

“Restoring the Voting Rights Act: Combatting Discriminatory Abuses”

Hearing before the Senate Committee on the Judiciary, Subcommittee on the Constitution

September 22, 2021

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Prof. Franita Tolson:

1. Statements at the hearing reflected that there was record turnout by white and minority voters in recent elections, undermining the need for preclearance and to restore the Voting Rights Act more generally.
 - a. Did the statistics cited in support of this argument present a fair and representative assessment of the state of voter access during the 2020 election? If not, why not?

The statistics cited in support of this argument did not present a fair and representative assessment of the state of voter access during the 2020 elections for several reasons. First, turnout statistics only provide information about voters who were able to successfully cast a ballot, and not information on whether all voters (and potential voters) are being treated equally as they navigate the political process. The Voting Rights Act has always focused on the ability of minority communities to participate in the entirety of our political system on equal terms as white voters, and not just during the sole act of casting a ballot. Notably, a plaintiff can establish a violation of Section 2 of the Voting Rights Act if they show that “based on a totality of the circumstances...the political processes leading to the nomination or election in the State or political subdivision are not equally open to members of the class of citizens protected...”¹ Section 2 can be violated even if a minority voter is able to overcome various obstacles (i.e., lack of polling places, long wait times, difficulty registering, etc.) and cast a ballot. Thus, turnout statistics only tell us that some finite number of people successfully voted, but they reveal no other relevant information regarding the qualitative experience of those who voted. Despite high levels of turnout during the 2020 election cycle, it remains true that the political process was “not equally open” to everyone since minorities often had to overcome obstacles that white voters did not to vote.

Second, voter turnout statistics do not capture the number of voters who did not vote because of restrictive voting laws. In any given election cycle, tens of millions of legally eligible voters do not register or cast a ballot. Reasons that individuals fail to vote range from antipathy about the political process to outright voter suppression. Voter turnout statistics not only obscure that minority voters are not participating in the political process on equal terms as white voters, but these statistics also do not account for those potential voters unable to cast a ballot because of unduly restrictive voting laws.

¹ 52 U.S.C. § 10301(b). Given that Section 2 litigation is expensive and time consuming, Sections 4(b) and 5 of the Voting Rights Act were an efficient and effective means of preventing the implementation of restrictive laws that make it more difficult for minority voters to participate in the political process on equal terms with white voters.

- b. Is overall turnout the appropriate metric to use to evaluate whether Congress should enact voting protections specifically for minority communities? If not, why not and what other metrics should be considered?

Voter turnout is an important metric, but it should not be the sole metric used to evaluate whether Congress should enact voting protections for minority communities. Instead, Congress should focus on the impact of restrictive laws on the voting eligible population, which includes both registered voters and unregistered potential voters. Turnout statistics ignore portions of the former group (i.e., registered voters who were unable to successfully cast a ballot) and completely ignore the latter group altogether.

This distinction has significant implications for debates regarding the need for more federal voting protections. For example, a recent study by political scientist Emily Rong Zhang investigated why voter identification laws have a negligible effect on voter turnout despite the substantial number of eligible voters who lack the required identification.² This phenomenon can be explained by the fact that courts tend to focus on the impact of these laws on registered voters (information that can be partially extracted from turnout statistics), and not their effect on unregistered voters.³

As Professor Zhang notes, the determination of whether a law is suppressive often turns on whether we are asking the right questions, and to take the point further, relying on the right data. Turnout data will be insufficient to gauge the impact of a suppressive law on both registered voters who were not able to successfully vote and unregistered potential voters. If a law discourages otherwise eligible voters from registering in the first instance or results in registered voters being turned away at the polls, these outcomes are, in some ways, more pernicious than when voting laws make it difficult for voters who are nonetheless able to successfully cast a ballot. Thus, the story that voter turnout statistics tell is, at best, incomplete, and Congress should broaden its focus to include metrics that gauge the impact of voting restrictions on the voting-eligible population in determining whether additional protections are needed.⁴

- c. How has the racial turnout gap been affected since the Supreme Court's *Shelby County* decision in 2013?

² Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate over Voter ID Laws' Effects Teaches About Asking the Right Questions*, 69 UCLA L. REV. (forthcoming 2022).

³ *Id.*

⁴ Qualitative and survey data could communicate powerful stories about registered voters being turned away from the polls, but states also possess large amounts of data on the unregistered voters who will be most harmed by voting restrictions. *See Id.* at 43 (noting that "States could easily learn, as they possess the richest data sources to do so, about the characteristics of vulnerable populations who are most likely to feel the effect of electoral changes").

In the years since the *Shelby County v. Holder* decision, the racial turnout gap grew significantly in jurisdictions formerly covered by Sections 4(b) and 5 of the Voting Rights Act.⁵ This gap was evident during the 2020 election cycle,⁶ and it persists because minority voters have faced new obstacles in casting a ballot since *Shelby County*. Covered and noncovered jurisdictions have instituted a number of changes that make it more difficult to register and cast a ballot including the closure of polling places, more restrictive voter identification laws, and cutbacks in early voting, to name just a few changes. These restrictions will likely cause the racial gap in turnout to worsen for election cycles to come.

⁵ Kevin Morris et al., *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act*, Brennan Center, Aug. 20, 2021, available at <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights> (noting that “between 2012 and 2020, the white-Black turnout gap grew between 9.2 and 20.9 percentage points across five of the six [formerly covered] states”).

⁶ Kevin Morris et al., *Large Racial Turnout Gap Persisted in 2020 Election*, Brennan Center, Aug. 6, 2021, available at <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election> (stating that, in 2020, “70.9 percent of white voters cast ballots compared with only 58.4 percent of nonwhite voters”).