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State's Rights, Last Rites, and Voting Rights

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There are two ways to read the Supreme Court's decision in Shelby County Alabama v. Holder: as a minimalist decision or as a decision that undermines the basic infrastructure of voting rights policy, law, and jurisprudence. In this Article, we present the case for reading Shelby County as deeply destabilizing. We argue that Shelby County has undermined three assumptions that are foundational to voting rights policy, law, and jurisprudence. First, the Court has generally granted primacy of the federal government over the states. Second, the Court has deferred to Congress particularly where Congress is regulating at the intersection of race and voting. Third, the Court and Congress have understood that racial discrimination is a problem and have operated from a similar conception of what racial discrimination means. Shelby County undermines all three assumptions. We explore what this means for voting rights policy, law, and jurisprudence going forward.

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State's Rights, Last Rites, and Voting Rights

GUY-URIEL E. CHARLES* & LUIS FUENTES-ROHWER**

I. INTRODUCTION

In *Shelby County, Alabama v. Holder*,¹ the United States Supreme Court struck down Section 4(b) of the Voting Rights Act (VRA), the provision that identified the jurisdictions required to obtain federal preclearance, under Section 5 of the Act, for any policy changes related to voting.² Though the Court did not strike down Section 5,³ the Court has effectively declared an end to the Section 4-Section 5 coverage-preclearance tandem that had been in place since the Act's enactment in 1965.

The Court's decision in *Shelby County* did not come as a surprise to voting rights experts. Four years prior to *Shelby County*, in *Northwest Austin Municipal District Number One v. Holder (Northwest Austin)*,⁴ the Court threatened to strike down Section 5 as unconstitutional.⁵ Though the Court ultimately decided *Northwest Austin* on statutory grounds, it was abundantly clear then that a majority of Justices were hostile to important provisions of the Act and that the Act was living on borrowed time.⁶

What was surprising about *Shelby County* was the nature of the Court's legal analysis. Chief Justice Roberts's opinion for the Court's conservative majority vacillated between Section 5 and Section 4 before settling on Section 4 as the problem.⁷ Most surprisingly, the Court did not hang its hat on a federalism rationale, but instead it focused on the failure of Congress to treat the states with equal dignity.⁸ This principle of equal dignity,

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¹ 133 S. Ct. 2612 (2013).

² *Id.* at 2631.

³ *Id.* at 2618, 2631.

⁴ 557 U.S. 193 (2009).

⁵ *See id.* at 202 (noting that Section 5 exceeds the prohibition of the Fifteenth Amendment).

⁶ *See id.* at 202–03 (noting that improvements to the Act were insufficient to justify such features as the preclearance requirement and that the Act needed to be modified to accommodate current societal needs).

⁷ *See Shelby Cnty.*, 133 S. Ct. at 2627–28, 2631 (deciding that only the coverage formula found in Section 4 is unconstitutional, not Section 5).

⁸ *See infra* text accompanying notes 242.

though mentioned in *Northwest Austin*, was explicitly rejected in *South Carolina v. Katzenbach*,⁹ the landmark voting rights case, yet resurrected to justify the Court's decision in *Shelby County*.¹⁰

Reading the opinion optimistically, *Shelby County* could have been worse, a lot worse. It is possible to read *Shelby County* as a narrow and arguably minimalist opinion. For example, though the Court struck down Section 4's coverage formula, it did not deem Section 5 and the preclearance requirement unconstitutional.¹¹ Moreover, the opinion does not have any obvious bearing on Section 2 of the VRA.¹² Notwithstanding the Court's conclusion that the particular coverage formula employed by the VRA was unconstitutional, the Court did not express any constitutional opposition to coverage formulas per se and just focused on this one, which it did not find justifiable on current facts.¹³ This leaves open the possibility that an updated formula would pass constitutional scrutiny.

Additionally, while the opinion is less than pellucid with respect to the standard of review that the Court employed to evaluate an act of Congress, there is a good case to be made that the standard of review is unsettled and left to be decided for another day. Better yet, one can argue that the Court applied rational basis review, admittedly with some bite, and that the Act failed rational basis review because Congress failed to do *any* updating.¹⁴ Consequently, under this reasoning, a new coverage formula should easily pass rational basis review, even a rational basis standard that is applied with some bite.¹⁵

Further, to the extent that the decision was motivated by what the Court viewed as political avoidance on the part of Congress—the failure of that body to update the VRA because it refused to bear the political costs of doing so¹⁶—one could view *Shelby County* as not reflecting hostility to the VRA itself but as communicating a message to Congress about the perils of political avoidance. Relatedly, if we had a functioning Congress,

⁹ See 383 U.S. 301, 328–29 (1966) (“The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”) (citation omitted).

¹⁰ *Shelby Cnty.*, 133 S. Ct. at 2620.

¹¹ *Id.* at 2631 (emphasizing that the Court did not issue any opinion on Section 5 itself).

¹² In fact, the Court took pains to underscore by the end of its opinion that its “decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.” *Id.*

¹³ *Id.* at 2629–30.

¹⁴ See, e.g., *id.* at 2630–31 (“If Congress had started from scratch in 2006, . . . It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data . . .”).

¹⁵ See, e.g., *id.* at 2631 (“Congress may draft another formula based on current conditions.”).

¹⁶ See Richard H. Pildes, *Political Avoidance, Constitutional Theory and the VRA*, 117 YALE L.J. POCKET PART 148, 153 (2007), available at <http://www.yalelawjournal.org/forum/political-avoidance-constitutional-theory-and-the-vra> (noting that Congress has not renewed the VRA since 1982).

one that could respond as an institution to the Court's invitation to update the Act, one might view *Shelby County* as dialogic. On this reading, *Shelby County* would be contributing to the furtherance of voting rights policy by providing Congress an incentive to act and to amend the VRA to reflect twenty-first century concerns.

This narrow and minimalist interpretation of the case is plausible, though, perhaps much too optimistic.¹⁷ The departing premise of this optimistic read of *Shelby County* is that the Court essentially left intact the basic infrastructure of its voting rights jurisprudence. But what if, instead, the Court unsettled the fundamental premises of its voting rights jurisprudence? If *Shelby County* signals the need for a complete reset on the approach to voting rights that has been in effect for the latter half of the twentieth century, what then is the import for voting rights reform and jurisprudence going forward?

Consider instead a less optimistic reading of *Shelby County*, one that views the Court's decision as deeply destabilizing to the infrastructure of voting rights law and policy. Such a reading construes *Shelby County* as a radical departure from past precedent, particularly from *South Carolina v. Katzenbach*.¹⁸ More specifically, we understand modern voting rights law, policy, and jurisprudence—that is, voting rights law, policy, and jurisprudence since 1965—as based upon a number of foundational and basic assumptions. Three are absolutely critical. First, the Court has generally granted primacy to the federal government over the states with respect to the authority to regulate elections.¹⁹ Federal regulation, particularly at the intersection of race and voting, displaced conflicting state regulation.²⁰

Second, the Court has accorded Congress a fair amount of deference and leeway, particularly when Congress attempts to address the problem of racial discrimination in democratic politics.²¹ When Congress has regulated at the intersection of race and voting, the Court has generally provided

¹⁷ For a similar assessment of the case, see Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714 (2014).

¹⁸ See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1965) (holding that sections of the VRA that South Carolina challenged are constitutional).

¹⁹ See *id.* at 334 (acknowledging that the Act deviates from traditional congressional action, but that such deviation is deemed appropriate in certain circumstances); see also *Shelby Cnty.*, 133 S. Ct. at 2624 (noting that the Court had upheld the Act permitting Congress to depart from traditional governmental principles in the past).

²⁰ See *Shelby Cnty.*, 133 S. Ct. at 2629 (commenting that the Fifteenth Amendment gives Congress the power to identify and change laws in jurisdictions that abridge one's right to vote because of his or her race).

²¹ See *id.* at 2646–47 (citing *United States v. McGregor*, 824 F. Supp. 2d 1339, 1344–48 (M.D. Ala. 2011)) (noting that case law illustrates the prevalence of racism in state politics).

Congress a fair amount of deference as to its choice of means.²² And third, the Court, Congress, and the Executive Branch have generally operated from a similar and fluid conception of racial discrimination. All three branches agreed that racial discrimination was a significant problem to be addressed and all three have had the same general understanding of racial discrimination, at least as a point of departure: intentional discrimination by state actors.²³ But more importantly, the Court has permitted Congress to define and regulate discrimination broader than just intentional discrimination, such as vote dilution or racial disparate impact, in large part because of the need to eradicate intentional racial discrimination in voting.²⁴

When the Court held that Section 4(b) was unconstitutional in *Shelby County*, it did not simply strike down a key provision of the VRA. Far more importantly, it also questioned these key assumptions that undergirded modern voting rights law and policy. *Shelby County* portends a realignment in voting rights law and policy.

Voting rights policy, law, and jurisprudence must now pivot from *Shelby County*. As a consequence there is much at stake in properly interpreting the case. The voting rights bar must use *Shelby County* not just to anticipate as accurately as possible the Court's next move, but also to think about where voting rights law and policy are likely to go. To some, voting rights policy ought to severely break with the approach of the past, while others argue that voting rights policy should adopt a "mend-it, don't end-it" approach by continuing the race-based and centralized regulatory structure to protecting voting rights.²⁵ Voting rights activists are currently and urgently pressing the race-based approach against a structural

²² See, e.g., *Katzenbach*, 383 U.S. at 324 (holding, inter alia, that the Fifteenth Amendment allows Congress to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting").

²³ See The Voting Rights Act of 1965, 42 U.S.C. §§ 1973b, h (banning tools that states used to intentionally discriminate against minority voters, such as literacy tests and poll taxes); *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 225 (2009) (Thomas, J., concurring in part and dissenting in part) ("[T]he constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible.").

²⁴ See *Shelby Cnty.*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting) ("[T]his Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.") (citations omitted).

²⁵ On the centralized regulatory framework of the VRA see, for example, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131, 132 (2013), http://www.yalelawjournal.org/pdf/1172_7tf1ew4q.pdf and Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 116 (2013) (describing the "command-and-control" regulatory model of the VRA).

rethinking of voting rights law, policy, and jurisprudence.²⁶ In particular, voting rights activists are urgently lobbying in favor of a revised race-based and centralized coverage formula as a *Shelby County* fix that would essentially reinstate the coverage-preclearance tandem.²⁷ The preference for a race-based approach is driven by the belief that race continues to be the primary problem in voting. The preference for a centralized approach is supported by the belief that what we have called elsewhere the “public protection model” is the most effective way of conducting voting rights policy.²⁸

Coming to terms with the meaning and scope of *Shelby County* is thus important for at least three reasons. First, the constitutional viability of a legislative response to *Shelby County* will depend in part on the scope of *Shelby County*. A race-based revised coverage formula that reinstates the coverage-preclearance tandem assumes that *Shelby County* is a narrow, minimalist opinion that did not disturb the fundamental underpinnings of modern voting rights jurisprudence. If the narrow reading of *Shelby County* is correct, a race-based formula that essentially updates the old coverage formula should easily pass constitutional scrutiny. But to the extent that *Shelby County* conveys a deeper hostility to the regulatory logic of the VRA and to the extent that *Shelby County* has undermined the jurisprudential infrastructure that once sustained the VRA, such an approach is not likely to be successful.

Second, the Court’s decision in *Shelby County* may be significant because it reflects a broader trend away from the dominant civil rights model. That is, *Shelby County* may be reflecting or anticipating a trend away from a race-based and centralized regulatory structure and towards something else. To the extent that *Shelby County* portends a move away from the centralized public protection model—that is, to the extent that the conservatives on the Court have anticipated or are reflecting an erosion of support in the political process for the current regulatory framework—voting rights activists would be wise to focus their efforts more on the future and less on the past.

²⁶ See Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2838 (2014) (describing legislative responses proposed by voting rights activists).

²⁷ This is precisely what the recent Amendment to the VRA does. See Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(b)(3) (2014) (providing, inter alia, standards for determining whether local or state governmental actions violate a citizen’s voting rights on racial grounds); see also Bagenstos, *supra* note 26, at 2838 (describing legislative responses proposed by voting rights activists).

²⁸ See Charles & Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, *supra* note 25, at 132 (“The twenty-first century presents voting rights activists and scholars with two different frameworks for securing and protecting voting rights. The first framework is essentially the centralized regulatory structure that is quite familiar to voting rights activists and scholars. For ease of explanation, we term this framework ‘the public protection model.’ Under this model, Congress identifies both violators and violations.”).

Third, even if *Shelby County* does not impose significant constitutional constraints on future policy proposals and even if *Shelby County* does not reflect a broader political zeitgeist toward a different regulatory structure for voting rights policy, *Shelby County* might tilt the policy space against the current regulatory framework.²⁹ Thus, public policy options that were on the wall before *Shelby County* are now off the wall after *Shelby County*.

Put a different way: a race-based *Shelby County* fix will most likely depend upon a broader definition of racial discrimination than is consistent with a reasonable reading of *Shelby County*, something broader than intentional discrimination.³⁰ Such a fix will also depend on a robust conception of congressional power as against the states to enforce the Reconstruction Amendments so as to prohibit racial discrimination in voting, as well as an assumption that the Court will generously defer to Congress's factual determinations. This is a tall order. If the voting rights bar bets wrongly on the meaning of *Shelby County*—that is, if *Shelby County* is more disruptive than most voting rights activists assume—a race-based approach that attempts to reinstate the coverage-preclearance arrangement is not only likely to be struck down, but it will also jeopardize other VRA provisions that are currently constitutional such as Section 2 and Section 5.

In this Article, we present the case against an optimistic reading of *Shelby County*. Part II argues that the Court in *Shelby County* has declared that systematic racial discrimination—what we term the “Era of Big Racism”—is no longer a significant problem in voting. Part III maintains that the Court has also indicated that it will no longer defer to Congress on voting rights policy. Part IV shows that the telos of *Shelby County* is the redemption of the South and the states from the past.³¹ Consequently, as long as the current majority controls the Court, any future regulation that depends upon systematic racial discrimination as justification, distinguishes among the states, and attempts to make Congress the

²⁹ An apt example is the Court's decision in *Beer v. United States*, in which the Court held that Section 5 of the VRA is violated only when a covered jurisdiction makes voters of color worse off. *Beer v. United States*, 425 U.S. 130, 140–41 (1976). It is not violated when a covered jurisdiction does not make voters of color better off. *Id.* For a long time, both the liberals on the Court and, more importantly, the voting rights community have deplored the *Beer* decision. *Id.* However, *Beer* has become such an integral fabric of voting rights law and policy that the voting rights bar sought to enshrine the *Beer* standard in the VRAA. *Id.*

³⁰ In fact, the recent amendment to the Voting Rights Act, proposed by Representatives Jim Sensenbrenner and John Conyers in the House and Patrick Leahy in the Senate, does just that. It defines discrimination to include vote dilution, objection letters by the Department of Justice, and intentional discrimination. H.R. 3899, 113th Cong. (2014); S. 1945, 113th Cong. (2014).

³¹ Prior to the Court's decision in *Shelby County* but after oral arguments in the case, Professor Joseph Fishkin advanced a very thoughtful argument along similar lines. See Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 175–76 (2013), http://www.yalelawjournal.org/pdf/1174_yst6fvo.pdf (discussing the concept of equal dignity afforded to states and its centrality to the issues presented before the Court in *Shelby County*, as well as the concept's philosophical roots).

guarantor of voting rights for voters of color over the states will be constitutionally suspect. By way of a conclusion, we consider the future of voting rights policy under a future Supreme Court that would be more receptive to the use of race in public policy.

II. THE END OF BIG RACISM? (IN VOTING?)

The voting rights bar is in the midst of two interrelated debates. The first is whether race continues to be a significant problem in voting. The second concerns whether voting rights policy going forward ought to be race-based or universalist. Most voting rights activists are currently urging a race-based approach that updates the coverage formula and reinstates the coverage-preclearance regime that the Court undermined in *Shelby County*. They view racial discrimination as an enduring and central problem in voting.

As with the voting rights bar, voting rights scholars are also in the midst of a debate with respect to the continued relevance of race and the proper response to *Shelby County*. Professor Rick Pildes began this debate years ago when he argued that “the narrow targeting model of Section 5 – its effort to single out particular areas and changes in voting rules – is less well suited to the voting rights problems of today than was the original Section 5 to the voting-rights problems of its day.”³² Professor Samuel Issacharoff has similarly argued against a race-based approach on the ground that “current voting controversies, unlike the concerns of racial exclusion under Jim Crow, are likely motivated by partisan zeal and emerge in contested partisan environments.”³³ In a related vein, Professor Richard Hasen has argued that current voting rights controversies are about both race and party.³⁴ Consequently, courts should move “beyond race or party” to force state actors to justify voting laws “discriminating against a party’s voters or otherwise burdening voters.”³⁵

In a recent article, Professor Spencer Overton has pushed back against the universalist approach. Though he acknowledges that “race relations have improved dramatically in the past fifty years, discounting the need to prevent racial discrimination is a mistake.”³⁶ In his view, “[r]ather than abandon preclearance, Congress should update preclearance by tying coverage to areas with recent voting rights violations.”³⁷

³² Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 *HOW. L.J.* 741, 752 (2006).

³³ Issacharoff, *supra* note 25, at 100.

³⁴ Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 *HARV. L. REV. FORUM* 1 (2013).

³⁵ *Id.* at 13–14.

³⁶ Spencer Overton, *Voting Rights Disclosure*, 127 *HARV. L. REV. FORUM* 19, 21 (2013).

³⁷ *Id.* at 20.

The most extensive and comprehensive case against the universalist approach has been made by Professor Samuel Bagenstos.³⁸ Professor Bagenstos has characterized the claims in favor of a universal approach to voting rights into two categories, substantive and tactical. The substantive category is whether a race-based approach or a universal approach is best for addressing current voting rights problems. Professor Bagenstos argues, contra Professors Issacharoff and Hasen, that the universal approach is misguided because it would “leave a lot of significant discrimination against black and Latino voters unremedied. That is because a great deal of that discrimination involves vote dilution, not vote denial, and it takes place at the county and local, not state, level.”³⁹

The tactical category refers to whether there are non-substantive justifications for preferring one approach to the other. In particular, Professor Bagenstos characterizes as tactical the argument that voting rights activists should adopt a universalist model because the Court is not likely to be receptive to a race-based approach. He concludes, “the tactical arguments for the universalist position are likely overblown.”⁴⁰

To be fair, most of this debate is occurring purely on important substantive and policy grounds, *viz.*, whether voting rights policy is better served by a universalist approach than a race-based or particularist one. But the policy options available in the short or long-term are realistically constrained by the constitutional framework. Thus, whether the tactical case for the universalist position is overblown or not and whether claims of vote dilution would count, or continue to count, as racial discrimination depends upon the constraints of *Shelby County*. An important question for voting rights activists who are crafting a response to *Shelby County* is determining whether *Shelby County* is a minimalist decision or whether it fundamentally alters our basic assumptions about the Court’s voting rights jurisprudence. Judging by the early reaction to the decision, many in the voting rights community, not surprisingly, seem attracted to a narrow read of *Shelby County*.

As we noted at the outset, *Shelby County* can be read as a minimalist opinion. For one, the Court only struck down Section 4(b) of the Act, the coverage formula, and only because of what it viewed as changed circumstances.⁴¹ This means, and the Court took pains to underscore, that Section 2 of the Act, its permanent, nationwide provision, remains

³⁸ Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838 (2014).

³⁹ *Id.* at 36. By vote denial, Bagenstos means “actions . . . [such as] altering electoral districts, moving from district-based to at-large elections, changing election dates, and so forth . . . that dilute the voting strength of growing black and Latino communities.” *Id.*

⁴⁰ *Id.* at 39.

⁴¹ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2617 (2013).

unaffected, as does Section 5, the preclearance requirement.⁴² Furthermore, one could read the Court's decision as not reflecting hostility to the VRA's regulatory structure, but mainly as a message to Congress for failing to update the Act because Congress feared a political backlash.⁴³ Recall also the majority's annoyance that Congress not only failed to narrow the VRA, but it also expanded the scope of the Act when it renewed Section 5 in 2006.⁴⁴ If *Shelby County* prompts Congress to enact a modern statute, one might even regard the opinion as salutary. On this reading, *Shelby County* would be contributing to the furtherance of voting rights policy by providing Congress an incentive to act.

Moreover, Chief Justice Roberts positioned *Shelby County* as a direct descendant of *South Carolina v. Katzenbach*.⁴⁵ In *South Carolina v. Katzenbach*, the Court adopted a rationality test and concluded that the coverage formula was "rational in both practice and theory."⁴⁶ Congress designed the formula to target the most egregious states and the formula performed as intended. Congress's formula only needed to be rational. This is, arguably, the same test that the Court purported to use in *Shelby County*.⁴⁷ The cases come out differently only because Congress did not justify its extension of the formula with new evidence.⁴⁸ The voting and registration disparities that undergirded the original formula no longer exist, and though "the Nation is no longer divided along those lines, . . . the Voting Rights Act continues to treat it as if it were."⁴⁹ In other words, the Court is not breaking new ground with *Shelby County*; it is simply situating new facts within established legal doctrine. Relatedly, the Court acknowledged that "[s]triking down an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform.'"⁵⁰ And thus,

⁴² See *id.* at 2631 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only the coverage formula.").

⁴³ Pildes, *Political Avoidance*, *supra* note 16, at 148.

⁴⁴ *Shelby Cnty.*, 133 S. Ct. at 2626–27.

⁴⁵ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); see *Shelby Cnty.*, 133 S. Ct. at 2624–25 (discussing how the prevalence of racially discriminatory voting policies in covered jurisdictions has lessened since the Court's decision in *South Carolina v. Katzenbach*).

⁴⁶ *Katzenbach*, 383 U.S. at 330.

⁴⁷ See *Shelby Cnty.*, 133 S. Ct. at 2624–25. (describing the test as rational for the circumstances in the past and that a rational test will be used for the circumstances of present).

⁴⁸ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (discussing the fact that the coverage formula is based on old data); *id.* at 226 (Thomas, J., concurring in part and dissenting in part) (explaining that evidence of discrimination, which previously caused Congress to uphold Section 5, no longer exists and that the lack of this evidence undermines the basis for retaining it); Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 78 (2010) (explaining that both the majority and dissent in *Northwest Austin* expressed, in dicta, constitutional concerns with the reauthorization of the Act and the record which supported the reauthorization of the Act).

⁴⁹ *Shelby Cnty.*, 133 S. Ct. at 2628.

⁵⁰ *Id.* at 2631 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

when the Court does so, it does so as a matter of last resort. From this perspective, *Shelby County* is a minimalist decision because the Court was forced to intervene surgically when Congress reauthorized a statute that was not rational in theory or in practice.

But this is not the only way to interpret the decision. *Shelby County* has reopened long running debates in election law, debates that were temporized in the post-VRA period. Consider first the question of racial discrimination. The telos of modern voting rights law, policy, and jurisprudence has been the importance of eradicating any trace of racial discrimination in voting.⁵¹ This consensus was the fulcrum for voting rights policy and framed the Court's approach to the Act, as well as its approach to Congress.⁵²

When President Lyndon B. Johnson signed the Voting Rights Act into law on August 6, 1965, he called it "one of the most monumental laws in the entire history of American freedom."⁵³ Coming on the heels of the Civil Rights Act of 1964, this was high praise from the President. But it was not hyperbolic. Writing in 1959, the United States Commission on Civil Rights emphatically declared, "qualified Americans are, because of their race or color, being denied their right to vote."⁵⁴ This was not a controversial conclusion. Within six years of the Commission's report, President Johnson addressed the nation and explained that "the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes."⁵⁵

The Court accepted this view the following year in *South Carolina v.*

⁵¹ See, e.g., *id.* at 2618 (describing how Congress's approach was strong but necessary to address the evils of racism); *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 205 ("Congress amassed a sizeable record in support of its decision to extend the preclearance requirements, a record the District Court determined 'document[ed] contemporary racial discrimination in covered states.' . . . The District Court also found that the record 'demonstrat[ed] that section 5 prevents discriminatory voting changes' by 'quietly but effectively deterring discriminatory changes.'") (citations omitted).

⁵² See, e.g., *Shelby Cnty.*, 133 S. Ct. at 2619 (stating that the Court would look at both constitutional issues and the current needs of society in analyzing the Act's measures); *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 201–05 (discussing the successes of VRA with respect to eliminating certain racial disparities in voting and analyzing Congress's aims in this vein); *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) ("Still, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and § 2 must be interpreted to ensure that continued progress.").

⁵³ John T. Woolley & Gerhard Peters, *Lyndon B. Johnson: Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act*, AM. PRESIDENCY PROJECT (Aug. 6, 1965), www.presidency.ucsb.edu/ws/?pid=27140.

⁵⁴ U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, 1959 107 (1959).

⁵⁵ LYNDON B. JOHNSON, RIGHT TO VOTE: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO THE RIGHT TO VOTE, H.R. DOC. NO. 117, at 2 (1965).

Katzenbach.⁵⁶ A cursory reading of *South Carolina v. Katzenbach* makes clear that the historical backdrop of systemic and pervasive discrimination framed the Supreme Court's response. For the Court, evidence of pervasive discrimination was readily available on the television set. Of particular interest to us is the way that the Supreme Court in *South Carolina v. Katzenbach* understood and summarized the "voluminous" congressional record and, particularly, the majority reports.⁵⁷ The Court first offered the history of voter suppression in the late nineteenth century and the many legal challenges that followed.⁵⁸ This history culminated in the first civil rights statutes since the Reconstruction Era, none of which had the desired effect. Case-by-case litigation proved ineffective, for reasons of both time and effort.⁵⁹ Litigation was expensive, cases required a lot of time to prepare and carry out through litigation, and, once a judgment was secured, the affected jurisdictions could then enact new laws in order to evade enforcement.⁶⁰

The ultimate proof of racial discrimination was found in the numbers. Voter registration rates had only inched forward since the mid-1950s. For example, voter registration rates in Louisiana between 1956 and 1965 increased from 31.7% to 31.8%; in Mississippi, from 4.4% to 6.4% between 1954 and 1964; and in Alabama, from 14.2% to 19.4% between 1958 and 1964.⁶¹ Most importantly, white registration rates in these jurisdictions "ran roughly 50 percentage points or more ahead of Negro registration."⁶² For a telling example, the Court offered the litigation in Selma, Alabama, sitting in Dallas County with approximately 15,000 voting-age blacks.⁶³ After four years of litigation and great expense, and even after two federal courts had found "widespread" discrimination in voting, black voter registration only rose from 156 to 383.⁶⁴

In his opening statement before the Judiciary Committee, Attorney General Katzenbach relied on these figures for support of the proposed voting rights bill. As he told the Committee, "[c]urrent voter registration statistics demonstrate that comprehensive implementing legislation is

⁵⁶ 383 U.S. 301, 309 (1966) ("Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.").

⁵⁷ *Katzenbach*, 383 U.S. at 309.

⁵⁸ *See id.* at 310–13 (detailing the history and legal challenges of voter suppression in the late nineteenth century).

⁵⁹ *Id.* at 314.

⁶⁰ *Id.* (noting that when plaintiffs brought suits against local governments for VRA violations and received favorable judgments, the local governments who lost such cases would merely switch to various other discriminatory devices that were not addressed by the VRA's requirements).

⁶¹ *Id.* at 313.

⁶² *Id.*

⁶³ *Id.* at 314–15.

⁶⁴ *Id.*

essential [sic] to make the 15th amendment work.”⁶⁵ He offered the figures in Alabama, Mississippi, and Louisiana, and the example of Dallas County, where, “[a]fter 4 years of litigation, only 383 Negroes are registered to vote.”⁶⁶ These figures, he later explained, “are indicative of a probability of racial discrimination within those areas in violation of the 15th amendment.”⁶⁷

Critics of the Act disagreed with this characterization. For example, Senator Ervin asked, in reference to the coverage formula, “do you not think that the fact that less than 50 percent of the people vote or even the fact that less than 50 percent of the people of voting age register may be reasonably explained on grounds other than discrimination?”⁶⁸ One common answer was simply voter apathy.⁶⁹ More forcefully, Judge Leander Perez, representing Louisiana Governor McKeithen, explained the figures as follows:

I think it is just a low type of citizenship. They do not have the ambition, they do not have the urge, they do not know enough about government, they do not care You are willing to take statistics and fabricated statistics that do not show the true facts.⁷⁰

The constitutionality of the Act thus hinged on how the Court would understand these data points and the record put together by Congress. In *South Carolina v. Katzenbach*, the Court agreed with the government’s reading of the facts.⁷¹ In the Court’s words, “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”⁷² This experience reflected an encounter with “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”⁷³ Thus, though the Court remarked that in promulgating certain statutory provisions of the VRA, “Congress

⁶⁵ *Voting Rights: Hearing on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 9 (1965) (statement of Nicholas Katzenbach, Att’y Gen. of the U.S.).

⁶⁶ *Id.* at 12.

⁶⁷ *Id.* at 25.

⁶⁸ *Id.* at 28 (statement of Sen. Samuel J. Ervin, Jr., Member, S. Comm. on the Judiciary).

⁶⁹ *See id.* at 272, 560, 600, 632, 669 (providing the statements of, inter alia, Senator Everett Dirksen; Senator Samuel J. Ervin, Jr.; A. Ross Eckler, the Acting Director of the Bureau of the Census; James J. Kilpatrick, vice chairman of the Virginia Commission on Constitutional Government; and Thomas J. Watkins, an Attorney from Mississippi, which discussed the high degree of voter apathy amongst a variety of demographics).

⁷⁰ *Id.* at 547 (statement of Judge Leander H. Perez, Plaquemines Parish, La.).

⁷¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

⁷² *Id.* at 308.

⁷³ *Id.* at 309.

exercised its authority under the Fifteenth Amendment in an inventive⁷⁴ and even an “uncommon”⁷⁵ way, it ultimately concluded “that exceptional conditions can justify legislative measures not otherwise appropriate.”⁷⁶ In light of the pervasive history of discrimination in the exercise of the franchise, the Court agreed with Congress that the VRA was necessary to effectuate the “commands of the Fifteenth Amendment.”⁷⁷

The structure of the Act, however, would lead the justices to revisit this question periodically. Congress faced a malfunctioning political process in 1965 and the VRA was designed to operate as a corrective measure, and in some respects, not much more.⁷⁸ Put differently, the VRA was a remedy and not an entitlement. As originally implemented, the Act had a five-year sunset provision, on the assumption that the special provisions of the Act would finally turn the dream of the Fifteenth Amendment into a reality.⁷⁹ Once black voters could register and vote freely, the need for the Act would subside. This was a sensible theory, but five years—or ten, or even seventeen years—would not be enough. This is why Congress continued to extend the special provisions of the Act in short spurts.⁸⁰

By 1980, when the Court examined the 1975 extension of the special provisions of the Act in *City of Rome v. United States*,⁸¹ the Act faced its toughest challenge yet. Among other objections, the City of Rome argued that the Act was unconstitutional;⁸² that the Act cannot be applied to changes that had a discriminatory effect but not a discriminatory purpose;⁸³ that the Act had outlived its usefulness;⁸⁴ and that the Act violated federalism principles.⁸⁵ President Nixon had named four new justices in

⁷⁴ *Id.* at 327.

⁷⁵ *Id.* at 334.

⁷⁶ *Id.* (citation omitted).

⁷⁷ *Id.* at 337.

⁷⁸ See *Voting Rights Act: Major Dates in History*, ACLU, <https://www.aclu.org/print/voting-rights-act-major-dates-history> (last visited Sept. 25, 2014) (asserting that the primary aims of the Voting Rights Act were to correct past barriers to political participation by minority groups and to eliminate wrongful election practices).

⁷⁹ See *Federalist Society 2011 National Lawyers Convention, Showcase Panel IV: A Federal Sunset Law*, 17 TEX. REV. L. & POL. 339, 353–54 (2011) (speech of Professor William N. Eskridge, Jr.) (discussing the 1965 Voting Rights Act’s sunset provision and its implications for federalism).

⁸⁰ See *Voting Rights Act: Major Dates in History*, *supra* note 78 (noting that President Nixon, President Ford, President Reagan, and Congress extended provisions of the Voting Rights Act over short spans of time).

⁸¹ 446 U.S. 156 (1980).

⁸² *Id.* at 173.

⁸³ *Id.* at 172.

⁸⁴ *Id.* at 180.

⁸⁵ *Id.* at 178.

three years, and President Ford had named one.⁸⁶ More importantly, Nixon had run his 1968 campaign under what became known as a “Southern Strategy.”⁸⁷ Would Chief Justice Burger and Justices Blackmun, Powell and Rehnquist continue to view the evidence as the Court had viewed it in 1966?

The early signs were not encouraging. In two cases prior to *City of Rome*, the conservative justices seemed to be laying down a marker for a reconsideration of the Court’s landmark voting rights decision in *Allen v. State Board of Elections*.⁸⁸ *Allen*, decided in 1969, was important as the case that interpreted the scope of Section 5 broadly and in so doing adapted the Voting Rights Act to new circumstances.⁸⁹ For example, in *Perkins v. Matthews*,⁹⁰ and in line with *Allen*, the Court held that changes to polling places, boundaries lines, and electoral structures were required to be pre-cleared.⁹¹ But Justice Blackmun, joined by the Chief Justice, issued a warning, explicitly concurring in the judgment, “[g]iven the decision in *Allen v. State Board of Elections*, . . . a case not cited by the District Court.”⁹² And in *Holt v. City of Richmond*,⁹³ where the Court enjoined the City Council elections for the City of Richmond, Virginia,⁹⁴ Justices Burger and Blackmun offered a similar warning, this time joined by Justice Rehnquist.⁹⁵ The stage apparently was set for a reexamination of *Allen*. It was only a matter of time until the Nixon appointees made their move.

But the warnings came to naught. In *City of Rome*, the Court followed the previous script and once again sided with Congress and its view of the evidence. For example, the Court acknowledged, with Congress, that

⁸⁶ Bill Mears, *The Supreme Court & Election-Year Blockbusters*, CNN POL. (Mar. 26, 2012, 4:02 PM), <http://www.cnn.com/2012/03/25/politics/scotus-health-care-blockbusters>; *Gerald R. Ford Timeline*, THE GERALD FORD PRESIDENTIAL FOUND., <http://www.geraldrfordfoundation.org/about/gerald-r-ford-timeline> (last visited Sept. 25, 2014).

⁸⁷ See ROWLAND EVANS, JR. & ROBERT D. NOVAK, NIXON IN THE WHITE HOUSE: THE FRUSTRATION OF POWER 137 (1971) (“[I]mportant was the political frame of mind in the Nixon White House as his Presidency began. The pivotal element in John Mitchell’s grand strategy of combining the 1968 Nixon and Wallace Votes for a Republican majority in 1972 was the South.”); see also, e.g., HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960–1972 134 (1992) (discussing the inception, details, and goals of Nixon’s “Southern Strategy”).

⁸⁸ 393 U.S. 544 (1969).

⁸⁹ See *id.* at 565–67 (noting that the legislative history of the VRA and of Section 5 suggested Congress’s and the Court’s consensus that they were meant to be broad in scope).

⁹⁰ 400 U.S. 379 (1971).

⁹¹ *Id.* at 394.

⁹² *Id.* at 397 (Blackmun, J., concurring) (citation omitted).

⁹³ 406 U.S. 903 (1972).

⁹⁴ *Id.* at 903.

⁹⁵ *Id.* (“In joining in Mr. Justice Blackmun’s opinion concurring in the judgment in *Perkins* . . . I indicated that ‘[g]iven the decision in *Allen* . . .,’ the result reached by the Court in *Perkins* followed. The instant motion for a stay is not an appropriate occasion to reconsider the holdings in *Allen* and *Perkins*.”).

registration rates of black voters had “improved dramatically” and that the number of black elected officials had also increased.⁹⁶ And yet, the Court agreed with the congressional determination that “significant” registration disparities remained between black and white voters in covered jurisdictions.⁹⁷ Also, black elected officials had only gained “relatively minor positions” and did not hold statewide offices, and the number of those elected to statewide offices was unrepresentative of the black population within the covered jurisdictions.⁹⁸ The decision to extend the Act for seven years was “both unsurprising and unassailable.”⁹⁹ The Supreme Court reaffirmed the judgments of *Allen* and *City of Rome* with respect to the pervasiveness of racial discrimination in voting.¹⁰⁰

Shelby County broke the pattern. Of course, the Court politely acknowledged early in the opinion that “voting discrimination still exists; no one doubts that.”¹⁰¹ But the central message of *Shelby County* is that “the era of big racism” is over.¹⁰² The majority confidently declared that “[t]here is no denying . . . that the conditions that originally justified” the coverage formula and preclearance requirement “no longer characterize voting in the covered jurisdictions.”¹⁰³ For the majority, the VRA responded to a failure of the political marketplace where “[s]everal States had enacted a variety of requirements and tests ‘specifically designed to prevent’ African-Americans from voting.”¹⁰⁴ But that era, according to the majority, is not reflective of the present era. “Nearly 50 years later,” Chief Justice Roberts proclaimed, “things have changed dramatically.”¹⁰⁵ The vestiges or indicia of official state discrimination in voting are no more; “[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”¹⁰⁶ Furthermore, Section 5 objections had declined significantly, from 14.2 percent in the decade after enactment of the Act to a “mere 0.16 percent” in the decade before the last

⁹⁶ *City of Rome v. United States*, 446 U.S. 156, 180 (1980).

⁹⁷ *Id.*

⁹⁸ *Id.* at 180–81.

⁹⁹ *Id.* at 182.

¹⁰⁰ *See, e.g., Lopez v. Monterey Cnty.*, 525 U.S. 266, 271 (1999) (“Monterey County was designated a covered jurisdiction based on findings that, as of November 1, 1968, the County maintained California’s statewide literacy test as a prerequisite for voting and less than 50 percent of the County’s voting age population participated in the November 1968 Presidential election.”) (citations omitted).

¹⁰¹ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

¹⁰² Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute* 41 (Maurer Sch. of Law, Ind. Univ., Bloomington Legal Studies Research Paper Series, Paper No. 278, 2014), available at <http://ssrn.com/abstract=2377470>.

¹⁰³ *Shelby Cnty.*, 133 S. Ct. at 2618.

¹⁰⁴ *Id.* at 2624 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966)).

¹⁰⁵ *Id.* at 2625.

¹⁰⁶ *Id.* at 2621 (internal quotation marks and citation omitted).

reenactment.¹⁰⁷ These facts led the Court to only one conclusion, and toward the end of its opinion, as if to drive home the message, the Court once again declared in benediction, “[o]ur country has changed”¹⁰⁸

Justice Ginsburg’s dissenting opinion in *Shelby County* took a decidedly different view. She acknowledged that the racial disparities in registration and voter turnout in the covered jurisdictions had diminished considerably, while also noting that this was to be expected after the Act had been in place for over forty years.¹⁰⁹ In direct response to the Chief Justice’s use of Department of Justice objection percentages, she offered instead the absolute number of such objections, which was substantial.¹¹⁰ Between 1982 and 2004, for example, the Attorney General objected to more voting changes from covered jurisdictions (626 objections) than he did between 1965 and 1982 (490 objections).¹¹¹ Moreover, she argued that electoral barriers had shifted to what are known as second-generation barriers.¹¹² These barriers included racial gerrymandering, shifting from redistricted to at-large elections, and annexations.¹¹³

More generally, Justice Ginsburg urged deference to the record compiled by Congress in support of the statute.¹¹⁴ Of course, that record was not enough for the five-member majority. Responding to Justice Ginsburg’s argument about the record, Chief Justice Roberts maintained: “Regardless of how to look at the record . . . no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.”¹¹⁵

Justice Thomas, whose partial concurrence and dissent in *Northwest Austin* seemed to have served as an intellectual blueprint for the majority in

¹⁰⁷ *Id.* at 2626.

¹⁰⁸ *Id.* at 2631.

¹⁰⁹ *Id.* at 2634 (Ginsburg, J., dissenting).

¹¹⁰ *Id.* at 2639.

¹¹¹ *Id.*

¹¹² *Id.* at 2634.

¹¹³ *Id.* at 2635. Incidentally, these were the same barriers first recognized by the Court in *Allen* as being within the scope of Section 5. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 550–52, 571 (1969) (discussing the proposed voting amendments to local Mississippi and Virginia voting laws that the Court would examine under Section 5). This recognition is what made *Allen* one of the most important cases in the history of the Act.

¹¹⁴ See *Shelby Cnty.*, 133 S. Ct. at 2652 (Ginsburg, J., dissenting) (“The record supporting the 2006 reauthorization of the VRA is also extraordinary.”). According to the Chairman of the House Judiciary Committee, Representative Jim Sensenbrenner, the record in support of the 2006 reauthorization was “one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years” he had been in the House. 152 CONG. REC. H5143 (July 13, 2006) (statement of Jim Rep. Sensenbrenner).

¹¹⁵ *Shelby Cnty.*, 133 S.Ct. at 2629.

Shelby County, articulated the point in the starkest terms.¹¹⁶ With respect to the meaning of discrimination, he argued that the only “explicit prohibition” of the Fifteenth Amendment was against “intentional discrimination.”¹¹⁷ Moreover, “the constitutionality of section 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible.”¹¹⁸ So as not to be misunderstood, he declared that the “extensive pattern of discrimination that led the Court to previously uphold section 5 as enforcing the Fifteenth Amendment no longer exists.”¹¹⁹ Relatedly, he opined that vote dilution and second-generation barriers are “not probative of the type of purposeful discrimination that prompted Congress to enact § 5 in 1965.”¹²⁰ Racially polarized voting, Section 5 enforcement actions, and Section 2 and Section 4 lawsuits do not constitute “pervasive voting discrimination,” and are thus insufficient to justify the coverage-preclearance regime.¹²¹

The epistemic dispute between the majority and dissent in *Shelby County* is over whether racial discrimination, which the majority defines as intentional and systematic discrimination, remains a significant problem in voting today.¹²² Following *Shelby County*, we can no longer confidently assume that the Court will permit Congress to justify voting rights law and policy on the ground of remedying racial discrimination in the political process. A current majority on the Court is deeply skeptical that state actors continue to engage in systemic racial discrimination in voting. If this point is correct, a *Shelby County* fix that attempts to reinstate the race-based coverage-preclearance tandem, albeit an updated version, will have to overcome the Court’s challenge to show systematic racial discrimination as a justification for the fix. This will be close to impossible to show because as a consequence of the VRA itself, systematic racial discrimination has abated significantly.¹²³ Seizing upon this fact, the majority in *Shelby County* all but declared that the era of big racism is over. A central claim of *Shelby County* is that systematic racial discrimination is a phenomenon of the past that can no longer justify broad congressional power to burden state actors with tedious compliance standards simply because of their tainted histories.¹²⁴

¹¹⁶ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 212 (2009) (Thomas, J., concurring in part and dissenting in part).

¹¹⁷ *Id.* at 223.

¹¹⁸ *Id.* at 225.

¹¹⁹ *Id.* at 226.

¹²⁰ *Id.* at 228.

¹²¹ *Id.*

¹²² *See Shelby Cnty.*, 133 S. Ct. at 2626 (using statistics to show the problem of discrimination in voting).

¹²³ *Id.*

¹²⁴ *Id.* at 2627–28.

III. THE END OF DEFERENCE AND COOPERATION

Much epistemic uncertainty exists with respect to race and voting discrimination. The central question is whether we still have systematic racial discrimination in voting by state actors or perhaps, more precisely, what is the extent of racial discrimination in voting. Given this uncertainty, one possible resolution, perhaps the most obvious resolution, is for the Court to defer to the institution that is best positioned to resolve that uncertainty: Congress. There are many reasons why one might defer to Congress. Consider three possibilities.

A. *Deference Because the Constitution Demands It*

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment explicitly grant Congress the “power to enforce, by appropriate legislation, the provisions of this article.”¹²⁵ Thus, one might argue that the Reconstruction Amendments not only shifted power away from the states to Congress, but also away from the Court to Congress.¹²⁶ At the very least, one might view the Reconstruction Amendments as establishing Congress and the Court as co-equal guarantors of equality in voting.¹²⁷ Congress is as able as the Court, at least in this context, to determine what the Constitution requires.¹²⁸

This was arguably the Court’s judicial posture in *Katzenbach v. Morgan*,¹²⁹ one of the most significant cases in the voting rights canon. In *Morgan*, the Court upheld Section 4(e) of the VRA, which provided that no person who has completed a sixth grade education in a school accredited by the commonwealth of Puerto Rico shall be denied the right to vote on account of an inability to read or write English.¹³⁰ Congress enacted the provision pursuant to its authority under Section 5 of the Fourteenth Amendment.¹³¹ The State of New York, challenging Section 4(e), sensibly argued that Congress did not have the power under the Fourteenth Amendment to prohibit New York from enforcing its literacy requirement

¹²⁵ U.S. CONST. amend. XIV, § 5; *see also* U.S. CONST. amend. XV, § 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).

¹²⁶ *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1823 (2010) (“The early history of the Reconstruction Amendments suggests that Congress believed that it had both the power and the obligation to interpret the Constitution when it passed enforcing legislation Including enforcement clauses in the text of the new amendments . . . presumed that Congress and the courts were coequal partners in interpreting and enforcing these provisions.”).

¹²⁷ *Id.*

¹²⁸ *See id.* at 1826 (discussing how, with respect to remedying constitutional violations occurring in society, broad congressional enforcement of constitutional principles has been more effective than “courts’ more limited interpretations” of such principles).

¹²⁹ *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

¹³⁰ *Id.* at 643, 658.

¹³¹ *Id.* at 646.

because the Supreme Court held in *Lassiter v. Northampton Election Board*,¹³² a case decided a scant six years earlier, that literacy tests were not *per se* violations of the Fourteenth Amendment.

The Court disagreed.¹³³ Quoting from a prior Reconstruction Era precedent, the Court noted that “[i]t is the power of Congress which has been enlarged.”¹³⁴ Moreover, the Court explained:

A construction of §5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the ‘majestic generalities’ of § 1 of the Amendment.¹³⁵

Thus, the question was not whether the application of the literacy requirement violated the Equal Protection Clause, as the Court would interpret the Constitution.¹³⁶ Rather, “[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York’s English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?”¹³⁷ The Court went on to note: “[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”¹³⁸

Reviewing Congressional statutes enacted pursuant to Section 5 of the Fourteenth Amendment, a reviewing court must keep in mind that “[b]y including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.”¹³⁹ Citing the “classic

¹³² *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51–52 (1959); *see also Morgan*, 384 U.S. at 648–49 (discussing New York’s arguments in its defense of the literacy requirement).

¹³³ *See Morgan*, 384 U.S. at 658 (“[T]he limitation on relief effected in § 4(e) does not constitute a forbidden discrimination . . .”).

¹³⁴ *Id.* at 648 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1879)).

¹³⁵ *Id.* at 648–49 (internal citations omitted).

¹³⁶ *Id.* at 649.

¹³⁷ *Id.*

¹³⁸ *Id.* at 651.

¹³⁹ *Id.* at 650.

formulation” in *M’Culloch v. Maryland*,¹⁴⁰ as long as the statute is “‘appropriate legislation’ to enforce the Equal Protection Clause [of the Fourteenth Amendment],”¹⁴¹ the Court will defer to Congress’s judgment.¹⁴² Testifying in the Senate during the 1969 hearings on the VRA, former Solicitor General Cox referred to *Morgan* as “a token of congressional supremacy.”¹⁴³

In *Morgan*, the Court viewed Congress as a collaborator or partner in effectuating voting equality.¹⁴⁴ The Court deferred to Congress’s judgment on the ground that the Constitution has granted Congress the power to enforce the provisions of the Reconstruction Amendment as Congress understands those provisions.¹⁴⁵ Reflecting on the VRA and the Civil Rights Act of 1964 in a related context, Professor Lucas Powe observed:

The Court was extending an offer to Congress to become a full partner in the Court’s great tasks, just as Congress had become with the Civil Rights Act of 1964 and the Voting Rights Act of 1965. In making the offer the Court saw that its views and those of Congress were harmonious. Each was working as hard as it could to improve American life.¹⁴⁶

¹⁴⁰ 17 U.S. (4 Wheat) 316 (1819).

¹⁴¹ *Id.* at 651 (citing *M’Culloch*, 17 U.S. at 421).

¹⁴² In a controversial footnote, the Court explained that “Congress’ power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.” *Id.* at 651 n.10.

¹⁴³ *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507 and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. 334 (1970) (statement of Archibald Cox, Professor, Harvard Law School).

¹⁴⁴ Think here of accounts of the Court as a member of the national coalition of its day. For the classic formulation, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294 (1957) (“The main objective of presidential leadership is to build a stable and dominant aggregation of minorities with a high probability of winning the presidency and one or both houses of Congress. The main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition. There are times when the coalition is unstable with respect to certain key policies; at very great risk to its legitimacy powers, the Court can intervene in such cases and may even succeed in establishing policy.”); and Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 518 (2007) (reviewing MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH? HOW THE COURTS SERVE AMERICA* (2006); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2006)) (“The fundamental insight of the regime politics literature . . . is now reigning orthodoxy in political science and is increasingly widespread in legal scholarship as well.”).

¹⁴⁵ *Katzenbach v. Morgan*, 384 U.S. 641, 655–56 (1966).

¹⁴⁶ LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 265 (2000); see Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966) (“A newer theme is the strong declaration of congressional power under Section 5 of the fourteenth amendment. If the Congress follows the lead that the Court has provided, the last Term’s opinions interpreting Section 5 will prove as important in bespeaking national legislative

This was just as the Reconstruction Congress envisioned.

Moreover, the Court's prior cases would have also supported deference as a constitutional imperative. Consider briefly the state of the congressional powers doctrine at the time of *Shelby County*. In the voting rights context, it is clear to us that both *Morgan* and *South Carolina v. Katzenbach* easily support the extension of the Act in 2006.¹⁴⁷ *City of Boerne v. Flores*,¹⁴⁸ decided in 1997, was also on the side of congressional action.¹⁴⁹ So was *Nevada Department of Human Resources v. Hibbs*,¹⁵⁰ which upheld a provision of the Family Medical Leave Act under Section 5 of the Fourteenth Amendment on a theory of gender discrimination,¹⁵¹ and *Tennessee v. Lane*,¹⁵² which upheld a provision of the Americans with Disabilities Act on a claim of access to the courts.¹⁵³ These and related cases suggest that congressional powers reach farther under Section 5 of the Fourteenth Amendment when Congress is dealing with types of discrimination that would trigger heightened scrutiny under the Equal Protection Clause. When Congress deals with racial discrimination, in other words, its discretion is enhanced. This is precisely the category into which the VRA is most applicable.

Further, the Court could have also relied on *Hibbs* and *Lane* on the ground that voting is a fundamental interest that is directly protected under the Reconstruction Amendments and thus deserving of heightened scrutiny.¹⁵⁴ Or following Justice Scalia's dissent in *Lane*, the Court could have also chosen to honor the principle of *stare decisis* and "apply the permissive *M'Culloch* standard to congressional measures designed to remedy racial discrimination by the States."¹⁵⁵ The bottom line is that existing doctrine offered much support for Congress and the VRA.¹⁵⁶

authority to promote human rights as the Labor Board decisions of 1937 were in providing national authority to regulate the economy.") (footnote omitted).

¹⁴⁷ See *supra* text accompanying notes 75–80 (acknowledging that the current evidence played a role in the *Katzenbach* Court's decision); *supra* text accompanying note 133 (stating that the *Morgan* Court deferred to Congress's research in its decision).

¹⁴⁸ 521 U.S. 507 (1997).

¹⁴⁹ *Id.* at 536.

¹⁵⁰ 538 U.S. 721 (2003).

¹⁵¹ *Id.* at 737.

¹⁵² 541 U.S. 509 (2004).

¹⁵³ *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

¹⁵⁴ *Id.* at 533–34 (holding that "the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment"); *Hibbs*, 538 U.S. at 728 ("[S]tatutory classifications that distinguish between males and females are subject to heightened scrutiny.").

¹⁵⁵ *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). Justice Scalia hedges, and "would not, of course, permit any congressional measures that violate other provisions of the Constitution." *Id.* Assuming that one believes that the "equality of states" doctrine is one such provision, the charge of inconsistency in the pursuit of a policy goal is thankfully avoided.

¹⁵⁶ See Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 122–26 (2007). One of the more interesting questions in the case is

B. *Deference for Institutional Reasons: Congress Can Compile a Record and Make Findings*

Beyond the textual and constitutional argument, the Court might also defer for institutional reasons. In particular, one might view Congress as the best institution to resolve the types of epistemic uncertainty that we see in the voting rights context. This is because Congress is able to make nationwide systematic findings and to create a record in support of its statute. It may be—and the historical record fully supports this—that as between piecemeal adjudication through the judicial system and legislation through the political process, adjudication is less well suited to resolve this type of epistemic uncertainty. Thus, courts should defer to the epistemic judgments of legislative bodies on the ground that legislatures are better institutions to resolve epistemic uncertainties.

This was Justice Ginsburg’s contention in *Shelby County*. She advised that “the Court should have left the matter where it belongs: in Congress’ bailiwick.”¹⁵⁷ This was also the posture that the Court adopted in *South Carolina v. Katzenbach*, where the Court framed the approach that would guide nearly fifty years of voting rights jurisprudence: “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”¹⁵⁸ Deference was the order of the day, and much language in the Court’s opinion underscored as much. Sprinkled throughout the opinion are references to “legitimate response[s]”¹⁵⁹ by Congress, “appropriate means”¹⁶⁰ that Congress may employ, and “permissible method[s]”¹⁶¹ that Congress may use.

To be sure, this language is less than crystal clear and could be understood as an argument for constitutional deference. The problem for the Court was that the VRA was an unusual statute. For one, Congress was aiming its considerable powers at the Southern states, and, in so doing, it sought to redraw the federalism lines that were drawn at the end of the first Reconstruction. Complicating matters, the VRA did not only show distrust of the state legislatures; the preclearance requirement similarly bypassed southern judges, federal and state, by requiring covered jurisdictions to

why the majority in *Shelby* failed to rely on the Court’s prior federalism precedent. The phrase “congruence and proportionality” is nowhere to be found in the opinion. Instead the Court turned to the concept of the “equality of the states” to strike down Section 4(b). *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013). As we argue in the last Part of this Article, the conservative justices had a much larger goal in mind; redemption and existing doctrine had little if anything helpful to say about that. We are indebted to our colleague Dan Conkle for helping us navigate these doctrinal questions.

¹⁵⁷ *Shelby Cnty.*, 133 S. Ct. at 2650.

¹⁵⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

¹⁵⁹ *Id.* at 328.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

preclear their election changes with the Department of Justice or district court in D.C.¹⁶² The preclearance requirement cast an accusing—even offensive—light on southern judges and their integrity and it privileged an administrative agency to the southern judiciary.

Chief Justice Warren's majority opinion for the Court in *South Carolina v. Katzenbach* responded to these concerns with history, the specter of Bull Connor and, importantly for our purposes, the substantial congressional record in support of the statute. This was not to say that rationality review demanded extensive findings. Findings were not generally required as a condition to uphold congressional acts as a *constitutional question*,¹⁶³ but they buttressed the case in this context as Congress was exercising its powers with great inventiveness. With respect to the record, the Court noted:

The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all. At the close of these deliberations, the verdict of both chambers was overwhelming. The House approved the bill by a vote of 328–74, and the measure passed the Senate by a margin of 79–18.¹⁶⁴

With the benefit of hindsight and the reality of *Shelby County*, it is easy to see why emphasizing the record compiled by Congress was a risky move. Justice Brennan could see it as soon as he read the first draft of the opinion. In notes he wrote on the margins of his circulated draft, he queried the reliance on the congressional record by Warren's opinion. For example, he asked, "Do we judge statutes by no. of witnesses[,] length of hearings[,] unanimity of vote? The Chief is judging the legislative product as if it were

¹⁶² See *id.* at 359–60 (Black, J., dissenting) ("I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.").

¹⁶³ See *id.* at 326–27 (majority opinion) (explaining the limits of congressional power without any mention as to the necessity of findings).

¹⁶⁴ *Id.* at 308–09 (footnotes omitted).

a judicial one.”¹⁶⁵ By the end of the first part of the draft, he offered the following criticism: “In several places, like this one, the Chief comes close to writing this as if it were an advisory opinion. I think this might be avoided. Are we reviewing the sections, any more than we are the adequacy of the hearings?”¹⁶⁶

Justice Brennan raised some important questions. How would the Court go about deciding how many hearings are enough, or how many witnesses, or pages of testimony? What weight should be given to the vote margins by which the VRA and subsequent extensions pass each chamber? Perhaps, most importantly, how convincingly must Congress demonstrate the existence of racial discrimination to justify the VRA? These are questions without definitive answers, and Justice Brennan wished to remove the Court from taking a central role in deciding them. In particular, he was looking to the future, to a time when the record would not be as robust as it was then. He was looking, in other words, to the world that gave rise to *Shelby County*.

We thus understand *Katzenbach v. Morgan* as Justice Brennan’s attempt to fix what he perceived to be a flaw in *South Carolina v. Katzenbach*. He wished to take the spotlight off the record and emphasize instead the deferential standard of review.¹⁶⁷ Deference, as we argued earlier, was owed as a matter of constitutional law, not institutional competence.¹⁶⁸ Justice Brennan could foresee that the future of the Act hung on the Court’s resolution of this debate. In *Katzenbach v. Morgan*, in fact, Justice Harlan argued in his dissent that the Court in *South Carolina v. Katzenbach* deferred to Congress only after that body had compiled a record to present an affirmative showing of a Fifteenth Amendment violation in support of its remedial action.¹⁶⁹ Congress had done no such thing in support of Section 4(e).¹⁷⁰

Justice Brennan won this particular battle. The Court upheld Section 4(e) by going back to its traditional rationality review. The Court did not mention the issue of legislative findings at all. The question was whether Section 4(e) was “appropriate legislation” to enforce the Fourteenth Amendment, whether it was “plainly adapted to that end,” and whether it

¹⁶⁵ Chief Justice Warren, Original Draft of *South Carolina v. Katzenbach* 3 (Feb. 23, 1966) (Brennan Papers, Library of Congress, Box I:132, folder 6, copy on file with author) (including Justice Brennan’s handwritten notes on draft).

¹⁶⁶ *Id.* at 11.

¹⁶⁷ See *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (explaining the court’s deference to congressional power).

¹⁶⁸ See *supra* part III.A (arguing that reconstruction amendments increased deference to Congress actions regarding voting rights).

¹⁶⁹ *Morgan*, 384 U.S. at 667 (Harlan, J., dissenting).

¹⁷⁰ *Id.* at 669.

was in accord with “the letter and spirit of the Constitution.”¹⁷¹ For example, this was an area in which Congress brought a “specially informed legislative competence.”¹⁷² Also, “[i]t was for Congress . . . to assess and weigh the various conflicting considerations.”¹⁷³ Congress was owed deference because it was better positioned than the judiciary to determine the existence and extent of racial discrimination in voting. More importantly, the Court deferred because the Constitution so demanded. Of note, nothing in *South Carolina v. Katzenbach* suggested otherwise.

This is precisely the debate we see in *Shelby County* between Chief Justice Roberts in the majority and Justice Ginsburg in the dissent. Channeling Chief Justice Warren in *South Carolina v. Katzenbach*, and as a precursor to making an argument that “[i]t is well established that Congress’ judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference,” Justice Ginsburg sought to focus the Court’s attention on the “sizeable record.”¹⁷⁴ She remarked that “[t]he House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages.”¹⁷⁵ Similarly, the record for supporting the extension of the preclearance requirement “was huge.”¹⁷⁶ In addition, she accused the majority of “mak[ing] no genuine attempt to engage with the massive legislative record that Congress assembled.”¹⁷⁷ She went on to note:

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court’s opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. . . . 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

¹⁷¹ *Id.* at 651 (citing *M’Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819)).

¹⁷² *Id.* at 656.

¹⁷³ *Id.* at 653.

¹⁷⁴ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting).

¹⁷⁵ *Id.* at 2635–2636 (2013) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009)); H.R. REP. NO. 109–478, at 5, 11–12 (2006); S. REP. NO. 109–295, at 2–4, 15 (2006).

¹⁷⁶ *Shelby Cnty.*, 133 S. Ct. at 2639.

¹⁷⁷ *Id.* at 2644.

legislation.¹⁷⁸

Chief Justice Roberts offered two responses to the dissent's argument that the majority refused to engage with the record. First, the Chief Justice argued—a point that Justice Brennan anticipated—that the record amassed by Congress in 2006 pales in comparison to the record amassed by Congress in 1965. “Regardless of how to look at the record,” the Chief remarked, “no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.”¹⁷⁹ In other words, the record did nothing to convince the majority that racial discrimination in voting remained a significant problem in the twenty-first century. More importantly, this was not a question of deference for the majority.

Second, the Chief Justice argued that “a more fundamental problem remains: 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.”¹⁸⁰ As Justice Brennan anticipated, and Chief Justice Roberts demonstrated, if deference were owed to the record, it was a simple matter to conclude that the record was not good enough, that the record had not met some mystical or historical bar.

The Chief Justice had two choices in *Shelby County*. He could have followed the historical path and treated the case as a question of constitutional deference under the Reconstruction Amendments. This was what the Court did in *Morgan*.¹⁸¹ Alternatively, he could have followed the institutional path and considered the case as a question of deference under conditions of epistemic uncertainty. This was what the Court did in *South Carolina v. Katzenbach*.¹⁸² He followed the latter, of course, but with an ironic twist. Though professing self-restraint, the majority in *Shelby County* took a very aggressive view of the facts in order to strike down a federal statute.¹⁸³ In this respect, a conservative Court out-liberaled Justice Brennan.

¹⁷⁸ *Id.* (internal citations omitted).

¹⁷⁹ *Id.* at 2629 (quoting *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 201; *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 315, 331 (1966)).

¹⁸⁰ *Id.*

¹⁸¹ *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966) (holding that Section 4(e) of the Voting Rights Act of 1965 is “a proper exercise of the powers granted to Congress by §5 of the Fourteenth Amendment”).

¹⁸² *South Carolina v. Katzenbach*, 383 U.S. at 308 (holding that the challenged sections of the Voting Rights Act “are an appropriate means for carrying out Congress’ constitutional responsibilities and are consonant with all other provisions of the Constitution”).

¹⁸³ See Luis Fuentes-Rohwer, *Judicial Activism and the Interpretation of the Voting Rights Act*, 32 CARDOZO L. REV. 857, 859 (2011) (arguing that the Court, though maintaining a posture of deference

C. *Deference to Congress as a Partner*

Finally, one might defer to Congress because the VRA—its history and evolution—so counsels. According to Chief Justice Roberts, the VRA is not “just like any other piece of legislation, . . . [as] this Court has made clear from the beginning . . . the Voting Rights Act is far from ordinary.”¹⁸⁴ We agree with the Chief Justice about the special nature of the VRA, yet disagree about what this means. As we argue elsewhere, the VRA must be understood as a superstatute, that is, landmark legislation that demands the cooperation of multiple branches of government in order to fulfill its purposes.¹⁸⁵ Rather than a sharp break from the past, we understand the Act as a necessary response to a fundamental democratic deficit. It is also true that, from its inception, the Court has understood the VRA precisely in this way and has willingly cooperated with Congress, as the people’s representatives, in fulfilling the Act’s considerable promise. The point here is that it takes (or took) all three branches working together to fulfill the promises of the Fourteenth and Fifteenth Amendments. The Court needed Congress’s help (and vice versa) to eradicate the scourge of racial discrimination in voting.

To make sense of this argument, it is important to remember that voting discrimination had been an issue that neither the political branches nor the courts could address alone. In Justice Ginsburg’s apt description, fighting voter discrimination “resembled battling the Hydra.”¹⁸⁶ No sooner had a court case declared a practice unconstitutional under the Fifteenth Amendment than a new practice arose in its place. Adjudication proved to be time-consuming and ineffectual. In important respects, the need for the VRA reflected not simply the intransigence and persistence of racial discrimination in voting, but the institutional limitations of the judiciary in fulfilling the promises of the Fourteenth and Fifteenth Amendments.

But Congress also needed the cooperation of the judiciary to accomplish the aims of the VRA. Further, it is clear that Congress was confronting an insidious and pervasive problem devoid of easy solutions. The language of the Act was short on specifics and subject to myriad interpretations. What, after all, is a “voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting?”¹⁸⁷ When

to the Voting Rights Act, “has interpreted the language of the Act dynamically, often in total disregard to the text of the law or the intent of Congress”).

¹⁸⁴ *Shelby County*, 133 S. Ct. at 2630.

¹⁸⁵ See Charles & Fuentes-Rohwer, *The Voting Rights Act in Winter*, *supra* note 102 (explaining that a superstatute, such as the VRA, “is landmark legislation that addresses a significant public policy question, the resolution of which compels the cooperation of all branches of government”); see also WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 27 (2010) (offering the VRA as a classic example of a superstatute).

¹⁸⁶ *Shelby County*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting).

¹⁸⁷ 42 U.S.C. § 1973a(c) (2012).

does a voting change “not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color?”¹⁸⁸ And what is the meaning of the language of Section 2 of the Act, which prohibits the denial or abridgment of the right to vote “on account of race or color?”¹⁸⁹ These were questions for the future, for the courts to sort through and for the executive to enforce through Section 5. The Court and the executive would confront them in due course, flexibly and with a mind towards eliminating the “blight of racial discrimination in voting.”¹⁹⁰

The Court understood the need for a partnership in this context from the moment it first confronted the VRA in the *Katzenbach* cases.¹⁹¹ The *Katzenbach* cases signaled the Court’s willingness to share responsibility with Congress to move the country forward.¹⁹² The Court knew that it was unable to take on this problem all by itself. Perhaps the Justices were being more than polite during President Johnson’s voting rights address as they joined members of Congress in applause a number of times, which led critics of the bill to question their impartiality.¹⁹³

In one of the early and most significant voting cases to come before the Court, *Allen v. State Board of Elections*, the Court strongly signaled its intention to cooperate with Congress to address the problem of voting discrimination.¹⁹⁴ *Allen* is best known as the Court’s first substantive interpretation of the VRA. The case is far more important to us, however, for the way in which it handled a number of preliminary jurisdictional issues. How the Court decided these questions would go a long way in determining the effectiveness of the Act. Unsurprisingly, the Court decided these questions expansively, even where the language of the statute was either silent or in apparent tension with the Court’s preferred conclusions. Take, for example, the question of coverage: what is the statutory

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* § 1973(b).

¹⁹⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

¹⁹¹ POWE, *supra* note 146, at 265 (“The Court was extending an offer to Congress to become a full partner in the Court’s great tasks . . .”).

¹⁹² *See id.* (“[T]he Court saw that its views and those of Congress were harmonious. Each was working as hard as it could to improve American life.”); *see also* Cox, *supra* note 146, at 91 (“If the Congress follows the lead that the Court has provided, the last Term’s opinions interpreting section 5 will prove as important in bespeaking national legislative authority to promote human rights as the Labor Board decisions of 1937 were in providing national authority to regulate the economy.”) (internal footnote omitted).

¹⁹³ *See Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 642 (1965) (statement of James Kilpatrick, Vice Chairman of the Virginia Commission on Constitutional Government) (“[I]t is . . . unfortunate that members of the Supreme Court of the United States appeared—turned up to here [sic] the President’s message and appeared on the television cameras applauding. I think this is a violation of the separation of powers of the United States and creates imbalances.”).

¹⁹⁴ *Allen v. State Bd. Of Elections*, 393 U.S. 544, 569 (1969) (weighing legislative history and Congress’s intention in passing the Voting Rights Act).

definition of a “standard, practice, or procedure with respect to voting” that would be subject to preclearance under the Act?¹⁹⁵ The Court could have taken the view of the plaintiffs, who argued that the statute only covered changes that determined who may register to vote.¹⁹⁶ The Court rejected this interpretation, on the view that “[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.”¹⁹⁷ Instead, the Court concluded that “[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.”¹⁹⁸

But as Justice Harlan pointed out in his dissenting opinion, this reading of the statute ran into some very difficult problems.¹⁹⁹ For example, the words of the statute could not be clearer.²⁰⁰ Only voting changes that voters must comply with were subject to preclearance under Section 5 of the Act; to Justice Harlan, this was the end of the matter.²⁰¹ Not so for a majority of justices. In *Allen*, and in spite of this language, the Court found a legislative intent to expand the reach of the Act that “all changes, no matter how small, be subjected to § 5 scrutiny.”²⁰² While the government’s brief suggested that the language was “merely the result of an oversight,”²⁰³ the majority opinion simply ignored the language altogether.

Allen was not the last case in which the Court interpreted the statutory language expansively to update the Act or to address issues that Congress did not anticipate.²⁰⁴ This is not to say that the Court has always expanded

¹⁹⁵ 42 U.S.C. § 1973(a) (2012).

¹⁹⁶ *Allen*, 393 U.S. at 564.

¹⁹⁷ *Id.* at 565.

¹⁹⁸ *Id.* at 566.

¹⁹⁹ *Id.* at 582–94 (Harlan, J., concurring in part and dissenting in part).

²⁰⁰ Here is the relevant portion of the Act:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure 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, and unless and until the court enters such judgment no person shall be denied the right to vote *for failure to comply* with such qualification, prerequisite, standard, practice, or procedure

42 U.S.C. § 1973(a) (2012) (emphasis added).

²⁰¹ *Allen*, 393 U.S. at 587 (Harlan, J., concurring in part and dissenting in part).

²⁰² *Id.* at 568 (majority opinion).

²⁰³ *Id.* at 587 (Harlan, J., concurring in part and dissenting in part).

²⁰⁴ See *Dougherty Cnty. Bd. of Educ. v. White*, 439 U.S. 32, 47 (1978) (interpreting the Voting Rights Act Section 5 to encompass a rule requiring board of education members to take an unpaid leave

the language of the Act. Rather, it is to say that the text of the VRA has, at best, served as a jumping-off point for making voting rights policy. Not even the plain meaning of an unambiguous text has cabined the Court's interpretations of the Act.

This was true as late as five years ago, in *Northwest Austin*. The case seemed to present a fairly prosaic statutory interpretation question. Under the clear terms of the statute, only states or political subdivisions could seek bailout from coverage. The plaintiff, a utility district, was not a state, and a political subdivision was defined by the statute as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."²⁰⁵ The lower court correctly understood this language to bar the utility district from escaping coverage. To the Court, however, "specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision."²⁰⁶ From the Court's perspective, it had to amend the Act in order to avoid a constitutional problem and strike down an act of Congress. The Court was clear on this point: "all political subdivisions—not only those described in §14(c)(2)—are eligible to file a bailout suit."²⁰⁷

In *Northwest Austin*, the Chief Justice had been willing to author an opinion updating the Act in order to save it. In *Shelby County*, however, he wrote that "[w]e cannot . . . try our hand at updating the statute ourselves, based on the new record compiled by Congress."²⁰⁸ In *Northwest Austin*, the Chief Justice expressed a reluctance to strike down an Act of Congress because "Congress is a coequal branch of government," the "Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it," and because "Congress amassed a sizable record in support of its decision to extend the preclearance requirements."²⁰⁹ The Court was not willing to strike down the Act in *Northwest Austin* out of deference to a co-equal branch.

In *Shelby County*, the Court declared that the era of deference was over. When Congress first promulgated the VRA, the Court remarked that

of absence while campaigning for office because it falls within the meaning of a "standard, practice, or procedure with respect to voting"); *United States v. Bd. of Comm'rs*, 435 U.S. 110, 128 n.15 (1978) (finding that the term "political subdivision" is only relevant for purposes of determining geographical coverage where a whole state is not covered); *Perkins v. Matthews*, 400 U.S. 379, 388 (1971) ("§ 5 requires prior submission of any changes in the location of polling places").

²⁰⁵ 42 U.S.C. § 1973l(c)(2) (1964).

²⁰⁶ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 207 (2009).

²⁰⁷ *Id.* at 211.

²⁰⁸ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2629 (2013).

²⁰⁹ *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 205 (internal quotation marks omitted).

the “coverage formula [was] rational in both practice and theory.”²¹⁰ The Chief explained that in 1966, “the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense.”²¹¹ As explained by Chief Justice Roberts, “rational in both theory and practice” meant that there was both a theoretical and practical understanding of what caused the discrimination (tests and devices); what were its effects (disparities in voter registration and turnout); and how to address the cause and effect (the coverage formula).²¹² Congress’s use of tests and devices as a way of identifying the covered jurisdictions was rational because tests and devices were not simply proxies for discrimination but were in fact instruments of discrimination.²¹³ “The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.”²¹⁴

Forty years later, the formula is no longer rational.²¹⁵ This is because the tests and devices that the formula used as a trigger are no longer devices of racial discrimination. In 1966 literacy tests were synonymous with racial discrimination and therefore it was rational to use them as a trigger to capture the states that were engaged in systematic discrimination, but because literacy tests have been banned for almost forty years, they cannot be responsible for current voting problems.²¹⁶ Thus, the government does not have a story to tell about causation. Moreover, because voter registration and turnout are equal between blacks and whites or have approached near parity, the government also does not have a story to tell about effect. Consequently, from the perspective of the majority, the coverage formula is a remedy in search of a problem.²¹⁷ The era of deference has been replaced, at least from one scholar’s perspective, by the era of disdain.²¹⁸

²¹⁰ *Shelby Cnty.*, 133 S. Ct. at 2625 (alteration in original) (internal quotation marks omitted).

²¹¹ *Id.*

²¹² *Id.* at 2617 (internal quotation marks omitted) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966)).

²¹³ *Id.* at 2625 (quoting *Katzenbach*, 383 U.S. at 330).

²¹⁴ *Id.* at 2627.

²¹⁵ We are grateful to Rick Pildes for helping us flesh out this point and urging us to address it.

²¹⁶ *Shelby Cnty.*, 133 S. Ct. at 2627 (“The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years.”).

²¹⁷ Having concluded that the trigger was no longer rational, in theory or in fact, because the formula does not capture current purported discriminatory practices, the Court felt free to dismiss the government’s reverse-engineering argument that “Congress identified the jurisdictions to be covered and then came up with criteria to describe them.” *Id.* at 2628 (emphasis in original). Chief Justice Roberts argues that the argument is not compelling because the government “does not even attempt to demonstrate the continued relevance of the formula to the problem it targets.” *Id.*

²¹⁸ Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 2, 65–66 (2012).

IV. REDEEMING THE STATES AND THE SOUTH FROM THE PAST

Consider now the question of the proper allocation of authority for elections as between the states and the federal government. This struggle between the states and the national government with respect to the apportionment of powers over elections has waxed and waned throughout American history. Concomitantly, the Court has also assumed the role of arbiter, fixing the metes and bounds of the authority of each over elections. The Court has often stated as a constitutional principle the proposition that the states “have broad powers to determine the conditions under which the right of suffrage may be exercised”²¹⁹ But it has sometimes qualified the constitutional principle with the caveat that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”²²⁰ The tug of war between the states and the federal government for final say over elections, and the Court’s role as arbitrator, is an important part of our constitutional history.²²¹ *Shelby County* is simply the latest scene, though assuredly not the last, in a long running drama.

The obvious starting point is the Reconstruction Era, when the federal government began to aggressively assert its authority against the states in matters of elections. This was a time when the pendulum swung heavily from the states, which were clothed with the authority to regulate elections under the Constitution of 1787, to the federal government as protector of voting rights.²²² The classic example of this newfound posture is the Military Reconstruction Act of 1867, which required that the new state constitutions in the South extend the right to vote to “male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition . . . except such as may be disfranchised for

²¹⁹ *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 50 (1959) (citing *Pope v. Williams*, 193 U.S. 621, 633 (1904)).

²²⁰ *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966).

²²¹ Professor Joshua Douglas has recently authored a wonderful piece exploring this question with great depth. See generally Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2405396; see RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* (2004) (presenting a historical overview of the enfranchisement of African Americans in America).

²²² See VALELLY, *supra* note 221, at 16 (“Under the Constitution of 1787, the determination of voting rights fell to state and local governments. But the Civil War and Reconstruction, and the ensuing massive program of African American electoral inclusion, recast the constitutional responsibilities for establishing and protecting voting rights by means of ratification of the Fifteenth Amendment and passage of several implementing statutes. These legal initiatives posed an enormous challenge to widely held conceptions of American federalism.”).

participation in the rebellion or for felony at common law”²²³ The Act was soon followed by both the Fourteenth and Fifteenth Amendments, which sought to delegate the responsibility for the full enfranchisement of the newly freedmen to the national government. Taken together, these various efforts to protect the franchise against racial discrimination accomplished their aims as Blacks registered, voted, and took office at unprecedented levels.

By the turn of the twentieth century, however, the pendulum had clearly swung away from the promise of Reconstruction and from the federal government and back to the states. Southern redemption proved particularly unkind to the Black political community. The South used myriad methods to disenfranchise black voters, including literacy tests and poll taxes, complex registration and residency requirements, and fraud and violence. These practices had their desired effect, so that “[b]y the early 1900s, such measures had virtually eliminated black political participation in the South.”²²⁴ Reconstruction, with its promise of political equality as enforced by a strong national government, was clearly over. The states were once again in charge of elections.²²⁵

There would be fits and starts in the intervening years, from cases striking down grandfather clauses and the white primaries in Texas, but not until the Civil Rights Era would the pendulum shift towards a much stronger national involvement in protecting the right to vote. The archetypical representation of federal power was the Voting Rights Act of 1965. The Act was the actualization of the original meaning of the Reconstruction Amendments, specifically the Fourteenth and Fifteenth Amendments. The VRA was a signal of national power and national responsibility, as against the states, for preserving the right to vote, particularly against racial discrimination. This is why we think that Justice Ginsburg was right when she wrote in *Shelby County* that “[w]hen confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress’ power to act is at its height.”²²⁶

However, the VRA did not simply represent the apotheosis of federal power; it was concomitantly a symbol of the subject position of the states, specifically the southern states, and perhaps the most visible reminder of our national and original sin, slavery. It was also a reminder of the Civil

²²³ Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429, amended by Act of Mar. 23, 1867, ch. 6, 15 Stat. 2, amended by Act of July 19, 1867, ch. 30, 15 Stat. 14, amended by Act of Mar. 11, 1868, ch. 25, 15 Stat. 41.

²²⁴ MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 77 (2007); see J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

²²⁵ VALELLY, *supra* note 221, at 100.

²²⁶ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting).

War and Reconstruction.²²⁷ By targeting selected southern jurisdictions with a history of racial discrimination in voting, which happened to be almost all of the states of the Old Confederacy, and requiring them to pre-clear these jurisdictions' voting changes, the Act treated the southern states as "little more than conquered provinces."²²⁸

In both *Northwest Austin* and *Shelby County*, Chief Justice Roberts has cryptically referred to the "federalism costs" of the VRA. Though he has not said much about these federalism costs, if one examines these issues from the context of the historical circumstances that gave rise to the VRA, it is plausible to conclude that the supposed harm to the states is not consequential but expressive. *Northwest Austin* and *Shelby County* help us understand the "federalism costs" of the VRA in expressive terms; it is the message that the VRA sends about the proper and respective roles of the federal government and the states.²²⁹ Or perhaps more precisely and directly, it is the fact that the VRA sends a message of national superiority and state subservience over elections. This is the expressive harm that Chief Justice Roberts framed in dignity terms in *Northwest Austin* and later elaborated upon in *Shelby County*.

Whether one agrees or not with Justice Black's provocative characterization of the effect of the coverage-preclearance duo of the VRA, the post-VRA Supreme Court understood the Reconstruction Amendments to privilege federal regulation over state regulation in voting, particularly where voting regulation intersected with race. It is in the full-throated register of a nationalist that Chief Justice Warren roared in *South Carolina v. Katzenbach*:

The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. . . . Section 1 of the Fifteenth Amendment declares that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This declaration has always been treated as self-executing and has repeatedly been construed, without further

²²⁷ Fishkin, *supra* note 31, at 180.

²²⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 360 (1966) (Black, J., dissenting).

²²⁹ See Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, "Bizarre Districts," and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 485 (1993) (explaining that expressive harms are the "kinds of harms against which the Constitution protects").

legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice.²³⁰

Though Chief Justice Warren perfunctorily acknowledged “the general rule . . . that States ‘have broad powers to determine the conditions under which the right of suffrage may be exercised[,]’” the general rule is cabined by the corollary that the “Fifteenth Amendment supersedes contrary exertions of state power.”²³¹ Congress has a power that is “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”²³² Chief Justice Warren’s departing premise is nationalist to its core. His premise presumes federal power as the default premise and assumes the legitimacy of the exercise of federal power until proved otherwise by a rational basis standard. For Chief Justice Warren and the post-Voting Rights Act Supreme Court, Congress possesses near plenary power over the states and only when Congress exercises its power irrationally does it become unconstitutional.

By contrast, Chief Justice Roberts departs from a very different premise altogether, that of state supremacy. As he notes:

States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens . . .

More specifically, “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” Of course, the Federal Government retains significant control over federal elections. But States have “broad powers to determine the conditions under which the right of suffrage may be exercised.”²³³

For Chief Justice Roberts, the default position is the presumption and legitimacy of state power as against the federal government.²³⁴ The Chief Justice appealed to the Constitution of 1791 as opposed to the Constitution

²³⁰ *Katzenbach*, 383 U.S. at 324–25.

²³¹ *Id.* at 325 (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965)).

²³² *Id.* at 327 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

²³³ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991); *Carrington*, 380 U.S. at 91).

²³⁴ See Douglas, *supra* note 221, at 27 (explaining that the current Court trusts states more than Congress to administer elections).

of 1870. It is as if the Reconstruction Amendments never happened.²³⁵ It is federal, not state, power that must be justified under the Constitution.

In striking down Section 4(b) of the Act in *Shelby County*, Chief Justice Roberts wrested the nationalist premise from its moorings and replaced it with state supremacy as the pendulum swings yet again. As importantly, the Chief Justice introduced, or he might say reintroduced, an additional consideration. Recall that in *South Carolina v. Katzenbach*, Chief Justice Warren stated as the “fundamental principle” plenary, or near-plenary, Congressional power.²³⁶ In *Shelby County*, Chief Justice Roberts, announced a different, competing, and incongruous fundamental principle:

Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of *equal* sovereignty” among the States. . . . Over a hundred years ago, this Court explained that our Nation “was and is a union of States, equal in power, dignity and authority.” . . . Indeed, “the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” . . . *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. . . . At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent

²³⁵ For a terrific discussion about the import of the Reconstruction Amendments for our federalism, see Fishkin, *supra* note 31, at 179. We agree with Fishkin, if partially, when he writes:

A historical memory of a “War Between the States,” followed by a reunion between noble blue and gray on equal terms—with Reconstruction a best-forgotten corrupt interregnum in between—might well yield the conclusion that antebellum understandings of state sovereignty remain largely intact, even today. However, such a conclusion cannot be sustained if we instead remember the Civil War and Reconstruction as a radical transformation of the South through federal military and civilian power, with a series of amendments specifically ratifying the use of that federal power to establish the equal citizenship of Southern blacks.

Id. We do think, however, that Fishkin’s historical account is a bit more complicated than he lets on. See, e.g., Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65 (1974) (arguing that the Republican Congress did not intend to expand the power of the national government as against the states); Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39; Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the “State Action” Cases of the Waite Court*, 41 LAW & SOC’Y REV. 343 (2007)

²³⁶ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

disparate treatment of States.²³⁷

The Chief Justice attributed the “fundamental principle” to the Court’s decision in *Northwest Austin*. But *Northwest Austin* simply asserted the point and provided no support for the assertion. Consider the relevant passage from *Northwest Austin*:

The Act also differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty.” Distinctions can be justified in some cases. “The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.” But a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.²³⁸

Prior to *Northwest Austin*, the argument for “equal sovereignty” was generally understood as applicable only at the time of admission. The cases cited by the Court do not hold otherwise. In *United States v. Louisiana*,²³⁹ for example, the Court explained that:

[t]his Court early held that the 13 original States, by virtue of the sovereignty acquired through revolution against the Crown, owned the lands beneath navigable inland waters within their territorial boundaries, and that each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission.²⁴⁰

And more importantly, *South Carolina v. Katzenbach* ratified the view that the equal sovereignty argument was only relevant in the context of admission of a state to the United States. The Court stated in *Katzenbach* that “[t]he doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”²⁴¹

Given the Court’s clear and unequivocal rejection of the equal sovereignty argument as a valid constitutional objection to the VRA in *South Carolina v. Katzenbach*, how was it determinative in *Shelby County*?

²³⁷ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623–24 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *Coyle v. Smith*, 221 U.S. 559, 567, 580 (1911)) (footnotes omitted).

²³⁸ *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203 (internal citations omitted).

²³⁹ 363 U.S. 1 (1960).

²⁴⁰ *Id.* at 16.

²⁴¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966).

The Court's decision in *Northwest Austin* is of course the key point of transition. As the Chief Justice said in response to one of Justice Ginsburg's points in dissent, "the dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. . . . [T]he dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin*'s emphasis on its significance."²⁴² As it has become clearer with hindsight, the battle for the constitutionality of the VRA was lost on the hill of *Northwest Austin*,²⁴³ though many in the civil rights community thought otherwise at the time.

In *Northwest Austin*, the Court noted "our historic tradition that all the States enjoy 'equal sovereignty.'"²⁴⁴ The Court then went on to note that there can be exceptions to the "historic tradition" because "[d]istinctions can be justified in some cases."²⁴⁵ The resurrection is performed in the sentence that followed. The Court quoted *South Carolina v. Katzenbach* for the following proposition: "The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared."²⁴⁶ The Court closed out the paragraph by noting, in the language that we quoted above, that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."²⁴⁷

As an aside, note how equal sovereignty begins as an "historic tradition" at the start of the paragraph, morphs into a "doctrine" in the middle of the paragraph, and comes to life as a "fundamental principle" by the end of the paragraph. But more importantly, compare what the Court in *South Carolina v. Katzenbach* actually said with the *Northwest Austin*'s Court representation of *Katzenbach*; the strikeouts indicate how the Court in *Northwest Austin* edited the portion it was quoting from *South Carolina v. Katzenbach*: "The doctrine of the equality of States, ~~invoked by South Carolina,~~ does not bar ~~this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the~~ remedies for local evils which have subsequently appeared."²⁴⁸ *Northwest Austin* not only distorted the meaning of what the Court said in *South Carolina v. Katzenbach* but also revived the equal dignity of the states that *Katzenbach* buried. By essentially rewriting the *South Carolina v. Katzenbach* Court's argument on equal sovereignty in *Northwest Austin*, Chief Justice Roberts

²⁴² *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2630 (2013).

²⁴³ See, e.g., Stuart Minor Benjamin, *Bootstrapping*, 75 LAW & CONTEMP. PROBS. 115, 140 n.180 (2012) (predicting that the Court will strike down the VRA in the near future as a consequence of its opinion in *Northwest Austin*).

²⁴⁴ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

²⁴⁵ *Id.*

²⁴⁶ *Id.* (quoting *Katzenbach*, 383 U.S. at 328).

²⁴⁷ *Id.*

²⁴⁸ *Id.* (quoting *Katzenbach*, 383 U.S. at 328–329).

was able to use *Northwest Austin* to “bootstrap”²⁴⁹ the equal sovereignty argument into a viable legal argument. This then permitted him to accuse the dissent of ignoring the principle of equal sovereignty, not as understood in *South Carolina v. Katzenbach* of course, but as revived in *Northwest Austin*.

Before *Shelby County*, we had a fairly strong grasp on the allocation of authority between the federal government and the states for regulating elections.²⁵⁰ While we knew that the Constitution delegated to the states authority for administering elections, we assumed, justifiably, that the scope of federal authority was fairly robust. In particular, when the federal government was regulating at the intersection of race and voting, it was operating within its zone of influence and was at the height of its powers. In this vein, we further assumed that the Reconstruction Amendments realigned the relationship between the federal government and the states. This was the lesson of the civil rights revolution.

However, *Shelby County* has destabilized these assumptions. At root, the conservative justices understand the Civil Rights Era as *sui generis*, a moment in the nation’s history when abnormal conditions demanded a commensurate and abnormal response. The VRA distorted the proper relationship between the federal government and the states. This is why Chief Justice Roberts has repeatedly emphasized the “extraordinary” nature of the VRA and the “extraordinary” nature of the problem. These departures were justified in 1965 and 1966,²⁵¹ from the Chief Justice’s perspective, because of the “extraordinary” nature of the problem, the Court permitted Congress and the VRA to “sharply depart[.]” from “basic principles” of federalism and equal sovereignty.²⁵² In 1965, the VRA divided the Nation between North and South.²⁵³ Recall here the Chief Justice’s question at oral argument as to whether “citizens in the South are more racist than citizens in the North?” Or recall Justice Kennedy’s

²⁴⁹ We borrow the term from Professor Stuart Benjamin. See Benjamin, *supra* note 243, at 116. (“The idea behind bootstrapping is that by undertaking Y, an actor creates the conditions that enable that actor to undertake some further action Z. . . . A key element of bootstrapping is an actor using two or more steps to achieve an outcome it could not achieve with a single step. The actor does not merely build on conditions precedent that have arisen, but instead creates those conditions precedent.”).

²⁵⁰ Douglas, *supra* note 221, at 14 (“The Court, in *Shelby County v. Holder*, was not as generous toward Congress’s rationale for its voting rule involving the preclearance mechanism of the Voting Rights Act Although just one case, *Shelby County* is extremely significant in part because it demonstrates the Court’s deep skepticism toward Congress’s asserted reasoning for its election laws. This flies in the face of Constitutional authority to Congress to regulate the election process.”).

²⁵¹ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (“In 1966, we found these departures from the features of our system of government justified.”).

²⁵² *Id.* at 2624.

²⁵³ *Id.* at 2628 (“In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. . . . Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.”).

question with respect to whether Alabama is better off as “its . . . own independent sovereign or . . . under the trusteeship of the United States government?”²⁵⁴ As the Court read the history:

It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966. But history did not end in 1965.²⁵⁵

Shelby County is a course correction. It aims to restore, from the perspective of the current Supreme Court majority, the proper balance between the federal government and the states by limiting congressional power exercised pursuant to the Reconstruction Amendments. Quoting *Gregory v. Ashcroft*,²⁵⁶ which limited congressional power exercised under the Fourteenth Amendment against the state’s power to define the qualifications of its office holder, the Chief Justice remarked that “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.”²⁵⁷ From this perspective the Reconstruction Amendments did not alter the balance between federal and state power, which was fixed by 1791, following the ratification of the Bill of Rights.

But *Shelby County* is not simply about recalibrating the federal-state balance; the majority is after bigger game here. *Shelby County* is also about the redemption of the South.²⁵⁸ The *Shelby County* majority seeks to redeem the states and the South from the past.²⁵⁹ The majority sees voting rights law and policy as impermissibly backward-looking, too tied to the past, and insufficiently forward-looking. Justice Thomas gestured toward this point in his partial concurrence and partial dissent in *Northwest Austin*. “Punishment for long past sins,” he argued, “is not a legitimate basis for imposing a forward-looking preventative measure that has already served

²⁵⁴ Transcript of Oral Argument at 41–42, 51, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

²⁵⁵ *Shelby Cnty.*, 133 S. Ct. at 2628.

²⁵⁶ 501 U.S. 452 (1991).

²⁵⁷ *Shelby Cnty.*, 133 S. Ct. at 2623.

²⁵⁸ Fishkin, *supra* note 31, at 178.

²⁵⁹ See *Shelby Cnty.*, 133 S. Ct. at 2629 (explaining how the Fifteenth Amendment supports looking forward to a brighter future and not looking back in judgment).

its purpose.”²⁶⁰ Chief Justice Roberts later echoed this point in *Shelby County*. As he explained:

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. . . . To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin*, and we make it clear again today.²⁶¹

In the same paragraph and quoting from *Rice v. Cayetano*,²⁶² the case that struck down a provision of the Hawaii Constitution that limited voting for trustees for the Office of Hawaiian affairs to Hawaiians or native Hawaiians, the Court noted that “[c]onsistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment.”²⁶³ The next sentence in *Rice v. Cayetano*, which Chief Justice Roberts did not quote, provides: “The Amendment grants protection to all persons, not just members of a particular race.”²⁶⁴

If one listens carefully, one hears echoes of the *Civil Rights Cases*, particularly in the Court’s admonition that:

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 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, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.²⁶⁵

One is also reminded of Justice Scalia’s reproach in his concurring opinion in *Adarand v. Peña*²⁶⁶ “under our Constitution there can be no such thing as

²⁶⁰ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2525 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

²⁶¹ *Shelby Cnty.*, 133 S. Ct. at 2629 (internal citation omitted).

²⁶² 528 U.S. 495 (2000).

²⁶³ *Id.* at 512.

²⁶⁴ *Id.*

²⁶⁵ 109 U.S. 3, 25 (1883).

²⁶⁶ 515 U.S. 200 (1995).

either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual"²⁶⁷ He went on to caution:

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.²⁶⁸

One is also reminded of Justice Scalia's comment during oral argument in *Shelby County* where he characterized the VRA as a racial entitlement.²⁶⁹ Or, to close the circle, consider this quote from the Chief Justice from *Parents Involved in Community Schools*: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."²⁷⁰

The clear message from a majority of the Court in *Shelby County* is that the time has come to move on from the regulatory framework that characterized voting rights law, policy, and jurisprudence for the last half century. For the Court's conservative majority, the regulatory framework is no longer *au courant* but *passé*. "Current conditions" and "current needs" is the persistent refrain of *Shelby County*. Racism, at least systematic racism in voting, is a thing of the past and therefore is not a justification for regulation. The South can no longer be tainted on the basis of its past history. The federal government can no longer assert broad powers on the basis of its past role as protector and defender of the voting rights for people of color or as enforcer of the Reconstruction Amendments. As Justice Thomas advised in *Northwest Austin*, the fact that the coverage-preclearance regime is no longer necessary "is not a sign of defeat. It is an acknowledgement of victory."²⁷¹ As the majority would have it, it is time to withdraw the troops, declare victory, and go home. This is the end of the Second Reconstruction.

V. CONCLUSION: ON THE VOTING RIGHTS AMENDMENT ACT

If the broader reading of *Shelby County* turns out to be the correct, *Shelby County* will limit the civil rights community's attempt to restore the status quo ante *Shelby*. In many respects *Shelby County* has already done

²⁶⁷ *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).

²⁶⁸ *Id.*

²⁶⁹ Amy Davidson, *In Voting Rights, Scalia Sees a "Racial Entitlement"*, NEW YORKER (Feb. 28, 2013), <http://www.newyorker.com/news/amy-davidson/in-voting-rights-scalia-sees-a-racial-entitlement.html>.

²⁷⁰ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

²⁷¹ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2525 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

so. Consider the Voting Rights Amendment Act of 2014 (the “VRAA”) introduced by Representatives Jim Sensenbrenner and John Conyers in the House and Patrick Leahy in the Senate.²⁷² The proposed legislation is a significantly scaled down version of the VRA and the old Section 4(a), which it is replacing. The new proposed coverage formula would apply to any state that committed five voting rights violations in the last fifteen years and has had “persistent and extremely low minority voter turnout.”²⁷³ The VRAA defines a voting rights violation as a final judgment from a court concluding that the state has violated the Fourteenth or Fifteenth Amendment; or that the state has violated federal voting laws; or that the Attorney General has refused to pre-clear a proposed change, not including photo voter identification laws.²⁷⁴ The VRAA is proposed as a *Shelby County* fix but it is scaled so as not to overstep the constitutional boundaries laid down by *Shelby County*.

Some voting rights activists have objected to the VRAA on policy grounds that it is too narrow and that it does not address modern voting rights problems, such as voter photo identification requirements. Unlike the old coverage formula, which applied to nine states²⁷⁵ and parts of seven other states,²⁷⁶ the new VRAA coverage formula would apply only to four states: Georgia, Louisiana, Mississippi, and Texas.²⁷⁷ The VRAA does not cover states such as Ohio, Florida, and North Carolina that have been the site of recent voting rights controversies.²⁷⁸ Some Latino activists have also complained that the VRAA does not do enough to protect language minority groups.²⁷⁹

The VRAA may not simply be inadequate as a matter of policy,²⁸⁰ if

²⁷² H.R. 3899, 113th Cong. (2014); S. 1945, 113th Cong. (2014); Press Release, Patrick Leahy, U.S. Sen. For Vt., Leahy, Sensenbrenner & Conyers Lead Bipartisan, Bicameral Introduction of Legislation to Restore the Voting Rights Act (Jan. 16, 2014), *available at* <http://www.leahy.senate.gov/press/leahy-sensenbrenner-and-conyers-lead-bipartisan-bicameral-introduction-of-legislation-to-restore-the-voting-rights-act>.

²⁷³ Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014).

²⁷⁴ *Id.* at 6–7.

²⁷⁵ Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia (except for 17 counties and cities). JAMES A. GARDNER AND GUY-URIEL E. CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 279 (2012).

²⁷⁶ *Id.* at 280.

²⁷⁷ *The Voting Rights Amendment Act of 2014: Moving Forward On The VRAA*, NAT’L ASSOC. FOR THE ADVANCEMENT OF COLORED PERSONS: LEGAL DEFENSE FUND, <http://www.naacpldf.org/case-issue/voting-rights-amendment-act-2014> (last visited Oct. 30, 2014).

²⁷⁸ *Id.*

²⁷⁹ See NALEO EDUCATIONAL FUND REP., *LATINOS AND THE VOTING RIGHTS ACT: PROTECTING OUR NATION’S DEMOCRACY THEN AND NOW 2*, *available at* http://www.naleo.org/downloads/NALEO_VRA_Report_5.pdf (noting that the VRAA would only restore protections to about two thirds of the Latinos that were protected under the VRA).

²⁸⁰ As we wrote in 2009, prior to *Northwest Austin*:

one reads *Shelby County* broadly, certain parts of the VRAA are constitutionally vulnerable. Notwithstanding the attempt to draft a race-based *Shelby* fix within the confines of *Shelby County*, as it turns out, this is a difficult task to accomplish when one is operating within the confines of a doctrine that is increasingly skeptical of the race-based approach. In order to write a statute that is in any way effective, the VRAA must at least skirt the constitutional lines laid down by *Shelby County*. For example, the VRAA amends Section 3(c) of the Act in order to make it easier to bail-in states and local subdivisions. Under the VRAA, a jurisdiction would be bailed-in not only when the jurisdiction engaged in voting discrimination that violates the Fourteenth or Fifteenth Amendments—intentional discrimination under the current statute—but when a jurisdiction violates Section 2’s results, disparate impact, test.²⁸¹

But if *Shelby County* signals the majority’s intent to limit the scope of the VRA and, in this context, to limit the VRA’s scope to voting rights violations that are the consequence of intentional discrimination by state actors,²⁸² the VRAA’s amended Section 3(c) may not only be struck down, but it will also have unnecessarily put Section 2 within the Court’s crosshairs. Similarly, the VRAA uses “persistent and extremely low minority voter turnout” as a trigger for determining which jurisdictions ought to be covered under a revised Section 4. However, if *Shelby County* is properly read as limiting the scope of Congressional intervention where Congress is enacting race-based voting legislation to eradicate systemic racism, a trigger that relies on persistent low turnout will not be rational in theory or practice.²⁸³ The persistently low turnout is not directly tied to identifiable racial discrimination.

By any account, the VRAA is a modest intervention, in part because the highly partisan legislative process in Congress limits what is politically possible, but also in part because voting rights activists insist on framing the *Shelby* fix in race-based terms and thus must operate within the Court’s

If the high court now votes to invalidate the Voting Rights Act, Congress and the civil rights community would have an opportunity to engage in a much-needed debate on voting rights policy for a new century. Among the issues that could be debated are voter identification requirements and their potentially disparate racial impact, varying resources for voting machines and equipment, obstacles faced by Latinos in voting and political participation, and denial of the right to vote to thousands of ex-felons, many of whom are non-white.

Guy-Uriel E. Charles and Luis Fuentes-Rohwer, *A Golden Opportunity to Revamp the Voting Rights Act*, L.A. TIMES (May 25, 2009), <http://articles.latimes.com/2009/may/25/opinion/oe-charles25>.

²⁸¹ See Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong., available at http://sensenbrenner.house.gov/uploadedfiles/vra_bill_text.pdf (interpreting the effect of the act with regard to disparate impact tests).

²⁸² See *infra* text accompanying notes 102–25.

²⁸³ See *infra* text accompanying notes 216–19.

confining *Shelby County* paradigm. Notwithstanding the fact that the VRAA is a modest intervention, the VRAA is constitutionally vulnerable.

Shelby County presents significant challenges for those advocating in favor of a race-based approach. Specifically, they will need to articulate a clear understanding of what constitutes racial discrimination in voting in the twenty-first century. Following the Court's decision in *Northwest Austin*, where the Court declined to strike down Section 5 of the VRA, many in the civil rights community declared victory, notwithstanding the fact that the writing was then clearly on the wall. The assumption was that, notwithstanding the Court's expressed skepticism, the conservative majority would not dare strike down the VRA. Voting rights activists dared the Court to blink. This time the Court did not blink and voting rights has suffered a significant setback. *Shelby County* presents an important opportunity for voting rights supporters to search for a better model that best represents the challenges faced by voters in the twenty-first century. The old consensus is no more; the past is gone. It is time to look forward toward the future.

