Plaintiffs' Opening Statement

May 6, 2024

United States District Court
Middle District of North Carolina
North Carolina State Conference of the NAACP, et al., v. Alan Hirsch, et al.

No. 1:18-cv-01034

Discriminatory Purpose: Arlington Heights

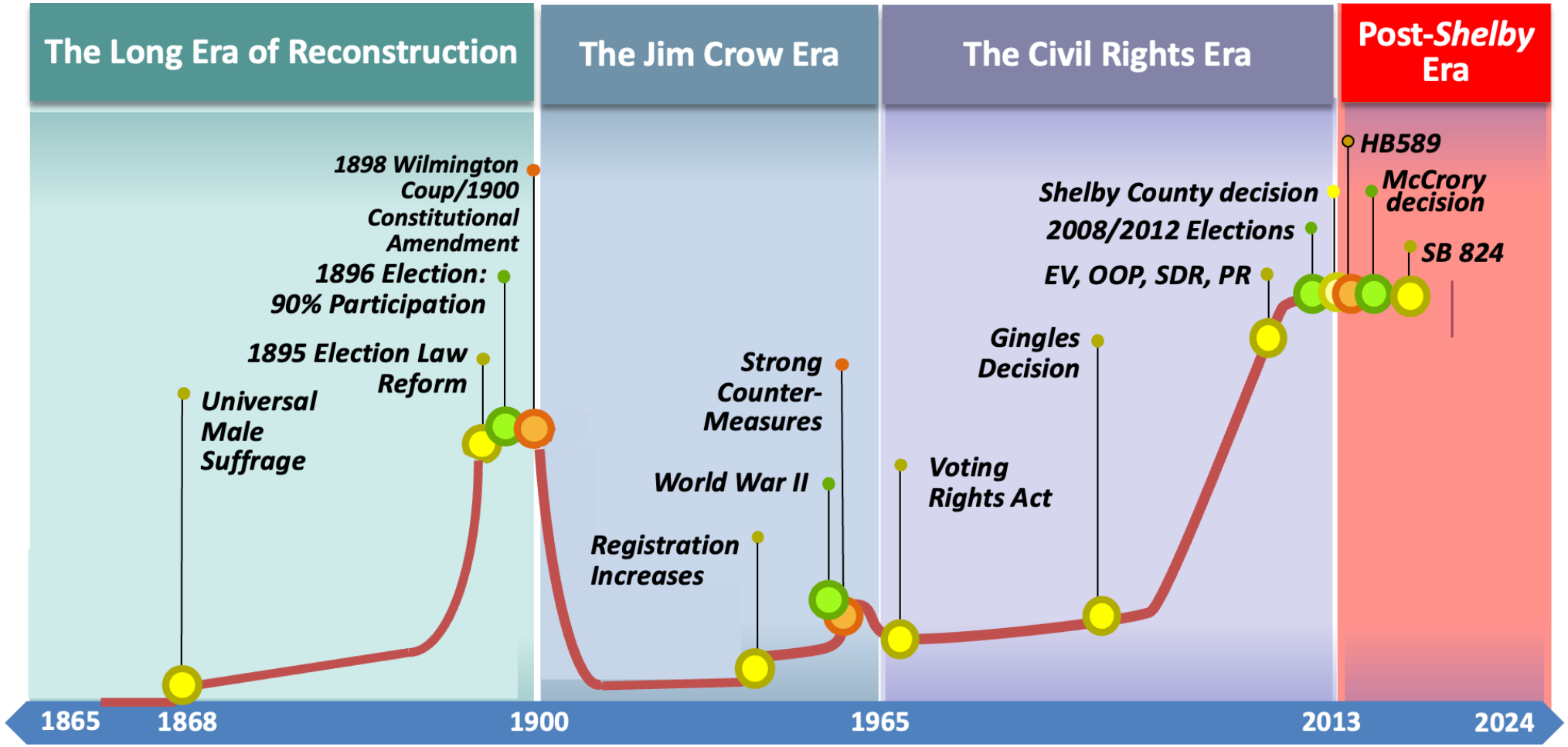
- A law has illegal intent "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).
- Discriminatory purpose does not need to be the "sole" or "primary" factor, just "a motivating factor." *Id*.
- This is not the same as racial animus. *See Garza v. County of Los Angeles*, 918 F. 2d 763 (9th Cir. 1990).
- It is no defense that racial discrimination may be "done for partisan ends." *NAACP v. McCrory*, 831 F. 3d 204, 233 (4th Cir. 2016).

Discriminatory Purpose: Arlington Heights Factors

- Historical Background Preceding the Law
- Sequence of Events Leading to Passage of Bill
- Departures from Substantive or Procedural Practice
- Legislative History
- Whether Decision Bears More Heavily on Certain Racial Groups
- Pretextual Justification for Passage of the Law
- Post-Enactment Measures Entrench Majority Political Power

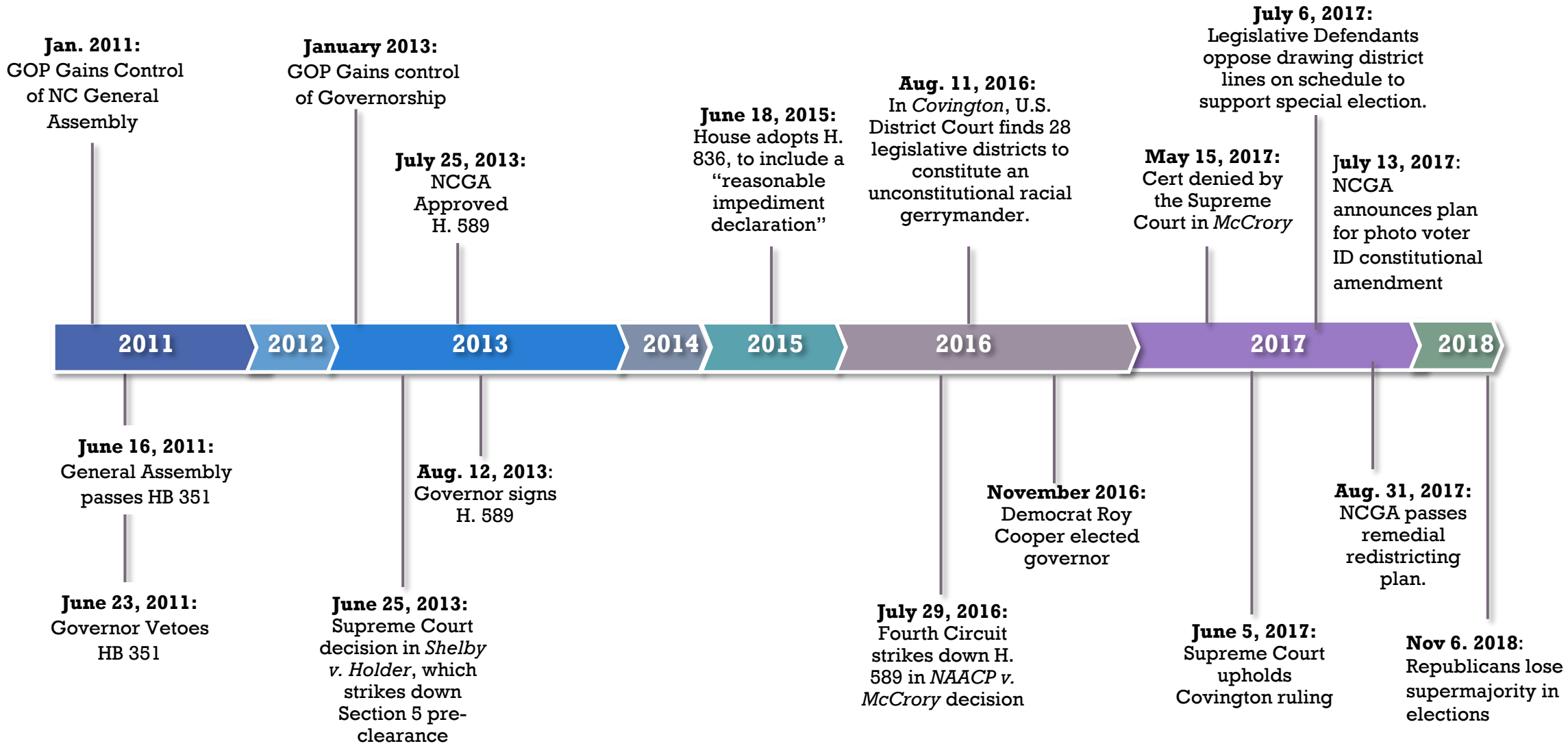
- *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)

Historical Background of the Challenged Decision



Source: Preliminary Expert Report of James L. Leloudis, PX1.

Events Leading to the Passage of SB 824



Departures from Normal Procedural Sequence

- Placed six constitutional amendments on the ballot at once.
- Approved the photo voter ID constitutional amendment without implementing legislation.
- Instead of waiting for a duly elected legislature to be seated, the General Assembly made the choice to rush through consideration and adoption in a lame-duck session. The only rationale for this was to beat the clock on the loss of their supermajority.
- Majority party circumvented the ability of the minority party to introduce ameliorating amendments.
- "*Of course, a legislature need not break its own rules to engage in unusual procedures.*" – *NAACP v. McCrory, 831 F.3d at 228.*

The Legislative History of the Decision

- Race data still in hand when the General Assembly took steps to enact S.B. 824.
- Similar to H.B. 589, this bill did not allow for the use of federal government IDs or public assistance IDs.
- S.B. 824 Added New Limitations:
- Changed the expiration date limit from four years to one year (DMV IDs, passport, out-of-state IDs, tribal IDs).
- The only exception to this rule is that voters who are 65 or older can use expired ID, so long as the ID was valid on the voter's 65th birthday.
- Shorter roll-out period than H.B. 589.

The Reasons Cited for S.B. 824's Passage are Pretextual

The 2013 report by the SBOE on "documented cases of voter fraud in North Carolina" concluded that between 2000 and 2012, out of nearly 40 million votes cast, only two cases of voter impersonation were referred to a district attorney.

The SBOE Post-Election Audit Report for the 2016 General Election found that only two cases of voter impersonation were referred to a district attorney out of the 4.8 million votes cast in that election.

Source: Letter from Gary Bartlett to Committees of the NC General Assembly (March 11, 2013) - PX0273; 2016 SBOE Audit, PX0277

SECTION 2:

S.B. 824 WILL HAVE A DISCRIMINATORY RESULT

Section 2 Vote Denial Standard

Section 2 vote-denial claim consists of two elements:

- *First*, the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
- *Second*, that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

- *League of Women Voters v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014)

Brnovich Guideposts

- The size of the burden
- The degree to which a voting rule departs from what was standard practice when Section 2 was amended in 1982
- The size of any disparities in a voting rule's effect on members of different racial or ethnic groups
- The opportunities afforded by a State's entire system of voting
- The strength of the state's interest in the challenged voting rule

Brnovich v. Democratic National Committee, 141 S.Ct 2321 (2021)

Section 2 Vote Denial Standard

- Courts should consider the “totality of circumstances”
- In evaluating Section 2 claims, courts have looked to certain “typical” factors:

1. History of voting-related discrimination
2. Racially polarized voting
3. Use of voting practices to enhance discrimination
4. Exclusion of minorities from candidate slating process
5. Minorities bear effects of past discrimination
6. Racial appeals in campaigns
7. Minorities in public office
8. Officials unresponsive to minority needs
9. Policy underlying contested practice is tenuous

S.B. 824 Imposes a Discriminatory Burden (Barreto Report)

Lack of Possession Rates of Valid ID by Race in North Carolina (All NC Eligible Voters)

Valid ID Category	White	Black	Wht-Blk	Latino	Wht-Lat
Does not have any valid unexpired ID	3.1	7.2	-4.1*	11.0	-7.9***
No valid ID + no photo match	6.1	12.4	-6.3**	16.7	-10.6***
No valid ID + no photo or name match	9.1	15.5	-6.4*	19.7	-10.6***

Results are statistically significant at following level: *** pr <.001 ** pr <.010 * pr <.050 ‡ pr <.100

Source: Preliminary Expert Report of Matthew A. Barreto Appendix B, table 1B, 3B

S.B. 824 Imposes a Discriminatory Burden (Herron Report)

Table 3: Statewide no-match rates by racial group

County	Registered voters	No-match rate
White	5,186,104	6.5
Black	1,670,793	10.6
Undesignated	379,943	15.2
Other	201,316	8.2
Asian	98,789	10.0
American Indian	59,313	12.9
Multiple races	49,910	14.4

Source: Preliminary Expert Report of Michael C. Herron, Table 3

S.B. 824 Imposes a Discriminatory Burden (Herron Report)

Table 5: Statewide no-match rates by ethnicity, restricted to registered voters whose year of registration is 2003 or after

Ethnicity	Registered voters	No-match rate
Not Hispanic	3,478,500	5.7
Unknown	1,458,645	10.7
Hispanic	207,424	11.1
Not Hispanic, white	2,489,604	4.9

Source: Preliminary Expert Report of Michael C. Herron, Table 5

Tenuousness of the Policy

1) The law is unnecessarily burdensome
2) The reasonable impediment option does not eliminate the disproportionate burden on minority voters
3) Other means of voting for people without acceptable ID do not eliminate the disproportionate burden on minority voters
4) Minority voters are less likely to possess acceptable ID
5) The costs of obtaining acceptable ID are significant
6) The law will do little to improve election security or public confidence in elections
7) Lack of public knowledge is likely to affect voter turnout

Source: Preliminary Expert Report of Dr. Barry C. Burden, at 22.