⁴⁶

It is important to recall that the District Court held that the changes were mere inconveniences, but that those inconveniences were not unconstitutional or passed with racially discriminatory intent. The Fourth Circuit refuted that conclusion by saying that, “In holding that the legislature did not enact the challenged provisions with discriminatory intent, the court seems to have missed the forest in carefully surveying the many trees.”¹⁴⁷ Again, just as with all of the other prongs, by the Court’s standards, SB2013-381 did not pass this section of the *Arlington Heights* standard.

V. Summary of Reasoning and Remedy

After applying the *Arlington Heights* standard to explain their reasoning, they summarize their opinion in the following way:

In sum, assessment of the Arlington Heights factors, requires the conclusion that, at least in part, discriminatory racial intent motivated the enactment of the challenged provisions in SL 2013-381. The district court clearly erred in holding otherwise. In large part, this error resulted from the court’s consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by Arlington Heights. Any individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context. The totality of the circumstances—North Carolina’s history of voting discrimination; the surge in African American voting; the legislature’s knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so—cumulatively and unmistakably reveal that the General Assembly used SL 2013-381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party.¹⁴⁸

¹⁴⁶ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 55

¹⁴⁷ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 9

¹⁴⁸ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 56

By identifying the “surgical precision” with which the North Carolina legislators crafted their bill, the Court reversed the lower court. The Court held:

It is beyond dispute that ‘voting is of the most fundamental significance under our constitutional structure.’ For “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” We thus take seriously, as the Constitution demands, any infringement on this right. We cannot ignore the record evidence that, because of race, the legislature enacted one of the largest restrictions of the franchise in modern North Carolina history. We therefore reverse the judgment of the district court. We remand the case for entry of an order enjoining the implementation of SL 2013-381’s photo ID requirement and changes to early voting, same-day registration, out-of-precinct voting, and preregistration.¹⁴⁹

The impact that this decision had on society in the following months and on the 2016 election will be explored in the next chapter.

¹⁴⁹ NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 77-78

CHAPTER FOUR: RESPONSE TO *NAACP V. MCCRORY* IN NORTH CAROLINA AND THE 2016 ELECTION

What became very clear when analyzing the *NAACP v. McCrory* was how the court unanimously held that the State of North Carolina's omnibus bill with voting reforms was passed with discriminatory intent. Due to intense media scrutiny of the opinion, the opinion garnered considerable attention not only from voting rights activists and progressives who closely monitor changes in election laws, but also from every day Americans. This was because of the "surgical precision" that the State of North Carolina used when passing this omnibus law that the Fourth Circuit held targeting African American voters. *The Atlantic* described the law that was overturned as, "North Carolina's Deliberate Disenfranchisement of Black Voters."¹⁵⁰

The Fourth Circuit filed its decision on July 29th, 2016, just a few months before the 2016 election. Several other cases also overturned new voter restrictions. In fact, a conventional progressive interpretation of the way in which the courts ruled was that three different courts walked back restrictive voting measures in three different states, those states being North Carolina, Texas, and Wisconsin.¹⁵¹ Those decisions highlighted the fact that this was the first time since 1965 that the Voting Rights Act would not be in place in its entirety.

Without Sections 4(b) and 5, several states quickly acted to pass new legislation that would restrict access to voting, disproportionately restricting the access based on an individual's race, class, and age. Such laws, as Ginsburg alluded to in her dissent in *Shelby County*, may have

¹⁵⁰ Graham, David A. "North Carolina's Deliberate Disenfranchisement of Black Voters." *The Atlantic*, July 29, 2016. <https://www.theatlantic.com/politics/archive/2016/07/north-carolina-voting-rights-law/493649/>.

¹⁵¹ Wines, Michael, and Alan Blinder. "Federal Appeals Court Strikes Down North Carolina Voter ID Requirement." *The New York Times*, July 29, 2016. <https://www.nytimes.com/2016/07/30/us/federal-appeals-court-strikes-down-north-carolina-voter-id-provision.html>.

contributed to the disenfranchisement of communities most affected by these changes in voting. In addition to the disenfranchisement, there were a number of new restrictive voting measures that were passed, which may have affected the number of persons eligible to vote.

I. Response to NAACP v. McCrory

As mentioned earlier, the case garnered national media attention because of the unusually inflammatory language used by the Fourth Circuit, a court that is often described as conservative. For example, the court held that this bill was: “the most restrictive voting law North Carolina has seen since the era of Jim Crow.”¹⁵² Commentator on American political life John Oliver had the following to say about the Fourth Circuit’s decision:

When you hear what North Carolina’s voter ID law contained, it is hard to disagree with that Court...they didn’t just go with their gut and think that it was going to be discriminatory, they got the spreadsheets, crunched the numbers and they knew it would be. I don’t know how you did it, North Carolina, but I think you officially ‘moneyballed’ racism.¹⁵³

The reaction to the decision was split primarily along partisan lines. The president of North Carolina’s chapter of the NAACP Reverend William Barber II, a plaintiff in this case, said the following in response to the decision: ““We are beyond happy that the Fourth Circuit Court of Appeals exposed for the world to see the racist intent of the extremist element of our government in North Carolina...the ruling is a people’s victory, and it is a victory that sends a message to the nation.”¹⁵⁴

¹⁵² NAACP v. McCrory, 16-1468 (4th Cir. 2016), page 46

¹⁵³ Avery, Kevin, Tim Carvell, Josh Gondleman, Dan Gurewitch, Geoff Haggerty, Jeff Maurer, John Oliver, Scott Sherman, Will Tracy, Jill Twiss, and Juli Weiner, writers. "Last Week Tonight with John Oliver Season 3, Ep 19: July 31, 2016." In *Last Week Tonight with John Oliver*, directed by Paul Pennolino, produced by John Oliver, Tim Carvell, John Thday, James Taylor, and Liz Stanton. HBO. July 31, 2016.

¹⁵⁴ Graham, “North Carolina’s...”

Additionally, those who sided with the plaintiffs in this case remarked on the significance that this decision could have on the future of voting rights in the United States.

Because North Carolina's law was among the nation's most sweeping, and because it came so quickly after *Shelby County*, it has been watched as a bellwether for voting-rights cases nationwide. A favorable outcome for the state would likely embolden other conservative states to undertake similar overhauls, while a negative one would force them to take another tack, and encourage voting advocates.¹⁵⁵

This was reinforced by the other Court cases that were decided similarly within roughly the same week, those other decisions being in Wisconsin and Texas.¹⁵⁶

However, not all of the reaction to the *NAACP v. McCrory* was uniform, and the reaction was politically dichotomous. While most news agencies, voting rights activists, and progressives were highly supportive of the Fourth Circuit's opinion, others looked much less favorably on the decision. "Republican leaders in North Carolina vowed an appeal to the high court. They issued a fiery statement denouncing the ruling 'by three partisan Democrats' and suggested it was intended to help the Democratic candidates for president and governor."¹⁵⁷

Similarly,

North Carolina Gov. Pat McCrory (R) issue[d] a short statement that, like that of the legislative leaders, and said the decision would be appealed, repeating claims about the partisan cast of the panel that reviewed the case. "Three democratic judges are undermining the integrity of our elections while also maligning our state."¹⁵⁸

What was also important to note about Governor McCrory was that at the time he was in a highly competitive reelection campaign. The Washington Post reported, "McCrory is locked in a tight

¹⁵⁵ Graham, "North Carolina's..."

¹⁵⁶ Avery, et. Al. "Last Week Tonight with..."

¹⁵⁷ Avery, et. Al. "Last Week Tonight with..."

¹⁵⁸ Barnes, Robert and Anne E. Marrimow. "Appeals Court Strikes down North Carolina's Voter-ID Law." *Washington Post*. Accessed April 8, 2017.

https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html.

reelection race against Democrat Roy Cooper. Senator Richard Burr is expected to face a tight battle to hold his seat against Democrat Deborah Ross. And Hillary Clinton’s campaign has targeted the Old North State as a key swing state, hoping that a win here would block any path to victory for Donald Trump.”¹⁵⁹ Given the decision, there was a lot of speculation about how it would affect the 2016 election. “If the law is not in effect in November, it could have a major impact.”¹⁶⁰ This impact was monitored by many, and was important because of North Carolina’s emergence as a highly contested swing state in elections.

II. Election 2016, and the 2017 Legislative Response to the Election

What happened in *NAACP v. McCrory* was not unique to the state of North Carolina. The Brennan Center confirmed that, “in 2016, 14 states had new voting restrictions in place for the first time in a presidential election. Those 14 states were: Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.”¹⁶¹ These laws include restrictions like voter ID requirements and limits on early voting.¹⁶² Moreover, according to a report issued by the Brennan Center for Justice, which monitors voting rights in the United States,

20 states have new restrictions in effect since [2010] — 10 states have more restrictive voter ID laws in place (and six states have strict photo ID requirements), seven have laws making it harder for citizens to register, six cut back on early voting days and hours, and three made it harder to restore voting rights for people with past criminal convictions.¹⁶³

¹⁵⁹ Graham, “North Carolina’s...”

¹⁶⁰ Graham, “North Carolina’s...”

¹⁶¹ "New Voting Restrictions in America." Brennan Center for Justice. Accessed May 08, 2017. <http://www.brennancenter.org/new-voting-restrictions-america>.

¹⁶² “New Voting Restrictions...”

¹⁶³ “New Voting Restrictions...”

In addition to the legal challenges faced by Americans who did not possess the requisite forms of identification, there was also the fear of voter intimidation inspired by the Trump campaign's rhetoric. Citing no evidence, candidate Trump, before the election took place, repeatedly tried to discredit the election, by saying that it would've been "stolen" due to rampant voter fraud.¹⁶⁴ Even amongst the increasing laws passed primarily by Republican legislators across the country, Trump was still perpetuating the rumor of voter fraud across the country, and was calling for poll observers to monitor the elections.

His call to monitor polling places betrays an ignorance of election laws in most states, which require poll watchers to be registered in the county or precinct where they operate. Even though Mr. Trump's website includes a form to sign up as a poll watcher and 'help me stop Crooked Hillary from rigging this election,' local officials in battleground states said they had seen no surge by Trump supporters seeking to be certified poll watchers.¹⁶⁵

Trump continued to insist that 3 million illegal votes were cast, even after he was inaugurated, a point that will be discussed in the following chapter in greater detail.

At this current juncture, it is difficult to fully measure the effects that the new laws and campaign rhetoric had on the 2016 election, but there may be disenfranchisement effects going forward too. That said, if there are more obstacles to overcome for someone to engage in the political process, it is likely that their willingness to participate in the process will go down. Those people, as highlighted in the Fourth Circuit's decision in North Carolina, are less likely to be able to overcome those challenges because the solutions require money and mobility; and the Fourth Circuit found that low-income minority voters might not have access to those resources. Furthermore, if a political candidate keeps perpetuates false rumors of voter fraud and a stolen

¹⁶⁴ Gabriel, Trip. "Donald Trump's Call to Monitor Polls Raises Fears of Intimidation." *The New York Times*, October 18, 2016. <https://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html>.

¹⁶⁵ Gabriel, "Donald Trump's Call..."

election without substantiating them with evidence, it is hard to think that your vote in the process would even matter. And if you're someone without many resources, and for whom voting is already a difficulty, the thought of a "stolen election" may lead you to not even think that your vote matters, thus, in effect, disenfranchising you from voting.

The most recent research on the impact that new voting laws had on the 2016 election suggests that they may have actually "hurt voter turnout for Trump."¹⁶⁶ At the recent Midwestern Political Science Association convention, Professor Michael A. Smith of Emporia State University presented research showing that:

New voting laws are likely to have the greatest impact on new and infrequent voters. Those who vote regularly will adjust to a photo ID or proof-of-citizenship requirement, while those that do not may not be prepared for the changes. Given that Trump appears to have mobilized new and infrequent voters, it makes sense that those votes would be the most 'thrown' by new requirements.¹⁶⁷

However, while Smith's research indicates the effect that new restrictive voting measures may have affected Republican voters this time, he warns that this does not mean that they will not affect Democrats in future elections. He concluded his paper by observing that "the fact that these laws appear to have hindered vote shifts to a (quirky, unexpected) Republican candidate this year does not mean that they will do the same in the future. More importantly, it does not justify the laws. The voter-fraud premise remains as flimsy as before, while evidence of disparate impact on society's most vulnerable remain credible."¹⁶⁸ This means that voter fraud claims can still affect elections in a way that reduces turnout amongst marginalized communities, even if we

¹⁶⁶ Smith, Michael A. "Election 2016: Did New Voting Laws Tip the Balance?," MPSA: Midwestern Political Science Association. April 7, 2017.
<https://blog.mpsanet.org/2017/04/07/election-2016-did-new-voting-laws-tip-the-balance/>.

¹⁶⁷ Smith, "Election 2016..."

¹⁶⁸ Smith, "Election 2016..."

do not yet have evidence for the results in this election. The pervasiveness of voter fraud claims made by Republican officials will be addressed in the next chapter.

Although it is too soon to know how voting laws affected the 2016 election, it did prompt a legislative response in 2017 that has reverberated across the country. According to the Brennan center,

At least 87 bills to restrict access to registration and voting have been introduced in 29 states. Ten bills have passed through at least one legislative chamber in 6 states. Three states have enacted new voting laws. Arkansas passed a restrictive voter ID bill, Wyoming passed legislation to ease restoration of voting rights for people with criminal convictions, and Utah passed bills to improve voter list maintenance and expand early voting opportunities.¹⁶⁹

These laws were primarily justified by concerns of voter fraud in these states. If it appears that there has only been a conservative legislative response to restrict voting, that is not entirely the case because in addition, “at least 478 bills to enhance voting access have been introduced in 43 states. Thirty bills have passed through at least one legislative chamber in 15 states.”¹⁷⁰ This means that the election prompted some states in 2017 to act in a way that could increase access to voting, and while no states have officially passed laws that enhance voter laws, the movement demonstrates that there is support for enhancing access to voting.

III. Status of NAACP v. McCrory

Understandably so, the response to the case prompted very different reactions from the two different parties. The current status of the case is that the North Carolina has filed a petition for a writ for certiorari in the Supreme Court. The state’s argument asserts that the Fourth Circuit Court of Appeals ruled incorrectly for the following reasons: that the decision effectively

¹⁶⁹ "Voting Laws Roundup 2017" Brennan Center for Justice. March 27, 2017. Accessed May 08, 2017. <http://www.brennancenter.org/new-voting-restrictions-america>.

¹⁷⁰ “Voting Laws Roundup...”

nullified the *Shelby County* decision, that the court sets a precedent for invalidating many state election laws, and that the Fourth Circuit’s opinion exacerbates conflicts over the use of statistical evidence.

The first part of the petition was centered on how the Fourth Circuit’s opinion nullified the *Shelby County* decision. The State made the following argument:

Shelby County freed former preclearance States like North Carolina to legislate without “long-ago history”—however shameful—forever besmirching the motives of today’s legislators. At a minimum, the decision must mean that those States may adjust voting procedures as they choose—potentially in ways Section 5 would have blocked—provided they satisfy Section 2. But it cannot be consistent with a judicial approach like the Fourth Circuit’s which—openly disdainful of *Shelby County*’s result—smuggles Section 5 preclearance into Section 2. The Court should grant certiorari to resolve the conflict with *Shelby County*.¹⁷¹

To summarize, the centerpiece of the first argument was that the Court’s intervention in *NAACP v. McCrory* conflicted with the power returned to states after the *Shelby County* decision.

The second part of the State’s argument was that the Court’s decision provided a “roadmap for invalidating many state election laws.”¹⁷² This was based on the State’s interpretation that the Fourth’s Circuit ruling was incredibly “hyperbolic” and overrode the District Court’s decision.¹⁷³ More importantly, the state argued this point with three different rationales. The first rationale is that “the Fourth Circuit’s intent analysis is egregiously misguided,” meaning that the way that the Court erroneously interpreted the intent of the North Carolinian State Legislature.¹⁷⁴ The second rationale was that “the Fourth Circuit’s reasoning

¹⁷¹ North Carolina v. NAACP, *Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit* (2016), page 3-4

¹⁷² North Carolina v. NAACP, *Petition for a Writ of Certiorari*...page 4

¹⁷³ North Carolina v. NAACP, *Petition for a Writ of Certiorari*...page 4

¹⁷⁴ North Carolina v. NAACP, *Petition for a Writ of Certiorari*...page 4

would overturn numerous election laws,” meaning that the scope of the case extends far beyond the omnibus North Carolina law since it can be applied to the laws of other states.¹⁷⁵

Finally, the third part of the state’s argument was that “the Fourth Circuit’s decision exacerbates conflicts over the use of statistical evidence.”¹⁷⁶ Specifically, the State argued that the Fourth Circuit’s

Reliance on statistical disparities to evidence discriminatory intent—in the absence of discriminatory effects—conflicts with decisions of the Sixth, Seventh, and Ninth Circuits holding that such evidence does not demonstrate discriminatory effects. It is also in tension with a Fifth Circuit decision indicating that such evidence can demonstrate intent where discriminatory effect is proven.¹⁷⁷

In other words, the State argues that different courts have decided similar cases in conflict with each other, and because of those discrepancies the North Carolina case merits the review by the Supreme Court.

The Solicitor General of the United States under President Obama also filed a Brief for the United States in Opposition to the State of North Carolina. It was their argument that:

The court of appeals correctly held, based largely on undisputed evidence, that the challenged provisions of HB 589 were enacted at least in part for a discriminatory purpose, and that the district court’s contrary finding was clearly erroneous. In reaching that conclusion, the court faithfully followed well-settled precedent, and its fact-bound conclusion does not warrant this Court’s review. Contrary to petitioners’ assertions, the decision below does not conflict with any decision of this Court or of another court of appeals.¹⁷⁸

At the core of the Solicitor General’s argument was that the Fourth Circuit appropriately used evidence to determine that the Legislature targeted African Americans with surgical precision.

However, it is important to note that, as mentioned before, the Solicitor General under President

¹⁷⁵ North Carolina v. NAACP, *Petition for a Writ of Certiorari*...page 7

¹⁷⁶ North Carolina v. NAACP, *Petition for a Writ of Certiorari*...page 11

¹⁷⁷ North Carolina v. NAACP, *Petition for a Writ of Certiorari*...page 11-12

¹⁷⁸ North Carolina v. NAACP, “On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit” Brief in Opposition. No. 16-833. (2017).

Barack Obama, not President Trump, wrote this Brief. This is significant because this brief represents the views of the “United States” but more importantly, the President’s views and those of the previous Justice Department. This means that the views of Justice Department, led by Attorney General Sessions, could quite drastically change under the Trump Administration. However, they have not yet changed, and this is especially important of note because the Supreme Court has not yet accepted the State’s Writ for Certiorari.

CHAPTER FIVE: THE FUTURE OF VOTING RIGHTS

The storied past of voting rights in the United States makes it challenging to determine if the future will be bright for our most vulnerable citizens. This chapter examines the role that the federal government could play in the future of voting rights. Given the character of the newly made nine-person Supreme Court, the new Trump administration, and Congress, it is unlikely that the choices and policies that they will be supporting will strengthen voting rights or the Voting Rights Act in the future.

This chapter also analyzes the concept of voter fraud, the argument most often made in support of the need for stricter election laws. The evidence to date suggests that despite all of the rhetoric being spewed about voter fraud, it is virtually non-existent in our elections today, and is merely used as a political tool for conservative lawmakers. Finally, this chapter ends with conclusions and some potential public policy recommendations in order to restore equity to voting procedures in America so that minority voters will be free from discrimination.

I. Gorsuch and Supreme Court Projections

On April 7th, 2017, the United States Senate confirmed Neil Gorsuch as the 113th Justice of the Supreme Court.¹⁷⁹ Gorsuch's confirmation was the final chapter of a "political brawl" between Democrats and Republicans who wanted to fill the vacant Supreme Court seat prompted by the death of Justice Antonin Scalia on February 13th, 2016. Conflict over a replacement intensified because he died during an election year and Senate Majority Leader announced that

¹⁷⁹ Liptak, Adam, and Matt Flegenheimer. "Neil Gorsuch Confirmed by Senate as Supreme Court Justice." *The New York Times*, April 7, 2017. <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

he would not allow for hearings of any nominee to the Court.¹⁸⁰ The current Court could be highly influential when addressing the future of voting rights in the United States, and Gorsuch, according to a report in *The Nation*, “could be the deciding vote on whether to weaken the remaining sections of the VRA and whether to uphold discriminatory voter-ID laws and redistricting plans from states like North Carolina and Texas. In many ways, the fate of voting rights in the United States hangs on this nomination.”¹⁸¹ Justice Gorsuch is a product of The Federalist Society and subscribes to originalism, a legal philosophy that has a strict interpretation of the Constitution and usually upholds conservative policies.¹⁸²

It hard to predict how Justice Gorsuch will decide on voting rights cases, and specifically on the Voting Rights Act. The challenge is that he has next to no track record of decision-making on the issue. *New York Times* reporters observed that “Judge Neil Gorsuch, Trump's nominee for the Supreme Court has next to no track record on voting rights but is a staunch conservative and could join the court in time to hear an upcoming round of challenges to restrictive new laws.”¹⁸³ This challenge is also heightened by the fact that: “During 20 hours of questioning from senators during his confirmation hearings last month, Judge Gorsuch said almost nothing of substance. He presented himself as a folksy servant of neutral legal principles, and senators had little success in eliciting anything but canned answers.”¹⁸⁴

¹⁸⁰ Liptak and Flegenheimer, “Neil Gorsuch Confirmed...”; Liptak, Adam. “Antonin Scalia, Justice on the Supreme Court, Dies at 79.” *The New York Times*, February 13, 2016. <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

¹⁸¹ Berman, Ari. “In E-Mails, Neil Gorsuch Praised a Leading Republican Activist Behind Voter Suppression Efforts.” *The Nation*, March 17, 2017. <https://www.thenation.com/article/in-emails-neil-gorsuch-praised-a-leading-republican-activist-behind-voter-suppression-efforts/>.

¹⁸² Liptak and Flegenheimer, “Neil Gorsuch Confirmed...”

¹⁸³ Williams, Joseph P. “Voting Rights in the Balance.” *US News & World Report*, March 17, 2017. <https://www.usnews.com/news/the-report/articles/2017-03-17/trump-sessions-gorsuch-and-the-new-battle-over-voting-rights>.

¹⁸⁴ Liptak and Flegenheimer, “Neil Gorsuch Confirmed...”

However, while there may not be much tangible judicial history on how Gorsuch has ruled in previous cases regarding voting rights as a Judge on the 10th Circuit Court, his judicial philosophy and ties to conservatives may indicate how Gorsuch would vote on voting rights cases in the future. Gorsuch is an originalist, just like Antonin Scalia and, “Gorsuch has already cited Justice Antonin Scalia as a role model.”¹⁸⁵ Now we do have a record on how Justice Scalia has voted on cases regarding voting rights, and in fact he sided with the Majority Opinion of the Court in 2013 when striking down Sections 4(b) and 5. Scalia said “the Voting Rights Act had led to a ‘perpetuation of racial entitlement.’”¹⁸⁶ Scalia’s decisions suggest that, “Gorsuch... could be the deciding vote on whether to weaken the remaining sections of the VRA and whether to uphold discriminatory voter-ID laws and redistricting plans from states like North Carolina and Texas.”¹⁸⁷

Additionally, it was revealed that Gorsuch has ties to Hans von Spakovsky, former member of the Federal Elections Commission and current Manager of the Election Law Reform Initiative and Senior Legal Fellow at the Meese Center for Legal and Judicial Studies at the Heritage Foundation. We know that,

von Spakovsky has argued against that the Voting Rights Act was ‘constitutionally dubious at the time of its enactment’ and praised Trump’s promised investigation into voter fraud, which has been widely panned by Democrats and Republicans. ‘The real problem in our election system is that we don’t really know to what extent President Trump’s claim is true because we have an election system that is based on the honor system’, he wrote with John Fund after Trump said with no evidence that 3 million to 5 million people voted illegally.¹⁸⁸

¹⁸⁵ Berman, “In E-Mails, Neil Gorsuch...”

¹⁸⁶ Berman, “In E-Mails, Neil Gorsuch...”

¹⁸⁷ Berman, “In E-Mails, Neil Gorsuch...”

¹⁸⁸ Berman, “In E-Mails, Neil Gorsuch...”

The lack of a Gorsuch record on voting rights cases, paired with his originalist ideology, and ties to those who suspect that voter fraud is rampant in this country serve as potential indicators of how Gorsuch will vote on voting rights cases. With Gorsuch not only filling the vacancy on the Supreme Court, but on the very Court that decided the *Shelby County* decision eroding the Voting Rights Act, he is likely to vote as Scalia did if future cases are under review. These cases might also challenge Sections 4(b) and 5 as unconstitutional, or argue that individual states' election law changes are needed to prevent problems such as voter fraud.

In the meantime, all eyes will be on Justice Anthony Kennedy, a conservative who voted with the majority in the *Shelby* case but sometimes sides with the court's four-member liberal bloc. The American Constitution Society's Fredrickson says Kennedy seems to have moved from the far right to the center, particularly on cases involving racial bias, but his views on voting rights are difficult to anticipate.¹⁸⁹

For voting rights advocates, “The slender hope remaining is that—faced with clear evidence of discrimination—Justice Kennedy will vote to strike it down.”¹⁹⁰

II. President Trump and Voting Rights

Voting, voting rights, and voter fraud were all of grave concern to Donald Trump throughout the duration of his presidential campaign and while serving as President. As a campaigner, then candidate Trump made repeated claims of rampant voter fraud, specifically that undocumented citizens would vote in the election and that they would steal the election from him. As the victor in the 2016 election, Trump continued to make the charge that spread that

¹⁸⁹ Williams, “Voting Rights in the...”

¹⁹⁰ Patterson, Richard North. “Supreme Court Nominee Threatens Voter Rights.” *The Boston Globe*, February 1, 2017. <https://www.bostonglobe.com/opinion/2017/02/01/supreme-court-nominee-threatens-voter-rights/Z1jqcKqTg0QC7xqt2F8zVM/story.html>.

millions voted illegally in the election thereby contributing to his lack of a popular vote win. Remarkably, despite all of these claims, there is no evidence to support them.

This issue was of great concern to President Trump, and this is precisely why “[he] used his first official meeting with congressional leaders...to falsely claim that millions of unauthorized immigrants had robbed him of a popular vote majority, a return to his obsession with the election’s results even as he seeks support for his legislative agenda.”¹⁹¹ But despite President Trump’s repeated assertions about the 2016 election, experts have struggled to understand why he continues to discuss the issue at all, especially given the fact that he seems to be fighting this battle nearly alone. Moreover, “...The vast majority of those in Trump’s party share the view of House Speaker Paul D. Ryan (R-Wis.), who told reporters...that he has seen no evidence to buttress what Trump said at a meeting with the bipartisan congressional leadership...at the White House.”¹⁹² Some congressmen have even gone as far as to say that Trump’s rhetoric could be damaging to his presidency. In fact, “Sen. Lindsey O. Graham (R-S.C.) implored Trump to stop repeating the indefensible. He said Trump could find himself in a situation where he undermines his own credibility. People will begin to doubt what Trump says, Graham warned.”¹⁹³

But while the issue is of great concern to President Trump, there is little evidence to support his claims. The assertions made about rampant voter fraud have been disproven, but are relevant because Trump continuously said on numerous occasions that between 3 and 5 million

¹⁹¹ Shear, Michael D., and Emmarie Huetteman. “Trump Repeats Lie About Popular Vote in Meeting With Lawmakers.” *The New York Times*, January 23, 2017.

<https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html>.

¹⁹² Balz, Dan. “Trump’s Voter Fraud Claims Undermine the Democratic Process and His Presidency.” *The Washington Post*, January 25, 2017.

https://www.washingtonpost.com/politics/trumps-voter-fraud-claims-undermine-the-voting-system-and-his-presidency/2017/01/24/a71d58ee-e288-11e6-a453-19ec4b3d09ba_story.html.

¹⁹³ Balz, “Trump’s Voter Fraud...”

people could have voted illegally in the 2016 election.¹⁹⁴ However, “voting officials across the country have said there is virtually no evidence of people voting illegally, and certainly not millions of them.”¹⁹⁵ And when the Trump administration has been pressured to respond to what voting officials and experts on voting have to say, “White House officials [do] not respond to requests for a comment on Mr. Trump’s discussion of the issue.”¹⁹⁶ Sean Spicer, the White House Press Secretary, has said, “I think the president has believed that for a while based on studies and information he has.”¹⁹⁷ It is important to note that those studies have not been shared with fact checkers, voting rights experts, or the public at large, as they are not supported by any data.

Separately from President Trump’s false assertions, that are not supported by data or other evidence, Trump has not discussed the Voting Rights Act in explicit terms, nor has he issued any opinions on the *Shelby County* decision. While he has not discussed the decision, perhaps the best indication of how Trump views the Voting Rights Act and the *Shelby County* decision would be his appointment of former Senator Jeff Sessions to be Attorney General of the United States.

As a United States attorney in the 1980s, Jeff Sessions, Mr. Trump’s choice for attorney general, charged black civil rights activists in Alabama with voter fraud. (They were acquitted.) He has called the Voting Rights Act ‘a piece of intrusive legislation’, and supported the Supreme Court’s *Shelby* decision, saying “if you go to Alabama, Georgia, North Carolina, people aren’t being denied the vote because of the color of their skin.”¹⁹⁸

¹⁹⁴ Fandos, Nicholas. “Trump Won’t Back Down From His Voting Fraud Lie. Here Are the Facts.” *The New York Times*, January 24, 2017. <https://www.nytimes.com/2017/01/24/us/politics/unauthorized-immigrant-voting-trump-lie.html>.

¹⁹⁵ Balz, “Trump’s Voter Fraud...”

¹⁹⁶ Balz, “Trump’s Voter Fraud...”

¹⁹⁷ Fandos, “Trump Won’t Back...”

¹⁹⁸ Berman, Ari. “Voting Rights in the Age of Trump.” *The New York Times*, November 19, 2016. <https://www.nytimes.com/2016/11/22/opinion/voting-rights-in-the-age-of-trump.html>.

If that was not sufficient in explaining Attorney General Sessions' views on the Voting Rights Act, when applying the law today, "just after taking office, Sessions made a big change to an ongoing Justice Department challenge of Texas's new voter ID law late last month: He decided not to argue that Texas passed the law to discriminate against minority voters. If a judge agreed, the contention could have forced the state to get federal permission before making changes to voting laws."¹⁹⁹

It is fair to speculate that Attorney General Sessions is not the most ardent supporter of the Voting Rights Act, as he has enthusiastically supported the outcome of the *Shelby County* decision. Because Trump has no record with the Voting Rights Act or the *Shelby County* decision, the appointment of Jeff Sessions and his past history of opposing voting rights indicates that Trump will likely be unwilling to support policies that expand peoples access to voting or strengthen the Voting Rights Act.

III. Congressional Response to *Shelby County* and Enforcement Challenges

As mentioned in the first chapter of this thesis, prior to the *Shelby County* decision there was broad congressional support for the Voting Rights Act (VRA) in its entirety. Again, in 2006 the VRA was reauthorized by a vote of 390-33 in the House and a 98-0 vote in the Senate where the law was extended for an additional 25 years with the broadest support the Act has ever achieved.²⁰⁰ However, the *Shelby County* decision of 2013 held Section 4(b) of the VRA unconstitutional, thus nullifying Section 5, and by doing so, the Court held that the law Congress renewed in 2006, with overwhelming support, did not justify the current needs of the time. So, after the *Shelby County* decision, Congress attempted to reinstate the law in its entirety with a

¹⁹⁹ Williams, "Voting Rights in the..."

²⁰⁰ Congressional Research Service Article Page 22

new formula that would take into account new data and conditions instead of relying on the original calculations. It is noteworthy that Congress ultimately has not acted upon the new bipartisan legislation.

Although there have been two restoration efforts since the *Shelby County* decision, and both of them have had bipartisan support, they have been met with much more opposition than in the past. A 2014 bill was supported because

In accordance with the Court’s recommendations in *Shelby County*, the proposed Amendment to the Act would impose burdens that are justified by the current needs. Current statistics were used to determine which jurisdictions would be added or removed from preclearance coverage. With the new formula, only Georgia, Louisiana, Mississippi, and Texas would be placed back on the preclearance requirement.²⁰¹

For some, this constituted a fair compromise and included fewer covered jurisdictions than in the past. Others, typically on the more progressive end of the political spectrum, argued that the new coverage formula did not go far enough to protect or enforce equal voting. Critics thought that “Congress must structure the new preclearance formula around the number of successful Section 5 objection determinations interposed by the Department of Justice over a twenty-year period plus the number of dismissals of voting changes by the District Court of the District of Columbia” because it wouldn’t appropriately solve the problems posed without preclearance.²⁰² Regardless of the political interpretations of 2014 bill, it was acted upon due to the deeply polarized and partisan divide that characterizes today’s Congress. The same thing goes for the 2015 version.

²⁰¹ Oluoma Kas-Osoka, *A New Preclearance Coverage Formula: Renewing the Promise of the Voting Rights Act*, 47 Wash. U. J. L. & Pol’y 151 (2015), http://openscholarship.wustl.edu/law_journal_law_policy/vol47/iss1/13

²⁰² Oluoma Kas-Osoka, *A New Preclearance...*

The 2015 version of the Voting Rights Amendment Act was the same bill that never was brought to the floor of either chamber in 2014. This time, however, the difference was that there was a legislative push by the sponsors of the bill including Democratic Senator Patrick Leahy, Democratic Representative John Conyers Jr., and Republican Representative Jim Sensenbrenner. Congressman Sensenbrenner took his support straight to the *Washington Post* in an opinion piece days before the 2016 election, arguing that:

This bill offers a modern and thoughtful response to voter discrimination that ensures the minimal possible federal interference in state elections. Unfortunately, despite the legislation having more than 100 co-sponsors, Congress still has not acted on it. If opponents take issue with the details of how preclearance would operate or the way the bill defines consistent discrimination, I will happily work with them on changes. But to not act at all suggests they believe that Congress should not allow federal oversight of local elections no matter how discriminatory and unfair those elections are. I do not believe that is an acceptable position.²⁰³

So far in this legislative year, Congress has still not acted on this bill, at least in part because Republicans may prefer to await the ultimate disposition of the North Carolina case.

While it is disheartening that Congress will not act on the issue now, this is not to say that Congress will not act in the future. The majority party in power will mostly drive action on this issue, and in the past, we have seen Democrats take the lead to eliminate discrimination in voting laws. A new law may have to wait until Democrats again become the majority in Congress. It is important to note that Congress is the branch of government that is responsible for implementation of laws, so if there is to be a restoration of a strong Voting Rights Act, Congress must legislate.

²⁰³ Sensenbrenner, Jim. "Without a Modernized Voting Rights Act, There's No Such Thing as an Honest Election." *The Washington Post*, November 2, 2016. https://www.washingtonpost.com/opinions/without-a-modernized-voting-rights-act-theres-no-such-thing-as-an-honest-election/2016/11/02/ba1cb138-a06b-11e6-8832-23a007c77bb4_story.html?utm_term=.b3bbbfb4107d.

IV. The “Problem” of Voter Fraud

The most prevalent conservative argument that was used in the North Carolina case, and many other states that have passed more restrictive voting measures since the *Shelby County* decision, was that the voting changes are necessary to prevent voter fraud. In fact, conservative politicians at every level and in a variety of capacities, including by President Trump, Attorney General Sessions, and numerous conservative members of state legislatures have uttered this claim. Voter fraud is something that everyone should be trying to prevent because a system rampant with voter fraud would undermine a legitimate democracy. However, the threat in the United States is non-existent, and the conservative argument can produce no evidence to support its claims.

As reported at *Vox*, “Loyola University law professor Justin Levitt tried to quantify the epidemic of voter ID fraud that's forcing so many states to pass restrictive voter ID laws. He looked for not only cases where someone was convicted, but tracked ‘any specific, credible allegation that someone may have pretended to be someone else at the polls, in any way that an ID law could fix.’”²⁰⁴ In addition,

So far, [he’s] found about 31 different incidents (some of which involve multiple ballots) since 2000, anywhere in the country. If you want to check my work, you can read a comprehensive list of the incidents below. To put this in perspective, the 31 incidents below come in the context of general, primary, special, and municipal elections from 2000 through 2014. In general and primary elections alone, more than 1 billion ballots were cast in that period.²⁰⁵

So, there was virtually no voter fraud throughout recent history, and the same held true for 2016.

²⁰⁴ Klein, Ezra. “Voter ID Laws Fix a Fake Problem by Creating a Real One.” *Vox*, December 21, 2014. <https://www.vox.com/2014/8/7/5979377/voter-id-laws-fix-a-fake-problem-by-creating-a-real-one>.

²⁰⁵ Levitt, Justin. “A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast.” *The Washington Post*, August 6, 2014. <https://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/>.

The Republican-nominated chair of the U.S. Election Assistance Commission, an independent, bipartisan agency, said that voter fraud is ‘not widespread’ and ‘not an epidemic’ while simultaneously playing down concerns about voter suppression. ‘The reality—and this data and information comes from those who directly run elections—is that the state and local election officials, and specifically the secretaries of state across the country that looked into it, find that fraud happens’, Matthew Masterson said in an interview with the Center for Public Integrity.²⁰⁶

Without the evidence to substantiate claims of rampant voter fraud in our democracy, it becomes a difficult position to support. Furthermore, without the evidence to support claims of voter fraud, the most commonly used argument to support restrictive voting measures thus becomes moot, and highlights how in places like North Carolina conservative lawmakers who pass restrictive voting measures with near “surgical precision” do so in order to discriminate against minorities who threaten their power.

V. Conclusions

As this thesis has shown, in the wake of the *Shelby County* decision, conservative lawmakers in states as well as political subdivisions that were previously covered by Sections 4(b) and 5 of the Voting Rights Act have passed laws that impose restrictive voting measures targeted at discriminating against the poor and racial minorities in order to maintain political power. This has been most prevalent in states with changing voter demographics and key political swing states, such as North Carolina, Texas, and Wisconsin. With only Section 2 of the Voting Rights Act still in place, plaintiffs face a much higher legal burden in cases against states or political subdivisions to prove that laws were passed with discriminatory intent. This is the case because the laws have already been implemented due to the removal of preclearance and

²⁰⁶ Sneed, Tierney. “GOP-Nominated Top Elections Official: Voter Fraud Is ‘Not Widespread.’” *Talking Points Memo*, April 14, 2017. <http://talkingpointsmemo.com/livewire/elections-assistance-commission-chair-matthew-masterson-voter-fraud-not-widespread>.

approval required under Sections 4(b) and 5 of the Voting Rights Act. Given the likely policies of the current Trump presidency, conservative-leaning Supreme Court, and Republican led Congress, it is unlikely that greater legal and policy support for voting rights will be forthcoming. That said, there are measures that can be taken in order to restore integrity and equality to our voting system, which include:

- A full restoration of the Voting Rights Act in the version reauthorized by Congress just over 10 years ago in 2006, which Congress had reauthorized for 25 years.
- After observing the Russian influence in the 2016 election, the Voting Rights Act could be a potential place where the federal government could regulate, via amendments to the Act, voting devices, ballots cast, and other ways that a foreign actor could influence an election. We are still unsure about the extent to which the Russians infiltrated the 2016 election, but if there were oversight or preventative measures in place, such as an Amendment to the Voting Rights Act, the extent could be clarified and prevented in the future.

After considering my primary research question about the extent to which the *Shelby County* decision undermined equal voting rights in the United States and the principle of equal voting, I draw a few final conclusions. First, the *Shelby County* decision severely undermined equal voting rights and the principle of equal voting in the United States. Second, the *Shelby County* decision eroded the most fundamental right in a democracy, the right to vote. We saw our most vulnerable citizens targeted in order to reduce the chances of Democrats winning elections, which is indisputably unjust. In her dissent in the *Shelby County* decision, Justice Ginsburg said it best: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”²⁰⁷ All advocates of fair and equal voting rights should take inspiration from her words.

²⁰⁷ Shelby County Dissenting Opinion Page 33

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