

## Judges Are Not Social Scientists (Yet)

David C. Kimball

THE CRUX OF THE *SHELBY COUNTY* case is whether the coverage formula for identifying jurisdictions subject to the preclearance conditions of the Voting Rights Act (VRA) is still an appropriate way to identify locations with heightened levels of voting discrimination. This is the kind of question that lends itself to social science research, and a large volume of social science evidence was presented for this case. Justice Ginsberg's dissenting opinion documents the "sizeable record" that was created when Congress reauthorized the VRA in 2006.<sup>1</sup> Many social scientists contributed to that record. Furthermore, many briefs presenting social science evidence were submitted to the Supreme Court in the *Shelby County* case (as in the *Northwest Austin* case decided in 2009). More generally, there is a large social science literature on minorities and voting rights in the United States.<sup>2</sup>

It is impossible to adequately summarize the social science record in a small space, but here are a few of the key findings.

- Racially and ethnically polarized voting is still significantly more common in covered jurisdictions than in the rest of the country.<sup>3</sup>
- Racial resentment and anti-immigrant attitudes are substantially more pronounced among white residents in covered jurisdictions.<sup>4</sup>
- Cases alleging voting discrimination under Section 2 of the VRA, which can be filed against any jurisdiction in the country, are much more frequently brought against covered

jurisdictions than non-covered jurisdictions, even in recent years, and minority plaintiffs more frequently win those cases against the covered jurisdictions.<sup>5</sup>

Overall, the record shows that elevated rates of voter discrimination remain a serious concern in the covered jurisdictions.

To be fair, the district and appellate courts had already analyzed the evidentiary record when they heard the *Shelby County* case, although both upheld the coverage formula passed by Congress in 2006. In addition, the Supreme Court also had other analyses to undertake in the *Shelby County* case, such as interpretations of constitutional doctrines. Nevertheless, it is jarring how little the majority opinion written by Chief Justice Roberts mentions any

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<sup>1</sup>*Shelby County v. Holder*, 570U.S. (2013) (Ginsberg dissenting, quoting *Northwest Austin Municipal Utility District No. 1 v. Holder (NAMUDNO)*, 557U.S. 193, 205 (2009)).

<sup>2</sup>For another summary see John Sides, "Race and Voting after the Voting Rights Act: What You Need to Know," *Washington Post*, June 30, 2013 (<<http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/30/race-and-voting-after-the-voting-rights-act-what-you-need-to-know/>>, accessed July 26, 2013).

<sup>3</sup>Brief for Professors, Richard L. Engstrom, Theodore S. Arrington, and David T. Canon, *Shelby County v. Holder*; Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart III, "Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act," *Harvard Law Review* 126:211–220.

<sup>4</sup>Brief of Political Science and Law Professors as Amici Curiae in Support of Respondents, *Shelby County v. Holder*, pp. 6–15.

<sup>5</sup>Morgan Kousser, "Gutting the Landmark Civil Rights Legislation," *Reuters*, June 26, 2013 (<<http://blogs.reuters.com/great-debate/2013/06/26/gutting-the-landmark-civil-rights-legislation/>>, accessed July 22, 2013); Brief of Amici Curiae Ellen D. Katz and the Voting Rights Initiative in Support of Respondents, *Shelby County v. Holder*.

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social science evidence. Justice Ginsberg's dissent in *Shelby County* is notably longer than the majority opinion, in large part because she devotes about ten pages to the evidentiary record.

The majority opinion in *Shelby County* does not ignore social science entirely. The majority seems to accept the analysis of social science evidence conducted by Judge Williams in his dissent at the appellate level.<sup>6</sup> The Court cites three pieces of evidence from Judge Williams' analysis: voter registration and turnout rates by race; the number of black elected officials; and successful Section 2 lawsuits. Very similar evidence was cited by the Court majority in the *NAMUDNO* case.<sup>7</sup> This evidence shows that the number of African American elected officials has increased substantially in covered jurisdictions. Voter registration rates are now similar for African Americans and Whites across the county. Furthermore, Judge Williams examines each set of data at the state level and compares covered states versus uncovered states. In each comparison there are at least some uncovered states that perform worse than some covered states (for example, the racial disparity in turnout is worse in some uncovered states than in some covered states). On that basis, the majority concludes that the coverage formula is no longer appropriate.

This is a rather crude comparison since in six states only some, but not all, local jurisdictions are covered under the formula. Furthermore, the analysis of racial disparities in voter turnout by the Court appears to only examine presidential elections. Yet racial and ethnic disparities in turnout tend to be more pronounced in midterm elections, primary elections, and local elections.<sup>8</sup> Why focus just on turnout in presidential elections? Finally, a large body of evidence on race, ethnicity, and voting is excluded from the Court majority's analysis, including measures of prejudice and racially polarized voting. The *Shelby County* majority opinion seems to rest on a narrow slice of available evidence. Perhaps the pieces of evidence cited by the *Shelby County* majority are the only ones that matter, but Chief Justice Roberts offers no justification for such a conclusion.

This is unfortunate because a vast body of evidence is available now that was not available when the Voting Rights Act was first passed or when it was previously reauthorized. There are many sources of administrative data available to measure election performance at the state and

local level. Several large national surveys have been conducted recently that document the voting experience.<sup>9</sup> There are now several measures of racial and ethnic prejudice and resentment that can be estimated at the state and perhaps even the county level.<sup>10</sup> Since local jurisdictions have much discretion in implementing election laws, it makes sense to examine these data at the local level.<sup>11</sup>

Now that the Supreme Court has asked twice, Congress again has an opportunity to create a new coverage formula for Section 5 of the Voting Rights Act. Others have noted that a polarized and gridlocked Congress is not likely to agree on a new coverage formula.<sup>12</sup> I agree with this analysis, but despite these obstacles it is worth a try in Congress so that policymakers take a closer look at the large quantity of empirical evidence on race, ethnicity and voting in the United States. Assuming that Congress does enact a new formula for Section 4,

<sup>6</sup>679F.3d 885 (2012, dissenting opinion); *Shelby County*, at \*8. The *Shelby County* majority cites similar evidence elsewhere, \*14–16.

<sup>7</sup>*Northwest Austin* at \*7–9. By my count, Chief Justice Roberts cites the *NAMUDNO* decision 26 times in his majority opinion in *Shelby County*. In future election law cases, will liberal justices agree to join majority opinions written by Chief Justice Roberts that seem intended to kick the can down the road?

<sup>8</sup>Zoltan L. Hajnal, *America's Uneven Democracy: Race, Turnout, and Representation in City Politics* (Cambridge University Press 2010); Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation, and Democracy in America* (Macmillan 1993) 130–133.

<sup>9</sup>For a description of many of these data sources see Pew Center on the States, *Election Administration by the Numbers 2012* (<[http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Pew\\_Elections\\_By\\_The\\_Numbers.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Elections_By_The_Numbers.pdf)>).

<sup>10</sup>For example, Brief of Political Science and Law Professors, *Shelby County*, 6–15; James H. Kuklinski et al., "Racial Prejudice and Attitudes Toward Affirmative Action," *American Journal of Political Science* 41(1997):402–419; Nicholas A. Valentino and David O. Sears, "Old Times There Are Not Forgotten: Race and Partisan Realignment in the Contemporary South," *American Journal of Political Science* 49(2005):672–688. At oral argument, Chief Justice Roberts asked whether "citizens in the South are more racist than citizens in the North" (41–42). The Solicitor General reported that he did not know the answer, but these and other studies seem to answer in the affirmative.

<sup>11</sup>For recent examples see Kousser, "Gutting the Landmark Civil Rights Legislation;" Bernard Fraga, "The SCOTUS Majority is Missing Exactly What the VRA Sought to Remedy," *The Monkey Cage*, June 27, 2013 (<<http://themonkeycage.org/2013/06/27/the-scotus-majority-is-missing-exactly-what-the-vra-sought-to-remedy/>>, accessed July 22, 2013).

<sup>12</sup>Richard L. Hasen, "Shelby County and the Illusion of Minimalism," paper to be presented at the annual meeting of the American Political Science Association, Chicago, August 29, 2013.

it will eventually need to beseech the Supreme Court for permission to implement the new coverage formula.

Will the Court approve a new coverage formula? I am not very optimistic. Writing for the *Shelby County* majority, Chief Justice Roberts strongly endorses the “fundamental principle of equal sovereignty”<sup>13</sup> among the states, and notes that a new formula must support a “determination that exceptional conditions still exist justifying such an ‘extraordinary departure from the traditional course of relations between the States and the Federal Government.’”<sup>14</sup> I read the *Shelby County* majority opinion as an invitation for future challenges to other portions of the Voting Rights Act, including Section 2. Nevertheless, writing a new coverage formula would be worthwhile in forcing the Supreme Court to confront the full evidentiary record again.

Social science is likely to feature prominently in future election law cases. There is room in the legal profession for a better understanding of what social science evidence does and does not show. Justice

Stevens recently expressed his disapproval of the majority opinion in *Shelby County*. However, Justice Stevens still approvingly notes the *Shelby County* majority’s reading of the empirical evidence in the case.<sup>15</sup> Justice Powell expressed regret for his opinion upholding the death penalty in the *McCleskey* case. Yet Justice Powell apparently remained unpersuaded by statistical evidence of persistent racial disparities in the application of the death penalty.<sup>16</sup> Interaction between the law and social science professions has advanced considerably in recent years. This journal is one valuable source for those conversations. I hope they continue.

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<sup>13</sup>*Shelby County* at \*9.

<sup>14</sup>Id. at \*24. Perhaps the “fundamental principle of equal sovereignty” is to conservatives what the “right to privacy” is to liberals, and vice versa.

<sup>15</sup>John Paul Stevens, “The Court and the Right to Vote: A Dissent,” *New York Review of Books*, August 15, 2013 (<<http://www.nybooks.com/articles/archives/2013/aug/15/the-court-right-to-vote-dissent/>>, accessed July 25, 2013).

<sup>16</sup>John C. Jeffries Jr., *Justice Lewis F. Powell Jr.: A Biography* (Fordham University Press 1994) 451.