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Reflections on Justice Thurgood Marshall and Shelby County v. Holder

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INTRODUCTION

In 2013, close to 50 years after upholding the Voting Rights Act of 1965 ("Act") against its first constitutional challenge,[1] the United States Supreme Court declared a central provision of the Act unconstitutional. In

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1. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966). The Court upheld the Act as amended against constitutional challenge several times. *See* Georgia v. United States, 411 U.S. 526 (1973); City of Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterey Cnty., 525 U.S. 266 (1999).

Shelby County v. Holder,[2] the Court struck down Section 4 of the Act that prescribed the "formula" for determining which states would be subject to, or "covered,"[3] by the preclearance requirement of Section 5.[4] Five Justices agreed that, despite numerous congressional findings of persistent discrimination,[5] "current conditions" in American society no longer warranted the application of the current coverage formula.[6] Although the majority recognized that "voting discrimination still exists," the Court held that, in light of current social and political conditions surrounding the right to vote, the scope and reach of the remedial measures imposed unjustified burdens on state governments and political subdivisions covered under Section 4.[7] Therefore, Section 4 no longer satisfied "constitutional requirements" for the use of such "extraordinary measures" as the coverage formula in issue,

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2. 133 S. Ct. 2612 (2013).

3. *See* 42 U.S.C. § 1973b(b) (2006) (currently codified as 52 U.S.C.A. § 10301(West, Westlaw through P.L. 113-296)). The coverage formula calculated coverage by looking at whether on November 1, 1964 (and later, 1968) the state or political subdivision maintained a "test or device" that restricted the opportunity of a citizen to register, as evidenced by census data. *Section 4 of the Voting Rights Act*, U.S. DEP'T. JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php#formula [http://perma.cc/S5J4-JWPR] (last updated Aug. 8, 2015). Section 5 provides that no change in voting procedures can take effect without approval by specified federal authorities or the court. *See* 52 U.S.C.A. § 10304 (West, Westlaw through P.L. 113-296).

4. Section 5 empowers the federal government to send federal officials into covered jurisdictions, primarily in the South, to take over voter registration. *See* 52 U.S.C.A. § 10304. It also suspends the use of discriminatory voting practices and requires covered jurisdictions to seek permission from the Justice Department or the federal court before implementing any change that affects voting. *Id.*; *see also* David Pildes, *Introduction* to THE FUTURE OF THE VOTING RIGHTS ACT, at xi-xii (David L. Epstein et al. eds., 2006) (discussing of the historical context and the relevant provisions of the Voting Rights Act); *About Section 5 of the Voting Rights Act*, U.S. DEP'T. JUSTICE, http://www.justice.gov/crt/about/vot/sec_5 /about.php [http://perma.cc/DKW2-DCZV] (last visited August 9, 2015); *Areas Covered by Section 5 of the Voting Rights Act*, WASH. POST (June 25, 2013), http://www.washingtonpost.com/wp-srv/special/politics/section-five-voting-rights-act-map/ [http://perma.cc/WM33-YBLC]; *cf.* Jalila Jefferson-Bullock, *The Flexibility of Section 5 and the Politics of Disaster in Post-Katrina New Orleans*, 16 J. GENDER RACE & JUST. 825 (2013) (asserting that Section 5 should be strengthened to address the needs of minority voters during large-scale disaster or displacement).

5. Congress amended and reauthorized the Voting Rights Act in 1970, 1975, 1982, and 2006. *History of Federal Voting Rights Law*, U.S. DEP'T. JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_b.php [http://perma.cc/3XSB-H4LJ] (last visited August 9, 2015). Congress named the 2006 reauthorization *The Fannie Lou Hammer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, 120 Stat. 577 (2006).

6. *See Shelby Cnty.*, 133 S. Ct. 2612.

7. *Id.* at 2619.

which resulted in regular federal intervention causing "disparate treatment of the States."[8]

Although the decision did not render the Act unconstitutional in its entirety,[9] the Court's ruling crippled the effectiveness of the legislative scheme, leaving the Act in grave condition.[10] The ruling crippled the Act by leaving the voters of states and political subdivisions previously subject to Section 4 uncovered. Almost immediately after the Court rendered the decision in *Shelby County*, a number of state and local jurisdictions formerly covered under Section 4 of the Act implemented changes to voting practices that would have otherwise required preclearance under the Act. One common change that had been found to restrict voting opportunities was the imposition of voter identification laws even when there was virtually no evidence of voter fraud.[11] Other potentially

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8. *Id.* at 2624, 2627–31.

9. Other provisions of the Act remained intact. Section 2 of the Act applies nationwide and bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C.A. § 10301(a) (West, Westlaw through P.L. 113-296). Section 2 allows private and government plaintiffs to make affirmative challenges to voting practices that dilute the voting strength of and discriminate against minority citizens (Black, Latino, Indian, etc.). Thornburg v. Gingles, 478 U.S. 30, 43 (1986). The Court adopted a "totality of the circumstances" test that gave plaintiffs greater latitude for proving discriminatory effect than the previous requirement of showing evidence of intent. *See id.* at 43. Section 3 of the Act, referred to as a "pocket trigger" or "bail in" provision, authorizes federal courts to place states and political subdivisions found in violation of the Fourteenth or Fifteenth Amendments under preclearance. *See* Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2010–11 (2010) (proposing the use of Section 3 after the Court's decision in *Northwest Austin Municipality Utility District No. One v. Holder*, 557 U.S. 193 (2009)); *see also* Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, AM. PROSPECT (Aug. 19, 2013), http://prospect.org/article/get-know-section-3-voting-rights-act [http://perma.cc/GW93-V893] (noting the infrequent use of the provision and the difficulty of proving intentional discrimination as required under the Fourteenth Amendment).

10. *See* Barbara Arnwine & Marcia Johnson-Blanco, *Voting Rights at a Crossroads: The Supreme Court Decision in* Shelby *is the Latest Challenge in the 'Unfinished March' to Full Black Access to the Ballot*, ECON. POL'Y INST. (Oct. 25, 2013), http://www.epi.org/publication/voting-rights-crossroads-supreme-court-decision/ [http://perma.cc/ZV3E-5ADE] (A response from the director of leading civil rights organization, the Lawyers Committee for Civil Rights). *But see* Ilya Shapiro, Shelby County *and the Vindication of Martin Luther King's Dream*, 8 N.Y.U. J.L. & LIBERTY 182, 193 (2013) (supporting the decision as an acknowledgement that the "cancer" or discrimination against black voters has been eradicated).

11. *See, e.g.*, Rick Lyman, *Texas' Stringent Voter ID Law Makes a Dent at Polls*, N.Y. TIMES (Nov. 6, 2013), http://www.nytimes.com/2013/11/07/us/politics/texas-stringent-voter-id-law-makes-a-dent-at-polls.html?_r=0 [http://perma.cc/B7Q7-DLLG]. Texas reenacted the identification requirement shortly after *Shelby County*. *See id.* The law required valid identification with the same or similar name.

discriminatory changes in local voting laws included modifications to early voting practices and procedures and the elimination of certain polling places, both of which would have otherwise required preclearance or federal court approval.[12] In addition to ushering in sweeping changes in voting practices, *Shelby County* also made the avenues for challenging changes more narrow and costly. The Attorney General of the United States, civil rights organizations, or individuals would have to initiate expensive and protracted litigation to challenge changes under Section 2 or Section 3[13] or raise pre-Act claims seeking affirmation of the right to vote on constitutional grounds.[14]

The visceral reactions to *Shelby County* by proponents of the Act suggest that the Roberts Court departed from a more favorable judicial interpretation of the legislation. The outcome in *Shelby County*, however, was not surprising for at least three reasons. First, the Roberts Court has consistently worked to solidify post-racial constitutionalism in the Court's

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Id. The law required people to sign affidavits to their name if it was not the exact same on the identification and the voting list. *Id.*

12. *See* Tomas Lopez, *'*Shelby County*': One Year Later*, BRENNAN CENTER FOR JUST. (June 24, 2014), http://www.brennancenter.org/analysis/shelby-county-one-year-later [http://perma.cc/D6UE-V2MV]. In North Carolina, immediately after the *Shelby County* opinion was released, the district courts dismissed all Section 5 cases. Myrna Pérez, *After* Shelby County *Ruling, Are Voting Rights Endangered?*, BRENNAN CENTER FOR JUST. (Sept. 23, 2013), https://www.brennancenter.org/analysis/after-shelby-county-ruling-are-voting-rights-endangered [https://perma.cc/L4ED-2CM6]; Laura Leslie, *NC Voter ID Bill Moving Ahead with Supreme Court Ruling*, WRAL.COM (June 25, 2013), http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/ [http://perma.cc/G3W5-BAGP]; *see also Voting Law Roundup 2013*, BRENNAN CENTER FOR JUST. (Dec. 19, 2013), http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup [http://perma.cc/J8E9-7G97].

13. *See supra* note 9.

14. *See* South Carolina v. Katzenbach, 383 U.S. 301, 311–13 (1966) (summarizing challenges brought under the Fifteenth Amendment to racially discriminatory voting practices and noting the limitations of case-by-case litigation); *see, e.g.*, Terry v. Adams, 345 U.S. 461, 463 (1953) (banning as unconstitutional under the Fifteenth Amendment the practice of private white primaries with the purpose or effect of denying black voters "any voice or part in the election" of county officials); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (prohibiting under Fifteenth Amendment racial gerrymandering that resulted in denying black citizens the right to vote and other benefits); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (declaring the required poll tax in state elections unconstitutional under the Fourteenth Amendment); *see also* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (announcing the "one-person-one-vote" principle, where the Court held that, in the reapportionment process, the Constitution demanded "no less than substantially equal state legislative representation for all citizens" because the right to direct representation was "a bedrock of our political system").

jurisprudence on race and fundamental rights.[15] Second, the outcome in *Shelby County* was predictable because the Court rehearsed the arguments against the constitutionality of the Act four years earlier. In *Northwest Austin Municipality v. Holder*,[16] cited extensively in *Shelby County*, a Texas utility district had to follow rules of preclearance despite there being no evidence of activities that gave rise to the need for federal preclearance.[17] The Court decided that the area was not a political subdivision for the purposes of the Voting Rights Act, but declined to rule on the constitutionality of Section 5, citing the need for judicial deference.[18] However, after finding that the Act did not apply, the Court went on to say that "the Act imposes current burdens and must be justified by current needs."[19] Third, a retrospective view of Supreme Court decisions on the Act confirms the Court's historic ambivalence towards enforcing the Act starting with the first decision in 1969.[20]

This Article takes the retrospective view of the Court's earlier jurisprudence on the Act through the eyes of Associate Justice Thurgood Marshall to prove the predictability of the *Shelby County* decision. Part I of this Article explores how the Court has differed on two fundamental constitutional questions raised by civil rights statutes: the appropriate balance between state and federal authority and whether Congress or the Court has the authority to determine the constitutional necessity for the Act. These important issues are at the heart of the differing judicial perspectives on the Act. Part II details the Court's response to the strategies employed by covered jurisdictions to resist congressional authority and push the federalism balance in favor of local control. Many of these opinions were rendered while Justice Marshall sat on the Court and illustrate the historic ambivalence towards the Act. Part III contrasts the prevailing norms on the Roberts Court of color-blind equality and post-racialism that undergird *Shelby County* with Justice Marshall's approach to achieving racial equality under the Act. While Marshall would have reached a different result, the majority in *Shelby County* reached a conclusion consistent with

15. *See infra* Part III.

16. 557 U.S. 193, 202–06 (2009) (raising the federalism and equal sovereignty concerns as dicta that became doctrine in *Shelby County*).

17. *Id.*

18. *See id.* at 204. In his brief concurrence in *Shelby County*, Justice Thomas once again urged the Court to declare Section 5 unconstitutional: "By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision." 133 S. Ct. 2612, 2632 (2013) (Thomas, J., concurring); *see also Nw. Austin*, 557 U.S. at 212 (Thomas, J., concurring) (asserting that Section 5 is unconstitutional); Perry v. Perez, 132 S. Ct. 934 (2012) (Thomas, J., concurring) (stating that Section 5 is unconstitutional).

19. *Shelby Cnty.*, 133 S. Ct. at 2615 (quoting *Nw. Austin*, 557 U.S. at 203).

20. *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (addressing the failure of several jurisdictions in Mississippi to seek preclearance of voting changes under the new law).

earlier decisions on racial equality. The Article concludes that the choice made to declare Section 4 unconstitutional will lead to the dilution of minority voting strength absent a congressional response to the Court.

I. CONSTITUTIONALITY AND REAUTHORIZATION PRIOR TO *SHELBY COUNTY*

Two primary questions have presented themselves in civil rights law since the Reconstruction Era. First, the Court has grappled with how to respect state authority while protecting the individual rights of citizens. Second, the Justices have disagreed about whether it is the Court or Congress who has the authority to strike the acceptable balance. Both issues were presented in *Shelby County*.

A. The Federalism Balance

After the ratification of the Fifteenth Amendment, former states of the Confederacy[21] ignored the Reconstruction Amendments and persistently engaged in a systematic campaign to deny African-American citizens the right to vote.[22] Prior to the Act, the Court served as the only avenue for stemming the tide of disfranchisement by allowing challenges to these laws and practices under Section 1 of the Fifteenth Amendment.[23] The length and expense of litigation, however, made it impractical to move local control closer to federal scrutiny.[24] Finally, in 1965, Congress offered a landmark political response by passing the Voting Rights Act. The Voting Rights Act shifted the balance of power toward federal intervention

21. "Former states of the Confederacy" is a legal term in civil rights law that refers to the most recalcitrant states against racial equality and who were instead in perpetual support of states' rights. The states that enacted the most stringent voter registration qualifications following the Civil War included Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. *See* South Carolina v. Katzenbach, 383 U.S. 301, 310–11 (1966).

22. *See id.* at 311–14 (describing voting laws requiring proof of literacy, completion of forms, poll taxes, gerrymandered voting districts, exclusionary primary elections and other voting practices that conspired to dilute the voting strength of African Americans).

23. *See, e.g.*, *Shelby Cnty*., 133 S. Ct. 2612; *Nw. Austin*, 557 U.S. 193.

24. *See* H.R. REP. NO. 94-196, at 57–58 (1975) ("Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. Congress decided 'to shift the advantage of time and inertia from the perpetrator of the evil to its victim . . . by freezing election procedures in covered areas unless the changes can be shown to be nondiscriminatory." (internal quotation marks omitted)).

in state and local elections.[25] It provided a remedy for those affected by the entrenched, horrific voting practices employed in the South and across the country, which were designed to intimidate African-American voters and otherwise deny them the fundamental right to vote.[26] The Act did a number of other things, including shifting the burden of justifying voting practices to the states and shifting significant power to federal authorities to regulate state and local voting practices through administrative and judicial oversight in covered jurisdictions.[27]

The Voting Rights Act survived its first challenge in *South Carolina v. Katzenbach*, where the Court held that the Act did not encroach on state authority.[28] In *Katzenbach*, South Carolina filed a bill of complaint seeking a declaration that the preclearance provisions of the VRA were unconstitutional and requested an injunction against enforcement of the Act in South Carolina. The Justices characterized the conduct of state officials in thwarting the efforts of African-American citizens to vote as an "unremitting and ingenious defiance of the Constitution."[29] Additionally, the Court held that the shift in the balance of power toward federal oversight was permissible.[30] What Chief Justice Roberts refers to in *Shelby County* as "a drastic departure from basic principles of federalism"[31] in the Act guaranteed that all citizens could vote without fear or the use of "second generation" hindrances to the ballot box.[32]

The second major challenge came against the 1975 reauthorization of the Act by Congress, which would sunset after seven years.[33] *City of Rome v. United States* presented the Court with two issues: the constitutionality of the Voting Rights Act and its applicability to multiple electoral changes and annexations made by leaders in Rome, Georgia.[34] In a declaratory judgment

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25. *Congress and the Voting Rights Act of 1965*, NAT'L ARCHIVES, http://www.archives.gov/legislative/features/voting-rights-1965/ [http://perma.cc/M8M2-NZCM] (last visited Aug. 27, 2015).

26. *See Katzenbach*, 383 U.S. at 314. The Civil Rights Act of 1957, the Civil Rights Act of 1960, and Title I of the Civil Rights Act of 1964 proved ineffective in curbing racial discrimination against voters. *Id.*

27. *Id.*

28. *Id.* at 323; *accord* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding Section 4(e) of the Voting Rights Act under the Fourteenth Amendment).

29. *Katzenbach*, 383 U.S. at 309.

30. *See id.* at 337.

31. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2618 (2013).

32. *Id.* at 2635–36 (Ginsburg, J., dissenting) (stating that "[s]econd-generation barriers come in various forms" and include racial gerrymandering, at-large voting, and discriminatory annexation used to dilute the voting strength of groups protected under the Act).

33. City of Rome v. United States, 446 U.S. 156 (1980). The Act was reauthorized again in 1982 for 25 years and in 2006 for an additional 25 years. *Shelby Cnty.*, 133 S. Ct. at 2615.

34. *See* 446 U.S. 156.

action, the City sought relief from the preclearance requirement.[35] As in *Shelby County*, the City argued that the Act "violate[d] principles of federalism."[36] Justice Marshall delivered the opinion of the Court, and, after addressing the statutory questions, he affirmed the broad power of Congress under the Fifteenth Amendment.[37] He asserted that the principles of federalism were overridden by the power to enforce the Civil War Amendments because they were designed as both an expansion of federal power and an intrusion on state sovereignty.[38] He continued that the extension of the Act was a constitutional method for enforcing the Fifteenth Amendment.[39] He concluded that the Act did not exceed Congress's power to enforce the Fifteenth Amendment, nor did the Act violate the principles of federalism.[40] Faced with both the anticipated recalcitrant response of covered jurisdictions to enforcement of the Act on the one hand, and the potential for reversion to discriminatory voting practices if the Act was repealed on the other, the Court found the Act's coverage formula constitutional.

In *Katzenbach* and *City of Rome*, the majorities also rejected the relevance of "the doctrine of the equality of States" because "the doctrine applie[d] only to the terms upon which States [were] admitted to the Union and not to the remedies for local evils which [had] subsequently appeared."[41] Chief Justice Warren explained that the coverage formula was a permissible method that focused attention to only those geographic areas known to Congress as perpetuating substantial voting discrimination.[42] On the other hand, no explanation was offered in *Shelby County* for the interpretive shift on the equal sovereignty doctrine. Justice Ginsburg suggested that expanding the scope of the equal sovereignty principle beyond the admission of new states was "capable of much mischief."[43] She concluded that "[i]f the Court [was] suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*'s

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35. *See id.* at 156.

36. *Id.* at 178. The city relied on the articulation of federalism principles in *National League of Cities v. Usery*, 426 U.S. 833 (1976), a case overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985).

37. *City of Rome*, 446 U.S. at 180. The Fifteenth Amendment allows Congress to outlaw voting practices that are only discriminatory in effect or that give effect to past discrimination, despite the fact that the first section prohibits only purposeful discrimination. *See* 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.").

38. *See City of Rome*, 446 U.S. at 179.

39. *Id.* at 182.

40. *Id.* at 179.

41. South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966).

42. *Id.* at 328.

43. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting) ("Federal statutes that treat States disparately are hardly novelties.").

limitation of the equal sovereignty doctrine to 'the admission of new States,' the suggestion [was] untenable."[44] *Katzenbach* and *City of Rome* express the allegiance of the Court to a strong federal presence. Conversely, *Shelby County* moved the pendulum back towards stronger state sovereignty.

B. Who Decides: Congressional or Judicial Authority?

The Supreme Court Justices have also divided sharply in civil rights cases on the question of whether it is Congress or the Court who decides whether and to what degree to respect state authority in the federalism balance.[45] The formulation of the issue implies that the majority in *Shelby County* adopted the *City of Boerne* holding that placed the determination of the constitutionality of the Act with the Court. According to the majority, the question presented was not whether Congress had acted within the scope of its authority, but whether the Act "continue[d] to satisfy constitutional requirements."[46] A significant difference between these approaches is the level of scrutiny employed by the Court. Under the *Katzenbach* formulation, the Court employed deferential rational basis to evaluate congressional action.[47] The *Shelby County* Court adopted a form of congruency and proportionality to determine if "current burdens" of disparate geographic coverage were sufficiently related to the problem and justified by "current needs."[48]

The *Katzenbach* Court and the dissenters in *Shelby County* formulated the question as whether Congress had acted within the scope of its authority when it passed and reauthorized the Act.[49] In *Katzenbach*, South Carolina contended that Congress had robbed the courts of "their rightful constitutional role" of determining whether a state has used its power "as an instrument for circumventing a federally protected right."[50] The *Katzenbach* Court acknowledged the unprecedented scope of authority that the Act granted

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44. *Id.*

45. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (limiting Congressional power under Section 5 of the Fourteenth Amendment to "enforcing" the provisions only after a judicial determination that a constitutional right has been violated).

46. *Shelby Cnty.*, 133 S. Ct. at 2619.

47. *Id.* at 2638 (Ginsburg, J., dissenting) (calling for application of rational basis to legislation reauthorizing the existing statute).

48. *Id.* at 2646.

49. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (evaluating whether Congress "exercised its power under the Fifteenth Amendment in an appropriate manner with relation to the States"); *accord Shelby Cnty.*, 133 S. Ct. at 2636 (asking "whether Congress had the authority under the Constitution to act as it did").

50. *Katzenbach*, 383 U. S. at 325.

to Congress over state and local elections.[51] Nonetheless, the Court affirmed that the power of Congress under Section 2 of the Fifteenth Amendment was broad enough to allow Congress to enact "stringent new remedies" prescribed by the Act, such as requiring the submission of voting changes for federal approval.[52] In *Allen v. State Board of Elections*, the Court explained that "[t]he Act implemented Congress' firm intention to rid the country of racial discrimination in voting."[53] The Court should therefore give greater deference to Congress under a rational basis standard.

The dissenting Justices in *Shelby County* offered impassioned arguments on the continued need for statutory protection against racial discrimination in the voting process. The dissent, citing Justice Kennedy's discussion in *City of Boerne v. Flores*,[54] reminded the majority that the Act was "the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history."[55] The four dissenters decried the immobilization of Section 5 without a coverage formula.[56] Justice Ginsburg further criticized the majority for its dismissal of the extensive congressional record amassed by Congress, noting countless examples of "flagrant" and "intentional" race discrimination in voting since the last reauthorization in 1982.[57] The record, she contended, demonstrated that the jurisdictions covered under the Section 4 formula continued to have the most racially polarized voting, a disproportionate amount of Section 2 litigation, and access to a bail-out provision.[58] Dissenting Justices also criticized the majority for not deferring to congressional judgment in reauthorizing the Act with bi-partisan support.[59] Without legislative protection, the dissenters feared a return to old strategies and development of new strategies to dilute minority voting strength.

II. SOUTHERN STRATEGIES TO CIRCUMVENT THE APPLICATION OF THE VOTING RIGHTS ACT

Without hesitation after the passage of the Act in 1965, Southern states devised the "Southern Manifesto"—strategies to resist federal oversight of

51. *See id.* at 316–17.
52. *Id.* at 309.
53. 393 U.S. 544, 548 (1969).
54. 521 U.S. 507 (1997).
55. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting).
56. *Id.* at 2632.
57. *See id.* at 2636.
58. *Id.* at 2635.
59. *Id.* at 2651.

voting practices.[60] Southern states supported these strategies with the same vehemence as their reactions against school desegregation.[61] The strategies included outright defiance of federal authority, reapportionment, annexation, and at-large voting schemes.[62] As the Court's composition changed, the Court itself began to create barriers to litigation against covered jurisdictions by the Justice Department. The number of plurality, concurring, and dissenting opinions reflected the ambivalence towards the authority of Congress to regulate state conduct under the Act.[63] As a result of the lack of consistent unanimity, lower courts were left with little guidance in how to respond to the defiant and dilatory strategies employed by states to circumvent the regulations of the Act.

In describing the strategies of resistance, Justice Ginsburg referred to the mythical Hydra in her *Shelby County* dissent. The analogy to a creature that grows "two heads in place of one that was cut off" refers to the replacement of one strategy with others intended to circumvent the Act.[64] Ginsburg explained that "[e]arly attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable 'variety and persistence' of laws disfranchising minority citizens."[65] Strategies to dilute minority voting strength ranged from outright defiance of the Act to the development of obstreperous voting practices to the encouragement of judicial barriers.

A. Defiance as a Strategy to Resist the Act

States defied the Act in practice and in court. In court, challenges to the requirements of the Act often came before the Court as offensive litigation objecting to the denial of preclearance by the Attorney General. Like *Shelby County* and *Northwest Austin*, most litigation under the Act

60. *See* 102 CONG. REC. 4515–16 (1956). The Southern Manifesto was a "statement of the position" of Congressmen from the former Confederate Southern states who strongly opposed the Supreme Court's decision in *Brown v. Board of Education* prohibiting school segregation. *Id.* The Congressmen protested a perceived judicial encroachment on state rights and denounced the Court's forced race intermingling. *Id.*

61. *Id.*

62. *Id.*

63. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding an at-large electoral system not violative of the Act because the Court claimed that black citizens did not have hindrances to vote); *but see* Rogers v. Lodge, 458 U.S. 613 (1982) (holding an at-large election system was maintained for discriminatory purposes and was violative of the Act).

64. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1106 (1986).

65. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting).

had been initiated as declaratory judgment actions by a local or state government seeking relief from the preclearance requirement.[66] In practice, "certain local officials ha[d] defied and evaded court orders or ha[d] simply closed their registration offices to freeze the voting rolls."[67] Marshall singled out South Carolina as "a leader of the movement to deprive the former slaves of their federally guaranteed right to vote" and stated that it remained "one of the last successful members of that movement."[68] However, the Court faced defiance from every covered jurisdiction.

Allen v. State Board of Elections pitted newly empowered African-American voters and the federal government against defiant state and local officials who refused to acknowledge their obligation to seek preclearance of voting practices.[69] In *Allen*, several jurisdictions in Mississippi refused to seek preclearance of changes specified by the Court as constituting "a voting qualification or prerequisite to voting . . . standard, practice or procedure" that had the potential to deny the franchise or dilute African-American voting strength.[70] The changes included switching to at-large voting systems, moving from elected to appointed positions, limiting candidate eligibility to run in primaries, changing the length of time to qualify as a candidate, increasing the signature requirement to be placed on a ballot, and amending the rules for who was eligible for assistance at the polls.[71] Chief Justice Earl Warren wrote for the majority and held that the changes qualified for preclearance.[72] But in *Marbury v. Madison*-like style, Warren declined to impose the requested remedy of new elections.[73]

Justice Marshall agreed that the changes required preclearance, but dissented from the decision to let the elections stand.[74] He believed that the Solicitor General should be permitted to order new elections for a state's failure to comply with the preclearance requirement.[75] Marshall

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66. *See, e.g.*, Lockhart v. United States, 460 U.S. 125 (1983); City of Rome v. United States, 446 U.S. 156 (1980); Beer v. United States, 425 U.S. 130 (1976); City of Richmond v. United States, 422 U.S. 538 (1975); Allen v. State Bd. of Elections, 393 U.S. 554 (1969); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

67. *Katzenbach*, 383 U.S. at 314.

68. Morris v. Gressette, 432 U.S. 491, 517 (1997) (Marshall, J., dissenting); *see also* Luis Fuentes-Rohwer & Guy-Uriel Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S.C. L. REV. 827, 827 (2006).

69. 393 U.S. 544.

70. *Id.* at 548.

71. *Id.* at 569–70.

72. *Id.* at 571–72.

73. *Id.*

74. *Id.* at 594–95 (Marshall, J., dissenting).

75. *Id.* at 595.

reiterated his position for a strong remedy in *Conner v. Waller*[76] and *Berry v. Doles*.[77] Marshall could only concur with the majority. Marshall contended that stringent remedies were required for failing to comply with Section 5 of the Act.[78] Therefore, in *Berry* as in *Allen*, Marshall concluded that the only sufficient remedy was to set aside the election results and hold new elections.[79] In *Conner*, he called for more direct instructions to Mississippi state officials.[80] Specifically, any future elections in Mississippi under the proposed enactments were to be enjoined either until they were cleared pursuant to the Act or until the plan was submitted and approved by the Attorney General.[81]

B. Reapportionment as a Strategy to Dilute Minority Voting Power

Next, the issue of whether reapportionment plans were constitutional under the Fourteenth and Fifteenth Amendments arose in numerous cases.[82] The courts were faced with determining whether reapportionment

76. 421 U.S. 656 (1975) (calling for a stronger instruction in the remand order concerning the state's obligation under Section 5).

77. 438 U.S. 190, 193 (1978) (remanding to the district court to enter an order allowing officials 30 days within which to apply for approval of such voting procedure changes pursuant to Section 5 of the Act). Brennan concurred and Marshall agreed that the district court committed reversible error by not ordering the county officials to seek preclearance of the voting change enforced in the 1976 election but argued that the only sufficient remedy is to set aside the 1976 election and order a new election under the pre-1968 law. *Id.* at 193–202 (Brennan, J., dissenting) (joined by Justice Marshall).

78. *Id.* at 194 (Brennan, J., dissenting) (joined by Justice Marshall); *Allen*, 393 U.S. at 594–95 (Marshall, J., dissenting).

79. *Berry*, 438 U.S. at 194 (Brennan, J., dissenting) (joined by Justice Marshall); *Allen*, 393 U.S. at 594–95 (Marshall, J., dissenting).

80. 421 U.S. at 656.

81. *Id.* at 657. Justice Marshall stated that:

> I am of the opinion that the *per curiam* in this case should be made clear by adding a paragraph similar to the concluding paragraph of our opinion in Georgia v. United States. Therefore, I would add the following paragraph in this case: "The case is remanded with instructions that any future elections in Mississippi under House Bill No. 1290 and Senate Bill No. 2976, Mississippi Laws, 1975, Regular Session, be enjoined unless and until the State, pursuant to § 5 of the Voting Rights Act of 1965, tenders to the Attorney General a plan to which he does not object, or obtains a favorable declaratory judgment from the District Court for the District of Columbia."

Id. (citations omitted).

82. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735 (1973); White v. Regester, 412 U.S. 755 (1973); Karcher v. Daggett, 462 U.S. 725 (1983); *see also* Reynolds v. Sims, 377 U.S. 533 (1964) (dealing with reapportionment issues).

plans and at-large voting schemes diluted the minority voting strength.[83] The objective of a reapportionment plan must be equality of populations among the various districts so that every citizen's vote is equal.[84] In *Mahan v. Howell*, Justice Rehnquist found that the Equal Protection Clause of the Fourteenth Amendment would tolerate population variances as a result of reapportionment.[85] The Court reasoned that variances were unavoidable despite a good faith effort to achieve absolute equality in state reapportionment and did not violate the one-person-one-vote doctrine.[86] Marshall joined in Brennan's opinion, dissenting from the finding that the Virginia reapportionment statute was constitutional.[87] The majority rejected the "absolute equality test" giving states broader latitude in state legislative redistricting than in congressional redistricting.[88] Deviations from the equal protection principle are allowed if they are based on legitimate considerations and the state made an honest and good faith effort to construct districts with as near to equal population sizes as feasible.[89] Therefore, the legislature's plan for apportionment of the House of Delegates reasonably advances the rational state policy of respecting the boundaries of political subdivisions.[90] The Court concluded that the population disparities among the resulting districts did not exceed constitutional limits.[91]

C. Annexation as a Strategy to Dilute Minority Voting Power

States not only used offensive litigation and reapportionment to resist the Act. Cities and other political subdivisions also engaged in annexation as a means of diluting minority voting strength.[92] Annexation cases also

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83. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980); Rogers v. Lodge, 458 U.S. 613 (1982).
84. Mahan v. Howell, 410 U.S. 315, 321 (1973).
85. *Id.*
86. *Id.*
87. *Id.* at 333 (Brennan, J., dissenting).
88. *Id.* at 321 (majority opinion).
89. *Id.* at 322.
90. *Id.* at 323.
91. *Id.* at 328.
92. Annexation involves the detachment of the annexed property from the political subdivision in which it lies (e.g., county, municipality) so that it becomes the part of another political subdivision. *See, e.g.*, Town of Superior v. Midcities Co., 933 P.2d 596, 600–02 (Colo. 1997) (en banc); *see also* Perkins v. Matthews, 400 U.S. 379 (1971) (explaining how changing boundary lines by annexations, which enlarge the city's number of eligible voters, constitutes the change of a standard, practice, or procedure with respect to voting). The revision of boundary lines can have an effect on voting in two ways:

> (1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not;

provide several examples of offensive litigation with declaratory judgment actions. In *City of Richmond v. United States*[93] and *City of Rome v. United States*,[94] several covered jurisdictions attempted to dilute minority voting strength using annexation.[95] In *City of Richmond*, the issue was whether the City, in its declaratory judgment action, had carried its burden of proof by demonstrating that the annexation had neither the purpose nor the effect of denying or abridging the right to vote of the black community on account of its race or color.[96] Writing for the Court, Justice White held that an annexation that reduced the relative political strength of the minority race as compared to its pre-annexation political strength was not a statutory violation as long as the post-annexation electoral system fairly recognized the minority's political potential.[97] In other words, annexation was permissible if the adverse effects of the boundary line changes had been sufficiently minimized or neutralized by other changes in voting practices.

Justice Marshall, along with Justice Douglas, joined in a dissent authored by Justice Brennan.[98] The dissenters contended that the district court properly denied the declaratory judgment sought by Richmond based on a record that clearly showed Richmond's intent to discriminate.[99] Through the Voting Rights Act, "Congress . . . imposed a stringent and comprehensive set of controls upon States falling within the Act's coverage."[100] If the annexation decreased black citizenry less than the proportion of blacks living in the old boundary lines—particularly if there was a history of racial bloc voting in the city—the voting power of black citizens as a class was diluted and abridged.[101]

City of Rome presented another example of skirting around the Act's preclearance requirement through use of annexation. In *City of Rome*, one annexation was submitted for preclearance.[102] The Attorney General discovered that more than 60 annexations had been planned but not

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> (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Id. at 388 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

93. 422 U.S. 358 (1975).

94. 446 U.S. 156 (1980).

95. *See Perkins*, 400 U.S. 379 (holding that the extension of a city's boundaries through annexation required preclearance under Section 5).

96. 422 U.S. at 362.

97. *Id.* at 378.

98. *Id.* at 379 (Brennan, J., dissenting).

99. *Id.*

100. *Id.* at 381.

101. *Id.* at 386–87.

102. 446 U.S. 156, 161–62 (1980).

submitted by the City.[103] He declined to grant preclearance to 13 of the 60 annexations, which, when coupled with at-large voting schemes and evidence of racial bloc voting, diluted the black vote.[104] Moreover, the Court noted the presence of other vote-dilutive factors, including an at-large electoral system, residency requirements for office holders, and a high degree of racial bloc voting.[105] Justice Marshall, writing for the majority, concluded that those factors, coupled with the annexations, "reduced the importance of the votes of Negro citizens who resided within the preannexation boundaries of the city."[106]

Although the outcomes in *City of Richmond* and *City of Rome* differ, the annexation attempts of both cities underwent scrutiny under Section 5. Officials in *Shelby County* successfully avoided scrutiny of their annexation and redistricting plans once they were no longer covered under the Act. After *Shelby County*, states may engage in annexation, reapportionment, and create at-large voting schemes even if doing so works to the detriment of black voting strength and participation.

D. At-Large Voting Schemes as a Dilution Technique

At-large voting schemes displaced single-member districts to dilute the voting strength of minority voters.[107] *City of Mobile v. Bolden* represents one of Justice Marshall's most forceful statements on the recalcitrance of the states and the Court.[108] The issue was whether the at-large voting system diluted minority voting strength under Section 2 of the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment, and, if so, whether the district court was empowered to order single-member districts as a remedy.[109] Since 1911, Mobile, Alabama had been governed by a city commission consisting of three members elected by the voters of the city at large.[110] African-American citizens brought suit in the Federal District Court for the Southern District of Alabama alleging that the practice of

103. *Id.* at 161.
104. *See id.*
105. *Id.*
106. *Id.* at 187.
107. *See, e.g.*, Wise v. Lipscomb, 437 U.S. 535 (1978). Even if the reapportionment plan is considered a legislatively enacted plan, voting dilution through at-large voting remained at issue. *Id.* at 537–38. Although at-large and multimember voting is not *per se* unconstitutional in an area with these issues, single-member districts should be applied. *Id.*
108. 446 U.S. 55 (1980).
109. *See id.*
110. *Id.* at 58.

electing the city commissioners at large unfairly diluted the voting strength of Negroes.[111]

The plurality, led by Justice Stewart, with Chief Justice Burger, Justice Rehnquist, and Justice Powell, disagreed.[112] The plurality concluded that "political groups" have no "constitutional claim to representation" independent from "the right of a person to vote on an equal basis."[113] Recognizing group rights, the plurality reasoned, would have established "a substantive right" beyond the guarantee of the equal protection of the laws.[114]

Justice Marshall framed the multimember district problem differently. For Justice Marshall, the system "submerge[ed] electoral minorities and overrepresent[ed] electoral majorities."[115] To be sure, Justice Marshall agreed with the proposition that "a municipality ha[d] the freedom to design its own governance system."[116] However, Justice Marshall argued that "the question [was] whether [the system] was enacted or maintained with a discriminatory purpose or [had] a discriminatory effect, not whether it comport[ed] with one or another of the competing notions about 'good government.'"[117] Justice Marshall believed that the social realities of race- and poverty-based discrimination significantly contributed to the historic lack of political influence of minority voters.[118] Justice White agreed with Marshall that the plaintiffs had proven "purposeful discrimination."[119] He concluded that a discriminatory intent requirement was inconsistent with the Fifteenth Amendment and Section 2 of the Voting Rights Act.[120] Congress agreed with Justice Marshall and overruled the *Bolden* plurality in the 1982 reauthorization of the Act.[121]

E. Judicial Barriers to Litigation under Section 5

Despite Justice Marshall's fight for the franchise, minority voters still faced barriers to litigation, such as high standards of proof and the judicially imposed non-reviewability of an Attorney General's preclearance decision.

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111. *Id.*
112. *Id.* at 80.
113. *Id.* at 78.
114. *Id.* at 77.
115. *Id.* at 105 (Marshall, J., dissenting).
116. *Id.* at 107 n.4.
117. *Id.* at 108 n.4.
118. *See id.* at 110.
119. *Id.* at 103 (White, J., dissenting).
120. *Id.* at 94–95.
121. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

1. High Standards of Proof

In two significant decisions on Section 5 of the Act, a majority of the Court imposed high standards for proving racial discrimination in cases where jurisdictions covered under Section 4—the provision stricken in *Shelby County*—sought preclearance or opposed compliance with the preclearance requirement.[122] The Court began to approve reapportionment plans as long as they did not increase discrimination. Justice Marshall disagreed. The Act, he contended, was neither enacted to maintain discrimination at a manageable level, nor to ignore the cumulative effect of old and new voting practices.[123] Rather, he maintained that the Act was intended to protect against the perpetuation of discrimination.[124]

In *Beer v. United States*, Justice Marshall disagreed with the Court's proof requirements under the Act to establish a violation of the constitutional mandate against denying or abridging the right to vote.[125] The district court rejected the reapportionment plan of New Orleans as a violation of Section 5.[126] In various plans put forward to the Justice Department, the city created one majority-minority voting district and two districts with black majority populations.[127] In a declaratory judgment action brought by the city, the district court found that the plan submitted for preclearance had the effect of abridging the voting rights of black citizens.[128] The district court found the possibility of electing only one black councilperson out of seven unacceptable.[129]

The Supreme Court held that the lower court had erred in concluding that the plan abridged the right to vote on account of race and set aside the judgment.[130] The Court adopted the test that a reapportionment plan denies or abridges the right to vote when it results in "a *retrogression* in the position of racial minorities" in comparison to their position under the existing plan.[131] If there was no retrogression, the City was required to show that the new plan did not run afoul of the constitutional prohibition

122. *See* Beer v. United States, 425 U.S. 130 (1976); City of Lockhart v. United States, 460 U.S. 125 (1983).
123. *Beer*, 425 U.S. at 151–52 (Marshall, J., dissenting).
124. *Id.*
125. 425 U.S. 130.
126. *See* Beer v. United States, 374 F. Supp. 363, 383–84 (D.D.C. 1974).
127. *Beer*, 425 U.S. at 138–39. The plans also left intact the at-large voting system from 1954 (before the effective date of the Act). *Id.* The City argued that the at-large system was not subject to review under Section 5. *Id.* Both the U.S. and the City agreed on appeal that, even if discriminatory, the at-large system was not subject to preclearance. *Id.*
128. *Beer*, 374 F. Supp. at 383–84.
129. *Id.* at 389.
130. *Beer*, 425 U.S. at 143.
131. *Id.* at 141 (emphasis added).

against race discrimination.[132] The majority concluded that because there was a greater possibility that at least one or two black candidates would be elected under the new plan than under previous ones, there was no evidence of retrogression under the Act or of a constitutional violation.[133]

Again, Justice Marshall dissented.[134] He joined Justice White in rejecting the majority's requirement for proof that a reapportionment plan leads to retrogression in the voting position of racial minorities in comparison to their position under the existing plan.[135] Justice Marshall contended that the statutory standard incorporated the standard of proof under the Fifteenth Amendment, which did not require proof of retrogression.[136] He showed that, according to the legislative history, the Act was designed to preclude new plans that "perpetuate discrimination" thus circumventing the guarantees of the Fifteenth Amendment.[137] Citing Fourteenth and Fifteenth Amendment precedent on proof requirements, Justice Marshall argued that these precedents applied to evaluating voting practices under Section 5.[138]

Under Justice Marshall's approach, the Court does not have to preliminarily determine if a proposed redistricting plan would lead to retrogression in the position of racial minorities.[139] The legislative history of Section 5 makes clear that it was designed to prevent new districting plans that perpetuate discrimination.[140] The covered jurisdiction would have the burden to show that "the political processes leading to the nomination and election were equally open to participation by the group in question."[141] In *Beer*, this should have included consideration of the diluting effect of the at-large voting scheme as part of the larger context for determining a violation of the statute.[142] Justice Marshall concluded that black citizens were underrepresented by the city's at-large voting plan

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132. *Id.*
133. *Id.* at 141–42.
134. *Id.* at 143–44 (White, J., dissenting separately on statutory grounds). Justice Marshall joined Justice White's dissent and also wrote his own dissent. *Id.* at 145 (Marshall, J., dissenting). He reasoned that the redistricting plan should afford black voters "the opportunity to achieve legislative representation roughly proportional to the Negro population in the community." *Id.* at 144–45 (White, J., dissenting). White suggested that there should be the opportunity to elect at least three councilmen. *Id.* at 144.
135. *Id.* at 144–45 (White, J., dissenting).
136. *Id.* at 149–150 (Marshall, J., dissenting).
137. *Id.* at 151.
138. *Id.* at 156–57.
139. *Id.*
140. *See, e.g.*, S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508; H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437.
141. *Beer*, 425 U.S. at 157 (Marshall, J., dissenting) (citing White v. Regester, 412 U.S. 755, 765–66 (1973)).
142. *Id.* at 158.

and had been denied equal access to the political process in New Orleans, that the plan infringed upon constitutionally protected rights, and that only a compelling justification could save the plan.[143]

Justice Marshall objected to the continued application of the *Beer* retrogression requirement in *City of Lockhart v. United States*.[144] Applying the standards of *Beer*, the Court held in *City of Lockhart* that election changes of 1973 did not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.[145] Justice Marshall concurred with the Powell majority requiring preclearance of a city's redistricting plan.[146] However, he dissented in part because the Court's interpretation of Section 5 was inconsistent with both the language and purpose of that provision and was not supported by the decision in *Beer*.[147] Justice Marshall wrote that the Court's view that Section 5 of the Voting Rights Act permitted the adoption of a discriminatory election scheme—so long as the scheme was not more discriminatory than its predecessor—was inconsistent with both the language and the purpose of that provision.[148] He contended that Section 5 forbade preclearance of a proposed election procedure that perpetuates existing discrimination.[149] Therefore, an extension of *Beer* was unsupported by any of the purposes of the Voting Rights Act and was inconsistent with Congress's understanding of Section 5 when it reenacted the Act in 1982.[150]

The Act specifically required that the new procedure not have the effect of denying or abridging the right to vote on a discriminatory basis.[151] Therefore, Justice Marshall reasoned, the focus in each case should have been on the effect of the new voting procedure itself and *not* on the difference between the new and old system.[152] When Congress enacted and reenacted the Act in 1970, 1975, and 1982, it consistently reaffirmed the central purpose of Section 5: to promote the attainment of voting

143. *Id.* at 156–57.
144. 460 U.S. 125 (1983).
145. *Id.* at 128–29.
146. *Id.* at 136 (Marshall, J., dissenting in part).
147. *Id.* at 137.
148. *Id.* at 138.
149. *Id.*
150. *Id.* at 142.
151. 42 U.S.C. § 1973(a) (2006) (currently codified as 52 U.S.C.A. § 10303 (West, Westlaw through P.L. 113-296) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed of applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).")).
152. *Lockhart*, 460 U.S. at 144–45 (Marshall, J., dissenting in part).

equality by preventing the adoption of new voting procedures that perpetuate past discrimination.[153] He concluded that the majority's interpretation of Section 5 permitted a covered jurisdiction to circumvent the Fifteenth Amendment and the general prohibitions of the Act.[154]

By extending *Beer* and holding that discriminatory electoral schemes may be pre-cleared as long as they do not increase the level of discrimination, the Court has interpreted Section 5 in a manner that is inconsistent with Congress's intent. Instead of the retrogression analysis, Justice Marshall proposed a two-step analysis: Section 5 does not authorize the preclearance of any electoral scheme that (1) is discriminatory in effect and (2) does not reduce past discrimination.[155]

2. Non-Reviewability of Attorney General's Preclearance Decisions

In addition to high standards of proof, the Court limited its own power of judicial review. The effect was to let stand potentially discriminatory voting changes without any judicial or administrative scrutiny.

In *Morris v. Gressette*, the Court held that the Attorney General's failure to object, for any reason, to a change in voting procedures submitted for preclearance was not subject to judicial review.[156] Although a covered jurisdiction could litigate the denial of preclearance in a declaratory judgment action, voters subject to approved voting procedures could not challenge the constitutionality of the change.[157] Justice Marshall, joined by Justice Brennan, dissented.[158] Cynically referencing his exchange with counsel during oral argument of the case, Justice Marshall wrote, "Indeed the Court today grants unreviewable discretion to a future Attorney General to bargain acquiescence in a discriminatory change in a covered State's voting laws in return for that State's electoral votes."[159]

Marshall argued that the Court had failed to identify clear and convincing evidence or legislative history that established congressional intent to preclude judicial review of the Attorney General's actions.[160] The majority relied instead on the inference that judicial review would thwart the "congressional purpose of limiting the time during which covered States are prevented from implementing new legislation."[161] Justice

153. *Id.* at 142.
154. *Id.*
155. *Id.* at 147.
156. 432 U.S. 491 (1977).
157. *Id.* at 502.
158. *Id.* at 507 (Marshall, J., dissenting).
159. *Id.* at 508.
160. *Id.* at 517.
161. *Id.* at 510.

Marshall responded that "the majority put[] aside both common sense and legal analysis, relying instead on fiat."[162] He argued that the Act did not explicitly preclude review of the Attorney General's actions under Section 5.[163] Accordingly, there is a heavy burden to overcome the strong presumption that Congress did not intend to prohibit all judicial review of an Attorney General's decisions.[164] Marshall bolstered his position by pointing to the express prohibition of review in Section 4(b) of the Act to support his analysis of the statute,[165] stating:

> If the Congress that wrote § 4 had also intended to preclude review of the same officer's actions under § 5, it would certainly have said so. The Court makes no effort to explain why the congressional silence in § 5 should be treated as the equivalent of the congressional statement in § 4.[166]

He concluded that "[t]his highly contingent possibility that the promise of the Fifteenth Amendment will be realized in South Carolina, some 110 years after that Amendment was ratified, is apparently sufficient in the eyes of the majority. It is not sufficient for me."[167]

III. COMPARING COURTS

Justice Marshall practiced and judged during the era when barriers to voting were at their height. As a practicing lawyer, Justice Marshall viewed local authority with suspicion and battled for the protection of the franchise in federal court against the incursion of state and locally imposed barriers to voting.[168] He brought to the Court his personal and professional

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162. *Id.* at 509.
163. *Id.*
164. *Id.* at 510 (quoting Dunlop v. Bachowski, 421 U.S. 560, 567 (1975)).
165. 42 U.S.C. § 1973b(b) (2006) (currently codified as 52 U.S.C.A. § 10303 (West, Westlaw through P.L. 113-296) ("A determination or certification of the Attorney General or of the Director of the Census under this section or under section 10305 or 10309 of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.")).
166. *Morris*, 432 U.S. at 510 (Marshall, J., dissenting). In *Briscoe v. Bell*, Marshall authored the majority opinion finding that Congress was within the scope of its power by not making the Attorney General's determination of coverage under Section 4 subject to judicial review under the Act. 432 U.S. 404 (1977). He distinguished *Morris v. Gressette* on the grounds that in *Briscoe*, the congressional intent was clear. *Id.* at 412. Moreover, the Act provided alternative judicial remedies in Section 4 for states that wanted to avoid coverage under the Act. *Id.* at 414.
167. *Morris*, 432 U.S. at 517 (Marshall, J., dissenting).
168. *See supra* Part II.

experience of the atrocities committed to ensure the disfranchisement of African Americans.

Thurgood Marshall sat on the Supreme Court when the Warren Court decided the first cases brought before the Justices under the Act. During Justice Marshall's tenure, the Court, in addition to periodically addressing the Act's constitutionality, also decided fundamental interpretive issues created by the Act. Initially, courts had to determine what constituted a "voting qualification" that would be subject to preclearance[169] and what changes in voting qualifications required preclearance by the Justice Department or the courts.[170] Justice Marshall rebuked the strategies deployed by Southern states to resist the application of the new legislation.[171] He saw those strategies begin to be systematically dismantled for African Americans and the poor.[172] Beyond race and economic status, Justice Marshall made it his mission on the Court to expand and protect the franchise for all citizens.[173]

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169. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 550 (1969).

170. *See* Fuentes-Rohwer & Charles, *supra* note 68, at 836 (analyzing the Department of Justice's efforts to determine what voting changes would fall under the Voting Rights Act by a thorough examination of election letters from the Department of Justice to South Carolina).

171. *Id.* Ginsburg referred to the Southern states' resistance to the new legislation—such as racial gerrymandering, at-large voting, and discriminatory annexation—as "second generation" or "substituted" barriers put in place after the enactment of the Act, which sought to continue the dilution of individuals covered by the Act. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2635–36 (2013) (Ginsburg, J., dissenting).

172. In the amicus curiae brief for *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), Solicitor General Marshall, opposing the imposition of a poll tax, stated:

> [H]owever it may have been viewed in an earlier era, restricting the franchise to the propertied or financially able can no longer be justified on the theory that there is a reliable and demonstrable relationship between the possession of monetary means and the attributes of responsible citizenship.

Brief for the United States as Amicus Curiae at 32, *Harper*, 383 U.S. 663, 1965 WL 130114, at *32.

173. For example, in support of the right for 18 year olds to vote, Justice Marshall agreed with the plurality that the Fourteenth Amendment was not limited to protecting African American voters. Oregon v. Mitchell, 400 U.S. 112, 231 (1970) (Brennan, J., concurring) (endorsing broad congressional power under Fourteenth amendment to enfranchise 18 year olds to vote in all elections). He also opposed lengthy residency requirements for voter eligibility. *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (holding that a one-year residency requirement was an unconstitutional violation of right to vote and "[b]y denying some citizens the right to vote, such laws deprive them of 'a fundamental political right'" and durational residency laws set apart residents who have exercised their right to travel); *but see* Marston v. Lewis, 410 U.S. 679, 682 (1973) (Marshall dissenting from a per curiam opinion upholding Arizona's 50 day residency requirement for voting as inconsistent with *Dunn v. Blumstein*, 405 U.S. 330). Finally, Marshall disagreed with restrictions on the voting rights of incarcerated

Justice Marshall made history central to his constitutional analysis. He demonstrated the importance of placing the present in historical context in *City of Rome* by commending the "extensive investigation" done by Congress to substantiate the need for the extraordinary extension of federal authority.[174] The record supporting the 2006 reauthorization of the Act was equally extensive.[175] Justice Ginsburg, like Justice Marshall, focused on the numerous examples of discriminatory practices blocked by preclearance after the 1982 reauthorization leading up to the 2006 reauthorization.[176] She concluded that the Court should expect the record supporting reauthorization to be less stark than the original record; otherwise there would be "scant reason to renew a failed regulatory scheme."[177] On the other hand, the *Shelby County* majority criticized Congress for relying on "decades-old data and eradicated practices."[178]

Post-racial constitutionalism has several features that are evidenced in the Roberts Court's jurisprudence.[179] In contrast to Justice Marshall's commitment to sustained efforts to end discrimination, post-racial constitutionalism promotes the position that the protection of minorities against race discrimination is no longer needed.[180] In each case,[181] the Court upheld the claim of a white petitioner seeking to end the use of race in government decision making.[182] In fact, Chief Justice Roberts posited that racial

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individuals. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (Marshall dissenting from majority judgment that disfranchisement of convicted felons who had completed their sentences and paroles did not deny equal protection).

174. *See* City of Rome v. United States, 446 U.S. 156, 174 (1980).

175. *See, e.g.*, *Shelby Cnty.*, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting) (stating that "Congress did not take this task lightly" and detailing the extensive hearings held over a nine-month period, which amassed to more than 15,000 pages, and the overwhelming support from the House, Senate, and President Bush).

176. *Id.* at 2639.

177. *Id.* at 2638.

178. *Id.* at 2617.

179. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009); *see also* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (Roberts, J., concurring) (upholding the right of voters in a state initiative to prohibit consideration of race in university admissions); LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT & THE CONSTITUTION 28–51 (2014) (discussing the Roberts' court jurisprudence).

180. *See* Jessica Mason Pieklo, *Michigan Amendment Feeds Roberts Court's 'Post Racial' American Mythology*, RH REALITY CHECK (Oct. 16, 2013, 2:50 PM), http://rhrealitycheck.org/article/2013/10/16/michigan-amendment-feeds-roberts-court-post-racial-america-mythology/ [http://perma.cc/XWY6-V38S].

181. *See generally* TRIBE & MATZ, *supra* note 179, at 28–51.

182. *See* Wendy Parker, *Recognizing Discrimination: Lessons from White Plaintiffs*, 65 FLA. L. REV. 1871, 1915 (2013) ("The Robert's Court's commitment

preferences have had the "debilitating effect" of perpetuating racial inequality.[183] Therefore, according to the Roberts Court, cases involving race should be resolved based on the principles of colorblindness and racial neutrality. For example, Chief Justice Roberts concluded his opinion in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*[184] by stating that the way to eliminate school assignment on the basis of race is to stop assigning students on a racial basis, and "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[185]

In *Shelby County*, Chief Justice Roberts expressed the idea of post-racialism this way: "[t]he conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[186] One relevant condition was the increase in the election of African-American office holders, including an African-American president. "Things have changed in the south" stated Roberts, pointing to the "unprecedented levels" of minority office holders, as well as higher voter turnout and registration rates.[187] He reasoned that the voluminous record compiled by Congress relied on history and "played no role in shaping the statutory formula before us today."[188] Post-racial constitutionalism also casts white people as the subject of discrimination due to affirmative action, the promotion of diversity, the belief that gains for racial minorities come at the expense of whites, and the shifting demographics of white Americans becoming the minority.[189] The Court's post-racial jurisprudence has seemingly embraced the *Plessy v. Ferguson* concept that the continued existence of racism is a construct of the African-American imagination.[190]

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to colorblind jurisprudence is stronger than any previous Court's, including the Rehnquist's Court.").

183. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1638–39 (2014) (Roberts, J., concurring).

184. 551 U.S. 701.

185. *Id.* at 748. *Contra* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) ("In order to get beyond racism, we must first take account of race.").

186. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2618 (2013).

187. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).

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

189. A recent study reports that 51% of the white people surveyed thought that there was more racism against whites than against blacks in the 2000s. Michael I. Norton, *A Civil Rights Movement for White People*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/roomfordebate/2013/06/26/is-the-civil-rights-era-over/a-civil-rights-movement-for-white-people [http://perma.cc/2U9Y-NVWG]; *see also* Jamelle Bouie, *America's Fatigue in the Fight Against Racism: How John Robert's Ruling Elevates White Fatigue into Constitutional Law*, AM. PROSPECT (June 25, 2013), http://prospect.org/article/americas-fatigue-fight-against-racism [http://perma.cc/5LB9-V25N].

190. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (stating that the enforced separation of the races stamped African Americans with a badge of

The interpretive concerns raised by Justice Marshall foreshadowed the eventuality of a decision like *Shelby County.* The Court continues to disagree on whether to defer to Congress's remedial power under the Reconstruction Amendments or to require congressional action only after a judicial finding of unconstitutional state action. Moreover, the approach to federalism taken by the majority in *Shelby County* reflected many of the major themes that emerged while Justice Marshall was on the Court. Eventually, Justice Marshall found himself in dissent as the Court weighted the federalism balance towards protection of equal state sovereignty over federal protection of the franchise of black voters. But his opinions provide a unique interpretive voice during an era when political and legal forces prematurely tug American society away from continued vigilance against racial discrimination.

In *Shelby County*, the Court moved the balance closer to state and local control of voting. Marshall, on the other hand, always cast a suspicious eye on unchecked local authority over voting practices in covered jurisdictions. The Court contended, despite findings by Congress, that the passage of time and the success of the Voting Rights Act had corrected "the insidious and pervasive evil" perpetuated to prevent African Americans and other racial and language minorities from voting.[191] However, state voting laws that are no longer subject to the preclearance requirement have the potential to restrict the franchise and revive the second-generation barriers that were brought down under the Act. A return to at-large voting and discriminatory reapportionment looms in the background. Absent congressional legislation to amend the Act by re-enacting a coverage provision, changes to voting practices that have a discriminatory effect on racial and language minority voters will take effect with fewer, more costly, and more time consuming mechanisms for challenge in the federal courts.[192]

CONCLUSION: BATTLING THE HYDRA

Without congressional intervention to rework the coverage formula, state and local governments no longer carry the burden to prove that a voting practice was not intended to discriminate based on race. Without Sections 4

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inferiority "solely because the colored race chooses to put that construction upon it").

191. *See Shelby Cnty.*, 133 S. Ct. at 2615.

192. *See* Ellen Katz, *Dismissing Deterrence*, 127 HARV. L. REV. FORUM 248 (2014) (critiquing the Voting Rights Amendment Act of 2014 as more vulnerable to challenge than the original Section 4); Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928 (2013) (proposing that Congress expand the reach of Section 4 coverage).

and 5, the Hydra will develop "unremitting and ingenious defiance of the Constitution," breed ponderous "case-by-case adjudication" under Sections 2 and 3 of the Act, and evade capture by switching to "discriminatory devices not covered by a federal decree."[193]

193. City of Rome v. United States, 446 U.S. 156, 174 (1980).