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A Doctrine of Sameness, not Federalism: How the Supreme Court's Application of the "Equal Sovereignty" Principle in *Shelby County v. Holder* Undermines Core Constitutional Values

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A Doctrine of Sameness, not Federalism: How the Supreme Court’s Application of the “Equal Sovereignty” Principle in *Shelby County v. Holder* Undermines Core Constitutional Values

SAMUEL SPITAL¹

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I. INTRODUCTION

In *Shelby County v. Holder*, a sharply divided Supreme Court struck “at the heart of the Nation’s signal piece of civil-rights legislation,” the

1. Senior Counsel, Holland & Knight Community Services Team; Lecturer in Law, Columbia Law School. I am deeply indebted to current and former colleagues at the NAACP Legal Defense and Educational Fund, Inc., with whom I worked as co-counsel in both the *Shelby County* and *Northwest Austin* cases—especially Debo Adegbile, Ryan Haygood, Dale Ho, and Kristen Clarke. Christopher Kelly provided helpful comments on an earlier draft. I would also like to thank the editors of the NORTHERN ILLINOIS UNIVERSITY LAW REVIEW, especially Bailey Standish and Emily Fitch. As with all things, I am grateful to Robert and Max Burnett for their inspiration and support. All errors are mine.

Voting Rights Act of 1965.² The Court eviscerated section 5 of the Act, which had been an essential tool in remedying voting discrimination. The majority held that section 4(b), which identified those states and localities where section 5 was needed, violated “the principle that all States enjoy equal sovereignty.”³ In the Court’s view, because of this equal sovereignty principle, laws with a limited geographic scope must satisfy a higher constitutional burden than laws applying nationwide. The Court determined that section 4(b) could not meet that burden, thereby preventing the application of section 5.

The Court’s analysis, I submit, is grounded in its conflation of equality and sameness. Equality means likes should be treated alike, not that unlikes should be treated alike. When a problem is prevalent in one state, but rare in another state, “equal sovereignty” does not require Congress to treat them the same. On the contrary, Congress promotes federalism by limiting a law like section 5 to those states where Congress determines the remedy is most necessary. Such geographic targeting should weigh in favor of a statute’s constitutionality, not against it.

The majority’s approach in *Shelby County* may appear to be a natural extension of the Court’s equal protection jurisprudence. There, too, a majority of Justices have conflated equality and sameness by subjecting race-conscious laws to the same level of rigorous scrutiny regardless of the law’s purpose.

In the context of federalism challenges to civil rights statutes, however, *Shelby County* represents a radical departure from precedent. As a result of that departure, the Court in *Shelby County* failed to give Congress the respect to which it is entitled under the Constitution. Ironically, the Court’s decision also creates an incentive for Congress to engage in greater intrusions on state sovereignty in the future. Most importantly, the Court has left millions of minority citizens without a law which remains necessary to protect the right that is “preservative of all rights,” the right to vote.⁴

Mindful of Shakespeare’s (and Justice Ginsburg’s) admonition that “‘what’s past is prologue,’”⁵ I begin by tracing the evolution of voting discrimination, and the congressional and judicial response to it, from Reconstruction to the Court’s decision in *Shelby County*. In Part III, I discuss *Shelby County*’s application of the “equal sovereignty” doctrine, and its disregard of the Court’s federalism and separation-of-powers precedents. Finally, in Part IV, I address why *Shelby County* is likely to have the unin-

2. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2644 (2013) (Ginsburg, J., dissenting).

3. *Id.* at 2618.

4. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

5. *Shelby Cnty.*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting) (quoting WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1).

tended consequence of causing more intrusion on state sovereignty in the future, particularly because of yet another departure from precedent: the Court invalidated section 4(b) on its face even though it was undisputed that section 4(b) appropriately identified Shelby County as a jurisdiction where section 5 remains needed.

II. FROM RECONSTRUCTION TO *SHELBY COUNTY*

The demise of Reconstruction resulted in a systematic campaign in many states to do precisely what the Fifteenth Amendment prohibits: to “den[y] or abridge[]” the right to vote “on account of race, color, or previous condition of servitude.”⁶ The Fifteenth Amendment gives Congress the “power to enforce this article by appropriate legislation,” but “[t]he first century of congressional enforcement . . . can only be regarded as a failure.”⁷ Enforcement laws passed during Reconstruction were inconsistently applied and largely repealed by the 1890s.⁸ And Congress did nothing to exercise its enforcement power during the first half of the twentieth century.⁹

Beginning in 1957, Congress enacted three measures designed to facilitate case-by-case litigation challenging racially discriminatory restrictions on the right to vote.¹⁰ Those laws, however, did “little to cure the problem of voting discrimination.”¹¹ “Voting suits are unusually onerous to prepare,” and “exceedingly slow.”¹² And, even when a suit resulted in a favorable judgment from a federal court, some jurisdictions enacted new “discriminatory devices not covered by the federal decrees.”¹³

The case-by-case method therefore did little to remedy the problem of voting discrimination in the states where it was most prevalent. “[I]n Alabama, [registration of voting-age blacks] rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana . . . [the figure went] from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964.”¹⁴

6. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 197 (2009) (citing U.S. CONST. amend. XV, § 1.).

7. *Id.*

8. *See id.*; *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966).

9. *See Katzenbach*, 383 U.S. at 310.

10. *See id.* at 313.

11. *Id.* at 313.

12. *Id.* at 314.

13. *Id.*

14. *Katzenbach*, 383 U.S. at 313. *See also id.* at 329 (recognizing that the evidence of racial discrimination in voting was the strongest in these three states). A study before Congress in 2006 identified these same three states as continuing to have the strongest evi-

It was against this backdrop that, in February 1965, an Alabama state trooper murdered Jimmie Lee Jackson near Selma, Alabama.¹⁵ Jackson was a twenty-seven-year-old black man trying to protect his mother from troopers using clubs to attack participants in a registration vigil.¹⁶ In the wake of Jackson's murder, black citizens decided to walk from Selma to Montgomery and petition Governor George Wallace for the right to vote.¹⁷ On March 7, 1965, when the marchers reached the Edmund Pettus Bridge, state troopers and volunteers, deputized by the county sheriff, brutally attacked them, using tear gas, clubs, bullwhips, and electric cattle prods.¹⁸ Video clips of the event were shown on national television, interrupting ABC's showing of *Judgment at Nuremberg*.¹⁹

One week later, President Johnson addressed a special session of Congress. He began:

I speak tonight for the dignity of man and the destiny of Democracy At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.²⁰

President Johnson stressed that the "most basic right of all . . . [is] the right to choose your own leaders" and that "[e]very American citizen must have an equal right to vote."²¹ "Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes. Every device of which human ingenuity is capable, has been used to deny this right."²² Emphasizing that existing laws were inadequate to "overcome systematic and ingenious discrimination," President Johnson urged the passage of a new Voting Rights Act that would "eliminate illegal barriers to the right to vote."²³

dence of voting discrimination. *See* *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 896 (D.C. Cir. 2012) (Williams, J., dissenting) (Image 7).

15. *See* DAVID J. GARROW, *PROTESTS AT SELMA* 61-62 (Yale Univ. Press 1978).

16. *See id.*; LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 176 (Simon & Schuster 1998).

17. *See id.*

18. *See* GARROW, *supra* note 15, at 74-76; GUINIER, *supra* note 16, at 176.

19. *See* GUINIER, *supra* note 16, at 176.

20. President Lyndon B. Johnson, Address to Congress on the Voting Right Act: We Shall Overcome (Mar. 15, 1965), available at www.historyplace.com/speeches/johnson.htm.

21. *Id.*

22. *Id.*

23. *Id.*

A. THE VOTING RIGHTS ACT OF 1965

Congress responded by enacting the Voting Rights Act of 1965 (VRA or Act). “The heart of the Act,” as the Supreme Court later described it, was a “set of stringent remedies aimed at areas where voting discrimination has been most flagrant.”²⁴ These remedies included the suspension of literacy tests and similar voting qualifications, a provision authorizing the attorney general to appoint federal examiners to enroll qualified voters, and section 5.²⁵ section 5 required covered jurisdictions to obtain preclearance of voting changes from either the Department of Justice or a three-judge panel of the United States District Court for the District of Columbia.²⁶ Preclearance would be granted unless the voting change either: (a) purposefully discriminated against minority voters, or (b) was retrogressive, meaning the new law worsened the position of minority voters.²⁷

The genius of section 5 was that it “shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims.”²⁸ As Attorney General Katzenbach later explained,

[w]hen we drafted . . . [the Voting Rights Act], we recognized that increased black voting strength might encourage a shift in the tactics of discrimination. Once significant numbers of blacks could vote, communities could still throw up obstacles to . . . make it difficult for a black to win elective office.²⁹

For example, a racially polarized city with a white majority could switch from district-based elections for city council to at-large elections, thereby preventing black residents from electing any candidates of choice. A city on the verge of becoming majority black could engage in racially selective annexations designed to increase the white percentage of the population. And a city with a white minority could attempt to perpetuate white control by racially gerrymandering their districts, i.e., concentrating

24. *South Carolina v. Katzenbach*, 383 U.S.301, 315 (1966).

25. *See id.* Congress subsequently prohibited literacy tests nationwide. *See Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

26. *See* 42 U.S.C. § 1973c(a) (2006).

27. *See* 42 U.S.C. § 1973c(c) (2006); *Beer v. United States*, 425 U.S. 130, 141 (1976).

28. *Katzenbach*, 383 U.S. at 318.

29. *Voting Rights Act: Section 5 of the Act-History, Scope & Purpose: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 123-24 (2005). *See* Dale Ho, *Election Law: Beyond the Red, Purple, and Blue*, 47 U. RICH. L. REV. 1041, 1057-58 (2013).

most black voters in a few overwhelmingly-black districts (known as packing) while spreading out other black voters in the remaining districts, which would be majority white (known as cracking).

The foregoing are examples of vote dilution: intentional efforts “to cancel out or minimize the voting strength of” black voters.³⁰ “Whatever the device employed, . . . th[e Supreme] Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.”³¹ section 5 empowered the Department of Justice or a three-judge court to prevent covered jurisdictions from engaging in such discrimination.

Section 4(b) of the Act identified those parts of the country where section 5 would apply. It did so based on two criteria: (a) the use of a test or device as a prerequisite to voting (e.g., literacy tests, good moral character requirements), and (b) low voter registration or turnout in the 1964 presidential election.³² Based on these criteria, the principal covered jurisdictions in 1965 were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and thirty-nine counties in North Carolina.³³ The Act also permitted jurisdictions to “bailout,” i.e., remove themselves from coverage, under limited circumstances: the jurisdiction had to prove it had not used any test or device within the previous five years “for the purpose or with the effect of denying or abridging the right to vote on account of race or color.”³⁴ By contrast, a jurisdiction not covered by section 4(b) could be “bailed-in” to coverage by a federal court if the court found as part of a voting suit that the jurisdiction violated the Fourteenth or Fifteenth Amendment.³⁵

South Carolina challenged the constitutionality of the Voting Rights Act on federalism grounds. In *South Carolina v. Katzenbach*, Chief Justice Warren, writing for eight Justices, rejected that challenge and forcefully affirmed Congress’s power to enact the VRA. The Court specifically considered and rejected the argument that section 4(b) violated the equal sovereignty doctrine, explaining:

30. *White v. Regester*, 412 U.S. 755, 765 (1973).

31. *See Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting). *See also* *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (noting that vote dilution can “nullify [black voters’] ability to elect the candidate of their choice just as would prohibiting some of them from voting”).

32. *See Shelby Cnty.*, 133 S. Ct. at 2619 (citing The Voting Rights Act of 1965, 79 Stat. 438 (codified as amended 42 U.S.C. § 1973b)).

33. *See id.* at 2620.

34. *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 855 (D.C. Cir. 2012) (quoting § 4(a) of the 1965 Act). The effect of this version of the bailout standard was that a jurisdiction could not bailout if it used discriminatory tests or devices at the time it was covered, even if it had eliminated voting discrimination since then. *See infra* note 46.

35. *See id.* (citing 42 U.S.C. § 1973a(c) (2006)).

Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future. In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.³⁶

As for the design of the coverage formula, the Court emphasized that this issue was primarily for Congress to decide, subject only to rational basis review.³⁷ South Carolina's argument that the formula was "awkwardly designed" was therefore "largely beside the point."³⁸ Because the formula was rational, it was constitutional.³⁹

B. THE 1970, 1975, AND 1982 REAUTHORIZATIONS

The VRA led to dramatic gains in black enfranchisement.⁴⁰ In the face of those gains, however, many covered jurisdictions resorted to ingenious efforts designed to abridge or cancel out the black vote, just as Attorney General Katzenbach had anticipated in 1965. In 1970, Congress learned that "as Negro voter registration has increased under the Voting Rights Act, several jurisdictions have undertaken new, unlawful ways to diminish the Negroes' franchise and to defeat Negro and Negro-supported candidates."⁴¹ Congress therefore decided to reauthorize section 5—which initially had a five-year sunset provision—for five more years.⁴² The record before Congress was much the same in 1975, when Congress reauthorized section 5 for seven years, and in 1982, when Congress reauthorized section 5 for twenty-five years.⁴³

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

37. *Id.* at 330-31.

38. *Id.* at 329.

39. *See id.* at 330.

40. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 180 (1980).

41. H.R. REP. NO. 91-397 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3283.

42. *See Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

43. *See City of Rome*, 446 U.S. at 181 (citing House and Senate Reports from 1975 reauthorization); S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 187 (finding that "covered jurisdictions have substantially moved from direct, over [sic] impediments

During these reauthorizations, the section 4(b) coverage formula remained essentially the same, except for an expansion of the definition of “test or device” in 1975, and the addition of the 1968 and 1972 presidential elections to the low registration/turnout prong of the test.⁴⁴ These amendments resulted in coverage of the states of Alaska, Arizona, and Texas, and of counties in several additional states.⁴⁵ In the 1982 reauthorization, Congress amended bailout to allow any state or political subdivision with a clean voting rights record over the last ten years to remove itself from coverage.⁴⁶

The Supreme Court sustained each reauthorization against federalism challenges.⁴⁷ As the Court stated in a 1999 decision: “[T]he Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however.”⁴⁸

C. THE 2006 REAUTHORIZATION

In 2005, Congress began the process of determining whether section 5 remained necessary to remedy and deter voting discrimination in the covered jurisdictions. Congress “approached its task seriously and with great care.”⁴⁹ From October 2005 through July 2006, the House and Senate Judiciary Committees held a combined twenty-one hearings, received testimony from ninety witnesses, and compiled a record of over 15,000 pages.⁵⁰ Rep-

to the right to vote to more sophisticated devices that dilute minority voting strength”). *See also Shelby Cnty.*, 133 S. Ct. at 2620.

44. *See* *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 200 (2009). In 1975, “test or device” was amended to include the provision of English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. *See Shelby Cnty.*, 133 S. Ct. at 2620 (citing *The Voting Rights Act*, 89 Stat. 401-02 (codified as amended 42 U.S.C. § 1973b(f))).

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

46. *See Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 856 (D.C. Cir. 2012); 42 U.S.C. § 1973b(a) (2006). This represented a substantial liberalization of the bailout provision. Prior to 1982, a state that had used a discriminatory test or device at the time it was covered could not bailout, even if it had eliminated its discriminatory practices. *See Shelby Cnty.*, 679 F.3d at 856.

47. *Shelby Cnty.*, 679 F.3d at 856 (citing *Georgia v. United States*, 411 U.S. 526 (1973)); *City of Rome*, 446 U.S. at 156; *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999)).

48. *Lopez*, 525 U.S. at 284-85. In 2006, the Court went even further, with all eight Justices who reached the issue agreeing that compliance with section 5 was a compelling state interest which could justify race-conscious districting under strict scrutiny review. *See League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 475 n.12, 485 n. 2, 518-19 (2006) (Stevens, J., concurring in part and dissenting in part) (Souter, J., concurring in part and dissenting in part) (Scalia, J., concurring in part and dissenting in part).

49. *Shelby Cnty.*, 679 F.3d at 858 (citations omitted) (internal quotation marks omitted).

50. *See Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 435 (D.D.C. 2011).

representative James Sensenbrenner (R-WI), then-Chair of the House Judiciary Committee, described the process as “one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years that I have been honored to serve as a Member of this body.”⁵¹

The “virtually unprecedented legislative record” revealed that, notwithstanding progress, there was “extensive evidence of recent voting discrimination” in the covered jurisdictions.⁵² Between 1982 and 2006 (hereinafter “the reauthorization period”), over 640 discriminatory voting changes were blocked by either the Department of Justice or a federal district court under section 5—more than the number of discriminatory changes blocked between 1965 and 1982.⁵³ Representative examples of discrimination blocked by section 5 since the 1982 reauthorization included the following:

- States sought to implement numerous statewide redistricting plans that employed racial gerrymandering to discriminate against minority voters. In one such example, the Mississippi redistricting process after the 1990 census was “characterized by overt racial appeals,” with legislators referring to an alternate districting plan as the “nig---plan.”⁵⁴
- After successful litigation challenging at-large elections for the board of education in Spartanburg County, South Carolina, the first black candidates in the county’s history were elected to the board. The South Carolina legislature then attempted to disband the board and devolve its powers to an appointed panel.⁵⁵

51. 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

52. *Shelby Cnty.*, 811 F. Supp. 2d at 428.

53. *Shelby Cnty.*, 679 F.3d at 866, 870-71. Approximately two-thirds of those changes involved purposeful discrimination. *See id.* at 867 (noting that 423 objections interposed by the Department of Justice between 1980 and 2004 were based, in whole or in part, on discriminatory purpose).

54. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose, Hearing Before the Subcomm. on the Constitution*, 109th Cong. 1412 (2005); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 253 (D.D.C. 2008) (holding by a three-judge court).

55. *Section 5 History, Scope and Purpose*, *supra* note 54, at 2042.

- When the 2000 census showed that Kilmichael, Mississippi, had become majority black, the white mayor and all-white Board of Aldermen sought to cancel city elections.⁵⁶
- Shortly after a water district in Lubbock County, Texas was forced to abandon at-large elections, the district enacted polling place changes requiring residents of predominately-black neighborhoods to travel to remote venues to vote.⁵⁷
- Augusta, Georgia followed an “annexation policy center[ed] on a racial quota system requiring that each time a black residential area [was] annexed into the city, a corresponding number of white residents [had to] be annexed in order to avoid increasing the city’s black population percentage.”⁵⁸
- Dallas County, Alabama—whose county seat is Selma—attempted to implement a discriminatory voter purge, which would have allowed citizens to be disfranchised “simply because they failed to pick up or return a voter update form, when there was no valid requirement they do so.”⁵⁹ Then, after the census showed black population gains, the county and city of Selma submitted a total of five racially gerrymandered plans for preclearance; each was designed to prevent blacks, who represented a majority of voters, from electing a majority of candidates to the county school board or city council.⁶⁰

Nor were preclearance denials the only evidence of persistent voting discrimination in the covered jurisdictions. During the reauthorization period, there were over 100 successful enforcement actions, viz., cases where a

56. *Id.* at 1616-19 (2005). See also *Mukasey*, 573 F. Supp. 2d at 252-53.

57. *Section 5 History, Scope and Purpose*, *supra* note 54, at 2300-03. See also *Mukasey*, 573 F. Supp. 2d at 251.

58. *Section 5 History, Scope and Purpose*, *supra* note 54, at 642.

59. *Section 5 History, Scope and Purpose*, *supra* note 54, at 356. See also *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2341 (2013) (Ginsburg, J., dissenting).

60. *Reviewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry*, *Hearing before the Subcomm. on the Constitution*, 109th Cong. 378-79 (2006); *Section 5 History, Scope and Purpose*, *supra* note 54, at 397-405.

covered jurisdiction had violated section 5 by failing even to submit a voting change for preclearance and had to be ordered to do so by a court.⁶¹ Jurisdictions also withdrew over 200 voting changes from preclearance consideration in response to letters from the Department of Justice requesting more information about the proposed change.⁶² And, in addition to all this section 5 activity, plaintiffs in covered jurisdictions brought over 650 successful lawsuits under section 2, the Act's principal mechanism for remedying voting discrimination through case-by-case litigation.⁶³

In light of this evidence, Congress determined—by a vote of 390 to 33 in the House and 98 to 0 in the Senate—that section 5 remained necessary in the covered jurisdictions.⁶⁴ Congress reauthorized section 5 for twenty-five years, while committing itself to reconsider the provision in fifteen years.⁶⁵ President Bush signed the reauthorization into law.

D. *NORTHWEST AUSTIN V. HOLDER*

Just days after the 2006 reauthorization became effective, it was challenged by a small utility district in Texas.⁶⁶ The district argued that it was entitled to bailout; in the alternative, the district contended that the reauthorization was unconstitutional.⁶⁷ Because it was a bailout suit, a three-judge panel of the District Court for the District of Columbia was convened.⁶⁸

That court rejected both of the district's arguments. The district was ineligible to seek bailout because, under the Act, only states or "political subdivisions" were eligible to seek bailout, and the VRA defines "political subdivisions" as counties, parishes, or political subunits that registered voters, which the utility district did not.⁶⁹ The VRA remained constitutional because, in light of the evidence before it, Congress reasonably concluded that "extending section 5 was necessary to protect minorities from continued racial discrimination in voting."⁷⁰

The Supreme Court noted probable jurisdiction and reversed. The Court stated that the section 5 preclearance requirement and the section 4(b)

61. *Nw. Austin*, 573 F. Supp. 2d at 256-57.

62. *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 476 (D.D.C. 2011).

63. *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 868 (D.C. Cir. 2011).

64. *See* An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 109-246, 120 Stat. 578 §§ 2(b)(2), (4)-(5), (7)-(9) (2006).

65. *See id.* § 4; 42 U.S.C. §§ 1973b(a)(7), (8) (2008).

66. *Nw. Austin*, 573 F. Supp. 2d at 229.

67. *Id.* at 230.

68. *Id.*

69. *Id.* at 232.

70. *Id.* at 283.

coverage formula “raise serious constitutional questions.”⁷¹ The Court emphasized the dramatic improvements in minority registration, turnout, and office holding that had occurred in the covered jurisdictions since 1965. Although “[t]hese improvements are no doubt due in significant part to the Voting Rights Act itself,” past success “is not adequate justification to retain the preclearance requirements,” which impose “substantial federalism costs.”⁷² On the other hand, “[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act.”⁷³ The Court also recognized that “Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the District Court determined ‘documented contemporary racial discrimination in covered states.’”⁷⁴

With respect to the coverage formula, “[t]he Act also differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’”⁷⁵ The Court recognized, however, that “[d]istinctions can be justified”⁷⁶ so long as “a statute’s disparate geographic coverage” is “sufficiently related to the problem that it targets.”⁷⁷

The Supreme Court did not reach these constitutional questions. In a clear compromise, eight Justices concluded that the VRA’s definition of “political subdivision” did not apply to bailout suits, meaning the district was eligible to seek bailout.⁷⁸ The stage was set for the next suit.

E. *SHELBY COUNTY V. HOLDER*

That suit was brought by Shelby County, Alabama, which asked the District Court for the District of Columbia to hold sections 4(b) and 5 of the Voting Rights Act facially unconstitutional. Ironically, Shelby County turned out to be the right plaintiff because recent voting discrimination in the county had earned a section 5 objection in 2008. That objection meant the county would not be eligible for bailout. For this reason, the district court could not avoid the constitutional issues raised by the Supreme Court in *Northwest Austin*.⁷⁹

The district court analyzed those issues based on a careful review of the record, and it upheld the Act. The persistent discrimination in the cov-

71. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009).

72. *Id.* at 202 (citation omitted) (internal quotation marks omitted).

73. *Id.* at 203.

74. *Id.* at 205 (citation omitted).

75. *Id.* at 203 (citations omitted).

76. *Nw. Austin*, 557 U.S. at 203.

77. *Id.*

78. *See id.* at 206-11.

79. *See Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 857 (D.C. Cir. 2012).

ered jurisdictions was “plainly adequate to justify section 5’s strong remedial and preventative measures.”⁸⁰ Congress’s reauthorization of the covered formula was justified by “evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement.”⁸¹ A divided panel of the D.C. Circuit affirmed.⁸²

The Supreme Court granted certiorari and reversed, holding section 4(b)’s geographic coverage formula unconstitutional. The effect of the Court’s ruling is that covered jurisdictions no longer need comply with section 5.⁸³

III. EQUALITY AS SAMENESS, FEDERALISM, AND THE SEPARATION OF POWERS

The Court’s ruling in *Shelby County* is based on the “equal sovereignty” doctrine, viz., the principle that the federal government generally must treat the states equally. The basis for the doctrine is unclear. The Fourteenth Amendment mandates equal treatment for citizens, but nothing in the Constitution speaks to equal treatment of states.⁸⁴ As Justice Ginsburg explained, prior to 2006 VRA reauthorization, the Court had held that the equal sovereignty principle only applied with respect to the admission of new states.⁸⁵ The Court had never before suggested that Congress needs special justification for laws that treat existing states differently. Justice Ginsburg pointed out that there are many such laws, whose constitutionality is now unclear.⁸⁶

The purpose of this Article, however, is not to quarrel with the Court’s holding that the equal sovereignty doctrine applies to existing states. Instead, I contend that the Court’s application of that doctrine in *Shelby County* contradicted several lines of settled precedent, upset the proper sep-

80. *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 492 (D.D.C. 2011) (internal quotation marks omitted).

81. *Id.* at 507.

82. *See Holder*, 679 F.3d at 848.

83. The exception is for a jurisdiction covered pursuant to bail-in, as bail-in is contained in a separate statutory provision, section 3(c), which was not invalidated by *Shelby County*.

84. Justice Stevens has argued that the “unwritten rule requiring Congress to treat all the states as equal sovereigns” ignores the fact that the Constitution “created a basic inequality between the slave states and the free states.” John Paul Stevens, *The Court & the Right to Vote: A Dissent*, THE N.Y. REV. OF BOOKS (2013) (book review). Article I, Section 2 of the Constitution increased the power of Southern states in Congress and the Electoral College through the notorious Three-Fifths Clause, which counted three fifths of a state’s slaves for apportionment purposes even though slaves were denied the right to vote. *See id.*

85. *See Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2649 (2013).

86. *See id.*

aration of powers between the Court and Congress, and is likely to undermine the federalism values that the Court is seeking to protect.

A. THE COURT'S DEPARTURE FROM *NORTHWEST AUSTIN*

In *Northwest Austin*, the Court explained that, even under the equal sovereignty doctrine, a law's "disparate geographic coverage" is justified so long as it "is sufficiently related to the problem that it targets."⁸⁷ In *Shelby County*, the Court acknowledged this as the controlling standard no fewer than three times.⁸⁸

The Court did not actually analyze that question, however. Had it done so, it would have been forced to engage with the record evidence, which leaves no doubt that the coverage formula is sufficiently related to the problem of voting discrimination.

A study of electronically available cases showed that there were nearly four times as many successful section 2 suits on a per capita basis in the covered jurisdictions compared with the non-covered jurisdictions during the reauthorization period.⁸⁹ Another study revealed that, when cases not electronically available were taken into account (including court-approved settlements), the true ratio was even higher: controlling for population, there were twelve times as many successful section 2 suits in the covered jurisdictions.⁹⁰

These figures were remarkable because section 5 blocked a substantial portion of discrimination in covered jurisdictions without the need for sec-

87. *Nw. Austin Mun. Util. Dist. No. 1 v. Holderv. Holder*, 557 U.S. 193, 203 (2009).

88. *See Shelby Cnty.*, 133 S. Ct. at 2622, 2627, 2630.

89. *See Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 874 (D.C. Cir. 2012).

90. *See id.* at 875-76. That study showed eighty-one percent of the successful suits were filed in covered jurisdictions, even though the covered jurisdictions contain less than a quarter of the nation's population. *See id.* The evidence before Congress also documented that extreme racially polarized voting, and racial appeals by candidates (e.g., a candidate emphasizing his opponent's race by disseminating literature with a darkened picture of his opponent on it) were more prevalent in covered jurisdictions. *See To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcomm. on the Constitution*, 109th Cong. 1003 (2005); *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provision of the Act: Hearing before the Subcomm. on the Constitution*, 109th Cong. 85 (2005) (statement of Mr. Derfner); *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 22 (2006) (statement of Robert B. McDuff, Att'y of Jackson, Miss.); *The Continuing Need for Section 5 Preclearance, Hearing before the Subcomm. on the Judiciary*, 109th Cong. 48 (2006); *Understanding the Benefits and Costs of Section 5 Preclearance-Clearance: Hearing before the Subcomm. on the Judiciary*, 109th Cong. 48 (2006) (response of Anita Earls, Dir. of Advocacy, Ctr. for Civil Rights, Univ. of N.C. School of Law); *Understanding the Benefits and Costs of Section 5 Pre-Clearance, Hearing before the Subcomm. on the Judiciary*, 109th Cong. 17 (2006).

tion 2 litigation, whereas the section 5 remedy was not in place in the non-covered jurisdictions. In other words, if the problem targeted by section 5 (voting discrimination) was similar in the covered and the non-covered jurisdictions, there should have been substantially fewer section 2 suits in the covered jurisdictions. In fact, there were twelve times more suits in those jurisdictions.

Had the majority in *Shelby County* applied the standard announced in *Northwest Austin*, it would have had to engage with this evidence and then reach the same conclusion as the D.C. Circuit, which found “no principled basis for setting aside the district court’s conclusion that section 5 is ‘sufficiently related to the problem that it targets.’”⁹¹

B. THE COURT’S DEPARTURE FROM SEPARATION-OF-POWERS LAW

The Court, however, did “not even deign to grapple with the legislative record” in striking at the heart of the nation’s most important civil rights statute.⁹² That was because the Court invalidated section 4(b) based on a perceived design flaw in the provision. In the Court’s view, section 4(b) identified jurisdictions for coverage based on data that were too old—i.e., the use of tests or devices and turnout and registration in the 1960s and early 1970s. The Court therefore determined that it was irrelevant what the record showed about the prevalence and concentration of ongoing voting discrimination in the covered jurisdictions: “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.”⁹³

The superficial simplicity of the majority’s opinion obscures its significant, and unjustified, aggrandizement of the Court’s power at Congress’s expense. Prior to *Shelby County*, the Court had repeatedly acknowledged Congress’s principal role in determining which measures are appropriate to enforce the constitutional rights protected by the reconstruction amendments.⁹⁴ This is required by the text of those amendments. As the Court stated in *Northwest Austin*, “[t]he Fifteenth Amendment empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is needed to enforce it.”⁹⁵ This also makes good sense in light of Congress’s superior institutional competence to investigate complex problems like voting discrimination and design appropriate remedies. As the Court has recognized, “Congress has the capacity to investigate and analyze facts beyond

91. *Shelby Cnty.*, 679 F.3d at 883 (quoting *Nw. Austin*, 557 U.S. at 203).

92. *Shelby Cnty.*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting).

93. *Id.* at 2629.

94. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997); *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966).

95. *Nw. Austin*, 557 U.S. at 205.

anything the Judiciary could match,”⁹⁶ and it “is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.”⁹⁷

Consistent with the text of the Fifteenth Amendment and Congress’s superior institutional competence, prior to *Shelby County*, the Supreme Court had applied the rational basis standard of review when considering the constitutionality of the VRA.⁹⁸ Under that deferential standard, the Court will not second guess rational legislative judgments. This means the legislature has great latitude in establishing distinctions—such as those created by the section 4(b) coverage formula—that advance its policy goals, even if those distinctions are over inclusive and under inclusive. Stated differently, the fact that the legislature could have “implemented [a] policy judgment with greater precision,” is “hardly enough to make the rules fail rational-basis review, for ‘rational distinctions may be made with substantially less than mathematical exactitude.’”⁹⁹

The majority in *Shelby County* stressed that Congress must consider “current conditions” in reauthorizing civil rights legislation.¹⁰⁰ In light of this requirement, it may have been irrational for Congress to reauthorize the section 4(b) coverage formula without considering recent evidence of voting discrimination. But that is not what Congress did in 2006. As discussed, Congress learned that voting discrimination remained prevalent and concentrated in the jurisdictions which had the most troublesome histories of voting discrimination and which had been subject to section 4(b) coverage in the first place.

It was therefore rational for Congress to reauthorize the existing formula. As the D.C. Circuit explained: “[A]lthough observing that Congress’s reauthorization ‘ensured that Section 4(b) would continue to focus on those jurisdictions with the worst *historical* records of voting discrimination,’ the district court found this continued focus justified by *current* evidence that

96. *General Motors Corp. v. Tracy*, 519 U.S. 278, 309 (1997).

97. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)) (internal quotation marks omitted).

98. *See Katzenbach*, 383 U.S. at 324 (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”); *City of Rome*, 446 U.S. at 177-78.

99. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 653 (1992) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

100. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2629 (2013). Unlike section 5, most laws do not have sunset provisions, meaning they remain in force without any reconsideration of the law in light of “current conditions.” *Id. Cf. id.* at 2637 (Ginsburg, J., dissenting) (noting that “the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act”).

discrimination remained concentrated in those jurisdictions.”¹⁰¹ The court of appeals concluded: “[A]lthough the section 4(b) formula relies on old data, the legislative record shows that it, together with the statute’s provisions for bail-in and bailout . . . continues to single out the jurisdictions in which discrimination is concentrated.”¹⁰²

Of course, Congress could have changed the coverage formula in the 2006 reauthorization, and perhaps it should have. Justice Stevens, who is retired, wrote his own “dissent” to the majority opinion in *Shelby County*. In his view, the majority persuasively explained “why a neutral decision-maker could reasonably conclude” that reauthorizing the Section 4(b) coverage formula was “not justified by the conditions that prevail today.”¹⁰³ But that was a decision for Congress, not the Supreme Court:

The opinion fails, however, to explain why such a decision should be made by the members of the Supreme Court Not only is Congress better able to evaluate the issue than the Court, but it is also the branch of government designated by the Fifteenth Amendment to make decisions of this kind.¹⁰⁴

The constitutional question should have been whether it was *rational* for Congress to reauthorize Section 4(b) based on evidence that the provision continued to identify jurisdictions where voting discrimination was concentrated. To ask that question is to answer it.

The Court did not identify the standard of review it applied to invalidate Section 4(b),¹⁰⁵ but its reasoning reflects a type of review that is far more stringent than rational basis. It is instead consistent with what Justice Kennedy envisioned at oral argument in *Northwest Austin*, when he stated to the deputy solicitor general: “[T]he government of the United States is

101. *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 857 (D.C. Cir. 2012) (internal citation omitted).

102. *Id.* at 883.

103. Stevens, *supra* note 84.

104. *Id.*

105. *See Shelby Cnty.*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting) (noting the majority’s failure to identify the standard of review). The majority did characterize Congress’s decision to reauthorize the coverage formula as “irrational,” but it made no effort to explain why it was irrational—within the meaning of rational basis review—for Congress to reauthorize a distinction between states that continued to identify the jurisdictions where voting discrimination was concentrated. *Id.* at 2629-30 (majority opinion).

saying that our States must be treated differently. And you have a very substantial burden if you're going to make that case."¹⁰⁶

By imposing a substantial burden on Congress to justify geographically targeted civil rights laws, the Court shifted the balance of power away from Congress and to the Court. In so doing, the Court failed to acknowledge Congress's superior institutional competence and flouted the text of the Constitution, which gives Congress, not the Court, the authority to enforce the reconstruction amendments.

C. THE COURT'S DEPARTURE FROM FEDERALISM LAW

To borrow a phrase from Justice O'Connor, for the *Shelby County* majority, this was "a case about federalism,"¹⁰⁷ with the Court vindicating covered states' rights to be free from what the majority viewed as undue federal interference with their elections. Yet, the majority's application of the "equal sovereignty" doctrine represents a substantial departure from the Court's federalism precedents. It is a departure that should give advocates of state sovereignty pause.

The *Shelby County* majority acknowledged that the history of voting discrimination is not uniform in this country. The jurisdictions covered by the Voting Rights Act of 1965 had a history of "state and local governments work[ing] tirelessly to disenfranchise citizens on the basis of race."¹⁰⁸ Yet, as discussed, the Court also concluded that the VRA's disparate geographic coverage no longer satisfied a rigorous (if undefined) level of scrutiny under the "equal sovereignty" doctrine.¹⁰⁹

The Court's approach reflects an unduly narrow understanding of the "equal" part of "equal sovereignty." In the Court's view, "equal sovereignty" establishes a strong presumption that states must be treated the same. If Congress wishes to depart from this principle of sameness, it bears a heavy burden. This type of analysis mirrors the equal protection jurisprudence of the Rehnquist and Roberts Courts. There, too, the Court has held that the "equality" part of "equal protection" generally means legislatures may not make distinctions based on race, notwithstanding the long history of racial discrimination by federal and state officials against people of color. And, similarly, if a legislature wants to depart from this principle of sameness through race-conscious policies designed to promote diversity or overcome

106. Transcript of Oral Argument at 34-35, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322).

107. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). See *Shelby Cnty.*, 133 S. Ct. at 2643-44.

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

109. *Id.*

a legacy of discrimination, the legislature must overcome a heavy burden.¹¹⁰

Prior to *Shelby County*, however, the Court had not applied an equality-as-sameness analysis in the federalism context. By so doing, the *Shelby County* majority has unmoored federalism from its foundations.

The basis of the Court's federalism precedents is that the federal government must respect the sovereignty and dignity of each state. "[E]ach State is a sovereign entity in our federal system,"¹¹¹ and the states "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general [i.e., federal] authority than the general authority is subject to them, within its own sphere."¹¹²

The Court has also recognized, however, that the reconstruction "[a]mendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."¹¹³ Therefore, state sovereignty must yield when Congress exercises its power to enforce the reconstruction amendments "by appropriate legislation."¹¹⁴

Shelby County is the most recent in a line of cases since *City of Boerne v. Flores*,¹¹⁵ in which challengers have contended that civil rights laws impermissibly intruded on state sovereignty because they were not "appropriate legislation" to enforce the reconstruction amendments.¹¹⁶ Those cases have sharply divided the Court, but prior to the 2006 VRA Reauthorization, the Justices who were the strongest proponents of federalism had stressed that Congress should endeavor to respect states' unique histories, not treat

110. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). See also *id.* at 741-43. The Court's ahistorical equality-as-sameness approach to equal protection has been sharply criticized. In his *Parents Involved* dissent, Justice Stevens argued that the plurality had "rewrit[ten] the history of [*Brown v. Board of Education*], one of this Court's most important decisions[,] in a manner that reminded him 'of Anatole France's observation: '[T]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.'" *Id.* at 799 (alterations in the original). See generally Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 2003 (2000) ("Discrimination carries two distinct connotations: to disadvantage, and to distinguish between. As the twentieth century ends, the Supreme Court has increasingly conflated these meanings, moving toward the view that for the state to explicitly take account of race at all is the . . . central prohibition embedded in the equal protection clause.").

111. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

112. *Alden v. Maine*, 527 U.S. 706, 714 (1999).

113. *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

114. *Id.*

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

116. A number of those laws were generally valid under Congress's Commerce Clause authority, but raised issues about the abrogation of state sovereign immunity, which is permitted when Congress acts pursuant to the reconstruction amendments but not when it acts pursuant to the Commerce Clause. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001).

them the same. In pro-federalism decisions involving other statutes, the Court repeatedly praised Section 5 for being limited to certain parts of the country. In *City of Boerne*, the majority explained that such geographic restrictions “tend to ensure Congress’[s] means are proportionate to ends legitimate,” and the Court noted that the Religious Freedom Restoration Act (RFRA), which it invalidated, lacked any such geographic limitation.¹¹⁷ In subsequent cases, the Court held that provisions of the Americans with Disabilities Act (ADA) and the Violence Against Women Act, which applied nationwide, exceeded Congress’s enforcement power under the Fourteenth Amendment; in both cases, the majority again favorably contrasted the VRA’s geographic limitations.¹¹⁸

In *Nevada Department of Human Resources v. Hibbs*,¹¹⁹ by contrast, a different majority of the Court upheld the Family Medical Leave Act (FMLA), which also applied nationwide, as appropriate legislation to enforce the Equal Protection Clause’s prohibition on sex-based discrimination. The Court did so even though there was not evidence of unconstitutional discrimination related to family leave in all fifty states.¹²⁰ Dissenting, Justice Scalia argued that prophylactic civil rights legislation could only be justified in those states where there had been a prior violation of the relevant constitutional provision: “There is no guilt by association, enabling the sovereignty of one State to be abridged under . . . [the Enforcement Clause of] the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.”¹²¹ Justice Scalia continued: “Congress has sometimes displayed awareness of this self-evident limitation. That is presumably why the most sweeping provisions of the Voting Rights Act of 1965—which we upheld in *City of Rome* . . .—were restricted to States ‘with a demonstrable history of intentional racial discrimination in voting.’”¹²²

The majority in *Shelby County* turned these precedents on their head, holding that the geographic limitation on Section 5 weighs against, rather than in favor, of the statute’s constitutionality. Justice Ginsburg made this point in her masterful dissent, and she explained that the majority’s departure from precedent was particularly problematic because Congress had relied on that precedent in reauthorizing the VRA:

117. *City of Boerne*, 521 U.S. at 533.

118. *See Garrett*, 531 U.S. at 373; *United States v. Morrison*, 529 U.S. 598, 626 (2000).

119. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

120. *See id.*

121. *Id.* at 741-42 (Scalia, J., dissenting).

122. *Id.* (citation omitted) (quoting *City of Rome v. United States*, 446 U.S. 156, 177 (1980)).

Congress . . . had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality. *See, e.g., United States v. Morrison*, 529 U.S. 598, 627 . . . (2000) (confining preclearance regime to states with a record of discriminated bolstered the VRA's constitutionality). Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect.¹²³

IV. *SHELBY COUNTY'S APPLICATION OF THE EQUAL SOVEREIGNTY DOCTRINE IS LIKELY TO CAUSE MORE, NOT LESS, INTRUSION ON STATE SOVEREIGNTY*

By establishing a heavy presumption against geographically limited laws, the *Shelby County* majority has undermined the very federalism values the Court intended to protect. Now, the incentive for Congress is to apply civil rights laws nationwide, even when Congress thinks the law is only necessary in certain states. *Hibbs* makes clear that nationwide laws may be upheld based on evidence of constitutionally relevant discrimination in a subset of states,¹²⁴ and such nationwide laws do not implicate *Shelby County's* heavy presumption that states must be treated the same. Thus, in the name of promoting federalism, *Shelby County* encourages Congress to pass laws that intrude upon the sovereignty of more states.

This is particularly so because of another unexplained departure from precedent in the Court's opinion: the majority's willingness to entertain *Shelby County's* facial challenge. *Shelby County* did not argue that there was insufficient evidence warranting its coverage under Section 5. Instead, the county argued that Sections 4(b) and 5 were facially invalid because there was insufficient evidence of discrimination to justify coverage of cer-

123. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2649 (2013). The majority attempted to obscure its radical break from precedent by citing *Northwest Austin's* statement that "disparate geographic coverage" must be "sufficiently related" to the problem it targets. *Id.* at 2630. But, as discussed, the record before Congress made clear (and the Court did not dispute) that section 5's disparate geographic coverage *was* sufficiently related to the problem of voting discrimination—just as it had been in prior reauthorizations. Because there was a rational basis for section 5's disparate geographic coverage, "[Congress] had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality." *Id.* at 2649 (Ginsburg, J., dissenting).

124. *See generally Hibbs*, 538 U.S. 721 (upholding nationwide FMLA despite the fact that the evidence of the relevant discrimination was limited to certain states).

tain other covered jurisdictions, notably Arizona and Alaska.¹²⁵ Under normal rules of constitutional adjudication, the county never ought to have been permitted to mount to a facial attack on that basis. As Justice Scalia recently noted: “‘The fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an “overbreadth” doctrine outside the limited context of the First Amendment.’”¹²⁶

Consistent with this basic rule of adjudication, the Court, prior to *Shelby County*, had “consistently rejected constitutional challenges to legislation enacted pursuant to Congress’[s] enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court.”¹²⁷ For example, in *United States v. Raines*, the Court upheld a statute proscribing racial discrimination in voting as applied to the state officials before the Court, without resolving whether it could be constitutionally applied to private parties.¹²⁸ And, in *Tennessee v. Lane*, the Court held that Title II of the ADA was constitutional as applied to cases involving court access, without resolving whether it was constitutional in other contexts.¹²⁹

As Justice Ginsburg explained, those precedents should have been dispositive because, in light of persistent voting discrimination, it was appropriate for Congress to maintain Section 5 coverage for Alabama and Shelby County. Even with Section 5 in place, Alabama had the second-highest rate of successful Section 2 suits in the entire country from 1982 through 2005.¹³⁰ As recently as 2010, state legislators were recorded “refer[ring] to

125. See Brief for Petitioner at 47-48, 50, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

126. *Arizona v. United States*, 132 S. Ct. 2492, 2515 (2012) (Scalia, J., dissenting) (alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

127. *Shelby Cnty.*, 133 S. Ct. at 2647 (Ginsburg, J., dissenting).

128. See *United States v. Raines*, 362 U.S. 17, 24-25 (1960).

129. See *Tennessee v. Lane*, 541 U.S. 509, 530-34 (2004). The principal dissent in *Lane* acknowledged “the majority is of course correct that this Court normally only considers the application of a statute to a particular case,” but asserted that federalism challenges to enforcement legislation warranted a different rule, which would consider “the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce.” *Id.* at 551-52 (Rehnquist, C.J., dissenting). See also *Hibbs*, 538 U.S. at 743 (Scalia, J., dissenting). That approach would improperly privilege federalism challenges to laws that enforce the Constitution over citizens’ challenges to laws that violate the Constitution. See generally Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1357-58 (2000) (analyzing this issue prior to *Lane*). And, two years after *Lane*, the Court once again considered the validity of Title II of the ADA only as applied to the circumstances of the case, this time in a unanimous opinion by Justice Scalia. See *United States v. Georgia*, 546 U.S. 151, 158-59 (2006) (holding that Title II is valid enforcement legislation with respect to violations of prisoners’ constitutional rights, without considering whether the provision is valid in other cases).

130. See *Shelby Cnty.*, 133 S. Ct. at 2645 (Ginsburg, J., dissenting).

African-Americans as ‘Aborigines’ and talk[ing] openly of their aim to quash a particular gambling-related referendum because the referendum . . . might increase African-American voter turnout.”¹³¹ Widespread voting discrimination persisted in jurisdictions throughout the state, including in Shelby County.¹³² In sum:

[T]he Court’s opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit The reason for the Court’s silence is apparent, for as applied to Shelby County, the VRA’s preclearance requirement is hardly contestable.¹³³

The majority instead responded to Justice Ginsburg by claiming her discussion of ongoing voting discrimination in Alabama and Shelby County was “like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired.”¹³⁴ That glib response is plainly inapt. In the majority’s hypothetical, the policy in question (pulling over all redheads) has nothing to do with the reason why government action is justified (the expired driver’s license). By contrast, in *Shelby County*, the policy in question (identifying jurisdictions that should be subject to Section 5) is directly related to the reason why government action is justified (deterring voting discrimination through Section 5).

A better hypothetical would have been to ask whether a twelve-year-old driver could bring a facial challenge to a state law prohibiting anyone under sixteen from driving, arguing that fifteen-year-olds are safer drivers than ninety-eight-year olds, and there was no rational basis for the legislature to conclude otherwise. Such a facial challenge would be improper because it would be a paradigmatic example of “[t]he fact that [a law] might operate unconstitutionally under some conceivable set of circumstances” being “insufficient to render it wholly invalid.”¹³⁵

Shelby County thus represents an exception to the normal rules of constitutional adjudication in cases involving geographically limited statutes. This, too, strengthens Congress’s disincentive to enact such laws. If Congress enacts a nationwide statute, a facial challenge will be rejected so long as the law can be constitutionally applied in the circumstances of the case.

131. *Id.* at 2647.

132. *Id.* at 2646.

133. *Id.* at 2645.

134. *Id.* at 2629.

135. *Arizona v. United States*, 132 S. Ct. 2492, 2515 (Scalia, J., concurring in part and dissenting in part) (second alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

But if Congress enacts a geographically limited statute, the Court will permit the challenger to argue that the statute is facially invalid based on circumstances not before the Court.

V. CONCLUSION

Equality is one of our legal system's most important principles. Its application, however, is sharply contested. Similarly situated actors should be treated alike, but how do we know if the actors are similarly situated? At what point are their differences sufficient to warrant different treatment?

In many circumstances, these are difficult, if not agonizing, questions.¹³⁶ When it comes to the treatment of states in the area of voting rights, however, what is clear is that the Constitution entrusts those questions to Congress. The reconstruction amendments grant a democratically elected Congress the power to decide when a state's unequal treatment of its citizens justifies the application of a geographically targeted remedy.

The majority in *Shelby County* disregarded multiple lines of precedent in arrogating that power. In so doing, the Court has risked undermining the federalism principles it sought to protect. Worst of all, in dismantling the core of the nation's most important civil rights law, the Court overruled a Congress that had carefully done its job in gathering evidence, conducting hearings, and thereafter reenacting—by an overwhelming majority—a law that was within its unique constitutional power to continue.

136. See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990) ("Decisions about education, employment, benefits and other opportunities in society should not turn on an individual's ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently.").