Shelby County v. Holder: When the Rational Becomes Irrational

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INTRODUCTION

For most of our nation's history, African Americans and other racial and ethnic minorities were systematically excluded from voting, particularly in the South and Southwest. By 1965, almost a century had passed since the Fifteenth Amendment had outlawed voting discrimination on the basis of race, color, or previous condition of servitude. Yet, despite the promise of the Fifteenth Amendment, state-sanctioned disenfranchisement of African Americans continued relentlessly. The failure of legal mechanisms to break apart discriminatory voting regimes resulted in intractable barriers to the ballot box for African Americans and other minority voters. Only with the enactment of the Voting Rights Act of 1965 ("Voting

Rights Act" or "Act")[1] did the constitutional right to vote free of racial discrimination begin to become a reality.

In its wisdom, Congress included a provision in the Act, Section 5, which required federal "preclearance" of voting changes in jurisdictions with the worst records of discrimination as captured by a coverage formula that was based on low political participation and the use of a voting test or device.[2] This system was extremely effective as the Department of Justice issued more than 1,000 objection letters that blocked racially discriminatory voting changes from going into effect[3] and covered jurisdictions were deterred countless times from making discriminatory changes because of the preclearance process.

Given the unusually stringent nature of the Section 5 preclearance scheme, Congress limited the duration of the statute so that it would be subject to periodic review. The Supreme Court upheld the constitutionality of Section 5 in 1966, 1973, 1980, and 1999 as an appropriate use of Congress's power to enact legislation to enforce the constitutional prohibitions against racial discrimination in voting.[4] Indeed, in *South Carolina v. Katzenbach* and *City of Rome v. United States*, the Court showed substantial deference to Congress and applied the deferential "rational basis" test to Congress's Fifteenth Amendment enforcement power.[5]

When Congress reauthorized the Act in 2006, the landscape had changed. The constitutionality of the Section 5 scheme would likely be decided by a conservative Supreme Court majority more hostile to congressional legislation to enforce the Civil War Amendments. Congress's response was to amass a record of more than 15,000 pages, which showed that the covered jurisdictions that had historically engaged in the worst voting discrimination also had a recent record of racial voting discrimination.

1. 42 U.S.C. § 1973 (2012).

2. *See* 42 U.S.C. § 1973c(a) (2012).

3. *See Voting Rights Act: Section 5 of the Act–History, Purpose, and Scope: Hearing Before for Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13 (2005) (statement of Bradley Schlozman, Ass't Att'y Gen. for Civil Rights).

4. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Georgia v. United States, 411 U.S. 526 (1973); City of Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterey County, 525 U.S. 266 (1999).

5. *See City of Rome*, 446 U.S. at 177–78; *Katzenbach*, 383 U.S. at 324.

On June 25, 2013, in *Shelby County v. Holder*,[6] the five-member Supreme Court conservative majority "immobilized"[7] Section 5 by holding that the coverage formula was unconstitutional.[8] The majority declined to use or even mention the arguably more rigorous "congruence and proportionality" test adopted in *City of Boerne v. Flores* to apply to Congress's Fourteenth Amendment enforcement power, which had the twin benefits of enabling the majority to ignore that Congress was protecting two fundamental rights: the right to vote and to be free of racial discrimination, and to avoid examining the entire record compiled by Congress. Instead, the Court found that the formula was "irrational" because it was expressed in registration and turnout data and the use of a test or device in 1964, 1968, and 1972, and that this bore no relationship to current registration and turnout data.[9]

In this Article, we argue that the Court's decision defied the deferential nature of the rational basis test and conflicted with how it was applied in *Katzenbach* and *City of Rome*. In the process, the Court misstated the theory of coverage Congress used to enact the 2006 reauthorization and refused to acknowledge that Congress's purpose was to cover jurisdictions with historical and current records of discrimination. We demonstrate the Court's doctrinal departure from Fifteenth Amendment jurisprudence by first reviewing the historical and legal developments from the initial adoption of the Act in 1965 and through subsequent reauthorizations in 1970, 1972, 1982, and 2006.

We further argue that a close reading of the opinions and transcripts of *Shelby County* and earlier cases reveals two aspects of the Section 5 scheme that motivated the *Shelby County* decision. First, the conservative justices viewed the treating of states differently as an affront to the "equal sovereignty" of the states. This led the Court to place the burden on Congress to justify reauthorizing Section 5 in 2006, even though the rational basis standard places the burden of proving irrationality on the party challenging legislation. The equal sovereignty argument, however, had been flatly rejected by the Court

6. Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013). Chief Justice Roberts wrote the majority opinion on behalf of himself and Justices Kennedy, Scalia, Thomas, and Alito. *Id.* at 2612. Justice Thomas wrote a separate concurring opinion. *Id.* at 2631. Justice Ginsburg wrote a dissenting opinion on behalf of herself and Justices Breyer, Sotomayor, and Kagan. *Id.* at 2632.

7. *Id.* at 2632 n.1 (Ginsburg, J., dissenting).

8. *Id*.

9. *See id.* at 2628 (majority opinion).

in *Katzenbach* as having any relevance and finds no support in constitutional jurisprudence prior to 2009, when Chief Justice Roberts initially introduced it as dicta in a previous challenge to the 2006 reauthorization.[10] Second, despite Section 5's firm constitutional footing under the Fifteenth Amendment and the record supporting the need for its protections, Section 5 offended the conservative majority's view that the explicit use of race conflicts with the Equal Protection Clause of the Fourteenth Amendment. Section 5 protects minority voters but not white voters and required covered jurisdictions, when making decisions related to changes in voting rules and procedure, to ensure that the position of racial minorities would not ultimately worsen. In prior opinions, the conservative members, and Justice Kennedy in particular, had repeatedly mentioned the concern that Section 5 conflicted with the Fourteenth Amendment, and this concern was expressed again in *Shelby County*.[11]

Part I of this Article summarizes the history of discrimination in voting and of Section 5 prior to the *Shelby County* decision; Part II discusses the implications of the Court declining to apply the congruence and proportionality test and the Court's departure from rational basis principles; and Part III analyzes the significance of the equal sovereignty and colorblindness principles to the *Shelby County* decision and argues that the Court's reliance on those principles was unfaithful to the Constitution and the Court's jurisprudence.

I. THE HISTORICAL AND LEGAL CONTEXT LEADING UP TO *SHELBY COUNTY*

A. The Disenfranchisement of African Americans Prior to the Enactment of the Voting Rights Act

Prior to the Civil War, African Americans in the South did not possess the right to vote. The Civil War Amendments gave African Americans, among others, a set of civil rights against racial discrimination by state and local governments.[12] One such endowment provided in both the Fourteenth and Fifteenth Amendments is the right to vote free of racial discrimination.[13] The Fifteenth Amendment is direct in

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

11. *Shelby Cnty.*, 133 S. Ct. at 2627.

12. The Civil War Amendments, also commonly referred to as the Reconstruction Amendments, include the Thirteenth, Fourteenth, and Fifteenth Amendments. For the purposes of this Article, "Civil War Amendments" refers only to the Fourteenth and Fifteenth Amendments.

13. U.S. CONST. amend XV, § 1; *see* U.S. CONST. amend. XIV, § 1.

this regard: "The 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."[14] The last section of both amendments provides Congress with the power to enforce the amendments with appropriate legislation.[15]

In the first decade after the Civil War, Congress and the executive branch undertook aggressive efforts to use its enforcement powers to enable African Americans to exercise the right to vote,[16] but after the election of 1876 when Reconstruction ended, the federal government largely abandoned these efforts.[17] For nearly 100 years thereafter, many Southern states prevented most of their African American citizens from exercising their right to vote through laws and by force.[18] The failure of legal redress to dismantle pervasive, and oftentimes violent, voting discrimination resulted in intractable problems for African American voters. Beginning in the 1940s, the heroic efforts of those in the Civil Rights Movement, combined with legislation and some legal victories began to break down this generational assault on the

14. U.S. CONST. amend. XV, § 1. The language of the Fourteenth Amendment is not as direct, but the Court has held that it prohibits racial discrimination in voting. Rogers v. Lodge, 458 U.S. 613, 616 (1982).

15. Section 5 of the Fourteenth Amendment provides, "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Section 2 of the Fifteenth Amendment provides, "[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend XV, § 2.

16. The Military Reconstruction Acts of 1867, 14 Stat. 428–430, ch. 153, *amended by* 15 Stat. 2–5, ch. 6, *amended by* 15 Stat. 14–16, ch. 30, *amended by* 15 Stat. 41, ch. 25, required former Confederate states to provide for African American male suffrage in their state constitutions before the state could be admitted to the Union. The Enforcement Acts of 1870 and 1871 provided that any citizen shall be entitled to vote without regard to race, color, or previous condition of servitude, provided penalties against officials and citizens who obstructed the right to vote, and established election supervisors for municipalities with more 20,000 people. An Act to enforce the Right of Citizens of the United States to vote in the Several States of the union and for other Purposes, 16 Stat. 140, ch. 114 (1870); An Act to enforce the rights of citizens to vote in the several states of this union, 16 Stat. 433, ch. 99 (1871). The Supreme Court found portions of the Enforcement Acts unconstitutional in *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875) (holding Enforcement Act penalties for interference of the vote cannot be enforced against private citizens), and *United States v. Reese*, 92 U.S. 214, 221–22 (1875) (finding that the Enforcement Act provision enabling citizens who are refused voter registration to be registered if they present affidavit establishing registration exceeded Congress's Fifteenth Amendment authority). Congress repealed much of the rest of the Enforcement Act in 1894. 28 Stat. 36, ch. 25.

17. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000) (discussing the abandonment of efforts to enforce the right to vote of African Americans beginning in the 1870s); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PART SOUTH, 1880-1910, at xiii (1974) (discussing disenfranchisement of African Americans in the South in the late nineteenth and early twentieth centuries).

18. *See* KEYSSAR, *supra* note 17; KOUSSAR, *supra* note 17.

right to vote.[19] But even as of the 1964 Presidential election, low African American political participation in several Southern states demonstrated that much more needed to be done.[20]

The reports and images of the March 7, 1965, "Bloody Sunday" attack by Alabama State Troopers on John Lewis, Hosea Williams, and other civil rights activists as they crossed the Edmund Pettus Bridge in Selma, Alabama on their way to Montgomery to protest the denial of African American citizens' rights to register and vote finally provided the long-needed impetus for sweeping federal legislation. Eight days later, President Lyndon Baines Johnson addressed Congress and informed it and the nation that he would be sending a bill to Congress which, among other things, "will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote."[21] That bill would become the Voting Rights Act of 1965.[22]

B. The Adoption of the Voting Rights Act of 1965

In seeking "to banish the blight of racial discrimination in voting"[23] in a comprehensive way, Congress adopted various provisions to confront different issues. Some provisions were national in scope and permanent, including Section 2, which allows the federal government and private plaintiffs to bring lawsuits regarding voting practices

19. *See* South Carolina v. Katzenbach, 383 U.S. 301, 312–33 (1966) (summarizing the Fifteenth Amendment cases that invalidated grandfather clauses, the white primary, racial gerrymandering, and the discriminatory application of voting tests). *See generally* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969 (2001) (discussing the progress made from 1944–1964). The Court in *Katzenbach* also discussed federal voting rights litigation that had been brought pursuant to the Civil Rights Acts of 1957 and 1960, which were the first federal civil rights laws enacted since the Reconstruction era. *See Katzenbach*, 383 U.S. at 313–15.

20. For example, the registration rate of the African American voting age population in 1964 in Mississippi was estimated at 6.4% in Mississippi and 19.4% in Alabama. *Katzenbach*, 383 U.S. at 313.

21. Lyndon Baines Johnson, U.S. President, Special Message to the Congress: The American Promise (Mar. 15, 1965).

22. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965), 42 U.S.C. § 1973 *et seq*.

23. *Katzenbach*, 383 U.S. at 308.

or procedures that racially discriminate,[24] and Section 10, which barred the use of poll taxes.[25]

There were three sets of provisions limited in time and geography that covered certain jurisdictions ("covered jurisdictions") for five years. One set enabled the Attorney General to certify examiners who could oversee the registration of voters for federal elections and the observation of elections.[26] The second barred voting tests and devices, such as a literacy test or a test for moral character, in covered jurisdictions.[27] In 1975, the ban on tests and devices became permanent and nationwide.[28]

The third set, contained in Section 5 of the Act, required covered jurisdictions to get federal approval for any changes to a voting practice or procedure.[29] This came to be known as Section 5 preclearance. Under Section 5, the covered jurisdiction has to demonstrate to the Attorney General, or to a three judge court for the United States District Court for the District of Columbia, that a voting change will not have a discriminatory purpose or effect before the jurisdiction can implement the change.[30] The impetus for Section 5 was the numerous examples where the Department of Justice would prevail after spending years litigating against a discriminatory voting barrier that a Southern jurisdiction had erected to prevent African Americans from registering to vote or voting, and the jurisdiction would effectively undermine the victory by enacting a new provision that had a similar purpose and effect as the prior provision.[31]

These requirements applied to jurisdictions based on a formula contained at Section 4(b) of the Act. States and political subdivisions were covered under the formula if: (1) less than fifty percent of their voting age residents were registered as of November 1, 1964, or voted

24. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965). Originally Section 2 largely tracked the language of the Fifteenth Amendment. After the Supreme Court decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), see discussion *infra* n.54, Congress amended Section 2 in 1982 to explicitly provide for discriminatory results claims. Pub. L. 97-205, § 3, 96 Stat. 134 (1982).

25. 42 U.S.C. § 1973h (2012).

26. Voting Rights Act of 1965, Pub. L. 89-110, §§ 6–9, 79 Stat. 439–42 (1965).

27. § 4, 79 Stat. 438–39.

28. *See generally* Pub. L. 94-73, 89. Stat. 400 (1975) (making the ban against certain prerequisites to voting permanent).

29. § 5, 79 Stat. at 439.

30. *Id.*

31. South Carolina v. Katzenbach, 383 U.S. 301, 327–28 (1966); H.R. Rep. No. 89-439, at 9–11 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439–42; S. Rep. No. 89-162, pt. 3, 6–9 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2543–47.

in the November 1964 Presidential Election according to the Census Bureau and (2) the jurisdiction employed a test or device for voting.[32] Congress had largely reverse engineered the formula: it decided which jurisdictions should be covered because of their record of discrimination and then designed a formula around it.[33] The formula captured many of the Southern states with horrific records of discrimination—Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as many political subdivisions in North Carolina.[34] Also, by focusing on jurisdictions with low political participation, and that had employed tests or devices, the formula did a reasonably good job of reflecting where discrimination was most prevalent.

Congress tailored the coverage to reduce potential overinclusion by providing a means for jurisdictions to "bail out" of coverage. The original provision enabled a covered jurisdiction to bail out if it could demonstrate in a federal declaratory judgment action that any test or device had not "been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color."[35] At the same time, Congress enabled federal courts to "bail-in" jurisdictions not covered by the 4(b) formula if found by a court to violate the Fifteenth Amendment and the court deems it appropriate.[36]

C. Unsuccessful Challenges to the Section 5 Preclearance Scheme and Reauthorizations of Section 5 in 1970, 1975, and 1982

Not surprisingly, covered jurisdictions wasted little time in challenging the formula and the Section 5 preclearance scheme as exceeding Congress's enforcement power under the Civil War Amendments. In *South Carolina v. Katzenbach*, the Supreme Court upheld the constitutionality of the geographically limited provisions of the Act, including the Section 4(b) formula and Section 5 preclearance.[37] With respect to South Carolina's federalism challenge, the Court responded that the "[t]he gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power."[38] The Court found that

32. § 4(b), 79 Stat. at 438.
33. *Katzenbach*, 383 U.S. at 329.
34. *See* Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).
35. § 4(a), 79 Stat. at 438.
36. § 3(c), 79 Stat. at 437–38.
37. *Katzenbach*, 383 U.S. at 325–26.
38. *Id.* at 325.

the two unusual components of the Section 5 preclearance scheme—the preclearance process and selective geographical coverage—were constitutionally acceptable. The Court held that Congress could remedy voting discrimination absent prior adjudication because of the history of systematic resistance to the Fifteenth Amendment and Congress's determination that case-by-case litigation was inadequate.[39] The Court found that selective geographical coverage was "acceptable" because it had "learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil may spread elsewhere in the future."[40] As discussed more fully below, the Court applied the deferential "rational basis" test and found that the coverage formula was rational in theory and fact.[41]

In the first five years after passage of the Act, there were some significant changes in voter participation in the covered jurisdictions as the bans on tests and devices, the ability of federal examiners to register voters, and continued voting litigation made a difference. A 1968 report of the United States Commission on Civil Rights found that black voter registration exceeded fifty percent in every Southern state, whereas at the time the Act passed, only Florida, Tennessee, and Texas had black registration rates over fifty percent.[42] In response, Southern jurisdictions were introducing voting changes that were designed to dilute black voting power,[43] such "as conversion from elections by district to elections at-large, laws permitting the legislature to consolidate predominantly Negro counties with predominantly white counties, and reapportionment and redistricting statutes."[44] The next year, in *Allen v. State Board of Elections*, the Supreme Court would make clear that the Act, in general, and Section 5, in particular, was

39. *Id.* at 327–28.

40. *Id.* at 328.

41. *See infra* at Section III.B.1.

42. U.S. COMM'N ON CIV. RTS., POLITICAL PARTICIPATION 12 (1968) [hereinafter POLITICAL PARTICIPATION]. For example, Mississippi's black voter registration rate increased from 6.7 percent to 59.8 percent. *Id.* The Commission found that there was a positive correlation between the use of federal examiners and black voter registration rates. *Id.*

43. The Court began discussing the concept of vote dilution in the one person, one vote cases where it held that the constitutional right to vote under the Fourteenth Amendment can be violated where there are legislative districts of substantially unequal population and, as a result, the voting strength of individuals in the districts with larger populations is diluted compared to those with smaller populations: "[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." Reynolds v. Sims, 377 U.S. 533, 568 (1964).

44. POLITICAL PARTICIPATION, *supra* note 42, at 21.

"intended to reach any state enactment which altered the election law of a covered State in even a minor way[,]"[45] including changes that had the potential of diluting minority voting strength.[46]

Congress would reauthorize and amend the Section 4 coverage formula in 1970, for five years, and 1975, for seven years. The 1970 reauthorization added jurisdictions where less than fifty percent of voting age residents were registered as of November 1, 1968, or voted in the November 1968 Presidential Election according to the Census Bureau and had employed a voting test or device.[47] Subsequently, the 1975 reauthorization added jurisdictions where less than fifty percent of voting age residents were registered as of November 1, 1972, or voted in the November 1972 Presidential Election according to the Census Bureau and had employed a voting test or device. It also added as a test or device the use of English-only elections in jurisdictions where at least five percent of the voting age citizens are from a single language minority.[48] As a result of the changes in 1975, the states of Alaska, Arizona, and Texas became covered under Section 5.[49]

The Supreme Court continued to dismiss challenges to the Section 5 preclearance regime. The Court declined to hear full argument to a challenge to the 1970 reauthorization.[50] Regarding the 1975 reauthorization, the Court upheld the constitutionality of Section 5 in *City of Rome v. United States*.[51] The Court rejected Rome's federal-

45. Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969).

46. *See id.* at 569. In *Allen*, private litigants brought four cases claiming that covered jurisdictions had implemented voting changes without preclearance. The Court held that private parties had standing to bring an action alleging that a covered jurisdiction had not complied with Section 5 and found that the jurisdictions had violated Section 5 by not submitting the changes. *See id.* at 554–57, 564–71. Prior to the *Allen* decision, most jurisdictions were not submitting voting changes to the Department of Justice. The Civil Rights Commission found that the Department of Justice was not enforcing Section 5. POLITICAL PARTICIPATION, *supra* note 45, at 176. From 1965 to 1969, the Department of Justice only received thirty Section 5 submissions. *Voting Rights Act: Section 5 of the Act—History, Purpose, and Scope: Hearing Before for Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13 (2005) (statement of Bradley Scholzman, Ass't Att'y Gen. for Civil Rights). Things changed after the *Allen* decision. In 1970, the Department received 331 submissions. In 1976, the Department received 2,685 submissions. *Id.*

47. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 4–5, 84 Stat. 315, 315 (1970).

48. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 202–04, 89 Stat. 400, 401–02 (1975). As defined by the Act, the "term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." § 207, 89 Stat. at 402.

49. U.S. DEP'T OF JUSTICE, CIV. RTS. DIVISION, *Section 5 Covered Jurisdictions*, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Jan. 21, 2014).

50. Georgia v. United States, 411 U.S. 526, 534–35 (1973).

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

ism challenge to Section 5 because "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by "appropriate legislation,"'" reaffirming one of the central tenets of *Katzenbach*.[52] As in *Katzenbach*, the Court applied the deferential "rational basis" test.[53] The Court also found that Congress could prohibit changes with a discriminatory impact as part of its enforcement powers even if such changes did not violate the Constitution.[54] In reviewing the record, the Court accepted Congress's determination that though minority registration and turnout were increasing in the covered jurisdictions, Section 5 was still needed because of efforts to dilute minority voting strength as reflected in Department of Justice objections to proposed voting changes.[55]

During the 1982 reauthorization, which extended the Section 4 and 5 preclearance scheme for twenty-five years without changing the coverage formula,[56] Congress changed the bailout standard so that any jurisdiction with a "clean" record for ten years could bail out of coverage by filing a declaratory judgment action.[57] The Court denied the State of California's as-applied constitutional challenge in 1999.[58]

D. The 2006 Reauthorization and the *Northwest Austin* Case

Going into the 2005–06 reauthorization process, there were signals that the increasingly conservative Supreme Court might more closely scrutinize the Section 5 scheme. As detailed below in Part III, the Supreme Court had raised constitutional concerns about Section 5 in several cases and had limited both the purpose prong in *Reno v. Bossier Parish*,[59] and the effect prong in *Georgia v. Ashcroft*.[60] In addition, the Court had adopted a new method of reviewing the consti-

52. *Id.* at 179.
53. *Id.* at 177.
54. *Id.* at 177–78. On the same day the Supreme Court decided *City of Rome*, it also decided *City of Mobile v. Bolden*, where a plurality of the Court held that a discriminatory purpose was required to find a violation of the Fourteenth or Fifteenth Amendments and that discriminatory vote dilution did not violate the Fifteenth Amendment. *See* City of Mobile v. Bolden, 446 U.S. 55, 58 (1980). The Court previously held that discriminatory vote dilution violates the Fourteenth Amendment. White v. Regester, 412 U.S. 755, 765 (1973).
55. *See City of Rome*, 446 U.S. at 180–82.
56. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133 (1982).
57. *See* § 2(b)(4), 96 Stat. at 131–32.
58. *See* Lopez v. Monterey County, 525 U.S. 266, 268 (1999).
59. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 340–41 (2000) ("*Bossier Parish II*").
60. *See* Georgia v. Ashcroft, 539 U.S. 461, 461–62 (2003).

tutionality of Fourteenth Amendment legislation that appeared to be more demanding than the rational basis test applied in *Katzenbach* and *City of Rome*. This new method of review, often referred to as the "congruence and proportionality test," first appeared in *City of Boerne v. Flores*,[61] and then in a series of cases that followed.[62] The congruence and proportionately test is described in more detail in Part II. Some commentators expressed the view that these changes in Supreme Court jurisprudence would constrain Congress's authority to reauthorize Section 5 before it expired in 2007.[63]

Against this backdrop, Congress undertook an extensive process in 2005 and 2006 to reauthorize the Act. Congress held twenty-one hearings and heard from ninety-two witnesses and amassed a record of more than 15,000 pages.[64] With respect to the preclearance scheme, the predominant focus was on the extensive record of discrimination in the covered jurisdictions since the 1982 reauthorization instead of changing the coverage formula or performing an extensive comparative analysis between covered and non-covered jurisdictions.[65] The most significant comparative analysis, which looked at Section 2 cases with reported opinions since the 1982 reauthorization, showed that there had been more successful Section 2 cases in the covered jurisdictions than in the non-covered jurisdictions even though the covered jurisdictions represented a minority of the states

61. *See* City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

62. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 521 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81–82 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999).

63. *See, e.g.*, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177 (2005); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225 (2003); Victor Andres Rodriquez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 CALIF. L. REV. 769 (2003).

64. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 435 (D.D.C. 2011).

65. *See generally* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007) (giving an account of the reauthorization process). As noted in that article, there were political and practical challenges to changing the coverage formula, and the current formula had the benefit of having been upheld by the Supreme Court in *City of Rome*. *Id.* at 208–11. The article also noted that comparing covered to non-covered jurisdictions was difficult because "[r]eliance on almost any of the voting data in the record to prove a greater need for section 5 in the currently covered jurisdictions, however, must account for the fact that the successful operation of section 5 will prevent the emergence of the type of evidence that would best justify its continued operation." *Id.* at 207. A comparative analysis had not been something Congress had devoted much attention to in 1965 or in subsequent reauthorizations. The lack of a comparative analysis had not troubled the Supreme Court in *Katzenbach*, and the Court did not mention the issue in *Georgia v. United States*, *City of Rome*, or *Lopez*.

and were also subject to Section 5.[66] The law which reauthorized the Act[67] extended the preclearance scheme for twenty-five years and left the coverage formula intact.[68] In addition, Congress legislatively overruled the decisions in *Bossier Parish II* and *Georgia v. Ashcroft*[69] and eliminated the federal examiner provisions while reaffirming the ability for the federal government to send observers.[70]

Days after President George W. Bush signed the 2006 reauthorization into law a municipal utility district in Texas filed an action before the three-judge federal court in the District of Columbia requesting bailout and, alternatively, challenging the constitutionality of Section 5.[71] The district court denied bailout because the municipal utility district was not a political subdivision as defined under the Act,[72] and found that Section 5 was constitutional as reauthorized in 2006.[73] On appeal, the Supreme Court, in *Northwest Austin Municipal Utility District No. 1 v. Holder*, effectively punted on the constitutional issue by adopting a strained definition of "political subdivision" and stating that the district was eligible to bail out.[74] The opinion acknowledged the dispute as to the governing legal standard (rational basis or congruence and proportionality) but did not resolve it.[75]

At the same time, however, Chief Justice Roberts's majority opinion, on behalf of eight justices, threw down some markers for a future challenge to the preclearance scheme. While acknowledging the accomplishments of the Act and Section 5 preclearance in particular, the opinion contains statement after statement suggesting skepti-

66. The analysis, which was performed by Professor Ellen Katz and students at the University of Michigan Law School, can be found at *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 964–1124 (2005).

67. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

68. § 4, 120 Stat. at 580.

69. §§ 2(b)(6), 5, 120 Stat. at 578, 580–81.

70. § 3, 120 Stat. at 578–80.

71. Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 223 (D.D.C. 2008).

72. The Voting Rights Act defines political subdivision as follows: "The term 'political subdivision' shall mean 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." 42 U.S.C. § 1973 (c)(2) (2012). The municipal utility district was located in Travis County, which conducted voter registration as well as the other electoral administrative functions for the district. *See Nw. Austin*, 573 F. Supp. 2d at 231–34.

73. *See Nw. Austin*, 573 F. Supp. 2d at 223–24.

74. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 206–11 (2009).

75. *See id.* at 204.

cism that the 2006 reauthorization was constitutional.[76] Preluding principles that the Court would come back to in *Shelby County*, the opinion in dicta stated that "the Act imposes current burdens and must be justified by current needs,"[77] and 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 it targets."[78]

The decision in *Northwest Austin* left supporters of Section 5 relieved and opponents of Section 5 resolved to bring a new challenge.[79]

II. GAME CHANGE: *SHELBY COUNTY V. HOLDER*

About a year after the *Northwest Austin* decision, Shelby County, Alabama brought a new constitutional challenge to Section 5. Shelby County's legal team framed its claims more strategically than those in *Northwest Austin* so that the Court would more likely need to confront the facial constitutionality of Section 5.[80] In addition, Shelby County separately challenged the constitutionality of the coverage formula.[81] This gave the Supreme Court a way to effectively undermine Section 5 without finding it unconstitutional.

As discussed more fully below, both the district court and court of appeals rejected Shelby County's claims.[82]

By a five to four vote, the Supreme Court reversed the lower courts and held that the Section 4(b) coverage formula was unconsti-

76. *See id*. at 202 (Section 5 "imposes substantial 'federalism costs'") (citing Lopez v. Monterey County, 525 U.S. 266, 282 (1999)); *id.* ("Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law––however innocuous––until they have been precleared by federal authorities in Washington, D.C.") (emphasis in original); *id.* ("[C]onditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South."); *id.* at 203 ("[F]ederalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another"); *id.* ("The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions").

77. *Id.*

78. *Id.*

79. *See, e.g.*, Michael King, *Point Austin: The Supremes Bail Out,* AUSTIN CHRON. (June 26, 2009), http://www.austinchronicle.com/news/2009-06-26/799163/.

80. First, it produced a plaintiff that was "bailout-proof" because there had been a recent Section 5 objection to a voting change within Shelby County. *See* Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 443 (D.D.C. 2011). Second, it made only a facial challenge to minimize the likelihood that the Court would find that Section 5 was unconstitutional as applied to Shelby County and then not reach a facial claim. *See id.* at 443–44.

81. *See id.*

82. *See* Shelby Cnty. v. Holder, 679 F.3d 848, 853 (D.C. Cir. 2012); *Shelby Cnty.*, F. Supp. 2d at 427–28.

tutional.[83] Chief Justice Roberts's majority opinion explicitly did not address the constitutionality of Section 5 directly.[84] As Justice Ginsburg's dissent noted, however, the decision had the effect of immobilizing Section 5.[85]

By referencing the determination in *Katzenbach* that the original coverage formula was rational in practice and theory[86] and stating three times that the reauthorization of the coverage formula in 2006 was irrational,[87] the majority in *Shelby County* appeared to be applying a rational basis test. However, the purported rational basis analysis the Court engaged in bore no resemblance to standard rational basis analysis and was in conflict with how the Court applied rational basis to Section 5 in *Katzenbach* and *City of Rome*.

Before discussing the rational basis test, how it was applied in *Katzenbach* and *City of Rome*, and how the *Shelby County* Supreme Court majority departed from precedent, it bears discussion that the majority's decision not to analyze the 2006 reauthorization under the congruence and proportionality test enabled the Court to sidestep aspects of the preclearance scheme that would favor a finding of constitutionality.

A. The Congruence and Proportionality Test Would Have Required the Court in *Shelby County* to Consider Factors It Largely Ignored

The 1997 case of *City of Boerne v. Flores* further developed––or some might say muddled—the standard of review for congressional enforcement power under the Civil War Amendments. *Boerne* involved the question of whether Congress had exceeded its enforce-

83. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2615 (2013).

84. *See id.* at 2631–32 (Thomas, J., concurring). The Court previewed this in granting Shelby County's petition writ of certiorari. The Supreme Court stated that it would limit its inquiry to whether the coverage exceeded Congress's enforcement powers under the Fourteenth and Fifteenth Amendments. Shelby County v. Holder, 133 S. Ct. 594 (2012).

85. *Shelby Cnty.*, 133 S. Ct. at 2632 n.1 (Ginsburg, J., dissenting).

86. *See id.* at 2629 (majority opinion).

87. "Viewing the preclearance requirements as targeting such efforts simply highlights the *irrationality* of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution." *Id.* (emphasis added).

> If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been *irrational* for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been *irrational* to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

Id. at 2630–31 (emphasis added).

ment power under §5 of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act.[88] In answering the question, the Court required that Fourteenth Amendment enforcement legislation exhibit a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[89] The Court adopted the "congruence and proportionality" test for the purpose of designating remedial legislation legitimately enacted pursuant to Congress's Fourteenth Amendment enforcement power from legislation that expands the substantive scope of rights under the Amendment, which the Court in *Boerne* held exceeds the scope of Congress's enforcement power.[90]

The jurisprudential ambiguity, which many scholars and voting rights practitioners expected the Court to resolve in *Shelby County*, was whether the *Katzenbach-Rome* standard, which dealt with the specific question of Section 5 of the Act's constitutionality and Congress's Fifteenth Amendment enforcement powers, or whether *Boerne* and its progeny, which dealt with Congress's Fourteenth Amendment enforcement power, was controlling precedent for determining the constitutionality of the Section 4(b) coverage formula and Section 5 preclearance remedy.[91] Though the Court has never explicitly held that the "congruence and proportionality" test extends to Fifteenth Amendment enforcement legislation or the Act, the enforcement provisions of the Fourteenth and Fifteenth Amendment have frequently been read as coextensive,[92] and *Boerne* embraced *South Carolina v.*

88. City of Boerne v. Flores, 521 U.S. 507, 511–12 (1997).

89. *See id.* at 520.

90. *Id.*; *see also* Tennessee v. Lane, 541 U.S. 509, 520 (2004). *Boerne* itself may provide the best example of how Congressional legislation could change substantive constitutional rights. In *Emp't Div.* v. *Smith,* 494 U.S. 872, 874–76 (1990), the Court rejected a Free Exercise Clause claim brought by individuals who were fired and denied state unemployment benefits because they had used peyote as members of a Native American church. Congress enacted legislation where it specifically stated that it was changing the test for Free Exercise Clause cases like those in *Smith* and cited the Fourteenth Amendment as its rationale against applying the legislation against a state. *Boerne*, 521 U.S. at 517. The Court found that Congress had gone beyond its enforcement power and was substantively defining the Constitution, which was the job of the Court. *Id.* at 536; *see also Lane*, 541 U.S. at 520; Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

91. *See* Shelby Cnty. v. Holder, 811 F.Supp. 2d 424, 447–48 (D.D.C. 2011).

92. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 742, n.** (2003) (Scalia, J., dissenting) ("Section 2 of the Fifteenth Amendment is practically identical to §5 of the Fourteenth Amendment."); *Garrett*, 531 U.S. at 373 n.8 ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); Lopez v. Monterey County, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendment as coextensive."); *City of Boerne*, 521 U.S. at 518 (comparing Congress'[s] "parallel power to enforce the provisions of the Fifteenth Amendment"); City of Rome, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting)

Katzenbach and *Rome* by underscoring Section 5 of the Act as a model of appropriate use of congressional enforcement powers.[93]

Both of the lower courts in *Shelby County* applied the *Boerne* standard of review, though varied in reasoning as to why it applied. After the district court found that *Boerne* "merely explicated and refined the one standard of review that has always been employed to assess legislation enacted to *both* the Fourteenth and Fifteenth Amendments"[94] it concluded that "Boerne's congruence and proportionality framework reflects a refined version of the same method of analysis utilized in Katzenbach, and hence provides the appropriate standard of review to assess Shelby County's facial constitutional challenge to Section 5 and Section 4(b)."[95] The Court of Appeals for the District of Columbia Circuit looked to the two principles raised in *Northwest Austin*—that current burdens are justified by current needs and disparate geographic coverage is sufficiently related to the problem—"as sending a powerful signal that congruence and proportionality" was the correct test.[96] It also found *Katzenbach* and *City of Rome* highly relevant to its analysis in that those cases "tell [a] great deal about [t]he evil that § 5 is meant to address, as well as the types of evidence that are probative of 'current needs.'"[97]

Given these series of decisions interpreting Congress's enforcement power under the Civil War Amendments, it was bizarre that the *Shelby* majority did not seek to explain *Boerne*'s position relative to the "any rational means" standard, or its application to the Fifteenth Amendment. In fact, the opinion did not cite *Boerne* even once, though it seemed that the two guiding principles first raised in *Northwest Austin* and subsequently adopted in *Shelby*—that current burdens are justified by current needs and disparate geographic coverage is sufficiently related to the problem—fit the "congruence and proportionality" model.

("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by appropriate legislation [Section 5 of the Fourteenth Amendment].").

93. *See City of Boerne*, 521 U.S. at 518, 525–27. *Boerne*'s progeny similarly invoked the reasoning of *South Carolina v. Katzenbach* and *Rome* in evaluating Congress's Fourteenth Amendment enforcement power. *See Lane*, 541 U.S. at 547–48; *Hibbs*, 538 U.S. at 757–58 (Scalia, J., dissenting); *Garrett*, 531 U.S. at 373; Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 638–39, 662 (1999) (Stevens, J., dissenting).

94. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 449 (D.D.C. 2011).

95. *Id*.

96. Shelby Cnty. v. Holder, 679 F.3d 848, 859 (D.C. Cir. 2012).

97. *Id.* (second alteration in original) (citations omitted).

The "congruence and proportionality" test set forth in *Boerne* is considered to be "arguably more rigorous" than rational basis review[98]; this increased rigor of the *Boerne* test extends not only to the test appearing less deferential to Congress than rational basis, but to requiring the Court to analyze the enactment at issue more methodically. The Court in *Boerne* and subsequent cases developed a three-part test to assess "congruence and proportionality." "The first step . . . is to identify with some precision the scope of the constitutional right at issue."[99] Second, the Court "examine[s] whether Congress identified a history and pattern of unconstitutional" conduct.[100] Third, the Court examines whether the legislation at issue is "an appropriate response to this history and pattern" of conduct.[101]

In applying the *Boerne* framework to the Section 5 preclearance scheme, the first step—the scope of the constitutional right at issue—would have weighed heavily in favor of constitutionality because Section 5 protects two fundamental rights: the right to vote and the right to be free from racial discrimination by the government.[102] In the *Boerne* cases, the scope of the right at issue has often largely suggested the outcome; when Congress has legislated to protect a right not subject to heightened protection, the Court has struck it down, whereas when Congress was protecting a right subject to greater protection, the Court has been more deferential.[103] If the Court in *Shelby County* had analyzed the preclearance scheme under the *Boerne* test, it would have had to give substantial weight to the fact that Section 5's purpose is to protect two fundamental rights. Instead, the Court

98. *Id.* ("In any event, if section 5 survives the arguably more rigorous 'congruent and proportional' standard, it would also survive *Katzenbach*'s 'rationality' review.").

99. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

100. *Id.* at 368.

101. Tennessee v. Lane, 541 U.S. 509, 530 (2004).

102. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

103. *Compare Garrett*, 531 U.S. at 374 (holding that Congress violated the Fourteenth Amendment when enacting a provision that allowed employees to sue states for damages under the Americans with Disabilities Act), *and* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000) (holding that employees could not sue state employers for damages under the Age Discrimination in Employment Act), *with Lane*, 541 U.S. at 533–34 (upholding provisions of the Americans with Disabilities Act as applied to the "fundamental [due process] right of access to the courts."), *and* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737, 740 (2003) (upholding provisions of the Family and Medical Leave Act forbidding states from having different family leave provisions based on gender).

eluded any discussion of the importance of the Fifteenth Amendment's proscriptions against racial discrimination in voting.

The second prong of *Boerne* requires an analysis of whether there was a pattern of unconstitutional conduct. Moreover, the Court has stated that "'it [is] easier for Congress to show a pattern of state constitutional violations'" when the right sought to be protected merits heightened protection.[104] The Supreme Court in *Shelby County* acknowledged that "voting discrimination still exists; no one doubts that."[105] But then the Court never analyzed how much voting discrimination still exists in the covered jurisdictions. If it had employed the *Boerne* standard, it would have needed to do so. Both lower courts in *Shelby County* applied the fact-intensive *Boerne* test and then extensively reviewed the record of discrimination Congress amassed.[106] Both courts found the record was sufficient to find a pattern of unconstitutional conduct in the covered states based on evidence of contemporary discrimination in voting.[107] Indeed, the district courts in *Northwest Austin* and *Shelby County* examined the congressional record of the 2006 reauthorization in detail and found that the pattern of unconstitutional conduct was "more powerful"[108] and "far exceed[ed]"[109] that in *Hibbs* and *Lane*.

If the Court had employed the *Boerne* analysis in *Shelby County*, the closest issue would have been the third prong because it would have weighed the needs and the costs of the legislation and analyzed whether the Section 5 scheme was appropriately tailored. But the Court would have had to answer these questions in a functional way by reviewing the entire legislative record by weighing the actual need

104. *Lane*, 541 U.S. at 529 (quoting *Hibbs*, 538 U.S. at 736).

105. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2619 (2013).

106. *See supra* text accompanying notes 94–97.

107. *See* Shelby Cnty. v. Holder, 679 F.3d 848, 865; Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 498. The evidence relied upon by the district court included: "significant" disparities between non-Hispanic white and minority registration rates in several covered states; the underrepresentation of African Americans in state legislatures of covered states based on percentage of population; the more than 700 Section 5 objections lodged by the Attorney General between 1982 and 2006, including more than 400 based on discriminatory purpose; the couple hundred voting changes between 1982 and 2006 that were withdrawn after the Department of Justice issued a written request for more information; the twenty-five unsuccessful judicial preclearance suits between 1982 and 2006; the 105 successful Section 5 enforcement suits between 1982 and 2006, which led jurisdictions to submit changes or abandon them; the tens of thousands of federal observers that were sent to monitor elections between 1982 and 2006; and fourteen reported Section 2 cases between 1982 and 2006 where courts made findings of intentional discrimination. *See Shelby Cnty.*, 811 F. Supp. 2d at 492–94 (citations omitted).

108. Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 271 (D.D.C. 2008).

109. *Shelby Cnty.*, 811 F. Supp. 2d at 494.

for the Section 5 preclearance scheme against the federalism cost.[110] Instead, as discussed below,[111] the Court placed form over function and ignored the bulk of the record because it involved second-generation voting discrimination issues. Moreover, in a functional analysis, the Court would have had to give greater consideration to the tailoring effect of bailout, which the Court in *Boerne* referenced as a positive component of the Section 5 preclearance scheme.[112]

It would not have been impossible for the Supreme Court majority in *Shelby County* to find that the 2006 reauthorization of the Section 5 scheme did not satisfy the congruence and proportionality test given that *one* of the *six l*ower court judges in *Northwest Austin* and *Shelby County*, Judge Williams, reached that conclusion.[113] But the Court would have had to account for the fundamental rights that the Section 5 preclearance scheme protects, carefully analyze the entire 2006 record to determine whether there was a substantial pattern of unconstitutional conduct, weigh the need for the Section 5 scheme against the federal cost, and account for the tailoring mechanisms of bail-in and bailout. By ignoring *Boerne*, the majority got around this.

B. The *Shelby County* Supreme Court Majority Finds the Rational Irrational

1. The Rational Basis Test and Its Application to Section 5 Prior to *Shelby County*

Rational basis review of a statute by a Court is usually highly deferential to the governing body that enacted the statute. The Court has stated that the legislative act bears a "strong presumption of validity" and those challenging the statute "have the burden 'to negative every conceivable basis which might support it.'"[114] Indeed, the justification for the statute need not be one that actually motivated the

110. For example, the circuit court in *Shelby County* described the two key issues as whether "the legislative record contain[s] sufficient probative evidence from which Congress could reasonably conclude that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy[,]" and "whether the record supports the requisite 'showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.'" 679 F.3d at 865, 873 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

111. *See* discussion *infra* Section III.B.3.

112. *See* City of Boerne v. Flores, 521 U.S. 507, 533 (1997).

113. *See* Shelby Cnty. v. Holder, 679 F.3d 848, 884–905 (D.C. Cir. 2012) (Williams, J., dissenting).

114. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U. S. 356, 364 (1973)).

legislature, and the "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[115] A study of Supreme Court decisions from 1971 to 1996 found that challenges to government acts were successful less than ten percent of the time when the Court applied the rational basis test.[116] Most of the time when the Supreme Court has stricken down a statute under rational basis scrutiny, it claims to be applying rational basis but in actuality is more closely scrutinizing the purposes of the law and/or the legislative record supporting it.[117]

Regarding Section 5, the Supreme Court applied the traditional rational basis review in *South Carolina v. Katzenbach* and *City of Rome*. In *Katzenbach,* the Court explicitly stated that it was applying rational basis: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[118] The Court explained that such deference was appropriate because Congress's enforcement power under the Civil War Amendments superseded state authority.[119] In finding that the formula was "rational in both practice and

115. *Id.* at 315 (citation omitted).

116. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370 (1999).

117. *Id.* at 360. The two sets of instances in which the Court has applied a more rigorous rational basis test is when the statute discriminates against a class that, though not subject to heightened constitutional protection, has some similarities with classes subject to heightened protection, or the government benefit at issue that has been denied is significant. Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same Sex Relationships*, 86 WASH L. REV. 281, 305 (2011). Even in these instances, the Court has sometimes applied the typical rational-basis analysis and sometimes a heightened rational basis analysis. *Id.* at 305–06.

118. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966). In setting forth the standard of review, the Court in *Katzenbach* stated that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." *Id.* at 326. The Court stated the "classic formulation" of the test that was originally derived from *McCulloch v. Maryland*, which involved a challenge to the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819)).

119. The Court in *Katzenbach* said the following about how Congress's Fifteenth Amendment enforcement power to prevent discrimination in voting is greater than state power to regulate elections:

> This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. These decisions have been rendered with full respect for the general rule, reiterated last Term in *Carrington v. Rash*, 380 U.S. 89, 91, that States "have broad powers to determine the conditions under which the right of suffrage may be exercised." The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. "When a State exercises power wholly within the domain of state interest, it is insulated from federal

theory,"[120] the Court showed substantial deference to Congress. The Court accepted Congress's approach of reverse engineering, starting with "reliable evidence of actual voting discrimination" in certain states and then constructing a formula that included those states.[121] The Court stated that Congress was "entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered" by the formula.[122] The Court found that this approach was rational because tests and devices had been used as a means of preventing African Americans from registering and voting and because a low rate of registration and voting reflected the effect of the tests and devices.[123] The Court also was relatively dismissive of South Carolina's claims that the formula was unconstitutionally overbroad or underinclusive. Regarding overbreadth, the Court cited to the bailout provision,[124] and with respect to underbreadth, the Court said that it was "irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination"[125] because "[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience."[126]

The Court's deference to Congress's enforcement authority in *City of Rome* was similar to that in *Katzenbach*. The Court reiterated the statement in *Katzenbach* that "'the Fifteenth Amendment supersedes contrary exertions of state power,'"[127] because the "[Civil War] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[128] The Court also repeatedly indicated that rational basis was the appropriate standard of review.[129] In reviewing the factual support for the 1975 reauthorization, the Court referenced the Committee reports from the House and Senate record repeatedly and deferred to the conclusions drawn by

judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

383 U.S. at 325 (citations omitted).

120. *Id.* at 330.

121. *Id.* at 329–31.

122. *Id.* at 329.

123. *Id.* at 330.

124. *Id.* at 331.

125. *Id.* at 330–31.

126. *Id.* at 331.

127. City of Rome v. United States, 446 U.S. 156, 180 (1980) (quoting *Katzenbach*, 383 U.S. at 325).

128. *Id.* at 179.

129. *See id.* at 177–79.

Congress in those reports. The Court mentioned that Congress "acknowledged that largely as a result of the Act, Negro voter registration had improved dramatically since 1965" though some registration disparities between white and African American citizens remained.[130] The Court also accepted Congress's determination in the Committee reports that African American representatives in the covered states were not elected in proportion to the African American share of the population.[131] The final piece of evidence the Court credited was Congress's determination, as reflected in Section 5 objections, that although minority registration was increasing, covered jurisdictions were engaged in practices that diluted the voting strength of minority voters, and Section 5 remained necessary to protect the gains that had been accomplished.[132]

2. Congress Elected to Cover Jurisdictions with Both Historical and Current Records of Discrimination

In 2006, Congress elected to maintain the same coverage formula because it reflected those jurisdictions that it believed were most likely to discriminate in the future: those with historical and contemporary records of discrimination. In the 2006 reauthorization statute, Congress laid out a series of findings in support of its decision to reauthorize Section 5. Congress first found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, state legislatures, and local elected offices. This progress is the

130. *Id.* at 180.

131. *See id.* at 180–81.

132. After examining information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General, Congress not only determined that § 5 should be extended for another seven years, it gave that provision this ringing endorsement:

> 'The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength.
>
> The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Sect[i]on 5 which serves to insure that that progress not be destroyed through new procedures and techniques. Now is not the time to remove those preclearance protections from such limited and fragile success.'

Id. at 181 (first alteration in original) (quoting H.R. REP. NO. 94-196, 10–11 (1975)).

direct result of the Voting Rights Act of 1965."[133] Congress found, however, that in the covered jurisdictions "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."[134] After Congress noted the continued evidence of racially polarized voting in the covered jurisdictions and how it "demonstrate[d] that racial and language minorities remain politically vulnerable" in those jurisdictions,[135] Congress then listed the items of evidence of continued discrimination, beginning with the hundreds of Section 5 objections.[136] Congress concluded that:

> continuance of this discrimination without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.[137]

House Judiciary Committee Chair James Sensenbrenner explained Congress's approach to cover those jurisdictions with both historical and contemporary discrimination when he spoke during floor debate in opposition to a proposed amendment that would have based coverage on registration and turnout figures from the 1996, 2000, and 2004 elections. Regarding the importance of historical discrimination, Rep. Sensenbrenner stated:

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133. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577 (2006).

134. § 2(b)(2), 120 Stat. at 577.

135. § 2(b)(3), 120 Stat. at 577.

136. (4) Evidence of continued discrimination includes–

(A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength;

(B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;

(C) the continued filing of section 2 cases that originated in covered jurisdictions; and

(D) the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.

(5) The evidence clearly shows the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982, as demonstrated in the counties certified by the Attorney General for Federal examiner and observer coverage and the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions.

§§2(b)(4)–(5), 120 Stat. at 577–78.

137. § 2(b)(9), 120 Stat. 578.

> By radically altering the coverage formula of the Voting Rights Act in a way that severs its connection to jurisdictions with proven discriminatory histories, this amendment will render H.R. 9 unconstitutional and leave minority voters without the essential protections of the preclearance and the Federal observer requirements central to the VRA.[138]

He also made clear that "the reauthorization of this formula in H.R. 9 is based on recent and proven instances of discrimination in voting rights compiled in the Judiciary Committee's 12,000-page record."[139]

In finding Section 5 preclearance and 4(b) formula constitutional as reauthorized in 2006, the district court found "the legislative record amassed by Congress in support of the 2006 reauthorization of Section 5 is at least as strong as that held sufficient to uphold the 1975 reauthorization of Section 5 in *City of Rome*."[140] The court then found that the coverage formula was constitutional because "Congress ensured that the Section 4(b) would continue to focus on those jurisdictions with the worst *historical* records of discrimination,"[141] "Congress found substantial evidence of contemporary voting discrimination by the very same jurisdictions that had histories of unconstitutional conduct,"[142] and bail-in and bailout minimized underinclusiveness and overinclusiveness.[143] The district court also found that the record contained "substantial evidence" showing that discrimination was worse in the covered jurisdictions than in the non-covered jurisdictions "to the extent" such a showing was required.[144]

Relying largely on the same evidence as the district court,[145] the majority in the court of appeals affirmed the district court. The court defined the essential question regarding whether Section 5 was still needed as follows: "Does the legislative record contain sufficient probative evidence from which Congress could reasonably conclude that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy?"[146]

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138. 152 CONG. REC. H14,274 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (internal quotation marks omitted).

139. *Id*. at H14,275.

140. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 492 (D.D.C. 2011).

141. *Id.* at 506 (emphasis in original).

142. *Id.*

143. *See id.*

144. *Id.*

145. *See* Shelby Cnty. v. Holder, 679 F.3d 848, 865–73 (D.C. Cir. 2012).

146. *Id.* at 865.

The court concluded that the record supported such a finding.[147] Regarding the appropriateness of the coverage formula, the court relied on the fact there were more successful Section 2 cases—in reported decisions, unreported decisions, and settlements—in covered jurisdictions than in non-covered jurisdictions despite: (1) the covered jurisdictions having less population than the noncovered jurisdictions and (2) the existence of Section 5 in the covered jurisdictions blocks discriminatory voting changes before they are put into effect and could be challenged under Section 2.[148] The court also relied on the bail-in and bailout provisions as providing for additional tailoring.[149] In dissent, Judge Williams found the coverage formula "irrational" for two reasons: first, because the formula was based on data that was decades old,[150] and, second, he found that the current data did not support a finding that "the disparity in current evidence of discrimination between the covered and uncovered jurisdictions [was] proportionate to the severe differential in treatment imposed by § 5."[151] Of the six lower court judges who reviewed the record in *Northwest Austin* and *Shelby County*, Judge Williams was the only one who found the record lacking.[152]

3. The Supreme Court in *Shelby* Departs from Precedent in Conducting Its Rational Basis Review

The reasoning and analysis in the Supreme Court majority opinion in *Shelby County* simply cannot be reconciled with standard "rational basis" analysis or how "rational basis" was applied in *Katzenbach* and *City of Rome*. Far from requiring Shelby County to satisfy the typical burden of demonstrating that is no conceivable basis to justify the statute, the Court placed the burden on the federal government to show that the current needs justified the current burden

147. *See id.*

148. *See id.* at 880–81.

149. *See id.* at 881–82.

150. *Id.* at 884 (Williams, J., dissenting).

151. *Id.* at 889.

152. The three judge district court that decided *Northwest Austin* consisted of Judges Tatel, Friedman, and Sullivan. Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 223 (D.D.C. 2008). The district court judge in *Shelby County* was Judge Bates, *Shelby, Cnty. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011), and the three-judge circuit court panel consisted of Judges Tatel, Griffith, and Williams. Shelby Cnty., v. Holder, 679 F.3d 848, 852 (D.C. Cir. 2012).

placed on the covered jurisdictions.[153] This is in direct contrast to the deferential approach adopted in both *Katzenbach* and *City of Rome*.

Moreover, in adopting this standard for judging rationality, the Court seems to narrow the extent and kinds of historical evidence Congress may rationally rely upon as probative in adopting Fifteenth Amendment remedial legislation. If this is indeed what the Court is doing, this is diametrically opposed to basic canons underlying rational basis review that "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"[154] and that it "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[155] The Court disregarded the bulk of the evidence Congress had compiled of current need because the evidence was second generation vote dilution evidence, while the coverage formula was based on first generation metrics of registration and turnout rates and the use of a test or device.[156] This directly conflicts with *City of Rome* where the Court explicitly found that the 1975 reauthorization, which was based on the very same coverage formula, was appropriate based in significant part on vote dilution evidence,[157] and the Court's 1969 precedent in *Allen* that changes where vote dilution was the possible type of discrimination were subject to Section 5.[158] It also conflicts with the statement of purpose in the 2006 reauthorization, which stated that the Act was designed to ensure "that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and

153. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2622 (2013). The Court's use of the "current needs justify the current burden" standard suggests a jurisprudential departure toward an analysis that marginalizes history. *See id. Katzenbach* stated that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which [the legislation] reflects." South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). *City of Rome* similarly cited to an extended history of racial discrimination in voting. *See* 446 U.S. 156, 181–82 (1980). Moreover, in the context of determining whether a decision maker has acted with a discriminatory purpose, the Court's longstanding principle is that the "historical background . . . particularly if it reveals a series of official actions taken for invidious purposes " is relevant in the analysis of intent. Vill.of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

154. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

155. *Id.* at 313.

156. In response to the dissent pointing out that the majority had largely disregarded the record, the majority stated that "[c]ontrary to the dissent's contention, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today." *Shelby Cnty.*, 133 S. Ct. at 2629 (citation omitted).

157. *See City of Rome*, 446 U.S. at 187.

158. *See* Allen v. State Bd. of Elections, 393 U.S. 554, 569 (1969).

protected as guaranteed by the Constitution."[159] Even to the extent the Court analyzed the record regarding minority electoral participation and officeholding, it cherrypicked the evidence least favorable to the federal government. Indeed, the conclusion it reached was in contrast to the district court, which found that these factors weighed in favor of reauthorization.[160] As a result, the Court never analyzed whether the formula was rational in practice.

Though the Court appears to analyze whether the coverage formula was rational in theory, and finds that it is not, it misstates the theory. Drawing from the Government's brief, the Court suggests that the "approach" used for coverage was reverse engineering: Congress identified jurisdictions that engaged in discrimination, discovered that those jurisdictions had low voter participation and employed tests or devices, and then constructed a coverage formula based on those factors.[161] Then the Court goes on to find that while this approach might have been rational in 1965, it is not rational today because conditions have changed, most notably in regard to voter participation, and that Congress did not rely on current data to justify the continued use of the formula.[162] The problem with the Court's analysis is that reverse engineering was the theory for coverage Congress used in 1965, not 2006. As discussed above,[163] Congress's coverage theory in 2006 was that those jurisdictions with both a historical and recent history of discrimination are those that should be covered.[164] Indeed, this was the approach the Government actually ar-

159. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(a), 120 Stat. 577 (2006).

160. The district courts in *Northwest Austin* and *Shelby County* found the voter participation disparity between whites and minorities to be "comparable" to what the Supreme Court deemed "significant" in *City of Rome*. *See* Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 468 (2011); Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 248 (2008).

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

162. *See id.* at 2628–29.

163. *See* discussion *supra* Section III.B.2.

164. The circuit court took a similar approach regarding the theory of coverage:

> Congress chose the section 4(b) criteria [in 1965] not because tests, devices, and low participation rates were all it sought to target, but because they served as accurate proxies for pernicious racial discrimination in voting. The question, then, is not whether the formula relies on old data or techniques, but instead whether it, together with bail-in and bailout, continues to identify the jurisdictions with the worst problems. If it does, then even though the formula rests on decades-old factors, the statute is rational in theory because its "disparate geographic coverage" remains "sufficiently related to the problem that it targets."

Shelby Cnty. v. Holder, 679 F.3d 848, 879 (2012) (quoting Nw. Austin Mun. Util. No. One v. Holder, 557 U.S. 193, 202 (2009)).

gued in its brief.[165] As a result, the Court's apparent finding that the coverage formula was irrational in theory was based on a theory different than what Congress used.[166]

Finally, by concluding that current burdens are not met by current needs,[167] the Court substitutes its own judgment for that of Congress without properly valuing the current needs—the Court did not credit Section 5 for protecting two fundamental rights and did not analyze the whole record to calculate the positive impact of Section 5 in the covered jurisdictions. For this reason, the *Shelby County* standard of rational review is functionally different even from "heightened" rational basis. "Heightened" rational basis involves more rigorous scrutiny of the purpose and effect of a law than traditional rational basis, but does not alter the standard itself, which is what the Court did in *Shelby County* by avoiding meaningful review of the record, incorporating the current burdens/current needs requirement and asserting "equality of the states" as "highly pertinent" to its analysis. The latter is discussed below.

III. STATE SOVEREIGNTY AND RACE: DRIVING THE *SHELBY COUNTY* MAJORITY

As the decision in *Shelby County* cannot be explained as a faithful application of rational basis review or even the *Boerne* congruence and proportionality standard, it is evident that something else was driving the Court's decision. Perhaps unsurprisingly, it appears that two principles dear to the conservative majority are at play. Over the

165. *See* Brief of the Federal Respondent at 49–50, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

166. As a related matter, the Court states that "[i]f Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula" because it would be "irrational" to base a formula on forty-year-old data when conditions had changed since. *Shelby Cnty.*, 133 S. Ct. at 2630–31. But the Court fails to offer a reason why Congress needed to "start from scratch" in 2006 when the record revealed that the current formula was continuing to capture jurisdictions engaged in substantial discrimination even though the nature of the discrimination—from vote denial to vote dilution—had changed to a significant degree.

167. In relevant part:

> There is no denying . . . that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.
>
> . . . .
>
> [T]hings have changed dramatically in the South [since the initial adoption of the Voting Rights Act of 1965, and that] . . .
>
> . . . .
>
> [N]o one can fairly say that [the record] 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.

See Shelby Cnty., 133 S. Ct. at 2618, 2625, 2629 (third alteration in original).

past several decades, coinciding with the conservative ascendancy on the Court, increased skepticism of race-based legislation that protects the rights of minority citizens has taken hold, and the Court has undergone a so-called "federalism revolution."[168] As discussed in this Part, the majority's opinion in *Shelby County* is of a piece with those jurisprudential trends and stretches those principles beyond their breaking points.

A. State Sovereignty and Equal Sovereignty of the States

The *Shelby County* majority repeatedly emphasizes the burdens that Section 5 of the Act places on covered jurisdictions, purportedly raising issues of state sovereignty.[169] This emphasis immediately and significantly shifts the tone from what otherwise might be deference to Congress's will to a more skeptical one. The emphasis, however, is in error.

The majority in *Shelby County* advances a federalism argument focusing on the Tenth Amendment.[170] The Court notes that "states retain broad autonomy in structuring their governments and pursuing legislative objectives" and that such federalism protections are critical to "secure[ ] to citizens the liberties that derive from the diffusion of sovereign power."[171] The Court believes that these costs are even higher after the 2006 reauthorization, as Congress expanded the substantive reach of Section 5 at that time.[172]

As discussed below, the Court's attempt to invoke these federalism principles, which are of great concern to the Court, does not withstand scrutiny in the context of Congress's Fifteenth Amendment enforcement power. Nonetheless, reliance on federalism principles undergirds the majority's invocation of a supposed constitutional principle of "equal sovereignty"; in short, because the federalism costs of

168. *See* Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. Rev. 7, 30 (2001).
169. *See Shelby Cnty.*,133 S. Ct. at 2621, 2623–24, 2626–27, 2630.
170. *See id.* at 2623.
171. *Id.* (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)).
172. *See Shelby Cnty.*, 133 S. Ct. at 2626–27 ("In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved."). *Compare* Georgia v. Ashcroft, 539 U.S. 461, 483–84 (2003) (permitting state to consider "influence and coalitional districts," not just districts where minority voters can elect "candidates of choice," in assessing Section 5 retrogression), *and* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000) ("*Bossier Parish II*") (holding that Section 5 does not cover "discriminatory but nonretrogressive vote-dilutive purposes"), *with* 42 U.S.C. § 1973c(b) (2012) (pegging retrogression analysis to minority group's "ability . . . to elect their preferred candidates of choice"), *and* 42 U.S.C. § 1973c(c) ("The term 'purpose' . . . shall include any discriminatory purpose.").

Section 5 are high, the fact that Section 5 treats states differently is especially problematic. Consequently, Chief Justice Roberts pins much of the rationale for invalidating the Section 4(b) coverage formula on the equal sovereignty principle, which disfavors any federal government attempt to impose different requirements on the various states.[173] Chief Justice Roberts asserts that "equal sovereignty requires a showing that a statute's geographic coverage is sufficiently related to the problem that it targets."[174] The importance of this differential treatment to the Justices against the background of robust state sovereignty interests was made clear at oral argument, where several justices expressed concern as to the basis for the differential treatment.[175] This invocation of equal sovereignty was far from inconsequential; the concept formed a crucial piece of the Court's logic.

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173. *See Shelby Cnty.*, 133 S. Ct. at 2618, 2622–24.

174. *Id.* at 2622 (quoting *Nw. Austin*, 557 U.S. at 203).

175. Transcript of Oral Argument at 21, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf.

> Justice Kennedy: I don't know why under the equal footing doctrine it would be proper to just single out States by name.
> . . . .
> Justice Scalia: I thought it's sort of extraordinary to say Congress can just pick out, we want to hit these eight States.
> . . . .
> Justice Kennedy: This reverse engineering that you seem so proud of, it seems to me that that obscures the––the real purpose of ––of the statute. And if Congress is going to single out separate States by name, it should do it by name.
> . . . .
> Justice Alito: Then why shouldn't it apply everywhere in the country?
> . . . .
> Chief Justice Roberts: [I]s it the government's submission that the citizens in the South are more racist than citizens in the North? . . . And not—and not impose it on everyone else?

Id. 21, 35, 40–42.

> Justice Kennedy: Do you think the preclearance device could be enacted for the entire United States?
> General Verrilli: I don't think there is a record that would substantiate that. But I do think Congress was—[Justice Kennedy]: And that is because that there is a federalism interest in each State being responsible to ensure that it has a political system that acts in a democratic and a civil and a decent and a proper and a constitutional way.
> . . . .
> If Alabama wants to have monuments to the heros [sic] of the Civil Rights Movement, if it wants to acknowledge the wrongs of its past, is it better off doing that if it's an own [sic] independent sovereign or if it's under the trusteeship of the United States government?
> Justice Scalia: I don't think anybody is contesting that it's more effective if you use Section 5. The issue is why just in these States. That's it.
> . . . .
> Chief Justice Roberts: I guess the question is whether or not that disparity [in Section 5 objections] is sufficient to justify the differential treatment under Section 5. Once you take away the formula, if you think it has to be reverse engineered and––and not simply justified on its own, then it seems to me you have a much harder test to justify the differential treatment under Section 5.
> Justice Scalia: Do you think all of the noncovered States are worse in that regard than the nine covered States, is that correct? . . . Every––very one of them is worse. [Mr.

The majority opinion repeatedly stressed that the coverage formula did not respond to current conditions regarding voting discrimination.[176] As discussed earlier, however, there was sufficient basis to uphold the coverage formula under rational basis review despite this purported shortcoming.[177] Thus, the Court relied in significant part on equal sovereignty in subjecting the legislation to greater scrutiny by requiring the formula to more directly fit the problem: "And in the context of a decision as significant as this one—subjecting a *disfavored subset of States* to 'extraordinary legislation otherwise unfamiliar to our federal system,'—that failure to establish even relevance is fatal."[178] The Court, thus, used the principle of equal sovereignty, at least in significant part, to require something more than rationality.[179]

The problem, of course, is that Chief Justice Roberts' reliance on "the fundamental principle of equal sovereignty"[180] is reliance on a constitutional principle that, to the extent it exists at all, is wholly inapplicable to the situation the Court faced in *Shelby County*.

1. Congress's Power Under the Civil War Amendments and State Sovereignty

Despite the *Shelby* majority's misgivings, the degree of sovereignty possessed by the states with regard to voting rights issues is, in fact, quite limited. This is especially so with respect to racial discrimination in voting.

Any reliance on the Tenth Amendment in supporting limits on congressional legislation faces several key obstacles. By the Amendment's very terms, this reservation of powers does not include powers the Constitution explicitly grants to the federal government.[181] Thus,

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> Adegbile]: Justice Scalia, it's—it's a fair question, and—and I was speaking to the aggregate [Justice Scalia]: It's not just a fair one, it's the crucial question. Congress has selected these nine States. Now, is here some good reason for selecting these nine?
> Chief Justice Roberts: Have there been episodes, egregious episodes of the kind you are talking about in States that are not covered?
> Mr. Adegbile: Absolutely, Chief Justice Roberts.
> Chief Justice Roberts: Well, then it doesn't seem to help you make the point that the differential between covered and noncovered continues to be justified.

Id. at 50–51, 53. 56, 58–59, 61–62.

176. *See Shelby Cnty.*, 133 S. Ct. at 2625–31.

177. *See* discussion *supra* Section III.B.

178. *Shelby Cnty.*, 133 S. Ct. at 2628 (emphasis added) (citation omitted).

179. *Id.* at 2630 ("[T]his case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is 'consist[ent] with the letter and spirit of the constitution.'") (second alteration in original).

180. *Id.* at 2623–24.

181. *See* U.S. CONST. amend. X.

there is a fundamental problem with relying on the Tenth Amendment as an argument against congressional action taken pursuant to other, more specific provisions of the Constitution, as is the case with voting and racial discrimination.

The degree of sovereignty states possess in the conduct of elections is already significantly limited, as Congress already has the power to regulate the "[t]imes, [p]laces, and [m]anner" of federal elections under the Elections Clause.[182] Thus, many of the voting changes that Section 5 requires preclearance of are already within an area where congressional authority is broad in substantive scope and "paramount."[183]

To the extent states do maintain sovereign power with regard to their electoral systems that power is further limited vis-à-vis Congress as a result of the Fourteenth and Fifteenth Amendments, particularly the enforcement powers granted to Congress under those provisions.[184] Those amendments, of course, were enacted for the *purpose* of restricting state sovereignty.[185] For this reason and others, the Supreme Court has previously held that the Tenth Amendment does not act as a constraint on Congress's powers under the Civil War Amendments.[186] And the Court has explicitly and repeatedly recognized that

182. U.S. CONST. art., I, § 4.

183. *See* Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2253–54 (2013) ("The power of Congress over the 'Times, Places and Manner' of congressional elections is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.") (quoting *Ex parte* Siebold, 100 U.S. 371, 392 (1880)); *see also* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1207 (2012) ("[T]he Elections Clause gives states autonomy . . . but [states are] not sovereign because Congress retains its authority to modify or alter state practices.").

184. *See* U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

185. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments. Those [Civil War] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("When Congress acts pursuant to § 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."); *Ex parte* Virginia, 100 U.S. 339, 346 (1880) ("[The Thirteenth and Fourteenth Amendments] were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress [sic].").

186. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) ("[W]hen properly exercising its power under § 5 [of the Fourteenth Amendment, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause Powers."), *superseded by statute*, 29 U.S.C. 621 *et. seq.* (2012); *Fitzpatrick*, 427 U.S. at 456 (1976) ("When Congress acts pursuant to § 5 [of the 14th Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority

these powers vis-à-vis states apply to voting protections and, with respect to the Act in particular, "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion[.]"[187]

The cases cited in *Shelby County* asserting great state sovereignty in voting do not concern the direct grant of power to Congress under the Fourteenth and Fifteenth Amendments, so they do not advance the majority's position.[188] Indeed, the Court in *City of Rome* considered and rejected the very argument advanced by the majority opinion in *Shelby County*, concluding that federalism principles do not limit Congress's enforcement powers under the Fifteenth Amendment.[189]

Nonetheless, despite this previously clear understanding, recent Court opinions have referenced sovereignty concerns in cases concerning Section 5 of the Act, warning Congress that the Act comes close to the line in terms of constitutionality. In *Miller v. Johnson*, the Court expressed concern about the burden placed on states by an interpretation of Section 5 that required overreliance on race in redistricting: "[O]ur belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of

under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."); *cf.* Hunter v. Underwood, 471 U.S. 222, 233 (1985) ("[T]he Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment.").

187. Lopez v. Monterey Cnty., 525 U.S. 266, 284–85 (1999); *see also City of Rome*, 446 U.S. at 179–80 ("Applying [the] principle [that the Civil War Amendments were designed as an expansion of federal power and an intrusion on state sovereignty], we hold that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act."); South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) ("The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.").

188. *See* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (limiting power of Congress to enact voting policies under the Commerce Clause); Carrington v. Rash, 380 U.S. 89, 96 (1965) (rejecting the state's voting policies as a violation of the Fourteenth Amendment); Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 170 (1892) (rejecting power of state to declare naturalized U.S. citizen ineligible for election to public office); *see also* Perry v. Perez, 132 S. Ct. 934, 941–43 (2012) (addressing standards to be applied by a federal court in drawing interim redistricting maps pending state enactment of a redistricting plan).

189. *City of Rome*, 446 U.S. at 179 ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments."); *see also Katzenbach*, 383 U.S. at 324 ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.").

this litigation."[190] In *Bossier Parish II*, the Court expressed concern that including nonretrogressive changes enacted with a discriminatory purpose within the ambit of Section 5 would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality."[191] And in *Northwest Austin*, the Court echoed the concerns in *Miller v. Johnson* and Justice Kennedy's concurrence in *Georgia v. Ashcroft* regarding the supposed tensions between Section 5 and the Equal Protection clause and noted the misgivings about Section 5's constitutionality expressed in dissents and concurrences in previous cases.[192] The concerns, in the Court's mind, increased after Congress reversed the rulings in *Bossier Parish II* (which had held that voting changes enacted with discriminatory but nonretrogressive purpose must be precleared under Section 5) and *Georgia v. Ashcroft* (which had held that states were permitted to consider not only effective minority districts,[193] but also coalition and influence districts,[194] in complying with Section 5 responsibilities) during the 2006 reauthorization.[195]

2. State Sovereignty and the Equal Footing Doctrine

The Constitution's framers took state sovereignty very seriously, building in various protections against federal intrusion. Nevertheless, nothing in the text of the Constitution suggests, let alone dictates,

190. 515 U.S. 900, 926–27 (1995) (rejecting the Justice Department's interpretation of Section 5 due in part to federalism concerns and indicating that the rejected interpretation raised "troubling and difficult constitutional questions").

191. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 321–22 (2000) (citations omitted) (internal quotations omitted); *see also, e.g.*, *Ashcroft*, 539 U.S. at 491–92 (Kennedy, J., concurring) (discussing perceived tension between the Equal Protection Clause and Section 5 of the Act); *Lopez*, 525 U.S. at 289–98 (Thomas, J., dissenting) (asserting that interference with state sovereignty is extreme and arguing for a more limited interpretation of Section 5 to avoid the constitutional question).

192. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–03 (2009); *see also id.* at 224 (Thomas, J., dissenting) ("[Section] 5 pushes the outer boundaries of Congress'[s] Fifteenth Amendment enforcement authority.").

193. 539 U.S. 461, 479 (2003) (The "ability of minority voters to elect their candidate of choice.").

194. *Id.* at 481–82 (discussing approvingly districts comprised of "coalitions of voters who together will help to achieve the electoral aspirations of the minority group" and districts "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process").

195. *See supra* note 176.

that the federal government must treat states equally in legislative enactments.[196]

a. The Equal Footing Doctrine

Despite the absence of a direct textual basis for the general principle of equality of the states—and that the Constitution's text concerning admission of states also does not discuss state equality[197]—the Supreme Court has developed a doctrine establishing the *constitutional* equality of the states, often called the "Equal Footing Doctrine."[198] In sum and substance, the Equal Footing Doctrine holds that Congress cannot place any special restrictions on states at admission that it could not place on states after their admission.

The Supreme Court's most complete discussion of the Equal Footing Doctrine is contained in *Coyle v. Smith*,[199] a case Chief Justice Roberts relies on in *Shelby County* to support his equal sovereignty argument.[200] Therein, the Justices considered whether Congress had exceeded its authority with respect to the admission of states when it forbade Oklahoma from moving its capital for a certain period after its admission.[201] To make clear the question to be addressed, *Coyle* distinguished among three different types of congressional restrictions

196. Rather, the Constitution mentions equality of the states in two places. First, Article I, Section 3 provides that each state has two Senators. U.S. CONST. art. I, § 3. Second, Article V provides that no state may be "deprived of its equal Suffrage in the Senate" without its consent. *Id.* at art. V. Indeed, the equality of representation in the Senate—written into the Constitution to protect state interests—suggests that the Founders contemplated the differential effects of federal laws on the various states and chose to protect states at the legislative stage. *See, e.g.*, South Carolina v. Baker, 485 U.S. 505, 512 (1988) ("States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.").

197. *See* U.S. CONST. art. IV, § 3. To the contrary, earlier drafts of the Constitution contained language requiring that new states "shall be admitted on the same terms with the original states," but that provision did not make it into the final draft. 2 The Records of the Federal Convention of 1787, at 173, 188 (Max Farrand ed., Yale Univ. Press 1966) (1911); *see also* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 383–95 (2002) (discussing drafting history of Article IV, § 3). Nonetheless, Congress has typically granted admission to new states on equal footing as the original states. *See* Coyle v. Smith, 221 U.S. 559, 566–67 (1911) (noting that Congress had used the term "on equal footing with the original states in all respects whatsoever" since the admission of Tennessee as the third new state).

198. *See, e.g.*, *Coyle*, 221 U.S at 570; Bolln v. Nebraska, 176 U.S. 83, 87 (1900); Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678, 688–89 (1883); Pollard v. Hagan, 44 U.S. 212, 216 (1845); *cf.* United States v. Texas, 339 U.S. 707, 717–18 (1950) (holding, based on the Equal Footing Doctrine, that Texas was not entitled to *more* rights than other states by virtue of its prior status as an independent sovereign nation).

199. *See Coyle*, 221 U.S. at 564–80.

200. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2624 (2013).

201. *See Coyle*, 221 U.S. at 562–66.

on states.[202] First, the Court discussed legislative provisions that are "fulfilled by the admission of the state," such as requiring the state constitution to contain particular provisions (which could subsequently be modified by the state) as a condition of admission, holding that such legislation is permissible.[203] The second distinct category was "compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject."[204] Such legislation is permissible as applied to the admission of states because it is "plainly within the regulating power of Congress."[205] In other words, Congress can enact laws affecting states differently at admission where its powers would allow it to do so in any event. Implicit in this, of course, is the notion that Congress may enact legislation that affects different states differently. The third category, meanwhile, consists of "compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power."[206] This third category of legislation is what the Equal Footing Doctrine forbids.[207] Stated more clearly, Congress cannot place restrictions on states that "would not be valid and effectual if the subject of congressional legislation after admission."[208]

Significantly, absent from *Coyle* and other cases prior to *Northwest Austin* is the idea that Congress is restricted in enacting legislation that treats different states differently after they have already joined as states. Indeed, it would make little sense to apply the Equal

202. *See id.* at 568.
203. *Id.*
204. *Id.*
205. *Id.* at 574.
206. *Id.* at 568.
207. *See id.* at 570–80; *see also, e.g.*, Bolln v. Nebraska, 176 U.S. 83, 87–89 (1900) (holding that provision of Nebraska Constitution permitting prosecution of felonies on the basis of information was valid despite enabling act arguably forbidding such a provision); Ward v. Race Horse, 163 U.S. 504 (1896) (holding that federal government's treaty with Native Americans entered before Wyoming was a state could not restrict state's ability to regulate hunting within its borders); Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678, 688–89 (1883) (holding that congressional act admitting Illinois could not restrict state's power over its rivers insofar as the original thirteen states had such power); Pollard v. Hagan, 44 U.S. 212, 235 (1845) (holding that Alabama has the same sovereignty and jurisdiction over its territory as the original thirteen states possessed at the Founding); *cf.* United States v. Wheeler, 435 U.S. 313, 320 (1978) ("Each [state] has the power, inherent in any sovereign, independently to determine what shall be an offense against *its* authority and to punish such offenses.") (emphasis added), *superseded by statute on other grounds as recognized in* United States v. Lara, 541 U.S. 193, 207 (2004).
208. *Coyle*, 221 U.S at 573; *see also* Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 834–35 (1980) ("[T]he equal footing doctrine does not require the federal government to treat every state equally. Rather, the doctrine only guarantees states equal authority within the federal system.").

Footing Doctrine beyond the admission of states, as the issue of whether those states have the same sovereign powers as other states has already been resolved by that doctrine.[209] Rather, the only question in the case of post-statehood legislation affecting states is whether the restriction is within the scope of congressional power to legislate generally vis-à-vis the states.[210]

In practice, Congress has passed a number of laws that treat different states differently, based on various factors. Justice Ginsburg, in her *Shelby County* dissent, noted several of those laws.[211] The Emancipation Proclamation, while not a congressional enactment, famously limited its coverage to the rebel states.[212] Reconstruction is another obvious example, whereby the federal government imposed a wide variety of burdens on the rebel states.[213] It has not been suggested that these laws are suspect by nature of the fact that they do not subject all states to the same burdens.

b. *South Carolina v. Katzenbach*: Definitively Dismissing the Equal Footing Doctrine As Applied to the Act

In *South Carolina v. Katzenbach*, the Supreme Court evaluated the impact of "the doctrine of equality of States" on Section 4(b) of the Act's geographic limitation on the application of Section 5, and

209. The constitutional equality of the states does, however, have implications beyond admission. For example, in deciding lawsuits between states, the Supreme Court evaluates those disputes "on the basis of equality of right." Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931); *see also, e.g.*, Kansas v. Colorado, 206 U.S. 46, 97 (1907) ("One cardinal rule, underlying all the relations of the states to each other, is that of equality of right."). But that is an issue of interstate relations, not federal-state relations.

210. *See* McCulloch v. Maryland, 4 Wheat. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."); *see also* Touton, *supra* note 212, at 834–35. In recent years, the Supreme Court has limited congressional power to require states to administer federal regulatory programs. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). The principle embodied in those cases, however, derives from limits on congressional power and the Tenth Amendment, not from any principle of equal sovereignty. *See New York*, 505 U.S. at 169–83. And, in any event, those cases do not concern Congress's broad legislative powers over states when enforcing the Fourteenth and Fifteenth Amendments, making the cases of little relevance in the context of evaluating the Act. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 179 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

211. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting).

212. Emancipation Proclamation, January 1, 1863; Presidential Proclamations, 1791–1991; Record Group 11; General Records of the United States Government; National Archives.

213. *See* 14 Stat. 428–430, c.153; 15 Stat. 2–5, c.6; 15 Stat. 14–16, c.30; 15 Stat. 41, c.25 (providing for, *inter alia*, the creation of five military districts headed by generals to act as governments for the rebel states, the requirement that the rebel states rewrite their state constitutions and have them approved by Congress, the requirement that the rebel states ratify the Fourteenth Amendment, and the requirement that the rebel states provide voting rights to black men).

definitively answered the question, determining that the doctrine "does not bar this, for that doctrine applies *only* to the terms upon which States are admitted to the Union, and not the remedies for local evils which have subsequently appeared."[214] In fact, the *Katzenbach* Court appears to have viewed the limited geographic scope as a virtue of Section 5, not a vice: "In acceptable legislative fashion, Congress chose to limit its attention to geographic areas where immediate action seemed necessary."[215] In *City of Rome*, the Court expressed the same sentiment.[216] The Court again reiterated this position in *City of Boerne v. Flores*[217] and several other cases applying the *Boerne* standard.[218]

c. The Perversion of the Equal Footing Doctrine in *Northwest Austin*

When the Supreme Court again looked at the constitutionality of the preclearance regime in 2009 in *Northwest Austin*, the majority opinion again discussed the "fundamental principle of equal sovereignty,"[219] albeit as dicta.[220]

Initially, Justice Kennedy raised the issue of equal sovereignty at oral argument when he commented that "Congress has made a finding

214. South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) (emphasis added).

215. *See id.* at 328. Even Justice Black's partial dissent in *Katzenbach* acknowledges that the Act is not suspect by reason of its differential treatment of states. *Katzenbach*, 383 U.S. at 356 (Black, J., dissenting in part). Specifically, his opinion noted that, by stating in detail that certain provisions would apply to certain areas based on criteria that the Attorney General are able to mechanically apply, "Congress has acted within its established power to set out preconditions upon which the Act is to go into effect." *Id.*

216. 446 U.S. 156, 178 (1980) ("Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.").

217. 521 U.S. 507, 533 (1997) ("[L]imitations of this kind tend to ensure Congress'[s] means are proportionate to ends legitimate under § 5.").

218. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 626–27 (2000) ("By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan* was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach* the remedy was directed only to those States in which Congress found that there had been discrimination."); *see also* Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 741–42 (2003) (Scalia, J., dissenting) ("There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other State. . . . Congress has sometimes displayed awareness of this self-evident limitation. That is presumably why the most sweeping provisions of the Voting Rights Act of 1965 . . . were restricted to States with a demonstrable history of intentional racial discrimination in voting.") (citations omitted) (internal quotation marks omitted).

219. Nw. Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 203 (2009).

220. *See id.* at 211 ("Whether conditions continue to justify such [extraordinary] legislation is a difficult constitutional question we do not answer today.").

that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama, is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments than the other."[221] The comment demonstrates the sovereignty concerns that are driving the Court, with regard to Section 5, which carry over to the written opinion.

Chief Justice Roberts' majority opinion first states that the Act "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"[222] The cases he cites for that proposition, however, do not support the idea that any doctrine of state equality may serve as the basis for invalidating an act of Congress that treats different states differently. *United States v. Louisiana* addressed whether the Submerged Lands Act had *granted additional land rights* to the states beyond those their sovereignty guaranteed them.[223] *Louisiana* did not address equal sovereignty, as the Court noted that the states did not own submerged lands outside their borders (the land at issue in that case) and was grappling with a statutory interpretation as to whether Congress granted them ownership of those lands.[224]

The second case the *Northwest Austin* majority opinion cites is *Texas v. White*.[225] That case concerned the question of whether Texas remained a state during its rebellion in the Civil War and could file a lawsuit in United States federal court.[226] The section the *Northwest Austin* opinion cites[227] simply holds that the Constitution does not permit secession and, therefore, Texas remained a state during its rebellion.[228] *Texas v. White does* address issues of state sovereignty, noting their residual sovereignty in most areas *as a contrast* to their total lack of power to secede.[229] However, nothing in *Texas v. White* sug-

221. Transcript of Oral Argument at 34, Nw. Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193 (2009) (No. 08-322).

222. *Nw. Austin*, 557 U.S. at 203 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).

223. *See id.* at 6, 13–18 (emphasis added).

224. *Louisiana*, 363 U.S. at 16–20. In dicta, the *Louisiana* Court noted that, because the original thirteen states owned their own lands beneath navigable inland waters, "each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission." *Id.* at 16 (citing Pollard v. Hagan, 44 U.S. 212 (1845)). The point is one about equality of states at admission, a conclusion confirmed by the fact that the case cited for the point is *Pollard v. Hagan*, 44 U.S. 212 (1845), a leading case with regard to the Equal Footing Doctrine.

225. 74 U.S. 700 (1869).

226. *Id.* at 717.

227. *See Nw. Austin*, 557 U.S. at 203.

228. *See Texas*, 74 U.S. at 725–26.

229. *See id.* at 725 (emphasis added).

gests that the Equal Footing Doctrine or any similar principle may require the federal government to treat states equally.[230] Essentially, then, the idea that any "historic tradition" of "equal sovereignty" has any bearing on the validity of an Act of Congress that treats different states differently is wholly without support in *Northwest Austin*.

Northwest Austin noted *Katzenbach*'s holding that "[t]he doctrine of equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared."[231] In the subsequent sentence, however, *Northwest Austin* unjustifiably eviscerates the basis upon which *Katzenbach*'s holding rests (i.e., the conclusion that the Equal Footing Doctrine is irrelevant to the issue): "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."[232] In addition to lacking any support from authority, this statement contradicts the statement in *Katzenbach*, which is curiously omitted from *Northwest Austin* by use of ellipses, that "[t]he doctrine of equality of states . . . applies only to the terms upon which States are admitted to the Union . . . ."[233]

d. The Equal Sovereignty Doctrine Comes to Roost in *Shelby County*

As noted above, the conservative members of the Court focused extensively on the unequal treatment of states under Section 5 at oral argument.[234] Building off of the dicta in *Northwest Austin*, Chief Justice Roberts in the *Shelby County* written opinion faults Congress for departing from "the fundamental principle of equal sovereignty" in enacting the Act.[235] As support for the existence of this principle, the

230. In fact, the Supreme Court in *Texas v. White* took a very broad view of congressional power to regulate vis-à-vis states:

> In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

Id. at 729.

231. *Nw. Austin*, 557 U.S. at 203 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 328–29).

232. *Id.*

233. *Katzenbach*, 383 U.S. at 328–29.

234. *See supra* note 176.

235. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2623–24 (2013).

majority opinion relies primarily on two cases, *Northwest Austin*[236] and *Coyle v. Smith*.[237] As discussed above, however, *Coyle* does not support the existence of a principle of equal sovereignty outside of the admission context,[238] and *Northwest Austin*'s discussion of the issue, which is dicta, relies on a perversion of constitutional provisions and prior case law.[239] In short, the majority's conclusion that any "principle of equal sovereignty" was applicable to the Act is wholly without support.

Chief Justice Roberts also attempts to avoid the clear language of *Katzenbach* that confines the Equal Footing Doctrine to admission of states. To that end, the *Shelby County* opinion describes *Katzenbach* as "reject[ing] the notion that the principle operated as a *bar* on differential treatment outside [the] context" of the admission of new states.[240] Chief Justice Roberts focuses on the use of the term "bar," suggesting that, while differential treatment of the states is not *forbidden*, the fact of unequal treatment *weighs against* the validity of congressional action.[241] That approach, much like the dicta in *Northwest Austin*, ignores the other language in that same sentence in *Katzenbach* explaining *why* there is no bar, namely that the law "applies only" to admission of states and "not" to remedies for state conduct subsequent to admission.[242] In other words, Chief Justice Roberts treats that holding in *Katzenbach* as creating a sliding scale, while claiming to remain true to the decision, when *Katzenbach*, in fact, creates a bright line rule that directly contradicts Chief Justice Roberts's position.

Moreover, Chief Justice Roberts's federalism arguments addressed at the outset of this Section do not provide additional support for the principle of equal sovereignty. First, the Tenth Amendment, which notes that powers not granted to the federal government are

236. The *Shelby County* decision also notes the cases *Northwest Austin* cites, but those cases also do not support the position asserted, as discussed above. *See Shelby Cnty.*, 133 S. Ct. at 2622, 2624.

237. *Id.* at 2623; *see* Coyle v. Smith, 221 U.S. 559, 567 (1911).

238. *See* discussion *supra* Section III.A.2.a. Chief Justice Roberts acknowledged that *Coyle* "concerned the admission of new states" without noting that that context was crucial to *Coyle*'s outcome. *See Shelby Cnty.*, 133 S. Ct. at 2623.

239. *See* discussion *supra* Section III.A.2.c.

240. *Shelby Cnty.*, 133 S. Ct. at 2623–24.

241. *See id.* at 2624 ("[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent equal disparate treatment of States"); *see also Nw. Austin*, 557 U.S. at 203 ("But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficient[ ].").

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

reserved for the states, says nothing about *equality* of states.[243] Second, a law that covers only select states is less offensive to federalism principles than a law that covers all states.[244] Thus, to the extent state sovereignty principles bear on the Court's analysis, the Act's unequal treatment of states should not make it more constitutionally suspect, particularly in light of *Katzenbach*'s approval of this approach.[245]

In sum, as Judge Richard Posner noted in the immediate aftermath of the *Shelby County* decision, "there is no doctrine of equal sovereignty. The opinion rests on air."[246]

B. Race and the Demise of Section 5

While state sovereignty may have been the jurisprudential vehicle for the decision, the Roberts Court's views on issues of race were also a key driving force in its consideration of *Shelby County*. A central premise of the majority opinion in *Shelby County*, stated in conclusion to justify the evisceration of Section 5, is that "[o]ur country has changed."[247] Chief Justice Roberts's opinion repeatedly downplays the problem of racial discrimination in voting, distinguishing discrimination in 1965 from the record before Congress in 2006[248] and exhorting that "today's statistics tell an entirely different story."[249] This approach flips the problem around, making racial discrimination by state and local governments seem less significant than the federal government's actions done to prevent such discrimination, which the Court views as themselves discriminatory against majority white interests.

Against the broader background of the Court's shift over the past forty years toward a more "color-blind" Constitution and the Roberts Court's even more skeptical approach to racial discrimination claims, the majority's opinion in *Shelby County* can hardly be seen as a surprise. A review of the limited history of race discrimination cases de-

243. *See* U.S. CONST. amend. X.

244. *See supra* notes 218–19.

245. *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting) ("Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect.").

246. Richard A. Posner, *The Voting Rights Act Ruling Is About the Conservation Imagination*, SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html.

247. *See Shelby Cnty.*, 133 S. Ct. at 2631.

248. *See id.* at 2625–31.

249. *See id.* at 2631.

cided by the Roberts Court reveals a tendency to limit or invalidate any law that does not conform to the majority's view that the Constitution generally does not permit differential treatment based on race, regardless of the purpose.[250] The "postracial" jurisprudence, which "purports to be merely a ban on discrimination against whites," makes all racial classifications highly suspect (i.e. subject to "strict scrutiny").[251] Although the Court in *Shelby County* did not apply strict scrutiny, it is also evident that the Court has applied something more than rational basis (as discussed in Part II), and race seems to play a key role in driving the decision to do so.

1. Constructing a More "Colorblind" Constitution

The idea of constitutional color-blindness has its roots in the seminal case of *Plessy v. Ferguson*, where Justice Harlan famously said in his dissent against the majority's decision upholding "separate but equal" accommodations on common carriers that "[o]ur Constitution is colorblind."[252] Seizing that concept, the Court in recent years has moved more and more toward the idea of a colorblind Constitution. This development has been untrue to the Constitution, particularly the Civil War Amendments.

As an initial matter, Harlan's dissent does not support the notion that conduct intended to help disadvantaged minorities is constitutionally impermissible. Justice Harlan was concerned with subordination by the dominant racial group, viewing that as the constitutionally objectionable conduct.[253]

Further, the intent and early understanding of the Civil War Amendments similarly suggests an anti-caste, rather than colorblind,

250. One commenter has suggested that the Roberts Court believes that "a prospective commitment to colorblind race neutrality is now sufficient to promote racial equality, and any deviation from such neutrality will itself constitute unlawful discrimination." Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26, 39 (2009).

251. Spann, *supra* note 250, at 39; *see also* Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 435 (2010) ("Although the application of strict scrutiny is desirable in cases involving invidious discrimination, it is devastating in cases involving affirmative action.").

252. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

253. *See id.*

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

Id.

view of those amendments.[254] As a result, courts have generally been more tolerant, at least since *United States v. Carolene Products Co.*,[255] of race distinctions meant to achieve greater equality than race distinctions enacted for invidious purposes.[256]

Despite these jurisprudential and purpose-based obstacles, the idea of a Constitution hostile to all racial classifications, regardless of purpose, began to gain traction. By the mid-1970s, it was being used against policies and programs intended to promote racial equality.[257] In particular, Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, although it did not use the term, brought color-blindness squarely into the conversation about the constitutionality of such policies and programs by holding that all classifications, even those made for remedial purposes, that "den[y] an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background . . . must be regarded as suspect" and applying strict scrutiny.[258]

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254. *See* Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglas, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 833 n.44 (2008) (listing support for proposition that the legislative history of the Civil War Amendments dictates a conclusion that they "were color-conscious, group rights based constitutional amendments"); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 340 (1993) ("Originally the Fourteenth Amendment was understood as an effort to eliminate racial caste—emphatically not as a ban on distinctions on the basis of race. A prohibition on racial distinctions would excise all use of race in decisionmaking. By contrast, a ban on caste would throw discriminatory effects into question and would allow affirmative action.").

255. 304 U.S. 144 (1938). Therein, the Court stated:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities. [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (citations omitted); *see also* JOHN HART ELY, DEMOCRACY & DISTRUST 73–77 (1980) (describing the Warren Court's approach as ensuring that the "political process . . . was open to those of all viewpoints on something approaching an equal basis" and noting Footnote 4 of *Carolene Products* as presaging that approach).

256. Jones, *supra* note 257, at 430.

257. *See* Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1513–21 (2004) ("Courts . . . understood equal protection as a race-asymmetric constraint on governmental action; they understood that the purpose of equal protection doctrine was to prevent the state from inflicting certain forms of status harm on minorities."); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (plurality opinion) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *cf.* Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that violation of the Equal Protection Clause requires intentional discrimination).

258. Regents of the Univ. of Cal., 438 U.S. at 305–06 (plurality opinion); *cf. id.* at 414–17 (Stevens, J., concurring in part & dissenting in part) (arguing that Title VI of the Civil Rights Act of 1964 was intended to prescribe a colorblind standard). Justice Brennan's opinion in *Bakke* explicitly rejected the idea of constitutional color-blindness. *Id.* at 355–56 (Brennan, J., concurring in judgment and dissenting in part).

And, more recently, the Supreme Court has endorsed the application of strict scrutiny to all racial classifications,[259] overruling prior precedent that recognized the utility of benign classifications and subjecting such classifications to lesser scrutiny.[260] In the wake of this shift, racial classification plans have only been allowed to survive if they survive strict scrutiny, as was the case in *Grutter v. Bollinger*.[261] *Grutter* further acknowledged the goal, if not the realization, of the color-blind Constitution.[262]

2. The Roberts Court's Embrace of "Color-blind" Principles

Building from the foundation created during the Burger and Rehnquist Courts, the Supreme Court under Chief Justice Roberts's watch has focused on further undermining efforts to remedy racial disparities, validating attacks on those efforts several times.[263]

The first significant case in this regard was the challenge to Seattle and Louisville programs designed to decrease segregation in K-12 public schools in *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*.[264] Therein, despite the Court's recent approval of post-secondary school programs that promote diversity in *Grutter*, the majority held that the Seattle and Louisville plans (which were narrowly drawn to affect only a small number of students) could not withstand constitutional scrutiny.[265] Chief Justice Roberts went even further on behalf of a plurality of the Court, suggesting that *Brown v. Board of*

259. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995). The decision in *Adarand* is arguably a logical extension of an earlier case. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to affirmative action plan and holding that the plan could not be upheld based on general assertions of past racial discrimination). *Croson*, however, dealt with racial classifications made by state and local governments, as opposed to Congress. *See Adarand*, 515 U.S. at 222 ("But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government.").

260. *See Adarand*, 515 U.S. at 227 (overruling Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990)). *Metro Broadcasting* had held that intermediate scrutiny, rather than strict scrutiny, applies to benign racial classifications enacted by Congress. *Id.* at 564–65; *see also* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment) ("[T]he proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives.").

261. *See* 539 U.S. 306, 329–33 (2003).

262. *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

263. *See generally* Spann, *supra* note 256 (discussing Supreme Court's jurisprudence related to race through the prism of *Ricci v. DeStefano*, 557 U.S. 557 (2009)).

264. 551 U.S. 701 (2007) (plurality opinion).

265. *See id.* at 735. Chief Justice Roberts's majority opinion refused to apply *Grutter*, cabining that opinion as based upon "considerations unique to institutions higher education." *Id.* at 724–25.

Education required this result.[266] To Chief Justice Roberts, the limited use of race to achieve greater racial balance in schools was legally equivalent to the total segregation of African American and white schools in *Brown*: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again."[267] Finally, as a further endorsement of a wholly "color-blind" Constitution, he ended his opinion with the line: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[268] It is evident, as set forth at length in Justice Breyer's dissent, that Chief Justice Roberts's formalistic approach ignores the realities of racial inequality in this country and, in fact, undermines *Brown*.[269]

Justice Kennedy's separate opinion in *Parents Involved* suggests that there is not a true Court majority for constitutional colorblindness, albeit in a way that makes little practical difference in the outcome of cases involving *explicit* use of race to remedy discrimination and promote diversity. Justice Kennedy asserts that, "[i]n the real world, it is regrettable to say, [colorblindness] cannot be a universal constitutional principle."[270] The problem to Justice Kennedy, it appears, is not the consideration of race as *a reason* for enacting legislation, but rather the use of race as *a means* by which legislation achieves its goals.[271] Put another way, Justice Kennedy's view requires colorblindness as to the appearance and applicability of government action to individuals, but allows some consideration of race as the basis for policy decisions of general applicability.

Parents Involved is just the first example of the Roberts Court co-opting protections intended to protect racial minorities, and it is emblematic of the approach. Another key case in this regard is *Ricci v.*

266. *See Parents Involved in Cmty. Schs.*, 551 U.S. at 746–48.

267. *Id.* at 747.

268. *Id.* at 748.

269. *See id.* at 803–68 (Breyer, J., dissenting). Further, while Chief Justice Roberts's opinion does note the lack of any current desegregation orders in Seattle or Louisville (*id.* at 753–54 (plularity opinion)), this ignores the reality of the considerable segregation that existed in those districts. *See id.* at 806–22 (Breyer, J., dissenting).

270. *Id.* at 788 (Kennedy, J., concurring in judgment). *Compare id.* at 748 (plurality opinion), *with id.* at 772–82 (Thomas, J. concurring) (espousing belief in colorblind Constitution that does not permit "race-based decisionmaking").

271. Justice Kennedy asserts that school administrators are "free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race" and describing ways they could do that without running afoul of the Equal Protection Clause. *Id.* at 788–89.

DeStefano.[272] That case involved a situation where the city of New Haven had declined to use the results of a firefighter promotion exam that disproportionately favored white candidates because it had received evidence of problems with the test in terms of identifying firefighting skills and believed using the test would subject the city to disparate *impact* liability under Title VII of the Civil Rights Act of 1964.[273] The Supreme Court held that New Haven was required to follow the tests, as refusing to follow them because they favored whites was disparate *treatment* in violation of Title VII.[274] The Court cast the case as one of reverse discrimination,[275] and Justice Alito's concurrence, joined by two other justices, paints a picture of powerful minority interests dictating New Haven's unfair treatment of whites.[276] Again, in *Ricci*, what animates Justice Kennedy (who delivered the Court's opinion) is the appearance of a race-driven decision and the differential treatment of individuals because of their race.

Ultimately, the Roberts Court's approach boils down to this: extreme skepticism of any law, action, or program that takes race into account in seeking to address the vast racial inequalities that continue to exist in the United States.

3. Colorblindness and Voting Rights

Voting rights law has been one of the prime targets of colorblindness jurisprudence for the last two decades, beginning before the Roberts Court, but definitively carrying over into it. Section 5 of the Act places the Court's views about the appropriate used of race in legislation at issue in large degree because, unlike some other civil rights laws, Section 5 only protects racial minority voting rights. The Court made this clear in 1976 when it held, in *Beer v. United States*, that "the purpose of [Section] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of *racial minorities* with respect to their effective exercise of the electoral franchise."[277] In this way, Section 5 groups people by

272. 557 U.S. 557 (2009).
273. *See id.* at 563–74.
274. *See id.* at 593.
275. *See id.* at 578–80, 585.
276. *See id.* at 598–605 (Alito, J., concurring) ("[A] reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.").
277. 425 U.S. 130, 141 (1976) (emphasis added).

race. For that reason, to the extent that some Justices are concerned about laws that are designed to benefit minorities only, perhaps to the detriment of the majority race, Section 5 necessarily runs up against serious objections.[278]

The Supreme Court's concerns about the consideration of race to advance minority interests have largely arisen in redistricting cases, where Section 5 of the Act has long *required* jurisdictions to consider race to ensure that voting changes are not "retrogressive" in purpose or effect.[279] This requirement continued to exist at the same time the Court began to consider, over the last twenty years, whether the Fourteenth Amendment's Equal Protection Clause *prohibited* consideration of race in redistricting, as discussed below.

The modern shift toward colorblindness in voting protections started with a bang in 1993 with the Court's decision in *Shaw v. Reno*.[280] The case challenged a North Carolina congressional-redistricting plan that had been designed to create an additional majority-minority district in response to a Department of Justice Section 5 objection.[281] The redistricting plan at issue was responsible for sending African American representatives to Congress from North Carolina for the first time since Reconstruction.[282] *Shaw* invalidated the plan as violating the Equal Protection Clause because it "rationally [could] be viewed only as an effort to segregate the races for purposes of voting."[283] The Court believed that while it was constitutionally permissible for the state legislature to consider race, the legislature could not place too much weight on it.[284] While not an explicit endorsement of colorblindness—and Justice O'Connor's opinion denied requiring col-

278. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 911–12 (1995) (discussing concerns, particularly with respect to voting, about laws that treat people as members of a particular race as opposed to as "individuals").

279. *See Beer*, 425 at 140–41.

280. 509 U.S. 630 (1993).

281. *See id.* at 635.

282. *Id.* at 659 (White, J., dissenting).

283. *Id.* at 642 (majority opinion); *cf.* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994) (invalidating school district boundaries drawn to aid religious community). *Shaw* is in tension with an earlier case, *United Jewish Organizations of Williamsburgh, Inc. v. Carey* ("*UJO*"), where the Court found that there had been no Equal Protection Clause violation when the state intentionally split a group of white voters to create majority-minority districts. 430 U.S. 144, 167–68 (1977); *see also Shaw*, 509 U.S. at 658, 664–69, 674–75 (Souter, J., dissenting) (discussing *UJO*).

284. *Cf.* Bush v. Vera, 517 U.S. 952 (1996) (discussing determinations of whether race was "predominant" in mixed motive redistricting cases).

orblindness[285]—the reasoning in *Shaw* relied on colorblindness principles and was a step in that direction.[286] Justice O'Connor decried the consideration of race in redistricting with a statement that in some ways mirrors Chief Justice Roberts's statement in *Parents Involved* about "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[287] "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."[288]

More important than the outcome in *Shaw* was the tension that the conservative members on the Court perceived between the Equal Protection Clause and Section 5 of the Act, perhaps spurred by what it viewed as overreach by the Department of Justice in its redistricting objections. That tension grew more acute in *Miller v. Johnson*, where Justice Kennedy took up the cause in considering whether a redistricting plan adopted because of Department of Justice Section 5 objections nonetheless violated the Equal Protection Clause.[289] In *Miller*, the Court avoided a situation where the Equal Protection Clause and Section 5 were working at cross purposes by rejecting the Department of Justice's interpretation of Section 5, which the Court described as a black "maximization" policy.[290] Nonetheless, the implication for Congress's enforcement powers was unmistakable: "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress'[s] authority under § 2 of the Fifteenth Amendment into tension with the Fourteenth Amendment."[291] Justice Kennedy further noted the existence of "troubling and difficult constitutional questions" related to congressional actions enforcing the Fifteenth Amendment to the extent they came into tension with the Court's announced Equal Protection prin-

285. *See Shaw*, 509 U.S. at 642 ("Despite their invocation of the ideal of a 'color-blind' Constitution appellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise.") (citations omitted)).

286. *Cf.* T. Alexander Aleinikoff & Samuel Issacharoff, *Race & Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 650 (1993) ("We believe that Justice O'Connor and a majority of the Court would ultimately like to push equal protection law toward a color-blind standard.").

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

288. *Shaw*, 509 U.S. at 657.

289. *See* 515 U.S. 900, 911–12 (1995).

290. *See id.* at 924–25.

291. *Id.* at 927 (citations omitted).

ciples, which was a particular concern in the context of Section 5 in light of the statute's "federalism costs."[292] Perhaps more than any other opinion, *Miller v. Johnson* demonstrates Justice Kennedy's fundamental objection against Section 5, namely that, in some circumstances, it allows race to become a predominant factor in shaping voting laws.

The Court appears to have had similar concerns in *Reno v. Bossier Parish School* ("*Bossier Parish II*"), which addressed the issue of whether voting changes enacted with a discriminatory but nonretrogressive purpose[293] were subject to Section 5 objections, holding in the negative.[294] Indeed, Justice Scalia's opinion implicitly expressed strong skepticism about the purpose of the challenge—which it essentially described as similar to the minority "maximization" plan attacked in *Miller*[295]—noting that "[t]o deny preclearance to a plan that is *not* retrogressive—*no matter how unconstitutional it may be*—would risk leaving in effect a status quo that is even worse."[296] Thus, the majority accused the government of "chang[ing] the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan."[297] This shift, in the Court's view, would also raise the federalism costs of Section 5, "perhaps to the extent of raising concerns about § 5's constitutionality."[298] The Court's invocation of *Miller* in this context suggests that the Court has concerns about discriminatory but nonretrogressive purpose, which would likely increase states' consideration of race in voting changes running up against the same tension with the Equal Protection Clause.[299]

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292. *See id.*

293. For an example of a factual scenario where a voting change was enacted with a discriminatory but nonretrogressive purpose, see *Busbee v. Smith*, which addressed a Georgia redistricting plan that was not retrogressive in that the resulting district had a higher black population than the previous district; the plan was clearly enacted with a discriminatory purpose in that it split a large, cohesive black community and that the chairman of the Reapportionment Committee had stated that he would not draw a majority-minority district because "I don't want to draw nigger districts." 549 F. Supp. 494, 501 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983). The holding in *Busbee* is in contradiction to the *Bossier Parish II* holding.

294. *See Bossier Parish II*, 549 U.S. at 341.

295. *See id.* at 324–25, 335 (describing challenge to redistricting plan as based on the fact that the Bossier Parish School board could have enacted more majority-minority districts but did not).

296. *Id.* at 336 (emphasis in original).

297. *Id.* (quoting Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 480 (1997) ("*Bossier Parish I*")).

298. *Id.* (citing Miller v. Johnson, 515 U.S. 900, 926–27 (1995)).

299. At the same time, the Court may additionally or alternatively be asserting that by measuring states against a hypothetical plan that would raise the bar for states to clear, compared to

Although the concerns discussed in *Shaw* and its progeny regarding the predominance of race in voting changes were largely addressed in the aftermath of those decisions, such that *Shaw* violations became rare, the Court took a further turn toward color-blindness in *Georgia v. Ashcroft*, where the Court more explicitly stated that as the goal: "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life."[300] While the decision in *Georgia v. Ashcroft* did not address the Equal Protection Clause, Justice Kennedy's concurring opinion did.[301] He argued that, while the majority opinion was correct in interpreting Section 5 of the Act, the redistricting plan at issue likely violated the Equal Protection Clause[302] (although no such claim was before the Court) because race was "a predominant factor" in the redistricting.[303] In his view, this raised serious constitutional questions about Section 5: "There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive."[304] Curiously, Justice Kennedy's discussion did not aim to clarify, qualify, or modify anything stated in the majority opinion. Thus, there was no clear reason for Justice Kennedy to raise his point, other than to express his strong doubts about the constitutionality of Section 5; such skepticism toward Section 5 did not portend well for later cases.

As the Rehnquist Court gave way to the Roberts Court, the trend against the consideration of race to combat racial discrimination in voting only accelerated. The October Term 2008 case of *Bartlett v. Strickland*[305] demonstrates how far the thinking had shifted. Therein, the Supreme Court held that plaintiffs may not maintain a vote dilution claim under Section 2 of the Act when the district in question is a

the existing benchmark plan, increases the burden on those states and thus Section 5's federalism concerns.

300. 539 U.S. 461, 490–91.

301. *See id.* at 491–92 (Kennedy, J., concurring).

302. *See id.* ("If the Court's statement of facts had been written as the preface to consideration of a challenge brought under the Equal Protection Clause or under §2 of the Voting Rights Act of 1965, a reader of the opinion would have had sound reason to conclude that the challenge would succeed.").

303. *See id.*

304. *Id.*

305. 556 U.S. 1 (2009) (plurality opinion).

so-called "crossover" district where minority and white voters combine to elect the minority group's candidates of choice.[306] In support of this conclusion, Justice Kennedy's controlling plurality opinion[307] asserted that the improvement in race relations in the United States is the reason why "crossover" districts exist, and the Court would not go any further.[308] Justice Kennedy viewed this limitation of Section 2 to majority-minority districts only as appropriate to avoid the types of constitutional concerns first raised in *Shaw*. Specifically, he argued that consideration of coalition districts raised "serious constitutional concerns under the Equal Protection Clause" in that it would inject race into more redistricting decisions, which "would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.'"[309] Thus, Justice Kennedy, uneasy about the consideration of race in any circumstances, limited the consideration of race under Section 2 to circumstances where minorities could elect candidates without cooperation from whites.

That same term, the Court also considered the previous challenge to Section 5 of the Act in *Northwest Austin*. The Court in *Northwest Austin* demonstrated the strong influence of a post-racial, color-blind view of the Constitution when it indicated that the Act's coverage formula raised constitutional concerns not present when the law was passed because "we are now a very different Nation."[310] Moreover, the Equal Protection principles established in *Shaw* and *Miller* provided further ammunition for the Court's attacks against Section 5 on equal sovereignty grounds, relying on Justice Kennedy's concurrence in *Georgia v. Ashcroft*: "These federalism concerns are underscored by the argument that the preclearance requirements in one State

306. *See id.* at 12–23.

307. Justices Thomas and Scalia would have held that vote dilution claims are not cognizable under § 2 of the Act. *See id.* at 26 (Thomas, J., concurring in the judgment); *see also* Holder v. Hall, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment) (arguing that Section 2 only reaches state legislation that interferes with an individual's right to vote).

308. *See Bartlett*, 556 U.S. at 25–26 ("Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation. We decline now to expand the reaches of § 2 to require, by force of law, the voluntary cooperation our society has achieved."). This is, of course, an overly simplistic analysis, as crossover districts would often rely on a relatively small proportion of white voters who may be voting against the overwhelming majority of white voters.

309. *Id.* at 21–22 (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

310. Nw. Austin Mun. Utility Dist. No. 1 v. Holder, 557 U.S. 193, 211 (2009).

would be unconstitutional in another."[311] The message was unmistakable; "[t]hings have changed in the South"[312] and the Court was going to subject the preclearance regime to close scrutiny despite its previous endorsements.

Ultimately, the Court's jurisprudence on race, including in voting cases, is defined by Justice Kennedy's views, because he tends to provide the swing vote in close cases.[313] His recent opinions discussed herein show a hostility toward Section 5 and a desire to limit, if not eliminate, it. More generally, those cases (and others[314]) show an overriding concern with the use of race as an overriding factor in redistricting and other voting changes. Colorblindness is not the test he applies, but it is something like "color-weakness," where attention to race must be tempered such that its consideration is secondary.

As noted at the outset, the fingerprints of the Court's recent approach to race issues are all over the Court's consideration of Section 5's continued constitutionality in *Shelby County*. That much was clear from the oral argument, where Justice Scalia described Section 5 as a "racial entitlement."[315] Moreover, much like the other recent voting cases discussed herein, Chief Justice Roberts's opinion is based on the premise that "our country has changed," such that the primary concern to the Court is not discrimination against minorities, but rather the Voting Rights Act's requirement that race be considered.[316] Not only did the majority opinion ignore the record showing the continued prevalence of voting discrimination in the covered jurisdictions, but it also interjected evidence that purported to show the lack of a need for Section 5's protections throughout the decision.[317]

311. *Id.* at 203 (citing Georgia v. Ashcroft, 539 U.S. 461, 491–92 (Kennedy, J., concurring)).

312. *Id.* at 202.

313. *See* Kedar Bhatia, *October Term 2012 Summary Memo*, SCOTUSBLOG (June 29, 2013, 10:25 AM), http://www.scotusblog.com/2013/06/october-term-2012-summary-memo/ ("Justice Kennedy was once again the Justice most frequently in the majority of 5-4 decisions. He has been either the most frequent Justice in the majority of 5-4 decisions, or tied for that title, in every Term since OT03 and 13 times since OT95.").

314. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 423–43 (2006) (invalidating under Section 2 of the Act a congressional district drawn as a majority-minority district that artificially connected two distinct Latino populations to replace a compact Latino opportunity district elsewhere in the state, where voters in the original Latino opportunity district had become increasingly politically active and that district had been redrawn to create the "façade of a Latino district," while protecting an incumbent who had not been responsive to the Latino community).

315. Transcript of Oral Argument at 47, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf.

316. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

317. *See id.* at 2618–19, 2625–29.

As a result, the concerns about Equal Protection again emerge in the majority's opinion: "We have also previously highlighted the concern that 'the preclearance requirements in one State [might] be unconstitutional in another.' . . . Nothing has happened since to alleviate this troubling concern about the current application of § 5."[318] This concern seems to animate the Court in two ways. First, the Court seems to believe that Section 5 is, as Justice Kennedy put it in *Georgia v. Ashcroft*, "fundamentally flaw[ed]"[319] because it injects race into voting decisions more than the Court believes should be permitted under the Equal Protection Clause. Second, the Court's belief that Section 5 requires covered states to violate the Equal Protection Clause adds to the "federalism burden" of Section 5, which is particularly relevant in light of the equal sovereignty holding discussed above.

The result in *Shelby County* was consistent with the Court's recently-adopted view of the propriety (or lack thereof) of legislation that seeks to benefit minorities through means that consider race.[320] Particularly in light of the supposed sovereignty concerns that the Court raised and discussed at length, which allowed the Court to assert that certain states were being burdened with the requirement that they violate the Constitution, observers can hardly be surprised that the Court would seek to limit the consideration of race for the benefit of minorities in this context. What is surprising, or at least inconsistent with the purposes of the Civil War Amendments, is that this Court's hostility to legislation benefiting minorities took hold in the first place.

CONCLUSION

The purpose of the Fifteenth Amendment was to prioritize federal enforcement to eliminate racial discrimination in voting over state sovereignty issues. The Supreme Court's decision in *Shelby County v. Holder* completely undermines this purpose and cannot be reconciled with prior Supreme Court cases analyzing the constitutionality of the Section 5 preclearance scheme or other precedents regarding the rational basis standard.

318. *Id.* at 2627 (alteration in original) (citations omitted) (quoting Nw. Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) (Kennedy, J., concurring)).

319. 539 U.S. 461, 491 (2003).

320. Consistent with Justice Kennedy's views, the Court stops short of declaring colorblindness as the standard. *See Shelby Cnty.*, 133 S. Ct. at 2618–31.

When President Reagan signed the 1982 reauthorization of the Act, he stated that "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished."[321] With the *Shelby County* decision, the Roberts Court has significantly diminished the luster of America's crown jewel.

321. President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982).