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THE SUPREME COURT RIGHTLY DECIDED THAT SECTION 4 OF THE VOTING RIGHTS ACT VIOLATED THE CONSTITUTION.

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The last several years have been very eventful for the Supreme Court of the United States (SCOTUS), with the Court handing down decisions on a number of highly contentious issues, earning the praise and ire of court watchers, political leaders, and public interest groups alike. Perhaps the most widely covered case concerned the constitutionality of the Affordable Care Act (or Obamacare), where a narrow 5 to 4 majority controversially found in June 2012 that the enforcement mechanism of that Act's individual mandate was a constitutionally-permissible tax, dashing the hopes of conservative politicians and activists that the Court would hamstring the landmark legislative achievement of President Obama's first term. This past summer saw the Court issue a decision in another highly visible case, Shelby County v. Holder, where another 5 to 4 split found the Court ruling that Section 4 of the Voting Rights Act (VRA), first enacted by Congress in 1965 and most recently renewed by significant majorities in both the House and Senate in 2006, was unconstitutional. Specifically, the court found that the formula used to determine which jurisdictions should be subjected to so-called "pre-clearance requirements" was too outdated. In ruling the current formulation of Section 4 unconstitutional, the Court effectively rendered Section 5, which mandates the pre-clearance requirements, unenforceable until (and unless) Congress passes legislation including a coverage formula that meets constitutional muster. The decision was hailed as a victory by conservative groups, who argued that the pre-clearance requirements imposed an unfair burden on areas that had progressed beyond the evils of the Jim Crow era, and was derided by liberal groups and civil rights activists, who claimed that the ruling had "stuck a dagger in the heart" of the Voting Rights Act and threatened to compromise meaningful ballot access for potentially tens of millions of people. This essay will discuss the major features of the case, address some of the critical issues surrounding voter discrimination and the Voting Rights Act, and, touch upon some of the strongest arguments on both sides of the resolution.

The fundamental issue raised in Shelby v. Holder concerns the extent of Congress's constitutional authority to prevent voter discrimination in light of the states' power to administer their own elections. Legal scholar Ilya Shapiro of the Cato Institute outlines the stakes in a recent article:

> This term the Supreme Court has a chance to do that in a case examining the continuing constitutionality of an important but now outmoded part of the Voting Rights Act of 1965. Shelby County, Alabama is challenging Section 5 of the VRA, which requires that certain states and counties – as determined by a decades-old formula – receive approval ("preclearance") from the Department of Justice or a federal district court in Washington before implementing any change to their election regulations, no matter how modest. The county sued to resolve the "serious constitutional questions" noted by the Supreme Court in the last significant VRA challenge in 2009 – a case infelicitously named Northwest Austin Municipal Utility District v. Holder, or "NAMUDNO" – but the U.S. Court of Appeals for the D.C. Circuit ruled against it, over a heated dissent by Judge Stephen Williams. This lawsuit hinges on the validity of extraordinary federal power in a nation where massive racial disenfranchisement is, thankfully, consigned to history books. Here's the background: The Fifteenth Amendment grants Congress the power to craft "appropriate" enforcement legislation to secure the rights of all citizens to vote, regardless of race. Congress's initial attempts to enforce those rights, however, were frustrated by tactics designed to avoid complying with a colorblind voting mandate. Congress thus enacted Section 5, meant to apply to jurisdictions with a history of disenfranchising racial (and later linguistic) minority voters. The Supreme Court upheld the measure against constitutional challenge in the 1960s but noted that its perverse and substantial costs to federalism and equal protection were justified only because of the "exceptional conditions" on the ground. [Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "America Has Changed, So Voting Rights Act Section 5 Is No Longer Constitutional," CATO AT LIBERTY, 1—2—13, http://www.cato.org/blog/america-has-changed-so-voting-rights-act-section-5-no-longer-constitutional, accessed 1-3-14]

As noted in a report from the Congressional Research Service, these are issues that the Court has addressed several times in the past:

> Shelby County appears against a historical backdrop of cases in which the Supreme Court repeatedly upheld the constitutionality of the Section 5 preclearance regime. Following enactment of the VRA in 1965, in South Carolina v. Katzenbach, 50 the Supreme Court upheld Section 5's constitutionality. Rejecting an argument that it supplants powers that are reserved to the states, the Court found the law to be "a valid means for carrying out the commands of the Fifteenth Amendment." Following the 1975 reauthorization of Section 5, in City of Rome v. United States, the Court reaffirmed its holding in Katzenbach, and likewise upheld its constitutionality. Similarly, in Lopez v. Monterey County, the Court upheld the constitutionality of Section 5 after its 1982 reauthorization, finding that although "the Voting Rights Act, by its nature, intrudes on state sovereignty," nonetheless, "[t]he Fifteenth Amendment permits this intrusion." More

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recently, however, the Supreme Court had expressed concerns with the constitutionality of Section 5. In the wake of the 2006 reauthorization and amendments to Section 5, a municipal utility district in Texas filed suit asking to be released from Section 5 preclearance requirements. In the alternative, the utility district challenged the law's constitutionality, arguing that Congress had exceeded its enforcement power under the 15th Amendment. In the resulting 2009 decision of Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder, while the Supreme Court did not answer the question of Section 5's constitutionality, it did caution that the VRA's preclearance requirement and coverage formula "raise serious constitutional questions." On the one hand, the Court acknowledged that while some of the conditions it had relied upon in upholding Section 5 in Katzenbach and City of Rome had improved, such improvements may be insufficient, thereby continuing to justify the need for preclearance. On the other hand, the Court announced that the law "imposes current burdens and must be justified by current needs." By deciding that the utility district was eligible to be released from coverage, in NAMUDNO, the Court avoided the constitutional question. In an early 2012 decision on redistricting, the Supreme Court reiterated its observation from NAMUDNO that Section 5's intrusion on state sovereignty "raises serious constitutional questions." [L. Paige Whitaker, Legislative Attorney, Congressional Research Service, "Congressional Redistricting and the Voting Rights Act: A Legal Overview," CRS REPORT FOR CONGRESS, 8—30—13, p. 9-10]

The majority in Shelby avoided ruling on the constitutionality of Section 5. Instead, the Court ruled that the coverage formula used to determine the jurisdictions subject to preclearance requirements was no longer valid "in light of current conditions":

By a 5 to 4 vote, in Shelby County v. Holder, 48 the U.S. Supreme Court decided that Congress' decision in 2006 to reauthorize the Section 5 preclearance requirement, without modifying the coverage formula in Section 4(b), was unconstitutional. The Court determined that the coverage formula's application to certain states and jurisdictions departed from the principle of equal sovereignty among the states without justification in light of current conditions. According to the Court, the coverage formula was "based on 40-year old facts having no logical relation to the present day." Therefore, it concluded that the coverage formula could no longer be used as a basis for subjecting certain states and jurisdictions to the Section 5 preclearance requirement. [L. Paige Whitaker, Legislative Attorney, Congressional Research Service, "Congressional Redistricting and the Voting Rights Act: A Legal Overview," CRS REPORT FOR CONGRESS, 8—30—13, p. 9]

A more detailed summary of the Court's reasoning can be found in the syllabus of the Shelby majority opinion:

The Voting Rights Act of 1965 was enacted to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." South Carolina v. Katzenbach, 383 U. S. 301, 309. Section 2 of the Act, which bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color," 42 U. S. C. § 1973(a), applies nationwide, is permanent, and is not at issue in this case. Other sections apply only to some parts of the country. Section 4 of the Act provides the "coverage formula," defining the "covered jurisdictions" as States or political subdivisions that maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s. § 1973b(b). In those covered jurisdictions, § 5 of the Act provides that no change in voting procedures can take effect until approved by specified federal authorities in Washington, D. C. § 1973c(a). Such approval is known as "preclearance." The coverage formula and preclearance requirement were initially set to expire after five years, but the Act has been reauthorized several times. In 2006, the Act was reauthorized for an additional 25 years, but the coverage formula was not changed. Coverage still turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at that time. Shortly after the 2006 reauthorization, a Texas utility district sought to bail out from the Act's coverage and, in the alternative, challenged the Act's constitutionality. This Court resolved the challenge on statutory grounds, but expressed serious doubts about the Act's continued constitutionality. See Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U. S. 193. Petitioner Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General in Federal District Court in Washington, D. C., seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing § 4(b)'s coverage formula. The D. C. Circuit affirmed. After surveying the evidence in the record, that court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, that § 5 was therefore still necessary, and that the coverage formula continued to pass constitutional muster. Held: Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis [**657] for subjecting jurisdictions to pre-clearance. [***2] Pp. 9-25. [Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in

Voting Rights Act: Overview [cont'd]

> Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14]

The most significant effect of the ruling is that Section 5 is now legally inoperable, as again summarized by the Congressional Research Service:

> In Shelby County v. Holder the U.S. Supreme Court invalidated Section 4(b)22 of the VRA. Section 4(b) contained a formula prescribing which states and jurisdictions with a history of discrimination were required to obtain federal approval or "preclearance" under Section 5 before changing any voting law, including redistricting plans. Section 5 and the Court's ruling in Shelby County are discussed below. As a result of the Court's decision, the nine states, and jurisdictions within six states, that were previously covered under the formula are no longer subject to the VRA's preclearance requirement. The covered states were: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. The six states containing covered jurisdictions were: California, Florida, Michigan, New York, North Carolina, and South Dakota. It does not appear, however, that the Court's decision affected Section 3(c) of the Act, known as the "bail in" provision, under which jurisdictions can be ordered to obtain preclearance of voting laws if a court finds that violations of the 14th or 15th Amendment justifying equitable relief have occurred. [L. Paige Whitaker, Legislative Attorney, Congressional Research Service, "Congressional Redistricting and the Voting Rights Act: A Legal Overview," CRS REPORT FOR CONGRESS, 8—30—13, p. 5]

Notably, however, the Shelby decision does not by itself vacate Congress's authority to prevent voter discrimination, nor does it eliminate pre-clearance measures per se. However, given the current political climate, most observers agree that it is highly unlikely that Congress will choose to implement a new coverage formula in either the short- or medium-term.

> The Supreme Court did not restrict the classes of evidence upon which Congress can rely to target remedial measures such as preclearance. The Court did not adopt certain extreme arguments made by Shelby County that Congress could not employ evidence of minority vote dilution as a basis for reauthorizing preclearance coverage. Similarly, the Court did not adopt Shelby County's comparably extreme arguments that only adjudicated violations of intentional voting discrimination – such as the recent Texas redistricting case – could justify the preclearance remedy. For example, in City of Rome the Court credited and highlighted evidence of Section 5 objections in upholding Congress' 1975 reauthorization of Section 5, and the Court gave no indication in Shelby County that it meant to overrule or in any manner question that aspect of the Rome decision. More broadly, the Shelby County Court did not disturb the longstanding principle that Congress can appropriately prevent and deter unconstitutional voting discrimination by prohibiting a somewhat broader class of conduct than what is directly prohibited under the Constitution. [Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf, accessed 1-6-14]

There are a number of potent pro arguments. Most prominently, the majority opinion and its supporters argued that the pre-clearance requirements enabled by Section 4 are no longer necessary. Chief Justice Roberts and the concurring justices claimed that the substantial abuses of the Jim Crow era were a thing of the past, and that minority voters in the areas currently covered by Section 4 generally enjoyed fair and equal voting access. In particular, the Court pointed to relatively high voter registration rates and election turnouts among minority groups, and the increasingly significant electoral success of minority candidates, as evidence that the most aggressive parts of the Voting Rights Act had served their purpose in ensuring equal access to the franchise for all voters. A second argument advanced by the Shelby majority was that the pre-clearance requirements imposed an unfair, and ultimately unjustified, burden on the states and localities identified as being at particular risk for voter discrimination under a coverage formula based on data form the 1960s. The majority claimed that Congress could only single out these jurisdictions under extraordinary circumstances, since the Congress remains constitutionally-bound to treat each state and its sovereignty equally. The opinion argued that such extraordinary circumstances were present when the Voting Rights Act was originally passed in the 1960s, but the majority maintained that times had changed, and that although some risk of voter discrimination remained, such risks did not rise to a level that would justify burdensome infringements on the sovereignty of the states and counties subject to Section 5 pre-clearance requirements under VRA Section 4. Third, the pro team can readily argue that the Shelby decision neither permanently undermines the Voting Rights Act in toto nor Section 5 in particular, since it only struck down the coverage formula outlined in Section 4. As noted above, the Roberts-written decision explicitly left open the possibility that Congress could constitutionally draft an updated coverage

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formula that addressed existing discrimination problems in voting access. The Roberts decision did not argue that voter discrimination is not a problem in some area, nor that Congress lacked the authority to engage in remedial actions to address said discrimination—rather, the Court held that the means chosen by Congress reflected the realities of American in 1965, and were thus ill-suited to address contemporary problems. Fourth, defenders of the Shelby decision note that many federal laws, including powerful sections of the Voting Rights Act itself, serve as a critical shield against voter discrimination efforts. Evidence in the pro section outlines a number of federal and state laws that outlaw vote suppression and provide officials and activists with a number of legal channels to ensure fair and equitable access to the ballot box. In particular, Section 2 of the VRA allows individuals to challenge voting laws that act to suppress citizen participation in elections. Although this Section does not include the controversial pre-clearance requirements of Sections 4 and 5, Section 2 has been successful used on many occasions to invalidate unfair state and local voting laws. Fifth, the suspension of the preclearance requirements will allow the previously covered states and countries to implement modern voting laws that will both facilitate fair and speedy election procedures while protecting against voter fraud. Many critics of the more expansive components of the VRA, including those overturned by the Shelby decisions, contend that the law has been used by an overly aggressive Justice Department, often egged on by narrowly focused outside interest groups, to stymie the implementation of critical changes to voting laws. In particular, many jurisdictions in the pre-clearance area have been prohibited from instituting voter identification requirements, which supporters argue are necessary to check growing voter fraud and to restore public confidence in the nation's election systems. The extension blocks have answers to many of the most likely con defenses of Section 4 and the current coverage formula—the most useful evidence includes some pretty solid indictments of the 2006 congressional findings of voter discrimination in the coverage area.

The core con argument under this resolution, and one that was given considerable development in the Shelby dissent, is that the Voting Rights Act, and in particular the pre-clearance requirements of Section 5, which are in turn enabled the coverage formula outlined in the Act's Section 4, remain a vital bulwark against a potential flood of voting law changes that will serve to disenfranchise millions of Americans, both violating the fundamental principle of equality upon which our nation is founded and threatening to undermine the very foundations of our democracy. The Cohen evidence included in the "topshelf" section does an excellent job of outlining the stakes in this debate. The Ginsburg-led dissent strongly summarizes the sentiment behind most of the con arguments, claiming that the decline in voter discrimination is largely due to effects of the pre-clearance requirements, which both allow voting rights advocates to block discriminatory laws before they are put into place and act as a powerful deterrent against the passage of such laws. There is very strong evidence arguing that the recent litigation surrounding the 2010 and 2012 election proves that voter suppression efforts will increase absent a strong VRA. Con teams should also consider advancing the claim that the Supreme Court should have afforded greater deference to Congress's decision to maintain strong Section 4 & 5 voter protections, especially in light of the explicit enforcement powers afford to Congress by the Fifteenth Amendment. There is also excellent evidence answering most of the pro arguments, including a rigorous defense of the necessity of pre-clearance requirements and the deficiencies of Section 2 and anti-discrimination legal strategies, the strong nature of the 2006 congressional findings justifying the current Section 4 formula and the need for pre-clearance requirements in the covered jurisdictions, and indictments of the "state sovereignty" claims that are at the core of the Shelby majority opinion.

This is a very strong and fairly balanced topic, with sound and responsive arguments on both sides.

Best of luck!

Topshelf: Shelby Decision Undermined the Voting Rights Act

1. The ruling effectively made Section 5 unenforceable

David Bernstein, "SCOTUS Deals a Blow to the Voting Rights Act," BOSTON MAGAZINE, 6—25—13, www.bostonmagazine.com/news/blog/2013/06/25/voting-rights-act-and-new-england/, accessed 1-4-14.
The Supreme Court today dealt a blow to a key portion of the Voting Rights Act—a decision that might not have particularly large consequences for minority voters, but that seems odd and unnecessary given the experience of the Act right here in New England. The ruling concerns Sections 4 and 5 of the Act. Section 5 dictates that the federal government must pre-approve any voting-related changes in some parts of the country; Section 4 outlines the "formula" that determines which parts of the country fall under those Section 5 requirements. Congress has occasionally updated the formula when re-authorizing the Act.
According to the initial reports, the conservatives on the Court, in a 5-4 decision, ruled that the formula as it currently exists is unconstitutional, meaning that the federal government must stop doing Section 5 pre-approvals until Congress re-writes Section 4, which could be a long time coming.

2. The Shelby ruling effectively gutted the Voting Rights Act

Paul Barrett, "Supreme Court Ends Era of the Voting Rights Act," BUSINESSWEEK, 6—25—13, www.businessweek.com/articles/2013-06-25/supreme-court-ends-era-of-the-voting-rights-act, accessed 1-4-14.
The Supreme Court's conservative majority ended an era in American racial relations. The 5-4 decision (PDF) today to kill a core part of the 1965 Voting Rights Act eviscerates a landmark law that allowed millions of southern blacks to participate in democracy. The South, the high court majority declared, is no longer the zone of racism and segregation that stubbornly preserved attitudes tracing back to slave days. In other words, five justices reasoned, the very success of the Voting Rights Act has altered political reality, making the law unnecessary and unjustified. Perhaps the most striking thing about the ruling is its sheer boldness in demanding that society cease using one of the main tools employed for generations to make amends for the legacy of slavery. That aggressive action stands in sharp contrast to the court's cautious refusal just a day earlier in a separate case to heed conservative calls for an end to racial-preference policies in university admissions.

3. The decision effectively renders Section 5 unenforceable

Chris Cillizza, "What the Supreme Court's Voting Rights Act Decision Means for Politics," WASHINGTON POST, 6—25—13, www.washingtonpost.com/blogs/the-fix/wp/2013/06/25/what-the-voting-rights-act-decision-means-for-politics/, accessed 1-5-14.
Section 4 of the VRA creates a formula that determines what states should be subject to Section 5, which requires states to submit any changes to election or voting laws, or alterations of state legislative or congressional district lines, to the Justice Department for approval. (That process is commonly known as pre-clearance.) That formula was -- until today -- based on a) states that had used some sort of ballot test (literacy being the main one) to determine whether people can vote and b) whether less than 50 percent of eligible voters were registered to vote by November 1964. In essence, states and counties with a history of racial discrimination were required to seek pre-clearance. (You can read the full section 4 provision here.) With no Section 4 -- the Court asked Congress to determine a new formula -- there is no section 5, according to a Democratic election lawyer who was granted anonymity to speak candidly. "Unless Congress creates a new coverage formula, Section 5 is not in force," said the source. In essence, the Court said that the Justice Department still has the right to approve of line-drawing under the VRA but by invalidating the formula for determining what states/counties are subject to the VRA they made that power moot. Given Congress' inability to do, well, anything, the idea that they would wade into this incredibly contentious issue at any point in the near future seems unlikely. So, if Congress does nothing, what are the political consequences?

Topshelf: Shelby Decision Undermined the Voting Rights Act [cont'd]

4. The decision puts a dagger into the heart of the VRA

Deborah J. Vagins, "Supreme Court Put a Dagger in the Heart of the Voting Rights Act," American Civil Liberties Union, 7—2—13, www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act, accessed 1-5-14.
While the 15th Amendment was adopted in 1870 and prohibited denial of the right to vote on account of race or color, in reality, many African-Americans were only able to vote within recent memory -- less than 50 years ago, with the passage of the Voting Rights Act of 1965. Many people fought and bled for that right. Yet, despite a victory so recent in our memories, last week, the Supreme Court undermined one of the most powerful tools forged during that struggle—Section 5 of the Voting Rights Act (VRA). Section 5 required nine states and portions of seven others to get approval from the Department of Justice or the federal court in the District of Columbia before they can implement any voting changes, because of those jurisdictions' past history and ongoing incidents of discrimination against racial and language minorities. The ACLU represented the Alabama State NAACP and impacted voters in Shelby County v. Holder, defending the constitutionality of Section 5 of the Voting Rights Act. Alabama challenged Section 4 (the Section 5 coverage formula) and Section 5 as facially unconstitutional, meaning there are no circumstances under which Sections 4 and 5 could be valid. While the Court did not strike down Section 5 as unconstitutional, it did say that current geographic reach of the VRA under Section 4 was impermissible. Civil rights icon Representative John Lewis rightly commented that the Supreme Court's decision "put a dagger in the heart of the Voting Rights Act."

5. The Shelby decision renders Section 5 inoperable

L. Paige Whitaker, Legislative Attorney, Congressional Research Service, "Congressional Redistricting and the Voting Rights Act: A Legal Overview," CRS REPORT FOR CONGRESS, 8—30—13, p. i.
In its June 2013 decision, Shelby County v. Holder, the U.S. Supreme Court invalidated Section 4(b) of the VRA. Section 4(b) contained a formula prescribing which states and jurisdictions with a history of discrimination were required to obtain prior approval or "preclearance" under Section 5 before changing any voting law, including congressional redistricting plans. Section 5 required those "covered" jurisdictions to preclear their redistricting plans with either the Department of Justice or the U.S. District Court for the District of Columbia before implementation. In order to be granted preclearance, the covered jurisdiction had the burden of proving that the proposed voting change neither had the purpose, nor would it have the effect, of denying or abridging the right to vote on account of race or color, or membership in a language minority group. Although the Court invalidated only the coverage formula in Section 4, by extension, Section 5 has been rendered currently inoperable. As a result, the nine states and six jurisdictions previously covered under the formula are no longer subject to the VRA's preclearance requirement. Section 2 of the VRA, which applies in all jurisdictions, was not at issue in this case.

6. The Shelby decision effectively suspends Section 5 enforcement indefinitely

Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf, accessed 1-6-14.
The most prominent effect of the Shelby County decision is to suspend Section 5 review indefinitely. That is, Section 5 remains on the books, but no jurisdictions – other than those subject to Section 3(c) court orders – are presently required to obtain preclearance before implementing new voting practices. The Department of Justice has issued "no determination" letters to jurisdictions which had Section 5 submissions pending at the time of the decision, and has posted an advisory on the Voting Section web site regarding the Shelby County decision.

Rightly Decided: Topshelf

1. The case was rightly decided—it does not threaten minority voter rights and removes an unnecessary and burdensome legal anachronism

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "Jim Crow Is Dead. Long Live the Constitution," BLOOMBERG, 6—25—13, http://www.cato.org/publications/commentary/jim-crow-dead-long-live-constitution, accessed 1-3-14.

In striking down Section 4 of the Voting Rights Act, the U.S. Supreme Court has restored a measure of constitutional order. Based on 40-year-old voting data that doesn't reflect current political conditions, this provision subjected a seemingly random assortment of states and localities to onerous burdens and unusual federal oversight. To be clear, neither minority voting rights nor the ability of the federal government to enforce those rights were at stake in Shelby County v. Holder. Both of those were, are and will be secure regardless of this case and its consequences. Instead, the court was considering whether the "exceptional conditions" and "unique circumstances" of the Jim Crow South still exist such that an "uncommon exercise of congressional power" is still constitutionally justified — to quote the 1966 ruling that approved Section 5 of the Voting Rights Act as an emergency measure. As Chief Justice John Roberts wrote for the court in 2009, the last time it looked at this law, the "historic accomplishments of the Voting Rights Act are undeniable," but the modern uses of Section 5 — which requires federal "pre-clearance" of any changes in election regulation in certain jurisdictions — "raises serious constitutional concerns." The provision maintains antiquated assumptions and flies in the face of the 15th Amendment's requirement that all voters be treated equally.

2. Voting Rights Act forces states to engage in racially-based gerrymandering

Roger Clegg, President and General Counsel, Center for Equal Opportunity, "The Future of the Voting Rights Act after Bartlett and NAMUDNO," CATO SUPREME COURT REVIEW, 2008-2009, p. 40.

We see the same phenomenon with respect to the Voting Rights Act. Some legitimate voting practices—for example, making sure that voters can identify themselves as registered-to-vote, U.S. citizens— will be challenged if they have a racially disparate impact; this problem is beyond the scope of this article. The other problem is central to it: Jurisdictions will be pressed to use racial gerrymandering— racially segregated districting—to ensure racially proportionate election results and thus, perversely, to engage in the very discrimination that is at odds with the underlying law's ideals. Let me emphasize and elaborate on that last point, because otherwise the Bartlett decision, to which I turn next, is incomprehensible— and so are the high stakes regarding the constitutionality vel non of Section 5, which I discuss thereafter: The principal use of Sections 2 and 5 in 2009 is to coerce state and local jurisdictions into drawing districts with an eye on race, to ensure that there are African American (and, in some instances, Latino) majorities who will elect representatives of the right color.

3. This gerrymandering is dangerous—fosters racial divisions and compromises the competitiveness of elections

Roger Clegg, President and General Counsel, Center for Equal Opportunity, "The Future of the Voting Rights Act after Bartlett and NAMUDNO," CATO SUPREME COURT REVIEW, 2008-2009, p. 41.

The racial gerrymandering Sections 2 and 5 foster is pernicious. The Supreme Court has warned about the unconstitutionality of racial gerrymandering in a number of decisions, because the practice encourages racial balkanization and identity politics. In addition, the segregated districts that gerrymandering creates have contributed to lack of competitiveness in elections, districts that are more polarized (both racially and ideologically), the insulation of Republican candidates and incumbents from minority voters and issues of particular interest to them—to the detriment of both Republicans and minority communities—and, conversely, the insulation of minority candidates and incumbents from white voters (making it harder for those politicians to run for statewide or other larger jurisdiction positions). As Chief Justice John Roberts wrote, it is, indeed, ''a sordid business, this divvying us up by race.''

4. There is no need for the law—recent elections prove

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, "Shelby County v. Holder: The Restoration of Constitutional Order," CATO SUPREME COURT REVIEW, 2012-2013, p. 33-34.

In the end, Justice Ginsburg may well be right that "what's past is prologue." But time marches on. President Barack Obama carried Florida, North Carolina, and Virginia. The only African-American senator is a Republican from South Carolina who was appointed by an Indian-American governor. Philadelphia, Mississippi, and Selma, Alabama, have African-American mayors. As Justice Thomas eloquently put it, "Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory."

Rightly Decided: Topshelf [cont'd]

5. Conditions have changed markedly in the South—voting discrimination is no longer pervasive

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

(2) In 1966, these departures were justified by the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century," Katzenbach, 383 U. S. ___, at 308. At the time, the coverage formula — the means of linking the exercise of the unprecedented authority with the problem that warranted it — made sense. The Act was limited to areas where Congress found "evidence of actual voting discrimination," and the covered jurisdictions shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." Id., at 330. The Court explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." Ibid. The Court therefore concluded that "the coverage formula [was] rational in both practice and theory." Ibid. Pp. 12-13. (3) Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, "[v]oter turnout and registration rates" in covered jurisdictions "now [**658] approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." Northwest Austin, supra, at 202. The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years. [***3] Yet the Act has not eased § 5's restrictions or narrowed the scope of § 4's coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger. Because § 5 applies only to those jurisdictions singled out by § 4, the Court turns to consider that provision. Pp. 13-17.

Rightly Decided: Alternatives Solve—Broader Social Change

- **We need much broader solutions to addressing voting access problems than the VRA**

Richard H. Pildes, Professor, Law, New York University, "We Need a Broader Approach," NEW YORK TIMES, Room for Debate, 1—24—13, http://www.nytimes.com/roomfordebate/2013/02/24/is-the-voting-rights-act-still-needed/we-need-a-broader-approach, accessed 1-4-14.

The Voting Rights Act of 1965 was born out of the widespread, intentional disfranchisement of black voters (and many poor whites) that had endured in much of the South ever since the 1890s. Forged in response to that specific distortion of American democracy, the law largely took the form of civil rights legislation: it targeted racially discriminatory voting practices (though it did soon ban all literacy tests nationwide, regardless of what motivated such laws). Still today, both those provisions of the law that apply uniquely to the South and those that apply nationwide are narrowly targeted in scope to voting restrictions that courts are prepared to find involve racial discrimination. If we are to address the remaining barriers to full political participation, through new legislation at either the national or state level, the most effective legislation is unlikely to stay within the constraints of the civil rights model. For several reasons, that model is too limited to address today's largest remaining obstacles. For example, we are one of the few countries that holds its elections on a working day. Making Election Day a national holiday (perhaps combining it with Veterans Day), moving it to a weekend, or running the election from Saturday through Tuesday would facilitate voting by parents, hourly-wage workers and others who currently cannot easily take a break from other responsibilities during the week (especially if lines are long). Yet no legislation in the civil rights model, and no court, is going to conclude that Tuesday elections are racially discriminatory. Instead, the more effective approach is to think in terms of solutions, federal or state, that eliminate unnecessary barriers and protect the right to vote in general, uniform terms.

The American system of voter registration is another one of the significant barriers to fuller participation today. Though we are an exceptionally mobile society, each time you move, the burden is on you in most states to remember to change your voter registration, well before Election Day. Laws and technological advances should make it easier for the state to update automatically when eligible voters move, at least within a single state. Similarly, I have written elsewhere about the underlying causes of the unconscionably long wait times this past election in places like Florida and Virginia. Yet many of those causes – insufficiently trained workers at polls, confused registration lists, under-funded counties – cannot be captured by laws that attack only racially discriminatory practices. And for those who believe voter identification laws with excessive documentation requirements impose unjustified and unnecessary barriers, those laws should be illegal in states where the effect is most heavily felt by elderly voters, or young voters, or poor voters – not only in those where the effect is disproportionate among minority voters. Our history rightly makes us particularly sensitive to racially discriminatory barriers to voting. But we should not be overly limited by that history, either intellectually or in terms of policy solutions. The most effective means of protecting the rights of all voters, including minority voters, should not be limited to the search for barriers that courts are likely to find racially discriminatory. Those remaining barriers are most likely to fall as part of a larger effort to root out all unnecessary and unjustified barriers to full participation for all eligible voters.

Rightly Decided: Alternatives Solve—Other Federal Laws

- **Other federal laws and sections of the VRA will continue to safeguard voting rights**

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, www.heritage.org/research/testimony/2013/08/the-voting-rights-act-after-the-supreme-courts-decision-in-shelby-county, accessed 1-6-13.

The Supreme Court correctly found that the coverage formula of Section 4 does not reflect current conditions and is therefore unconstitutional. As the Court concluded, "there is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago." If Congress had first considered it in 2006, "it plainly could not have enacted the present coverage formula" because it "would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story." The other provisions of the VRA such as Section 2 and Section 3 provide strong federal provisions to remedy voting discrimination if and when it occurs. My discussion of the robust provisions of the VRA that guarantee the right to vote does not even include the many other protections for voters that exist outside of the VRA in the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act, and the Help America Voting Act. There is no reason for Congress to take any action to reinstate the coverage formula of Section 4. There is, in fact, no evidence that particular states are engaged in systematic discrimination that would justify treating them differently from other states.

Rightly Decided: Alternatives Solve—VRA Section 2

1. The Voting Rights Act actually confounds the effectiveness of the more-important Section 2

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "The Voting Rights Act Is Outmoded, Unworkable," NATIONAL LAW JOURNAL, 2—27—12, http://www.cato.org/publications/commentary/voting-rights-act-is-outmoded-unworkable, accessed 1-3-14.

Section 5's selective applicability precludes the establishment of nationwide districting standards, confounding lower courts and producing different, often contradictory, treatment of voting rights in different states. As the Supreme Court unhelpfully noted, lower courts "should presume neither that a State's effort to preclear its plan will succeed nor that it will fail." Moreover, sections 2 and 5 conflict with each other. Even as Section 2 requires race-based districting, Section 5, along with the 14th and 15th amendments, prohibit it. These tensions cannot but produce chaotic proceedings like those here, which are replicated every redistricting cycle. Put simply, the Voting Rights Act's success has undermined its continuing viability; courts and legislatures struggle mightily and often fruitlessly to satisfy both the act's race-based mandate and the 15th Amendment's equal-treatment guarantee. These difficulties — constitutional, statutory and practical — disadvantage candidates and voters, and undermine the Voting Rights Act's legacy of vindicating the voting rights of all citizens. Although Perry v. Perez may not have been the right vehicle for doing so, the Court should reconsider the constitutionality of the modern Voting Rights Act at the next available opportunity — perhaps in Shelby County v. Holder, argued in the D.C. Circuit last month.

2. Section 2 can still be used to remedy discrimination problems

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, "Strike Down Section 5," NATIONAL REVIEW, 2—27—13, http://www.heritage.org/research/commentary/2013/2/strike-down-section-5, accessed 1-5-14.

Representative Lewis claims that many of the covered jurisdictions have "persistent, flagrant, contemporary records of discrimination," but there is no evidence to support such a claim. He mentions the small town of Calera in Shelby County as an example. But Shelby County has no political control over Calera, a small town that has experienced growing pains because of rapid growth, whatsoever. Calera is an anomaly. Since 2001, the Department of Justice has objected to only one submission from Alabama, a redistricting plan in Calera. But Justice has not objected to a statewide Alabama preclearance submission in almost 20 years. And in the ten years before the 2006 renewal of Section 5, Justice objected to only 0.06 percent of all of the preclearance submissions received from all levels of government in the entire state of Alabama. This is not a "persistent, flagrant, contemporary" record of discrimination. With all due respect to Lewis, his claim that such cases "are numerous" is simply not true. No one claims that discrimination does not exist. But isolated cases of it can be remedied through Section 2, rather than by placing Shelby County and the entire state of Alabama under the "emergency" provisions of Section 5 for another 20 years.

3. There are many federal voting protections outside of Section 4—including Section 2

J. Christian Adams, founder, Election Law Center, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/C%20Adams%207-18-2013.pdf, accessed 1-6-14.

Contrary to the hype surrounding the Shelby decision, the Voting Rights Act remains alive and well. Multiple federal protections against discrimination in voting are still on the books. These permanent provisions of the Voting Rights Act can still be utilized by private parties and the Justice Department to protect voting rights. Section 2: Nationwide and Permanent Protections Remain in Force Section 2 is the nationwide prohibition against racial discrimination. It remains in full force and effect. If witnesses from the Department of Justice ask Congress to reverse the outcome in Shelby, Congress should ask them a few simple questions: First, why hasn't the Justice Department utilized Section 2 of the Voting Rights Act to initiate and bring a single lawsuit since President Obama was inaugurated? Indeed, this administration's record of Section 2 enforcement is nonexistent. Second, if discrimination in voting is so pervasive and widespread justifying renewed Section 5 coverage, why hasn't your Justice Department brought a single case to address a single instance of the problem that you purport exists using Section 2? Third, since taking office, why has your administration effectively switched off Section 2 enforcement – is it inefficient management, or a policy decision to ignore the law?

Rightly Decided: Alternatives Solve—VRA Section 2 [cont'd]

4. The ruling does not undermine voting rights—the entirety of the rest of the VRA remains in place

J. Christian Adams, founder, Election Law Center, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/C%20Adams%207-18-2013.pdf, accessed 1-6-14.

Reports of the demise of the Voting Rights Act have been greatly exaggerated. Those who say that the Supreme Court decision in Shelby means an end to protections in the Voting Rights Act are peddling hype. In fact, they are peddling the most dangerous and disingenuous sort of hype. Deliberately stoking fears, deliberately targeting certain racial groups for disinformation, deliberately ignoring the multiple protections which remain in the Voting Rights Act does a disservice to the nation and to civil rights.

5. Section 2 can still be used to stop voting discrimination

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, www.heritage.org/research/testimony/2013/08/the-voting-rights-act-after-the-supreme-courts-decision-in-shelby-county, accessed 1-6-13.

The "heart" of the VRA today is Section 2, not Section 5. Section 2 applies nationwide, not just in a limited number of states and counties, and it is permanent; it will never expire. It forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority. Discriminatory measures or actions can be stopped before an election through temporary restraining orders and injunctions. Private plaintiffs can have their attorneys' fees and costs reimbursed if they are the prevailing party. Section 2 was not at issue in the Shelby County case and the Supreme Court's decision "in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2." Section 2 is an effective remedy when it is utilized by the Civil Rights Division of the Justice Department. During the eight years of the Bush administration, the Division filed 17 Section 2 lawsuits and obtained one out-of-court settlement. The current administration has barely utilized Section 2, having filed only one lawsuit since it came into office, and that suit was actually the outcome of an investigation started during the Bush administration. A recent report by the Inspector General of the Justice Department concluded that the "statistical evidence did not support" the claim that the Bush administration was hostile to Section 2 cases, particularly in light of the fact that the number of cases brought during the Bush administration far exceeded the number of cases brought during the current administration. The decreasing number of Section 2 cases maybe an indication that discrimination is abating, further demonstrating that enforcement through Section 5 is not essential, or even necessary.

Rightly Decided: Changed Conditions—General

1. The conditions that justified the preclearance provisions simply do not exist anymore

Edward Blum, Director, Project on Fair Representation, "The Supreme Court Can Update the Obsolete Voting Rights Act," WALL STREET JOURNAL, 2—24—13, www.aei.org/article/society-and-culture/civil-rights/the-supreme-court-can-update-the-obsolete-voting-rights-act/, accessed 1-7-14.

In Northwest Austin v. Holder, the Supreme Court noted that African-Americans and Hispanics in most of these states now register to vote and participate in elections at rates equal to, or greater than, whites. "The evil that Section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance," the court wrote. "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." By granting the utility district's request that it be allowed to bail out of coverage, the court avoided a decision on the bigger question of Section 5's constitutionality. Now the Voting Rights Act is once again at issue before the court. In 2010, Shelby County, Ala., sued in federal court, arguing that Sections 4(b) and 5 of the Voting Rights Act as amended in 2006 are unconstitutional because Congress failed to modernize the bill in light of the remarkable changes in the covered states during the last 40 years. The emergency that existed in 1965 is over. It is a compelling argument. Congress reauthorized these provisions in 2006 based upon the black-voter disenfranchisement in the deep South that existed in 1965, but those conditions measurably don't exist anymore. Furthermore, Congress made no effort to analyze minority electoral conditions outside of the covered jurisdictions. It makes no sense today for Texas and Alabama, but not Arkansas or Kentucky, to be supervised by the federal government.

2. Section 5 is no longer needed—it is based on old data, and the voting problems have been fixed

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, "Strike Down Section 5," NATIONAL REVIEW, 2—27—13, http://www.heritage.org/research/commentary/2013/2/strike-down-section-5, accessed 1-5-14.

Representative John Lewis certainly deserves the nation's thanks for the fight he led during the civil-rights movement. But his latest commentary in the Washington Post, about the Shelby County case and the Voting Rights Act, shows that he is living in the past. The South has changed since he marched from Selma to Montgomery nearly 50 years ago. Even the article's headline is deceptive: "Why we still need the Voting Rights Act." The entire VRA is not at issue in the Shelby case. The justices will be hearing arguments on Wednesday about the continued constitutionality of Section 5 only. Section 5 was an emergency provision that was supposed to terminate after five years and that covered only certain jurisdictions (nine states and parts of seven others). Covered jurisdictions such as Shelby County, Ala., are basically in federal receivership — they cannot make any changes to their voting laws without getting preclearance from the federal government. Section 5 was supposed to be a temporary supplement to Section 2, which is the heart of the VRA: the permanent, nationwide ban on racial and ethnic discrimination in voting. Because the key symptom of the official, systematic voting discrimination that was occurring against black citizens in 1965 was low registration and turnout, coverage under Section 5 was based on registration or turnout below 50 percent in the 1964, 1968, or 1972 presidential elections. When Congress renewed Section 5 in 2006 for the fourth time, it did not update the triggering formula — the formula still uses data from the 1964, 1968, and 1972 elections, and the renewal lasts for 25 years. Had it done so, in all likelihood, all of the states currently covered would have dropped out. This is because the barriers that prevented registration and turnout in the covered jurisdictions were eliminated long ago. There is nothing that prevents anyone, black or white, from registering and voting.

3. Voter records show that preclearance requirements are no longer needed

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, "Shelby County v. Holder: The Restoration of Constitutional Order," CATO SUPREME COURT REVIEW, 2012-2013, p. 51-52.

The question for the majority, then, was whether that justification remained valid in 2006. As NAMUDNO made clear, there was reason for doubt. "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." These conclusions were "not [the Court's] alone. Congress said the same when it reauthorized the Act in 2006." In particular, Congress found that "the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years" and that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." To highlight this point, the majority opinion displayed a chart comparing voter registration rates from 1965 to 2004 in the six states originally covered by Section 4(b):101 [table omitted]. The chief justice added that Census Bureau data from the most recent election showed further improvements in minority turnout in the covered states, specifically that "African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent." Moreover, he noted that the Section 5 objection rate exhibited the same trend. Whereas "in the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes," in "the last decade before reenactment, the Attorney General objected to a mere 0.16 percent."

Rightly Decided: Changed Conditions—General [cont'd]

4. Current conditions do not justify the existing coverage formula

Kevin Clarkson, "Court's Decision on Voting Rights Act Long Overdue," THE ALASKA BAR RAG v. 37, July-September 2013, lexis.

But, the Court in Shelby County explained that although justified historically, the selective and unequal coverage of Section 5 could no longer be upheld based upon current conditions. As the Court stated, "things have changed dramatically." Voter registration rates in covered jurisdictions now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. The tests and devises that blocked access to the ballot have been forbidden nationwide for over 40 years. Congress itself, even while expanding and reenacting the VRA for another 25 years in 2006, recognized that "[s]ignificant progress has been made," including increased African-American voter registration and voting--sometimes surpassing white voters, and increased numbers of African-Americans serving in elected office--a 1,000 percent increase since 1965 in the six States originally covered. The current state of the Nation, the Court held, no longer justifies disparate treatment amongst the sovereign States, at least not based upon the historic coverage formula.

5. There is no evidence of widespread discrimination in the covered areas

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, www.heritage.org/research/testimony/2013/08/the-voting-rights-act-after-the-supreme-courts-decision-in-shelby-county, accessed 1-6-13.

No one can rationally claim that there is still widespread, official discrimination in any of the covered states, or that there are any marked differences between states such as Georgia, which was covered, and states such as Massachusetts, which was not covered (except that Massachusetts has worse turnout of its minority citizens). As the Supreme Court approvingly noted and as Judge Stephen F. Williams pointed out in his dissent in the District of Columbia Court of Appeals, jurisdictions covered under Section 4 have "higher black registration and turnout" than noncovered jurisdictions. Covered jurisdictions also "have far more black officeholders as a proportion of the black population than do uncovered ones." In a study that looked at lawsuits filed under Section 2 of the VRA, Judge Williams found that the "five worst uncovered jurisdictions…have worse records than eight of the covered jurisdictions." Arizona and Alaska, which were covered under Section 5, had not had a successful Section 2 lawsuit ever filed against them in the 24 years reviewed by the study. The increased number of current black officeholders is additional assurance that official, systemic discriminatory actions are highly unlikely to recur.

6. There is no justification for Section 5—the underlying conditions have profoundly changed

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "The Voting Rights Act Doesn't Reflect Current Political Conditions," U.S. NEWS & WORLD REPORT, 2—27—13, http://www.cato.org/publications/commentary/voting-rights-act-doesnt-reflect-current-political-conditions, accessed 1-3-14.

Neither minority voting rights nor the ability of the federal government to enforce those rights are at stake at Shelby County v. Holder. Both of those are secure regardless of how the Supreme Court rules in the case. Instead, Shelby County considers whether the "exceptional conditions" and "unique circumstances" of the Jim Crow South still exist such that an "uncommon exercise of congressional power" is still constitutionally justified—to quote the 1966 Supreme Court that approved Section 5 of the Voting Rights Act as an emergency measure. That is, while the "historic accomplishments of the Voting Rights Act are undeniable," as the court said 43 years later, the modern use of Section 5—which requires federal "preclearance" of any changes in election law in certain jurisdictions—"raises serious constitutional concerns." Most recently renewed in 2006, the provision adopts flawed assumptions and flies in the face of the 15th Amendment's requirement that all voters be treated equally. Section 5's preclearance scheme is an anachronism, based on 40-year-old data that doesn't reflect current political conditions. For example, the racial gap in voter registration and turnout is lower in states originally covered by Section 5 than it is nationwide. Blacks in some covered states actually register and vote at higher rates than whites. Facetious tests and sinister devices are now permanently banned—while even individual violations are exceedingly rare and no more likely to occur in Section 5 jurisdictions.

Rightly Decided: Changed Conditions—General [cont'd]

7. There is no statistical justification to the Section 5-level scrutiny

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "Jim Crow Is Dead. Long Live the Constitution," BLOOMBERG, 6—25—13, http://www.cato.org/publications/commentary/jim-crow-dead-long-live-constitution, accessed 1-3-14.

"If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula," Roberts wrote for the majority. "It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story." And so this law had to fall. Of course, the court really should have gone further, as Thomas pointed out in his concurring opinion. The court's explanation of Section 4's anachronism applies equally to Section 5. In practice, however, Congress will be hard-pressed to enact any new coverage formula because the pervasive, systemic discrimination in voting that justified a deviation from the normal constitutional order is now gone. That's a good thing. We can finally move on to a healthier stage of race relations, particularly with respect to how the American people govern themselves.

8. The case was rightly decided—the provisions were based on outdated stereotypes about the South

Edward Blum, Director, Project on Fair Representation, "The Supreme Court Can Update the Obsolete Voting Rights Act," WALL STREET JOURNAL, 2—24—13, www.aei.org/article/society-and-culture/civil-rights/the-supreme-court-can-update-the-obsolete-voting-rights-act/, accessed 1-7-14.

Congress knew that Jim Crow was not hibernating in the deep South, let alone in the Bronx. This was apparent to election-law experts on the right and on the left who testified before Congress that the evidence in the congressional record did not address the differences in covered and non-covered jurisdictions, e.g., that voter-registration rates are higher among minorities in covered states than in states not under federal supervision. Congress did not base the original formula in 1965 on election data from the 1924 election, experts argued, so it made no sense to rely on data from 1964 to reauthorize the act in 2006. These provisions are stuck in a time warp, rendering them unconstitutional. Our system of government requires that federal laws should be one-size-fits-all, but that all 50 states are entitled to equal sovereignty. Congress and the administration could have avoided this litigation by updating the coverage formula or strengthening existing election laws that apply to the entire nation. Their failure to acknowledge the remarkable racial progress made by the deep South and elsewhere by modernizing the statute means that the Supreme Court may well strike down these sections of the law, as it should.

9. The South has changed—there is no justification for treating Southern states in a discriminatory fashion

Jonathan S. Tobin, "Supreme Court Rightly Cites 'Old Data' in Voting Rights Act," CHRISTIAN SCIENCE MONITOR, 6—25—13, www.csmonitor.com/Commentary/Opinion/2013/0625/Supreme-Court-rightly-cites-old-data-in-Voting-Rights-Act, accessed 1-5-14.

But as even those opposed to the court's decision today must acknowledge, voting rights in the South, where approval mostly applies, and other parts of the country that were placed under the act's supervision, are as protected now as they are in any other part of the country. While racism is not extinct, it is no longer sovereign in the South. Indeed, as it was argued before the court, in some ways Mississippi is a better place for voting than Massachusetts. Congress should have addressed these changes each time it re-authorized an act that was never intended to be permanent. But altering it in any way became taboo in a politically correct environment in which preservation of the existing scheme for approval became a litmus test of tolerance. Congress did not muster the courage to deal with the new reality so it fell to the court to rightly declare that treating states in this discriminatory fashion based only on what had happened there a half-century earlier was clearly unconstitutional. If there is to be approval of election procedures in the future, it must be based on a new formula rooted in present day conditions – if Congress can ever agree on one.

Rightly Decided: Changed Conditions—Emergency / Temporary Only

1. The invalidated sections were intended to be temporary when the VRA was originally passed

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. § 4(c), id., at 438-439. A [*2620] covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4(a), id., at 438. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. See 28 CFR pt. 51, App. (2012). [**661] In those jurisdictions, § 4 of the Act banned all such tests or devices. § 4(a), 79 Stat. 438. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D. C. — either the Attorney General or a court of three judges. Id., at 439. A jurisdiction could obtain such "preclearance" only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." Ibid. Sections 4 and 5 were intended to be temporary; they were set to expire after five years. See § 4(a), id., at 438; Northwest Austin, supra, at 199. In South Carolina v. Katzenbach, we upheld [***6] the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale." 383 U. S. ___, at 308.

2. The case was rightly decided—the provisions were meant for emergency situations that no longer hold

Jonathan S. Tobin, “Supreme Court Rightly Cites ‘Old Data’ in Voting Rights Act,” CHRISTIAN SCIENCE MONITOR, 6—25—13, www.csmonitor.com/Commentary/Opinion/2013/0625/Supreme-Court-rightly-cites-old-data-in-Voting-Rights-Act, accessed 1-5-14.

Racism is the original sin of American history. But acknowledging this should not mean ignoring America’s racial progress since 1965, when the Voting Rights Act was enacted to help right this wrong. By striking down a key provision of the act today, the Supreme Court has rightly decided that the act’s “extraordinary measures” to prevent voting discrimination must be directed toward places where discrimination is going on now, not where it happened nearly 50 years ago. In a 5-4 ruling in the case of Shelby County v. Holder, the court upheld the principle that localities with a history of discrimination be subject to approval from the federal government before changing their voting laws. But it struck down as unconstitutional the formula to determine those locations, because that formula is based on “decades-old data,” as Chief Justice John Roberts wrote in the majority opinion. Unless Congress updates the formula, approval – which has blindly covered 15 states in part or in whole – can’t be applied.

3. Section 2 provides more than adequate protections—Sections 4 and 5 were meant to be temporary

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, “Jim Crow Is Dead. Long Live the Constitution,” BLOOMBERG, 6—25—13, http://www.cato.org/publications/commentary/jim-crow-dead-long-live-constitution, accessed 1-3-14.

The list of “covered” jurisdictions is bizarre: six states of the old Confederacy, plus Alaska, Arizona and parts of other states including California and South Dakota. Three New York counties are covered, all New York City boroughs. What’s going on in the Bronx, Brooklyn and Manhattan that isn’t in Queens or Staten Island? Moreover, it is Section 2 — the ban on racial discrimination in voting that applies nationwide — that is the heart of the Voting Rights Act, and it remains untouched. Section 2 provides for both federal prosecution and private lawsuits, and has proved more than sufficient to remedy disenfranchisement. Sections 4 and 5, meanwhile, were to be temporary tools that supplemented Section 2. They succeeded, overcoming “widespread and persistent discrimination in voting” and thus eliminating the circumstances that originally justified it.

Rightly Decided: Changed Conditions—Coverage Formula Obsolete / Irrational

1. The Section 4 coverage area was simply obsolete

J. Christian Adams, founder, Election Law Center, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/C%20Adams%207-18-2013.pdf, accessed 1-6-14.

In Shelby County, the Supreme Court characterized the Section 4 triggers as "extraordinary and unprecedented." By 2013, these 1965 triggers had stagnated into a scattershot rule to force 16 states to seek federal approval for thousands of small voting changes. Mississippi was captured, but so was New Hampshire. Alabama was subject to Section 5, but so were New York and Alaska. Arkansas, the epicenter of school desegregation in 1957 was not covered, but Michigan was. Some counties in North Carolina were covered, and neighboring counties weren't. Virginia, a state which elected a black governor and twice voted for President Obama was captured by Section 4. By 2013, the Section 4 triggers appeared obsolete, and the Supreme Court agreed in Shelby. When the coverage formula was written in 1965, My Fair Lady had just won the Oscar for Best Picture, My Girl by the Temptations topped the charts and Bonanza was the most watched show on television. The Supreme Court in Shelby recognized what most Americans now recognize and appreciate: elections in 2013 bear no resemblance to elections in 1965.

2. Maintaining the coverage requirement would be irrational—no empirical basis for its continuation in the current context

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, www.heritage.org/research/testimony/2013/08/the-voting-rights-act-after-the-supreme-courts-decision-in-shelby-county, accessed 1-6-13.

Without evidence of widespread voting disparities among the states, continuing the coverage formula unchanged in 2006 was irrational. As the Court said in the Shelby County decision, Congress "did not use the record it compiled to shape a coverage formula grounded in current conditions." Instead, it reenacted Section 4 "based on 40-year-old facts having no logical relation to the present day." It was no different than if Congress in 1965 had based the coverage formula not on what had happened in the prior year's election in 1964, but had instead opted to base coverage on registration and turnout from the Hoover era in 1928 or the Roosevelt election in 1932.

3. The coverage formula is invalid—it relies on facts that no longer hold

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, "Shelby County v. Holder: The Restoration of Constitutional Order," CATO SUPREME COURT REVIEW, 2012-2013, p. 53.

Not surprisingly, the majority found that the coverage formula was unsustainable under Katzenbach. Whereas Congress, in 1965, "looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both," Congress, in 2006, relied on "a formula based on 40-year-old facts having no logical relation to the present day." That Congress expressly sought to target vote dilution, yet chose to employ a formula tied to ballot access, provided decisive evidence that Section 4(b) was no longer rational in theory. The vote dilution evidence on which Congress relied to reenact Section 5 "played no role in shaping the statutory formula" used to base coverage until 2031. In other words, the coverage formula was no longer rational in theory because it was now divorced from the conduct Congress targeted and the legislative record it compiled in support of that statutory aim.

4. The coverage formula is irrational—even the dissenting opinion cannot answer this argument

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, "Shelby County v. Holder: The Restoration of Constitutional Order," CATO SUPREME COURT REVIEW, 2012-2013, p. 60-61.

In sum, the dissent simply had no answer to the majority's conclusion that Section 4(b)'s coverage formula is irrational in theory. The dissent offers a host of reasons why Congress should no longer have to defend the formula as rational in theory notwithstanding Katzenbach, why those leading the charge for reenactment might have assumed that the outdated formula would be upheld, and why the coverage formula is rational in practice. Whether or not those arguments have merit—we think not—they are no substitute for an argument on why Katzenbach's requirement that the formula be rational in theory has been met or why that requirement has lost legal pertinence. It therefore makes sense that the dissent would devote most of its opinion to why Section 5 remains constitutional. When you have little to say, change the subject. Because the issue was beyond the scope of the majority's holding, however, it turned into a one-sided conversation. Yet it would be wrong to assume that the majority's failure to decide that question amounted to implicit concurrence in the dissent's view. Congress and the president should learn from the NAMUDNO experience and take the Court's concerns seriously before attempting to reinstall this same preclearance regime under a revised coverage formula.

Rightly Decided: Changed Conditions—Old Data

1. The South has changed—the data is very much out of date

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, "Strike Down Section 5," NATIONAL REVIEW, 2—27—13, http://www.heritage.org/research/commentary/2013/2/strike-down-section-5, accessed 1-5-14.
When the Supreme Court upheld Section 5 in 1966, it recognized that this law was an extraordinary intrusion into state sovereignty. It was needed in 1965 because dire and unique circumstances existed. No one can rationally argue that such conditions exist today. As the Supreme Court said several years ago in a similar case out of Texas, "things have changed in the South. . . . Blatantly discriminatory evasions of federal decrees are rare." Not only do voter-registration and -turnout rates "now approach parity," but "minority candidates hold office at unprecedented levels." In fact, in some covered states, black voters' registration and turnout often exceed those of white voters. By the time Section 5 approaches its latest termination date (in 2031 if the Supreme Court does not strike it down), states will have been covered under registration and turnout levels that are almost 70 years out-of-date. That is as if Congress, when it passed Section 5 in 1965, had based coverage on turnout in the 1896 election between William McKinley and William Jennings Bryan.

2. The South has changed—there is no rational basis for the current formula

Sharon Kehnemui, "US Supreme Court Strikes Down Key Component of Voting Rights Act," American Enterprise Institute, 6—25—13, www.aei.org/article/society-and-culture/civil-rights/us-supreme-court-strikes-down-key-component-of-voting-rights-act/, accessed 1-7-13.
Blum, who is director of The Project on Fair Representation (POFR), a not-for-profit legal defense foundation based in Alexandria, Va., provided counsel to Shelby County, Ala., which sued the federal government in 2010 claiming that the voting rights rules unfairly singled out jurisdictions based on outdated data. "We are grateful the Supreme Court recognized that our vibrant and diverse county no longer requires federal supervision of our elections," Frank C, Ellis, Jr., the county attorney for Shelby County, Ala., said. The entirety of nine states -- Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia -- and 69 other jurisdictions in California, Florida, New York, North Carolina, Michigan and South Dakota were originally covered by the law, which abolished barriers to voting and required the jurisdictions to get "preclearance" from the Justice Department to make any changes to voting rules. The formula … can no longer be used as a basis for subjecting jurisdictions to preclearance," Roberts wrote, noting that discriminatory practices are still forbidden by the law. Originally scheduled to expire in five years after it was enacted in 1965, the law had been renewed four times without any changes to acknowledge the progress made in minority voting. The 2006 vote in Congress, which received overwhelming support, put it in force for another 25 years. At the time the law was enacted, it had real impact. The racial disparity in voting in 1964 showed a 49.9 percentage-point gap in Alabama. But by 2004, that number was 0.9, according to a chart compiled by the Supreme Court from House and Senate compilations of Census data. In 2012, black turnout in Alabama was 3.5 percentage points higher than white turnout, according to the US Census. "There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula," Roberts wrote. "The justices correctly acknowledged that the covered jurisdictions should no longer be punished by the federal government for conditions that existed over 40 years ago," Ellis said. "The South is an altogether different place than it was in 1965." "The Supreme Court today confirmed that there are no meaningful differences in minority voting opportunities between the covered and non-covered jurisdictions," Blum said. "The American South long ago laid down the burdens of minority disfranchisement and has integrated African Americans fully into its political life. "The Supreme Court's opinion is a great testament to the character of the American people who have labored to fulfill the guarantee of racial equality in voting," he added.

Rightly Decided: Changed Conditions—Old Data [cont'd]

3. Defenses of the coverage formulas are highly suspect because they are based on decades-old data—they ignore that the country has changed

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." Katzenbach, 383 U. S., at 330. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." Northwest Austin, 557 U. S., at 204. As we explained, a statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." Id., at 203. The coverage formula met that test in 1965, but no longer does so. Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. § 6, 84 Stat. 315; § 102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. H. R. Rep. No. 109-478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, e.g., Katzenbach, supra, at 313, 329-330. [*2628] There is no longer such a disparity. In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

Rightly Decided: Changed Conditions—Registration / Voting Rates

1. The sections are no longer needed—voting rates, number of elected officials prove

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, www.heritage.org/research/testimony/2013/08/the-voting-rights-act-after-the-supreme-courts-decision-in-shelby-county, accessed 1-6-13.

The coverage formula of Section 4 was based on that disparity and Congress specifically designed it to capture those states that were engaging in such blatant discrimination. Thus, coverage under Section 4 was based on a jurisdiction maintaining a test or device as a prerequisite to voting as of Nov. 1, 1964, and registration or turnout of less than 50 percent in the 1964 election. Registration or turnout of less than 50 percent in the 1968 and 1972 elections was added in successive renewals of the law. That was the last time the coverage formula was revised, and Section 4 did not employ more current information on registration and turnout when Section 5 was last renewed in 2006. Section 5 was needed in 1965. But as the Court recognized, time has not stood still and "[n]early 50 year later, things have changed dramatically." The systematic, widespread discrimination against black voters has long since disappeared. As the Court recognized in the Northwest Austin case in 2009: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." As an example, in Georgia and Mississippi, which had such high disenfranchisement rates in 1964, black registration actually exceeded white registration in the 2004 election, just two years before Congress was considering the renewal of Section 5. Black registration exceeded white registration by 0.7 percent in Georgia and by 3.8 percent in Mississippi. The Census Bureau's May 2013 report on the 2012 election showed that blacks voted at a higher rate than whites nationally (66.2 percent vs. 64.1 percent). That same report shows that based on Census regional data, black voting rates exceeded those of whites in Virginia, South Carolina, Georgia, Alabama, and Mississippi, which were covered in whole by Section 5, and in North Carolina and Florida, portions of which were covered by Section 5. Louisiana and Texas, which were also covered by Section 5, showed no statistically significant disparity between black and white turnout. Minority registration and turnout are consistently higher in the formerly covered jurisdictions than in the rest of the nation.

2. Turnout figures show that the original rationale for preclearance no longer holds

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally [*2619] covered by § 5 than it [was] nationwide." Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U. S. 193, 203-204 (2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b). At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time [**660] ago, "the Act imposes current burdens and must be justified by current needs."

Rightly Decided: Changed Conditions—VRA Did Its Job

1. The ruling shows that the VRA worked and that the Section 4 provisions are no longer necessary

Abigail Thernstrom, Vice-Chairwoman, U.S. Commission on Civil Rights, "A Vindication of the Voting Rights Act," WALL STREET JOURNAL, 6—26—13, www.aei.org/article/politics-and-public-opinion/judicial/a-vindication-of-the-voting-rights-act/, accessed 1-7-14.

The Supreme Court did itself proud on Tuesday when it struck down Section 4 of the Voting Rights Act. That is the provision of the law containing the formula that determined which jurisdictions should be kept in the penalty box for suspected discrimination—even after nearly half a century of dramatic and heartening racial progress. While passage of the 1965 act marked the death knell of the Jim Crow South, the elimination of one of the act's obsolete provisions this week reflects the progress since. With the court's decision in Shelby County v. Holder, the "covered" jurisdictions (mostly in the South) are free at last to exercise their constitutional prerogative to regulate their own elections. In killing Section 4, the court made unenforceable the preclearance provision in Section 5 of the act that required certain states and jurisdictions to obtain Justice Department permission for any laws or actions related to voting. So "covered" jurisdictions are no longer covered by Section 4, and the requirement that they get federal approval before even moving a polling place across the street is dead.

2. The majority opinion reflects the fact that the Voting Rights Act worked, and is no longer needed

Abigail Thernstrom, Vice-Chairwoman, U.S. Commission on Civil Rights, "A Vindication of the Voting Rights Act," WALL STREET JOURNAL, 6—26—13, www.aei.org/article/politics-and-public-opinion/judicial/a-vindication-of-the-voting-rights-act/, accessed 1-7-14.

In his majority opinion, Chief Justice John Roberts described the purpose of the 15th Amendment—which forbids government at any level to deny voting rights to citizens based on race—as ensuring a better future. But the safe minority districts are not that better future. These districts once served the purpose of protecting black candidates from white competition when Southern whites would not vote for black candidates. But times have changed, and whites now vote for black candidates at every level of government. The Section 4 coverage formula ignores current political conditions, Chief Justice Roberts wrote: "No one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination . . . that clearly distinguished the covered jurisdictions from the rest of the Nation" in 1965. He also cited the dramatically increased figures on black turnout and registration, as well as black office-holding. In enforcing the Voting Rights Act, Congress, the Justice Department and the courts have coped with the question of when decisions about electoral matters can be trusted to elected representatives by ignoring racial progress. Blacks, they have implied, live in a world in which the clock has almost stopped. The issue of racial change has long sharply divided right and left, on the bench and off. Justice Sonia Sotomayor is too young ever to have witnessed the horrors of the South before the great civil rights acts of the mid-1960s. Yet, in the oral argument in Shelby, she questioned the whole notion that race relations in the region have been transformed. Whatever the rates of black political participation in a covered jurisdiction, however many blacks are elected to legislative office, the liberals on the court were not likely to be satisfied. In the oral argument, a skeptical Justice Stephen Breyer drew an analogy between the problem of voting discrimination and a state whose crops had a plant disease in 1965. But "the disease is still there." No statistical evidence could possibly convince him that what he believed to be true was in fact false. Justice Roberts gave full credit to the 1965 law for the progress he noted. The Voting Rights Act "has proved immensely successful at redressing racial discrimination and integrating the voting process," he said. It was an important statement—an acknowledgment of the efficacy of the act in the years it was so badly needed. As for the coverage formula of Section 4—which was originally only supposed to last five years—the justice made clear that even if it could no longer be justified, it should never be forgotten. In 1965, Southern blacks were still in political chains, and the hold of whites on political power made all other forms of racial subjugation possible. It was part of a law that was an indispensable, beautifully designed and effective response to a profound moral wrong—Southern black disfranchisement that persisted 96 years after passage of the 15th Amendment. Justice Roberts's opinion for the court is a celebration of the Voting Rights Act—and of a nation that made it work and outgrew its most-radical provisions.

Rightly Decided: Changed Conditions—VRA Did Its Job [cont'd]

3. Section 5 has served its purpose, is very successful

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, "Shelby County v. Holder: The Restoration of Constitutional Order," CATO SUPREME COURT REVIEW, 2012-2013, p. 31.
The Voting Rights Act of 1965 is possibly the most consequential federal law in our nation's history. Passed in the aftermath of "Bloody Sunday" and pursuant to Congress's authority to enforce the Fifteenth Amendment by "appropriate" legislation, the VRA represented a decisive federal response to the campaign of voting discrimination that had plagued the South since Reconstruction. The law included a plethora of remedies designed to root out systematic efforts to disenfranchise African Americans. Unique among them was Section 5's "preclearance" obligation, which operated against certain states and political subdivisions pursuant to Section 4(b)'s "coverage" formula. Under those provisions, jurisdictions with the worst records of discrimination could not make changes to their voting laws until the Department of Justice—or a special three-judge federal district court in Washington, D.C.—approved them. It took time and effort, but Section 5 was remarkably successful. No one should doubt that preclearance helped transform the South from a bastion of voting discrimination into a place where racial equality is an institutional priority.

4. The patterns of discrimination that justified Section 4 no longer hold

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13,
www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.
(b) Section 4's formula is unconstitutional in light of current conditions. Pp. 17-25. [*2617] (1) In 1966, the coverage formula was "rational in both practice and theory." Katzenbach, supra, at 330. It looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, the "coverage formula raise[d] serious constitutional questions." Northwest Austin, supra, at 204. Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years. And voter registration and turnout numbers in covered States have risen dramatically. In 1965, the States could be divided into those with a recent history of voting tests and low voter registration and turnout and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. Pp. 17-18.

Rightly Decided: Changed Conditions—Answers to "Congressional Findings"

1. The congressional record does not show substantial discrimination rising to a level that justifies intrusive regulation

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

(3) Respondents also rely heavily on data from the record com piled by Congress before reauthorizing the Act. Regardless of how one looks at [**659] that record, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that clearly distinguished the covered jurisdictions from the rest of the Nation in 1965. Katzenbach, supra, at 308, 315, 331. But a more fundamental [***4] problem remains: Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead re-enacted a formula based on 40-year-old facts having no logical relation to the present day. Pp. 21-22.

2. Claims about the 2006 Congressional fact-finding are disingenuous—they do not show pervasive discrimination, and the coverage formulas are still based on 1965 data

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows — they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh § 2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Compare, e.g., 679 F. 3d, at 873-883 (case below), with id., at 889-902 (WILLIAMS, J., dissenting). 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. Katzenbach, supra, at 308, 315, 331; Northwest Austin, 557 U. S., at 201. But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, see post, at 23, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today. The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject [***16] it to preclearance. Post, at 23-30. 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. Shelby [*2630] County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The county was selected based on that formula, and may challenge it in court.

3. 2006 re-authorization included no justification for continued federal scrutiny

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "America Has Changed, So Voting Rights Act Section 5 Is No Longer Constitutional," CATO AT LIBERTY, 1—2—13, http://www.cato.org/blog/america-has-changed-so-voting-rights-act-section-5-no-longer-constitutional, accessed 1-3-14.

VRA enforcement went on to successfully defeat the systemic discrimination that had once justified Section 5. In 2006, however, after several successive reauthorizations – the last of which, in 1981, also made permanent a provision (Section 2) aimed at discrete instances of discrimination in voting – Congress reauthorized Section 5 for another 25 years. It did so without explaining why the covered jurisdictions had to be subject to such an intrusive process on the basis of an obsolete formula, particularly when all of the evidence showed that the goal of minority representation and access to voting was achieved (and indeed that black voter registration and voting rates were higher in covered jurisdictions than elsewhere).

Rightly Decided: Changed Conditions—Answers to "Congressional Findings" [cont'd]

4. Significant progress has been made in ending voter discrimination—Congress's 2006 findings also support this claim

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[[**667] v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." Northwest Austin, 557 U. S., at 202. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See § 6, 84 Stat. 315; § 102, 89 Stat. 400. Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." § 2(b)(1), 120 Stat. 577. The House Report elaborated that "the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." H. R. Rep. No. 109-478, p. 12 (2006). That Report also explained that there have been "significant increases in the number of African-Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act. Id., at 18. [*2626]

Rightly Decided: Federalism Concerns

1. Federal election oversight raises serious federalism issues

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Shortly after this reauthorization, a Texas utility district brought suit, seeking to bail out from the Act's coverage and, in the alternative, challenging the Act's constitutionality. See Northwest Austin, 557 U. S., at 200-201. A three-judge District [***7] Court explained that only a State or political subdivision was eligible to seek bailout under the statute, and concluded that the utility district was not a political subdivision, a term that encompassed only "counties, parishes, and voter-registering subunits." Northwest Austin Municipal Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 232 (DC 2008). The District Court also rejected the constitutional challenge. Id., at 283. We reversed. We explained that "`normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" Northwest Austin, supra, at 205 (quoting Escambia County v. McMillan, 466 U. S. 48, 51 (1984) (per curiam)). Concluding that "underlying constitutional concerns," among other things, "compel[led] a broader reading of the bailout provision," we construed the statute to allow the utility district to seek bailout. Northwest Austin, 557 U. S., at 207. In doing so we expressed serious doubts about the Act's continued constitutionality. We explained that § 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." Id., at 202, 203 (internal quotation marks omitted). We also noted that "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." Id., at 202. Finally, we questioned whether the problems that § 5 meant to address were still "concentrated in the jurisdictions singled out for preclearance." Id., at 203. Eight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional. Ultimately, however, the Court's construction of the bailout provision left the constitutional issues for another day.

2. Federalism grounds validate the Supreme Court’s decision

Kevin Clarkson, “Court’s Decision on Voting Rights Act Long Overdue,” THE ALASKA BAR RAG v. 37, July-September 2013, lexis.

The Majority's reasoning rests heavily upon concepts of federalism and state sovereignty. The Constitution and laws of the United States are supreme. But, this does not give the Federal Government a general right to review and veto state enactments before they go into effect. A proposal to grant the Federal Government the authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect subject to later challenge under the Supremacy Clause. By our system of federalism, States retain broad autonomy in structuring their governments and pursuing legislative objectives. And, by the Tenth Amendment, all powers not specifically granted to the Federal Government are reserved to the States and the People. This structure of federalism, the Shelby County Majority explains, "preserves the integrity, dignity, and residual sovereignty of the States." Sovereignty which is fundamentally required to be equal among the States. As the Court explained, our Nation "was and is a union of States, equal in power, dignity and authority." Sections 4 and 5 of the VRA "sharply depart[] from these basic principals." Despite the tradition of equal sovereignty, the Act applies to only nine States and several counties. For covered jurisdictions, preclearance "not only switches the burden of proof," but also applies substantive standards quite different from those governing the rest of the nation." This "stringent" and "potent" remedy was justified by the conditions prevailing in 1965. As the Court explained in Katzenbach, "legislative measures not otherwise appropriate" could be justified by "exceptional conditions."

3. The invalidated parts of the law infringe upon critical state powers

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, “Shelby County v. Holder: The Restoration of Constitutional Order,” CATO SUPREME COURT REVIEW, 2012-2013, p. 49.

On June 25, 2013, the Supreme Court invalidated Section 4(b)’s coverage formula as unconstitutional, thus rendering Section 5’s preclearance obligation inoperative. Chief Justice Roberts authored the majority opinion, which Justices Scalia, Kennedy, Thomas, and Alito joined in full. Chief Justice Roberts began the majority’s analysis of Sections 4(b) and 5 by highlighting the extraordinary nature of the preclearance obligation. To place this extraordinary remedy in proper context, he reiterated the federalism principles that inhere in our constitutional order. As the chief justice explained, the “federal Government does not . . . have a general right to review and veto state enactments before they go into effect”; the authority to “negative” state laws was considered and rejected at the Constitutional Convention. Rather, the “States retain broad autonomy in structuring their governments and pursuing legislative objectives,” which includes “power to regulate elections.” “Not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal sovereignty’ among the States.”

Rightly Decided: Federalism Concerns [cont'd]

4. The Voting Rights Act raises serious federalism concerns and discourages good state laws

Roger Clegg, President and General Counsel, Center for Equal Opportunity, "The Future of the Voting Rights Act after Bartlett and NAMUDNO," CATO SUPREME COURT REVIEW, 2008-2009, p. 49-50.
But there is bad news, too. First, there is no longer any rhyme or reason to the jurisdictions that are covered by Section 5. And given the intrusiveness of the statute, this problem is not simply an aesthetic one: It raises serious federalism concerns. Second, both Sections 2 and 5—by incorporating ''results'' and ''effects'' tests, respectively— have banned much that is not illegal under the Fifteenth Amendment. Further, not only have they required something that is not required by the Fifteenth Amendment, but the requirement itself undermines the Amendment's guarantees and voting integrity generally. This in turn is objectionable not just as a matter of federalism and federal overreach, but because state laws that might be objectively good are discouraged or struck down (e.g., anti-voter fraud measures that might have a disparate impact, or long-standing laws preventing criminals from voting), and because state practices that are bad are now required (in particular, racial segregation of voting districts through racial gerrymandering).

5. Our presumption should be against federal preemption of state law

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13,
www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.
The Constitution and laws of the United States are "the supreme Law of the Land." U. S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. See 1 Records of the Federal Convention of 1787, pp. 21, 164-168 (M. Farrand ed. 1911); 2 id., at 27-29, 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. Amdt. 10. This "allocation of [***9] powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." Bond v. United States, 564 U. S. ___, ___ (2011) (slip op., at 9). But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." Ibid. (internal quotation marks omitted). More specifically, "`the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" Gregory v. Ashcroft, 501 U. S. 452, 461-462 (1991) (quoting Sugarman v. Dougall, 413 U. S. 634, 647 (1973); some internal quotation marks omitted). Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, § 4, cl. 1; see also Arizona v. Inter Tribal Council of Ariz., Inc., ante, at 4-6. But States have "broad powers to determine the conditions under which the right of suffrage may be exercised." Carrington v. Rash, 380 U. S. 89, 91 (1965) (internal quotation marks omitted); see also Arizona, ante, at 13-15. And "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." Boyd v. Nebraska ex rel. Thayer, 143 U. S. 135, 161 (1892). Drawing lines for congressional districts is likewise "primarily the duty and responsibility of the State." Perry v. Perez, 565 U. S. ___, ___ (2012) (per curiam) (slip op., at 3) (internal quotation marks omitted).

Rightly Decided: General

1. Congress's use of the Act does not make sense—voter discrimination has eased substantially while the oversight has been made even more stringent

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

There is no doubt that these improvements are in large part because of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. See § 2(b)(1), 120 Stat. 577. During the "Freedom Summer" of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African-American voters. See United States v. Price, 383 U. S. 787, 790 (1966). On "Bloody Sunday" in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African-American enfranchisement. See Northwest Austin, supra, at 220, n. 3 (THOMAS, J., concurring in judgment in part and dissenting in part). Today both of those towns are governed by African-American mayors. 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. Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized — as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40 — a far cry from the initial five-year period. See 42 U. S. C. § 1973b(a)(8). Congress also expanded the prohibitions in § 5. We had previously interpreted § 5 to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups. See Bossier II, 528 U. S., at 324, 335-336. In 2006, Congress amended § 5 to prohibit laws that could have favored such groups [*2627] but did not do so because of a discriminatory purpose, see 42 U. S. C. § 1973c(c), 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," Bossier II, supra, at 336 (citation and internal quotation marks omitted). 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." § 1973c(b). In light [***13] of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.

2. Voting Rights Act is flawed—outlaws voting provisions that may even have discriminatory effects, even when they are not discriminatory on face

Roger Clegg, President and General Counsel, Center for Equal Opportunity, "The Future of the Voting Rights Act after Bartlett and NAMUDNO," CATO SUPREME COURT REVIEW, 2008-2009, p. 38-39.

If a voting practice or procedure is racially nondiscriminatory on its face, is applied equally and nondiscriminatorily, and was not adopted with any discriminatory intent, then can it be said to be racial discrimination? For example, suppose that a state does not allow prison inmates to vote. Suppose further that this law applies to all inmates without regard to color, was adopted without a desire to disenfranchise African Americans (indeed, perhaps when the state had very few African Americans, or when most of the African Americans there were slaves and thus were never expected to vote anyhow), and has always been applied to all inmates without regard to race. But it turns out that, in 2009, there is now a substantially higher percentage of African Americans in the prison population than in the general population. Are African Americans now being denied the right to vote ''on account of race'' (to quote the Fifteenth Amendment)? If you said yes, you may have a future in this-or-that Legal Defense and Education Fund. The correct answer is that this is not racial discrimination, and so such laws are not fairly within Congress's enforcement authority under Section 2 of the Fifteenth Amendment. What's more, whenever the government bans actions (public or private) that merely have racially disparate impact, two bad outcomes are encouraged that would not be encouraged, or would at least be encouraged less, if the government stuck to banning actions that are actually racially discriminatory. First, actions that are perfectly legitimate will be abandoned. Second, if the action is valuable enough, then surreptitious—or not so surreptitious—racial quotas will be adopted so that the action is no longer racially disparate in its impact.

Rightly Decided: General [cont'd]

3. Federal scrutiny is no longer warranted

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "Jim Crow Is Dead. Long Live the Constitution," BLOOMBERG, 6—25—13, http://www.cato.org/publications/commentary/jim-crow-dead-long-live-constitution, accessed 1-3-14.

Accordingly, it should be no surprise that the chief justice, again writing for the court, began his opinion by noting that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions." For example, the racial gap in voter registration and turnout is lower in states originally covered by Section 5 than it is nationwide. Blacks in some covered states have actually registered and voted at higher rates than whites. Facetious tests and sinister devices are now permanently banned; even individual violations are exceedingly rare, and no more likely to occur in jurisdictions that Section 4 sweeps in than in the rest of the country.

4. Enhanced scrutiny is no longer needed—'Jim Crow' has been defeated

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "Jim Crow Is Dead. Long Live the Constitution," BLOOMBERG, 6—25—13, http://www.cato.org/publications/commentary/jim-crow-dead-long-live-constitution, accessed 1-3-14.

In other words, three generations of federal intrusion on state sovereignty have been more than enough to kill Jim Crow. As Justice Clarence Thomas wrote in 2009, an acknowledgment of the unconstitutionality of the existing regime "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA." That's why the court acted as it did, recognizing that the nation had changed and that "extraordinary measures" could no longer be justified in a nation where widespread racial disenfranchisement is, thankfully, consigned to history books.

5. "Reverse engineering" justifications simply do not hold water—fundamental conditions have changed

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

The Government suggests that Katzenbach sanctioned such an approach, [**670] but the analysis in Katzenbach was quite different. Katzenbach reasoned that the coverage formula was rational because the "formula . . . was relevant to the problem": "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U. S., at 329, 330. Here, by contrast, the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one — subjecting a disfavored subset of States to "extraordinary legislation otherwise unfamiliar to our federal system," Northwest Austin, supra, at 211 — that failure to establish even relevance is fatal. The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then — regardless of how that discrimination compares to discrimination in States unburdened by coverage. Brief for Federal Respondent 49-50. This argument does not look to "current political conditions," Northwest Austin, supra, at 203, but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history — rightly so — in sustaining the disparate coverage of the Voting Rights Act in 1966. See Katzenbach, supra, at 308 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."). But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress [*2629] reauthorized in 2006 ignores these developments, keeping the focus on decades-old data [***15] relevant to decades-old problems, rather than current data reflecting current needs.

Rightly Decided: Interest Group Hijacking

1. The Act has allowed interest groups, in collaboration with the Department of Justice, to legally abuse localities

J. Christian Adams, founder, Election Law Center, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/C%20Adams%207-18-2013.pdf, accessed 1-6-14.

Some groups and activists who disagree with Shelby prefer that states run a gauntlet of Washington bureaucrats before they may implement voting changes. Unfortunately, some of those same groups have participated in abuses of power. These abuses tainted Section 5 enforcement before Shelby. Simply, the Justice Department has colluded with racial interest groups and behaved inappropriately while conducting Section 5 reviews. This conduct has cost federal taxpayers millions of dollars in sanctions. Those who supported continued use of Section 5 are either unfamiliar with these abuses, or are comfortable with them. For example, in Johnson v. Miller (864 F. Supp. 1354, 1364 (S.D. Ga. 1994)), the United States District Court sanctioned the Voting Section $594,000 for collusive misconduct by DOJ Voting Section lawyers. A federal court noted that the ACLU was "in constant contact with the DOJ line attorneys." Pronouncing the communications between the DOJ and the ACLU "disturbing," the court declared, "It is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." After a Voting Section lawyer professed that she could not remember details about the relationship, the court found her "professed amnesia" to be "less than credible." Abuse of power in the Section 5 process is not confined to Johnson v. Miller. As recently as this May, the Justice Department Voting Section used the Section 5 process to extract legally indefensible concessions from states that a federal court would never impose. In places like Rock Hill, South Carolina, the Voting Section permitted blatantly unconstitutional district lines to survive in order to prop up the electoral success of multiple election officials based on their race

2. The sections had allowed the Department of Justice to abuse its authority

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, www.heritage.org/research/testimony/2013/08/the-voting-rights-act-after-the-supreme-courts-decision-in-shelby-county, accessed 1-6-13.

Second, the Civil Rights Division of the Justice Department has abused its authority and power under Section 5 on numerous occasions. South Carolina was forced to spend $3 million in 2012 litigating a specious objection filed by the Division against its voter ID law. A federal court found that there was no basis for the objection. Similarly, during the Clinton administration, the American taxpayers were forced to pay over $4.1 million in attorneys' fees and costs awarded to defendants falsely accused of discrimination by the Division, including in several Section 5 cases. For example, in Johnson v. Miller, which involved Georgia's 1992 legislative redistricting plan, a federal court severely criticized the Division for its unprofessional relationship with the ACLU, the "professed amnesia" of its lawyers when questioned by the court over their activities (which the court found "less then credible), and the Division's "implicit commands" to the Georgia legislature over how to conduct its redistricting. This case cost American taxpayers almost $600,000 in attorneys' fees and costs awarded to Georgia. The district court found that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment." The court was surprised that the Justice Department "was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote." As the U.S. Supreme Court found, instead of basing its decision on Georgia's redistricting plan on whether there was evidence of discrimination as required under Section 5, "it would appear the Government was driven by its policy of maximizing majority-black districts." In related cases filed in the early 1990s, a federal district court similarly criticized the Division, finding that it was trying to use its power "as a sword to implement forcibly its own redistricting policies." The court found that the Louisiana legislature "succumbed to the illegitimate preclearance demands of the Justice Department" that "impermissibly encouraged – nay, mandated – racial gerrymandering." Those cases cost the American public $1.1 million in attorneys' fees and costs awarded to Louisiana.

Rightly Decided: Local Burdens

- **The preclearance requirements imposed a significant burden on localities**

J. Christian Adams, founder, Election Law Center, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/C%20Adams%207-18-2013.pdf, accessed 1-6-14.

The Supreme Court's characterization in Shelby of the burdens imposed on a covered jurisdiction in 2013 is similar to the Court's characterization in 1966 in South Carolina v. Katzenbach of preclearance obligations as "stringent and complex." The burdens are significant. Our Constitution vests states with the power to run their own elections. This diffusion of power is designed to protect individual liberty. The Founders knew that centralizing control of elections would eventually threaten individual freedom.

Rightly Decided: New Formula Permitted

1. The decision leaves Section 2 in place and allows Congress to draft an up-to-date coverage formula

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." Blodgett v. Holden, 275 U. S. 142, 148 (1927) (Holmes, J., concurring). We do not do so lightly. That 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. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance. Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Presley, 502 U. S., at 500-501. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions. The judgment of the Court of Appeals is reversed.

2. Congress could simply pass a new formula

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, “Shelby County v. Holder: The Restoration of Constitutional Order,” CATO SUPREME COURT REVIEW, 2012-2013, p. 33.

It’s now Congress’s move. If Congress and the president can find their way to a new coverage formula that can meet the constitutional standard, the battle over Section 5’s constitutionality will be joined for a third time since 2006. But perhaps those disappointed with the Supreme Court’s decision and interested in pursuing that course should think twice before reinstituting the sweeping preclearance regime reenacted in 2006. “As the Shelby County decision shows, when the Court gives the political branches one last chance to remedy a program’s constitutional defects, it is probably not bluffing.” Congress would be wise to reconsider whether an emergency response to rampant voting discrimination remains justifiable given the transformation our nation has seen since 1965.

Rightly Decided: Racial Gerrymandering

1. Voting Rights Act-forced gerrymandering discriminates against non-protected groups

Roger Clegg, President and General Counsel, Center for Equal Opportunity, "The Future of the Voting Rights Act after Bartlett and NAMUDNO," CATO SUPREME COURT REVIEW, 2008-2009, p. 40-41.
Note also that the VRA literally denies the equal protection of the laws by providing legal guarantees to some racial groups that it denies to others. A minority group may be entitled to have a racially gerrymandered district, or be protected against racial gerrymandering that favors other groups. At the same time, other groups are not entitled to gerrymander and indeed may lack protection against gerrymandering that hurts them. This is nothing if not treating people differently based on their race. Under the Constitution, no racial group should be guaranteed ''safe'' districts or districts where it has ''influence'' or some combination thereof unless all other groups are given the same guarantee—a guarantee that is impossible to give (even if it were a good idea to encourage racial obsession).

2. The ruling will benefit African American voters—will end counterproductive racialized gerrymandering

Abigail Thernstrom, Vice-Chairwoman, U.S. Commission on Civil Rights, "A Vindication of the Voting Rights Act," WALL STREET JOURNAL, 6—26—13, www.aei.org/article/politics-and-public-opinion/judicial/a-vindication-of-the-voting-rights-act/, accessed 1-7-14.
The court's ruling Tuesday will benefit black America. Enforcement of the statute—including the imposition of "safe" black (and Hispanic) legislative seats as a remedy for discrimination—has herded black voters into what even North Carolina Democrat and Congressional Black Caucus member Rep. Mel Watt once called "racial ghettos." Rep. Watt was referring to race-based districts that have generally rewarded minority politicians who campaign (and win) by making the sort of overt racial appeals that are the staple of invidious identity politics. The black candidates who ran in such enclaves never acquired the skills to venture into the world of competitive politics in majority-white settings. They were thus thrust to the sidelines of American political life—which is precisely what the statute did not intend. In this sense the law became a brake on minority political aspirations.

3. The Voting Rights Act does not make sense in the current context—it effectively mandates race-based gerrymandering

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "The Voting Rights Act Is Outmoded, Unworkable," NATIONAL LAW JOURNAL, 2—27—12, http://www.cato.org/publications/commentary/voting-rights-act-is-outmoded-unworkable, accessed 1-3-14.
Fair enough, but this reasonable-sounding decision belies larger issues: The Voting Rights Act has served its purpose but is now outmoded and unworkable — and is thus itself now unconstitutional. To understand why, let's review the background of this case, Perry v. Perez. Not surprisingly, it arises out of the redistricting that all states engage in after every decennial census: People move around, and states gain or lose congressional seats, so election maps need to be redrawn. Some activist groups challenged the Texas Legislature's maps, alleging racial discrimination under Section 2 of the Voting Rights Act. At the same time, Texas sought the Section 5 "preclearance" it needs to implement them. Originally conceived as a check on states where discrimination was prevalent in the 1960s, Section 5 requires certain jurisdictions — a bizarre list that includes some of the Old Confederacy, plus Alaska, Arizona and certain counties or townships in eight other states, including (only) three New York City boroughs — to get federal approval before changing any election laws. To obtain this preclearance, these jurisdictions may propose only changes that do not result in "retrogression," a reduction in minority voters' ability to elect their "preferred" candidates. Section 5 was a valuable tool in the fight against systemic disenfranchisement, but it now facilitates the very discrimination it was designed to prevent. Indeed, the prohibition on retrogression effectively requires districting that assures that minority voters are the majority in some districts — an inherently race-conscious mandate. The law, most recently renewed in 2006 for another 25 years, is based on deeply flawed assumptions and outdated statistical triggers, and it flies in the face of the 15th Amendment's requirement that all voters be treated equally.

Rightly Decided: Racial Gerrymandering [cont'd]

4. Current provisions actually encourage racial segregation in congressional districting

Roger Clegg, President and General Counsel, Center for Equal Opportunity, "The Future of the Voting Rights Act after Bartlett and NAMUDNO," CATO SUPREME COURT REVIEW, 2008-2009, p. 35.

According to my handy pocket copy of the U.S. Constitution (Cato edition), Section 1 of the Fifteenth Amendment provides: ''The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.'' Section 2 provides: ''The Congress shall have power to enforce this article by appropriate legislation.'' It's hard to fault either provision. Of course nobody should be kept from voting because he or she is the wrong color; and, given the historical context, it makes perfect sense to give the national legislature the authority to pass statutes that make the guarantee a reality. The trouble is that the principal statutes that Congress has passed in the name of the Fifteenth Amendment go far beyond enforcing this guarantee. Worse, in many respects the statutes passed are used to encourage racial segregation of voting districts through racial gerrymandering—a result quite at odds with the underlying constitutional guarantee.

5. 2006 authorization actually encouraged race-based gerrymandering

Ilya Shapiro, senior fellow, constitutional studies, Cato Institute, "America Has Changed, So Voting Rights Act Section 5 Is No Longer Constitutional," CATO AT LIBERTY, 1—2—13, http://www.cato.org/blog/america-has-changed-so-voting-rights-act-section-5-no-longer-constitutional, accessed 1-3-14.

Indeed, the 2006 revisions made matters worse, authorizing the federal government to reject any electoral changes in covered jurisdictions whenever they are believed to "diminish[] the ability of minority citizens … to elect their preferred candidate of choice" – which has been taken to mean the need to gerrymander to preserve majority-minority districts. Ironically, Section 5 has become an obstacle to racial integration because race-conscious districting balkanizes the population and marginalizes minority legislators.

6. The law backfires—promotes race-based redistricting

Hans A. von Spakovsky, senior legal fellow, Heritage Foundation, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, www.heritage.org/research/testimony/2013/08/the-voting-rights-act-after-the-supreme-courts-decision-in-shelby-county, accessed 1-6-13.

Finally, two other serious problems must be noted with how Section 5 was interpreted and enforced. First, the "effects" test of Section 5 has led to a virtual apartheid system of redistricting, causing race to become a predominant factor in redistricting in covered jurisdictions. Jurisdictions are often forced to engage in racial discrimination to meet the Section 5 standard and create majority-minority districts. Rather than helping eliminate racial discrimination in voting, Section 5 has perpetuated it in redistricting and provided a legal excuse for legislators of both parties to engage in such discriminatory behavior when drawing boundary lines, manipulating district lines and isolating particular voters based entirely on their race. This is the exact opposite of the intention of the VRA, which the Supreme Court said was to "encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life."

Rightly Decided: State Equality / Sovereignty Concerns

1. States should have "equal sovereignty"—there must be extraordinary reasons justifying differential federal treatment of the states

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of equal sovereignty" among the States. Northwest Austin, supra, at 203 ([**665] citing United States v. Louisiana, 363 U. S. 1, 16 (1960); Lessee of Pollard v. Hagan, 3 How. 212, 223 (1845); and Texas v. White, 7 Wall. 700, 725-726 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." Coyle v. Smith, 221 U. S. 559, 567 (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." Id., at 580. Coyle concerned the admission of new States, and Katzenbach rejected the notion that the principle [*2624] operated as a bar on differential treatment outside that context. 383 U. S., at 328-329. At the same time, as we made clear in Northwest Austin, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. 557 U. S., at 203. The Voting Rights Act sharply departs from these basic principles. It suspends "all changes to state election law — however innocuous — until they have been precleared by federal authorities in Washington, D. C." Id., at 202. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. See 28 CFR §§ 51.9, 51.37. If a State seeks preclearance from a three-judge court, the process can take years. And despite the tradition of equal sovereignty, [***10] the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation." 679 F. 3d, at 884 (Williams, J., dissenting) (case below). All this explains why, when we first upheld the Act in 1966, we described it as "stringent" and "potent." Katzenbach, 383 U. S., at 308, 315, 337. We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." Id., at 334. We have since noted that the Act "authorizes federal intrusion into sensitive areas of state and local policymaking," Lopez, 525 U. S., at 282, and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government," Presley v. Etowah County Comm'n, 502 U. S. 491, 500-501 (1992). As we reiterated in Northwest Austin, the Act constitutes "extraordinary legislation otherwise [**666] unfamiliar to our federal system." 557 U. S. ___, at 211.

2. The invalidated sections unfairly discriminated against states and localities

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, "Shelby County v. Holder: The Restoration of Constitutional Order," CATO SUPREME COURT REVIEW, 2012-2013, p. 49-50.

Section 5, accordingly, "sharply departs" from these elemental constitutional principles by "suspend[ing] 'all changes to state election law . . . until they have been precleared by federal authorities in Washington, D.C.'" Indeed, it leaves states powerless to implement laws, sometimes for years, "that they would otherwise have the right to enact and execute on their own." Section 4(b) represents "an equally dramatic departure from the principle that all States enjoy equal sovereignty." It makes nine states (and additional counties) wait "months or years and expend funds to implement a validly enacted law," all while their neighboring states "can typically put the same law into effect immediately, through the normal legislative process."

Rightly Decided: State Equality / Sovereignty Concerns [cont'd]

3. Congress cannot punish areas for past wrongs—it must have a good reason to single out areas based on current practices

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

(2) The Government attempts to defend the formula on grounds that it is "reverse-engineered" — Congress identified the jurisdictions to be covered and then came up with criteria to describe them. Katzenbach did not sanction such an approach, reasoning instead that the coverage formula was rational because the "formula . . . was relevant to the problem." 383 U. S., at 329, 330. The Government has a fallback argument — because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965. But this does not look to "current political conditions," Northwest Austin, supra, at 203, instead relying on a comparison between the States in 1965. But history did not end in 1965. In assessing the "current need[]" for a preclearance system treating States differently from one another today, history since 1965 cannot be ignored. The Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress — if it is to divide the States — must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.

Rightly Decided: Voter Protections

- **Strict VRA enforcement makes it difficult to pass voter ID laws, which the public supports**

Jonathan S. Tobin, "Supreme Court Rightly Cites 'Old Data' in Voting Rights Act," CHRISTIAN SCIENCE MONITOR, 6—25—13, www.csmonitor.com/Commentary/Opinion/2013/0625/Supreme-Court-rightly-cites-old-data-in-Voting-Rights-Act, accessed 1-5-14.

This is a sensible decision that preserves the Voting Right Act yet strips it of a mechanism that is a vestigial remnant of past battles that have been long since resolved. If liberals and civil rights groups are blasting the court it is not because the right to vote is in any real danger in 2013 America but because the Voting Rights Act has become a handy tool they have used to prevent common sense measures about voting around the nation that have been wrongly labeled racist. For example, polls show the vast majority of Americans, including most African-Americans, regard the requirement that voters be able to identify themselves at the polls when they go to vote as a common sense measure needed to prevent voter fraud. Yet the Voting Rights Act was used by the Obama Justice Department to prevent some states from adopting Voter ID laws that the court has deemed constitutional and which have been put into law in other states. By continuing to wave the flag of Jim Crow on such flimsy grounds, civil rights groups have discredited the cause they seek to protect. Those who oppose the court's decision seem to think America should continue to pretend that its politics and society are no different than in 1965. We should all agree that the right to vote must be defended, but pretending that nothing has changed in America since then does neither the law nor the cause of equality any good.

Rightly Decided: Answers to "Federal Role Necessary"

1. A federal role in protecting voting rights is no longer needed and we should limit federal intrusion

Roger Clegg, President and General Counsel, Center for Equal Opportunity, "The Future of the Voting Rights Act after Bartlett and NAMUDNO," CATO SUPREME COURT REVIEW, 2008-2009, p. 50-51.
Given American history, it is easy to recognize, to borrow Clint Bolick's phrase, the problem of ''grassroots tyranny'' here—that, as James Madison discussed in Federalist No. 10, the federal government might be needed to prevent abuses by state and local governments. On the other hand, the federal government is also perfectly capable of abusing its power in this area, and, as an unintended (perhaps) consequence, this is what's happened. As is often the case, in this abuse there has been collaboration between liberal federal bureaucrats and activist judges. As is also often the case, this collaboration has replaced a colorblind ideal with politically correct color-consciousness. Adding to the problem is that partisans from both parties have happily supported the abuse. Bottom line: Friends of liberty—and opponents of racial discrimination in voting—should now favor less of a federal role than could have been justified in 1965. This aim of lessening the federal role should be pursued both through the political branches and through litigation, because the current text of the Voting Rights Act exceeds Congress's power. The Act should be refocused on fulfilling—not undermining—the Fifteenth Amendment's purpose: ensuring that the right to vote is not denied or abridged on account of race.

2. The provisions are no longer needed—racial discrimination in voting access has been largely eliminated

Roger Clegg, President and General Counsel, Center for Equal Opportunity, "The Future of the Voting Rights Act after Bartlett and NAMUDNO," CATO SUPREME COURT REVIEW, 2008-2009, p. 49.
The good news—and it is very good news—is that the problem of systemic exclusion of racial minorities from the polls no longer exists. This is not to say that there are not still occasional instances of such discrimination, but they are aberrant: The problem that the framers of the Fifteenth Amendment undoubtedly had foremost in their minds—and that, unconscionably, had festered until 1965— has been addressed. In this respect, then, Sections 2 and 5 of the Voting Rights Act can be hailed as stunningly successful.

Rightly Decided: Answers to "Fifteenth Amendment Powers"

1. Congress's actions are not justified—discrimination is no longer a problem and it has acted to increase restrictions

Justice Clarence Thomas, Concurring Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." Ante, at 1. In the face of "unremitting and ingenious defiance" of citizens' constitutionally protected right to vote, § 5 was necessary to give effect to the Fifteenth Amendment in particular regions of the country. South Carolina v. Katzenbach, 383 U. S. 301, 309 (1966). Though § 5's preclearance requirement represented a "shar[p] depart[ure]" from "basic principles" of federalism and the equal sovereignty of the States, ante, at 9, 11, the Court upheld the measure against early constitutional [***18] challenges because it was necessary at the time to address "voting discrimination where it persist[ed] on a pervasive scale." Katzenbach, supra, at 308. Today, our Nation has changed. "[T]he conditions that originally justified [§ 5] no longer characterize voting in the covered jurisdictions." Ante, at 2. As the Court explains: "`[V]oter turnout and [**674] registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.'" Ante, at 13-14 (quoting Northwest Austin Municipal Util. Dist. No. One v. Holder[*2632] , 557 U. S. 193, 202 (2009)). In spite of these improvements, however, Congress increased the already significant burdens of § 5. Following its reenactment in 2006, the Voting Rights Act was amended to "prohibit more conduct than before." Ante, at 5. "Section 5 now forbids voting changes with `any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, `to elect their preferred candidates of choice.'" Ante, at 6. While the pre-2006 version of the Act went well beyond protection guaranteed under the Constitution, see Reno v. Bossier Parish School Bd., 520 U. S. 471, 480-482 (1997), it now goes even further. It is, thus, quite fitting that the Court repeatedly points out that this legislation is "extraordinary" and "unprecedented" and recognizes the significant constitutional problems created by Congress' decision to raise "the bar that covered jurisdictions must clear," even as "the conditions justifying that requirement have dramatically improved." Ante, at 16-17. However one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5. As the Court aptly notes: "[N]o one can fairly say that [the record] shows anything approaching the `pervasive,' `flagrant,' `widespread,' and `rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time." Ante, at 21. Indeed, circumstances in the covered jurisdictions can no longer be characterized as "exceptional" or "unique." "The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." Northwest Austin, supra, at 226 (THOMAS, J., concurring in judgment in part and dissenting in part). Section 5 is, thus, unconstitutional.

2. Section 5 pre-clearance requirements run afoul of important constitutional principles

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, "Shelby County v. Holder: The Restoration of Constitutional Order," CATO SUPREME COURT REVIEW, 2012-2013, p. 31-32.

At the same time, that undeniable success came at a high cost. Preclearance deviates from our constitutional order in fundamental ways. Under our system of government, states are sovereign in the field of state and local elections. Yet preclearance deprived them of the right to self-government. It is therefore difficult to overstate just how novel preclearance is. For example, the Americans with Disabilities Act prevents state and local courthouses from denying access to the handicapped. But it does not require state and local governments to "preclear" their architectural drawings with DOJ before breaking ground on a new building. Therein lies the difference. It is one thing to ban discrimination in voting. It is another to place an entire region of the country in federal receivership.

Rightly Decided: Answers to "Fifteenth Amendment Powers" [cont'd]

3. Fourteenth and Fifteenth Amendment powers are not absolute—they are only intended to correct bad state behavior

J. Scott Detamore, attorney for the Mountain States Legal Foundation, Petition for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit, Shelby County, Alabama, petitioner, v. Eric Holder Jr., Attorney General et al., respondents, 8—23—12, http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-96-MSLF-Shelby-County-Cert-Amicus-Filed-8-23-12.pdf, accessed 1-8-14.

The Fourteenth and Fifteenth Amendments are remedial and merely prohibit certain State conduct. Thus, "Congress's power under § 5 extends only to 'enforcing the provisions of the Fourteenth Amendment[, which] [t]his Court has described . . . as 'remedial.' " Boerne, 521 U.S. at 519 (quoting Katzenbach, 383 U.S. at 326). Congress "has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." Id. That is, "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." Id. at 529. Constitutional difficulty arises when Congress, in a purported attempt to prevent unconstitutional conduct, legislates regulating conduct that is facially constitutional, without requiring proof of discriminatory intent – so-called "prophylactic legislation" like Section 5. In such a case, the question arises as to whether Congress has enforced the constitutional prohibition set forth in the Amendment, or whether it has unconstitutionally substantively defined the Amendment. To address this, Boerne pronounced the congruency and proportionality standard of review: There must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect. Id. at 519-20 (all emphasis added). In other words: While preventive rules are sometimes appropriate remedial measures, there must be congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the [degree of] evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. Id. at 530 (all emphasis added). This standard restrains Congress from unconstitutionally defining the substance of the Fourteenth and Fifteenth Amendments instead of enforcing them.

Rightly Decided: Answers to "Invalidated Section 5"

1. The Shelby holding side-stepped whether Section 5 is constitutional

William S. Consovoy and Thomas R. McCarthy, attorneys for Shelby County, Alabama in the case, "Shelby County v. Holder: The Restoration of Constitutional Order," CATO SUPREME COURT REVIEW, 2012-2013, p. 32-33.
In a 5–4 decision, the Supreme Court ruled that Section 4(b)'s outdated formula was no longer constitutional. Chief Justice John Roberts authored the majority opinion, which was joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito. Without a valid formula, no jurisdiction is subject to preclearance. The majority thus declined to decide whether Section 5 itself exceeded Congress's authority given the improvements that have taken place since 1965. Justice Thomas, who had previously found that Section 5 was no longer constitutional, would have decided that issue once and for all. Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, dissented. The dissenters would have upheld both challenged sections. In deciding the case in the way it did, the Supreme Court sidestepped a contentious dispute over the standard that Congress should be held to when exercising Fourteenth or Fifteenth Amendment enforcement authority in the context of voting, afforded Congress the opportunity to go back to the drawing board to design a rational coverage formula, and, most notably, avoided deciding whether preclearance itself remained a constitutional remedy. Unless your definition of "minimalism" is judicial abdication, the Supreme Court's decision invalidating a coverage formula that not even the attorney general could bring himself to defend on its own terms was modest in every relevant sense.

2. The Shelby decision did not find Section 5 unconstitutional

Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf, accessed 1-6-14.
The Supreme Court did not find Section 5 unconstitutional. Despite the vigorous facial attack mounted against Section 5, the Supreme Court did not hold, nor did the majority opinion even suggest, that Congress lacks the power to adopt a preclearance remedy – that is, to suspend all voting changes in particular jurisdictions pending federal review to screen the changes for racial discrimination. Therefore, the Court did not overrule – or bring into question – the Court's prior decisions in South Carolina v. Katzenbach, 383 U.S. 301 (1966) and City of Rome v. United States, 446 U.S. 156 (1980), which strongly upheld the power of Congress to adopt and reauthorize the preclearance remedy.

Rightly Decided: Answers to "Previously Upheld"

1. The previous necessity of the VRA does not justify giving it a "constitutional pass" now

Chief Justice John Roberts, with Justices Scalia, Kennedy, Thomas, and Alito, Majority Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary. At the risk of repetition, Katzenbach indicated that the Act was "uncommon" and "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions. 383 U. S., at 334, 335. Multiple decisions since have reaffirmed the Act's "extraordinary" nature. See, e.g., Northwest Austin, supra, at 211. Yet the dissent goes so far as to suggest instead that the preclearance requirement and disparate treatment of the States should be upheld into the future "unless there [is] no or almost no evidence of unconstitutional action by States." Post, at 33. In other ways as well, the dissent analyzes the question presented as if our decision in Northwest Austin never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite Northwest Austin's emphasis on its significance. Northwest Austin also emphasized the "dramatic" progress since 1965, 557 U. S., at 201, but the dissent describes current levels of discrimination as "flagrant," "widespread," and "pervasive," post, at 7, 17 (internal quotation marks omitted). Despite the fact that Northwest Austin requires an Act's "disparate geographic coverage" to be "sufficiently related" to its targeted problems, 557 U. S., at 203, the dissent maintains that an Act's limited coverage actually eases Congress's burdens, and suggests that a fortuitous relationship should suffice. Although Northwest Austin[***17] stated definitively that "current burdens" must be justified by "current needs," ibid., the dissent argues that the coverage formula can be justified by history, and that the required showing can be weaker on reenactment than when the law was first passed. There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish [*2631] between States in such a fundamental way based on 40-year-old [**673] data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

2. Only significant discrimination can justify the type of oversight brought by Section 5

J. Christian Adams, founder, Election Law Center, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/C%20Adams%207-18-2013.pdf, accessed 1-6-14.

In Shelby, the Supreme Court rejected the concept of so-called "second generation" structural racism to justify continued federal oversight of elections in 15 states. Congress should heed the warning. According to the Supreme Court, genuine, direct and immediate racial discrimination alone justifies federal intrusion into state sovereignty, not vague and attenuated so-called "second generational structural" discrimination. The Court made it clear that only certain current conditions could justify a formula for Section 5 coverage. Among the touchstones listed in Shelby are: "blatantly discriminatory evasions of federal decrees," lack of minority office holding, tests and devices, "voting discrimination 'on a pervasive scale,'" "flagrant" voting discrimination, or "rampant" voting discrimination. Again, pay close attention to the Supreme Court. Federal intrusion into powers reserved by the Constitution to the states must relate to these empirical circumstances. Triggers built around political or partisan goals cannot withstand Constitutional scrutiny. These extraordinary conditions in 1965 were what justified the extraordinary remedy of Section 5 oversight in 1965. Without such current extraordinary conditions, Congress may not impose modern extraordinary remedies on certain states.

Wrongly Decided: Topshelf

1. The case was wrongly decided—Justice Ginsburg's dissent proves why a strong federal role is necessary

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. Ante, at 21-22, 23-24. With that belief, and the argument derived from it, history repeats itself. The same assumption — that the problem could be solved when particular methods of voting discrimination are identified and eliminated — was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the "variety and persistence" of measures designed to impair minority voting rights. Katzenbach, 383 U. S., at 311; supra, at 2. In truth, the evolution of voting discrimination into more subtle second-generation barriers is [***39] powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding. Beyond question, the VRA is no ordinary legislation. It is extraordinary because [*2652] Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made. The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years" he had served in the House. [**696] 152 Cong. Rec. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner). After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." 2006 Reauthorization § 2(b)(7), 120 Stat. 577. That determination of the body empowered to enforce the Civil War Amendments "by appropriate legislation" merits this Court's utmost respect. In my judgment, the Court errs egregiously by overriding Congress' decision.

2. The case was wrongly decided—it invalidate a law that protects the voting rights of tens of millions of citizens

Andrew Cohen, fellow, Brennan Center for Justice, "On Voting Rights, a Decision as Lamentable as Plessy or Dred Scott," THE ATLANTIC, 6—25—13, www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/, accessed 1-6-14.

Let's be clear about what has just happened. Five unelected, life-tenured men this morning declared that overt racial discrimination in the nation's voting practices is over and no longer needs all of the special federal protections it once did. They did so, without a trace of irony, by striking down as unconstitutionally outdated a key provision of a federal law that this past election cycle alone protected the franchise for tens of millions of minority citizens. And they did so on behalf of an unrepentant county in the Deep South whose officials complained about the curse of federal oversight even as they continued to this very day to enact and implement racially discriminatory voting laws. In deciding Shelby County v. Holder, in striking down Section 4 of the Voting Rights Act, the five conservative justices of the United States Supreme Court, led by Chief Justice John Roberts, didn't just rescue one recalcitrant Alabama jurisdiction from the clutches of racial justice and universal enfranchisement. By voiding the legislative formula that determines which jurisdictions must get federal "preclearance" for changes to voting laws, today's ruling enables officials in virtually every Southern county, and in many other jurisdictions as well, to more conveniently impose restrictive new voting rules on minority citizens. And they will. That was the whole point of the lawsuit. Here is the link to the ruling.

Wrongly Decided: Topshelf [cont'd]

3. The VRA is not outdated—it protects against a very real threat of voter suppression, and the Shelby ruling is one of the worst in the Court's history

Andrew Cohen, fellow, Brennan Center for Justice, "On Voting Rights, a Decision as Lamentable as Plessy or Dred Scott," THE ATLANTIC, 6—25—13, www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/, accessed 1-6-14.

The Court's majority is wrong. Terribly wrong. The Voting Rights Act isn't outdated. Its vitality was amply demonstrated in the years before the 2006 renewal, and in the years since. What has become outdated is the patience of a certain political and legal constituency in this country that has decided for itself over the past few years that there now has been enough progress toward minority voting to justify the law's demise. To this constituency, it is enough that more blacks and Hispanics now vote or are elected to office. To them, Section 4's actual burdens on officials -- petty little bureaucratic burdens when compared to the burden of losing one's right to vote -- suddenly are burdens so unreasonable they cannot be constitutionally borne. Today's decision is the legal sanctification of an ugly movement that has brought America a new generation of voter suppression laws. It is the culmination of an ideological dream of a young Reagan Administration official named John Roberts, who sought 30 years ago to block an earlier renewal of the law. It is the latest manifestation of America's unfortunate eagerness to declare itself the grand victor even when a fight is clearly not won. Indeed, as today's setback demonstrates, the nation's fight for voting rights will never be over because the effort to undermine these rights is ceaseless. Section 4 of the Voting Rights Act was so strong that it took 48 years and this dubious ruling to bring it down. But down it has come. For these reasons and many more, the Supreme Court's decision in Shelby County is one of the worst in the history of the institution. As a matter of fact, and of law, it is indefensible. It will be viewed by future scholars on a par with the Court's odious Dred Scott and Plessy decisions and other utterly lamentable expressions of judicial indifference to the ugly realities of racial life in America. And to those tens of millions of Americans whose voting rights were protected last year by Section 4, it is a direct slap in the face rendered by judges who today used the banner of "states rights" to undermine the most basic right any individual can have in a free society -- the right to be able to vote free from racial discrimination employed by public officials. The America described by the Chief Justice, the one in which "blatantly discriminatory evasions of federal decrees are rare," is an America which has never once existed and which obviously does not exist today. The America the rest of us see so clearly with our own eyes, the America in which officials all over are actively seeking to suppress black and Hispanic votes, is the one that tens of millions of the rest of us have to live with, at least for now, without the protections of Section 4 of the venerable law. When rights are weakened for some, they are weakened for all. We all are much weaker today in the wake of this ruling.

4. The decision has spurred a new wave of voter suppression

Norm Ornstein, "The Right to Vote," NATIONAL JOURNAL, 10—30—13, http://www.nationaljournal.com/washington-inside-out/the-right-to-vote-20131030, accessed 1-5-14.

It is becoming increasingly obvious that the Supreme Court decision in Shelby County v. Holder, which eviscerated the Voting Rights Act, is leading to a new era of voter suppression that parallels the pre-1960s era—this time affecting not just African-Americans but also Hispanic-Americans, women, and students, among others. The reasoning employed by Chief Justice John Roberts in Shelby County—that Section 5 of the act was such a spectacular success that it is no longer necessary—was the equivalent of taking down speed cameras and traffic lights and removing speed limits from a dangerous intersection because they had combined to reduce accidents and traffic deaths. In North Carolina, a post-Shelby County law not only includes one of the most restrictive and punitive vote-ID laws anywhere but also restricts early voting, eliminates same-day voting registration, ends pre-registration for 16- and 17-year-olds, and bans many provisional ballots. Whatever flimsy voter-fraud excuse exists for requiring voter ID disappears when it comes to these other obstacles to voting. In Texas, the law could require voters to travel as much as 250 miles to obtain an acceptable voter ID—and it allows a concealed-weapon permit, but not a student ID, as proof of identity for voting. Moreover, the law and the regulations to implement it, we are now learning, will create huge impediments for women who have married or divorced and have voter IDs and driver's licenses that reflect maiden or married names that do not exactly match. It raises similar problems for Mexican-Americans who use combinations of mothers' and fathers' names. In a recent election on constitutional issues, a female Texas District Court judge, Sandra Watts, who has voted for 49 years in the state, was challenged in the same courthouse where she presides; to overcome the challenge, she will have to jump through hoops and possibly pay for a copy of her marriage license, an effective poll tax on women. The Justice Department is challenging both laws, but through a much more cumbersome and rarely successful provision of the Voting Rights Act that is still in force. It cannot prevent these laws and others implemented by state and local jurisdictions, many of which will take effect below the radar and will not be challenged because of the expense and difficulty of litigation.

Wrongly Decided: Topshelf [cont'd]

5. The Shelby decision weakens the Voting Rights Act

Ari Berman, "North Carolina Shows Why the Voting Rights Act Is Still Needed," THE NATION, 12—12—13, www.thenation.com/blog/177577/north-carolina-shows-why-voting-rights-act-still-needed, accessed 1-3-14.
Under Section 5 of the VRA—which SCOTUS paralyzed by invalidating the states covered under Section 4—North Carolina would have had to prove to the Justice Department or a three-judge court in Washington that its new law was not discriminatory. The burden of proof would have been on the state and the law would have been frozen until DOJ or the courts weighed in. Given the clear evidence of disparate racial impact in this case—African-Americans are 23 percent of registered voters in the state, but made up 29 percent of early voters in 2012, 34 percent of those without state-issued ID and 41 percent of those who used same-day registration—the law would have almost certainly been rejected. Instead, voting rights groups had to sue North Carolina under Section 2 of the VRA, which applies nationwide but is much more cumbersome than Section 5. Now the burden of proof is on the plaintiffs to show evidence of discrimination and the law is in effect until the courts block it. Unless a federal judge in Winston-Salem grants a preliminary injunction in the summer of 2014, the new restrictions will be in place during the 2014 midterm elections (except for voter ID, which goes into effect in 2016). Those who have been discriminated against will have no recourse until after the election has been decided, when there's a full trial in 2015, on the fiftieth anniversary of the VRA. (A challenge to Texas's voter ID law under Section 2 of the VRA will go to trial in September 2014.)

6. Section 5 is vital to protecting voting rights

John Lewis, U.S. Representative and key leader of the civil rights movement, "Why We Still Need the Voting Rights Act," WASHINGTON POST, 2—24—13, http://www.washingtonpost.com/opinions/why-we-still-need-the-voting-rights-act/2013/02/24/a70a930c-7d43-11e2-9a75-dab0201670da_story.html, accessed 1-3-14.
But without Section 5, guaranteed civil liberties of millions of voters could be flagrantly denied, and those violations would remain in force and nearly unchecked unless a lawsuit provided some eventual relief. The act also rewards progress. In fact, every jurisdiction that has applied for bailout, demonstrating a clean record over 10 years, has been freed from Section 5 compliance. Evidence proves there are forces in this country that willfully and intentionally trample on the voting rights of millions of Americans. That is why every president and every Congress, regardless of politics or party, has reauthorized Section 5. The right to vote is the most powerful nonviolent tool we have in a democracy. I risked my life defending that right. Some died in the struggle. If we are ever to actualize the true meaning of equality, effective measures such as the Voting Rights Act are still a necessary requirement of democracy.

7. The entire VRA Is justified—is permissible under the Constitution, Congress's finding of need is valid, and the 2012 election proves that voting discrimination remains a problem

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.
The Court should reject Shelby County's argument. In this Issue Brief, we show that the constitutionality of the preclearance requirement of the Voting Rights Act should not be in serious doubt. Part I demonstrates that the Voting Rights Act falls squarely within the constitutional powers granted to Congress in the Fifteenth Amendment, which specifically empowers Congress to enact "appropriate legislation" to "enforce" the text's prohibition on racial discrimination in voting. The text and history of the Reconstruction Amendments establish that "appropriate" enforcement legislation includes broad prophylactic regulation to protect the right to vote free from racial discrimination and ensure that the right to vote is meaningfully enjoyed by all citizens regardless of race. Part II examines the massive legislative record that Congress assembled in concluding that the preclearance requirement continues to be a necessary tool to enforce the Constitution's promise of a multi-racial democracy. Shelby County argues that preclearance is now an unnecessary, gratuitous burden, but Congress – which is charged with the responsibility of enforcing the Fourteenth and Fifteenth Amendments – concluded otherwise. Moreover, the simple reality is that the preclearance requirement is not a particularly significant burden for covered jurisdictions that do not seek to enact laws that deny or abridge the right of racial minorities to vote. Finally, Part III examines the vital role preclearance played in the run up to the 2012 election, demonstrating that, in state after state in the South, preclearance prevented state governments from enacting new discriminatory changes that would have denied African-American and Latino citizens an equal right to cast a ballot and diluted their voting strength. This recent history is proof positive that the Act is still very much needed to ensure compliance with the Fifteenth Amendment's promise of voting equality.

Wrongly Decided: Deference to Congress Justified

1. The Court should defer to Congress on voting questions—previous jurisprudence and constitutional analysis prove

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its [*2638] 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." 383 U. S., at 324. Faced with subsequent reauthorizations of the VRA, the Court has reaffirmed this standard. E.g., City of Rome, 446 U. S., at 178. Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed "rational means." For three reasons, legislation reauthorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality and Congress has adhered to the very model the Court has upheld. See id., at 174 ("The appellants are asking us to do nothing less than overrule our decision in South Carolina v. Katzenbach . . ., in which we upheld the constitutionality of the Act."); Lopez v. Monterey County, 525 U. S. 266, 283 (1999) (similar). Second, the very fact that reauthorization is necessary arises because [**681] Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. Cf. Grutter v. Bollinger, 539 U. S. 306, 343 (2003) (anticipating, but not guaranteeing, that, in 25 years, "the use of racial preferences [in higher education] will no longer be necessary"). [***25] Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See Persily 193-194. This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are "adapted to carry out the objects the amendments have in view." Ex parte Virginia, 100 U. S. 339, 346 (1880). The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that "Congress could rationally have determined that [its chosen] provisions were appropriate methods." City of Rome, 446 U. S., at 176-177. In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, [*2639] to be working to advance the legislature's legitimate objective.

Wrongly Decided: Deference to Congress Justified [cont'd]

2. The Court should show substantial deference to Congress as it exercises its constitutional authority to prevent voting discrimination

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." Yick Wo v. Hopkins, 118 U. S. 356, 370 (1886). When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height. The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation."[fn2] In choosing this language, the [*2637] Amendment's framers invoked Chief Justice Marshall's formulation of the scope of Congress' powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 4 Wheat. 316, 421 (1819) (emphasis added).

3. The Supreme Court has no business second-guessing congress on an issue as important as are voting rights

Elizabeth Wydra, chief counsel, Constitutional Accountability Center, "2012 Showed Us the Law is Still Needed," NEW YORK TIMES, Room for Debate, 10—6—13, http://www.nytimes.com/roomfordebate/2013/02/24/is-the-voting-rights-act-still-needed/how-2012-shows-the-voting-rights-act-is-still-needed, accessed 1-4-13.

It is not the Supreme Court's job to second-guess Congress's decision. The Constitution unquestionably gives Congress the authority to determine how best to protect voting rights through "appropriate legislation." In the wake of the Civil War, the framers of the 15th Amendment were reluctant to leave the courts with sole responsibility for protecting against racial discrimination in voting — unsurprising, given that the amendment was drafted and ratified just a few years after the Supreme Court issued the infamous Dred Scott ruling. How do we know that the 2006 reauthorization was "appropriate legislation"? Those 15,000-plus pages of evidence. Perhaps this clear constitutional grant of discretion to Congress is why there has been a dearth of support from prominent conservative scholars and political figures for the lawsuits aimed at dismantling the Voting Rights Act. In fact, Richard Thornburgh, who was attorney general for President Ronald Reagan, signed on to one of the most powerful briefs supporting the Voting Rights Act filed in the Supreme Court Shelby County case, and prominent conservatives like Ramesh Ponnuru have emphasized that it is up to Congress — not the courts and certainly not state officials — to figure out how best to make the Constitution's promise of voting equality a reality. Americans from across the ideological spectrum should recognize that the Voting Rights Act enforces the 15th Amendment's clear constitutional prohibition on racial discrimination in voting and is as vital today as when first passed.

Wrongly Decided: Deference to Congress Justified [cont'd]

4. These questions should be left up to Congress—the case was wrongly decided

Guy-Uriel Charles, Professor, Law, Duke University and Luis Fuentes-Rohwer, Professor, Law, Indiana University, "A Decision that Belongs to Congress," NEW YORK TIMES, Room for Debate, 2—24—13, http://www.nytimes.com/roomfordebate/2013/02/24/is-the-voting-rights-act-still-needed/decisions-about-the-voting-rights-act-belong-to-congress, accessed 1-4-13.

Relatedly, it would be a mistake as an institutional question. If there is an area of the law where deference to the political branches is due, it is this one. This is a question about the state of the world and whether racial discrimination in voting exists. The answer was obvious in 1965, not so much in 2013. The problem is that we are currently living in a transition period. State officials, specifically those in the South, are not engaged in rampant and rank racial discrimination today as they were in 1965. The number of objections by the Justice Department to racially discriminatory submissions is in the single digits. Citizens of color have more political power today, judged by the number of elected officials of color, than they have ever had before. White voters do vote for candidates of color, even in the South. And of course, there is President Obama. On the other hand, we do not know what would happen if we got rid of Section 5, because we believe Section 5 is the reason for the significant reduction in racial discrimination in the political process. Moreover, there remain many bad apples in the barrel. Further, many discriminatory statutes come in partisan and not racial garb. For example, while voter identification requirements are usually debated in partisan and not racial terms, they often have a disparate impact on voters of color. The fact that we have made significant progress is undeniable. But it is also true that we are not there yet. Thus the institutional question: should Congress or the court be entrusted with deciding whether the Voting Rights Act is no longer necessary? Should the question of whether racial discrimination in voting exists today be entrusted to nine politically insulated individuals with no particular expertise in political science, sociology or social psychology? In this period of uncertainty, we would rather defer to Congress than the court.

5. The decision represents the worst form of judicial activism—should not challenge Congress on these issues

Gerry Hebert, Campaign Legal Center, "A Radical Act of Judicial Activism," MOYERS & COMPANY, Group Think, 6—26—13, http://billmoyers.com/groupthink/voting-rights-act/a-radical-act-of-judicial-activism/, accessed 1-7-14.

The Court's decision is also a radical act of judicial activism. It is a slap in the face to the congressional authority to enact legislation to enforce the post-Civil War Reconstruction Amendments to the Constitution. As Justice Ginsburg correctly observed in her dissent in the Shelby County case, "It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference." The Court failed to afford Congress this "well-established" deference. To illustrate how extreme the decision in Shelby County is, it is worth noting that not since 1883 has the U.S. Supreme Court struck down an act of Congress that was passed to enforce these Amendments. In its Shelby County ruling, the Court not only cast aside decades of legal precedents, but it also usurped Congress's role of enforcing those Amendments "by appropriate legislation." The Court's decision in the Shelby County case overrode Congress' decision that the special provisions of the Voting Rights Act were still needed in the covered jurisdictions, substituting its decision for the considered views of Congress that voting discrimination remains particularly acute in the covered areas. Decisions like Shelby County do great harm to the Court as an institution and the traditional respect for the Bench. Congress should act in a bipartisan manner to update the coverage formula to determine what jurisdictions will be covered by Section 5 and ensure that voters will continue to be protected from the evils of discrimination.

Wrongly Decided: Deference to Congress Justified [cont'd]

6. The Court should give deference to Congress on voting issues—previous decisions prove

Paul M. Smith, counsel of record, Amicus Curiae Brief in Support of Respondents, Brennan Center for Justice, NYU School of Law, in Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., et al., Respondents, 2013, http://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brennan_Center_Brief.pdf
As Yarbrough shows, this Court has long recognized that the Fifteenth Amendment vested Congress with broad powers to protect against racial discrimination. In the years immediately following the Amendment's ratification, this Court shared the contemporary understanding that the Fifteenth Amendment represented a major transfer of authority from the states to the federal government and vested Congress with broad powers to enforce the Amendment's prohibition on racial discrimination in voting. Even as it placed severe restrictions on Congress's efforts to enforce the Reconstruction Amendments in the 1870s and 1880s, the Court signaled that Congress's authority to enforce the Fifteenth Amendment was greater than its authority to enforce the Fourteenth Amendment. The Court's decision in United States v. Cruikshank, 92 U.S. 542 (1876), illustrates its differing approaches to the Fourteenth and Fifteenth Amendments. The Court in Cruikshank overturned the convictions of white supremacists who led the infamous Colfax Massacre, "the bloodiest single act of carnage in all of Reconstruction," Foner, Reconstruction, at 530, and "the largest murder of African Americans in American history," Kousser, The Voting Rights Act and the Two Reconstructions, at 160. While the decision led to "disastrous" interference with Reconstruction, for example by imposing insurmountable burdens of proof on the prosecution, id., it actually upheld the constitutionality of the Enforcement Acts and affirmed that Congress had particularly broad authority with respect to the Fifteenth Amendment. See Robert M. Goldman, Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank 106 (2001) (noting that Cruikshank was a surprisingly "narrow" decision that "clearly and explicitly confirmed congressional authority" to protect against racial discrimination in voting). The Cruikshank Court pointedly did not invalidate Congress's power to protect equal suffrage, and it affirmed that the Fifteenth Amendment (unlike the Fourteenth) created "a new constitutional right" that Congress could protect against individual interference. Cruikshank, 92 U.S. at 555. The Fifteenth Amendment, the Court explained, had established the "exemption from discrimination in the exercise of" the right to vote as a "necessary attribute of national citizenship." Id. Congress had primary responsibility for protecting against racial discrimination in voting because "[t]he right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States." Id. at 556. And within this intersection of race and voting, primary responsibility was vested in Congress, not the states. This Court's early interpretation of the Amendment thus shows that Congress's Fifteenth Amendment power is sweeping, and that so long as Congress is acting to prevent racial discrimination in voting, this Court will defer to Congress's judgment about how best to do that. Thus, "[o]n the rare occasions when the Court has found an unconstitutional exercise of [Fifteenth Amendment] powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment." South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966). Indeed, when Congress passed the Voting Rights Act in 1965, the Senate and House Reports noted that "[n]o statute confined to enforcing the 15th amendment exemption from racial discrimination in voting has ever been voided by the Supreme Court." S. Rep. No. 89-162, at 17 (1965); H.R. Rep. No. 89-439, at 17 (1965). That remains true today.

7. The court should have shown deference to Congress's findings

Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf, accessed 1-6-14.
In short, the Supreme Court put form over function by applying an overly literal reading of Section 4(b) as reauthorized in 2006. The evidence in the massive Congressional record in 2006, to which the Lawyers' Committee substantially contributed, showed a recent and persistent pattern of voting discrimination in the Section 4(b) covered jurisdictions since 1982 (when Sections 4(b) and 5 were last reauthorized by Congress), including numerous and repeated Section 5 objections and Section 2 violations. There was overwhelming bipartisan support for the 2006 reauthorization. In my view the Court provided no good reason for giving less deference to Congress' judgment in 2006 concerning current conditions than the Court had done in each of its previous cases upholding the constitutionality of Congress' 1965 enactment of Section 5, and its 1970, 1975, and 1982 reauthorizations.

Wrongly Decided: Constitution Justifies—General

1. Multiple amendments give Congress the power to protect voting rights

Akhil Reed Amar, Professor, Law and Political Science, Yale University, "The Lawfulness of Section 5—And Thus of Section 5," HARVARD LAW REVIEW FORUM v. 126, 2—13, p. 119.
It remains to say a few words about the Fifteenth Amendment, and the manner in which its two sections further buttress the constitutionality of the VRA. Its opening section reiterated and extended the "right to vote" language of the Fourteenth Amendment's second section. With this reiteration, a constitutional pattern began to emerge. Today, via a repeated process of amendments echoing the Fifteenth (which in turn echoed the Fourteenth), no fewer than five separate amendments -- the Fourteenth, the Fifteenth, the Nineteenth, the Twenty-Fourth, and the Twenty-Sixth -- contain language expressly affirming a "right to vote." Every single one of these amendments ends with pointed wording empowering Congress in sweeping McCulloch-based language to enact "appropriate" enforcement laws. Surely, any sound analysis of constitutional proportionality must attend to the actual and stunning proportion of postbellum constitutional texts affirming the link between congressional power and the enforcement of voting rights. Time and again, Americans across the generations have explicitly said, via amendments drafted by Congress and approved by the states, that protecting voting rights is a central mission given to Congress; and each and every one of these amendments has contained express language suggesting that Congress should have a considerable choice of means in discharging its powers, in the emphatic tradition of McCulloch v. Maryland.

2. Constitutional claims against the VRA are nonsense—the Constitutional clearly empowers Congressional protections of voting rights

David H. Gans, Director, Human Rights, Civil Rights, and Citizenship Program, "The Gaping Hole in the Conservative Case Against the Voting Rights Act," Constitutional Accountability Center," 1—15—13, http://theusconstitution.org/text-history/1770/gaping-hole-conservative-case-against-voting-rights-act, accessed 1-4-14.
Shelby County and its amici argue Congress rode roughshod over the Constitution in insisting that preclearance was still necessary to ensure protection for the right to vote free from racial discrimination in jurisdictions with long proven records of voting discrimination. These arguments get the Constitution exactly backward. By any measure of fidelity to the Constitution, Shelby County should be an easy case: the Constitution's text expressly gives to Congress the power to enact legislation to enforce the Constitution's prohibition against racial discrimination in voting, arming Congress with substantial power to ensure that our most precious fundamental right is enjoyed by all Americans regardless of race; the Supreme Court's cases have on no less than four occasions affirmed the constitutionality of this very Act; and the record developed by Congress manifestly shows that racial discrimination in voting is still a blot on our Constitution's promise of a multiracial democracy. The question now, as the case moves closer to oral argument next month, is whether the Roberts Court will follow the Constitution or subvert it.

3. Congress clearly has the constitutional authority to protecting against voter discrimination

David H. Gans, Director, Human Rights, Civil Rights, and Citizenship Program, "The Surprisingly Easy Case for the Constitutionality of the Voting Rights Act," Constitutional Accountability Center, 9—24—12, http://theusconstitution.org/text-history/1623/surprisingly-easy-case-constitutionality-voting-rights-act, accessed 1-4-13.
Last June, Chief Justice Roberts cast the deciding vote to end the long-running legal battle over the constitutional power of the federal government to solve the nation's health care crisis by holding that, because the Constitution expressly gives the federal government the power to tax, the Supreme Court had no basis to set aside the penalty provision of the Affordable Care Act's individual mandate. The same reasoning demonstrates the surprisingly easy case for upholding the constitutionality of the Voting Rights Act. If the Court grants review in Shelby County, the Court should reaffirm that "the Fifteenth Amendment empowers Congress, not the Court, to determine . . . what legislation is needed to enforce it," and uphold the 2006 renewal of the Voting Rights Act as a constitutional exercise of Congress' express power to protect the right to vote free from racial discrimination.

Wrongly Decided: Constitution Justifies—General [cont'd]

4. The VRA provisions are entirely consistent with the Fourteenth and Fifteenth Amendments

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in Northwest Austin,[fn3] is there clear recognition [**680] of the transformative effect the Fifteenth Amendment aimed to achieve. Notably, "the Founders' first successful amendment told Congress that it could `make no law' over a certain domain"; in contrast, the Civil War Amendments used "language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality" and provided "sweeping enforcement powers . . . to enact `appropriate' legislation [***24] targeting state abuses." A. Amar, America's Constitution: A Biography 361, 363, 399 (2005). See also McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 Harv. L. Rev. 153, 182 (1997) (quoting Civil War-era framer that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative."). 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. McCulloch, 4 Wheat., at 421. 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 to perceive a basis upon which the Congress might resolve the conflict as it did." Katzenbach v. Morgan, 384 U. S. 641, 653 (1966).

Wrongly Decided: Constitution Justifies—Fifteenth Amendment

1. Congress is specifically empowered to do whatever it takes to protect voting rights

Doug Kendall, Founder and President, "Defending the Voting Rights Act from Its Conservative Critics," Constitutional Accountability Center, 12—3—12, http://theusconstitution.org/text-history/1749/defending-voting-rights-act-its-conservative-critics, accessed 1-4-14.
As history shows, the Framers of the Fifteenth Amendment recognized that the hard-won gains towards what Lincoln called "government of the people, by the people, and for the people" would be frustrated unless Congress had the power to protect the right to vote against all forms of racial discrimination in voting, whether heavy-handed or subtle. The Framers knew that states hostile to the Fifteenth Amendment could use their power to regulate elections to frustrate the Fifteenth Amendment's guarantee, and made sure to give Congress the power to secure to racial minorities full enjoyment of the right to vote. Taranto is loath to admit it, but, on any faithful reading of our Constitution, Congress has the power of selecting the means of protecting one of our most cherished constitutional rights from racial discrimination.

2. Congress has broad powers to prevent voter discrimination under the Fifteenth Amendment

Paul M. Smith, counsel of record, Amicus Curiae Brief in Support of Respondents, Brennan Center for Justice, NYU School of Law, in Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., et al., Respondents, 2013, http://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brennan_Center_Brief.pdf
In this brief, amicus shows that the history of the Fifteenth Amendment supports special deference to Congress's findings. With the Fifteenth Amendment, the Framers elevated the right to vote as a central concern of the federal government and made Congress the primary enforcer of that right. A core purpose of the Amendment was to give Congress significantly broader, constitutionally-based legislative authority to protect citizens' right to vote from racial discrimination. Soon after the abolition of slavery, Congress embarked on legislative efforts to enfranchise the newly emancipated former slaves. These efforts were limited by federalism concerns and were frustrated by fierce resistance in the former Confederate states. Of particularly grave concern, Congress feared it could lose its power to regulate voting in the former Confederate states once they were readmitted to the Union. The Fifteenth Amendment was adopted to address these problems. To that end, Congress crafted two simple, straightforward, and interdependent sections. The first section elevated protection of the "right of citizens of the United States" to vote from all forms of discrimination "on account of race, color or previous condition of servitude" to constitutional status. U.S. CONST. amend. XV, § 1. To give those words their full meaning, the second section delegated to Congress broad authority to enforce these words by "appropriate legislation." U.S. CONST. amend. XV, § 2. Congress adopted these sections with the conviction that the right to vote was the right on which all other rights were founded and was therefore indispensable to achieve equality for all citizens.

3. The Fifteenth Amendment gives Congress very broad enforcement powers

Paul M. Smith, counsel of record, Amicus Curiae Brief in Support of Respondents, Brennan Center for Justice, NYU School of Law, in Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., et al., Respondents, 2013, http://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brennan_Center_Brief.pdf
Conscious of the importance and fragility of the right to vote, the Framers used the Fifteenth Amendment to confer extensive powers upon Congress to prevent racial discrimination in voting. The Amendment entrusted Congress with primary authority for enforcement as well as sweeping powers to accomplish this task. With the Amendment, the Framers consciously altered the balance of federalism, providing powers to Congress that traditionally had been reserved to the states. Mindful of this commitment of broad power to Congress, this Court has, ever since the Amendment's passage, recognized that Congressional action under the Fifteenth Amendment is entitled to special deference.

Wrongly Decided: Constitution Justifies—Fifteenth Amendment [cont'd]

4. Congress has the primary authority to protect voting rights under the Fifteenth Amendment

Paul M. Smith, counsel of record, Amicus Curiae Brief in Support of Respondents, Brennan Center for Justice, NYU School of Law, in Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., et al., Respondents, 2013, http://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brennan_Center_Brief.pdf

The Fifteenth Amendment vested Congress with primary authority for enforcing the new constitutional guarantee against racial discrimination in voting, and with wide remedial powers to achieve that goal. Based upon its experience with prior efforts to enfranchise blacks in the District of Columbia, federal territories, and former Confederate states, Congress knew that the Fifteenth Amendment would require a vigorous enforcement mechanism. "[T]here was never any difference of opinion among the friends of the measure, either as to the desirability of including ... [an enforcement provision] in the Amendment or as to the form which it should assume." Mathews, History of the Fifteenth Amendment, at 36 n.55. Indeed, Republicans who preferred a broader constitutional amendment were willing to accept a narrower version of the first section of the Fifteenth Amendment precisely because the second section would provide Congress with additional enforcement power to transform the negatively phrased first section into a positive guarantee: If there were nothing at all here except the first section I might see a great deal of weight in [a concern that the first section's purely negative formulation leaves states able to devise indirect means of disenfranchising African-Americans]. But there happens to be added to that a second section, giving to Congress the express power to enforce the prohibition. The result of the whole matter is that if we amend this first section [to a form almost identical to the one ultimately enacted], ... by the second section Congress is invested with express authority to enforce the limitation. Cong. Globe, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Bingham); see also id. at 1625 (statement of Sen. Howard). Opponents of the Amendment similarly noted that the enforcement clause would give Congress substantial discretion to determine the scope of its own enforcement power. See id. at app. 163 (statement of Sen. Saulsbury) (warning that enforcement clause language "leav[es] [the] legitimate and proper meaning [of 'appropriate' legislation] to be determined by each particular head in this Senate Chamber and in the House of Representatives" and asking "[u]nder the exercise of the power to carry this amendment into execution by appropriate legislation what cannot you do?").

5. The Fifteenth Amendment gives Congress broad powers to protect against voter discrimination—the record from Congressional debates proves

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

The debates on the Fifteenth Amendment reflect the text's broad grant of power to Congress to secure the right to vote free from racial discrimination. During the debates, the Framers made clear that the Fifteenth Amendment's Enforcement Clause, like that of the Thirteenth and Fourteenth Amendments, gave Congress a broad "affirmative power" to secure the right to vote. Without a broad enforcement power, the Framers feared that the constitutional guarantee would not be fully realized: "Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States? Clearly, no power but that of the central government is or can be competent for their adjustment . . . ." Both supporters and opponents alike recognized that the Fifteenth Amendment's Enforcement Clause significantly altered the balance of power between the federal government and the states, giving Congress broad authority to secure the right to vote to African-Americans and to eradicate racial discrimination in state elections. Opponents of the Fifteenth Amendment were vehemently against conferring on Congress "all power over what our Constitution regards as the proper subject of State action exclusively." As Senator Thomas Hendricks put it, "when the Constitution of the United States takes away from the State the control over the subject of suffrage it takes away from the State the control of her own laws upon a subject that the Constitution of the United States intended she should be sovereign upon." These concerns over state sovereignty were flatly rejected by the Framers of the Fifteenth Amendment, who explicitly conferred on Congress the power to secure the right to vote free from racial discrimination. During the debates on the Fifteenth Amendment, Senator George Edmunds explained that it was necessary to "withdraw from the States of this Union who have hitherto exercised . . . the entire power over the political question of the right of suffrage" because "in many of these States there are large classes of citizens who are practically ostracized from the Government . . . ." "The time has arrived," Senator Joseph Abbott declared, "when the power of the General Government should be felt within every foot of its territory. . . . [T]he time has come when it is the duty of the Government to assert its supremacy and protect life and property everywhere in the United States." "[T]his Government was founded on the idea that all political power was vested in the people—not a third of a half or any fraction, but all the people." In giving Congress the power to remedy voting discrimination by the states, the Fifteenth Amendment specifically limited state sovereignty. In short, the Fifteenth Amendment radically altered the constitutional balance between the states and the federal government on the issue of racial discrimination in voting. It vested Congress with broad power to prevent and deter racial discrimination in voting and placed all citizens "under the shield of national protection."

Wrongly Decided: Constitution Justifies—Fifteenth Amendment [cont'd]

6. The Fifteenth Amendment gives Congress broad powers to proactively prevent discrimination in voting

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

The Framers were well aware that Congress needed broad authority to enact prophylactic legislation to stamp out all forms of racial discrimination in voting. For example, during the debates on the Fifteenth Amendment, Representative William Pile observed that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," emphasizing that "[w]hat we desire to reach" is "to insure by constitutional enactment . . . the right of suffrage" of citizens without regard to race. In the months following ratification of the Fifteenth Amendment, Congress recognized the grim reality that many states would pursue novel methods of disenfranchising African-Americans on account of their race. Highlighting the importance of providing "proper machinery . . . for enforcing the fifteenth amendment," Senator William Stewart explained that "it is impossible to enumerate over-specifically all the requirements that might be made as prerequisites for voting . . . . The states can invent just as many requirements [for voting] as you have fingers and toes. They could make one every day." "There may be a hundred prerequisites invented by the States," "a hundred modes whereby [an African-American] can be deprived of his vote." Senator Stewart was prescient. The struggle for voting rights for African-Americans did not end with the ratification of the Fifteenth Amendment. Even with crystal clear constitutional protection of the right to vote, a number of states across the country – concentrated in the Southern states that made up the former Confederacy – flouted the command of the Fifteenth Amendment, with whites-only primaries, literacy tests, poll taxes, and registration restrictions that combined with segregation to suppress racial minorities' political participation. The promise of the Fifteenth Amendment rang hollow throughout the South. It was not until civil rights champions fought long and hard to make Congress use its Fifteenth Amendment enforcement powers to pass the Voting Rights Act of 1965 that there was a successful response to nearly a century of minority disenfranchisement. The Voting Rights Act has subsequently been expanded by bipartisan majorities and remains one of the most iconic civil rights statutes on the books. The history summarized above documents that the Framers of the Fifteenth Amendment wanted to and by their words did ensure that Congress had the authority to stamp out and deter the full range of racial discrimination in voting, including by enacting prophylactic regulation. This history demonstrates why the preclearance requirement of the Voting Rights Act falls squarely within Congress' express power to protect the right to vote free from racial discrimination.

7. The Fifteenth Amendment gives Congress broad powers to enforce voting rights

Akhil Reed Amar, Professor, Law and Political Science, Yale University, "The Lawfulness of Section 5—And Thus of Section 5," HARVARD LAW REVIEW FORUM v. 126, 2—13, p. 120-121.

Which leads, finally, to section 2 of the Fifteenth Amendment. Even if none of the foregoing arguments has persuaded the reader, the VRA can and should be upheld simply and solely on the basis of section 2, giving Congress sweeping power to enact laws aimed at preventing race discrimination in voting. The Fifteenth Amendment is much more focused than the Fourteenth Amendment, which ranges far beyond voting rights. The Fourteenth speaks expansively of life, liberty, and property, and of unspecified privileges and immunities. A vast number of laws might be thought to implicate the concerns of this amendment, and in response, the Court in City of Boerne v. Flores and its progeny has sought to limit Congress via doctrines of "congruence" and "proportionality." But the Fifteenth Amendment has a much tighter, more specific concern: voting rights. Even if congressional power in this one domain were virtually plenary, Congress could not, based on this section, claim plenary power over most other areas of life. Precisely because section 2 has obvious built-in limits -- it is about voting, not everything else in the world -- there is far less need for judges to invent or infer additional limits in order to preserve a proper regulatory space for states. And on the other side of the ledger, there is far more warrant for judges to defer to Congress in the area of voting rights, for the simple reason that time and time and time again the Constitution's text explicitly links voting rights to the idea of congressional enforcement power. The Twenty-Sixth Amendment, proposed by Congress in March 1971 and ratified by the states less than four months later (!), is especially notable, enacted as it was in the immediate aftermath of the initial adoption (in 1965) and first renewal (in 1970) of the highly visible Voting Rights Act. Had the states and the American people deemed the VRA constitutionally problematic, why did they so quickly and emphatically agree to an amendment whose wording in section I ("the right . . . to vote") and section 2 ("Congress shall have the power to enforce") so obviously tracked -- and thus blessed -- the language of the earlier Fourteenth and Fifteenth Amendments that had been the express constitutional basis for the VRA itself? In ratifying the Twenty-Sixth Amendment, the states and the American people in effect re-ratified the Fourteenth and Fifteenth Amendments as these amendments had been broadly and properly construed in the enactment of the Voting Rights Act itself. (And in the process of ratifying this most recent Right to Vote Amendment, the American people also overruled a closely divided Supreme Court decision, Oregon v. Mitchell, that had more narrowly construed congressional power to promote democracy and voting rights for all.) In sum: If sweeping congressional power to enforce voting rights is somehow unconstitutional, then the Constitution itself is unconstitutional. So perhaps another title of this article might have been "The Constitutionality of the Constitution."

Wrongly Decided: Constitution Justifies—Fifteenth Amendment [cont'd]

8. The Fifteenth Amendment gives Congress supremacy over the states in voting rights issues

Paul M. Smith, counsel of record, Amicus Curiae Brief in Support of Respondents, Brennan Center for Justice, NYU School of Law, in Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., et al., Respondents, 2013, http://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brennan_Center_Brief.pdf
Both Congress and the states recognized that the Fifteenth Amendment fundamentally altered the balance of power between Congress and the states, and gave Congress paramount authority to prohibit racially discriminatory practices that denied or abridged the right to vote, notwithstanding the states' traditional role in regulating voting and elections. This understanding of the broad authority the Framers intended to give Congress is confirmed by the vigorous enforcement legislation Congress enacted immediately after ratifying the Amendment. The Reconstruction Congress was well aware that the former Confederate states might use various stratagems to evade the terms of the Fifteenth Amendment. The choice, therefore, to prohibit not only those practices that "deny" the right to vote on account of race, but also those that "abridge" it reflected the Framers' purpose to end all practices— whatever their form—that might diminish or lessen the value of a citizen's voting rights, including specifically dilution of their votes. This Court's subsequent precedent has honored this original intent by reading the Fifteenth Amendment's prohibition against "abridg[ing]" the right to vote to encompass protection against vote dilution. In sum, the history of the Fifteenth Amendment confirms that its Framers entrusted to Congress the primary responsibility for determining whether and what legislation is needed to enforce and give meaning to the Amendment's prohibition of practices that deny or abridge the right to vote on account of race. In light of that history, Congress's legislative judgment that the evidence is sufficient to justify reauthorization of the Voting Rights Act's preclearance and coverage provisions is entitled to special deference.

9. The Fifteen Amendment powers are rooted in the recognition that the right to vote is a fundamental right

Paul M. Smith, counsel of record, Amicus Curiae Brief in Support of Respondents, Brennan Center for Justice, NYU School of Law, in Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., et al., Respondents, 2013, http://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brennan_Center_Brief.pdf
The history leading up to the adoption and ratification of the Fifteenth Amendment vividly demonstrates that its Framers deliberately chose to protect the right to vote as the one right that was paramount to the goal of achieving racial equality. Congress passed the Fifteenth Amendment immediately after the 1868 elections and at the end of a two-year period in which it had expanded black enfranchisement as far as possible through ordinary legislation. The limits imposed on such legislation by federalism, pervasive violence, obstructionist practices, and the looming readmission of the former Confederate states convinced Congress that its authority to protect black enfranchisement was fragile and tenuous. Congress responded by passing a constitutional amendment that would prohibit practices by the states that "denied or abridged" the right to vote "on account of race" and would give Congress adequate authority to enforce its terms through appropriate legislation. Congress adopted the Fifteenth Amendment with the solemn understanding that protecting the right to vote against racial discrimination was indispensable to securing the equality promised by the other Reconstruction Amendments, and that the right to vote was the right on which all other rights depended. Congress's authority to enforce the Fifteenth Amendment should be interpreted in light of that understanding.

Wrongly Decided: Democracy Concerns

1. Section 5 has advanced our democracy—should not undermine it

Sandhya Bathija, Campaign Manager, Legal Progress, "5 Reasons Why Section 5 of the voting Rights Act Enhances Our Democracy," Center for American Progress, 2—19—13, http://www.americanprogress.org/issues/civil-liberties/report/2013/02/19/53721/5-reasons-why-section-5-of-the-voting-rights-act-enhances-our-democracy/, accessed 1-7-14.

Thanks to the Voting Rights Act and Section 5, the United States has made immense progress in protecting and expanding the right to vote. In Section 5-covered jurisdictions, change is happening, although slowly, but it may not have happened at all if it were not for the Voting Rights Act and Section 5. The changes we see include: The election of the first African American president A higher percentage of African American elected officials—the number of which has increased from just 300 nationwide in 1964 to more than 9,100 today The highest-ever percentage of African Americans in Mississippi's state legislature—27 percent—since the first African American to Mississippi's state legislature was elected in 1967, following the passage of the Voting Rights Act A more diverse electorate Racial discrimination continues to be a problem in our country, particularly in Section 5-covered states. Section 5 serves as a shield to protect minority voters in jurisdictions where progress has come slowly and continues to be a necessary remedy to disenfranchisement. Without it, minority voters would be in jeopardy—and so too would our democracy.

2. The decision threatens to expand racial discrimination and impoverishes our democracy

Ari Berman, "The Return of Jim Crow," MOYERS & COMPANY, Group Think, 6—26—13, http://billmoyers.com/groupthink/voting-rights-act/the-return-of-jim-crow/, accessed 1-7-14.

The Supreme Court's ruling in Shelby County v. Holder guts the most effective provision of the country's most effective civil rights law. The opinion by the Roberts Court was the most radical since Citizens United v. FEC and the worst voting rights decision in a century, since the Court upheld poll taxes and literacy tests in Giles v. Harris in 1903. Just as the Citizens United decision led to an explosion of unregulated dark money spending in U.S. elections, so too will the loss of Section 5 of the Voting Rights Act encourage many more of the shadowy voter suppression attempts that we saw in 2012. The states of the Old Confederacy will return to the pre-1965 playbook, passing new voting restrictions that can only be challenged, after years of lengthy litigation, in often-hostile Southern courts, with the burden of proof on those subject to discrimination rather than those doing the discriminating. Conservatives will be emboldened to challenge the other parts of the Voting Rights Act, like Section 2, that apply nationwide. Our democracy will become more unequal, with the most powerful interests manipulating the electoral rules to preserve their own power.

3. Shelby threatens equality and democracy, and will lead to a surge in new voter ID/suppression laws

Paul M. Smith, attorney, "Open Season for Voter ID Laws," MOYERS & COMPANY, Group Think, 6—26—13, http://billmoyers.com/groupthink/voting-rights-act/slowing-progress-undermining-democracy/, accessed 1-7-14.

There can be no doubt that the Shelby County decision will slow progress toward racial equality and undermine democracy in this country. It will now be open season for states to pass laws ostensibly aimed at preventing voter fraud but actually aimed at suppressing participation by minorities who disagree with the governing majority about key issues of public policy. Even with Section 5 in place, we saw a huge wave of these laws pass last year. As the lawyer who argued and lost the Indiana voter ID case in the Supreme Court, I know from personal experience how difficult it will be to use more conventional legal remedies like standard civil lawsuits to tackle these insidious laws. The genius of Section 5 was that it provided for expedited review by the Department of Justice before new election laws could go into effect in states with a long history of attempting to suppress minority voting. States were required to show that the law did not impermissibly harm the voting rights of minorities. This outcome is particularly indefensible since the Fifteenth Amendment specifically authorized Congress (not the courts) to use its own judgment about the best way in which to grant full voting rights to African-Americans in the South. While the country has made great progress on voting rights since 1965, Congress in 2006 compiled an extensive record showing that in covered states there remained a need for the extraordinary remedy of Section 5 in order to prevent backsliding. Under the Fifteenth Amendment, it had the right to make that judgment, which it did virtually unanimously. The Court should have deferred to Congress on this important question.

Wrongly Decided: General

1. Throwing out the pre-clearance provisions is the equivalent of throwing away your umbrella in a rainstorm because you are not getting wet

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. See, e.g., City of Boerne v. Flores, 521 U. S. 507, 530 (1997) (legislative record "mention[ed] no episodes [of the kind the legislation [***37] aimed to check] occurring in the past 40 years"). No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress' bailiwick. Instead, the Court strikes § 4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." Ante, at 17. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old [**694] ways. 2006 Reauthorization § 2(b)(3), (9). Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

2. The ruling is ridiculous—it acknowledges that discrimination exists while removing one of the biggest protections against such discrimination

Nicole Austin-Hillery, Director and Counsel, Washington DC office, Brennan Center for Justice, NYU Law School, “A Broken Promise,” MOYERS & COMPANY, Group Think, 6—26—13, http://billmoyers.com/groupthink/voting-rights-act/a-broken-promise/, accessed 1-7-14.

The Voting Rights Act, one of the cornerstone laws passed during the 1960s in an effort to advance equality for African Americans and other minorities, lost some of its power yesterday. The Supreme Court declared as unconstitutional the formula used to determine which states and localities are covered by the Act. What this means: Jurisdictions that were formerly required to gain federal approval for election law changes because of a history of voting discrimination will no longer be required to do so, at least for now. Why? Because the Court determined the formula identifying which states had the most egregious history of voting discrimination, and therefore required such oversight, was problematic. The Court did not, however, determine that the very cancer the formula and its ancillary protections were meant to address were no more. On the contrary, the Court declared that the issue of discrimination in voting still exists but sought fit, regardless, to remove one of the biggest shields in our legal arsenal to protect voters against such discrimination. Days like this, when a core tenet of our democracy is literally stripped away by the stroke of a jurist’s pen, reinforce why, despite years of legal progress and increased protections for the underrepresented, the fight for racial equality still persists. The protections afforded by the Voting Rights Act are not outdated and applicable only to circumstances that existed 40 years ago. Rather, the Voting Rights Act, in all its glory, actively offered protection to voters as recently as 2012 when numerous states attempted to enact laws that, in effect, would have discriminated against millions of minority voters, the poor and the elderly. It was the existence of the Voting Rights Act that reassured countless voters that despite the efforts of some politicians to make it harder for them to take part in our democracy, the protections afforded by the Act remained intact and continued to offer the promise of equality. African Americans and other minorities, despite our tumultuous early history in this country, have continued to believe in the promise of America because of guarantees for fair and equal treatment under the law. That promise was reinforced by laws such as the Voting Rights Act, now broken by this ruling. We all have a stake in this democracy and in promises being kept. When Americans can no longer depend on our laws and courts to offer protection against disparate treatment and inequality, we all lose.

Wrongly Decided: General [cont'd]

3. The ruling threatens voting rights—we have not yet achieved voting equality

Barbara A. Arnwine, President, Lawyers' Committee for Civil rights Under Law and Marcia Johnson-Blanco, co-director, Lawyers' Committee's Voting Rights Project, VOTING RIGHTS AT A CROSSROADS, Economic Policy Institute, 10—24—13, p. 3.

The 2013 Supreme Court decision (Shelby County., Ala. v. Holder) striking down the coverage formula that determines which states are subject to Section 5 imperils African Americans' hard-fought access to the ballot. Congress must pass bipartisan legislation that ensures that the goals of the Voting Rights Act are fulfilled. As U.S. Attorney General Eric Holder has noted, many pieces of state legislation concerning election administration or the creation of electoral districts that were previously subject to the "potent tool" of preclearance review to ensure that there was no racially disproportionate impact now go unchecked. When Barack Obama was elected president of the United States, many prematurely heralded the arrival of post-racial America. But the disproportionate impact of suppressive voting laws, such as felony disenfranchisement laws, on African Americans, coupled with the response by some states to the recent gutting of essential provisions of the Voting Rights Act, mean that the quest for full voting rights continues.

4. The ruling will exacerbate inequalities in voting access

Gilda Daniels, Assistant Professor, Law, University of Baltimore, "Prepare for a Thrashing of the Democratic Process," MOYERS & COMPANY, Group Think, 6—27—13, http://billmoyers.com/groupthink/voting-rights-act/prepare-for-a-thrashing-of-the-democratic-process/, accessed 1-7-14.

While great progress has certainly been made since the Voting Rights Act was put into place in 1965, new barriers to exercising the franchise are being erected at a rapid pace. Section 5 of the Voting Rights Act provided assurance that in areas with a history of discrimination, those barriers would receive federal oversight to insure that they would not deter progress for voters of color. With the Supreme Court's decision in Shelby County vs. Holder, jurisdictions once required to preclear any voting qualification or prerequisite will now be left to themselves to determine what laws they should adopt, a "right" the Court's decision says is foundational for treating states equally. The Court ignores, however, the importance of insuring that laws are in place to treat citizens equally. In a nation with changing demographics, where a significant percentage of voters of color reside in now-formerly protected jurisdictions, the removal of federal oversight could lead to a sound thrashing of the democratic process. With protections removed, we will witness a widening gap between voters of color and white voters in voter registration, a decline in the number of minority elected officials and more restrictive laws that impact the elderly, the poor and other historically disadvantaged groups. It has taken a herculean effort of massive education and legal challenges from advocacy groups, nonprofit organizations and the federal government to combat the onslaught of restrictive legislation proposed in the last two years. It will take even more vigilance to protect the progress of the last fifty years and to exceed the promise of current conditions.

5. Weakening Fifteenth Amendment powers threatens voting rights

Paul M. Smith, counsel of record, Amicus Curiae Brief in Support of Respondents, Brennan Center for Justice, NYU School of Law, in Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., et al., Respondents, 2013, http://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brennan_Center_Brief.pdf

History shows that restricting Congress's Fifteenth Amendment power would pose significant risks, and that gains in voting rights are fragile and tenuous. The Framers of the Fifteenth Amendment "fully realized that enfranchisement required practical safeguards against evasions of the law and retrogression." Kousser, The Voting Rights Act and the Two Reconstructions, at 137. One of the central lessons of the Reconstruction Era is that "revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made." Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 97th Cong. 2027 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University). Declaring Sections 4(b) and 5 of the Voting Rights Act to be beyond Congress's Fifteenth Amendment enforcement powers would ignore the lessons of history and weaken the essential constitutional guarantee that Congress has sought to enforce.

Wrongly Decided: General [cont'd]

6. Pre-clearance is particularly effective in checking voter discrimination

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

"[V]oting discrimination still exists; no one doubts that." Ante, at 2. But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights. A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the "blight of racial discrimination in voting" continued to "infec[t] the electoral process in parts of our country." South Carolina v. Katzenbach, 383 U. S. 301, 308 (1966). Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens. Id., at 311. To take just one example, the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary elections, Nixon v. Herndon, 273 U. S. 536, 541; in 1944, the Court struck down a "reenacted" and slightly altered version of the same law, Smith v. Allwright, 321 U. S. 649, 658; and in 1953, the Court once again confronted an attempt by Texas to "circumven[t]" the Fifteenth Amendment by adopting yet another variant of the all-white primary, Terry v. Adams, 345 U. S. 461, 469.

7. The Court's holding risks reversing the substantial gains we have made in protecting voter rights

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an "avalanche of case studies of voting rights violations in the covered jurisdictions," ranging from "outright intimidation and violence against minority voters" to "more subtle forms of voting rights deprivations." Persily 202 ([*2642] footnote omitted). This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting. True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization § 2(b)(1). But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. §§ 2(b)(2), (9). Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA. City of Rome, 446 U. S., at 180-182 (congressional reauthorization of the [**685] preclearance requirement was justified based on "the number and nature of objections interposed by the Attorney General" since the prior reauthorization; extension was "necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination") (internal quotation marks omitted). Facing such evidence then, the Court expressly rejected the argument that disparities in voter turnout and number of elected officials were the only metrics capable of justifying reauthorization of the VRA. Ibid.

Wrongly Decided: Pre-Clearance Necessary—General

1. The case is wrong decided—the VRA is necessary to prevent backsliding and facilitate future equality gains

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has [***19] been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 [**675] remains justifiable,[fn1] this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against back sliding. Those assessments were well within Congress' province to make and [*2633] should elicit this Court's unstinting

2. Section 5 serves as a powerful deterrent for discriminatory practices

National Bar Association, Amicus Curiae Brief in Support of Respondents in Shelby Co. v. Holder, No. 12-96 in the Supreme Court of the United States, 2013, http://redistrictingonline.org/uploads/Shelbyamici-nationalbarassoc020313.pdf, accessed 1-8-14.

Section 5 deters discrimination by placing the burden and cost of litigating discriminatory practices on covered jurisdictions, rather than placing that burden on victims of discrimination. Under Section 5, covered jurisdictions must prove that a proposed rule has neither a discriminatory intent nor effect. This serves to address the reality of discrimination and the shortfalls of Section 2. In fact, as Congress explained: Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. . . . Congress therefore decided . . . to shift the advantage of time and inertia from the perpetrators of the evil to its victim[.] Section 5 additionally deters discrimination through its requirement that a covered jurisdiction seeking preclearance must specify the extent to which minorities were involved in its decisionmaking process. In practice, this requirement deters discrimination by "encourag[ing] local jurisdictions to consult and involve local minority representatives in the preclearance process," which will highlight the potential for discriminatory effect before measures are enacted. Section 5 also provides that during the preclearance review process, if the Department of Justice preliminarily finds that some aspect of a proposed rule change is discriminatory, or that it needs additional information about a proposed rule change, it will request additional information from the jurisdiction. Congress, scholars, and voting rights attorneys alike have found that such requests (which are referred to as "more information requests" or "MIRs") deter covered jurisdictions from enacting discriminatory procedures because, in practice, many jurisdictions withdraw requests for preclearance when they receive such a request. Between 1990 and 2005, the Department of Justice issued 885 MIRs in response to which the covered jurisdiction either (i) changed its preclearance submission, (ii) withdrew its request for preclearance, or (iii) ignored the MIRs, which is the functional equivalent of withdrawal because the jurisdiction cannot implement the proposed change. Ultimately, the Department of Justice objected to 365 submissions during that time period.

Wrongly Decided: Pre-Clearance Necessary—General [cont'd]

3. Overwhelming evidence proves that voter protections are still needed

Doug Kendall, Founder and President, "Defending the Voting Rights Act from Its Conservative Critics," Constitutional Accountability Center, 12—3—12, http://theusconstitution.org/text-history/1749/defending-voting-rights-act-its-conservative-critics, accessed 1-4-14.

Mr. Taranto's willful blindness goes even further. He ignores completely the massive record assembled by Congress in 2006, when bipartisan majorities (by votes of 98-0 in the Senate and 390-33 in the House) renewed the preclearance requirement of the Voting Rights Act for a fifth time. Congress found repetitive violations of minority voting rights, including a number of intentionally discriminatory practices -- redistricting decisions made on the basis of race, intimidation and harassment at the polls, closing or relocating polling places and even cancelling elections to deprive African Americans of the right to vote -- that persisted in jurisdictions covered by the Act. As conservative jurist Judge John Bates wrote in his district court opinion in Shelby County rejecting a constitutional challenge to the preclearance provision, there is "extensive evidence of recent voting discrimination reflected in th[e] virtually unprecedented legislative record." The evidence from the most recent presidential election -- where preclearance played a vital role in protecting the right of racial minorities to vote -- only adds to the overwhelming record. While voter suppression efforts occurred across the country, they were concentrated in the states where preclearance applies, as this fact sheet makes clear. In short, the actual record demolishes Mr. Taranto's claim that supporters of the Voting Rights Act are simply "clinging to the policies of the past." Instead, the record demonstrates that it is Mr. Taranto who is blinding himself to realities of today and the mountain of facts found by Congress in exercising the constitutional authority explicitly conferred on it by the Fifteenth Amendment. For the last 47 years, year in and year out, the Voting Rights Act has stood as our nation's most effective weapon to realize the guarantees of the Fifteenth Amendment and prevent and deter state-sponsored racial discrimination in voting. If the Supreme Court is faithful to the text and history of the Fifteenth Amendment, it should resoundingly affirm the constitutionality of the Voting Rights Act.

4. A strong VRA is necessary to address "secondary barriers" to voting

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. City of Rome v. United States, 446 U. S. 156, 181 (1980). Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." Ibid. (quoting H. R. Rep. No. 94-196, p. 10 (1975)). See also Shaw v. Reno, 509 U. S. 630, 640 (1993) ("[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices" such as voting dilution). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting. [*2635] 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." Id., at 642. Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. Grofman & Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution in the South 301, 319 (C. Davidson & B. Grofman eds. 1994) (hereinafter Quiet Revolution). A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. Shaw, 509 U. S., at 640-641; Allen v. State Bd. of Elections, 393 U. S. 544, 569 (1969); Reynolds v. Sims, 377 U. S. 533, 555 (1964). See also H. R. Rep. No. 109-478, p. 6 (2006) (although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").

Wrongly Decided: Pre-Clearance Necessary—General [cont'd]

5. Section 5 is necessary to block many previously-enacted anti-voting laws

Myrna Perez, Deputy director, Democracy Program and Vishal Agraharkar, counsel, Democracy Program, "If Section 5 Falls: New Voting Implications," Analysis, Brennan Center for Justice, New York University Law School, 6—2—13, p. 3-4.
If Section 5 is no longer operational, jurisdictions may try to re-propose and re-enact previously-blocked discriminatory election changes. In the past 15 years, DOJ has blocked 86 state and local submissions of election changes. Forty-three of those objections occurred in the last decade. Thirty-one occurred since the 2006 reauthorization of Section 5. But these numbers understate the actual number of changes blocked because Section 5 submissions often include multiple changes. Federal courts have also blocked a number of very recent discriminatory election changes. In 2012, for example, a court blocked Texas's statewide redistricting maps, finding the state enacted certain maps with the intent to racially discriminate against African-American and Latino voters. Since the 2006 reauthorization of Section 5, federal courts have denied preclearance to states' proposed election changes in at least three instances. Blocked voting changes range from statewide voter registration procedures that would make it harder to register, especially for minorities, to localized changes to methods of election that would dilute minority voting strength, among others. In many cases, Section 5 has blocked repeated attempts to dilute minority voting rights by the same jurisdiction — the type of gamesmanship Section 5 was intentionally designed to combat. Some examples of proposed changes blocked in recent years include: • In 2001, the white mayor and the all-white Board of Aldermen for the small town of Kilmichael, Mississippi attempted to cancel an election shortly after black citizens became a majority of the registered voters. DOJ objected, finding the cancelation was designed to weaken African Americans' voting strength. The town refused to reschedule the election until DOJ required it to hold one in 2003, when the town's first African-American mayor and three African-American aldermen were elected. • In 2002, DOJ objected to a proposal by the city of Freeport, Texas to abandon its single-member districts in favor of an at-large election system. While minority voters had been able to elect candidates under the single-member district method, DOJ found a shift to at-large elections would make it harder for minority voters to exercise their right to vote. • In 2012, DOJ objected to a Texas law that would have required voters to show photo identification before casting a ballot. DOJ found hundreds of thousands of registered voters did not have the necessary identification, and of those, a disproportionate number were Latino. Later that year, the reviewing federal district court agreed, finding the law would disproportionately burden African Americans and Latinos. • In 2012, Section 5 prevented implementation of two changes to the method of electing trustees of the Beaumont Independent School District in Beaumont, Texas. The first change replaced two single-member districts of the school district with at-large districts, from which it was highly unlikely that African Americans could successfully elect their candidates of choice. Just a few months later, Section 5 prevented other election changes that would have shortened, without notice, the terms of the three incumbent minority candidates, and treated the candidate qualification period as closed such that the incumbents would not have been able to run for re-election in their own districts. If Section 5 is struck down, jurisdictions may seek to revive these and other previously-blocked election changes. Of particular concern are those election changes that could be resuscitated with little delay and little public notice. Some changes, for example, usually do not require legislation, including changes to polling place locations, changes to procedures to assist limited-English-proficiency voters, and changes affecting the date of elections. Examples of these types of changes blocked in recent years include: • In 2006, DOJ objected to a decision by a Houston-area community college district to no longer conduct joint elections with several coextensive school districts. As a result, voters would have had to travel to two separate polling places in order to cast their ballots. The change also reduced the number of polling places from 84 to 12, which covered an area greater than 1,000 square miles and served more than 540,000 voters. In its letter objecting to the shift, DOJ noted the assignment of voters was "remarkably uneven," as one polling site for the school board election with the smallest proportion of minority voters would serve 6,500 voters, while the most heavily minority site would serve more than 67,000 voters, 80 percent of whom were black or Latino. • In 2003, Bexar County, Texas announced plans to eliminate the five polling places for early voting that served the predominantly-Latino West Side of San Antonio, leaving the area with no early voting polling places. The county did not, however, secure preclearance for the proposed change, leading to an enforcement action that blocked the closures. Without a system of preclearance, the public might not even know about such changes sufficiently in advance of an election to seek relief from the courts.

Wrongly Decided: Pre-Clearance Necessary—General [cont'd]

6. Voter suppression remains a serious problem—proves that Shelby was wrongly decided

Angela Glover Blackwell, CEO, PolicyLink, "America Is Not a Post-Racial Society," MOYERS & COMPANY, Group Think, 6—26—13, http://billmoyers.com/groupthink/voting-rights-act/america-is-not-a-post-racial-society/, accessed 1-7-14.
The Court went outrageously wrong in assuming we have become a post-racial America that no longer needs to be bound by the legal protections that have preserved the electoral process for nearly a half-century. Indeed, discrimination still happens, and it's not limited just to the southern states covered under provisions of the Voting Rights Act. Discrimination happens across America: North, East, West and South. And, unfortunately, it is not rare. The Supreme Court's decision utterly ignores the efforts to suppress voting in 2012. With no real evidence of voter fraud, more than 30 states considered laws to make voting more difficult for African Americans, low-income communities, the elderly and people with disabilities. Fifteen states implemented such measures. The efforts did not rely on poll taxes, dogs or fire hoses, but the intent was the same. Given this trend, the last thing the Court should be doing is sending a message of leniency. Instead, they should make it clear that efforts to suppress the vote will not be tolerated.

7. Preclearance remains vital in protecting against voter discrimination

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.
For the last 47 years, year in and year out, the Voting Rights Act (VRA) has stood as our nation's most effective civil rights law to realize the guarantees of the Fifteenth Amendment and prevent and deter state-sponsored racial discrimination in voting. Much of the Act's success is due to the preclearance requirement contained in Section 5 of the Voting Rights Act, which requires state and local jurisdictions with a history of racial discrimination in voting to get "preclearance" from the U.S. Department of Justice (DOJ) or a three-judge federal court in Washington, D.C., before changing their voting laws and regulations. Preclearance requires that covered jurisdictions demonstrate that proposed changes do not have a discriminatory purpose or will not have a discriminatory effect on racial minorities. Proving to be a critical tool to secure our Constitution's promise of a multi-racial democracy, the preclearance requirement was subsequently renewed in 1970, 1975, 1982, and 2006, and signed into law respectively by Presidents Richard Nixon, Gerald Ford, Ronald Reagan, and George W. Bush. Indeed, in the run up to the 2012 presidential election, we saw how vital preclearance remains as a tool for preventing racial discrimination in voting. Judges across the ideological spectrum applied the Act's preclearance requirement to prevent states, including Florida, Texas and South Carolina, from disenfranchising African-American and Latino voters and diluting their voting strength. Despite its success (or, perhaps because of it), every time the Act has been reauthorized, it has faced a constitutional challenge. This time has been no different.

Wrongly Decided: Pre-Clearance Necessary—Congressional Findings

1. Congress's findings prove that we still need the VRA to check secondary barriers to voting

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. 2006 Reauthorization § 2(b)(1). But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, [***23] which increased the political vulnerability of racial and language minorities in those jurisdictions. §§ 2(b)(2)-(3), 120 Stat. 577. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. §§ 2(b)(4)-(5), id., at 577-578. The overall record [**679] demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(9), id., at 578. Based on these findings, Congress reauthorized pre-clearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. 42 U. S. C. § 1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

2. The decisions was wrong—it ignored the significant body of evidence gathered by Congress when it reauthorized the law

Andrew Cohen, fellow, Brennan Center for Justice, "On Voting Rights, a Decision as Lamentable as Plessy or Dred Scott," THE ATLANTIC, 6—25—13, www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/, accessed 1-6-14.

In a passionate dissent, Justice Ruth Bader Ginsburg immediately homed in on the extraordinarily aggressive nature of what the Court has just done. "The question this case presents," she wrote, "is who decides whether, as currently operative, Section 5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War amendments 'by appropriate legislation.'" Until today, Justice Ginsburg wrote, the Court "had accorded Congress the full measure of respect its judgments should garner" in implementing that anti-discriminatory intent of the Fourteenth and Fifteenth Amendments. Until today. "The Court," Justice Ginsburg wrote, "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." And then she proceeded to outline the countless ways in which racial discrimination in voting practices is alive and well in Alabama and other jurisdictions covered by the law. "The sad irony of today's decision," she wrote, "lies in its utter failure to grasp why the VRA has proven effective." It has been effective, of course, because it has made it harder for vote suppressors to suppress the votes of minority citizens. No more and no less.

3. The VRA is still needed—extensive congressional debate and fact-finding during the 2006 re-authorization proves

John Lewis, U.S. Representative and key leader of the civil rights movement, "Why We Still Need the Voting Rights Act," WASHINGTON POST, 2—24—13, http://www.washingtonpost.com/opinions/why-we-still-need-the-voting-rights-act/2013/02/24/a70a930c-7d43-11e2-9a75-dab0201670da_story.html, accessed 1-3-14.

This week the Supreme Court will hear one of the most important cases in our generation, Shelby County v. Holder. At issue is Section 5 of the Voting Rights Act, which requires all or parts of 16 "covered" states with long histories and contemporary records of voting discrimination to seek approval from the federal government for voting changes. The court is questioning whether Section 5 remains a necessary remedy for ongoing discrimination. In 2006, Congress debated this very question over 10 months. We held 21 hearings, heard from more than 90 witnesses and reviewed more than 15,000 pages of evidence. We analyzed voting patterns in and outside the 16 covered jurisdictions. We considered four amendments on the floor of the House; the Senate Judiciary Committee considered several others. After all of that, Congress came to a near-unanimous conclusion: While some change has occurred, the places with a legacy of long-standing, entrenched and state-sponsored voting discrimination still have the most persistent, flagrant, contemporary records of discrimination in this country. While the 16 jurisdictions affected by Section 5 represent only 25 percent of the nation's population, they still represent more than 80 percent of the lawsuits proving cases of voting discrimination.

Wrongly Decided: Pre-Clearance Necessary—Congressional Findings [cont'd]

4. Congress's findings from the 2006 reauthorization prove that the VRA is still needed

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

Examination of the legislative record assembled by Congress demonstrates that the 2006 renewal of the Voting Rights Act's preclearance requirement falls squarely within Congress' power to protect against racial discrimination in voting – the single purpose of the Fifteenth Amendment. Acting within its wide discretion to select appropriate means, Congress conducted an extensive inquiry into the current state of racial discrimination in voting and permissibly determined that prophylactic measures were "current[ly] need[ed]" to protect against unconstitutional racial discrimination in the administration of elections concentrated in the covered jurisdictions. By an overwhelming margin – 98-0 in the Senate and 390-33 in the House – bipartisan majorities agreed that the preclearance provision of the historic Voting Rights Act continued to serve the critical purpose of preventing and deterring racial discrimination in voting. Under any standard – whether the McCulloch standard reflected in the text of Section 2 of the Fifteenth Amendment or Boerne's more restrictive congruence and proportionality standard used in the Supreme Court's recent cases – the legislative record compiled by Congress establishes that the preclearance requirement is "appropriate legislation" enforcing the Constitution's prohibition on racial discrimination in voting. Based on a record "over 15,000 pages in length," including "'statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination,'" Congress concluded that state-sponsored racial discrimination in voting continues to be concentrated in the jurisdictions long covered by the Voting Rights Act. Indeed, Congress found that many of the same state and local governments that had flouted the Fifteenth Amendment and had first occasioned the Voting Rights Act in 1965 continue to engage in racial discrimination in voting on a systematic basis. Thus, despite considerable progress towards the goal of a multiracial democracy demanded by the Fifteenth Amendment, Congress found that preclearance still served the vital goal of preventing government-sponsored racial discrimination in voting. In many cases, Congress found that just as minorities were close to exercising political power, state and local governments interposed discriminatory voting changes. As conservative jurist District Court Judge John Bates observed in rejecting Shelby County's challenge, given "the extensive evidence of recent voting discrimination reflected in th[e] virtually unprecedented legislative record . . . Section 5 remains a 'congruent and proportional remedy' to the 21st century problem of voting discrimination in the covered jurisdictions."

5. The Court's decision ignores the robust evidence Congress used to justify the VRA's reauthorization

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. See supra, at 18-19. 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." Ante, at 20-21. One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation. I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

Wrongly Decided: Pre-Clearance Necessary—Congressional Findings [cont'd]

6. Congressional findings from 2006 prove that the pre-clearance requirements are still needed

David H. Gans, Director, Human Rights, Civil Rights, and Citizenship Program, "The Gaping Hole in the Conservative Case Against the Voting Rights Act," Constitutional Accountability Center," 1—15—13, http://theusconstitution.org/text-history/1770/gaping-hole-conservative-case-against-voting-rights-act, accessed 1-4-14.

Shelby County and its amici strive to make the case that the Voting Rights Act no longer identifies the worst constitutional violators. But Congress – the institution specifically empowered by the Constitution to enforce the Fifteenth Amendment's command of equality in the voting booth – disagreed. In 2006, amidst considerable progress, Congress also found continuing resistance to the Constitution's promise of a multi-racial democracy, open to all without regard to race, concentrated in many of the same states that resisted the Fifteenth Amendment, flouted its commands, and made the Voting Rights Act a necessity. With demographic changes giving minorities a real chance to exercise political power, governments interposed discriminatory voting changes to stifle their constitutional rights. The examples of state-sponsored voting discrimination in the covered jurisdictions detailed in record – redistricting decisions made on the basis of race and even accompanied by use of racial appeals, intimidation and harassment at the polls, closing or relocating polling places and even cancelling elections to deprive African Americans of the right to vote – show why large bipartisan majorities of Congress concluded that it was still appropriate to single out jurisdictions with a long history of voting discrimination for coverage under the Voting Rights Act's preclearance requirement. While states like Ohio and Pennsylvania may be badly in need of election reform, Congress found that only in the predominantly-Southern covered jurisdictions do government officials express overt hostility to minority voting power, seek to use all-white clubs as polling places, and even go to the extreme of cancelling elections when it appears that racial minorities will be successful at the polls.

7. The lower court findings prove that Congress had more than adequate justification for the pre-clearance requirements

David H. Gans, Director, Human Rights, Civil Rights, and Citizenship Program, "The Surprisingly Easy Case for the Constitutionality of the Voting Rights Act," Constitutional Accountability Center, 9—24—12, http://theusconstitution.org/text-history/1623/surprisingly-easy-case-constitutionality-voting-rights-act, accessed 1-4-13.

When the Shelby County case was considered in the lower courts, conservative jurist John Bates (an appointee of George W. Bush) in the District Court and liberal stalwart Judge David Tatel (joined by another George W. Bush appointee, Judge Thomas Griffith) of the D.C. Circuit meticulously reviewed the large body of evidence of racial discrimination in voting amassed by Congress in 2006, concluding that Congress had demonstrated that preclearance was still an appropriate tool to enforce the Fifteenth Amendment's prohibition on racial discrimination in voting. Shelby County disagrees, but its arguments cannot be squared with the text's express grant of power to Congress to select the means of eliminating the scourge of racial discrimination in voting.

Wrongly Decided: Pre-Clearance Necessary—Congressional Findings [cont'd]

8. Congress created a substantial record justifying the extension of the VRA

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. Ante, at 4-5. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. Ante, at 5. As the 1982 reauthorization approached its 2007 expiration date, Congress [***22] again considered whether the VRA's preclearance mechanism remained an [**678] appropriate response to the problem of voting discrimination in covered jurisdictions. Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. S. Rep. No. 109-295, p. 2 (2006). In April 2006, the Senate followed suit, with hearings of its own. Ibid. In May 2006, the bills that became the VRA's reauthorization were introduced in both Houses. Ibid. The House held further hearings of considerable length, as did the Senate, which continued to hold hearings into June and July. H. R. Rep. 109-478, at 5; S. Rep. 109-295, at 3-4. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. 152 Cong. Rec. H5207 (July 13, 2006); Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L. J. 174, 182-183 (2007) (hereinafter Persily). The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. 152 Cong. Rec. S8012 (July 20, 2006). President Bush signed it a week later, on July 27, 2006, recognizing the need for "further work . . . in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect." 152 Cong. Rec. S8781 (Aug. 3, 2006). In the long course of the legislative process, Congress "amassed a sizable record." Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U. S. 193, 205[*2636] (2009). See also 679 F. 3d 848, 865-873 (CADC 2012) (describing the "extensive record" supporting Congress' determination that "serious and widespread intentional discrimination persisted in covered jurisdictions"). The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. H. R. Rep. 109-478, at 5, 11-12; S. Rep. 109-295, at 2-4, 15. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." 679 F. 3d, at 866.

Wrongly Decided: Pre-Clearance Necessary—Empirical Examples

1. Florida proves that pre-clearance requirements are necessary to protect voter rights

Michael Ellement, "Block the Vote: Why Florida's New Voting Restrictions Demonstrate a Need for Continued Enforcement of the Voting Rights Act Preclearance Requirement," CATHOLIC UNIVERSITY LAW REVIEW v. 62, Winter 2013, p. 572-573.

In NAMUDNO, the Supreme Court suggested that the preclearance authority of section 5 may no longer be necessary to enforce minority-voting rights. In an attempt to demonstrate this, the Court surveyed the changing demographics in voter representation and emphasized the increased number of minority voters casting ballots. As of the writing of this Note, the Court is scheduled to consider a direct challenge to section 5 in Shelby County. When it does, the Court would be remiss to ignore recent voting legislation. The facts surrounding Florida's passage of H.B. 1355 and voter purge attempt demonstrate an urgent need for the preclearance requirement. In particular, Florida's actions demonstrated the ability--and desire--of a state to restrict voting in a manner that could limit minorities' ability to vote. These concerns can only be addressed by requiring jurisdictions with a history of such disenfranchisement to seek review of their voting changes. The preclearance process ensures that such a review takes place. The case of Florida demonstrates not only the need for the preclearance requirement, but also its effectiveness. As outlined in this Note, the preclearance requirement has been utilized to slow Florida's plan to purge voter rolls, and it has prevented the full implementation of Florida's initial proposals for early voting restrictions. Now, even Florida appears to agree that the initial purge attempt was flawed, and that the restrictions on early voting should be lifted. It is hard to imagine where Florida would be without the section 5 review process. The purge attempt would have gone forward without challenge, leading to the removal of validly registered voters from the voter rolls. Further, the early voting changes would have been implemented to their fullest extent, giving county election officials full discretion to determine an early voting site's operating hours. The preclearance process prevented the most drastic of these consequences. If anything, the preclearance requirement should be strengthened, not weakened. As recognized by this Note, the District Court for the District of Columbia's preclearance decision permitted covered counties to implement H.B. 1355's changes to early voting as long as the counties offered the same number early voting hours, over a decreased number of days. As evidenced by the 2012 election, this change had the effect of decreasing minority participation in the voting process. Courts reviewing such changes in the future should be mindful of their role in vigorously enforcing the strictures of section 5. Only with vigorous enforcement is the VRA's purpose achieved. Lastly, although Florida's situation provides ample evidence of the continuing need for section 5 enforcement, Florida is not alone. Rather, Florida is one of over a dozen states that chose to modify their voting laws in 2011 and 2012, making it more difficult for individuals to access the ballot. This reality should not go unnoticed when considering the future of section 5. Instead, in determining whether Congress continues to maintain the authority to subject states to the preclearance requirement, attention should be given to the enactment of any legislation likely to negatively affect minority participation in elections.

2. The Supreme Court was wrong—the new discriminatory North Carolina voting law proves

Ari Berman, "North Carolina Shows Why the Voting Rights Act Is Still Needed," THE NATION, 12—12—13, www.thenation.com/blog/177577/north-carolina-shows-why-voting-rights-act-still-needed, accessed 1-3-14.

A federal judge in Winston-Salem today set the schedule for a trial challenging North Carolina's sweeping new voter restrictions. There will be a hearing on whether to grant a preliminary injunction in July 2014 and a full trial a year later, in July 2015. This gives the plaintiffs challenging the law, which includes the Department of Justice, the ACLU and the North Carolina NAACP, a chance to block the bill's worst provisions before the 2014 election. Earlier this year, in July 2013, the North Carolina legislature passed the country's worst voter suppression law, which included strict voter ID to cast a ballot, cuts to early voting, the elimination of same-day voter registration, the repeal of public financing of judicial elections and many more harsh and unnecessary anti-voting measures. These restrictions will impact millions of voters in the state across all races and demographic groups: in 2012, for example, 2.5 million North Carolinians voted early, 152,000 used same-day voter registration, 138,000 voters lacked government-issued ID and 7,500 people cast an out-of-precinct provisional ballot. These four provisions alone will negatively affect nearly 3 million people who voted in 2012. Ironically, it took the North Carolina legislature less than a month to approve the law, but it will take a year before an initial hearing on it and two years before a full trial. That's because in June 2013 the Supreme Court invalidated Section 4 of the Voting Rights Act, which meant that previously covered states like North Carolina, with the worst history of voting discrimination, no longer had to clear their voting changes with the federal government. North Carolina passed its new restrictions a month after the SCOTUS decision, making the legislation as draconian as possible because it no longer needed federal approval. The state is crystal-clear evidence of why SCOTUS was wrong to gut the VRA and to treat voting discrimination as a thing of the past. It also shows why Section 2 of the VRA is no substitute for Section 5.

Wrongly Decided: Pre-Clearance Necessary—Empirical Examples [cont'd]

3. Section 5 is necessary to block discriminatory voting practices—multiple examples prove

Sandhya Bathija, Campaign Manager, Legal Progress, "5 Reasons Why Section 5 of the voting Rights Act Enhances Our Democracy," Center for American Progress, 2—19—13, http://www.americanprogress.org/issues/civil-liberties/report/2013/02/19/53721/5-reasons-why-section-5-of-the-voting-rights-act-enhances-our-democracy/, accessed 1-7-14.

1. Section 5 blocks discriminatory voting practices Section 5 has blocked discriminatory state laws that would have disenfranchised or diluted the minority vote. Without Section 5: Texas would have passed the strictest voter ID law in the nation in 2011, placing unforgiving burdens on minority voters. The law would have allowed concealed handgun licenses to serve as a form of valid identification to vote, but would have rejected the use of a college ID or a state employee ID. Luckily, Section 5 blocked the law and saved African American and Latino voters from being disenfranchised in the 2012 election. Mississippi would have required people to register to vote twice: once for federal elections and once for state and local elections. Knowing that it is more difficult for minorities to overcome administrative barriers, this tactic would have resulted in diluting the minority vote in state and local elections. The Department of Justice, using Section 5, blocked the law in 1997. Georgia would have continued to use a voter verification program to check the citizenship status of every person seeking to register to vote. Because Georgia failed to receive Section 5 preclearance before implementing the law, evidence was obtained that made it clear that minority voters were being flagged at higher rates, requiring time-consuming additional steps to be taken to prove their citizenship. The Department of Justice denied preclearance for this law in 2009. Arizona would have implemented a redistricting plan that would have divided certain election districts so Latinos would no longer be the majority in those districts and would no longer be able to elect candidates of their choice to represent them. The Department of Justice denied preclearance for this law in 2002.

4. Pre-clearance is still justified in Alabama—the threat of voter discrimination remains strong

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

A recent FBI investigation provides a further window into the persistence of racial discrimination in state politics. See United States v. McGregor, 824 F. Supp. 2d 1339, 1344-1348[*2647] (MD Ala. 2011). Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African-Americans as "Aborigines" and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African-American voter turnout. Id., at 1345-1346 (internal quotation marks omitted). See also id., at 1345 (legislators and their allies expressed concern that if the referendum were placed on the ballot, "`[e]very black, every illiterate' would be `bused [to the polls] on HUD financed buses'"). These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010. Id., at 1344-1345. The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the "recordings represent compelling [***34] evidence that political exclusion through racism remains a real and enduring problem" in Alabama. Id., at 1347. Racist sentiments, the judge observed, "remain regrettably entrenched in the high echelons of state government." Ibid. These recent episodes forcefully demonstrate that § 5's preclearance requirement is constitutional as applied to Alabama and its political subdivisions.[fn8] And under our case law, that conclusion should suffice to resolve this case. See United States v. Raines, 362 U. S. 17, 24-25 (1960) ("[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."). See also Nevada Dept. of Human Resources v. Hibbs, 538 U. S. 721, 743 (2003) (SCALIA, J., dissenting) (where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress' enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute "could constitutionally be applied to some jurisdictions").

Wrongly Decided: Pre-Clearance Necessary—Empirical Examples [cont'd]

5. The Court ignored evidence that voter discrimination remains a serious problem in Alabama

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi. 679 F. 3d, at 897 (Williams, J., dissenting). In other words, even while subject to the restraining effect of § 5, Alabama was found to have "deni[ed] or abridge[d]" voting rights "on account of race or color" more frequently than nearly all other States in the Union. 42 U. S. C. § 1973(a). This fact prompted the dissenting judge below to concede that "a more narrowly tailored coverage formula" capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting "might be defensible." 679 F. 3d, at 897 (opinion of Williams, J.). That is an understatement. Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to § 5's preclearance requirement.[**689] [*2646] [fn7] A few examples suffice to demonstrate that, at least in Alabama, the "current burdens" imposed by § 5's preclearance requirement are "justified by current needs." Northwest Austin, 557 U. S., at 203. In the interim between the VRA's 1982 and 2006 reauthorizations, this Court twice confronted purposeful racial discrimination in Alabama. In Pleasant Grove v. United States, 479 U. S. 462 (1987), the Court held that Pleasant Grove — a city in Jefferson County, Shelby County's neighbor — engaged in purposeful discrimination by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. The city had "shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws," and its strategic annexations appeared to be an attempt "to provide for the growth of a monolithic white voting block" for "the impermissible purpose of minimizing future black voting strength." Id., at 465, 471-472. Two years before Pleasant Grove, the Court in Hunter v. Underwood, 471 U. S. 222 (1985), struck down a provision of the Alabama Constitution that prohibited individuals convicted of misdemeanor offenses "involving moral turpitude" from voting. Id., at 223 (internal quotation marks omitted). The provision violated the Fourteenth Amendment's Equal Protection Clause, the Court unanimously [***33] concluded, because "its original enactment was motivated by a desire to discriminate against blacks on account of race[,] and the [provision] continues to this day to have that effect." Id., at 233. Pleasant Grove and Hunter were not anomalies. In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated § 2. Dillard v. Crenshaw Cty., 640 F. Supp. 1347, 1354-1363 (MD Ala. 1986). Summarizing its findings, the court stated that "[f]rom the late 1800's through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." Id., at 1360. The Dillard litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. Dillard v. Baldwin Cty. Bd. of Ed., 686 F. Supp. 1459, 1461 (MD Ala. 1988). One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it. See Dillard v. Crenshaw Cty., 748 F. Supp. 819 (MD Ala. 1990).

Wrongly Decided: Pre-Clearance Necessary—Local Elections

1. Section 5 is especially important in checking discrimination in local elections

Sandhya Bathija, Campaign Manager, Legal Progress, "5 Reasons Why Section 5 of the voting Rights Act Enhances Our Democracy," Center for American Progress, 2—19—13, http://www.americanprogress.org/issues/civil-liberties/report/2013/02/19/53721/5-reasons-why-section-5-of-the-voting-rights-act-enhances-our-democracy/, accessed 1-7-14.

2. Section 5 safeguards local elections The elimination of Section 5 may have the most devastating consequences in small cities and communities where individuals are less likely to litigate discriminatory changes. Section 5 requires covered jurisdictions to submit requests for even minor changes at the local level and protects against discriminatory practices that would otherwise go unnoticed. In 2011 the Pitt County School District in North Carolina decided to reduce the number of school board members from 12 to 7 and shorten their terms in office. Section 5 blocked the change from going into effect after the Department of Justice determined that such a change would decrease representation of minority-preferred candidates on the school board. In Clinton, Mississippi, where 34 percent of the population is African American, the city proposed to its six-member council a redistricting plan that did not include a single ward where African American voters had the power to elect candidates of their choice. Racially polarized voting is still a problem in Mississippi, and the redistricting plan ensured there was no longer a majority African American ward. The Department of Justice found reliable evidence that the city had acted with a racially discriminatory purpose and blocked the change from going into effect in 2011.

2. The ruling threatens democratic access, especially at the local level

Spencer Overton, Professor, Law, George Washington University, "A Setback for Local Democracy," MOYERS & COMPANY, Group Think, 7—1—13, http://billmoyers.com/groupthink/voting-rights-act/a-setback-for-local-democracy/, accessed 1-7-14.

The Supreme Court's decision in Shelby County v. Holder is a setback for democracy — especially at the local level. Overwhelming evidence shows that too many politicians continue to win elections by unfairly manipulating election rules based on how voters look or talk. The Court's decision makes this problem worse. The biggest problem will be the manipulation of election rules for local offices that are often non-partisan and escape national attention. In Nueces County, Texas, for example, the rapidly growing Latino community surpassed 56 percent of the county's population, and in response, county officials gerrymandered county commission election districts to weaken the Latino vote. Without Section 5 protections to block this type of racial manipulation, Americans in areas like Nueces County will be vulnerable to unfair election changes. Voters often lack the thousands and sometimes millions of dollars required to bring a lawsuit to stop unfair changes. Even aside from expense, lawsuits are not the best tools to protect voting rights. Lawsuits can take years, and too often, do not stop unfair voting rules before they are used in elections. Though we tend to focus more on national politics, the manipulation of local election rules has significant consequences. County commissioners, city and town council members, school board members, sheriffs and other elected local officials make important decisions related to education, criminal justice, human services and economic opportunity that shape our daily lives. Republicans and Democrats in Congress should work together to address these problems and modernize the Voting Rights Act. Specifically, Congress should: (1) update the Act's preclearance and litigation provisions; and (2) require that states and localities disclose new voting rules and their effects on voters.

Wrongly Decided: Pre-Clearance Necessary—2012 Proves

1. Voting discrimination efforts during the 2012 election prove that we still need the VRA

Doug Kendall, Founder and President, "Supreme Court Review Puts Voting Rights Act in Jeopardy after Election Proves Its Necessity," Constitutional Accountability Center, 11—9—12, http://theusconstitution.org/text-history/1682/supreme-court-review-puts-voting-rights-act-jeopardy-after-election-proves-its, accessed 1-4-14.

As everyone knows by now, in the run-up to the 2012 election, the right to vote was under siege. Conservatives throughout the country tried to change election rules to disenfranchise ordinary Americans – passing restrictive voter ID laws, shortening early voting hours, and making it more difficult to register to vote. These restrictions had the greatest impact on young, minority, elderly, and poor voters. They made a mockery of President Lincoln's description of our government being "of the people, by the people, and for the people," and they failed to honor the heroic efforts of generations of Americans to ratify six different Amendments that expanded the right to vote. The happier, but lesser known, part of this story is how effective the Justice Department and progressive organizations were in going to court and using the Voting Rights Act to prevent the worst of these statutes from going into force. In the run up to the election there were a number of hugely important lower court rulings that enforced the requirement that states with a history of racially discriminatory voting restrictions must "preclear" with the Department of Justice any change in voting laws. These rulings provide critical new evidence of precisely why preclearance is still a much needed tool to protect the right to vote free from racial discrimination. Without the Voting Rights Act in place, African American and Hispanic voters in states across the country might have been denied their constitutional right to cast a ballot on election day.

2. The 2012 election proves that the VRA is still needed and effective

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

If the experience over the course of the 2012 election has proven anything, it's that the Voting Rights Act is still our nation's first and best defense against efforts to disenfranchise American voters. In the run-up to the 2012 election, the right to vote was under siege. Conservatives tried to change election rules to disenfranchise ordinary Americans, passing restrictive voter ID laws, shortening early voting hours, and making it more difficult to register to vote. These restrictions had the greatest impact on young, minority, elderly, and poor voters. They made a mockery of President Lincoln's description of our government being "of the people, by the people, and for the people," and they failed to honor the fact that the right to vote is perhaps our most fundamental constitutional right, a right "preservative of all rights." The happier, but lesser known, part of this story is how effective DOJ and public interest organizations were in going to court and using the Voting Rights Act to prevent the worst of these statutes from going into force. In the last few months before the election, there were a number of important lower court rulings that enforced the preclearance requirement and provided critical new evidence of precisely why preclearance is still a much needed tool to protect the right to vote free from racial discrimination. Without the VRA in place, African-American and Hispanic voters – in a number of states in the South and Southwest – might have been denied their constitutional right to cast a ballot on election day.

Wrongly Decided: Pre-Clearance Necessary—2012 Proves [cont'd]

3. Recent examples of discriminatory voting laws proves that the VRA is needed

John Lewis, U.S. Representative and key leader of the civil rights movement, "Why We Still Need the Voting Rights Act," WASHINGTON POST, 2—24—13, http://www.washingtonpost.com/opinions/why-we-still-need-the-voting-rights-act/2013/02/24/a70a930c-7d43-11e2-9a75-dab0201670da_story.html, accessed 1-3-14.

It is ironic and almost emblematic that the worst perpetrators are those seeking to be relieved of the responsibilities of justice. Instead of accepting the ways our society has changed and dealing with the implications of true democracy, they would rather free themselves of oversight and the obligations of equal justice. Calera, a city in Shelby County, Ala., provides a prime example. Once it was an all-white suburb of Birmingham. Rapid growth created one majority-black district that in 2004 had the power, for the first time, to elect a candidate of its choice to city government, Ernest Montgomery. Just before the 2008 election, however, the city legislature redrew the boundaries to include three white-majority districts in an effort to dilute the voting power of black citizens. The Justice Department blocked the plan, but Calera held the election anyway, and Montgomery was toppled from his seat. In 2012, Section 5 was used to block Texas from implementing the most restrictive voter law in the country, which threatened the rights of more than 600,000 registered voters, predominantly Latinos and African Americans. Kilmichael, Miss., was blocked from canceling elections shortly after the results of the 2000 Census demonstrated a black-voting majority that could, for the first time, elect the candidate of its choice. Such cases are numerous and exemplify the "unprecedented legislative record" amassed in 2006. That mountain of evidence paved the way for a bipartisan majority in Congress to reauthorize Section 5 by a vote of 390 to 33 in the House and 98 to 0 in the Senate. Opponents of Section 5 complain of state expense, yet their only cost is the paper, postage and manpower required to send copies of legislation to the federal government for review, hardly a punishment.

4. The VRA was used to invalidate discriminatory laws prior to the 2012 election

Barbara A. Arnwine, President, Lawyers' Committee for Civil rights Under Law and Marcia Johnson-Blanco, co-director, Lawyers' Committee's Voting Rights Project, VOTING RIGHTS AT A CROSSROADS, Economic Policy Institute, 10—24—13, p. 8-9.

Following the 2010 elections, conservative lawmakers quickly began passing restrictive voting laws (Lawyers' Committee for Civil Rights Under Law 2012, 3). These laws included voter ID laws and limitations on early voting and voter registration drives. States passing restrictive voter ID laws claimed these laws were needed to combat voter fraud, but offered no proof of such a threat. Rather, as an earlier 2006 survey had shown, up to 25 percent of African Americans did not have the required identification (Brennan Center for Justice 2006). Litigation under the Voting Rights Act highlighted the impact of these restrictive state voting laws on minority voters and helped prevent some of these laws from going into effect before the 2012 elections. For example, in 2011, Texas passed one of the country's most restrictive voter identification laws. The law required voters to show a limited number of government-issued identification documents in order to vote. As a jurisdiction governed by Section 5, Texas was required to submit the law for review. It first submitted the law to the Department of Justice. The U.S. attorney general objected to the law. As was its right, Texas then sought review before the federal district court in Washington, D.C. That court again denied approval, finding in Texas v. Holder that the law was one of the most stringent in the country and that the implicit costs of obtaining the required identification would fall disproportionately on the poor, of which a high percentage were the state's African American and Hispanic voters. Similarly, in another separate review of the state's redistricting laws, the court rejected Texas's redistricting plans for the state legislature and Congress. The court found that the congressional redistricting plan was not only retrogressive, but that it also had a racially discriminatory purpose. Additionally, Section 5 review mitigated the discriminatory effect of South Carolina's voter identification law and Florida's reduction of early voting hours.

Wrongly Decided: Pre-Clearance Necessary—2012 Proves [cont'd]

5. Current efforts to restrict voting prove that we need a strong Voting Rights Act

Elizabeth Wydra, chief counsel, Constitutional Accountability Center, "2012 Showed Us the Law is Still Needed," NEW YORK TIMES, Room for Debate, 10—6—13, http://www.nytimes.com/roomfordebate/2013/02/24/is-the-voting-rights-act-still-needed/how-2012-shows-the-voting-rights-act-is-still-needed, accessed 1-4-13.

The 2012 election proved that the Voting Rights Act is still our nation's first and best defense against efforts to disenfranchise American voters. In the run-up to the 2012 election, state and local officials attempted to put in place restrictive voter ID laws, shorten early voting hours and make it more difficult to register to vote. These efforts included Texas's stringent voter ID law, which would have disenfranchised low-income Texas citizens, who are disproportionately African-American and Hispanic, as well as the state's discriminatory redistricting plan, and Florida's attempts to slash the period for early voting, which is disproportionally used by African-American voters. These restrictions would have had the greatest impact on young, minority, elderly and poor voters. Fortunately, some of the worst of these restrictions — including the laws in Florida and Texas — were blocked under the Voting Rights Act by federal courts, including conservative judges, or the Department of Justice. Despite considerable progress toward the goal of a multiracial democracy demanded by the 15th Amendment, Congress was right to find that the Voting Rights Act still serves the vital goal of preventing racial discrimination in voting.

6. Voter suppression remains a serious problem—2012 election proves

Andrew Blotky, Director, Legal Progress and Billy Corriher, Associate Director, Legal Progress, "State and Federal Courts: The Last Stand in Voting rights," Center for American Progress, 6—25—13, www.americanprogress.org/issues/civil-liberties/report/2013/06/25/67905/state-and-federal-courts-the-last-stand-in-voting-rights/, accessed 1-7-14.

The 2012 election cycle highlighted a significant and troubling trend in our democracy: states across the country passing laws that would keep many Americans from participating in the political process. We witnessed states enacting restrictive voter ID laws, purging voter rolls, limiting early voting and polling-place hours, and redrawing congressional districts in a way that limits fair and equal participation in the political process. Because of these efforts, as well as fundamental shortcomings in our election administration system, many Americans had to wait in line for hours to cast their ballots in the 2012 election. These voter-suppression measures had a disproportionate impact on people of color, low-income voters, and the growing Millennial population. Post-election studies indicate that African American and Latino voters had to wait in line nearly twice as long as white voters. The ability to cast a ballot came under attack in all corners of the country. Americans, regardless of political affiliation, are concerned about whether their most cherished right—the right to vote—will be honored on Election Day. Efforts to discourage voting not only undermine democracy by making our government less representative, but they also make citizens question the integrity of our democracy. During the 2012 election, voters in nine states and dozens of additional local jurisdictions were protected by the preclearance requirement of the Voting Rights Act, which prevented their governments from implementing changes in voting if racial or language minorities would be disenfranchised. Section 5 of the act required those jurisdictions with a history of racial discrimination in voting to ask either the U.S. Department of Justice or a court in Washington, D.C., for approval before making any changes to voting laws—a process known as "preclearance." Section 4 of the act established the scope of this "preclearance" requirement, and the act included a provision for states to "bail out" of requesting approval for changes if they had not discriminated against voters of color or non-English-speaking voters for 10 years.

Wrongly Decided: Precedent Proves

1. The Supreme Court had already upheld the VRA four times

David H. Gans, Director, Human Rights, Civil Rights, and Citizenship Program, "The Gaping Hole in the Conservative Case Against the Voting Rights Act," Constitutional Accountability Center," 1—15—13, http://theusconstitution.org/text-history/1770/gaping-hole-conservative-case-against-voting-rights-act, accessed 1-4-14.

Let's start with the plain words of the Constitution. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged. . . by any State on account of race, color, or previous condition of servitude." To ensure that this new constitutional guarantee would be actually enjoyed, the Fifteenth Amendment goes on to provide that "Congress shall have the power to enforce this article by appropriate legislation." To protect the right to vote free from racial discrimination, Congress has the power to target states that have a long history of racial discrimination in voting with special, more stringent remedies. As Shelby County and its amici studiously ignore, there is no Equality of States Clause of the Constitution that requires Congress to treat Alabama or Mississippi the same as Oregon or Massachusetts when it enforces the Fifteenth Amendment's command of voting equality, or to ignore a history of racial discrimination in voting that continues to the present day throughout the covered jurisdictions. Indeed, the Supreme Court has upheld the preclearance requirement four times and repeatedly recognized the Voting Rights Act as the archetype of appropriate enforcement legislation in countless others precisely because the Act targets only those jurisdictions with a proven history of racial discrimination in voting. Thus, for example, in 2000, in United States v. Morrison, the Supreme Court struck down the civil damage provision of the Violence Against Women Act because "it applies uniformly throughout the Nation," distinguishing it from the VRA's preclearance requirement in which "the remedy was directed only to those States where Congress found that there had been discrimination." It would turn the Fifteenth Amendment on its head to strike down the Voting Rights Act because Congress targeted the worst constitutional violators.

2. Several previous Supreme Court cases recognize Congress's broad anti-voting discrimination authority

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

Consistent with the text and history of the Fifteenth Amendment, the Supreme Court has held numerous times that "Congress' authority under § 2 of the Fifteenth Amendment . . . [is] no less broad than its authority under the Necessary and Proper Clause." In these cases, broad deference was applied to the means Congress adopted to enforce the constitutional right to vote free from racial discrimination. The preclearance requirement contained in Section 5 of the Voting Rights Act seeks to enforce the core purpose of the Fifteenth Amendment, and the nearly unanimous, bipartisan decision of Congress to re-authorize it falls squarely within Congress's broad power to enforce the Fifteenth Amendment. In South Carolina v. Katzenbach, the Supreme Court deferred to Congress's broad authority to protect voting rights in holding that the preclearance and coverage provisions of the Voting Rights Act—the same provisions Shelby County attacks—were "appropriate legislation" within Congress's Fifteenth Amendment enforcement power. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition on racial discrimination in voting." The Katzenbach Court analyzed the history of the Fifteenth Amendment, noting that "[b]y adding th[e] authorization [for congressional enforcement in Section 2], the Framers indicated that Congress was to be chiefly responsible for implementing the rights created. . . . Congress has full remedial powers to effectuate the constitutional prohibition on racial discrimination in voting."

3. The case overturns long-standing precedent

Mark A. Posner, Adjunct Professor, Law, Washington College of Law, American University, "Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting," NEW YORK UNIVERSITY JOURNAL OF LEGISLATION AND PUBLIC POLICY v. 10 n. 1, Fall 2006, p. 54-55.

That the Supreme Court might strike down the section 5 reauthorization seems, on one level, inconceivable. After all, it has been over one hundred years since the Court last overturned national legislation aimed at guaranteeing the civil rights of our country's racial and ethnic minority citizens. In the modern era, the Supreme Court has broadly construed Congress's authority to act against the evil of racial and ethnic discrimination, and those decisions, though they date back to the 1960s, continue to have great vitality today.

Wrongly Decided: Precedent Proves [cont'd]

4. The VRA is Constitutional, and was upheld by the Supreme Court four times previously

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

By any measure of constitutional fidelity, Shelby County should be an easy case for three reasons. First, the Constitution's text expressly gives to Congress the power to enact legislation to enforce the Constitution's prohibition against racial discrimination in voting, arming Congress with substantial power to ensure that our most precious fundamental right is enjoyed by all Americans regardless of race. Second, the Supreme Court already has affirmed the constitutionality of this very Act four times previously. Third, and finally, the record developed by Congress in 2006 – as well as the actions of states in the course of the 2012 elections – manifestly shows that racial discrimination in voting is still a blot on our Constitution's promise of a multiracial democracy. The question, then, is whether Chief Justice Roberts and the Court's conservatives will recognize or stifle Congress' power to enforce the Constitution's guarantee of equality in the ballot booth, turning the Fifteenth Amendment on its head. Unfortunately, the conservatives on the Court have been willing to sacrifice fidelity to the Constitution in cases that have the potential to substantially advance the right's political agenda – cases such as Bush v. Gore and Citizens United v. FEC. It would be tragic to see one of the most iconic civil rights statutes fall in a decision likely to be added to this ignominious group.

Wrongly Decided: Voting Rights / Voter Suppression

1. The decision threatens minority voting rights—four mechanisms

Gerry Hebert, Campaign Legal Center, "A Radical Act of Judicial Activism," MOYERS & COMPANY, Group Think, 6—26—13, http://billmoyers.com/groupthink/voting-rights-act/a-radical-act-of-judicial-activism/, accessed 1-7-14.
The Supreme Court's 5-4 decision in Shelby County v. Holder, struck down core provisions of the Voting Rights Act. The Court declared Section 4 of the Voting Rights Act unconstitutional, invalidating the coverage formula that determines which jurisdictions must seek federal approval of their voting changes under the Act. This decision is a major setback for voting rights and will have a real, detrimental impact on voters. Without federal oversight of voting changes in the covered states, the cause of racial equality and effective participation by minority voters in our democracy is harmed in four ways: First, minority voters will not be informed of voting changes occurring in their community, as they were until the Shelby County decision. Second, the Shelby County decision means that changes in voting procedures will take effect immediately, without any review of whether those proposed changes harm minority voters. Third, minority voters now will bear the heavy burdens of time and expense of litigating to stop racially discriminatory voting procedures. Fourth, the preclearance provisions have a clear legal standard (retrogression) that was easily understood by state and local governments. That clear legal standard will no longer be applied to covered states and political subdivisions as a result of the Shelby County decision.

2. Numerous examples prove that the absence of the VRA provisions would allow substantial voter discrimination

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.
The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that [***27] the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy. Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which § 5 continues to protect minority voting rights. Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization: • In 1995, Mississippi sought to reenact a dual voter registration system, "which was initially enacted in 1892 to disenfranchise Black voters," and for that reason, was struck down by a federal court in 1987. H. R. Rep. No. 109-478, at 39. • Following the 2000 census, the City of Albany, Georgia, proposed a restricting plan that DOJ found to be "designed with the purpose to limit and retrogress the increased black voting strength . . . in the city as a whole." Id., at 37 (internal quotation marks omitted). • 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. DOJ required an election, and the town elected its first black mayor and three black aldermen. Id., at 36-37. • In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore "the mark of intentional discrimination that could give rise to an equal protection violation," and ordered the district redrawn in compliance with the VRA. League of United Latin American Citizens v. Perry, 548 U. S. 399, 440 (2006). In response, [*2641] Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the § 5 preclearance requirement. See Order in League of United Latin American Citizens v. Texas, No. 06-cv-1046 (WD Tex.), Doc. 8. • In 2003, after African-Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African-American members of the school board, was found to be an "`exact replica'" of an earlier voting scheme that, a federal court had determined, violated the VRA. 811 F. Supp. 2d 424, 483 (DDC 2011). See also S. Rep. No. 109-295, at 309. DOJ invoked § 5 to block the proposal. • In 1993, the City of Millen, Georgia, proposed to delay the election [**684] in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority white district would have three representatives. 1 Section 5 Hearing 744. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits. Id., at 816. • In 2004, Waller County, Texas, threatened to prose cute two black students after they announced their intention to run for office. The county then at tempted to reduce the availability of early voting in that election at polling places near a historically black [***28] university. 679 F. 3d, at 865-866. • In 1990, Dallas County, Alabama, whose county seat is the City of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory, noting that it would have disqualified many citizens from voting "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so." 1 Section 5 Hearing 356. These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress' conclusion that "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive." 679 F. 3d, at 865.[fn5]

Wrongly Decided: Voting Rights / Voter Suppression [cont'd]

3. The Shelby ruling will make it easy to engage in voter suppression

Andrew Cohen, fellow, Brennan Center for Justice, "On Voting Rights, a Decision as Lamentable as Plessy or Dred Scott," THE ATLANTIC, 6—25—13, www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/, accessed 1-6-14.

We should also be clear today about who the winners and the losers are in the wake of this opinion. The primary winners are vote suppressors in those many jurisdictions covered by Section 5, the politicians, lobbyists and activists who have in the past few years endorsed and enacted restrictive new voting laws in dozens of states. The legal burden now will be shifted from these partisans to the people whose votes they seek to suppress. This will mean that discriminatory practices will occur with greater frequency than they have before. The Constitution, the Court declared, must be color-blind and may not discriminate between states even if it means being blind to the political realities of a nation still riven by racial divides. Even in those jurisdictions not covered by Section 5 of the Voting Rights Act, lawmakers will cite today's ruling to justify future restrictions on voting -- and in that sense this is a national disaster and not just a regional one. Proponents of racial redistricting, or voter identification laws that are really a poll tax, will find succor in today's ruling. And that means we will see more of these measures and, as we do, the people most directly impacted by them will have fewer ways in which to fend them off. The deterrent effect of Section 4, alone, was enormous. As U.S. District Judge John Bates remarked last year in a case out of South Carolina, its mere presence has stopped lawmakers from pitching hundreds more dubious laws. So the winners today are officials like Rep. Darryl Metcalfe, the Republican state senator from Pennsylvania, who defended his state's statutory effort to suppress votes in the 2012 election by dog-whistling that those registered voters too "lazy" to get new identification cards didn't merit a ballot. Rep. Alan Clemmons, a Republican state representative from South Carolina, also wins today. He's a politician from a Section 5 state that sought to restrict voting rights. He answered "Amen" to a constituent who had written that encouraging black voters to get voter identification cards would "be like a swarm of bees going after a watermelon." Also winning big as a result of Shelby County? The grandees of the current iteration of the "voter fraud" myth.

4. The ruling poses a significant threat to the voting rights of millions of people

Andrew Cohen, fellow, Brennan Center for Justice, "On Voting Rights, a Decision as Lamentable as Plessy or Dred Scott," THE ATLANTIC, 6—25—13, www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/, accessed 1-6-14.

Who loses today? Not just the tens of millions of minority voters whose ability to cast a ballot now may be more easily restricted by new voting laws. Not just the millions who now will be more vulnerable to redistricting plans that are patently discriminatory. But the poor, the elderly, and the ill of all races, men and women who have voted lawfully for years but who will not be able to find the money to pay for new identification cards, or take the time out of work to travel to state offices to get one, or have the health to make the journey to obtain identification they otherwise do not need. These people, everywhere, were the indirect beneficiaries of Section 5 of the Voting Rights Act. And today their right to vote is far less secure.* So the losers today are registered voters like Craig Debose, a Vietnam veteran and longtime resident of South Carolina. Last year, he traveled 11 hours by train to Washington to testify in a Section 5 lawsuit. He doesn't have a car, which is why he didn't have photo identification, which is why he was going to be disenfranchised by state lawmakers until the Voting Rights Act saved him (for at least the last election cycle, the South Carolina law is still on the books). Losing today, too, is Jacqueline Kane, an elderly woman in Pennsylvania who had voted lawfully without incident for decades but who would have been forced from her nursing home to get an identification card. All to prevent "voter fraud" no one can prove. Losing today also are citizens of all races in Texas who work for a living but cannot afford to travel hundreds of miles to state licensing offices. They were spared last year by Section 5 when a federal court declared, among other things, that officials intentionally limited the hours of operation for offices available to issue new identification cards so as to preclude the working poor from getting there. "A law that forces poorer citizens to choose between their wages and their franchise unquestionable denies or abridges their right to vote," declared a federal court last year. Today's ruling in Washington stands for precisely the opposite proposition.

Wrongly Decided: Voting Rights / Voter Suppression [cont'd]

5. The unenforceability of Section 5 risks significant increases in voter discrimination

Myrna Perez, Deputy director, Democracy Program and Vishal Agraharkar, counsel, Democracy Program, "If Section 5 Falls: New Voting Implications," Analysis, Brennan Center for Justice, New York University Law School, 6—2—13, p. 1.
For nearly five decades, Section 5 of the Voting Rights Act of 1965 ("VRA") has been one of the nation's most effective tools to eradicate racial discrimination in voting. Section 5 prohibits certain states and jurisdictions with histories of voting discrimination from enforcing changes to their election procedures until the changes have been reviewed by the U.S. Department of Justice ("DOJ") or a federal court through a process called "preclearance." This critical tool stops discriminatory election changes before they can harm voters by requiring jurisdictions covered by Section 5 to demonstrate that their proposed voting changes do not have a racially discriminatory intent or effect. Section 5 has been challenged as unconstitutional in Shelby County v. Holder, now pending before the U.S. Supreme Court. The Court upheld Section 5 in four previous cases, and we believe it ought to do so again. The U.S. Constitution specifically gives Congress the authority to adopt legislation to combat racial discrimination in voting. Lawmakers considered a vast amount of evidence showing ongoing racial voting discrimination in the Section 5 covered states before voting nearly unanimously in 2006 to continue the provision through 2031. The decision in the Shelby County case could have significant consequences. Should the Court eliminate or weaken Section 5, minority voting rights could be threatened on a number of fronts by jurisdictions attempting to: • re-enact discriminatory voting changes that have been formally blocked by Section 5 (31 proposals were blocked by DOJ alone since the VRA was reauthorized in 2006); • adopt discriminatory voting changes that previously were deterred by Section 5 (for example, between 1999 and 2005, 153 changes were withdrawn when DOJ asked questions about them); • implement discriminatory voting changes that have lain dormant while awaiting Section 5 review; • adopt new restrictive changes; or • implement discriminatory voting changes that have been blocked from going into effect, but technically still remain on the books.

6. The decision opens the door to new voter discrimination efforts

Deborah J. Vagins, "Supreme Court Put a Dagger in the Heart of the Voting Rights Act," American Civil Liberties Union, 7—2—13, www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act, accessed 1-5-14.
Section 5 was designed to check certain states' attempts to circumvent the protections of the 14th and 15th Amendments by replacing one unconstitutional voting practice with another. Leading up to the passage of the VRA, many states, largely former slave states, used an array of tactics, from white-only primaries, to literacy tests, to poll taxes, to violence and intimidation, to suppress minority voters. As one method was deemed unconstitutional, another method took its place. And new tactics have developed overtime – documentary proof of citizenship requirements, voter ID, last minute polling place changes, limitations on third party voter registration activities and reducing the days for early voting - have all worked to disfranchise voters. Before the Supreme Court struck down Section 4, Section 5 was still actively combatting barriers which, though subtler than a white-only primary, were just as discriminatory. In 2001 in Kilmichael, Mississippi, for example, a significant number of African American candidates qualified for the board and mayoral races for the first time in its history. In response, the city promptly cancelled the general election entirely. Sadly, the list of similar discriminatory schemes is long, sordid, and shamefully current. Congress recognized hundreds of similar instances when it reauthorized the VRA in 2006. Just as Section 5 has given tangible protections to millions of voters since 1965, its absence will leave the door open for discrimination. Just hours after the Court released its decision in Shelby, Texas announced that it would implement its voter ID law that had been blocked under Section 5 because of its discriminatory impact. More changes that negatively impact voters of color, from changes in polling locations to changes in redistricting, are sure to come if Congress does not act to repair the damage and restore the legislation they passed on an overwhelming bipartisan basis, just seven years ago.

7. The overturn leaves voting rights protection up to the white-controlled state legislatures

Jeffrey Toobin, "Do We Still Need the Voting Rights Act?" THE NEW YORKER, 5—2—12, http://www.newyorker.com/online/blogs/comment/2012/05/toobin-voting-rights.html,
But as those changes illustrate, nothing about the nation is static, and it's not easy to say which way the country is moving on racial matters. By overwhelming majorities, both Houses of Congress thought it was worthwhile to maintain the federal monitoring that has made such changes took place. It's a more complicated country these days, but it's not a fully healed one, either. So far, the Roberts Court has been eager to portray the nation as beyond the need for racial remedies—especially with regard to public schools. In light of that record, the odds are that the Court will reach the same kind of conclusion with regard to the Voting Rights Act and declare Section 5 unconstitutional. At that point, the white-controlled legislatures of the former Confederacy will be largely on their own in protecting minority voting rights. For better or worse, our problems are solved when the Court says they are—and these Justices appear determined indeed to close the door to an era that may not be completely over.

Wrongly Decided: Voting Rights / Voter Suppression [cont'd]

8. The ruling makes it much harder for persons to protect their voting rights

Andrew Blotky, Director, Legal Progress and Billy Corriher, Associate Director, Legal Progress, "State and Federal Courts: The Last Stand in Voting rights," Center for American Progress, 6—25—13, www.americanprogress.org/issues/civil-liberties/report/2013/06/25/67905/state-and-federal-courts-the-last-stand-in-voting-rights/, accessed 1-7-14.
Voters in those states and localities to which Section 5 applies will now have a harder time protecting their right to vote, thanks to the U.S. Supreme Court's June 25, 2013, opinion in Shelby County v. Holder. The Court ruled that Section 4's method for determining which jurisdictions have to seek preclearance is unconstitutional because, in Chief Justice John Roberts's words, it is "based on decades-old data and eradicated practices." The majority opinion by Chief Justice Roberts faults Congress for basing Section 5's coverage on the "history of voting tests and low voter registration and turnout" in 1965. He argues, "Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were." The majority did not ignore the voluminous record of voting discrimination that Congress compiled when it repeatedly reauthorized the act, but Chief Justice Roberts dismisses the record as failing to show "anything approaching" the type of discrimination that "clearly distinguished the covered jurisdictions" in 1965. Justice Clarence Thomas wanted the Court to clearly strike down Section 5 as unconstitutional, arguing that declining to do so "needlessly prolongs the demise" of Section 5. In dissent, Justice Ruth Bader Ginsburg described the evidence of discrimination on which Congress relied in reauthorizing the act, most recently in 2006. Congress noted that while progress had been made, "voting discrimination had evolved into subtler second-generation barriers," such as racial gerrymandering, at-large voting, and discriminatory annexation. Justice Ginsburg criticizes the majority for failing to defer to the "Congress charged with the obligation to enforce the [the Fifteenth Amendment] 'by appropriate legislation.'" Rep. John Lewis (D-GA), who as a young man was severely beaten by police during a voting rights march, calls the decision was "a dagger in the heart of the Voting Rights Act."

9. Section 5's demise risks a flood of previously-deterred anti-voting measures

Myrna Perez, Deputy director, Democracy Program and Vishal Agraharkar, counsel, Democracy Program, "If Section 5 Falls: New Voting Implications," Analysis, Brennan Center for Justice, New York University Law School, 6—2—13, p. 4-5.
If Section 5 is struck down or no longer operational, we may see jurisdictions attempt to move forward with discriminatory voting changes that were abandoned, or never finally adopted, because the jurisdictions realized such changes would likely draw a Section 5 objection. It is not possible to quantify the number of problematic changes that have been deterred by Section 5, but there is ample evidence of its effectiveness. Deterrence is strongly suggested in situations where: i. A proposed change has either been withdrawn or altered after DOJ issues a letter requesting the jurisdiction provide more information about the proposed change. These requests are sent when DOJ cannot determine, on the basis of the material submitted for preclearance, whether the proposed change was enacted with a discriminatory intent or would have a discriminatory effect. ii. A contemplated change is either revised or abandoned in light of concerns that it would not survive Section 5 scrutiny. The numbers demonstrate these circumstances are plentiful. One analysis found that just between 1999 and 2005, 153 voting changes were withdrawn and 109 were superseded by altered submissions after DOJ requested more information. • In 2012, the city of Decatur, Alabama submitted a change to the structure of its government that would have eliminated two city council districts and diluted the only majority-minority district in the city. Some examples include: After DOJ responded with a request for more information, the city abandoned the plan. City officials said they assumed DOJ would reject the new government structure because of its negative effect on minority voters. Decatur then revised its plan, retaining the city council districts, and DOJ approved. In March 2013, the city once again contemplated resubmitting the original plan, although the city council narrowly voted down the measure. After the vote, a challenger to the incumbent mayor noted the "pre-clearance issue that has been the point of contention" may soon go away if the Supreme Court strikes down Section 5. • In 2003, Monterey County, California sought to reduce the number of polling places from 190 to 86 for a special gubernatorial recall election. Such a dramatic reduction would have made it harder for minorities to travel to their local polling site. DOJ requested more information, resulting in the county withdrawing five of the proposed precinct consolidations. DOJ then precleared the submission.

Wrongly Decided: Voting Rights / Voter Suppression [cont'd]

10. Section's 5 demise will lead to new suppression efforts

Myrna Perez, Deputy director, Democracy Program and Vishal Agraharkar, counsel, Democracy Program, "If Section 5 Falls: New Voting Implications," Analysis, Brennan Center for Justice, New York University Law School, 6—2—13, p. 6.
If Section 5 is struck down, jurisdictions may try to implement discriminatory voting changes that have been enacted but — for lack of Section 5 review and preclearance — have not been enforced. Voting rights experts are concerned that some jurisdictions are purposely delaying the preclearance process for their election changes in the hopes Section 5 will be struck down. Alabama provides two examples. In the 2011 legislative session, the Alabama General Assembly passed a law requiring voters to present documentary proof of citizenship when registering to vote. Because changes of this variety already have undergone the necessary state or local approval process, they are ready to be implemented in the absence of a functioning Section 5. On April 23, 2012, Alabama submitted this law for preclearance. Seven months later, DOJ sent a letter requesting more information. On May 15, 2013, Alabama withdrew the law from the preclearance process. Laughlin McDonald, a veteran voting rights attorney and leader of the ACLU's Voting Rights Project for approximately four decades, believes the withdrawal was motivated by a desire to avoid an objection in the short-term, and the hope that Section 5 would not function as a barrier. Additionally, just days after Alabama passed the 2011 proof-of-citizenship requirement, the state legislature passed a strict photo identification law. This law has not been implemented or submitted to DOJ for preclearance.

11. New voter restriction risk is very real—recent legislative history proves

Myrna Perez, Deputy director, Democracy Program and Vishal Agraharkar, counsel, Democracy Program, "If Section 5 Falls: New Voting Implications," Analysis, Brennan Center for Justice, New York University Law School, 6—2—13, p. 7.
In the absence of a functioning Section 5, jurisdictions may seek to implement new forms of restrictive election changes. In the run-up to the 2012 election, state legislatures abruptly reversed America's long tradition of expanding voting access by pressing scores of new bills that would have made it harder for eligible Americans to vote. These new laws — which included onerous voter identification requirements, cutbacks to early voting, and restrictions on community-based registration drives — were adopted in 19 states. But citizens, the courts, and DOJ intervened, blocking many of these measures. Section 5 was instrumental in these successes, playing a major role in ameliorating the disenfranchising effect of restrictive laws in Texas, South Carolina, and Florida. In the most recent legislative session and as of April 29, 2013, 28 restrictive voting bills were introduced in the states that are covered, wholly or in part, by Section 5. Two have already passed, and 17 are still pending as of June 10, 2013. The bills introduced include, for example, a strict photo identification requirement in Virginia, restrictions on early voting and same-day registration in North Carolina, and a South Carolina bill requiring documentary proof of citizenship to register to vote. Section 5 would require a detailed examination of these laws. Without it, any restrictive legislation — even if it were discriminatory — could be implemented unless or until a litigant challenged it.

12. The decision has led to a surge in voter suppression efforts

Andrew Blotky, Director, Legal Progress and Billy Corriher, Associate Director, Legal Progress, "State and Federal Courts: The Last Stand in Voting rights," Center for American Progress, 6—25—13, www.americanprogress.org/issues/civil-liberties/report/2013/06/25/67905/state-and-federal-courts-the-last-stand-in-voting-rights/, accessed 1-7-14.
Legislators and election administrators formerly subject to preclearance could erect more obstacles to voter registration or casting a ballot. In 2013 alone, state legislatures considered more than 80 bills that would limit voting opportunities, according to the Brennan Center for Justice. Republicans in North Carolina gained control of the state government in 2012 for the first time since 1896, and their effort to restrict the right to vote is now in full swing. Republican legislators in the Tar Heel State are considering a bill that would impose a tax on parents whose college-student children register to vote in the city or town where they attend college. North Carolina legislators are also considering bills to make voter registration more difficult, end same-day voter registration, make it harder for ex-felons to vote, reduce early voting, and end early voting on Sundays. Similar efforts are underway in scores of state legislatures, including several jurisdictions that were previously required to preclear their voting laws.

Wrongly Decided: Answers to "Discriminatory Intent / Outcomes"

1. The wording of the Fourteenth Amendment itself proves that the "discriminatory nature" of the VRA is itself permissible

Akhil Reed Amar, Professor, Law and Political Science, Yale University, "The Lawfulness of Section 5—And Thus of Section 5," HARVARD LAW REVIEW FORUM v. 126, 2—13, p. 109-110.

To unpack, briefly, this title's (and this article's) argument: section 5 of the Voting Rights Act (VRA) is an obviously appropriate, and thus lawful, congressional enactment pursuant to section 5 of the Fourteenth Amendment, which explicitly empowers Congress to "enforce, by appropriate legislation, the provisions of this article" -- that is, the Fourteenth Amendment itself. Those who oppose section 5 of the VRA claim that its regime of selective preclearance -- whereby certain states with sorry electoral track records must get preapproval from federal officials in order to do things that other states with cleaner electoral track records may do automatically -- is not appropriate, not proper, not proportional. But if section 5 of the VRA is unconstitutional, why wasn't section 5 of the Fourteenth Amendment itself unconstitutional? For that section -- and indeed every section -- of the Fourteenth Amendment was itself adopted by a process in which certain states were subject to a kind of selective preclearance. In the very process by which section 5 and the rest of the Fourteenth Amendment were adopted, certain states with sorry electoral track records were obliged to get preapproval from federal officials in order to do things that other states with cleaner electoral track records were allowed to do automatically. But it would be preposterous to say that section 5 of the Fourteenth Amendment was itself illegal. And what is true of section 5 (of the amendment) is true of section 5 (of the VRA). Section 5 (of the VRA) is constitutionally proper, appropriate, and proportional, under the very same constitutional principles that legitimated section 5 (of the Fourteenth Amendment) itself. In short, any serious constitutional analysis of the special preclearance system of the Voting Rights Act must come to grips with the special preclearance system that generated the Fourteenth Amendment itself in the 1860s. Between 1865 and 1868, states with abysmal track records of rights-enforcement and democratically deficient voting rules were not allowed back into Congress to sit alongside states with minimally acceptable track records, and these same democratically deficient states were also not allowed to resume full powers of state self-governance enjoyed by their nondeficient sister states. Instead, states with sorry track records were required to submit new state constitutions for federal preapproval/preclearance, and were also required to ratify the Fourteenth Amendment itself. Other states, by contrast, were not subject to these special federal preclearance requirements. Although many critics of Congress's actions in the 1860s loudly objected, in the name of states' rights and state equality, to this highly visible system of selective preclearance, the Reconstruction Congress successfully defended its actions as a proper federal enforcement of the Article IV Republican Government Clause -- the very clause that today's states' rights critics of the VRA have tried to invoke, with unintended but astonishing irony, against the VRA! Whatever the clause may have meant to the Founding generation -- a question that has generated a range of scholarly views -- it is uncontested that the Republican Government Clause was the explicit and widely publicized legal basis for Reconstruction itself, and for the specific regime of selective preclearance that was undeniably part of the very process by which the Fourteenth Amendment (and also the Fifteenth Amendment) became part of the Constitution. Modern interpreters of the Republican Government Clause must thus take account of how this clause was powerfully and publicly glossed by the Reconstruction Amendments themselves -- in particular, by the process by which these amendments sprang to life, with the repeated and well-informed endorsement of the American people in a series of watershed elections that culminated in an emphatically Reconstructed Constitution.

Wrongly Decided: Answers to "Discriminatory Intent / Outcomes" [cont'd]

2. Existing racial polarization creates an environment vulnerable to discrimination—the pre-clearance requirements remain justified

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. H. R. Rep. No. 109-478, at 34-35. While racially polarized voting alone does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically outvoted and having their interests underrepresented in legislatures. Second, "when [***30] political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." Ansolabehere, Persily, & Stewart, Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act, 126 Harv. L. Rev. Forum 205, 209 (2013). In other words, a governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive "will inevitably discriminate against a racial group." Ibid. Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic literature. See 2006 Reauthorization § 2(b)(3), 120 Stat. 577 ("The continued evidence of racially polarized voting in each of the jurisdictions covered by the [preclearance requirement] demonstrates that racial and language minorities remain politically vulnerable"); H. R. Rep. No. 109-478, at 35; Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution 21, 22.

Wrongly Decided: Answers to "Improved Conditions"

1. "Conditions have changed" arguments are just wrong—the covered jurisdictions present an ongoing risk of voter discrimination absent the VRA

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in § 4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions. There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. Ante, at 12-13. Consideration of this long history, [***29] still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." Ante, at 20. But the Court ignores that "what's past is prologue." W. Shakespeare, The Tempest, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, The Life of Reason 284 (1905). Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization § 2(b)(9). Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs." Northwest Austin, 557 U. S., at 203. Congress learned of these conditions through a report, known as the Katz study, that looked at § 2 suits between 1982 and 2004. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., pp. 964-1124 (2005) (hereinafter Impact and Effectiveness). Because the private right of action authorized by § 2 of the VRA applies nationwide, a comparison of § 2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would [*2643] expect that the rate of successful § 2 lawsuits would be roughly the same in both areas.[fn6] The study's findings, however, indicated that racial discrimination in voting remains "concentrated in the jurisdictions singled [**686] out for preclearance." Northwest Austin, 557 U. S., at 203. Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. Impact and Effectiveness 974. Controlling for population, there were nearly four times as many successful § 2 cases in covered jurisdictions as there were in noncovered jurisdictions. 679 F. 3d, at 874. The Katz study further found that § 2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. Impact and Effectiveness 974. From these findings — ignored by the Court — Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.

2. Covered states still engage in discrimination—congressional findings prove

Elizabeth Wydra, chief counsel, Constitutional Accountability Center, "2012 Showed Us the Law is Still Needed," NEW YORK TIMES, Room for Debate, 10—6—13, http://www.nytimes.com/roomfordebate/2013/02/24/is-the-voting-rights-act-still-needed/how-2012-shows-the-voting-rights-act-is-still-needed, accessed 1-4-13.

Certainly there has been significant progress in the struggle to protect voting rights, which is cause for celebration, but the Voting Rights Act is absolutely still needed. Before Congress reauthorized the act in 2006, it amassed a record of over 15,000 pages demonstrating that state-sponsored racial discrimination in voting continues to be concentrated in the jurisdictions long covered by the Voting Rights Act. Indeed, Congress found that many of the same state and local governments that had flouted the 15th Amendment's guarantee of a right to vote free from racial discrimination, requiring Congress to pass the Voting Rights Act in 1965, continue to engage in systematic racial discrimination in voting.

Wrongly Decided: Answers to "Improved Conditions" [cont'd]

3. Discrimination efforts have simply become more sophisticated

National Bar Association, Amicus Curiae Brief in Support of Respondents in Shelby Co. v. Holder, No. 12-96 in the Supreme Court of the United States, 2013, http://redistrictingonline.org/uploads/Shelbyamici-nationalbarassoc020313.pdf, accessed 1-8-14.

Petitioner and certain amici curiae argue that the discrimination that prompted Congress to pass the Voting Rights Act is a thing of the past. That is wrong. In just the six years since Congress reauthorized the Voting Rights Act, Section 5 jurisdictions have proposed a wave of voting-related rules that abridge the rights of minorities to vote. That the means of discrimination today are less blatant than they were in 1965 does not make them less nefarious. Jurisdictions subject to Section 5 recently have enacted limitations on voter registration drives and early voting that disproportionately impact minorities. Minorities are significantly more likely than Caucasians to register to vote at registration drives, which several Section 5 jurisdictions, including Florida and Texas, have sought to limit. Minorities also are significantly more likely than Caucasians to vote early. For example, during the 2008 presidential election, African Americans and Hispanics respectively comprised thirty-one percent and twenty-two percent of all citizens who cast votes on the last Sunday of early voting in Florida. The same two groups cast only thirteen percent and eleven percent of votes in that election in total. Proposals to eliminate early voting on the Sunday before Election Day thus targets minority voters. Section 5 jurisdictions also recently have proposed voter-identification laws that would disenfranchise minority voters, because African- jurisdictions have proposed a wave of voting-related rules that abridge the rights of minorities to vote. That the means of discrimination today are less blatant than they were in 1965 does not make them less nefarious. Jurisdictions subject to Section 5 recently have enacted limitations on voter registration drives and early voting that disproportionately impact minorities. Minorities are significantly more likely than Caucasians to register to vote at registration drives, which several Section 5 jurisdictions, including Florida and Texas, have sought to limit. Minorities also are significantly more likely than Caucasians to vote early. For example, during the 2008 presidential election, African Americans and Hispanics respectively comprised thirty-one percent and twenty-two percent of all citizens who cast votes on the last Sunday of early voting in Florida. The same two groups cast only thirteen percent and eleven percent of votes in that election in total. Proposals to eliminate early voting on the Sunday before Election Day thus targets minority voters. Section 5 jurisdictions also recently have proposed voter-identification laws that would disenfranchise minority voters, because African-

4. The fact that things have improved does not invalidate the need for the VRA

Andrew Koppelman, Professor, Law, Northwestern University, "The Supreme Court's Naïve Reasoning for Gutting the Voting Rights Act," NEW YORK MAGAZINE, 6—25—13, http://nymag.com/daily/intelligencer/2013/06/supreme-courts-voting-rights-blunder.html, accessed 1-6-13.

The fundamental premise that drives Roberts's analysis is the claim that there is no reliable connection between a centuries-long history of slavery, Jim Crow, and voter suppression and any present voting discrimination. But the Deep South hasn't changed that much. Outright vote suppression has been outlawed, but white officials continue to use nasty tricks to keep blacks from voting. Justice Ginsburg, in her dissent, offers plenty of examples. Here's one: In 2001, the all-white board of aldermen in Kilmichael, Mississippi, suddenly canceled the town's election after an unexpected number of African-American candidates announced their intention to run. The Justice Department required an election. The town elected its first black mayor and three black aldermen. The fact that things have gotten better hardly means that the act is no longer necessary. It may just mean that it is operating successfully. Ginsburg writes: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." When it struck down the lynch laws in the 1880s, the court lectured Congress on the need to rewrite its statutes to comport with previously unheard-of constitutional limitations. No rewriting occurred. There was no more Federal civil-rights legislation until 1957.

Wrongly Decided: Answers to "Improved Conditions" [cont'd]

5. Their "irrationality" arguments are wrong—Congress had good reason to maintain the existing coverage formula

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

The situation Congress faced in 2006, when it took up reauthorization of the coverage formula, was not the same. By then, the formula had been in effect for many years, and all of the jurisdictions covered by it were "familiar to Congress by name." Id., at 328. The question before Congress: Was there still a sufficient basis to support continued application of the preclearance remedy in each of those already-identified places? There was at that point no chance that the [*2651] formula might inadvertently sweep in new areas that were not the subject of congressional findings. And Congress could determine from the record whether the jurisdictions captured by the coverage formula still belonged under the preclearance regime. If they did, there was no need to alter the formula. That is why the Court, in addressing prior reauthorizations of the VRA, did not question the continuing "relevance" of the formula. Consider once again the [***38] components of the record before Congress in 2006. The coverage provision identified a known list of places with an undisputed history of serious problems with racial discrimination in voting. Recent evidence relating to Alabama and its counties was there for all to see. Multiple Supreme Court decisions had upheld the coverage provision, most recently in 1999. There was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that pre-clearance was still having a substantial real-world effect, having stopped hundreds of discriminatory voting changes in the covered jurisdictions since the last reauthorization. In addition, there was evidence that racial polarization in voting was higher in covered jurisdictions [**695] than elsewhere, increasing the vulnerability of minority citizens in those jurisdictions. And countless witnesses, reports, and case studies documented continuing problems with voting discrimination in those jurisdictions. In light of this record, Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas. And certainly Shelby County was no candidate for release through the mechanism Congress provided. See supra, at 22-23, 26-28. The Court holds § 4(b) invalid on the ground that it is "irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time." Ante, at 23. But the Court disregards what Congress set about to do in enacting the VRA. That extraordinary legislation scarcely stopped at the particular tests and devices that happened to exist in 1965. The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race. As the record for the 2006 reauthorization makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted substitutes for the first-generation barriers that originally triggered preclearance in those jurisdictions. See supra, at 5-6, 8, 15-17.

6. Things have not changed enough—we still need protections

Jeffrey Toobin, "Do We Still Need the Voting Rights Act?" THE NEW YORKER, 5—2—12, http://www.newyorker.com/online/blogs/comment/2012/05/toobin-voting-rights.html,

The questions at the heart of the case are both simple and profound. How much has American society, and especially the South, changed with regard to race relations since 1965? Is Section 5 still a necessary check on the white majority—or is the law a patronizing relic of a vanished age? Judge David Tatel, writing for the majority, said Congress still had the right to insist that the Justice Department continue to monitor voting rights in the South. Tatel's opinion acknowledged the obvious: that a great deal had changed for the better in the South, and elsewhere, since 1965. He said further that the evidence of continuing discrimination was "by no means unambiguous." Still, while the days of Bull Connor are long gone, Tatel said that Congress still had reason to keep Section 5 in place when it held the reauthorization vote in 2006. "Vote dilution" remained a big problem for black citizens; that is, white legislators were still " 'packing' minorities into a single district, spreading minority voters thinly among several districts, annexing predominately white suburbs, and so on." Certain facts, too, were unavoidable, notably that "not one African American had yet been elected to statewide office in Mississippi, Louisiana, or South Carolina." In short, Tatel concluded that "serious and widespread intentional discrimination persisted in covered jurisdictions and that case-by-case enforcement alone … would leave minority citizens with an inadequate remedy." Without Section 5, Tatel concluded, the rights of minority voters would be in jeopardy.

Wrongly Decided: Answers to "Improved Conditions" [cont'd]

7. Racial discrimination remains a problem—justifies Section 5-style provisions

Sandhya Bathija, Campaign Manager, Legal Progress, "5 Reasons Why Section 5 of the voting Rights Act Enhances Our Democracy," Center for American Progress, 2—19—13, http://www.americanprogress.org/issues/civil-liberties/report/2013/02/19/53721/5-reasons-why-section-5-of-the-voting-rights-act-enhances-our-democracy/, accessed 1-7-14.

3. Section 5 prevents discrimination where race is still a barrier Under the Voting Rights Act, jurisdictions that must seek preclearance have a history of racial discrimination in voting practices, and there is still evidence that racial discrimination is prevalent in Section 5-covered jurisdictions. Most of the states fully covered under Section 5 have the highest African American populations in the country, which should mean that African Americans are strongly represented in the government. But that is unfortunately not the case. African Americans are still significantly underrepresented in state legislatures, in Congress, and in statewide offices such as governor and U.S. Senate positions. Where African Americans do serve in public office, they are elected in districts that are majority minority voters. Racially polarized voting such as this indicates that race is still a factor in how people vote. (see Figure 2 on following page) Mississippi, which is nearly 40 percent African American—the highest population of African Americans in any state in the country—has never elected an African American governor. There is one African American currently in Congress who represents Jackson, Mississippi, which is more than 60 percent African American. Louisiana, Mississippi, Virginia, Georgia, and South Carolina lead the country in being the most underrepresented when it comes to African Americans in the state legislature. In addition, federal observers are frequently sent to Section 5-covered states on Election Day. The U.S. attorney general is permitted to send federal observers to certain Section 5-covered jurisdictions if there is reason to believe that voting rights will not be protected. Between 1966 and 2004, the attorney general sent a total of 1,142 federal observers to different states to monitor voting practices during elections. Most of these observers are sent into counties that are more than 40 percent nonwhite. Louisiana, Mississippi, Alabama, Georgia, and South Carolina accounted for 66 percent of all federal observer coverages between 1982 and 2004. When federal observers are sent to a jurisdiction, it is referred to as an "observer coverage." (see Figure 3) In the 2012 presidential election, the Department of Justice sent observers into counties in all of the fully covered Section 5 states except Virginia.

8. Voter discrimination persists—Shelby was wrong decided

Spencer Overton, Professor, Law, George Washington University, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/Overton%20%207-18-13.pdf, accessed 1-6-13.

Significant Voting Discrimination Persists: Too many political operatives in previously covered jurisdictions continue to maintain power by unfairly manipulating voting rules based on how voters look or speak. Congress determined as much during the last reauthorization, and such discrimination has occurred since that time in various jurisdictions like Nueces County, Texas. While the Court in Shelby County invalidated the coverage formula because it was based on data from the 1960s and 1970s, the Court acknowledged that "voting discrimination still exists" and that "any racial discrimination in voting is too much." In the last 50 years we have made significant progress on voting rights. Unfortunately, after Shelby County v. Holder political operatives have more opportunity to unfairly manipulate election rules based on race. The Court in Shelby County stated that the purpose of the Fifteenth Amendment is "to ensure a better future," but the future will be worse if Congress fails to act.

9. Section 5 is still needed—efforts to restrict minority voting rights persist

National Bar Association, Amicus Curiae Brief in Support of Respondents in Shelby Co. v. Holder, No. 12-96 in the Supreme Court of the United States, 2013, http://redistrictingonline.org/uploads/Shelbyamici-nationalbarassoc020313.pdf, accessed 1-8-14.

Voting discrimination is not a thing of the past. Although the Voting Rights Act, and particularly Section 5, has resulted in great strides forward from Jim Crow-era disenfranchisement, jurisdictions are still attempting today to restrict the ability of minority voters to exercise their right to vote. Historically, discrimination in Section 5 jurisdictions was both overt and violent. Modern discrimination, although perhaps more subtle, also is devastating to the voting rights of minorities. Legislatures continue to discriminate against minority voters by means of restrictions on early voting and voter registration drives, onerous voter-identification requirements, and discriminatory redistricting plans. And these discriminatory acts continue to draw objections from the Department of Justice under Section 5. Thus, contrary to Petitioner's and amici curiae's contentions, Section 5 remains necessary to protect minorities in covered jurisdictions from discrimination.

Wrongly Decided: Answers to "Local Burdens"

1. The VRA imposes no meaningful burden upon state and local governments

Emily Phelps, "For States, the Voting Rights Act Actually Means Manageable Burdens and Major Benefits," Constitutional Accountability Center, 1—23—13, http://theusconstitution.org/text-history/1783/states-voting-rights-act-actually-means-manageable-burdens-and-major-benefits, accessed 1-4-14.

Conservative adversaries of the Voting Rights Act have long tried to paint the law as an oppressive bureaucratic burden, a federal imposition on states that can't be tolerated under the Constitution. That was their argument against the law in 1964, and it's still their argument today as the Court prepares to consider Shelby County v. Holder. Setting aside the irony of this argument—we fought a little thing called the Civil War at least in part over states' rights and, shortly after the Union prevailed, ratified the 15th Amendment to explicitly grant the federal government strong powers to prevent states from denying or abridging the right to vote on the basis of race —these opponents misrepresent what the Voting Rights Act really looks like in practice. The simple reality is that the preclearance requirement of Section 5 of the Act is not a particularly significant burden for covered jurisdictions that do not seek to enact laws that deny or abridge the right of racial minorities to vote. Section 5 requires election officials in nine states, and some counties and townships in seven others, to submit changes to their voting policies either to a federal court or to the Justice Department for approval before putting them in place, including seemingly mundane but potentially significant issues like the closing of a polling place. How long does the preclearance process take in such cases? "Less than an hour to prepare and mail," according to elections administrators who contributed to congressional testimony in 2006. And the costs? "Insignificant, except for redistricting submissions." (As little as $100 for a routine submission, estimates longtime VRA litigator Gerry Hebert.)

2. VRA requirements are easy to follow

Emily Phelps, "For States, the Voting Rights Act Actually Means Manageable Burdens and Major Benefits," Constitutional Accountability Center, 1—23—13, http://theusconstitution.org/text-history/1783/states-voting-rights-act-actually-means-manageable-burdens-and-major-benefits, accessed 1-4-14.

To most election administrators, preclearance is a manageable procedure that's been well integrated into bureaucratic routine for decades. Administrators also recognize its tangible benefits: it gives them public credibility and enhances respect for voting rights, and helps them largely avoid citizen litigation, costly on both sides. That's one reason Mississippi and other states signed an amici brief opposed to their counterparts in Shelby County, AL. It's also why Senators and Representatives from covered districts spoke eloquently about the value of the process to their home states in 2006, when Congress reauthorized the Voting Rights Act by a bipartisan landslide. Moreover, jurisdictions with a clean recent record on this front can "bail out" of preclearance altogether. Section 5 is designed to apply to the areas that have longstanding, proven histories of racial discrimination in voting. While the formula for distinguishing covered from uncovered jurisdictions is under attack in Shelby County, this formula does not stand alone. If a jurisdiction's laws have been approved by the Justice Department without raising any red flags for a period of ten years, then it can apply to be excluded from preclearance altogether. And the use of the bailout process has recently spiked. 19 jurisdictions have bailed out in three years since the 2009 NAMUDNO v. Holder case. [Addendum: These 19 bailout actions have led to a total of 127 jurisdictions successfully bailing out since NAMUDNO, if one includes smaller sub-jurisdictions--i.e. towns—in addition to larger jurisdictions--i.e. counties. More information is available at justice.gov.] As Hebert, who has represented many governments in seeking a bailout, recently observed, "not a single jurisdiction seeking a bailout has been turned down, and . . . States and political subdivisions are pursuing bailouts with ease in greater numbers than ever before."

Wrongly Decided: Answers to "Local Burdens" [cont'd]

3. Localities can still earn their way out of pre-clearance requirements

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

As important, the coverage formula has never stood on its own. Even at the time of the 1965 Act, Congress recognized that the coverage formula had the potential to be both over- and under-inclusive. To address this problem, Congress designed two remedies: bailout, which permits covered jurisdictions to escape from preclearance obligations by demonstrating a clean voting record, and bail-in, which allows courts to extend preclearance to jurisdictions that have committed violations of the Fourteenth or Fifteenth Amendments. In 2006, rather than try to create a wholly-new, untested coverage formula, Congress examined the state of voting discrimination both within and outside the covered jurisdictions and appropriately chose to continue to rely on bail-out and bail-in to address any conceivable problems in the scope of the Act's coverage formula. Doing so was well within the choice of means permitted Congress under its express power to enforce the Constitution's prohibition on racial discrimination in voting. The history of bailout confirms that covered jurisdictions are not locked into the Act's coverage, but rather have a full and fair opportunity to be free of federal supervision, an opportunity which many jurisdictions have taken advantage of. At one time, towns or counties in the states of Colorado, Connecticut, Hawaii, Idaho, Maine, Massachusetts, New Mexico, and Wyoming were covered by the preclearance requirement; today, none of them are covered. Throughout the 1970s and 1980s, each bailed out. In the 1982 renewal of Section 5, Congress liberalized the bailout provision, making it easier for covered jurisdictions to free themselves of the Act's preclearance regime. Since then, in Northwest Austin, the Supreme Court expanded eligibility for bail-out to a broader range of political subdivisions, allowing them to be able to demonstrate a clean voting record and bail out. As a result, "[s]ince 2009, numerous local political subdivisions have sought and obtained a bailout . . . . [N]ot a single jurisdiction seeking a bailout has been turned down, and . . . States and political subdivisions are pursuing bailouts with ease in greater numbers than ever before."

4. Pre-clearance does not impose an undue burden on localilties

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

Finally, despite claims that the preclearance requirement imposes onerous burdens, the reality is that the preclearance requirement is not a particularly significant burden for covered jurisdictions that do not seek to enact laws that deny or abridge the right of racial minorities to vote. According to congressional testimony, most preclearance submissions take elections administrators "less than an hour to prepare and mail," and, with the exception of more complicated redistricting submissions, the costs are "insignificant." In sum, a review of the record before Congress in 2006 demonstrates that, despite considerable progress, the Voting Rights Act's preclearance regime is still necessary to prevent and deter racial discrimination in voting in state and local governments with longstanding, proven histories of racial discrimination in voting. The burdens created by the preclearance requirement are modest and fully justified by the need to ensure that states with a long history and contemporary record of voting discrimination live up to our Constitution's promise of a multi-racial democracy.

Wrongly Decided: Answers to "New Formula Solves"

1. The claim that Congress could write a new formula is wrong—gridlock

Andrew Koppelman, Professor, Law, Northwestern University, "The Supreme Court's Naïve Reasoning for Gutting the Voting Rights Act," NEW YORK MAGAZINE, 6—25—13, http://nymag.com/daily/intelligencer/2013/06/supreme-courts-voting-rights-blunder.html, accessed 1-6-13.

The notion that Congress can step in to fix the Voting Rights Act by writing a new formula is equally bogus. The most notorious fact about modern American politics is that Congress is utterly paralyzed and can accomplish nearly nothing. The preclearance requirement of the Voting Rights Act is effectively dead. Roberts writes: "There is no denying ... that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions." There is a sense in which this is trivially true, the way it's true that you can never step into the same river twice. The real question is whether racism is still powerful enough in these places to justify federal intervention. Congress thinks it is. But Roberts is sure that he knows better. The other notorious fact is a wave of voter I.D. laws that are being enacted across the United States. These laws are being justified with the rationale that they are necessary to prevent voter fraud. But that's a transparent lie. The evidence of such fraud actually occurring is nil. The real reason for such laws is that they reduce the voting rates of blacks and Hispanics, and therefore advantage Republican candidates. Racially motivated voter suppression is still with us. The Supreme Court has just made it easier.

2. Congress is unlikely to pass a new formula

Emily Wang, "Shelby County v. Holder," HARVARD POLITICAL REVIEW, 11—24—13, http://harvardpolitics.com/united-states/shelby-county-v-holder/, accessed 1-5-14.

In a 5-4 vote this past June, the Supreme Court dealt a serious blow to the legacy of the civil rights movement in Shelby County v. Holder. Striking down Section 4(b) of the Voting Rights Act of 1965, the decision nullified the coverage formula that determined which states and local governments required preapproval from the Department of Justice before modifying voting laws and requirements. Within hours of the decision, Texas and Mississippi state legislators announced their intentions to move forward with stricter voter identification standards. Stripped of preclearance, Attorney General Eric Holder announced plans to invoke Section 3—a related but less powerful statute—in order to block Texas from implementing its voter ID laws. Meanwhile, Congress has yet to pass a new coverage formula to replace its supposedly outdated predecessor. With the current partisan divide, compromise seems highly unlikely, and the future of voting protections remains uncertain. Shelby, though comprising only a single moment in the history of civil rights, marks an important turning point. The discourse surround- ing Shelby highlights the increasing divergence of this modern movement from its mid-20th century predecessor, although the decision may serve as a rallying point for a broad, progressive coalition in the near future.

Wrongly Decided: Answers to "Old Data / Formula"

1. Claims that the VRA formula is "static" are disingenuous—Congress had very good reason to fear voter discrimination when it reauthorized the Act in 2006

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded covered [*2644] jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to "bail out" of preclearance, and for court-ordered "bail ins." See Northwest Austin, 557 U. S., at 199. [**687] The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U. S. C. § 1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. § 1973a(c) (2006 ed.). Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H. R. Rep. No. 109-478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so"). Nearly 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 [***31] effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a-3a. This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

2. Claims that the VRA formula is "static" are disingenuous—Congress had very good reason to fear voter discrimination when it reauthorized the Act in 2006

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded covered [*2644] jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to "bail out" of preclearance, and for court-ordered "bail ins." See Northwest Austin, 557 U. S., at 199. [**687] The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U. S. C. § 1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. § 1973a(c) (2006 ed.). Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H. R. Rep. No. 109-478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so"). Nearly 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 [***31] effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a-3a. This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

Wrongly Decided: Answers to "Old Data / Formula" [cont'd]

3. The Court's decision ignores the robust evidence Congress used to justify the VRA's The geographic scope of the VRA is neither outdated nor discriminatory

David H. Gans and Elizabeth B. Wydra, "The Voting Rights Act Is in Jeopardy, But It Shouldn't Be: A Close Look at Shelby County v. Holder," ISSUE BRIEF, American Constitution Society for Law and Policy, 2—13, http://www.acslaw.org/sites/default/files/Gans_and_Wydra_-_A_Close_Look_at_Shelby_County_v._Holder_0.pdf, accessed 1-4-14.

One of the most prominent charges made by opponents of the Voting Rights Act is that – notwithstanding this mountain of evidence of racial discrimination in voting persisting in covered jurisdictions – the Voting Rights Act is now out of date and unconstitutional because Congress did not update the Act's coverage provision. But, on close analysis, these arguments cannot withstand scrutiny. Congress had good reason to reauthorize the Act's geographic coverage provision, which has captured and still captures the jurisdictions with the worst record of adhering to the Constitution's promise of a multi-racial democracy. Shelby County and its supporters have made a number of policy arguments about why a new coverage formula should have been designed. But they are exactly that – policy arguments. The Constitution specifically entrusts to Congress the power to select the means to eliminate the scourge of racial discrimination in voting. The question whether to use or amend the coverage formula was one for Congress to decide, using the broad power specifically conferred in the Constitution. The Act's geographic formula covers state and local governments that (1) maintained a voting "test or device" as of either November 1964, 1968, or 1972; and (2) at the same time had a low-registration or turnout rate below half the voting age population (1964 and 1968), or citizen voting age population (1972). The Act's triggers were designed to capture those places where voting discrimination was most entrenched. Going all the way back to 1965, "Congress identified the jurisdictions it sought to cover – those for which it had 'evidence of actual voting discrimination' – and then worked backward, reverse-engineering a formula to cover those jurisdictions." As the Court observed in South Carolina v. Katzenbach, "Congress began work with reliable evidence of actual voting discrimination" and the "formula eventually evolved to describe these areas . . . ." As in 1965, in 2006, preclearance coverage was "not predicated on statistics alone," but rather "on recent and proven instances of discrimination in voting rights compiled in the . . . record." And, as the voluminous record compiled by Congress and detailed by the lower courts in Shelby County shows, the covered jurisdictions continue to be the worst offenders, consistently refusing to live up to the Constitution's promise of a multi-racial democracy.

4. Whether the formulas are 'outdated' is irrelevant—Congress is still empowered to enforce the Fifteenth Amendment

David H. Gans, Director, Human Rights, Civil Rights, and Citizenship Program, "The Surprisingly Easy Case for the Constitutionality of the Voting Rights Act," Constitutional Accountability Center, 9—24—12, http://theusconstitution.org/text-history/1623/surprisingly-easy-case-constitutionality-voting-rights-act, accessed 1-4-13.

To anyone who takes the Constitution's text seriously, there are glaring holes in the conservative constitutional attack on the Voting Rights Act. Shelby County's primary argument is that the Act's preclearance requirement is outdated and unnecessary, given changes in Alabama (where Shelby County is located) and elsewhere, but the Constitution, in fact, assigns to Congress the job of deciding how to enforce the Constitution's ban on racial discrimination in voting. As Chief Justice Roberts recognized in a much-ignored passage of his 2009 opinion in NAMUDNO v. Holder, "the Fifteenth Amendment empowers Congress, not the Court, to determine . . . what legislation is needed to enforce it." In renewing the Act in 2006, Congress exercised that judgment. Lopsided bipartisan majorities of 98-0 in the Senate and 390-33 in the House concluded that the Act was still a necessary tool to combat unconstitutional voting discrimination by states with a long history of voting discrimination.

5. 'Datedness' should not be grounds for overturning a law

Richard A. Posner, judge, U.S. Court of Appeals, 7th Circuit, "The Voting Rights Act Ruling Is About the Conservative Imagination," SLATE, 6—26—13, www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html, accessed 1-5-14.

The majority opinion in Shelby acknowledges that racial discrimination in voting continues, but notes that the situation has improved since 1965 and that the procedures in the current Voting Rights Act do not make a clean fit with the current forms and pattern of discrimination. Ordinarily however a federal statute is not invalidated on the ground that it's dated. I hardly think the Supreme Court justices believe (as did Alexander Bickel) that "desuetude" is a constitutional doctrine. And the criticisms of the statute in the majority opinion are rather tepid. That's why the court's invocation of "equal sovereignty" is an indispensable prop of the decision. But, as I said, there is no doctrine of equal sovereignty. The opinion rests on air.

Wrongly Decided: Answers to "Old Data / Formula" [cont'd]

6. It is the jurisdictions that are important, not the formulas

David H. Gans, Director, Human Rights, Civil Rights, and Citizenship Program, "The Surprisingly Easy Case for the Constitutionality of the Voting Rights Act," Constitutional Accountability Center, 9—24—12, http://theusconstitution.org/text-history/1623/surprisingly-easy-case-constitutionality-voting-rights-act, accessed 1-4-13.

It is certainly true that the coverage formula relies on decades-old data that has less relevance today. But, as the D.C. Circuit concluded, the formula was always less important than the jurisdictions it covered. Going all the way back to 1965, "Congress identified the jurisdictions it sought to cover – those for which it had 'evidence of actual voting discrimination' – and then worked backward, reverse-engineering a formula to cover those jurisdictions." And, as the record described by Judge Bates and Judge Tatel in Shelby County shows, these jurisdictions continue to be the worst offenders, consistently refusing to live up to the Constitution's promise of a multi-racial democracy. Further, as Nate Persily observes, "no objective metric, such as minority turnout or officeholding or even reported court cases, has ever distinguished all the jurisdictions in need of greater oversight." Perhaps, for this reason, no one has ever come up with a workable, effective substitute for the current coverage formula. Even with a bevy of experts closely studying voting rights policy, it is not clear how one would design a new formula. In 2006, Congress considered the possibility of using modern voter turnout and registration data to update the coverage formula, but overwhelmingly rejected this course because it would have, in the words of one Republican Congressman, "turn[ed] the Voting Rights Act into a farce, " eliminating the preclearance requirement in jurisdictions with the longest history of racial discrimination in voting. The Constitution does not demand the impossible of Congress in order to protect the right to vote free from racial discrimination.

7. Localities can "bail out" if they prove that Section 5 is no longer needed

National Bar Association, Amicus Curiae Brief in Support of Respondents in Shelby Co. v. Holder, No. 12-96 in the Supreme Court of the United States, 2013, http://redistrictingonline.org/uploads/Shelbyamici-nationalbarassoc020313.pdf, accessed 1-8-14.

When covered jurisdictions have "eliminate[d] practices denying or abridging opportunities for minorities to participate in the political process," Section 4(e) of the Voting Rights Act expressly allows such jurisdictions to "bail out" of Section 5. This mechanism—which the congressional record shows is "easily proven for jurisdictions that do not discriminate in their voting practices"—ensures that the means by which Congress seeks to correct past discrimination are "neither permanent nor overbroad." Moreover, hundreds of jurisdictions have "bailed out" of Section 5. In fact, every jurisdiction that has sought to bail out has established that it was entitled to bail out. Petitioner here has not, however, even attempted to bail out or to establish that it has corrected past discrimination. Under Section 4(e) of the Voting Rights Act, a covered jurisdiction bails out of Section 5 by proving that it currently does not engage in discriminatory practices and has not done so in the past ten years. Moreover, if, after an independent investigation, the Department of Justice finds that a covered jurisdiction has demonstrated by "objective and compelling evidence" that it satisfied Section 4(e), the Department of Justice may consent to the jurisdiction's request to bail out. A jurisdiction that has complied with the Voting Rights Act thus can "exempt itself" from Section 5 quickly and efficiently. In total, as of May 9, 2012, there were 136 covered jurisdictions and sub-jurisdictions that had successfully bailed out. Indeed, since Congress liberalized bailout in 1982 to "incentiv[ize] jurisdictions to attain compliance with the law and increas[e] participation by minority citizens in the political process in their community," every single jurisdiction that has sought to bail out has done so successfully. More than 100 jurisdictions currently have bailout applications pending. Moreover, the Voting Rights Act does not require jurisdictions to be perfect in order to bail out; a jurisdiction can bail out despite its failure to comply with Section 5 preclearance so long as any such failure was "trivial," "properly corrected," or "not repeated." This flexibility has enabled "once- bad actors" who have meaningfully eliminated discrimination to bail out.

Wrongly Decided: Answers to "Section 2 / Alternatives Solve"

1. Section 2 is only effective in re-districting cases—it is not effective in dealing with voter suppression

Richard L. Hasen, Professor, Law and Political Science, UC Irvine, "Race or Party? How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere," HARVARD LAW REVIEW FORUM v. 127, 1—14, p. 66.

The loss of section 5 and the passage of new restrictive voting laws by states such as Texas and North Carolina in response has led the Justice Department to challenge Texas's and North Carolina's rules, under provisions of the Voting Rights Act that were not challenged in Shelby County. Section 2 of the Act, which applies nationwide, allows minority voters to sue for denial or abridgement of the right to vote on account of race. The language of the section provides that one can prove denial or abridgement by showing that the political processes leading to the nomination or election of officials in the state are not equally open to protected minority members, in that minority voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Section 2 has been extremely successful in the redistricting context, causing the creation of many majority-minority districts. But courts have not read section 2 widely in the context of nonredistricting measures, such as voter identification requirements or restrictions on early voting. Unlike section 5, the burden here is on the challengers, not on the state, to disprove discriminatory effect. And unlike section 5, courts do not compare the old law to the new law; instead, courts compare the law in place to the abstract principles of nondiscrimination contained in the language of section 2. Thus far, section 2 has not been a successful tool to challenge these laws, and unless courts change course it likely will not work now. Concededly, there have been few section 2 cases considering application of the provision to voter identification laws. However, if lower courts do change course and start holding that section 2 covers things like voter identification laws with a discriminatory effect, the Supreme Court could hold that section 2 is unconstitutional on the grounds that it exceeds congressional power and encroaches on states' rights along the lines of the reasoning in Shelby County.

2. The alternatives to Section 5 litigation are far more expensive and time-consuming

Sandhya Bathija, Campaign Manager, Legal Progress, "5 Reasons Why Section 5 of the voting Rights Act Enhances Our Democracy," Center for American Progress, 2—19—13, http://www.americanprogress.org/issues/civil-liberties/report/2013/02/19/53721/5-reasons-why-section-5-of-the-voting-rights-act-enhances-our-democracy/, accessed 1-7-14.

4. Section 5 is a necessary alternative to costly, time-intensive litigation Congress passed the Voting Rights Act because case-by-case litigation was not working to protect the right to vote in states where racial and ethnic discrimination mostly occurred. It was slow, difficult, and costly to challenge every type of voter suppression tactic used in counties and states around the country. And even when litigation was successful in stopping the unconstitutional practices, state officials would ignore the court orders or find some new discriminatory scheme to ensure minorities could not exercise their right to vote. This would not be any different today. Consider the number of states that passed voter suppression laws since 2010 in Section 5-covered jurisdictions. Without Section 5, minority voters would have had to build a case, front the costs, and challenge the following laws: Proof-of-citizenship laws: Alabama, Arizona, and Georgia Voter ID laws: Alabama, Mississippi, South Carolina, and Texas—in fact, because of Section 5, South Carolina watered down its original version of the law before seeking approval from the U.S. District Court for the District of Columbia Limits to early voting: Georgia Instead, Section 5 required the Justice Department or the D.C. Circuit Court to approve the laws before they disenfranchised minority voters.

3. Citizens generally lack the information needed to initiate anti-voting discrimination litigation

Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf, accessed 1-6-14.

Affected citizens generally lack ready access to the substantial basic information needed for voting rights litigation. This information, which is at the disposal of jurisdictions, will generally not be readily available to affected citizens without Section 5 review. Even in states that have sunshine or freedom of information laws, obtaining such information can involve time lags, expenses, and incomplete production requiring follow up or even litigation. In states lacking such laws, the relevant information may be strategically withheld to deter legal challenges. As a consequence, the process of assembling the necessary factual information to bring an affirmative legal challenge can extend far beyond the implementation date of a voting change. Because many voting rights claims require expert testimony, potential plaintiffs also must shoulder the up-front costs of expert witnesses; while expert fees are compensable to prevailing parties under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the road to that recovery can last years. These burdens in obtaining and developing the evidence can be expected to result in more discriminatory voting changes taking effect than would occur if Section 5 were still operational.

Wrongly Decided: Answers to "Section 2 / Alternatives Solve" [cont'd]

4. Section 2 alone will not prevent voting discrimination—multiple reasons

Spencer Overton, Professor, Law, George Washington University, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/Overton%20%207-18-13.pdf, accessed 1-6-13.

While the holding in Shelby County was limited to invalidating the coverage formula, the decision has a significant impact. It effectively suspends Section 5 preclearance in all jurisdictions other than the handful currently subject to a Section 3(c) "bail in" court order. Absent Congressional action that updates the Act, it will be more difficult to prevent and deter political operatives from manipulating voting rules based on race. Some have asserted that Section 5 is unnecessary because the Department of Justice or private parties can bring a lawsuit under Section 2 of the Voting Rights Act. This is wrong. While Section 2 is important, litigation is an inadequate substitute for the Section 5 preclearance process. Litigation Not Comprehensive: Preclearance was comprehensive—it deterred jurisdictions from adopting many unfair election rules because officials knew every decision would be reviewed. In contrast, litigation requires that plaintiffs have the information and resources to bring a claim, and therefore litigation misses a lot of under-the-radar manipulation. Even states and localities that post new bills online or are subject to freedom-of-information laws generally do not disclose the unfair aspects of their voting changes. Litigation More Expensive: Preclearance also put the burden to show a change was fair on jurisdictions—which enhanced efficiencies because jurisdictions generally have better access to information about the purpose and effect of their proposed election law changes. Litigation shifts the burden to affected citizens—who must employ experts and lawyers who fish for information during drawn-out discovery processes. This drives up the cost of compliance to the Department of Justice, to affected citizens, and to jurisdictions. Litigation Not Tailored to Non-Dilution Claims: Section 2 has well-developed standards to challenge unfair minority vote dilution in the context of at-large elections and racially-gerrymandered election district boundaries. The litigation standards, however, are not sufficiently developed to address non-dilution claims such as challenges to voting locations and candidate qualification procedures. In contrast, the Section 5 retrogression standard was well-suited to address non-dilution claims. Preclearance Protects Voting Rights in Local Elections: The preclearance process was particularly valuable in local elections, which are often nonpartisan. While national media outlets and political pundits may focus on voting rules that affect federal and state offices, the unfair manipulation of local election rules is a significant problem. At least 86.4% of all unfair election changes blocked by preclearance since 2000 would not have affected federal elections. That's because even when federal, state, and local elections are conducted at the same time, many important changes are confined to the local level, including local redistricting, annexations, and changes to candidate qualifications, the method of elections, and the structure of government. In Nueces County, Texas, for example, the rapidly-growing Latino community surpassed 56% of the county's population, and in response county officials gerrymandered local election districts to dilute the votes by Latinos. Without Section 5 protections to block this type of racial manipulation, Americans in many areas like Nueces County will not have the thousands and sometimes millions of dollars needed to bring a lawsuit to stop these unfair changes. Further, much of this local manipulation will not attract significant national media attention and will go unchallenged.

5. Section 2 cannot replace section 5—many discriminatory laws will remain in place

Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf, accessed 1-6-14.

Section 2 of the VRA is not an adequate substitute for Section 5. One of the arguments frequently made against Section 5 is the assertion that Section 2 of the Voting Rights Act provides all of the protections necessary to deal with today's voting discrimination. Congress considered this question in 2006 when it considered whether to reauthorize the preclearance remedy and disagreed. Based upon my experience in having litigated and supervised a number of both Section 2 cases and Section 5 cases, I also disagree with that contention both on theoretical and real-world grounds. I am confident that the Lawyers' Committee and other voting rights practitioners can use Section 2 to eventually invalidate some discriminatory voting changes that would have been blocked from ever taking effect under Section 5. That hardly shows that Section 2 can accomplish all that Section 5 did. The fact is that Section 2 will not do so.

Wrongly Decided: Answers to "Section 2 / Alternatives Solve" [cont'd]

6. It will be more difficult to show discrimination under Section 2

Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf, accessed 1-6-14.
The ability to successfully bring claims not involving minority vote dilution under the Section 2 results test is uncertain. The category of "everything else" (that is, Section 2 results claims not based upon dilution) includes challenges to voter registration procedures, candidate qualifying procedures, voter qualifications and disqualifications, voting methods and locations, poll worker hiring, voter assistance, and prerequisites to voting. These cases under Section 2 have been relatively infrequent and occasionally successful, but the legal standards for them are not nearly so well-developed as for dilution cases. By contrast, a number of Section 5 objections were interposed to these types of voting changes over the years, and the Section 5 retrogression standard showed itself to be well-suited for dealing with these types of problems. I believe that the ability to effectively address discriminatory changes of these types under the current Section 2 results test is uncertain.

7. Section 2 is insufficient—the subsequent suits are too complicated and expensive

National Bar Association, Amicus Curiae Brief in Support of Respondents in Shelby Co. v. Holder, No. 12-96 in the Supreme Court of the United States, 2013, http://redistrictingonline.org/uploads/Shelbyamici-nationalbarassoc020313.pdf, accessed 1-8-14.
Further, Section 2 of the Voting Rights Act is an insufficient remedy to counter continuing discrimination. Unlike Section 5, which prevents and deters discriminatory practices, Section 2 provides minority voters with a post hoc remedy for discriminatory conduct. Moreover, unlike administrative proceedings under Section 5, Section 2 lawsuits are complicated, expensive, and time-consuming, and, if successful, provide a more limited remedy. Once a court strikes down an election practice under Section 2, jurisdictions can (and often do) enact new methods of voter discrimination. As the State of Alabama concedes, historically, when the United States government sued Alabama for discrimination, its legislature defied court orders and implemented new discriminatory measures. This "gamesmanship" demonstrates that post hoc remedies (like Section 2) are an inadequate, or at least incomplete, means by which to protect equality in voter access. Moreover, covered jurisdictions know that any discriminatory change to voting rules will be preemptively reviewed under Section 5. This deters covered jurisdictions from proposing discriminatory changes in the first place.

8. Section 2 is insufficient—multiple reasons

National Bar Association, Amicus Curiae Brief in Support of Respondents in Shelby Co. v. Holder, No. 12-96 in the Supreme Court of the United States, 2013, http://redistrictingonline.org/uploads/Shelbyamici-nationalbarassoc020313.pdf, accessed 1-8-14.
Petitioners and their amici curiae also argue that Section 5 is unnecessary because Section 2 provides adequate protection against efforts to infringe minorities' right to vote. But Section 2 of the Voting Rights Act is a backward-looking remedy that, alone, is an insufficient antidote to discriminatory voting practices. Before Congress enacted the Voting Rights Act of 1965, the Department of Justice brought individual lawsuits against jurisdictions with discriminatory voting practices, similar to the way the Department of Justice and individual plaintiffs can bring lawsuits under Section 2. As this Court has noted, however, litigation of voting rights cases is "exceedingly slow" and "usually onerous to prepare," in part because the plaintiff must collect copious amounts of documentation about the discrimination. Section 2 requires that a discriminatory policy go into effect potentially for several election cycles before there is enough evidence to bring a successful Section 2 challenge. Further, few potential plaintiffs want to pursue Section 2 cases because they require "huge amounts of resources in the litigation process to be used, both by the jurisdictions and by the individual citizens." While a few nonprofit organizations represent plaintiffs in voting rights cases, they have limited resources, and the voting rights bar as a whole is very small. Even when a violation of the Voting Rights Act is "blatant," costs can be staggering: in one case with multiple, well established examples of discrimination, a plaintiffs' attorney worked 5,525 hours and spent $96,000 in out-of-pocket expenses, "exclusive of expenses incurred by Justice Department lawyers after the department intervened [in support of the plaintiffs] and the costs of expert witnesses and paralegals." Because Section 2 requires such massive efforts and imposes such extensive costs, striking down Section 5, and thus having Section 2 as the only remaining means to address discrimination "would quite plausibly leave literally thousands of unconstitutional systems in place."

Wrongly Decided: Answers to "Section 2 / Alternatives Solve" [cont'd]

9. Section 2 protections are inadequate—is entirely post hoc

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Congress also received evidence that litigation under § 2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. 1 Evidence of Continued Need 97. An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it. 1 Voting Rights Act: Section 5 of the Act — History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005) (hereinafter Section 5 Hearing). And litigation places a heavy financial burden on minority voters. See id., at 84. Congress also received evidence that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a § 2 claim, and clearance by DOJ substantially [**683] reduces the likelihood that a § 2 claim will be mounted. Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 13, 120-121 (2006). See also Brief for States of New York, California, Mississippi, and North Carolina as Amid Curiae 8-9 (Section 5 "reduc[es] the likelihood that a jurisdiction will face costly and protracted Section 2

10. It will be far harder to stop discriminatory voting laws before they do damage under Section 2 litigation

Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution, 7—18—13, http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf, accessed 1-6-14.

As you know, under Section 2 the burden of proof lies with the plaintiff, at the preliminary injunction stage no less than at trial. This of course is the general rule in civil litigation and for most purposes it is the logical approach. However, this burden works against the objective of blocking discriminatory voting changes before they can harm voters. Section 5, in contrast, by design froze the status quo while all new voting practices could be screened for discrimination with the relevant information in hand. Because the submitting jurisdictions had the burden of proof, in both administrative reviews and Section 5 declaratory judgment actions, stopping discriminatory voting changes was not a game of "catch me if you can." Where a jurisdiction has a current record of voting discrimination, or there otherwise is reason to believe that a voting change is racially discriminatory, it makes sense to shift the burden, at least to some extent, from the citizen to the jurisdiction.

11. Alternative to Section 5 are inadequate—too burdensome and expensive

Myrna Perez, Deputy director, Democracy Program and Vishal Agraharkar, counsel, Democracy Program, "If Section 5 Falls: New Voting Implications," Analysis, Brennan Center for Justice, New York University Law School, 6—2—13, p. 2.

Any decision by the Supreme Court striking down Section 5 would prompt a strong public outcry and demand for Congress to pass new legislation in response. If previously-covered jurisdictions attempt to take advantage of the period before Congress acts to implement discriminatory voting changes, voting rights advocates and DOJ can be expected to block them under other legal provisions. There is no guarantee, however, that other existing laws can substitute for Section 5. If the changes are adopted close to an election, there may be little or no practical recourse for voters. Moreover, case-by-case litigation is expensive and timeconsuming, and the number of lawsuits required to combat problematic changes could easily become difficult to maintain. In other words, there is no tool in the law right now as powerful as Section 5 in stopping voting discrimination. Accordingly, in the immediate aftermath of a Supreme Court decision striking down Section 5,11 minority voting rights could be imperiled in a number of ways. Although the precise effect would hinge on the Court's ruling and rationale, the following analysis identifies some of the issues that could emerge after such a decision.

Wrongly Decided: Answers to "Section 2 / Alternatives Solve" [cont'd]

12. Section 5 is the heart of the Voting Rights Act

Jeffrey Toobin, "Do We Still Need the Voting Rights Act?" THE NEW YORKER, 5—2—12, http://www.newyorker.com/online/blogs/comment/2012/05/toobin-voting-rights.html,
The heart of the Voting Rights Act is its famous Section 5, which essentially put the South on perpetual probation. In rough terms, the law requires the states of the old Confederacy (as well as a few smaller areas outside the South) to submit any changes in their electoral law to the Justice Department for what's known as "pre-clearance"—to make sure that the changes don't infringe on minority voting rights. Before Section 5, states and municipalities could simply change their rules—about everything from the location of polling places to the borders of district lines—and dare civil-rights activists to sue to stop them. It was a maddening, and very high-stakes, game of whack-a-mole. As a result of Section 5, though, the Justice Department monitored these moves and made sure there would be no backsliding on voting rights.

13. Post hoc litigation is far less effective

Andrew Blotky, Director, Legal Progress and Billy Corriher, Associate Director, Legal Progress, "State and Federal Courts: The Last Stand in Voting rights," Center for American Progress, 6—25—13, www.americanprogress.org/issues/civil-liberties/report/2013/06/25/67905/state-and-federal-courts-the-last-stand-in-voting-rights/, accessed 1-7-14.
Because of the Court's decision, discriminatory voting laws can only be challenged under the act through litigation. In her Shelby County dissent, Justice Ginsburg says the Congress that passed the Voting Rights Act "learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate" to protecting voters of color. "Litigation occurs only after … the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency." This means that our courts will assume an even more critical role in protecting voting rights. Republican legislators in several states are seeking to pass laws that would disenfranchise minorities, and now that the Department of Justice is no longer preclearing voting laws, the courts could become most important institution in protecting voting rights. This means that the composition of state and federal courts matters a great deal for voting-rights advocates.

14. Post hoc challenges are simply ineffective in preventing voter discrimination

Andrew Blotky, Director, Legal Progress and Billy Corriher, Associate Director, Legal Progress, "State and Federal Courts: The Last Stand in Voting rights," Center for American Progress, 6—25—13, www.americanprogress.org/issues/civil-liberties/report/2013/06/25/67905/state-and-federal-courts-the-last-stand-in-voting-rights/, accessed 1-7-14.
Sections 4 and 5 were included in the Voting Rights Act because after-the-fact legal challenges to discriminatory voting laws were not effective at preventing the disenfranchisement of black voters in the Jim Crow-era South. Section 5 has helped ensure voters' access to the polling booth in recent years. If the act had not required preclearance, then the only way to stop these discriminatory voting laws would have been costly and time-consuming litigation. South Carolina sought to implement a strict voter ID law before Election Day 2012, but legislators loosened some of the discriminatory provisions to avoid being denied preclearance. The original version of the law would have impacted South Carolina voters such as 82-year-old Hanna White, who, similar to many older African Americans, is unable to get a state-issued ID because she has never had a birth certificate. Texas passed the strictest voter ID law in the nation in advance of the 2012 election, placing unforgiving burdens on minority voters and other groups. The law would have allowed concealed handgun licenses to serve as a form of valid identification to vote but would have rejected the use of a college ID or a state-employee ID. Fortunately, a federal court blocked the law under Section 5 and saved African American and Latino voters from being disenfranchised in the 2012 election. Georgia would have continued to use a voter-verification program to check the citizenship status of every person seeking to register to vote. Evidence emerged that minority voters were being flagged at higher rates, requiring time-consuming additional steps to prove their citizenship. The Department of Justice denied preclearance for this law in 2009. Despite these successes, the U.S. Supreme Court struck down the act's formula for deciding which jurisdictions must preclear their voting rules.

Wrongly Decided: Answers to "State Rights / Sovereignty"

1. "Equal sovereignty" principles only apply to the admission of new states to the Union

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Katzenbach, the Court acknowledges, "rejected the notion that the [equal sovereignty] principle operate[s] as a bar on differential treatment outside [the] context [of the admission of new States]." Ante, at 11 (citing 383 U. S., at 328-329) (emphasis omitted). But the Court clouds that once clear understanding by citing dictum from Northwest Austin to convey that the principle of equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." Ante, at 11 (citing 557 U. S., at 203). See also ante, at 23 (relying on Northwest Austin's "emphasis on [the] significance" of the equal-sovereignty principle). 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. 557 U. S., at 203-204. 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 [***36] of whether stare decisis nonetheless counsels adherence to Katzenbach's ruling on the limited "significance" of the equal sovereignty principle. Today's unprecedented extension of the equal sovereignty principle outside its proper domain — the admission of new States — is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, e.g., 28 U. S. C. § 3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme "at any time during the period beginning January 1, 1976, and ending August 31, 1990"); 26 U. S. C. § 142(l) (EPA required to locate green [**693] building project in a State meeting specified population criteria); 42 U. S. C. § 3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with "a population density of fifty-two or fewer persons per square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997"); §§ 13925, 13971 (similar population criteria for funding to combat rural domestic violence); § 10136 (specifying rules applicable to Nevada's Yucca Mountain nuclear waste site, and providing that "[n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987"). Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

2. The Fifteenth Amendment was designed to shift the power balance towards the federal government from the states in voting issues

Paul M. Smith, counsel of record, Amicus Curiae Brief in Support of Respondents, Brennan Center for Justice, NYU School of Law, in Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., et al., Respondents, 2013, http://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brennan_Center_Brief.pdf

By vesting Congress with broad powers of enforcement, the Fifteenth Amendment radically altered the balance of power between the federal government and the states with respect to regulation of the franchise. The Amendment was passed against a status quo in which the states had exercised control over the franchise and Congress's control, as a practical matter, had been limited to protecting the right to vote in federal territories. As late as 1866, even among northern Republicans, "[t]here was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments." Mathews, History of the Fifteenth Amendment, at 12. The Fifteenth Amendment broke with that status quo by transferring ultimate power to protect against racial discrimination in voting away from the states and to the federal government—even with respect to the states' own elections. See id. at 36. The Congress that passed the Fifteenth Amendment and the states that ratified it determined that the traditional federal-state balance had been insufficient to protect against racial discrimination in voting. Supporters and opponents of the Fifteenth Amendment recognized that the Amendment would transfer to the federal government responsibility over an area that had once been left exclusively to the states. For example, Senator John Pool, a strong supporter of the Amendment, explained that: "If a State by omission neglects to give every citizen within its borders a free, fair, and full exercise and enjoyment of his rights, it is the duty of the United States Government to go into the State." Xi Wang, The Making of Federal Enforcement Laws, 1870- 1872, 70 Chi.-Kent L. Rev. 1013, 1030 (1995). Senator Bayard, an opponent of the proposed Amendment, contrasted the power provided by the Amendment with the autonomy states had previously enjoyed over their own elections: "The Federal Government in the past has neither attempted to usurp the power as within the limits of the Constitution, nor has it been yielded by the States or their people." Cong. Globe, 40th Cong., 3d Sess. app. 166 (1869).

Wrongly Decided: Answers to "State Rights / Sovereignty" [cont'd]

3. The majority justices in Shelby do not care about state's rights

Richard A. Posner, judge, U.S. Court of Appeals, 7th Circuit, "The Voting Rights Act Ruling Is About the Conservative Imagination," SLATE, 6—26—13, www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html, accessed 1-5-14.

That evidence—the record before Congress—should have been the end of this case. For apart from the spurious principle of equal sovereignty, all that the majority had on which to base its decision was tenderness for "states' rights." One doubts that this actually is a primary value for any of the justices. The same conservative majority that decided Shelby had rejected a more cogent argument for states' rights when it held three years ago in McDonald v. City of Chicago that the Second Amendment—a provision of the Constitution designed to secure state autonomy—specifically, the right of states to maintain their own little armies, the militias, against federal abolition—creates rights against states' limiting gun ownership. It seems that the court's regard is not for states' rights in some abstract sense but for particular policies that a majority of justices strongly favors.

4. 'State equality' rationales are wrong—they do not apply to the enforcement of civil rights

Barbara A. Arnwine, President, Lawyers' Committee for Civil rights Under Law and Marcia Johnson-Blanco, co-director, Lawyers' Committee's Voting Rights Project, VOTING RIGHTS AT A CROSSROADS, Economic Policy Institute, 10—24—13, p. 9-10.

However, as Justice Ruth Bader Ginsburg pointed out in the dissent to the court's opinion, the principle of equal sovereignty of the states had previously been "applie[d] only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared." Instead, the dissent focused on the evidence upon which Congress relied and determined that "[t]he number of discriminatory changes blocked or deterred by the pre- clearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy."

5. The "bail out" provisions are address any constitutionality concerns

National Bar Association, Amicus Curiae Brief in Support of Respondents in Shelby Co. v. Holder, No. 12-96 in the Supreme Court of the United States, 2013, http://redistrictingonline.org/uploads/Shelbyamici-nationalbarassoc020313.pdf, accessed 1-8-14.

Petitioner and certain amici curiae also contend that Section 5 must be held unconstitutional because it is not sufficiently narrowly tailored. To the contrary, Section 5 jurisdictions that have corrected past discriminatory practices can "bail out" under Section 4(e) of the Voting Rights Act. It therefore is within a covered jurisdiction's control to demonstrate that voter discrimination is a thing of the past. Yet Petitioner has not attempted to avail itself of this option. Given that discriminatory practices persist in Section 5 jurisdictions, that Section 2 provides only post hoc remedies that do not sufficiently protect minorities' right to vote, that Section 5 deters discrimination, and that it is within a covered jurisdiction's control to correct discriminatory practices and end federal oversight under Section 5, this Court should uphold the constitutionality of Section 5.

Wrongly Decided: Answers to "VRA Already Served Its Purpose"

1. The VRA is still needed—it has been used to block hundreds of discriminatory anti-voting laws

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. See City of Rome, 446 U. S., at 181 (identifying "information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General" as a primary basis for upholding the 1975 reauthorization). On that score, the record before Congress was huge. In fact, Congress found there were more DOJ objections between 1982 [**682] and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess., p. 172 (2006) (hereinafter Evidence of Continued Need). All told, between 1982 and 2006, DOJ objections blocked over 700 voting [***26] changes based on a determination that the changes were discriminatory. H. R. Rep. No. 109-478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, see 679 F. 3d, at 867, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process." H. R. Rep. 109-478, at 21. On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the § 5 preclearance requirements. 1 Evidence of Continued Need 186, 250. In addition to blocking proposed voting changes through preclearance, DOJ may request more information from a jurisdiction proposing a change. In turn, the jurisdiction may modify or withdraw the proposed change. The number of such modifications or withdrawals provides an indication of how many discriminatory proposals are deterred without need for formal objection. Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982. H. R. Rep. No. 109-478, at 40-41.[fn4] Congress also received empirical studies finding that DOJ's requests for more information had a significant effect on the degree to which covered [*2640] jurisdictions "compl[ied] with their obligatio[n]" to protect minority voting rights. 2 Evidence of Continued Need 2555.

2. The VRA is justified by its success—it has facilitated substantial progress in ending voter discrimination

Ruth Bader Ginsburg, with Justices Breyer, Sotomayor, and Kagan, Dissenting Opinion in Shelby County, Alabama, Petitioner, v. Eric H. Holder, Jr., Attorney General, et al., Shelby County. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) [2013 BL 167707], 6—25—13, www2.bloomberglaw.com/public/desktop/document/Shelby_Cnty_v_Holder_No_1296_2013_BL_167707_US_June_25_2013_Court, accessed 1-2-14.

Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions — those States and localities where opposition to the Constitution's commands were most virulent — the VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by § 5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes. 79 Stat. 439, codified at 42 U. S. C. § 1973c(a). A change will be approved unless DOJ finds it has "the purpose [or] . . . the effect of denying or abridging the right to vote on account of race or color." Ibid. In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia. After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (hereinafter 2006 Reauthorization), § 2(b)(1), 120 Stat. 577. On that [***21] matter of cause and effects there can be no genuine doubt.

Wrongly Decided: Answers to "VRA Already Served Its Purpose" [cont'd]

3. Voting Rights Act has not run its course—existing bigotry demands that we leave it in place

Morris Dees, founder, "SPLC Founder Morris Dees on Why the Voting Rights Act Still Matters," Southern Poverty Law Center, 3—25—13, http://www.splcenter.org/get-informed/news/splc-founder-morris-dees-on-why-the-voting-rights-act-still-matters, accessed 1-3-14.

I've lived in Alabama my entire life and have practiced civil rights law here for more than 40 years. I know the state and its people. And I know its history – the good, the bad, and the ugly. When I travel outside the state, I'm often amazed, though, at the naïveté and even hypocrisy of some of the people I meet. So many assume that rank bigotry is confined to the South. So many are blind to the pervasiveness of structural racism in other parts of the country. When I hear people say things that suggest that their region is somehow so different from my own, I can get a little angry, to be honest. Call it my Southern pride. That's why it pains me to conclude that Section 5 of the Voting Rights Act of 1965 – the section that contains extra voting rights protections that apply mainly to the South – is still necessary. It would be a mistake for the Supreme Court to rule that Section 5 has run its course because the South, particularly my home state, is still different in a fundamental way that goes to the heart of our democracy.

4. Successes prove that we should keep the VRA, not toss it out

Barbara A. Arnwine, President, Lawyers' Committee for Civil rights Under Law and Marcia Johnson-Blanco, co-director, Lawyers' Committee's Voting Rights Project, VOTING RIGHTS AT A CROSSROADS, Economic Policy Institute, 10—24—13, p. 10.

Justice Ginsberg noted that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." Indeed, at the beginning of the Shelby decision, the Supreme Court noted that the covered jurisdictions had better rates of voter registration and turnout, when compared with the rest of the nation. The court also noted that black voter turnout actually exceeded white voter turnout in some covered jurisdictions. However, the court ignored both the congressional record from the 2006 reauthorization and the recent spate of suppressive voter legislation.

5. The record shows that the VRA has been successful—not that it should be invalidated

Deborah J. Vagins, "Supreme Court Put a Dagger in the Heart of the Voting Rights Act," American Civil Liberties Union, 7—2—13, www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act, accessed 1-5-14.

The Court's opinion relies on a belief that the VRA uses an outdated formula to decide which states are covered by Section 5. In doing so, the Court acknowledged that voting discrimination exists, yet it took away one of the most successful, and still needed, tools that has been so effective in combatting it. As Justice Ginsburg wrote in her dissent, "Hubris is a fit word for today's demolition of the VRA." She noted that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." The Voting Rights Act has proven again and again to be the best defender of justice in voting. Its job is not finished. In 2006, Congress developed an extensive record, showing that Section 5, and the coverage formula on which it depends, is still needed. Congress amassed over 15,000 pages, heard from over 90 witnesses, held over a dozen hearings, and voted nearly unanimously to extend Section 5. What makes the Supreme Court's decision so shocking is that in addition to this record, Congress acts at the height of its authority when it enforces the Fourteenth and Fifteenth Amendments to root out invidious discrimination. The decision is an attack on Congress' constitutional authority to protect voters from racial discrimination.

Wrongly Decided: Answers to "VRA Already Served Its Purpose" [cont'd]

6. Voting Rights Act is still needed—strong racial polarization

Morris Dees, founder, "SPLC Founder Morris Dees on Why the Voting Rights Act Still Matters," Southern Poverty Law Center, 3—25—13, http://www.splcenter.org/get-informed/news/splc-founder-morris-dees-on-why-the-voting-rights-act-still-matters, accessed 1-3-14.

The issue, then, of whether Section 5 has run its course turns on the question of whether jurisdictions with ugly histories of voter discrimination that are not prepared to prove that they have clean records in recent years – jurisdictions like Alabama – are now just as trustworthy as those without similar histories. The answer, I'm afraid, is that they're not. The stark degree of racially polarized voting in the South gives me much pause. In the last presidential election, a healthy 40 percent of the white voting public crossed the racial divide and voted for a black president. In the Southern states covered by Section 5, the figure was much lower. In my home state of Alabama, for example, the figure was a paltry 15%. In Mississippi, the figure was even lower – 10%. Something in the South is different. The racial polarization in the presidential election was not unusual for my home state. In the history of voting in Alabama, not a single black candidate has been able to defeat a white incumbent or win an open seat in a statewide race. In majority white local jurisdictions, black political success is still rare. Today, for example, not a single black sheriff or probate judge serves in a predominantly white Alabama county. As a result of the high degree of white racial bloc voting, black office holders in Alabama are confined almost exclusively to minority districts created as a result of lawsuits like the one I filed in 1970 to ensure that black voters are not completely subsumed by majority white districts hostile to their interests. The fact that voting is racially polarized does not mean that only racists can win elections in Alabama. My state has seen many progressive white office holders over the years. But, in a democracy, elected officials tend, over time, to be responsive to the interests of the electorate. And in the state of Alabama, the electorate is still highly polarized along racial lines. That polarization distorts the political process in ways that retard the growth of multiracial coalitions and give the majority the ability to dominate the minority. Given Alabama's racial history and its reality of racially polarized voting today, the potential for electoral game playing still exists. It's that potential that Section 5 was designed to address.

7. Racism may have changed, but the VRA is still necessary—gains can be readily reversed

Emily Wang, "Shelby County v. Holder," HARVARD POLITICAL REVIEW, 11—24—13, http://harvardpolitics.com/united-states/shelby-county-v-holder/, accessed 1-5-14.

The driving factors of the civil rights movement have shifted significantly; instead of race riots and Jim Crow laws, activists today grapple with voter identification laws and persistent socioeconomic gaps. But attempts to paint the United States as a post-racial society ignore reality. In her dissent, Justice Ruth Bader Ginsburg criticized the Court for prematurely declaring the goals of the Voting Rights Act fulfilled. Though she acknowledged that "the VRA wrought dramatic changes in the realization of minority voting rights," she highlighted Section 4(b)'s continued relevance in the current age, arguing that "[j]urisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve." While the coverage formula is indeed outdated, anecdotal evidence suggests Section 4(b) retains its efficacy, especially in comparison with a nonexistent alternative. The elimination of Section 4(b), then, reveals either ignorance of or indifference to the undercurrents of racism driving the fallout of Shelby. In addition to Texas and Mississippi, state legislators from North Carolina and Florida have announced new voter identification laws. These restrictions, which empirically target minorities, threaten to weaken or reverse much of the progress the Voting Rights Act has wrought. In an interview with the HPR, Theda Skocpol of Harvard explained that "in many ways we have seen concerted efforts to roll back minority voting rights and participation … where progress hasn't been irreversible is in the area of political rights." The seeming irreversibility of civil rights gains is a myth. Indeed, the fallout of Shelby reveals the tentative nature of progress in the contemporary civil rights movement. Speaking with the HPR, Whitney Taylor, director of Public Advocacy at the Massachusetts ACLU, suggested that a lack of public awareness of institutionalized racism may have driven the Court's decision in Shelby: "People need to understand civil rights, civil liberties, and the reality of racism in this country."