

Did Voter Suppression Win President Trump the Election?: The Decimation of the Voting Rights Act and the Importance of Section 5

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DONALD TRUMP'S RECENT PRESIDENTIAL VICTORY in the United States has created a media firestorm centered largely around President Trump's explosive tweeting, anti-Trump protests, and an eerie uncertainty over his roadmap of policy creation. However, civil rights leaders are contending that there is a much larger issue at hand—whether Trump used calculated voter suppression to tip the scales in his favor. While voter suppression is an issue that many believe has been eradicated, civil rights leaders contend that “a tangle of Republican-backed ‘voter suppression’ laws enacted since 2010 probably helped tip the scale for Republican nominee Donald Trump in some closely contested states on election night.”¹ While many questions remain, there is one question that stands out—did the suppression of minority votes win Trump the election?

Voter suppression has been an issue in America since our nation's birth. Section 5 of the landmark 1965 Voting Rights Act (“VRA”) has stood as hallmark legislation to combat voter discrimination through requiring areas with a history of racial discrimination to receive a voting plan “preclearance” prior to enacting any new voting laws.² Since 1965, the Supreme Court has repeatedly affirmed Section

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1. Tony Pugh, *Voter Suppression likely tipped the scales for Trump, civil rights groups say*, McClatchy D.C. (Nov. 10, 2016), <http://www.mcclatchydc.com/news/politics-government/election/article113977353.html> [https://perma.cc/QP89-54S8].

2. Arusha Gordan & Ezra D. Rosenberg, *Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century*, 21 MICH. J. RACE & L. 23, 37–39 (2015).

5's broad power.³ However, in 2013's *Shelby County v. Holder*, the Supreme Court radically departed from its previous holdings by essentially invalidating Section 5 of the VRA.⁴ The Supreme Court left disenfranchised voters with a harder path to recovery, stripping voters of the protection Section 5 gave for over four decades.

This Comment focuses on the evolution of Section 5 of the Voting Rights Act and the legal effect it has had and will have on the American electoral process. Part I focuses on the history of voting rights. Part II analyzes the legal effect the Supreme Court case *Shelby County* has had on Section 5, as well as the possible future effects the case could have. Part III advocates for the overturn of *Shelby County*. Part IV illustrates the blatant racial voter suppression post-*Shelby County*. Finally, Part V analyzes the effect voter suppression had on the 2016 Presidential Election, emphasizing how voter suppression may have made the difference in the close battle between Hillary Clinton and Donald Trump.

I. History of Voting Rights

Prior to the Civil War, women and racial minorities were not allowed to vote.⁵ A bevy of amendments in the mid-1800's gave black men the right to vote, and a period of "unprecedented electoral success for African Americans" began.⁶ While constitutional amendments transformed the political landscape in voting, African-American voters were often threatened and physically beaten in their attempt to vote.⁷ To illustrate this, Ben Cady and Tom Glazer described the experience of a black man who was confronted and violently threatened by two white men when he attempted to register to vote in *Paynes v. Lee*.⁸

While voter intimidation was extreme in the early 1960s, the enforcement of several civil rights laws massively strengthened African-

3. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); see also *Shelby Cty., Alabama v. Holder*, 133 S.Ct. 2612, 2619 (2013).

4. *Shelby Cty.*, 133 S.Ct. at 2619.

5. Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Proactive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 62 (2008).

6. Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 185 (2015).

7. John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 122 (1972).

8. Cady & Glazer, *supra* note 6, at 216 (showcasing the extremity of voter intimidation in the early 1960s, including threats of assault, battery, and even death in *Paynes v. Lee*, 377 F.2d 61 (5th Cir. 1967)).

American voter participation.⁹ When African-American men showed up at the polls, southern states began to enact a number of ways to prevent black men from voting, “includ[ing]: district gerrymandering, purposeful closing of black polling places, poll taxes, literacy tests, grandfather clauses, and above all else, waves of Ku Klux Klan terrorism in the form of lynching and vigilante violence against blacks and white civil rights activists in the South.”¹⁰

a. The Voting Rights Act of 1965

After years of voter complications due largely to minority voter suppression, Congress passed the Voting Rights Act in 1965.¹¹ The VRA was signed into law by President Johnson, who called the legislation “one of the most monumental laws in the entire history of American freedom.”¹² Established to challenge discriminatory voting practices, it has been heralded as “the most successful civil rights law of the 20th century,” that “sparked a revolution in ballot access.”¹³ The Act installed a nationwide ban on any denial of the right to vote based on race or color.¹⁴ Further, the Act made many changes, including banning long-standing laws which required literacy tests.¹⁵ Most legal scholars believe that Section 5 of the Act was the most influential because it established powerful remedial actions by creating a system of examination in jurisdictions falling under the VRA’s coverage.¹⁶

Section 5 mandated that jurisdictions with a specific history of discrimination would be required to allow federal oversight regarding preclearance of a state’s particular voting plan.¹⁷ Specifically, Section 5 required certain jurisdictions to obtain “preclearance” for the imple-

9. *Id.*

10. Daniel Sullivan, *Viewing Tennessee’s New Photo Identification Requirements for Voters Through Historical and National Lens*, 9 TENN. J.L. & POL’Y 135, 143 (2013) (using examples such as a poll tax to show how black males were suppressed from voting because they could not afford a heavy tax required to vote) (quoting Bass, *infra* note 23, at 116–17).

11. Gordan & Rosenberg, *supra* note 2, at 24 (analyzing how the VRA changed the electoral landscape of America); see also Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 375 (2014).

12. President Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 1965 Pub. Papers 840, 841 (Aug. 6, 1965).

13. Gordan & Rosenberg, *supra* note 2, at 24 (“The Voting Rights Act immediately changed the electoral landscape of the country.”).

14. *Id.*

15. *Id.*

16. Daniels, *supra* note 5, at 69 (“The importance of Section 5 is difficult to overstate.”).

17. *Id.* at 69–70.

mentation of any new voting procedures.¹⁸ This preclearance requirement placed the burden on the specific state to prove the change had neither “the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.”¹⁹ Jurisdictions that were designated “preclearance” under Section 4 were called “covered” jurisdictions, determined by a formula.²⁰ A “covered” jurisdiction was a state or area that (1) maintained a test as a prerequisite to vote as of November 1, 1964 and (2) had less than fifty percent voter registration or turnout in the 1964 Presidential election.²¹

Historically, jurisdictions implemented tests which indirectly discriminated against African-American voters, including literacy and knowledge tests, good moral character requirements, and the need for vouchers from already registered voters.²² In an effort to remedy discrimination, areas falling under these requirements also required the United States Attorney General to approve any new proposed voting practices.²³ Once a “covered” jurisdiction proposed a voting plan, the Department of Justice could either block a proposed change or request more information.²⁴ At that point, the jurisdiction could modify or completely withdraw the proposed change, giving them broad power to deny the jurisdiction’s plan.²⁵

By imposing a preclearance requirement, the VRA aimed to prevent the enactment of discriminatory laws, in part, to preventively solve voter disenfranchisement instead of after-the-fact with costly litigation.²⁶ Before the VRA, an “illegal scheme might be in place for several election cycles before a . . . plaintiff can gather sufficient evidence to challenge it,” forcing a plaintiff to often wait years for an appropriate remedy.²⁷ For over forty years, Section 5 stood as a requirement for states to elicit federal pre-approval before being al-

18. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (2000) (current version at 52 U.S.C. 10304 (2006)).

19. *Shelby Cty*, 133 S.Ct. at 2620.

20. *Id.*

21. *Id.*

22. *Id.* at 2619.

23. Karyn L. Bass, *Are We Really over the Hill Yet? The Voting Rights Act at Forty Years: Actual and Constructive Disenfranchisement in the Wake of Election 2000 and Bush v. Gore*, 54 DEPAUL L. REV. 111, 121 (2004).

24. *Shelby Cty.*, 133 S.Ct. at 2620.

25. *Id.* at 2621.

26. *Id.* at 2640 (“Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency.”).

27. *Id.*

lowed to implement any voting changes in their state.²⁸ Since 1965, the Supreme Court has further defined the broad scope of Section 5.²⁹

b. Supreme Court's Early Reaffirmation of the VRA

The Supreme Court has continuously reaffirmed the constitutionality of the VRA.³⁰ In 1966, only one year after the VRA was enacted, the Supreme Court decided *South Carolina v. Katzenbach*.³¹ The Supreme Court rejected South Carolina's argument that certain provisions of the VRA violated the Constitution, holding that it was a valid exercise of Congress' power under the enforcement clause of the Fifteenth Amendment.³² Justice Warren, writing for the majority, stated that while Congress' method "may have been an uncommon exercise of congressional power," the VRA was enacted under "exceptional conditions."³³ By promptly affirming the VRA in *Katzenbach*, the Court demonstrated its steadfast support for the legislation.³⁴

Additionally, in *Georgia v. United States*, the Court reaffirmed Section 5's powerful breadth by holding that preclearance must be broadly construed and that all covered jurisdictions must get new voting plans cleared by the Attorney General.³⁵ Georgia submitted a voting plan, pursuant to Section 5 of the VRA, to the Attorney General who then requested further information "to assess the racial impact of the tendered plan."³⁶ The Attorney General ultimately rejected the plan, explaining that the state's extensive departures from the usual county lines suggested the possibility of racial discrimination.³⁷ Upon review, Justice Black's dissent in *Katzenbach* cited the broad scope of Section 5:

28. Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 231 (2003) ("The drastic nature of the Section 5 remedy comes from its abrogation of the autonomy of some state and local governments in all matters related to voting.").

29. See generally *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 330–34 (holding that Section 5's preclearance formula was "rational both in practice and in theory").

34. Pitts, *supra* note 28, at 238 ("[T]he Court upheld Section 5 [in *Katzenbach*], employing a highly deferential standard that gave Congress 'full remedial powers' to use 'all means which are appropriate' to eliminate unconstitutional voting discrimination.").

35. See generally *Georgia v. United States*, 411 U.S. 526 (1973).

36. *Id.* at 529.

37. *Id.* at 529–30.

Section 5 goes on to provide that a State . . . can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General . . . that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color.³⁸

The Court used Justice Black's dissent to emphasize that all preclearance plans in covered jurisdictions would need continuous preclearance by the Attorney General.³⁹

c. Section 5 Violation Test

In *Beer v. United States*, the Supreme Court created a two-part test to determine whether Section 5 has been violated: (1) determine whether the change would be a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"; and (2) assuming there is no retrogression, determine whether the plan is constitutionally discriminatory based on race under the Fourteenth Amendment.⁴⁰ In *Beer*, the Supreme Court validated a voting reapportionment plan in New Orleans that effectually enhanced the position of racial minorities, explicitly stating that reapportionment helps minority voters who cannot abridge the right to vote because of race.⁴¹

While the Court established a clear analysis for Section 5 claims, some commentators contend that it failed to consider who has the burden of proof on a Section 5 violation.⁴² Nevertheless, *Beer's* effect encouraged a "retrogression" test to determine if Section 5 had been violated.⁴³

d. The Supreme Court Continuously Reaffirms the VRA

The Supreme Court had continued to reaffirm its approval of the VRA, specifically noting in *City of Rome v. United States* the "modest and spotty" progress that minorities had struggled to attain in recent

38. *Id.* (quoting *Katzenbach*, 383 U.S. at 356).

39. *Id.*

40. *Beer v. United States*, 425 U.S. 130, 141 (1976).

41. *Id.* ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5.")

42. *Pitts*, *supra* note 28, at 234 (arguing that the Voting Rights Act of 2013 clearly places the burden on the jurisdiction to prove their plan does not have a discriminatory purpose or effect).

43. *Beer*, 425 U.S. at 146 (1976).

years.⁴⁴ In *Rome*, the Attorney General refused to preclear a voting plan requested by the city of Rome, Georgia, because “[the Attorney General] conclud[ed] that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, such electoral changes would deprive [African-American] voters of the opportunity to elect a candidate of their choice.”⁴⁵ Justice Marshall, writing for the majority, affirmed Congress’ intent for states to request Section 5 preclearance when evidence of a discriminatory purpose and effect were absent.⁴⁶ Finally, the Court explained that despite some delays from the Attorney General, the government was well within its right to deny the voting plan.⁴⁷

The Supreme Court bolstered the protection of Section 5 once more in *Lopez v. Monterey County*, holding that a judicial election system in California was not legally valid without preclearance.⁴⁸ The Court remained consistent, standing firm in its opinion that “covered” state governments must obtain preclearance from the federal government for voting plans.⁴⁹ The Court in *Morse v. Republican Party of Virginia* invalidated an argument that would have created a Section 5 loophole by allowing political parties to establish voting plans without preclearance in “covered” jurisdictions, showing that the Court would continue to take any attempts to seriously bypass Section 5.⁵⁰

e. The Supreme Court’s Shift to Reduce Federal Power Regarding Section 5

In 1997, the Supreme Court’s opinion of Section 5 seemed to have shifted when it reduced federal power over state governments in a multitude of cases.⁵¹ This shift is evidenced in *City of Boerne v. Flores*, which “redefin[ed] Congress’s ability to pass legislation under its enforcement power, applying much stricter limits to congressional authority than were extant when Section 5 was previously upheld.”⁵² Specifically, the Court focused on the enforcement clause—the clause

44. *City of Rome v. United States*, 446 U.S. 156, 181 (1980).

45. *Id.* at 156.

46. *Id.* at 170.

47. *Id.*

48. *Lopez v. Monterey County, Cal.*, 519 U.S. 9 (1996).

49. *Id.* at 19.

50. *Morse v. Republican Party of Virginia*, 517 U.S. 186, 188–89 (1996); see also Michael J. Pitts, *What Will the Life of Riley v. Kennedy Mean for Section 5 of the Voting Rights Act?*, 68 MD. L. REV. 481, 515 (2009).

51. Pitts, *Life of Riley*, *supra* note 50, at 512.

52. Pitts, *Section 5*, *supra* note 28, at 241.

that previously gave Section 5 its wide scope—to conclude that Congress must pass a “proportionality” test in order to prove that its legislation is constitutionally sound under the enforcement clause.⁵³ While Section 5 remained constitutionally valid, some thought it would not survive the new Supreme Court test laid out in *Boerne*.⁵⁴ After *Boerne*, some legal scholars sensed the shift in the Supreme Court as Congress moved its focus to second-generation issues facing disenfranchised voters.⁵⁵ Author Sudeep Paul emphasized a shift in Congress’ focus to modern voters experiencing racially polarized voting and vote dilution, bringing with it a battle between Congress and the Supreme Court regarding what to do with the VRA.⁵⁶ With its decision in *Boerne*, the Supreme Court looked as though it would continue to protect states’ power to constrain the long-standing power of the VRA by showing that Congress’ authority would be pulled back if Congress attempted to prohibit states too much.

f. Congress’ Reauthorization of the VRA

In 2006, perhaps in response to the Supreme Court’s new willingness to restrict Section 5 for second-generation voters, Congress extended the VRA for twenty-five years by declaring that Section 5 prohibits a “discriminatory purpose” regardless of its retrogressive effect.⁵⁷ This legislation effectively mandated that Section 5 would remain “a necessary tool in the statutory arsenal used to combat voting-related discrimination.”⁵⁸ To bolster its position, Congress provided more than 15,000 pages of records which demonstrated that the covered jurisdictions that had engaged in the worst voting discrimination also had a recent record of racial discrimination in voting, noting that “without the construction of the VRA protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”⁵⁹

53. *Id.* at 243.

54. *Id.* at 248–49.

55. Sudeep Paul, *The Voting Rights Act’s Fight to Stay Rational: Shelby County v. Holder*, 8 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 271, 280 (2013).

56. *Id.* at 279 (explaining that racially polarized voting “refers to a pattern of voting where voters of one race support the same candidate while voters of another race all support a different candidate”).

57. *Id.* at 280.

58. Pitts, *Life of Riley*, *supra* note 50, at 524.

59. Marcus Hauer, *Shelby County v. Holder: Why Section 5 of the Voting Rights Act is Constitutional and Remains Necessary to Protect Minority Voting Rights Under the Fifteenth Amendment*, 38 VT. L. REV. 1027 (2014).

Specifically, Congress mandated that Section 5 forbid “voting changes with ‘any discriminatory purpose’ as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, ‘to elect their preferred candidates of choice.’”⁶⁰ Legal scholar Michael J. Pitts pointedly described the VRA extension in 2000 as “a congressional smack-down of the Court’s interpretations of the substantive reach of Section 5” which stood as “Congress’ humbling of the Court’s ill-fated attempts at interpreting a seminal civil rights statute.”⁶¹

g. The Supreme Court Clashes with Congress’ 2006 Reauthorization of the VRA

After Congress’ reauthorization of the VRA in 2006, the Supreme Court reversed a Texas District Court opinion which protected Section 5 in *Northwest Austin Municipal Utility District Number One v. Holder* (“*NAMUDNO*”).⁶² A Texas utility district challenged the constitutionality of the VRA and sought a “bail out” from the VRA’s coverage.⁶³ The District Court upheld the VRA, explaining that because the Texas utility district was not a political subdivision it was not eligible for a bail out.⁶⁴ The Supreme Court reversed, expressly stating that it had “constitutional concerns” regarding the VRA.⁶⁵ The Court noted that “the [VRA] imposes current burdens and must be justified by current needs,” and that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”⁶⁶ Most importantly, the Court indicated its doubts that the VRA would remain constitutionally valid.⁶⁷

II. *Shelby County’s* Effect on Section 5

In 2013, the Supreme Court issued an opinion that many called a “game-changer.”⁶⁸ By granting certiorari in *Shelby County v. Holder*, the

60. *Id.*

61. Pitts, *Life of Riley*, *supra* note 50, at 525.

62. *Nw. Austin Mun. Util. Dist. No. One v. Holder* (hereinafter *NAMUDNO*), 557 U.S. 193 (2009).

63. *Id.*

64. *Shelby Cty.*, 133 S.Ct. at 2621.

65. *Id.*

66. *Id.* at 2619.

67. *NAMUDNO*, 557 U.S. at 206.

68. Jon Greenbaum, Alan Martinson & Sonia Gill, *Shelby Country v. Holder: When the Rational becomes Irrational*, 57 HOWARD L. J. 811, 825 (2014).

Court effectively signaled that it was ready to decide whether Section 5's preclearance requirement was still constitutionally viable.⁶⁹ In a landmark opinion, the Supreme Court "immobilized" Section 5 in *Shelby County* by calling the historically dated formula "irrational."⁷⁰ Petitioner Shelby County, located in a "covered" jurisdiction in Alabama, sued the Attorney General in federal district court, seeking a judgment declaring Section 5 of the VRA unconstitutional.⁷¹ The District Court upheld the VRA, and the Court of Appeals for the D.C. Circuit affirmed the judgment, concluding that Section 5 was still necessary and continued to pass constitutional muster.⁷² The District Court also leaned heavily on evidence from Congress' reauthorization of the VRA 2006, concluding that Congress was correct in its decision to continue the coverage and preclearance formula mandated by Section 5.⁷³

a. The Supreme Court Majority Rules on Shelby County

The Supreme Court emphasized the intended relationship between the federal government and state government, explaining that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."⁷⁴ Importantly, the Court reiterated its opinion from four years earlier, stating "as we made clear in [*NAMUDNO*], the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States."⁷⁵ In the very next sentence, the Court announced, "[t]he Voting Rights Act *sharply* departs from these basic principles."⁷⁶ The Court also revealed its distaste for the requirement that states get permission to enact laws from the federal government—a power that the states already have.⁷⁷ The Court in *Shelby County* expressly restated its opinion in *Lopez* that the VRA "authorizes federal intrusion into sensitive areas of state and local policymaking" and represents an "extraordinary departure from the traditional

69. Paul M. Wiley, *Shelby and Section 5: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. 2115, 2127 (2014).

70. *Shelby Cty.*, 133 S.Ct. at 2651 (2013).

71. *Id.* at 2615.

72. *Id.*

73. *Id.*

74. *Id.* at 2623 (quoting *Coyle v. Smith*, 221 U.S. 559, 580 (1911)).

75. *Id.* at 2624.

76. *Id.* (emphasis added).

77. *Id.*

course of relations between the States and the Federal Government.”⁷⁸

In addition to its conclusion regarding federal government’s encroachment on the states, the Supreme Court suggested that Section 5 was outdated and irrelevant, noting that the purpose of the VRA in 1965 was to stop intentional, malicious legislation that certain states had enacted to directly stop African-Americans from voting.⁷⁹ While the Court agreed that, at the time, the VRA made sense, currently, America hardly faces the same problem because most citizens are free to vote and there is no state legislation that maliciously attempts to deny African-Americans the basic right to vote.⁸⁰ As the Court then pointed out, “[n]early 50 years later, things have changed dramatically.”⁸¹ The Court then relied on Congress’ own reauthorization evidence from 2006, citing that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.”⁸² To bolster its position, the Court included a Census Bureau chart that compared voter registration numbers from 1965 and 2004, showing a huge improvement in voter registration since 1965.⁸³ The Court also leaned on voter statistics to suggest that Section 5 was outdated, citing that “African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by [Section] 5, with a gap in the sixth State of less than one half of one percent.”⁸⁴

While the Court conceded that much of the success seen in voter registration improvement was in large part *because* of the VRA, it criticized the lack of modification or changes to the original legislation.⁸⁵ Specifically, the Court seemingly expressed its surprise that these “extraordinary and unprecedented features were reauthorized as if nothing had changed.”⁸⁶ Finally, the Court held that current legislation needs to meet “current burdens,” justified by “current needs,”⁸⁷ con-

78. *Shelby Cty.*, 133 S.Ct. at 2612; *see also* *Lopez v. Monterey Cty.*, 525 U.S. 266, 282 (1999).

79. *Id.* at 2625.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 2619.

85. *Id.*

86. *Id.*

87. *Id.*

demning the VRA as a piece of legislation that effectively punishes “covered” jurisdictions for their past sins and not their current needs.⁸⁸

In addition to characterizing Section 5 as antiquated, the Court directly criticized Congress’ evidence for its 2006 reauthorization plan, noting that Congress used obsolete data with 40-year-old facts that bore no relationship to the present day.⁸⁹ The majority expressed disdain towards the dissent, claiming the dissent treated the VRA as if it were “just like any other piece of legislation, but this Court has made it clear from the beginning that the Voting Rights Act is far from ordinary.”⁹⁰ Finally, the Court implied that Congress was out of line for distinguishing states in “such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story.”⁹¹

While the Court wrote a scathing opinion on Section 5, it only ruled on the constitutionality of Section 4, holding that the formula to determine which areas should be considered “covered jurisdictions” was antiquated.⁹² By ruling that “covered jurisdictions” no longer existed, the Court effectively castrated Section 5, because without jurisdictions being labeled “covered,” there is no preclearance requirement.⁹³ Moreover, its scathing opinion of the VRA left little doubt of the “compelling [demonstration] that Congress has failed to justify ‘current burdens’ with a record demonstrating ‘current needs.’”⁹⁴

In his concurring opinion, Justice Thomas agreed with the Court’s opinion but explained that he would also find Section 5 unconstitutional.⁹⁵ Justice Thomas criticized Congress for its increasing restrictions on states regarding Section 5 preclearance in 2006, suggesting that Congress miscalculated by heightening the standards of already outdated legislation.⁹⁶ Finally, Justice Thomas criticized the majority for delaying what he believes to be the inevitable—declaring Section 5 of the VRA unconstitutional: “[b]y leaving the inevitable

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2631–32.

92. *Id.* at 2631.

93. *Id.* at 2628.

94. *Id.* at 2632.

95. *Id.* at 2631–32.

96. *Id.* at 2632–33.

conclusion unstated, the Court needlessly prolongs the demise of [Section 5].”⁹⁷

b. Justice Ginsburg’s Dissenting Opinion on Shelby County

In her dissent, Justice Ginsburg stated that “[t]he question this case presents is who decides whether, as currently operative, [Section] 5 remains justifiable, this Court, or a Congress charged with the obligation to enforce post-Civil-War Amendments by ‘appropriate legislation.’”⁹⁸

Then, Justice Ginsburg stated that Congress was well within its power to make the assessment that Section 5 remains valid and relevant.⁹⁹ Additionally, Justice Ginsburg criticized the majority for what she believes will effectively destroy the remedy “that proved to be best suited to block that discrimination.”¹⁰⁰

In addition to stating that Congress was well within its legislative power to reauthorize the VRA, Justice Ginsburg also criticized the majority for claiming that legislation was outdated.¹⁰¹ To bolster her opinion, the dissent relied on a multitude of evidence that showcased current problems in voter disenfranchisement, such as “second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”¹⁰² Ginsburg also noted racially polarized voting in “covered” jurisdictions, which increases the political vulnerability of minorities in those areas.¹⁰³

Regarding Section 5 preclearance, Ginsburg’s dissent then listed eight examples involving states attempting to enact legislation that were ultimately thwarted by Section 5, including a 2003 example of a South Carolina school board that had attempted a re-vote of a school board seat after African-Americans had won a majority of the seats.¹⁰⁴ During its conversation about a possible re-vote, the school board excluded all African-American members. The proposal was found to be an “exact replica” of an earlier voting scheme rejected by the VRA.¹⁰⁵ In another example, the dissent showcased a 2004 case in which a Texas city threatened to prosecute two black students after they an-

97. *Id.* at 2632.

98. *Id.* at 2632.

99. *Id.* at 2632–33.

100. *Id.* at 2633.

101. *Id.*

102. *Id.* at 2636.

103. *Id.*

104. *Id.* at 2640–41.

105. *Id.* at 2641.

nounced their intentions to run for office.¹⁰⁶ In response, the county reduced the availability of early voting at polling places close to a historically black university.¹⁰⁷ The dissent highlighted a case from 2006 where a Texas county attempted to thwart Latino voters by stopping early voting, an action that was ultimately blocked by a Section 5 preclearance requirement.¹⁰⁸ In another example, the dissent noted a 2001 case in which an all-white mayor and county board canceled their town's election after "'an unprecedented number' of African-American candidates announced they were running for office."¹⁰⁹

After citing eight cases of current racially based voter discrimination, Justice Ginsburg reinforced her position by explaining that "these examples, and scores more like them, fill the pages of the legislative record." She then concluded that this extensive data was more than sufficient for Congress to conclude that "racial discrimination in voting in covered jurisdictions [remains] serious and pervasive."¹¹⁰ Importantly, Justice Ginsburg pointed out that while conditions have massively improved in the South since 1965, Congress accurately assessed that voting discrimination had often evolved into "subtler second generation" barriers.

Finally, Justice Ginsburg relied on the serious and massive effort of Congress' reauthorization plan in 2006, citing Congress' extensive and conscientious hearings that lasted over a year.¹¹¹ Justice Ginsburg concluded by citing the Chairman of the House Judiciary Committee, who stated that Congress' reauthorization plan was "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 [and a half] years" he had served in the House.¹¹²

c. Reactions to *Shelby*

Some legal scholars believe that the decision in *Shelby County* "completely undermines" the original purpose of "prioritiz[ing] federal enforcement to eliminate racial discrimination in voting over state sovereignty issues."¹¹³ *Shelby County* has also gotten the attention

106. *Id.*

107. *Id.*

108. *Id.* at 2640–41.

109. *Id.* at 2640.

110. *Id.* at 2641.

111. *Id.* at 2644 ("Congress did not take this lightly. Quite the opposite.").

112. *Id.* at 2651.

113. Greenbaum, *supra* note 68, at 866–67 ("When President Reagan signed the 1982 reauthorization of [the Voting Rights] Act, he stated that 'the right to vote is the crown

of high-ranking officials in Washington: President Obama criticized the opinion as a disappointment, stating that the ruling “upset decades of well-established practices that help make sure voting is fair, especially in places where voting discrimination has been historically prevalent.”¹¹⁴ Attorney General Eric Holder noted *Shelby County*’s “serious setback for voting rights.”¹¹⁵

Paul M. Wiley explains that the new question emerging from *Shelby County* will concern tailoring a new Section 5 preclearance system that is resilient enough to realistically prevent voter discrimination and disenfranchisement but remain narrow enough to “survive strict scrutiny from a skeptical Supreme Court.”¹¹⁶ To combat this emerging issue, Wiley suggests the possibility of enacting new legislation to give the federal government more ammunition to combat voter disenfranchisement.¹¹⁷

III. Reasons to Overturn *Shelby County*

There is no dispute Section 5 gave disenfranchised voters a powerful tool to combat voter discrimination for over four decades.¹¹⁸ Since 1965, millions of minority voters have cast their votes. By 2011, African American elected officials rose to 10,500.¹¹⁹ The number of language-minority voters, specifically Hispanic voters, doubled between 1973 and 2006, due largely to Congress’ amendments requiring bilingual election requirements.¹²⁰

jewel of American liberties, and we will not see its luster diminish.’ With the [*Shelby County*] decision, the Roberts Court has significantly diminished the luster of America’s crown jewel.”).

114. Wiley, *supra* note 69, at 71 (quoting David Jackson, *Obama “Disappointed” in Court’s Voting Rights Decision*, USATODAY, (June 25, 2013), <http://www.usatoday.com/story/theoval/2013/06/25/obama-supreme-court-voting-rights-act/2455939/> [https://perma.cc/VM76-UHVJ]).

115. David Jackson, *Obama “Disappointed” in Court’s Voting Rights Decision*, USATODAY (June 25, 2013), <http://www.usatoday.com/story/theoval/2013/06/25/obama-supreme-court-voting-rights-act/2455939/> (quoting Attorney General Holder) [https://perma.cc/VM76-UHVJ].

116. Wiley, *supra* note 69, at 2121.

117. *Id.* at 2152–53.

118. Juliet Eilperin, *What’s changed for African Americans since 1963, by the numbers*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/08/22/whats-changed-for-african-americans-since-1963-by-the-numbers/?utm_term=.433634310430 [https://perma.cc/L2LH-MTZP].

119. *Id.*

120. James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS & PUB. POL’Y 195, 233–34 (2006).

While voter discrimination has largely improved since the civil rights era, Justice Ginsburg's dissent in *Shelby County* remains overwhelmingly persuasive. *Shelby County* failed to account for the multitude of voting plans that have been denied preclearance due to discrimination. During oral arguments in *Shelby County*, Justice Sotomayor stated that "if some portions of the South have changed, [Shelby] [C]ounty clearly hasn't."¹²¹ One can also analyze Congress' conclusion regarding current voter discrimination: "[the] vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."¹²² Additionally, the Supreme Court has held through various cases brought through the VRA that, "polarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them."¹²³

By safeguarding Section 5's preclearance, jurisdictions that continue to racially and illegally discriminate against voters should be forced to submit voting plans for approval. Thousands of examples of hatred, racism, and voter suppression in recent years prove that Section 5 should remain constitutionally valid. However, the questions remain: Exactly how much has the South changed? And exactly how great is the risk that voting equality may be lost without Section 5?¹²⁴

IV. Voter Suppression Post-*Shelby County*

If it was not for three important rulings by three federal appellate courts, including *North Carolina State Conference of the NAACP v. McCrory*, the number of states with discriminatory voting suppression post-*Shelby County* could be much higher.¹²⁵ Just a month after *Shelby County* freed states from the requirement to approve voting plans despite their long history of racially discriminatory voting practices, the North Carolina State Legislature passed a "monster" voter-suppression law that required strict photo ID, cut early voting, and eliminated

121. Hauer, *supra* note 59.

122. *Id.*

123. *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

124. Hauer, *supra* note 59.

125. Roger Parloff, A Guide to Voter Suppression, Intimidation Lawsuits, *FORTUNE* (Nov. 7, 2016), <http://fortune.com/2016/11/07/voter-suppression-intimidation-lawsuits-minorities/> [https://perma.cc/QE25-RJDD].

same-day registration and pre-registration for 16 and 17-year-olds.”¹²⁶ Prior to *Shelby County*, North Carolina had introduced a bill which allowed all government-issued IDs, including expired IDs, to satisfy the requirement as an alternative to DMV-issued photo IDs.¹²⁷ After *Shelby County*, “the legislature requested and received racial data [for] . . . the practices changed by the proposed law.”¹²⁸ Once the data had been received, the legislature used the race data it had received to “amend the bill to exclude many of the alternative photo IDs used by African-Americans.”¹²⁹ “As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess.”¹³⁰ The bill also eliminated the first seven days of early voting, eliminated one of the two “souls-to-the-polls” Sundays in which African American churches provided transportation to voters, eliminated out-of-precinct voting, and eliminated same-day registration.¹³¹ The United States Court of Appeals found that the law targeted African-Americans “with almost surgical precision.”¹³²

North Carolina’s legislative actions denotes a clear racial bias. The legislature specifically requested racial data and then used that data to amend the law, which then had the discriminatory effect of thwarting many African-American voters at the polls. These acts from states like North Carolina prove that VRA protection is necessary and remains current. More importantly, North Carolina’s racially motivated legislation exemplifies a type of blatant racial discrimination. This continued attempt to suppress minority voters is not the subtle and indirect type of disenfranchisement that Justice Ginsburg worried about in her dissent in *Shelby County*, but rather an eerily similar scene analogous to the discrimination minorities faced when the VRA was originally enacted. Unfortunately, this legislation would most likely have been rejected under Section 5 of the VRA due to its discriminatory purpose and effect on minority voting. Since *Shelby County*, fourteen states have enacted some form of voting restrictions, many of

126. Ari Berman, Donald Trump Is the Greatest Threat to American Democracy in Our Lifetime, *THE NATION* (Nov. 28, 2016), <https://www.thenation.com/article/donald-trump-is-the-greatest-threat-to-american-democracy-in-our-lifetime/> [https://perma.cc/277H-7PUZ].

127. *McCroy*, 831 F.3d at 216.

128. *Id.*

129. *Id.*

130. *Id.* at 216–17.

131. *Id.* at 214–15.

132. *Id.*

which may not have been given preclearance by the Department of Justice if the Supreme Court had ruled differently in *Shelby County*.¹³³

V. How Voter Suppression Tipped the Scales in Favor of Donald Trump

While the use of voter suppression tactics exploded post-*Shelby County*, the biggest example of voter suppression may lie at the highest point of our electoral system—the 2016 Presidential Election. Some civil rights leaders contend that voter suppression tipped the scales in favor of a Donald Trump victory because it was the first presidential election without the protections of Section 5 of the VRA.¹³⁴ Wade Henderson, the president of the Leadership Conference on Civil and Human Rights, stated that the 2016 presidential election “in all likelihood, influenced the outcome of this election” because of “voter suppression and a conscious effort to shave off 1 or 2 percent of the vote in key states.”¹³⁵

Enacting voter ID laws was not the only method used to disenfranchise voters in the recent presidential election.¹³⁶ The closing of polling places led to longer lines, and fewer opportunities to vote for those who lack transportation or the ability to take time away from work to stand in long lines.¹³⁷ Over eight-hundred polling places were closed this election in states such as Arizona, Texas, and North Carolina, jurisdictions with a long history of voter discrimination.¹³⁸ In North Carolina, black voter turnout decreased by 16% during the first week of voting in forty heavily black counties due to there being 158 fewer early polling places.¹³⁹ Of the 381 counties that previously required preclearance by Section 5, 43% reduced voting locations post-*Shelby*.¹⁴⁰ These tactics not only unfairly influenced the results of the election, they also disproportionately disenfranchised African-American voters.

133. Pugh, *supra* note 1.

134. See Parloff, *supra* note 125; see also Pugh, *supra* note 1.

135. Pugh, *supra* note 1.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

In Wisconsin, a tightly contested swing state, the margin of victory for Donald Trump was 27,000.¹⁴¹ The margin of victory is striking when 300,000 registered voters in Wisconsin were unable to vote due to a lack of the strict form of voter ID required by Wisconsin law.¹⁴² This led to the lowest voter turnout numbers in two decades, and decreased voter turnout in Milwaukee by 13%.¹⁴³ The decrease in voter turnout in Milwaukee is important to note since over 70% of Wisconsin's African-American population resides in Milwaukee.¹⁴⁴ Voter ID laws also have a deterrent effect on eligible voters. Confusion over what types of IDs are acceptable led some voters to erroneously believe they lacked the required ID, when in fact, their ID was acceptable.¹⁴⁵ While there is a valid counterargument that closed polling places and ID restrictions are for reasons besides racial discrimination, the lack of transparency often means that citizens are left in the dark when their polling places are closed.

Wisconsin and North Carolina were just two of the many states that faced voter discrimination issues in the 2016 presidential election. Key swing states like Ohio, Michigan, Virginia, and Iowa were among those that faced voter suppression problems.¹⁴⁶ In Virginia, a federal court held that certain legislators "racially gerrymandered" Virginia Congressman Robert Scott's district in order to "pack far more blacks into it than necessary."¹⁴⁷ The Court ordered Virginia to redraw its congressional map recognizing that "individuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm."¹⁴⁸ The invalidated congressional map included a district with a

141. Ari Berman, *The GOP's Attack on Voting Rights Was the Most Under-Covered Story of 2016*, THE NATION (Nov. 9, 2016), <https://www.thenation.com/article/the-gops-attack-on-voting-rights-was-the-most-under-covered-story-> [https://perma.cc/26CJ-S2GN].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Michael D. Regan, *What does voter turnout tell us about the 2016 election?*, PBS NEWSHOUR (Nov. 20, 2016), <http://www.pbs.org/newshour/updates/voter-turnout-2016-elections/> [https://perma.cc/C2SQ-JFF4].

147. J. Gerald Hebert & Danielle Lang, *Courts are finally pointing out the racism behind voter ID laws*, WASH. POST (Aug. 3, 2016) https://www.washingtonpost.com/posteverything/wp/2016/08/03/courts-are-finally-pointing-out-the-racism-behind-voter-id-laws/?utm_term=.7add44610a8f [https://perma.cc/PP7B-KSG5].

148. Ben Kamisar, *Federal court strikes down Virginia's congressional map*, THE HILL (June 5, 2015) available at <http://thehill.com/blogs/ballot-box/redistricting/244187-federal-court-strikes-down-virginias-congressional-map> [https://perma.cc/EL4L-J9GE].

black population of 57%, a stark difference to similar districts in the area.¹⁴⁹

In late December, an appeals court upheld a Virginia voting restriction that requires residents to present photo identification to cast ballots.¹⁵⁰ The panel ruled that the voting rule put no undue hardship on minorities, however, attorneys for the Democratic Party maintained that the law disparately impacted minorities who are less likely to have photo ID than white voters.¹⁵¹ In 2012, the Virginia legislature passed an election law requiring photo ID, however, ten months later, the Republican-controlled legislature tightened the law, barring those without photo ID from voting.¹⁵² Both bills were passed, and a federal judge upheld the laws in May 2016, finding that the state had provided all citizens with an equal opportunity to vote.¹⁵³ The three appeals judges who upheld Virginia's law in late December were all nominated by Republican presidents.¹⁵⁴ The head of the Virginia ACLU criticized the decision, stating that it "discounts the reality of the hardships that voters with disabilities encounter, and ignores that many other vulnerable groups lack ID or the means to obtain one."¹⁵⁵

Ironically, President Trump—through his Twitter account—called for an investigation into voter fraud in January 2017, stating that he lost the popular vote to Hillary Clinton due to voter fraud.¹⁵⁶ However, independent fact-checkers were quick to debunk the accusation, citing House Speaker Paul Ryan's agreement that there was no evidence to support Trump's claim.¹⁵⁷ Others worry about the implications Trump's accusation could have on an already-shaky voter suppression issue: "[This] voter fraud [accusation] gives the Republicans

149. *Id.*

150. Ann E. Marimow & Rachel Weiner, *Appeals court upholds Virginia's voter-ID law*, WASH. POST (Dec. 31, 2016) https://www.washingtonpost.com/local/public-safety/appeals-court-upholds-virginias-voter-id-law/2016/12/13/3888f46e-c150-11e6-9a51-cd56ea1c2bb7_story.html?utm_term=.ee295b589ff8 [<https://perma.cc/6HYP-8GXC>].

151. *Id.*

152. *Id.*

153. *Id.* ("Virginia allows everyone to vote and provides free photo IDs to persons without them").

154. *Id.*

155. Al Sharpton, *Voter suppression contributed to Trump win*, MSNBC (Dec. 18, 2016), <http://www.msnbc.com/politicsnation/watch/voter-suppression-contributed-to-trump-win-836030531794> [<https://perma.cc/4H4V-HZDK>].

156. Madeline Conway & Heather Caygle, *Democrats warn Trump's voter fraud investigation will increase voter suppression*, POLITICO (Jan. 25, 2017), <http://www.politico.com/story/2017/01/trump-voter-fraud-investigation-democrats-react-234161> [<https://perma.cc/7F6A-FW7F>].

157. *Id.*

and others another tool and another reason to justify to the public of denying people the right to vote.”¹⁵⁸ However, Trump’s allegation could give Republican-led state legislatures a platform to make a case to enact new voter regulations.¹⁵⁹ In response, civil rights leaders maintain that voter restrictions are discriminatory because they significantly hurt minorities and others who lack the resources to combat voter discrimination—and who also tend to vote for Democrats.¹⁶⁰ Bernie Sanders, the independent who lost to Hillary Clinton in the Democratic presidential primary last year, responded to Trump’s tweet, claiming that President Trump “is telling Republicans to accelerate voter suppression, to make it harder for the poor, young, elderly and people of color to vote.”¹⁶¹ Additionally, Sanders criticized Trump, stating that “[t]he great political crisis we face is not voter fraud, which barely exists. It’s voter suppression and the denial of voting rights. Our job is to fight back and do everything we can to protect American democracy from cowardly Republican governors and legislators.”¹⁶²

In addition to President Trump setting the stage for the future implementation of voter suppression laws, many claim that voter suppression in the 2016 election helped swing the win in favor of Trump.¹⁶³ In a MSNBC interview with Al Sharpton in December 2016, Kristen Clarke, the president of the Lawyers’ Committee for Civil Rights explained how voter suppression during the 2016 presidential election barred Black and Hispanic voters from the polls: “There were some patterns that emerged. Voter suppression was most certainly a culprit in the 2016 election cycle.”¹⁶⁴ In addition, Clarke claims that the civil rights group heard from a countless number of voters who encountered barriers to vote.¹⁶⁵

In addition to some civil rights leaders claiming voter discrimination, Al Sharpton released a poll on MSNBC regarding voter suppression just after the presidential election that showed that 41% of Black and 34% of Hispanic voters could not get time off of work to vote on election day.¹⁶⁶ On average, Hispanic voters had to wait twice as long

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Sharpton, *supra* note 155.

164. *Id.*

165. *Id.*

166. *Id.*

in line than white voters, and were twice as likely to have their voting eligibility questioned once at the polls.¹⁶⁷ In addition to resistance at the polls, Hispanic and Black voters claim in a Craig Newmark Foundation post-election poll that 47% and 42%, respectively, were unable to cast their votes on election day.¹⁶⁸ Sharpton claims that this is a direct result of new voter ID laws and what the “gutting of the Voting Rights Act has done on the 2016 election.”¹⁶⁹

Conclusion

By essentially revoking Section 5 of the VRA, the Supreme Court left Donald Trump a wide opening to use voter suppression to thwart minority voters that could have turned the election in favor of Hillary Clinton. As civil rights activist Kristen Clarke stated, “When we look back, we will find that voter suppression figured prominently in the story surrounding the 2016 presidential election.”¹⁷⁰ Many others continue to speak out about voter suppression.¹⁷¹ David Axelrod, Barack Obama’s former chief strategist, maintains that “[i]f you want to investigate voting in this country, the most productive thing you can do is . . . try to ascertain whether these stringent new requirements in some states, or more stringent new requirements, have kept some people from voting.”¹⁷²

Conservative courts continue to uphold voting restrictions that have a disparate impact on minority and vulnerable citizens.¹⁷³ Following the election, states like Arkansas and Michigan have proposed stricter voting ID laws.¹⁷⁴ In Texas, the attorney general asked the Supreme Court to reinstate a voter ID law that was ruled unconstitutional in federal court; in Michigan, a new strict voter ID law was approved by the Michigan House.¹⁷⁵ With President Trump in the White House, the Voting Rights Act demolished, and stronger voter restriction laws being passed, the future of equal opportunity voting for every eligible citizen is in great danger.

While many states passed voter laws, it is Wisconsin and North Carolina that demand closer inspection. Trump seized the White

167. *Id.*

168. *Id.*

169. *Id.*

170. Pugh, *supra* note 1.

171. *See* Conway, *supra* note 156.

172. *Id.*

173. Sharpton, *supra* note 155.

174. *Id.*

175. *Id.*

House by securing victories in the two states—in Wisconsin, Trump won by three percentage points; in North Carolina, he won by four. Wisconsin and North Carolina have both historically executed voter suppression towards minorities and college students.¹⁷⁶ As a result of the voter suppression problems in both states, minority and other vulnerable voters were “forced to wait in longer lines at less convenient locations” and “had less time to cast ballots.”¹⁷⁷ As the *Nation’s* voting rights expert Ari Berman wrote on [election night], thousands of voters had to “‘jump through hoops’ just to vote this year.”¹⁷⁸ While the future of voter suppression is unclear, the present facts remain: President Trump is in the White House, and he won two historically voter-suppressed swing states by three percent.

176. Mark Joseph Stern, *Did the Republican War on Voting Rights Help Trump Win?*, SLATE (Nov. 9, 2016), http://www.slate.com/blogs/the_slatest/2016/11/09/republican_war_on_voting_rights_may_have_helped_trump_win.html (“[I]t is certainly worth noting that [both Wisconsin and North Carolina] engaged in extensive and carefully coordinated voter suppression in the years preceding the election.”) [<https://perma.cc/87NW-36U5>].

177. *Id.*

178. *Id.*