

University at Buffalo School of Law

## Digital Commons @ University at Buffalo School of Law

---

Journal Articles

Faculty Scholarship

---

2015

### Toward a Fundamental Right to Evade Law? Protecting the Rule of Unequal Racial and Economic Power in Shelby County and State Farm

Martha T. McCluskey  
*University at Buffalo School of Law*

Follow this and additional works at: [https://digitalcommons.law.buffalo.edu/journal\\_articles](https://digitalcommons.law.buffalo.edu/journal_articles)



Part of the [Constitutional Law Commons](#), [Election Law Commons](#), and the [Rule of Law Commons](#)

---

#### Recommended Citation

Martha T. McCluskey, *Toward a Fundamental Right to Evade Law? Protecting the Rule of Unequal Racial and Economic Power in Shelby County and State Farm*, 16 Berkeley J. Afr.-Am. L. & Pol'y 216 (2015).

Available at: [https://digitalcommons.law.buffalo.edu/journal\\_articles/522](https://digitalcommons.law.buffalo.edu/journal_articles/522)



This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

## TOWARD A FUNDAMENTAL RIGHT TO EVADE LAW? THE RULE OF POWER IN SHELBY COUNTY AND STATE FARM

MARTHA T. MCCLUSKEY\*

Beyond its important impact on voting rights, *Shelby County, Alabama v. Holder*<sup>1</sup> advances a constitutional vision that inverts the rule of law, so that government authority becomes particularly illegitimate when it constrains institutional power to violate the law. This essay compares *Shelby County* to *State Farm Mutual Automobile v. Campbell*,<sup>2</sup> a 2003 Supreme Court ruling involving a different subject area, governed by state rather than federal authority. Despite these differences, both cases similarly assert new federal judicial power to override government efforts to prevent unlawful gain from exploitation of racial and economic inequality.

Authority becomes legitimate –the rule of law rather than personal whim -- when it must account for its actions with explanations and evidence subject to outside evaluation for consistency, truth, and value. In theory, the U.S. constitutional system holds government to account through democratic elections – a goal crucially advanced by the Voting Rights Act<sup>3</sup> and also through different degrees of judicial scrutiny of the justifications for government action. In general, constitutional doctrine requires federal judges to defer to the factual determinations and value judgments of other branches as long as these can be supported by some plausible reason (even if the reasons are not persuasive or proven). For some particularly exceptional areas of heightened constitutional concern, however, judges can demand that government action have stronger support in order to be valid law.

### I. Uneven Concern for States' Rights?

*Shelby County* invalidated the coverage formula of the Voting Rights Act on the ground that it was an irrational use of Congress's constitutional power to enforce the Fifteenth Amendment's protection against race-based

---

\*Professor of Law and William J. Magavern Fellow, SUNY Buffalo Law School, [mcclusk@buffalo.edu](mailto:mcclusk@buffalo.edu).

<sup>1</sup> *Shelby Cnty, Ala. v. Holder*, 133 S.Ct. 2612 (2013).

<sup>2</sup> *State Farm Mut. Auto. Ins. Cnty. V. Campbell*, 538 U.S. 408 (2003).

<sup>3</sup> 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011).

## **Toward A Fundamental Right to Evade Law? the Rule of Power in Shelby County and State Farm**

denials of voting rights – a provision central to the Reconstruction of the nation after the Civil War.<sup>4</sup> *Shelby County* invoked a newly articulated principle of equal state sovereignty<sup>5</sup> to explain its close scrutiny of Congress’s 2006 decision to renew the longstanding formula for targeting the Act’s preventative enforcement mechanisms. This principle of states’ equal rights does not derive from specific constitutional text or from the historical intent of the 15<sup>th</sup> Amendment, or from long-established precedent,<sup>6</sup> but instead appears to be grounded in a general theory of government structure that emphasizes protection of state sovereignty against federal government control.

The Court does not carefully explain how this theory squares with the change in federal-state relations represented by the Reconstruction Amendments. The 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments turned away from the pre-Civil War theory that states should be the primary protectors of fundamental liberties to instead explicitly grant new federal individual political and civil rights backed by specific federal enforcement authority.<sup>7</sup> Nor does *Shelby County* clearly explain how its state sovereignty theory fits with the post-New Deal principle emphasizing the structural importance of judicial deference to democratic political processes, with federal judicial power reserved primarily for explicit constitutional limits, for fundamental personal rights, and for correcting systemic failures of the political process – such as race-based barriers to political power.<sup>8</sup>

Indeed, *Shelby County’s* concern with protecting states from the possible burdens of federal prevention of racially discriminatory voting barriers appears especially questionable given the apparent inconsistency of the contemporary Court’s commitment to reviving state sovereignty. The *State Farm* decision is one of a number of notable recent decisions expanding

---

<sup>4</sup> See *Shelby County*, 133 S.Ct. at 2614.

<sup>5</sup> *Id.* at 9 (citing *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

<sup>6</sup> *Id.* at 2623; 2630-31 (Ginsburg, J. dissenting) (arguing that the “equal sovereignty” principle “veers away from controlling precedent” without acknowledging that fact). See also Eric Posner, *John Roberts Opinion on the Voting Rights Act is Really Lame*, *The Supreme Court 2013: The Year in Review*, Blog Entry #13, SLATE, June 25, 2013 (discussing the lack of constitutional support for the principle).

<sup>7</sup> See 133 S.Ct. at 2633 (Ginsburg, J., dissenting) (quoting Justice Holmes’ explanation of the need for federal legislative protection of voting rights in *Giles v. Harris*, 189 U.S. 475, 488 (1903)). In contrast, the majority in *Shelby County* explains that narrowing federal legislative powers to protect states’ rights furthers individual liberties. See 133 S.Ct. at 2626.

<sup>8</sup> See *id.* at 2623 (Ginsburg, J., dissenting) (criticizing the Court for lack of ordinary respect for Congress and for disregarding the legislative record).

federal powers to override state policy judgments in areas of traditional state expertise and experimentation.<sup>9</sup> The contrast between the Court's rejection of state sovereignty in *State Farm* and its embrace of state sovereignty in *Shelby County* deserves analysis not simply as a reflection of arbitrary and unprincipled judicial power, but rather as a purposeful construction of new covert constitutional rules.<sup>10</sup>

## II. What drives the Court's Selective Scrutiny of Rationality?

In each case, the Court appears to focus on procedural flaws in the government's choice of remedy for wrongdoing, without questioning the government's substantive goal of preventing violations of voting rights (in *Shelby County*) or insurance consumers' rights (in *State Farm*). In both cases, however, the Court's criticism of the rationality of the decision making process rests on implicit substantive judgments about the nature and meaning of the underlying problems of unlawful activity.

*Shelby County* suggests the Voting Rights Act's coverage formula fails even a basic deferential minimal rationality standard, concluding that "no valid reason" supported Congress's decision to renew the law in 2006 without fully reconsidering the formula for selecting jurisdictions required to get prior federal approval for electoral changes.<sup>11</sup> In the majority's analysis, Congress's reliance on the original formula was "irrational" because it was based on "40-year-old data" rather than on current statistical evidence of states' differences.<sup>12</sup>

---

<sup>9</sup> Richard A. Posner, *The Voting Rights Act is about the Conservative Imagination*, *Supreme Court 2013: The Year in Review*, Blog Entry 16, SLATE, June 26, 2013 (doubting that states' rights is a value for any of the Justices, noting the Court's recent expansion of federal citizenship rights limiting state police powers in *McDonald v. City of Chicago*, 567 F. 3d 856 (2010)).

<sup>10</sup> It is true that some language in *State Farm* suggests a states' rights theory for its ruling expanding federal rights. By limiting states' power to award high punitive damages, based on evidence of nationwide corporate policy affecting that state, the Court arguably protected other states from the burdensome effects of high damage awards on multistate corporations in their jurisdictions – or perhaps protected other states' power to permit rather than punish the underlying multistate corporate practices. See 538 U.S. at 421-22. Nonetheless, *State Farm* addresses this possible concern about inter-state conflict by expanding federal citizenship rights and narrowing state powers. The cases remain inconsistent because *Shelby County* took the opposite approach to the parallel problem that states' racially discriminatory election regulations are likely to have a multistate reach, interfering with other states' rights to fair and equal participation in the federal political process – a problem that the Reconstruction Amendments and Voting Rights Act intended to solve by expanding federal citizenship protections (contrary to *Shelby County*).

<sup>11</sup> 133 S.Ct at 2630.

<sup>12</sup> *Id.* at 2630.

## **Toward A Fundamental Right to Evade Law? the Rule of Power in Shelby County and State Farm**

Constitutional scholars defending the majority's reasoning have similarly faulted the coverage formula for insufficient evidence, avoiding the substantive question of the relative importance of state sovereignty compared to federal political citizenship and racial equality. For example, constitutional scholar Suzanna Sherry acknowledges *Shelby County's* potentially harmful impact on constitutionally protected voting rights, but explains that Congress, not the Court, is at fault for exercising abnormal, unprincipled, power based on unwise and arbitrary judgment.<sup>13</sup> She insists that a "rational, functional Congress" would have modified the current coverage formula when renewing the Voting Rights Act to ensure that the Act targets states with the lowest levels of current voter registration and turnout.<sup>14</sup> Similarly, a comment by law professor Marci Hamilton explains that *Shelby's* ruling was a "no-brainer" rather than a dramatic change in constitutional substance because Congress chose a policy approach "not tethered" to fact.<sup>15</sup>

As in *Shelby County*, the majority in *State Farm* determined that a government strategy for deterring institutionalized wrongdoing was so lacking in rational support that special judicial intervention was justified to protect the federal citizenship rights of corporations.<sup>16</sup> *State Farm* ruled that a state award of \$145 million in punitive damages in a civil case arbitrarily deprived the corporate defendant of property in violation of the corporation's Fourteenth Amendment right to due process.<sup>17</sup>

Two questionable implicit normative judgments ground the Court's analysis of rationality in these cases. First, in both cases the Court presumes that the wrongdoing at issue can only be legitimately understood as a problem of isolated irrational and arbitrary mistake or misdeed, not as a rational system calculated to produce ongoing gain through unlawful power. Second, in both cases the Court determines that the government's strategy for controlling the acknowledged wrongdoing risks producing illegitimate systemic, ongoing bias against the wrongdoers meriting unusual judicial

---

<sup>13</sup> Suzanna Sherry, *It's Congress's Fault, The Supreme Court's Voting Rights Act Decision: Live Updates*, June 25, 2013, posted on Aaron Blake, POST POLITICS (blog of Washington Post), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/25/the-supreme-courts-voting-rights-act-decision-live-updates/> last visited June 2013.

<sup>14</sup> *Id.*

<sup>15</sup> Marci A. Hamilton, *The Inevitable Holding in Shelby v. Holder, And its Fallout*, JUSTIA, June 25, 2013.

<sup>16</sup> See Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in State Farm*, 56 BUFF. L. REV. 1035 (2008) (criticizing the majority's due process analysis).

<sup>17</sup> *State Farm Mut. Auto. Ins. Cnty. v. Campbell*, 538 U.S. at 429.

intervention. In the constitutional picture colored by these two assumptions, both state and federal government power loses legitimacy when directed at limiting long term unlawful institutional gain derived from exploiting racial and economic inequality.

### A. Denying the Rationality of Deterrence

Turning to the first presumption, regarding the nature of the problem, the majority opinion acknowledged that, when originally enacted in 1965, the coverage formula was rationally designed to target the problem of discriminatory “tests and devices for voter registration” combined with evidence of low turnout of voters of color in the jurisdictions selected for coverage.<sup>18</sup> The question, however, was whether Congress could continue to target its enforcement to those jurisdictions fifty years later, when voter turnout and registration rates “approach parity”<sup>19</sup> with other jurisdictions, and when those targeted jurisdictions showed evidence of substantial improvement in racial minority voting and representation. The majority agreed that these improvements “are in large part *because of* the Voting Rights Act.”<sup>20</sup>

Nonetheless, the majority rejected the rationality of using successful deterrence as a reason for maintaining the original enforcement targets when renewing the Act in 2006. The problem, according to the majority opinion, was that this deterrence rationale plausibly could extend indefinitely: these jurisdictions could not disprove their particular risk through empirical evidence of improvement in voter turnout or registration.<sup>21</sup> Because the majority deemed this deterrence rationale illegitimately broad, it went on to fault Congress for its lack of new empirical evidence showing that the problems in the covered jurisdictions remain worse than in others. The majority’s rejection of the deterrence theory is noteworthy given the prominence and power in contemporary jurisprudence of economic rationales justifying policy with predictions about ongoing or future behavior – predictions based not on detailed current empirical evidence but instead on deductive logic from general assumptions about calculated gain-seeking in response to incentives.<sup>22</sup>

---

<sup>18</sup>Shelby Cnty. v. Holder, 133 S.Ct at 2616.

<sup>19</sup>*Id.* at 2617.

<sup>20</sup>*Id.* at 2618 (emphasis in original).

<sup>21</sup> *Id.* at 2619.

<sup>22</sup> See e.g., A. Mitchell Polinsky, *An Introduction to Law and Economics* 79-97 (4<sup>th</sup> ed. 2011) (using an economic theory of law enforcement centered on deterrence theory); see also Judicial Symposium on the Law and Economics of Crime and Punishment, Law and Economics Center,

## **Toward A Fundamental Right to Evade Law? the Rule of Power in Shelby County and State Farm**

According to *Shelby County*'s majority opinion, the evidence of pervasive discrimination in the covered jurisdictions forty years ago has "no logical relation to the present day."<sup>23</sup> To the contrary, Justice Ginsburg's dissent argued that pervasive historical race discrimination, along with recent evidence of ongoing patterns of new forms of discrimination, could be a reasonable basis for predicting particular future risk meriting preventative enforcement. Categorically severing the links in this causal chain, the majority insisted that the current discrimination in the targeted jurisdictions appears less "'pervasive,' 'flagrant' widespread' and 'rampant' than in 1965"<sup>24</sup> - - overriding Congress's explicit judgment that the evidence showed the problem remained "serious and pervasive."<sup>25</sup> The majority therefore assumes that in some unstated point in time the Act's formula for targeting deterrence became unnecessary and capricious rather than reasonable. The majority further dismissed the dissent's analysis of the substantive connection between the jurisdictions' previous strategies for undermining voting rights and current evidence of "second generation" barriers to non-white electoral power, such as racial gerrymandering.<sup>26</sup> Instead, the majority noted that the original coverage formula was based on the essentially different problem of particular impediments to casting ballots rather than on the weight of minority voting.<sup>27</sup>

These categorical judgments suggest the view that racial discrimination in voting is naturally isolated in time and scope. The majority's analysis forecloses the possibility that the historical discrimination in the covered jurisdictions involved particular institutions designed to produce long term unlawful political power, such as an especially racially identified and racially polarized political party structure.<sup>28</sup> Indeed, as the dissent emphasizes, Congress found these objectionable voting changes were not accidental or isolated irrational actions but rather were "calculated decisions to keep minority voters from fully participating in the political

---

George Mason University, April 19-21, 2012, <http://www.masonlec.org/site/files/2012/04/C-P-Agenda-FINAL-with-links-4.17.121.pdf>, (opening a judicial training program with this reading).

<sup>23</sup> 133 S.Ct. at 2629.

<sup>24</sup> *Id.* at 2629.

<sup>25</sup> 133 S.Ct. at 2641 (Ginsburg, J., dissenting) (citing 679 F. 3d. at 865).

<sup>26</sup> 133 S.Ct. at 2629 (Ginsburg, J., dissenting).

<sup>27</sup> *Id.* at 2629.

<sup>28</sup> *See* 133 S.Ct. at 2643 (Ginsburg, J., dissenting) (noting that Congress relied on evidence showing "that voting in the covered jurisdictions was more racially polarized than elsewhere in the country") (citing H.R. Rep. No. 109-478, at 34-35); *see also* 133 S.Ct. at 2634 (Ginsburg, J., dissenting) (noting that this racial polarization increases the vulnerability of minority citizens).

process.”<sup>29</sup> If these jurisdictions’ past pervasive discrimination was motivated by the desire to maintain and exacerbate racially privileged access to resources and power, current evidence of strong non-white voter turnout in covered jurisdictions could be logically consistent with a special continuing risk of backlash meriting heightened prevention efforts. In fact, Ginsburg’s dissent noted Congress considered evidence in 2006 showing an increase in voting changes in the covered jurisdictions deemed objectionable because of racial discrimination in the period from 1982 to 2004 compared with the earlier period of enforcement from 1965 to 1982.<sup>30</sup>

Similarly, in this understanding of the motive for historical voting barriers, recent redistricting to strengthen partisan power and incumbent strength could be logically linked to past discriminatory voter registration tests and efforts to suppress turnout. *Shelby County’s* majority opinion rejects the evidence and logic of this kind of institutional analysis not simply as unpersuasive, but rather as inherently illogical and undeserving of the general deference accorded to plausible legislative policy judgments.

The majority’s substantive judgment about the nature of the problem underlies its further discussion doubting (without deciding) the rationality of the preclearance solution,<sup>31</sup> which now is inoperable without a valid coverage formula. The majority concludes by noting the Act’s nationwide ban on race discrimination remains enforceable with post hoc litigation.<sup>32</sup> However, if the underlying motive for discrimination in covered jurisdictions centers on skewing elections to institutionalize racial power, rather than on harming individual voters, prevention of that institutionalized inequality will be crucial. As the dissent explains, Congress had evidence that case-by-case enforcement through litigation challenging past discriminatory practices is likely to be ineffective compared to preclearance review,<sup>33</sup> in part because discriminatory elections secure the long term political and economic advantages of incumbency— a problem that would be difficult to rectify or undo after the fact, especially given that the evidence required to prove a violation could take several election cycles to establish.<sup>34</sup>

---

<sup>29</sup> 133 S.Ct. at 2629 (Ginsburg, J., dissenting) (citing H.R. Rep. 109-478, at 21).

<sup>30</sup> 133 S.Ct. at 2629 (Ginsburg, J., dissenting).

<sup>31</sup> 133 S.Ct. at 2625 (stating that *Shelby County’s* arguments challenging the constitutionality of the preclearance requirement “have a good deal of force”).

<sup>32</sup> 133 S. Ct. at 2631 (noting that the decision “in no way affects the permanent, nationwide ban on racial discrimination in voting”).

<sup>33</sup> 133 S.Ct. at 2640 (Ginsburg, J., dissenting).

<sup>34</sup> 133 S.Ct. at 2640 (Ginsburg, J., dissenting) (citing 1 EVIDENCE OF CONTINUING NEED 97).



## **Toward A Fundamental Right to Evade Law? the Rule of Power in Shelby County and State Farm**

*Shelby County's* rejection of Congress's institutional deterrence theory echoes *State Farm's* rejection of a state court's reasoning for awarding punitive damages against a multistate corporation. In that case, the state court found that a national insurance company engaged in particularly reprehensible illegal conduct in breaching its legal obligations to defend the insured plaintiff in an automobile accident liability lawsuit.<sup>35</sup> The state awarded punitive damages at a level much higher than the plaintiff's compensatory damages, based on evidence that the plaintiffs' injury was caused not by isolated error or malice but instead by a corporate plan and institutional system designed to profit by denying policyholders' rights and to evade law enforcement efforts.<sup>36</sup> In that theory, deterring future unlawful activity by the company in that state could reasonably require a damage award set high enough to threaten the company's expected gains from this larger system of wrongdoing.

*State Farm* ruled that the Fourteenth Amendment Due Process clause barred this punitive damages award because the state's theory connecting this case's injury to broader evidence of institutional wrongdoing was fundamentally irrational. In the majority opinion's reasoning, the state court illegitimately aimed "to punish and deter conduct that bore no relation" to the plaintiffs' injury.<sup>37</sup> The Court argued that the state court could not legitimately connect the evidence of an insurance company's conduct in other states or in other lines of insurance to predict and deter the risk of recidivism in its own jurisdiction because the Court determined that evidence involved categorically separate types of insurance using essentially disconnected strategies of illegal gain.<sup>38</sup>

As in *Shelby County*, Justice Ginsburg's dissenting opinion in *State Farm* takes a more detailed look at the evidence to show the rationality of the theory of institutional causation underlying the high punitive damages award.<sup>39</sup> Ginsburg notes "ample evidence" showing the plaintiffs' injury was not caused by "inadvertent error or mistake"<sup>40</sup> but rather was part of a long term nationwide "wrongful profit and evasion scheme"<sup>41</sup> implemented across insurance lines and states by top corporate management. Ginsburg explained that the state court relied on evidence showing that that plan was

---

<sup>35</sup> *State Farm*, 538 U.S. at 415-16.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 422.

<sup>38</sup> *Id.* at 425.

<sup>39</sup> *See id.* at 431-36 (Ginsburg, J., dissenting).

<sup>40</sup> *Id.* at 437 (Ginsburg, J., dissenting).

<sup>41</sup> *Id.* at 435 (Ginsburg, J., dissenting).

implemented through corporate-wide systems for undervaluing claims, falsifying claims records, and destroying documents to avoid law enforcement, as well as through institutional incentives pressuring employees to participate in these unlawful schemes.<sup>42</sup> The state court could have reasonably judged that this evidence showed particularly reprehensible wrongdoing likely to have caused numerous other injuries to consumers in the same state<sup>43</sup> and likely to continue to pose an ongoing risk difficult to control in that state without unusually high punitive damages calculated to counter future opportunities for large wrongful scale gains likely to evade law enforcement.

In the majority's theory, the plaintiffs were at risk solely because they were Utah automobile liability claimants victimized by the insurance company's bad faith legal defense, so that the state had no basis for considering other forms of insurance claims fraud in determining the amount of punitive damages needed for deterrence. Instead, Ginsburg cites trial court testimony showing the corporation's employees "were trained 'to target the weakest of the herd' –'the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money' and who therefore lack the power to enforce their legal rights."<sup>44</sup>

This evidence supports the theory that the corporate defendant's institutional position as a multistate business gave it the economic power and motive to subvert the law. Its large scale organization and wealth enabled the company to build competitive advantage and economic gain by systematically cheating a large class of unorganized and non-wealthy customers, profiting from wrongdoing that produced gain likely to far outweigh the costs of getting caught and punished in individual cases, where the low value of individual claims and information barriers would often make litigation unaffordable and ineffective.<sup>45</sup> To counter this unequal power to evade the law, the state civil justice system used its authority to award punitive damages to help position modest-income policyholders as if they were organized (like the insurance corporations) across states and across insurance lines to protect their rights. Like the majority in *Shelby County*, however, *State Farm* categorically denies the legitimacy of a theory interpreting particular evidence of wrongdoing as part of a pattern of ongoing

---

<sup>42</sup> *Id.* at 431-32 (Ginsburg, J., dissenting).

<sup>43</sup> *Id.* at 436-38 (Ginsburg, J., dissenting).

<sup>44</sup> *Id.* at 433-34 (Ginsburg, J., dissenting).

<sup>45</sup> See McCluskey, *supra* note 16, at 1053-54 (criticizing the Court's denial of economic class power in the case).

## **Toward A Fundamental Right to Evade Law? the Rule of Power in Shelby County and State Farm**

institutional exploitation of a disadvantaged group for deliberate unlawful gain.

### **B. Reconstructing Deterrence as Illegitimate Bias Against the Power to Evade Law**

In addition to rejecting the government's reasons as insufficient, in both cases the Court goes further to impute illegitimate reasons to the enforcement strategy at issue. In doing so, the Court embraces a structural perspective in which the government's chosen remedy risks systematic victimization of a distinct group whose members share similar institutional vulnerability.

In *Shelby County*, the Court characterizes the coverage formula as discrimination against particular states based on their sovereign identity. The Court justifies its seemingly demanding scrutiny of the evidence for the coverage formula by noting the Voting Rights Act's "extraordinary" nature due to its "stringent" and "potent"<sup>46</sup> intrusion into "sensitive areas"<sup>47</sup> of "a disfavored subset of States."<sup>48</sup> It asserts the need for judicial intervention to ensure that states enjoy a century-old tradition of "equal power, dignity and authority."<sup>49</sup> In this narrative, the legislation's purpose and effect is not merely to ensure current equal state compliance with national constitutional rights by tailoring the timing and quality of federal review. Instead, this narrative infuses the mere process of federal review of illegal race discrimination with pernicious substantive meaning that seems (in the majority's view) to eclipse the wrongfulness of the underlying problem of unconstitutional race discrimination in voting.

The majority imagines the act of accounting to the federal government for an electoral change as a shared trauma and stigma cutting to the core of states' identity and authority. In the Court's narrative, when a covered jurisdiction must show Voting Rights Act compliance before adopting electoral changes, that action does not bolster its position as a responsible constitutional partner proudly fulfilling its commitment to a national democratic union upholding the law. Instead, the Court constructs selection for preclearance review as an infantile position where states are forced to "beseech" federal authorities for permission to exercise what the Court

---

<sup>46</sup>133 S.Ct. at 2624.

<sup>47</sup> *Id.*

<sup>48</sup>133 S.Ct. at 2628.

<sup>49</sup> *Id.* at 2624.

presents as important state rights to control elections.<sup>50</sup> The Court does not discuss any actual evidence of harmful effects or of discriminatory Congressional intent toward the covered states, nor does it explain why its judgment about states' interests should override that of the Senators representing the covered states, all of whom voted in favor of continued coverage. Indeed the dissent notes that the evidence instead shows substantial benefits to states from being targeted for preclearance – such as savings in litigation costs.<sup>51</sup>

Further, the Court's narrative assumes its imagined harm to each covered jurisdiction is not an isolated bureaucratic hassle affecting a variety of disparate governmental decisions. Instead, the Court constructs this imagined and highly variable harm as part of a larger structural pattern of harm with fundamental constitutional implications. The Court presumes, without inquiry into Congressional intent, that the law involves federal discrimination against *states*, rather than, more precisely and neutrally identifying its target as jurisdictions, including not only states as a whole but also particular subdivisions like counties,<sup>52</sup> defined by a variety of specific factors related to their voting practices. Further, the Court presumes that states lack sufficient power to protect their interests against such discrimination in the normal federal political processes, despite the constitutional design of the Senate giving States equal representation. The Court does not discuss any evidence of barriers to states' ability to assert their alleged interests in the Senate's unanimous vote in 2006 re-authorizing the coverage provision.

Constitutional scholar Marci Hamilton develops the Court's implications of systemic bias by explaining the coverage formula not only as a problem of Congress's passivity -- shirking its purported duty to gather sufficient supporting facts -- but also as an expression of active partisan animus and prejudice (despite its overwhelming bipartisan support).<sup>53</sup> Hamilton suggests Congress resisted changing the formula because of irrational stereotypes that the Republican party is too intransigent and

---

<sup>50</sup> 133 S.Ct. at 2616.

<sup>51</sup> 133 S.Ct. at 2615. (Ginsburg, J. dissenting) (citing Reauthorizing the voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing before the Subcommittee on the Constitutional, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109<sup>th</sup> Cong., 2d Sess., pp. 13, 120-121 (2006); Brief for States of New York, California, Mississippi, and North Carolina as *Amici Curiae* 8-9).

<sup>52</sup> 133 S.Ct. at 2620 (discussing 1975 changes in the Act's coverage to include a number of counties, as well as 1982 changes allowing bailout of subdivisions of states). Indeed, the petitioner in *Shelby* was not a state, but a county.

<sup>53</sup> Marci A. Hamilton, *The Inevitable Holding in Shelby v. Holder, And its Fallout*, JUSTIA, June 25, 2013.

## **Toward A Fundamental Right to Evade Law? the Rule of Power in Shelby County and State Farm**

oppressive to be trusted to participate in creating a currently rational enforcement strategy.<sup>54</sup> This suggestion echoes Justice Scalia's comment at oral argument that the law is suspect because "the normal political processes" are so biased in favor of protecting "racial entitlements" that members of Congress face illegitimate political pressure to renew the law.<sup>55</sup> These comments deny the legitimacy of the unanimous Senate vote by constructing the covered states' Senatorial support as a sign that covered states are victims of political suppression so pervasive that it makes them dependent on judicial intervention.

Just as *Shelby County* assumes the covered states confront shared structural barriers to defending their interests in Congress, *State Farm* similarly suggests that pervasive structural victimization prevents multistate corporations from seeking state or federal legislation to adequately protect their interests in limiting punitive damage awards. In addition to criticizing the arbitrary basis for the punitive damage award, the Court goes on to identify the state court's award with a broader pattern of corporate victimization. It notes that the state court illegitimately took into account evidence of the insurance company's wealth, quoting a previous case warning "juries will use their verdicts to express biases against big businesses."<sup>56</sup> In this analysis, the majority assumes the insurance company shares common vulnerability with wealthy corporations in different lines of business accused of different types of wrongdoing-- despite the majority's refusal to recognize any shared vulnerability among insurance consumers with modest wealth but different types of insurance claims.

As in *Shelby County*, the Court in *State Farm* not only limits rationality to one-way recognition of the risk of wealth-based discrimination, it also assumes, without evidence, that this distinctive vulnerability of powerful wrongdoers extends beyond the particular enforcement process at issue (judicial punitive damage awards) and into the political system in general. *State Farm*'s ruling assumes that the shared vulnerability from (theoretical) anti-corporate bias requires judicial creation of a fundamental federal substantive due process right. In this view, wealthy multistate corporations are particularly disadvantaged in the political process and

---

<sup>54</sup> *Id.*

<sup>55</sup> Justice Antonin Scalia, Oral Argument transcript, *Shelby Cnty. v. Holder*, Feb. 27, 2013, at 47; see also Amy Davidson, *In Voting Rights, Scalia Sees "Racial Entitlement"*, NEW YORKER: CLOSE READ BLOG, Feb. 28, 2013 (discussing Scalia's comment).  
<http://www.newyorker.com/online/blogs/closeread/2013/02/in-voting-rights-scalia-sees-a-racial-entitlement.html>.

<sup>56</sup> 538 U.S. at 417, quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 532 (1994).

distinctly unable to lobby Congress for federal legislation protecting them from excessive state damage awards.<sup>57</sup> In addition, *State Farm* expands federal courts' power to invalidate individual state punitive damage awards without requiring case-by-case proof of duplicative state punishments or evidence of particularly devastating economic threat to a national corporation. That is, *State Farm* treats corporate wrongdoers as deserving the kinds of preventative federal control of state class bias it denies in *Shelby County* for victims of state racial bias: corporations subject to punitive damage awards by individual states do not have to wait for case-by-case judicial intervention until *after* they are subject to numerous state damage awards for the same national wrongdoing.

### III. Conclusion: Protecting Unequal Power Over Law

Although neither *Shelby County* nor *State Farm* directly bars the government from outlawing the harmful activity at issue – racially discriminatory voting practices or insurer bad faith – both cases limit the government's authority to give meaningful force to these formal rules. Taken together with *State Farm* and other recent rulings, *Shelby County* may herald not so much a new federalism as a revival of an older constitutional ideal assuming that law's protection normally and naturally must bend to accommodate the weight of unequal economic and racial power.

These two cases show unusual solicitude to the potentially harmful effects of preventative law enforcement, and unusual skepticism about the evidence used to predict and control future wrongdoing. This heightened concern for limiting government law enforcement authority is striking because the principles established by these cases do not protect individual human liberties but rather are directed solely at preserving the power of institutions: states (or other governmental units) in *Shelby County* and multistate business defendants in *State Farm*. The Court has often been much less willing to protect individual criminal suspects from law enforcement strategies based on dubious evidence of future risk or even based on substantial risk of racial or economic bias.<sup>58</sup> Individual human victims of overreaching law enforcement are likely to be disproportionately racially and

---

<sup>57</sup> See McCluskey, *supra* note 16, at 1055-56 (arguing that this heightened concern for supposed anti-business bias turns Carolene Products note four on its head, protecting an especially politically powerful group from the democratic process).

<sup>58</sup> See *e.g.*, *McCleskey v. Kemp*, 481 U.S. 297 (1987) (refusing to apply heightened judicial scrutiny to Georgia's death penalty despite evidence that its distinctive reliance on discretion had disparate racial effects and increased the risk of intentional racial bias – and that it also reflected a particular state history of racial discriminatory intent). See also McCluskey, *supra* note 16, at 1043-47 (discussing the Court's unequal concern for due process interests of corporate defendants).

## **Toward A Fundamental Right to Evade Law? the Rule of Power in Shelby County and State Farm**

economically disadvantaged, raising the question whether the Court's special protection in these cases is particularly skewed toward accommodating unlawful power that exacerbates racial and economic inequality.

Of course, the Court justifies its rulings in *Shelby County* and *State Farm* not as protection against institutional wrongdoers' interest in violating the law, but rather as protection against their legitimate interests in relief from the burdens of particular prevention strategies. But these "burdens" appear to consist mainly of decreased power to organize and entrench illegal exploitation of groups made vulnerable precisely because of their exclusion from comparably powerful institutional protection. In *Shelby County*, the Court protects the state's interest in implementing possibly unlawful electoral changes without the delay of federal oversight. Although that interest in avoiding delay might seem benign, it is a key source of the unlawful power at issue: the ability to entrench political racial inequality through incumbency so that future enforcement actions will be less meaningful. In *State Farm*, the Court protects corporate wrongdoers from the risk that engaging in large scale multistate wrongdoing will subject them to unusually high and overlapping damage awards (or, more likely, from the less disruptive costs of having to devote company legal and economic resources to seeking national legislative relief from such risks). But the multistate corporation's ability to spread and offset the cost of relatively predictable, isolated and individualized damage awards over a large volume of unlawful gains was exactly what gave it the power to profit from cheating its modest-income individual customers.<sup>59</sup>

The Civil War Amendments stand for reconstructing a constitutional system characterized not only by racially unequal rules but also by institutional force operating above and against lawful government efforts to advance equality.<sup>60</sup> *Shelby County* joins with *State Farm* to retreat from that goal, subordinating both state and federal authority to the interest in protecting institutional power to evade the law.

---

<sup>59</sup> See McCluskey, *supra* note 16, at 1040-42.

<sup>60</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876) (ruling the Constitution bars the federal government from using Civil War Amendment powers to enforce the law in response to a white supremacist massacre aimed at usurping the local government). See James Gray Pope, *Snubbed Landmark: How United States v. Cruikshank Shaped Constitutional Law and Racialized Class Politics in America*, 49 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 385 (2014).