

Voting Rights after *Shelby County*:
Starting to Evaluate a Continuing Dialogue

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Abstract:

In an exceptional expression of federal power, the Voting Rights Act created an automatic formula to single-out jurisdictions for federal “preclearance” for all proposed election laws; this led to an immediate increase in African-American voter participation. It also structured a long-term conflict over the authority to control electoral processes. The decision in *Shelby County v. Holder* struck down the preclearance formula that determined which jurisdictions were subject to preclearance. This paper reviewed past studies into the effectiveness of preclearance, and it highlighted some of the initial responses to *Shelby County* initiated by multiple political actors—such as states and local governments, lower-level federal courts, Congress, and administrative agencies. After reviewing this data, this paper culminates by generating some hypotheses and methodologies to guide future research examining the impact of *Shelby County*.

Introduction

Within two hours of the Supreme Court issuing its 5-4 decision in *Shelby County v. Holder* (2013), Texas governor Rick Perry announced his state would move forward with a voter ID law previously prevented by section 5 preclearance which was required of some jurisdictions under the Voting Rights Act (VRA).¹ Within forty-eight hours, six states formerly “covered” by the section 4 preclearance formula of the VRA—the section struck down by the majority opinion—went forward with laws that would have previously been subjected to (and at least stalled, if not outright prevented by) preclearance.² These immediate responses to *Shelby County* are precursors to a newly inaugurated debate. The intent of this paper is to analyze data into the effectiveness of the VRA, to review some of the immediate impacts of the *Shelby County* decision, and to generate hypotheses to more effectively study the long-term effects of the decision.

¹ Michael Cooper, “After Ruling, States Rush to Enact Voting Laws,” *NY Times*, July 5, 2013. http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html?pagewanted=all&_r=0

² Joseph Diebold, “Six States Already Moving Forward With Voting Restrictions After Supreme Court Decision,” *Think Progress*, June 27, 2013. <http://thinkprogress.org/justice/2013/06/27/2223471/six-states-already-moving-forward-with-voting-restrictions-after-supreme-court-decision/>

The *Shelby County* opinion is less than a year old, and the opinion came during the least active election year in the US quadrennial electoral cycle; therefore, it is not yet possible to assess all of the repercussions of the decision.³ For example, it will not be until 2016 that the country experiences its first presidential election in fifty-two years without out several states, *and several thousand local governmental units*, being forced to seek federal preclearance for all proposed changes to their electoral procedures. It will not be until 2020 that the country will experience its first redistricting cycle since 1970 without preclearance affecting the districts of nearly 25% of all US residents.

While the totality of *Shelby County* cannot yet be fully analyzed, it is important to catalog the changes that have already occurred, and even more important to develop hypotheses to properly analyze the future impacts. Analyzing and anticipating the effects of *Shelby County* is critical. Obviously this line of study has public policy repercussions; in order to develop voting protections for the twenty-first century it is essential to compare the difference between employing a preclearance versus employing an after-the-fact lawsuits strategy to ensure voting protections. Even more broadly, studying the effects of *Shelby County* can add to our understanding of the power of the federal courts, of interbranch relations, and of federalism.

Since the *Shelby County* decision was issued, there has been wide speculation on its effects and proposals for policy solutions. In “After *Shelby County*: Getting Section 2 of the VRA to do the Work of Section 5” Cristopher Elmendorf and Douglas Spencer argue for changes that federal courts and the DOJ should employ to make

³ “2013 State and Local Election Preview,” *Governing Magazine*, October 23, 2013. <http://www.governing.com/news/headlines/gov-2013-state-election-preview.html>

section 2 more effective.⁴ Now that section 4 (the preclearance formula) is nullified, no jurisdictions are required to seek federal preclearance for proposed election laws under section 5 of the VRA. Similarly, in “The South After Shelby County” Nicholas Stephanopoulos analyzes the gap left in protecting voting rights now that section 5 is a “zombie provision” without the coverage formula laid out in section 4.⁵ As both papers explain, even though section 5 remains good law for now, the 12,000 plus jurisdictions forced to comply with section 5 as of June 2013, are no longer forced to do so.

Stephanopoulos sees a gap between the voting rights protections that existed when both section 5 and section 2 were standing, and the voting protections that remain with just section 2 in effect. According to Stephanopoulos this gap “means that numerous policies that previously would have been blocked now will go into effect.”⁶

Stephanopoulos also notes that “more than one-third of all formerly protected districts in the South may be eliminated [through redistricting] with legal impunity.”⁷

Of course the concern expressed by Stephanopoulos, Elmendorf, and Spencer is not shared by all. During the oral argument for *Shelby County* Justice Kennedy articulated “it’s not clear to me that there’s that much difference between a section 2 suit now and preclearance.”⁸ Bert Rein, the attorney for Shelby County, likewise felt that the decision to strike down section 4 would have but minor impacts on minority voting rights.⁹ What the above assertions all share is a lack of post-*Shelby County* data to substantiate the claims. It is one thing to claim that *Shelby County* will have certain

⁴ Christopher Elmendorf and Douglas Spencer, “After *Shelby County*: Getting Section 2 of the VRA to do the Work of Section 5,” *UC Davis Legal Studies Research Paper Series*, March 23, 2014.

<http://ssrn.com/abstract=2414652>

⁵ Nicholas Stephanopoulos, “The South After Shelby County,” *The University of Chicago Law School Public Law Working Paper No. 451*. October 2013.

<http://www.law.uchicago.edu/academics/publiclaw/index.html>

⁶ *Ibid.*, Abstract.

⁷ *Ibid.*, Abstract.

⁸ Transcript of Oral Argument *Shelby County v. Holder*.

⁹ Bert Rein, “American Constitution Society 2012-2013 Supreme Court Review,” June 25, 2013. National Press Club, Washington, DC.

effects; it is another to search for altered voting patterns and increased electoral discrimination that can be attributed to *Shelby County*. While some of this work can be done now, much of it will need to be done after a couple of election cycles. What can be done now: establish the hypotheses to be tested to effectively measure the effects of *Shelby County*.

It is also important to note that a decision of this magnitude allows for inquiries beyond analyzing voting data; we can also delve into several of the fundamental questions about US government. The Court striking down an act of Congress, as it did in *Shelby County*, is a rare event that provides an opportunity to study the next step in the constitutional dialogues process. Louis Fisher's *Constitutional Dialogues: Interpretation as Political Process* explores the dialogues between multiple political actors that drive constitutional interpretation. Fisher's research challenged the notion that constitutional interpretation is solely from Supreme Court decisions.¹⁰ By focusing attention on the post-*Shelby County* actions of multiple political actors the political process that drives constitutional interpretation can be further explored. Additionally, in 1957 Robert Dahl's "Decision-Making in a Democracy" argued the judicial appointment process largely constrained the anti-majoritarian nature of the Court.¹¹ For Dahl—except for a certain lag time—the Court would typically remain in line with national majorities; therefore the Court would rarely strike down an act of Congress.¹² Scholars after Dahl continued to emphasize the judicial appointment

¹⁰ Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process*. Princeton: Princeton University Press, 1988.

¹¹ Robert A. Dahl, "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 285.

¹² Dahl further backs up his argument that the Court is rarely counter majoritarian for long by using the example of Roosevelt and the New Deal hostilities over the Court rulings. Based on a new Justice being appointed every twenty-two months it stands that "Generalizing over the whole history of the Court, the chances are about one out of five that that a president will make one appointment to the Court in less than a year, better than one out of two that he will make one within two years, and three out of four that he will make one within three years. Mr. Roosevelt had unusually bad luck: he had to wait four years for

process and further reemphasized the ability of Congress to enact decision reversals and court curbing measures as reasons why the Court rarely rules against Congress.¹³ To underscore how rarely the Court has exercised its power of judicial review to strike down an act of Congress: from 1803-2013 just 176 acts of Congress have ever been struck down by the Supreme Court; this works out to fewer than one per year.¹⁴

Some case studies of Court-Congress relations have taken pains to show that even in instances of statutes being struck down based on constitutional interpretation, congressional overrides do occur. For example, Richard A. Paschal's oft cited article, "The Continuing Colloquy: Congress and the Finality of the Supreme Court," indicates that congressional adopted statutes in response to nullification of federal law can still change the "political or economic effects of the Court's opinions."¹⁵ Like Paschal, other researchers have included case studies of constitutional-interpretation-overrides in their works.¹⁶ Louis Fisher in "Judicial Finality or an Ongoing Colloquy?" explores hot button social issues such as the death penalty, abortion, the right to die, and gay rights to provide examples of how the Court's exercise of judicial review is neither final

his first appointment; the odds against this long an interval are four to one. With average luck, the battle with the Court would never have occurred." Dahl, "Decision-Making in a Democracy," 285.

¹³ Often congressional checks on the Court are broken into two categories—court curbing and decision reversals. Court curbing is defined as congressional legislation that attempts to alter "the structure or functioning of the Supreme Court as an institution." These types of actions may include the creation of new judgeships, shaping the jurisdiction and procedures of the courts, controlling compensation and appropriation, passing laws affecting sentencing, or requiring constitutional interpretation to have super majorities. Thus court curbing actions are aimed at the institution, whereas decision reversals attempt to "modify the legal result or impact...of a specific Supreme Court decision." Harry P. Stumpf, "Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics," *Journal of Public Law* 14 (1965): 382.

¹⁴ *The Constitution of the United States of America: Analysis and Interpretation of the Constitution Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*. Washington DC: GPO. 2013. <http://beta.congress.gov/content/conan/pdf/GPO-CONAN-2013-11.pdf>

¹⁵ Richard A. Paschal, "The Continuing Colloquy: Congress and the Finality of the Supreme Court," *Journal of Law and Politics* 8 (1992): 209-10. Beth M. Henshen and Edward I. Sidlow, "The Supreme Court and the Congressional Agenda-Setting Process." *Journal of Law and Politics* 5 (1989): 687 makes a similar observation that Congress can use statutes to modify the Courts constitutional objections.

¹⁶ Louis Fisher, "Judicial Finality or an Ongoing Colloquy?" in *Making Policy, Making Law: An Interbranch Perspective*, ed. Mark C. Miller and Jeb Barnes (Washington DC: Georgetown University Press, 2004), 153-69 and Louis Fisher, "Congressional Checks on the Judiciary," in *Congress Confronts the Court*, ed. Colton C. Campbell and John F. Stack Jr. (Lanham: Rowman and Littlefield Publishers, 2001), 21-35 and Lawrence Baum, *The Supreme Court. 10th ed.* Washington DC: CQ Press, 2010. 202-09.

nor definitive.¹⁷ Fisher's case study, and others like it, provides important examples of congressional responses to nullification of federal law.

Further, Robert Dahl's "Decision-Making in a Democracy" included a survey of Supreme Court decisions that held "major legislation" unconstitutional, within four years of congressional enactment. Of the thirty-eight cases that fit his criteria, Dahl noted that 50 percent were reversed by Congress.¹⁸ In 1994 Ignagni and Meernik completed a rare quantitative study purely focused on constitutional-interpretation-overrides examining all overrides of Court decisions based in constitutional interpretation from 1954-1990.¹⁹ Ignagni and Meernik found that 20 percent of Supreme Court cases nullifying federal laws were later modified by Congress.²⁰ A study published by the author of this article in the *Journal of Legal Metrics* found that of the forty-one federal laws overruled during the Rehnquist Court, twelve were overridden by Congress.²¹

There are numerous studies that attempt to identify which exercises of judicial interpretation will see an override. Many empirical studies on congressional overrides focused on what Virginia Hettinger and Christopher Zorn termed "case salience."²² Conceptually, "case salience" theorizes that not all court cases are equally likely to be overridden by Congress.²³ Lori Hausegger and Lawrence Baum concluded that

¹⁷ Fisher, "Judicial Finality," 153-169.

¹⁸ Dahl, "Decision-Making in a Democracy," 290.

¹⁹ Joseph Ignagni and James Meernik, "Explaining Congressional Attempts to Reverse Supreme Court Decisions," *Political Research Quarterly* 47, no. 2 (June 1994): 353-371. www.jstor.org/stable/449015 (accessed June 14, 2010).

²⁰ They cite Congress responding to 29% and reversing 20% of Supreme Court cases ruling acts of Congress unconstitutional from 1954 to 1990.

²¹ This represents 29.3 percent of all constitutional cases eligible for an override. The number of successful overrides during the Rehnquist Court highlights only part of post judicial review interaction between the Court and Congress. In addition to the twelve successful overrides, two additional override bills passed one chamber of Congress and another three bills died in committee. In fact, of the forty-one federal laws nullified by the Rehnquist Court only fourteen failed to generate an override bill.

²² Virginia A. Hettinger and Christopher Zorn, "Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court," *Legislative Studies Quarterly* 30 (2005): 8.

²³ None of the studies observed tested exactly the same variables, however most had some combination of the following: (1) How many of amicus briefs were filed with the Court; (2) Who were the winners and/or losers of

congressional action was more than twice as likely when the United States was a party on the losing side and more than three times as likely when Congress was a losing participant.²⁴ Ignagni and Meernik's study is the only systematic analysis of "case salience" for overrides to acts of Congress being held unconstitutional; they noted both the role of public opinion and the age of legislation to be statistically relevant in predicting a congressional response.²⁵ In cases where a public opinion poll existed, and at least 50% expressed an opinion opposed to the court decision, the authors found that the probability of a congressional response increased by 63%.²⁶ They also concluded that each year that passes from the date a law is enacted, to when the Court strikes down the law, the probability of a congressional response decreases.²⁷

Many of the important criteria for case salience exist in this case. It is therefore worthwhile to add the qualitative analysis of Congress's response to *Shelby County* to the quantitative approaches on case salience. Adding this qualitative data will help identify further criteria to analyze for likely overrides and to add another narrative to the case studies examining the constitutional dialogues theory of constitutional interpretation.

In order to develop hypotheses to evaluate the effects of *Shelby County*, this paper is broken into four main sections. Section I will provide a brief overview and history of the VRA; this brief history will place particular emphasis on preclearance since that is the section of the VRA struck down in *Shelby County*. Section II will look

the case; (3) Was the Court's decision unanimous or not; and (4) Was there an ideological difference between the Congress and the Court. See William N Eskridge Jr. "Overriding Supreme Court Statutory interpretation Decisions," *The Yale Law Journal* 101 (1991): 331-455. Lori Hausegger and Lawrence Baum, "Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation," In *Great Theatre: The American Congress in the 1990s*, edited by Herbert F. Weisberg and Samuel C. Patterson, 224-247. Cambridge: Cambridge University Press, 1998; Michael E. Solimine and James L. Walker, "The Next Word: Congressional Response to Supreme Court Statutory Decisions,"; Hettinger and Zorn, "Explaining the Incidence,"; Ignagni and Meernik, "Explaining Congressional Attempts."

²⁴ Hausegger and Baum, "Behind the Scenes," 242.

²⁵ Ignagni and Meernik, "Explaining Congressional Attempts," 366.

²⁶ *Ibid.*, 366.

²⁷ *Ibid.*, 366.

at previous studies that analyzed the effectiveness of the VRA. The intention is to use previously cited successes of preclearance to evaluate electoral changes that occur post *Shelby County*. If subjecting certain jurisdictions to preclearance was an effective means protecting minority voting rights, then the sudden nullification of the coverage formula should show regression of minority voting rights. Section III will highlight some of the changes that have occurred since *Shelby County*, and it will also explore the limitations of what changes can be expected so soon after the preclearance formula was nullified. The culminating section of this paper will develop some hypotheses to analyze the effects of *Shelby County*. The hope is that this section can start mapping a path for future research as data is generated from upcoming election cycles.

I. Brief History of the Voting Rights Act

In the fall of 2014 the US will experience its first congressional elections since 1964, while 2016 will mark the first presidential election in fifty-two years, when thousands of jurisdictions have not been forced to preclear all of their election laws with the federal government. When Congress adopted the Voting Rights Act in 1965 it represented the most comprehensive measure since 1870 to protect the voting rights of blacks.²⁸ Indicative of its transformative success was the surge in African-American voter registration in the segregated South. In Mississippi, the year before the VRA was adopted, black voter registration was below 7 percent, just two years later, it reached 60 percent.²⁹ In Alabama registration rose from 19.4 percent in 1964 to 51.6 percent

²⁸ Keyssar, *Right to Vote*, 211-212.

²⁹ Thernstrom, *Voting Wrongs*, 6. cites U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 43.

by 1967.³⁰ While this oversight led to an immediate increase in African-American voter participation, it also structured a long-term conflict over the authority to control electoral processes. Central in this conflict is the singling-out of some jurisdictions for section 5 “preclearance.” These “covered” jurisdictions, targeted by an automatic formula, required approval from the Department of Justice (DOJ) or the District Court in D.C. before implementing *any changes* to their electoral systems. Originally established as a temporary measure, set to expire in 1970, section 5 was renewed (and even expanded) by Congress four times—most recently in 2006 for an additional twenty-five years.³¹ With the adoption of preclearance, racially-segregated jurisdictions could no longer stay one-step ahead of the next lawsuit by continually deploying new tactics to deny franchise. Preclearance placed the burden on the applicant to prove that new electoral practices would not injure voting rights before the practice could go into effect.³²

In *Shelby County*, Shelby County, Alabama, emphasized that the massive disenfranchisement of African-American voters—which inspired prior Court decisions upholding the constitutionality of the VRA—had significantly improved, negating Congress’s power to impose such federal oversight. Shelby County further asserted that the criterion for determining what jurisdictions are “covered” by the preclearance requirement was based on a “decades-old formula.” Preclearance requirements based on this formula, the County claimed, indiscriminately imposed burdens on jurisdictions through an automatic formula no longer related to Congress’s interest in reducing voter discrimination. Thus the County argued the Court should overturn the

³⁰ *Ibid.*, 32.

³¹ Congress extended section 5 for five years in 1970, for seven years in 1975, twenty-five years in 1982, and another twenty-five years in 2006.

³² See 42 U.S.C. § 1973c.

VRA for exceeding Congressional authority and imposing an unjustified “federalism cost.”³³

In a 5-4 decision the Court left section 5 preclearance in place while striking down the formula established by section 4. Section 4 singled out which jurisdictions were bound by preclearance. Without section 4, no jurisdictions are forced to follow the preclearance requirements of section 5. The majority opinion asserted two main arguments. One, there exists a “fundamental principle of equal sovereignty” among the states,³⁴ and two the “insidious and pervasive evil”³⁵ of racially motivated voter suppression, which once justified preclearance, no longer exists. In fact, the Court argued that largely because of the VRA:

in covered jurisdictions “voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”³⁶

Both of these points were highly contested in the dissenting opinion, drafted and orally delivered, by Justice Ginsburg. In the dissenting opinion, *Shelby County* represented an “unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States.”³⁷ Ginsburg also asserted that voter suppression is now based on “second-generation barriers” such as racial gerrymandering and at-large voting.³⁸ These second generation barriers result in *vote dilution* rather than *vote denial*; therefore assessments that only look at registration data and voter turnout rates will not be sufficient to evaluate the continued need for preclearance.³⁹

³³ *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009)

³⁴ *Shelby County v. Holder* citing *Northwest Austin v. Holder* 557 U.S., at 203

³⁵ *Shelby County v. Holder* citing *South Carolina v. Katzenbach* 383 U.S. 301,309

³⁶ *Shelby County v. Holder* citing *Northwest Austin v. Holder* 557 U.S., at 202.

³⁷ *Shelby County v. Holder* (2013)

³⁸ *Shelby County v. Holder* (2013)

³⁹ *Shelby County v. Holder* (2013)

Ginsburg also asserted that the divergence between the majority and minority opinions was attributed to an argument over the proper role of the Court in a system of separated powers. Ginsburg's opinion poses the question of who has the authority to decide and interpret the 14th and 15th amendments of the Constitution: Congress or the Court. She then answers it is "well within" Congress's authority to determine that preclearance is still necessary and that Congress's determination "should elicit this Court's unstinting approbation."⁴⁰ She further asserts "the Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record" showed that Congress had made a rational determination to impose preclearance.⁴¹ While the majority opinion noted the success of the VRA as undermining its continued constitutionality, Ginsburg asserted:

Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.⁴²

Ginsburg is not alone in questioning the majority's two assertions. For example Zachary Price asserts in "NAMUDNO's Non-Existent Principle of State Equality," that

the suggestion that federal legislation must treat states equally is a chimera, without support in constitutional text, history, or precedent. There is no such notion of equal sovereignty among the states and that it is a principle that is not followed in several instances.⁴³

The other challenge to the majority opinion focuses on measures of voter discrimination. This is where the next section will now turn.

⁴⁰ *Shelby County v. Holder* (2013)

⁴¹ *Shelby County v. Holder* (2013)

⁴² *Shelby County v. Holder* (2013)

⁴³ Zachary Price, "NAMUDNO 's Non-Existent Principle of State Equality," March 2013 *NYU Law Review Online*. p. 1 http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-88-1-Price_0.pdf

II. Studies into the Effectiveness of Preclearance

Proponents of the VRA's preclearance requirement argued that various efforts of the Justice Department and the federal courts prior to the VRA, such as the Civil Rights Acts of 1957, 1960, and 1964, did little to reduce voting discrimination. As cited by the Supreme Court in *South Carolina v. Katzenbach* (1966), these efforts barely increased the registration of voting-age African-Americans.

In Alabama it rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.⁴⁴

Abigail Thernstrom's treatise in opposition to preclearance, *Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections* provides extensive evidence that covered jurisdictions no longer engage in voter discrimination at rates substantially different from non-covered jurisdictions. Samuel Issacharoff's influential article "Is Section 5 of the Voting Rights Act a Victim of its Own Success?" argues improved minority voting rates "eroded the preconditions" that previously justified preclearance.⁴⁵ These studies, like the *Shelby County* decision that post-dates them, focus on the increased parity in black-white voter registration rates and voter turnout. For example the majority opinion included this chart that displays the narrowing of the white-black registration rates between 1965 (before the VRA took effect) and 2004 (right before Congress reauthorized the law). The majority noted significant reduction in the white-black registration gap, and even the reversal of it in some states, to show that the automatic preclearance formula no longer targeted the jurisdictions most responsible for voting discrimination.

⁴⁴ *South Carolina v Katzenbach*, 383 U.S. 301 (1966)

⁴⁵ Samuel Issacharoff, "Is Section 5 of the Voting Rights Act a Victim of its Own Success?" *Columbia Law Review*, 104 (2004): 1731.

Table 1

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

In Ginsburg’s *Shelby County* dissent she alluded that these measures may not satisfactorily measure the important effects of preclearance because preclearance has a prophylactic quality and because second generation voter discriminations emphasize vote dilution rather than vote denial.⁴⁶

One of the most cited comparisons of voter discrimination between covered and non-covered jurisdictions was conducted by University of Michigan law professor Ellen Katz. Katz led an extensive study of section 2 violations of the VRA from 1982 to 2004.⁴⁷ While section 5 requires preclearance for voting changes, section 2 allows a plaintiff to challenge a law after adoption. Importantly, section 2 applies to all jurisdictions, not just “covered” ones, thus section 2’s universal coverage allows comparisons in voter discrimination between “covered” and “non-covered” jurisdictions.⁴⁸ As Justice Ginsburg noted in her *Shelby County* dissent, Professor Katz’s study found that section 2 lawsuits that resulted in favorable outcomes for

⁴⁶ *Shelby County v. Holder* (2013)

⁴⁷ Ellen Katz, “Documenting Discrimination in Voting: Judicial Finding Under Section 2 of the Voting Rights Act Since 1982,” *Michigan Journal of Law Reform* 39 (2006): 643-772. It should be noted that while section 2 is designed to protect minority voting rights it has different voter discrimination standards than section 5.

⁴⁸ *Ibid.*, 650.

minority voters were significantly more likely to originate from covered jurisdictions.⁴⁹ If discrimination was evenly distributed throughout the nation, we would expect to see a *significantly* lower percentage of successful section 2 lawsuits (and settlements) in covered jurisdictions, because section 5 blocks much of the voter discrimination that would constitute a section 2 violation.⁵⁰ The high rate of section 2 lawsuits provide an observable difference between covered and non-covered jurisdictions. Katz’s study also challenges the notion that voter registration rates tell the whole story. This indicates that analyzing the fallout of *Shelby County* should not be limited to voter registration and voter turnout rates.

In addition to the prophylactic function of section 5, it also has a deterrent effect. From 1982 to 2006, section 5 was used to block more than 1,000 changes to electoral processes that the federal government determined could potentially have impaired voting rights in covered jurisdictions.⁵¹ Countless other changes to voting practices were modified in a mandated dialogue between the DOJ and covered jurisdictions to ensure clearance. Since January of 2012, section 5 blocked electoral changes in Florida, Georgia, Mississippi, North Carolina, and Texas and forced South

⁴⁹ Katz found that 46.4 percent of the lawsuits originated in covered jurisdictions. Yet only 25 percent of the population lives in a covered jurisdiction. Perhaps a better way to compare the rates of section 2 lawsuits is based on the percentage of the total jurisdictions that are covered. Out of the 89,476 jurisdictions in the United States, only about 12,000 (13.4 percent) are “covered” jurisdictions. When the number of jurisdictions is factored in, *a covered jurisdiction was more than five-and-a-half-times as likely to be sued for a section 2 violation of minority voting rights*. The difference between covered and non-covered jurisdictions becomes more pronounced when successful section 2 lawsuits and unpublished section 2 decisions are included. Plaintiffs were also more likely to win section 2 lawsuits in cases originating in covered jurisdictions (42.5 percent versus 32.2 percent in non-covered). Published section 2 lawsuits are only a portion of all section 2 claims filed—many claims are settled without a published opinion. When published and unpublished cases are combined, 81 percent that resulted in favorable outcomes for minority voters originated in covered jurisdictions. If discrimination was evenly distributed throughout the nation, we would expect to see a *significantly* lower percentage of successful section 2 lawsuits (and settlements) in covered jurisdictions because section 5 blocks much of the voter discrimination that would constitute a section 2 violation. The high number of section 2 lawsuits and decisions provide an observable difference between covered and non-covered jurisdictions.

⁵⁰ *Shelby County, Alabama v. Holder* 679 F. 3d 848 (2012)

⁵¹ Pamela S. Karlan, “Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act,” *Houston Law Journal* 44 (2007): 22.

Carolina to add flexibility to its voter identification law.⁵² Given that covered jurisdictions made up a significantly higher rate of section 2 violations in Katz’s study, *even with preclearance blocking and deterring numerous others*, it appears on average that covered jurisdictions were engaging in a significantly higher percentage of actions that infringe on minority voting rights. Without preclearance in effect it seems likely that a significant number of lawsuits will be implemented in formerly covered jurisdictions, and that section 2 lawsuit rates will increase in formerly covered jurisdictions.

Another consideration for post-*Shelby* studies is that some jurisdictions benefited from coverage and thus chose to remain covered. Under the VRA jurisdictions that were caught by the automatic preclearance formula in section 4 could “bailout” from coverage provided they had no violations of minority voting rights in the last ten years. Almost 200 jurisdictions bailed out of preclearance and the Justice Department assented to every bailout request submitted.⁵³ The high number of jurisdictions that qualified for bailout, the low expense, and the one-hundred-percent success rate indicates some jurisdictions may have made a conscious choice to remain covered. In fact, New York, California, and Mississippi (all of which were covered at least in part by the automatic formula) filed a combined *amicus* brief in *Shelby County* arguing that the preclearance requirement should be upheld. As the brief argues, jurisdictions receive benefits from coverage; it grants a measure of protection against lawsuits and provides DOJ feedback on proposed election law changes.⁵⁴ Any future study of the effects of *Shelby County* should be careful about how it analyzes data

⁵² Maya Perez and Vishal Agraharkar, “If Section 5 Falls: New Voting Implications,” (New York: Brennan Center for Justice, 2013).

⁵³ J Gerald Hebert, “An Assessment of the Bailout Provisions of the Voting Rights Act,” in *Voting Rights and Democratic Participation*, ed. Ana Henderson (Berkeley: UC Berkeley Public Policy Press, 2007), 270.

⁵⁴ see http://www.naacpldf.org/files/case_issue/Shelby-Brief%20for%20the%20States%20of%20New%20York%20et%20al.pdf

from previously covered jurisdictions; a jurisdiction that was consciously choosing to remain covered may not make for a good comparison with a jurisdiction that was eagerly awaiting the nullification of preclearance. Also, interviews with representatives from some formerly covered jurisdictions, to determine if they regret no longer being covered, could be important. If we only view preclearance as a burden on covered jurisdictions we may be missing a major story of the repercussions of *Shelby County*.

Voter discrimination data from the preclearance era paints a complex picture for post-*Shelby County* scholarship. The blocking effect of preclearance might indicate that there will be a rush of electoral laws, which were adopted but put on hold by preclearance, being implemented. It might also indicate a rush of new electoral laws from formerly covered jurisdictions that did not adopt or contemplate new electoral laws for anticipation of the preclearance hurdle; with preclearance out of the way, elected officials are free to contemplate electoral laws their jurisdictions have avoided for decades. The number of laws that were stopped by the DOJ might indicate that laws that will violate voting rights that would have been stopped previously will now go into effect, thus formerly covered jurisdictions may experience a sudden increase in voting rights violations and a higher proportion of section 2 lawsuits in previously covered jurisdictions might occur. It is also possible to see the federal courts playing an even larger role in monitoring election laws now that preclearance does not stop voter discriminatory laws before they are enacted. Before developing all the theories of what changes to anticipate in the future, this paper will first catalog some of the changes that have already occurred since *Shelby County*; this data can augment hypotheses generation.

III. Changes Since *Shelby County*

Shelby County did not settle the dispute over federal oversight of local elections; instead, it inaugurated a new debate—centered in federalism and separation of powers—over what part of American government shall prescribe voting protections. The responses unfolding after *Shelby County* provide a case study in the constitutional dialogues model of constitutional interpretation. The decision of the Supreme Court in *Shelby County* has not been accepted as final; on January 16th 2014, just seven months after the decision, a small, bipartisan group of congressional representatives introduced legislation to fundamentally modify the effects of the decision. As of yet, no bill has passed a single house of Congress, let alone a law being adopted.⁵⁵ Yet, based on the congressional overrides literature discussed earlier in this paper, it is apparent that *Shelby County* is the type of Court decision likely to see a congressional response.

As some members of Congress attempt a legislative response to *Shelby County*, there have already been responses by other political actors: state and local governments, lower federal courts, the DOJ, and interest groups. Some of the actions of each of these political actors are explained to help with this paper's goal to hypothesize about future responses to more fully analyze the impacts of nullified preclearance.

When the section 4 preclearance formula of the VRA was struck down by the Court there were nine states in their entirety and portions of six others forced to seek federal preclearance. In total, this included more than 12,000 of the 90,106 governments (or 13.3 percent) in the US.⁵⁶ Within hours of the *Shelby County* decision, Texas indicated it would move forward with previously adopted voter identification and

⁵⁵ House Bill 3899 and Senate Bill 1945 both titled "Voting Rights Amendment Act of 2014" were introduced in their respective chambers on January 16, 2014.

⁵⁶ The decision in *Shelby County, Alabama v. Holder* 679 F. 3d 848 (2012) cites there were more than 12,000 covered jurisdictions and the 2012 US Census of Governments cites 90,106 state and local governments.

redistricting laws.⁵⁷ Both of these laws were previously prevented by preclearance and ruled by a federal court to impose discriminatory burdens on minority voters.⁵⁸ While other states formerly covered by the VRA adopted new voter identification laws after *Shelby County*, Texas was the only state to implement one in 2013.⁵⁹ After the 2013 election, *The New York Times* reported that 200 voters cast ultimately uncounted provisional ballots in just seventeen of the state's 254 counties, because the voters did not return within six-days with photo identification. This is a very small percentage of the 670,000 ballots cast in these seventeen counties.⁶⁰ Overall, Texas has 254 counties and more than 2,354 ballots were cast provisionally; however, not all of these provisional ballots were connected to a lack of photo identification.⁶¹ These numbers indicate a potential area of study for future elections. The major change in Texas election law between 2011 and 2013 was the addition of a photo identification requirement; during that time *provisional ballots more than tripled*.⁶² Researchers should be posed to look for increases in provisional ballots in 2014 and 2016. This will require contacting all 254 counties as the data is not compiled at the state level. The increases in provisional ballots should be even higher in on-year elections; voter turnout in the November 2013 election was just 6.14 percent of the voting age population. Past elections indicate that turnout should be close to 40 percent in the 2014 congressional and nearly 60 percent in the 2016 presidential election.⁶³

⁵⁷ Michael Cooper, "After Ruling, States Rush to Enact Voting Laws," *NY Times*, July 5, 2013.

⁵⁸ Ellen Katz, "How Big is *Shelby County*?" SCOTUSblog, June 25, 2013.
<http://www.scotusbog.com/2013/06/how-big-is-shelby-county/>.

⁵⁹ Rick Lyman, "Texas' Stringent Voter ID Law Makes a Dent at Polls," *NY Times*, November 6, 2013.

⁶⁰ The total uncounted provisional ballot because of photo identification works out to just three-tenths of 1 percent of the 670,000 votes cast.

⁶¹ To accumulate this data each county must be contacted, an important but laborious task.

⁶² The 2011 saw just 738 provisional ballots.

⁶³ Texas Secretary of State Website Turnout and Voter Registration Figures (1970-Current).
<http://www.sos.state.tx.us/elections/historical/70-92.shtml>

A section 2 lawsuit has been filed over the implementation of Texas’s voter identification law. A Texas federal judge has set a hearing on the voter ID law for September 2014. When the law was struck down previously, it was under section 5.⁶⁴ The standard of review under section 5 was to evaluate if a proposed law would have a *discriminatory effect*. (Even if the intent was not to discriminate, if the implementation of the law would cause a discriminatory effect it would not hold up under section 5 review). But under section 2 a law must have been adopted with a *discriminatory intent*. Also under section 2 the burden is on the plaintiff to prove discriminatory intent. Under section 5 the burden of proof was reversed. If the jurisdiction could not prove the application of the law was absent discriminatory effect, the DOJ would refuse clearance.⁶⁵ It seems likely that the removal of preclearance will lead to increased section 2 lawsuits in formerly covered areas; it is also possible that fewer of these lawsuits will be successful because of the different burdens of proof.

Another change that seems attributable to *Shelby County* is the increase in section 3 “bail-in” proceedings. Section 3 of the VRA provides a mechanism to allow the federal courts to “bail-in” jurisdictions forcing them to seek federal preclearance. The DOJ has filed lawsuits to bring North Carolina and Texas back under preclearance coverage.⁶⁶ On January 13th a federal judge ordered Evergreen, Alabama to seek federal preclearance for proposed electoral changes under section 3 of the VRA.⁶⁷ Civil Rights groups have asked a federal court in Alaska to return that state to

⁶⁴ see <http://www.brennancenter.org/press-release/texas-voter-id-law-violates-voting-rights-act-and-constitution-groups-challenge>

⁶⁵ See 42 U.S.C. § 1973c.

⁶⁶ Josh Gerstein, “Justice Department Challenges North Carolina Voter ID Law,” *Politico*, September 30, 2013. <http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html>

⁶⁷ Nicole Flatow, “Court Returns First City to Federal Oversight Under Voting Rights Act,” *Think Progress*

coverage under section 3 of the VRA.⁶⁸ Historically there were very few bailed-in jurisdictions. In fact since 1975 only two states, six counties and one city have been bailed in.⁶⁹ The standard under section 3 is difficult. To prove a section 3 violation a court must find a jurisdiction “intentionally denied or abridged a citizen’s right to vote on account of race, under either a Fifteenth Amendment ballot access standard or a Fourteenth Amendment vote dilution standard.”⁷⁰ Despite the difficulty, it appears the DOJ, interest groups, and the lower federal courts are looking to respond to the nullification of section 4 with increased use of section 3. Between section 2 and 3 activity it appears the federal courts will be the primary arena of voting rights struggles without the administrative preclearance process that existed under section 5. Research into the effects of *Shelby County* will need to scour the dockets of the federal courts.

One of the major assertions of interest groups looking to protect minority voting rights is a concern over changes to local election laws.⁷¹ State laws that involve voter identification or redistricting tend to draw a great deal of attention. Local election law changes, such as what side of the street on which to locate a voting booth or changing from a ward system to at-large elections, are less likely to be noticed. Preclearance required that there be public notification of proposed election law changes, so that local groups could comment and voice concern. Without preclearance, there is no longer a disclosure requirement in the VRA. This poses difficulty for researchers given that there were 12,000 formerly covered jurisdictions and only nine of them were states.

⁶⁸ Abby Rapoport, “Get to Know Section 3 of the VRA,” American Prospect, August 19, 2013, <http://prospect.org/article/get-know-section-3-voting-rights-act>.

⁶⁹ Travis Crum, “The Voting Right’s Act’s Secret Weapon.”

⁷⁰ Travis, Crum, “The Voting Right’s Act’s Secret Weapon.”

⁷¹ Maya Perez and Vishal Agraharkar, “If Section 5 Falls: New Voting Implications,” (New York: Brennan Center for Justice, 2013).

One example of the local election law changes that can have repercussions for minority voters can be seen with a specific district in Texas. During the November 2014 election, Pasadena, Texas proposed changing the make-up of its city council. The council is currently made up of eight individual districts with a council member from each. The proposed change would reduce the districts to six and add two at-large members elected by voters of the entire city. Pre-*Shelby County*, this change could not have gone on the ballot without being precleared. The measure passed by eighty-seven votes. Interestingly, this is the first election with implementation of Texas's voter identification law.⁷² Some members of the community have indicated that might file a section 2 lawsuit over the change.⁷³

Numerous other laws have passed in the wake of *Shelby County*, but the goal here was not to provide a comprehensive list of electoral law changes, but was to highlight a few as examples to aid future studies. Perhaps the most interesting aspects of this research is realization that there is an inability to evaluate most of the effects of *Shelby County* because most of the legal changes associated with the decision are unlikely to have been implemented yet. For the upcoming 2014 elections stricter photo-identification laws will take effect in Alabama, Arkansas, Mississippi, New Hampshire, North Dakota, Oklahoma, Rhode Island, Tennessee, and Virginia.⁷⁴ Pennsylvania and Wisconsin approved similar laws but they have been stopped by state court challenges.⁷⁵ Many other laws have not been passed yet because the state legislatures barely have held sessions since the June 2013 decision occurred: South Carolina's and Alabama's first legislative session after the *Shelby County* decision was

⁷² see <http://www.scotusblog.com/media/after-shelby-county/>.

⁷³ Jeff Newpher, "Proposals Pass, but Voters Spilt on Redistricting Question," *The Pasadena Citizen*, November 10, 2013. http://www.yourhoustonnews.com/pasadena/news/proposals-pass-but-voters-split-on-redistricting-question/article_90f0d207-5dc4-5c9d-8b31-bffb9452e5ec.html

⁷⁴ Thomas Beaumont, "Voter ID Laws to Get Big Test in Primaries,"

⁷⁵ *Ibid.*

not until January 14th; Alaska’s January 21st; and Louisiana’s March 10th.⁷⁶ At this point, most state legislatures have had little time to pass laws with the knowledge that preclearance is no longer in effect.

IV. Developing Post-Shelby County Hypotheses

After the 1965 adoption of the preclearance formula there, was a dramatic increase in African American voter registration and turnout. No matter how effective preclearance was at protecting minority voting rights in 2013, it is unlikely that its nullification will result in a return to pre-1965 voter participation rates. As Justice Ginsburg notes in her *Shelby County* dissent, modern day versions of voter discrimination are based in second generation *vote dilutions* rather than *vote denials*. One of the challenges for measuring the impact of preclearance is how to quantify vote dilution? Based on the two previous sections—one section that covered data on the potential effectiveness of preclearance, and one section that highlighted electoral law changes since *Shelby County*—this paper will develop some hypotheses to analyze the impacts of *Shelby County*.

(1) After the nullification of preclearance, there will be a strong correlation between formerly covered jurisdictions and the number of newly implemented election laws.

This should be expected for two reasons:

(a) Many formerly covered jurisdictions adopted election laws in the last few years, but many of these laws were held-up in the preclearance process. With preclearance nullified, those previously adopted laws can come cascading into implementation. This

⁷⁶ see <http://www.ncsl.org/research/about-state-legislatures/session-calendar-2014.aspx>

is the situation we see with Texas and its ability to implement a new voter identification law immediately after the nullification of preclearance.

(b) Also many covered jurisdictions did not entertain the possibility of obtaining preclearance and they therefore chose to stick with established electoral procedures; even when elected officials desired change. In the absence of the expense, the time-investment, and the burden of proving a lack of discriminatory effect for all proposed election laws, formerly covered jurisdictions will be more likely to adopt and implement new election laws. This is the experience we see in Pasadena, Texas when officials proposed changing their city council structure because preclearance was no longer a barrier. Understandably, jurisdictions that are not coming out from under preclearance are less likely to have a backlog of desired electoral changes. Thus the next few years should show a much higher number of new election law being implemented in formerly covered jurisdictions.

(2) There should be a substantial increase in the rate of section 2 lawsuits filed in formerly covered jurisdictions. This will also cause the rate of successful section 2 lawsuits to decrease.

The increase of section 2 lawsuits will occur for a three reasons: (1) there will be a increased number of electoral law changes in formerly covered jurisdictions; (2) the DOJ and interest groups will put more emphasis on protecting voting rights through section 2 lawsuits now that section 5 actions are not available; and (3) laws that would have been prevented under section 5 will now go into effect meaning more laws in violation of section 2 will be adopted and implemented. Because the fore mentioned reasons point to an increase in section 2 lawsuits, and because there is a different evidentiary standard for a successful section 2 lawsuit than there is for withholding

preclearance, the rate of successful section 2 lawsuits will likely decrease. Professor Katz's study on section 2 lawsuits provides a good model to test this hypothesis.

(3) With the nullification section 4 there will be an increased reliance on section 3 and the rate of jurisdictions “bailed in” will increase post-*Shelby County*.

In the absence section 5 preclearance, the DOJ and interest groups will resort to using the section 3 bail-in process. Since *Shelby County*, the DOJ has already pushed for section 3 bail-in for Texas and North Carolina. Native American civil rights groups are pushing for Alaska to be brought back under coverage. Further, the DOJ and interest groups are likely to be assisted by sympathetic federal judges that disagree with *Shelby County*. Not all federal judges felt that preclearance should be struck down. *Shelby County* was a 5-4 opinion that reversed a lower federal court decision. Judges that believe in preclearance have a means of “getting around” the Court opinion, while not blatantly ignoring the precedent. Section 3 bail-in is a tough standard to meet, and few jurisdictions have ever been bailed-in, but already after *Shelby County* there has been one city bailed-in. With preclearance not blocking certain discriminatory laws and more section 2 lawsuits moving forward, it becomes easier to build a record that the DOJ and interest groups can present to sympathetic federal judges for bail in. The federal courts' dockets can be analyzed for section 3 proceedings to analyze this hypothesis.

(4) There will be an increased role of federal courts in monitoring state and local elections.

The argument by *Shelby County*, and others opposed to preclearance, centered on the “federal cost” that preclearance imposed by allowing federal intrusion into state and local elections. It is unlikely that the *Shelby County* decision will limit

federal involvement in local elections; instead the decision will most likely trade a preclearance regulatory regime for after-the-fact lawsuits and federal court oversight of private litigation. In fact *Shelby County* might point to increased federal oversight of state and local elections through increased judicial administration of them. The number of section 2 and 3 actions can be tallied to look for post-*Shelby County* increases. The total expenditures and the length of legal proceedings for jurisdictions defending section 2 and section 3 actions after *Shelby County* can be compared with the time and expense of applying for preclearance. An increase in time and expense for jurisdictions would indicate that the federal imposition in their elections has not decreased because of *Shelby County*.

(5) Congress will pass legislation to respond to Shelby County; however, the new coverage formula will and the preclearance requirements will not be as robust as the ones struck down.

The case salience literature presented in this paper's introduction points to *Shelby County* as a likely case to see a congressional response. On January 16, 2014 a bill, the "Voting Rights Amendment Act of 2014," was introduced in both the House (HR 3899) and the Senate (SB 1945) to respond to the Court's decision. Both bills are in committee, but both possess support from congressional leaders; the House version had 22 co-sponsors (which includes bi-partisan support) as of February 25, 2014. Of course to get this support the bill excludes state voter identification laws from preclearance as a compromise.⁷⁷ Given that there is currently divided government, the fact that Congress would not be able to adopt as robust a preclearance formula or requirements is not surprising.

⁷⁷ The proposed bill would also subject four states to preclearance, with one more state, one violation away from also falling under coverage. This is significantly fewer jurisdictions than the number covered under the old formula.

All of these hypotheses are testable, but they will require some reflection on the best methodologies. For all of them, the nine states that were formerly covered can be compared with the thirty-five that had no jurisdictions covered to establish the average number of electoral laws implemented, and the number of section 2 and section 3 actions over the next few years. Additionally local laws and the activity of federal district courts throughout the country will need to be analyzed—a massive undertaking given there are more than 13,000 electoral districts and 90,106 governments in the US. Random sampling of jurisdictions or selecting jurisdictions in only some states might make this a more manageable task. The six states that had some jurisdictions covered might make for interesting comparisons: neighboring jurisdictions in the same state with the variable being previous coverage.

Beyond these hypotheses there is additional data that should be analyzed to document the impacts of *Shelby County*. Registration and turnout rates for different minority groups should be tracked. It is possible that *registration rates* may not fall as significantly in states that impose photo identification laws; while people may be *able to register*, they *may not be able to cast a ballot*. If small changes, such as a reduction in polling locations or shortening of early voting hours (changes that would have previously required preclearance) occur, then turnout will likely reduce while registration rates may not.

There are some other variables that will make monitoring the data difficult. For one, it is unlikely that one of the two major parties will have an African-American candidate for president in 2016. Given that there were huge increases in African American voters in 2008 and 2012, a drop off in African American voters in 2016 may not indicate that nullification of preclearance was the cause. Also, the Latino population has been increasing rapidly as has the Latino population's share of the

electorate. Thus the number of Latino voters could increase even if there are vote denial tactics in place. Also, the Latino population has a larger percentage of non-citizens than the Black population in the US. This makes tracking the percentage of the Latino voting age population that casts ballots difficult to analyze over time. A final challenge for analyzing the effects of *Shelby County* is the amount of time until the next census. The next census occurs in 2020, and the post census redistricting in 2021. Some of the major effects of Shelby County may not be known until sometime after that time.

Conclusion

The Voting Rights Act (VRA) has been described as the crown jewel of the Civil Rights Movement. From the moment the federal government singled out some jurisdictions for preclearance, there was a dramatic desiccation of entrenched voter suppression. For forty-eight years, preclearance was seen as the most effective component of the VRA. When the Supreme Court struck down the preclearance formula defined in section 4, it struck down a recently enacted congressional statute adopted by an overwhelming congressional majority. The Court rarely strikes down acts of Congress. Even more rare: striking down an act of Congress passed by a recent supermajority.

There is an obvious interest in studying the next steps in the constitutional dialogue. There are public policy interests; voting protections for the twenty-first century require a comparison between a preclearance regulatory framework and an after-the-fact lawsuit strategy. But beyond the importance of studying the public policy impacts, the effects of *Shelby County* can add to our understanding of the

federal courts, our comprehension of intergovernmental relations, and our knowledge of interbranch conflicts.

The *Shelby County* opinion is less than a year old, and that opinion came during the most off-year of the four year election cycle; therefore, it is not yet possible to assess the full repercussions of the decision.

Thus, this paper set out to generate some hypotheses, and to broadly sketch-out some methodologies to guide future research. A wide variety of studies were reviewed to assist future research in capturing the post-judicial review reactions of multiple political actors. In particular, this paper reviewed past studies into the effectiveness of preclearance, and traced some of the initial responses to *Shelby County*. The five hypotheses generated here do not encompass the entire universe of post-*Shelby County* research. The hypotheses need further refinement and the methodologies to test them are underdeveloped. Still, the work presented here adds to this new scholarly discussion, and it is a step towards systematically analyzing the impacts of *Shelby County*.