UNTEACHABLE: *SHELBY COUNTY*, CANONICAL APOSTASIES, AND A WAY FORWARD FOR THE VOTING RIGHTS ACT

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I. INTRODUCTION

THE Supreme Court in *Shelby County v. Holder*[1] held that the targeting formula contained in § 4(b) of the Voting Rights Act[2] was invalid because the factors used to identify covered jurisdictions bore no rational relationship to current political conditions. In reaching this conclusion, a five-justice majority contended that the extraordinary burdens imposed on certain states in 1965 were no longer tenable since the criteria used in the formula—the use of qualification tests or devices along with measures of voter registration and turnout—had ceased to demonstrate significant racial disparities among voters in these areas.[3]

The Court's textual or literalist interpretation of § 4(b)'s coverage formula stands in sharp contrast to the "functionalist" approach to statutory interpretation applied just one term earlier in *National Federation of Independent Business v. Sebelius*,[4] involving a requirement in "Obamacare"[5] that individuals purchase health insurance on pain of a penalty, payable to the Internal Revenue Service. Despite the statute's explicit use of the term "penalty,"[6] and despite its holding that the mandate was not sustainable under Congress's authority to regulate commerce, the Court found that the fee was functionally a tax on those who did not purchase

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1. 133 S. Ct. 2612 (2013).
2. Voting Rights Act, 42 U.S.C. §§ 1971–1973aa–b (2006).
3. *See Shelby Cnty.*, 133 S. Ct. at 2628.
4. 132 S. Ct. 2566 (2012).
5. "Obamacare" refers to the informal name used in the press for The Patient Protection and Affordable Care Act. 124 Stat. 119–124 (2013); *see also* Peter Baker, *Democrats Embrace Once Pejorative 'Obamacare' Tag*, N.Y. TIMES (Aug. 3, 2012), http://www.nytimes.com/2012/08/04/health/policy/democrats-embrace-once-pejorative-obamacare-tag.html; Gregory Wallace, *'Obamacare': The Word that Defined the Healthcare Debate*, CNN (June 25, 2012), http://www.cnn.com/2012/06/25/politics/obamacare-word-debate/index.html.
6. 26 U.S.C. § 5000A(b)(1) ("If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable . . . fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty . . . .").

health insurance.[7] The individual mandate was thus constitutional under Congress's enumerated power to "lay and collect taxes."[8]

The Court's functionalist approach to statutory interpretation in *Sebelius* gave "practical effect to the Legislature's enactment," which left its core functions intact.[9] The Court applied the statutory canon that "if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so,"[10] even if it is not the "most natural interpretation," as long as it is a "fairly possible one."[11]

Ignoring the canonical approach employed in *Sebelius*, the Court in *Shelby County* fixated on the specific wording of § 4(b) while disregarding the very weighty legislative record—including data, court findings, and witness testimony—that cites current discriminatory conditions throughout the covered jurisdictions.[12] Moreover, the Court's literalist approach abridged the canon that statutory interpretation is a "holistic endeavor."[13] If § 4(b) was read in complete isolation from the remainder of the statute and totally divorced from the ample legislative record that demonstrated the ongoing relevance of § 4(b)'s targeting formula, a court might find that Congress exceeded its enabling authority under the Fifteenth Amendment. However, that crabbed approach seems wholly misplaced in *Shelby County* on its own facts, and it is especially so given the Court's willingness to see its way to upholding the legislation in *Sebelius*.

While the *Shelby County* holding invalidates the targeting formula, it purports to leave the other provisions of the law intact.[14] These provisions include § 5,[15] which lays out a covered jurisdiction's obligations to submit proposed changes to its voting laws and practices for review; § 4's "bailout" regime,[16] which permits a covered jurisdiction to show evidence that it should be allowed to exit preclearance coverage; and § 3,[17] which authorizes a U.S. District Court to "bail in," or mandate preclearance for jurisdictions based upon findings of intentional discrimination.

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7. *See Sebelius*, 132 S. Ct. at 2600.
8. *Id.* at 2601.
9. *Id.* at 2598.
10. *Id.* at 2593.
11. *Id.* at 2594.
12. *See Shelby Cnty.* v. Holder, 133 S. Ct. 2612, 2617 (2013) ("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.").
13. *See* United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).
14. *Shelby Cnty.*, 133 S. Ct. at 2631 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula.").
15. 42 U.S.C. § 1973c (2006 & Supp. V 2011).
16. *Id.*
17. *Id.*

Given these provisions, § 4(b)'s coverage formula was sustainable under a functionalist approach to statutory interpretation. No one doubts Congress's clear intent to maintain existing protections for minority groups within these areas,[18] and the Court might well have shown regard for that purpose by applying a functionalist interpretation. If, instead of reenacting the same coverage formula, Congress had directed, "This section [4(b)] shall apply to all jurisdictions currently covered by § 5 that do not qualify for bailout under § 4(a)," the reasoning in the *Shelby County* opinion would be groundless. The hypothesized formula directly relies on "current conditions" because it relies upon the presently covered jurisdiction's current ability to bail itself out.[19] In fact, we contend that this hypothetical formula that would preserve the function of preclearance is precisely the sum of the mandates contained in §§ 3, 4, and 5—that an originally covered jurisdiction needs to demonstrate that its inclusion in the preclearance regime is no longer warranted. The interpretive reasoning in *Sebelius* compels such an approach, yet the *Shelby County* Court inexplicably avoids it.

After setting forth the Court's unexplained departure from recent canonical precedent in *Sebelius*, we examine the Court's prior treatment of § 5 and the Voting Rights Act more broadly. We argue that the trajectory of the Court's decisions regarding the Act has been in favor of the functionalist approach to statutory interpretation and that when the Court has departed from this approach, Congress has on numerous occasions stepped in with a legislative corrective.

An important implication of *Shelby County*, however, is that the Court rendered its decision knowing that the political environment of the day would make it less likely that Congress would fix or overturn the Court's interpretation.[20] Yet, ironically, the Court disclaimed any interest in undermining the legislative authority to enact an alternative version of the law. This foreseeable congressional inertia has important implications for separation of powers, the Voting Rights Act, and the enforcement of antidiscrimination laws generally.

First, the juxtaposition of *Sebelius* and *Shelby County* leads to a chilling conclusion about the current Court's view of its role in a democratic system. Obamacare was controversial legislation that passed in Congress

18. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendment Act of 2006, Pub. L. No. 109-246, § 2(a), 120 Stat. 577, 577 (2006) (codified as amended at 42 U.S.C. § 1973).

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

20. Professor Richard Hasen stated that the structure of the Court's holding was clever but unsurprising, given the justices' keen awareness that suspending the VRA even on limited grounds would leave a divided Congress unlikely to respond with new legislation. *NPR: Talk of the Nation: What Changes After Supreme Court Ruling on Voting Rights Act*, NPR (June 25, 2013), *available at* http://www.npr.org/2013/06/25/195557564/what-changes-after-supreme-court-ruling-on-voting-rights-act ("This was exactly the decision I expected, and the reason is that this is a kind of false judicial modesty that we see in this opinion. Chief Justice Roberts says, well, we're only striking the coverage formula. But the political reality, as everyone knows, is Congress is not going to go back and pick a new coverage formula.").

along strictly partisan lines and continues to divide the nation.[21] Yet the Court strained to uphold its essential operating provision, the individual mandate to purchase health insurance.[22] In contrast, the 2006 reauthorization of § 5 of the Voting Rights Act was passed by large bipartisan majorities in the House and Senate, yet the Court struck down the statutory provision that identifies states with continuing record evidence of discrimination for coverage.[23] Without strong reasons, the Court's holding in *Shelby County* contravenes the traditional role of the Court in protecting minorities and cuts against a still extant public sentiment in favor of the Voting Rights Act.

Second, the Court's decision shifts the focus of voting rights enforcement from a hybrid administrative/litigation model to a purely litigious model. The latter is bound to be less effective for the very reasons that Congress anticipated. Litigation is an especially ill-equipped tool to combat the tactical advantages discriminatory jurisdictions enjoy in their ability to elude judicial edicts by continually replacing existing practices and procedures found by courts to discriminate with new ones not yet addressed by past rulings. Moreover, while § 2 of the Voting Rights Act authorizes claims for vote dilution, which could address some of the issues previously handled administratively under § 5, it is unlikely that § 2 could effectively bear the full weight of the numerous and myriad issues that § 5 has previously handled.

Third, and relatedly, this view of the ineffectualness of litigation in voting has, over time, metastasized into a broader skepticism and frustration about the effectiveness of litigation as a tool for enforcing civil rights more generally. The channels for seeking redress in the federal courts have been blocked or narrowed in ways that range from less forgiving pleading rules to limited opportunities for broad class-based relief. Having contributed greatly to that skepticism through rulings on affirmative

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21. *See* U.S. Congress Votes Database, http://www.projects.washingpost.com/Congress/lll/senate/l/votes/396 (Senate vote, 60 Ayes–39 Noes, 58 Democrats and 2 Independents voting Aye, 39 Republicans voting no, 1 Republican not voting); U.S. Congress Database, http://www.projects.washingtonpost.com/congress/lll/house/2/votes/165 (House vote 219 Ayes – 212 Noes, 219 Democrats voting Aye, 35 Democrats and 178 Republicans voting No); Patricia Zengerle, *Most Americans Oppose Health Law but Like Provisions*, REUTERS (June 24, 2012), http://www.reuters.com/article/2012/06/24/us-usa-campaign-healthcare-id-USBRE85NO1M20120624; *Public Approval of Healthcare*, REAL CLEAR POLITICS, http://www.realclearpolitics.com/epolls/other/obama_and_democrats_health_care_plan-1130.html (last visited Nov. 23, 2013) (collection of polls from several polling services).

22. Sustaining the individual mandate is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes." U.S. CONST. art. I, § 8, cl. 1; Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2584 (2012); *see also* Brian Galle, *The Taxing Power, The Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. 407 (2011).

23. Stunningly, Justice Scalia stated in oral argument on the *Shelby County* case that Congress was solicitous of the Voting Rights Act because it feared being called a racist. Thus a justice who has insisted that the Court not look beyond the words of a statute for its meaning purported to plumb the psyches of individual members of Congress. *See* Transcript of Oral Arguments at 46, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

action, Title VII, and other antidiscrimination issues, the Court in *Shelby County* offers little assurance that its approach to the litigation of voting rights claims will be any different. In all likelihood, these disturbing trends will be applied by the Roberts Court, leaving a litigation-only voting rights regime that is far less effective than the system of protections that Congress overwhelmingly approved.

We conclude our article with a discussion of ways forward for the Voting Rights Act in light of *Shelby County*.

II. FUNCTIONALISM, STATUTORY CANONS, AND APOSTASIES

Shelby County is unteachable as a case about methods of statutory interpretation—it betrays the basic canons the Supreme Court articulated only a year before eviscerating §§ 4(b) and 5 of the Voting Rights Act.[24] At best, the case Gerry-builds a type of entitlement for a state to be informed explicitly by Congress about the bases on which a statutory regulation is to be applied. At worst, *Shelby County* is an example of what Justice Ginsburg has accused the Court's conservative majority of both in her dissenting opinion and in the press—institutional "hubris"[25] and being "one of the most activist courts in history."[26]

To determine which description of the case is more apt, it is important to understand how *Shelby County* compares to the Supreme Court's past treatment of § 5 and the Voting Rights Act. As it turns out, the Court has fairly consistently employed its functionalist approach (one grounded in the attention to legislative objectives) to statutory interpretation in a series of seminal Voting Rights Act cases, even to restrict the scope of the Act within constitutional bounds. If the Court had emulated the approach illustrated in *Shelby County* in these cases, however, both §§ 5 and 2 of the Voting Rights Act likely would have been declared unconstitutional well before *Shelby County*. Moreover, as we demonstrate in this section, the most significant instances when the Court arguably departed from its functionalist approach in interpreting the Act were followed by a comprehensive repudiation of the Court's decision by Congress.

A. The Functionalist Approach and Relevant Canons

The functionalist approach to statutory interpretation (also known as the purposive approach) seeks to comprehend statutory language within

24. *See Sebelius*, 132 S. Ct. at 2577.

25. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2648 (2013). (Ginsburg, J., dissenting) ("Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today's demolition of the VRA.").

26. Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N. Y. Times (Aug. 24, 2013), http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html.

the context of Congress's goals in passing a specific law.[27] This interpretive lens authorizes—and at times necessitates—an examination of legislative history to ascertain congressional purpose and thus to correctly construe the meaning of the words of a statute.[28] The functionalist approach is in contradistinction to the "plain meaning" or textualist methodology of statutory interpretation. The plain meaning approach allows reference to external sources to aid in the interpretation of a statute only when its language is ambiguous.[29] To its adherents, the plain meaning approach avoids the judicial subjectivity inherent in picking and choosing which parts of a legislative record to accord weight in interpreting a statute.[30] Both interpretative approaches enjoy a long pedigree.[31]

The Court in *Sebelius* employed the functionalist approach not merely to ascertain legislative intent but also to uphold a venerated canon of statutory interpretation and constitutional adjudication: "[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so . . . . [E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[32] Thus, while Congress in the Affordable Care Act described as a "penalty" the amount individuals refusing to purchase health insurance would be required to pay to the U.S. Treasury, Congress's motivation in requiring the payment was more relevant to the Court's analysis than what the payment was called. Justice Roberts, the author of *Shelby County*, wrote for the Court in *Sebelius*. Observing that four million people per year were estimated to pay the Internal Revenue Service (IRS) rather than purchase insurance pursuant to individual mandate of the Affordable Care Act, Roberts concluded "[t]hat Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance."[33] Clearly, a textualist approach would not have yielded such a conclusion.

In more than four decades of jurisprudence under the Voting Rights Act, the Court's interpretive approach has been more reminiscent of its handling of *Sebelius* than *Shelby County*. In fact, *Shelby County* does not comfortably fit in the textualism camp either because it examined the coverage formula divorced from the rest of the Voting Right Act's statu-

27. Donald G. Gifford, William L. Reynolds & Andrew M. Murad, *A Case Study in the Superiority of the Purposive Approach to Statutory Interpretation:* Bruesewitz v. Wyeth, 64 S.C. L. REV. 221, 224–25 (2012).

28. *See id.* at 233–34.

29. *See id.* at 227–28.

30. *See id.* at 229.

31. *See id.* at 228, 232.

32. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593–94 (2012) (majority opinion of Roberts, C.J.) (citations and internal quotation marks omitted).

33. *Id.* at 2597.

tory scheme.[34] As the most famous textualist alive today, Justice Scalia has written: "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[35]

Finally, *Shelby County* betrays yet another interpretive principle by undermining the Court's precedents under the Voting Rights Act: the principle of stare decisis.[36] While stare decisis is the cornerstone of a common-law legal regime, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court does]."[37]

We characterize the Court's departures from recognized precepts of statutory interpretation as nothing short of canonical apostasies.

B. The Aftermath of Passage of the Voting Rights Act of 1965

Shelby County's attack on the coverage formula for § 5 bore an unmistakable mark of déjà vu. In *South Carolina v. Katzenbach*,[38] South Carolina and other jurisdictions complained that "the coverage formula is awkwardly designed in a number of respects and that it disregards various local conditions *which have nothing to do with racial discrimination.*"[39] The majority in *Shelby County* similarly found that § 4(b)'s formula lacked a relationship to current voting discrimination, contending that Congress simply "reenacted a formula based on 40-year-old facts having no logical relation to the present day."[40] The Court in *Shelby County* focused heavily on the supposed staleness of § 4(b)'s criteria—low voter registration and turnout statistics and the use of tests and devices—vis-à-vis the second generation voting rights harms that Congress purported to be addressing (namely vote dilution claims), which the majority described as "electoral arrangements that affect the weight of minority votes."[41]

Although staleness was not at issue in *Katzenbach* (the first challenge to § 5 only one year after its enactment in 1965), if that Court had applied a similarly unforgiving standard as the Court in *Shelby County* in assessing the fit between the coverage formula and the conditions to which it

34. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).
35. United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).
36. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
37. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) (citations and internal quotation marks omitted).
38. 383 U.S. 301 (1966).
39. *Id.* at 329 (emphasis added).
40. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013).
41. *Id.*

was directed, § 5 could well have been doomed in its infancy. There were undoubtedly more accurate and superior ways of designating jurisdictions for coverage in 1965 than were enumerated in § 4(b), but for the *Katzenbach* Court, these putative formulations were "largely beside the point."[42] Instead, in a nod to the primacy of legislative intent that the Court would later embody in *Sebelius* in its decision on the Affordable Care Act, the Court in *Katzenbach* noted that Congress knew from the outset which states had been guilty of voting discrimination and devised the coverage formula to fit those states that it wished to capture under § 5.[43]

In 2006, when it reauthorized § 5 using essentially the same coverage formula as in 1965, Congress was aware from a more-than-15,000-page legislative record of which states were guilty of continuing discrimination in voting, including so-called second-generation violations.[44] Although the Court in *Shelby County* concluded that this extensive record "played no role in shaping the statutory formula"[45]—a conclusion that requires an assumption that Congress amassed a more-than-15,000-page legislative record as an act of futility—it is not at all difficult to see how Congress would have found it efficient and permissible to leave the coverage formula in place if the original designees were also the worst continuing violators. Indeed, in the congressional findings made part of the statute reauthorizing the provision, Congress expressly found a variety of continuing evidence of voting discrimination in the originally covered jurisdictions that rendered racial and language minorities "politically vulnerable."[46] The Court in *Shelby County* concluded that evidence does not look to "current political conditions" because it does not demonstrate how such discrimination compares to the states "unburdened by coverage."[47] *Katzenbach*, however, required no such comparison, nor does the Court in *Shelby County* cite authority for imposing this geographically comparative analysis on the government. It was sufficient in *Katzenbach* that Congress "had learned that substantial voting discrimination presently occurs in certain sections of the country" and that it "chose to limit its attention to the geographic areas where immediate action seemed necessary."[48] To the Court in *Katzenbach*, it was irrelevant that certain noncovered jurisdictions may have been discriminating by means that evaded

42. *Katzenbach*, 383 U.S. at 329.

43. *Id.* ("*Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivision affected by the new remedies under the Act*. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination . . . .") (emphasis added).

44. Kirsten Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385 (2008).

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

46. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(6)(3), 120 Stat. 577, 577 (2006) (codified as amended at 42 U.S.C. § 1973).

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

48. *Katzenbach*, 383 U.S. at 328.

the sweep of Congress's efforts because "[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience."[49] In reauthorizing § 5 and the existing coverage formula, Congress had concluded from practical experience that "[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965."[50]

Katzenbach held that the precision of Congress's findings was not a basis for striking the coverage formula because (1) "Congress is clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under § 2 of the Fifteenth Amendment,"[51] and (2) the covered jurisdictions at all times remained free to rebut Congress's presumption by demonstrating under the bailout provision of § 4(a) that they had not been guilty of recent discrimination in voting.[52] Finally—and perhaps most importantly because it colors the entirety of the majority's opinion in *Shelby County*—although *Shelby County* sought to elevate the concept of equal sovereignty among the states to the level of a constitutional "fundamental principle,"[53] the Court in *Katzenbach* rejected precisely this state-equal-protection argument because "[t]he doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[54]

Only by clinging to the literal terms of the coverage formula at the expense of any of the readily available signs about legislative intent—in a way that it refused to do in *Katzenbach* and later in *Sebelius*—does the Court in *Shelby County* reach an outcome requiring the invalidation of the coverage formula.

Three years after *Katzenbach*, the Court was presented with complex questions about federal court jurisdiction over suits contesting § 5's coverage and legislative intent regarding the scope of § 5. In *Allen v. State Board of Elections*,[55] the covered jurisdictions of Mississippi and Virginia had enacted various modifications to their voting laws without first submitting them to the United States Attorney General for review or obtaining a declaratory judgment from the federal district court for the

49. *Id.* at 330–31.

50. *See* Voting Rights Act Reauthorization, § 2(6)(3), 120 Stat. at 577.

51. *Katzenbach*, 383 U.S. at 330.

52. *See id.* at 331 ("Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years.")

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

54. *Katzenbach*, 383 U.S. at 328–29.

55. 393 U.S. 544 (1969).

District of Columbia.[56] Mississippi and Virginia contended that their voting modifications, which included a change from district-based to at-large voting, did not constitute a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" and thus were not subject to Justice Department or federal court approval under § 5.[57]

The suit in *Allen* was brought by private citizens who claimed to be adversely affected by the states' voting modifications.[58] Unlike the Court in *Shelby County*, which appeared to accept the legitimacy of regulating the kinds of voting harms at issue in *Allen* yet failed to view these harms as especially relevant in assessing the targeting formula, the Court in *Allen* was of a different mind. In addressing Mississippi's change from district to at-large elections for county supervisors, the Court clearly saw § 5 as engineered to address vote dilution: "Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[59] This reasoning from *Allen* makes clear that, even in 1969, second-generation voting discrimination was part of § 5's ambit in regulating the states identified by the very same formula that the Court in *Shelby County* deems blind to second-generation voting harms.[60] Based on its earliest reauthorizations of § 5 using the

56. *See id.* at 550.
57. *See id.* at 563.
58. *See id.* at 554.
59. *See id.* at 569.
60. *See also* Perkins v. Matthews, 400 U.S. 379, 388–89 (1971) (holding that the city of Canton, Mississippi, was required to subject for Justice Department or D.C. District Court review changes in boundary lines by annexations because such a change "dilutes the weight of the votes of voters to whom the franchise was limited before the annexation, and 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" (citations omitted)); Georgia v. United States, 411 U.S. 526, 534 (1973) (concluding that, regarding Georgia's failure to submit its redistricting for approval by the Attorney General under § 5, "the question is not whether the redistricting of the Georgia House, including extensive shifts from single-member to multimember districts, in fact had a racially discriminatory purpose or effect. The question, rather, is whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5. It is beyond doubt that such a potential exists." (citations omitted)); Morris v. Gressette, 432 U.S. 491, 496 n.4 (1977) (The Court reviewed the Attorney General's failure to object to a South Carolina state senate reapportionment plan that featured multimember districts, numbered posts, and a majority (run-off) requirement that the Attorney General believed would abridge minority voting rights).
The Court in *Perkins* quoted with approval the following language from a study by the United States Civil Rights Commission that underscored that registration and access to the polls were just the beginning of the battle to eliminate voting discrimination in the covered jurisdictions because "gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters:

> The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Acts and the increased black registration that followed has resulted in new methods to maintain white control of the political process.
> For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly enfranchised

original coverage predicates, Congress was clearly aware that "[a]s registration and voting of minority citizens increases [sic], other measures may be resorted to which would dilute increasing minority voting strength."[61] In light of the contemporaneous period that illustrates the enacting Congress's intent, the Court in *Shelby County* simply cannot be right in deeming the original coverage formula an irrational means of addressing new types of voting wrongs that were likely to emerge—and indeed have emerged—in originally covered jurisdictions.

Allen denudes other errors in *Shelby County*'s interpretative approach as well. Before the Court in *Allen* could address the plaintiffs' claims, it had to resolve whether Congress intended to confer a private right of action under § 5 and whether a federal district court other than the district court for the District of Columbia had jurisdiction to issue a declaratory judgment or injunction in a suit based on § 5.[62] The Court's disposition of these preliminary matters in *Allen* brings into further relief the Court's begrudging treatment of § 4(b) in *Shelby County*. While acknowledging that the Voting Rights Act did not explicitly address the question, the Court in *Allen* found a private right of action by reading § 5

> Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.

Perkins, 400 U.S. at 389 (citations omitted). The majority in *Shelby County* ignores altogether cases such as *Perkins* in concluding that "[v]iewing the preclearance requirement as targeting [second-generation barriers] highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting test and access to the ballot, not vote dilution." Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013). If the formula is irrational today, however, it was also irrational shortly after the passage of the Voting Rights Act because that is when § 5 began to be employed against the originally covered jurisdictions to combat the very second-generation voting barriers that the Court in *Shelby County* insisted have no relationship to the coverage formula.

Shelby County gets it wrong by, among other errors, inexplicably attempting to imbue the coverage formula in § 4(b) with a precise, imbricated relationship to the substantive evils that § 5 has proven capable of combatting. Cases such *Allen* and *Perkins* demonstrate the folly of any such requirement. These cases document that even as the coverage formula remained static, the covered jurisdictions themselves engage in dynamic, transmuting schemes to blunt the effects of allowing black voters to register and vote. If the coverage formula had to change to reflect the myriad evils that covered jurisdictions might eventually conceive and perpetrate, § 5 would have been a nullity almost from its inception because "[t]he history of white domination in the South has been one of adaptiveness . . . ." *Perkins*, 400 U.S. at 389 (citations and internal quotations omitted).

61. City of Rome v. United States, 446 U.S. 156, 181 (1980) (quoting H.R. REP. NO. 94-196, at 10–11 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, which involved a seven-year extension of § 5) (internal quotation marks omitted).

62. *Allen*, 393 U.S. at 557 ("We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action. . . . . We held that '[w]hile this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result.' A similar analysis is applicable here. The guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." (internal citations omitted)).

"in light of the major purpose of the Act."[63] According to the Court, given the limited resources of the Justice Department, "[i]t is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements."[64] Had the Court in *Shelby County* similarly read § 4(b) in light of the major purpose of the Voting Rights Act, it could not have reasonably concluded, given the success of the Act, that § 4(b)'s coverage formula was unrelated to the harms that Congress intended to combat. To so conclude is to suggest that the Act's success, which the *Shelby County* Court itself readily acknowledged,[65] has been a fluke, owing nothing to the very statutory design that the Court upends by striking down § 4(b).

Allen provides one other lesson in functionalist—and hence, rational—statutory interpretation. In addressing the question of whether plaintiffs could have pursued their claim in a federal district court outside of the District of Columbia, the Court again declined to read the Voting Rights Act's provisions in isolation.[66] This holistic reading led the Court to reject Mississippi and Virginia's contention that a plaintiff seeking to compel compliance with the review process had to commence an action in the District of Columbia. The Court coupled its imbricated statutory analysis with "strong reasons for adoption of this interpretation,"[67] which were focused on the plaintiff's burdens. "The individual litigant will often not have sufficient resources to maintain an action easily outside the district in which he resides, especially in cases where the individual litigant is attacking a local city or county regulation."[68]

In other cases interpreting § 5, the Court has emphasized that "it is important to focus on the entire scheme of § 5"[69] and that there exists an "explicit textual relationship between § 4 and § 5."[70] This common-sense approach to statutory interpretation is nowhere evident in the majority's

63. *Id.* at 555.

64. *Id.* at 556–57. Other early § 5 cases similarly sought to effectuate the broad purposes of the Voting Rights Act when presented with a question that the Voting Rights Act did not explicitly address. *See, e.g.*, *Gressette*, 432 U.S. at 505 (finding that, despite the absence of express statutory guidance, the Voting Rights Act did not allow private plaintiffs to file suit contesting the Attorney General's failure to object to a voting change under § 5 because "[i]n light of the potential severity of the § 5 remedy, the statutory language, and the legislative history, we think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions").

65. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2626 (2013) ("The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.").

66. *See, e.g.*, *Allen*, 393 U.S. at 558 ("Section 14(b) must be read with the Act's other enforcement provisions.").

67. *Id.* at 559.

68. *Id.* at 560.

69. Georgia v. United States, 411 U.S. 526, 538 (1973).

70. *See* United States v. Bd. of Comm'rs of Sheffield, Ala., 435 U.S. 110, 128 (1978) (addressing §§ 4 and 5 in the context of determining whether a political subdivision that did not register voters was nevertheless required to submit changes in voting procedures for preclearance by the Attorney General).

opinion in *Shelby County*.[71] There, the Court trained its attention exclusively on the coverage formula to the exclusion of § 4(a) of the Act, which allows covered states no longer guilty of recent discrimination to bail out of § 5's requirements.[72] The majority likewise ignored § 2 of the Act, which prohibits vote dilution and applies nationwide, and § 3, which allows the Justice Department to seek to bail in an uncovered jurisdiction that has been found guilty of intentional discrimination.[73]

The absurdity of the Court's fragmentary approach to statutory construction in *Shelby County* is highlighted by its sophistic assertion that its decision regarding the coverage formula did not effectively gut § 5's preclearance provisions: "We issue no holding on § 5 itself, only on the coverage formula."[74] Yet, the Court had in the past been quite clear that "§ 5 was structured to assure the effectiveness of the dramatic step that Congress had taken in § 4 and is clearly designed to march in lock-step with § 4."[75] In short, neither traditional methods of statutory construction nor the Court's own § 5 precedents supports *Shelby County*'s piecemeal handling of the coverage formula in § 4(b).

Pivoting from the coverage formula, the substantive requirements of § 5 itself were at issue in *Beer v. United States*,[76] and the Court again set about the task of discerning legislative intent when it could have embraced literalism.[77] Section 5 prohibits covered jurisdictions from imple-

71. *Contra* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2632–33 (2013) (Ginsburg, J., dissenting).

72. *Id.* at 2629 ("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, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.").

73. *Id.* at 2619 ("Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any 'standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.' The current version 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.' Both the Federal Government and individuals have sued to enforce Section 2, and injunctive relief is available in appropriate cases to block voting laws from going into effect. Section 2 is permanent, applies nationwide, and is not at issue in this case." (citations omitted)). As does the bailout provision, the nationwide applicability of §§ 2 and 3 directly addresses the Court's purported concern with equal treatment of states. Non-covered jurisdictions were not given a pass under the Voting Rights Act, although their discrimination in voting was addressed differently than that of jurisdictions with the worst histories of voting discrimination. Unless the *Shelby County* majority is prepared to fashion a rule of exactitude in congressional treatment of the states, there is no principled limitation to the approach adopted by the majority.

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

75. Bd. of Comm'rs of Sheffield, Ala., 435 U.S. at 122 (internal quotation marks omitted).

76. 425 U.S. 130 (1976).

77. *Id.* at 139–40 ("A determination of when a legislative reapportionment has 'the effect of denying or abridging the right to vote on account of race or color,' must depend, therefore, upon the intent of Congress in enacting the Voting Rights Act and specifically § 5. The legislative history reveals that the basic purpose of Congress in enacting the Voting Rights Act was 'to rid the country of racial discrimination in voting.' Section 5 was intended to play an important role in achieving that goal: 'Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by

menting voting procedures or qualifications that "have the purpose . . . [or] the effect of denying or abridging the right to vote on account of race or color . . . ."[78] Because § 5's prohibition mirrors the Fifteenth's Amendment proscription against voting discrimination,[79] Justice Marshall contended that § 5's "'denying or abridging' phrase does no more than directly adopt the language of the Fifteenth Amendment."[80]

The majority in *Beer*, however, declined to follow Justice Marshall's *in pari materia* approach to interpreting § 5. It instead discerned a legislative intent from its review of the congressional record to limit the scope of § 5's prohibition to voting changes "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[81] Although not categorically so, Justice Marshall's dissent was textualist, while the majority's approach to statutory interpretation was more akin to the functionalist variety seen in *Sebelius*.[82] The Court was guided by its understanding of the goals that Congress intended to accomplish, importing new concepts that would work consistent with that purpose.[83] We do not mean to suggest that one approach versus the other commends the actual holding in *Beer*. Nor, for that matter, is our objective in this article to explain *Shelby County* as a liberal or conservative decision. The point, instead, is that viewed in comparison to the majority's approach in *Beer*—which involved searching for congressional intent beyond the literal terms of § 5—*Shelby County* is methodologically unmoored from precedent and thus unteachable as either a canonical statutory interpretation decision or as progeny of the Court's Voting Rights Act jurisprudence. It is an estranged decision that lends itself to popular caricatures of high-court politicization precisely because it inexplicably dashes the approach that the Court undertook in its earliest decisions interpreting § 5 and the coverage formula of § 4(b).

C. Modern § 5 Cases

More recent § 5 cases cast *Shelby County* in no better light than the Court's earlier precedents. Even as it reached controversial conclusions regarding the scope of § 5, the Court's decisions were not susceptible to

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passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory.' . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'" (citations omitted)).

78. *Id.* at 132.

79. U.S. Const. amend. XV, § 1 ("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.").

80. *Beer*, 425 U.S. at 148–49 (Marshall, J., dissenting).

81. *Id.* at 141.

82. *Compare id.* at 148–155 (Marshall, J., dissenting), *with id.* at 139–42 (majority opinion), *and* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593–94 (2012).

83. *See Beer*, 425 U.S. at 139–40.

the charge of fragmentary statutory analysis that disserves legislative purpose, as is *Shelby County*. Thus, in *Reno v. Bossier Parish School Board* ("*Bossier Parish I*"),[84] the Court contemplated the relationship between § 5 and § 2 and whether a clear violation of the latter—i.e., a finding of vote dilution—was a basis for interposing an objection under the former, which required only retrogression of the minority group's position vis-à-vis the prior plan to which a proposed change is compared.[85] Writing for the majority, Justice O'Connor arguably demonstrated fidelity to stare decisis in holding that the retrogression standard announced in *Beer* controlled the decision in *Bossier I*.[86] Noting that requiring covered jurisdictions to satisfy the standards of § 2 would "impose a demonstrably greater burden"[87] than those entities previously had to satisfy under the retrogression standard of *Beer*, the Court viewed its holding as consonant with congressional intent because Congress had declined to amend the longstanding *Beer* standard when it reauthorized § 5.[88] Consistent with our view of *Beer*, we do not claim that the Court's approach to interpreting § 5 commends the result it reaches in *Bossier Parish I*. It is undeniable, however, that the Court's approach to statutory interpretation in that case features recognized elements of functionalist statutory construction and the application of traditional canons, including: (1) respect for stare decisis, (2) a holistic reading of the statute that attempts to give practical effect to each of its parts, and (3) an effort to reconcile its reading of the statute with legislative intent.[89]

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84. 520 U.S. 471 (1997).

85. *Id.* at 487–88 ("In fact, we have previously observed that a jurisdiction's single decision to choose a redistricting plan that has a dilutive impact does not, without more, suffice to establish that the jurisdiction acted with a discriminatory purpose. This is true whether the jurisdiction chose the more dilutive plan because it better comported with its traditional districting principles, or if it chose the plan for no reason at all. Indeed, if a plan's dilutive impact were dispositive, we would effectively incorporate § 2 into § 5, which is a result we find unsatisfactory no matter how it is packaged.").

86. *Id.* at 478.

87. *Id.* at 484.

88. *Id.* at 483–84.

89. *See also* Morse v. Republican Party of Va., 517 U.S. 186 (1996) (holding that a state political party's decision to require payment of a registration fee to become a delegate to the party's convention to nominate a candidate for the United States Senate required preclearance under § 5). The question in *Morse* was whether a political party in a covered jurisdiction that changed its party nominating rules was subject to preclearance in the same way a covered state or political subdivision would be if it had made such a change.
After concluding that political parties in Virginia act under color of state law when they select nominees for the general election, *see id.* at 194, the Court addressed whether § 5 covered the party's imposition of a filing fee for delegates to its convention. The Court first noted that it had "consistently construed the Act to require preclearance of any change in procedures or practices that may bear on the 'effectiveness of a vote cast in 'any primary, special, or general election'" *Id.* at 205. It then determined that the filing fee was the kind of "prerequisite to voting" comprehended by § 5 because "[d]elegate qualifications are in fact more closely tied to the voting process than practices that may cause vote dilution, whose coverage under § 5 we have repeatedly upheld." *Id.* at 207. The Court also noted that § 2 of the Voting Rights Act encompasses by its own terms "the political processes leading to nomination or election." *Id.* at 209. This finding was important to the Court's decision because "changes in practices within covered jurisdictions that would be potentially objectionable under § 2 are also covered under § 5." *Id.* at 209–10. Finally, the Court

As discussed in Part I.A, *Shelby County* contorts and ignores the Court's § 5 precedents to fit a contrived conception of equal sovereignty among states for which the majority lacks direct case authority.[90] Unlike the Court's attempt in *Bossier Parish I* to give effect to and harmonize both §§ 5 and 2 of the Voting Rights Act, the Court in *Shelby County* wholly detaches the bailout provisions in § 4 from its consideration of whether the coverage formula addresses "current need" or "current political conditions."[91] A demonstration of the absence of recent discrimination in a covered jurisdiction is a current condition that frees it from the coverage formula. Finally, *Shelby County*'s treatment of legislative history is highly unusual. The majority concludes that Congress's extensive documentation of racially polarized voting and continuing discrimination in covered jurisdictions "played no role in shaping the statutory formula."[92] Setting to one side that the majority's conclusion seems flatly contradicted by the congressional findings that preamble the 2006 reauthorization of § 5, we are simply unaware of any precept of statutory interpretation that allows a court to disengage the legislative history of statutory language by blithely discounting Congress's reliance on that history.[93] In *Sebelius*, Congress expressly said it was imposing a "penalty" on individuals who failed to purchase health insurance, yet to avoid declaring an act of Congress unconstitutional, the Court searched for what Con-

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considered application of § 5 to the convention filing fee in light of the history that led to passage of the Voting Rights Act.

Morse, then, is emblematic of the functionalist and canon-abiding interpretive approach that the Court has largely followed in its § 5 jurisprudence. On the other hand, we must acknowledge that some of the Court's § 5 cases do not easily fit the topology we have set forth in this Article. Arguably, *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), is one such case. In *Presley*, the plaintiffs sought enforcement of § 5's preclearance provision for changes that reduced the authority of local commissioners after black people had been elected to the county commissions in Etowah County and Russell County. A six-justice majority found that by its terms § 5 did not cover modifications in the organization of government. Instead, preclearance was required only for any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." *Id.* at 504. One could read *Presley* as a "plain meaning" case which admits of no further complexity. On the other hand, the Court's decision was born of a perceived need to "formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting." *Id.* at 506. Arguably, then, *Presley* is functionalist and canon-abiding to the degree that the Court's interpretation was intended to preserve § 5's constitutionality.

90. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2621 (2012) ("We explained that § 5 'imposes substantial federalism costs' and 'differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.'" (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–03 (2009))).

91. *Id.* at 2628–29.

92. *Id.* at 2629.

93. *Id.* at 2638 (Ginsburg, J., dissenting) ("[L]egislation *re*authorizing 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 (citation omitted) ("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.")").

gress reasonably could have meant.[94] In contrast, in *Shelby County*, the majority deemed any such exercise as tantamount to "try[ing] our hand at updating the statute ourselves."[95] Surely enough, however, updating or rewriting the penalty provision of the Affordable Care Act is precisely what the dissent accused the Court of doing in *Sebelius*. Writing for the dissent, Justice Scalia explained, "The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so."[96] In his view, Congress most assuredly did not exercise its taxing powers.[97]

The fundamental inconsistency between *Sebelius* and *Shelby County*, separated by only a year, is made more apparent in comparing *Shelby County* with the identical constitutional issue raised in *Northwest Austin Municipal Utility District No. 1 v. Holder*.[98] In *Austin*, decided a mere four years before the Court effectively invalidated § 5, the Court strove mightily to give the entire statutory scheme of § 5 a savings construction that would render it constitutional.[99] As a political subdivision in a covered state—Texas—the plaintiff utility district in *Austin* was required to seek preclearance under § 5 before making changes to the manner in which it elected its board.[100] The utility district, however, sought relief from this obligation under the bailout provisions of § 4.[101] A district court denied the utility district bailout on the ground that the utility district was not a "political subdivision" for bailout purposes under § 4(a) because it did not register its own voters.[102] In overturning the district court's decision, Justice Roberts set forth interpretive criteria that he failed to apply in *Shelby County*: "[H]ere specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision."[103] Moreover, in contrast to its singular focus on the coverage formula in *Shelby County*, the Court refused to consider § 4(a)'s bailout provisions "in isolation from the rest of the statute and our prior cases."[104]

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94. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2583 (2012) (stating that "[t]here is no immediate reason to think that a statute applying to 'any tax' would apply to a 'penalty'"— ultimately concluding that the penalty is equivalent to a tax).

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

96. *Sebelius*, 132 S. Ct. at 2651 (Scalia, J., dissenting).

97. *Id.*

98. 557 U.S. 193 (2009).

99. *Id.* at 205. ("We will not shrink from our duty 'as the bulwar[k] of a limited constitution against legislative encroachments,' but '[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case[.]' Here, the district also raises a statutory claim that it is eligible to bail out under §§ 4 and 5." (citations omitted)).

100. *See id.* at 196.

101. *See id.* at 197 ("[The bailout] provision allows the release of a "political subdivision" from the preclearance requirements if certain rigorous conditions are met.").

102. *Id.* at 200–01.

103. *Id.* at 207

104. *Id.*

The constitutional concerns that drove the Court's analysis in *Austin* were the federalism concerns that formed the sword on which the Court would eventually hoist § 5 and its coverage formula. Despite its purported federalism concerns, the Court in *Austin* spoke only broadly of "our historic tradition that all States enjoy 'equal sovereignty'" and at no point did the Court cite a specific precedent holding that this tradition—which it a short while later equates to a "fundamental principle"—applied beyond the point at which states are admitted to the Union.[105] In seeming deference to *Katzenbach*, the Court acknowledged this limitation on equal sovereignty of the states, but then, with no citation at all, it concluded that a departure from equal treatment of the states "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem it targets."[106]

Notwithstanding the doctrinally unsubstantiated nature of the federalism concerns raised in *Austin*, the Court's application of the principle of constitutional avoidance meant that nothing turned on these concerns. By viewing the Voting Rights Act in its entirety rather than looking at the bailout provisions in isolation, the Court found that "political subdivision" did not have a constant meaning throughout the Act.[107] Moreover, the Court actually examined legislative history with a view toward construing the term "political subdivision" in § 4 consistently with Congress's intent in the 1982 reauthorization of the Voting Rights Act.[108] The Court acted with an understanding that "Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States," and thus "normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."[109]

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105. *Id.* at 203. The Court cites *United States v. Louisiana*, 363 U.S. 1, 16 (1960), in which the Court was determining a territorial dispute between the United States and various states, and the Court wrote as follows: "This Court early held that the 13 original States, by virtue of the sovereignty acquired through revolution against the Crown, owned the lands beneath navigable inland waters within their territorial boundaries, and that each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission." *Id.* Nothing in the Court's statement suggests an extension of the principle of equal sovereignty beyond the point of admission to the United States. The Court also cited to *Texas v. White*, 74 U.S. 700 (1869), a case determining the effect of an attempted secession by Texas. The Court in *Austin* does not specify which language in *White* it is relying on for the proposition that states enjoy equal sovereignty, but the only relevant language from that case appears to be this: "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Id.* at 726. This elliptical language, however, does not directly address the question of whether and to what degree states must be treated equally.

106. *Austin*, 557 U.S. at 203.

107. *Id.* at 208.

108. *Id.* at 209.

109. *Id.* at 204–05.

These separation of power concerns, and the interpretive approach which facilitates them, literally disappear in *Shelby County*. In fact, one might observe that out of a purported concern with § 5's high federalism costs, the majority in *Shelby County* exacts a corresponding toll on the separation of powers doctrine. Had the Court in *Shelby County* viewed the coverage formula through the prism of the very bailout provision that proved pivotal in forestalling a constitutional ruling in *Austin*, it would have not been possible to argue that § 4(b)'s coverage formula does not look to current conditions. That is because the bailout provision makes express reference to the ten years preceding a covered jurisdiction's suit to bailout.[110] If the applicant has not used a voting test or device, has not been the subject of any lawful objection under § 5, has not been found liable for voting rights violations, and has otherwise attempted to prevent the intimidation or harassment of voters, the coverage formula ceases to apply. In short, § 4(a) updates the coverage formula as covered jurisdictions' conduct changes. This holistic view of the coverage formula is entirely consistent with the Court's reading of it in *Katzenbach*, in which the Court observed that Congress "[a]cknowledged the possibility of overreach" by "provid[ing] for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years."[111]

In *Shelby County*, however, Justice Roberts writes for the majority as if it actually decided the constitutional issue in *Austin* and the Congress simply failed to heed its ruling: "[I]n issuing [*Austin*], we expressed our broader concern 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."[112] If the Court's intention in *Austin* was to spur Congress to action, it could have said so at the time. Justice Ginsburg, for instance, showed no hesitation in inviting congressional action in the context of the Court's ruling on a Title VII pay discrimination claim: "This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose. Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[113] We do not understand the separation of powers doctrine to prohibit this kind of dialogue be-

110. *Id.* at 199 ("To bail out under the current provision, a jurisdiction must seek a declaratory judgment from a three-judge District Court in Washington, D.C. It must show that for the previous 10 years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations; it must also show that it has 'engaged in constructive efforts to eliminate intimidation and harassment' of voters, and similar measures.").

111. South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966).

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

113. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007), *overruled by* Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

tween coequal branches of government. Nor, for that matter, would it have been inappropriate for the Court in either *Austin* or *Shelby County* to have given more specific guidance regarding what would be an acceptable coverage formula. Indeed, if the majority in *Austin* meant what it said about Congress's authority relative to its own,[114] it may have even been appropriate for the Court in *Shelby County* to have stayed its ruling pending Congress's revision of the coverage formula.

The interpretive approach applied by the majority in *Shelby County* is similar to the approach taken in two major § 5 cases in which Congress chose to correct the Court's construction of that provision. It is the odd case in which one Justice disapprovingly accuses another of "embark[ing] upon a lengthy expedition into legislative history[,]" yet Justice Scalia made such a claim in *Reno v. Bossier Parish School Board* (*Bossier Parish II*).[115] *Bossier Parish II* answered a question left open by *Bossier Parish I*: Does a discriminatory purpose bar preclearance under Section 5 or is retrogressive intent was needed? *Bossier Parish I* held that compliance with § 2's vote dilution prohibition was not necessary for preclearance under § 5, but the Court deemed dilutive impact as probative of a discriminatory purpose.[116] It remanded *Bossier Parish I* to the district court to determine whether the parish's redistricting for its twelve-member Police Jury was performed with a discriminatory purpose, contrary to § 5's instruction that a change is to be precleared only if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[117]

The district court did not find a discriminatory purpose.[118] On appeal to the Supreme Court, Justice Scalia, writing for the majority, held that like the "effect" prong of § 5, the "purpose" prong applies only to retrogressive purpose—in this case, an intent to render a minority group worse off than they were under a prior baseline redistricting plan.[119] Because the parish's previous redistricting contained no majority black districts, and its proposed new plan contained none, there was no evidence of a retrogressive purpose, even if there may have been evidence of a discriminatory purpose.[120] To reach the conclusion that § 5 prohibits retrogres-

114. *Austin*, 557 U.S. at 205–06 ("We will not shrink from our duty 'as the bulwar[k] of a limited constitution against legislative encroachments,' THE FEDERALIST NO. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton), but '[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case . . . .'" (citations omitted)).

115. 528 U.S. 320, 335 n.4 (2000).

116. *Id.* at 325.

117. 42 U.S.C. § 1973(c)(a) (2006).

118. *Bossier II*, 528 U.S. at 326.

119. *Id.* at 328.

120. *Id.* at 340 ("Appellants assert that we must have viewed the city's purpose as discriminatory but nonretrogressive because, as the city noted in contending that it lacked even a discriminatory purpose, the city could not have been acting to worsen the voting strength of any present black residents, since there were no black voters at the time. However . . . we did not hold that the purpose prong of § 5 extends beyond retrogression, but

sive rather than discriminatory purpose, Justice Scalia first had to circumvent two decisions in which the Court had in fact given the purpose prong of § 5 a broader meaning.[121] He also had to dismiss as dictum the Court's statement in *Beer* that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."[122] The plaintiffs in *Bossier II* had alleged just such a constitutional violation. Finally, Justice Scalia was compelled to dismiss Justice Souter's examination of legislative history "since [Souter] can point to nothing suggesting that the Congress thought § 5 covered both retrogressive and nonretrogressive *dilution*."[123] Yet Justice Souter maintained that "the whole point of the legislative history is that Congress meant to guard against just those discriminatory devices that were as yet untried. Congress did not know what the covered jurisdictions would think up next."[124] Thus, according to Justice Souter, Congress in § 5 was concerned with "[a]ny purpose to give less weight to minority participation in the electoral process than to majority participation."[125]

Congress agreed. In its 2006 reauthorization of § 5, Congress repudiated Justice Scalia's approach to interpreting the purpose prong of § 5, clarifying that "[t]he term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose."[126] Unchastened by Congress's rejection of its cramped reading of § 5 in *Bossier Parish II*, the Court in *Shelby County* treated Congress's 2006 clarification not as a precautionary tale that it should not narrowly construe the coverage formula, but rather as "exacerbat[ing] the substantial federalism costs that [the] preclearance procedure already exacts . . . ."[127] Nothing about federalism privileges a state to implement racially discriminatory voting changes.[128] Presumably, in the absence of § 5, plaintiffs in a voting rights case could seek preliminary relief from the implementation of such changes, and that too would entail costs to federalism. No one, however, doubts a federal court's authority to enjoin such changes, so it is puzzling that, in the Court's view, Congress, which is given express remedial authority to prevent voting discrimination in § 2 of the Fifteenth Amendment, cannot do the same without running afoul of federalism.[129]

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rather held that a jurisdiction with no minority voters can have a retrogressive purpose, at the present time, by intending to worsen the voting strength of *future* minority voters.").

121. *See id.* at 330, 339.

122. *Id.* at 337–38 (citing Beer v. United States, 425 U.S. 130, 141 (1976)).

123. *Id.* at 335 n.4.

124. *Id.* at 367 (Souter, J., concurring in part and dissenting in part).

125. *Id.*

126. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 581 (2006) (codified as amended at 42 U.S.C. § 1973).

127. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2626–27 (2013).

128. *See Federalism and the Voting Rights Act*, ACS Blog (Feb. 26, 2013), http://www.acslaw.org/acsblog/federalism-and-the-voting-rights-act.

129. *See id.*

In the very same 2006 reauthorization of § 5, Congress also expressed its disapproval of the Supreme Court's interpretation of that provision in *Georgia v. Ashcroft*.[130] In *Ashcroft*, "the state of Georgia had sought preclearance of its state senate redistricting plan" by a three-judge federal district court in the District of Columbia.[131] The district court denied preclearance, finding retrogression in three majority-minority senate districts in which the percentage of voting-age African Americans had been reduced and thus diminishing their voting strength.[132] Writing for the majority, Justice O'Connor held that the relevant standard—whether there has been "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"—required an assessment of the totality of the circumstances, including but not limited to the minority group's ability to elect the candidate of its choice.[133] The Court gave no indication of how this malleable standard of retrogression, which looked at such factors as whether a redistricting plan would enable a minority-preferred candidate to be reelected and to ascend to the ranks of legislative leadership, could possibly be applied by a district court or the Attorney General.[134] Indeed, Justice Souter argued that the majority's construction left § 5 "practically unadministrable."[135] Moreover, the standard was unmoored from the Court's precedents under § 5, and contrary to Justice O'Connor's own admonitions about the distinct functions of §§ 5 and 2 in *Bossier Parish I*, her analysis borrowed heavily from § 2 cases.[136] Moreover, the majority made no attempt to reconcile its construction with legislative intent.[137] Just as its interpretative approach was identical to *Bossier Parish II*, so too did *Ashcroft* meet the same fate in Congress. In its 2006 reauthorization of § 5, Congress clarified that "[t]he purpose of subsection (b) of [§ 5] is to protect the ability of such citizens to elect their preferred candidates of choice."[138]

D. Summary: § 5 Cases

We have argued that, on the whole, in interpreting § 5, the Court's methodology has been more akin to *Sebelius* and a functionalist approach than to the sui generis tact taken by the majority in *Shelby County*. On the two significant occasions where the Court's interpretation of § 5 has veered distinctly from a functionalist, canon-faithful approach, Congress has overturned its decisions. *Shelby County* likely will mark the third such notable occasion, except that in disabling § 5 by declaring § 4(b)'s cover-

130. 539 U.S. 461 (2003); *see* Pub. L. 109-246, § 2(b)(6), 120 Stat. at 578.
131. *Ashcroft*, 539 U.S. at 461.
132. *Id.* at 474–75.
133. *Id.* at 477–80.
134. *Id.* at 484–85.
135. *Id.* at 493–94 (Souter, J., dissenting).
136. *See, e.g.*, *id.* at 479–80, 482–86.
137. *Id.* at 463–91.
138. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3)(d), 120 Stat. 577, 581 (2006) (codified as amended at 42 U.S.C. § 1973).

age formula unconstitutional, the majority in *Shelby County* knowingly lateraled an issue to Congress that the present Congress is likely politically incapable of resolving. Before addressing the implications of this in Part II, we briefly examine the Court's treatment of § 2 cases to discern whether the trajectory of its decisions parallels the overarching interpretative approach in its § 5 cases.

E. § 2 Cases

Section 2 of the Voting Rights Act of 1965 presented a learning curve for the Supreme Court. Whereas the Court began its construction of § 5 of the Act with the capaciousness needed to carry out Congress's goal of eradicating discrimination in voting, it did precisely the opposite with § 2. In *City of Mobile, Alabama v. Bolden*,[139] black citizens sued, alleging that Mobile's at-large scheme for electing its commissioners violated the Fifteenth Amendment and § 2 of the Voting Rights Act.[140] Justice Stewart, the author of the *Beer* decision limiting the effects prong of § 5 to retrogression, wrote for the plurality. The Court held that "the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."[141] Because the Fifteenth Amendment required a showing of discriminatory intent, the Court found that § 2 likewise required such a demonstration.[142] Justice Stewart read § 2's prohibition on electoral rules that "deny or abridge the right of any citizen of the United States to vote on account of race or color" in *pari materia* with the Fifteenth Amendment's command that the right to vote "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."[143] This represented a reversal for him and the Court. Over Justice Marshall's dissent arguing that the scope of § 5 was coterminous with the Fifteenth Amendment, the Court in *Beer* declined to read § 5's standard—"does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color"—in *pari materia* with the Fifteenth Amendment's language that the right to vote "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."[144] Moreover, the majority in *Bolden* never explained why Congress would simply recodify the command of the Fifteenth Amendment in § 2 when a private right of action already existed under the Fifteenth Amendment. Unlike § 5, which, among other things, shifted the burden of proof to defendants and therefore augmented the Fifteenth

139. 446 U.S. 55 (1980).
140. *Id.* at 58.
141. *Id.* at 60–61.
142. *Id.* at 62–63.
143. *Id.* at 60–62.
144. Beer v. United States, 425 U.S. 130, 141 (1976).

Amendment's proscription,[145] a mere recodification of the Fifteenth Amendment in § 2 was superfluous. Thus, in addition to not adhering to precedent, the Court in *Bolden* did not give a practical interpretation to § 2.

Congress acted swiftly to "dispositively reject[ ] the position of the plurality in [*Bolden*], which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters."[146] In adopting an "effects test" for vote dilution under § 2, however, Congress left important questions unanswered.[147] These questions, depending on the interpretive method employed by the Court, could well have called into question the revised section's constitutionality. In *Thornburg v. Gingles*, a case challenging a multimember (at-large) districting system for the North Carolina legislature, the Court began its review of the revised § 2 with a thorough vetting of its legislative history.[148] The Court understood the legislative record to require a "functionalist" view of political processes and their relationship to § 2.[149] This understanding was particularly important given the Court's task of bridging § 2's goal of not creating racial electoral quotas—which would be unconstitutional—with its commitment to disrupt electoral systems that did not provide a protected group an equal opportunity "to participate in the political process and to elect representatives of their choice."[150]

The "*Gingles* preconditions" that emerged from the Court's opinion—and which are nowhere present in the actual text of § 2—were the product of the Court's effort to give a constitutional reading as well as practical effect to § 2.[151] This approach has persisted across a series of § 2

145. *Id.* at 147–49 (Marshall, J., dissenting) ("While the substantive reach of § 5 is somewhat broader than that of the Fifteenth Amendment in at least one regard—the burden of proof is shifted from discriminatee to discriminator—§ 5 is undoubtedly tied to the standards of the Constitution. Thus, it is questionable whether the 'purpose and effect' language states anything more than the constitutional standard, and it is clear that the 'denying or abridging' phrase does no more than directly adopt the language of the Fifteenth Amendment.").

146. *See* Thornburg v. Gingles, 478 U.S. 30, 43–44 (1986) (citations omitted).

147. *See id.* at 63.

148. *See id.* at 35, 43–46.

149. *Id.* at 66 (quoting S. REP. NO. 97-417, at 30 n.120 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208).

150. 42 U.S.C. § 1973(b) (2006).

151. *Gingles*, 478 U.S. at 48–51 ("These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district . . . . Second, the minority group must be able to show that it is politically cohesive . . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, and usually to defeat the minority's preferred candidate . . . . Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election." (citations omitted)).

cases.[152] Thus, in *Holder v. Hall*,[153] black voters who challenged a county's single-commissioner form of government as vote dilution under § 2 failed because the Court had no practical way of determining "where the search for reasonable alternative benchmarks should begin" and could not formulate "acceptable principles for deciding future cases."[154] In *Bartlett v. Strickland*,[155] the Court interpreted the first *Gingles* precondition as requiring that the minority group in a remedial district under § 2 must constitute a voting-age majority to state a claim.[156] The Court predicated its decision on the need to preserve the framework of *Gingles* itself, the need for "workable standards and sound judicial and legislative administration," and the need to avoid "serious constitutional concerns under the Equal Protection Clause."[157] One need not agree with the holding in *Bartlett* to identify the interpretive canons that it arguably heeds.

The need (and desire) to construe § 2 in a manner that rendered it consistent with the Equal Protection Clause of the Fourteenth Amendment was apparent in a series of challenges to majority-black and majority-Latino congressional districts in the 1990s.[158] In those cases, the defendant-states argued that the creation of these districts was based on their compelling interest in complying with § 2 of the Voting Rights Act.[159] The Court declined to give § 2 a construction that would run afoul of the Equal Protection Clause: "§ 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.' If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact."[160]

The comparison of the interpretive approach of the Court across its seminal post-*Bolden* § 2 cases to its interpretive approach in *Shelby*

152. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1 (2009); Holder v. Hall, 512 U.S. 874 (1994).

153. 512 U.S. at 874.

154. *Id.* at 885.

155. 556 U.S. 1 (2009).

156. *Id.* at 18 (Thomas, J., concurring) ("Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2.").

157. *Id.* at 17, 21.

158. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541 (1999); Abrams v. Johnson, 521 U.S. 74 (1997); Bush v. Vera, 517 U.S. 952 (1996); Holder v. Hall, 512 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Johnson v. DeGrandy, 512 U.S. 997 (1994); Miller v. Johnson, 515 U.S. 900 (1995).

159. Hunt v. Cromartie, 526 U.S. 541 (1999); Abrams v. Johnson, 521 U.S. 74 (1997); Bush v. Vera, 517 U.S. 952 (1996); Holder v. Hall, 512 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Johnson v. DeGrandy, 512 U.S. 997 (1994).

160. *Bush*, 517 U.S. at 979.

County yields a portrait of the Court striving to give constitutional and practical effect to § 2 while doing precisely the opposite to §§ 4(b) and 5.[161] However, there is simply no principled basis for the Court's canonical apostasies in *Shelby County*. We next turn to some important implications of *Shelby County*'s unmoored and unorthodox interpretive methodology.

II. IMPLICATIONS

The American judiciary serves as the ultimate arbiter in our system of government in determining what the law is.[162] This general statement of mission reflects not only the court's preeminent role in interpreting constitutional law, but it also applies (to a lesser degree) to its ability to give meaning to ambiguous statutory language. In an era where federal regulation and public law increasingly occupy the federal docket,[163] the court's interpretive authority gains greater significance in maintaining and expanding important substantive rights. No longer is statutory interpretation "an alien intruder in the house of common law;"[164] rather, this analytical tool now accounts for a considerable share of the cases in the federal court system. In other words, the district courts have become "mechanisms for implementing statutes, and thus active participants in our modern scheme of statutory governance."[165]

Signaling that the time has now passed for special administrative tools like the preclearance remedy in voting rights, the Supreme Court has effectively set out on an interpretive path that directs the regulatory scheme to curb or end discriminatory conduct toward traditional civil litigation. In expressing skepticism about the necessity and effectiveness of the preclearance system, the Court often asserts that there are political harms and management burdens that the covered jurisdictions can no longer afford. At the same time, the critique is also paired with an expression of (unwarranted) faith that the traditional means of vindicating constitutional rights—the civil lawsuit—is plenty sufficient to assure the political efficacy of racial minority groups.

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

162. Marbury v. Madison, 5 U.S. 137 (1803).

163. *See, e.g.*, Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723 (2008) (presenting research showing the increase of class action lawsuits in the federal courts).

164. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936) ("Happily the abrasive effect of the never-ending judicial labor of making a workable system of our law, so largely composed of statutes, is bringing about a more liberal attitude on the part of the courts. Fortunately, too, law schools have begun to study and investigate the problem involved in an adequate union of judge-made with statute law. They are developing the underlying principles for its solution, which rest basically on a more adequate recognition that a statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs.").

165. Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 579 (1992).

In this section, we demonstrate why this line of reasoning from the Court suffers from several flaws. First, it is completely blind to the historical experience that led to the adoption of the preclearance remedy in 1965 as well as the 2006 record findings in which Congress reconfirmed the present advantages of a dual enforcement strategy—pairing preclearance oversight with litigation. Second, the judicial optimism about funneling the resources and energy of voting enforcement into litigation alone is misleading and dangerous given this Court's procedural holdings that curtail meaningful opportunities for civil plaintiffs (including voting rights plaintiffs) to obtain relief. And third, eliminating the preclearance remedy is all the more disturbing in light of how this move is at odds with basic judicial policy. In short-circuiting the preclearance remedy, the Court has turned the foundational anti-majoritarian principle of the judiciary on its head. As the Court apparently views the concept, judicial power is correctly marshaled to block rules that protect the minority—even where the majority has fashioned a rule to constrain itself from interfering with the political rights of vulnerable minorities. We address each of these matters in turn in the sections that follow.

A. An Unwarranted Focus on Litigation

In examining the most recent cases on Section 5, one finds the Court sounding a strong note of mistrust about the administrative oversight model of voting rights enforcement.[166] Aside from the selectivity of states that is built into the system, *Shelby County* is equally as concerned with the severe constraints on local governing authority that preclearance demands.[167] In place of this purportedly burdensome limitation on state sovereignty, the majority points to litigation as an effective alternative to the special protections that preclearance provides.[168] The Court's apparent reasoning is that the civil lawsuit offers all the necessary means for plaintiffs to vindicate their rights while avoiding the kinds of impediments that prevent the state from crafting policies pursuant to its normal course

166. *See* Miller v. Johnson, 515 U.S. 900, 922 (1995) ("We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues."); Georgia v. Ashcroft, 539 U.S. 461, 490 (2003) ("While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters. . .").

167. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2624 (2013) ("[D]espite the tradition of equal sovereignty, 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.") *See also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) ("It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.")

168. *See Shelby Cnty.*, 133 S. Ct. at 2619 ("Both the Federal Government and individuals have sued to enforce §2 and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U. S. C. §1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.") (citation omitted).

of business. Aside from the earlier point that this thinking is completely antithetical to the historical circumstances that led Congress to enact § 5, the assertion of equivalence between an administrative and litigation regime rings rather hollow in light of the facts.

1. The Court's Idealized View of Litigation

Recent voting rights cases reflect the Court's strong preference for the litigation form of civil remedy, and they follow a particular pattern of thought. First, the Court accords major weight to the perceived costs associated with continuing the administrative review of the election changes in covered states. Although the *Shelby County* court noted that there were troubling federalism costs that burden the interests of state sovereignty (a topic that is never fully theorized in the opinion itself), there are additional instances where the Court has voiced its grave concerns about the costs of state and local jurisdictions trying to comply with the system.

In *NAMUDNO*, for example, the covered jurisdiction that brought the lawsuit (a water utility district) asserted that the expenses of seeking federal review for election changes exceeded the jurisdiction's available financial resources.[169] Even in the face of ample record evidence showing that the costs of sending a filing to the federal government were quite nominal,[170] the Court characterized this process as a series of expensive hurdles to policymaking choices that have little if any potential for race discrimination. During his questioning at oral argument, for instance, Justice Kennedy voiced suspicions that the regulated states had spent a total of more than a billion dollars over the last decade to meet the federal filing mandates.[171] With a price tag so large, the apparent costs of litigation would be far less onerous for most any local and state government to bear.[172]

A similar concern about the preclearance system arises from the Court in its expression of worry about the over-breadth of the remedy. The Court has, in similar voting rights contexts, characterized states as generally "good actors" that operate in the best interests of racial minority

169. *See* Kareem U. Crayton, *The Court's NAMUDNO Decision: Judging the Costs and Efficiency of Preclearance*, FINDLAW (May 26, 2009) http://writ.lp.findlaw.com/commentary/20090527_crayton.html.

170. *Id. See also* Brief for the States of N.C., Ariz., Cal., La., Miss. & N.Y. as Amici Curiae in Support of Eric H. Holder, Jr., et al. in NAMUDNO v. Holder. No 08-322 (Mar. 5, 2009) at 9 http://www.campaignlegalcenter.org/attachments/Court_Cases_Of_Interest/1996.pdf ("Not only is the monetary cost to States in complying with Section 5 *de minimis*, the intrusion on state sovereignty as a result of delay in implementing state election law changes is also minimal.").

171. *See* Transcript. of Oral Argument. in NAMUDNO at 33 (Apr. 29, 2009) http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf ("JUSTICE KENNEDY: . . . [D]o you quarrel with the assessment—the testimony before the Senate Judiciary Committee that it costs the States and the municipalities a billion dollars over 10 years to comply?").

172. *Id.*

groups—along with every other member of the electorate.[173] In contrast to the 1965-era South, when systematic defects in representation disadvantaged non-white groups, the norm for governance is quite different in modern times. Thus, many of the § 4 jurisdictions today must engage in time-consuming oversight that interferes with their efforts to work on behalf of the entire electorate. Insofar as the preclearance system overpredicts for race discrimination in the current era, several of the "good actors" are saddled with administrative costs that are in fact both unnecessary and harmful.[174] Put in the language of law and economics, the current system of federal safeguards creates systemic inefficiencies that tend to interfere with government decision-making.[175]

The implied advantage that civil litigation provides is that it allows for a more efficient identification of bad actors. The jurisdictions most in need of remediation essentially would self-select into the Court's desired litigation-focused system, to the extent that a plaintiff seeks a voting rights remedy with a legal claim that has merit. When plaintiffs take on the responsibility for alerting the courts of illegal rules or practices and for meeting the evidentiary burden of proof at trial, the regulatory arm of the federal government avoids the kind of overreach that might meddle with the local political process. Most of the policies and practices that are typical to governance would raise no objections and therefore deserve no close judicial scrutiny. The court's attention to voting rights, then, would extend no further than the problems that Congress directs courts to consider. Application of these legal standards would be national in scope (avoiding the selectivity inherent in preclearance), but the weight of enforcement would be tailored to apply in the circumstances as they are demonstrated to the court.

Third, the challenge to an administrative regime emanates from concerns about the corrupting influence of ideological bias in Washington, D.C. This line of thought asserts that the federal officials who commonly review proposed changes are not applying the law impartially, but are assessing the issues through a partisan lens that is improper in the enforcement of civil rights.[176] The specific target of this critique is the work

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173. *See* Presley v. Etowah County Commission, 502 U.S. 491, 504 (1992) ("in a real sense every decision taken by government implicates voting. This is but the felicitous consequence of democracy, in which power derives from the people. Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision.").

174. Ironically, the dissent in *Shelby County* made clear the irony that the "good actors" line of argument was ill-fitting for Shelby County, which was a jurisdiction that would not easily evade virtually any version of the preclearance regime's targeting formula, based on its own past violations of anti-discrimination law as well as that of the State of Alabama. *See Shelby Cnty.*, 133 S. Ct. at 2645 (J. Ginsburg dissenting) ("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.")

175. *See* Kareem Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201 (2010).

176. Dan Eggen, *Politics Alleged In Voting Cases*, WASH. POST (Jan. 23, 2006) http://www.washingtonpost.com/wp-dyn/content/article/2006/01/22/AR2006012200984.html; Dan Eggen, *Justice Staff Saw Texas Districting As Illegal*, WASH. POST (Dec. 2, 2005). http://

done by the Department of Justice in reviewing preclearance changes.[177] On questions about where (if anywhere) to apply the preclearance remedy (the subject of *Shelby County*) or how to apply the substantive standard to a complex set of facts (*Shaw v. Reno* or *Georgia v. Ashcroft*), articulating a consistent or uniform application of the remedy often defies easy synthesis. The reason for this level of variance, some have argued, is attributable to the partisan shifts in the White House and internal disputes within the ranks of the Department of Justice.[178] Put plainly, the Democratic administrations have a different manner of interpreting the federal law than those of Republicans.[179]

The underlying critique on this point is that an adjudication-only review process could develop a more uniform rule to address these disputes. As a more neutral arbiter responsible for adjudicating these rights in a litigation posture, the courts could produce a more predictable and consistent set of governing principles. Only with the administrative expertise and impartiality of the members of the judicial branch managing these rules can one expect to have a set of rules and standards that are predictable regardless of what party controls the White House.

2. Why Litigation and Elections Don't Mix

While there are undoubtedly some benefits of civil litigation, this approach alone cannot replace what is lost in the absence of a robust administrative oversight regime like the preclearance provision.[180] Aside from

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www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927.html; *see also* Richard Hasen, *Roberts' Iffy Support for Voting Rights*, L.A. TIMES (Aug. 3, 2005) http://articles.latimes.com/2005/aug/03/opinion/oe-hasen3 (recounting then-staffer John Roberts' role in framing the Reagan Justice Department's position on the 1982 amendments to the Voting Rights Act).

177. In the 2010 round of redistricting, preclearance states with Republican leadership asserted their concerns that the Obama Justice Department would not favorably review their mapping proposals due to partisan concerns. Accordingly, these states filed their proposed changes simultaneously, with both the Justice Department and with the D.C. District Court or (as in Texas) avoided the Justice Department review entirely. David G. Savage, *Justice Department Walks a Line on Political Redistricting*, L.A. TIMES (Aug. 13, 2011) http://articles.latimes.com/2011/aug/13/nation/la-na-justice-redistricting-20110814 ; Aaron Blake, *Texas Redistricting Case: Five Things You Need to Know*, WASH. POST (Dec. 13, 2011). http://www.washingtonpost.com/blogs/the-fix/post/texas-redistricting-case-five-things-you-need-to-know/2011/12/13/gIQAdowHsO_blog.html.

178. *See, e.g.,* Charlie Savage, *U.S. Cites Race in Halting Law over Voter ID*, N.Y. TIMES, Dec. 24, 2011, at A1 (describing South Carolina Governor Nikki Haley 's outrage over DOJ Objections to its voter identification law"); Hans von Spakovsky, *Abusing the Voting Rights Act*, NAT'L REV. ONLINE (Feb. 23, 2011) http://www.nationalreview.com/articles/260303/abusing-voting-rights-act-hans-von-spakovsky; Charles S. Bullock III & Ronald K. Gaddie, *What If the Courts Have to Handle Section 5 Reviews—Lots of them?*, S. POL. REP. (Mar. 9, 2011), http://www.southernpoliticalreport.com/storylink_39_1869.aspx ("Georgia's Democratic leadership feared that the Justice Department would not approve the gerrymanders.").

179. *See generally* Ellen D. Katz, *Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All*, 23 STAN. L. & POL'Y REV. 415 (2012) (outlining and critiquing concerns about the role of partisanship in administrative review of preclearance changes).

180. *See generally*, The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess. (2006). The point of this

the well-traced concerns we have noted, there are also major limitations inherent to election-related lawsuits that make the reliance on litigation alone an incomplete strategy of maintaining voting rights protections. They bear noting here because they represent the special burdens faced by plaintiffs when they seek legal relief against states in this context. Indeed, these are some of the same considerations that led Congress to develop the preclearance system in 1965.

One of the most significant burdens associated with civil litigation in the electoral context is the disadvantage of time. A jurisdiction's election calendar does not simply slow or stop just because a lawsuit challenging a law or policy has been filed.[181] Terms of office end and replacements must be named to fill those vacancies; further, the machinery of qualifying candidates, assigning election districts and running the polling places rely upon actions and decisions that are months in advance of the actual election. This unyielding timeline highlights an almost-universal truth for election law scholars: the judiciary can be an especially slow and ineffective institution for settling election-related grievances in real time.[182] The worlds of politics and law, while overlapping, generally work on different time frames. Trials and appeals in the judiciary can take years to complete, and many of the underlying issues can become moot due to expired terms of office or rapidly changed circumstances (you've heard the line before: "A week is a long time in politics").[183]

A modern example of the way that election time can interfere with litigation is legislative redistricting fights, which often can force courts to contend with severe time-related pressures. The final resolution of a district map can take a decade after the initial plan is adopted—just in time for a new round of redistricting. Similar problems exist with legal efforts to enjoin certain polling practices on Election Day: the voting may be over before the court even hears the claim. In North Carolina's now well-known *Shaw v. Reno* litigation,[184] the final approval of districts first challenged in 1991 did not happen until well after the year 2000—just in time

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paper is not to suggest that civil litigation has no place at all in an enforcement regime of voting rights. Rather, our point (which is reflected in the Congressional voting rights reenactment of 2006) is that absent preclearance, litigation alone is not equal to the task of assuring opportunity to non-white voters that they can be equal participants in the political process.

181. Kareem Crayton, *What* Powell v. McCormack *Teaches Us About Contemporary Race and Politics*, SCOTUS Blog (Feb. 24, 2010, 12:51 pm), http://www.scotusblog.com/2010/02/what-powell-v-mccormack-teaches-us-about-contemporary-race-and-politics/.

182. 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).

183. *See* Megan Liehs, A Week is a Long Time in Politics: Harold Wilson, the Labour Party, and the European Question 1964–1975 (2011) (about the Prime Minister who is credited with originating the oft-quoted maxim).

184. *See* North Carolina Redistricting Cases: the 1990s, Minn. Legislature, http://www.senate.leg.state.mn.us/departments/scr/redist/redsum/ncsum.htm (last updated July 8, 2003); Aleinikoff, T. Alexander & Issacharoff, Samuel, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich. L. Rev. 588 (1993).

for a new redistricting process to commence.[185] Courts will rarely succeed in addressing live election disputes without clear, predictable standards that guide when they should hear cases.

Second, one cannot easily devise a remedy to undo elections once they have been conducted. Notwithstanding the court's ability to declare a violation of the law, there is little or no recourse following an election other than to invoke a retrospective order that undoes the result. Aside from the typical inertia or unwillingness of candidates to press such claims,[186] the courts themselves are loath to engage. Because civil litigation views the preliminary injunction as an extraordinary (and disfavored) equitable remedy,[187] the only practical options available to litigants challenging a completed election are prospective forms of relief. Once the proverbial genie leaves the bottle, however, the effect of any remedy to govern future elections is a rather hollow hope to offer a plaintiff who has successfully demonstrated a violation of the law.

Finally, the ebb and flow of civil litigation can sometimes conflate the attention for the public's concerns with those of elected officials. At times, the latter can eclipse the representational group interests of the former. While these interests can align, this tension can prove a thorny matter when they do not. This dynamic is not uncommon in election cases, including Voting Rights Act challenges (when courts must decide if black politicians have divergent political goals and preferences from those of their constituents) or in partisan post-election challenges. *Bush v. Gore*, of course, was a major case implicating the Court in the resolution of an election related dispute.[188] There, the strategic interests of the Democratic and Republican nominees for President often displaced the distinct substantive concerns of individual citizens in determining the number of challenged counties where balloting was in dispute.[189] Since distilling these interests can be difficult, these divergent interests can

185. *See* Easley v. Cromartie, 532 U.S. 234, 237–38 (2001) (describing procedural history of *Shaw* litigation).

186. *See* Mark Braden, *Disputed Elections Post* Bush v. Gore: *Are Federal Courts Entering the Political Contest Thicket?* 4 (Caltech/MIT Voting Technology Project Working Paper No. 17, April 16, 2011) ("Only a small percentage of recounts lead to formal contest actions. The candidates who are the apparent losers usually are too physically, emotionally, financially and politically exhausted. The "political sore loser" label is not easily shed. The contestant always has the burden of proof and the regularity of election results is a strong presumption to overcome, with judges commonly expressing their desire that the voters, not themselves (judges) decide the elections. These factors combine to make actual election contest actions rare in comparison to recounts.").

187. *See* Bethany Bates, *Reconciliation After Winter: The Standard For Preliminary Injunctions In Federal Courts*, 111 COLUM. L. REV. 1522, 1524–30 (2011) (reviewing the evolution and variation of the preliminary injunction standard across circuits).

188. 531 U.S. 98 (2000); *see also* Richard Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 393–96 (2001) (exploring conceptual challenges of applying an equal protection analysis to election related disputes).

189. William Marshall, *Rough Justice*, 29 FLA. ST. U. L. REV. 787, 803 ("Unless any of the political players were to rise above their own partisan interest, any decision resulting from this chaos would necessarily reek of partisanship and self-dealing. And it was clear that none of the players were prepared to abandon their partisan battle stations.") (citation omitted).

sometimes result in a remedy that disserves an important stakeholder.[190]

B. Civil Rights in the Roberts Era

A second implication of *Shelby County* has to do with how relying on a litigation-based model of enforcement would actually fare as a practical matter in the current era. Taking the Court's recent cases on civil procedure into account, the prospects are not especially bright. In addition to the inherent limitations associated with civil rights cases involving voting rights and elections, another more troubling factor is the general trend that has made civil litigation less, not more, viable as a tool of enforcement. In fact, the Roberts Court has quite methodically advanced new regimes that constrain many of the traditional uses of civil litigation to address structural reform. Plaintiffs today face important new hurdles to pursuing (let alone winning) lawsuits in this context, making the decision to relegate voting rights enforcement to traditional courtroom action a rather cold comfort.

While there are several recent areas that one might use to illustrate this trend, two of the Court's most recent and controversial rulings in the civil procedure arena are most relevant for present purposes. They are the Court's holdings relating to heightened pleading standards and the heavier policing of court-invoked remedies.

1. Pleading

Until the Roberts era, most students of civil procedure would resolutely offer the view that the standard of pleading found in Rule 8 is a rather minimal one for plaintiffs to commence a legal action.[191] All that is needed is "a short and plain statement of the claim showing that the pleader is entitled to relief."[192] The U.S. Supreme Court had interpreted this requirement in *Conley v. Gibson*,[193] and held that a complaint should not be dismissed unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[194]

Under the classic way of thinking, a judge had a duty to credit even the most basic complaint that gestured toward a more formalized legal claim. Courts, at times, would in fact reinterpret the documents in order to avoid dismissal of a claim based on lack of legal merit. The rationale behind this interpretation was to maintain greater access to and participation in the court system, especially for those who could not afford legal representation.

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190. Kareem Crayton, *What* Powell v. McCormack *Teaches Us About Contemporary Race and Politics*, SCOTUS Blog (Feb. 24, 2010, 12:51 pm), http://www.scotusblog.com/2010/02/what-powell-v-mccormack-teaches-us-about-contemporary-race-and-politics/.

191. Fed. R. Civ. P. 8.

192. Fed. R. Civ. P. 8(a)(2).

193. 355 U.S. 41 (1957).

194. *Id.* at 45–46.

The Roberts Court set out on an entirely different path, announcing a pair of major decisions that effectively shift the tide against plaintiffs by imposing a higher burden on them to plead. Starting with the anti-trust case in *Bell Atlantic Corp. v. Twombly*,[195] the Court reconsidered *Conley*'s plaintiff-friendly conception of pleading.[196] The majority imposed a new demand: that plaintiffs plead a set of plausible facts in order to survive a motion to dismiss.[197] Courts were directed to determine whether the complaint included more than just a threadbare recitation of facts that might possibly amount to misconduct, focusing instead on whether the complaint's set of facts is plausible in light of judicial experience.[198] The Court's later decision in *Ashcroft v. Iqbal*[199] made clear that this new pleading regime would apply to all civil litigation, since *Conley*'s standard was no longer tenable.[200]

What this means for voting rights plaintiffs (as with all others) is that the courthouse door is effectively narrowed.[201] Before one can even pursue a lawsuit, the Court now demands greater knowledge and detail of the harms that are at issue. Plaintiffs must engage in far more investigation in order to establish the knowledge or belief that the facts amount to a violation of law.[202] More to the point, plaintiffs effectively must contend with a more frequently utilized and more powerful motion to dismiss by defendants. Several studies already confirm the more frequent use of the motion in civil cases.[203] And with the directive by the Roberts Court to apply one's judicial experience, the predictability of these preliminary motions has become more tenuous.

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195. 550 U.S. 544 (2007).

196. *Id.* at 562 ("[A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard." (citation omitted)).

197. *Id.* at 545 ("[S]tating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'").

198. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

199. *Id.* at 684.

200. *Id.* ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.' Fed. Rule Civ. P. 1. Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike.").

201. *See* Michael Eaton, *The Key to the Courthouse Door: The Effect of* Ashcroft v. Iqbal *and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 314–15 (2011).

202. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1296 (2010) ("*Twombly*'s approach to pleading has been widely criticized as inconsistent with prior Supreme Court decisions, contrary to the text of the Federal Rules of Civil Procedure, and having destructive policy consequences in terms of litigants' access to the federal courts.").

203. Joe S. Cecil et al., *Motions to Dismiss for Failure to State Claim After* Iqbal 8 (2011); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 648 (2012).

2. Relief

At the other end of the civil litigation process is concern about legal relief, which is another emerging challenge for plaintiffs in the Roberts era. Obviously, relief is the main reason that plaintiffs commence a lawsuit and spend countless hours plodding through the process. Even where the party that alleges an injury linked to discrimination manages to prove their case, the possibility of obtaining meaningful and durable relief has also been placed into greater doubt in this new era of decisions from the Roberts Court. Whereas the courts previously enjoyed wide berth to establish equitable remedies that would respond to some of the most intractable and systemic problems, the current era has viewed these efforts with far less favor.

This trend is perhaps most apparent in cases involving individual challenges to state power. It was not that long ago that the Supreme Court upheld a decision that endorsed the notion that courts were empowered to rid the nation of race discrimination in the education sphere "root and branch."[204] Similar statements were embraced in the Court's review of special remedies devised by courts to address the unwillingness of state governmental actors to apply non-discrimination principles in their hiring practices.

While the Rehnquist era surely viewed these situations with some skepticism, the Roberts Court has advanced that agenda with great alacrity. The current court has very closely policed these remedial schemes, indicated by both its outright distrust of judicial power and distaste for race-conscious remedies. This includes instances where the local jurisdiction intends to avoid race discrimination liability by reversing policies it views as troublesome. In *Ricci v. DeStefano*,[205] the Court resolutely stated that the city government had erred in acceding to the demands of minority parties to eliminate an employment qualification test that appeared to impose a disparate burden on minority job applicants.[206] The Court determined that it was a violation of the Equal Protection Clause to do so, chiding the city for attempting to develop a solution that would avoid a

204. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'") (quoting Green v. Cnty. Sch. Bd. of New Kent Cnty., Va., 391 U.S. 430, 437–38 (1968)).

205. 557 U.S. 557 (2009).

206. *Id.* ("We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII.").

costly and troublesome lawsuit.[207] The Court faulted the city government's racial concerns because they apparently clouded a rational judgment that the proposed reform did not address an actual legal problem.[208] Rather, they led to one.

Even in Section 5 related cases, the Court has been remarkably sparing in latitude for judicial remedies even in those cases where intentional discrimination was found. Such was the case in *Perry v. Perez*,[209] where the Court vacated a local trial court's imposition of a remedial plan that was developed due to a preclearance violation.[210] The Court found fault with the plan because it was not tied to any established state policy and likely the judges' own preferences.[211] The Court directed judges generally to identify and preserve those parts of an invalidated state proposal that were not infected by a finding of intentional discrimination;[212] apparently, this was to be divined by determining whether a given aspect of the plan would be subject to a preliminary injunction due to a possible violation.

C. Inverting Principles of Judicial Power

The result of the Court's strong bias toward civil litigation in this context offers a troubling report on the reach of the judicial policing power. By rejecting a statutory provision that was resoundingly supported by a majority in Congress, the Supreme Court has undermined one of the most significant laws of the last century. Importantly, the point of the provision is to assure those who have less power are not completely shut out of the political process – the very anti-majoritarian concern that has traditionally guided judicial intervention. Yet *Shelby County* represents the work of five members to vindicate the perceived rights and interests of a political majority that engineered these minority protections. While Justice Scalia vainly attempted to explain this irony in oral argument by dismissing Congress's reauthorization as the result of "perpetual racial

207. *Id.* at 581 ("[W]hen Congress codified the disparate-impact provision in 1991, it made no exception to disparate-treatment liability for actions taken in a good-faith effort to comply with the new, disparate-impact provision . . . . Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact.").

208. *Id.* at 585.

209. 132 S. Ct. 934 (2012).

210. *Id*. at 944 ("Because it is unclear whether the District Court for the Western District of Texas followed the appropriate standards in drawing interim maps for the 2012 Texas elections, the orders implementing those maps are vacated, and the cases are remanded for further proceedings consistent with this opinion.").

211. *Id.* at 941 ("[T]he state plan serves as a starting point for the district court. It provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences.").

212. *Id.* at 940–41 ("[T]he plan already in effect may give sufficient structure to the court's endeavor. Where shifts in a State's population have been relatively small, a court may need to make only minor or obvious adjustments to the State's existing districts in order to devise an interim plan.").

entitlement,"[213] the more persuasive narrative is that this decision turns the traditional principle in *Carolene Products* completely on its head.[214]

Put differently, this Court has inverted the traditional conception of its anti-majoritarian role. Instead of tempering majority will in the defense of the guaranteed rights of minorities, the Court now works to reinforce majority entitlements even in the face of showings that document systemized minority disadvantage. The cold truth is that even where the majority has taken its own steps to reform structures to benefit minorities, the Court has defiantly responded by finding fault with such enactments—using partially reasoned or entirely imagined harms to the majority itself. Left completely out of this picture is any serious consideration, heightened or otherwise, to the plight of minorities that made the enactment a necessity. *Shelby County* epitomizes this judicial pabulum and its assault on *Carolene Products*. In the context of our nation's sordid racial history, when a white majority is prepared to prophylactically constrain potential racial bias in voting through a vehicle such as § 5, it is difficult to justify judicial interference as anything other than the naked exercise of power for its own sake. While few doubt that the voter registration and turnout figures on which Justice Roberts trained so much attention in *Shelby County* are significant indicators of racial progress, a majority populace willing to check *its own* potential biases in voting trumps these indicators by an order of magnitude and obviates judicial interference. Indeed, it is only by virtue of the very democratic process that *Shelby County* thwarts that the Court majority has any metrics of progress upon which to base its determination that the coverage formula has outlived its usefulness. If, however, Congress, as the representatives of a sovereign people, possessed the institutional competence to produce a degree of amelioration in voting that even the Court itself had to take cognizance of, it is highly unlikely that five justices of the Court know better than Congress how to preserve and further such progress.

Reva Siegal has suggested that the bulk of the Supreme Court's recent Equal Protection docket can be organized around a revised understanding of the judiciary's empathy toward different groups.[215] Whereas the traditional view of equal protection doctrine sprang from the governmental concern with eliminating or reforming structural inequalities that had

213. *See* Transcript. of Oral Argument at 47, Shelby Cnty. v. Holder, No. 12-96 (Feb. 27, 2013) http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf; ("JUSTICE SCALIA: . . . And this last [VRA] enactment, not a single vote in the Senate against it. And the House is pretty much the same. Now, I don't think that's attributable to the fact that it is so much clearer now that we need this. I think it is attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement. It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes.").

214. United States v. Carolene Products Co., 304 U.S. 144, 152 at n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.") (citation omitted),

215. Reva Siegal, *Equality Divided*, 127 HARV. L. REV. 1, 4 (2013)

disadvantaged certain marginalized groups, the current view has shifted focus instead to alleged excesses of these policies.[216] The attention has now shifted to take account of those persons in society who have traditionally benefited from past group exclusion and who now must navigate in a world that is informed by these reform policies. In a variety of contexts, from cases involving gender, to sexual orientation and (as in *Shelby County*) race, protecting this generally favored group's entitlement to equal regard under the law appears to be an overriding consideration for the Court. It is this odd institutional concern with the perceived threats and harms to traditionally empowered citizens that has developed a divided doctrine of equality for the Court.

In her treatment of *Shelby County*, Siegal specifically notes the marked contrast between the majority and the dissent's treatment of the same history that produced the Voting Rights Act in 1965. Looking at identical material in the Congressional record, the justices on either side of the issue reached markedly contrasting conclusions.[217] Whereas the dissenters led with their review of the well-documented Reconstruction and Jim Crow experiences of Congress attempting to address Southern resistance to black enfranchisement, the Chief Justice's opinion showed much more regard for both the historic and current concerns of the states that had to comply with the national law:

The majority was more concerned about the "disparate treatment" that civil rights law inflicts on states than the disparate treatment that discrimination inflicts on citizens. This concern led the majority to ignore longstanding precedents on deference the Court owes to Congress in reviewing an exercise of its power to enforce the provisions of the Reconstruction Amendments. Instead, the Court took for itself a primary role in determining whether Congress was justified in distinguishing among states as the preclearance mechanisms of the Voting Rights Act did.[218]

Siegal notes the surprising extension of this state-centered reasoning, which employs antiquated legal principles like "equal dignity" for propositions that reach far beyond their intended usage. Yet the creative treatment aids a much broader institutional purpose for the Roberts majority. Insofar as the constitutionally protected expression of policy preferences within the states (presumably majority ones) encounter interference from a federal regime (especially one with a questionable shelf-life), the latter must yield to the former. The approach reifies the notion of state sovereignty even in cases where the Reconstruction Amendments and the Supremacy Clause would indicate that the opposite conclusion is correct.

This theory explaining the Court's topsy-turvy approach to equal protection finds further support in work by Darren Hutchinson, who examines the judiciary's views about certain discrete and insular minority

216. *Id.* at 6.
217. *Id.* at 67–68.
218. *Id.* at 69.

groups.[219] In his invitation for scholars and the judiciary to rethink equal protection doctrine, Hutchinson notes the major problems with the view in some theoretical camps that the LGBT community should be exempted from the designation as discrete and insular.[220] He laments the extent to which the courts appear to embrace this thinking in the manner in which they address equality cases involving sexual orientation.[221]

Hutchinson finds that the misperception is rooted partly in the belief that material definitions of power (e.g., education and financial resources) are the traditional dimensions on which a court might assess a group's leverage in the political system. Imposing this narrow legal definition of power in the context of the rights of gay and lesbian persons, however, is an unhelpful and misplaced application. Limited conceptions of what constitutes those with power and those without it tend to overlook the important ways that the majority population's animus works to undermine the political effectiveness of groups.[222] In this particular context, Hutchinson reminds that not only is the "materially powerful minority" claim inaccurate in light of the facts about the LGBT community taken as a whole, but it also works to unreasonably immunize certain majority political and legislative enactments meant specifically to curtail the enjoyment of certain constitutional rights by this group.[223]

For both Siegel and Hutchinson, the common bond is the finding that the Court's current trajectory reflects a significant departure from settled doctrine about how and when the judiciary should invoke its authority to curb majority will. In *Shelby County* and other cases, reopening this discussion with a novel set of constitutional arguments has a clear effect. It places the Court solidly in favor of showing greater respect for the concerns of political majorities, groups that have rarely been denied or limited in their will in the political system. These cases demonstrate that the Court has taken a markedly different path on equal protection in which minority concerns rarely if ever predominate.

Departing from the traditional sense that judges should show sensitivity to policies aimed at improving the lot of discrete and insular groups, *Shelby County* fails the test for the sound application of judicial enforcement in two respects. Foremost, the Court ignores the well-known historical circumstances that led to Congress' imposition of the special rules to defend against discrimination in voting in 1965. Even despite its massive revisionism, the Court majority discounts the many concerns that made federal intervention in state governmental structures necessary. The move likely accounts for the Court's lack of attention to one of the ques-

219. Darren Hutchinson, *Not Without Political Power: Gays and Lesbians, Equal Protection, and the Suspect Class Doctrine*, 65 ALA. L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract=2238733.

220. *Id.*; *see also* Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?*, 85 Cornell L. Rev. 1358, 1372–83 (2000).

221. Hutchinson, *supra* note 219 at *21–23.

222. *Id.* at *25–33.

223. *Id.* at *56–59.

tions presented in the case: Whether the federal law violated the Guarantee Clause, a constitutional provision that grants protections not just to states but ultimately to the people.

And by scrutinizing matters clearly within the power of Congress to consider in legislation, the Court engages in the kind of judicial activism that many of its conservative personnel decry. Perhaps the most surprising aspect of these decisions is how swiftly the Court has been willing to supplant a decision taken by the legislature on policy. *Shelby County*, in this respect, is far from a modest decision because it takes no account of the fact that it upends a longstanding and bi-partisan piece of national legislation due to its own concerns about issues that the legislative record clearly addresses. By saving the legislative majority from itself, the Court at once establishes its own power as paramount in the vindication of rights. Sadly, that power seems inordinately limited to work to the advantage of majorities.

III. RETURNING TO CONGRESS

In this section, we present a simple but effective proposal for a legislative response to the decision taken by the Court in *Shelby County*. Given the above critique of the underlying reasoning in the decision, particularly with respect to statutory interpretation, Congress would be well advised to respond with an enactment that simply makes its consideration of the current conditions in the country more explicit. The approach that we advocate provides the most justifiable update that shows loyalty to the original basis for adopting and reauthorizing the preclearance remedy. We next address the most recent effort by a bi-partisan group in Congress to answer the Court's concerns differently. Pointing out various elements of the alternative proposal, we show why this approach poses more problems for preclearance than it resolves.

A. A Modest Proposal

Assume that in the immediate aftermath of passage of the Voting Rights Act of 1965 black voter registration and turnout increased dramatically, which they in fact did.[224] Assume further, though, that in response to these increases, the originally covered § 5 jurisdictions implemented photo voter identification requirements as a prerequisite to voting. Whatever the arguments about the disparate impact of photo voter I.D. today, in the 1960s with a less educated and poorer black population in the South that had not yet been fully acculturated into the civic tradition of voting, such requirements would likely have a racially disenfranchising impact. If it seems that the heuristic is some fifty years ahead of itself, that it precisely the point: The Congress that enacted the Voting Rights

224. *See* Chandler Davidson & Bernard Grofman, Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990 at 332 (1994); S. Rep. No. 109-295 (2006).

Act of 1965 could not possibly foresee the use of voter I.D. laws as disenfranchisement devices in 2014 any more than it could foresee the use of myriad vote dilution schemes that § 5 would begin to address shortly after passage of the Act. If, as the *Shelby County* majority seems to suggest, Congress must "link[ ] coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement,"[225] then one could easily see how the Voting Rights Act would have been a dead letter soon after its passage unless Congress was willing to revise the coverage formula each time a covered jurisdiction (or a non-covered jurisdiction) engaged in a disenfranchising scheme not mentioned in the coverage formula.

The absurdity of this approach is apparent. We suspect that the majorities in *Austin* and *Shelby County* never gave an example (or even a clear indication) of what would be an acceptable coverage formula because they failed to extrapolate the consequences of the broad pronouncements in those cases. The threat that this kind of theoretical musing by the judicial branch poses to the legitimate exercise of congressional and executive branch authority should not be underestimated. While the *Shelby County* majority complained that Congress's coverage formula in § 4(b) was stale-dated, the Court itself routinely relies on stale-dated information in applying a basic judge-made constitutional precept: one person, one vote. "States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability."[226] Indeed, many prophylactic judicial tests applicable to politics could easily be immobilized if the Court held itself to the same standard as its language in *Shelby County* suggests it is willing to apply to Congress. Regardless of one's political ideology, members of Congress have an interest in ensuring that the judicial branch does not impose on it a requirement of precision that the Court itself is unable to meet in the most universally accepted non-discrimination principle of voting: one-person, one-vote.

What is particularly vexing about the *Shelby County* majority's facileness in invalidating the coverage formula is that in the highly relevant context of redistricting—relevant because minority vote dilution is often perpetrated during this process—certain members of the majority have found that the Constitution's express commitment of a subject to Congress's authority is a salient consideration in the judiciary's abstention. Thus, in *Vieth v. Jubelirer*,[227] Justice Scalia and three other justices emphasized that the remedy to political gerrymanders rested with Congress and its power under § 4 of Article I of the Constitution (the Elections Clause) to regulate congressional redistricting.[228] More importantly,

225. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2625 (2013).
226. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 421 (2006).
227. 541 U.S. 267 (2004).
228. *Id.* at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.").

these justices would have found all partisan gerrymandering claims nonjusticiable because of the lack of judicially manageable standards by which to judge such claims.[229] Our point here is not to argue that the Court had no business ruling on the merits in *Shelby County*. But if the manageability of a legal standard is relevant to whether the Court should entertain a claim at all, then the Court should take care not to impose unclear constitutional standards on Congress when it is acting pursuant to a power that the Constitution expressly grants it in § 2 of the Fifteenth Amendment. As important, in writing for the four-justice bloc supporting nonjusticiability in *Vieth*, Justice Scalia argued that the political process is rife with imponderables that make it difficult to know when a political party is a majority party entitling it to a majority of congressional seats from a given state, and even if it could, how durable partisan affiliations would be from one election to the next or one political office to the next.[230] The complexity that Justice Scalia identifies in the partisan gerrymandering context, which is deployed as a reason for the Court to abstain, is surely present in the decision about what coverage formula is most suitable to achieve Congress's goal of eliminating discrimination in voting. Thus, Congress—having a more-than-15,000-page record[231] before it and greater institutional capacity in the subject area generally—is entitled to deference.

These separation-of-powers concerns, as well as the current reality of gridlock in Congress, lead us to conclude that the most expeditious congressional response to the Court's decision in *Shelby County* is, in essence, to tell the Court,

You misunderstood the coverage formula. It was not meant to be interpreted or operate in isolation from (1) the ability of covered jurisdictions to bail out under Section 4(a) based on current conditions in those jurisdictions; (2) the ability of non-covered jurisdictions to be bailed in if they are found guilty of intentionally discriminating against minority voters; and (3) the nationwide operation of Section 2 to combat discrimination in jurisdictions that are not covered by Section 5 or eligible for bail in under Section 3. We have determined that this regime identifies the areas of the country in which voting discrimination is most persistent and most likely to occur, while at the same time addressing federalism concerns through the availability of bail out, bail in, and the nationwide application of Section 2. Thus, we reaffirm the congressional record on which the 2006 reauthorization was based, and we expressly inform the Court that our decision to employ the existing coverage formula is based and remains based on that record.

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229. *Id.* at 281 ("[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that Bandemer was wrongly decided.").

230. *Id.* at 286–87, 290.

231. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 428 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).

Under this approach, the coverage formula of § 4(b) would be slightly revised to read as follows: "This section [§ 4(b)] shall apply to all jurisdictions currently covered by Section 5 or bailed in pursuant to Section 3 that do not qualify for bailout under Section 4(a)." This proposal has the benefit of simplicity and would obviate having to establish an entirely new, extensive congressional record to support a revised § 5.

B. What is Missing from the Congress's Proposed Answer

Earlier this year, members of Congress announced their proposed legislative response to the problem presented by the holding in *Shelby County*.[232] House Bill 3899, sponsored by House Judiciary Committee Chair James Sensenbrenner, lays out a series of technical adjustments in the VRA that intend, among other things, to reduce or eliminate some of the existing litigation burdens for plaintiffs seeking to address election problems.[233] However, the principal focus of the set of amendments to the law is to revive the preclearance targeting formula – albeit using different criteria.

To show that current political conditions direct Section 4's targets for administrative oversight, Chairman Sensenbrenner has proposed to transform the formula from making a "snap shot" assessment of a jurisdiction's eligibility (based on the conditions as they existed in 1965) to a rolling review of various political conditions in the entire country. Instead of determining preclearance coverage using a moment in time, the envisioned formula reconsiders the necessity for a given jurisdiction's coverage afresh each year. The apparent advantage of this revised approach is that federal review would depend upon standard criteria that are updated with the results of each election cycle. The main variable that drives eligibility in the targeting formula's analysis is the number of preclearance violations that occurred within the jurisdiction during the last fifteen years.[234]

In addition to the compliance element, the proposed formula also establishes a jurisdiction's eligibility based upon its especially low levels of minority turnout in a series of elections.[235] Distinct from the pre-*Shelby County* approach, the proposed targeting formula expands the analysis for eligibility in two distinct ways. First, the election cycle under review extends from just the data from a single year (as the original formula relies on 1964 returns) to national elections in each election cycle.

Aside from the longitudinal extension, the relevant election data would be broadened to consider not just national races but also state and local contests as well. To the extent there is evidence of depressed minority participation at any level of government, the bill captures places where it

232. Dustin Volz & Jack Fitzpatrick, *New Voting Rights Act Rewrite Would Revive Federal Oversight for Only Four States*, Nat'l. J. (Jan. 16, 2014).
233. H.R. 3899, 113th Cong. (2014); *see also* S. 1945, 113th Cong. 1st Sess.
234. H.R. 3899.
235. *Id.* at § 3(b)(4)(B)(i),(ii).

exists based on several lines of comparison. Further, the relevant baseline figure, against which sub-par minority turnout can be established, varies based upon the context. Relevant measures can include the national average for minorities, the statewide rate for white voters, or (in the case of a smaller jurisdiction) the local rates for white voters.

As suggested above, the intent behind this overhauled formula is to accomplish two different goals: one that is legal and the other practical. On the legal dimension, proponents claim that the revamped formula satisfies the Supreme Court's demand for a rational "fit" between the underlying evidence of current problems and the scope of preclearance coverage. To justify its renewed formula, Congress has derived characteristics to distinguish the places where the special remedy operates from the rest of the country. The presumably tighter nexus between the current data and the updated application of the remedy make a stronger case that the provision will survive judicial scrutiny. Insofar as the entire country would be theoretically subject to the provision based on their compliance with certain criteria (now or in the future), the selectivity concerns expressed in *Shelby County* are far less salient.

The practical consideration that speaks in favor of the plan is the necessity of obtaining bipartisan support for the bill. One of the singular strengths of the Voting Rights Act is that it has remained one of the few laws that members of Congress join across the aisle to support. Some commentators count this law among America's so-called "super statutes," whose symbolic significance eclipses the typical enactment.[236] Such laws command the utmost respect because they reflect settled (quasi-constitutional) understandings. They therefore should not change without a tremendous amount of legislative consideration. Each time the Voting Rights Act has been amended, Republicans and Democrats fashioned important compromises to smooth the rougher edges of their differences about the law. To maintain the national support for the VRA, any reorganization would need endorsements from a cross section of the country—including its different racial, partisan, and regional segments.

While the legislative effort to address the conceptual puzzle that *Shelby County* poses is laudable, several thorny issues remain regarding the portion of the administrative remedy that has been left in place. The noteworthy omissions from this new proposal tell at least as important a story about the gaps in the law as the new features that have been proposed. A brief review here helps to illustrate the ways that the proposed fix may create more problems for voting rights enforcement than it resolves. In fact, the provision appears to concede much of what those who have sought to protect preclearance were hoping to preserve.

The first glaring omission from this replacement regime in the bill is the narrowed focus of the kinds of election "changes" that are eligible for preclearance review. Perhaps in an effort to persuade the conservative

236. *See* William Eskridge & John Ferejohn, *SuperStatutes*, 50 DUKE L.J. 1215 (2001).

members of Congress to accept the new proposal, the bill's sponsors have agreed to exempt any new state voter identification laws from the policies that can be reviewed by federal authorities.[237] According to the thinking, these qualification laws are enacted with a variety of purposes in mind, not all of them racial discrimination. And insofar as the Supreme Court has approved of these provisions in principle as a valid method of protecting against voting fraud,[238] imposing a burden on states to justify these statutes is constitutionally questionable and practically untenable in a new formula.

The second matter that defies logic is the rolling review that is embedded in this formula. This approach appears to meet the Court's challenge to use current data to demonstrate the need for coverage, yet the effect of this particular revision goes so far as to undermine a core function of preclearance. Congress ignored the ingenious design in the original enactment – it assures the prolonged compliance of states and, over time, a likely "transformation" of the targeted jurisdictions with respect to racial discrimination.[239] Compliance was regarded as necessary through the life of the law, barring a special bailout provision that allows the state to demonstrate that it had embraced the core principles of preclearance – to avoid practices and policies that leave non-white voters in a worse position compared to the status quo. The underlying incentive for the state was to engage in fair treatment when it drafted new policy, with the expectation that it would continue to do so in the absence of immediate review.

By reverting to a more temporary application, the proposed revision falls short of this long term compliance aspiration in two different ways. First, the proposal would only apply federal review to future changes in state election policy. The prospective orientation effectively grandfathers any of the laws adopted by states during the period between the court's suspension of targeting formula in *Shelby County* and any later Congressional adoption of a new statutory formula. States like Texas and North Carolina that swept through restrictive voting laws without serious concern for the negative consequences on minority groups would be rewarded for their action. With these harmful changes already in place as the basis of comparison, few new proposals could possibly make things worse politically for minorities. In other words, the effective bite of preclearance would be reduced substantially. One might well have designed a formula to direct attention to how states behaved during this period, but that consideration is noticeably absent from the proposal. Undoubtedly, this omission shores up support among some conservative legislators with misgivings about federal oversight. But it leaves serious questions for all of those who view the point of preclearance as preventing such laws from taking effect.

237. *See* H.R. 3899 § 2.
238. *See* Crawford v. Marion County, 433 U.S. 181 (2008).
239. *See* Crayton, *supra* note 175.

A more specific way that this design falls short is that the review regime does not last for a reasonable length of time. Indeed, the application of coverage in this new regime is scattershot. The bill's sponsors have perhaps unknowingly endorsed the "penalty box" analogy that Southern states developed in 1965 to criticize the statute. The rolling review feature in the bill makes preclearance more of a respite from discrimination than a reform of a system. According to most estimates, Mississippi (with six violations in the last fifteen years) would remain part of the preclearance system for only two years – unless it commits a new violation.[240] With such a clear end in sight, preclearance would have little if any transformative effect on local authorities. A jurisdiction that is committed to adopting a discriminatory policy (that would otherwise be denied in preclearance) could simply evade the statute's aims by delaying passage of the law until its brief time in the penalty box expires. There is thus very little incentive in these communities to work toward compromises that engage the concerns of racial minority groups. Without even a follow-up probationary period to assure compliance, nothing would stop state lawmakers from utilizing the advantages of time and inertia that the original provision explicitly sought to curtail.

Finally, and perhaps most striking, are the omissions in the geographic reach of the revised formula. It is noteworthy that the proposal does not initially designate any new targeted state that was not included in the pre-*Shelby County* system. If indeed the Court was concerned that states outside of the South might be similar to states targeted in 1965, this new formula seems to suggest otherwise. But other omissions are even more surprising. While Mississippi, Georgia, and Louisiana remain part of the system, the formula would seem to omit the Heart of Dixie. Alabama, the state whose sustained resistance to black enfranchisement spurred the need for the original Voting Rights Act 1965, somehow eludes coverage under the revamped formula.[241] The same state is home to *Shelby County*, the titular jurisdiction in the challenge that led to the dismantling of Section 5. The ironies of this stunning omission abound. During oral argument in *Shelby County*, the Supreme Court repeatedly was reminded that Alabama would not be eligible for bailout under the original system because of its misconduct in the review process. On the factual record that Congress itself developed in the 2006 reauthorization, there was ample testimony from Alabama showing how the current environment works to undermine or dilute the voting power of African American voters and others.

In essence, the proposed formula actually deepens the very same concerns that the Chief Justice noted in his account of Section 4 in *Shelby*

240. Carroll Rhodes, The Harmful Effects of the Voting Rights Act Amendments of 2014 (H.R. 2899 and S. 1995, 113th Congress) on Minority Voters in Mississippi (Feb. 17, 2014) at 7.

241. *See* National Conference of State Legislatures, H.R. 3899 Voting Rights Amendment Act of 2014: Section by Section Summary www.ncsl.org/documents/elections/Voting-Rights-Act-Amendment-2014.pdf.

County. Alabama is, in many ways, far more analogous as a jurisdiction to Mississippi than Massachusetts is.[242] Yet the logic in the proposed bill is to place these two states in the Deep South (with very similar historical and political trajectories with respect voter enfranchisement) into different categories – one that demands the sustained federal review and the other that has substantially reformed so that such review is no longer necessary. The reasoned distinctions that exist between these two states are difficult if not impossible to identify. One would be hard pressed to argue that the situation for racial minorities in Alabama is materially more improved than for racial minorities in Mississippi. However, the structure and application of the proposed reform of Section 4 require one to make that assertion. Indeed, the claim fails to pass the risibility test. The point of this critique is simply to suggest the following obvious point: In pursuit of the goal of complying with an otherwise nonsensical decision by the Supreme Court in *Shelby County*, the Congress has developed a provision that neither offers an internal logic nor a practically meaningful application. Put plainly, an otherwise neutral formula that serves an important societal purpose has been refashioned by Congress to become less rational and effective, not moreso.

IV. CONCLUSION

This article has demonstrated how the *Shelby County* decision departs wholly from the established method of statutory interpretation that is represented in the Court's handling of a more politically contested and publicly controversial national policy. In ways that are difficult to square with the majority's strained efforts to locate a rationale to uphold the provisions of Obamacare, the same majority of justices could find no basis whatsoever on which to justify a provision of law that has been rightly described as the crown jewel of the civil rights movement. As this paper has pointed out, such interpretive moves were readily available; however, Chief Justice Roberts and his colleagues in the majority were not inclined to consider them in light of the palpable skepticism they have held for the statute.

Although the Court's departure in *Shelby County* from its recent health care case is disappointing, what is roundly disturbing is how starkly different this voting rights case is from those where the Court rather consistently has viewed the VRA in light of Congressional intentions over the last four decades. *Shelby County*'s rather limited, disjointed, and unduly narrow conception of the statutory formula is wholly misplaced in light of the bulk of the precedent that has informed how both the judiciary and Congress itself viewed the statute.

242. *See* Brief of Political Sci. and Law Professors as Amici Curiae in Support of Respondents at 6, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).