

FIVE JUSTICES, SECTION 4, AND THREE WAYS FORWARD IN VOTING RIGHTS

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INTRODUCTION

This Article offers a critical examination of the genesis, content, and possible consequences of the voting rights decision in *Shelby County v. Holder*.¹ This recent United States Supreme Court case, among the most provocative of the Roberts Court era, fits within a series of cases establishing a particularly radical judicial philosophy about democratic participation. Though the majority purports only to offer a technical and limited treatment of the Voting Rights Act's administrative remedy, which targets certain states and jurisdictions in the country with a lengthy record of Fifteenth Amendment violations, the decision is one of several demonstrating the Court's skepticism about federal safeguards for racial minorities' role in political discourse. This skepticism is reflected most acutely in the *Shelby County* majority's inattention to current evidence of racial discrimination, which is at the core of the Court's issue about the statute.²

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1. 133 S. Ct. 2612 (2013).

2. *Id.* at 2644 (Ginsburg, J., dissenting) (“Without even identifying a standard of review, the Court dismissively brushes off arguments based on ‘data from the record,’ and declines to enter the ‘debat[e] [about] what [the] record shows.’ One would expect more from an opinion striking at the heart of the Nation’s signal piece of civil-rights legislation.” (alteration in original) (citation omitted)).

Assessing the constitutionality of a federal civil rights law, a certain Justice of the Supreme Court wrote about Black citizens, “by the aid of beneficent legislation, . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws.”³ Echoes of this viewpoint rang rather loudly in oral argument for *Shelby County* when Justice Antonin Scalia attributed Congress’s nearly unanimous vote in 2006 to reauthorize the Voting Rights Act to “a phenomenon that is called the perpetuation of racial entitlement,” adding rather sardonically, “it’s been written about.”⁴

Justice Scalia was surely correct about one thing. The so-called phenomenon of racial entitlement has indeed been written about, and the *Civil Rights Cases* of 1883 are but one example.⁵ There, Justice Bradley invoked the phrase “special favorite of the laws” to admonish Congress that laws like the Civil Rights Act of 1875—designed to safeguard equal protection regardless of race—not only exceed Congress’s power but also impede the political progress of freedmen.⁶ Bradley’s prediction was that Black citizens would fare quite fine in the former Confederate States, where slavery had been authorized by law and custom, even in the absence of protective federal legislation.⁷

The subsequent experience of African Americans demonstrates the epic flaw of that ill-considered prediction. In the absence of sustained federal oversight, state-sponsored race discrimination in politics soon emerged. Despite the enactment of the Fourteenth and Fifteenth Amendments, the systematic exclusion of non-Whites from politics—through state constitutions, statutes, intimidation, and violence—became the governing principle in these states for nearly one hundred years, until the enactment of the Voting Rights Act of 1965. Under the Act, the federal government had oversight over certain covered jurisdictions such that any changes these jurisdictions proposed related to voting had to be preapproved before they could

3. *Civil Rights Cases*, 109 U.S. 3, 25 (1883). We employ the terms ‘Black’ and ‘African American’ interchangeably in this Article.

4. Transcript of Oral Argument at 47, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96).

5. *Civil Rights Cases*, 109 U.S. at 25 (“When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage . . . when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . .”).

6. *Id.*

7. *Id.* (“There were thousands of free colored people in this country before the abolition of slavery . . . ; yet no one, at that time, thought that it was any invasion of their personal *status* as freemen because they were not admitted to all the privileges enjoyed by white citizens . . .”).

go into effect, among other things.⁸

Decades later, in 2006, and by an overwhelming margin, a Republican-controlled Congress voted to continue the work commenced in 1965 and extend the Act.⁹ The accompanying legislative report noted that the legacies and practices from this sad era of political exclusion had not yet been eradicated in these states.¹⁰ Although registration and voting rates for non-White groups had improved in covered jurisdictions, patterns of racial prejudice and racially polarized voting, and the adoption of voter qualification laws remained more pronounced.¹¹ Taken as whole, this record persuaded

8. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King, Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended in scattered sections of 42 U.S.C.). In light of the empirical record on racial disparities in covered jurisdictions available to the *Shelby County* Court, the language of “racial entitlement” is even more inapt than in the *Civil Rights Cases*. The racial entitlement arguments were articulated more than a century ago without the aid of either systematic data or the experience of the history of racial retrenchment in former slave-holding states. Both demonstrate today that arguments about racial entitlement for Blacks have proved to be fundamentally wrong, for it was the Court’s decision in 1883 that helped open the floodgates for widespread state-sponsored institutionalized voting discrimination, and not the intervention of Congress. See *Civil Rights Cases*, 109 U.S. at 25 (“[N]o countenance of authority for the passage of the [Civil Rights Act] in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void . . .”).

9. This Article will discuss three sections of the Voting Rights Act in particular—Sections 2, 4, and 5. Section 2 of the Voting Rights Act (a permanent, nationwide provision) follows the traditional litigation-oriented remedy contained in other civil rights bills. Section 2 entitles a private citizen or the Department of Justice to seek a court-ordered remedy against a state or local jurisdiction that enacts a policy or practice whose purpose or effect denies or abridges the right to vote with respect to race. 42 U.S.C.A. § 1973 (West 2013). The second, more controversial enforcement tool (the administrative remedy at issue in *Shelby County*) is Section 5—also called the preclearance remedy. For designated areas (as defined by the targeting formula outlined in Section 4 of the Act), any proposed changes that relate to voting must be reviewed or “precleared” before they can go into effect. *Id.* § 1973c. The federal reviewing authority must find that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote with respect to “race or color.” *Id.* § 1973c(a). The targeting formula that designates the states where Section 5 applies is outlined in Section 4. *Id.* § 1973b. States and jurisdictions in which less than half the eligible citizens were registered or participated in specified elections (initially, 1964) and that also applied certain qualification devices were included as “covered states.” See *South Carolina v. Katzenbach*, 383 U.S. 301, 316–20 (1966). See generally Kareem Crayton, *Introduction to the Reports: Assessing Progress of the Voting Rights Act*, 17 USC REV. L. & SOC. JUST. 65 (2008) (reviewing the evolution of the current provisions of the Voting Rights Act).

10. See 152 CONG. REC. S8372–73 (daily ed. July 27, 2006) (statement of Sen. Leahy) (“Leading up to the final passage of the Voting Rights Act reauthorization, I provided the Senate with some of the extensive evidence received in the Judiciary Committee about the persistence of discriminatory practices in covered jurisdictions that supports reauthorization of this crucial provision.”).

11. S. REP. NO. 109-295, at 11–12 (2006) (detailing evidence that demonstrates persistent discrimination in covered jurisdictions).

both Houses of Congress (by lopsided margins) that the risk was too great and the burden too high on non-White voters to end the special federal oversight of these states.¹²

Only seven years later, in declaring parts of the Act unconstitutional, the *Shelby County* Court endorsed the view that race discrimination in covered jurisdictions is no longer a serious concern that merits special attention.¹³ But the evidence collected by Congress demonstrates a different position, that the problem remains a present danger that requires sustained federal vigilance.¹⁴ Whether race discrimination remains a present danger is at bottom a predictive judgment about society, which is precisely why the Justices should have relied upon the institution designed to make such an assessment.¹⁵ This Article is an effort to expound upon the record evidence that the Court seems to have disregarded.

Part I of this Article examines the different substantive areas that undergird what we would define as the Roberts Court's emerging philosophy on political participation. The Court's record has been marked by a five-member majority that now drives these decisions. Part II provides a close analysis of the current social science evidence presented to the Court in *Shelby County*, in response to the Court's query whether Section 4's formula identifying covered jurisdictions was still relevant decades after the law was adopted. We show that the five members of the Roberts majority failed to account for the distinct political conditions present in these areas where preclearance applies compared to those where the remedial provision does not. Part III considers the various responsive steps that Congress might adopt in the wake of *Shelby County*; the motivation for each of these options rests upon how modestly one views the Court's decision. We provide our own recommendation of and defense for what we see as the best

12. The Act passed the House by a recorded vote of 390 to 33, 152 CONG. REC. H5207 (daily ed. July 13, 2006), and passed the Senate without amendment by Yea-Nay vote of 98 to 0, 152 CONG. REC. S8012 (daily ed. July 20, 2006).

13. Throughout this Article we use the phrases "covered jurisdictions" and "covered states" to refer to the subgroup of state and local governments that were designated for the special administrative review process outlined under Section 5 of the Voting Rights Act. Although the status of these states has changed considerably in the wake of *Shelby County*, for simplicity and because it is unnecessary for the purposes of this Article, we do not distinguish between covered and formerly covered jurisdictions.

14. See S. REP. NO. 109-295, at 14-15 (2006).

15. *But see* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) ("Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives.").

route, namely reinforcing Section 5.

I. FIVE JUSTICES & *SHELBY COUNTY*

Contrary to those who would characterize *Shelby County* as a modest statement about the scope of legislative authority, the case is part of a pattern of radical decisions penned by the Roberts majority.¹⁶ In fact, we argue that the five members of the Roberts majority have left few doubts about the broad strokes of their viewpoint on the issue of democratic participation in general, and on the topic of minority voting rights in particular. Their decisions define a fairly clear agenda that does not offer especially happy news for advocates in the civil rights community.

Although some had hoped that the Chief Justice would pursue a similarly conservative but pragmatic approach to these issues as his predecessor William Rehnquist, instead the Roberts majority has reopened debates previously considered long settled.¹⁷ Particularly in cases that implicate important issues of political participation, the Roberts majority has reached decisions and provided reasoning that reveal a certain coldness—even hostility—toward existing structures designed to assure open and equal involvement for historically marginalized groups in elections and governance.¹⁸

A basic review of some of the Court's most significant cases during the Roberts era highlights this point. Below, we compare the Roberts Court's behavior with its predecessor (the Rehnquist Court) in three important areas of the law: (1) affirmative action, (2) campaign finance, and (3) voting rights. Using representative

16. When we refer to the Roberts majority, we reference the emerging voting alliance that comprises the Chief Justice and Associate Justices Scalia, Kennedy, Thomas, and Alito. These Justices have consistently formed the majority on the Court's more controversial decisions implicating issues of democratic participation. *See, e.g., id.* at 2618; *Bartlett v. Strickland*, 556 U.S. 1, 17, 25–26 (2009) (imposing a narrow interpretation of prima facie evidence of vote dilution under Section 2 of the Voting Rights Act); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709 (2007).

17. *See* discussion *infra* Parts I.A–I.C.

18. *See generally Shelby Cnty.*, 133 S. Ct. 2612 (holding Section 4(b) of the Voting Rights Act unconstitutional and effectively striking down the Section 5 preclearance provision); *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193 (2009) (holding that the Voting Rights Act permits all political subdivisions to seek bailout from the preclearance requirements of Section 5); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (finding constitutional a state law requiring voter identification before casting a ballot); *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006) (holding that a Texas district was drawn unconstitutionally but noting skepticism about the legitimacy of using race in the districting process).

decisions from each area of law, we demonstrate how Roberts has departed from the Rehnquist era doctrine in order to reopen previously settled matters in constitutional law.¹⁹ The new doctrinal terrain may prove perilous for non-White citizens, as they assume new burdens in light of the Court's dismantling of existing structural protections.

A. *Affirmative Action*

The Chief Justice has rather consistently voted along with a majority to undo several policies related to affirmative action.²⁰ Whereas the Rehnquist era majority at times voiced unease with race-conscious remedies,²¹ the Roberts majority has expressed very little hesitation when dismantling state-based programs that help offset disparate life chances for racial groups. Prior to Roberts's confirmation, the Court followed Justice O'Connor's suggested approach of weighing the particular facts and circumstances, and assessing the institutional justification behind a given affirmative action policy.²² For example, in *Grutter v. Bollinger*,²³ the Court upheld the University of Michigan Law School's affirmative action plan on the ground that maintaining a diverse law school class promoted a key social good.²⁴ Though race-conscious remedies were disfavored even then, a state was able to adopt policies to assure that fellow

19. Although *Ricci v. DeStefano*, discussed below, is explicitly a case involving Title VII, the decision relies on the Court's understanding of the defendant city's obligations to prevent racial discrimination in its employment qualification exams, which in turn implicates the Fourteenth Amendment color-blindness norms that form the basis of the plaintiff class in this case.

20. See, e.g., *Parents Involved in Cmty. Schs.*, 551 U.S. at 705 (striking down voluntary school desegregation and integration efforts as not sufficiently "narrowly tailored").

21. See generally *Johnson v. California*, 543 U.S. 499 (2005); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Martin v. Wilks*, 490 U.S. 755 (1989); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

22. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288–90 (1986) (O'Connor, J., concurring) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."); *id.* at 292 ("[I]n order to provide some measure of protection to the interests of its nonminority employees and the employer itself in the event that its affirmative action plan is challenged, the public employer must have a firm basis for determining that affirmative action is warranted.").

23. 539 U.S. 306 (2003).

24. *Id.* at 308. *But see Gratz v. Bollinger*, 539 U.S. 244, 273–75 (2003) (holding that the affirmative action program for the University of Michigan's undergraduate admissions was unconstitutional because the University automatically awarded points necessary for admission to minority applicants).

students and the broader public enjoyed the benefits of a community of legal professionals who represented and were familiar with all segments of society.²⁵ Using the Michigan model, schools could pursue the goal of maintaining a critical mass of non-White students in order to achieve a diverse and successful intellectual community.²⁶

The Roberts Court thus far has shown far less deference to state actors who decide to pursue such concerns.²⁷ In place of the Rehnquist era deference to educational institutions that choose to pursue affirmative action programs, the Roberts Court has erected a generally unforgiving prohibition on race-conscious decision-making such that few if any such programs will survive scrutiny—even where the stated goal is diversity.

The Roberts majority's approach was presented most clearly in *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁸ where a local school district sought to maintain student populations that were balanced based on race and other factors through a race-conscious student assignment plan.²⁹ Although the school's assignment plan was to be entirely voluntary, the Court voided this approach because of its attention to a classification that it viewed as arbitrary.³⁰ Harkening back to the traditional discrimination cases that invoked strict scrutiny for all such classifications—pernicious or benign—the Court articulated its guiding principle: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³¹ The school district's concerns about diversity were not sufficient to create a meaningful exception to this seemingly bright line rule. The Court held that absent a pattern of racial exclusion, the local government could not justify implementing programs to enhance diversity in public schools.³² In so finding, the Court effectively eviscerated a program with a structure and goal that

25. *Grutter*, 539 U.S. at 328–29 (“The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

26. *Id.* at 329–30 (“As part of its goal of ‘assembling a class that is both exceptionally academically qualified and broadly diverse,’ the Law School seeks to ‘enroll a “critical mass” of minority students.’” (citation omitted)).

27. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419–20 (2013) (suggesting that under strict scrutiny review, universities are entitled to some but not total deference with respect to their decision to employ affirmative action programs, and no deference with respect to the question of narrow tailoring).

28. 551 U.S. 701 (2007).

29. *Id.* at 711–12.

30. *Id.* at 703–04.

31. *Id.* at 747–48.

32. *Id.* at 702–03.

mirrored the approach to affirmative action that had been embraced during the Rehnquist era.

The Roberts majority has applied its new approach beyond the educational sphere. In *Ricci v. DeStefano*,³³ the Court roundly criticized an employment-related affirmative action plan because the plan interfered with what the Court viewed as the normal course of local governance.³⁴ There, a city government vacated the results of an employment-qualifying exam for firefighters, in part due to concern that the city might be subject to a discrimination lawsuit.³⁵ Although the employer took subsequent preventative action to ensure that its exam was free from racially disparate effects, the Court ordered the original exam results reinstated, effectively voiding the impact of the city's race-conscious reforms.³⁶

One operative feature of the *Ricci* decision was the assessment of the process that gave rise to the city's preemptive action. The holding seemingly rests on the assumption that the normal order of public governance would never have mandated the invalidation of an exam that had already been administered.³⁷ This analysis leaves out any valid consideration of the exam's ability to measure qualifications accurately or to prevent unlawful racially disparate effects.³⁸ In addition, some of the Justices took note of the involvement of special interest groups, including a local minister who called public attention to the racial impact of the exam.³⁹ In his concurring opinion, Justice Alito expounded on his unease with the close relationship between

33. 557 U.S. 557 (2009).

34. *Id.* at 562–63.

35. *Id.* at 562.

36. *Id.* at 593 (“[T]he City was required to make a difficult inquiry [regarding the prospect of disparate-impact liability]. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.”).

37. *See id.* at 585 (noting that employers are entitled to employ “affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made,” but that once established, employers “may not then invalidate the test results”).

38. *See id.* at 587, 592 (finding it sufficient that “the examinations were job related and consistent with business necessity,” and refuting the argument that the examination may have produced discriminatory results); Cheryl Harris & Kimberley West-Faulcon, *Reading Ricci: Whiteness Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 83 (2010).

39. *Ricci*, 557 U.S. at 600–01 (Alito, J., concurring) (“[T]he Civil Service Board [or CSB] . . . convened its first public meeting. Almost immediately, Rev. Kimber began to exert political pressure on the CSB. . . . Reverend Kimber protested the public meeting, arguing that he and the other fire commissioners should first be allowed to meet with the CSB in private.” (citations omitted)).

New Haven’s mayor and an African American minister, Reverend Kimber, who was a “self-professed kingmaker.”⁴⁰ The city’s acquiescence to the minister’s pressure to eliminate the exam apparently indicated a kind of dysfunction of the political process, because the outcome was likely affected by some external (and undue) leverage.

The holding suggests that, from the viewpoint of the Roberts majority, the (presumably unfounded) threat of a discrimination lawsuit led the city to acquiesce⁴¹—which represented an abdication of the city’s duty to respond to the broader public. Put differently, the Court suspected that the political decision to suspend the exams was flawed because an entrenched minority demanded the adoption of a policy that ran counter to the interests of a majority of citizens. However, this rent-seeking outcome commonly occurs in politics when a small group with especially high stakes in a policy concentrates its effort on lobbying government for policy concessions—including ones that do not align with majority preferences. The reasoning of the case suggests that minority groups could not have obtained a policy to benefit non-Whites without undue influence.⁴² The effectiveness of minority groups was presumed not the result of traditional democratic bargaining but of unfair leveraging that harmed at least the plaintiff class in *Ricci* and perhaps the larger community.

B. Campaign Finance

The second area of constitutional doctrine that is now in play under the Roberts Court is campaign finance. Few people would characterize earlier eras of the Court as rampant with decisions encouraging robust federal regulation. It has long been established, however, that there is a clear legal distinction between enforcing limits on campaign spending (which remained relatively unregulated) and limits on fundraising (which, based upon concerns about

40. *Id.* at 598 (citation omitted) (internal quotation marks omitted).

41. *See id.* at 592 (majority opinion) (“[T]here is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results.”).

42. *See id.* at 598–99 (Alito, J., concurring) (“[T]he District Court admitted that ‘a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven’s African-American community.’” (second alteration in original) (citation omitted)).

transparency and corruption, were subject to strict constraints).⁴³ Not only has the Roberts majority effectively eviscerated these distinctions,⁴⁴ it has now introduced the wildcard of corporate personhood into the conversation.⁴⁵

In *Citizens United v. Federal Election Commission*,⁴⁶ the Roberts majority voided key provisions of the McCain-Feingold Act,⁴⁷ at least one of which had been upheld during the Rehnquist era in *McConnell v. Federal Election Commission*.⁴⁸ The decision in *Citizens United* stands for the proposition that corporations and unions exercise speech rights comparable to those of a natural person under the First Amendment.⁴⁹ Accordingly, the government may not limit the expenditure of union or corporate general funds when they are used to support independent election-related activity like campaign commercials.⁵⁰

Unlike the direct support of a campaign or candidate, the Court reasoned, independent expenditures do not create the same risks of political corruption that justify regulation.⁵¹ So long as the group in question does not coordinate directly with a candidate's campaign, its

43. See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (upholding the Federal Election Campaign Act's individual contribution limits, but invalidating the Act's limitations on campaign expenditures). See generally Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469 (2001) (questioning whether campaign finance reform can be inclusive of multi-racial interests).

44. See *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”).

45. See *id.* at 343 (“[P]olitical speech of corporations or other associations should [not] be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”).

46. 558 U.S. 310 (2010).

47. *Id.* at 365 (“[O]verruling *Austin* ‘effectively invalidate[s] not only [the Bipartisan Campaign Reform Act] Section 203, but also 2 U.S.C. 441b’s prohibition on the use of corporate treasury funds for express advocacy.’ Section 441b’s restrictions on corporate independent expenditures are therefore invalid” (citation omitted)).

48. See 540 U.S. 93 (2003) (upholding Titles I and II of the Bipartisan Campaign Reform Act of 2002, relating to soft-money contributions and certain electioneering communications).

49. *Citizens United*, 558 U.S. at 313 (“*Bellotti* reaffirmed the First Amendment principle that the Government lacks the power to restrict political speech based on the speaker’s corporate identity.” (citing *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978))).

50. *Id.* at 353 (holding that “[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations”).

51. *Id.* at 314 (“[T]his Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt.”).

financial backing of an independent viewpoint in the political discourse must not be limited.⁵² Indeed, the Court even appeared to endorse the suggestion that more speech of this kind actually improved, not distorted, the public's deliberative process—providing further support for its surprising and sweeping decision.⁵³

The holding in *Citizens United* is closely tied to a view the Roberts majority has about the proper functioning of the democratic process. The Roberts majority embraces the Rehnquist era notion that money is a form of protected political speech. However, Roberts goes much further in advancing the proposition that corporate speech is equivalent in value and impact to individual speech.⁵⁴ Thus, the Roberts majority appears less concerned with the dangers of unbridled spending on political messaging and voters' ability to discern how their preferences align with the groups behind the messages.

The point is not just one of abstract curiosity. It also carries major consequences for political outcomes. Principally, the decision led to the proliferation of Super PACs.⁵⁵ The Super PAC often serves as a shell for corporations and political parties, permitting these groups to funnel unregulated money from anonymous donors in amounts that go as deep as personal bank accounts will permit.⁵⁶ So long as Super PACs can justify their classification as “social welfare groups,” there is

52. *See id.* at 360 (“The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” (citing *Buckley v. Valeo*, 424 U.S. 1, 46 (1976))).

53. *See id.* at 312 (“The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers. There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers.”).

54. *See id.* at 365 (“We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”); *see also* Jeffrey Toobin, *Money Unlimited*, THE NEW YORKER (May 21, 2012), http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin?currentPage=all (emphasizing that the Court could have decided the case on much narrower grounds, and that the broad holding ultimately reached “reflects the aggressive conservative judicial activism of the Roberts Court”).

55. Richard L. Hasen, *Super-Soft Money: How Justice Kennedy Paved the Way for ‘SuperPACS’ and the Return of Soft Money*, SLATE (Oct. 25, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/citizens_united_how_justice_kennedy_has_paved_the_way_for_the_re.html.

56. *See* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1644–45 (2012) (“Super PACs spent an estimated \$65 million on independent expenditures in 2010 By early 2012, Super PACs were already major participants in the 2011-2012 election cycle, significantly outpacing the candidates in the early Republican presidential nominating contests.”).

no requirement to report funding sources or membership, obscuring the sponsors of attack ads.⁵⁷ The effect on the political process is a deluge of heavily funded messages unattributed to groups or to specific individuals. This information distortion often prevents individuals from understanding how major political interests align on a given issue.⁵⁸

The stakes are likely more pronounced when one takes account of race, because the issues of who gives and how much tend to be driven to a significant degree by one's racial background. As Professor Terry Smith has persuasively noted, political communities with heavy concentrations of racial minorities tend to feature low levels of individual political giving.⁵⁹ Where this is true, candidates and campaigns are often more dependent on corporate infusions of cash or, alternatively, more vulnerable to a well-funded challenger.

To the extent that *Citizens United* permits more funding of unattributed political messages, in these communities candidates are more likely to be swayed by external, concentrated interests that may undermine the interests of their constituencies. As Black candidates are rarely self-funders,⁶⁰ their need to pursue non-coordinated Super PAC dollars adds more pressure on voters in these areas to ensure that their collective policy interests retain priority over (now anonymous) corporate concerns.

C. Voting Rights

Finally, the area with the most direct linkage to the issue at hand is voting rights. Here as well, the Roberts majority has sharply departed from the Rehnquist era cases that addressed the 1965 Voting Rights Act—especially with respect to the now-inert preclearance provision.

57. Kathy Kiely & Jacob Fenton, *Outside Political Spending Crosses \$1 Billion Mark*, SUNLIGHT FOUND. (Oct. 26, 2012, 7:09 AM), <http://reporting.sunlightfoundation.com/2012/outside-political-spending-crosses-1-billion-mark/> (“Outside groups' \$1 billion has funded an overwhelmingly negative shadow campaign: More than 80 percent of the spending has gone to oppose, rather than support, candidates. And it includes \$219 million in dark money—donations from nonprofit organizations which, because of their tax-exempt status, will never have to disclose their donors.”); *see also* 26 C.F.R. § 1.501(c)(4)-(1) (2013).

58. BLAIR BOWIE & ADAM LIOZ, DEMOS & U.S. PIRG EDUCATION FUND, MILLION-DOLLAR MEGAPHONES: SUPER PACS AND UNLIMITED OUTSIDE SPENDING IN THE 2012 ELECTIONS 6 (2012), *available at* <http://www.demos.org/sites/default/files/publications/MegaphonesMillionaires-DemosUSPIRG.pdf>; *see also* Brian Montopoli, *Colbert Super PAC Ad Promises “Orgy of Pure Distortion”*, CBS NEWS (Jan. 18, 2012), http://www.cbsnews.com/8301-503544_162-57361118-503544/colbert-super-pac-ad-promises-orgy-of-pure-distortion/.

59. *See, e.g.*, Smith, *supra* note 43, at 1499–1500, 1512–15.

60. *Id.*

The Roberts majority has reopened questions thought long settled about the legitimacy of the Act and introduced novel questions that leave observers mystified about how far the current Court intends to move the doctrine.

To be sure, there were some reasons for concern about the vitality of the preclearance regime even during the Rehnquist era. Starting with *City of Boerne v. Flores*,⁶¹ the Court indicated its desire to more carefully review federal anti-discrimination laws to assure that they were within the scope of legislative enforcement authority.⁶² In *City of Boerne*, the Court devised a test that turned on evidence of congruence and proportionality between observed constitutional injuries and the remedy contemplated in the statutory scheme.⁶³

Though several enactments were voided for lack of constitutional fit during the Rehnquist era,⁶⁴ advocates retained guarded optimism about the constitutionality of Section 5, the administrative remedy in the Voting Rights Act, for two reasons.⁶⁵ First, the Court had repeatedly cited Section 5 as a model of a federal law whose limits and evidentiary foundation complied with the rubric set forth in *City of Boerne*.⁶⁶ Although several commentators have opined that these citations only referred to the original 1965 enactment (and not the later extensions),⁶⁷ there was at least some foundation for the belief

61. 521 U.S. 507 (1997).

62. *Id.* at 518 (“It is also true, however, that “[a]s broad as the congressional enforcement power is, it is not unlimited.” (alteration in original) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970))).

63. *Id.* at 530 (“While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.”).

64. See *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (striking down Title I of the Americans with Disabilities Act as applied to the states); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91–92 (2000) (striking down the Age Discrimination in Employment Act as applied to the states).

65. Section 5, the administrative remedy in the Voting Rights Act, directs jurisdictions specified by Section 4 to preclear “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” 42 U.S.C.A. § 1973c (West 2013). A jurisdiction can seek review by the Attorney General or a declaratory judgment by the United States District Court for the District of Columbia. *Id.* In either case, the jurisdiction needs to show that the change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.” *Id.*

66. See, e.g., *Nevada v. Hibbs*, 538 U.S. 721, 737 (2003) (“Here, as in *Katzenbach* . . . Congress again confronted a difficult and intractable proble[m] . . . where previous legislative attempts had failed.” (citations omitted)).

67. See, e.g., Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination can the Constitution Tolerate*, 43 HARV. C.R.-C.L. L. REV. 385, 387 (2008); Richard Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 196 (2005).

that a challenge to Section 5 would not succeed.⁶⁸

A second reason for a patina of hope was rooted in the Court's reasoning as it worked through the doctrinal line of cases following *City of Boerne*. In approving federal legislation in various cases, the Court developed an analytical framework that seemed to offer a favorable view of Section 5.⁶⁹ For example, in *Tennessee v. Lane*,⁷⁰ the Court noted that Section 5 was a valid congressional enactment insofar as it responded to a clear pattern of state discrimination in a congruent and proportional way.⁷¹ Even in dissent, Justice Scalia synthesized the earlier cases in a way that established a kind of "sliding scale" approach to scrutiny depending on the type of legislation under review.⁷² For laws addressing fundamental rights (as in *Lane*) or suspect classifications (as in *Nevada v. Hibbs*⁷³), the Court has been disposed to apply a more forgiving analysis with respect to constitutional "fit" that does not as easily overturn a remedial enactment.⁷⁴ Insofar as Section 5 implicated the intersection of these two factors—protecting the right to vote for racial minorities—any subsequent challenge under this recitation of the *City of Boerne* standard seemed unlikely to prevail. The optimism, in retrospect, was clearly unwarranted.

68. This is principally because the Court had upheld the Act against several past challenges. See, for example, *City of Rome v. United States*, where the Court approved a 1982 congressional extension of Section 5 against an attack by Georgia officials, who suggested that federal oversight was no longer necessary. 446 U.S. 156, 187 (1980).

69. See *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (noting that congressional power is heightened when Congress enacts remedial legislation that addresses problems at the convergence of race and fundamental rights); see also Hasen, *supra* note 67, at 181–82 (discussing decisions by the Court to uphold federal legislation).

70. 541 U.S. 509 (2004).

71. *Id.* at 532–33.

72. See *id.* at 564 (Scalia, J., dissenting) (applying the "permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States," and noting that "Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations," and that the prophylactic remedy "must be directed against the States or state actors rather than the public at large").

73. 538 U.S. 721 (2003).

74. See *id.* at 539 (discussing how the *City of Boerne* analysis applies to remedies for state violations of fundamental rights like due process); see also Pamela Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 24 (2007) (observing that when "Congress acts to protect a fundamental right or when it acts to protect a suspect or quasi-suspect class, its powers are generally broader than when it acts to promote equality more generally").

In the Roberts Court's first major Section 5 case, *Northwest Austin Municipal Utility District Number One v. Holder (NAMUNDO)*,⁷⁵ the complaining jurisdiction argued that its inability to bail out of the preclearance process was a fatal constitutional flaw in the provision.⁷⁶ Taking the Rehnquist era doctrine on its face, the local jurisdiction could not have independently exited the preclearance system because it was situated within a wholly covered state.⁷⁷ In an earlier case, *City of Rome v. United States*,⁷⁸ the Court made this point clear based on a straightforward application of interpretive principles.⁷⁹ The statutory text simply did not lend itself to such a reading, and the legislative record included analogous situations that Congress clearly intended to prohibit when it designed the law's administrative remedy.⁸⁰

Yet, *NAMUNDO* departs from this view notwithstanding expressed concerns in *City of Rome* and related voting rights cases that manipulation of state election administration power vis-à-vis local authorities would go undetected,⁸¹ along with historical experience that suggested the same.⁸² The *NAMUNDO* Court noted that the ruling served the interests of local policymaking bodies that needed to perform basic functions without the overwhelming burdens of federal oversight.⁸³ Indeed, though Roberts declined to address the constitutional question about Section 5, he noted that the issue raised

75. 557 U.S. 193 (2009).

76. See, e.g., Appellant's Brief at 12, *NAMUNDO*, 557 U.S. 193 (No. 08-32) ("The district court's interpretation makes bailout a virtual nullity in all but a very few covered jurisdictions, apparently all in Virginia. Moreover, that interpretation reorders state government by putting counties in control of entities not subject to their authority under state law.").

77. *NAMUNDO*, 557 U.S. at 209.

78. 446 U.S. 156 (1980).

79. *Id.* at 173 ("[A]ppellants urge that . . . § 5, to the extent that it prohibits voting changes that have only a discriminatory effect, is unconstitutional. Because the statutory meaning and congressional intent are plain, however, we . . . reject the appellants' suggestion that we engage in a saving construction and avoid the constitutional issues they raise.").

80. *Id.* at 178–80.

81. Compare *NAMUNDO*, 446 U.S. at 224 (Thomas, J., concurring in part and dissenting in part) ("More than 40 years after its enactment, this intrusion has become increasingly difficult to justify."), with *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 111 (1978) ("[Excluding localities from preclearance obligations] permits precisely the kind of circumvention of congressional policy that § 5 was designed to prevent.").

82. Indeed, the tactic of devolving authority from the state level to the local level to evade federal constitutional demands was one of the very experiences that Congress addressed in devising the Voting Rights Act in 1965. See *Reynolds v. Katzenbach*, 248 F. Supp. 593, 594 (S.D. Ala. 1965).

83. *NAMUNDO*, 557 U.S. at 202 ("At the same time, § 5, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs." (quoting *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999)) (internal quotation marks omitted)).

concerns that the Court would likely consider at some point in the near future.⁸⁴ From Roberts’s perspective, the remedial provision did not make clear why some of the covered jurisdictions continued to merit special treatment and others did not.⁸⁵ Once the issue was squarely presented, the Court was likely to demand clear justification for the disparate treatment, especially due to the severe interference with the “sensitive areas of state and local policymaking.”⁸⁶

The underlying message about democratic participation had all the subtlety of a crashing cymbal: Local governments could properly handle the business of the people without an artificial process centered on racial considerations. And given that the available record evidence left the Roberts majority unpersuaded about whether covered states were distinct from non-covered states, there is little wonder that the concerns animating *City of Rome* carried little weight.⁸⁷ For the Roberts majority, the racial fairness agenda has resolutely and completely lost its priority in favor of local political governance concerns.

II. WHAT THE COURT IN REVIEWING SECTION 4 REFUSED TO ACKNOWLEDGE ABOUT CONTINUING RACIAL DISCRIMINATION

This Part turns to the decision and reasoning in *Shelby County* itself, focusing on the material presented to the Court. Specifically, this Part reviews the abundant social science data showing the current distinctions in covered jurisdictions that helped to animate Congress’s action to renew the statutory remedy in 2006. In light of the readily available record evidence that shows empirically verifiable differences between covered states and the rest of the country, the Court’s claim that it found no rational connection between current conditions and the remedy contained in Section 5 is subject to considerable doubt.

84. *Id.* at 211 (noting that “[i]n part due to the success of [the Voting Rights Act], we are now a very different Nation,” but that “[w]hether conditions continue to justify such legislation is a difficult constitutional question we do not answer today”).

85. *Id.* at 203–04.

86. *Id.* at 202 (noting that members of the Court have previously expressed misgivings about the constitutionality of Section 5 due to the provision’s “federalism costs”).

87. *See City of Rome v. United States*, 446 U.S. 156, 167 (1980) (noting that “the coverage formula of § 4(b) has never been applied” to the defendant city, but that the city nonetheless “comes within the Act because it is part of a covered State”).

The pernicious history that gave rise to Congress's initial enactment of the Voting Rights Act in 1965 was deep and prolonged enough to merit a long-term federal response. Further, the contemporary record presented to the Court demonstrates that this legacy is not very easily forgotten. The most recalcitrant states identified in 1965 remain works in progress.

A. The Voting Rights Act Did Not Respond to a Short-Term Problem

No party in *Shelby County* disputed the fact that Congress's intervention in 1965 to rid the country of race discrimination in the political arena was warranted. Though *Shelby County* asserted that the time had arrived for this project to end, the basis on which it framed the argument was both incomplete and contrary to contemporary empirical evidence documenting the persistence of racial disparity in covered jurisdictions.⁸⁸

The *Shelby County* Court mistook the goal of removing the legal barriers to non-White citizens registering to vote as a limited and short-term effort.⁸⁹ This perspective ignored the fact that preventing minority citizens from being excluded from voting in covered jurisdictions was but one aspect of Congress's broader effort to end institutionalized political exclusion based on race. The racially discriminatory practices embedded in institutions, political culture, and popular attitudes that necessitated the Voting Rights Act were nourished by the institution of slavery and have deep roots dating back centuries. Thus, ensuring that minority citizens could get to the ballot box was a necessary but not at all sufficient step to address the problem.

We argue that institutionalized race discrimination was in fact the evil that the statute addresses, which is a long-term project. Institutionalized race discrimination was the effective political norm in the South for nearly a century after the Reconstruction Amendments. Under the system of Jim Crow, state government institutions prevented non-Whites from exercising their constitutionally protected rights, which included, inter alia, casting ballots, engaging in political activities like campaigning, and enjoying responsive government representation.

88. See, e.g., Brief for Petitioner at 28, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) (stating that “[n]othing in the record suggests that covered jurisdictions remain engaged in the pervasive voting discrimination and electoral gamesmanship”).

89. *Id.* at 29.

1. Institutionalized Discrimination in the South pre-1965

Congress has recognized on multiple occasions that dismantling deeply entrenched racial discrimination in the political system demands sustained vigilance. Otherwise, there could be no assurance that states would not reverse course on the hard won protections that took decades to establish.⁹⁰ In this regard, it is worth highlighting the obvious: This concern with the risk of state retrenchment is not just one of abstract logic but of historical experience. The imperative of protecting the equal right to vote regardless of race has only been systematically enforced since the 1965 Act and *South Carolina v. Katzenbach*,⁹¹ a mere half-century ago, compared with the practice of explicit racial discrimination that occurred during the century prior. Put differently, the current era is a fraction of the length of time that the period of institutionalized political exclusion was the order of the day in the American South.

We refer to institutionalized political exclusion as a system, represented in the structures, practices, and norms of government institutions, designed to deny or limit the political effectiveness of a specific class of citizens. The concept reflects a fundamental organization of private and public power to deny a targeted group an equal share of the inputs and outputs of government. This political model reflects a jointly held agreement by the larger electorate to reject the excluded group's status as equal citizens, which is a principle born of personal or group animus. The realm of politics therefore is set aside for the involvement and enjoyment of several interests—but not those of the excluded group. The point of describing the model as institutionalized is that this system is both self-reinforcing (meaning that it is perpetual) and that it is resistant to contrary external pressures.

In the post-Reconstruction American South, the exclusion of Black voters illustrates this model quite well. Even though the

90. See, e.g., 152 CONG. REC. H5143 (2006) (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (“In fact, the extensive record of continued abuse compiled by the committee over the last year, which I have put on the table here today, echoes that which preceded congressional reauthorization of the [Voting Rights Act] in 1982.”). See also CHARLES S. BULLOCK III & RONALD KEITH GADDIE, *THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH* 8–20 (2009) (describing the motivation and timing of congressional enactments aimed at providing access to the ballot, beginning in 1957 with the Civil Rights Act—in addition to subsequent versions of the Act passed in 1960 and 1964—and the 1965 Voting Rights Act and subsequent reauthorizations in 1970, 1975, 1982, and 2006).

91. 383 U.S. 301 (1966).

Constitution had been amended to establish and safeguard the equal status of freedmen, the politics of the former Confederate States did not long embrace this principle in practice. Indeed, these states soon returned to their prior practice of marginalizing and subjugating Blacks in both law and practice. Through both public and private efforts, the noteworthy but brief period of Black political participation, officeholding, and policymaking ended with a multifaceted campaign to re-establish the norm that reduced Blacks in these states to second-class citizenship. We expound below on the components of institutionalized exclusion as they were manifested in the post-Reconstruction South.

2. The Ideology of Racial Animus

At the core of the strategy for retrenchment was the ideology of racism itself—the popular denial among Whites of the political and even natural equality of Black persons. Linked to the bare racial animus on which slavery itself was founded, the expressions of the inherent inferiority of Blacks were framed as arguments that Blacks were less educated, inclined toward corruption, and genetically attuned toward savagery.⁹² This ideological frame was promulgated by several political figures and animated campaigns throughout the twentieth century.⁹³ Aside from the personal benefit to the individual politician, the argument called for political and social systems to assure that the less civilized class of persons remained distanced from the reins of government power. Accordingly, state legislatures developed criminal laws intended to target Black citizens, adopted qualification devices that privileged Whites, and condoned private acts of violence that sought to enforce a norm of inferiority through terror.⁹⁴

The ideology also focused on curtailing political activities that are key precursors to political participation, such as the ability of citizens to organize and to associate. Social science recognizes that one's

92. See generally A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978) (cataloging the foundations of racial ideologies in the early colonial period).

93. See V.O. KEY, JR., *SOUTHERN POLITICS: IN STATE AND NATION* 142–45, 241–46 (1949) (recounting the racial campaigns employed by figures including Ben “Pitchfork” Tillman of South Carolina and Theodore Bilbo of Mississippi).

94. See J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in *MINORITY VOTE DILUTION* 27, 31–37 (Chandler Davidson ed., 1984) (reviewing examples of efforts to limit political freedoms using qualification devices and criminal provisions).

likelihood to register and vote partly depends upon one's level of involvement in civic life,⁹⁵ including traditional political activities such as attending rallies, signing petitions, and seeking redress of grievances.⁹⁶ The Supreme Court has recognized these core activities as protected under the First Amendment.⁹⁷

In maintaining institutionalized political exclusion, preclearance states were responsible for some of the most egregious restrictions on these rights. The State of Alabama is a rather notorious example—it adopted laws that required the publication of membership lists from civil rights organizations.⁹⁸ In addition, Alabama, among other states, implicitly sanctioned violent criminal activity against certain Americans exercising their rights of association by under-enforcing the law in the face of blatantly discriminatory and unlawful behavior.⁹⁹ Not until decades after citizens were killed for engaging in activities like registering voters did the government attempt to correct flawed state court trials that previously failed to convict wrongdoers.¹⁰⁰

3. Vote Denial

To be sure, the most obvious feature of institutionalized racial exclusion is denying minority citizens the opportunity to register and vote. The ability to exercise the franchise itself represents an important marker of equal status as citizens, and the long-time denial of this right in certain states was a critical element of the asserted theory of second-class citizenship. Put differently, disenfranchisement

95. See William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANNU. REV. POL. SCI. 217, 224 (2001); James B. Hyman & Peter Levine, *Civic Engagement and the Disadvantaged: Challenges, Opportunities and Recommendations 1–7* (The Ctr. for Info. & Research on Civic Learning & Engagement, Working Paper No. 63, Dec. 2008), available at http://www.civicyouth.org/PopUps/WorkingPapers/WP63_Hyman_Levine.pdf.

96. Sidney Verba et al., *Race Ethnicity and Political Participation*, in CLASSIFYING BY RACE 354, 355 (Paul Peterson ed., 1995).

97. See *Edwards v. South Carolina*, 372 U.S. 229, 230–33, 238 (1963) (finding that convictions of protesters at the state capitol violated the freedom to petition for redress of grievances); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 518 (1939) (reaffirming the freedom to assemble peaceably); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (“The holding of meetings for peaceable political action cannot be proscribed.”); *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (holding that the right of peaceable assembly is an attribute of national citizenship and is guaranteed by the United States).

98. See *NAACP v. Alabama*, 357 U.S. 449, 451 (1958) (discussing the State of Alabama’s requirement that the NAACP produce membership lists).

99. See STEVEN A. LIGHT, *THE LAW IS GOOD: THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS* 42–43 (2010).

100. Dan Barry et al., *When Cold Cases Stay Cold*, N.Y. TIMES (March 16, 2013), http://www.nytimes.com/2013/03/17/us/souths-cold-cases-reopened-but-still-unresolved.html?pagewanted=all&_r=0.

was the linchpin in the plan to maintain an unconstitutional scheme of discrimination in all facets of public and private life. From the end of the Reconstruction era, the effort to undo the guarantees of the Reconstruction Amendments targeted the franchise as a primary means to control the political and social advancement of Blacks.¹⁰¹ Curtailing the exercise of the franchise also reversed another clear metric of progress—the election of Black political candidates for state and federal offices.

Common efforts during the post-Reconstruction era included the adoption of devices like the grandfather clause, poll taxes, and literacy tests. In the long term, states attempted to cement these changes with the ratification of new constitutions to prevent the realization of political power among those previously excluded from voting on the basis of race.¹⁰² And, as Morgan Kousser has amply demonstrated, the use of private violence was a factor that worked in concert with the more formalized practices of maintaining a stranglehold on the exercise of Black political power.¹⁰³

Due to systematic disenfranchisement on the basis of race, the most recalcitrant of segregationist politicians were able to represent some of the largest concentrations of African Americans in the South.¹⁰⁴ These politicians had no reason to address or even acknowledge the issues most relevant to non-Whites. Indeed, many of the early efforts by Congress to pass civil rights legislation (including voting rights bills) were thwarted by segregationist White members of Congress who hailed from Southern districts in which large numbers of African Americans were disenfranchised.¹⁰⁵ Although Black

101. See J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 135, 142–50 (Bernard Grofman & Chandler Davidson eds., 1992) (discussing strategies employed by states to undermine the effectiveness of the Fifteenth Amendment).

102. In 1960, Alabama, Arkansas, Mississippi, Texas, and Virginia enforced a poll tax, and Alabama, Georgia, Louisiana, South Carolina, Mississippi, North Carolina, and Virginia employed a literacy test. See James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, 351, 374 (Chandler Davidson & Bernard Grofman eds., 1994).

103. See Kousser, *supra* note 101, at 141–42 (recalling instances of armed violence in Louisiana and Mississippi).

104. See, e.g., George C. Wallace, Governor of the State of Alabama, Inaugural Address 2 (Jan. 14, 1963) (transcript available at <http://digital.archives.alabama.gov/utills/getfile/collection/voices/id/2952/filename/2953.pdf>) (calling for “segregation today . . . segregation tomorrow . . . segregation forever”).

105. One of the most prominent examples of failed civil rights legislative efforts is the Dyer Anti-Lynching Bill, which was repeatedly blocked in Congress due to the organized objections of Southern Democrats. See 67 CONG. REC. H1779 (1922).

representation in Congress and across other levels of government has increased in the current era, it is noteworthy that a full measure of representational equality remains elusive for minority Americans, including African Americans, Latinos, and Asian Americans.¹⁰⁶

4. Denying Substantive Benefits

Finally, a significant feature closely related to the absence of representational power where a group is institutionally excluded is the lack of substantive responsiveness. There should be little surprise that the product of the system is little to no improvement in the material existence of non-White citizens in both real and relative terms compared with White citizens. Without efforts in elected bodies to advance the causes that are important to a given community, a group has little chance at directing policy toward its material benefit. The absence of any meaningful quantum of minority voter pressure in the political arena had the consequence of severely limiting the willingness of elected officials to focus on non-White citizens and their material needs and interests.

The largely rural and agricultural based communities in the post-Reconstruction South were and remain among the poorest in the nation.¹⁰⁷ Among the starkest disparities was the funding of public schools, where the policy of maintaining inequity between Black and White schools was repeatedly invalidated by the federal courts.¹⁰⁸ The persistent racial disparities were only possible due to the commitment of all-White legislatures to the cause of racial segregation and the wholesale denial of voter registration to African Americans in the South who otherwise would have challenged it.

106. RONALD SCHMIDT, SR. ET AL., *NEWCOMERS, OUTSIDERS, AND INSIDERS: IMMIGRANTS AND AMERICAN RACIAL POLITICS IN THE EARLY TWENTY-FIRST CENTURY* 14 (2009).

107. Though all the residents in these areas suffered, African Americans continue to face the greatest economic challenges and lowest standards of living. See Angel L. Harris, *The Economic and Educational State of Black Americans in the 21st Century: Should We be Optimistic or Concerned?*, 37 REV. BLACK POL. ECON. 241, 245 (2010) (noting that, “[i]n general, black Americans are disadvantage[d] across various measures of economic well-being” with regard to unemployment rates, durations of unemployment, net worth, and education).

108. See, e.g., *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 231–32 (1964) (finding that a local school board decision to close public schools and provide vouchers to attend private schools violated the Equal Protection Clause); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955) (setting forth directions for implementing the Court’s earlier decision in *Brown I*); *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) (declaring state laws establishing separate but equal public schools for black and white students unconstitutional); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding public school segregation in the District of Columbia unconstitutional).

B. Contemporary Social Science Evidence

The historical circumstances described above that we link to institutionalized racial exclusion did not disappear in 1965. They have left a legacy that illustrates the ongoing need for the project that Congress commenced when it adopted the Voting Rights Act. We next discuss the significance of these disparate conditions, and the remainder of this section details empirically quantifiable contemporary indicators of racial exclusion and discrimination that the *Shelby County* Court failed to consider in its majority opinion.

The analysis documents systematic variation between covered and non-covered jurisdictions, and in particular, a higher degree of negative racial attitudes among White citizens in Section 5 areas. Furthermore, we provide evidence of racially polarized voting that demonstrates the landscape remains different in covered jurisdictions than in other states. Finally, covered jurisdictions are also more likely to employ voter disqualification policy measures than elsewhere. Taken together, the data demonstrates a continuing danger in preclearance locations of constitutional violations to the right to vote on the basis of race.

1. Racial Attitudes

Among the most enduring components of institutionalized exclusion is the enshrinement of negative racial attitudes toward non-White groups.¹⁰⁹ Whites' resentment of non-White groups served as the foundation for the structures of political exclusion. Indeed, social science research has documented and continues to provide systematic evidence for the attitudinal legacies of slavery in political attitudes among Whites.¹¹⁰

Data from the American National Election Study (ANES) of 2000 and 2008 demonstrate the differences—both substantively and statistically significant—between White respondents to the surveys in covered and non-covered jurisdictions.¹¹¹ Table 1 shows that Whites

109. Brief of Political Science and Law Professors as Amici Curiae in Support of Respondents at 6, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) [hereinafter Brief of Political Scientists] (“Racial animosity [was] embedded in the very ideology of segregation—deeming some groups unworthy of the benefits of citizens.”).

110. EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 148–52 (2003); KEY, JR., *supra* note 93, at 4–6; Avidit Acharya et al., *The Political Legacy of American Slavery* 30–31 (Oct. 18, 2013), *available at* <http://scholar.harvard.edu/files/msen/files/slavery.pdf>.

111. American National Election Studies, 2000 and 2008, *available at* http://www.electionstudies.org/studypages/download/datacenter_all_datasets.php. The data

living in Section 5 covered states are much more likely to hold attitudes consistent with racial antipathy against minorities. For example, 51% of the Whites residing in Section 5 states agreed that the government should not make any effort to help Blacks, compared with only 39% of Whites in non-covered states. Other measures of racial attitudes shown in Table 1 document the differences in antipathy toward groups either fully identified as minority or whose racial grouping is signaled by stereotypes (i.e., undocumented immigrants as Latino or Hispanic).

Table 1. Racial Attitudes Among Whites in ANES, 2000 and 2008

Statement	2008 ANES			2000 ANES		
	Sec 5	Not Sec 5	Diff	Sec 5	Not Sec 5	Diff
“Government should not make any special effort to help Blacks because they should help themselves.”	51	39	12**	43	29	14**
“Other minorities overcame prejudice and worked their way. Blacks should do the same without any special favors.”	48	34	14**	42	32	10**
“Generations of slavery and discrimination have created conditions that make it difficult for Blacks to work their way up” – <u>percent who disagree</u>	61	47	14**	57	43	14**
“If Blacks would only try harder they could be just as well off as Whites.”	66	57	9*	54	45	9*
“It is not the federal government’s business to see to it that Black people get fair treatment in jobs.”	36	27	9*	38	32	6†
“Do you personally hope the United States has an African American president in your lifetime.”	48	56	-8*	—	—	—
“Oppose the U.S. government making it possible for undocumented immigrants to become U.S. citizens.”	45	33	12**	—	—	—

Chi-square test results are statistically significant: ** P>.010 * P>.050, † P>.100.

Source: American National Election Study, 2000 and 2008, data among White respondents.

presented *infra* in Table 1 was compiled and organized separately by the authors.

Political Science surveys such as the ANES also ask respondents questions about whether and which groups have too much influence in American politics. Table 2 presents the differences between covered and non-covered states on these measures. White respondents in Section 5 covered states compared with non-covered states were more likely to say that Blacks, Latinos, Asians, and Jews had too much influence in American politics today, but were less likely to think Whites had too much influence.

Table 2. Perceptions of Group Influence Among Whites in ANES, 2000

Statement (percent who agree)	2000 ANES		
	Sec 5	Not Sec 5	Diff
“Blacks have too much influence in American politics”	37	21	16**
“Latinos have too much influence in American politics”	15	8	7*
“Asians have too much influence in American politics”	10	5	5†
“Jews have too much influence in American politics”	22	14	8*
“Whites have too much influence in American politics”	16	23	-7*

Chi-square test results are statistically significant: ** $P > .010$ * $P > .050$ † $P > .100$.

Source: American National Election Study, 2000 data among White respondents.

Similarly, data from the 2010 Cooperative Congressional Election Study (CCES) based on interviews with more than 50,000 respondents across the fifty states show systematic variation in racial resentment and anti-immigrant attitudes among White respondents living in covered states compared with non-covered states.¹¹² The differences are detailed in Table 3.

Table 3. Racial Attitudes Among Whites in CCES, 2010

Percent Reporting	Section 5	Non Sec 5	Diff
Racial Resentment	66%	53%	13%***
Anti-immigrant attitudes	46%	35%	11%***

Chi-square test results are statistically significant: *** $P > .001$ ** $P > .010$ * $P > .050$.

Source: Cooperative Congressional Election Study, 2010, data among White respondents.

112. Cooperative Congressional Election Study, 2010, available at http://projects.iq.harvard.edu/cces/data?dvn_subpage=/faces/study/StudyPage.xhtml?globalId=hdl:1902.1/17705 (measuring racial resentment through responses to attitudinal items). The CCES is a large study that included questions on racial resentment for the sample of respondents. The survey sample is large enough to compare statistically significant differences across geographic locations.

Among White respondents in covered states, an average of 66% had high levels of racial resentment towards Blacks—a full thirteen points higher than the measure for Whites living in non-Section 5 states. Among all of the states, White respondents in Alabama, Louisiana, Mississippi, and Georgia rated highest on their quotient of racial resentment—all four states are fully covered by Section 5.¹¹³ White respondents in Section 5 states were also significantly more likely to report attitudes that were negative about immigrants and supportive of restricting immigrant rights than White respondents in non-Section 5 states and localities.¹¹⁴ Alabama, Mississippi, Texas, Georgia, Louisiana, Alaska, and Arizona had the highest degree of anti-immigrant attitudes in the CCES 2010 data.¹¹⁵ These states are all covered by Section 5, signifying consistency with other negative racial attitudes.

2. The Persistence of Racially Polarized Voting

These data are consistent with an abundance of published research in leading academic publications.¹¹⁶ Scholarly research in the last decade alone has produced findings showing that discriminatory attitudes towards Blacks and Latinos persist and that they are strongest among Whites in states covered by Section 5.¹¹⁷ Further, numerous scholars conclude that harboring negative racial attitudes is the underlying mechanism responsible for producing racial bloc voting among Whites against minority candidates for elected office.¹¹⁸

113. *Id.*

114. *Id.*

115. *Id.*

116. See, e.g., Dana Ables Morales, *Racial Attitudes and Partisan Identification in the United States, 1980–1992*, 5 PARTY POL. 191, 195–97 (1999); Nicholas A. Valentino & David O. Sears, *Old Times There Are Not Forgotten: Race and Partisan Realignment in the Contemporary South*, 49 AM. J. POL. SCI. 672, 677–84 (2005).

117. See generally M. V. Hood III & Seth C. McKee, *Gerrymandering on Georgia's Mind: The Effects of Redistricting on Vote Choice in the 2006 Midterm Election*, 89 SOC. SCI. Q. 60 (2008); Jonathan Knuckey, *Racial Resentment and the Changing Partisanship of Southern Whites*, 11 PARTY POL. 5 (2005); Richard Skinner & Philip A. Klinkner, *Black, White, Brown and Cajun: The Racial Dynamics of the 2003 Louisiana Gubernatorial Election*, 2 FORUM 1 (2004).

118. See, e.g., EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 49–51 (1989); THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 41 (1991); ROBERT HUCKFELDT & CAROL WEITZEL KOHFELD, *RACE AND THE DECLINE OF CLASS IN AMERICAN POLITICS* 46 (1989); KEITH REEVES, *VOTING HOPES OR FEARS?: WHITE VOTERS, BLACK CANDIDATES & RACIAL POLITICS IN AMERICA* 74 (1997); Michael W. Giles & Kaenan Hertz, *Racial Threat and Partisan Identification*, 88 AM. POL. SCI. REV. 317, 319 (1994).

In his study of racial attitudes and voting, Associate Professor Keith Reeves finds that “a significant number of whites harbor feelings of antipathy toward Black Americans as a categorical group—feelings and sentiments that are openly and routinely expressed... And where such prejudices are excited... they constitute the critical linchpin in Black office-seekers’ success in garnering White votes.”¹¹⁹ Writing more than ten years later about the 2008 presidential election, Michael Tesler and David Sears found the same pattern. Even after controlling for partisanship and ideology, they found “the most racially resentful were more than 70 percentage points more likely to support McCain in March 2008 than were the least racially resentful.”¹²⁰ Other scholarly work also supports the finding that discriminatory attitudes and racial prejudice play key roles in driving White party identification, and this is especially strong in Section 5 covered jurisdictions.¹²¹

In extending the Voting Rights Act in 2006, Congress declared racially polarized voting to be “the clearest and strongest evidence the Committee has before it of the continued resistance [sic] within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process.”¹²² Racial bloc voting remains persistent and was evident in the voting behavior among Whites during the 2008 election of Barack Obama.¹²³

These racialized attitudes, in turn, help explain the persistence and magnitude of racially polarized voting in covered jurisdictions relative to non-covered jurisdictions. Following the election of Barack Obama in 2008, several political scientists took up the issue of racial prejudice and White voting patterns for Obama, relying on respected data sources and cutting-edge research methodologies.¹²⁴ Political Scientist Michael Lewis-Beck summarizes the data succinctly when he writes,

119. REEVES, *supra* note 118, at 74.

120. MICHAEL TESLER & DAVID O. SEARS, *OBAMA’S RACE: THE 2008 ELECTION AND THE DREAM OF A POST-RACIAL AMERICA* 61 (2010).

121. See CARMINES & STIMSON, *supra* note 118, at 49–51; Knuckey, *supra* note 117, at 59; Morales, *supra* note 116, at 197; Valentino & Sears, *supra* note 116, at 674–76.

122. H.R. REP. NO. 109-478, at 34 (2006).

123. Todd Donovan, *Obama and the White Vote*, 63 *POL. RES. Q.* 863, 870–72 (2010); Anthony G. Greenwald et al., *Implicit Race Attitudes Predicted Vote in the 2008 U.S. Presidential Election*, 9 *ANALYSIS SOC. ISSUES & PUB. POL’Y* 241, 248 (2009); Michael S. Lewis-Beck et al., *Obama’s Missed Landslide: A Racial Cost?*, 43 *POL. SCI. POL.* 69, 72–74 (2010).

124. TESLER, *supra* note 120, at 61; Lewis-Beck et al., *supra* note 123, at 75 (relying on established datasets regularly collected by political scientists, including the American National Election Study).

“The roots of Obama’s relative underperformance electorally can be laid at the feet of race prejudice. . . . Obama got the vote share he got, instead of the landslide that could have been expected. Race appears to have imposed a real cost on his electoral margin.”¹²⁵

Even before the Obama election, political scientists had amassed data with a particular eye toward Section 5 covered jurisdictions, and concluded that racial attitudes were driving partisanship and voting.¹²⁶ Jonathan Knuckey writes, “These findings suggest that race and racial attitudes continue to shape southern party politics in the early twenty-first century.”¹²⁷ Racial attitudes, and in particular expressions of racial antipathy in terms of opposition to policies aimed at enhancing politically egalitarian outcomes, are products of practices born from racially discriminatory political and social institutions. In Alabama, the state at issue in *Shelby County*, the adoption of discriminatory policies in the state’s 1901 Constitution (adopted by an all-White convention) was heavily informed by the desire to keep African American voters out of politics and in subservient positions in society.¹²⁸ Subsequent developments maintained systems of exclusion and supported discriminatory practices.¹²⁹

To illustrate the effect of polarization in covered jurisdictions, Table 4 summarizes the level of support for Democratic candidates among White voters in covered and non-covered states for presidential elections in 2000, 2004, and 2008.¹³⁰ The data illustrates that the level of White support for the Democratic nominee varies significantly between covered and non-covered states, and the difference is statistically significant for all years. The 2000 election shows that the average level of White voter support for the nominee was fourteen percentage points higher in non-covered states than in covered states. In 2004, the average level of White support in covered

125. Lewis-Beck et al., *supra* note 123, at 75.

126. See, e.g., Valentino & Sears, *supra* note 116, at 674.

127. Knuckey, *supra* note 117, at 5.

128. See John B. Knox, Inaugural Address (May 22, 1901), available at http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_vol1/day2.html (remarking that the Convention’s aim was “to establish white supremacy”); see also ALA. CONST. art. IV, § 102; *id.* art. VIII, § 181(1); *id.* art. XIV, § 256.

129. See, e.g., KEY, JR., *supra* note 93, at 37–46.

130. See Brief of Political Scientists, *supra* note 109, at 22–26. A complete test of racially polarized voting would search for a sharp contrast in the level of support for a candidate among Whites compared to other racial groups. Amici curiae examine the preferences of White voters alone as an indicator, because well over a majority of the relevant non-White groups supported the Democratic ticket in each of the presidential elections at issue.

states was 25%, compared with 43% in non-covered states (a difference of 18.2 percentage points). In 2008, the level of White support in Section 5 states was 23% compared to an average of 48% in the rest of the country.

Table 4. Polarized Voting Among Whites in the 2000, 2004, and 2008 Presidential Elections

State	% Gore '00	% Kerry '04	% Obama '08	04-08 Change	00-08 Change	% Dem	% Ind	% Rep
Sec. 5 states	29	25	23	-2	-6	32	13	55
Non-Sec. 5	43	43	48	5	5	39	12	49
Difference	-14**	-18***	-25***	-7*	-11*	-7	1	6

Chi-square test results are statistically significant: *** P>.001 ** P>.010 * P>.050.

Sources: National Exit Poll vote among White respondents 2000, 2004, 2008; and CCES 2010 for party identification among White voters.

Among Whites, support for the Democratic candidate declined in the 2008 election, the year the nominee was Black. On average, White support in preclearance states dropped an additional two percentage points below that of the Democratic nominee in 2004. The extent of this drop-off provides another way to assess the extent to which White voters remain unwilling to vote for candidates due to race. In fact, more than half of the nine total states where the measure dropped for the Democratic nominee between 2004 and 2008 were covered jurisdictions.¹³¹ The State of Louisiana had the nation's steepest decline in support among Whites, dropping ten percentage points during this period—from 24% to 14%.¹³²

These results are not simply the product of partisanship. Where nearly a third (32%) of Whites in Section 5 states identified as Democrats, less than a quarter (23%) supported the Democratic Party nominee for President in 2008, the lowest share of the three elections examined here. Moreover, though about the same percentage of White voters in the states of Utah (non-covered) and Georgia (covered) reported their affiliation with the Republican Party, the Black candidate in 2008 lost both statewide contests, but a much smaller share of White voters in Georgia supported the Democratic candidate than in Utah—one of the nation's most

131. *Id.* at 24.

132. *Id.*

Republican states.¹³³ Thus political party affiliation does not fully account for the difference in states with roughly similar patterns of allegiance to the Republican Party.

These findings comport with other existing research that has noted the pattern of polarized voting in national elections. The newest published research by political scientists finds evidence that, among White voters, Barack Obama received less support in 2008 than John Kerry did in 2004 in many Section 5 states, largely as a result of racial prejudice and discriminatory attitudes.¹³⁴ In his analysis of the White vote for Obama in Southern states, Professor Ben Highton notes, “at the state level, the influence of prejudice on voting was comparable to the influence of partisanship and ideology. Racial attitudes explain support for Obama and shifts in Democratic voting between 2004 and 2008.”¹³⁵ This finding is corroborated by Spencer Piston’s searching individual-level analysis of voter attitudes and support for Barack Obama in Southern states, which confirm the view “that prejudice hurt Obama but not previous Democrats.”¹³⁶

Beyond the realm of voting, the research is quite clear that Section 5 states continue to witness discrimination against minorities in housing, education, employment, criminal justice, and the legal system.¹³⁷ Not only does the evidence on racially polarized voting

133. *Id.* at 24–25. According to the available data, about 30% of White voters in Utah identified as Democrats, and Barack Obama received about 31% of ballots cast by Whites. By comparison, Democrats are about 27% of all White voters, yet the Democratic ticket received only 23% of the White vote in 2008.

134. See Donovan, *supra* note 123, at 867; Lewis-Beck et al., *supra* note 123, at 73; Tom Pyszczynski et al., *Is Obama the Anti-Christ? Racial Priming, Extreme Criticisms of Barack Obama, and Attitudes Towards the 2008 US Presidential Candidates*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 863, 866 (2010).

135. Benjamin Highton, *Prejudice Rivals Partisanship and Ideology When Explaining the 2008 Presidential Vote Across the States*, 44 POL. SCI. & POL. 530, 530 (2011).

136. Spencer Piston, *How Explicit Racial Prejudice Hurt Obama in the 2008 Election*, 32 POL. BEHAV. 431, 447 (2010).

137. See Pauline K. Brennan & Cassia Spohn, *Race/Ethnicity and Sentencing Outcomes Among Drug Offenders in North Carolina*, 24 J. CONTEMP. CRIM. JUST. 371, 372–73 (2008); Fidel Ezeala-Harrison et al., *Housing Loan Patterns Toward Minority Borrowers in Mississippi: Analysis of Some Micro Data Evidence of Redlining*, 35 REV. BLACK POL. ECON. 43, 46 (2008); James H. Johnson, Jr. et al., *Racial Apartheid in a Small North Carolina Town*, 31 REV. BLACK POL. ECON. 89, 90–91 (2004); Bill Quigley, *Racial Discrimination and the Legal System: The Recent Lessons of Louisiana*, 44 UN MONTHLY CHRON. 3, 3 (2007); John B. Strait et al., *Rubbing Elbows in the Big Easy: The Dynamics of Residential Segregation Among Racial and Ethnic Groups in New Orleans, Louisiana, 1990-2000*, 47 SOUTHEASTERN GEOGRAPHER 254, 282 (2007); Jeannie Haubert Weil, *Finding Housing: Discrimination and Exploitation of Latinos in the Post-Katrina Rental Market*, 22 ORG. & ENV’T 491, 498–500 (2009). See also Vanessa Wong, *Twenty States with the Most Workplace Discrimination*, BLOOMBERG BUSINESSWEEK (Jul. 29, 2011), <http://images.businessweek.com/slideshows/20110728/twenty-states-with-the->

point to a continued need for Section 5 preclearance in selected areas, but the data on racial attitudes clearly identify the symptom¹³⁸ for which the Department of Justice review is the remedy.

Knuckey concludes that “the increase in the effect of racial resentment should give pause to those who would diminish the role that racial conservatism played as an explanation for Republican gains among southern Whites in the 1990s.”¹³⁹ And in a lengthy and thorough review of racial attitudes and voting, Political Scientist Todd Donovan finds, “[a]lthough there are prominent examples of African American candidates winning in electorates that are majority White, such cases have been relatively rare. The history of race and voting in the South demonstrates particularly high levels of racially polarized voting.”¹⁴⁰ Without question, the data show that Whites in Section 5 jurisdictions have higher rates of negative racial attitudes and prejudice than in non-Section 5 states.¹⁴¹

3. Voting Qualification Rules

The legacy of racial attitudes and institutionalized discrimination are manifest in the distinct pattern of legal devices now present in Section 5 states. Covered and partially covered jurisdictions are more likely than others to impose an array of restrictions on the exercise of the franchise. These restrictions, in turn, have a disparate impact on minority access to the polls. The data in Table 5 show that the differences between the states inside and outside the preclearance coverage regime are stark. States fully covered by Section 5 are more than twice as likely as non-covered states to adopt policies that make

most-workplace-discrimination#slide1 (examining United States Equal Employment Opportunity Commission [EEOC] merits resolutions—resolutions in favor of complainants—in discrimination charges for fiscal year 2010 and finding six of the nine fully covered jurisdictions among the top twenty most discriminatory states). Population size does not fully explain the inclusion of these fully covered jurisdictions. For instance, though Texas has a population that is more than ten million less than California, it had the most merit resolutions of any state. *Id.* And whereas Alabama is only the twenty-third largest state, it ranked number eleven in EEOC merit resolutions. *Id.*

138. Steven A. Tuch & Michael Hughes, *Whites' Racial Policy Attitudes in the Twenty-First Century: The Continuing Significance of Racial Resentment*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 143 (2011); see also TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 174–78 (2001) (addressing evidence of racial resentment in other elections); Nicholas A. Valentino et al., *Cues that Matter: How Political Ads Prime Racial Attitudes During Campaigns*, 96 AM. POL. SCI. REV. 75, 77 (2002).

139. Knuckey, *supra* note 117, at 64.

140. Donovan, *supra* note 123, at 863

141. See *supra* Part II.B.1; see also *supra* notes 117–122 and accompanying text.

voting more difficult for citizens, and are also more likely to employ a combination of these restrictive measures, which amplifies the disqualification effect on voters.

Table 5. States with Limits on Enfranchisement by Section 5 Coverage

	States Fully Covered by Sec 5	States Fully or Partially Covered by Sec 5	States Not Covered by Sec 5
Percent of states that currently require identification to vote ¹	25%	30%	11%
Percent that require or request photo ID to vote, current and pending clearance ²	50%	50%	16%
Percent requiring proof of citizenship to vote ³	25%	13%	8%
Percent that currently have permanent or partial limits on voting if felony conviction ⁴	38%	31%	16%
States with most restrictive immigration-control legislation as current law ⁵	50%	29%	6%
Number of states	8	16	34

¹National Conference of State Legislators, Oct. 2012.

²National Conference of State Legislators, Oct. 2012 and Ballotpedia.com, Jan. 2013.

³Lawyers Committee for Civil Rights, June 2011.

⁴ACLU Map of State Felon Disenfranchisement Laws (n.d.).

⁵National Conference of State Legislatures, Aug. 2012.

As Table 5 documents, states fully covered by Section 5 or that include covered jurisdictions are much more likely to institute policies that require citizens to produce potentially burdensome documentation proving their identities or citizenship before they are allowed to vote.¹⁴² The disproportionate impact that restrictive voter identification requirements have on Black and Latino voters is well-established in both the scholarly literature and more general

142. States covered by Section 5 are also more likely to adopt laws that permanently or partially limit the rights of convicted felons to vote. States that are not covered by Section 5 are much more likely to allow convicted felons to vote as soon as their sentences are completed. Because Blacks and Latinos are overrepresented in the criminal justice system, felon disenfranchisement laws disproportionately deprive minority citizens of the right to vote. See Mark Hugo Lopez & Gretchen Livingston, *Hispanics and the Criminal Justice System: Low Confidence, High Exposure*, PEW HISPANIC CTR. (April 7, 2009), <http://www.pewhispanic.org/files/reports/106.pdf> (“Overall . . . some 4% of adult Hispanics in 2007 were either in prison or jail or on probation or parole. This is larger than the share of whites (2%) who were under some form of corrections control in 2007 and smaller than the share of blacks (9%).”)

analysis.¹⁴³

The presence of discrimination in covered locations compared with non-covered locations represents the continuing legacy of the institutionalization of racially discriminatory practices. Covered locations identified by Section 4 were the most persistent purveyors of government policies designed to disenfranchise minority voters prior to the Voting Rights Act. Described as such by the majority opinion of the Court in *NAMUDNO*, these “exceptional conditions justified extraordinary legislation.”¹⁴⁴ Petitioner’s brief in *Shelby County* also acknowledged the long history of blatantly discriminatory practices that compelled Congress to provide federal authority in Section 5 for voting rights enforcement: “In 1965, 95 years after the Fifteenth Amendment’s ratification, African-Americans were still widely denied the right to vote throughout the South.”¹⁴⁵ Despite the Court’s recognition that the coverage formula links the genesis of unlawful election practices based in racial antipathy against minorities to preclearance status, the *Shelby County* Court failed to acknowledge the substantial empirical evidence of systematic racial disparity that continues to this day in locations originally targeted by the 1965 Voting Rights Act.¹⁴⁶

III. THREE WAYS FORWARD FOR VOTING RIGHTS

The prior two Parts addressed the foundation for the Court’s decision to invalidate the formula undergirding the preclearance provision and offered an empirically based critique showing the fundamental flaws in the analysis offered by the *Shelby County* majority. Notwithstanding the problems with the decision, Congress is faced with a choice about how to approach the issue of voting rights and entrenching the guarantees contained in the Fifteenth

143. See, e.g., Matt A. Barreto et al., *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters* (Sept. 1, 2007), available at http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf; Gabriel R. Sanchez et al., *Racial and Ethnic Differences in Access to Photo-ID in Texas*, *LATINO DECISIONS BLOG* (Mar. 12, 2012), <http://www.latinodecisions.com/blog/2012/03/21/racial-and-ethnic-differences-in-access-to-photo-id-in-texas/>.

144. *NAMUNDO*, 557 U.S. 193, 211 (2009) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966)).

145. Brief for Petitioner, *supra* note 88, at 1–2.

146. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 428 (D.D.C. 2011) (“[T]he Court concludes that ‘current needs’—the modern existence of intentional racial discrimination in voting—do, in fact, justify Congress’s 2006 reauthorization of the preclearance requirement imposed on covered jurisdictions by Section 5, as well as the preservation of the traditional coverage formula embodied in Section 4(b).”).

Amendment. In similar fashion, the larger civil rights bar must envision either a world in which it works within the constraints set by the Court or one in which it presses legislators to amend the Voting Rights Act. In light of what we see as the Roberts majority's emergent philosophy on the democratic engagement of racial minorities, this Part addresses three possible options and offers comments in favor of a preferred strategy.

We argue that Congress may take one of at least three responses to the Court's decision in *Shelby County*: (1) effectively de-racialize the issue of voting rights; (2) rely more heavily on existing litigation remedies; or (3) restate and reinforce the preclearance provision with current data. Although the third option presents risks, both legal and political, it is the approach most consistent with the nation's longstanding commitment to reform the racially discriminatory political culture in the covered jurisdictions.

A. De-Racializing Election Reform

The first option that Congress might take in light of *Shelby County* is a wholesale retreat from the question of race-conscious remedies on the subject of voting rights. This approach urges a strategic shift away from remedies that rely on the connection between racial discrimination and political structures.¹⁴⁷ If one views the Court's decision as decidedly hostile to the proposition that race still informs some of the barriers to full and fair political participation, then one might support a reform that turns away from the traditional approach to civil rights enforcement.

This move might have more bi-partisan appeal because it would remove the stigma of racial animus that has been especially irksome for Republican officials in Southern states.¹⁴⁸ Further, the measure would likely reach into more locations nationwide,¹⁴⁹ which would respond to Chief Justice Roberts's purported unease with the selectivity of the current regime. In addition, the move would answer

147. See Richard Pildes, *The Future of Voting Rights Policy: From Antidiscrimination to the Right to Vote*, 49 HOW. L.J. 741, 755–62 (2006); see also Jonathan Soros & Mark Schmitt, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY J. IDEAS (Spring 2013), <http://www.democracyjournal.org/28/the-missing-right-a-constitutional-right-to-vote.php?page=all>.

148. See BLACK & BLACK, *supra* note 110, at 99–102.

149. This is particularly true where a nationwide right to vote would alleviate special targeting to certain states and local jurisdictions. Several actors in the 2006 process suggested making the preclearance system apply nationally, a proposal that was viewed as a “poison pill” to the renewal process.

growing concerns from the residents of jurisdictions where emergent communities of color face voting problems that are not currently receiving special attention.¹⁵⁰ The crucial challenge of this strategy would be to locate congressional authority in a constitutional provision other than the Fifteenth Amendment.¹⁵¹ Three examples help illustrate how the de-racialization strategy might translate into policy.

1. A Real Right to Vote

Perhaps the most well-known proposal that fits this model of reform is the proposed constitutional amendment to guarantee the right to vote. Although the Supreme Court has essentially read the franchise into the Fourteenth Amendment as a fundamental right—characterizing the “right to vote freely for the candidate of one’s choice” as the “essence of a democratic society”¹⁵²—backers of the amendment contend that an affirmative commitment to the right would provide the opportunity to recognize a more robust set of protections for citizens and obligations for states.¹⁵³ The right could include not only the casting of a ballot but also the fair and effective counting of the ballot.

Further, the right could impose specific limits on what a state may do to restrict the right to vote, thereby directly challenging existing doctrine that is inconsistent with a commitment to the fundamental right to vote. Some advocates would go so far as to imply that the provision could demand a legal bar on partisan gerrymandering, an

150. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2630 (2013) (noting that “[i]f Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula” because “[i]t would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story . . . [b]ut that is exactly what Congress has done”); *NAMUNDO*, 557 U.S. 193, 203 (2009) (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on [outdated] data . . . , and there is considerable evidence that it fails to account for current political conditions.”).

151. *Shelby Cnty.*, 133 S. Ct. at 2629 (“The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future.” (quoting *Rice v. Cayetano*, 528 U.S. 495, 512 (2000)) (internal quotation marks omitted)).

152. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (noting that “any restrictions on [the right to vote] strike at the heart of representative government”).

153. Samuel Issacharoff & Richard H. Pildes, *Epilogue: Bush v. Gore and the Constitutional Right to Vote* 11 (New York Univ. Public Law and Legal Theory, Working Paper No. 381, 2013); see also John B. Anderson et al., *Presidential Elections—The Right to Vote and Access to the Ballot*, 29 NOVA L. REV. 571, 615–16 (2005).

issue on which the Supreme Court currently has no settled position.¹⁵⁴ In all cases, the proponents of this plan would argue that many ongoing concerns could be addressed by incorporating language in a constitutional provision that might empower Congress to adopt legislation to regulate states.¹⁵⁵

2. Elections Clause

A second proposal takes a less ambitious approach than the constitutional amendment, and focuses instead on existing but seldom-used provisions in the founding charter. For example, the Supreme Court itself has recently turned its attention to the Elections Clause of Article I, which empowers Congress to set rules that regulate the time, place, and manner of elections.¹⁵⁶ The federal

154. See *Vieth v. Jubilirer*, 541 U.S. 267, 309–10 (2004); Lois Beckett, *Is Partisan Gerrymandering Unconstitutional?*, PROPUBLICA (Nov. 7, 2011, 1:10 PM), <http://www.propublica.org/article/is-partisan-gerrymandering-unconstitutional>; Kali Borkoski, *An Interview with Justice Stevens*, SCOTUSBLOG (Nov. 3, 2011, 3:10 PM), <http://www.scotusblog.com/2011/11/an-interview-with-justice-stevens/> (stating that Justice Stevens contends that partisan gerrymandering is “outrageously unconstitutional”). Some states have taken such measures already, such as Florida. Florida’s Constitution was amended in 2010 to prohibit lawmakers from establishing apportionment plans “with the intent to favor or disfavor a political party or an incumbent.” See FLA CONST. art. III, §§ 20–21.

155. John Nichols, *Time for a ‘Right to Vote’ Constitutional Amendment*, THE NATION (Mar. 5, 2013), <http://www.thenation.com/article/173200/time-right-vote-constitutional-amendment#> (justifying the need for a constitutional amendment because “[v]oting rights have too frequently been left to chance in the United States,” and noting that “[e]ven as the franchise has been extended through constitutional and other federal initiatives, the administration of elections has been left to states with radically different standards”); Norm Ornstein, *The U.S. Needs a Constitutional Right to Vote*, THE ATLANTIC (Oct. 31, 2013), <http://www.theatlantic.com/politics/archive/2013/10/the-us-needs-a-constitutional-right-to-vote/281033/> (“[T]he Constitution contains no explicit right to vote. . . . An explicit constitutional right to vote would give traction to individual Americans who are facing [voter-suppression] tactics, and to legal cases challenging restrictive laws.”); Jonathan Soros & Mark Schmitt, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY J. IDEAS (Spring 2013), <http://www.democracyjournal.org/28/the-missing-right-a-constitutional-right-to-vote.php?page=all> (“[T]he right to vote is itself a subject of continued partisan, regional, and racial conflict. It’s time to resolve the fights, and fulfill the promise of American democracy, by joining together in an effort to make the right to vote, at last, a part of our basic covenant as a nation.”). Representative Mark Pocan (D-WI) proposed to amend the Constitution by adding the following: “Section 1. Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides. Section 2. Congress shall have the power to enforce and implement this article by appropriate legislation.” H.R.J. Res. 44, 113th Cong. (2013).

156 U.S. CONST. art. I, § 4, cl.1–2; *Shelby Cnty.*, 133 S. Ct. at 2623 (“Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives.”); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257–58 (2013) (“The Constitution prescribes a straightforward rule for the composition of the federal electorate. . . . [E]lectors in each State for the House of Representatives ‘shall have the

supervisory power in this area has long been recognized as an underutilized source of authority. In *Colegrove v. Green*,¹⁵⁷ Justice Frankfurter concluded that an early one-person-one-vote claim was nonjusticiable because the Elections Clause committed the regulation of district line drawing (at least at the federal level) to Congress.¹⁵⁸ Invoking the same constitutional provision, Congress could command the states to abide by certain rules in elections involving campaigns for federal offices (which would include both presidential and midterm elections).

To the extent that the Court is willing to endorse a robust interpretation of the Elections Clause, this approach is perhaps the most readily available national answer to the problem—at least as far as federal elections are concerned. Although it is not clear how broadly the federal power applies, particularly against a contrary and important state objective,¹⁵⁹ the provision does provide an alternative and relatively straightforward source of power for legislation that guarantees access to the political system. Of course, the power would presumably not reach those elections for state and local government that occur in odd years without a federal election on the ballot.¹⁶⁰

3. Good Government Rules

Other proposals favor the adoption of neutral procedural rules to help curtail decisions about the electoral system that might not reflect the best interests of a community. For instance, the public notice and comment concept is a simple but possibly effective means to assure careful consideration of new election laws. Absent the preclearance

Qualifications requisite for Electors of the most numerous Branch of the State Legislature,' and the Seventeenth Amendment adopts the same criterion for senatorial elections.'" (citation omitted).

157. 328 U.S. 549 (1946).

158. *Id.* at 556.

159. *See Arizona*, 133 S. Ct. at 2256–59 (outlining the proposed balance of power between state and federal enforcement regimes to regulate voter identification laws where the state has a policy that appears to conflict with that of a federal agency).

160. Two examples of states that frequently hold their statewide races in the absence of federal campaigns are New Jersey and Virginia. Karl Kurtz, *Why do Four States Have Odd-Year Elections*, THE THICKEST AT STATE LEGISLATURES (Aug. 25, 2011), http://ncsl.typepad.com/the_thicket/2011/08/why-do-four-states-have-odd-year-elections.html. Aside from these states, a multitude of county and local governments also hold elections that occur outside of the federal campaign window. *See* Jose P. Hernandez, *Odd-Year vs. Even-Year Consolidated Elections in California*, THE GREENLINING INST. (OCT. 2013), <http://greenlining.org/wp-content/uploads/2013/10/Research-Brief-Odd-Year-vs-Even-Year-Consolidated-Elections-in-California.pdf> (detailing the heightened costs associated with off-year elections at the local level).

process, a rule that imposes a general waiting period on any new legislation focused on voting would further several principles that are commonly associated with good governance.

As an example, Professor Gilda Daniels has suggested a waiting period to ensure that the enacting jurisdiction has carefully considered the implications of the bill.¹⁶¹ It would also provide notice to the public of a pending change, which would prompt their attention to and involvement in developing new measures. And, where the proposed regulation raises problems, the procedural measure might offer potential plaintiffs time to negotiate change before the new measure is enacted. It would also offer more time to a plaintiff class to develop the terms of a lawsuit.

* * *

There is nothing inherently objectionable about any of the aforementioned ideas for responding to *Shelby County*. Indeed, one can imagine that they could operate quite well within an overall reform effort that takes on either of the other two broad strategies to be discussed below. However, they each heavily depend upon judicial endorsement of a broad federal authority to regulate elections that seems unlikely after *Shelby County*. This is particularly so where the legislative enactment might demand that jurisdictions assume burdens on their sovereignty that seem inconsistent with the expressed political preferences of their constituents.¹⁶² Unless advocates can assert new arguments to the Court—or the composition of the Court changes and new members are willing to rethink these principles—one cannot see great promise in using these approaches to reframe the debate.

The larger problem with relying only on these strategies as an answer to *Shelby County* is that they are insufficient substitutes for the kind of focused attention necessary in areas where the political environment remains divided by race. Chief Justice Roberts is surely correct that political conditions have improved over time in the areas identified by Section 4.¹⁶³ However, he is incorrect to assert that these

161. See *Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 106 (2008) (statement of Gilda R. Daniels, Assistant Professor, University of Baltimore School of Law); see also Heather Gerken, *The Missing Right to Vote*, SLATE (June 13, 2012), <http://hive.slate.com/hive/how-can-we-fix-constitution/article/the-missing-right-to-vote>.

162. See *Arizona*, 133 S. Ct. at 2256–57 (outlining the proposed yet untested balance of power between state and federal enforcement regimes to regulate voter identification laws).

163. *Shelby Cnty v. Holder*, 133 S. Ct. 2612, 2628–29 (2013).

areas are now virtually indistinguishable from the remainder of the nation. By ignoring the ongoing differences within these areas, a de-racialized reform effort might well miss severe manifestations of race discrimination present in the areas on which Section 5 focused.

B. Litigation Centered Enforcement

An alternate approach would take the Court's invitation at face value and rely solely on litigation as a means of enforcing voting rights. Although it does not retreat from the cause of employing race-based remedies, this approach departs from the strategy of using an administrative remedy, such as preclearance, to select jurisdictions based on their prior behavior. Instead, the remedial approach ties federal action to litigation activity, which would essentially isolate those parts of the country where plaintiffs successfully challenge discriminatory provisions and structures.

The most commonly advocated version of this approach directs attention to Section 2 of the Voting Rights Act, an entitlement for plaintiffs to file lawsuits in district court that currently applies nationwide and adopts a traditional adversarial posture. By returning to lawsuit-based attacks on discriminatory provisions, litigants will be pressed to focus on the individual circumstances of each case. It is argued that little if anything would be lost in a reformed regime because many of the prior restraint measures that are built into Section 5 are also available using temporary restraining orders or preliminary injunctions. Ultimately, Congress could develop a more current record based on the rates of rights violations and associated court findings from Section 2 challenges that might later merit a more specialized administrative remedy.

Some advocates would endorse a set of enhancements to Section 2 that would offer greater ease with which to pursue voting litigation.¹⁶⁴ For example, one could push for a more forgiving standard for a preliminary injunction where voting regulations are concerned, in light of the pressing time considerations of elections. One might also suggest that relying on Section 3 (the bail-in procedure) represents an enhanced version of the traditional litigation approach.¹⁶⁵ Under

164. See Bernice M. Bird, Section 2 as an "Adequate Substitute" for Section 5: Proposing an "Effects-Only" Test as an Amendment to Section 2 of the Voting Rights Act of 1965 (Dec. 2012) (unpublished paper), available at http://works.bepress.com/bernice_bird/3/.

165. See Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 *YALE L.J.* 1992, 1997 (2010) ("[C]ivil rights groups can redefine the

Section 3, a jurisdiction that is found to have violated constitutional rights might be ordered to comply with the preclearance regime where a judge finds that remedy appropriate.¹⁶⁶ Unlike the version of preclearance voided in Section 5, the trigger for coverage here would be more individualized and only follow after an evidentiary showing that the behavior of the jurisdiction demanded a more sweeping remedy than an order of damages.

As appealing as a singular reliance on this litigation approach sounds in theory, it tends to ignore much of the reality that gave rise to the preclearance system in the first place—it was the inability of federal litigation on its own to address the problems that convinced Congress to develop an oversight scheme.¹⁶⁷ The problems were too widespread and the defendants were too innovative; traditional lawsuits could not keep up with such a dynamic target.¹⁶⁸

Even though it is undisputed that the situation in covered states has improved since 1965, the time and costs associated with litigation—both for the Department of Justice and private civil rights attorneys—remain considerable.¹⁶⁹ At present, the costs associated with obtaining experts, developing strategies, and conducting a trial would stretch present public and private resources quite thin. Further, the increased use of litigation would mean that states themselves would be subject to higher expenditures to respond to complaints. Even if lawsuits were successful, the negative byproducts of increased litigation makes this strategy rather undesirable.

The proposals for litigation enhancement would also require Congress's endorsement, which would presumably require votes from members who would be disinclined to increase the chances their states would find themselves named as defendants in race-based challenges. Though there may be some appeal in this approach relative to the preclearance system, it is not at all obvious that this effort would be more popular among opponents of anti-

preclearance regime through litigation.”).

166. *Id.*

167. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (“Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.”).

168. *Id.*

169. *Voting Rights Act After the Supreme Court's Decision in Shelby County: Hearing Before the Subcomm. on the Constitution and Civil Justice*, 113th Cong. 52–58 (2013) (statement of Spencer Overton, Professor of Law, The George Washington University Law School).

discrimination lawsuits.¹⁷⁰

Perhaps most daunting, though, is the very real possibility that the existing set of protections now contained in Section 2 will be struck down. A subset of the same parties that have attacked the constitutional basis for Section 5 have also vowed to turn their attention to undermine the effects-based test that supports Section 2's concept of vote dilution.¹⁷¹ If successful, the effort could eliminate any effective legal protection in the Voting Rights Act. To the extent the Roberts majority already views affirmative action policies in contexts like education with disfavor,¹⁷² it is quite possible that such a future legal challenge in the voting rights sphere could succeed by framing the litigation as a departure from the principle that unconstitutional state-based discrimination has to be intentional in nature.¹⁷³

C. Reinforcing Existing Section 5

The third approach, the one that we endorse, is an effort to reinforce the provision at issue in *Shelby County*. It takes the majority's statement in *Shelby County* on its own terms as an invitation to show the Chief Justice what he does not see: a basis for differential treatment—using readily available information in the record. This approach would make explicit use of current relevant criteria in a formula that reinforces the ongoing legislative record to identify those communities with persistent problems of political incorporation.

We reject the arguments favoring a wholesale retreat from the transformative approach of preclearance.¹⁷⁴ First, nothing in *Shelby*

170. See, e.g., ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 137–91 (1987) (describing a negative view of novel enforcement theories in the absence of congressional action to change the statute itself).

171. See *Holder v. Hall*, 512 U.S. 874, 893–94 (1994) (Thomas, J., concurring) (“A clear understanding of the destructive assumptions that have developed to guide vote dilution decisions and the role we have given the federal courts in redrawing the political landscape of the Nation should make clear the pressing need for us to reassess our interpretation of the Act.”); THERNSTROM, *supra* note 170, at 233–35 (criticizing the application of “vote dilution” jurisprudence as a judicial misadventure).

172. See *supra* Part I.

173. Already, parties have put forth arguments in the context of Section 2 lawsuits advancing a limited interpretation of the provision against challenges to voter identification laws, suggesting that the provision is unconstitutional if applied to these statutes. See Defendant's Motion to Dismiss at 21–25, *Veasey v. Perry*, No. 2:13-CV-193 (S.D. Tex. Dec. 20, 2013); see also *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (“Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.” (citation omitted)).

174. See Kareem Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 232

County establishes a clear statement that Congress may not devise a regulation that addresses a problem more pronounced in some states than in others. As Justice Ginsburg highlighted in her lively dissent, legislative enactments commonly differentiate among the states based upon the presence or absence of certain factors.¹⁷⁵ And these criteria can work in situations where states are identified to benefit as well as to incur special responsibilities.¹⁷⁶

The majority offered no sufficient answer to this charge,¹⁷⁷ which suggests that it does not view the differential approach to regulation as inherently troubling. Indeed, the majority seemed to focus on the need for a rational connection between the formula and current conditions on the ground.¹⁷⁸ Of course, election regulation may be the presumptive domain of state sovereignty for the Court, but nothing in *Shelby County* purports to change the continued application of the *City of Boerne* line of cases.¹⁷⁹ The cases following the *City of Boerne* logic make clear that because the Voting Right Act intersects two substantive areas of heightened constitutional attention, it deserves a level of deference in the fit analysis;¹⁸⁰ there is little to suggest that a current-conditions formula would fail judicial review.

Second, our approach is desirable because it utilizes an established set of principles and metrics already familiar to local jurisdictions and states that have been subject to Section 5. So too would the courts have greater ease in the application of a reinforced law. One great peril of completely scrapping the existing preclearance structure is that any new system would leave questions about meaning and application that would need to be resolved by the Supreme Court.

(2010) (proposing “a distinct way of defining the substantive aims of the preclearance system”).

175. See *Shelby Cnty v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting) (“Today’s unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. . . . Do such provisions remain safe given the Court’s expansion of equal sovereignty’s sway?” (citations omitted)).

176. *Id.*

177. See *id.* at 2630 (majority opinion) (“The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary.”).

178. See *id.* at 2631.

179. See *id.* (purporting to address only the mismatch between the statute’s targeting formula and current conditions, which the Court refers to as an “initial prerequisite” for Section 5 to be constitutional).

180. See *supra* Part I.

With the reinforced law, the Court would be limited (at least to some extent) by existing precedent, which would tend to preserve the level of substantive improvement in representation for racial minorities in a given political community.¹⁸¹ Though there are, of course, issues that remain unclear or ambiguous under the current system, the terms of the debates are well laid out to interested parties. Starting anew poses some risks for minority populations, whose rights were hard won and whose continued progress in the political system should not be taken lightly.

Finally, the approach takes account of what we find is the central concern of the preclearance system—the transformation of states with longstanding histories of racial exclusion. The goal is ultimately to aid in eliminating the vestiges of racially discriminatory culture and practices and to establish more durable and effective communities that are open to voters regardless of their race. Achieving this long-term goal demands sustained attention to assure that hard won gains are not quickly reversed or lost.

Notwithstanding the Roberts majority's assertion to the contrary,¹⁸² important effects of the pre-1965 era of exclusion remain present and pronounced in much of the preclearance territory as compared to elsewhere.¹⁸³ To the extent that these jurisdictions remain standouts, retreating from the task of reforming their systems essentially endorses the maintenance of institutionalized race discrimination, along with the backsliding Congress hoped to prevent.¹⁸⁴ And those who would bear the greatest burden of such an outcome are the very populations that were deprived of their fundamental rights for an extended portion of this nation's history.

There are two broad approaches that Congress might take as part of this strategy to reinforce Section 4 and Section 5 of the Voting Rights Act. To illustrate we offer likely scenarios that would indicate the geographic reach of adopting each approach. First, legislators could use current evidence that closely tracks participation factors

181. Because the structure of Section 5 is intended to prevent jurisdictional backsliding, *see Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 323 (2000), the reinforced provision would generally serve to maintain existing levels of representation and political clout for a protected group.

182. *See Shelby Cnty.*, 133 S. Ct. at 2625 (explaining how “things have changed dramatically”).

183. *See* Brief of Political Scientists, *supra* note 109, at 39 n.115.

184. *Id.* at 4–5.

very similar to those used by sponsors in 1965.¹⁸⁵ Alternatively, Congress could take a more modern approach and marshal additional factors related to (though not directly analogous) to the factors traditionally used to support the preclearance formula.

1. Participation Based Formula

Even Chief Justice Roberts would agree that participation is a valid metric on which to assess the entrenchment of the right to vote.¹⁸⁶ The apparent problem in *Shelby County* is that the metrics for turnout and registration have substantially improved since 1965, which in the majority's view obviated the need for a continued remedy.¹⁸⁷ Although racial parity seems the norm for presidential elections (the length of time that Congress used in 1965), Professor Bernard Fraga has provided helpful analysis showing the persistence of clear turnout differentials during mid-term election years that tend to distinguish areas that were subject to preclearance.¹⁸⁸ In his treatment of data over a series of years, Fraga finds evidence for the proposition that Roberts embraces regarding turnout during presidential years: Blacks tend to have equal (or at times, greater) rates compared to Whites on turnout measures during the last two presidential elections, and preclearance states are generally more favorable on this score.¹⁸⁹

In stark contrast, however, patterns of voting turnout in midterm elections do not show parity. As Fraga writes:

Nationwide, African-American voter turnout was approximately 15 percentage points below that of the non-Hispanic White population in 2006, and 12 points below White turnout in 2010. In 2008 and 2012, however, Black turnout was within 5 percentage points of White turnout. Despite recent gains, there is not consistent racial parity in voter turnout.¹⁹⁰

185. See Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, *supra* note 101 at 7, 18–19.

186. See *Shelby Cnty.*, 133 S. Ct. at 2626 (relying on data showing an increase in African-American voter registration).

187. *Id.*

188. 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/> (noting that whereas many Southern states ask citizens their race when they register to vote, other states do not; thus, estimates of race are made based on “census block demographic data and name matching”).

189. *Id.*

190. *Id.*

States like Texas, New York, Florida, and Virginia have markedly higher disparities between Black and White voter turnout in mid-term election years.¹⁹¹ This trend helps to explain why one might find the rise of the Tea Party in the 2010 midterm election, shortly after Obama's victory, a historic election of the nation's first non-White president.¹⁹² But more to the point, these disparities offer some indication that incorporating off-year elections (involving only state and local races or midterm years) may lead to a different assessment. Insofar as midterm elections focus on legislators, who directly represent the people, Congress might find that a formula incorporating turnout during years that do not involve a presidential election reaches more jurisdictions than before.

2. Formula Utilizing Racial Bias

A second approach to an updated formula, which would likely incorporate much of the existing preclearance territory, could rely on current data on the demonstrated unwillingness of White voters to cooperate across racial lines. As mentioned in Part II of this Article, there are ample measures in political science that assess how frequently these negative and racialized viewpoints interact with the existing political structure to impede minority political effectiveness.¹⁹³

On this score, the Chief Justice maintains a clear hesitation about the relevance of this kind of data in his analysis. His negative comments about the preclearance formula in *Shelby County* instead fixate on the traditional participation factors that Congress identified in 1965.¹⁹⁴ However, this critique would only be sensible if one assumes that the right to vote is limited to those steps necessary to cast a ballot in the election—the obvious main concern when outright vote denial was the norm. But the great weight of the case law, from *Katzenbach to Thornburg v. Gingles*,¹⁹⁵ also expresses a much broader

191. *Id.*

192. See CHRISTOPHER S. PARKER & MATT A. BARRETO, CHANGE THEY CAN'T BELIEVE IN: THE TEA PARTY AND REACTIONARY POLITICS IN AMERICA 214–17 (2013) (providing survey evidence that Tea Party members, even accounting for ideology, hold negative views about racial minorities in general and President Obama in particular).

193. As discussed in Part II of this Article, there are ample measures applied in political science that assess how frequently these negative and racialized viewpoints interact with the existing political structure to impede minority political effectiveness.

194. See *Shelby Cnty v. Holder*, 133 S. Ct. 2612, 2626 (2013) (relying on voter registration data).

195. 478 U.S. 30 (1986).

concern with the effectiveness of the votes that are cast.¹⁹⁶ The political rules and systems that translate those ballots into electoral success and governing authority are equally at play. The second-generation matters, which relate to how cast votes are aggregated and valued, are equally relevant to assessing the full and fair exercise of the right to vote.¹⁹⁷

Moreover, the Roberts majority's fixation on the fact that Congress in 1965 did not explicitly address factors related to dilution¹⁹⁸ is of no particular significance. The Southern strategy of enacting measures to achieve outright vote denial prior to the Voting Rights Act obviated the need for metrics to track the effectiveness of cast ballots. For the most part in the South, there were no votes cast by Blacks in any large number.¹⁹⁹ Accordingly, one cannot rely upon the mere absence of these measures in the original formula as evidence that Congress never thought these issues were relevant. As the maps in Figures 1–3 show, political attitudes of racial resentment, anti-immigrant biases, and racial polarization are most prevalent in states covered by Section 5. This pattern persists for all three indicators of racial disparity.²⁰⁰

196. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 565–66 (1969) (“The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations [T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes ‘all action necessary to make a vote effective.’” (citations omitted)).

197. The term “second generation” voting issues refers to the problem of vote dilution, i.e., concerns having to do with the counting and value of cast ballots. See Chandler Davidson & Bernard Grofman, *Introduction to QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, *supra* note 102, at 3, 14–15 (discussing the parallel generations of voting rights research and measurement). These are related to the “first generation” matters concerning qualification for the franchise and casting of the ballot, however, the *Shelby County* Court sees these as distinct problems, not of concern to Section 5 of the Voting Rights Act. See *Shelby Cnty.*, 133 S. Ct. at 2629 (“The dissent relies on ‘second generation barriers,’ which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem.”).

198. See *Shelby Cnty.*, 133 S. Ct. at 2625 (looking only to tests, devices, and low voting rate).

199. See Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 542 (1972) (noting that during and after Reconstruction, “the various disfranchising vehicles” served to wholly eliminate Blacks from the political process, with “rare exceptions”).

200. In geographic fashion, these figures display upon the contemporary social science data referenced above by state. Figure 2 includes a total of eleven of the “top ten” racially polarized states due to a tie among four states. In each figure, the Section 5 states in the Deep South consistently fall within targeted areas. Though the three factors do not capture every one of the Section 5 jurisdictions, Section 5 jurisdictions do represent a majority of the areas where these disparity measures are the highest. Furthermore, there is no constitutional requirement that Congress design remedies that perfectly align with the states that were initially designated by the triggering formula. Where the underlying theory for the remedy is that the project of reforming originally designated states is a long term one, Congress could reasonably conclude that the evidence endorses an approach of caution before ending federal review.

Figure 1.

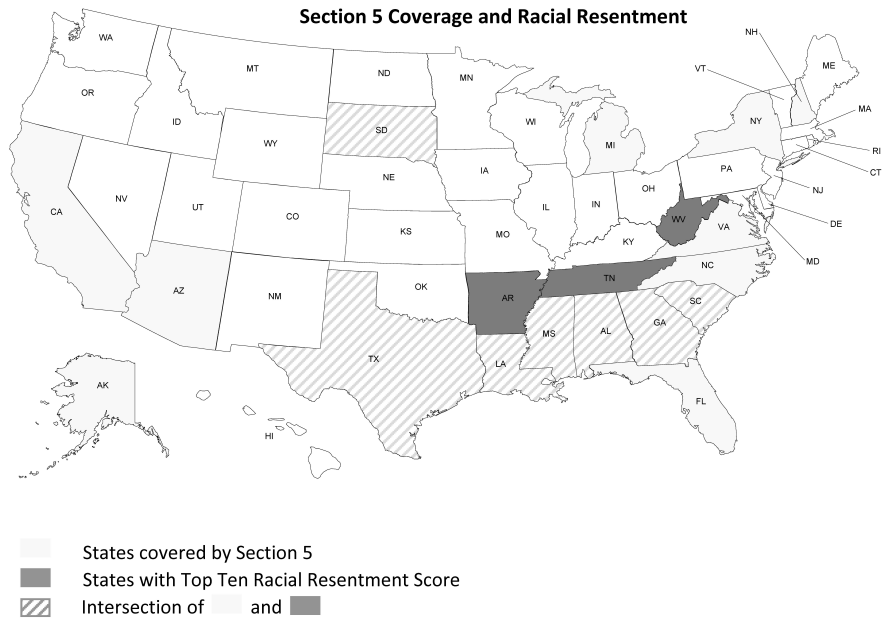


Figure 2.

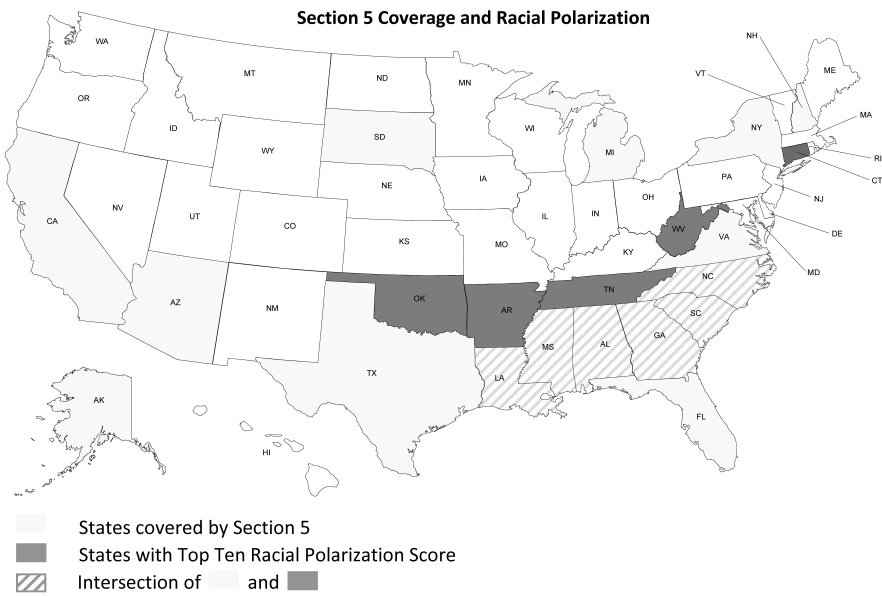
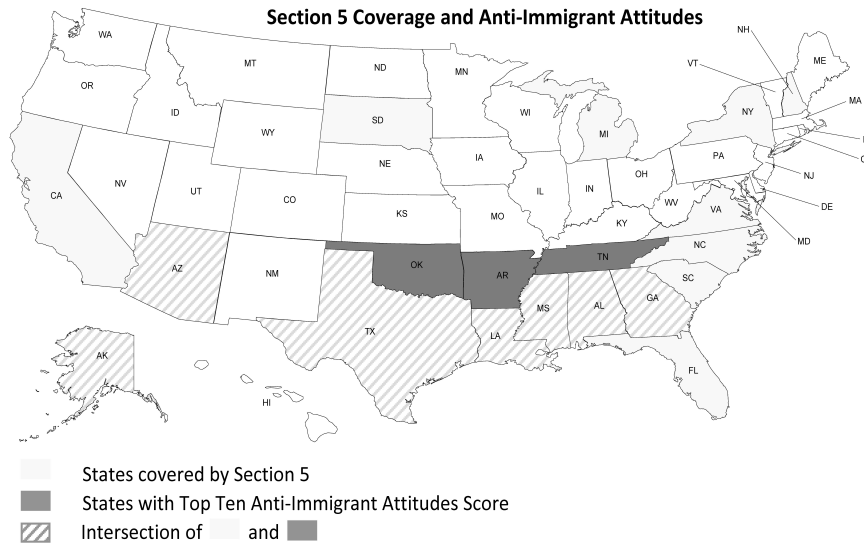


Figure 3.



CONCLUSION: AFTER *SHELBY COUNTY*

Though the majority in *NAMUDNO* expressed uncertainty about whether there was sufficient justification for the burden of preclearance to outweigh the apparent unequal treatment among the states,²⁰¹ the *Shelby County* Court was unequivocal.²⁰² In *NAMUNDO*, judgment was rendered and the question regarding the evidence of continuing racial disparities was settled: “The statute’s coverage formula is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”²⁰³

This comment about the age of the coverage formula belied the position that the majority eventually would take in *Shelby County*: The formula was both anachronistic and unnecessary.²⁰⁴ Contrary to

201. See *Shelby Cnty.*, 133 S. Ct. at 2624 (“[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”).

202. Compare *NAMUDNO*, 557 U.S. 193, 203 (2009) (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.”), with *Shelby Cnty.*, 133 S. Ct. at 2631 (“[W]e expressed our broader concerns [in *NAMUDNO*] about the constitutionality of the [Voting Rights] Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.”).

203. *NAMUNDO*, 557 U.S. at 203.

204. See *Shelby Cnty.*, 133 S. Ct. at 2629 (“Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.”).

the informed actions of Congress and the will of the American people, the *Shelby County* Court seemingly found that the era of the most pernicious racial discrimination—at the structural, institutional, and individual level—had ended.²⁰⁵ In contrast, the record of systemic and empirical evidence reviewed here reveals that continuing racial disparities in once-covered jurisdictions remain visible to the naked eye. Our ignominious past of slavery and the perpetuation of racial antipathy over the vast majority of the nation’s history remain codified in the political DNA of preclearance locations. Once blatantly enshrined in constitutions and state and local election laws, these social ills now are revealed through systematically higher levels of racial antipathy, racially-polarized voting, and barriers to voting that disproportionately affect minority voters in these locations. This considerable evidence, which persuaded vast majorities in Congress and a United States President, was nevertheless ignored and denied by *Shelby County*’s five-member majority.

Institutionalized political exclusion based on race had profound effects not just on eliminating Black voting and registration, but also on election outcomes and public policy. It allowed governors like George Wallace to grandstand in support of maintaining all-White public universities.²⁰⁶ It was also the reason that Senators like Strom Thurmond and Richard Russell were able to block and dilute proposed national civil rights legislation during the first half of the twentieth century.²⁰⁷ A politics of, by, and for the concerns and interests of one racial group to the exclusion of all others is indeed the essence of racial entitlement. And the system designed to exclude Black political voices in the South was built to last.

It would take the lives of many women and men in the civil rights movement and the passage of the 1965 Voting Rights Act for the nation to dedicate itself anew in the twentieth century to dismantling state-sponsored voting discrimination. The law’s constitutionality has been affirmed multiple times by the Supreme Court. In *Katzenbach*,

205. See *id.* at 2631 (“Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”).

206. See George C. Wallace, Governor of the State of Alabama, Inaugural Address 2 (Jan. 14, 1963) (transcript available at <http://digital.archives.alabama.gov/utlils/getfile/collection/voices/id/2952/filename/2953.pdf>).

207. See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 921 (2009) (describing the key role of Senators Russell and Thurmond in the effort to scuttle earlier civil rights provisions in 1957).

in which only one Justice partially dissented, the Court acknowledged the judiciary's role in countenancing the entrenchment of race discrimination in politics.²⁰⁸ As recently as 2009, the majority opinion of the Roberts Court in *NAMUDNO* noted that, despite its misgivings about the statute, these systematic and state-sanctioned violations of rights were "exceptional conditions . . . [that] justified extraordinary legislation."²⁰⁹

As the petitioner in *Shelby County* observed, nearly a century would pass between the ratification of the Fifteenth Amendment and the implementation of the Voting Rights Act.²¹⁰ Although the "half-life" of the virulent racial antipathy that fueled discriminatory voting procedures in preclearance states is unknown, experience admonishes us all to take great care in eliminating effective safeguards until it is unequivocally demonstrable that covered jurisdictions are no different from non-covered locations.

208. *South Carolina v. Katzenbach*, 383 U.S. 301, 325–26 (1966).

209. *NAMUNDO*, 557 U.S. 193, 211 (2009) (quoting *Katzenbach*, 383 U.S. at 334) (internal quotation marks omitted).

210. Brief for Petitioner, *supra* note 88, at 2.