

The Voting Rights Act, *Shelby County*, and Redistricting:
Improving Estimates of Racially Polarized Voting in a Multiple-Election Context

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To my grandmother, who gave me purpose,
my mother, who gave me passion,
and my sister, who has made pursuing both possible.

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Abstract

The Supreme Court's decision in *Shelby County* has severely limited the power of the Voting Rights Act. I argue that Congressional attempts to pass a new coverage formula are unlikely to gain the necessary Republican support. Instead, I propose a new strategy that takes a "carrot and stick" approach. As the stick, I suggest amending Section 3 to eliminate the need to prove that discrimination was intentional. For the carrot, I envision a competitive grant program similar to the highly successful Race to the Top education grants. I argue that this plan could pass the currently divided Congress.

Without Congressional action, Section 2 is more important than ever before. A successful Section 2 suit requires evidence that voting in the jurisdiction is racially polarized. Accurately and objectively assessing the level of polarization has been and continues to be a challenge for experts. Existing ecological inference methods require estimating polarization levels in individual elections. This is a problem because the Courts want to see a history of polarization across elections.

I propose a new 2-step method to estimate racially polarized voting in a multi-election context. The procedure builds upon the Rosen, Jiang, King, and Tanner (2001) multinomial-Dirichlet model. After obtaining election-specific estimates, I suggest regressing those results on election-specific variables, namely candidate quality, incumbency, and ethnicity of the minority candidate of choice. This allows researchers to estimate the baseline level of support for candidates of choice and test whether the ethnicity of the candidates affected how voters cast their ballots.

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Chapter 1

Introduction

Since the Supreme Court's landmark decision in *Shelby County v. Holder*, which found the Section 4 coverage formula for preclearance unconstitutional, numerous proposals for Congressional action have been suggested. Two of the main proposals, amending Section 3 and revising Section 4, have been combined in a bill currently before Congress, the Voting Rights Amendments of 2014. The bill has stalled in committee and has few Republican allies.¹ To reignite the momentum to pass the bill, I suggest abandoning efforts to revise Section 4. The coverage formula, any coverage formula, is simply too controversial among Republicans who see it as lingering punishment for the Civil War. Instead, I argue that the Section 3 amendment should be coupled with a competitive grant program to incentivize states to voluntarily reform their election procedures. Such a program could encourage states to shorten wait times at polling places and reduce the burden that voter identification laws place on voters.

Until Congress acts, the remaining provisions of the Voting Rights Act are more important than ever before. Because Section 3 requires proving that a jurisdiction has discriminated *intentionally*, it will only be useful against a very small number of jurisdictions. Most of the cases brought under the Voting Rights Act, in its present form,

¹ Indeed, the bill has even fewer allies after Eric Cantor's primary loss. Any hopes that the bill would pass quickly were based on his support.

will be based on violations of Section 2. Doing so will require estimates of racially polarized voting.

Unfortunately, such estimates are difficult to obtain and courts have been wary of sanctioning statistically advanced methods. Additionally, no agreement exists over how to select which elections to study. Some consultants analyze every election over the period in question. Others select a subset of elections, but this can raise allegations of cherry-picking data. Cherry-picking is especially tempting in litigation, where the data is being analyzed by consultants paid by the plaintiffs or defendants. These consultants clearly have a conflict of interest when picking which elections to include in their reports to the courts. The problem with increasing the number of elections studied is that estimates often differ between elections. If the results from one election display racially polarized voting but results from another do not, what conclusion should be reached? Currently, no method for aggregating the estimates across elections exists. This paper seeks to provide a first step toward creating such a method.

I propose using a 2-step method to estimate racially polarized voting in a multi-election context. In the first step, I obtain election-specific estimates of racially polarized voting using the Rosen, Jiang, King, and Tanner (2001) multinomial-Dirichlet model. In the second step, I regress these election results on election-level variables, specifically candidate quality, incumbency, and ethnicity of the minority candidate of choice. This allows me to estimate the baseline level of support for candidates of choice and test whether the ethnicity of the candidates affected how voters cast their ballots.

In Chapter 2, I discuss the history of the Voting Rights Act and litigation prior to *Shelby*. I begin by discussing Jim Crow laws and the context of the passage of the Voting

Rights Act. I look at the debate in Congress surrounding each reauthorization and notable court cases that followed each reauthorization. The Supreme Court's strong suggestions in *NAMUDNO* that the Voting Rights Act was unconstitutional are discussed. Additionally, I consider the effect of the Voting Rights Act on minority voting and the ancillary laws that have subsequently been passed.

In the third chapter, I discuss the facts behind *Shelby* and the Court's holding. I begin by discussing the background of the case and the key questions that, prior to the decision, I posited might be pivotal to the Court's holding. I include my own predictions of how the Justices would rule, where I accurately predicted that Section 4 and only Section 4 would be found unconstitutional. I then analyze the majority and minority opinions.

In the fourth chapter, I discuss developments since *Shelby* and suggest a new path for Congressional action. I begin by detailing how states, the Department of Justice, and Congress have reacted to the decision. Then, I evaluate proposals to amend Section 3 and Section 4. I conclude that the former is politically viable but the latter is a political nonstarter. I propose taking a "carrot and stick" approach. Amending Section 3 serves as a "stick" to punish jurisdictions that discriminate. I recommend creating a competitive grant program to reward districts for improving voting procedures as the "carrot." I argue that this could pass Congress during the lame duck session.

In Chapter 5, I discuss why estimates of racially polarized voting are needed from a legal standpoint. First, I explain the constitutional requirement to reapportion Congressional districts and the Supreme Court cases that caused the need for equal population districts. Then, I discuss how the Voting Rights Act regulates redistricting

and the specific requirements to satisfy Section 2. I look at the Supreme Court's three-prong test for determining when majority-minority districts should be drawn and highlight the difficulty of estimating one of those prongs, racially polarized voting.

In Chapter 6, I discuss the general ecological inference problem and the most commonly used methods of estimating racially polarized voting. I explain why estimating rates of crossover voting poses an ecological inference problem. Then, I discuss several commonly used methods to estimate racially polarized voting: homogenous precinct analysis, Goodman's Ecological Regression, double regression, King's Ecological Inference, and the multinomial-Dirichlet model.

In the seventh chapter, I explain the method that I propose for estimating racially polarized voting in a multiple-election context. This method improves upon existing methods that first estimate elections separately and then rely on experts to interpret the results across elections. Instead, I suggest adding an additional step that considers election-specific factors that may have influenced how voters cast their ballots.

In Chapter 8, I apply the method proposed in Chapter 7 to data from Los Angeles County. I look specifically at Supervisorial District 3, where voting has previously been shown to be racially polarized. I examine 10 elections and find that a multi-election analysis shows that voting is not racially polarized. More specifically, I find evidence that Hispanics vote as a bloc for Hispanics, but I do not find that non-Hispanics vote as a bloc to defeat the Hispanic candidate of choice.

Finally, I conclude in Chapter 9 and recommend requiring law school students to take a quantitative methods class to equip future judges to evaluate statistical evidence.

Chapter 2

The Long and Winding Road: A Legislative and Judicial History of the Voting Rights Act

2.1 Overview

The Voting Rights Act has had a long and winding legislative and judicial history. In this chapter, I present that history and explain how the most important provisions of this landmark civil rights legislation have changed over time. Understanding this background is essential in order to grasp the relevance and impact of recent challenges to the law.

2.2 Introduction

The Voting Rights Act has been reauthorized, amended, and reinterpreted on numerous occasions in the nearly 50 years since its passage. Over time, the relative power of its individual provisions has shifted. Initially, the Supreme Court interpreted Section 5 broadly, making it the section most commonly litigated under. When the Supreme Court narrowly interpreted Section 2 in 1980, Congress quickly responded by strengthening Section 2 in the 1982 reauthorization. At the same time, the Court began narrowly interpreting Section 5. As a result, Section 2 became the section most commonly litigated under. After the Court further narrowed Section 5 in 2003, Congress

responded by strengthening Section 5 in the 2006 reauthorization. Although the power of the individual provisions of the Voting Rights Act has varied, Congress has repeatedly strengthened the VRA.

Congress's repeated efforts to strengthen the VRA, despite judicial challenges, are important because they demonstrate Congress's commitment to strong protections of minority voting rights. Congress could have allowed most of the provisions of the law to lapse by failing to reauthorize the law. Alternatively, Congress could have reauthorized a weak voting rights act, by not revising it to overcome narrow judicial interpretations. Instead, Congress repeatedly reauthorized and strengthened the Voting Rights Act.

This chapter begins, in Section 2.3, with an overview of minority voting rights prior to the landmark passage of the Voting Rights Act in 1965. Section 2.4 discusses the original Voting Rights Act and legal challenges to it. Section 2.5 covers the first reauthorization, in 1970, and subsequent legal challenges. The 1975 authorization and legal challenges to it are discussed in Section 2.6. In Section 2.7, the 1982 reauthorization is laid out along with relevant legal challenges. The most recent reauthorization and judicial challenges are discussed in Section 2.8. Section 2.9 discusses the legacy of the Voting Rights Act and ancillary voting rights laws. Finally, Section 2.10 concludes.

2.3 Minority Voting Before the Voting Rights Act

Initially after the Civil War, Black voter turnout was extraordinarily high. In many Southern states, including Alabama, Mississippi, and Louisiana, Blacks constituted

a majority of the electorate.² In many elections, Black voter turnout reached rates as high as 90 percent.³ Black voting rates remained high even after reconstruction military forces left the Southern states.⁴ For example, two out of three Black men voted in the 1880 presidential election.⁵ Additionally, Blacks were extremely successful at winning political offices. From 1878 to 1900, twenty Blacks were elected to Congress, all from majority Black districts.⁶ In the 44th Congress, there were eight Black representatives.⁷

After passing the Thirteenth Amendment freeing the slaves, Congress enacted additional laws and amendments to protect the rights of Blacks. Congress passed the Civil Rights Act of 1866 to combat the Black Codes that many southern legislatures had enacted, some of which went as far as requiring freed slaves to work for their former masters, essentially continuing slavery.⁸ The act said that all citizens, regardless of color, had the right to sue, give evidence, hold property, and enjoy equal benefit of all laws for the security of person and property.⁹ Fearing that a future Congress could repeal these rights, its proponents began a push to solidify these rights into a constitutional amendment, which ultimately became the Fourteenth Amendment.¹⁰ The amendment declared “all persons born or naturalized in the United States, and subject to the

² Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, Const. Comment. 17:295, 299-300 (2000).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Katherine Tate, *Black Faces in the Mirror* 51 (2003).

⁷ Carol M. Swain, *Black Faces, Black Interest: The Representation of African Americans in Congress* 21. (2006).

⁸ Eugene Gressman. *The Unhappy History of Civil Rights Legislation*, Mich. L. Rev. 50:8 1323, 1325 (1952).

⁹ *Id.* at 1328.

¹⁰ *Id.*

jurisdiction thereof, are citizens.”¹¹ Additionally, all citizens were guaranteed due process and equal protection.¹²

Less than two years after the Fourteenth Amendment’s guarantees of equal protection were ratified in 1868, the Fifteenth Amendment was ratified, providing that “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.”¹³ Both amendments granted Congress the right to enforce them “by appropriate legislation.”¹⁴ Congress exercised this power quickly with the passage of the Civil Rights Act of 1870.¹⁵ In addition to reenacting the provisions of the 1866 law, the new act criminalized interfering with a citizen’s right to vote and made the use of intimidation to hinder the enjoyment of any Constitutional right a felony.¹⁶ In 1871, Congress passed the Ku Klux Klan Act to establish civil and criminal penalties to combat the rise of the Klan, but it was later overturned by the Supreme Court.¹⁷

In 1875, Congress passed another civil rights act to “protect all citizens in their civil and legal rights.”¹⁸ The first two sections of the law required all places of public amusement to open their accommodations and privileges to citizens of every race and gave anyone denied access the right to recover \$500 for each offense.¹⁹ In 1883, the Supreme Court invalidated these provisions, asserting that the Fourteenth Amendment

¹¹ U.S. Const. amend. XIV, § 1.

¹² Eugene Gressman. *The Unhappy History of Civil Rights Legislation*, Mich. L. Rev. 50:8 1323, 1328 (1952).

¹³ *Id.* at 1333.

¹⁴ *Id.* at 1334.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1340.

¹⁸ 18 Stat. L. 335.

¹⁹ Eugene Gressman. *The Unhappy History of Civil Rights Legislation*, Mich. L. Rev. 50:8 1323, 1335 (1952).

only protected Blacks from discrimination by the State, not by private individuals.²⁰ The Supreme Court's decisions overturning the Ku Klux Klan Act and the Civil Rights Act of 1875 effectively transferred the responsibility for protecting civil rights back to the states.²¹

Southern states essentially disregarded the guarantees of the Fourteenth and Fifteenth Amendments.²² They controlled Congress and were able to block efforts to enforce the amendments.²³ Southern Democrats enacted Jim Crow laws to limit the ability of Blacks to vote.²⁴ They also gerrymandered districts, switched to at-large elections, required literacy tests, enacted poll taxes, and added bond requirements for officeholders.²⁵ Additionally, they set up property qualifications, grandfather clauses, and good character clauses.²⁶ At the same time, they also passed secret-ballot laws, which disadvantaged illiterate ex-slaves, and created the white primary system.²⁷ Whenever a voter suppression method ceased to be successful, a new technique was quickly thought up.²⁸

From 1900 to 1964, Jim Crow laws were extremely successful at disenfranchising Black citizens. In Louisiana, the number of Blacks registered to vote dropped from

²⁰ *Id.* at 1340.

²¹ *Id.* at 1342.

²² Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 459 (3rd 2007).

²³ *Id.*

²⁴ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, *Tex. L. Rev.* 86(4): 670, 679 (2008).

²⁵ *Id.*

²⁶ C. Van Woodward, *The Strange Career of Jim Crow*, 84 (2002).

²⁷ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, *Tex. L. Rev.* 86(4): 670, 679 (2008).

²⁸ *Id.*

130,334 in 1896 to 1,342 in 1904.²⁹ In 1896, twenty-six Louisiana parishes had majority Black constituencies.³⁰ By 1900, Blacks were in the minority in every parish.³¹ In the first six decades of the twentieth century, Black voters were almost completely shut out of politics in the South.³² To spur Congressional action, the National Association for the Advancement of Colored People (NAACP), the Southern Christian Leadership Conference (SCLC), and the Student Non-violent Coordinating Committee (SNCC) began registration drives.³³

Congress responded by enacting two relatively weak voting rights bills in 1957 and 1960. Most notably, these bills created a Civil Rights Division at the Department of Justice and authorized that department to bring suits on behalf of citizens who were denied the right to vote on account of race.³⁴ The burden of initiating litigation was on the Justice Department or on voting rights proponents.³⁵ Such case-by-case litigation was slow and expensive.³⁶ Local election officials often resisted cooperating with Justice Department investigators by “losing” records or even resigning to quash injunctions.³⁷ Investigations took hundreds and sometimes thousands of hours.³⁸ Victories were often pyrrhic.³⁹ Even worse, after losing a voting rights case, localities would often simply

²⁹ C. Van Woodward, *The Strange Career of Jim Crow* 84 (2002).

³⁰ *Id.*

³¹ *Id.*

³² Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* 92 (2006).

³³ Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials* 37 (2008).

³⁴ Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 459 (3rd 2007).

³⁵ Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials* 37 (2008).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

replace the old, banned practice with a new practice that would reach the same result of excluding Blacks from the ballot box.⁴⁰

Southerners often circumvented federal legislation by replacing banned practices with similar methods. For example, the poll tax was considered “the most effective instrumentality” of disenfranchisement.⁴¹ By 1908, each of the eleven former Confederate states had enacted a poll tax.⁴² In an attempt to ban the practice and expand the franchise, Congress passed the 24th Amendment in 1962 to prohibit poll taxes in federal elections.⁴³ Before the amendment was even ratified by the states, the Virginia legislature quickly enacted a law to ensure poll taxes would be used in state elections.⁴⁴

Despite these Congressional attempts to stop Jim Crow laws, little progress was achieved. Between 1957 and 1964, the Justice Department filed 71 voting rights cases, but registration rates remained extremely low.⁴⁵ In 1954, 4.4 percent of Blacks were registered in Mississippi; in 1964, 6.4 percent of Mississippi Blacks were registered.⁴⁶ In Alabama, registration rates rose from 5.2 percent in 1958 to 19.4 percent in 1964.⁴⁷ The SCLC and SNCC continued their registration efforts and moved their organizations into Selma, Alabama.⁴⁸

⁴⁰ Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* 92 (2006).

⁴¹ J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 53 (1999).

⁴² *Id.*

⁴³ *24th Amendment, Banning Poll Tax, Has Been Ratified* The New York Times. January 24, 1964.

⁴⁴ *24th Amendment, Banning Poll Tax, Has Been Ratified* The New York Times. January 24, 1964.

⁴⁵ Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 459 (3rd 2007).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 460 (3rd 2007).

Their efforts came to a head on March 7, 1965, a day that would be remembered as “Bloody Sunday.”⁴⁹ John Lewis and a group of 600 people planned to march from Selma, Alabama to the state capital of Montgomery.⁵⁰ When they attempted to cross the Edmund Pettus Bridge, only six blocks from where they had started their march, they were met by dozens of Alabama state troopers and dozens more armed men.⁵¹ As the marchers reached the bottom of the bridge, the troopers charged the marchers, shooting tear gas, trampling the marchers with horses, and beating them with nightsticks and whips.⁵² The marchers attempted to retreat, scabbling back across the bridge, but the troopers went after them, attacking everyone in the streets.⁵³ That night, Americans sitting in their living rooms to watch the Sunday night movie were shocked when their program was interrupted by gruesome images of peaceful protestors bleeding and crying out in agony as white troopers beat them.⁵⁴

The nation was outraged. Protests denouncing the violence occurred in more than eighty cities.⁵⁵ President Lyndon Johnson went on national television to call for the passage of a new, stronger voting rights law. He said, “There is no Negro problem. There is no Southern problem. There is no Northern problem. There is only an American problem.”⁵⁶ Then, employing a well-known civil rights slogan to demand a strong bill from Congress, President Johnson said “We shall overcome.”⁵⁷

⁴⁹ *Id.*

⁵⁰ Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression*, 93 (2006).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 94.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials*, 37 (2008).

2.4 Passage of the Voting Rights Act of 1965 and the Supreme Court's Response

2.4.1 The Voting Rights Act of 1965

Responding to the violence in Selma, Congress quickly began considering a voting rights bill to strengthen the 14th and 15th Amendment's protections of the right to vote for minorities.⁵⁸ Senate Minority Leader Everett Dirksen began working with Attorney General Katzenbach to draft the legislation.⁵⁹ Ten days after Bloody Sunday, a bill was introduced in Congress and cosponsored by Senate Majority Leader Mike Mansfield and Senate Minority leader Everett Dirksen.⁶⁰ In a strong bipartisan demonstration of support, the bill ultimately had 66 cosponsors in the Senate.⁶¹

Despite the overwhelming number of Senators supporting the bill, the opposition was fierce.⁶² To prevent the chair of the Senate Judiciary Committee, Mississippi Senator James Eastland, from killing the bill in committee, the Senate had to pass a motion to require the committee to report the bill out of committee by April 9.⁶³ As the bill was being debated by the full Senate, Senator Strom Thurmond declared that passage of the bill would cause "despotism and tyranny."⁶⁴ Southern Senators offered several

⁵⁸ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, Tex. L. Rev. 86(4): 670, 681 (2008).

⁵⁹ Gary May, *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* 96 (2013).

⁶⁰ *Id.* at 150.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

amendments in an attempt to weaken the bill, but none of the amendment passed.⁶⁵ On May 29, the Senate passed the Voting Rights Act by a vote of 77-19.⁶⁶

In the House, opponents of the bill slowed its progress through committees. Full House debate did not start until the beginning of July.⁶⁷ In an attempt to kill the strong Voting Rights Act that had passed the Senate, House Republicans offered an alternative, weaker bill that would have empowered the Attorney General to appoint federal registrars and imposed a nationwide ban on literacy tests.⁶⁸ That bill died by a vote of 171-248 on July 9 and the Voting Rights Act was passed that same night by a vote of 333-85.⁶⁹ The House approved the conference committee version of the bill on August 3 and the Senate passed the bill the following day.⁷⁰ On August 6, President Johnson signed the Voting Rights Act of 1965.⁷¹

The law gave the federal government broad new powers to end the discriminatory voting practices that were used to disenfranchise minority voters. Section 2 banned any practice in any jurisdiction that denied or abridged of the right to vote.⁷² Unlike Sections 4-9, Section 2 was permanent.⁷³ Because Section 2 essentially just restated the 15th Amendment, most of the new federal powers to limit discrimination came from Sections 4 and 5.⁷⁴

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 163.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 53 (1999).

⁷² VRA § 2, 42 U.S.C. § 1973 (2006).

⁷³ *Id.*

⁷⁴ Luis Fuentes-Rohwer, *The Future of Section 2 of the VRA in the Hands of a Conservative Court* Duke J. Const. L. 5:125-158, 129.

Sections 4-9 were only applicable to the states included in Section 4's coverage formula.⁷⁵ That formula included states and localities that used a literacy or other test as a condition for registering or voting in 1964 and in which less than half of the voting age population voted in the 1964 presidential election.⁷⁶ This resulted in Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and large parts of North Carolina being covered.⁷⁷ Initially, Sections 4-9 were scheduled to expire in 1970.⁷⁸

Section 5 required states and localities to obtain "preclearance" of "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" from either the attorney general or the U.S. District Court for the District of Columbia.⁷⁹ If preclearance were denied by the attorney general, it could still be sought from the judiciary.⁸⁰ The preclearance requirement was needed because, as the House Judiciary Committee declared, "[b]arring one contrivance too often has caused no change in result, only in methods."⁸¹ Sections 6 through 9 allowed the Attorney General to request federal registrars and election observer to assure nondiscriminatory election administration in jurisdictions covered by Section 4.⁸² In these covered jurisdictions, the VRA prohibited the use of literacy tests and other tests or devices.⁸³

⁷⁵ Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials*, 37 (2008).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Voting Rights Act Amendments of 1970 Public Law 91-285.

⁷⁹ Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials*, 37 (2008).

⁸⁰ *Id.* 38.

⁸¹ H.R. Rep. No. 89-439, at 9.

⁸² Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials*, 37 (2008).

⁸³ *Id.*

2.4.2 The Supreme Courts Upholds the VRA

Immediately after the passage of the Voting Rights Act, opponents challenged its constitutionality and scope. In *South Carolina v. Katzenbach* (1966), the Court upheld the coverage formula, the ban on literacy tests, and the preclearance requirements as constitutional based on Congress's power to enforce the Fifteenth Amendment.⁸⁴ The Court acknowledged that the bill had a wide reach into state prerogatives, but said those provisions of the law were justified by the South's long history of blatantly violating the Fourteenth and Fifteenth Amendments.⁸⁵ The Court also said that, although literacy tests are not unconstitutional, Congress was within its power to ban them in the South in order to enforce the Fifteenth Amendment.⁸⁶

In *Allen v. State Board of Elections* (1969), the Supreme Court rejected a narrow reading of Section 5 that would have limited its application to voter registration.⁸⁷ The ruling combined four cases, all of which considered whether newly enacted state laws or regulations were covered by Section 5.⁸⁸ In "reject[ing] a narrow construction," the Court held that the VRA was "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."⁸⁹ With these sweeping decisions by the Court, Section 5 became a strong and wide-reaching provision.

⁸⁴ 383 U.S. 301 (1966).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 393 U.S. 544 (1969).

⁸⁸ *Id.*

⁸⁹ *Id.*

2.5 Reauthorizing and Updating the VRA in 1970

2.5.1 Updating the VRA in 1970

In 1970, Congress renewed Section 5 for an additional 5 years over the opposition of the Nixon administration, which advocated for a repeal of Section 5.^{90,91} Attorney General John Mitchell argued that Section 5 should be allowed to expire because the Justice Department had never really enforced it.⁹² Indeed, from 1965 to 1970, the Justice Department usually assigned only one lawyer to monitoring state and local compliance with Section 5.⁹³ Jurisdictions rarely submitted electoral changes for preclearance, but no criminal or civil sanctions were imposed on them.⁹⁴ Even if a jurisdiction did obey the preclearance requirement, the Justice Department did not have the manpower to ensure that laws it objected to were not subsequently enacted.⁹⁵ The administration's opposition to a straightforward renewal awakened the laws supporters and a backlash ensued.⁹⁶ In the Senate, liberals rallied to renew the VRA, including Section 5, for another five years by a vote of 64 to 12.⁹⁷ Despite the Nixon administration's opposition, the House voted to reauthorize Section 5 by a bipartisan vote of 272 to 132.⁹⁸ Nixon capitulated and signed the reauthorization.⁹⁹

⁹⁰ Laughlin McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* 132 (2003).

⁹¹ Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* 19 (1992).

⁹² J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, *Tex. L. Rev.* 86(4): 670, 686 (2008).

⁹³ *Id.* at 684.

⁹⁴ *Id.*

⁹⁵ *Id.* at 689.

⁹⁶ *Id.* at 684.

⁹⁷ *Id.* at 686-687.

⁹⁸ *Id.* at 687.

⁹⁹ *Id.*

While the amendments of 1970 were largely the same as the original 1965 legislation, some important changes were included. A key modification was that the bill expanded the VRA's reach to include language minorities.¹⁰⁰ Now, Hispanics, Native Americans, Asians, and Native Alaskans were protected by the VRA.¹⁰¹ Additionally, two new sections, Section 4(f) and Section 203, were added.¹⁰² Section 4(f) targeted a limited number of jurisdictions to prohibit English-only election materials in jurisdictions that had a history of discriminating against language minority groups that compose over 5% of the jurisdiction.¹⁰³ Section 203, like Section 5, was not permanent, but it did apply nationwide and required language-assistance in areas with sizeable minority groups and high rates of illiteracy.¹⁰⁴

A few other notable changes were include in the revised bill. Congress updated Section 4's coverage formula, using November 1968 as the new date from which to examine minority election registration and participation.¹⁰⁵ Congress also expanded the ban on literacy tests to include the entire nation for a five-year period.¹⁰⁶ Additionally, Congress heightened the bailout requirements.¹⁰⁷

2.5.2 Broad Interpretations of Section 5

Opponents of the Voting Rights Act continued to seek to narrow the scope of the Section 5 requirements. In *Perkins v. Matthews*, the Court was asked to decide what

¹⁰⁰ Ancheta, Angelo N. "Language Accommodation and the Voting Rights Act." In *Voting Rights Act Reauthorization of 2006* ed. Ana Henderson. 293-323, 296 (2007).

¹⁰¹ *Id.*

¹⁰² *Id.* at 298.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Voting Rights Act Amendments of 1970 Pub. L. No. 91-285 (codified as amended at 42 U.S.C. § 1973 (2006)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

types of election changes are covered under Section 5.¹⁰⁸ In another broad reading of Section 5, the Court held that changes in locations of polling places, changes in municipal boundaries through annexations, and a change to at-large election of aldermen were all covered by the preclearance requirement.¹⁰⁹ Thus, the Court again took an expansive reading of the federal government's powers under the Voting Rights Act.

2.6 Expanding the VRA in 1975, but Limiting it in 1976

2.6.1 The 1975 Reauthorization

In 1975, Congress again renewed and expanded the Voting Rights Act.¹¹⁰ Riding the wave of Watergate, Democrats had swept the 1974 midterm elections.¹¹¹ Attempts to end Section 5 or expand coverage to the entire nation (thereby overwhelming the Justice Department and diluting the department's ability to enforce the law) failed in the Senate.¹¹² The proposal that came closest to passing, losing 48-41 in the Senate, was sponsored by Georgia Democrat Sam Nunn and was supported by 24 Democrats and 17 Republicans.¹¹³ To ensure that Section 5 would apply to redistricting after the 1980 census, the House passed a reauthorization that would last for ten years. As the Senate was considering the House bill, President Gerald Ford flip-flopped, initially supporting

¹⁰⁸ 400 U.S. 379 (1971).

¹⁰⁹ *Id.*

¹¹⁰ Voting Rights Act Amendments of 1975, Pub. L. No. 94-73 (codified as amended at 42 U.S.C. § 1973 (2006)).

¹¹¹ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, *Tex. L. Rev.* 86(4): 670, 705 (2008).

¹¹² *Id.*

¹¹³ *Id.*

the bill, then opposing it, then ultimately backing it.¹¹⁴ The Senate passed the bill 77-12, but reduced the reauthorization period from 10 years to 7 years.¹¹⁵ Without convening a conference committee, the House passed the Senate's amendments by a 345-56 vote.¹¹⁶

In addition to renewing the act for a period of 7 years, several other provisions were revised or added.¹¹⁷ The coverage formula was updated to make 1972 the new date from which to examine minority election registration and participation.¹¹⁸ Congress also expanded the definition of tests and devices to include the provision of English-only election information in jurisdictions with a single language minority group that comprised more than five percent of the voting age citizens.¹¹⁹ This extended coverage to three new states: Alaska, Arizona, and Texas.¹²⁰ Furthermore, the nationwide ban on literacy tests was made permanent.¹²¹

2.6.2 SCOTUS Begins Limiting the VRA

In 1976, the Court began limiting the power of Section 5. In *Beer v. United States*, the Supreme Court interpreted the effect prong of Section 5.¹²² The Court decided that preclearance could not be denied unless minorities were made worse off by the change (i.e., there was retrogression).¹²³ Thus, a city that was currently cracking or

¹¹⁴ *Id.* at 705-06.

¹¹⁵ *Id.* at 706.

¹¹⁶ *Id.*

¹¹⁷ Voting Rights Act Amendments of 1975, Pub. L. No. 94-73 (codified as amended at 42 U.S.C. § 1973 (2006)).

¹¹⁸ *Id.*

¹¹⁹ Section 4, Voting Rights Act of 1965, 42 U.S.C § 1973(b) (2006).

¹²⁰ Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials*, 38 (2008).

¹²¹ *Id.*

¹²² 425 U.S. 130 (1976).

¹²³ *Id.*

packing minorities in order to minimize the number of majority-minority districts could continue doing so as long as the total number of majority-minority districts did not decrease.

In 1980, the Court also drastically limited the scope of Section 2. In *City of Mobile v. Bolden*, the Court held that a jurisdiction was not in violation of Section 2 unless there was evidence of intentional discrimination.¹²⁴ Civil rights activists regarded the decision as a major setback.¹²⁵ The “devastating” effect of the ruling became apparent as dilution cases came to a “virtual standstill.”¹²⁶ Existing cases were overturned or dismissed and new cases were “abandoned.”¹²⁷ Critics of the ruling looked to Congress to “overturn” the ruling.¹²⁸

2.7 The 1982 VRA Reauthorization

2.7.1 Strengthening the VRA Congressionally

Despite facing far more opposition in Congress than previous reauthorizations, the 1982 reauthorization again strengthened the VRA. By 1982, many southerners and conservatives felt that the Section 5 had achieved its purpose and was no longer needed.¹²⁹ President Ronald Reagan had opposed both the Civil Rights Act of 1964 and

¹²⁴ Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials*, 144 (2008).

¹²⁵ *Id.*

¹²⁶ Armand Derfner. “Vote Dilution and the Voting Rights Act Amendments of 1982” in *Minority Vote Dilution*. Ed. Chandler Davidson. 145-163, 161 (1989).

¹²⁷ *Id.*

¹²⁸ Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process*, 459 (3rd 2007).

¹²⁹ Abigail M Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 105-15 (1987).

the Voting Rights Act of 1965.¹³⁰ In the Republican-controlled Senate, Strom Thurmond, a South Carolina Republican, was chairman of the Judiciary Committee.¹³¹ Recognizing that reauthorization of Section 5 was in jeopardy, supporters of the act mobilized early and prepared for a contentious fight.¹³²

Because of the recent *Bolden* decision, the battle in Congress ultimately focused on Section 2 rather than Section 5. The Congressional hearings over the reauthorization were used effectively by civil rights activists as a stage to parade the failings of *Bolden* before Congress.¹³³ Numerous witnesses testified to the near impossibility of winning vote dilution claims in a post-*Bolden* world.¹³⁴ Likewise, a report by the U.S. Commission on Civil Rights concluded that jurisdictions continued to suppress minority participation in elections.¹³⁵ Demonstrating just how successful lobbying efforts by VRA proponents were, the House Judiciary Committee voted 23-1 for a bill that not only added a results test to Section 2, but also reauthorized Section 5 permanently.¹³⁶

As the Senate Judiciary Subcommittee on the Constitution considered the bill, Senator Orrin Hatch, the committee's Chairman, tried to block the proposed intent standard for Section 2.¹³⁷ To prevent the committee from deadlocking, Senator Robert

¹³⁰ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, Tex. L. Rev. 86(4): 670, 706 (2008).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process*, 563 (3rd 2007).

¹³⁴ *Id.*

¹³⁵ Senate Judiciary Committee Report on the Voting Rights Act Amendments of 1982, S. Rep. No. 97-417, 97th Cong., 2d Sess. 16, 43 (1982), reprinted in 1982 USCCAN 177, 222.

¹³⁶ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, Tex. L. Rev. 86(4): 670, 709 (2008).

¹³⁷ *Id.* at 710.

Dole proposed a compromise.¹³⁸ Section 2 would prohibit any voting procedure that “results in a denial or abridgement,” but would also include a guarantee that the test did not create a right to proportional representation.¹³⁹ Instead, having “less opportunity than other members of the electorate...to elect representatives of their choice” would be one circumstance of the totality of circumstances that could prove a violation of Section 2.^{140,141} Liberal Democrats and moderate Republicans united to pass the bill and the “Dole Compromise” by veto-proof majorities.^{142,143} Despite his previous “vehement opposition” to the act, President Reagan signed the law, saying its passage “proves our unbending commitment to voting rights.”¹⁴⁴

In addition to the major revision of Section 2, a few other changes were included in the final bill. In order to prevent a majority of covered jurisdictions from becoming eligible for bailout, Congress revised the bailout provisions. To be eligible for a bailout, Congress now required jurisdictions to have had no discriminatory voting practices in the previous ten years and have taken constructive steps to increase minority voter participation.^{145,146} Additionally, Congress added Section 208, which states that “any voter who requires assistance to vote by reason of blindness, disability, or the inability to

¹³⁸ *Id.*

¹³⁹ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, Tex. L. Rev. 86(4): 670, 709 (2008).

¹⁴⁰ Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, *Election Law Cases and Materials*, 144 (2008).

¹⁴¹ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, Tex. L. Rev. 86(4): 670, 709 (2008).

¹⁴² Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 237 (2000).

¹⁴³ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, Tex. L. Rev. 86(4): 670, 709-10 (2008).

¹⁴⁴ *Id.* at 707.

¹⁴⁵ *Id.* at 44, reprinted in 1982 U.S.C.C.A.N. at 222.

¹⁴⁶ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205 (codified at 42 U.S.C. § 1973 (2006)).

read or write may be given assistance by a person of the voter's choice."¹⁴⁷ Section 208 was initially intended to help the disabled and illiterate, but it has been used to guarantee assistance for limited-English-proficient voters.¹⁴⁸ One section that Congress did not update was the coverage formula.¹⁴⁹

2.7.2 Interpreting the revised Section 2 and Limiting Section 5

In *Thornburg v. Gingles* (1986), the Court interpreted the newly-amended Section 2 language. The Court held that Section 2 required jurisdictions to create majority-minority districts when certain criteria were met. These criteria were spelled out by the Court in a 3-prong test known as the Gingles Test. To prove a Section 2 claim, a minority group must meet all 3-prongs of the test. The first prong requires that the minority group be large and compact. The second prong is that the minority group must be politically cohesive. This means that members of the minority group unite behind a minority candidate of choice. The final Gingles prong requires that the minority group must be politically cohesive and they must usually defeat the minority candidate of choice. Additionally, as explicitly required in the amended Section 2 language, courts must consider the "totality of circumstances." If, in the totality of circumstances, minorities have equal opportunities to elect, then they do not have a Section 2 claim. A variety of factors that could provide evidence of a lack of opportunity were suggested in a report by the Senate Judiciary Committee, including the extent to which minorities have

¹⁴⁷ Angelo N. Ancheta, "Language Accommodation and the Voting Rights Act." In *Voting Rights Act Reauthorization of 2006* ed. Ana Henderson. 293-323, 303 (2007).

¹⁴⁸ *Id.*

¹⁴⁹ Section 4, Voting Rights Act of 1965, 42 U.S.C § 1973(b) (2006).

been elected within the jurisdiction, the use of racial appeals in political campaigns, and the exclusion of minorities from the candidate slating process.¹⁵⁰

The Supreme Court continued to limit the power of Section 5. In *Presley v. Etowah County Commission* (1992), the Court narrowed the preclearance requirement. The preclearance requirement now only applied to four categories: changes in the “matter of voting”; changes to the “candidacy requirements and qualifications”; changes “in the composition of the electorate that may vote for candidates”; and “the creation or abolition of an elected office.”¹⁵¹ In *Reno v. Bossier Parish School Board* (2000), the Court found that a jurisdiction that has a discriminatory purpose is not in violation of Section 5 as long as there is no retrogression.¹⁵² In *Georgia v. Ashcroft*, the Supreme Court approved a plan that reduced the number of majority-minority districts but expanded the number of influence districts.¹⁵³ The Court held that the “nonretrogression” standard ought not to be applied mechanically and that instead a variety of relevant factors ought to be considered.¹⁵⁴

¹⁵⁰ S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.

¹⁵¹ 502 U.S. 491 (1992).

¹⁵² 528 U.S. 320 (2000).

¹⁵³ 539 US 461 (2003).

¹⁵⁴ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 242 (2000).

2.8 The Most Recent VRA Reauthorization & a Warning by SCOTUS

2.8.1 The 2006 VRA Reauthorization

Although the 2006 reauthorization faced continued opposition from conservatives and southerners, the law was again strengthened.¹⁵⁵ In 2006, key Republicans, such as Senate Majority Leader Bill Frist, Republican National Committee Chairman Ken Mehlman, and House Judiciary Committee Chairman James Sensenbrenner, all supported reauthorization.¹⁵⁶ However, the end of Rep. Sensenbrenner’s chairmanship, in January 2007, was quickly approaching, and his likely successor, Representative Lamar Smith, was a Texan who opposed Section 5.¹⁵⁷

Chairman Sensenbrenner and Rep. Mel Watt, the Chairman of the Congressional Black Caucus, negotiated two key changes to the VRA. First, they agreed on a reversal of *Bossier II* that removed “purpose and effect” and added “purpose or effect” to Section 5.¹⁵⁸ Second, in response to *Georgia v. Ashcroft*, the bill states that Section 5 “is to protect the ability of such citizens to *elect* their preferred candidates of choice.”^{159,160} The amended language would make it much more difficult for majority-minority districts

¹⁵⁵ James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006* 33 J Legis 205 (2007).

¹⁵⁶ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, Tex. L. Rev. 86(4): 670, 752 (2008).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 752-53.

¹⁵⁹ *Id.* at 753.

¹⁶⁰ Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, sec. 203, §5, 89 Stat. 400, 401–02 (1975) (codified as amended at 42 U.S.C.A. § 1973b (West 2003 & Supp. 2007)).

to be reduced to influence districts.¹⁶¹ Additionally, they agreed that the reauthorization would last for twenty-five years.¹⁶²

Despite the support of the Congressional leadership, several rank-and-file Republicans and some liberals opposed the reauthorization.¹⁶³ A “vociferous” group of Republicans, led by southerners, opposed the coverage formula’s targeting of the South.¹⁶⁴ The group held up the bill for a month, protesting the use of a decades-old coverage formula.¹⁶⁵ Additionally, many liberal academics worried that the failure to update the coverage formula might jeopardize the constitutionality of the act.¹⁶⁶

Although the coverage formula was protested by some on the left and the right, the formula was not updated, instead retaining the use of data from 1972.¹⁶⁷ The House overwhelmingly passed the bill by a vote of 390-33 on July 13, 2006.¹⁶⁸ The Senate passed the bill by a vote of 98-0 only seven days later, on July 20, and President George W. Bush then signed the bill on July 27.¹⁶⁹

2.8.2 SCOTUS Warns that the Reauthorization may be Unconstitutional in NAMUDNO

After Congress renewed the Voting Rights Act for an additional twenty five years, the Supreme Court hinted that the reauthorization of the preclearance requirement

¹⁶¹ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 242 (2000).

¹⁶² J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, *Tex. L. Rev.* 86(4): 670, 753 (2008).

¹⁶³ *Id.* at 760.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 760-61.

¹⁶⁹ *Id.*

may have been unconstitutional. In *Northwest Austin Municipal Utility District No. 1 v. Holder* (2009) (NAMUDNO), a small utility district challenged the constitutionality of Section 5.¹⁷⁰ In a unanimous decision, the Court decided to interpret the bailout provision broadly, thereby rendering the utility district eligible for a bailout.¹⁷¹ All of the Justices except Justice Thomas, agreed to avoid ruling on the constitutionality of Section 5.¹⁷² Even though discussion of Section 5 was unnecessary for the holding, the majority hinted that they might not find it constitutional in a future case.¹⁷³ Chief Justice Roberts, writing for the majority, said that the Voting Rights Act “now raises serious constitutional concerns.”¹⁷⁴ Justice Thomas wrote a notable dissent in which he concluded that Section 5 was unconstitutional.¹⁷⁵

2.9 The Legacy of the Voting Rights Act

2.9.1 The Effect of the VRA on Minority Representation

The Voting Rights Act has increased both voter registration rates and descriptive minority representation. The gap between Black and white registration rates decreased from 44 percent to 11 percent from 1965 to 1972 in the seven states originally covered.¹⁷⁶ Descriptive representation soared after the 1990s redistricting cycle was conducted under

¹⁷⁰ 557 U.S. 193 (2009).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 212–229 (Thomas, J. dissenting).

¹⁷⁶ Chandler Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting* 7, 21 (1992).

a Section 2 that had been strengthened by the 1982 Amendments.¹⁷⁷ The number of Black Congressmen from the eleven former Confederate states rose from 5 in 1990 to 17 in 1993.¹⁷⁸

While the increase in descriptive representation is undeniable, scholars disagree over whether race matters for substantive representation. Two leading proponents of the idea that race does not matter are Abigail Thernston and Carol Swain. In *Whose Votes Count?*, Abigail Thernston argued that the Voting Rights Act was never intended to provide descriptive representation and, instead, provides substantive representation by empowering Blacks to influence which white candidate wins election.¹⁷⁹ In *Black Faces, Black Interests*, Carol Swain found that whites could effectively represent Black interest.¹⁸⁰ Her regression analysis of House members' votes in the 100th Congress showed that votes were unaffected by the percentage of Blacks in a Congressional district and the representative's race.¹⁸¹ Despite this finding that descriptive representation did not increase substantive representation, she saw other merits to descriptive representation.¹⁸² Having Blacks in Congress, she said, was valuable to provide role models and decrease racial polarization.¹⁸³ She found that redistricting had reached the maximum number of majority Black districts and, therefore, to further increase Black representation efforts needed to be made to win in majority-white districts.¹⁸⁴

¹⁷⁷ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, *Tex. L. Rev.* 86(4): 670, 721 (2008).

¹⁷⁸ *Id.*

¹⁷⁹ Abigail Thernston, *Whose Votes Count? Affirmative Action and Minority Voting Right* 215-220 (1987).

¹⁸⁰ Carol Swain, *Black Faces, Black Interests: The Representation of African Americans in Congress* 207-217 (1993).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Many authors have disagreed with Therston and Swain and found that majority-minority districts are necessary for substantive representation. In *The Paradox of Representation*, David Lublin analyzed House votes from 1872 to 1992 and found that substantive representation of Blacks occurs, but only when Blacks constitute over 40 percent of a district.¹⁸⁵ Because districts where Blacks constitute less than 50 percent of the voting population are unlikely to elect Black candidates, Lublin says maximizing descriptive representation can decrease substantive representation.¹⁸⁶ Lublin recommends that district lines be drawn to balance between drawing districts with over 50 percent minority population (to achieve descriptive representation) and districts with 40 to 50% minority population (to maximize substantive representation).¹⁸⁷ Studying the 1982, 1984, and 1986 elections, Bernard Grofman and Lisa Handley concluded that majority-minority districts are necessary for descriptive representation.¹⁸⁸ In another study of the 1970s and 1980s, they found that majority-white districts virtually always elect white candidates.¹⁸⁹

In *The Color of Representation*, Kenny J. Whitby finds that substantive representation is “periodic” and varies by issue.¹⁹⁰ He found that legislators were more responsive to Black constituents’ interests in fair housing legislation than on voting rights

¹⁸⁵ David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* (1997).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Bernard Grofman and Lisa Handley, *Minority Population Proportion and Black and Hispanic Congressional Success in the 1970s and 1980s*, *American Politics Quarterly* 17: 439-440 (1989).

¹⁸⁹ Lisa Handley and Bernard Grofman. “The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations.” In *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*. Eds. Chandler Davidson and Bernard Grofman 343-344, 344 (1994).

¹⁹⁰ Kenny J. Whitby, *The Color of Representation: Congressional Behavior and Black Constituents*. (1998).

bills.¹⁹¹ Whitby also found that the race of a legislator affected votes on civil rights bills, but that this effect was “periodic” and depended on the content of the legislation.¹⁹²

In *Race, Redistricting, and Representation*, a more comprehensive study of bill sponsorship, floor speeches, and committee assignments in the 103rd Congress, David T. Canon found that majority-Black districts elected legislators who better represented Black interest.¹⁹³ Canon also found that representatives who had ran campaigns seeking biracial support were less supportive of Black issues in Congress.¹⁹⁴ Canon’s results were corroborated by Kerry L. Haynie’s analysis of state legislatures in *African American Legislators in the American States*.¹⁹⁵

In *Black Faces in the Mirror*, Katherine Tate found support for the theory that descriptive representation matters. She analyzed data from the 104th Congress and survey data from the 1996 National Black Election Study.¹⁹⁶ Like previous studies, she found that Black members of Congress were more likely to stand up for Black interests.¹⁹⁷ Interestingly, she also found that Black constituents were more likely to be satisfied with their representative when their Congressman was Black.¹⁹⁸

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts* (1999).

¹⁹⁴ *Id.*

¹⁹⁵ Kerry Haynie, *African American Legislators in the American States* (2001).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

2.9.2 Ancillary Federal and State Legislation

The success of the Voting Rights Act in increasing registration rates and the number of majority-minority districts has led Congress to pass several ancillary laws.

In 1986, Congress passed and President Reagan signed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to protect the rights of service members to vote.¹⁹⁹ The law permits service members and overseas voters to use absentee registration procedures and to vote by absentee ballot in Federal elections.²⁰⁰ Additionally, the law requires state election officials to accept voter registration applications from overseas voters that are received at least 30 days prior to the election.²⁰¹ Furthermore, the act permits overseas voters to use write-in absentee ballots in general elections for federal office.²⁰²

In 1993, President Clinton signed the National Voter Registration Act, commonly known as the “motor voter” act, to expand opportunities to register to vote.²⁰³ The law required that all states that do not offer election-day voter registration must establish mail-in voter registration programs, stop the practice of purging nonvoters from the rolls, and must provide applicants for a driver’s license with a voter registration form.²⁰⁴ Although the first and second provisions have been thought to have little effect on voter registration rates, the DMV provision has significantly increased participation rates.²⁰⁵

¹⁹⁹ Alan Gura, *Ex-Patriates and Patriots: A Constitutional Examination of the Uniformed and Overseas Citizens Absentee Voting Act*, Tex. Rev. L. & Pol. 6:179-204 (2001).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Stephen Knack, *Does ‘Motor Voter’ Work? Evidence from State-Level Data*, The Journal of Politics. 57(3):796-811 (1993).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

Following the controversial 2000 Presidential election, Congress passed and President Bush signed the Help America Vote Act.²⁰⁶ The law allocated \$325 million to replace punch card and lever voting machines before the 2004 election.²⁰⁷ The bill also established the Election Assistance Commission to oversee testing and certification of voting systems.²⁰⁸ Additionally, the law spelled out minimum requirements for voting systems, for provisional voting, and for computerized statewide voter registration lists.²⁰⁹ Another \$325 million was designated for the acquisition of voting systems and administrative compliance with the law.²¹⁰

To expand the protections of the VRA, legislators in Sacramento passed a state-based remedy: the California Voting Rights Act.²¹¹ The law largely mirrors Section 2's protections of majority-minority districts, but deviates by also protecting influence districts.²¹² Empowered by the law, minorities have pushed cities, counties, and school districts to switch from at-large to district elections.²¹³

2.10 Conclusion

The individual sections of the Voting Rights Act have repeatedly been altered by Congress and the Court. After initially being interpreted broadly by the Court, Section 5

²⁰⁶ Leonard M. Shambon, *Implementing the Help America Vote Act*, Elec. L. J. 3(3): 424-443 (2004).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, Harv. Latino L. Rev. 15: 183-231 (2012).

²¹² *Id.*

²¹³ Jean Merl, *Voting Rights Act leading California Cities to Dump At-Large Elections*, The Los Angeles Times (Sept. 14, 2013), <http://www.latimes.com/local/la-me-local-elections-20130915-story.html>.

was later weakened by the Court. After the Court narrowly interpreted Section 2, Congress greatly strengthened it. Despite the numerous times that the Voting Rights Act has been reauthorized, amended, and reinterpreted, Congress has strengthened it with each reauthorization.

Despite this complicated history, one takeaway is clear: the Voting Rights Act dramatically increased minority voter registration. In the seven states originally covered, the gap between Black and white registration rates decreased from 44 percent to 11 percent from 1965 to 1972.²¹⁴ Because minority voter registration rates are so much higher now than they were when the last was originally passed, does it make sense to have an even stronger VRA today? This is the tough question that the Court grappled with in *Shelby County v. Holder*.²¹⁵

²¹⁴ Chandler Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting* 7, 21 (1992).

²¹⁵ 570 U.S. ____ (2013).

Chapter 3

Shelby v. Holder: A Predictable Partisan Divide

3.1 Overview

In this chapter, I review the recent Supreme Court case *Shelby v. Holder*. I present the background of the case and predictions that I made after oral arguments, before the Court issued its ruling. I analyze the opinions and evaluate my predictions. I find that Section 2 is likely safe from a challenge in the near future, but any future revisions to the coverage formula would need to limit the scope of coverage.

3.2 Introduction

After the Court made it clear in *NAMUDNO* that the Voting Rights Act was vulnerable to a challenge, it was only a matter of time before another VRA case made it to the Court. Less than four years after issuing its warning in *NAMUDNO*, the Court granted certiorari to *Shelby v. Holder*, yet another challenge to Sections 4 and 5. Supporters of the Voting Rights Act worried that entire law up might be overturned. After the Court heard oral arguments, but before the Court issued its ruling I analyzed the Court's options and concluded that the Court was likely to find Section 4(b), the coverage formula, unconstitutional. I predicted that the ruling would be a 5-4 split with Justice Kennedy joining the Court's conservative block. Additionally, I asserted that the Court would most likely remain silent on the constitutionality of the rest of the Voting Rights

Act. Each of those predictions proved correct. Thankfully for supporters of the Voting Rights Act, I was wrong about the standard of review that the Court would apply. Rather than raising the standard of review to congruent and proportional and throwing Section 2 in jeopardy, the Court decided the case using a rational basis standard. This is especially important since Section 2 will be relied upon even more for combating voting discrimination now that jurisdictions are free from preclearance.

In Section 3.3, I briefly lay out the facts and history of *Shelby*. Section 3.4 begins my analysis of the case prior to the Court's holding, laying out key questions that I suggested might determine how the Court would rule. In Section 3.5, I present my evaluation of the possible outcomes from before the holding. There, I evaluated the likelihood of each outcome occurring. Section 3.6 presents the actual holding of the Court and discusses the accuracy of my predictions. Finally, I conclude in Section 3.7.

3.3 Shelby v. Holder – Facts of the Case and History

Four year after *NAMUDNO*, the Court decided to hear another challenge to the Voting Rights Act. Shelby County, Alabama had filed suit in the U.S. District Court for the District of Columbia, seeking both a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional and a permanent injunction prohibiting the Attorney General from enforcing them.²¹⁶ Shelby had not asked to be bailed out because the county did not have the needed 10-year history free from VRA violations. Their violations occurred when Shelby held several special elections under a law for which it failed to seek preclearance. Additionally, the Attorney General had

²¹⁶ 811 F. Supp. 2d 424, 427 (D.D.C. 2011).

recently objected to annexations and a redistricting plan proposed by a city within Shelby County.²¹⁷

Both the district court and the appeals court found that Section 5 was still constitutional. The district court concluded that “Section 5 remains a ‘congruent and proportional remedy to the 21st century problem of voting discrimination in covered jurisdictions.’”²¹⁸ The majority on the appeals court found that the burdens of Section 5 are justified because it is needed to combat discriminatory election laws and procedures. Additionally, the appeals court found that the coverage formula was sufficiently tailored to the problem that it targets.²¹⁹ Senior Circuit Judge Williams dissented, finding Section 4(b) unconstitutional without reaching the constitutionality of Section 5.²²⁰

3.4 *Shelby v. Holder* – Key Questions

Before the Court announced its holding in *Shelby*, I identified the following key questions that the Court needed to consider to address the constitutionality of the Voting Rights Act.

3.4.1 What level of scrutiny should the Court apply?

First, the court must determine what level of scrutiny to apply. The Court could choose to apply a “rational basis” standard, under which the VRA must only be rationally linked to a legitimate government interest. This is what the Court used in *Katzenbach*,

²¹⁷ *Id.* at 446.

²¹⁸ *Id.*

²¹⁹ 679 F. 3d 848 (D.C. Cir. 2012).

²²⁰ *Id.* at 885.

saying that “Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”²²¹ The Attorney General has argued that this is the applicable standard.²²² Alternatively, the Court can apply a higher standard requiring the law to be “congruent and proportional” to the harm Congress is seeking to remedy. In *City of Borne v. Flores*, the Court said “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²²³ This higher standard is what Shelby argues is appropriate.²²⁴

Based on recent cases and the interpretation of those cases by the lower courts, the Supreme Court appears likely to apply the “congruence and proportionality standard” from *City of Borne*.²²⁵ Both the district court and the appeals court upheld the Voting Rights Act using this higher standard.²²⁶ The appeals court said that “[a]lthough Congress declined to resolve this issue in *Northwest Austin*, the questions the Court raised—whether section 5’s burdens are justified by current needs and whether its disparate geographic reach is sufficiently related to that problem—seem to us the very questions one would ask to determine whether section 5 is ‘congruen[t] and proportional[] [to] the injury to be prevented.’”²²⁷ The appeals court “read *Northwest Austin* as sending a powerful signal that congruence and proportionality is the appropriate standard of review.”²²⁸ Since the composition of the court has not changed since

²²¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966); *See also City of Rome*, 446 U.S. 156 (1980).

²²² 679 F. 3d 848 (D.C. Cir. 2012).

²²³ *City of Borne*, 521 U.S. 507, 520 (1997).

²²⁴ 679 F. 3d 848 (D.C. Cir. 2012).

²²⁵ *City of Borne*, 521 U.S. 507, 520 (1997).

²²⁶ 811 F. Supp. 2d at 427.

²²⁷ 679 F. 3d 848 (D.C. Cir. 2012), citing *City of Borne*, 521 U.S. 507, 520 (1997).

²²⁸ 679 F. 3d 848 (D.C. Cir. 2012).

Northwest Austin and that aspect of the decision was unanimous, it seems likely that the Supreme Court will apply the higher standard.²²⁹

3.4.2 For Section 4, is racial discrimination more prevalent in covered jurisdictions?

Answering this question is complicated by the abundance of data Congress collected, which can point to different conclusions based on the method of analysis used. Anticipating a legal battle, Congress documented an extensive history of discrimination when it reauthorized the law in 2006. Over 15,000 pages were submitted to the record and 22 hearings were held.²³⁰ The two sides, though, disagree over the proper ways to evaluate the evidence. For example, both sides extensively cite evidence of Section 2 cases, but they reach very different conclusions. The legislative record cites a study of Section 2 cases that concluded that covered jurisdictions, which account for less than 25 percent of the nation's population, account for 56 percent of all successful Section 2 litigation since 1982.²³¹ Shelby counters that instead of aggregating states into two categories, the data should be analyzed state-by-state.²³² When the Section 2 data mentioned above is broken down by state, the data show that many non-covered states have more lawsuits than many covered states. Specifically, "taking the States with the highest number of Section 2 lawsuits filed since 1982, the nine fully-covered States are only 5 of the top 10."²³³ Additionally, "Illinois and Tennessee had more Section 2

²²⁹ *NAMUDNO*, 557 U.S. 193 (2009).

²³⁰ 811 F. Supp. 2d 424.

²³¹ 679 F. 3d at 885, citing Ellen Katz et al. "To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. On the Judiciary" 109th Cong. 986-87.

²³² Brief for Petitioner at 46, *Shelby v. Holder*, No. 12-96 (U.S. Dec 26, 2012).

²³³ Brief for Petitioner at 47, *Shelby v. Holder*, No. 12-96 (U.S. Dec 26, 2012).

lawsuits that resulted in findings of intentional discrimination than all but one covered State.”²³⁴ The Court will have to decide which method of analysis to give credence to.

Additionally, the sides disagree over whether the Court should consider unpublished Section 2 cases. Looking only at published Section 2 cases, Georgia appears to have few violations—between 1982-2004, only three Section 2 cases were successful. But when unpublished cases are also considered, that number jumps to 66.²³⁵ Shelby argued that the methods of collecting this evidence was flawed and argued that this data should not be considered.²³⁶ The appeals court agreed that “there are reasons to approach this data with caution,” but thought the evidence was “helpful.”²³⁷ The Court will have to decide how much weight to place on such questionable data.

The Court could bypass considering the data above by finding that Section 4 is not rational in theory.²³⁸ Shelby argued that Section 4 is unconstitutional because the formula is based on “first generation” tactics (e.g., suppressing minority registration and turnout), while the evidence Congress used to justify the reauthorization is of “second generation” barriers (e.g., vote dilution).²³⁹ In justifying the reauthorization, Congress acknowledged that racial disparities in both registration and turnout have “narrowed considerably” in covered jurisdictions.²⁴⁰ Because of this “serious mismatch,” Shelby

²³⁴ Brief for Petitioner at 48, *Shelby v. Holder*, No. 12-96 (U.S. Dec 26, 2012).

²³⁵ 679 F. 3d 848, 885 citing the Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. On the Judiciary, 109th Cong. (2006). Georgia also had 83 Section 5 objections and 17 successful enforcement actions during the same period.

²³⁶ 679 F. 3d 848 (D.C. Cir. 2012). The data collection methods may have been inconsistent between covered and uncovered cases.

²³⁷ 679 F. 3d 850.

²³⁸ Brief for Petitioner at 21, *Shelby v. Holder*, No. 12-96 (U.S. Dec 26, 2012). *Katzenbach* upheld the formula in 1964, saying it was “rational in both practice and theory.”

²³⁹ Brief for Petitioner at 21, *Shelby v. Holder*, No. 12-96 (U.S. Dec 26, 2012).

²⁴⁰ 679 F. 3d 848 citing H.R. Rep. No. 109-478 at 12-17.

says that “[t]he formula is not rational in theory,” as required by the Court in *Katzenbach*.²⁴¹

3.4.2 Is discrimination so widespread in covered jurisdictions that case-by-case Section 2 litigation is insufficient to combat it?

If the Court chooses to weigh in on the constitutionality of Section 5, the Justices must decide how widespread discrimination must be in order for Section 5 to be constitutional. Shelby has argued that there must be “a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment.”²⁴² The appeals court found those to be unreasonably high bars, since “section 5 preclearance makes such tactics virtually impossible.”²⁴³ Instead, the appeals court found that “what is needed to make section 5 congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate.”²⁴⁴ Recall that Section 5 “shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim.”²⁴⁵ Prior to the passage of the VRA, states could stay ahead of the courts “by passing new discriminatory voting laws as soon as the old ones had been struck down.”²⁴⁶ In his *NAMUDNO v. Holder* dissent, Justice Thomas applied a standard similar to that of the appeals court, requiring that there be “current evidence of intentional discrimination with respect to voting.”²⁴⁷ Considering how far apart Justice Thomas and

²⁴¹ Brief for Petitioner at 21, *Shelby v. Holder*, No. 12-96 (U.S. Dec 26, 2012) citing *Katzenbach* 383 U.S.301 at 330 (1966).

²⁴² *Id.* at 865 quoting Appellant’s Br. 23.

²⁴³ 679 F. 3d at 885.

²⁴⁴ *Id.*

²⁴⁵ *South Carolina v. Katzenbach*, 385 U.S. 301 at 328 (1966).

²⁴⁶ *Beer v. United States* 425 U.S. 130 (1976) quoting H.R. Rep No. 94-196, at 57-58 (1975).

²⁴⁷ 557 U.S. 193 (2009) and 679 F. 3d 848 (D.C. Cir. 2012). Despite using similar bars, Justice Thomas and the appeals court reached opposite decisions on the constitutionality of Section 5.

the appeals court were in their opinions on the constitutionality of Section 5, their near agreement over how prevalent discrimination needs to be seems telling. Should the Court choose to weigh in on the constitutionality of Section 5, they will likely use a similar bar, with the key point of contention being whether there needs to be evidence that the discrimination was “intentional.”

After deciding how prevalent discrimination needs to be, the Court must then determine what evidence to consider. The two sides also disagree over what evidence is relevant. For example, Shelby argues that vote dilution evidence should not be considered because Section 5 enforces the 15th Amendment, not the 14th Amendment.²⁴⁸ The appeals court sided with the Attorney General and concluded that vote dilution evidence should be considered because “Congress expressly invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments.”²⁴⁹ Additionally, the two sides disagree over whether Section 2 lawsuits should be considered as evidence of discrimination. Shelby argues that evidence of successful Section 2 litigation should not be considered because Section 2, unlike the Constitution, does not require evidence of discriminatory intent.²⁵⁰ The appeals court disagreed, finding that “we cannot ignore the sheer number of successful section 2 cases—653 over 23 years, averaging more than 28 each year.”²⁵¹

In light of the complexity of the questions, the appeals court recommended deferring to the judgment of the legislative branch. Congress had determined that “attempts to discriminate persist and evolve, such that Section 5 is still needed to protect

²⁴⁸ 679 F. 3d 848 (D.C. Cir. 2012).

²⁴⁹ *Id.* at 866. See H.R. Rep No. 109-478 90.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 875.

minority voters in the future.”²⁵² The appeals court found, though, that the record is “by no means unambiguous.”²⁵³ Due to the importance of protecting the right to vote, the appeals court said it “owe[s] much deference to the considered judgment of the People’s elected representatives.”²⁵⁴ Of course, not everyone agrees that the judiciary should defer to Congress’s decision that Section 5 is needed. In oral arguments, Justice Scalia said “whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes.”²⁵⁵ He believed that Section 5 “will be reenacted in perpetuity unless a court can say it does not comport with the Constitution.”²⁵⁶

3.4.4 Is bailout sufficient relief for jurisdictions?

Even if the Court decides that the coverage formula is not well tailored to target the jurisdictions where racial discrimination is most prevalent, the Court could still uphold the formula by finding that the bailout and bail-in provisions are not overly burdensome. Under Section 3(c), any jurisdiction can be required to obtain preclearance for future voting changes if a federal court finds that the jurisdiction has engaged in voting discrimination.²⁵⁷ Under Section 4(a), a covered jurisdiction or subjurisdiction can bailout of the coverage requirements if it can demonstrate that it has complied with “the specified non-discrimination requirements for ten years.”²⁵⁸ The Attorney General

²⁵² *Id.* at 862 quoting H.R. Rep. No. 109-478 21.

²⁵³ *Id.* at 903.

²⁵⁴ *Id.* at 903-904.

²⁵⁵ Transcript of Oral Argument at 4, *Shelby Cnty v. Holder*, 570 U.S. ____ (Argued Feb. 23, 2013).

²⁵⁶ *Id.*

²⁵⁷ 42 U.S.C. 1973a(c).

²⁵⁸ Brief for Respondents at 5.

argues that these bailout and bail-in procedures “address any potential over- and under-inclusiveness attributable to using the Section 4(b) criteria.”²⁵⁹

Shelby County, however, argues that bailout “can at best ameliorate over-inclusiveness only at the margin.”²⁶⁰ The bailout requirements, Shelby County argues, are “highly subjective” and DOJ requires “onerous non-statutory conditions.”²⁶¹ Shelby argues that this is why very few jurisdictions (about 1%) have bailout of coverage since 1982.²⁶² With bailout providing relief for so few jurisdictions, Shelby says that it “cannot possibly solve the formula’s massive over and under-inclusiveness problems.”²⁶³ The appeals court was unconvinced by this logic, saying that “absent evidence that there are ‘clean’ jurisdictions that would like to bail out but cannot meet the standards, the low bailout rate tells us nothing about the effectiveness of the bailout provision.”²⁶⁴

3.5 Possible Outcomes of *Shelby v. Holder*

Before the Court ruled in *Shelby*, I evaluated the likelihood of possible outcomes of the case. I ordered my analysis from greatest to least change from the status quo. Under each outcome, I also evaluated how likely Justice Kennedy was to reach that decision. I focused on Justice Kennedy, because, like many other scholars, I believed he will be in the majority no matter what the decision was.²⁶⁵

²⁵⁹ Brief for Respondents at 4.

²⁶⁰ Brief for the Petitioner at 54.

²⁶¹ Brief for the Petitioner at 56.

²⁶² Brief for the Petitioner at 54.

²⁶³ Brief for the petitioner at 55.

²⁶⁴ 679 F. 3d 848 (D.C. Cir. 2012).

²⁶⁵ See Luis Fuentes-Rohwer, *The Future of Section 2 of the VRA in the Hands of a Conservative Court* Duke Journal of Constitutional Law 5:125-158, 153: “It is no secret that the future of the Act rests in the hands of Justice Kennedy.” See also Lincoln Caplan, *Will Justice Kennedy Vote for Voting Rights?* The New York

3.5.1 Declare the entire Voting Rights Act unconstitutional

The Court could declare the entire Voting Rights Act unconstitutional, but this is extremely unlikely. Doing so would be a drastic step far beyond what Shelby is even asking the Court to do. Shelby is only seeking “a declaration that Section 5 and Section 4(b) are facially unconstitutional and a permanent injunction prohibiting the Attorney General from enforcing those provisions.”²⁶⁶ Although the Court has the power to make a broader decision than is being sought by Shelby, such a decision would deviate from previous statements made by Justice Kennedy acknowledging the need for the Voting Rights Act. In *NAMUDNO*, Justice Kennedy said that:

“No one questions the validity, the urgency, the essentiality of the Voting Rights Act. The question is whether or not it should be continued with this differentiation between the states.”²⁶⁷

Additionally, in *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy criticized Justice Robert’s majority opinion:

“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality’s postulate that “[t]he way to stop discrimination on the basis of race is to stop discrimination of race” is not sufficient to decide these cases.”²⁶⁸

From these comments, it is clear that Justice Kennedy’s views on race deviate from those of his conservative colleagues. He is far more sympathetic to the need to empower the

Times (Feb. 2, 2013): “he is likely to cast the deciding vote.” See also Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court’s Recent Election Law Decisions*, *The Supreme Court Review* 89, 90: “On issues of racial discrimination and the Voting Rights Act, the Roberts Court (which is really the Kennedy Court, in this regard)...”

²⁶⁶ Brief for the Petitioner 12.

²⁶⁷ *NAMUDNO*, Oral Arguments 35 April 29, 2009.

²⁶⁸ *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007). In *Parents Involved*, Justice Kennedy and the other conservative Justices struck down the use of race classification in admissions policies. Justice Kennedy wrote a separate concurrence.

federal government to protect minority rights. While Justice Kennedy may someday agree that consideration of race is unnecessary, now does not seem to be that time: “[t]he enduring hope is that race should not matter; the reality is that too often it does.”²⁶⁹

Additionally, Shelby has relied on the power of Sections 2 and 3 to argue that Section 5 is unnecessary, a position that Justice Kennedy seemed to agree with in oral arguments. For example, Shelby argued that Section 5 is unnecessary because “Section 2 is an effective way of redressing vote dilution.”²⁷⁰ Furthermore, Shelby has said that “[e]specially in conjunction with Section 3’s bail-in mechanism, which can be utilized to remedy a judicial finding that a jurisdiction has violated constitutional voting rights, Section 2 is now the ‘appropriate’ prophylactic remedy for any pattern of discrimination that Congress documented in the 2006 legislative record.”²⁷¹ Similarly, Justice Kennedy said “a Section 2 case can, in effect, have an order for bail-in, correct me if I’m wrong, under Section 3 and then you basically have...something that replicates Section 5.”²⁷² Based on Justice Kennedy’s prior comments and the arguments Shelby has presented, only Sections 4 and 5 appear at risk.

3.5.2 Throw out both Sections 4 and 5.

Throwing out both Sections 4 and 5 would be an unnecessarily bold move. If the Court finds Section 4 unconstitutional, then it does not *need* to rule on Section 5.²⁷³

²⁶⁹ Parents Involved in Cmty. Scho. V. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007).

²⁷⁰ Brief for the Petitioner at 33.

²⁷¹ Id. at 20.

²⁷² Transcript of Oral Argument at 4, Shelby Cnty v. Holder, 570 U.S. ____ (Argued Feb. 23, 2013).

²⁷³ 679 F. 3d 848 (D.C. Cir. 2012) (Williams, J., dissenting). Judge Williams found Section 4 unconstitutional and avoided ruling on Section 5 in his dissent, saying “I need not and do not reach the constitutionality of § 5 itself.”

Without Section 4, Section 5 becomes unenforceable. Throwing out just Section 4 does, however, leave the door open for Congress to pass a revised coverage formula. If the Court is certain that Section 5 could not be upheld under any coverage formula, then they may want to strike it down now to prevent the unnecessary hassle of future legislation and litigation. Justice Thomas made clear that he supports overturning Section 5 even when doing so is not necessary. He found that “the extensive pattern of discrimination that led the Court to previously uphold Section 5 as enforcing the Fifteenth Amendment no longer exists,”²⁷⁴ and he has said that overturning preclearance would be “[a]n acknowledgement of Section 5’s unconstitutionality represents a fulfillment of” the Fifteenth Amendment’s “guarantee that no citizen would be denied the right to vote based on race, color, or previous condition of servitude...”²⁷⁵ But, Justice Kennedy has expressed very different beliefs. He’s said that “racial discrimination and racially polarized voting are not ancient history” and that “[m]uch remains to be done to ensure that citizens of all races have equal opportunity.”²⁷⁶ Based on these views, discussed in more detail below, Kennedy seems unlikely to strike down Section 5, especially when a ruling on Section 5 is unnecessary.

3.5.3 Declare only Section 5 unconstitutional.

The Court could decide to rule on Section 5 and avoid Section 4, as Justice Thomas did in his *NAMUDNO* dissent, where he said that “Section 5 exceeds Congress’ power to enforce the Fifteenth Amendment.”²⁷⁷ Doing this would have the same impact

²⁷⁴ 557 U.S. 193 (2009), (Thomas, J., concurring in the judgment in part and dissenting in part).

²⁷⁵ *Id.*

²⁷⁶ *Bartlett v. Strickland*, 556 U.S. 1 (2009).

²⁷⁷ 557 U.S. 193 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

as throwing out both Sections 4 and 5, and would end the pre-clearance requirement. It seems unlikely, though, that Justice Kennedy will overturn Section 5.

In recent years, Justice Kennedy’s rhetoric on race issues has changed. Those who believe Justice Kennedy will overturn Section 5 often note his opinion in *Georgia v. Ashcroft*: “[r]ace cannot be the predominant factor in redistricting,” but “considerations of race that would doom a redistricting plan under the Fourteenth Amendment or Section 2 seem to be what save it under Section 5.”²⁷⁸ However, more recently, Justice Kennedy’s “views began to shift” into “a far more accommodating view on questions of race.”²⁷⁹ He has said there is a “legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”²⁸⁰ Based on these more recent comments, Justice Kennedy seems unlikely to decide that discrimination is not sufficiently widespread enough to justify Section 5’s preclearance requirement.

Additionally, Justice Kennedy has been sympathetic to the argument of relying on bail-in to determine which jurisdictions are covered by Section 5, implying that Section 5 itself is constitutional. For example, he’s said that “[i]t seems to me that the government can very easily bring a Section 2 suit and as part of that ask for bail-in under Section 3.”²⁸¹ Additionally, he’s said that “a Section 2 case can, in effect, have an order for bail-

²⁷⁸ *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring).

²⁷⁹ Luis Fuentes-Rohwer, *Response, Justice Kennedy to the Rescue?*, 160 U. PA. L. Rev. PENumbra 209, 215 (2011). See also Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 Harv. L. Rev. 104 (2007): “Many have noticed that Justice Kennedy softened his stance on race in *Parents Involved in Communities Schools v. Seattle School District No. 1*: “Until *LILAC*, Justice Kennedy had never voted to find a violation of the Voting Rights Act and had repeatedly expressed reservations about the Act’s constitutionality because it required the state to engage in race-conscious districting. Justice Kennedy had also consistently signed on to the Court’s *Shaw v. Reno* decisions, which struck down many majority-minority districts prior to *LULAC*...” See also, e.g., *League of United Latin American Citizens v. Perry (LULAC)* 548 U.S. 399 (2006). *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003); *Miller v. Johnson* 515 U.S. 900 (1995); *Johnson v. De Grandy* 512 U.S. 997 (1994).

²⁸⁰ *Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 701 (2007).

²⁸¹ Transcript of Oral Argument at 4, *Shelby Cnty v. Holder*, 570 U.S. ____ (Argued Feb. 23, 2013).

in, correct me if I'm wrong, under Section 3 and then you basically have a mini—something that replicated Section 5.”²⁸² These comments suggest that Justice Kennedy takes issue with the coverage formula, not the preclearance requirements.

3.5.4 Declare only Section 4 unconstitutional.

The most likely outcome appears to be the Court finding Section 4 unconstitutional and challenging Congress to write a new coverage formula. Barring the unlikely event that the currently deeply-divided Congress could pass a new coverage formula, such a ruling would have the same effect as finding Section 5 unconstitutional and would end the preclearance requirement. By avoiding a ruling on Section 5, the Court could place the blame for ending the preclearance requirement on Congress's dysfunction. In his appeals court dissent, which was clearly aimed at Justice Kennedy, Judge Williams reached this conclusion, finding Section 4 unconstitutional and avoiding ruling on Section 5.²⁸³

In addition to comments supporting the idea that bail-in replace the coverage formula (see above), Justice Kennedy has also directly criticized Section 4:

“the Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama, is less than the sovereign dignity of Michigan. And the governments in one area to be trusted less than the governments than the other.”²⁸⁴

²⁸² Transcript of Oral Argument at 4, *Shelby Cnty v. Holder*, 570 U.S. ____ (Argued Feb. 23, 2013).

²⁸³ 679 F. 3d 848 (D.C. Cir. 2012) (Williams, S., dissenting). For example, Judge Williams said that “[u]nfortunately, when Congress passed the 2006 version of the VRA, it not only disregarded but flouted Justice Kennedy's concern[s] in *Georgia v. Ashcroft*.”

²⁸⁴ Transcript of Oral Argument at 4, *Shelby Cnty v. Holder*, 570 U.S. ____ (Argued Feb. 23, 2013).

This devastating critique of the coverage formula is matched by an equally harsh description of the bailout provisions:

“It’s like Eurystheus keeps telling Hercules, ‘Oh, you did a good job, but now you’ve got another – got another thing to do.’ That’s the bailout provision. Anybody who has tried to fill out a government form realized they make a mistake, so that the DOJ rejects it, that counts as a rejection. You have to have a – what, a clean record for how many – how many years – before you can preclear? I mean, this is simply impracticable. And it seems to me a cornerstone of the Act and of your argument for upholding the Act, and if we find that it doesn’t work, that it’s just – it’s just an illusion, that gives me serious pause.”²⁸⁵

Based on Justice Kennedy’s criticisms of Section 4, it seems highly likely that he will find Section 4 unconstitutional.

3.5.5 Uphold all sections of the Voting Rights Act

The Court could also uphold all sections of the Voting Rights Act. Such a ruling could validate the law as it is understood now or could require the bail-out requirements be expanded. This would be the ruling that supporters of the law would prefer, but during oral arguments even the liberal members of the court seemed doubtful that this would happen. Instead, they seemed to think it more likely that their conservative colleagues could be convinced that that Shelby does not have standing and therefore they should ruling on the constitutionality of the Voting Rights Act (see below).²⁸⁶

3.5.6 Find that Shelby does not have standing

Finally, the Supreme Court could take a pass on the constitutional questions just as they did in *NAMUDNO*. This is the outcome that the liberal justices seemed to be

²⁸⁵ *NAMUDNO*, Oral Arguments 45 April 29, 2009.

²⁸⁶ Transcript of Oral Argument 4, *Shelby Cnty v. Holder*, 570 U.S. ____ (Argued Feb. 23, 2013).

pushing for during oral arguments.²⁸⁷ The basis of the ruling would be that, because Shelby is not eligible for bailout, it does not have standing to challenge the Voting Rights Act. As Justice Sotomayor told Shelby County’s lawyer, “you may be the wrong party bringing this.”²⁸⁸ Justice Kagan pointed out that “[u]nder any formula that Congress could devise, it would capture Alabama.” Shelby conceded this point, prompting Justice Kennedy to ask “[i]f you would be covered under any formula that most likely would be drawn, why are you injured under this one?” The Court could find that only an unjustly covered district has standing to challenge the coverage formula. This would effectively punt on the constitutionality of the Voting Rights Act for another day. The Court may be reluctant to take this option for two reasons. One, they would likely be criticized for avoiding ruling on Section 5 so soon after they previously avoided it in *NAMUDNO*. Two, doing so would be unlikely to delay a decision on the constitutionality of the Voting Rights Act for long, because a similar challenge would likely make it to the Supreme Court very soon.²⁸⁹

3.6 The Supreme Court’s Holding in *Shelby*

In a 5-4 decision, Justice Kennedy joined the Court’s conservative block to find the coverage formula unconstitutional just as I predicted. Likewise, the majority opinion, written by Justice Roberts, did not issue a holding on the constitutionality of any other section, including Section 5. In a concurrence, Justice Thomas wrote that he would also

²⁸⁷ Transcript of Oral Argument at 4, *Shelby Cnty v. Holder*, 570 U.S. ____ (Argued Feb. 23, 2013).

²⁸⁸ *Id.*

²⁸⁹ See *Texas v. Holder*, 2012 WL 3743676 (D.D.C. Aug. 30, 2012).

find Section 5 unconstitutional. Writing for the liberal block, Justice Ginsburg wrote that she would defer to Congress's judgment and uphold the Voting Rights Act.

3.6.1 The Majority Opinion and Justice Thomas's Concurrence

Writing for the majority, Justice Roberts held that using 40-year-old data to construct the coverage formula was irrational.²⁹⁰ Citing voting data, he argued that “things have changed dramatically” since the Voting Rights Act was passed. Despite hints that Section 5 could be unconstitutional, the majority issued no holding on either on any section other than Section 4.

The majority struck down the coverage formula based on the use of “decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”²⁹¹ Because the burdens of Section 5 are so great, Justice Roberts holds that Congress must single out jurisdictions for coverage “on a basis that makes sense in light of current conditions.” Congress “cannot rely simply on the past.” The extensive record of current discriminatory conditions that Congress collected is not sufficient to justify the formula because it did not shape the formula.²⁹² Instead, the record's reliance on second-generation barriers, such as vote dilution, only “highlights the irrationality” of a coverage formula based on the first-generation barriers of voting tests and ballot access.

Interestingly, Justice Roberts chose to cite voting data to argue that “today's statistics tell an entirely different story.”²⁹³ His opinion could have simply stated the fact that the data in the coverage formula was too old, but instead he used voting data to argue

²⁹⁰ See 570 U.S. ____ (2013).

²⁹¹ 570 U.S. ____ (2013) at 2629.

²⁹² *Id.*

²⁹³ *Id.* at 2631.

that the world has changed greatly since the initial passage of the Voting Rights Act. For example, the opinion notes that Census Bureau data indicate that Black turnout is higher than white turnout in five of the six states originally covered by Section 5.²⁹⁴

Additionally, when summarizing the D.C. Circuit's holding on *Shelby*, Justice Roberts cites several pieces of data from Judge William's dissent.²⁹⁵ For example, he cites there being no positive correlation between being covered and having low Black registration.²⁹⁶

Additional, Justice Roberts cites Judge William's own disaggregation of data by state showing that the five worst uncovered jurisdictions have worse Section 2 records than eight of the covered jurisdictions.²⁹⁷ Justice Roberts even included a chart comparing voting registration data from 1965 to 2004, the most recent data available at the time of the reauthorization.²⁹⁸ Justice Robert's decision to incorporate so much data into his opinion suggests that data will also be important to future challenges to the Voting Rights Act.

Although the opinion is silent as to the constitutionality of Section 5, Justice Robert's hints that a revised coverage formula could not cover such a large portion of the United States. Repeatedly throughout the opinion, Justice Roberts asserts that conditions have "dramatically improved" since the Voting Rights Act was passed.²⁹⁹ Despite these improvements, the VRA's "unusual remedies have grown even stronger."³⁰⁰ Justice Robert's also quotes *Katzebach* in saying that the coverage formula was rational when it

²⁹⁴ *Id.* at 2619.

²⁹⁵ *Id.* at 2622.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 2626.

²⁹⁹ *Id.* at 2627.

³⁰⁰ *Id.* at 2626.

targeted jurisdictions characterized by voting discrimination “on a pervasive scale.”³⁰¹ The Chief Justice’s juxtaposition of more stringent Section 5 requirements against evidence of decreasing voter registration gaps suggests that he would consider there to be few jurisdictions where discrimination could be shown at levels justifying Section 5 burdens. This is important because, if Congress were to pass a revised coverage formula, a broad formula that covers many jurisdictions may also be held unconstitutional.

In a one and one-half page concurring opinion, Justice Thomas wrote that he would also find Section 5 unconstitutional, a position he had previously taken in *NAMUDNO*. In a departure from the majority opinion, he argues that even if “one aggregates the data [on voting discrimination] compiled by Congress, it cannot justify the considerable burdens created by Section 5.”³⁰² Justice Thomas argues that the preclearance requirement was an extraordinary measure that can only be justified to address pervasive discrimination, which no longer exists. By issuing no holding on Section 5, the majority, he argues, “needlessly prolongs [its] demise.”³⁰³

3.6.2 The Minority Opinion

In a scathing dissent read from the bench, Justice Ginsburg argued that the Voting Rights Act should be upheld.³⁰⁴ The dissent heavily cited evidence of ongoing racial discrimination in voting. Additionally, the dissent criticizes the majority for placing a “double burden” on defenders of legislation, requiring them to show not only evidence of

³⁰¹ *Id.* at 2625.

³⁰² 570 U.S. ___, 2632 (2013) (Thomas, J., concurring).

³⁰³ *Id.*

³⁰⁴ Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, The New York Times (June 25, 2013), http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all&_r=0.

discrimination in covered jurisdictions but also to disprove the existence of comparable discrimination elsewhere.³⁰⁵ Furthermore, the dissent argues that Shelby’s purely facial challenge to the VRA cannot succeed because Alabama has a sufficient history of discrimination to warrant coverage.³⁰⁶

Demonstrating how strongly she disagreed with the majority, Justice Ginsburg’s dissent is filled with stinging language. For example, she says that “[h]ubris is a fit word for today’s demolition of the VRA.”³⁰⁷ Likewise, she said that the majority’s opinion “can hardly be described as an exemplar of restrained and moderate decisionmaking.”³⁰⁸ Furthermore, she criticized the logic of “throwing out preclearance when it . . . is continuing to work” as equivalent to “throwing away your umbrella in a rainstorm because you are not getting wet.”³⁰⁹ Moreover, to argue that racially polarized voting in covered jurisdictions justifies preclearance, Justice Ginsburg says the logic is as clear as “buildings in California hav[ing] a greater need to be earthquake-proof.”³¹⁰ Justice Ginsburg’s sharp rebuke suggests that no one on the Court’s liberal wing will be voting down any provisions of the Voting Rights Act for a very long time.

3.6.3 Evaluating my Predictions

As I predicted, the Court found the coverage formula unconstitutional. Furthermore, Justice Kennedy was the swing vote in a 5-4 decision along partisan lines. As I expected, the Court was silent the constitutionality of every other section. The

³⁰⁵ 570 U.S. ____, 2649 (2013) (Ginsburg, J., dissenting).

³⁰⁶ *Id.* at 2647.

³⁰⁷ *Id.* at 2648.

³⁰⁸ *Id.* at 2648.

³⁰⁹ *Id.* at 2650.

³¹⁰ *Id.* at 2643.

decision, though, departs from my prediction that the Court would use the opportunity to heighten the standard of review. Instead, the decision found that Section 4 is irrational. This is important because a heightened standard of review would have lowered the bar for future cases challenging other sections of the Voting Rights Act. Although the rational basis standard of review might not be enough to save Section 5 from a future challenge, it makes Section 2 less likely to be found unconstitutional. If the majority had wanted to lay the groundwork for finding Section 2 or the entire Voting Rights Act unconstitutional, they would likely have raised the standard of review to congruent and proportional.

3.7 Conclusion

In this chapter, I have discussed *Shelby v. Holder* and the key questions that I predicted could affect how the justices would rule. Then, I discussed my previous predictions about the likelihood of possible outcomes of the case. Finally, I analyzed each of the opinions and evaluated the accuracy of my predictions. As I predicted, the Court found Section 4 unconstitutional and challenged Congress to devise a new coverage formula. Had the Court found a provision of the VRA unconstitutional in a previous, less-polarized Congress, a new coverage formula would likely have been enacted quickly. Unfortunately, the current Congress may be unable to rise above the partisan divide to update the coverage formula. As long as Congressional inaction continues, the preclearance requirement is essentially neutralized. Fortunately for supporters of the Voting Rights Act, many other paths forward exist, including relying on the bail-in proving and strengthening other sections of the Voting Rights Act.

Chapter 4

The VRA Post-Shelby: A “Carrot and Stick” Path Forward

4.1 Overview

This chapter discusses developments since the Court announced its decision in *Shelby*, including the Justice Department’s response and proposals to amend the Voting Rights Act. I evaluate proposals to amend Section 3 and Section 4. I suggest an alternative path that combines an amendment of Section 3 with a grant competition to encourage states to voluntarily take actions that would protect voting rights.

4.2 Introduction

Since the Supreme Court declared Section 4 unconstitutional in *Shelby*, countless proposals have been offered to strengthen protections of minority voting rights. The initial reaction was a rush to understand what provisions of the Voting Rights Act remained. Section 3, a previously rarely used provision to bail-in jurisdictions, suddenly became immensely important. Within one month of the Court’s decision, the Justice Department announced it would file a lawsuit to bail-in Texas.³¹¹ At the same time,

³¹¹ Richard Hansen, *Why AG Holder’s Decision to ‘Bail In’ Texas Under the Voting Rights Act is a Big Deal, Legally and Legislatively, Post-Shelby County*, Election Law Blog (July 25, 2013), <http://electionlawblog.org/?p=53425>.

legislators in previously covered jurisdictions rushed to change their voting laws.³¹² For many VRA supporters, this was further evidence that new amendments to the Voting Rights Act were needed. A wide range of proposals have been suggested, including writing a new coverage formula for Section 4 and expanding Section 3. I argue that the former is too politically charged to garner the necessary Republican votes. Instead, I propose adopting a “carrot and stick” approach that expands Section 3 to punish state’s for violating the Voting Rights Act but also creates a competitive grant program to encourage states to voluntarily take actions that would protect voting rights.

4.3 Responses to *Shelby*

The magnitude of the decision in *Shelby* was felt immediately. States quickly enacted dozens of new voting laws that had previously been blocked by Section 5. Within a month, the Justice Department sued to bail-in the entire state of Texas. At the same time, members of Congress began working on new amendments to the Voting Rights Act.

4.3.1 New State Voting Laws

States wasted no time in enacting new state voting laws that would have previously been prohibited by Section 5. On the same day that the *Shelby* ruling was announced by the Court, officials in Texas announced that they would implement a strict

³¹² See, e.g., Michael Cooper, *After Ruling, States Rush to Enact Voting Laws* New York Times (July 5, 2013); Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, The Guardian. (June 25, 2013), <http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision>.

photo identification law which had previously been blocked by Section 5.³¹³ North Carolina not only enacted a voter identification requirement, but also significantly cut back on early voting and shortened the voter registration window.³¹⁴ Likewise, Alabama and Mississippi began to enforce previously-passed voter identification laws that had been blocked by the preclearance requirement.^{315,316} In 2013 and the first half of 2014, ten of the fifteen states previously covered by Section 5 enacted new legislation that the Brennan Center for Justice says would make it more difficult for minorities to cast a ballot.³¹⁷

States were not the only ones making election law changes; many local jurisdictions have sought to do the same. For example, in Georgia, some municipal elections will no longer be held on the traditional election day in November.³¹⁸ A similar proposal had previously been blocked by Section 5 because doing so would disproportionately reduce Black turnout.³¹⁹ Additionally, in Pasadena, Texas, voters approved a plan to scrap the current city council districts and to move to an at-large city

³¹³ Ed Pilkinton, *Texas Rushes Ahead with Voter ID Law after Supreme Court Decision*, The Guardian (June 25, 2013), <http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision>.

³¹⁴ Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, The Washington Post (Aug. 12, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/>.

³¹⁵ Kim Chandler, *Alabama Photo Voter ID Law to be Used in 2014, State Officials Say*, AL.com (June 26, 2013), http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html.

³¹⁶ Emily Wagster Pettus, *Primary Voting in Mississippi Will Occur Under New Identification Laws for Residents*, The Washington Post (June 1, 2014), http://www.washingtonpost.com/politics/primary-voting-in-mississippi-will-occur-under-new-identification-laws-for-residents/2014/06/01/b98c07f8-e9c2-11e3-9f5c-9075d5508f0a_story.html.

³¹⁷ Tomas Lopez, *'Shelby County': One Year Later*, Brennan Center for Justice (June 24, 2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later>.

³¹⁸ Sandy Hodson, *City Wins Lawsuit over Change in Election Date for Local Offices*, The Augusta Chronicle (May 13, 2014), <http://chronicle.augusta.com/news/government/elections/2014-05-13/city-wins-lawsuit-over-change-election-date-local-offices>.

³¹⁹ Susan McCord, *Justice Department Rejects Bill to Move Augusta Elections*, The Augusta Chronicle (Jan. 4, 2013), <http://chronicle.augusta.com/news/government/elections/2013-01-04/justice-department-rejects-bill-move-augusta-elections>.

council.³²⁰ Although 60% of the city's population is Latino, the move will likely eliminate the ability of Latinos to elect a candidate of their choice.³²¹

4.3.2 The Justice Department's Offensive

Within a month of the Court's *Shelby* decision, the Department of Justice began an offensive to broaden the reach of Section 3 and the protections of Section 2. Attorney General Eric Holder personally announced that his department would sue under Section 3 to bail-in Texas.³²² The case for bail-in would be based on a decision the prior year that held that a Texas redistricting plan intentionally discriminated against Hispanic voters.³²³ In North Carolina, the Justice Department sued under Section 2 to block a law that would require photo identification to vote, eliminate the first week of early voting, and eliminate same-day voter registration during early voting.³²⁴ The case is still pending trial, but officials at the Justice Department were disappointed that the judge did not grant them an injunction to prevent the law from affecting the 2014 election.³²⁵

The Justice Department also joined two Section 2 cases challenging voting laws in Wisconsin and Ohio.³²⁶ The Ohio case challenges not only a directive from Ohio's

³²⁰ Jeff Newpher, *Proposals Pass, but Voters Split on Redistricting Question*, The Pasadena Citizen (Nov. 10, 2013), http://www.yourhoustonnews.com/pasadena/news/proposals-pass-but-voters-split-on-redistricting-question/article_90f0d207-5dc4-5c9d-8b31-bffb9452e5ec.html.

³²¹ *Id.*

³²² Adam Liptak and Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, The New York Times (July, 25, 2013), http://www.nytimes.com/2013/07/26/us/holder-wants-texas-to-clear-voting-changes-with-the-us.html?pagewanted=2&_r=1&hp&pagewanted=all&.

³²³ *Id.*

³²⁴ Holly Yeager, *Justice Department to Sue North Carolina over Voting Law*, The Washington Post (Sept. 30, 2013), http://www.washingtonpost.com/politics/justice-department-to-sue-north-carolina-over-voting-law/2013/09/29/123cbbce-292d-11e3-8ade-a1f23cda135e_story.html.

³²⁵ Richard Fausset, *Judge Backs New Limits on North Carolina Voting*, The New York Times (Aug. 8, 2014), <http://www.nytimes.com/2014/08/09/us/judge-in-north-carolina-upholds-2013-voting-law.html>.

³²⁶ Eric Tucker, *Justice Dept. Files in Ohio, Wisconsin Voter Cases*, The Associated Press (July 30, 2014), <http://bigstory.ap.org/article/justice-dept-weighs-oh-wi-voting-cases>.

Republican Secretary of State that limits early voting hours but also a law that shortens the early voting period and eliminates same-day registration.³²⁷ The lawsuit was brought by the American Civil Liberties Union, the Ohio NAACP, and several predominantly Black churches.³²⁸ The Wisconsin case concerns a voter identification law that was passed in 2011.³²⁹ A district court held for the ACLU of Wisconsin and struck down the voter identification law as violating Section 2 and the 14th Amendment.³³⁰ The case is currently on appeal before the 7th Circuit, where a 3-judge panel stayed the district court's injunction.³³¹ Wisconsin is now free to enforce the law for the 2014 election.³³²

In all four of these cases, in Texas, Wisconsin, Ohio, and North Carolina, potential appeals to the Supreme Court are being contemplated.³³³

4.3.3 Congressional Attempts to Amend the Voting Rights Act

After the *Shelby* decision, several members of Congress immediately began calling for new amendments to the Voting Rights Act. In the weeks following the decision, Republican Representative James Sensenbrenner joined with Democratic

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ Edvard Pettersson and Andrew Harris, *Wisconsin Wins Bid to Enforce Voter ID Rule in November*, Bloomberg (Sept. 13, 2014), <http://www.bloomberg.com/news/2014-09-12/wisconsin-wins-bid-to-enforce-voter-id-rule-in-november.html>.

³³² *Id.*

³³³ Richard Wolf, *Voting Rights Cases May Be Headed Back to Supreme Court*, USA Today, (Sept 11, 2014), http://www.usatoday.com/story/news/nation/2014/09/11/voting-rights-states-courts-wisconsin-texas-north-carolina-ohio/15279621/?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=usatoday-newstopstories.

Representative and civil rights leader John Lewis to call for Congressional action.³³⁴ At the same time, House Majority Leader Eric Cantor began discussions with Democrats.³³⁵ In January of the following year, Reps. Jim Sensenbrenner and John Conyers and Sen. Patrick Leahy introduced an amendment in Congress.³³⁶ The bill has been stalled in committee by House Judiciary Committee Chairman Bob Goodlatte.³³⁷ As recently as March 2014, Eric Cantor was seen as leading the effort to deliver the necessary Republican votes.³³⁸ Those efforts came to a sudden and surprising end in June, when Eric Cantor lost his primary election.³³⁹ Needing a new conservative to champion the bill, the Congressional Black Caucus has put pressure on Sen. Thad Cochran, who relied on Black votes to fend off a tea party challenger in his primary election.³⁴⁰ Thus far, Sen. Cochran has not endorsed the need for an amendment and has only said that he is “listening” to the conversation.³⁴¹

³³⁴ Mike Lillis, *Lawmakers Lewis, Sensenbrenner urge Congress to restore Voting Rights Act*, The Hill (July 17, 2013), <http://thehill.com/homenews/news/311811-sensenbrenner-lewis-urge-congress-to-restore-voting-rights-act>.

³³⁵ Mike Lillis, *GOP's Eric Cantor is Dems' Unlikely Ally on Voting Rights Act*, The Hill (Aug. 9, 2013), <http://thehill.com/homenews/house/316219-dems-find-unlikely-ally-for-voting-rights-act-fix>.

³³⁶ Dylan Matthews, *The Supreme Court Gutted the Voting Rights Act. Now a Bipartisan Gang Wants to Put It Back Together*, The Washington Post (Jan. 16, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/16/the-supreme-court-gutted-the-voting-rights-act-now-a-bipartisan-gang-wants-to-put-it-back-together/>.

³³⁷ Zachary Roth, *Republicans Drag their Feet on Fixing the Voting Rights Act*, MSNBC.com (May 19, 2014), <http://www.msnbc.com/msnbc/zero-hour-bid-fix-voting-rights-act>.

³³⁸ Emma Dumain, *Can Cantor Deliver on Voting Rights Act?* Roll Call (March 12, 2014), <http://blogs.rollcall.com/218/can-cantor-deliver-on-voting-rights-act/>.

³³⁹ Jake Sherman, *Cantor Loses*, Politico (June 10, 2014), <http://www.politico.com/story/2014/06/eric-cantor-primary-election-results-virginia-107683.html>.

³⁴⁰ Anna Palmer and Lauren French, *Congressional Black Caucus to Thad Cochran: You Owe Us*, Politico (June 29, 2014), <http://www.politico.com/story/2014/06/thad-cochran-mississippi-election-2014-black-vote-108411.html>.

³⁴¹ Daniel Strauss, *Sen. Cochran Only 'Listening' to Voting Rights Act Fix Proposal*, Talking Points Memo. (June 28, 2014), <http://talkingpointsmemo.com/livewire/thad-cochran-voting-rights-act-chris-mcdaniel-runoff>.

4.4 Possible Congressional Action – A New Coverage Formula

The most obvious response to the Court’s decision is to simply write a new coverage formula. Indeed, the first and thus far only bill in Congress to respond to *Shelby* does so, among other changes. Any new coverage formula, though, is likely to be too controversial to pass Congress.

4.4.1 Voting Rights Amendments of 2014

Reps. Jim Sensenbrenner and John Conyers have joined with Sen. Patrick Leahy to sponsor the Voting Rights Act of 2014.³⁴² Among other changes, the bill would create a new coverage formula.³⁴³ A state can be covered if it has committed five voting violations in the previous 15 years and at least one violation was committed directly by the state.³⁴⁴ A political subdivision can be covered if it has committed three violations in the past 15 years.³⁴⁵ Alternatively, a subdivision may be covered if it has had only one violation but also has a history of extremely low minority voter turnout.³⁴⁶ Violations include a court judgment that the jurisdiction has violated federal voting laws, the 14th Amendment or the 15th Amendments.³⁴⁷ Additionally, a failure or denial of pre-clearance under Section 5 or Section 3 also counts as a violation.³⁴⁸ Any violations caused by voter

³⁴² Dylan Matthews, *The Supreme Court Gutted the Voting Rights Act. Now a Bipartisan Gang Wants to Put It Back Together*, The Washington Post (Jan. 16, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/16/the-supreme-court-gutted-the-voting-rights-act-now-a-bipartisan-gang-wants-to-put-it-back-together/>.

³⁴³ H.R. 3899, 113th Cong. (2014).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

identification laws, however, would not be counted.³⁴⁹ Coverage would last for 10 years unless the jurisdiction bails-out.³⁵⁰ Under the new formula, just four states would be covered: Georgia, Louisiana, Mississippi, and Texas.³⁵¹

Additionally, the bill would strengthen Section 3, which is discussed in detail below in section 4.4.2. The bill would also require states and localities to give the media and the public advance notice of election changes and it would expand the Attorney General's authority to dispatch election observers.³⁵² For Section 2 cases, the bill would lower the burden of proof that plaintiffs are required to show to obtain an injunction.³⁵³

4.4.2 Political Difficulties

Although the proposed coverage formula is much more targeted than the previous formula, amending the formula has largely been a non-starter in Congress due to the stigma attached to it. In the four decades since the Voting Rights Act was passed, the coverage formula has come to be seen by many Republicans as punishing the South for “ancient sins.”³⁵⁴ Rather than criticize the criteria of the proposed formula, Republicans have largely opposed the use of any formula at all. Senator John Cornyn said that any voting law “should apply to the entire country” rather than “impose[] a presumption of

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ Dylan Matthews, *The Supreme Court Gutted the Voting Rights Act. Now a Bipartisan Gang Wants to Put it Back Together*, The Washington Post (Jan. 16, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/16/the-supreme-court-gutted-the-voting-rights-act-now-a-bipartisan-gang-wants-to-put-it-back-together/>.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, Harvard Law & Policy Review 73: 71-108 (2014).

guilt.”³⁵⁵ Senator Chuck Grassley has said that voting rights are sufficiently protected by the remaining sections of the Voting Rights Act.³⁵⁶ Rep. Bob Goodlatte, the House Judiciary Committee chair, is thought to agree with Sen. Grassley.³⁵⁷ Many Republicans seem to agree with these sentiments. Although the House bill has 164 Democratic cosponsors, it has only 11 Republican cosponsors.³⁵⁸ In the Senate, the bill has 11 Democratic cosponsors, but not one single Republican cosponsor.³⁵⁹ With so much Republican opposition to revising the coverage formula, it is not surprising that the bill has stalled in committee.³⁶⁰

4.5 Possible Congressional Action – Expanding Bail-in

A more promising avenue is to amend Section 3 so that intentional discrimination need not be proved to bail-in a jurisdiction. Although this lower bar for bail-in would not be a perfect substitute for a revised coverage formula due to the high costs of litigation, it is much more likely to pass, especially if the courts deny the DOJ’s request to bail-in Texas.

³⁵⁵ Jaime Fuller, *Republicans Used to Unanimously Back the Voting Rights Act. Not Any More*, *WashingtonPost.com*, (June 26, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/26/republicans-used-to-unanimously-back-voting-rights-act-not-any-more/>.

³⁵⁶ *Id.*

³⁵⁷ Zachary Roth, *GOP: No Need to fix the Voting Rights Act*, *MSNBC.com* (June 25, 2014), <http://www.msnbc.com/msnbc/gop-no-need-fix-voting-rights-act>.

³⁵⁸ H.R. 3899, 113th Cong. (2014).

³⁵⁹ S. 1945, 113th Cong. (2014).

³⁶⁰ Kate Nocera, *Judiciary Chairman In No Rush To Move On Voting Rights Act Bill*, *Buzzfeed.com* (June 26, 2014), <http://www.buzzfeed.com/katenocera/judiciary-chairman-in-no-rush-to-move-on-voting-rights-act-r#50a5pg>.

4.5.1 Fulfilling Justice Kennedy’s Understanding of Section 3

Section 3 currently only allows a jurisdiction to be bailed-in if the jurisdiction *intentionally* discriminated against minority voters. This is a very high bar. When the Supreme Court, in *City of Mobile v. Bolden*, interpreted Section 2 as requiring a showing that the right to vote was denied or abridged intentionally, Congress quickly amended Section 2 to prohibit any procedure that “results in a denial or abridgement.”³⁶¹ The speed with which Congress reacted to lower the bar for Section 2 demonstrates that Congress has historically considered intentional discrimination to be a very high bar. For a revision Section 3, violations of Section 2 would be added as a coverage trigger, rather than mirror the way Congress amended the language of Section 2. It is important to note that during oral arguments Justice Kennedy seemed to think violations of Section 2 already could trigger coverage under Section 3. Justice Kennedy, when speaking to Shelby County’s lawyer, said:

“But I do have this question: Can you tell me – it seems to me that the government can very easily bring a Section 2 suit and as part of that ask for bail-in under Section 3. Are those expensive, time-consuming suits?”³⁶²

Shelby’s lawyer sidestepped the question by responding that Section 2 is a very effective remedy.³⁶³ Justice Kennedy posted the same question to a lawyer from the Legal Defense Fund.³⁶⁴ There he said:

“But a Section 2 case can, in effect, have an order for bail-in, correct me if I’m wrong, under Section 3 and then you basically have a mini – something that replicates Section 5.”³⁶⁵

³⁶¹ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, Tex. L. Rev. 86(4): 670, 709 (2008).

³⁶² Transcript of Oral Argument at 4, *Shelby Cnty v. Holder*, 570 U.S. ____ (Argued Feb. 23, 2013).

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

Unfortunately, the lawyer did not explicitly explain the necessity of demonstrating intentional discrimination.³⁶⁶ Instead, he explained that “bail-in is available if there’s an actual finding of a constitutional violation.”³⁶⁷ While those who have studied Section 3 closely know that this constitutional trigger is where the requirement for a showing of intentional discrimination comes from, it seems likely that Justice Kennedy was unfamiliar with this nuance. Rather than explain this point in detail, the lawyer reiterated that Section 2 is an inadequate remedy.³⁶⁸

From Justice Kennedy’s line of questioning, it seems apparent that he thought Section 3 already included violations of Section 2 as a trigger. His suggestion that Section 3 could replicate Section 5 suggests that he was more comfortable finding Section 4 unconstitutional knowing that Section 3 could be used in its place. Based on these comments, it seems likely that he would uphold an amendment to Section 3 that carried out his previous understanding of it. The current proposal in Congress adds not just violations of Section 2, but also violations of any provision of the Voting Rights Act and violations of any federal voting rights law that prohibits discrimination on the basis of race color or membership in a language minority group.

4.5.2 A More Politically Acceptable Amendment

Amending Section 3 seems much more politically feasible than writing a new coverage formula. Unlike Section 4, Section 3 has never been as controversial. Indeed,

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

Republicans have pointed to Section 3 as evidence that Section 4 is not necessary.³⁶⁹ The concept of bail-in is not considered fundamentally offensive by Southerners, whereas a coverage formula is.

Ironically, the best chance to generate political will to support amending Section 3 would likely come from the Department of Justice *losing* in its current effort to bail-in Texas. If the DOJ wins the case, many Republicans will say it is evidence that the Voting Rights Act remains strong and does not need to be amended. It would be very risky, though, for the DOJ to intentionally throw the case in order to pressure Congress to amend Section 3. Doing so could create a precedent that would make it difficult to bail-in any other jurisdictions and would make Congressional action an absolute necessity. This is especially true because Texas is the jurisdiction where the DOJ has the strongest record of intentional discrimination.³⁷⁰ As Justin Levitt has said, “If you can make the case for [intentional] discrimination anywhere, you can make it there.”³⁷¹ With such large stakes, betting on Congressional action would be risky to say the least.

4.6 Possible Congressional Action – A Carrot and a Stick

With voter identification laws, voter registration purges, and reductions of early voting days all over the news, many have called for broad voting rights protections. At the same time, it is not surprising that Senators reluctant to amend the Voting Rights Act because it is entirely a punishment mechanism. The push to pass legislation in response

³⁶⁹ Tom Curry, *Conservatives Not Keen on Effort to Revise Key Section of Voting Rights Act*, NBCNews.com (July 18, 2013), <http://www.nbcnews.com/news/other/conservatives-not-keen-effort-revise-key-section-voting-rights-act-f6C10672368>.

³⁷⁰ Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, The American Prospect (August 19, 2013), <http://prospect.org/article/get-know-section-3-voting-rights-act>.

³⁷¹ *Id.*

to *Shelby* presents a great opportunity to pass additional measures to protect voting rights that do not explicitly rely on racial discrimination and instead reward states for good election and voting practices. A bill that combines a “carrot” with a “stick” would both be the most likely to pass politically and also the best way to advance voter protections.

The Supreme Court’s conservative majority has made it very clear that they are uncomfortable thinking along racial lines. This was made most evidence by the line of cases following *Bartlett v. Strickland* that limit the ability of legislators to redistrict based on race when they are not required to do so by Section 2.³⁷² Numerous scholars have worried that the Court will throw out Section 2 in the near future; indeed, many thought the Court would do so in *Shelby*. Future litigants may still seek to have the entire Voting Rights Act thrown out, including Section 2.³⁷³ Supporters of voting rights would be wise to begin preparing for such a day by enacting alternative protections of voting that do not explicitly rely on race.

Such a plan would need to be amenable to Republicans. A federal law to require improved election procedures by states would likely be opposed by Republicans as imposing on states’ rights to control their own election procedures. Even if such a law passed, it would be need to be limited to federal elections in order to be constitutional. Because of these limitations, a proscriptive law is unlikely to be the best path forward.

³⁷² 556 U.S. 1 (2009).

³⁷³ Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, Northern Illinois University Law Review 25 184: “recent decisions from the Supreme Court have caused a number of commentators to question the [Voting Rights Act’s] constitutional validity”; See also Luis Fuentes-Rohwer, *The Future of Section 2 of the VRA in the Hands of a Conservative Court*, Duke Journal of Constitutional Law 5:125-158, 129: “a conservative majority on the Court stands poised to strike down Section 2 of the Voting Rights Act.”

Instead, a voting rights “carrot” that incentivizes states to voluntarily improve their election procedures, à la Race to the Top, seems much more likely to pass Congress and could reach state and local election procedures. Like Race to the Top, the law should award multiple grants in multiple rounds, with grant sizes that are proportional to state populations. Instead of detailing specific actions for states to take, the contest should be based on meeting goals. Specifying exactly what those goals should be is a task for another paper; here, I will simply give examples. One goal might be reducing the average wait time to vote in a federal election to below 15 minutes, with no more than, say, 2% of voters waiting more than 60 minutes. For voter identification laws, a goal might be for the state’s voter registration list to include pictures of voters gathered from DMV lists and pictures taken on election day. To combat the effort to limit early voting days, a goal might be to meet a minimum number of early voting hours on nights and weekends. Another goal might be to collect better data on election administration. The specifics of the grant competition likely need not be spelled out in the law and could be left to a revived Election Assistance Commission.

The most likely aspect of this plan to generate Republican opposition is the funding aspect. The benefit of a competition is that states will likely expend some of their own money in order to have a better chance of winning the federal funding. Additionally, the funding could be contingent on a matching percentage from the state of, say, 15%. Thus, the cost should be less than it would be to directly pay for states to make these changes. For perspective, Race to the Top received \$4.35 billion, which pales in comparison to the \$632 billion spent nationwide on pre-K to 12 education.³⁷⁴ To

³⁷⁴ National Center for Education Statistics, *Fast Facts*, <http://nces.ed.gov/fastfacts/display.asp?id=66>.

sufficiently incentivize states to participate, at least \$1 billion would likely be needed, but preferably over \$2 billion would be allocated. Grants need to be large to grasp the attention of state legislators and numerous enough to seem winnable. By being less expensive than past election reforms (over \$3.5 billion has been spent on HAVA) and respecting states' rights to conduct elections, this competition should garner Republican support.

Combining this “carrot” of competitive grants with the “stick” of a revised Section 3 could yield a bill that appeals to both Democrats and Republicans and that responds to both the holes in the Voting Rights Act created by *Shelby* and the need for voting reforms that reach beyond race. An opportune time to pass this legislation is during the lame-duck session after the 2014 Midterm Elections. At that point, Republicans can rest assured that voters cannot immediately punish them for such a vote, as they could if the bill were considered prior to the election. It would give Republicans a chance, though, to court minority voters. In Sen. Thad Cochran's primary race, Black voters demonstrated that they are willing to vote for Republican establishment candidates to fend off tea party primary challengers. Incumbent Republicans would be wise to openly embrace a Voting Rights Amendment to thank Black voters and solidify similar support in future elections. Additionally, by passing a bill that focuses on improving voting procedures overall, not just covering Southern states, Republicans could also court Hispanic voters. Florida, a state with a large Cuban population, has some of the longest wait times to vote in the nation.³⁷⁵ Republicans could improve their image among Hispanics

³⁷⁵ Aaron Blake, *The Wait Times to Vote in Florida are Horrendous*, Washington Post (Sept. 15, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/09/15/study-states-with-long-lines-are-failing-to-meet-their-own-election-day-requirements/>.

by reducing wait times in Hispanic areas, a topic especially likely to be on voters' minds in the weeks following the election.

4.7 Implications of *Shelby* on Section 2

For the time being, the bulk of VRA litigation will come under Section 2. Section 3's intentional discrimination requirement means that very few jurisdictions are even candidates for bail-in litigation. Without the preclearance process to prevent discriminatory practices, the volume of Section 2 litigation will likely increase dramatically, as Section 2 litigation will be needed to combat discriminatory laws on a case-by-case basis. This increases the importance not only of Section 2, but also of estimates of racially polarized voting. The need to produce estimates of racially polarized voting will be one of the factors limiting the number of Section 2 cases. Indeed, the director of the Asian American Legal Defense and Education Fund has called the production of racially polarized voting estimates "an enormous hurdle."³⁷⁶

4.8 Conclusion

In this chapter, I have discussed developments since the Court's decision in *Shelby*. I have argued that amendments to Section 4 are unlikely to pass due to the stigma Republicans attach to the coverage formula. Instead, I have argued that amending Section 3 to include Section 2 violations as a trigger is a more promising alternative. This is especially true because Justice Kennedy's questions during oral arguments

³⁷⁶ Glenn Magpantay, Comment made during the "Voting Rights After *Shelby County v. Holder*" Conference, Washington, D.C. (July 1, 2013).

suggest that he thought Section 3 already included such a provision. I proposed a novel path forward that combines an amendment of Section 3 with a grant competition to encourage states to voluntarily take actions that would protect voting rights. If Congress is unable to pass any legislation, Section 2 litigation will be relied upon even more and the importance of accurate estimates of racially polarized voting will increase.

Chapter 5

Redistricting and the Role of Racially Polarized Voting

5.1 Overview

In this chapter, I explain the constitutional requirement to reapportion Congressional districts and the Supreme Court cases that caused the need for equal population districts. Then, I discuss how the Voting Rights Act protect minority voting rights in redistricting. The Supreme Court's three-prong test for determining when majority-minority districts should be drawn is laid out. The difficulty of estimating one of those prongs, racially polarized voting, is highlighted.

5.2 Introduction

Over the last five decades, the federal government has gone to great lengths to enable minorities to be heard in the political process. In 1965, Congress passed the landmark Voting Rights Act of 1965. The law gave the federal government broad new powers to end the discriminatory voting practices that were used to disenfranchise minority voters. Congress has subsequently revised and reauthorized the law, doing so most recently in 2006. The wide-sweeping law has many provisions, but one of the most significant ways that minority votes are protected is by the prohibition against denying or

abridging the rights of minorities to vote. The Supreme Court has interpreted this as prohibiting jurisdictions from cracking minority communities into several majority white districts in order to limit their ability to elect minority candidates. In other words, minorities must have an equal opportunity to elect their candidates of choice. States and other jurisdictions with a history of discrimination can be compelled by the courts to redraw district lines to create majority-minority districts. The idea is that, with the majority of votes in a district, minorities will be able elect candidates they believe will represent their interests and give them a voice in the legislative process. The requirement, though, only applies if it can be shown that voting is polarized along ethnic lines, which is no simple matter.

5.3 Why Redistricting Occurs

Although states and localities are now required to redraw legislative districts every decade, for nearly 200 years no such requirement existed. The United States Constitution is virtually silent on how districts should be drawn. Article I Section 2 of the Constitution says that every decade Congressional seats shall be reapportioned among the states based on their respective numbers, as determined by a decennial census. For nearly 200 years, the Constitution was interpreted as leaving the power to determine how districts should be drawn and who should draw them to the states. A wide-variety of districting methods were undertaken. Some states used at-large districts, while others allocated multiple representatives to a subset of districts. The number of residents in a district varied greatly not only across states, but also within states. Until the first half of the twentieth century, states had wide leeway to decide how to elect representatives.

Initially, the Supreme Court was reluctant to limit the redistricting power of states. In *Colegrove v. Green*, 328 U.S. 549 (1946), three Illinois voters sued the state because the Congressional districts had huge population disparities. The largest Congressional district had over eight times the population of the smallest Congressional district (914,000 people vs 112, 116 people). In a 4-3 decision, the Court held that redistricting was not judiciable. Writing for the majority, Justice Frankfurter famously asserted that “Courts ought not to enter this political thicket.” Instead, he suggested two alternative remedies: voters could “secure State legislatures that will apportion properly” or they could “invoke the ample powers of Congress.” Both of these remedies require representatives of other districts (or other states) to stand up for the underrepresented, an unlikely outcome.

States continued abusing their redistricting power, and the Court felt compelled to step in when voters in Alabama were completely disenfranchised from municipal elections. The Alabama state legislature had redrawn the boundaries of Tuskegee, Alabama from a square to a twenty-eight-sided figure that eliminated all but four or five of Tuskegee’s Black residents from the city limits. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), Justice Frankfurter, again writing for the majority, found that redistricting is judiciable when it has been used “as an instrument for circumventing a federally protected right“, here the right to vote in municipal elections. Because the ruling was based on the 15th Amendment’s protection of the right to vote and not the 14th Amendment’s Equal Protection Clause, only a narrow precedent was set that did not cover population disparities.

Only two years later, though, the Court expanded the judiciability of redistricting to include cases of wide population variances. In *Baker v. Carr*, 369 U.S. 186 (1962), the court departed from their previous decisions and found that redistricting was judiciable based on the 14th Amendment. By basing the decision on the Equal Protection Clause, any districting scheme that treated voters unequally could now be challenged. The following year, in *Gray v. Sanders*, Justice Douglas coined the now famous phrase “one person, one vote” in a case that ruled that weighted voting was unconstitutional.

Two rulings in 1964 drastically limited states’ redistricting powers and compelled states to redraw jurisdictions after every census. In *Wesberry v. Sanders* (1964), the Court found that Sections 2 and 4 of Article I of the U.S. Constitution require that Congressional districts be drawn with as close to equal populations as possible. In *Reynolds v. Sims* (1964), the Supreme Court went further and found that the 14th Amendment requires that legislative districts at all levels of government need to have equal population levels. Because the two cases were decided on different Constitutional grounds, the Court has said that different levels of variation will be tolerated. For Congressional districts, any population deviation, no matter how small, must be justified. For state and local legislative districts, the Court has been willing to tolerate larger deviations. Historically, a deviation of up to 10% has been presumed to be constitutional. To maintain population equality, States and localities are required to redraw districts after every decennial census.

Because of these landmark cases, the process of drawing legislative districts was forever changed. After every census, states now need to redraw the lines in order to place

equal numbers of people in each district. Any districting plan that fails to respect that requirement can be thrown out by the courts.

5.4 How the Voting Rights Act Affects Redistricting

In response to the Voting Rights Act, Southerners switched from a policy of denying Blacks the right to vote to a policy of diluting their voting power.³⁷⁷ Often this was done through the newly-required redistricting process by racial gerrymandering.³⁷⁸ That is the practice of redrawing the district lines to dilute Black voting strength.³⁷⁹ The most popular techniques were cracking, stacking, and packing.³⁸⁰ Cracking divides a Black population across multiple districts to prevent Blacks from having an effective voting majority in any district.³⁸¹ Stacking means combining a Black population with a predominately white population to dilute the Black vote. Packing is over-concentrating Blacks in a particular district to minimize the number of Black influence districts.³⁸² Section 5 has been of limited use in stopping these redistricting practices. In *Beer v. United States*, the Supreme Court interpreted Section 5 as meaning that a redistricting plan is in violation of the VRA only if the plan reduces the ability of minorities to vote.³⁸³ For example, if two of ten districts are majority-minority and the population is 55% minority, the jurisdiction cannot change the districts to reduce the number of majority-minority districts to zero or one. The district may, though, continue to have only 20% of

³⁷⁷ Frank R. Parker. 1990. *Black Votes Count: Political Empowerment in Mississippi After 1965*. University of North Carolina Press: Chapel Hill.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 51.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ 425 U.S. 130, 141 (1976)

the districts be majority-minority. Under Section 5, covered states are not required to *increase* minority representation—they are only prevented from *decreasing* it. When the Voting Rights Act was passed in 1965, many covered jurisdictions had no majority-minority districts. For minorities in these communities, Section 5 does nothing to help them gain majority-minority districts.

Initially, the text of Section 2 mirrored the 15th Amendment, which only redistricting plans that *intentionally* discriminated against minorities violated. This interpretation was confirmed by the Supreme Court in *Mobile v. Bolden* 446 U.S. 55 (1980). Soon after the Court’s decision, Congress decided to broaden the power of Section 2 by amending it. Accordingly, the 1982 reauthorization of the Voting Rights Act contained new Section 2 language that expanded its power to include laws with the *effect* of denying or abridging the right to vote. Although this was clearly intended to increase minority representation beyond the status quo protections afforded by Section 5, Congress left it up to the courts to determine the circumstances under which jurisdictions would need to create majority-minority districts.

5.5 Section 2, *Gingles*, and Redistricting

In *Thornburg v. Gingles*, the Court interpreted the newly amended Section 2 language as requiring the creation of a majority-minority district when certain criteria were met.³⁸⁴ The Court established a 3-prong test known as the *Gingles* Test. To prove a Section 2 claim, a minority group must meet all 3-prongs of the test.³⁸⁵ The first prong

³⁸⁴ 478 U.S. 30 (1986).

³⁸⁵ *Id.*

requires that the minority group be large and compact.³⁸⁶ In *Bartlett v. Strickland*, the Court defined large as meaning the minority group must constitute a numerical majority of the voting age population in the proposed district.^{387,388} The second prong is that the minority group must be politically cohesive.³⁸⁹ This means that members of the minority group unite behind a minority candidate of choice.³⁹⁰ The final *Gingles* prong requires that the majority group be politically cohesive and they must usually defeat the minority candidate of choice.³⁹¹

One additional criteria was explicitly required in the amended Section 2 language: consideration of the “totality of circumstances” when determining whether minorities have less opportunity to elect representatives of their choice. If, in the totality of circumstances, minorities have equal opportunities to elect, then they do not have a Section 2 claim. A variety of factors that could provide evidence of a lack of opportunity were suggested in a report by the Senate Judiciary Committee.³⁹² These factors include:

1. the history of official voting-related discrimination in the state or political subdivision;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the

³⁸⁶ *Id.*

³⁸⁷ In *LULAC v. Perry* 548 U.S. 399, 429 the Court said to use the Citizen voting age population rather than other population measures.

³⁸⁸ 556 U.S. 1 (2009).

³⁸⁹ 478 U.S. 30 (1986).

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.

minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;

4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. the use of overt or subtle racial appeals in political campaigns; and
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additionally, the amended language of Section 2 says that the extent to which minorities have been elected to office may be considered as evidence. If the totality of circumstances shows that discrimination in the jurisdiction exists and all three prongs of the *Gingles* test are met, then Section 2 requires that there be a majority-minority district. If no compact district can be drawn, then Section 2 does not require the creation of a majority-minority district and any district drawn with race as the predominant factor will be subject to strict scrutiny.³⁹³

5.6 Racially Polarized Voting

Racially polarized voting refers to a correlation between the race of voters and the candidates they select.³⁹⁴ Estimates of racially polarized voting are important because they are necessary to satisfy the second and third *Gingles* prongs.³⁹⁵

³⁹³ See *Shaw v. Reno*, 509 U.S. 630 (1993); See also *Miller v. Johnson*, 515 U.S. 900 (1995).

³⁹⁴ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

³⁹⁵ *Id.*

Many scholars initially concluded that voting was extremely racially polarized. David Lublin's study of House elections from 1972 to 1994 found that congressional elections are racially polarized.³⁹⁶ Lublin found that majority white districts "almost never" elect Black representatives.³⁹⁷ He also found that white support for minority candidates did not increase between 1972 and 1994.³⁹⁸ Additionally, he tested and rejected the hypothesis that non-racial demographic characteristics explain the level of polarization.³⁹⁹

Further examination led scholars to conclude that voters were considering more than just race. Charles S. Bullock III analyzed fifty-two elections in the Atlanta area and found that Atlanta voters were less racially polarized than voters in other rural southern communities.⁴⁰⁰ Both Black and white candidates were able to make inroads with voters of the other race, though the degree of success varied greatly.⁴⁰¹ For example, crossover voting increased when an incumbent, either Black or white, was on the ballot.⁴⁰² Newspaper endorsements explained much of the remaining variance in crossover voting rates.⁴⁰³ Marisa A. Abranjano, Jonathan Nagler, and R. Michael Alvarez studied voting in the City of Los Angeles and concluded that previous estimates of racially polarized voting may have been overstated.⁴⁰⁴ They looked at two elections, each of which

³⁹⁶ David Lublin, *The Election of African Americans And Latinos to the U.S. House of Representatives 1972-1994*, *American Politics Quarterly* 25(3): 269-286 (1997).

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ Charles S. Bullock III, *Racial Crossover Voting and the Election of Black Officials*, *The Journal of Politics* 46(1): 238-251 (1984).

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ Marisa A. Abranjano, Jonathan Nagler, R. Michael Alvarez, *A Natural Experiment of Race-Based and Issue Voting: The 2001 City of Los Angeles Elections*, *Political Research Quarterly* 58(2): 203-218 (2005).

featured a Latino candidate was running against a white candidate.⁴⁰⁵ In one election, the Latino was the more liberal candidate; in the other, the Latino was the more conservative candidate.⁴⁰⁶ They found that, rather than just choosing the candidate of the same race, voters factored issues and ideology into their choices.⁴⁰⁷

More recently, scholars have argued that country isn't racially polarized. Nolan McCarty, Keith T. Poole, and Howard Rosenthal have argued that income inequality is the cause of polarization. They show that the polarization of Congress has occurred at the same time that partisanship and presidential voting have become more stratified by income.⁴⁰⁸ Morris P. Fiorina, Samuel J. Abrams, and Jeremy C. Pope argued that the polarization of America is a myth.⁴⁰⁹ They concluded that there is "little evidence" that Americans have become more ideologically polarized in the last thirty years.⁴¹⁰ Instead, they argue, it is "partisan elites" who have become polarized, not ordinary citizens.⁴¹¹

It is important to note that there is often a difference between how scholars assess racially polarized voting and how the Supreme Court defined it. Scholars often seek to determine if race is more predictive of a voter's choice than other factors, such as education or income. Thus, even if white voters were all conservatives who voted for a white conservative candidate and if Blacks were all liberals who voted for a Black liberal candidate, scholars might say that ideology, not race was causing the polarization. In *Gingles*, Justice William Brennan was very clear that causation was *not* needed to prove

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ Nolan McCarty, Keith T. Poole, and Howard Rosenthal. *Polarized America: The Dance of the Ideology and Unequal Riches* (2008).

⁴⁰⁹ Morris P. Fiorina, Samuel J. Abrams, and Jeremy C. Pope, *Culture War? The Myth of a Polarized America* (3rd. 2010).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

the existence of racially polarized voting.⁴¹² For Justice Brennan, it did not matter if whites and Blacks voted for a candidate of their respective race for ideological reasons, all that mattered was that they voted differently.⁴¹³ As Bernard Grofman pointed out shortly after the *Gingles* decision, some expert witnesses failed to note the difference.⁴¹⁴

5.7 Basics of the Ecological Inference Problem

To determine whether there is racially polarized voting to support a Section 2 claim, the rates of crossover voting need to be determined. This is no simple matter. To do so precisely, one would need to know how every individual voter cast her ballot. This is impossible to know in the United States, because every state uses the secret ballot. Additionally, survey data cannot be used, because respondents often misstate or lie about whether they voted and for whom they voted.⁴¹⁵

All is not lost though because we know who turns out to vote and we know the elections results. Voter registration and turnout data are public information. From this, one can see how many of the voters are members of the minority group. Additionally, election results are known not only at jurisdiction-wide level, but also for individual voting precincts. Jurisdictions can have hundred and even thousands of precincts (the

⁴¹² *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁴¹³ *Id.*

⁴¹⁴ Bernard Grofman, *Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts*, *Social Science Quarterly* 72(4): 826-833 (1991).

⁴¹⁵ See, e.g., Jonathan N. Katz and Gabriel Katz, *Correcting for Survey Misreports Using Auxiliary Information with an Application to Estimating Turnout*, *American Journal of Political Science* 54(3): 815-835 (2008); see also Stephen Ansolabehere and Eitan Hersh, *Validation: What Big Data Reveal About Survey Misreporting and the Real Electorate*, *Political Analysis* 20: 437-59 (2012). For a suggestion on how to combine survey data ecological data into a hybrid model, see D. James Greiner and Kevin M. Quinn, *Exit Polling and Racial Block Voting: Combining Individual-Level and R x C Ecological Data*, *The Annals of Applied Statistics* 4(4): 1774 – 1796 (2010).

City of Los Angeles has over 1300 precincts). With this data, one groups the precincts by the percentage of voters in the precinct who are minorities and then look for patterns. Do precincts with a high percentage of minorities tend to support one candidate (a candidate of choice)? Do precincts with a low percentage of minorities tend to oppose that candidate? Answering yes to both questions would seem to imply that voting is racially polarized, but this may not be the case.

Such a simple, superficial analysis of voting data can lead to flawed conclusions. For example, it may be the case that there is no minority candidate of choice. Rather, it may be the case that whites in minority areas vote differently than those in areas with few minorities. It may be the case that in minority areas, voters of all ethnicities support one candidate, say the more liberal candidate. Likewise voters of all ethnicities in areas with few minorities may support a different candidate, say the conservative. Here, one could wrongly conclude that voting is racially polarized when it is not due to aggregation bias. Alternatively, it may be the case that no pattern can be discerned from this grouping method. Some precincts with large minority populations may overwhelmingly support one candidate but others may not. Without a clear pattern, one would have to conclude that voting is not racially polarized. Because of this potential for inaccurate inferences, a more sophisticated method of analysis is necessary.

5.8 Conclusion

This chapter has introduced the legal requirements for redistricting under Section 2 of the Voting Rights Act. I began by explaining the constitutional requirement to redraw district lines every decade to ensure equal population. I then discussed how

Section 2 of the Voting Rights Act protected majority-minority districts. The *Gingles* 3-prong test for a Section 2 claim was explained and the concept of racially polarized voting was introduced. Finally, I suggested why estimating racially polarized vote requires complex mathematical methods.

Chapter 6

The Ecological Inference Problem and Methods

6.1 Overview

In this chapter, I will discuss the ecological inference problem and common methods for estimating racially polarized voting. First, I will explain how the estimating rates of crossover voting poses an ecological inference problem. Then, I will discuss commonly used methods to estimate racially polarized voting: homogenous precinct analysis, Goodman's Ecological Regression, double regression, King's Ecological Inference, and the multinomial-Dirichlet model.

6.2 Introduction

To understand why estimating racially polarized voting is so challenging, one needs to understand the information and methods that are available. Recall from Chapter 5 that in order to determine whether there is racially polarized voting to support a Section 2 claim, the rates of crossover voting need to be determined. Because the United States uses the secret ballot, there is no way to know how individuals voted. Fortunately, though, voter registration and turnout data are public information. From this, one can see how many of the voters are members of the minority group. Additionally, election results are released not only at jurisdiction-wide level, but also for individual voting precincts.

Jurisdictions can have hundred and even thousands of precincts (the City of Los Angeles has over 1300 precincts). Having this precinct-level data allows for the use of statistical methods to estimate how voters cast their ballot.

As discussed in Chapter 5, statistical methods are needed because simple, superficial analysis of voting data can lead to flawed conclusions. For example, it may be the case that there is no minority candidate of choice. Rather, it may be the case that whites in minority areas vote differently than those in areas with few minorities. It may be the case that in minority areas, voters of all ethnicities support one candidate, say the more liberal candidate. Likewise voters of all ethnicities in areas with few minorities may support a different candidate, say the conservative. Here, one could wrongly conclude that voting is racially polarized when it is not due to aggregation bias. Alternatively, it may be the case that no pattern can be discerned from this grouping method. Some precincts with large minority populations may overwhelmingly support one candidate but others may not. Without a clear pattern, one would have to conclude that voting is not racially polarized. Because of this potential for inaccurate inferences, a more sophisticated method of analysis is necessary.

The statistical methods discussed in this chapter vary not only in their methods, but also in the type of results they produce. Some of these methods, Homogenous Precinct Analysis and Goodman's Regression, produce only a single jurisdiction-wide estimate of crossover voting. Other, more sophisticated methods, King's Ecological Inference and the Multinomial-Dirichlet model, produce a jurisdiction-wide estimate and also provide estimates of crossover voting rates in each individual precinct.

6.3 The Ecological Inference Problem

Because voting in the United States is conducted using the secret ballot, it is impossible to know which voter cast which ballot. All that is known is how many votes each candidate received and the demographics of the voting population. Fortunately, researchers not only have this information for the county as a whole, but also for each individual precinct. Consider an example depicted in Table 6.1. Here, “C+D” is the number of people that turned out to vote. “A” is the number of votes that were cast for the minority candidate of choice and “B” is the number of votes that were cast for the other candidate.^{416,417} There were “C” number of voters who were white and “D” number of people who were minorities. Of course, researchers are not able to see how an individual voter cast his ballot and, thus, do not know the values in the interior cells of the table.

One can improve this information, though, by converting the numbers into percentages, as shown in Table 6.2. X percent of voters were minorities and it follows that (1-X) percent of votes were white. One also knows that the minority candidate of choice received P percent of the votes and the white candidate received (1-P) percent of the vote. Additionally, instead of expressing the interior cells as raw numbers, convert them into percentages. Here, the percentage of white voters who supported the minority candidate is β_w . Therefore, the percentage of white voters who supported the white

⁴¹⁶ Methods exist to estimate more than two ethnic groups. Here, I have collapsed all non-Latinos into one group for two reasons. First, it allows me to compare my results with those of other authors. Second, it is a practice adopted by many expert witnesses and lower courts. Interestingly, this two-ethnicity method was incorporated into the definition of racially polarized voting used in the California Voting Rights Act (Greiner, 2011).

⁴¹⁷ Throughout this paper, the terms Latino and Hispanic will be used interchangeably.

candidate is $(1-\beta_w)$. Similarly, the percentage of minority voters who supported the minority candidate is β_L , and the percentage of minority voters who supported the white candidate is $(1-\beta_L)$.

The information in Table 6.2 can be used to place bounds on the possible values of β_w and β_L . Note that, by simple algebra, $\beta_L(X) + \beta_w(1-X) = P$. Since X and P are known values, this is a linear equation with two unknowns that can be rewritten as $\beta_L = [P - \beta_w(1-X)] / X$. Additionally, because they are percentages, $1 \geq \beta_L \geq 0$ and $1 \geq \beta_w \geq 0$. These bounds can be calculated for all precincts and plotted. As example of such a bounds plot is shown in Figure 6.1.

6.4 Homogenous Precinct Analysis

Using these bounds calculations, one can conduct a simple analysis of racially polarized voting, known as “homogenous precinct analysis.”⁴¹⁸ In this method, one uses only the bounds information from the most homogenous precincts.⁴¹⁹ For example, one might use only precincts in which at least 90% or at most 10% of the residents are minorities.⁴²⁰ After calculating the bounds for each of these homogenous precincts, one can plot all of the β_w precinct bounds.⁴²¹ Using this plot, one then looks for a single (or range of) β_w that crosses all of the bounds.⁴²² This is then repeated for the β_L bounds.⁴²³

⁴¹⁸ J. Morgan Kousser, *Ecological Inference from Goodman to King*, *Historical Methods*. 34: 100-204 (2001).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

There are many common criticisms of this method. First, it relies on the assumption that there is no aggregation bias.⁴²⁴ This means that a white voter who lives in heavily minority precinct voter the same as a white voter in a precinct with few minorities. Second, this method often fails to produce informative estimates.⁴²⁵ Sometimes, the bounds of individual precincts are so narrow that no β_W or β_L exist that are within all of the bounds. Other times, the bounds are so wide that the possible values of β_W or β_L are any number between zero and one.⁴²⁶ Third, there is no way to measure uncertainty.⁴²⁷ Because this method is so flawed and leading redistricting experts have recommended abandoning it, homogenous precinct analysis will not be used in the analysis below.

6.5 Goodman's Ecological Regression

The most commonly used method for tackling the ecological inference problem is Goodman's Ecological Regression (ER). This method assumes that β_W and β_L are the same across precincts and that there is no aggregation bias. Recall, from above, that $P = \beta_L(X) + \beta_W(1-X)$. Let the subscript i denote the value for an individual precinct. Thus, using precinct level data on P and X , one can estimate β_W and β_L by running a linear regression on the equation $P_i = \beta_L(X_i) + \beta_W(1-X_i) + e$, where e is an error term.

⁴²⁴ D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, And Where Do We Want to Be?* *Jurimetrics Journal* 47: 115-167 (2007).

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ Jon Wakefield, *Ecological Inference for 2 x 2 Tables*, *Journal of the Royal Statistical Society: Series A* 164: 385-445 (2004).

Although this method is very popular, it is a “blunt instrument” with many problems.⁴²⁸ First, because it does not use the information on the bounds of β_W and β_L , it can produce estimates that are below zero or exceed one.⁴²⁹ This is most likely to occur when one must project the regression line beyond values for which one has data.⁴³⁰ Although some authors simply round these estimates to zero or one, others argue that impossible estimates signal that the model does not fit the data.^{431,432} Second, the model does not produce estimates for individual level precincts.⁴³³ Thus, it is not possible to tell if RPV exists in some precincts, but not others.⁴³⁴ Third, this method weights all precincts equally.⁴³⁵ Thus, very small precincts have no less effect on the estimates than very large precincts. Finally, this method fails to produce estimates for tables larger than 2×2 .⁴³⁶

Despite these problems, ER has remained popular, especially with judges. Many courts have relied on ER estimates in their decisions. Recent, prominent examples include the Supreme Court case *League of United Latin American Citizens v. Perry*,⁴³⁷ the 5th Circuit Court case *Rodriguez v. Bexar County*,⁴³⁸ and the 9th Circuit Court case

⁴²⁸ Daron R. Shaw, *Estimating Racially Polarized Voting: A View From the States*, Political Research Quarterly 50(1):49-74 (1997).

⁴²⁹ D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, And Where Do We Want to Be*, Jurimetrics Journal. 47: 115-167 (2007).

⁴³⁰ J. Morgan Kousser, *Ecological Inference from Goodman to King*, Historical Methods 34: 100-204 (2001).

⁴³¹ D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, And Where Do We Want to Be*, Jurimetrics Journal. 47: 115-167 (2007).

⁴³² Even when impossible estimates occur, regression fits are still often “wonderful.” Christopher H. Achen and W. Phillips Shively, *Cross-level Inference* (1995).

⁴³³ J. Morgan Kousser, *Ecological Inference from Goodman to King*, Historical Methods 34: 100-204 (2001).

⁴³⁴ The assumption that the β s are constant can be relaxed, but doing so allows one to obtain only point estimates, not variances. See D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, And Where Do We Want to Be?* Jurimetrics Journal 47: 115-167 (2007).

⁴³⁵ J. Morgan Kousser, *Ecological Inference from Goodman to King*, Historical Methods 34: 100-204 (2001).

⁴³⁶ Gary King, *A Solution to the Ecological Inference Problem* (1997).

⁴³⁷ 548 U.S. 399 (2006).

⁴³⁸ 385 F. 3d 953 (5th Cir. 2004).

United States v. Blaine County.^{439,440} Courts, though, have disagreed over the validity of estimates that exceed the logical bounds. Some courts have placed less weight on such estimates (e.g., *Aldasoro v. Kennerson*⁴⁴¹), while many others have accepted impossible estimates as evidence of extreme polarization (e.g., *Shirt v. Hazeltine*⁴⁴²).⁴⁴³

6.6 Double Regression

To overcome ER's failure to produce estimates for 2 x 3 contingency tables, many authors turned to double regression. The method was first presented by historian Morgan Kousser⁴⁴⁴ and popularized by Loewen,⁴⁴⁵ Kleppner,⁴⁴⁶ and Grofman et. al..⁴⁴⁷ It was widely used in courts by expert witnesses in voting rights cases.⁴⁴⁸

Double Regression drops ER's assumption that each racial group turns out in equal proportion.⁴⁴⁹ To implement this, the procedure runs two separate Goodman's regressions, giving the method its name. In the first regression, one runs a least squares regression of the fraction of the voting-age population turning out on the proportion of

⁴³⁹ 363 F. 3d 897 (9th Cir. 2004).

⁴⁴⁰ D. James Greiner. "Ecological Inference in Voting Rights Act Disputes: Where Are We Now, And Where Do We Want to Be?" *Jurimetrics Journal*. 47: 115-167 (2007).

⁴⁴¹ *Aldasoro v. Kennerson*, 922 F. Supp. 339 (S.D. Cal. 1995).

⁴⁴² *Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004).

⁴⁴³ D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, And Where Do We Want to Be*, *Jurimetrics Journal* 47: 115-167 (2007).

⁴⁴⁴ J. Morgan Kousser. "Ecological Regression and the Analysis of Past Politics." *Journal of Interdisciplinary History* 4(2): 237-262 (1973).

⁴⁴⁵ James Loewen, *Social Science in the Courtroom: Statistical Techniques and Research Methods for Winning Class-Action Suit*. (1982).

⁴⁴⁶ Paul Kleppner. 1985. *Chicago Divided: The Making of a Black Mayor*. De Kalb: Northern Illinois University Press.

⁴⁴⁷ Bernard Grofman, Michael Migalski, and Nicholas Noviello, *The 'Totality of Circumstances' Test in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, *Law and Policy* 7: 209-223 (1985).

⁴⁴⁸ Gary King, *A Solution to the Ecological Inference Problem* (1997).

⁴⁴⁹ J. Morgan Kousser. "Ecological Regression and the Analysis of Past Politics." *Journal of Interdisciplinary History* 4(2): 237-262 (1973).

the population that is Black and white. In the second regression, the fraction of those in the voting-age population who voted for a particular candidate is regressed on the percentage of the population that is Black and white. The ratio of the estimates produced by the two estimates yields the fraction of Black and white voters who supported each candidate.

Although double regression eliminates ER's assumption of equal turnout rates for Blacks and whites, double regression is vulnerable to the other criticisms of ER.⁴⁵⁰ Double regression also adds one new problem: there is no method for calculating the uncertainty of the estimates it produces. Zax has shown that double regression estimators are neither unbiased nor consistent and has argues that the method "should be abandoned."⁴⁵¹

6.7 King's Ecological Inference

To prevent the problem of what to do with impossible estimates, Gary King developed a new method, King's Ecological Inference (EI), that incorporates the bounds into the estimation procedure.⁴⁵² His method combines the information that on the variation between precincts with the precinct-level bounds on β_w and β_L . EI assumes that β_w and β_L are drawn from a truncated bivariate normal distribution (TBND), which forms the likelihood function. This distribution is determined by five parameters that must be approximated by Maximum Likelihood Estimation, using numerical integration, and then

⁴⁵⁰ Gary King, *A Solution to the Ecological Inference Problem* (1997).

⁴⁵¹ Jeffery S. Zax, *The Statistical Properties and Empirical Performance of Double Regression*, *Political Analysis* 131:57-76 (2005).

⁴⁵² Gary King, *A Solution to the Ecological Inference Problem* (1997).

simulations. After estimating the TBND parameters, one can take random draws from it. More specifically, for each bounds line, one can randomly draw estimates from the slice above the line. To better visualize this, in Figure 6.2, there is an example of a bounds plot overlaid with contour lines that identify the portion of the bounds lines that are most likely to contain the true estimates.

After these samples are drawn for a specific precinct, one then computes the average of the β_W 's and β_L 's for that precinct, all of which are points along that precinct's bounds line. These averages of β_W and β_L are the estimates for that precinct. Once this has been done for all precincts, one can then compute a weighted average of the estimates of β_W across all of the precincts by weighting by the number of white voters in each precinct. Similarly, one weights the average of β_L by the number of minority voters in each precinct.⁴⁵³

This method overcomes several of ER's problems. First, because EI draws estimates only from the part of the distribution over the bounds line, it will always produce estimates that are within the bounds. Second, the precincts are properly weighted by population. Third, EI produces estimates for each individual precinct and does not assume that voters in every precincts vote the same. Fourth, it produces uncertainty estimates for not only the overall estimates of β_W and β_L , but also each individual precinct.⁴⁵⁴

Although EI quickly became popular and used by many researchers, it has had several vocal critics. In a series of articles, Wendy K. Tam Cho has strongly challenged

⁴⁵³ See Gary King, *A Solution to the Ecological Inference Problem* (1997); J. Morgan Kousser, *Ecological Inference from Goodman to King*, *Historical Methods* 34: 100-204 (2001); Adam Glynn and Jon Wakefield, *Ecological Inference in the Social Sciences*, *Statistical Methodology*. 7(3): 307-322 (2010).

⁴⁵⁴ J. Morgan Kousser, *Ecological Inference from Goodman to King*, *Historical Methods* 34: 100-204 (2001).

EI's assumptions.⁴⁵⁵ She argues that aggregation bias is a common phenomenon in ecological data, making King's EI "often inappropriate."⁴⁵⁶ Additionally, Herron and Shotts argued that the assumptions required for the first stage of King's EI are inconsistent with the assumptions of the methods second stage.⁴⁵⁷ In Adolph, King, Herron and Shotts, the authors reached a consensus on how to properly run second-stage ecological regressions; they recommended using King's extended EI model.⁴⁵⁸

The courts have had a mixed reaction to EI. In *Mallory v. Ohio*⁴⁵⁹, EI was recognized as providing better estimates than ER.⁴⁶⁰ However, in *United States v. City of Euclid*, the court said that EI should not replace ER or even homogenous precinct analysis.^{461,462}

6.8 The Multinomial-Dirichlet Model

Rosen, Jiang, King, and Tanner proposed a multinomial-Dirichlet model and two methods of estimation.⁴⁶³ The first method is a frequentist estimation method is based on

⁴⁵⁵ See Wendy K. Tam Cho., *Iff the Assumption Fits...: A Comment on the King Ecological Inference Solution*, *Political Analysis* 7:143-63; Luc Anselin and Wendy K. Tam Cho. "Spatial Effects and Ecological Inference." *Political Analysis* 10:276-97 (1998); Wendy K. Tam Cho and Brian J. Gaines. "The Limits of Ecological Inference: The Case of Split-Ticket Voting." *American Journal of Political Science* 48(1):152-71.

⁴⁵⁶ Wendy K. Tam Cho, *Iff the Assumption Fits...: A Comment on the King Ecological Inference Solution*, *Political Analysis* 7:143-63 (1998).

⁴⁵⁷ Michael C. Herron and Kenneth W. Shotts. *Logical Inconsistency in King's EI-Based Second-Stage Regressions*, *American Journal of Political Science* 48:172-83 (2004).

⁴⁵⁸ Christopher Adolph, Gary King, Michael C. Herron and Kenneth W. Shotts, *A Consensus on Second-Stage Analyses in Ecological Inference Models*, *Political Analysis* 11(1):86-94 (2003).

⁴⁵⁹ *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997).

⁴⁶⁰ D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, And Where Do We Want to Be?* *Jurimetrics Journal* 47: 115-167 (2007).

⁴⁶¹ *United States v. City of Euclid*, 580 F. Supp.2d 584 (N.D. Ohio 2008).

⁴⁶² D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, *Ind. L. J.* 86(2): 447-497 (2011).

⁴⁶³ Ori Rosen, Wenxin Jiang, Gary King, and Martin A. Tanner, *Bayesian and Frequentist Inference for Ecological Inference: the R x C case*, *Statistica Neerlandica* 55: 134-156 (2001).

a first moments estimator. The second method of estimation is a Bayesian approach that uses Markov chain Monte Carlo methods. A benefit of this multinomial-Dirichlet method is that it is better at estimating cases when there are more than two ethnic groups or more than two candidates. The most common use is a 2x3 case where there are 2 ethnic groups but three options for voters (vote for the minority candidate of choice, vote for the other candidate, or abstain). This hierarchical model assumes that turnout follows a binomial distribution. On the second level of the model, β_L is sampled from a beta distribution, the parameters of which follow an exponential distribution.

For several years after this model was proposed, it was considered to be computationally difficult to estimate. Consequentially, the Rosen et al. model was not widely used. Advancements in computing technology in recent years has made this much more feasible to estimate. Because the model is so new, the courts have had few opportunities to consider it.

6.9 Conclusion

I have explained how estimating rates of crossover voting poses an ecological inference problem. Then, I discussed three commonly used methods to estimate racially polarized voting: homogenous precinct analysis, Goodman's Ecological Regression, double regression, King's Ecological Inference, and the Multinomial-Dirichlet Model. I have highlighted benefits and problems of each method and the extent to which courts have accepted them.

6.10 Tables and Figures

Table 6.1: The Basic Ecological Inference Problem

	Latino Candidate	Non-Latino Candidate	
Non-Latino voters	?	?	C
Latino voters	?	?	D
	A	B	A+B = C+D

Table 6.2: The Basic Ecological Inference Problem in Percentages

	Latino Candidate	Non-Latino Candidate	
Non-Latino voters	β_w	$1-\beta_w$	$1-X$
Latino voters	β_L	$1-\beta_L$	X
	P	$1-P$	1

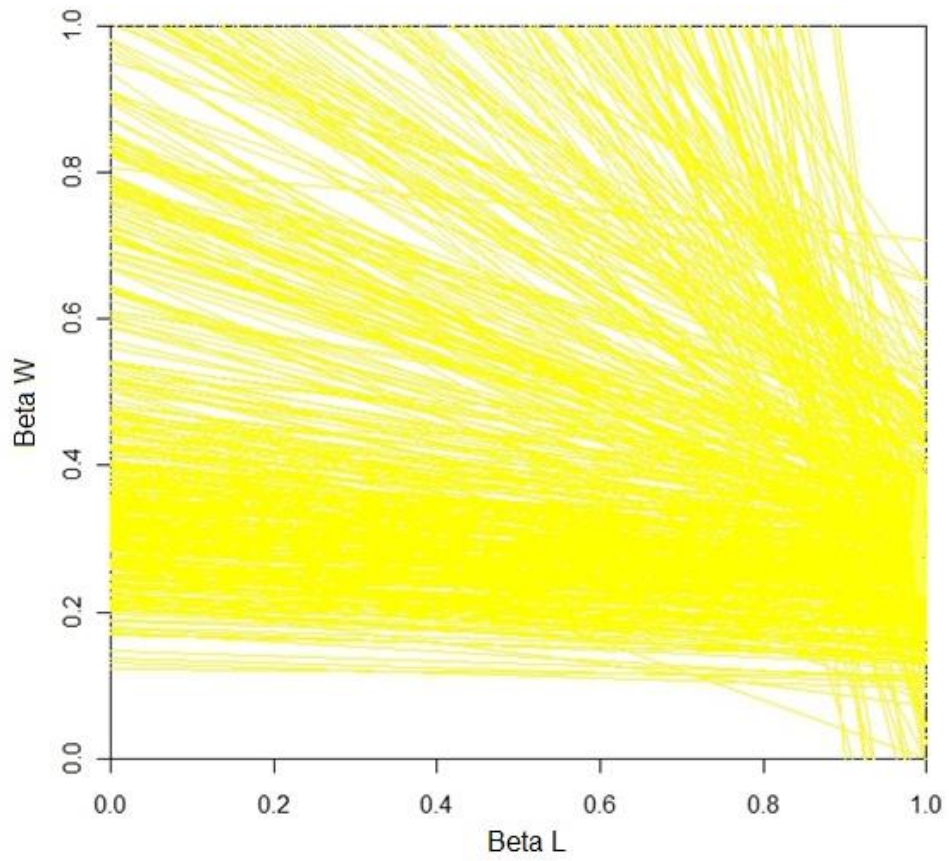
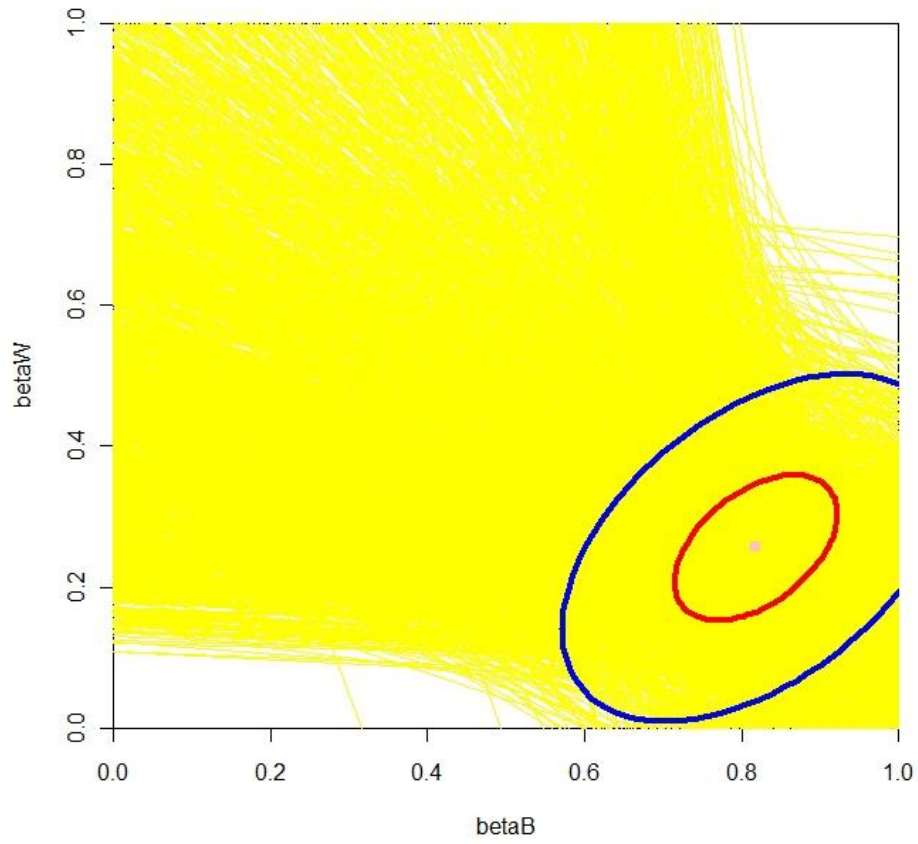
Figure 6.1: Bounds Plot

Figure 6.2: Bounds Plot with MLE Contour Lines

Chapter 7

Improving Estimates of Racially Polarized Voting in a Multi-election Context

7.1 Overview

In this chapter, I propose a method to estimate racially polarized voting across elections. This method improves upon existing methods that estimate elections separately and then rely on experts to interpret the results across elections. Instead, I suggest adding an additional step that considers election-specific factors that may have influenced how voters cast their ballot.

7.2 Introduction

The methods discussed in Chapter 6 estimate RPV in a single election, but courts want to see a consistent history of RPV before they will find that a Section 2 violation of the Voting Rights Act has occurred. This means that RPV must be found in multiple elections over the recent past. This, though, begs the obvious question of how many elections a researcher should estimate. Looking at just one—or even a few—election is frowned upon because of the possibility that the election in question is an outlier.

Some experts attempt to appease the courts by selecting several elections to study. For example, they might choose the subset of elections where one of the candidates is a

minority or choose elections for a single office. Allowing the expert consultants to choose the elections still allows the possibility of biased estimates due to consultants having the ability to choose only elections most likely to be favorable to their client's preferred outcome, i.e., they might cherry-pick the data. Cherry-picking is especially dangerous in Section 2 legislation, where the data is being analyzed by consultants paid by the plaintiffs or defendants. These consultants clearly have a conflict of interest when picking which elections to include in their reports to the courts.

To overcome this selection bias, some suggest estimating RPV in every election that has occurred in the jurisdiction over the period in question. This method eliminates the possibility of biased estimates due to sample selection, but raises a new problem. How does one interpret such a large number of estimates? With a very large sample, it is highly unlikely that all of the elections (or none of the elections) will generate estimates consistent with RPV. What should be done when some elections suggest RPV but others do not?

Below, I suggest a method that can facilitate looking at RPV across multiple elections. I will expand on the Rosen et al. multinomial-Dirichlet (eiMD) method by combining estimates of RPV across elections. Using these combined estimates, researchers can answer several questions. What is the baseline level of support from whites for the minority candidate of choice? Does the race of the candidate affect support from minorities and white voters? Does the quality of the candidate matter?

7.3 Data Collection

For this method, all of the data used in eiMD and more will be needed. As in eiMD, precinct-level election returns are needed. Collect data only on elections where the jurisdiction of the election is larger than the jurisdiction in question. For example, if estimating RPV for a city council district, do not include city council elections. Similarly, for a Congressional district, do not use Congressional districts. These election returns need to be paired with precinct-level estimates of the ethnic composition of the district. As noted above, estimates of the citizen voting age population (CVAP) are preferred over general population estimates, voting age population estimates, or surname-based estimates. This is all the information one needs to conduct for eiMD. Next, one needs to collect election-specific information for each and every election to be estimated. The aggregate election outcome and the ethnicity of the candidates should be recorded for each election. Additionally, determine whether any of the candidates were incumbents.

Several manipulations of this data are needed. First, using the ethnicity data, simply the data into two ethnicities—the minority group in question and everyone else. Second, calculate the number of voters in each precinct who abstained from voting in each election. This can be calculated using the total population numbers from the CVAP data and the election returns. Subtract the number of votes cast in the election in question for a given precinct from the CVAP estimate for the precinct. This is the number of abstentions.

7.4 Measuring Candidate Quality

Many methods exist for measuring candidate quality. Some methods measure quality as simply a binary variable indicating previous elective office. In 1983, Jacobson and Kernell indicated whether a House candidate had previously held office with a dummy variable.⁴⁶⁴ Additional examples include Abramowitz (1988) and Jacobson (1989).⁴⁶⁵ Other authors have used ordinal scales. In 1985, Bond, Covington, and Fleisher rated a challenger's quality using both a three-point scale of experience.⁴⁶⁶ Krasno and Green considered not only prior elective experience, but also personal characteristics.⁴⁶⁷ In 1989, Squire used a two-step method that first rated previous positions held along a seven point hierarchical scale and second multiplied the rating by the percentage of the state's population represented by the previous position.⁴⁶⁸ In 1994, Lublin broke down Squire's 7-point scale into six dummy variables: Senator, Governor, U.S. Representative, Lesser Statewide Official, State Legislator, and Local Official.⁴⁶⁹ In addition to previously holding elective office, campaign expenditures have also been used as a measure of candidate quality.⁴⁷⁰

⁴⁶⁴ Gary C. Jacobson and Samuel Kernell, *Strategy and Choice in Congressional Elections* (1983).

⁴⁶⁵ See Alan I. Abramowitz, *Explaining Senate Election Outcomes*, *American Political Science Review* 82(June):385-403 (1988). See also Gary C. Jacobson, *Strategic Politicians and the Dynamics of U.S. House Elections 1946-86*, *American Political Science Review* 83:773-93 (1989).

⁴⁶⁶ Jon R. Bond, Cary Covington, and Richard Fleisher, *Explaining Challenger Quality in Congressional Elections*, *Journal of Politics* 47:510-29 (1985).

⁴⁶⁷ Jonathan S. Krasno and Donald Philip Green, *Preempting Quality Challengers in House Elections*, *Journal of Politics* 50:920-36 (1988).

⁴⁶⁸ Peverill Squire, *Challengers in U.S. Senate Elections*, *Legislative Studies Quarterly* 14:531-47 (1989).

⁴⁶⁹ David Ian Lublin, *Quality, not Quantity: Strategic Politicians in U.S. Senate Elections, 1952-1990*, *Journal of Politics* 56(1): 228-41 (1994).

⁴⁷⁰ Jon R. Bond, Cary Covington, and Richard Fleisher, *Explaining Challenger Quality in Congressional Elections*, *Journal of Politics* 47:510-29 (1985).

Unlike these previous studies, I am studying only a small subset of precincts in a large jurisdiction. In those studies, the jurisdiction being analyzed was the entire jurisdiction voting for the office in question. Here, the jurisdictions being analyzed, precincts, are small subsets of the entire jurisdiction. Because precincts are such small subsets of the jurisdictions I am looking at and voting results vary so greatly from precinct to precinct, I can use how well the candidate of choice did in the election to measure the quality of that candidate.

7.5 Procedure

First, using the precinct-specific election returns and the precinct-level estimates of ethnicity, obtain eiMD estimates of racially polarized voting. Run the estimation using a 2xC framework. As noted above, voters will be broken into two ethnic breakdowns—the minority group in question and everyone else. C is the number of candidates in the election plus one (for abstention). After obtaining these estimates, identify which candidate was most preferred by the minority group in question, i.e., identify which candidate won the plurality of minority votes. For further estimation purposes, this will be the candidate of choice.

Next, create a new data set where each election is one observation. In the columns of the data set, input the estimates from the first step. Specifically, one column is the estimate of the percentage of minority voters who voted for the candidate of choice. Another column is the estimate of the percentage of non-minorities who voted for the candidate of choice. Create a dummy variable to identify whether the candidate of choice is a member of the minority group, e.g., if considering Hispanics voters, input a 1 if the

candidate herself Hispanic and a 0 if she is not. Then, create another variable to identify which candidate was an incumbent. If the candidate of choice was an incumbent, insert a -1. If the other candidate was an incumbent, insert a 1. If neither candidate was an incumbent, insert a 0.

How to measure candidate quality depends on whether the candidate of choice won or lost the election. If the candidate of choice won the election, then use her margin of victory over the second place finisher. For example, if the candidate of choice received 52% of the vote and the 2nd place finisher received 41% of the vote, then input .11 in the data set. If the candidate of choice lost, calculate the margin of victory of the winner over the candidate of choice and then multiply that by negative one. For example, if the candidate of choice received 35% of the vote and the winner received 47% of the vote, then input -.12 in the data set.

With this new data set, run two ordinary least squares (OLS) regressions. First, regress the percent of minorities voting for the minority candidate of choice (y_i^m) on the candidate quality variable (Q_i), the ethnicity of the candidate of choice variable (E_i), and incumbency variable (I_i). Include an intercept, x_i . Thus, the equation to estimate is

$$y_i^m = a_i + \alpha Q_i + \mu E_i + \delta I_i + \varepsilon_i.$$

Then, run a second OLS regression. This time regress the percentage of non-minorities voting for the minority candidate of choice (y_i^{nm}) on the candidate quality variable (Q_i), the ethnicity of the candidate of choice variable (E_i), and incumbency variable (I_i). Again include an intercept, x_i . Thus, the second equation to estimate with OLS is

$$y_i^{NM} = b_i + \beta Q_i + \eta E_i + \rho I_i + \varepsilon_i.$$

7.6 Results and Inferences

Several interesting questions can be answered from these regressions. Are minority voters more likely to vote for a candidate if she is also a minority? If μ is positive and statistically significant, then yes. Does incumbency affect how minorities vote? Yes, if δ is statistically significant. Does minority support for the candidate of choice drop if the candidate is of low quality? Yes, if α is positive and significant.

Similar questions can be asked about how non-minorities vote. Are non-minorities less likely to vote for the minority candidate of choice if the candidate is also a minority? Yes if η is negative and significant. If β is positive and significant, then non-minorities are more likely to support high quality candidates of choice. The effect of incumbency on how non-minorities vote is measured through ρ . The intercept, b_i , can be interpreted as the baseline level of support for a candidate of choice who is of the same quality as her opponent, is not a minority, and is neither an incumbent nor running against an incumbent.

If the results show that non-minorities have a low baseline of support for minority candidates, do not provide more support for high quality minority candidates, and decrease their support when the candidate of choice is a minority, these would all be indications of racially polarized voting by non-minorities. If the data demonstrate none of these criteria, then this would indicate that non-minorities are not voting as a block against minority candidates. In Chapter 8, I will apply this method to a real data set from Los Angeles County and interpret the results.

7.7 Conclusion

In this chapter, I proposed a method to estimate RPV across multiple elections. This improves upon the current method of estimating individual elections and relying on expert inferences to make a broad interpretation. There are two stages to the method. First, estimate racially polarized voting in each election using the Rosen et al. multinomial-Dirichlet (eiMD) method. Second, regress those results on several election-specific variables, specifically incumbency, candidate quality, and candidate ethnicity. With these results, one can identify whether voting is racially polarized across multiple elections, instead of estimating a single election.

Chapter 8

Estimating Racially Polarized Voting in a Multi-election Context: Los Angeles

8.1 Overview

I apply the method proposed in Chapter 4 to data from Los Angeles County. I look at Supervisorial District 3, where voting has previously been shown to be racially polarized. Examining 10 elections, I find that a multi-election analysis shows that voting is not racially polarized.

8.2 Introduction

In this chapter, I demonstrate how to proceed with the method that I proposed in Chapter 4. Recall from above, that this method allows researchers to estimate racially polarized voting across multiple elections. Additionally, it enables researchers to consider such election specific factors as incumbency, candidate quality, and candidate ethnicity. Below, I apply this method to the 3rd Supervisorial District of Los Angeles County. This is an important jurisdiction to study because other scholars have previously found that voting in District 3 was racially polarized. Additionally, the Supervisorial districts have previously been the subject of successful Section 2 litigation and contention continued to be present during the most recent redistricting cycle.

Using my multi-election method of analysis, I find that voting in the district is not racially polarized. My results suggest that non-Hispanic voters care a lot more about candidate quality than any other factor, including ethnicity. Hispanics, however, still care a great deal about candidate ethnicity and are far more likely to vote for a candidate who is Hispanic.⁴⁷¹

8.3 The History of Racially Polarized Voting in Los Angeles

During the past twenty-five years, the County of Los Angeles has repeatedly been accused of violating Section 2 of the Voting Rights Act. In *Garza v. County of Los Angeles*, the Mexican-American Legal Defense and Educational Fund (MALDEF) sued the County of Los Angeles.⁴⁷² MALDEF argued that the county supervisorial lines were drawn in a manner that discriminated against Hispanics. Specifically, the lines cracked Hispanic voters so that they could not form a majority in any of the districts. The Court sided with MALDEF and found the county to be in violation of the Voting Rights Act.⁴⁷³ Just over a decade later, MALDEF filed another lawsuit alleging a similar Voting Rights Act violation. In *Cano v. Davis*, MALDEF argued that the newly-drawn Congressional districts would abridge the rights of Hispanics by diluting their voting strength.⁴⁷⁴ This time, though, MALDEF lost and the Congressional districts remained the same.⁴⁷⁵

Although there have been no recent lawsuits, scholars have continued to study racially polarized voting in Los Angeles and voting rights advocates have continued to

⁴⁷¹ Throughout this paper, the terms Latino and Hispanic will be used interchangeably.

⁴⁷² 918 F.2d 763 (9th Cir. 1990).

⁴⁷³ J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, *Journal of Law & Politics* 7: 591-732 (1991).

⁴⁷⁴ 211 F. Supp. 2d 1208 (C.D. Cal 2002).

⁴⁷⁵ *Id.*

criticize redistricting in the county. Absoch, Barreto, and Woods analyzed fifteen elections occurring between 1994 and 2003.⁴⁷⁶ They were particularly interested in estimating RPV in Supervisorial District 3, which seemed ripe for a Section 2 claim. From their post-*Garza* data, Absoch, Barreto, and Woods concluded that there was overwhelming evidence that voting in Supervisorial District 3 was racially polarized.⁴⁷⁷ During the recent redistricting cycle, voting rights advocates again pushed for dramatic changes in the district line. Mark Rosenbaum, the chief counsel for the American Civil Liberties Union in Los Angeles, said that passing a plan with minimum changes (as was ultimately done) “will repeat one of the most shameful chapters in Los Angeles County history.”⁴⁷⁸

8.4 Data

This ongoing contention about whether the supervisorial districts in Los Angeles County violate the Voting Rights Act makes Los Angeles an excellent jurisdiction to apply the method I introduced in Chapter 4. I use data that was made publicly available by the County of Los Angeles during public hearings on the most recent redistricting of the supervisorial districts. The data contain election returns by precinct and estimates of ethnicity for the citizen voting age population (CVAP).⁴⁷⁹ I obtained election from the

⁴⁷⁶ Yishaiua Abosch, Matt Barreto, and Nathan Woods, “An Assessment of Racially Polarized Voting For and Against Latino Candidates in California.” In *Voting Rights Act Reauthorization of 2006*, ed. Ana Henderson (2007).

⁴⁷⁷ *Id.*

⁴⁷⁸ Mark Rosenbaum, *Drawing Fair District Lines*, The Los Angeles Times (Sept. 27, 2011), <http://articles.latimes.com/2011/sep/27/opinion/la-oe-rosenbaum-county-supervisors-redistricting-20110927>.

⁴⁷⁹ The individual units of the data are not actually precincts—they are “redistricting units.” A redistricting unit is larger than a precinct but smaller than a census tract. For consistency with the literature, I use the term precinct when discussing the data.

Secretary of State and the Los Angeles County Registrar-Recorder/County Clerk.

Incumbency information was obtained from news reports.

Using the data released by Los Angeles County is preferable for several reasons. First, it conforms to standard practice—it is the data other experts use when analyzing racially polarized voting in Los Angeles County. For example, the above referenced study by Absoch, Barreto, and Woods used the data released by Los Angeles County during the previous redistricting cycle.⁴⁸⁰ Second, because it has the census data already matched to the voting data, it saves a substantial amount of time. Third, it contains identifying information on which supervisorial district a given precinct is in, which enables me to easily look at an individual supervisorial district.

The main drawback to using the data released by Los Angeles County is that the election returns are limited. Many elections are not included in the data set. One may suspect that Los Angeles is only releasing data for elections where voting is not racially polarized, but this does not appear to be the case. Other researchers have found the publicly released data to be sufficient to prove claims of racially polarized voting.

I have restricted the analysis below to Supervisorial District 3 for two reasons. First, Absoch, Barreto, and Woods found that voting in Supervisorial District 3 was racially polarized using the data from the previous redistricting cycle.⁴⁸¹ Thus, there is good reason to suspect that voting in the district may have been racially polarized in the years covered by the more recent data.

⁴⁸⁰ Yishaiua Abosch, Matt Barreto, and Nathan Woods, “An Assessment of Racially Polarized Voting For and Against Latino Candidates in California.” In *Voting Rights Act Reauthorization of 2006*, ed. Ana Henderson (2007).

⁴⁸¹ *Id.*

Second, because my method requires elections to be held by a larger jurisdiction than the one in question, using a smaller district gives me the freedom to estimate more elections. If I suspected that voting throughout Los Angeles County were racially polarized, then it would be flawed to use county returns to measure candidate quality. Poor performance by a Hispanic candidate would not be an indication of low quality, but rather an obvious effect of county-wide racial polarization. I do not suspect this though, because Hispanics have been elected to countywide office. In one of the elections that I include in my analysis below, a Hispanic candidate was elected Los Angeles County Assessor. The City of Los Angeles elected a Hispanic Democratic mayor, Antonio Villaraigosa, over a white Democratic opponent, James Hahn. The election was a landslide, with Villaraigosa receiving 59% of the vote to Hahn's 41%. Additionally, statewide Hispanic candidates have also performed very well in Los Angeles County. I think it is highly unlikely that a court would find that voting in all of Los Angeles County is racially polarized.

The boundaries of District 3 during the years included in my data can be seen in Figure 8.1. The district is on the western edge of Los Angeles County and includes the beaches of Malibu. It runs southwest to Santa Monica and heads inland past Beverly Hills to Glendale. From there, it heads north to the San Fernando Valley and then back east to Malibu. Since 1994, the district has been represented by Zev Yaroslavsky.

I use data from ten elections, as shown in Table 8.1. Five of these elections are statewide and five are countywide. All of the statewide races come from the 2006 Democratic primary. In four of the elections, a Latino/a candidate was on the ballot in a race with no incumbent. In the first election, Lieutenant Governor Cruz Bustamante, the

Latino candidate, ran against political novice John Kraft for Insurance Commissioner. The statewide and Los Angeles County election results can be seen in Table 8.3. Bustamante won the election with 70.5% of the overall vote to Kraft's 29.5%. In Los Angeles County, Bustamante won 72.9% of the vote to Kraft's 27.1%. In the second election, Latino City Attorney of Los Angeles Rocky Delgadillo ran against Oakland Mayor Jerry Brown for Attorney General. Delgadillo lost the election, receiving only 36.7% of the statewide vote to Brown's 63.3%. In Los Angeles, Delgadillo received 47.4% of the vote and Brown earned 52.6% of the vote. In the third election, Latina State Senator Deborah Ortiz ran against State Senator Debra Bowen for Secretary of State. Ortiz gained 39.1% of the statewide vote to Bowen's 60.9%. The Los Angeles total was 38.5% for Ortiz and 61.5% for Bowen. In the fourth election, Latina State Senator Liz Figueroa ran against State Senator Jackie Speier and then-Insurance Commissioner John Garamendi for Lieutenant Governor. In this 3-man election, Figueroa finished a distant third, gaining only 17.7% of the vote to Garamendi's 42.6% and Speier's 39.7%. In Los Angeles County, Figueroa did much better, receiving 21.8% of the vote. Garamendi won 53.6% and Speier won 24.6%. In the final statewide election, no Latino/a was on the ballot. Board of Equalization Chair John Chiang defeated State Senator Joe Dunn with 53.3% of the vote to Dunn's 46.7% of the vote. In Los Angeles, the results were almost identical with Chiang receiving 53.2% of the vote to Dunn's 46.8%.

In the five countywide elections, two of the elections featured Hispanic candidates. In the 2002 primary, Lee Baca easily won reelection with 72.3% of the vote in a 3-candidate field. In the 2006 primary, Baca again won reelection this time with 66.8% of the vote in a 5-candidate field. In that same election, the County Assessor, Rick

Auerbach, was reelected with 77.5% of the vote. In the 2008 primary, District Attorney Steve Cooley was reelected with 64.9% of the vote in a 3-candidate field. His nearest opponent was Albert Robles, a Latino, who earned only 19.6% of the vote. In the final race, another Latino, John Noguez defeated John Wong, 59.6% to 40.4%.

8.5 Multinomial-Dirichlet Estimation

The first step in implementing the method discussed in Chapter 4 is to estimate racially polarized voting using the Rosen et al. multinomial-Dirichlet (eiMD) method. I did that for each of the ten elections and the results appear in Table 8.2. In the elections where more than two candidates were running, I looked at the eiMD results and identified the candidate receiving the plurality of the Hispanic vote. That candidate is the one whose name appears in Table 8.2 under the column “Candidate of Choice.”

In both of his campaigns for reelection as sheriff, Lee Baca was the candidate of choice. In his 2002 reelection, he received 56.6% of the Hispanic vote and 79.2% of the non-Hispanic vote. In his 2006 reelection, he earned 52% of the Hispanic vote and 76.5% of the non-Hispanic vote. In that same election, Auerbach was reelected as Assessor with 62% of the Hispanic vote and 85.6% of the Non-Hispanic vote. Of the 10 elections analyzed, Auerbach and Baca’s are the only ones in which the candidate of choice received more support from non-Hispanics than from Hispanics.

The two Hispanics running for countywide office had very different levels of support from non-Hispanics. In the race for District Attorney, Robles won 54.1% of the Hispanic vote but only 16% of the non-Hispanic vote. In the 2010 race for Assessor, Noguez received 73% of the Hispanic vote and nearly 52% of the non-Hispanic vote.

Looking at the statewide races, Bustamante did very well with Hispanic and non-Hispanic voters alike. He received 85.6% of the Hispanic vote and 69.2% of the non-Hispanic vote. Likewise, Dunn received similar levels of support from both groups. 53.6% of Hispanics supported him and 43.7% of non-Hispanics.

Delgadillo, Figueroa, and Ortiz all did much better with Hispanic voters than they did with non-Hispanic voters. Delgadillo received 90.1% of the Hispanic vote, but only 24.1% of the non-Hispanic vote. Similarly, Ortiz received 81.8% of the Hispanic vote, but only 20.1% of the non-Hispanic vote. Although a majority of Hispanics supported Figueroa (61.2%), a dismal 5.6% of non-Hispanics voted for her.

Traditionally, this would be the end of the data analysis. Experts would need to infer from this data whether voting is racially polarized. As you can see, the evidence is mixed. Some Hispanic candidates, Bustamante and Noguez, received a majority of the non-Hispanic vote. Other candidates, such as Figueroa and Robles, fared very poorly with non-Hispanic voters. With mixed results such as these, what is a researcher to conclude? The method I proposed in Chapter 4 is designed to clear up just such a murky situation.

8.6 Estimation in a Multi-Election Context

Recall from Chapter 4 that I am going to estimate two ordinary least squares regressions. The first is

$$y_i^m = a_i + \alpha Q_i + \mu E_i + \delta I_i + \varepsilon_i,$$

where y_i^m is the percentage of minorities voting for the candidate of choice, Q_i is the candidate quality variable, E_i is a dummy for whether the candidate of choice is a minority, and I_i is an incumbency variable. I have also included an intercept, a_i .

The second regression,

$$y_i^{NM} = b_i + \beta Q_i + \eta E_i + \rho I_i + \varepsilon_i,$$

is very similar but here y_i^{nm} is the percentage of non-minorities voting for the minority candidate of choice.

The first step in undertaking the method I have proposed is to create another data set. See Table 8.3. Recall from Chapter 4 that how to measure candidate quality depends on whether the candidate of choice won or lost the election. If the candidate of choice won the election, then use her margin of victory over the second place finisher. For example, for Bustamante who won the election and received 70.5% of the vote and who's challenger received 29.5% of the vote, subtract 0.295 from 0.705 and input .41 in the data set. If the candidate of choice lost, calculate the margin of victory of the winner over the candidate of choice and then multiply that by negative one. For example, Delgadillo lost with 36.7% of the vote to Brown's 63.3% of the vote, so subtract 0.633 from 0.367 and input - 0.266 in the data set. These values are Q_i .

Whether the candidate of choice is Hispanic can also be seen in Table 8.3. None of the opponents of the candidates of choice were incumbents, so the incumbency variable functions as a dummy indicating whether the candidate of choice was an incumbent.

With this data, I first ran the OLS regression of Hispanic support for the candidate of choice. The results can be seen in Table 8.4. The coefficient on the quality variable was .1668, but the standard error was .1144. The coefficient on incumbent was -.1243 with a standard error of .0829. This implies that candidate quality and incumbency are not important to Hispanics when deciding whom to support. The coefficient on ethnicity was .1938 with a standard error of .0829. Thus, ethnicity is the most important factor for Hispanics when deciding for whom to vote. Hispanics give substantially more support to their preferred candidate when she is Hispanic.

Next I ran the OLS regression of non-Hispanic support for the candidate of choice. These results can be seen in Table 8.5. The coefficient on ethnicity was -.0566 with a standard error of .0787 and the coefficient on incumbency was .0311 with a standard error of .0668. Thus, the ethnicity of the candidate of choice and incumbency are not driving how non-Hispanics vote. The coefficient on candidate quality was .6498 with a standard error of only .0726. This is large and highly significant. Thus, non-Hispanic voters in District 3 vote very similarly to voters outside the district.

The intercepts may be thought of as the baseline level of support for a candidate of choice who is not Hispanic and when there is no incumbent in the race. The baseline level for Hispanic voters is 59% and the baseline for non-Hispanics is 43%.

8.7 Results

Using the method I proposed in Chapter 4, I have found two important results. First, the baseline level of support from non-Hispanics is relatively high at 43%. Second, that level does not significantly drop if the candidate is Hispanic. Although ethnicity

plays a large role in how Hispanics vote, it was not a significant factor in non-Hispanics vote choices. Second, candidate quality is important to non-Hispanics, but less important to Hispanics. These results suggest that the criteria needed to demonstrate racially polarized voting is not present. Hispanics do vote as a block to support their candidate of choice, especially when the candidate is Hispanic. However, non-Hispanics are not blindly voting against candidates of choice. Instead, their votes mirror those of voters outside of the district and are based on candidate quality. Thus, non-Hispanics are not voting as a racial block to defeat Hispanic candidates.

8.8 Conclusion

In this chapter, I have demonstrated how to proceed with the method that I proposed in Chapter 4. This method allows researchers to estimate racially polarized voting across multiple elections. It also enables the researcher to consider election specific factors, such as incumbency, candidate quality, and candidate ethnicity. Applying this method to Los Angeles County, I found that Supervisorial District 3 is not racially polarized. This is important because other scholars have previously found that voting in District 3 was racially polarized. My results suggest that non-Hispanic voters care a lot more about candidate quality than any other factor. Additionally, they suggest that Hispanics still care a great deal about candidate ethnicity.

8.9 Tables and Figures

Table 8.1: List of Candidates and Election Results

*denotes incumbent

Office	Election	Candidate	Los Angeles Results	Statewide Results
Sheriff	Primary 2002	Lee Baca*	72.3	
		John Stites	15.3	
		Patrick Gomez	12.4	
Insurance Commissioner	Primary 2006	Bustamante	72.9	70.5
		Kraft	27.1	29.5
Attorney General	Primary 2006	Delgadillo	47.4	36.7
		Brown	52.6	63.3
Secretary of State	Primary 2006	Ortiz	38.5	39.1
		Bowen	61.5	60.9
Lieutenant Governor	Primary 2006	Figueroa	21.8	17.7
		Speier	24.6	39.7
		Garamendi	53.6	42.6
Controller	Primary 2006	Joe Dunn	46.8	46.7
		John Chiang	53.2	53.3
Sheriff	Primary 2006	Lee Baca*	66.8	
		Don Meredith	10.1	
		Ken Masse	10.0	
		Ray Leyva	8.6	
		Paul Jernigan	4.5	
Assessor	Primary 2006	Rick Auerbach*	77.5	
		John Taxes Loew	22.6	
District Attorney	Primary 2008	Steve Cooley*	64.9	
		Albert Robles	19.6	
		Steve Ipsen	15.5	
Assessor	General 2010	John Noguez	59.6	
		John Wong	40.4	

Table 8.2: Estimates of Racially Polarized Voting using eiMD

Office	Election	Candidate of Choice	Hispanic Vote	Non-Hispanic Vote
Sheriff	Primary 2002	Baca	0.566	0.792
Insurance Commissioner	Primary 2006	Bustamante	0.856	0.692
Controller	Primary 2006	Dunn	0.536	0.437
Attorney General	Primary 2006	Delgadillo	0.901	0.241
Lieutenant Governor	Primary 2006	Figueroa	0.612	0.056
Secretary of State	Primary 2006	Ortiz	0.818	0.201
Assessor	Primary 2006	Auerbach	0.620	0.856
Sheriff	Primary 2006	Baca	0.520	0.765
District Attorney	Primary 2008	Robles	0.541	0.160
Assessor	General 2010	Noguez	0.730	0.518

Table 8.3: Variables for OLS Estimation

Office	Election	Candidate of Choice	CoC Vote Share	Winner/Runner up Vote Share	Margin of Victory	Hispanic	Incumbent
Sheriff	P 2002	Baca	72.3%	15.3%	57.0%		1
Ins Comm	P 2006	Bustamante	70.5%	29.5%	41.0%	1	
Controller	P 2006	Dunn	46.7%	53.3%	-6.6%		
Attorney Gen	P 2006	Delgadillo	36.7%	63.3%	-26.6%	1	
LT Gov	P 2006	Figueroa	17.7%	42.6%	-24.9%	1	
Sec of State	P 2006	Ortiz	39.1%	60.9%	-21.8%	1	
Assessor	P 2006	Auerbach	77.5%	22.6%	54.9%		1
Sheriff	P 2006	Baca	66.8%	10.1%	56.7%		1
District Attorney	P 2008	Robles	19.6%	64.9%	-45.3%	1	1
Assessor	G 2010	Noguez	59.6%	40.4%	19.2%	1	

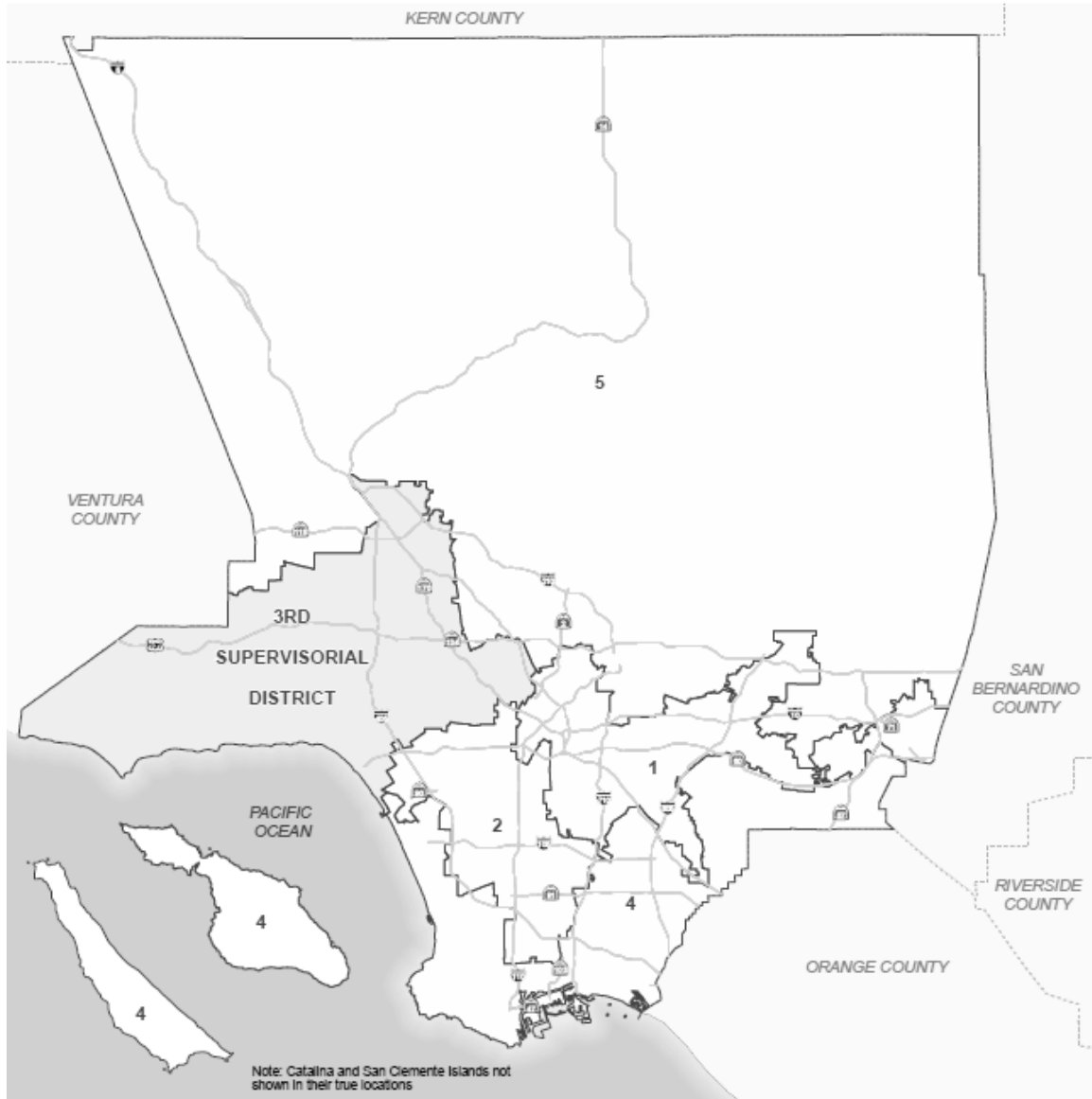
Table 8.4: Results of OLS Regression for Hispanic Voters

	Coefficient	Standard Error
Intercept	.5861	.0901
Candidate Quality	.1668	.1144
Ethnicity of CoC	.1938	.0978
Incumbant	-.1243	.0829

Table 8.5: Results of OLS Regression for non-Hispanic Voters

	Coefficient	Standard Error
Intercept	.4260	.0726
Candidate Quality	.6498	.0922
Ethnicity of CoC	-.0566	.0787
Incumbant	.0311	.0668

Figure 8.1: Supervisorial District 3



Chapter 9

Concluding Remarks

In this work, I analyzed the history of the Voting Rights Act, the Court's decision in *Shelby County v. Holder*, and proposed a legislative package to respond to the Court's decision. First, I discussed the legislative and judicial history of the Voting Rights Act. Then, I explained the last challenge to the Voting Rights Act, *NAMUDNO v. Holder*, and *Shelby v. Holder*. I explained that the decision to overturn Section 4 and only Section 4 was predictable. I then analyzed proposals for Congressional action and put forth my own proposal. I recommend abandoning efforts to amend Section 4. Instead, I proposed focusing on passing a package that amends Section 3 and creates a competitive grant program to encourage states to voluntarily improve their election procedures to protect voting rights. I argued that this "carrot and stick" package could gain necessary Republican support and pass Congress during the lame-duck session.

Then, I discussed why estimates of racially polarized voting are needed from a legal standpoint and why they are difficult to estimate mathematically. I explained the constitutional requirement to reapportion Congressional districts and the Supreme Court cases that lead to the equal population requirement. I discussed the Voting Rights Act, looking closely at Section 2. I then looked at the Supreme Court's three-prong test for determining when majority-minority districts should be drawn and introduced the concept of racially polarized voting.

From there, I discussed the general ecological inference problem and the most commonly used methods of estimating racially polarized voting. I explained why estimating rates of crossover voting is an ecological inference problem. Then, I discussed homogenous precinct analysis, Goodman's Ecological Regression, double regression, King's Ecological Inference, and the multinomial-Dirichlet model.

I proposed a 2-step method to estimate racially polarized voting in a multi-election context. In the first step, I obtained election-specific estimates of racially polarized voting using the Rosen, Jiang, King, and Tanner (2001) multinomial-Dirichlet model. In the second step, I regressed these election results on candidate quality, incumbency, and ethnicity of the minority candidate of choice. This method allowed me to estimate the baseline level of support for candidates of choice and test whether the ethnicity of the candidates affected how voters cast their ballots.

I applied this method to the 3rd Supervisorial District of Los Angeles County. Despite previous findings by other scholars of racially polarized voting in the district, I did not find evidence to support such a conclusion. Although I found that Hispanic voters are united and vote as a bloc for their candidates of choice, I found that non-Hispanics are not unified against the Hispanic candidate of choice. Instead, I found that candidate quality is the driving force in how non-Hispanics vote. Additionally, I found a high level of baseline support from non-Hispanics for the Hispanic candidate of choice.

Looking forward, the Court's decision in *Shelby* has increased the importance of statistics in litigation. Data will be "more valuable and more likely to be more influential than ever before."⁴⁸² Although the "interaction between the law and social science

⁴⁸² Doug Chapin, *Voting Rights After Shelby County: Bring on the Election Geeks*, Election Law Journal 12: 327 (2014).

professions has advanced considerable in recent years,” there is “room in the legal profession for a better understanding of what social science evidence does and does not show.”⁴⁸³ This is a trend that is not going to go away. Statistical methods are only going to improve and expand their reach into new areas of litigation. While it’s understandable that today’s judges, who were educated decades ago, were not prepared by their law school education to critically evaluate statistical evidence, it is unacceptable that law schools are continuing to produce future judges and justices that are equally ill-equipped. Law schools have a duty to adequately prepare the future members of the third branch of government. Failing to train the next generation of judges to understand basic statistics is unacceptable and dangerous.

Just as law schools require courses in Constitutional law and legal writing, law schools should also require that all students take one semester of a quantitative methods class. While an introductory statistics course would be ideal, it need not be required. I recognize that law school students would protest a mandatory statistics class. Instead, the curriculum could allow students to choose a quantitative class that most suits their interests. Some students would hopefully choose statistics, but others could choose a legal finance class, an e-discovery class, or even an accounting class. Any course with a quantitative methods component would be a vast improvement over the current legal education.

⁴⁸³ David C. Kimball, *Judges are not Social Scientists (Yet)*, Election Law Journal 12:237 (2014).

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