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Equal Sovereignty as a Right Against a Remedy

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TABLE OF CONTENTS

Introduction 83

I. Rights Talk About Remedies 87
A. Rights as Limits on Remedies 88
B. Examples of Rights Against Remedies 92
1. Due Process 93
2. First Amendment 95
3. Equal Protection 99

II. Equal Sovereignty and Constitutional Remedies 103
A. The Equal Sovereignty Two-Step 103
1. *NAMUDNO v. Holder* 103
2. *Shelby County v. Holder* 105
B. An Unusual Right Against a Remedy 106

III. Locating Equal Sovereignty Within the Jurisprudence of Constitutional Remedies 113
A. Interpreting *Shelby County* 113
B. *Shelby County* and Post-Racial Constitutional Remedies 118

Conclusion 119

INTRODUCTION

Fifty years ago, Congress enacted an ambitious statute—the Voting Rights Act of 1965 ("VRA")—that aimed to narrow the gap between voting rights on the books and voting realities for racial minorities.[1] Among its provisions was a creative enforcement mechanism that replaced

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1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended as 52 U.S.C.A. §§ 10101, 10301–10314 (West, Westlaw through P.L. 113-296)).

after-the-fact litigation, which had not succeeded in deterring race-based denials of the right to vote, with a regime that required jurisdictions with histories of racial discrimination to "preclear" changes to their election laws with the federal government.[2] Preclearance succeeded where after-the-fact litigation had failed, protecting the right to vote from both apparent and subtle forms of racial discrimination in the covered jurisdictions.[3]

In *Shelby County v. Holder*,[4] the Supreme Court shackled Section 5 of the VRA, this powerful enforcement tool, by striking down Section 4, which identified the jurisdictions that had to preclear their election laws.[5] The Court held that Congress had violated the "equal sovereignty" of the covered states in 2006 when it reauthorized the Section 5 preclearance remedy without changing Section 4's coverage formula.[6] The Court explained that Section 4's formula was unconstitutional because it was "based on 40-year-old facts," treating as irrelevant evidence that preclearance is necessary to address ongoing discrimination in the covered jurisdictions—including Shelby County, which had a record of recent, intentional violations of minority voting rights.[7] "[C]urrent burdens," the Court explained, "must be justified by current needs."[8] Voting rights advocates and election law scholars have proposed many reforms to voting rights enforcement in response,[9] but that is not this Article's subject.

Instead, this Article's subject is federalism's limits upon remedies. This Article aims at a new way to understand and to critique *Shelby County*. It argues that *Shelby County* created a new species of a "right against a remedy." This newfound right against a remedy is unusual when compared to other constitutional rights that may be invoked against remedies. Unlike other rights against remedies, *Shelby County*'s equal sovereignty doctrine does not take seriously countervailing concerns about the adequacy of the system of remedies for vindicating constitutional rights. The Court neither acknowledged nor explained this unusual distinction between equal sovereignty and individual rights that limit remedies. One possibility is

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2. *See* 52 U.S.C.A. § 10304 (West, Westlaw through P.L. 113-296).

3. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting).

4. 133 S. Ct. 2612.

5. *Id.* at 2631 ("We issue no holding on § 5 itself, only on the coverage formula [in § 4]."). Section 5 of the VRA is currently codified as 52 U.S.C.A. § 10304 (West, Westlaw through P.L. 113-296).

6. *Shelby Cnty.*, 133 S. Ct. at 2624, 2629.

7. *Id.* at 2629; *see also id.* at 2645–46 (Ginsburg, J., dissenting) (discussing recent voting rights violations in Alabama).

8. *Id.* at 2619 (majority opinion) ("As we put it a short time ago, 'the Act imposes current burdens and must be justified by current needs.'" (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

9. *See, e.g.*, Richard Pildes et al., Symposium, *The Future of Voting Rights*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 637, 646, 658–59, 663–64 (2014).

that *Shelby County*'s rule is peculiar to cases about race, as the majority made no secret of its assumption that America has entered a post-racial era.[10]

Though the phrase "rights against remedies" may be unfamiliar, the concept is an important part of the system of remedies. As a point of contrast, consider the right *to* a remedy, which is a familiar feature of the Anglo-American remedial tradition. As Chief Justice John Marshall stated in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[11] The right to a remedy is a principle of political morality that aspires to provide the victims of wrongs with personal redress.[12]

Shelby County contains a different kind of rights talk about remedies. It is common wisdom that the right to a remedy may be limited for policy reasons.[13] Courts may deny a *Bivens* remedy, for example, due to concerns about "governmental efficiency,"[14] or grant qualified immunity in order to produce "the optimum level of compliance with federal law."[15] In thinking about the relationship between rights and remedies, however, we cannot simply distinguish between "plaintiff-centered" analyses that embrace the right to a remedy and "broader, policy-oriented" analyses that limit the right to a remedy based upon "discretionary policy choices."[16] There are

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10. *See infra* Part III.B.

11. 5 U.S. (1 Cranch) 137, 163 (1803).

12. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 585 (1986).

13. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1789 (1991) (providing an influential treatment of the right to a remedy and its limits).

14. Bush v. Lucas, 462 U.S. 367, 388–89 (1983).

15. Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 878 (2000); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (explaining that officials need some "shield . . . from undue interference with their duties" so that government can function). Aspects of official immunity can also be understood in rights terms. *See* discussion *infra* note 33.

16. *See* Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 752, 755 (2008); John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857, 881 (2013) (focusing upon "limits" on remedial rights "rooted in public interest balancing"); Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 859 (1991) (distinguishing "corrective justice" tradition, in which "right and remedy are fused," and "equity" tradition, which "promises little but the trial judge's sense of good conscience and is much more flexible than corrective justice").

also rights-based reasons to limit the right to a remedy. In some cases, parties against whom remedies are available, including defendants found liable for legal wrongs, may invoke rights against remedies. More specifically, rights against remedies limit the government's power to create rights of action and judicial and administrative remedies to enforce primary law. In creating a new right against a remedy, the *Shelby County* Court was not "stress[ing] flexibility and the appropriateness of pragmatic solutions" in a discretionary, equitable mode.[17] Instead, it was trading on the power of rights discourse in our legal tradition and popular culture in order to limit remedies.

This Article compares *Shelby County*'s equal sovereignty holding with other examples of rights against remedies as a way of critiquing the decision. It argues that *Shelby County* recognizes an unusual right against a remedy. This equal sovereignty right is unusual because proof that a remedy is necessary to ensure the state complies with constitutional law is not necessarily relevant to assessing the state's challenge to the remedy. Individual rights against remedies do not function this way under the Due Process Clause, the First Amendment, or the Equal Protection Clause.[18] Typically, evidence that the remedy is necessary to ensure adequate enforcement is, to borrow a phrase from *Shelby County*, "highly pertinent."[19] Like rights to remedies, rights against remedies are not absolute. Instead, they are limited by the demand for a system of remedies that suffices to ensure the rule of law.

Under *Shelby County*, Congress's failure to use the right "formula" is "fatal" to a remedy that distinguishes states, even if Congress actually singles out the states where there is the greatest need for the remedy to redress constitutional violations.[20] This equal sovereignty right to the correct formula limits Congress's authority to impose preclearance even upon jurisdictions with recent voting rights violations. Equal protection, by way of comparison, does not create this unsparing right against a

17. Roach, *supra* note 16, at 859.

18. The closest analogy to the Court's newfound equality right against remedies is state sovereign immunity, but states are not immune from enforcement actions by the United States. *Cf.* Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights"*, 46 WM. & MARY L. REV. 213, 266 (2004) ("[T]he Court's primary concern [in modern sovereign immunity jurisprudence] is that states not be treated by Congress, with respect to their immunity from private lawsuits, as second-class sovereigns.").

19. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2624 (2013) ("[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.").

20. *Id.* at 2628; *see also id.* at 2650 (Ginsburg, J., dissenting) (discussing implications of majority's holding).

remedy, which has the potential to undercut the system of constitutional remedies against states.

These arguments unfold in three Parts. Part I introduces the concept of a right against a remedy. It shows that constitutional rights against remedies are limited by the demand for an adequate system of remedies even where nonconstitutional remedies are all that's at stake. As Part II argues, that makes *Shelby County*, which involved enforcement of the Fifteenth Amendment right to vote, all the more unusual for its failure to take seriously the need for adequate remedies. Part III locates equal sovereignty within the jurisprudence of constitutional remedies, arguing that it has the potential to undercut the principle that the system of constitutional remedies must be sufficient to ensure the rule of law.

I. RIGHTS TALK ABOUT REMEDIES

In *Shelby County*, the Court invoked equal sovereignty as a limit on Congress's authority to remedy violations of the Fifteenth Amendment. Equal sovereignty, the Court explained, entails a state's right to a remedial scheme that respects each state's equal "integrity" and "dignity."[21] *Shelby County* reveals a Court that is serious about elaborating a new right against a remedy. To critique the Court's newfound state right against a remedy, it is useful to place *Shelby County* within the larger context of rights talk about remedies.

Rights imply remedies. That much is familiar, and arguments that a right implies a remedy have linked a wide array of doctrinal areas.[22] Rights also deny remedies. Scholars do not, however, have an encompassing understanding of rights that spans the many contexts in which they limit remedies. This Article begins to consider rights against remedies as a way of critiquing *Shelby County*.[23]

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21. *Id.* at 2623 (majority opinion) (internal quotation marks omitted).

22. *See, e.g.*, Goldberg, *supra* note 12, at 529, 563 (arguing for "right to a law of redress"); Seth Davis, *Tribal Rights of Action*, 45 COLUM. HUM. RTS. L. REV. 499, 501 (2014) (discussing "how the right-remedy principle surfaces in federal Indian law"); Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1634 (2004) ("Arguing that the right to a remedy is a fundamental right, this Article suggests that a strict scrutiny calculus must be used to justify the denial of a remedy."); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1489 (1987) (discussing the "Constitution's structural principle of full remedies for violations of legal rights against government").

23. This Part leaves a complete account of rights against remedies for future work. It focuses upon defining the concept and discussing some of the limits on individual constitutional rights against remedies.

A. Rights as Limits on Remedies

Rights talk about remedies usually focuses upon the right *to* a remedy.[24] The aspiration to provide remedies to vindicate rights is a familiar and longstanding principle of political morality. Chief Justice Marshall announced in *Marbury* that the "essence of civil liberty" requires the government to recognize a remedy "for the violation of a vested legal right."[25] In the modern era, this aspiration has continued to support private remedies to redress personal wrongs.[26]

The Constitution does not, however, guarantee a personal legal remedy for every right. The right to a remedy may be limited for any number of policy reasons.[27] When it comes to constitutional rights, for example, remedial rights may be denied to avoid "costly and vexatious litigation," to protect "fiscal stability," and to ensure that government functions effectively.[28]

Policy-based limits on *Bivens* remedies provide an example. Under *Bivens v. Six Unknown Federal Narcotics Agents*[29] and its progeny, federal courts have implied damages remedies for violations of constitutional rights. The Court has cautioned, however, that "special factors" may preclude recognition of a right to a damages remedy.[30] In *Bush v. Lucas*, for instance, the Court refused to imply a remedy for a federal employee who claimed his employer unlawfully disciplined him for exercising First

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24. This Article considers the design of remedial systems in rights terms, or, in short, "rights talk about remedies." *See generally* Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1, 44 (2014) (defining "rights talk" as "what people say when they talk about rights or even how they express their claims"). There is extensive literature on the problems and the promises of rights talk. *See, e.g.*, RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY (2011); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); Robin West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990); Morton J. Horowitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988). Without expressing a general skepticism of rights arguments, this Article adds a critique of equal sovereignty as a form of rights talk about remedies.

25. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

26. *See, e.g.*, Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

27. *See* Fallon & Meltzer, *supra* note 13, at 1781–87.

28. Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 366 (1993).

29. 403 U.S. 388.

30. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67 (2001) (internal quotation marks omitted).

Amendment rights.[31] To be sure, the Court conceded, existing remedies "did not fully compensate [the plaintiff] for the harm he suffered."[32] Even so, considerations of "governmental efficiency," including the social "costs associated with the review of disciplinary decisions," were special factors that counseled judicial caution and the denial of a remedial right.[33]

Policy-based limits, as in *Bush v. Lucas*, are concerned with the social costs of running a dispute resolution system and thus are intrinsic to designing an optimal system of remedies. Jurisprudentially, they reflect judges' "discretionary policy choices" about remedial design.[34] Doctrinally, therefore, a court may point simply to its remedial authority when developing policy-based limits on remedies.[35] Institutionally, however,

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31. 462 U.S. 367, 390 (1983).

32. *Id.* at 372.

33. *Id.* at 388–89. The abstention doctrine is another example of policy limits on federal remedies. *See, e.g.*, Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982) (discussing Younger v. Harris, 401 U.S. 37 (1971), which "espouse[d] a strong federal policy against federal-court interference with pending state judicial proceedings"); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819–20 (1976) (holding that abstention was appropriate to effectuate "clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system," and also noting that abstention may be "appropriate" to avoid disrupting "state efforts to establish a coherent policy with respect to a matter of substantial public concern," (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943))); Kade N. Olsen, Note, Burford *Abstention and Judicial Policymaking*, 88 N.Y.U. L. REV. 763, 778–83 (2013) (summarizing scholarly debate about abstention and judicial policymaking authority and arguing federal courts "may abstain in a principled manner in *Burford*-type cases involving nonadjudicative decisionmaking").

The official immunity doctrine is an interesting example of courts reasoning from policy and rights arguments. In *Harlow v. Fitzgerald*, the Court held that "[p]residential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity." 457 U.S. 800, 809 (1982). In reaching this holding, the Court balanced the right to a remedy against various "social costs" including "the expenses of litigation, the diversion of official energy from pressing public issues . . . the deterrence of able citizens from acceptance of public office," and the "danger that the fear of being sued will" deter public officials from fulfilling their duties. *Id.* at 814. Official immunity might also be explained in terms of a morally blameless official's "right" to rely on the law. Still, while acknowledging a government official's interest in "rely[ing] upon old law," the Court has explained that qualified immunity reflects "a set of special federal policy considerations." Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 757–58 (1995); *see also* Vázquez, *supra* note 15, at 878 & n.81 (arguing "the deterrence/overdeterrence calculation [is] the operative test" in defining qualified immunity).

34. Starr, *supra* note 16, at 755.

35. *See, e.g.*, Minneci v. Pollard, 132 S. Ct. 617, 621 (2012) (explaining that the Court's authority to imply *Bivens* remedies after considering alternative remedies and special factors is "anchored within general 'arising under' jurisdiction" (quoting *Malesko*, 534 U.S. at 66)). It is also a familiar equitable principle that the availability of equitable relief in any particular case requires a court to consider the plaintiff's rights while avoiding undue hardship to the

remedial policy is presumptively for legislatures to develop. Policy-based limits therefore often take the form of default rules, such as clear-statement rules against implied rights of action, to force legislative deliberation.

It is possible, and sometimes useful, to describe all limits on remedies in policy terms. Doing so emphasizes that rights depend for their vindication upon remedies and that courts enforcing rights "often face serious remedial costs that require hard choices."[36] We therefore often distinguish between two approaches to remedies: The "pure plaintiff-centered" approach, which emphasizes the right to a remedy, versus the "broader policy-oriented interest balancing" approach that limits remedies.[37] In other words, rights may imply remedies that policy may deny. This way of talking about remedies is important but incomplete.

Shelby County contains a different kind of rights talk about remedies. States, the *Shelby County* Court held, may invoke equal sovereignty to limit Congress's power to create remedies for civil rights.[38] Echoing the language of equal protection, the Court explained that "disparate treatment" infringes the states' "integrity" and "dignity" as equal sovereigns.[39] Equal sovereignty, in short, entails a right against a remedy.

Different features of remedial jurisprudence stand out when limits on remedies are conceived in rights terms. After all, "[r]eflecting on certain features of a situation can trigger our deontological instincts," while "reflecting on other features can trigger our consequentialist instincts."[40] Rights talk about remedies is thus more nuanced than the distinction between an approach that emphasizes the plaintiff's right to a remedy and an approach that emphasizes judicial discretion, remedial "flexibility," "pragmatic solutions," and a "lack of concern for rules."[41]

Rights may be invoked to limit the government's power to provide redress to those who are injured and to design remedies to deter legal wrongs.[42] More specifically, rights against remedies are rights against

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defendant. *See, e.g.*, Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1028 (2015). This type of case-specific reasoning about appropriate equitable relief may be understood in policy terms or in terms of rights, but does not involve rights against remedies as this Article defines them.

36. Starr, *supra* note 16, at 752.

37. *Id.* at 752, 755.

38. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013).

39. *Id.* at 2623–24.

40. ROBERT FOGELIN, WALKING THE TIGHTROPE OF REASON: THE PRECARIOUS LIFE OF A RATIONAL ANIMAL 59–60 (2003).

41. Roach, *supra* note 16, at 859.

42. To be clear, rights against remedies include rights that can be invoked against multiple types of government action, including but not limited to judicial and administrative remedies. Immunities from suit or from particular remedies, which do not limit government action generally, may also be understood as rights against remedies.

remedial law that limit the power of government to provide remedial rights through courts or administrative adjudication.[43] The due process right against "grossly excessive" punitive damages is a straightforward example of a right against a remedy.[44] A defendant who is liable for a tort may invoke due process to limit the remedy of punitive damages. The Court has explained that the due process limits on punitive damages arise out of a "constitutional concern" with "[e]lementary notions of fairness" and "arbitrary coercion."[45]

To understand rights against remedies, it is useful to contrast due process limits on punitive damages, which invoke "elementary notions of fairness," or *Shelby County*'s emphasis upon state "dignity" and "integrity," with the Court's "special factors" in *Bush v. Lucas*. Rhetorically, there is a difference between denying a remedy for the sake of "efficiency" and denying a remedy because it violates a right to "equality." Sometimes it takes a right to deny a remedy. It is therefore unsurprising that the *Shelby County* Court created an equal sovereignty right to limit remedies to enforce minority voters' right to equal treatment. Jurisprudentially, rights against remedies reflect deontological values that are extrinsic to remedial design.[46] They limit what otherwise might be an all-things-considered balancing of the costs and benefits of different remedial schemes.[47] Doctrinally, rights against remedies are not based upon a court's authority

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43. Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 249 (1991) (stating that primary rules "govern persons independently of what happens in litigation"). By contrast, remedial law "describes 'what happens in the event of noncompliance or other deviation' from the primary rules." David Sloss, *Non-Self-Executing Treaties: Exposing A Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 10 (2002). Remedial law, as defined here, includes rights of action, particular remedies such as damages, injunctions, and declaratory judgments, and "administrative enforcement of statutory rights," which has become one of the "historically recognized forms of remedies." David Rudovsky, Lecture, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1212 (noting "historically recognized forms of remedies—damages, equitable relief, and governmental administrative enforcement of statutory rights").

44. *See infra* Part I.B.

45. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–17 (2003) (internal quotation marks omitted).

46. *See generally* Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 921 (2009) (explaining that "[a]rguments based on rights and duties (deontological approaches)" appeal to "values, or assertions about good and bad, right and wrong, justice and injustice, freedom and oppression, and autonomy and servitude").

47. *See* Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 415 (1993) ("[A] recurring problem in the theory of the structure of rights is one of attempting to sort out the relationship between rights and the background consequentialist considerations that rights sometimes, but certainly not always, override.").

to engage in case-specific reasoning about the appropriate relief. Instead, to claim a right against a remedy, a litigant must show that a specific right in constitutional or non-constitutional law protects her from a remedy. Rights against remedies may limit what counts as sufficient justification for creating a right of action or a remedy, may require especially compelling justifications, or may preclude a form of relief altogether. Institutionally, judges assert a special competence to elaborate rights against remedies. In constitutional cases, rights against remedies may preclude legislative decisions even where there has been careful deliberation about remedies, as in *Shelby County*.

Litigants and courts invoke rights against remedies to limit the demand for what Paul Gewirtz calls "remedial effectiveness."[48] Particularly where constitutional rights are at issue, the system of remedies must be "adequate to preserve separation-of-powers values and a regime of government under law."[49] This demand supports remedies even where there is no compelling claim of a right to a personal remedy and qualifies instrumental limits on remedial rights.[50] By invoking equal sovereignty as a right against a remedy, the *Shelby County* Court aimed to lessen its burden to justify halting the preclearance remedy.

B. Examples of Rights Against Remedies

Constitutional rights against remedies arise under the Due Process Clause, the First Amendment, and the Equal Protection Clause, to name a few. These rights are not absolute barriers to judicial or administrative relief. Instead, they are limited by claims of rights to redress and, more importantly, by the instrumental demand for a system of remedies sufficient to ensure the rule of law.

Constitutional rights against remedies are limited by the demand for an adequate system of remedies even where only non-constitutional remedies are at stake. That makes *Shelby County*, which involved enforcement of the Fifteenth Amendment right to vote, all the more unusual for its failure to take seriously the need for adequate remedies.

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48. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 591 (1983). Gewirtz briefly discusses rights against remedies as one reason to limit remedies based upon a balancing of interests, but does not explore the distinctions between these rights and other limits on remedial effectiveness. *See id.* at 603.

49. Fallon & Meltzer, *supra* note 13, at 1790.

50. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) (describing the exclusionary rule as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect on future unlawful police conduct, rather than a personal constitutional right of the party aggrieved"); *but see* Hudson v. Michigan, 547 U.S. 586, 599 (2006) (reflecting the Court's retrenchment from exclusionary rule).

1. Due Process

The Due Process Clause prohibits a "depriva[tion] of life, liberty, or property, without due process of law."[51] The Due Process Clause was designed to protect individuals against arbitrary government action. More specifically, due process doctrine has recognized rights against remedies to prevent "arbitrary coercion."[52] This right against arbitrary enforcement is flexible, however, in both its procedural and substantive aspects.[53]

Ex parte Young,[54] which is well known as supporting the right to a remedy, also supports a due process right against remedies.[55] *Young* implied a private right of action for a prospective injunction against a threatened state enforcement action.[56] The *Young* Court also held that a state criminal statute violates due process where the "fines [are] so enormous . . . as to intimidate" regulated parties and thus deter them from "resorting to the courts to test the validity of the legislation."[57]

Young's progeny has applied this right against civil remedies to construe statutory damages provisions in modern regulatory statutes. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), for example, empowers the Environmental Protection Agency ("EPA") to issue unilateral administrative orders requiring corporations to clean up industrial pollution.[58] If a corporation refuses to comply with the EPA's order, the EPA may bring an enforcement action or clean up the site and sue to recover its costs.[59] If the EPA sues, the

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51. U.S. CONST. amend. V; *see also id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

52. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

53. Due process rights reflect deontological values, but are flexible and shaped by consequentialist concerns as well. Under the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976), courts decide whether the government violated procedural due process by balancing "the private and governmental interests at stake" and considering "the nature of the existing procedures." *Id.* The contours of substantive due process rights are similarly shaped by balancing private and governmental interests under a scheme of multi-tiered review. *See* Witt v. Dep't of the Air Force, 527 F.3d 806, 813–20 (9th Cir. 2008) (discussing different tiers of substantive due process challenges).

54. 209 U.S. 123 (1908).

55. *See id.* at 147, 152–53.

56. *See id.* at 152–53; Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) (explaining that "ability to sue" in *Young* and similar cases rests on "judge-made remedy").

57. *Young*, 209 U.S. at 147.

58. *See* Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 387–88 (8th Cir. 1987).

59. *See id.*

defendant may be subject to substantial fines or treble damages.[60] Invoking *Young*, defendants have argued that they have a due process right against the substantial remedies available to the EPA.[61] Lower federal courts have construed CERCLA to permit "reasonable grounds to test the validity" of the EPA's orders, which satisfies the due process right against remedies that deter a party from seeking judicial review.[62] This interpretation is necessary, as the Eighth Circuit put it, to "protect the government's interest" in an effective system for enforcing CERCLA.[63]

The constitutional law of punitive damages also takes account of the demand for an adequate system of remedies. Due process imposes procedural and substantive limits on punitive damages. Substantively, a "grossly excessive" punitive damages award "constitutes an arbitrary deprivation of property" and thus violates the defendant's due process right to property.[64] To determine if an award is grossly excessive, the Court considers the "reprehensibility of the defendant's misconduct" and the "disparity" between the harm to the plaintiff and the punitive damages, while comparing the punitive damages award with the civil remedies and criminal penalties available for comparable misconduct.[65]

In terms of rights, the due process limit on punitive awards reflects a principle of proportional punishment that appears in a wide array of doctrinal areas and is familiar in the law of remedies.[66] For example, a punitive damages award in line with the other available remedies and penalties is, all else being equal, more likely to be proportional to the wrong and thus constitutional.[67] Comparing the award with other remedies also requires the court to consider the systemic demand for an adequate system of remedies. As the Court explained in *BMW of North America, Inc. v. Gore*,[68] a punitive damages award "cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."[69] Where, however, the award cannot "fairly be categorized as 'grossly excessive'" given the state's instrumental

60. *See id.*
61. *Id.* at 385.
62. *Id.* at 390–91.
63. *Id.* at 391; *see also* Gen. Elec. Co. v. Jackson, 610 F.3d 110, 119 (D.C. Cir. 2010); City of Rialto v. W. Coast Loading Corp., 581 F.3d 865, 872 (9th Cir. 2009); Emp'rs Ins. of Wausau v. Browner, 52 F.3d 656, 664 (7th Cir. 1995).
64. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).
65. *Id.* at 418.
66. *See* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 733 (2001).
67. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 435 (2001).
68. 517 U.S. 559 (1996).
69. *Id.* at 584.

interests in punishment and deterrence, the defendant has no due process right against the punitive remedy.[70]

Due process limits not only specific judicial remedies, but also rights of action and administrative remedies available through agency adjudication. For instance, the limits on who may stand for the government in court have a due process component.[71] By limiting the legislature's authority to assign public rights of action, standing doctrine implements a due process concern with protecting life, liberty, and property against arbitrary enforcement.[72] Due process jurisprudence reflects that underlying intuition. In *Marshall v. Jerrico, Inc.*,[73] for example, the Court opined that due process may create a right against a remedial scheme that "injects a personal interest, financial or otherwise," into an agency's enforcement decision.[74] Similarly, in *Fuentes v. Shevin*,[75] the Court struck down a remedial scheme that permitted "[p]rivate parties, serving their own private advantage . . . unilaterally [to] invoke state power to replevy goods from another" without a "fair prior hearing."[76] Like the right against grossly excessive punitive damages, these due process rights are flexible and limited by the public interest in a functioning system of remedies.[77]

2. First Amendment

The First Amendment also creates rights against civil remedies. As *New York Times Co. v. Sullivan*[78] announced, "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[79] The First Amendment therefore constrains civil liability for speech, including requiring the plaintiff to make additional or greater

70. *Id.* at 568. State courts have also incorporated instrumental factors into judicial review of punitive damages awards. *See, e.g.*, Green Oil Co. v. Hornsby, 539 So. 2d 218, 223–24 (Ala. 1989) (considering whether available remedies are sufficient "to encourage plaintiffs to bring wrongdoers to trial," given "[a]ll the costs of litigation . . . .").

71. *See* Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589635.

72. *See id.* (manuscript at 5–6).

73. 446 U.S. 238 (1980).

74. *Id.* at 349–50.

75. 407 U.S. 67 (1972).

76. *Id.* at 67.

77. *See generally* Mathews v. Eldridge, 424 U.S. 319, 334–35, 339–40 (1976) (discussing three factors to be considered in procedural due process cases, including "the private and governmental interests at stake . . . and the nature of the existing procedures").

78. 376 U.S. 254 (1964).

79. *Id.* at 277.

showings than tort law otherwise requires to establish violation of a duty.[80] *Sullivan*, for instance, required a public official to prove "actual malice" to recover damages for defamation, rejecting state tort law that presumed falsity and damages under a theory of "libel per se."[81]

The First Amendment right against remedies for wrongful speech distinguishes injunctions from damages. *Near v. Minnesota*,[82] the foundational case, reversed a state court injunction that prevented a newspaper publisher from publishing "malicious, scandalous or defamatory" statements about the Minneapolis mayor, other public officials, and law enforcement.[83] Striking down the statute upon which the injunction was based, the Court held that a prior restraint upon publication of a newspaper "is of the essence of censorship" and inconsistent with the First Amendment even when it takes the form of an injunction rather than a licensing scheme.[84] The Court suggested the First Amendment right against remedies for defamatory speech was not absolute, however. The Court explained, "[r]emedies for libel remain available and unaffected" and the statute was "not aimed at the redress of individual or private wrongs."[85] It therefore left open "questions as to . . . [the] protect[ion of] private rights according to the principles governing the exercise of the jurisdiction of courts of equity," that is, questions that arise where there is a strong countervailing claim of a right to a remedy.[86]

The First Amendment right against an injunction seems to be a counter-example to the notion that rights against remedies may be limited to ensure an adequate remedial system. After all, "it has been repeated as a truism: 'equity will not enjoin a libel.'"[87] But there is more play in the joints of the doctrine than first appears. Though the First Amendment right

80. *See* David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1138 (discussing "tensions between tort law and the First Amendment's protection of free speech"); David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 6 (2013) (analyzing First Amendment limits on injunctions in defamation cases); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1652 (2009) (discussing First Amendment limits on civil liability for speech).

81. 376 U.S. at 279–80.

82. 283 U.S. 697 (1931).

83. *Id.* at 706 (internal quotation marks omitted).

84. *Id.* at 713.

85. *Id.* at 709.

86. *Id.* at 716 (citing Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 640 (1916) ("The hesitation, if not downright refusal, of American law to allow preventive remedies in order to secure interests of personality, where redress by way of damages is often obviously inadequate or even wholly inapplicable, has frequently been criticized.")).

87. Ardia, *supra* note 80, at 4.

against injunctive relief in defamation cases remains robust,[88] courts have begun to treat the problem in instrumental terms.[89]

Consider, for example, the California Supreme Court's decision to permit narrow injunctive relief against defamatory speech in *Balboa Island Village Inn, Inc. v. Lemen*.[90] The state supreme court rejected the defendant's argument "that the only remedy for defamation is an action for damages," reasoning that "a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation."[91] It distinguished preliminary injunctive relief before trial and post-trial injunctions "to prevent a defendant from repeating statements that have been judicially determined to be defamatory."[92] Where an "award of damages [is] insufficient to deter the defendant from continuing the tortuous behavior," the First Amendment right against injunctive relief does not bar a "pin-pointed" injunction to achieve "the essential needs of the public order."[93]

The remedial approach to First Amendment limits on tort law also entails calibrating damages remedies. In *Gertz v. Robert Welch, Inc.*,[94] the Court held that private defamation plaintiffs get actual damages for negligence in a case involving "public issues," but not presumed or punitive damages.[95] The Court treated the problem as one that called for balancing "competing values."[96] The state had a "legitimate . . . interest" in recognizing the right to a remedy, which entailed "compensating private individuals for wrongful injury to reputation."[97] Private individuals have less access than public officials to the "first remedy of any victim of defamation[:] . . . self-help."[98] Accordingly, the state interest in affording private plaintiffs a damages remedy is greater than in the case of public officials. This interest is satisfied by a rule permitting private plaintiffs to obtain actual damages for negligent defamation. Presumed or punitive damages, in contrast,

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88. *See* Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 167 (2007) ("The strong presumption against prior restraints is evidenced by the fact that the Supreme Court has never upheld a prior restraint as a permissible remedy in a defamation action.").

89. *See infra* notes 90–93 and accompanying text.

90. 156 P.3d 339, 351 (Cal. 2007).

91. *Id.*

92. *Id.* at 350.

93. *Id.* at 351. The California Supreme Court held the injunction was not narrow enough and reversed it in part on that basis. *Id.* at 353; *see also* Erwin Chemerinsky, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1458–60 (2009) (discussing use of injunctions "limited to specific speech that is proven to be false").

94. 418 U.S. 323 (1974).

95. *Id.* at 350.

96. *Id.* at 348.

97. *Id.* at 348.

98. *Id.* at 344.

require a showing of actual malice under the First Amendment.[99] The *Gertz* approach was "penalty-sensitive;" it "did not limit the state's power to impose liability" but rather "limit[ed] the amount of damages that the state could attach to this liability."[100]

Thus, although some decisions limiting tort law on First Amendment grounds treat the problem as one of primary law, others hew to a remedial approach.[101] Under this approach, the public interest in an effective enforcement system is relevant to determining when the First Amendment precludes a remedial right. A final example underscores the point. In *Nike v. Kasky*,[102] the Court granted certiorari to consider whether California's unfair competition law violated the First Amendment.[103] In that case, a private plaintiff sued Nike under California's unfair competition law, claiming standing for the public and alleging that Nike had falsely denied that it had operated sweatshops in Southeast Asia.[104] The Court ultimately dismissed the writ as improvidently granted.[105] In his dissent from the dismissal, Justice Stephen Breyer argued that the First Amendment limits a state from authorizing private attorneys general to stand for the state unless there are "legal and practical checks" to ensure the private litigant does not use litigation as a way of suppressing protected speech.[106] There are instrumental reasons, Justice Breyer acknowledged, to use private

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99. *Id.* at 349.

100. Michael Coenen, *Of Speech and Sanctions: Toward A Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1007 (2012).

101. As Justice Potter Stewart memorably put it in *Rosenblatt v. Baer*, "[t]he First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars." 383 U.S. 75, 93 (1966) (Stewart, J., concurring); *see also* Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1134 (2013) (explaining that Justice Stewart traced right to redress to the due process "idea of 'ordered liberty'").

This Article shows that the interplay between rights and remedies includes a defendant's rights against remedies. In other words, rights and remedies are "inextricably intertwined," and not just because a plaintiff's rights depend upon remedies for their enforcement. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999). Of course, it is possible and sometimes helpful to jettison any distinction between rights and remedies, describing, for example, First Amendment rights against remedies as limits on duties in tort law. But not all the cases of rights-based limits on remedies fit easily into that mold, *Shelby County* included. And collapsing the distinction between rights and remedies risks overwhelming the analysis of how the interests of defendants—and potentially enforcement targets—bear upon remedial design. *See supra* notes 34–47 and accompanying text.

102. 539 U.S. 654 (2003).

103. *Id.* at 658.

104. *Id.* at 656–57.

105. *Id.* at 656.

106. *Id.* at 680 (Breyer, J., dissenting).

attorneys general, but he concluded the state could effectively enforce its restrictions on false advertising without a sweeping delegation of enforcement power to private litigants.[107] Although there are strong arguments against Justice Breyer's First Amendment theory,[108] his approach to rights against remedies is sound: to determine whether a right precludes a remedy requires a considered judgment about the need for the remedy to ensure enforcement of the law.

3. Equal Protection

Equal protection has often been understood to protect rights *to* remedies, at least in the state courts.[109] However, equality might also entail limits on remedies. Ideally, parties who are equally culpable—or equally likely to be culpable—should be subject to the same potential remedies. Remedies that are available against some wrongdoers, but not others, impose an unequal burden, including in the form of compliance costs.

The most familiar equal protection limits on remedies do not protect regulated parties and wrongdoers. Instead, they protect third parties whose interests may be affected by remedial action. Reverse discrimination challenges to race-conscious remedial programs are one example. Equal protection doctrine significantly limits, but does not preclude, race-conscious remedies. Though "fractured,"[110] the doctrine governing court-ordered affirmative action expressly considers the demand for an adequate system of remedies as one of several factors to determine if a remedy is constitutional.[111] Beyond court-ordered remedies, the government has a compelling interest in "remedying the effects of past or present racial

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107. *See id.* at 680–81.

108. *See* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 669 (2005).

109. *See* Thomas R. Phillips, Speech, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1332 & n.101 (2003).

110. Cheryl L. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 138 (discussing "fractured" opinions that have not adopted specific level of scrutiny but explaining that "gravitational pull towards strict scrutiny as the dominant analysis seems evident").

111. *See* United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion) (considering "several factors, including the necessity for the relief and the efficacy of alternative remedies"); *id.* at 187 (Powell, J., concurring) (considering "efficacy of alternative remedies"); Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 476 (1986) (plurality opinion) (explaining that race-conscious remedy may be "necessary to remedy . . . pervasive and egregious discrimination"); *id.* at 486 (Powell, J., concurring) (considering "efficacy of alternative remedies" as well as several other factors).

discrimination,"[112] but it must have a "strong basis in evidence" that race-conscious remedies are necessary in order to satisfy strict scrutiny.[113] Narrow tailoring requires that race-conscious programs be "specifically and narrowly framed" to accomplish the government's purpose.[114] In other words, an affirmative action plan to benefit racial minorities must "discriminate[] against whites as little as possible *consistent with effective remediation*."[115] *Shelby County*'s equal sovereignty doctrine goes further than these equal protection cases to restrict remedies for racial justice.[116]

Unlike reverse discrimination cases, which involve third party rights against remedies, *Shelby County* involved an equality claim by a regulated party with a record of wrongdoing.[117] Equality without consideration of other values—liberty, for instance—does not, however, clearly support rights against remedies. Where there is an unequal distribution of remedial burdens, the solution may be "to either extend burdens to, or remove them from, both classes."[118] The principle of equal remedies for equal wrongs may add little to the principle that "each person should receive punishment in proportion to his guilt."[119] Unsurprisingly, then, state courts have resisted imposing rights against remedies in favor of wrongdoers, stating "[t]here is no equal protection requirement to impose identical awards on all persons."[120]

Instead, equal protection review usually gives legislatures wide discretion to draw distinctions among regulated parties. The classic statement is found in *Williamson v. Lee Optical of Oklahoma*.[121] Oklahoma enacted a law

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112. Shaw v. Hunt, 517 U.S. 899, 909 (1996). In *Adarand Constructors, Inc. v. Pena*, the Court held that "Congress, like the States, may treat people differently because of their race only for compelling reasons." 515 U.S. 200, 235 (1995). The Court's approach to race-conscious remedial action by the federal government has not always been so strict. In *Fullilove v. Klutznick*, a divided Court affirmed Congress's set-aside for minority businesses in the Public Work Employment Act of 1977. 448 U.S. 448, 489–90 (1980). As Drew Days has explained, the Justices in the majority "wrote their own post hoc rationalizations" of the statute, "concluding not that Congress 'could reasonably have' relied, but in fact that Congress did rely, upon" what Days calls the "general condition of minority business enterprises." Drew S. Days, III, Fullilove, 96 YALE L.J. 453, 468 (1987).

113. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (plurality opinion) (internal quotation marks omitted).

114. Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

115. Majeske v. City of Chi., 218 F.3d 816, 820 (7th Cir. 2000) (quoting McNamara v. City of Chi., 138 F.3d 1219, 1222 (7th Cir. 1998)) (emphasis added).

116. *See infra* Part II.

117. *See infra* Part II.B.

118. Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693, 711 (2000).

119. *Id.* at 729.

120. United Farm Bureau Mut. Ins. Co. v. Ira, 577 N.E. 588, 596–97 (Ind. Ct. App. 1991).

121. 348 U.S. 483 (1955).

prohibiting anyone but a licensed optometrist or ophthalmologist from fitting lenses to eyeglasses without a prescription.[122] Opticians challenged the law as an arbitrary constraint on their business.[123] Applying rational-basis review under the Due Process Clause, the Court conceded the law "may exact a needless, wasteful requirement," but reasoned that "it is for the legislature, not the courts, to balance the advantages and disadvantages."[124] The opticians also challenged the scheme under the Equal Protection Clause, arguing that it was unconstitutional for the legislature to exempt "sellers of ready-to-wear glasses" and not opticians from the law.[125] The Court responded that equal protection does not impose significant limits except where there has been "invidious discrimination."[126] The Court reasoned that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies."[127] Accordingly, "[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others."[128]

This deference to legislatures extends even to a legislative choice to impose criminal penalties on some wrongdoers and civil penalties for others for the same wrong. In *Dixon v. District of Columbia*,[129] for example, the D.C. Circuit Court of Appeals held that motorists charged with criminal violations for speeding could not state an equal protection claim by alleging that similarly situated speeders were subject to only civil fines as a matter of statutory design.[130] The District of Columbia had provided by statute that motorists speeding more than 30 miles per hour over the limit would be subject to only civil fines if they were caught by an automated traffic enforcement system.[131] By contrast, motorists committing the identical violation—speeding more than 30 miles per hour over the limit—would be subject to criminal penalties when caught by a police officer.[132] The Court held this facially discriminatory scheme did not violate equal protection as a matter of law.[133] In reaching this holding, the Court reasoned that the distinction could be necessary to achieve the

122. 1953 Okla. Sess. Laws 271, 271–73.
123. *Williamson*, 348 U.S. at 485–86.
124. *Id.* at 487.
125. *Id.* at 488.
126. *Id.* at 489.
127. *Id.*
128. *Id.* Here, the Court used "remedy" in a broader sense than this Article uses it, apparently referring to the enactment of both primary and remedial law.
129. 666 F.3d 1337 (D.C. Cir. 2011).
130. *Id.* at 1344.
131. *See* D.C. CODE §§ 50-2209.01 to 50-2209.02 (2001).
132. *See* D.C. CODE MUN. REGS. tit. 18, § 2200.12 (LexisNexis 2009).
133. *Dixon*, 666 F.3d at 1344.

District's aim of deterring speeding violations.[134] "[B]ecause each penalty advances the District's deterrence interest in a different way and at a different cost," the court reasoned, it passed rational basis review.[135] Specifically, because "targeted enforcement through officer stops" can only identify so many violations, the legislature could create a "variable enforcement scheme [to] deter[] more motorists from speeding."[136]

Courts have similarly rejected equal protection claims against punitive damages, reasoning that the legislature may treat wrongdoers differently in order to deter more wrongs.[137] The public interest in a remedial system that adequately deters wrongs sustains a scheme that makes punitive damages available against some, but not all, wrongdoers who commit similar wrongs.[138]

Rights imply remedies, and rights deny remedies. But rights talk about remedies usually is not absolute. Evidence that a remedy is necessary to redress wrongs and to enforce the law is important to assessing a claim of an individual right against a remedy. Due process limits punitive damages, but this right must be measured against the state's interests in punishment and deterrence; the First Amendment creates a right against injunctions in tort cases, but this right may give way to the "protect[ion] [of] private rights"[139] and the "essential needs of the public order;"[140] and equal

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134. *Id.* at 1342.
135. *Id.*
136. *Id.* at 1343.
137. *See infra* note 138.
138. *See, e.g.*, Defender Indus., Inc. v. Nw. Mut. Life Ins. Co., 809 F. Supp. 400, 409 (D.S.C. 1992) (holding that state may allow "a jury to punish wealthier defendants more to effect a proportionally equal deterrent"); Jacobs Mfg. Co. v. Sam Brown Co., 792 F. Supp. 1520, 1538 (W.D. Mo. 1992), *aff'd in relevant part*, 19 F.3d 1259 (8th Cir. 1994) (rejecting equal protection challenge and explaining that "[d]efendants against whom punitive damages are sought do not constitute a suspect class"); Galjour v. Gen. Am. Tank Car Corp., 764 F. Supp. 1093, 1101–03 (E.D. La. 1991) (rejecting argument that punitive damages scheme "arbitrarily treats storers, handlers, and transporters differently from other persons associated with hazardous substances").
139. Near v. Minnesota, 283 U.S. 697, 716 (1931).
140. Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 351 (Cal. 2007). On one view, there is no meaningful distinction between a tort plaintiff's right to redress and the state's instrumental interest in a system of remedies that enforces the law. The Court's First Amendment cases sometimes adopt this "regulatory vision of tort law." Oman & Solomon, *supra* note 101, at 1135. The adjudicatory aspiration to provide personal remedies for rights is distinct, however, from the regulatory interest in detecting and deterring violations of law. *See* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 7–12 (2014); *see also* Oman & Solomon, *supra* note 101, at 1162 ("[P]rivate law has value that is not reducible to regulation."); Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1758 (2012) ("[D]espite the many aspects of tort law that render it importantly public[,] there is something

protection permits "variable" remedial schemes that advance the government's deterrence interest "in a different way and at a different cost."[141] Although these various rights against remedies are not typically associated with each other, they reflect the common principle that rights talk about remedies does not commit us to rights as trumps.

II. EQUAL SOVEREIGNTY AND CONSTITUTIONAL REMEDIES

States, like individuals, may claim rights against remedies. Sovereign immunity, at least under the Rehnquist and Roberts Courts, has entailed state rights that cannot be reduced to an instrumental calculus.[142] At the same time, the Court's sovereign immunity jurisprudence has consistently reaffirmed the demand for "ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause."[143]

A. The Equal Sovereignty Two-Step

With *Northwest Austin Municipal Utility District No. One v. Holder* ("*NAMUDNO*")[144] and *Shelby County v. Holder*,[145] the Court has recognized an equal sovereignty right against remedies that is hard to reconcile with the demand to deter violations of the law.[146] In *Shelby County*, the Court treated equal sovereignty as a trump in two ways: first, by striking down Section 4 of the Voting Rights Act for lack of the perfect formula, and second, by dismissing arguments that preclearance is necessary to deter voting wrongs as self-defeating.

1. NAMUDNO v. Holder

Beware witty beginnings in judicial opinions. As Chief Justice John Roberts framed the case, *NAMUDNO v. Holder* concerned a "small utility district raising a big question," namely, "the constitutionality of [Section]

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distinctively private about the common law of torts."); Goldberg, *supra* note 12, at 530 ("[N]otwithstanding the dominant tendency among modern scholars to treat tort law as an instrument for attaining public goals . . . it is still best understood as a law of redress.").

141. Dixon v. District of Columbia, 666 F.3d 1337, 1342–43 (D.C. Cir. 2011).

142. *See* Zick, *supra* note 18, at 266.

143. Alden v. Maine, 527 U.S. 706, 757 (1999); *see also* Green v. Mansour, 474 U.S. 64, 68 (1985).

144. 557 U.S. 193 (2009).

145. 133 S. Ct. 2612 (2013).

146. *See supra* Part I.B.

5 of the Voting Rights Act."[147] The Court did not answer that question, but rather freed the small utility district to seek to bail out from Section 5's preclearance requirement.

The VRA implements the Fifteenth Amendment's ban on racially discriminatory denials of the right to vote through both nationwide remedies and more targeted remedies.[148] Section 2, which applies nationwide, prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race or color."[149] Section 5 provides for the targeted remedy of preclearance, which requires covered jurisdictions to obtain federal approval of any changes to election procedures.[150] Section 5 entails both primary rules against changes that have a discriminatory purpose or would abridge the right to vote of minority groups and remedial rules directing a covered jurisdiction to apply to the Attorney General or a special district court for preclearance.[151] Jurisdictions may bail out of Section 5's remedial scheme by showing they have not discriminated within the past decade and have made "constructive efforts to eliminate intimidation and harassment" of voters.[152]

NAMUDNO applied to bail out of Section 5 preclearance, but the district court held it was not a "political subdivision" eligible for bailout.[153] The Supreme Court reversed, invoking the principle of constitutional avoidance and concluding that the VRA permitted NAMUDNO to bail out.[154] That principle was relevant, the Court explained, because of "serious constitutional concerns" about Section 5's preclearance remedy.[155] What's past is prologue. What was to come was writ in the Court's celebration of the VRA's "*historic* accomplishments" and "[*p*]*ast* success."[156] The preclearance remedy, the Court intoned, "imposes current burdens and must be justified by current needs."[157]

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147. *Nw. Austin*, 557 U.S. at 196.

148. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

149. 52 U.S.C. § 10301(a) (West, Westlaw through P.L. 113-296).

150. *Id.* § 10304.

151. *See id.*

152. *Id.* § 10303(a)(1).

153. Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 232 (D.D.C. 2008).

154. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197 (2009) ("Our usual practice is to avoid the unnecessary resolution of constitutional questions.").

155. *Id.* at 204.

156. *Id.* at 201–02 (emphasis added).

157. *Id.* at 203.

2. Shelby County v. Holder

NAMUDNO's aphorism has the ring of a truth about remedies: The punishment must fit the crime. Or, as one of *Shelby County*'s defenders has stated, "remedies need to match wrongs."[158]

In *Shelby County*, the Court, with Chief Justice Roberts again penning the majority opinion, answered a constitutional question, but not quite the constitutional question it posed in *NAMUDNO*. Rather than topple Section 5 directly, the Court removed its foundation by striking down Section 4 of the VRA.[159] Section 4 provided the coverage formula for identifying jurisdictions that had to preclear changes under Section 5.[160] With no jurisdictions covered under Section 4, there remains nothing to preclear.

The Court did not deny that voting wrongs still exist or that Section 5 preclearance helps remedy them.[161] Rather, the Court held that Section 4's coverage formula violated a "tradition of equal sovereignty" under which Congress may not adopt a remedy that results in "disparate treatment of States" unless that remedy "makes sense in light of current conditions."[162]

Shelby County was unsurprising and shocking at the same time. Unsurprising because *NAMUDNO* all but wrote the fatal holding, which scholars had anticipated after Congress did not alter the coverage formula in 2006.[163] Shocking because the Court's newfound equal sovereignty doctrine invites comparisons of the Roberts Court with some of its infamous predecessors.[164]

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158. Ilya Shapiro, Shelby County *and the Vindication of Martin Luther King's Dream*, 8 N.Y.U. J.L. & LIBERTY 182, 188 (2013).

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

160. *See id.* at 2627.

161. *See id.* at 2619 ("[V]oting discrimination still exists; no one doubts that.").

162. *Id.* at 2624, 2629.

163. *See, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 483 (2014) ("Though the Court ultimately decided *Northwest Austin* on statutory grounds, it was abundantly clear then that . . . the Act was living on borrowed time."); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184 (offering a reading of *NAMUDNO* under which "the Voting Rights Act's time of demise will come").

164. James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote:* Shelby County v. Holder, 8 HARV. L. & POL'Y REV. 39, 39 (2014) ("[O]nce again, just as the Court did in *Dred Scott* [*v. Sanford*, 60 U.S. 393 (1857)], the Court in *Shelby County* held that the 'equal sovereignty' of the State of Alabama takes precedence over Congress's exercise of its explicit constitutional power to enforce the voting rights of the descendants of slaves.").

The Court's equal sovereignty doctrine had a flimsy foundation in precedent.[165] Its failure to specify the standard of review reflected poor judicial craftsmanship,[166] and its call for a congressional fix of Section 4 was illusive—or perhaps elusive.[167] Here Justice Clarence Thomas's concurring opinion, with typical candor, stated what the Court's opinion did not. Justice Thomas would have struck down Section 5 outright for one straightforward reason: It is no longer "necessary to give effect to the Fifteenth Amendment."[168] In insisting that "Congress must ensure that the legislation it passes to remedy [racial discrimination in voting] speaks to current conditions,"[169] the Court may have accomplished indirectly what Justice Thomas would have done directly. After all, the Court explained that a revised coverage formula based upon "current conditions" was but "an initial prerequisite" to determining whether "exceptional conditions still exist justifying" a preclearance remedy.[170] With gridlock in Congress, a new formula is not in the offing.[171]

B. An Unusual Right Against a Remedy

Shelby County's equal sovereignty holding created a right against a remedy. Chief Justice Roberts explained equal sovereignty in rights terms, repeatedly invoking state "integrity" and "dignity."[172] Conspicuously missing was any consequentialist justification for limiting Congress's discretion to treat states differently when remedying constitutional violations. The Court did not argue that equal sovereignty makes for better election lawmaking or better

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165. As precedent, the Court invoked the equal footing doctrine. *See Shelby Cnty.*, 133 S. Ct. at 2623 (citing Coyle v. Smith, 221 U.S. 559, 567 (1911)). In *South Carolina v. Katzenbach*, which upheld the preclearance regime shortly after its enactment, the Court explained: "The doctrine of the equality of the States, invoked by South Carolina, does not bar [selective preclearance], for that doctrine applies only to the terms upon which States are admitted to the Union, and to the remedies for local evils which have subsequently appeared." 383 U.S. 301, 328–29 (1966). The only contrary precedent? Yes, *NAMUDNO. See* 557 U.S. 193, 203 (2009); Zachary S. Price, NAMUDNO*'s Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 30–31 (2013).

166. *Cf.* Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 727 (2014) ("[T]he Court's decision to sidestep the standard of review reflects something other than doctrinal sloppiness.").

167. *See id.* at 737 ("[W]hen the *Shelby County* majority wrote that it was 'only' overturning the coverage formula and not Section 5 preclearance itself, the majority knew full well it was effectively overturning Section 5 because there will not be the political will to come up with a new coverage formula." (footnotes omitted)).

168. *Shelby Cnty.*, 133 S. Ct. at 2631 (Thomas, J., concurring).

169. *Id.* at 2631 (majority opinion).

170. *Id.*

171. *See* Hasen, *supra* note 166, at 737.

172. *See Shelby Cnty.*, 133 S. Ct. at 2623 (internal quotation marks omitted).

protections for voting rights, nor did the Court argue that preclearance was inefficient or ineffective.[173] Indeed, it said very little about how preclearance actually operated. Rather, the Court defined equal sovereignty as a state right against federal remedies for constitutional violations.[174]

To make sense of *Shelby County* requires recognizing the Court's commitment to equal sovereignty as a right, not just a policy-based limit on a remedy. The *Shelby County* majority treated the states as political communities with collective interests in "integrity" and "dignity" protected by a collective right to "equal sovereignty."[175] At oral argument, Chief Justice Roberts asked the U.S. Solicitor General, "[I]s it the government's submission that the citizens in the South are more racist than citizens in the North?"[176] That, coyly phrased as a question,[177] is the rights argument for stopping preclearance. Sometimes it takes a right to defeat a remedy.

The defeat in *Shelby County* was resounding. What exactly Congress must do to satisfy equal sovereignty should it try to restart preclearance is unclear. In reauthorizing the VRA in 2006, Congress "compiled thousands of pages of evidence" to justify reauthorizing preclearance in the covered jurisdictions.[178] As Justice Ginsburg's dissenting opinion described it, the record included "countless 'examples of flagrant racial discrimination' since the last reauthorization; Congress also brought to light systematic evidence that 'intentional racial discrimination in voting remains so

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173. At most, the Court offered this slogan: "'[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Id.* at 2623 (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)). The Court made no attempt, however, to tie this general justification for federalism to an equal sovereignty right against the preclearance remedy.

174. Of course, it might be objected that *Shelby County* did not create a right against a remedy insofar as it left open the possibility of preclearance should Congress alight on the right formula. That objection fails for two reasons. First, and most important, on its own terms, *Shelby County* recognizes equal sovereignty as a collective interest of the states that precludes Congress from using one type of remedy against some states unless Congress offers the right justification. Second, it is hard to believe that the Court was not aware that gridlock in Congress makes enactment of a new formula unlikely at best. *See* Hasen, *supra* note 166, at 737.

175. *See Shelby Cnty.*, 133 S. Ct. at 2623 (internal quotation marks omitted).

176. Transcript of Oral Argument at 41–42, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96).

177. The Chief Justice's question was a "debater's trick." Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1424 (2015). But it was not only that. The Chief Justice asked a similar question during the oral argument in *NAMUDNO*. *See id.* 1424 n.188 (citing Transcript of Oral Argument at 48, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (No. 08-322)). *Shelby County* shows how serious the Chief Justice was in framing the case thus.

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

serious and widespread in covered jurisdictions that section 5 preclearance is still needed.'"[179]

Alabama was among the covered jurisdictions with recent voting-rights violations.[180] These violations included intentional discrimination against minority voters.[181] Shelby County in particular had discriminated against African-American voters since the last VRA reauthorization.[182] In 2008, a city within Shelby County had ignored the Department of Justice's objections to a redistricting plan and only relented in the face of a Section 5 enforcement action.[183] Additionally, as recently as 2010, an FBI investigation revealed state senators "derisively refer[ring] to African-Americans as 'Aborigines' and talk[ing] openly of" their opposition to a ballot referendum because it might increase turnout among African-Americans.[184]

Thus, evidence in the record before Congress showed that voting wrongs persist, which the *Shelby County* majority admitted.[185] There was evidence that preclearance was effective in redressing racial discrimination in voting by the covered jurisdictions—evidence that, again, the Court did not deny.[186] Finally, Congress specifically found that the preclearance remedy was necessary to protect racial and language minorities' right to vote.[187] The Court did not dispute that finding either.

Under equal protection review, the record evidence would have been relevant and potentially dispositive. Individual rights against remedies are limited by the demand for adequate enforcement of the law. Generally, because differential treatment, without more, triggers only a forgiving

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179. *Id.* at 2636 (Ginsburg, J., dissenting). In a detailed review of the legislative record, Nathaniel Persily stated that the "hearings in the House and the Senate, as well as the committee reports, [were] replete with examples of voting rights violations in the covered jurisdictions." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 202 (2007). But, as Persily explained, the evidence of violations "range from Jim Crow-like suppression to more subtle forms of voting rights deprivations." *Id.* at 202. Unwilling to consider subtleties, the *Shelby County* majority demanded more Jim Crow discrimination than the record could reasonably be expected to show. *See Shelby Cnty.*, 133 S. Ct. at 2629. After all, as Persily notes, any assessment of Congress's record "must account for the fact that the successful operation of section 5 will prevent the emergence of the type of evidence that would best justify its continued operation." Persily, *supra*, at 206.

180. *See Shelby Cnty.*, 133 S. Ct. at 2646 (Ginsburg, J., dissenting).

181. *See id.*

182. *See id.*

183. *Id.*

184. *Id.* at 2647.

185. *See id.* at 2619 (majority opinion) ("[V]oting discrimination still exists; no one doubts that.").

186. *See id.* at 2639–40 (Ginsburg, J., dissenting).

187. *See id.* at 2636.

rational-basis review,[188] wrongdoers' claims of rights against remedies under the Equal Protection Clause usually fail.[189] An individual cannot even state an equal protection claim against a scheme that in design and operation imposes criminal penalties upon some speeding drivers and mere civil fines upon others,[190] but, surprisingly, a state or locality may win an equal sovereignty challenge to a scheme that imposes additional remedies based upon a record of past and present wrongs.

Moreover, the Court treated as irrelevant evidence that preclearance was necessary to redress voting rights violations within Shelby County, which brought a facial challenge to the VRA.[191] As Justice Ginsburg pointed out in her dissenting opinion, federal courts usually disfavor facial challenges.[192] The Court responded that Section 4 was "unconstitutional in all its applications" because, even if the formula covers jurisdictions uniquely likely to discriminate on the basis of race, "how it select[ed] the jurisdictions" was unconstitutional.[193] Apparently, a state has an equal sovereignty right against a remedy even where the state has repeatedly violated the Fifteenth Amendment and is uniquely likely to keep doing so.

If Shelby County had had a record of compliance with the Fifteenth Amendment and the VRA, it could have bailed out of coverage and the preclearance requirement.[194] But it did not have a record of compliance and it therefore could not bail out of coverage.[195] Still, the availability of a bailout was relevant to the constitutional question, even as the Court framed it. Congress found that the bailout process addressed concerns that preclearance would perpetually apply to jurisdictions where it had become obsolete.[196] Justice Ginsburg, writing in dissent, would have concluded that bailouts, as well as the ability of courts to bail-in uncovered

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188. *See supra* Part I.B.3.

189. Only where an unequal remedial scheme burdens a fundamental right or makes an invidious classification will it be subject to more searching review. *See infra* notes 225–226 and accompanying text (discussing *Shelby County* as premised upon "fundamental" right of states).

190. *See supra* notes 130–36 and accompanying text.

191. *See Shelby Cnty.*, 133 S. Ct. at 2629–30.

192. *See id.* at 2644–45 (Ginsburg, J., dissenting); *cf.* Dynalantic Corp. v. U.S. Dep't of Def., 885 F. Supp. 2d 237, 249–50 (D.D.C. 2012) (discussing disfavor for facial challenge in case involving constitutional attack on federal contracting program favoring "socially and economically disadvantaged businesses").

193. *Shelby Cnty.*, 133 S. Ct. at 2630; *see also* Hasen, *supra* note 166, at 733 ("[T]he *formula itself* takes on constitutional significance for reasons the majority does not articulate.").

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

195. *See id.* at 2621 (majority opinion) (explaining that Shelby County "has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county").

196. *See id.* at 2643–44 (Ginsburg, J., dissenting).

jurisdictions that violate the Fourteenth and Fifteenth Amendments, were adequate to protect a state's right to a remedial scheme sensitive to "changing conditions."[197]

Rights against remedies are usually shaped by considered judgments about the whole remedial scheme. Due process, for instance, limits remedies that might "intimidate" regulated parties from seeking judicial review.[198] In determining whether any particular scheme violates this due process right, courts have considered how the scheme operates in order to determine if it "affords adequate protection."[199] Equal sovereignty imposes a different kind of right, it appears. The *Shelby County* majority simply did not address Justice Ginsburg's argument that a bailout process adequately protected a state's equal sovereignty.

Thus, the Court treated Shelby County more like a third party claiming an equal protection right against reverse discrimination than as a recidivist jurisdiction with a history of voting wrongs. The Court's modern equal protection doctrine has placed substantial limits on the government's power to design race-conscious remedies that would burden "innocent third parties."[200] Some of the factors in those cases, particularly the "duration of the remedy,"[201] were also crucial to the outcome in *Shelby County*. Yet the *Shelby County* Court gave short shrift to bailout under the VRA, even though "the availability of waiver provisions"[202] has been important to determining if a race-conscious remedy violates the equal protection rights of innocent third parties.

Though the Court does not say so, perhaps equal sovereignty differs from other rights against remedies just as sovereign immunity distinguishes states from private defendants. Though one strain of sovereign immunity jurisprudence treats it as an instrumental limit on the right to a remedy, more recent decisions consider it a right of states against remedies that offend their dignity as separate sovereigns.[203] Timothy Zick has argued that the Rehnquist Court's sovereign immunity jurisprudence embodied equal protection for the states.[204] Zick contends that these decisions stress that Congress may not

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197. *Id.* at 2644; *see also* Hasen, *supra* note 166, at 735 ("Bailout . . . responds to 'current conditions.'").

198. *See Ex parte* Young, 209 U.S. 123, 147 (1908).

199. Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 390 (8th Cir. 1987).

200. Local 28 of Sheet Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 486 (1986).

201. *Id.*

202. *Id.*

203. *See* Vázquez, *supra* note 15, at 859–61 (distinguishing supremacy from state sovereignty strains of sovereign immunity jurisprudence); *see also* Alden v. Maine, 527 U.S. 706, 715 (1999) ("The States . . . . are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.").

204. *See* Zick, *supra* note 18, at 265–66.

treat the states like second-class sovereigns.[205] Put differently, sovereign immunity is a species of equal sovereignty.

Sovereign immunity significantly limits Congress's power to authorize private suits against states. In *Green v. Mansour*,[206] the Court stated that "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."[207] That might be taken to support judicial recognition of state rights against remedies without regard to the demand for an adequate system of remedies. Yet *Green* also explained that the Supremacy Clause entails limits on sovereign immunity: "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."[208]

The Court traditionally has limited sovereign immunity by leaving open remedies to redress state violations of federal law. The states' immunity does not bar the United States from enforcing federal law against the states.[209] Nor does it bar certain types of injunctive relief against state officials, including structural injunctions that constrain policymaking.[210] Thus sovereign immunity is limited by the demand for an adequate system of remedies. The *Shelby County* Court's indifference towards the demand for adequate remedies is not an outgrowth of state sovereign immunity.

Perhaps, however, *Shelby County* applied some form of "congruence and proportionality" review under *City of Boerne v. Flores*.[211] *Boerne* precludes Congress from enacting remedial legislation under Section 5 of the Fourteenth Amendment unless the statute is a "congruen[t] and proportional[]" response to identified constitutional violations by the states.[212] But there are a few problems with pointing to *Boerne* as the basis for equal sovereignty rights against remedies.

For one, the *Shelby County* majority never cited *Boerne*. For another, *Boerne* and its progeny concerned the Fourteenth Amendment and had described preclearance as a constitutional remedy under the Fifteenth Amendment.[213] Most importantly, the *Boerne* line of cases have been about

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205. *See id.*
206. 474 U.S. 64 (1985).
207. *Id.* at 68.
208. *Id.*
209. *See* Alden v. Maine, 527 U.S. 706, 755 (1999) ("Sovereign immunity . . . does not bar all judicial review of state compliance with the Constitution and valid federal law.").
210. *See id.* at 756–57.
211. 521 U.S. 507 (1997).
212. *Id.* at 520.
213. *See, e.g.*, *id.* at 518. To be fair, *Boerne* did not sharply distinguish the Fourteenth and Fifteenth Amendments either. Instead, it drew liberally from *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), to elaborate the congruence and proportionality test for Congress's power under Section 5 of the Fourteenth Amendment. *See Boerne*, 521 U.S. at 519.

distinguishing between remedial legislation, which Section 5 of the Fourteenth Amendment authorizes, and substantive legislation, which is not valid under Section 5 because it aims to change the meaning of constitutional rights.[214] To distinguish the two requires careful examination of the record before Congress.[215] The question in *Shelby County* was different, and not simply because *Boerne* may not have applied. Instead of examining the record to determine whether the VRA was remedial legislation, the Court ignored the record and asked whether the preclearance remedy was unfairly remedial.[216] Though Justice Thomas' separate opinion argues that preclearance burdened constitutional conduct,[217] Chief Justice Roberts' opinion for the Court did not shape the contours of the equal sovereignty right that way. Indeed, the Court admitted that violations of the Fifteenth Amendment still exist in the covered jurisdictions.[218]

Equal sovereignty imposes constraints that sovereign immunity and congruence and proportionality review do not. The Court held that Congress's failure to use the right formula was itself "fatal."[219] Whether, as the United States argued, the formula actually identified states where preclearance is necessary was irrelevant. Instead, getting the right formula was but "an initial prerequisite to a determination" that preclearance remains a necessary part of the system of constitutional remedies.[220]

The Court's logic applies to constitutional remedies even where they are directed at constitutional violations. Under *Shelby County*, Congress may not use preclearance to address some states' violations of the Fifteenth Amendment if that remedy might be equally appropriate in other states. As Justice Ginsburg noted in dissent, "the defenders would have to disprove the existence of a comparable need elsewhere."[221] Getting the formula right is no mean task.

At a minimum, this newfound equal sovereignty right against remedies is unusual and troubling. Equal sovereignty requires the Court to strike

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214. *See Boerne*, 521 U.S. at 519–20 (attempting to draw "the line between measures that remedy or prevent unconstitutional actions and measures that make a change in substantive law"); Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 109 n.256 (2007) (discussing *Boerne*'s progeny).

215. *See* Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1709 (2002) (analogizing *Boerne* standard of review to review of record of agency rulemaking under the Administrative Procedure Act).

216. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013).

217. *See id.* at 2632 (Thomas, J., concurring).

218. *See id.* at 2619 (majority opinion).

219. *See id.* at 2628.

220. *Id.* at 2631.

221. *Id.* at 2650 (Ginsburg, J., dissenting); *see also* Hasen, *supra* note 166, at 733.

down a constitutional remedy without considering whether that remedy is necessary to redress constitutional violations.[222]

III. LOCATING EQUAL SOVEREIGNTY WITHIN THE JURISPRUDENCE OF CONSTITUTIONAL REMEDIES

The *Shelby County* Court did not explain how equal sovereignty relates to the jurisprudence of constitutional remedies. Equal sovereignty has the potential to undercut the principle that the system of constitutional remedies must be sufficient to ensure the rule of constitutional law.

A. Interpreting Shelby County

Shelby County suggests that states have uniquely robust sovereign rights against remedies. Sovereign immunity might be cited to support the notion that state rights against remedies are less sensitive than individual rights against remedies to the demand for adequate enforcement.[223] *Shelby County*,

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222. This criticism of the Court's reasoning could be attributed to a disagreement about framing the constitutional problem in *Shelby County*. *See* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 47–48. The *Shelby County* majority concluded that the Constitution requires Congress to identify differences between the states in order to impose preclearance upon some of them. The dissent disagreed, though it also discussed the well-known *Katz* study, reasoning that the study provided a basis for Congress to conclude "that the coverage formula continues to identify the jurisdictions of greatest concern." *Shelby Cnty.*, 133 S. Ct. at 2643 (Ginsburg, J., dissenting). The Court might have said that the Katz study was flawed and reliance on it irrational, as Richard Pildes has suggested. *See* Pildes, *supra*, 49 & n.151. If so, the study could not sustain Congress's burden to show that a departure from equal sovereignty was warranted to satisfy the demand for adequate remedies.

The Court, however, said none of that. It held that it did not need to consider the record because Congress used the wrong formula. It therefore did not explain why the *Katz* study failed to show differential preclearance was necessary to redress constitutional violations. Rather, as Rick Hasen has pointed out, the "majority goes even further than requiring that there be real differences in levels of race discrimination in voting between covered and uncovered jurisdictions." Hasen, *supra* note 166, at 733. The Court might have reasoned that Section 2 of the VRA, which applies nationwide, suffices to protect against racial discrimination in voting. At oral argument, Justice Anthony Kennedy raised that possibility. *See* Transcript of Oral Argument, *supra* note 176, at 37. The Court's opinion noted that Section 2 remains in effect. *See* 133 S. Ct. at 2631. Congress, however, found that Section 2 alone is not adequate to protect voting rights in the covered jurisdictions. *See id.* at 2640 (Ginsburg, J., dissenting). The Court did not address that finding, which it would have had to do in order to hold that Section 5 preclearance is no longer necessary in light of Section 2.

223. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 685–86 (1999) ("In the sovereign-immunity context, . . .

however, expands states' rights against remedies beyond what sovereign immunity entails without reconciling this newfound right with the principle that the Constitution requires "the necessary judicial means to assure [state] compliance with the Constitution and laws."[224]

A more limited reading suggests that there is something unique about equal sovereignty as a state right against a remedy. The *Shelby County* Court refers to equal sovereignty as a "'fundamental principle'"[225] of constitutional law, one "'essential to the harmonious operation of the scheme upon which the Republic was organized.'"[226] Whatever other rights against remedies the states enjoy, their right to equal sovereignty is particularly robust. This right makes a showing that differential treatment is necessary to enforce constitutional law irrelevant unless and until the federal government has shown it used the right criteria for distinguishing the states.

Understood in this way, *Shelby County* has the potential to significantly limit Congress's legislative power. Both Justice Ginsburg and subsequent commentators have been concerned about constraints on Congress, which treats states differently all the time.[227] But as the *Shelby County* majority pointed out, preclearance was unusual;[228] Congress usually makes the same suite of remedies available against all the states and thus leaves differential treatment to prosecutorial and judicial discretion.[229]

Equal sovereignty may disrupt enforcement of federal law even more significantly if applied to the Executive Branch and the Judiciary. States have already begun to raise equal sovereignty as a bar to executive and judicial action. Then-Texas Attorney General, now Governor, Greg Abbott has argued that the Obama "administration's litigious political strategy" of VRA enforcement uses "the legal system as a sword to wage partisan battles" against specific states "rather than a shield to protect voting

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'[e]venhandness' between individuals and States is not to be expected: '[T]he constitutional role of the States sets them apart from other employers and defendants.'" (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 477 (1987)).

224. Pennsylvania v. Union Gas Co., 491 U.S. 1, 33 (1989) (Scalia, J., concurring in part and dissenting in part).

225. *Shelby Cnty.*, 133 S. Ct. at 2623 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

226. *Id.* (quoting Coyle v. Smith, 221 U.S. 559, 580 (1911)).

227. *See id.* at 2649 (Ginsburg, J., dissenting); Abigail B. Molitor, Comment, *Understanding Equal Sovereignty*, 81 U. CHI. L. REV. 1839, 1878–82 (2014).

228. *See Shelby Cnty.*, 133 S. Ct. at 2624.

229. *See id.*

rights."[230] During the 2014 "voting wars,"[231] Texas argued that a court may not allow the Department of Justice to use Section 3 of the VRA to bail-in states to preclearance—a widely-touted post-*Shelby County* strategy[232]—because the Department of Justice's enforcement of the VRA has been too "partisan."[233] This argument trades on *Shelby County*'s equal sovereignty principle as applied to executive and judicial action to remedy voting rights violations.

One way to limit *Shelby County*'s reach over executive and judicial action is to distinguish disparate treatment from disparate impact. *Shelby County* stated that "equal sovereignty remains highly pertinent in assessing . . . disparate treatment of States,"[234] and the Solicitor General conceded disparate treatment, which was apparent from the face of the VRA.[235] If equal sovereignty creates rights against disparate impact, then typical executive decisions to sue one state but not others, or judicial decisions that impose greater relief against one state than relief granted in similar cases, might be subject to searching review under *Shelby County*. An equal sovereignty doctrine limited to disparate treatment would not reach as far.

So far, the lower courts have limited equal sovereignty to disparate treatment.[236] Traditions of judicial deference to prosecutorial discretion

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230. Greg Abbott, *Obama's Scheme to Take Over Texas*, WASH. TIMES (July 30, 2013), http://www.washingtontimes.com/2013/jul/30/obamas-scheme-to-take-over-texas/ [https://perma.cc/45DC-BZVK].

231. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012) (describing "voting wars" that surround every election in form of litigation over electoral outcomes).

232. *See, e.g.*, Michael Ellement, *Preclearance Without Statutory Change: Bail-In Suits Post*-Shelby County, YALE L. & POL'Y REV. INTER ALIA (Sept. 7, 2013, 11:45 AM), http://ylpr.yale.edu/inter_alia/preclearance-without-statutory-change-bail-suits-post-shelby-county [https://perma.cc/9Y3N-LHW5].

233. *See* Rick Hasen, *Texas's Unusual Defense in Voter ID Case: DOJ is Too Partisan*, ELECTION L. BLOG (Aug. 12, 2014), http://electionlawblog.org/?p=64248 [https://perma.cc/KK89-RELJ] (discussing case and linking to briefing). Texas based its argument on a recent report by the Department of Justice's Office of the Inspector General, which did not find a pattern of partisan motivation in specific enforcement decisions but did find partisan disagreements about enforcement priorities at the Department. U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION 4, 71, 91, 106, 115, 118 (2013).

234. *Shelby Cnty.*, 133 S. Ct. at 2624.

235. *See id.* at 2628 ("[T]he Government contends that the formula is 'reverse-engineered': Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them." (emphasis in original)).

236. *See* Mayhew v. Burwell, 772 F.3d 80, 94 (1st Cir. 2014) (suggesting that equal sovereignty right applies only where Congress has singled out a state, not where "Congress came up with the criteria without regard to which states would be covered by their application"); United States v. Heying, No. 14–CR–30, 2014

loom large here. But courts might treat disparate impact as evidence of disparate treatment, thus extending *Shelby County* without holding that equal sovereignty encompasses a disparate impact right.

There is a third reading of *Shelby County* under which state equality cannot alone justify unsparing review of federal action. The preclearance remedy might be thought to have a troubling resemblance to injunctions that impose prior restraints on individual speech. One precludes lawmaking without Department of Justice or judicial approval, while the other precludes speech without a court's leave. Just as injunctions that create prior restraints on speech may violate a fundamental First Amendment right, so too, *Shelby County* suggests, a remedy that imposes prior restraints on state lawmaking creates serious constitutional concerns.[237] Equal sovereignty may not entail searching scrutiny of all disparate treatment of states, but it does so when fundamental states' rights are at stake.

The Court's otherwise puzzling invocation of the Supremacy Clause supports this reading. That clause provides that the Constitution, statutes, and treaties are "the supreme Law of the Land."[238] Looking to the Clause's legislative history, *Shelby County* reminded us that the Framers rejected a federal "negative" on state laws "in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause."[239] The Clause, the Court explained, reflects a structural principle under which state autonomy from prior restraints on lawmaking is a fundamental right.[240] The Court stated that the "Federal Government does not . . . have a general right to review and veto state enactments before they go into effect," and then went on to state that, "[o]utside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives."[241] Most surprisingly, the Court asserted, "the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens."[242]

WL 5286153, at *16 (D. Minn. Aug. 15, 2014) (considering government's argument that "equal sovereignty principles have no relevance in this case, where the statutory scheme at issue treats all states equally and where Defendants' invoke equal sovereignty principles to attack the legitimacy of prosecutorial discretion").

237. Shelby County's counsel argued at oral argument that preclearance was an unconstitutional "prior restraint." *See* Transcript of Oral Argument, *supra* note 176, at 15.

238. U.S. CONST. art. VI, cl. 2.

239. *Shelby Cnty.*, 133 S. Ct. at 2623.

240. *Id.*

241. *Id.*

242. *Id.* How this statement of federal power is consistent with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819), and much of the constitutional structure built upon it is not apparent.

Phrased differently, preclearance—the power "to review and veto state enactments before they go into effect"[243]—is inconsistent with the Supremacy Clause and beyond the Federal Government's power unless "specifically granted" by the Constitution.[244] Preclearance under the VRA is therefore a "drastic departure from basic principles of federalism" because it "require[s] States to obtain federal permission before enacting any law related to voting."[245] The arguments against Section 5's constitutionality therefore "have a good deal of force," apart from any argument based upon on equal sovereignty.[246]

Reading *Shelby County* as concerned solely with prior restraints on state lawmaking seems to narrow the opinion considerably. The holding applies only to one type of remedy, much in the way that the robust, arguably absolute, right against injunctions in defamation cases is limited to that remedy. The Court repeatedly affirmed that preclearance is an extraordinary remedy.[247] Perhaps we should take it at its word.[248]

This reading still may transform the law of constitutional remedies against states. Consider structural injunctions to redress state violations of constitutional law. Like preclearance, these injunctions may entail prior restraints on, and judicial approval of, state and local lawmaking.[249] For this reason, some commentators have argued that structural injunctions are inconsistent with the remedial authority of federal courts.[250] *Shelby County* supports these arguments.

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243. *Shelby Cnty.*, 133 S. Ct. at 2623.
244. *Id.*
245. *Id.* at 2618.
246. *Id.* at 2625.
247. *See, e.g.*, *id.* at 2618–19.
248. In a case challenging Commerce Clause legislation that permitted Nevada special exemptions from federal gambling statutes, the Third Circuit read *Shelby County* in this way. *See* Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 239 (3d Cir. 2013) ("[T]here is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of 'sensitive areas of state and local policymaking.'" (quoting *Shelby Cnty.*, 133 S. Ct. at 2624)).
249. *See* Doug Rendleman, Brown II*'s "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1596 (2004). Structural injunctions might be distinguished from preclearance, however, because they are based upon a judicial finding of a current wrong in a specific case.
250. *See* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1164 (1996).

B. Shelby County *and Post-Racial Constitutional Remedies*

Shelby County recognizes a new state right against a remedy, one that protects a state even where there is evidence that the remedy is necessary to ensure adequate enforcement of constitutional law against that state. Whatever its merits, this doctrine promises changes in the jurisprudence of constitutional remedies.

Post-racialism helps to make sense of this new right against a remedy and the changes it may entail. The *Shelby County* majority made no secret of its assumption that America has entered a post-racial era, repeating several times some version of the refrain that "our Nation has made great strides."[251]

In a post-racial imaginary, America has emerged from its racist past into a present in which "racial discrimination is rare" and government, by considering race in its decision making, perpetuates this "aberrant behavior."[252] The Roberts Court's relationship with post-racialism is complex, especially because Justice Kennedy, the swing voter, apparently prefers a more nuanced post-racial jurisprudence than his conservative colleagues.[253] But *Shelby County* is not nuanced; instead, it "reflects the complete dissolution of the racial discrimination consensus" regarding voting rights.[254] One challenge is to rethink the meaning of rights in a post-racial era.[255] Another challenge is to understand what post-racialism means for the

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251. *Shelby Cnty.*, 133 S. Ct. at 2626.

252. Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Racial Equal Protection?*, 98 GEO. L.J. 967, 968 (2010) (defining post-racialism).

253. *Compare* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507, 2526 (2015) (holding, in an opinion by Justice Kennedy, that Fair Housing Act reaches disparate impact claims and rejecting dissenting views of four conservative Justices), *with* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782–83 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (explaining disagreement with both plurality and dissenting opinions on school districts' authority to adopt school integration programs that take race into account).

254. Uriel-Charles & Fuentes-Rohwer, *supra* note 177, at 1420.

255. *See, e.g.*, Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: Understanding Emerging Means of "Obama" in Anti-Discrimination Law*, 87 IND. L.J. 325, 328 (2012) (analyzing anti-discrimination cases in workplace settings and identifying "continuing need for judicial protection against various discriminatory practices"); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1789 (2012) (arguing that relationship between colorblindness and intent in Fourteenth Amendment doctrine has been misunderstood and that both work in tandem "to blind" Justices "to continued racism"); Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 118 (2012) (arguing for "more race-sensitive search incident to arrest doctrine"); Reva B. Siegel, *From Colorblindness to Antibalkinization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2010) ("focus[ing] on the views of Justices in the middle of the Supreme Court" to describe "emerging . . . view" of equality "more

jurisprudence of remedies and the foundational commitment to a system of remedies adequate to ensure the rule of constitutional law.[256]

What would a post-racial jurisprudence of constitutional remedies look like? If *Shelby County* is any indication, its most troubling feature will be this: The effectiveness of a remedy against race discrimination will be a reason to find the remedy unconstitutional. Typically, when a defendant challenges a remedy on rights or policy grounds, the remedy's effectiveness at achieving the rule of law is a countervailing consideration. This is not so in a post-racial vision of constitutional remedies, where "the very success" of a remedy "demands its dormancy."[257]

CONCLUSION

Equal sovereignty in *Shelby County* thus trades on the power of rights and the "impulse toward post-racialism"[258] within our constitutional tradition. Yet within that tradition, rights against remedies, like rights to remedies, are not absolute. Instead, evidence that a remedy is necessary to redress wrongs and to enforce the law is important to assessing a claim of a right against a remedy. The *Shelby County* Court's newfound equal sovereignty right is, therefore, unusual. What counts as an adequate system of constitutional remedies in an era of equal sovereignty remains to be seen.

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concerned with social cohesion than with colorblindness"); Barnes et al., *supra* note 252, at 972 (exploring "how we might rethink equal protection doctrines—intentional discrimination and disparate impact theory—in light of post-racial commitments"); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1617–21 (2009) (discussing possibility of "post-racial Court" and jurisprudential principles it might adopt).

256. *See, e.g.*, Fallon & Meltzer, *supra* note 13, at 1790.

257. *Shelby Cnty.*, 133 S. Ct. at 2632 (Ginsburg, J., dissenting).

258. Barnes et al., *supra* note 252, at 972.