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V. Alex Miller

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I. INTRODUCTION

Shelby County v. Holder[1] emphasized that the Voting Rights Act of 1965 (the "Act") was an "uncommon exercise of congressional power" that could only be justified by "exceptional conditions."[2] The Voting Rights Act was an extraordinary piece of legislation, which was used to combat the extraordinary problem of racial voting discrimination.[3] In striking down key portions of the Act, the Supreme Court of the United States held that times have changed since the 1960s such that Congress's formulaic encroachment upon the rights of states to conduct their own elections is no longer appropriate.[4]

Ratified in 1870, the Fifteenth Amendment created a "self-executing right" of nationwide suffrage regardless of race.[5] It also granted Congress the authority to enforce this right "by appropriate legislation."[6] Despite Congress's early attempts to enforce the Fifteenth Amendment, however, "States were creative in 'contriving new rules'" to contravene the decrees of Congress.[7] As the Supreme Court has noted, "[t]he first century of congressional enforcement of the Amendment . . . can only be regarded as a failure."[8] The Voting Rights Act of 1965 constituted an effective method to finally curtail racial voting discrimination, though several of its key provisions were "drastic departure[s] from basic principles of federalism."[9]

The original Voting Rights Act contained several powerful provisions; some permanent and some temporary.[10] Among the permanent sections was section 2, which established a nationwide prohibition on 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.'"[11] Section 2 allows the federal government, as well as private citizens, to file

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1. 133 S. Ct. 2612 (2013).
2. *Id.* at 2624 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (internal quotation marks omitted)).
3. *Id.* at 2618.
4. *Id.* at 2630-31.
5. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197, 229 (2009) (quoting U.S. CONST. amend. XV, § 1).
6. U.S. CONST. amend. XV, § 2.
7. *Nw. Austin*, 557 U.S. at 197-98 (quoting *Katzenbach*, 383 U.S. at 335).
8. *Id.* at 197.
9. *See* Shelby Cnty. v. Holder, 133 S. Ct. at 2618.
10. *See id.* at 2619-20.
11. *Id.* at 2619 (citing 42 U.S.C. § 1973(a) (2006)).

lawsuits in order to enjoin discriminatory practices.[12] Among the temporary sections were section 4 and section 5; these provisions "were set to expire after five years."[13] Section 4(b) set out a coverage formula for determining which areas of the country were especially prone to racial voting discrimination.[14] That formula included all "States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election."[15] Section 5 mandated that the states and political subdivisions that fell under section 4(b) were prohibited from changing their voting procedures unless the changes were approved by either the Attorney General of the United States or a three-judge court in Washington, D.C.[16] The Act permitted approval, or "preclearance," of voting changes only if the changes were determined to neither deny nor abridge "the right to vote on account of race or color" either in purpose or in effect.[17]

Since Congress enacted the temporary portions of the Voting Rights Act in 1965, it has reauthorized these provisions several times. The provisions were reauthorized in 1970 for an additional five years,[18] in 1975 for an additional seven years,[19] in 1982 for an additional twenty-five years,[20] and, most recently, in 2006 for another twenty-five years.[21] Each reauthorization contained some minor changes, but the first three reauthorizations, as well

12. *Id.*
13. *Id.* at 2620.
14. *Shelby Cnty.*, 133 S. Ct. at 2619 (citing 42 U.S.C. § 1973b(b)).
15. *Id.*
16. *Id.* at 2620; *see also* 42 U.S.C. § 1973c.
17. *Shelby Cnty.*, 133 S. Ct. at 2620.
18. The 1970 reauthorization also expanded the coverage under section 4(b) to include "jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968." *Id.* (citing Voting Rights Act Amendments of 1970, §§ 3-4, 84 Stat. 314).
19. The 1975 reauthorization also expanded the coverage under section 4(b) to include jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Congress also made the ban on "tests and devices" permanent in addition to expanding "the definition of 'tests and devices'" to "include the practice of providing English-only [ballots in parts of the country] where over five percent of voting-age citizens spoke a single language other than English." *Id.* (citing Voting Rights Act Amendments of 1975, §§ 101, 202, 89 Stat. 400, 401).
20. The 1982 reauthorization did not expand the coverage under section 4(b). It did, however, amend the bailout provision of the Act. This allowed covered states and political subdivisions to be bailed out of the coverage if they were able to, among other things, demonstrate that they had not used a forbidden test or device, had not failed to receive preclearance, or had not lost a section 2 lawsuit "in the ten years prior to seeking bailout." *Id.* (citing Voting Rights Act Amendments, 96 Stat. 131).
21. The 2006 reauthorization did not expand the coverage under section 4(b). It did, however, expand the prohibition language of section 5 by prohibiting voting law changes that had "'any discriminatory purpose.'" *Id.* at 2621. The reauthorization also prohibited any voting changes that diminished the ability of a citizen "to 'elect their preferred candidates of choice'" based upon the citizen's "race, color, or language minority status." *Id.* (quoting 42 U.S.C. §§ 1973c(b)-(d)).

as the original Voting Rights Act itself, have been held constitutional.[22] The 2006 reauthorization of sections 4 and 5 is the subject of *Shelby County v. Holder*, and the Court ultimately found section 4's coverage formula to be unconstitutional.[23]

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

Shelby County is located in Alabama and is a covered jurisdiction under section 4(b) of the Voting Rights Act.[24] Shelby County has been subject to the Voting Rights Act's preclearance requirement since the Act's inception in 1965.[25] The county filed suit in the United States District Court for the District of Columbia in 2010, seeking a declaration that section 5 and section 4(b) of the Voting Rights Act of 2006 were facially unconstitutional.[26] The county sought "a permanent injunction prohibiting the Attorney General [of the United States] from enforcing those provisions."[27] The district court granted Attorney General Eric Holder's Motion for Summary Judgment, holding "that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and . . . § 4(b) . . . ."[28] The United States Court of Appeals for the D.C. Circuit affirmed the lower court, holding that the record before Congress regarding the Voting Rights Act showed that litigation through section 2 alone would be insufficient to protect the rights of minority voters, and that section 5 was still necessary.[29] Subsequently, the United States Supreme Court granted a writ of certiorari to determine

> [w]hether Congress' decision in 2006 to reauthorize section 5 of the Voting Rights Act under the pre-existing coverage formula of section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.[30]

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22. *See supra* notes 18-21 and accompanying text; *see also Shelby Cnty.*, 133 S. Ct. at 2620-21 (citing Georgia v. United States, 411 U.S. 526 (1973); Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterey Cnty., 525 U.S. 266 (1999)).

23. *Shelby Cnty.*, 133 S. Ct. at 2621-22, 2631.

24. *Id.* at 2621.

25. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 442 (D.D.C. 2011).

26. Brief for Petitioner at 12, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96), 2012 WL 6755130 at *12.

27. *Id.*, 2012 WL 6755130 at *12.

28. *See Shelby Cnty.*, 133 S. Ct. at 2612, 2622.

29. *Id.*

30. Shelby Cnty. v. Holder, 133 S. Ct. 594 (2012) (emphasis omitted).

III. THE COURT'S DECISION AND RATIONALE

A. The Majority Opinion

Writing for the majority, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, discussed at great length how the Voting Rights Act of 1965 was an "'uncommon exercise of congressional power.'"[31] While noting that federal law is the supreme law of the land, the Court stressed that the states are afforded a great deal of autonomy under the Constitution.[32] "More specifically, 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'"[33]

The Supreme Court has ruled on the constitutionality of the Voting Rights Act and its various reauthorizations several times in the past, and Chief Justice Roberts noted some of the caveats mentioned in those prior decisions.[34] In 1966, the Court recognized that the Act was "'stringent' and 'potent'"[35] and was an "'uncommon exercise of congressional power.'"[36] In 1992, the Court mentioned that the Act "represents an 'extraordinary departure from the traditional course of relations between the States and the Federal Government . . . .'"[37] In 1999, the Court "noted that the Act 'authorizes federal intrusion into sensitive areas of state and local policymaking . . . .'"[38] In 2009, Chief Justice Roberts authored a majority opinion on the Act in which he wrote that section 5 "imposes substantial federalism costs."[39]

The majority opinion not only stressed that Congress's usurpation of the traditionally state function of running elections undermines federalism, but also drew attention to the Act's disregard of equal sovereignty among states.[40] The opinion repeatedly referenced *Northwest Austin Municipal Utility District Number One v. Holder*,[41] a 2009 case that also grappled with the 2006 reauthorization of the Voting Rights Act.[42] That opinion, which the Chief Justice also authored, ultimately avoided ruling on the Act's constitutionality because it construed the statute in such a way as to find the

31. *Shelby Cnty.*, 133 S. Ct. at 2618, 2624 (citing *Katzenbach*, 383 U.S. at 334).
32. *See id.* at 2623.
33. *Id.* at 2623 (quoting Gregory v. Ashcroft, 501 U S. 452, 461-62 (1991) (emphasis omitted) (internal quotation marks omitted)).
34. *Id.* at 2624.
35. *Id.* (quoting *Katzenbach*, 383 U.S. at 315, 337).
36. *Shelby Cnty.*, 133 S. Ct. at 2624 (quoting *Katzenbach*, 383 U.S. at 334).
37. *Id.* (quoting Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 500-01 (1992)).
38. *Id.* (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).
39. *Id*. at 2621 (quoting *Nw. Austin*, 557 U.S. at 202 (internal quotation marks omitted)).
40. *See id.* (quoting *Nw. Austin*, 557 U.S. at 202).
41. 557 U.S. 193.
42. *See id.* at 200.

constitutional question moot.[43] In its discussion, however, the *Northwest Austin* Court noted that the Act differentiated between states, "despite our historic tradition that all the States enjoy 'equal sovereignty.'"[44] Though Chief Justice Roberts recognized that the Court had previously upheld the Act, he was careful to note: "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[45]

After recognizing the problems that the Voting Rights Act posed to federalism, Chief Justice Roberts then discussed why conditions are not the same in 2013 as they were in 1965 when the Act was appropriate, and ultimately why the Act's coverage formula in section 4(b), which treats different states differently, no longer passes constitutional muster.[46] The section 4(b) coverage formula in the original 1965 Voting Rights Act is nearly identical to the formula in the 2006 reauthorization—both use voting data from the 1960s.[47] When the Act was created, "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary."[48] The Court noted that it was appropriate to target only certain states in the 1960s because the coverage formula was rational, both in practice and in theory, in those locations at that time.[49] As mentioned above, previous courts have scrutinized the Act's coverage formula.[50] It was upheld previously only because of the "'insidious and pervasive evil [of voter discrimination] which had been perpetuated in certain parts of [the] country through unremitting and ingenious defiance of the Constitution.'"[51] However, as Chief Justice Roberts succinctly stated, "[n]early 50 years later, things have changed dramatically."[52]

Chief Justice Roberts then presented some statistical and anecdotal data to demonstrate the drastic changes in the covered districts since 1965.[53] He stated that, in light of the current state of things, "[t]here is no valid reason" to maintain the old coverage formula.[54] Had Congress started from scratch in 2006, he continued, it would not have enacted the same formula, and certainly would not have based the formula on data from the 1960s.[55]

43. *See id.* at 196, 211.
44. *Id.* at 203 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).
45. *Id.*
46. *Shelby Cnty.*, 133 S. Ct. at 2625-26.
47. *See id.* at 2627.
48. *Id.* at 2625 (quoting *Katzenbach*, 383 U.S. at 328 (internal quotation marks omitted)).
49. *Id.* (quoting *Katzenbach*, 383 U.S. at 330).
50. *Id.* at 2621 (quoting *Nw. Austin*, 557 U.S. at 202-03).
51. *Shelby Cnty.*, 133 S. Ct. at 2618 (quoting *Katzenbach*, 383 U.S. at 309).
52. *Id.* at 2625.
53. *Id.* at 2625-26.
54. *Id.* at 2630.
55. *Id.* at 2630-31.

Though the dissent pointed to some data that showed lingering racial discrimination, it cannot be said that the data showed the sort of "'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that" allowed the Voting Rights Act to pass constitutional muster in decades past.[56] The decision contained no holding regarding the constitutionality of section 5 itself, only the coverage formula of section 4(b).[57] Chief Justice Roberts concluded that, "while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[58]

B. Concurring Opinion by Justice Thomas

Justice Thomas joined the majority opinion in its entirety, but wrote a concurring opinion to clarify that he would have gone a step further and held section 5 of the Voting Rights Act unconstitutional.[59] Justice Thomas reiterated what the majority stated repeatedly: that the Voting Rights Act was "'extraordinary' and 'unprecedented.'"[60] He believed firmly that the record before Congress in 2006 was insufficient to reauthorize either section 4(b) or section 5, especially since the 2006 version actually increased the preclearance coverage in section 5.[61]

C. Dissenting Opinion by Justice Ginsburg

Writing for the dissent, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, vehemently opposed the majority, stating that Congress sufficiently demonstrated a rational basis for reauthorizing sections 4(b) and 5 of the 2006 Voting Rights Act.[62] After providing some background information, Justice Ginsburg identified the standard of review that the Supreme Court had used previously when evaluating the Voting Rights Act.[63] In *South Carolina v. Katzenbach*,[64] the Court held that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[65] She explained further that the reauthorization of an existing

56. *Shelby Cnty.*, 133 S. Ct. at 2629 (quoting *Katzenbach*, 383 U.S. at 308, 315, 331; *Nw. Austin*, 557 U.S. at 201).
57. *Id.* at 2631.
58. *Id.*
59. *See id.* (Thomas, J., concurring).
60. *Id*. at 2632.
61. *See Shelby Cnty.*, 133 S. Ct. at 2632 (Thomas, J., concurring).
62. *Id.* at 2632, 2652 (Ginsburg, J., dissenting).
63. *Id.* at 2638 (quoting *Katzenbach*, 383 U.S. at 324; *Rome*, 446 U.S. at 178).
64. 383 U.S. 301.
65. *Id.* at 324.

statute is especially likely to satisfy the minimum requirement under the rational basis test.[66]

Citing *McCulloch v. Maryland*,[67] Justice Ginsburg next proceeded to demonstrate how the Voting Rights Act was "'appropriate' and 'plainly adapted to' a legitimate constitutional end."[68] She began by providing both statistical and anecdotal evidence of the necessity of the Voting Rights Act's section 5 preclearance requirement.[69] She went on to provide evidence supporting the necessity of the coverage formula used in section 4(b).[70] The data mostly showed that the jurisdictions covered under the coverage formula are still those with the most instances of racial voting discrimination claims in the country.[71]

Justice Ginsburg then mounted her assault on the majority opinion.[72] She first noted that the majority opinion accepted Shelby County's facial challenge of the statute without a word of discussion.[73] "'A facial challenge to a legislative Act . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'"[74] She noted that the majority made no mention of "why Congress lack[ed] the power to subject to preclearance the particular plaintiff" in this litigation: Shelby County, Alabama.[75] She opined that the reason for the Court's silence was obvious—Alabama has a clear history of racial voting discrimination.[76] Not only was Selma, Alabama the location of the "Bloody Sunday" beatings that served as a catalyst to the original 1965 Voting Rights Act, "Alabama [also] had one of the highest rates of successful § 2" lawsuits under the Voting Rights Act from 1982 to 2005.[77]

Justice Ginsburg's second attack on the majority opinion focused on the majority's use of dicta as controlling authority concerning the principle of state equal sovereignty.[78] She noted that the principle of equality among states was firmly stated in *Katzenbach*, where the Court held "that the principle '*applies only to the terms upon which States are admitted to the Union*, and not to the remedies for local evils which have subsequently

66. *Shelby Cnty.*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting).
67. 17 U.S. (4 Wheat.) 316 (1819).
68. *Shelby Cnty.*, 133 S. Ct. at 2639 (Ginsburg, J., dissenting) (citing *McCulloch*, 17 U.S. at 421).
69. *See id.* at 2639-42.
70. *See id.* at 2642-44.
71. *See id.* at 2643.
72. *See id.* at 2644.
73. *Shelby Cnty.*, 133 S. Ct. at 2644-45 (Ginsburg, J., dissenting).
74. *Id.* at 2645 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).
75. *Id.*
76. *See id.* at 2645-46.
77. *Id.* at 2645.
78. *Shelby Cnty.*, 133 S. Ct. at 2648-49 (Ginsburg, J., dissenting).

appeared.'"[79] The concept of equal state sovereignty was discussed in *Northwest Austin*, though only as dicta since that court ultimately ruled on statutory, rather than constitutional, grounds.[80] Justice Ginsburg noted that, even though *Northwest Austin*'s discussion of equal sovereignty was mere dicta, the majority here placed heavy reliance on it, holding "that the principle of equal sovereignty 'remains highly pertinent in assessing subsequent disparate treatment of States.'"[81] The majority's implication that the dicta of *Northwest Austin* silently overruled *Katzenbach* "is untenable."[82]

The third issue that Justice Ginsburg posed regarding the majority opinion involved the majority's failure to, as courts have done in the past, respect a congressional act that was created to implement one of the Civil War Amendments.[83] The previous coverage formula was not reauthorized on a whim; Congress was well aware of every jurisdiction that would be covered.[84] None were included by accident.[85] Congress also reviewed evidence that preclearance was still having an actual, real world effect.[86] Congress was also privy to the entire body of Supreme Court case law that had interpreted the Voting Rights Act since 1965.[87] And still, even though Congress is generally afforded deference to enforce the Civil War Amendments, and even though the congressional record was extensive, the majority decided to substitute its judgment for that of Congress.[88]

IV. ANALYSIS

A. Introduction

The Supreme Court incorrectly ruled that the coverage formula in section 4(b) of the Voting Rights Act of 2006 was unconstitutional. Chief Justice Roberts' majority opinion suffered three major flaws.[89] First, the Court applied the wrong standard of review.[90] Second, the Court failed to adequately take into account the overwhelming evidence contemplated by Congress.[91] Third, the Court not only used the principle of equal state

79. *Id.* at 2648 (quoting *Katzenbach*, 383 U.S. at 328-29).
80. *Id.* at 2649 (quoting *Nw. Austin*, 557 U.S. at 203-04).
81. *Id.* (citing *Nw. Austin*, 557 U.S. at 203).
82. *Id.*
83. *See Shelby Cnty.*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting).
84. *See id.* at 2650-51.
85. *See id.*
86. *See id.* at 2651.
87. *Id.*
88. *See Shelby Cnty.*, 133 S. Ct. at 2647, 2652 (Ginsburg, J., dissenting).
89. *See infra* Part IV.B.
90. *See infra* Part IV.B.1; *see also Shelby Cnty.*, 133 S. Ct. at 2622 (majority opinion).
91. *See Shelby Cnty.*, 133 S. Ct. at 2635-36 (Ginsburg, J., dissenting); *see infra* Part IV.B.2.

sovereignty out of its original context, it directly contravened precedent which stated that the principle cannot be applied to the Voting Rights Act.[92]

B. Discussion

1. Standard of Review

The majority opinion did not clearly articulate the applicable standard of review.[93] In its brief discussion of the standard of review, the Court referred to the "guiding principles" set forth by *Northwest Austin*, but did not explicitly state a standard of review.[94] The Court stated that:

> In *Northwest Austin*, we stated that "the Act imposes current burdens and must be justified by current needs. . . ." And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." These basic principles guide our review of the question before us.[95]

The Court included a footnote indicating that, since *Northwest Austin* also dealt with the Fourteenth and Fifteenth amendments, it should guide the Court's review of section 4(b).[96] There was one major problem, however, with the Court's heavy reliance on *Northwest Austin* as a guidepost for the standard of review: *Northwest Austin* did not have a clear standard of review either.[97]

In *Northwest Austin*, the Court acknowledged, and then quickly brushed aside, concerns regarding the proper standard of review.[98] In that case, the appellant argued that the Court must apply the *City of Boerne v. Flores*[99] standard.[100] The *Flores* standard requires that, in order for an act of Congress to be constitutional, "'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[101] The appellee opposed the use of that standard, arguing that the proper standard of review for the Voting Rights

92. *See Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting); *see infra* Part IV.B.3.
93. *See Shelby Cnty.*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting).
94. *See id.* at 2622 (majority opinion).
95. *Id.* (quoting *Nw. Austin*, 557 U.S. at 203 (internal citations omitted)).
96. *Id.* at 2622 n.1.
97. *See id.*; *see also Nw. Austin*, 557 U.S. at 204.
98. *See Nw. Austin*, 557 U.S. at 204.
99. 521 U.S. 507 (1997).
100. *Nw. Austin*, 557 U.S. at 204 (quoting Brief for Appellant at 31, *Nw. Austin*, 557 U.S. 193 (No. 08-322), 2009 WL 453246 at *31).
101. *Id.* (quoting City of Boerne v. Flores, 521 U.S. at 520).

Act was established in *Katzenbach*.[102] That standard only requires that Congress acted with "rational means to effectuate the constitutional prohibition,"[103] and it is the standard that courts have used when analyzing the Voting Rights Act in the past.[104] Despite this disagreement between the parties, the question of which was the correct standard was never answered.[105] The Court merely noted, "[t]hat question has been extensively briefed in this case, *but we need not resolve it*. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test."[106] It was certainly the prerogative of the *Northwest Austin* Court to sidestep this difficult constitutional question.[107] It was, however, quite another thing for the *Shelby County* Court to look past nearly fifty years of precedent in order to cite as controlling the unanswered question in *Northwest Austin*.

In her dissent, Justice Ginsburg neatly laid out the standard that the Court should have used when analyzing the Voting Rights Act.[108] She discussed *South Carolina v. Katzenbach*, the first Supreme Court case to rule on the Voting Rights Act, and its standard of review: "'As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.'"[109] Since 1966, courts have used the "rational means" standard when reviewing challenges to the Voting Rights Act.[110] This standard grants Congress wide latitude; courts must only "determine whether the legislative record sufficed to show that 'Congress could rationally have determined that [its chosen] provisions were appropriate methods.'"[111] Thus, it is not the courts' duty to determine whether the statute was the best or least intrusive means of preventing voter discrimination, rather courts must simply "'be able to perceive a basis upon which the Congress [resolved] the conflict as it did.'"[112]

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102. *See id.* (quoting Brief for the Federal Appellee at 6, *Nw. Austin*, 557 U.S. 193 (No. 08-322), 2009 WL 819480 at *6).

103. *Katzenbach*, 383 U.S. at 324.

104. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 216-17 (1970); *Rome*, 446 U.S. at 178-80.

105. *See Nw. Austin*, 557 U.S. at 204.

106. *See id.* (emphasis added).

107. *See id.* at 197, 204.

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

109. *Id.* at 2638 (quoting *Katzenbach*, 383 U.S. at 324).

110. *See, e.g.*, *Katzenbach*, 383 U.S. at 324; *Mitchell*, 400 U.S. at 216-17; *Rome*, 446 U.S. at 178-80.

111. *Shelby Cnty.*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting) (quoting *Rome*, 446 U.S. at 176-77).

112. *Id.* at 2637 (quoting *Katzenbach*, 384 U. S. at 653).

2. Examination of the Evidence

Both the majority and the dissent cite evidence to bolster their positions.[113] The majority's evidence consists in part of anecdotal evidence that there are some African-American elected officials in the covered districts.[114] The majority also included a dataset that showed a drastic increase in African American voter registration in covered states from 1965 until 2004.[115] For example, African American voter registration increased in Alabama from 19.3% in 1965 to 72.9% in 2004.[116] The majority highlighted evidence that demonstrated how conditions have improved since the law's enactment.[117] This was done in order to demonstrate how times have changed, and that the Voting Rights Act's coverage formula is no longer appropriate.[118] Though it is clear that voting discrimination has improved in the covered districts, the way that the majority used the evidence is troubling.[119] The majority crafted a catch-22 style analysis of the data—because the data showed improvement, the restrictions are no longer needed.[120] In the alternative, if the data had not shown improvement, it would have shown that the restrictions were ineffective, and Congress would not have adequate justification for renewing the restrictions.[121] Thus, regardless of what the data showed, the majority still could have found reason to abolish the Act's restrictions.

The dissent provided evidence to demonstrate its position that the enacted coverage formula in the Voting Rights Act is necessary today.[122] From 1982 to 2006, over 700 voting changes were blocked by the Department of Justice because the changes were deemed racially discriminatory.[123] In addition, over 800 proposed voting changes were either altered or withdrawn.[124] Congress also received information regarding the inadequacy of litigation through section 2 of the Act—by the time litigation, even successful litigation, concluded, the illegal voter discrimination had already occurred and elected officials were winning illegitimate elections.[125] One particularly egregious example of discrimination that Congress noted occurred in 2001: city officials in a town

113. *See id.* at 2626 (majority opinion); *see also id.* at 2639-43 (Ginsburg, J., dissenting).
114. *See id.* at 2626 (majority opinion).
115. *Id.*
116. *Shelby Cnty.*, 133 S. Ct. at 2626.
117. *See id.* at 2626-27.
118. *See id.*
119. *See id.*
120. *See id.* at 2638 (Ginsburg, J., dissenting); *see also id.* at 2627-28 (majority opinion).
121. *See Shelby Cnty.*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting).
122. *See id.* at 2642-43.
123. *Id.* at 2639.
124. *Id.* at 2639-40.
125. *Id.* at 2640.

in Mississippi abruptly cancelled its elections because "'an unprecedented number' of African-American candidates announced they were running for office."[126] The dissent's evidence makes it clear that the Act is still protecting minority voters from voter discrimination today.[127]

While these examples constitute only a small sample of evidence presented to Congress, the facts themselves are not the most persuasive argument for upholding the Voting Rights Act.[128] There are statistics and facts that support both sides of the argument, but the standard of review still should have been the rational means test.[129] Thus, it need only be demonstrated that Congress used rational methods when it drafted the statute.[130] Congress compiled over 15,000 documents in order to draft the 2006 reauthorization to the Voting Rights Act.[131] These documents presented "countless 'examples of flagrant racial discrimination' since the last reauthorization . . . ."[132] Regardless of whether the Court agreed with the statute enacted by Congress, it is clear that Congress made a rational policy choice based on adequate information.[133] Based on the voluminous record before Congress, the Court erred when it overturned section 4(b) of the Voting Rights Act.[134]

3. Equal State Sovereignty

Chief Justice Roberts based much of his rationale for striking section 4(b) of the Voting Rights Act on the principle of equal sovereignty.[135] This principle was taken completely out of context in this case, and most of the case law support for equal sovereignty was derived from Chief Justice Roberts' own non-binding dicta in *Northwest Austin*.[136] As explained above, the concept of state equal sovereignty was developed only in the context of admitting new states into the Union.[137] The *Katzenbach* Court was unequivocally clear that equal state sovereignty "applies only to the terms upon which States are admitted to the Union."[138] Chief Justice Roberts made some passing statements about the importance and potential

126. *Shelby Cnty.*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting) (quoting H.R. REP. NO. 109-478 at 36-37 (2006)).
127. *See id.* at 2640-41.
128. *See id.*
129. *See id.* at 2638 (quoting *Rome*, 446 U.S. at 176-77).
130. *See id.*
131. *Shelby Cnty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting).
132. *Id.* (quoting Hernandez v. Holder, 579 F.3d 864, 866 (8th Cir. 2009)).
133. *See id.* at 2638-39.
134. *See id.* at 2636, 2638, 2642-43.
135. *See id.* at 2618, 2622-24 (majority opinion).
136. *See Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).
137. *See Katzenbach*, 383 U.S. at 328-29 (citing Coyle v. Smith, 221 U.S. 559 (1911)).
138. *Id.*

universal applicability of equal sovereignty in *Northwest Austin*—a case settled by statutory, and not constitutional, interpretation.[139] Through repeated references to his own dicta in *Northwest Austin*, Chief Justice Roberts was able to craft a new application for equal state sovereignty[140]—one that had been clearly denounced in *Katzenbach*.[141] His disregard for precedent is clearly discernible in his opinion:

> *Katzenbach* rejected the notion that the principle [of equal sovereignty] operated as a *bar* on differential treatment outside that context. . . . At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.[142]

In the first sentence he recognized the controlling precedent of *Katzenbach*, where the Court held that the principle is not a bar on treating states differently.[143] In the very next sentence he brushed that precedent aside and announced that his non-binding dicta had effectively overruled *Katzenbach*.[144]

Though he concluded the majority opinion with the maxim that "[s]triking down an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform,'" Chief Justice Roberts seemed to go out of his way to find a method for striking down the a key provision of the Voting Rights Act.[145]

V. AFTERMATH

The majority opinion in *Shelby County* recognized the many strides toward voting equality since the 1960s, but turned a blind eye to the real problems that still plague the nation's minority voters today.[146] The Court noted that since the Voting Rights Act of 1965, "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers."[147] But these improvements do not tell the whole story. Justice Ginsburg's dissent pointed out several of the tools that political subdivisions

139. *See Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).
140. *See id.*
141. *Katzenbach*, 383 U.S. at 328-29.
142. *Shelby Cnty.*, 133 S. Ct. at 2623-24 (majority opinion) (citing *Katzenbach*, 383 U.S. at 328-29; *Nw. Austin*, 557 U.S. at 203).
143. *See id.*
144. *See id.* at 2624.
145. *See id.* at 2631 (quoting Blodgett v. Holden, 275 U. S. 142, 148 (1927)).
146. *See id.* at 2626.
147. *Shelby Cnty.*, 133 S. Ct. at 2628-29.

have attempted to use in recent years to dilute the power of minority voters.[148] These tools—"second-generation barriers" to voting—are more subtle than simply preventing minorities from voting.[149] These second-generation barriers used by formerly covered states and political subdivisions come in many forms: racial gerrymandering, choosing at-large district voting instead of district-by-district voting, requiring strict voter identification, and voter purging.[150]

A. Racial Gerrymandering

Racial gerrymandering is one of the second-generation barriers to minority voting power that formerly covered states can use.[151] Formerly, states covered by section 4(b) of the Voting Rights Act were forced to submit their congressional redistricting plans to Washington, D.C, for approval before they could go into effect.[152] In 2011, following the 2010 census, the Texas legislature created three maps for the state's new voting districts: one for its State Senate, one for its State House of Representatives, and one for its United States House of Representatives congressional districts.[153] Texas was a covered district, thus its redistricting plans required preclearance by either the Department of Justice or a three-judge panel in the District of Columbia.[154] In 2012, the United States District Court for the District of Colombia rejected Texas's redistricting plan, holding that all three maps contained racial discrimination.[155]

When the Supreme Court struck down section 4 of the Voting Rights Act, Texas saw a new opportunity to implement these racially discriminatory voting districts.[156] Prior to the D.C. court declaring the redistricting plans racially discriminatory, the United States District Court for the Western District of Texas was forced to create an interim redistricting plan for the 2012 elections.[157] The interim plan, however, was

148. *See id.* at 2634-35 (Ginsburg, J., dissenting).
149. *See id.*
150. *See id.* at 2634-35, 2641 n. 5.
151. *See id.* at 2635 (quoting Shaw v. Reno, 509 U.S. 630, 642 (1993)).
152. *See Shelby Cnty.*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting).
153. *See* Texas v. United States, 887 F. Supp. 2d 133, 138, 156 (D.D.C. 2012).
154. *Id.*
155. *Id.* at 161-62, 166, 178.
156. *See* Ryan J. Reilly, *Harsh Texas Voter ID Law 'Immediately' Takes Effect after Voting Rights Act Ruling*, HUFFINGTON POST (June 25, 2013), www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html.
157. *See* Perez v. Texas, No. 11-CA-360-OLG-JES-XR, 2013 U.S. Dist. LEXIS 127226, at 11-13 (W.D. Tex. Sept. 6, 2013).

developed using the original, racially discriminatory plan as guidance.[158] Just prior to the *Shelby County* decision, the Texas legislature voted to enact a permanent and slightly altered form of this interim plan.[159] The Voting Rights Act would have required Texas to preclear these maps, but, as Texas Attorney General Gregg Abbott announced the very day of the *Shelby County* decision, those maps could "'take effect without approval from the federal government.'"[160] One day later, Texas Governor Rick Perry signed these maps into law, and they are currently in effect today.[161]

In response to Texas's actions, Attorney General Eric Holder joined an ongoing lawsuit challenging the redistricting plan.[162] Though the section 4 coverage formula was deemed unconstitutional, section 2, which bans racially discriminatory voting practices, is still valid.[163] Thus, section 2 still provides a private cause of action to stop racially discriminatory practices.[164] Section 3 provides an additional remedy for those enforcing a private cause of action.[165] Section 3 contains the "bail-in" provision, which allows courts to force political subdivisions to submit to preclearance even if they do not fall under the (now unconstitutional) section 4 formula.[166] However, as Justice Ginsburg pointed out in her *Shelby County* dissent, litigation is often an inadequate remedy because it can only occur after the fact, and because it allows elected officials to gain office through discriminatory means.[167] Whether the lawsuit will succeed, and whether it will be concluded before the next election in Texas, remains to be seen.

B. At-Large/Multi-Member Voting Districts

Another type of second-generation voter discrimination is the practice of political subdivisions reordering their voting districts in a way that eliminates or reduces minority-elected candidates.[168] One way this is done is by eliminating or combining single-member voting districts, which have

158. *See* Perry v. Perez, 132 S. Ct. 934, 941-42 (2012) (holding that when a court creates a redistricting plan, it must derive its plan from the legislature's plan, even if the legislature's plan failed section 5 preclearance under the Voting Rights Act).

159. *Perez*, No. 11-CA-360-OLG-JES-XR, 2013 U.S. Dist. LEXIS 127226, at 16.

160. Reilly, *supra* note 156.

161. *See Perez*, No. 11-CA-360-OLG-JES-XR, 2013 U.S. Dist. LEXIS 127226, at 16-17.

162. *See* Penda D. Hair, *The Top 5 Voting Rights Moments of 2013*, HUFFINGTON POST (Dec. 25, 2013), http://www.huffingtonpost.com/penda-d-hair/voting-rights-2013_b_4498474.html.

163. *See Shelby Cnty.*, 133 S. Ct. at 2619 (citing 42 U.SC. § 1973).

164. *See id.*

165. *See* Press Release, Dep't of Justice, Justice Dep't to File New Lawsuit against State of Texas Over Voter I.D. Law (Aug. 22, 2013), *available at* http://www.justice.gov/opa/pr/2013/August/13-ag-952.html.

166. *See* 42 U.S.C. § 1973a(c).

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

168. *See* Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 87 (2010).

high minority populations, in favor of either at-large districts or multi-member districts.[169] This practice has been well documented, and examples of it were presented to Congress when the 2006 reauthorization of the Voting Rights Act was passed.[170] One such example occurred in Pointe Coupee Parish, Louisiana in the early 1970s:

> Pointe Coupee Parish, Louisiana, for instance, had ten police jury wards with a Black majority population in six of the wards. When Blacks were able to elect candidates of choice, the ten-ward system created a Black majority on the police jury. The Parish proposed eliminating one of the single-member wards by combining it with two other wards. The resulting multi-member district, however, did not give minorities an equal opportunity to elect candidates of choice and would eliminate the Black majority on the police jury.[171]

The Voting Rights Act, however, foiled that attempt at voter discrimination.[172] The State of Louisiana was covered by the Voting Rights Act's preclearance provision.[173] When the proposed change was submitted to Washington for approval, the Attorney General rejected it under section 5 of the Act.[174]

In the wake of *Shelby County v. Holder*, formerly covered jurisdictions can now enact racially discriminatory voting district changes without preclearance from Washington.[175] Pasadena, Texas, a formerly covered district, is sixty-two percent Hispanic, though only thirty-two percent of the voters are Hispanic.[176] A mayor and eight city councilmembers govern the city.[177] Prior to *Shelby County. v. Holder*, the eight councilmembers were elected according to eight single-member voting districts.[178] The city's Hispanic population tends to live in concentrated areas of the city, and in the election prior to *Shelby County* two Hispanics were elected to the city council.[179] However, in the wake of the *Shelby County* decision, the mayor

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169. *See id.*

170. *See id.*

171. *Id.* at 88 (citing Letter from David L. Norman, Assistant Att'y Gen., to Samuel C. Cashio, Dist. Att'y
(Aug. 9, 1971)).

172. *See id.*

173. *See Section 5 Covered Jurisdictions*, DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited January 13, 2014).

174. *See* Garrett, *supra* note 168, at 88.

175. *See supra* Part V.1-2; *see also infra* Part V.2.

176. Kali Borkoski, *After Shelby County*, SCOTUSBLOG (Nov. 6, 2013), http://www.scotusblog.com/media/after-shelby-county.

177. *Id.*

178. *Id.*

179. *Id.*

proposed a plan that would change how the city elected its councilmembers.[180] Rather than eight geographic districts, there would be just six geographic districts and two at-large districts would elect the councilmembers.[181] This proposal has raised the concern that the strongest voting bloc, i.e., the "southern, predominately Anglo neighborhoods," would control the elections of the two at-large councilmembers.[182] Because Texas is no longer subject to preclearance from Washington, the proposal went directly to vote, and passed by a vote of 3290 (50.67%) to 3203 (49.33%).[183]

C. Strict Voter Identification

The formerly covered districts have also started enacting strict voter identification laws that in the past have not withstood preclearance from Washington.[184] In this regard, Texas again exemplifies how *Shelby County v. Holder* has harmed minority voters.[185] In 2011, Texas Governor Rick Perry signed into law a voter identification law that "required voters casting a ballot at a polling place to show either a driver's license, an election identification certificate, a Department of Public Safety personal ID card, a military ID, a citizenship certificate, a passport or a concealed carry permit."[186] That law too was subject to preclearance, and when it faced the three-judge Washington federal court the court unanimously held that the law was "the most stringent in the country" and that "it impose[d] strict, unforgiving burdens on the poor, and racial minorities in Texas [who] are disproportionately likely to live in poverty."[187] Just like Texas's discriminatory redistricting plan, its discriminatory voter identification law was implemented immediately after *Shelby County v. Holder* was decided.[188]

Texas is not the only formerly covered state that has enacted strict voter identification laws.[189] Alabama, Mississippi, North Carolina, South Carolina, and Virginia have all either enacted or started working on new or

180. *Id.*
181. Borkoski, *supra* note 176.
182. *Id.*
183. *Id.*
184. *See* Kara Brandeisky & Mike Tigas, *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 1, 2013), http://www.propublica.org/article/voting-rights-by-state-map.
185. *Id.*
186. *Federal Court Rules Texas Voter ID Law is Discriminatory*, TALKING POINTS MEMO (Aug. 30, 2012), http://talkingpointsmemo.com/muckraker/federal-court-rules-texas-voter-id-law-is-discriminatory.
187. *See* Texas v. Holder, 888 F. Supp. 2d 113, 144 (D.D.C. 2012).
188. *See* Reilly, *supra* note 156.
189. *See* Brandeisky & Tigas, *supra* note 184.

stricter photo identification laws.[190] Some of these states had previously approved voter identification laws; since *Shelby County*, however, they now have greater latitude to enact stricter laws that permit fewer types of identification. [191]

D. Voter Purging

Since *Shelby County*, Florida and Virginia have enacted laws that haphazardly eliminate potential voters from the voter rolls.[192] They both make use of the federal Systematic Alien Verification for Entitlements ("SAVE") database, a Department of Homeland Security database that aids government agencies in checking the "immigration statuses of people applying for government benefits . . . ."[193] Both states run the SAVE list against the voting lists and remove any people who appear on the SAVE list.[194] Opponents of these laws argue that they serve to disenfranchise Hispanic voters directly because the lists are not always accurate: most of those whom the SAVE database has flagged are discovered to be citizens.[195] Additionally, the Department of Justice has indicated that the SAVE list is not intended to be "'a comprehensive and definitive listing of U.S. citizens,' especially since it doesn't [sic] include data about people born in the United States."[196] These laws are just another example of how, without the Voting Rights Act in full effect, states will continue to contrive "unremitting and ingenious" ways to subvert the voting rights of minorities.[197]

VI. CONCLUSION

The Court's decision to strike down section 4(b) of the 2006 Voting Rights Act has effectively gutted one of our nation's most influential pieces of legislation.[198] The Act, which the Court had approved on numerous previous occasions,[199] has now been rendered almost entirely useless. However, the Court only overturned the coverage formula of section 4(b).[200] This permits Congress to pass an updated, constitutionally permissible

190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.*
194. Brandeisky & Tigas, *supra* note 184.
195. *See id.*
196. *Id.* (citing Letter from Thomas E. Perez, Assistant Att'y Gen., to Ken Detzner, Fla. Sec'y of State, *available at* https://www.documentcloud.org/documents/805150-us-dep-of-justice-save-letter-1.html).
197. *See Katzenbach*, 383 U.S. at 309.
198. *See Shelby Cnty.*, 133 S. Ct. at 2630-31 (majority opinion).
199. *See id.* at 2620-21 (citing *Georgia*, 411 U.S. at 526; *Rome*, 446 U.S. at 156; *Lopez*, 525 U.S. at 266).
200. *See Shelby Cnty.*, 133 S. Ct. at 2630-31.

coverage scheme.[201] Whether Congress will be able to pass such a coverage scheme, and whether that scheme would pass constitutional muster, however, remains to be seen.

V. ALEX MILLER

201. *See id.*