

William & Mary Bill of Rights Journal

Volume *Volume 22 (2013-2014)*
Issue 3

Article 3

March 2014

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Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 Wm. & Mary Bill Rts. J. 713 (2014), <https://scholarship.law.wm.edu/wmborj/vol22/iss3/3>

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SHELBY COUNTY AND THE ILLUSION OF MINIMALISM

Richard L. Hasen*

INTRODUCTION

Chief Justice Roberts's majority opinion in *Shelby County v. Holder*,¹ holding unconstitutional a key part of the Voting Rights Act of 1965 (VRA),² purports to be a modest decision written with reluctance and humility. The Court struck the coverage formula in Section 4 of the VRA,³ which was used to determine which states and local governments must submit any proposed voting changes for federal approval (or "preclearance") under Section 5.⁴ According to the majority, by failing to amend the VRA to update the coverage formula after the Court raised constitutional doubts about preclearance in the 2009 *Northwest Austin Municipal Utility District No. One v. Holder* (*NAMUDNO*),⁵ Congress "leaves us today with no choice."⁶ "Striking an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform.'"⁷ The majority held that the coverage formula renewed without change by Congress in 2006 failed to take into account "current conditions" of discrimination in covered jurisdictions and failed to treat states with the "equal sovereignty" they deserved under the Tenth Amendment.⁸ Rather than strike down Section 5 of the VRA, as Justice Thomas would have done,⁹ the Court "issue[d] no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."¹⁰ The short opinion for the five most conservative Justices on the Court—only two-thirds the size of Justice Ginsburg's

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¹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

² 42 U.S.C. §§ 1973–1973p (2006).

³ *Shelby Cnty.*, 133 S. Ct. at 2619–31.

⁴ *Id.* at 2620.

⁵ *Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMUDNO*), 129 S. Ct. 2504, 2519 (2009).

⁶ *Shelby Cnty.*, 133 S. Ct. at 2631.

⁷ *Id.* (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

⁸ *Id.* at 2618, 2621.

⁹ *Id.* at 2631–32 (Thomas, J., concurring); see also *NAMUDNO*, 129 S. Ct. at 2517 (Thomas, J., concurring in part and dissenting in part).

¹⁰ *Shelby Cnty.*, 133 S. Ct. at 2631.

dissent for the four most liberal Justices¹¹—casts itself as adhering to precedent, reaching a result compelled by stare decisis and inevitably flowing from *NAMUDNO*.¹² The majority ostensibly stands ready for Congress's next step.

Despite the projected judicial modesty, the *Shelby County* Court was doing much more than calling balls and strikes¹³ and applying settled precedent to uncontested facts. *Shelby County* is an audacious opinion which ignores history, declines to engage the dissent's powerful argument that the VRA's bailout provisions solve any constitutional problem, and rejects the Roberts Court's stated commitment to judicial minimalism in its treatment of facial challenges and severability. It pretends it is not overturning Section 5 of the VRA, yet it sets a standard under which any new coverage formula will likely fail a constitutional test. The opinion disregards the pervasive polarization in the current Congress, which dooms agreement on a new coverage formula, and it seems to reject any replacement coverage formula.

But the opinion is minimalist in a different, important sense as well: its brevity seeks to mask major doctrinal and jurisprudential change. By writing a very short opinion and avoiding a discussion of the Fifteenth Amendment's history and how the Court silently resolved a dispute over the applicable standard of review, the Court tried to hide the major jurisprudential hurdles it jumped to reach a political decision. The opinion, relying on a new and unjustified "equal sovereignty" principle,¹⁴ demeans the strength of Congress's power to eradicate racial discrimination in voting, side-stepping a key standard of review question raised, but not resolved, in *NAMUDNO* regarding how much deference the Court owes Congress acting under its Fifteenth Amendment enforcement powers.¹⁵ The opinion's brevity is an insult, not an act of modesty. As Justice Ginsburg remarked in dissent, "[h]ubris is a fit word for today's demolition of the VRA."¹⁶

Yet the dissenters offer their own incomplete history of the VRA's renewal, failing to grapple with the more complex record of the congressional reenactment. To

¹¹ See generally *id.*

¹² See *id.* at 2619–30.

¹³ The reference here is to statements made by Chief Justice Roberts at his confirmation hearing that he would act as an umpire calling balls and strikes and decide no more than necessary. Todd S. Purdum & Robin Toner, *Roberts Pledges He'll Hear Cases with "Open Mind": Ritual Start of Hearings*, N.Y. TIMES, Sept. 13, 2005, at A1 (including a statement of Roberts at his confirmation hearing: "And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes, and not to pitch or bat"). This is consistent with the ideas of judicial minimalism. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–5 (2001); see also Geoffrey R. Stone, *Our Fill-in-the-Blank Constitution*, N.Y. TIMES, Apr. 14, 2010, at A27 (calling Roberts's "balls and strikes" metaphor "appealing but wholly disingenuous descriptions of what judges—liberal or conservative—actually do").

¹⁴ *Shelby Cnty.*, 133 S. Ct. at 2618.

¹⁵ *NAMUDNO*, 129 S. Ct. 2504, 2513 (2009).

¹⁶ *Shelby Cnty.*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting).

hear the dissenters' story, Congress in 2006 was nearly universally behind the twenty-five-year renewal of Section 5 using the old coverage formula and would have had no idea that the continuing use of the same coverage formula could have doomed its constitutionality.¹⁷ In fact, it was a less happy story. Congress willfully ignored the problems with the coverage formula which legal scholars brought to Congress's attention and which were amply covered by a Senate report written by Republican committee staffers who were deeply skeptical of the Act's continuing constitutionality.¹⁸ While the *Shelby County* majority minimized the audaciousness of its own holding, the dissenters minimized the difficult constitutional questions before Congress and before the Court.

Part I briefly describes the background of the *Shelby County* case and in particular the questions left open in *NAMUDNO*. Part II analyzes the majority opinion and explains the opinion as an act of false minimalism. Part III analyzes the dissenting opinion and explains the dissent as one willfully silent about difficult constitutional questions. In the end, the dissenters had the better argument about the Act's constitutionality, but the dissent would have been stronger had it described and grappled more forthrightly with the struggles over the VRA's renewal and the dangers of political avoidance. *Shelby County* is important not just for the loss of preclearance, but also for the diminution of congressional power over voting rights in the future.

I. THE ROAD TO *SHELBY COUNTY*¹⁹

In 1965, Congress enacted the Voting Rights Act (VRA).²⁰ Section 5 of the VRA required that "covered jurisdictions" obtain preclearance from the federal government before making any changes in voting "practice[s] . . . or procedure[s],"²¹ from redistricting to voter identification rules to relocating a polling place. Congress designated covered jurisdictions through a formula looking at whether the jurisdiction employed a test or device for voting in 1964 and had voter turnout below fifty percent.²² For each change, Section 5 of the VRA required the covered jurisdiction to demonstrate that the change was made without a discriminatory purpose and that it would not make the affected minority groups worse off.²³ Section 5's aim was to prevent state and local governments with a history of discrimination against racial

¹⁷ *Id.* at 2632.

¹⁸ S. REP. NO. 109-295, at 25–30 (2006).

¹⁹ The next few pages of this Part draw heavily on Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181 [hereinafter Hasen, *Constitutional Avoidance*].

²⁰ 42 U.S.C. §§ 1973–1973p (2006).

²¹ *Id.* §§ 1973–1973b.

²² See *Shelby Cnty.*, 133 S. Ct. at 2619–21 (majority opinion), for a description of the coverage formula over time.

²³ *Id.* at 2626–27.

minorities from changing their voting rules without first proving that such changes would have neither a discriminatory purpose nor effect.²⁴ Since 1965, Section 5 has been very successful at assuring minority voting rights.²⁵

Some covered jurisdictions challenged parts of the VRA as exceeding congressional power. In the 1966 *South Carolina v. Katzenbach* case,²⁶ the Court rejected South Carolina's argument that the Section 5 preclearance provision and other challenged parts of the VRA "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution."²⁷ On an eight-to-one vote—with Justice Black dissenting²⁸—the Court held that Congress had acted appropriately under its powers granted in Section 2 of the Fifteenth Amendment.²⁹ In so holding, the Court gave considerable deference to congressional determinations about the means necessary to "enforce" the Fifteenth Amendment prohibition by states in discriminating in voting on the basis of race and applied a rationality standard of review.³⁰

Over the years, Congress continued to renew Section 5, adding in additional coverage areas pegged to a formula that was tied to data from 1964, 1968, and 1972.³¹ In 1982, Congress renewed the provision for a twenty-five-year period, expiring in 2007.³² The city of Rome, Georgia challenged the renewed preclearance provision, and the Court again rejected the challenge.³³ Then-Justice Rehnquist, joined by Justice Stewart, dissented, raising federalism concerns, as did Justice Powell.³⁴

In the years since *City of Rome*, the Supreme Court underwent a federalism revolution, narrowing congressional power over the states. Beginning with *City of Boerne v. Flores*,³⁵ the Court has limited Congress to passing "remedial" statutes.³⁶ It has rejected congressional attempts to expand the scope of constitutional rights through legislation beyond that which is "congruen[t] and proportional[]"³⁷ to remedy intentional unconstitutional discrimination by the states. In *Board of Trustees v.*

²⁴ *Id.* at 2624 ("Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States 'merely switched to discriminatory devices not covered by the federal decrees,' 'enacted difficult new tests,' or simply 'defied and evaded court orders.'" (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966))).

²⁵ *Id.* at 2626.

²⁶ *Katzenbach*, 383 U.S. at 307.

²⁷ *Id.* at 323.

²⁸ *Id.* at 355–61.

²⁹ *Id.* at 337.

³⁰ *Id.* at 324–27.

³¹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

³² *Id.*

³³ *City of Rome v. United States*, 446 U.S. 156, 187 (1980).

³⁴ *Id.* at 206–21 (Rehnquist, J., dissenting); *id.* at 193–206 (Powell, J., dissenting).

³⁵ 521 U.S. 507 (1997).

³⁶ *Id.* at 519.

³⁷ *Id.* at 520.

Garrett,³⁸ the Court indicated that it will search for an adequate *evidentiary record* to support a congressional determination that states are engaging in sufficient, intentionally unconstitutional conduct so as to justify congressional regulation.³⁹ Importantly, the *Boerne* line of cases cited *Katzenbach* as correct, noting that Congress was within its power to require preclearance, especially given the law's limited temporal and geographic scope.⁴⁰

Because of the new federalism cases, election law scholars worried that unless Congress made changes to the existing VRA Section 5 regime when the Act was due to expire in 2007,⁴¹ a renewed Section 5 could be struck down as unconstitutional under these new standards.⁴²

Congress did make some changes to Section 5 when it renewed the Act in 2006,⁴³ such as rejecting earlier, stingier Supreme Court interpretations of the applicable Section 5 standards in *Georgia v. Ashcroft*⁴⁴ and *Reno v. Bossier Parish II*.⁴⁵ As we will see below, these changes, which had the effect of making it more difficult for covered jurisdictions to obtain preclearance, later appeared to agitate the *Shelby County* majority on the Supreme Court.⁴⁶

³⁸ 531 U.S. 356 (2001).

³⁹ *Id.* at 373–74.

⁴⁰ *See, e.g., City of Boerne*, 521 U.S. at 533.

⁴¹ *See* 42 U.S.C. § 1973b(a)(8) (2006); THE FUTURE OF THE VOTING RIGHTS ACT, at xi (David L. Epstein et al. eds., 2008); Mike Allen, *A Push to Extend Voting Rights Act; Rep. Sensenbrenner Tells NAACP He Will Work to Renew Provisions of Law*, WASH. POST, July 10, 2005, at A5.

⁴² *See The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10–12 (2006) (statement of Richard H. Pildes). *See generally* THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 41; 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) [hereinafter Hasen, *Congressional Power*]; Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

⁴³ *See* *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 229 (D.D.C. 2008) (three-judge panel).

⁴⁴ 539 U.S. 461 (2003); *see also* 42 U.S.C. § 1973c(b) (2006). For an exhaustive look at how the renewed Section 5 deals with the *Georgia v. Ashcroft* precedent, *see generally* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007).

⁴⁵ 528 U.S. 320 (2000).

⁴⁶ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2626–27 (2013) (“In 2006, Congress amended § 5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose . . . even though we had stated that such broadening of § 5 coverage would ‘exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5’s constitutionality,’ . . . In addition, Congress expanded § 5 to prohibit any voting law ‘that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States,’ on account of race, color, or language minority status, ‘to elect their preferred candidates of choice.’ . . . In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as

Congress, however, did not make changes to two key provisions of the VRA which would have updated it to account for changed political realities. First, Congress did not change the coverage formula determining which jurisdictions must engage in preclearance. That formula used data from the 1964, 1968, or 1972 elections.⁴⁷ Second, Congress did not seriously consider ways to make it easier for jurisdictions that have been covered to “bail out” from coverage under the Act, such as by putting the onus on the federal government to prepare a list of jurisdictions presumptively entitled to bailout because of their good record on voting and race.⁴⁸ These were politically sensitive subjects, and it appears that Congress did not have enough incentive to address these difficult race and politics questions⁴⁹ before re-authorizing Section 5 for another twenty-five years by a wide margin.⁵⁰ Although the reauthorization passed by a lopsided margin, Republicans on the Senate Judiciary Committee issued a report casting serious doubt on the renewal’s constitutionality.⁵¹ Even so, all the Republican Senators on the Committee voted in favor of renewal.⁵²

Soon after Congress passed the renewed Section 5, the Project on Fair Representation, a group ideologically opposed to Section 5 as impermissible race-based legislation,⁵³ backed litigation to challenge Section 5 as exceeding congressional power under the Fifteenth Amendment.⁵⁴ An obscure Austin utility district, the Northwest

the conditions justifying that requirement have dramatically improved.” (citations omitted)); *see also id.* at 2632 (Thomas, J., concurring) (“While the pre-2006 version of the Act went well beyond protection guaranteed under the Constitution, *see [Bossier II]*, . . . it now goes even further.” (citations omitted)).

⁴⁷ *See* 42 U.S.C. § 1973c(a) (2006).

⁴⁸ *See* Richard Hasen, *Pass the VRA Bailout Amendment*, ROLL CALL (July 11, 2006, 12:00 AM), http://www.rollcall.com/issues/52_3/-14173-1.html [hereinafter Hasen, *Pass the VRA Bailout Amendment*].

⁴⁹ *See generally* Persily, *supra* note 44, at 208; Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148 (2007), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/election-law/political-avoidance,-constitutional-theory,-and-the-vra/>.

⁵⁰ *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 229 (D.D.C. 2008) (three-judge panel) (“[I]n July 2006 Congress extended section 5 for an additional twenty-five years. Entitled the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, the statute, which passed overwhelmingly in both chambers (unanimously in the Senate and by 390–33 in the House), overruled several Supreme Court decisions interpreting section 5’s substantive test, but otherwise left the law virtually unchanged. . . . President George W. Bush signed the bill into law on July 27, 2006.” (citation omitted)).

⁵¹ *See generally* S. REP. NO. 109-295 (2006); Persily, *supra* note 44, at 180–97.

⁵² *See* S. REP. NO. 109-295, at 4 (2006).

⁵³ PROJECT ON FAIR REPRESENTATION, <http://www.projectonfairrepresentation.org> (last visited Mar. 2, 2014).

⁵⁴ *See* Chuck Lindell, *Star Lawyer Makes Supreme Court Splash*, AUSTIN AMERICAN-STATESMAN (July 5, 2009), <http://yetterwarden.com/news/statesman.pdf>.

Austin Municipal Utility District Number One,⁵⁵ brought the Project's challenge, which was initially heard by a three-judge federal district court in Washington, D.C.⁵⁶ Though its main argument was against the continued constitutionality of the pre-clearance provision of Section 5, the utility district also argued it should be entitled to bailout from coverage under the Act as a "political subdivision" covered by Section 5.⁵⁷

The three-judge court in an exhaustive and unanimous opinion rejected both arguments.⁵⁸ The court spent five pages addressing the bailout question⁵⁹ and then forty-eight pages addressing the thorny constitutional question.⁶⁰ In light of the statutory tour de force of the district court, voting rights experts believed that the statutory bailout argument had no chance when *NAMUDNO* was appealed to the Supreme Court.⁶¹ Instead, it seemed unavoidable that the Court would address the constitutionality of the renewed Section 5.

In a surprising and relatively short opinion, however, the Court on an eight-to-one vote decided *NAMUDNO* on statutory grounds,⁶² ruling that the utility district was entitled to bailout.⁶³ The Court applied the "avoidance canon," which counsels the Court to avoid declaring unconstitutional a federal statute about which there are serious constitutional doubts when there is a narrowing statutory interpretation to save the statute.⁶⁴ Justice Thomas, speaking only for himself, would have held Section 5 unconstitutional.⁶⁵ In an earlier *Supreme Court Review* article, I demonstrated at length how the Court's statutory decision on bailout was disingenuous and not supported by sound principles of statutory interpretation.⁶⁶ Perhaps what is most remarkable about the Court's statutory interpretation in *NAMUDNO* is the conspiracy of silence on the Court. No Justice, not even Justice Thomas in his partial dissent, objected to the statutory analysis, which mangled Congress's statutory intent.⁶⁷

⁵⁵ *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 229–30 (D.D.C. 2008).

⁵⁶ *Id.* at 221.

⁵⁷ *Id.* at 223–31.

⁵⁸ *Id.* at 230–82.

⁵⁹ *Id.* at 230–35.

⁶⁰ *Id.* at 235–82.

⁶¹ See, e.g., Heather Gerken, *The Supreme Court Punts on Section 5*, BALKINIZATION (June 22, 2009, 10:42 AM), <http://balkin.blogspot.com/2009/06/supreme-court-punts-on-section-5.html>; Richard L. Hasen, *Sordid Business: Will the Supreme Court Kill the Voting Rights Act?*, SLATE (Apr. 27, 2009, 11:59 AM), <http://www.slate.com/id/2216888/> [hereinafter Hasen, *Sordid Business*].

⁶² *NAMUDNO*, 129 S. Ct. 2504, 2507–08 (2009).

⁶³ *Id.* at 2508.

⁶⁴ *Id.* at 2513; Hasen, *Constitutional Avoidance*, *supra* note 19, at 182–89.

⁶⁵ *NAMUDNO*, 129 S. Ct. at 2517 (Thomas, J., concurring in part and dissenting in part).

⁶⁶ See generally Hasen, *Constitutional Avoidance*, *supra* note 19.

⁶⁷ *Id.* at 182.

In the earlier article, I offered three possible reasons why the Court engaged in the tortured statutory analysis and avoided the constitutional issue: perhaps the Court wanted to foster dialogue with Congress, spurring it to revise the VRA; perhaps the Court wished to preserve its public legitimacy by not striking a crown jewel of the civil rights movement unless absolutely necessary; or perhaps the Court was acting strategically, writing a statutory opinion casting constitutional doubts to soften the blow for an eventual overturning of the VRA.⁶⁸ In hindsight, the third explanation seems the most plausible explanation for the majority's motivations, although all three still remain plausible.⁶⁹

Although the Court did not resolve the constitutional question, it offered several pages of dicta on the question of Section 5's constitutionality.⁷⁰ The Court began by noting the great strides in minority voter registration and otherwise for minorities in covered jurisdictions since the 1965 VRA enactment.⁷¹ It then noted the "substantial federalism costs,"⁷² and how those costs had caused members of the Court in the past "to express serious misgivings about the constitutionality of § 5."⁷³

The Court commented that some of the improvements in conditions for minority voters "are no doubt due in significant part to the Voting Rights Act itself Past success alone, however, is not adequate justification to retain the preclearance requirements."⁷⁴ "[T]he Act imposes current burdens and must be justified by current needs."⁷⁵ Further, the VRA "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"⁷⁶

The Court then noted that the coverage formula may be outdated: "The statute's coverage formula is based on data that is now more than thirty-five years old, and there is considerable evidence that it fails to account for current political conditions."⁷⁷ It also highlighted the fact that "Congress heard warnings from supporters of extending § 5 that the evidence in the record did not address systematic differences between

⁶⁸ *Id.* at 183–84.

⁶⁹ It is a different question why the liberal dissenters in *Shelby County* signed on to the *NAMUDNO* opinion's discussion of the serious constitutional doubts about the preclearance provision of the VRA. The dissenters could well have been trying to forestall a ruling or to signal to Congress that Section 5 was in danger. See Richard L. Hasen, *Are the Liberal Justices Savvy or Suckers?*, SLATE (July 1, 2013, 2:29 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/are_the_liberals_on_the_supreme_court_savvy_or_suckers.html [hereinafter Hasen, *Are the Liberal Justices Savvy or Suckers?*].

⁷⁰ *NAMUDNO*, 129 S. Ct. at 2511–13 (majority opinion).

⁷¹ *Id.* at 2511.

⁷² *Id.* (citation omitted) (internal quotation marks omitted).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2506.

⁷⁶ *Id.* at 2512 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)).

⁷⁷ *Id.*

the covered and non-covered areas of the United States . . . and, in fact, the evidence that is in the record suggests there is more similarity than difference.”⁷⁸

The Court then turned to the key question of the standard of review, and on this issue the Justices punted:

The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,” . . . the Federal Government asserts that it is enough that the legislation be a “rational means to effectuate the constitutional prohibition,” That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test.⁷⁹

The Court concluded—in a paragraph which in retrospect appears to have been insisted upon by the Court’s liberal Justices—by stressing its limited “institutional role,”⁸⁰ noting the gravity of reviewing an Act of Congress, affirming that Congress is a co-equal branch of government, and stating that “[t]he Fifteenth Amendment empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the District Court determined ‘document[ed] contemporary racial discrimination in covered states.’”⁸¹

Congress did nothing to reconsider the coverage formula or otherwise change the VRA for four years after *NAMUDNO*. Meanwhile, the Project on Fair Representation,⁸² dissatisfied with the outcome of *NAMUDNO* despite a statutory win, looked for a new plaintiff to challenge the Act,⁸³ choosing Shelby County, Alabama, a jurisdiction not entitled to bailout because there had been recent objections to the county’s proposed voting changes.⁸⁴

⁷⁸ *Id.* (citation omitted) (internal quotation marks omitted).

⁷⁹ *Id.* at 2512–13 (citations omitted).

⁸⁰ *Id.* at 2513.

⁸¹ *Id.* (quoting *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 265 (D.D.C. 2008)).

⁸² PROJECT ON FAIR REPRESENTATION, *supra* note 53.

⁸³ Joan Biskupic, *Special Report: Behind U.S. Race Cases, a Little-Known Recruiter*, REUTERS (Dec. 4, 2012, 1:50 PM), <http://www.reuters.com/article/2012/12/04/us-usa-court-casemaker-idUSBRE8B30V220121204>.

⁸⁴ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2621 (2013) (“It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county.”) During the same term as the Court heard the *Shelby County* case, it also considered the fate

In the *Shelby County* case, a federal district court, in a lengthy opinion, rejected Shelby County's facial constitutional attack on preclearance. Judge John D. Bates, a George W. Bush appointee,⁸⁵ examined the record before Congress in 2006 and found sufficient evidence of continuing problems with race discrimination in voting in the covered jurisdictions to justify congressional renewal of preclearance under the *Boerne* congruence and proportionality test (or alternatively under the less onerous *Katzenbach* rationality standard).⁸⁶ A divided panel of the U.S. Court of Appeals for the D.C. Circuit affirmed.⁸⁷ Judge David S. Tatel, a Clinton appointee,⁸⁸ wrote an opinion joined by Judge Thomas Griffith, a George W. Bush appointee.⁸⁹ In another extensive analysis of the evidence before Congress, the appellate court found the evidence of continued problems with race discrimination in voting in the covered jurisdictions satisfied the *Boerne* standard (or alternatively under the less onerous *Katzenbach* rationality standard).⁹⁰ Judge Stephen F. Williams, a Reagan appointee,⁹¹ dissented. He concluded that the coverage formula in Section 4 of the VRA was irrational and unconstitutional.⁹² The Supreme Court granted certiorari.⁹³

II. THE *SHELBY COUNTY* MAJORITY'S FALSE MINIMALISM

A. The Majority Opinion

The structure of the *Shelby County* majority opinion mirrors the constitutional portion of the *NAMUDNO* decision,⁹⁴ in essence, treating *NAMUDNO* as though it

of affirmative action in higher education in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), another case from the Project on Fair Representation. See Project on Fair Representation, Press Release, Supreme Court Strikes Down University of Texas Affirmative Action Policy, Statement of Abigail Fisher (June 24, 2013), available at <http://www.projectonfairrepresentation.org/wp-content/uploads/2008/08/POFR-Fisher-Press-Release-SCOTUS.pdf>. *Fisher* looks a lot like *NAMUDNO*, in punting but signaling an eventual Supreme Court striking down of a race-based law. Richard L. Hasen, *The Chief Justice's Long Game*, N.Y. TIMES, June 25, 2013, at A25 [hereinafter Hasen, *The Chief Justice's Long Game*].

⁸⁵ District Judge John D. Bates, U.S. DISTRICT CT. FOR THE DISTRICT OF COLUMBIA, <http://www.dcd.uscourts.gov/dcd/bates> (last visited Mar. 2, 2014).

⁸⁶ *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 428–35 (D.D.C. 2011).

⁸⁷ See generally *Shelby Cnty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), cert. granted, 133 S. Ct. 594 (2012).

⁸⁸ Judge David S. Tatel, U.S. CT. OF APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+DST> (last visited Mar. 2, 2014).

⁸⁹ Judge Thomas B. Griffith, U.S. CT. OF APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+TBG> (last visited Mar. 2, 2014).

⁹⁰ *Shelby Cnty.*, 679 F.3d at 859–61.

⁹¹ Judge Stephen F. Williams, U.S. CT. OF APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+SFW> (last visited Mar. 2, 2014).

⁹² *Shelby Cnty.*, 679 F.3d at 885 (Williams, J., dissenting).

⁹³ *Id.*

⁹⁴ *NAMUDNO*, 129 S. Ct. 2504, 2508–10 (2009).

offered binding holdings on the constitutional questions rather than merely raising constitutional doubts about the statute for purposes of applying the avoidance canon.⁹⁵ The major differences between the *NAMUDNO* dicta and the *Shelby County* holding on the constitutionality of preclearance is that *Shelby County* ignores the *Boerne/Katzenbach* standard of review question entirely (the majority fails even to cite *Boerne* in its opinion⁹⁶), and it shifts the constitutional question from one focused on the constitutionality of Section 5 preclearance to one solely addressing the constitutionality of the Section 4 coverage formula.⁹⁷

Shelby County began by recounting the progress made in racial discrimination in voting, while acknowledging “[a]t the same time, voting discrimination still exists; no one doubts that.”⁹⁸ The opinion offered a brief history of racial discrimination in voting covering the Fifteenth Amendment, the enactment of the VRA in 1965, and the congressional renewals of preclearance.⁹⁹ After describing *NAMUDNO* and its statements about the “substantial federalism costs” of Section 5,¹⁰⁰ the majority opinion noted that “[e]ight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional.”¹⁰¹ This statement led Justice Ginsburg to retort in her dissent that “[a]cknowledging the existence of ‘serious constitutional questions’ . . . does not suggest how those questions should be answered.”¹⁰²

The *Shelby County* majority then described the current litigation, noting that the majority in the D.C. Circuit relied upon a study by Professor Ellen Katz and her co-authors showing a higher rate of VRA Section 2 litigation in covered jurisdictions than in non-covered jurisdictions.¹⁰³ The majority highlighted Judge Williams’s dissent in the D.C. Circuit and his determination that Section 4’s coverage formula was “irrational and unconstitutional.”¹⁰⁴

⁹⁵ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013).

⁹⁶ Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), <http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/> [hereinafter Hasen, *The Curious Disappearance*].

⁹⁷ *Shelby Cnty.*, 133 S. Ct. at 2627.

⁹⁸ *Id.* at 2619.

⁹⁹ *Id.* at 2619–21.

¹⁰⁰ *Id.* at 2621.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2637 n.3 (Ginsburg, J., dissenting) (citation omitted).

¹⁰³ See generally Ellen Katz et. al, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006).

¹⁰⁴ *Shelby Cnty.*, 133 S. Ct. at 2622 (“Judge Williams dissented. He found ‘no positive correlation between inclusion in § 4(b)’s coverage formula and low black registration or turnout.’ Rather, to the extent there was any correlation, it actually went the other way: ‘condemnation under § 4(b) is a marker of *higher* black registration and turnout.’ . . . Judge Williams also found that ‘[c]overed jurisdictions have *far more* black officeholders as a proportion of the black population than do uncovered ones.’ As to the evidence of successful § 2 suits, Judge

Turning to the merits, the majority wrote as though the Court already had determined the standard of review in *NAMUDNO*. It sidestepped the *Boerne* issue with its first footnote reading that “[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin* . . . and accordingly *Northwest Austin* guides our review under both Amendments in this case.”¹⁰⁵

Proceeding without clarifying the standard of review, the Court wrote that “[o]utside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens.”¹⁰⁶ The opinion declared the Framers’ intent to have the states maintain power over elections through the Tenth Amendment,¹⁰⁷ while noting that the Elections Clause of Article I, Section 4 gives Congress the power to set the time and manner for congressional elections.¹⁰⁸ The Court further held that state sovereignty, protected through the Tenth Amendment against federal government encroachment includes a “principle of *equal* sovereignty among the states.”¹⁰⁹

The *Shelby County* majority then held that “[t]he Voting Rights Act sharply departs from these [Tenth Amendment] principles” by making covered states “beseech the Federal government for permission to implement laws that they would otherwise have the right to enact and execute on their own.”¹¹⁰ The law further violates “equal sovereignty” principles because while covered states can “wait . . . months or years and expend[] funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately.”¹¹¹ Covered states are also subject to different substantive standards under the Act, including a shifting of the burden of proof to covered jurisdictions to prove an absence of discriminatory purpose and effect.¹¹²

The majority conceded that the coverage formula initially adopted “made sense” to deal with areas where discrimination was most prevalent¹¹³ and that the VRA itself “in large part” was responsible for improvements in voting conditions for

Williams disaggregated the reported cases by State, and concluded that ‘[t]he five worst uncovered jurisdictions . . . have worse records than eight of the covered jurisdictions.’ He also noted that two covered jurisdictions—Arizona and Alaska—had not had any successful reported § 2 suit brought against them during the entire 24 years covered by the data. Judge Williams would have held the coverage formula of § 4(b) ‘irrational’ and unconstitutional.”).

¹⁰⁵ *Id.* at 2622 n.1 (citations omitted).

¹⁰⁶ *Id.* at 2623.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (quoting *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009)) (internal quotation marks omitted).

¹¹⁰ *Id.* at 2616.

¹¹¹ *Id.* at 2624.

¹¹² *Id.*

¹¹³ *Id.* at 2625.

minority voters.¹¹⁴ But it concluded that the decline in racial discrimination in voting (as measured by objections in the covered jurisdictions) and the increase in minority voting statistics and minority representation in Congress showed a coverage formula now constitutionally impermissible.¹¹⁵ The formula was made even more problematic when Congress made preclearance more difficult by reversing *Georgia v. Ashcroft* and *Bossier II*.¹¹⁶

The Court rejected the argument that the improvements on the ground could be attributable to Section 5's deterrent effect,¹¹⁷ which justified continuation of the law: "Under this theory . . . § 5 would be effectively immune from scrutiny; no matter how 'clean' the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior."¹¹⁸

Finally, the Court majority rejected counterarguments of the federal government and dissent. It disagreed with the Government that the original coverage formula was "reverse-engineer[ed]" back in the 1960s¹¹⁹ and that the Government need not show a "logical relationship between the criteria in the formula and the reason for coverage."¹²⁰ It held that *Katzenbach*¹²¹ in fact recognized a rational relationship between the coverage formula and the aims of preclearance in 1965 and that the failure to show "even relevance [between the coverage formula and current conditions] is fatal."¹²² The Court characterized the government as ignoring history after 1965;¹²³ for preclearance to remain constitutional, Congress must use "current data reflecting current needs."¹²⁴

The Court in a single paragraph then dismissed as irrelevant thousands of pages of congressional evidence supporting the continuing need for preclearance and the Katz study: "Contrary 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

¹¹⁴ *Id.* at 2626.

¹¹⁵ *Id.* at 2622, 2625–26; *see also id.* at 2627–28 ("Coverage today is based on decades-old data and eradicated practices . . . Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.").

¹¹⁶ *Id.* at 2626–27 (describing how Congress's 2006 Act negated discussions in *Bossier II* and *Georgia v. Ashcroft*).

¹¹⁷ *Id.* at 2627.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2628.

¹²⁰ *Id.*

¹²¹ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

¹²² *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2628 (2013).

¹²³ *Id.* ("[H]istory did not end in 1965.").

¹²⁴ *Id.* at 2629; *see also id.* ("To serve that purpose [of ensuring a better future], Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin*, and we make it clear again today.").

us today.”¹²⁵ “Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.”¹²⁶

The Court also dismissed in a short paragraph the dissent’s argument that Shelby County cannot complain about the coverage formula because under any rational coverage formula Shelby County and the state of Alabama, with their recent histories of race discrimination in voting, deserved to be covered.¹²⁷

The Court concluded by protesting that the dissent “analyzes the question presented as if our decision in *Northwest Austin* never happened,”¹²⁸ noting that “four years ago, in an opinion joined by two of today’s dissenters, the Court expressly stated that ‘[t]he Act’s preclearance requirement and its coverage formula raise serious constitutional questions.’”¹²⁹ It then sought to minimize its holding:

Striking an Act of Congress “is the gravest and most delicate duty that this Court is called on to perform.” [T]hat is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds.¹³⁰

It concluded that Congress “leaves us today with no choice.”¹³¹ Rather than strike down Section 5, the Court “issue[s] no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.”¹³²

B. False Minimalism

Shelby County is falsely minimalist in two ways. First, the opinion purports to decide less than it could have, pretending to leave room for Congress to respond to the decision with a new preclearance regime. Second, the opinion is brief and breezy, eliding rather than confronting serious jurisprudential hurdles in the way of its decision.

Chief Justice Roberts’s majority opinion in *Shelby County* tries mightily to minimize the importance of its holding by acting as though it engaged in an act of

¹²⁵ *Id.* (citation omitted).

¹²⁶ *Id.* (citations omitted).

¹²⁷ *Id.* at 2629–30 (“But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired.”).

¹²⁸ *Id.* at 2630.

¹²⁹ *Id.*

¹³⁰ *Id.* at 2631 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

¹³¹ *Id.*

¹³² *Id.*

judicial minimalism. The message the majority tries to send is the following: In 2006, Congress insulted us by renewing Section 5 for twenty-five more years and making preclearance harder, despite our warnings that doing so would increase the law's constitutional problems, and despite hearing testimony from experts that failure to modify the coverage formula could render the Act unconstitutional. We did not initially strike down the VRA in the 2009 *NAMUDNO* case¹³³ despite Congress's insult; we gave Congress more time and flagged the serious constitutional issue, but Congress did nothing. Yet another insult. We had no choice but to act when the issue came back before us in 2013.¹³⁴ The result we reach in *Shelby County* is a simple application of the rules established in *NAMUDNO*; we made no new law. But we took as small a step as we could: rather than striking the preclearance regime of Section 5 itself, as Justice Thomas would have done,¹³⁵ we struck only the Section 4 the coverage formula, leaving Congress with room to update the VRA to account for current conditions.¹³⁶ We acted gravely and seriously, doing no more than necessary and recognizing our limited institutional role.

In fact, the opinion is audacious, rather than modest; it creates new law without adequate justification which limits congressional power to enforce voting rights; it willfully ignores political realities; its brevity, rather than signaling humility and minimalism, demonstrates a failure to engage with the voluminous congressional record and substantial arguments of the law's defenders and of the dissent; and the Court issued a broad decision when minimalism counseled issuing a narrower one. The remainder of this Part explains the false minimalism of the majority opinion.

To begin with, the Court's decision to sidestep the standard of review reflects something other than doctrinal sloppiness. Indeed, it is impossible to believe that the majority's failure to explicitly address whether *Boerne* "congruence and proportionality"¹³⁷ or *Katzenbach* rationality¹³⁸ applies to review of this congressional legislation was an oversight. The parties vigorously debated, and the Court flagged but did not decide the issue in *NAMUDNO*,¹³⁹ the district court judge and the majority and dissenting opinions in the D.C. Circuit in the *Shelby County* case addressed the standard of review issue,¹⁴⁰ the parties briefed the issue in the Supreme

¹³³ *NAMUDNO*, 129 S. Ct. 2504, 2508 (2009).

¹³⁴ *Shelby Cnty.*, 133 S. Ct. at 2612.

¹³⁵ *Id.* at 2631 (Thomas, J., concurring).

¹³⁶ See Artemus Ward & J. Mitchell Pickerill, *Judicial Minimalism Is Alive and Well on the Roberts Court*, NAT'L L.J. (July 3, 2013, 10:50 AM), <http://www.nationallawjournal.com/id=1202609561827> (characterizing *Shelby County* as a case where the Justices could have, but did not, "overturn the VRA").

¹³⁷ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹³⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

¹³⁹ *NAMUDNO*, 129 S. Ct. 2504, 2516 (2009).

¹⁴⁰ See *Shelby Cnty. v. Holder*, 679 F.3d 848, 859, 885 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012); *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 447 (D.D.C. 2011).

Court,¹⁴¹ and the dissent argued against *Boerne* and in favor of application of the *Katzenbach* rationality standard.¹⁴² The dissent even flagged the majority's failure to state the standard of review.¹⁴³

Rather than address the issue or reply to the dissent, the Court engaged in the worst kind of bootstrapping by seeking to incorporate the (non-) standard of review from *NAMUDNO* in footnote one.¹⁴⁴ As I noted when the opinion first came out, the footnote appears deliberately inscrutable: "[T]he Court sidesteps an issue about the standard of review in Case 1, and in Case 2 the Court endorses Case 1's analysis of the standard of review."¹⁴⁵

The issue matters immensely to the core of the legal question in *Shelby County* because it sets the basic ground rules for determining who decides which steps are necessary to prevent racial discrimination in voting.¹⁴⁶ The dissent powerfully argues that the Fifteenth Amendment's enforcement standard gives *Congress*, not the Court, the power to decide how to enforce the amendment's ban on racial discrimination in voting.¹⁴⁷ The dissent offers a muscular and integrated vision of the five constitutional

¹⁴¹ All of the parties' Supreme Court briefs discussed the potential applicability of *Boerne*. See Brief for Petitioner, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96); Reply Brief for Petitioner at 12–14, 18, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96); Brief for Federal Respondent at 18–19, 34, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96); Brief for Respondent-Intervenor Bobby Lee Harris, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96); Brief for Respondent-Intervenors Bobby Pierson et al., *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96).

¹⁴² *Shelby Cnty.*, 133 S. Ct. at 2637–38 (Ginsburg, J., dissenting).

¹⁴³ *Id.* at 2644 ("Without even identifying a standard of review, the Court dismissively brushes off arguments based on 'data from the record,' and declines to enter the 'debat[e] about] what [the] record shows.'").

¹⁴⁴ *Id.* at 2622 n.1 (majority opinion) ("Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*, and accordingly *Northwest Austin* guides our review under both Amendments in this case." (citation omitted)).

¹⁴⁵ See Hasen, *The Curious Disappearance*, *supra* note 96.

¹⁴⁶ *Shelby Cnty.*, 133 S. Ct. at 2632 (Ginsburg, J., dissenting) ("The question this case presents is who decides whether, as currently operative, § 5 remains justifiable."); *id.* at 2637 ("So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end.").

¹⁴⁷ The dissenters write:

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use "all means which are appropriate, which are plainly adapted" to the constitutional ends declared by these Amendments. . . . So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. "It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able

amendments mentioning the right to vote and, coupled with its view of the Elections Clause in Article 4, the Constitution gives Congress broad power to protect the franchise and democratic processes against state encroachment.¹⁴⁸

A lower rationality standard affords Congress much more leeway under the VRA, leeway which supports the constitutionality of the preclearance standard and justifies other parts of the VRA, such as Section 2,¹⁴⁹ which protects minority voting strength in districting plans and elsewhere, and Section 203,¹⁵⁰ which protects language minorities and requires that the translation of certain election-related materials.

to perceive a basis upon which the Congress might resolve the conflict as it did.” . . .

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its judgments in this domain should garner. *South Carolina v. Katzenbach* supplies the standard of review: “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.” . . . Faced with subsequent reauthorizations of the VRA, the Court has reaffirmed this standard. . . . Today’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed “rational means.”

Id. at 2637–38 (citations omitted).

¹⁴⁸ *Id.* at 2636 n.2 (“The Constitution uses the words ‘right to vote’ in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact ‘appropriate legislation’ to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections. U.S. Const., Art. I, § 4 (‘[T]he Congress may at any time by Law make or alter’ regulations concerning the ‘Times, Places and Manner of holding Elections for Senators and Representatives.’); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).”). This footnote may help explain why the *Shelby County* dissenters were willing to sign on to Justice Scalia’s majority opinion in *Inter Tribal Council*, 133 S. Ct. 2247, despite language in the opinion which could be used later by states to fight federal election legislation by claiming such legislation impedes state power to set voter qualifications. See Richard L. Hasen, *The Supreme Court Gives States New Weapons in the Voting Wars*, DAILY BEAST (June 17, 2013, 1:27 PM), <http://www.thedailybeast.com/articles/2013/06/17/the-supreme-court-gives-states-new-weapons-in-the-voting-wars.html> [hereinafter Hasen, *The Supreme Court*]. In a future case involving a state’s qualifications power being raised against a federal election rule, the dissenters likely would seek to distance themselves from the voter qualifications dicta in *Inter Tribal Council* just as they distanced themselves from the *NAMUDNO* dicta in *Shelby County*. Instead, the dissenters offer a nascent theory of broad congressional power to assure equality in voting.

¹⁴⁹ Voting Rights Act of 1965 § 2, Pub. L. No. 89-110 (codified as amended at 42 U.S.C. § 1973 (2006)).

¹⁵⁰ Voting Rights Act of 1965 § 203, Pub. L. No. 89-110, *amended by* Pub. L. No. 94-73 (1975) (codified as amended at 42 U.S.C. § 1973b(f) (2006)).

In supporting the rationality of Congress's readoption of the coverage formula, the dissent pointed to numerous recent instances of racial discrimination in voting rules occurring in covered jurisdictions. For example,

In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town's election after 'an unprecedented number' of African-American candidates announced they were running for office. The Department of Justice (DOJ) required an election, and the town elected its first black mayor and three black aldermen.¹⁵¹

The dissent also noted that the Court itself in a 2006 case held that the State of Texas engaged in intentional racial discrimination against Latino voters in its mid-decade congressional redistricting.¹⁵²

The dissent further argued that the Court should apply a more deferential standard of review when it considers the constitutionality of a law being renewed compared to when it considers the constitutionality of a new law.¹⁵³ Assuming that Section 5 worked successfully at least as a partial deterrent, no one would expect to see continued "flagrant," "wide-spread," or "rampant" racial discrimination in voting occurring in covered jurisdictions.¹⁵⁴ Nonetheless, the Katz study demonstrated that despite the preclearance requirement, covered jurisdictions as a whole had more successful VRA Section 2 suits against them than non-covered jurisdictions.¹⁵⁵ The dissent concluded that under the broad *Katzenbach* rationality standard of review, the continued preclearance regime should pass constitutional muster.¹⁵⁶

The majority's failure to take on the standard of review issue is more nefarious than simply ignoring the arguments of the dissent. Through the bootstrapping on the issue in the first footnote of *Shelby County*,¹⁵⁷ the majority could well write in future cases that it had established the *Boerne* standard as applying to review of all voting

¹⁵¹ *Shelby Cnty.*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting).

¹⁵² *Id.* (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006)).

¹⁵³ *Id.* at 2636–38.

¹⁵⁴ *Id.* at 2617 (majority opinion).

¹⁵⁵ In response the majority cited Judge Williams's D.C. Circuit dissent noting that disaggregating the Katz study's numbers showed that some covered jurisdictions fared better than some non-covered jurisdictions. *Id.* at 2622. The dissent replied that these differences might be a reason to reject the constitutionality of preclearance as applied to the better-performing covered jurisdictions, and to sever those jurisdictions leaving the rest of the preclearance provision standing. *Id.* at 2648 (Ginsburg, J., dissenting). For a brief methodological critique of the Katz study, see Adam B. Cox & Thomas J. Miles, *Documenting Discrimination?*, 108 COLUM. L. REV. SIDEBAR 31, 32 (2008), http://columbialawreview.org/wp-content/uploads/2008/06/31_CoxMiles.pdf.

¹⁵⁶ *Shelby Cnty.*, 133 S. Ct. at 2638–39 (Ginsburg, J., dissenting).

¹⁵⁷ *Id.* at 2622 n.1 (majority opinion) ("Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*, and accordingly *Northwest Austin* guides our review under both Amendments in this case." (citation omitted)).

laws Congress passes under its Fourteenth or Fifteenth Amendment enforcement powers.¹⁵⁸ *Boerne* itself never overruled *Katzenbach*—instead it endorsed it—yet *Shelby County* may be read as treating *Boerne* as having overruled *Katzenbach*'s rationality standard. Such disingenuousness would be no different than the disingenuousness the majority displayed in *Shelby County* when it repeatedly treated *NAMUDNO* as if it decided, rather than simply raised under the avoidance canon, constitutional questions with the preclearance regime. Future constitutional attacks on federal anti-discrimination voting laws such as Sections 2 and 203 of the VRA¹⁵⁹ will rely upon *Shelby County* and assert the cases require a tough standard of review. Opponents will argue in response that *Shelby County* avoided deciding the issue because the coverage formula would fail under either standard of review.

More time bombs lurk in *Shelby County* as well.¹⁶⁰ Most importantly, as Professor Sandy Levinson has noted, in discussing Congress's powers against the states under the Tenth Amendment, the *Shelby County* majority seems to have broadened the Tenth Amendment significantly.¹⁶¹ The majority writes: "Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not *specifically* granted to the Federal Government are reserved to the States or citizens."¹⁶² By adding the word "specifically," the majority seeks to limit congressional power toward those narrowly enumerated in the Constitution.

As Levinson notes, the Framers rejected limiting Congress's powers in the Tenth Amendment to those powers "expressly" granted to Congress, but Chief Justice Roberts appears to be trying to sneak the limiting standard back into the Constitution through an act of interpretation.¹⁶³ In any case, as both Levinson and the *Shelby*

¹⁵⁸ The dissent signals that such an interpretation is coming. *Id.* at 2649 (Ginsburg, J., dissenting) ("If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*'s limitation of the equal sovereignty doctrine to 'the admission of new States,' the suggestion is untenable. *Northwest Austin* cited *Katzenbach*'s holding in the course of declining to decide whether the VRA was constitutional or even what standard of review applied to the question. . . . In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited 'significance' of the equal sovereignty principle." (citations omitted)).

¹⁵⁹ See 42 U.S.C. §§ 1973, 1973b(f) (2006).

¹⁶⁰ On time bombs generally, see Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012) [hereinafter Hasen, *Anticipatory Overrulings*].

¹⁶¹ Sandy Levinson, *Tendentious, Mendacious or Audacious? John Roberts Rewrites the 10th Amendment*, BALKINIZATION (June 30, 2013, 3:19 PM), <http://balkin.blogspot.com/2013/06/tendentious-mendacious-or-audacious.html>.

¹⁶² *Shelby Cnty.*, 133 S. Ct. at 2623 (emphasis added).

¹⁶³ Levinson, *supra* note 161 ("One might offer three different descriptions of this sentence: a) merely tendentious; b) mendacious; or c) cleverly audacious, setting the basis for future

County dissenters argue, the Constitution does specifically grant Congress under its Fifteenth Amendment enforcement powers the power to pass legislation such as Section 5 of the VRA.¹⁶⁴

This point highlights the *Shelby County* majority's ahistoricism. Chief Justice Roberts excoriates the federal government for acting as though history ended in 1965.¹⁶⁵ Yet conspicuously absent from the majority opinion is any real appreciation of how the Civil War amendments, including the Fifteenth Amendment, changed the state-federal balance of power and the scope of the Tenth Amendment.¹⁶⁶ Congressional power should be at its highest when it comes to passing laws aimed at preventing race discrimination in voting, one of the key issues following the Civil War and the readmission of the former confederate states back into the Union.¹⁶⁷ Fairly understanding Congress's enforcement powers under the Fifteenth Amendment, and specifically its power to pass laws preventing racial discrimination in voting, requires a deep analysis of the Fifteenth Amendment's history, a discussion conspicuously absent from the majority's breezy historical discussion.

Instead of this crucial history, the Court places almost all of its doctrinal weight on the Tenth Amendment and the view that the Tenth Amendment protects not just state sovereignty—absent *specific* federal power otherwise recognized in the Constitution—but also a principle of “*equal* sovereignty,” requiring Congress to treat all states the same absent some compelling reason.¹⁶⁸ Even putting aside the dissent's examples of other congressional legislation in which states are *not* treated the same,¹⁶⁹ the argument simply highlights the ahistoricism of the *Shelby County* majority. Not only does the Court fail to point to anything in the history of the Tenth Amendment which requires that all states be treated equally, the Civil War amendments belay a history requirement of equal treatment—former slave and confederate states needed to do much more to assure equality on the basis of race in voting than the other states.¹⁷⁰

citations of the form ‘as we recognized in *Shelby County*, only powers ‘specifically granted to the Federal Government’ are legitimate and all others are reserved to the states.’ As a long-time law professor, I can only say that if a student, asked to complete a short-answer question on ‘what does the 10th Amendment say,’ wrote what Roberts did, I would be disinclined to award it a very good grade.”).

¹⁶⁴ *Shelby Cnty.*, 133 S. Ct. at 2636–37 (Ginsburg, J., dissenting). See generally Levinson, *supra* note 161.

¹⁶⁵ *Shelby Cnty.*, 133 S. Ct. at 2727–29 (majority opinion).

¹⁶⁶ See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 84–93 (rev. ed. 2009).

¹⁶⁷ Cf. *Shelby Cnty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting). See generally KEYSSAR, *supra* note 166.

¹⁶⁸ *Shelby Cnty.*, 133 S. Ct. at 2622–24 (majority opinion).

¹⁶⁹ *Id.* at 2649 (Ginsburg, J., dissenting).

¹⁷⁰ See generally Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175 (2013), <http://yalelawjournal.org/2013/06/08/fishkin.html>.

In short, as conservative legal scholar—and former Tenth Circuit judge—Michael McConnell remarked following issuance of the *Shelby County* opinion, the equal sovereignty principle enunciated by the *Shelby County* majority is “made up.”¹⁷¹ “There’s no requirement in the Constitution to treat all states the same. . . . It might be an attractive principle, but it doesn’t seem to be in the Constitution.”¹⁷² Further, even granted the ability of the Court to “make up” a new standard, doing so is unjustified in the case of Congress’s power to prevent race discrimination in voting granted by the Civil Rights amendments, which grew out of the end of a war in which some states, but not all states, systematically violated the rights of some of its citizens.

It is the majority fixation on the new principle of “equal sovereignty,” as well as the unfair treatment of *NAMUDNO* as binding precedent, which leads the conservative Justices to justify ignoring the record.¹⁷³ To the *Shelby County* majority, it is not enough if there are problems with race discrimination in voting in the covered jurisdictions; it must be shown that conditions are worse in the covered jurisdictions than in the uncovered jurisdictions.

But the majority goes even further than requiring that there be real differences in levels of race discrimination in voting between covered and uncovered jurisdictions¹⁷⁴—differences which the dissent says are demonstrated by the Katz study.¹⁷⁵ Congress must designate the covered jurisdictions using a current formula pegged to “current conditions,”¹⁷⁶ regardless of whether the covered jurisdictions present a greater Fifteenth Amendment danger of race discrimination in voting.¹⁷⁷ As the majority wrote: “[W]e are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.”¹⁷⁸ Thus the *formula itself* takes on constitutional significance for reasons the majority does not articulate. Under this reasoning, Congress could not even pass a congruent and proportional preclearance provision accurately targeting those areas in which race discrimination is a problem unless Congress also could demonstrate it did so with the “right” formula.¹⁷⁹

¹⁷¹ Nina Totenberg, *Whose Term Was It? A Look Back at the Supreme Court*, NPR (July 5, 2013, 3:35 AM), <http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court> (quoting Michael McConnell).

¹⁷² *Id.*

¹⁷³ *Shelby Cnty.*, 133 S. Ct. at 2618, 2621–24.

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* at 2642–43 (Ginsburg, J., dissenting).

¹⁷⁶ *Id.* at 2631 (majority opinion).

¹⁷⁷ *Id.* at 2629.

¹⁷⁸ *Id. But see id.* at 2644 (Ginsburg, J., dissenting) (“The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead it relies on increases in voter registration and turnout as if that were the whole story.”).

¹⁷⁹ *See id.* at 2647–48 n.9 (arguing that the majority’s focus on the formula “misses the reality that Congress decided to subject Alabama to preclearance based on evidence of continuing constitutional violations in that State”).

The majority's fixation on the formula is best understood through its response to the dissent's argument that Shelby County should not be able to complain about the coverage formula because regardless of whether the coverage formula properly covers other places, it should cover Shelby County and Alabama, with their recent history of race discrimination in voting.¹⁸⁰ To the majority, Shelby County is like a driver pulled over because he is a "redhead" who is then ticketed for failing to have a license.¹⁸¹

The redhead analogy fails. Pulling over a driver because he is a redhead is completely arbitrary. The dissent responds briefly that Shelby County is "no redhead,"¹⁸² but the point deserves elaboration. Imagine that people who have been arrested for drunk driving have to put a special sticker on their car. Police then pull over people with the stickers more frequently than cars without the stickers to make sure former drunk drivers are obeying the law. Surely it is not random to apply greater driving scrutiny to those with DUIs on their record than to others, even if those DUI convictions are old. Similarly, it is not random to apply greater scrutiny in voting to those jurisdictions with a history of discrimination than others. It is in this sense that Shelby County is "no redhead."¹⁸³

Shelby County was a recidivist, but the Court majority treated it as though its recent history was irrelevant because its recent history was not captured by Congress's coverage formula.¹⁸⁴ Rather than reject Shelby County's facial challenge or use a severability analysis to separate out unconstitutional applications of preclearance as counseled by judicial minimalism and urged by the dissent,¹⁸⁵ the Court issued a broad decision applying to all covered jurisdictions, whether they had a clean recent history or not.¹⁸⁶

In the end, the majority fell back on the idea that Section 5's deterrence argument goes too far because there would be no way to ever end Section 5 liability upon proof that it is no longer necessary.¹⁸⁷ The Chief Justice made the point colorfully in the *NAMUDNO* oral argument, talking about an "elephant whistle" which keeps away the elephants: one sees no elephants but there is therefore no way to know if the elephant whistle works or there are simply no elephants.¹⁸⁸ As the Chief Justice wrote in *Shelby County*, "[u]nder this theory . . . § 5 would be effectively

¹⁸⁰ *Id.* at 2629–30 (majority opinion).

¹⁸¹ *Id.*

¹⁸² *Id.* at 2647 n.8 (Ginsburg, J., dissenting) (internal quotation marks omitted).

¹⁸³ *See id.*

¹⁸⁴ *Id.* at 2629–30 (majority opinion).

¹⁸⁵ *Id.* at 2648 (Ginsburg, J., dissenting).

¹⁸⁶ *See id.* at 2631 (majority opinion).

¹⁸⁷ *Id.* at 2626–27.

¹⁸⁸ Transcript of Oral Argument at 28, *NAMUDNO*, 129 S. Ct. 2509 (2006) (No. 08-322) ("CHIEF JUSTICE ROBERTS: Well, that's like the old—you know, it's the elephant whistle. You know, I have this whistle to keep away the elephants. You know, well, that's silly. Well, there are no elephants, so it must work. I mean, if you have 99.98 percent of these being pre-cleared, why isn't that reaching far too broadly.").

immune from scrutiny; no matter how ‘clean’ the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.”¹⁸⁹

This deterrence argument ignores the role of bailout in limiting the constitutional burden of preclearance. Covered jurisdictions with “clean” records are entitled to be removed from preclearance,¹⁹⁰ and thanks to the Court’s tortured interpretation of bailout in *NAMUDNO*, many more political subdivisions were entitled to apply for bailout from preclearance after 2009. As the dissent observed, “[n]early 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective.”¹⁹¹ Had the VRA not been overturned, over time, as more jurisdictions bailed out, preclearance would become focused on those jurisdictions with a current record of problems. Bailout, in short, responds to “current conditions.”¹⁹²

Had the majority been willing to defer to congressional judgment, it almost certainly would have upheld the continued preclearance regime. Yet the Court was dismissive of Congress and the legislative record. How ironic that just a day after the Court issued *Shelby County*, four of the Justices in the *Shelby County* majority dissented in *United States v. Windsor*,¹⁹³ decrying the Court’s failure to defer to Congress’s judgment about the need for the Defense of Marriage Act.¹⁹⁴ As Justice Scalia wrote (for himself, the Chief Justice and Justice Thomas):

The majority concludes that the only motive for [the Defense of Marriage Act] was the “bare . . . desire to harm a politically unpopular group.” . . . Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court’s scorn . . .), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute.¹⁹⁵

¹⁸⁹ *Shelby Cnty.*, 133 S. Ct. at 2627.

¹⁹⁰ *See id.* at 2620 (describing factors that contribute to having a clean record).

¹⁹¹ *Id.* at 2644 (Ginsburg, J., dissenting).

¹⁹² The court uses the phrase “current conditions” often throughout the majority opinion. *See, e.g., id.* at 2627, 2629, 2631 (majority opinion); *see also supra* note 176 and accompanying text.

¹⁹³ 133 S. Ct. 2675 (2013).

¹⁹⁴ *See id.* at 2696 (Roberts, C.J., dissenting); *id.* at 2698–99 (Scalia, J., dissenting); *id.* at 2719–20 (Alito, J., dissenting).

¹⁹⁵ *Id.* at 2707 (Scalia, J., dissenting) (citations omitted); *see also id.* at 2696 (Roberts, C.J., dissenting) (“At least without some more convincing evidence that the Act’s principal

To be sure, Congress could have chosen more pinpointed ways to relieve covered jurisdictions with improved voting records from the preclearance burden. During the 2006 reauthorization debates in Congress, I proposed that the bill be amended to include a “pro-active” bailout provision, which would have required the DOJ to examine the records of all covered jurisdictions and move to bail out those jurisdictions with clean records.¹⁹⁶ A conservative Republican member of the House and opponent of Section 5, Lynn Westmoreland, offered my proposed amendment,¹⁹⁷ but it went down to resounding defeat as leadership fought all substantive amendments.¹⁹⁸ In a story ably told by Nate Persily and Rick Pildes, Congress lacked the political will to change the coverage formula or otherwise tinker with the Act, and reauthorization passed on lopsided vote without substantive amendment.¹⁹⁹

During the 2006 renewal, few Republicans and no mainstream national Republican leaders were willing to vote against preclearance.²⁰⁰ Since the 2006 authorization, however, mainstream Republicans from covered jurisdictions began publicly voicing their opposition to the preclearance regime, especially with Democrats now heading a DOJ in charge of preclearance.²⁰¹ Fear that attacking preclearance could be seen as racist gave way to attacks on the DOJ’s preclearance as run by out-of-control Obama Democrats.²⁰² Rick Perry, Governor of Texas,²⁰³ argued against preclearance

purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.”); *id.* at 2719 (Alito, J., dissenting) (“Accordingly, both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage.”).

¹⁹⁶ Hasen, *Pass the VRA Bailout Amendment*, *supra* note 48.

¹⁹⁷ *Id.*; Lynn Westmoreland, *Fixing the Voting Rights Act*, WASH. POST, June 28, 2009, at A15.

¹⁹⁸ Rick Hasen, *Could Congress Moot NAMUDNO by Passing the Proactive Bailout Amendment Now?*, ELECTION L. BLOG (Apr. 30, 2009, 2:45 PM), <http://electionlawblog.org/archives/013542.html> [hereinafter Hasen, *Could Congress Moot*].

¹⁹⁹ See generally Persily, *supra* note 44; Pildes, *supra* note 49.

²⁰⁰ See Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 238 (2012) [hereinafter Hasen, *End of the Dialogue?*] (noting the Act was renewed with a vote of ninety-eight-to-zero in the Senate and arguing that the VRA may have been filibustered if it were to be renewed today).

²⁰¹ See Josh Gerstein, *Voting Rights Act Under Seige*, POLITICO (Feb. 19, 2012, 7:06 AM), <http://www.politico.com/news/stories/0212/73058.html>; Richard Hasen, *Online VRA Symposium: The Voting Rights Act, Congressional Silence, and the Political Polarization*, SCOTUSBLOG (Sept. 10, 2012, 11:45 AM), <http://www.scotusblog.com/2012/09/online-vra-symposium-the-voting-rights-act-congressional-silence-and-the-political-polarization/> [hereinafter Hasen, *Online VRA Symposium*].

²⁰² See Gerstein, *supra* note 201; Hasen, *Online VRA Symposium*, *supra* note 201; see also Hasen, *End of the Dialogue?*, *supra* note 200, at 238 & n.115.

²⁰³ See Rick Perry, OFF. OF GOVERNOR, <http://governor.state.tx.us> (last visited Mar. 2, 2014); see also Hasen, *End of the Dialogue?*, *supra* note 200, at 238 & n.115.

at a Republican presidential debate in 2012 using a military metaphor quite ironic for the governor of a former confederate state:

I'm saying that the state of Texas is under assault by the federal government. I'm saying also that South Carolina is at war with this federal government and with this administration. When you look at what this Justice Department has done, not only have they taken them to task on voter i.d.²⁰⁴

The *Shelby County* majority surely knows of this sea change in Republican leaders' attitudes about the VRA. It also knows of Congress's increased political polarization, polarization which has made it exceedingly difficult for Congress to override Supreme Court statutory decisions, especially on a bipartisan basis.²⁰⁵ Thus, when the *Shelby County* majority wrote that it was "only" overturning the coverage formula and not Section 5 preclearance itself,²⁰⁶ the majority knew full well it was effectively overturning Section 5 because there will not be the political will to come up with a new coverage formula.

Further, the *Shelby County* majority's "current conditions" and "equal sovereignty" standards²⁰⁷ appeared to preclude the possibility that Congress could ever come up with a coverage formula which could satisfy the majority. It fell to Justice Thomas, who joined in the majority opinion and wrote separately to argue that preclearance is unconstitutional as well, to demonstrate the logical end of the majority's decision: "While the Court claims to 'issue no holding on § 5 itself,' . . . its own opinion compellingly demonstrates that Congress has failed to justify 'current burdens' with a record demonstrating 'current needs.' . . . By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision."²⁰⁸ The statement echoes Justice Scalia's comment in an earlier campaign finance case, against a concurring opinion by the Chief Justice, who at that time was unwilling to overrule precedent allowing a ban on campaign spending from corporate treasuries: "This faux judicial restraint is judicial obfuscation."²⁰⁹ Just a few years later, in *Citizens United v. Federal Election Commission*,²¹⁰ the Chief Justice reached the

²⁰⁴ Rick Hasen, *A Sea Change in Republican Presidential Attitudes on the Voting Rights Act*, ELECTION L. BLOG (Jan. 16, 2012, 8:22 PM), <http://electionlawblog.org/?p=28047> [hereinafter Hasen, *A Sea Change*] (internal quotation marks omitted).

²⁰⁵ See Hasen, *End of the Dialogue?*, *supra* note 200, at 209–10, 226–28, 234; Adam Liptak, *In Congress's Paralysis, A Mightier Supreme Court*, N.Y. TIMES, Aug. 21, 2012, at A10.

²⁰⁶ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

²⁰⁷ *Id.* at 2621–24, 2629, 2631.

²⁰⁸ *Id.* at 2632 (Thomas, J., concurring) (citations omitted).

²⁰⁹ *FEC v. Wis. Right to Life*, 551 U.S. 449, 498–99 n.7 (2007) (Scalia, J., concurring).

²¹⁰ 130 S. Ct. 876 (2010). As one commentator observed:

Justice Scalia is an outlier on the current court. He is a man in a hurry who would rather score points than make plans. In 2007, for instance,

“inevitable” conclusion²¹¹ of his reasoning, voting to allow unlimited corporate spending in elections.²¹²

How in the world under an “equal sovereignty” principle²¹³ will Congress ever come up with a constitutional standard singling out some jurisdictions for special scrutiny? Once again, the brief majority opinion offers no answers.

III. THE *SHELBY COUNTY* DISSENTERS’ MINIMIZED HISTORY OF THE 2006 RENEWAL

The dissent has the stronger argument regarding the appropriate standard for reviewing federal voting legislation that Congress passes using its Fifteenth Amendment enforcement powers. It makes the case that, under the *Katzenbach* rationality standard,²¹⁴ there was ample evidence under which Congress rationally could have concluded that racial discrimination in voting remains a problem in covered jurisdictions and that bailout stood as a useful tool to winnow down the requirement to those jurisdictions still in need of preclearance because of more recent problems with racial discrimination in voting.²¹⁵

Yet there is something unsettling about the dissent and its recounting of the 2006 congressional reauthorization. The dissent tells a happy story from 2006 and presents the image of a bipartisan, united Congress, confident in the preclearance provision and unaware of the potential constitutional peril of reenacting the preclearance provision without reworking the coverage formula, easing bailout, lowering the number of years for renewal, or otherwise taking steps to take into account the

when Chief Justice Roberts took a calculated step toward limiting campaign finance regulation, Justice Scalia accused him in a concurrence of effectively overruling a major precedent “without saying so.” “This faux judicial restraint is judicial obfuscation,” Justice Scalia said. Three years later, building on the 2007 decision, the court issued its decision in *Citizens United*, allowing unlimited corporate spending in elections. The chief justice had moved slower than Justice Scalia had wanted, but he got there.

Adam Liptak, *Steady Move to the Right: Roberts Pulls Supreme Court Along to Right Step by Step*, N.Y. TIMES, June 28, 2013, at A1.

²¹¹ *Citizens United*, 130 S. Ct. at 891 (“The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.”).

²¹² *Id.* at 898–99 (rejecting limits on corporate political expenditures).

²¹³ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2618 (2013).

²¹⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (allowing “any rational means” to prohibit voter discrimination).

²¹⁵ See *Shelby Cnty.*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting).

difficult constitutional questions posed by preclearance.²¹⁶ In the most disingenuous statement in the dissent, Justice Ginsburg writes that “Congress could hardly have foreseen that the VRA’s limited geographic reach would render the Act constitutionally suspect.”²¹⁷ In support of this statement, Justice Ginsburg cited to Persily’s masterful article on the 2006 renewal,²¹⁸ which noted that VRA reauthorization supporters focused their attention on showing why “covered jurisdictions should remain covered, rather than” why covered jurisdictions were more deserving of coverage than non-covered jurisdictions.²¹⁹

“[C]ould hardly have foreseen”²²⁰ the constitutional problem with the coverage formula? There was no need for foreseeability. A number of law professors and political scientists testified before the Senate Judiciary Committee on these very problems.²²¹ Indeed, the *NAMUDNO* opinion that Justice Ginsburg signed even referenced Professor Pildes’s testimony on the coverage formula problem and includes a relevant quote from the Persily article:

Congress heard warnings from supporters of extending § 5 that the evidence in the record did not address “systematic differences between the covered and the non-covered areas of the United States[,] . . . and, in fact, the evidence that is in the record suggests that there is more similarity than difference.” The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess. 10 (2006) (statement of Richard H. Pildes); see also Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 208 (2007) (“The most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would . . . disrupt settled expectations”).²²²

²¹⁶ See *supra* notes 17–18 and accompanying text.

²¹⁷ *Shelby Cnty.*, 133 S. Ct. at 2649.

²¹⁸ See *id.*; Persily, *supra* note 44.

²¹⁹ See Persily, *supra* note 44, at 195.

²²⁰ *Shelby Cnty.*, 133 S. Ct. at 2649.

²²¹ See generally *The Continuing Need for Section 5 Preclearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10–12 (2006) [hereinafter *The Continuing Need for Section 5 Preclearance*] (quoting statement of Richard H. Pildes, NYU); *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization*].

²²² *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009).

Pildes's testimony to the Senate Judiciary Committee in 2006 clearly flagged the constitutional danger,²²³ as did I.²²⁴

²²³ From the introduction:

First, I am concerned that the evidence in the record does not address an essential issue to the constitutionality of the proposed bill, and I am not aware that this concern, though I think it may be essential, has been addressed in the House hearings or in the previous hearings before this Committee. The assumption so far of all of the evidence I have seen, or most of the evidence at least, is that it is sufficient to document continuing instances of problems in the area of race and voting rights in the covered jurisdictions. But I am very concerned that under the congruence and proportionality test that the Court now applies in this area, the Court is going to insist that there be some account of systematic differences between the covered and non-covered areas of the United States. There is very little evidence in the record on this, and, in fact, the evidence that is in the record suggests that there is more similarity than difference Now, I want to be clear about why I raise this point. It is not to assert that the bill as proposed is unconstitutional. But I look at this record as a lawyer concerned about how the courts will respond to it, trying to determine how best to ensure the constitutionality of a renewed Section 5, and I think this is an essential issue that has been neglected until now.

The Continuing Need for Section 5 Pre-Clearance, *supra* note 221.

²²⁴ From the introduction:

I come before you as a strong supporter of the Act, who believes the expiring provisions should be renewed in some form, but also as someone, who after studying this issue for a number of years, has deep concerns about the constitutionality of the proposed amendments. I believe the Act has been an unqualified success in a remarkably increasing minority voter registration and turnout, increasing the number of African-American and Latino elected officials, and the ability of minority voters to effectively exercise their right to elect representatives of their choice.

But I urge the Committee to spend the time to craft a bill that will both pass constitutional muster in the Supreme Court and do the important work of continuing to protect minority voting rights in this country.

The constitutional issue, which I have explored in a Law Review article and have submitted to the Committee, is this: in recent years the Supreme Court has held that Congress has limited power to enact civil rights laws regulating the States. Beginning with the 1997 case, *City of Boerne v. Flores*, the Court has held that Congress must produce a strong evidentiary record of intentional State discrimination to justify laws that burden the States. In addition, whatever burden is placed on the States must be congruent and proportional to the extent of the violations.

Beginning in 1965, Congress imposed the strong preclearance remedy on those jurisdictions with what the Supreme Court called a pervasive, flagrant and unremitting history of discrimination on the basis

Persily's article makes crystal clear the dispute on the Senate Judiciary Committee and deep Republican concerns over constitutionality.²²⁵ He additionally points out:

The evolution of the Senate Judiciary Committee Report offers the best window into the fragility of the political compromise that undergirds the new VRA and the basic disagreement that exists concerning its key provision. It also provides a unique case study in the self-conscious manipulation of legislative history for partisan ends and the shadow cast on the legislative bargaining process by the Supreme Court's recent federalism precedents.²²⁶

It is not only the Persily article, cited by the dissent, which tells this story and was available to the *Shelby County* dissenters. The Senate report too, which Persily describes²²⁷ and which Justice Ginsburg cites for other purposes in the dissent,²²⁸ was a strongly political document drafted by Republican party staffers and casted serious doubts about the continued constitutionality of the preclearance regime.²²⁹ The 2006 legislative history demonstrates that the lopsided vote in favor of the bill masked serious opposition to preclearance by at least some Senate Republicans.²³⁰ After the Court issued *Shelby County*, former George W. Bush advisor Karl Rove revealed that President Bush too harbored doubts about the provision's constitutionality,²³¹

of race. In fact, in [*South*] *Carolina v. Katzenbach*, the Court upheld Section 5 of the Act as a permissible exercise of Congressional power.

What has changed since 1965? Both the law and the facts. On the law, the Court, in my view, wrongly, has placed a higher burden on Congress to justify laws aimed at protecting civil rights. On the facts we have an evidentiary problem. Because the Act has been so effective, it will be hard to produce enough evidence of intentional discrimination by the States so as to justify the extraordinary preclearance remedy for another 25 years.

An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, *supra* note 221 (quoting statement of Richard H. Pildes, NYU).

²²⁵ Persily, *supra* note 44, at 189.

²²⁶ *Id.* at 187.

²²⁷ *Id.* at 186–87.

²²⁸ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2635 (2013).

²²⁹ S. REP. NO. 109-295, at 16 (2006).

²³⁰ *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization*, *supra* note 221 (statement of Senator Arlen Specter, Chairman of the Committee) (discussing the constitutional challenges posed by reauthorization).

²³¹ Keli Goff, *Rove: Bush Was Skeptical of Voting Rights Act*, ROOT (June 27, 2013, 3:02 PM), <http://www.theroot.com/blogs/bloggng-beltway/rove-bush-was-skeptical-voting-rights-act> (“Bush did sign the renewal of this specific provision because Congress passed it . . . but we were dubious about it.” (quoting Rove) (internal quotation marks omitted)).

although not a word of such doubt appeared in a presidential signing statement or in his remarks upon signing the Act.²³²

Why did the dissenters see the need to sanitize and minimize this modern history? Perhaps it is just self-denial. Although there is no way to be sure, it is plausible the dissenters did not want to lend credence to the *Shelby County* majority's suggestion that Congress was insufficiently sensitive to the constitutional issues.²³³ The problem, as both Persily and Pildes so well demonstrated,²³⁴ was one of political avoidance. The civil rights community and Republican House Judiciary Committee then-Chair James Sensenbrenner²³⁵ made a calculation that the only way to get the preclearance provision reenacted in 2006 was to leave the coverage formula and the basic structure of preclearance untouched.²³⁶ Without political pressure from the civil rights community, which decided to roll the dice, Congress was not going to act.

If the political avoidance reading of the 2006 renewal is correct, then it is less likely that Congress was satisfied that the coverage formula remained a rational way to separate those jurisdictions which needed extra federal oversight in their elections and more likely that Congress accepted the coverage formula because politically its only choice was the old coverage formula or nothing. One could argue that a Congress making such a choice out of political avoidance was not even acting rationally, but in a cowardly way.

In the end, the dissenters likely could have written an opinion acknowledging Congress's political avoidance yet still sustaining the VRA's constitutionality. Under typical rational basis review, Congress's actual motives are less important than the plausibility of after-the-fact justifications for Congressional action. There were plenty of rational justifications to keep the preclearance provision and the old coverage formula in place, especially with bailout as a winnowing mechanism.²³⁷ Especially without acceptance of the equal sovereignty principle, the dissenters did not need to demonstrate that the problem in covered jurisdictions is materially different from

²³² President Bush apparently did not issue a signing statement in connection with the VRA renewal. His statement on the signing of the 2006 renewal makes no mention of constitutional problems and only celebrates the Act's renewal. See Presidential Statement on Signing the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1391 (July 27, 2006). In contrast, he issued a signing statement raising constitutional concerns about the Bipartisan Campaign Reform Act of 2002, which he signed. Presidential Statement on Signing the Bipartisan Campaign Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 517 (Mar. 27, 2002).

²³³ See, e.g., *Shelby Cnty.*, 133 S. Ct. at 2618 (noting the VRA's tenuous constitutional footing).

²³⁴ See *supra* notes 217–25 and accompanying text.

²³⁵ See Corey Dade, *Is the Voting Rights Act Outdated?*, NPR (Dec. 1, 2012, 10:19 PM), <http://www.npr.org/2012/12/01/166226641/is-the-voting-rights-act-outdated> (interviewing both James Sensenbrenner and Richard Hasen).

²³⁶ See *id.*

²³⁷ See *Shelby Cnty.*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting).

that in non-covered jurisdictions.²³⁸ But a dissenting opinion written along such lines would lose much of its moral force and the outrage the dissenters wished to express against the majority opinion. How much better to paint the majority as going against the will of a unified and bipartisan Congress.²³⁹

CONCLUSION

In my 2005 article, one of the first written on Congress's questionable constitutional power to continue to require the preclearance regime, I posed the "Bull Connor is Dead" problem²⁴⁰: in an era in which the most blatantly racist officials in the South and elsewhere have died or left office, and where covered jurisdictions had modified their behavior in light of Section 5 requirements so that the number of DOJ objections was asymptotically approaching zero, what kind of evidence would it take to convince a conservative Supreme Court extremely protective of states' rights and skeptical of race-based solutions to anything that Congress remained justified in requiring preclearance based on a formula using old data?

Congressional leaders who were shepherding the 2006 VRA reauthorization through Congress were well aware of the constitutional pitfalls when reenacting the law for another twenty-five years without changing the coverage formula.²⁴¹ Things unquestionably have changed for the better in the South, but the question is whether they changed enough.²⁴² Evidence showed improvements in covered jurisdictions,

²³⁸ *Id.* at 2635–36, 2649–50.

²³⁹ The dissenting opinion also contains a major irony. Justice Ginsburg explains that with "first generation barriers" to the right to vote (such as literacy tests) eliminated, Section 5 now protects against "second generation barriers," such as the use of at-large elections rather than legislative districts to dilute minority voting strengths. *Id.* at 2634–35. Yet the first of these second-generation barriers Justice Ginsburg lists is "racial gerrymandering." *Id.* ("Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an 'effort to segregate the races for purposes of voting.'"). *Shaw v. Reno* first recognized the racial gerrymander cause of action as an equal protection claim distinct from a vote dilution claim. 509 U.S. 630, 657 (1993). The liberal Justices dissented in *Shaw*, and they and Justice Ginsburg have continued to dissent from this line of cases. *Id.* at 658 (White, J., dissenting); *id.* at 676 (Blackmun, J., dissenting); *id.* (Stevens, J., dissenting); see also, e.g., *Abrams v. Johnson*, 521 U.S. 74, 103 (1997) (Breyer, J., dissenting); *Miller v. Johnson*, 515 U.S. 900, 934 (1995) (Ginsburg, J., dissenting). Adding to the irony, in these cases it appears that covered jurisdictions drew lines which constituted "racial gerrymanders" precisely to *comply* with the DOJ's objections under a strong reading of Section 5 of the VRA. See generally Daniel Hays Lowenstein, *You Don't Have to Be a Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998). Whatever one can say of the merits of Section 5, it is hard to believe that its continuation would minimize the number of successful racial gerrymandering claims.

²⁴⁰ Hasen, *Congressional Power*, *supra* note 42, at 188–96.

²⁴¹ See *supra* notes 235–36 and accompanying text.

²⁴² Cf. Richard Epstein, *The Cynicism of the Voting Rights Act's Defenders*, RICOCHET (June 26, 2013, 9:55 AM), <http://ricochet.com/main-feed/The-Cynicism-of-the-Voting-Rights>

but that race discrimination in voting remained a real problem, at least in some of the jurisdictions.²⁴³ Academics presented Congress with legislative options to increase the chances of the law's constitutionality before a conservative Supreme Court by narrowing or updating the Act,²⁴⁴ but congressional leaders and the civil rights community decided to gamble.²⁴⁵ Even after the strong warning in *NAMUDNO* of a looming reversal of preclearance, Congress did nothing. Voting rights supporters should direct some of their ire at Congress and not just at the Supreme Court.

The fact that this conservative Supreme Court on a five-to-four vote has eliminated the preclearance regime is unsurprising. But the *Shelby County* opinion reaching that result, with its false humility and its failure to seriously engage a record which demonstrates continued racial discrimination in voting in covered jurisdictions, is indefensible. The jurisprudential time bombs contained in the opinion are worse than the false humility, faux adherence to binding precedent, and feigned expectation that Congress will respond with a new coverage formula as the next step of the dialogue. From its expansion of the Tenth Amendment to its severe contraction of the Fifteenth Amendment, the opinion threatens to pull down a host of other voting laws, including key parts of the VRA in future years.²⁴⁶ None of these features were necessary even in a Court opinion striking the preclearance provision.

In *Citizens United v. Federal Election Commission*, the Court tried to create an illusion it was bringing coherence to campaign finance law by eliminating disparities in treatments of spending limits between domestic corporations and individuals.²⁴⁷ Yet the opinion simply created new disparities, such as between corporations and individuals on the one hand, who may spend unlimited sums supporting or opposing candidates for office, and foreign corporations and individuals, who may not.²⁴⁸ In *Shelby County*, the same five Justices tried to create a different illusion, that of the reluctant Court forced by Congress to act and acting in as narrow a way possible. Both cases are part of Chief Justice Roberts's longer-term project to bring constitutional

-Act-s-Defenders ("Hasen argues that the Court 'fantasizes that voting discrimination in the South is a thing of the past.' I am old enough to remember the state of race relations in the United States in 1965. The transformation in race relations since that time is palpable and it has been decisively and unquestionably for the better. It is irresponsible to suggest that nothing much has changed in the South on this issue. Hasen's off-handed slap trivializes the enormity of Jim Crow by suggesting any resemblance whatsoever between the situation then and the situation now.").

²⁴³ See *Shelby Cnty.*, 133 S. Ct. at 2626 ("Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.").

²⁴⁴ See *supra* notes 221–29 and accompanying text.

²⁴⁵ See *supra* notes 235–36, 241 and accompanying text.

²⁴⁶ See *supra* notes 158–61.

²⁴⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 898–99 (2010).

²⁴⁸ See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585 (2011).

jurisprudence in line with his conservative political vision while seeking to project the aura of modest technocratic justices simply doing their jobs.²⁴⁹

In the meantime, real politics marches on. Outside spending on elections is skyrocketing in the wake of *Citizens United*,²⁵⁰ and previously covered jurisdictions already are moving to impose new barriers on voting.²⁵¹ Texas has implemented its voter identification law,²⁵² one of the toughest in the nation, which accepts a concealed weapons permit, but not a student identification, for voting,²⁵³ and which may require individuals to travel up to 250 miles at their own expense to get a state issued voter identification card.²⁵⁴ North Carolina, partially covered by Section 5 of the VRA,²⁵⁵ posted the toughest set of voting rules since the 1965 passage of the VRA.²⁵⁶ These instances alone show the continued deterrent value of Section 5 at the time the Court killed it.

These changes in politics wrought by the Roberts Court's jurisprudence are no coincidence. As the Court applies more free market and color-blind principles to the political process, from campaign finance to voting rights, expect more of the same. Sometimes a Court that decides less decides much more.

²⁴⁹ See Ward & Pickerill, *supra* note 136; see also Hasen, *The Chief Justice's Long Game*, *supra* note 84 (speaking on the Chief Justice's "long game").

²⁵⁰ See DANIEL H. LOWENSTEIN ET AL., ELECTION LAW—CASES AND MATERIALS 48 (5th ed. Supp. 2013).

²⁵¹ See Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. 58 (2014) [hereinafter Hasen, *Race or Party?*]; Rick Lyman, *Texas' Stringent Voter ID Law Makes a Dent at Polls*, N.Y. TIMES, Nov. 6, 2013, at A20.

²⁵² See Lyman, *supra* note 251.

²⁵³ *Id.*

²⁵⁴ See Hasen, *The Chief Justice's Long Game*, *supra* note 84.

²⁵⁵ See Hasen, *Race or Party?*, *supra* note 251.

²⁵⁶ *Id.* In response, the U.S. DOJ has sued Texas and North Carolina. The Department contends that the new voting laws violate Section 2 of the VRA and the states should be bailed back into coverage under Section 3 of the Act. See *id.*