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Out of Touch: Shelby v. Holder and the Callous Effects of Chief Justice Roberts's Equal State Sovereignty, 49 J. Marshall L. Rev. 751 (2016)

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OUT OF TOUCH: SHELBY COUNTY V. HOLDER AND THE CALLOUS EFFECTS OF CHIEF JUSTICE ROBERTS’S EQUAL STATE SOVEREIGNTY

ADAM BOLOTIN*

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I. JOHN ROBERTS JR. AND THE ELEGANT ART OF FORESHADOWING

With his hair swept neatly to the side, his soft blue eyes gleamed up at the Senate Judiciary Committee.¹ John Glover

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Roberts Jr. then proudly stated, “Judges are like umpires,” and added that it was his “job to call balls and strikes and not to bat.”² Yet, Roberts failed to mention that just as umpires’ strike zones may differ, judges certainly determine what does and does not fit within their subjective zone of constitutional conformity. When this reality plays out in our nation’s courts, the results yield lasting ramifications on people’s lives.

Roberts’s decisions made from the bench have called into doubt his confirmation hearing proclamation that he does not have an agenda.³ Specifically in *Shelby County v. Holder*,⁴ Roberts’s majority opinion struck down⁵ a key provision of “the most effective civil rights law ever enacted.”⁶ Roberts cited a “fundamental principle[,]” equal state sovereignty, as the foundation supporting his majority opinion.⁷ The goal of this comment is to demonstrate that this doctrine is unsupported by the Court’s jurisprudence and yields profoundly dangerous consequences.⁸ Specifically, *Shelby County* opens the door to new forms of voting discrimination all for the sake of protecting equality amongst the states.⁹

This comment addresses the inability of the Supreme Court, and in particular Chief Justice Roberts to appreciate the contemporary role that the Voting Rights Act of 1965¹⁰ (VRA)

my dad whose work ethic I attempt to emulate every day and my mom who taught me to read and write.

1. *Roberts Confirmation Hearing, Day 1* (C-SPAN television broadcast Sept. 12, 2005), www.c-span.org/video/?188437-1/roberts-confirmation-hearing-day-1.

2. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr., Nominee to be chief justice of the United States).

3. *Id.* at 56 (stating to the chairman that he (Roberts) came “before the committee with no agenda”).

4. *Shelby Cty., Ala. v. Holder (Shelby County)*, 133 S. Ct. 2612 (2013).

5. *Id.* at 2632 (holding the Voting Rights Act of 1965, § 4(b)’s, 42 U.S.C. § 1973b(b) (2006), preclearance coverage formula that determined which states and other jurisdictions were subject to federal preclearance unconstitutional).

6. THE LEADERSHIP CONFERENCE, *History of the VRA*, www.civilrights.org/voting-rights/vra/history.html (last visited Sept. 26, 2014) (stating that when President Lyndon B. Johnson signed the VRA into law, it was “hailed by many as the most effective civil rights law ever enacted”).

7. *Shelby County*, 133 S. Ct. at 2622 (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder (Northwest Austin)*, 557 U.S. 193, 203 (2009)).

8. The chief justice first references the concept of equal state sovereignty in *Northwest Austin*. See *Northwest Austin*, 557 U.S. at 203 (stating the VRA “differentiates between the States, despite our historic tradition that all States enjoy ‘equal sovereignty’”). As the following sections will discuss, equal state sovereignty lacks precedential support.

9. *Shelby County*, 133 S. Ct. at 2618 (holding Section 4(b)’s coverage formula violated “the principle that all States enjoy equal sovereignty”).

10. 52 U.S.C. § 10301 (formally 42 U.S.C. § 1973). If a jurisdiction was

continued to play in society, as well as where sovereignty truly lies in the American constitutional system. Part II of this comment discusses the unavoidable history of discrimination in voting rights and the duty imposed upon the federal government to prevent such discrimination. Part II also presents a history of Roberts's previous views on the VRA expressed long before *Shelby County*. Part III analyzes the *Shelby County* decision in detail and compares it to other instances where the chief justice has overlooked the nation's history of racism and the effects it continues to play today. Finally, part IV proposes how Roberts should have decided *Shelby County* and how Congress can remedy Roberts's untenable holding.

II. A REPULSIVE PAST IS BEST LEFT UNFORGOTTEN

The road that led to Voting Rights Act of 1965 was long and tortuous. And that history did not end once the VRA was signed. This section revisits this history, while detailing important patterns that continue to persist today, albeit it in less appalling shades. Specifically, this section details the provisions of the VRA, their evolution, and their essential operation even in today's more tolerant voting atmosphere. Finally, this section will touch upon Roberts's long battle against the VRA and his early dismissive opinions of it.

A. A War Was Won, but a Battle Had Just Begun

At the close of the Civil War, Congress passed three amendments to the Constitution with the hopes of preventing "Southerners from re-establishing white supremacy."¹¹ The Thirteenth Amendment ended slavery,¹² the Fourteenth Amendment guaranteed due process of law and equal protection under the law,¹³ and the Fifteenth Amendment prohibited the denial of the right to vote "on account of race, color or previous condition of servitude."¹⁴ The Fifteenth Amendment also expressly

covered by Section 4(b)'s coverage formula it would have to obtain federal approval, also referred to as "preclearance," before changing its election laws. 52 U.S.C. §§ 10303(b), 10304(a) (formally 42 U.S.C. §§ 1973b(b), 1973c).

11. CONSTITUTIONAL RIGHTS FOUNDATION, *Race and Voting in the Segregated South*, www.crf-usa.org/brown-v-board-50th-anniversary/race-and-voting.html (last visited Apr. 20, 2016).

12. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States").

13. U.S. CONST. amend. XIV, § 1 ("Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

14. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States

gave Congress the “power to enforce [the] article by appropriate legislation.”¹⁵

Though the Fifteenth Amendment explicitly prohibits denying or abridging the right to vote because of race, it was not self-executing.¹⁶ To strengthen the effect of the Fifteenth Amendment, Congress passed the Enforcement Act in 1870,¹⁷ and expanded it by amendment in 1871.¹⁸ These Acts made a variety of racially motivated discriminatory actions federal offenses.¹⁹ The 1871 provisions mandated that federal officials supervise federal elections and voting registrations.²⁰ These officials, who were appointed by federal judges, were to protect the honesty of precincts’ rolls, ensure that elections were properly conducted, and guarantee that votes were tallied correctly.²¹

Federal enforcement of these Acts was vital to protect the rights of the newly enfranchised.²² If implemented and carried out properly, the Acts would stop nonwhite voters from being turned away from the polls and punish those who retaliated with violence against them.²³ Despite the empowering results of these Acts for black voters,²⁴ the Acts were constantly under ferocious attack by southern whites.²⁵ Though the Civil War was over and the

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.”).

15. *Id.* at § 2 (“The Congress shall have the power to enforce this article [U.S. CONST. amend. XV] by appropriate legislation”).

16. See MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY* 501 (3d ed. 2011) (stating that “neither the Fourteenth nor the Fifteenth Amendments created a positive right to vote”).

17. Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870).

18. Enforcement Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871).

19. See Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 526 (1973) (stating sections 4 and 5 of the Act criminalized “[t]he use of force, bribery, threats, economic pressure, or ‘other unlawful means’ to interfere with or obstruct any citizen’s right to be free of racial discrimination in voting”).

20. *Id.* at 527.

21. *Id.*

22. *Id.* at 530.

23. Early, the federal government vigorously enforced the Acts, prosecuting 1,271 in the South and appropriating \$3.2 million for election supervision under the 1871 Act. *Id.* Soon after, however, federal enforcement was less active and effective discrimination reinstated itself as the societal norm. *Id.*

24. Twenty-two blacks were elected as State Congressmen during Reconstruction. JOHN FRANKLIN, *FROM SLAVERY TO FREEDOM* 317-23 (3d ed. 1969). See also *Race and Voting in the Segregated South*, *supra* note 11 (explaining that from 1870 to 1880, Mississippi sent two black senators to Washington, while electing a black lieutenant governor).

25. See Anthony J. Gaughan, *Has the South Changed? Shelby County and the Expansion of the Voter ID Battlefield*, 19 TEX. J. ON C. L. & C. R. 109, 114 (2013) (explaining the federal government’s difficulties with enforcing the Fifteenth Amendment).

Constitution forbid the right to vote be denied because of race,²⁶ southern states did not sheath their weapons at the close of war.²⁷ Instead, blacks living in the South faced constant threat of violence when they attempted to participate in the political process.²⁸

To preserve the power recently lost with the passage of the Civil War Amendments, white supremacist organizations, such as the Ku Klux Klan (KKK), employed brutal violence to intimidate black Republicans from exercising their right to vote.²⁹ In 1873, seventy-one black Republicans were murdered by white Democrats over a disputed county election.³⁰ This atrocity, known as The Colfax Massacre, and the court battles that followed, only underscored the difficulties associated with enforcing the Enforcement Acts.

Those convicted for their roles in The Colfax Massacre appealed the Enforcement Acts' constitutionality. In *United States v. Cruikshank*, the Supreme Court held that the federal indictments charging several participants of the mob failed to state an offense.³¹ The Court reasoned that the rights and privileges the violent conspiracy aimed to deprive were not *federal* rights, because the mob was responding to a disputed *state* election.³² Congress could only protect the rights associated with voting when exercised during *federal* elections.³³ Since this mob erupted following a state election, the Court held that a deprivation of a federal right was not alleged; therefore, the indictments did not state an appropriate offense.³⁴

26. U.S. CONST. amend. XV, § 1.

27. See WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879 115-16 (1982) (detailing specific acts of violence carried out by whites in response to blacks exercising their right to vote).

28. *Id.* See also ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 106 (rev. ed. 2009) (stating that white supremacists "sought to drive the Republicans [who supported Reconstruction efforts] from power and elect Democrats").

29. See Gaughan, *supra* note 25, at 114 (explaining that during Reconstruction the majority of blacks were Republican, while the majority of whites were Democrats and "viewed African-American civil rights as a dual threat to the region's white supremacist racial order and its Democrat-dominated political order").

30. Details regarding The Colfax Massacre are described in HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 241-44 (1937).

31. *United States v. Cruikshank*, 92 U.S. 542, 556-57 (1875).

32. *Id.* at 556 (stating "[t]here is nothing to show that the elections voted at were any other than State elections").

33. See *id.* (clarifying that the federal government does not "have the power or [is] required to do mere police duty in the States").

34. See *id.* (stating that "[t]he charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State").

Violence was not the only tool used by southerners to abridge the right to vote during Reconstruction.³⁵ Whites in the South also waged relentless campaigns of fraud and disenfranchisement to protect Democrat strongholds at the state level.³⁶ These campaigns helped Democratic majorities pass additional discriminatory schemes such as poll taxes and literacy tests, designed to weaken the influence of black votes.³⁷

1. *One Step Forward, Now Turn Around and Keep Walking: The End of Reconstruction*

It was clear that the principle of the Fifteenth Amendment was hardly assured, let alone realized, through the Enforcement Acts. The Supreme Court refused to alleviate the quandary, and instead routinely fashioned holdings nullifying Congress's Reconstruction statutes.³⁸ Despite the South's often violent growing pains, many Americans and their political representatives were quick to point to the region's progress.³⁹ The problem was solved in then Congressman and future President James A. Garfield's mind when he declared that "[t]he Fifteenth Amendment confers upon the African race the care of its own destiny . . . [I]t places their fortunes in their own hands."⁴⁰

35. See Gaughan, *supra* note 25, at 114 (explaining the additional nonviolent means employed by southern whites to prevent blacks from voting).

36. Democrats generally sympathized with white supremacists. See *id.* (stating that election fraud and disenfranchisement subverted the democratic process and "ensur[ed] Democratic control over the region's political order").

37. *Id.* (stating "Confederate states enacted poll taxes, literacy tests, and other fraudulent election laws specifically designed to disenfranchise black voters and keep the Republican Party out of the South"). See also MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908 1-2 (2001) (stating that "each state in the former Confederacy set in motion complicated and hazardous electoral movements aimed at removing large numbers of its eligible voters").

38. See *United States v. Reese*, 92 U.S. 214 (1876) (holding section 3 and 4, of the Enforcement Act void). See also *The Slaughter-House Cases*, 83 U.S. 36 (1872) (applying a restrictive interpretation of Reconstruction legislation and Civil War Amendments); *Minor v. Happersett*, 88 U.S. 162 (1874) (narrowing the scope of the privileges and immunities clause of the Fourteenth Amendment). See also UROFSKY & FINKELMAN, *supra* note 16, at 550 (stating "The victories of 1861 to 1870 for civil rights and equality had been undone by four decades of jurisprudence").

39. See Joel Heller, *Shelby County and the End of History*, 44 U. MEM. L. REV. 357, 365 (2013) (stating "[d]espite the record of continued discrimination, a number of Northern officials and commentators expressed the belief that federal intervention to protect voting rights in the South was no longer necessary").

40. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, 8518-19 (2013) (ebook) (quoting Garfield).

Republicans further exemplified northern exhaustion when they agreed to withdraw federal troops from the South and end Reconstruction in exchange for Democrats' conceding the 1876 presidential election.⁴¹ In the following years, Northern exhaustion with maintaining the Enforcement Acts in the South, coupled with Democrats regaining control in Congress⁴² deteriorated any progress gained during Reconstruction.⁴³ Reconstruction efforts waned further when Congress failed to enact the Federal Election Bill of 1890.⁴⁴ The Bill would have authorized federal officials to overturn the results of elections certified by state officials.⁴⁵ Congress then repealed many of the Enforcement Acts provisions in 1894 and 1909.⁴⁶ Many attributed the decline of Reconstruction to the progressive enlightenment in the South.⁴⁷ But any enlightenment would prove short-lived; the absence of any federal intervention opened the door for the South to eradicate the modest gains of Reconstruction and to reinstate white supremacy in voting.⁴⁸

At the turn of the century, any gains of Reconstruction were drowned by the reemergence of facially neutral, but wholly discriminatory policies.⁴⁹ Though poll taxes, literacy tests,⁵⁰ property qualifications, and criminal exclusion laws were born in

41. Heller, *supra* note 39, at 365 (explaining “Republicans in Congress reputedly agreed to end Reconstruction and to restore ‘home rule’ to the South if Democrats would concede that Republican Rutherford Hayes had won the [1876 presidential] election”).

42. Republicans lost their majority congressional control in 1875. Derfner, *supra* note 19, at 529.

43. See KEYSSAR, *supra* note 28, at 88 (stating “[w]hatever the Fourteenth and Fifteenth Amendments said on paper, the right to vote was back in the hands of the states” and Congress did not “seriously consider federal intervention in southern politics” until the 1960s).

44. *Id.*

45. See Heller, *supra* note 39, at 365 (stating that even congressional supporters “did not view the bill as a high priority”). See also KEYSSAR, *supra* note 28, at 88 (explaining that Congress “signaled to the South that the federal government was not prepared to act energetically to guarantee the voting rights of blacks” when it failed to pass the Federal Election Bill).

46. Act of February 8, 1894, ch. 25, 28 Stat. 36 (1894); Act of March 4, 1909, ch. 321, 35 Stat. 1088 (1909). See also H.R. REP. No. 53-19, at 7 (1893) (stating “[l]et every trace of reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands”).

47. See FONER, *supra* note 40, at 8519 (quoting an Illinois newspaper that stated “the negro is now a voter and a citizen”).

48. See *id.* at 8000 (stating that “[t]he threat of federal intervention restrained the most extreme proposals” of Southern policies preventing blacks from exercising their right to vote).

49. Heller, *supra* note 39, at 366-67.

50. Literacy tests required applicants to read and write any section of the State or U.S. Constitutions. Derfner, *supra* note 19, at 537.

the 1870s, they thrived during the early 1900s.⁵¹ Moreover, federal apathy exacerbated their presence and effects.⁵² For instance, in 1901, the Alabama legislature reenacted criminal-exclusion laws, citing specific crimes it believed blacks were more likely to commit than whites.⁵³ Southern states also combatted fears that literacy tests would have the effect of disenfranchising white voters. Many southern states incorporated “understanding” tests and “grandfather clauses”⁵⁴ that eliminated honest application of the literacy tests.⁵⁵ These polices were associated with elastic standards that would snap in the face of blacks but not whites.⁵⁶ States also attempted to weaken black voting power through gerrymandering⁵⁷ and all-white primaries.⁵⁸ These policies caused minority registration and voting rates to free-fall.⁵⁹ Between 1896 and 1904 black voter turnout in the South that once reached 60 to 85 percent fell to single digits.⁶⁰

The successful discriminatory practices enacted at the turn of the century continued throughout the ensuing decades.⁶¹ Attempts to combat these policies through litigation proved difficult, and any victories for black voters would only have temporary effect.⁶² A pattern emerged: every time that voting rights advocates succeeded in overturning a discriminatory policy, the state would soon enact a new policy with a different name, but identical

51. See Heller, *supra* note 39, at 366-67 (explaining the increased effectiveness and presence of voter discrimination laws in the South during the early 1900s).

52. *Id.*

53. *Id.*

54. Grandfather clauses exempted voters whose ancestors could vote in the 1860s from literacy tests. *Id.* at 366.

55. *Id.*

56. See Derfner, *supra* note 19, at 537-38 (explaining the tests were not to be applied equally: “[t]here was a general understanding the interpretation of the Constitution offered by an illiterate white man would be acceptable to the registrars; that of a Negro would not”). See also Heller, *supra* note 39, at 366 (stating that the requirement that voters “read and understand a text was frequently applied stringently to black voters and forgivingly to whites”).

57. Heller, *supra* note 39, at 366 (explaining states would engage in gerrymandering to “dilute whatever black vote remained”).

58. See Derfner, *supra* note 19, at 538 (stating that “no doubt then existed that political parties were private organizations outside the purview of the fourteenth or fifteenth amendments”).

59. KEYSSAR, *supra* note 28, at 91 (stating that black registration in Louisiana dropped ninety-nine percent from 1896 to 1904).

60. Heller, *supra* note 39, at 367.

61. *Id.* (explaining seven of the eleven ex-confederate states maintained literacy tests, Louisiana enacted an arbitrary good character requirement, while Alabama required white citizens to vouch for blacks before blacks were allowed to register).

62. See LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE, THE ROBERTS COURT AND THE CONSTITUTION 33 (2014) (stating “every [discriminatory] law struck down was replaced by one, two or three more”).

effect.⁶³ With these frustrating schemes manipulating every election, Congress was compelled to act, and approached the problem from a different angle.

2. *Congress Takes a Stand: The Birth of the Voting Rights Act*

Although Congress enacted three statutes in 1957, 1960, and 1964 in an effort to quell the rampant discrimination in voting,⁶⁴ not one of the three acts overcame the obstacles blocking voting equality in the South.⁶⁵ In March 1965, Attorney General Katzenbach declared that the “[e]xisting law is inadequate . . . even in those jurisdictions where judgment is finally won, local officials intent upon evading the spirit of the law are adept at devising new discriminatory techniques not covered by the letter of the judgment.”⁶⁶ The fourth time would prove to be the charm.

In 1965, almost an entire century after the Fifteenth Amendment was passed,⁶⁷ Congress finally acted to address southern states’ continuous violations of the Constitution.⁶⁸

63. This tactic is seen via white-only Texas primaries through the following three cases: *Terry v. Adams*, 345 U.S. 461 (1953) (holding unconstitutional a policy that instituted a three step exclusion process upon pre-primaries, the primary, and the general election); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding a resolution that limited voting to only whites was unconstitutional); *Nixon v. Herndon*, 273 U.S. 536 (1927) (finding a statute that prohibited blacks from voting in Democratic primary unconstitutional).

64. The Civil Rights Act of 1957, 42 U.S.C. § 1971 (1957) (current version at 52 U.S.C. § 10101); The Civil Rights Act of 1960, 74 Stat. 86 (1960); and The Civil Rights Act of 1964, 78 Stat. 241 (1964).

65. See Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11. TEMP. POL. & C.R. L. REV. 359, 370-71 (2002) (explaining courts reached inconsistent conclusions when faced with claims arising out the Civil Rights Act of 1957); U.S. CIVIL RIGHTS COMM'N, REPORT 133 (1959) (declaring “[a]gainst the prejudice of registrars and jurors, the U.S. Government appears under present laws to be helpless to make good guarantees of the Constitution”). See also U.S. CIVIL RIGHTS COMM'N, JUSTICE REPORT 136 (1961) (concluding “broader measures are required if denials of constitutional rights [in voting] are to be quickly eliminated.”); Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 7 (1965) (stating the 1964 Amendments “did not remove the serious obstacles to effective protection of voting rights”).

66. *Hearings on Voting Rights Before the S. Comm. on the Judiciary*, 89th Cong. 13 (1965) (statement of Att’y Gen. Katzenbach).

67. The first century of the Fifteenth Amendment “can only be regarded as a failure.” *Northwest Austin*, 557 U.S. at 198.

68. *Shelby County*, 133 S. Ct. at 2618 (stating the VRA was enacted “to address entrenched racial discrimination in voting”). See also *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966), *abrogated by Shelby County*, 133 S. Ct. 2612 (stating in enacting the VRA, Congress was “confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution”).

Congress concluded that its previously unsuccessful attempts⁶⁹ to address voting rights must “be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.”⁷⁰ In addressing these failures, Congress passed the Voting Rights Act of 1965, which incorporated a comprehensive strategy to prevent the injustice that had plagued the previous century from ever resurfacing.⁷¹

Section 2 of the Act outlawed the “denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”⁷² The section also gave the attorney general and private individuals the right to file suit in federal court to block the implementation of discriminatory election laws.⁷³ The VRA also expressly prohibited poll taxes, literacy tests, and other previously implemented policies that had been used to deny blacks the right to vote.⁷⁴ These sections applied to every state.⁷⁵

Though each section of the VRA was powerful in its own right, the pillars assuring the Act’s success were Section 4(b)’s coverage formula and Section 5’s federal preclearance requirement.⁷⁶ The two sections operated in tandem. The coverage formula covered any jurisdiction which maintained any discriminatory “test or device” and had less than 50 percent of its eligible minority voters registered for the 1964 presidential election.⁷⁷ Most of the jurisdictions covered by the formula were located in the South: Alabama, Georgia, Louisiana, Mississippi,

69. Though Congress wrote the law, President Lyndon Johnson deserves praise as well. Pleading for Congress to act, the president stated, “Should we defeat every enemy, should we double our wealth and conquer the stars, and still be unequal to this issue then we will have failed as a people and as a nation.” Lyndon B. Johnson, U.S. Pres., Special Message to the Congress: The American Promise, Address Before the United States Congress (Mar. 15, 1965), in MILLER CENTER, <http://millercenter.org/president/speeches/speech-3386>.

70. *Katzenbach*, 383 U.S. at 309 (detailing the points that emerged from the legislative history of the Act contained in the committee hearings and debates).

71. 52 U.S.C. § 10301 (formally 42 U.S.C. § 1973). See THE LEADERSHIP CONFERENCE, *supra* note 6 (explaining the VRA was designed to and incorporated a scheme that overcome the inefficiencies of previous failed legislation).

72. 52 U.S.C. § 10301(a) (formally 42 U.S.C. § 1973a).

73. 52 U.S.C. § 10302 (formally 42 U.S.C. § 1973a).

74. 52 U.S.C. §§ 10306 (poll taxes), 10501 (literacy tests and other discriminatory devices) (formally 42 U.S.C. §§ 1973h, 1973a(a)).

75. 52 U.S.C. § 10301(a).

76. The phrase “preclearance” can also be understood as prior approval. Section 5 acted as a firewall and prevented local officials from putting laws into effect before litigation could strike them down. See TRIBE & MATZ, *supra* note 62, at 33 (stating the preclearance rule “prevent[ed] local officials from outmaneuvering civil rights litigation”).

77. 52 U.S.C. § 10303(b) (formally 42 U.S.C. § 1973b(b)).

South Carolina, Virginia, and part of North Carolina.⁷⁸ If a jurisdiction was covered by Section 4(b)'s coverage formula, it had to obtain prior federal approval, commonly referred to as "preclearance," under Section 5 before making any changes to its voting procedures.⁷⁹

The success of the coverage formula and preclearance was immediate. In Mississippi, black registration rose from 7 to 60 percent two years after the formula was implemented.⁸⁰ But not everyone was thrilled with this progress.⁸¹ The VRA was operating effectively, but those who despised its effect—the enfranchisement of minorities—attempted to attack the VRA's constitutionality.⁸²

A year after the VRA's adoption, South Carolina challenged the law's constitutionality in *South Carolina v. Katzenbach*.⁸³ In the case, Carolina argued that the VRA violated state equality by singling out certain states for special federal oversight.⁸⁴ Five states joined South Carolina and wrote amicus briefs expressing the same disdain.⁸⁵ The scorn expressed towards the VRA had a definitive southern twang—no northern state wrote in opposition.⁸⁶

South Carolina and the other southern states argued that the VRA violated the nation's federalist system, unnecessarily infringing on the rights of the states.⁸⁷ The Supreme Court rejected South Carolina's argument, refused to ignore history, and declared that "exceptional conditions can justify legislative measures not otherwise appropriate."⁸⁸ In the 8–1 decision, the

78. *Katzenbach*, 383 U.S. at 318. The formula also covered counties in Arizona, Idaho, and Hawaii. *Id.*

79. 52 U.S.C. § 10304(a) (formally 42 U.S.C. § 1973c). Derfner, *supra* note 19, at 550.

80. See TRIBE & MATZ, *supra* note 62, at 32–33, (stating "[f]ive years after the VRA was passed nearly as many blacks registered to vote in Georgia, Alabama, Louisiana, North Carolina, Mississippi, and South Carolina as the entire century before 1965"). See also *Race and Voting in the Segregated South*, *supra* note 11 (stating, "Registration of black voters in the South jumped from 43 percent in 1964 to 66 percent by the end of the decade . . . an increase of more than a million [new voters].").

81. See Jim Rutenberg, *A Dream Undone*, N.Y. TIMES, July 29, 2015, www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html?nlid=64827106&r=1 (detailing southern politicians' resentment to Section 5).

82. See generally, *Katzenbach*, 383 U.S. at 301 (South Carolina arguing the Voting Rights Act is unconstitutional).

83. *Id.*

84. *Id.* at 323.

85. Gaughan, *supra* note 25, at 117.

86. *Id.*

87. *Katzenbach*, 383 U.S. 301 at 334 (explaining South Carolina contends the VRA is an uncommon exercise of congressional power).

88. *Id.* The Court also recognized that "Congress knew that some of the States covered by [the coverage formula] had resorted to extraordinary

Court held the coverage formula was “rational in both practice and theory.”⁸⁹

Not every justice was so persuaded by the covered states’ palpably prejudicial history. Justice Hugo Black, alone in dissent, saw the VRA as a divergence from the nation’s constitutional structure.⁹⁰ The former member of the Ku Klux Klan⁹¹ argued the VRA allowed the federal government to treat the states as “conquered provinces.”⁹² He also contended that the federal government should keep in line with the tradition of filing suits against state officials once a state law created an actual case and controversy.⁹³ Although Justice Black’s arguments were soundly rejected in 1966, that same contempt for the coverage formula and preclearance requirement persisted for decades until finally accepted in 2013.⁹⁴

3. *The Scaling Back of the VRA*

Even though the South experienced immense progress in voting equality following the signing of the VRA, continued operation of the Act’s provisions was not guaranteed. Section 5’s preclearance requirement was set to expire after five years.⁹⁵ In 1970, Congress addressed this sunset clause by expanding the coverage formula to include jurisdictions that maintained discriminatory tests or devices and experienced less than 50 percent minority voter registration or turnout in 1968.⁹⁶ Five years later, Congress did the same thing, but changed the date from 1968 to 1972.⁹⁷ Those jurisdictions covered by the 1964 formula remained covered.⁹⁸ Though the VRA’s preclearance formula was

stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.” *Id.* at 335.

89. *Id.* at 330 (stating that the use of “[t]ests and devices [were] relevant to voting discrimination because of their long history as a tool for perpetrating the evil” and “a low voting turnout was pertinent for obvious reasons.”).

90. *See id.* at 358 (Black, J., dissenting) (stating the fact that the VRA compels states “to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless”).

91. *Hugo Black*, BIO., www.biography.com/people/hugo-black-37030 (last visited Apr. 20, 2016). Justice Black joined the KKK in the early 1920s and resigned after two years. *Id.*

92. *Katzenbach*, 383 U.S. at 360 (Black, J., dissenting).

93. *Id.* at 357.

94. *See Shelby County*, 133 S. Ct. at 2631 (agreeing with Shelby County that the coverage formula is an unconstitutional exercise of power by the federal government on the states).

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

96. *Id.*

97. *Id.*

98. *Id.*

still intact, other provisions of the Act were undermined by way of judicial interpretation.

In 1980, the Supreme Court dealt significant setback to Section 2 of the VRA in *City of Mobile v. Bolden*.⁹⁹ Prior to *Bolden*, some courts required individuals suing a jurisdiction because of its voting policy to satisfy a high burden and show that the voting policy was motivated by a discriminatory purpose or intent.¹⁰⁰ Other courts, however, were more deferential to plaintiffs and only required them to show that the state's scheme resulted in a discriminatory effect.¹⁰¹ In *Bolden*, the Court resolved these inconsistencies. In a plurality opinion, the Court held that for a scheme to be unlawful, it had to be fueled by purposeful discrimination.¹⁰² Purposeful discrimination was a much higher burden for plaintiffs to overcome.¹⁰³

Plaintiffs, however, would not be required to overcome such a burden for long. In 1982, Congress reassessed the VRA and upended the *Bolden* ruling.¹⁰⁴ During the effects/intent debates, John Roberts—at the time an advisor to then-Attorney General William French Smith—aggressively opposed the effects based standard.¹⁰⁵ Roberts wrote several memoranda that attacked the VRA. In his writings, he argued the “widely accepted practices” used by states should not be subject to attack in federal courts.¹⁰⁶ In other memoranda, Roberts contended that Congress's effects

99. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

100. The phrases “intent” and “purpose” are used interchangeably. See *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (holding policies must be “conceived or [operate] as purposeful devices to further racial or economic discrimination”).

101. The phrases “effects” and “results” are also used interchangeably. See *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (holding that merely requiring plaintiffs to show the schemes produces invidious effects or results).

102. See *Bolden*, 446 U.S. at 74 (holding the city of Mobile's voting policies did not violate Section 2 because the plaintiff's evidenced was “far from proof that the at-large electoral scheme represent[ed] purposeful discrimination against Negro voters”).

103. See *id.* at 134-35 (Marshall, J., dissenting) (stating that “a standard based solely upon motives . . . creates significant problems of proof for plaintiffs” and that the intent standard “creates the risk that officials will be able to adopt policies that are the products of discriminatory intent so long as they sufficiently mask their motives through the use of subtlety and illusion”).

104. THE LEADERSHIP CONFERENCE, *supra* note 6 (explaining Congress overturned the *Bolden* ruling in 1982).

105. See *On the Nomination of Judge John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States: Testimony of Wade Henderson, Executive Director Leadership Conference on Civil Rights* (Sept. 15, 2005), in THE LEADERSHIP CONFERENCE, www.civilrights.org/advocacy/testimony/henderson-roberts.html?print=t (last visited Apr. 20, 2016) (stating “Roberts was an aggressive enemy of the ‘results’ standard”).

106. Memorandum from John Roberts, to U.S. Att'y Gen. William French Smith (Nov. 6, 1981) (on file with the U.S. National Archives and Records Administration).

based test would “provide a basis for the most intrusive interference imaginable by federal courts into the state and local processes.”¹⁰⁷

Despite these arguments, Congress eliminated the intent based *Bolden* standard and crafted legislation that returned Section 2 to the effects based standard¹⁰⁸ laid out by the Supreme Court in *White v. Regester*.¹⁰⁹ Roberts maintained that members of Congress “did not know what they were doing” when they voted for the effects test.¹¹⁰ For the effects test to prevail, however, its congressional proponents had to embrace an updated bailout provision—an idea that intent proponents like Roberts and the Reagan administration supported.¹¹¹

Originally, any city, county, or local municipality could not seek a bailout independently, if it was located within a state that qualified under the coverage formula.¹¹² Congress wanted to “provide incentives to jurisdictions to attain compliance with the law and increas[e] participation by minority citizens in the political process of their community.”¹¹³ The revised bailout provisions allowed jurisdictions located within a covered state to opt out of preclearance independently. The updated provision required jurisdictions seeking to opt out to show it had a ten-year

107. Memorandum from John Roberts, to U.S. Att’y Gen. William French Smith (Dec. 22, 1981) (on file with the U.S. National Archives and Records Administration).

108. S. REP. No. 97-417, at 2 (1982) *reprinted in* 1982 U.S.C.C.A.N. 177, 179 [hereinafter *1982 Senate Report*] (clarifying that Congress amended Section 2 “to make clear that proof of discriminatory intent is not required to establish a violation under Section 2”). The House also wanted to make it clear discriminatory intent was not required: “[t]he amendment clarifies the ambiguities which have arisen in the wake of the *Bolden* decision. It is intended by this clarification that proof of intent is not a prerequisite to establish voting discrimination violations in Section 2 cases.” H.R. REP. No. 97-227, at 2 (1981).

109. *White v. Regester*, 412 U.S. 755 (1973) (holding Section 2 requires plaintiffs to show discriminatory results, but not intent or purpose).

110. Memorandum from John Roberts, to U.S. Att’y Gen. William French Smith (Jan 26, 1982) (on file with the U.S. National Archives and Records Administration) [hereinafter *Jan. 1982 Memorandum*]. Roberts also urged the attorney general to use his memos, which he argued would help Senators become more educated on the dangers of the effects tests. *Id.*

111. See Adam Serwer, *Chief Justice Roberts’ Long War Against the Voting Rights Act*, MOTHER JONES, Feb. 27, 2013, 7:01 AM, www.motherjones.com/politics/2013/02/john-roberts-long-war-against-voting-rights-act (explaining that Roberts and the Reagan administration supported the intent standard and the updated bailout provision).

112. J. Gerald Hebert, *An Assessment of the Bailout Provisions of The Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006 262 (2007).

113. *1982 Senate Report*, *supra* note 108, at 44.

record of nondiscriminatory voting practices and engaged in efforts to expand minority voter participation.¹¹⁴

The effects versus intent fight of 1982 would not be the only time Roberts took a strong stance on a racially charged issue as a Reagan administration adviser. Roberts also favored the administration's "anti-busing and anti-quotas" campaigns.¹¹⁵ Even in the 1980s, Roberts was quick to claim victory in the battle for all to bask in the light of equality.¹¹⁶ For Roberts, there was no need for the administration to continue the fight for civil rights; rather, doing so would be discriminatory in and of itself. He argued that the effects of school busing, racially based hiring quotas, and other race conscious remedies would constitute "reverse discrimination."¹¹⁷ He advised that it made "eminent sense" to seek legislation that permanently barred the use of employment quotas.¹¹⁸ Roberts also took umbrage with the Equal Employment Opportunity Commission, which he thought was taking positions that solicited discrimination claims that were "totally inconsistent" with the administration's policies.¹¹⁹ Roberts even "regarded civil rights enforcement by prior administrations as wrong-minded and viewed with suspicion the career lawyers in the Civil Rights Division of the Reagan Justice Department."¹²⁰

During his 2005 confirmation hearings, Roberts and his supporters argued these beliefs were not as tightly held as others suggested, but were simply declarations of the Reagan administration's stance at the time.¹²¹ Once he took his lifetime

114. Hebert, *supra* note 112, at 262. Absent these changes, nearly all the covered jurisdictions would have been eligible for a bailout. *Id.* at 261. The then current bailout required jurisdictions to show that they had not enacted a discriminatory voting practice since 1965. *Id.* Because the VRA prohibited them from passing such practices, nearly all covered jurisdictions would have been eligible for a bailout—a happenstance Congress thought to be "wholly unwarranted" especially when "problems of discrimination and widespread failure to comply with the Voting Rights Act in the covered jurisdictions" still persisted. *1982 Senate Report, supra* note 108, at 44.

115. Linda Greenhouse, *A Tale of Two Justices*, GREEN BAG 11, 44 (2007). (explaining that Roberts wrote a series of memoranda urging policy positions to advance the administration's anti-busing and anti-quota principles).

116. *Id.*

117. *Id.*

118. R. Jeffery Smith & Charles Babington, *Roberts Memo Urged Laws Prohibiting Busing, Quotas*, WASHINGTON POST, Aug. 30, 2005, at A2.

119. *Id.*

120. Greenhouse, *supra* note 115, at 44.

121. Roberts and others defended these statements by arguing they "merely show[ed] that he was [just] being a good soldier when he was in the Reagan Administration." Serwer, *supra* note 111. *See also Confirmation Hearing, supra* note 2, at 173 (Roberts stating "the articulation of [these] views . . . represented my effort to articulate the views of the administration and the position of the administration for whom I worked, for which I worked, 23 years ago").

seat on the bench as the chief justice of the United States Supreme Court, however, Roberts had no problem repeating his 1980s attitudes. Specifically, the revised bailout provisions would soon become irrelevant and seemingly forgotten when Roberts attained two additional chances to put his mark on the VRA.¹²²

4. *John Roberts Gets a New Title, but Sings the Same Song*

In 2009, as chief justice of the United States Supreme Court, John Roberts, found himself in an improved position to attack the VRA, albeit from a different angle.¹²³ He got his first chance in *Northwest Austin Municipal Utility District No. One v. Holder* (*Northwest Austin*).¹²⁴ There a municipal district in Texas sought a bailout exemption from federal preclearance.¹²⁵ The district met the provision's requirements and was thus eligible for a bailout.¹²⁶ However, in the process of seeking their bailout, the district also challenged the overall constitutionality of preclearance requirements.¹²⁷

In granting the bailout, the Court declined to address the constitutional challenge.¹²⁸ Nonetheless, writing for the majority, Roberts sharply criticized the coverage formula for being "based on data that is now more than [thirty-five] years old."¹²⁹ He added that the coverage formula "fails to account for current political conditions."¹³⁰ Roberts's opinion of the formula remained unchanged four years later.

In 2013, Roberts wrote the majority opinion in *Shelby County v. Holder*.¹³¹ In holding Section 4(b)'s coverage formula unconstitutional, Roberts repeated his *Northwest Austin* critiques.¹³² He again chastised the formula for being "based on

122. The chief justice would later write the majority opinions in *Northwest Austin*, 557 U.S. 193 and *Shelby County*, 133 S. Ct. 2612.

123. Roberts drafted previous attacks on the Section 2 of the VRA as an advisor to the Reagan administration; but as chief justice, Roberts challenged the Act's coverage formula and preclearance provisions. Serwer, *supra* note 111. See also *Northwest Austin*, 557 U.S. at 193; *Shelby County*, 133 U.S. at 2612.

124. 557 U.S. 193.

125. *Id.* at 196-97 (explaining jurisdictions are eligible to bail-out of Section 5 preclearance requirements "if certain rigorous conditions are met.").

126. *Id.* at 197 (the district did not have a history of discrimination in its elections and it engaged in efforts to expand minority voter participation).

127. *Id.*

128. *Id.* at 211.

129. *Id.* at 203.

130. *Id.*

131. 133 S. Ct. 2612.

132. Compare *Northwest Austin*, 557 U.S. at 203 (stating "[t]he [VRA's] coverage formula is based on data that is now more than [thirty-five] years old, and there is considerable evidence that it fails to account for current

decades-old data and eradicated practices”¹³³ and added that it was “irrational for Congress to distinguish between States in such a fundamental way.”¹³⁴ Often citing his own *Northwest Austin* dicta,¹³⁵ Roberts asserted the coverage formula violated the fundamental principle of equal state sovereignty.¹³⁶ The chief justice did recognize that the VRA was originally upheld in 1966 despite being “an uncommon exercise of congressional power.”¹³⁷ Roberts, however, reasoned that the Court only reached that conclusion because of the “exceptional conditions” during that time.¹³⁸ To Roberts, “nearly 50 years later, things have changed dramatically” and the conditions in covered jurisdictions were no longer exceptional.¹³⁹ Thirty years removed from his advising days, Roberts still believed that Congress did not know what it was doing when it came to the VRA.¹⁴⁰

III. WHAT IS AND WHAT SHOULD NEVER BE¹⁴¹

Chief Justice Roberts’s views on race in the United States do not vary whether they are articulated in the context of education as a chief justice of the Supreme Court, hiring practices as an Advisor to the Reagan administration, or voting rights as both. This section first details Roberts’s stances on race preceding *Shelby County*. Next, it identifies conjectures Roberts expounds in *Shelby County* about racism’s contemporary impotence and the lawful scope of the federal government’s relationship with the states in the context of voting legislation. Finally, this section puts Roberts’s conclusions under a microscope, revealing their flaws.

political conditions”), with *Shelby County*, 133 S. Ct. at 2627 (stating “[n]early [fifty] years later, things have changed dramatically”).

133. *Shelby County*, 133 S. Ct. at 2627. Roberts also argued that literacy tests and other discriminatory schemes “have been banned for over [forty] years” and “voter registration and turnout numbers in covered States have risen dramatically.” *Id.*

134. *Id.* at 2630-31.

135. *Northwest Austin* could have demonstrated the VRA was capable of protecting reformed jurisdictions from unwarranted federal oversight; however in *Shelby County*, Roberts chose to cite *Northwest Austin*’s emphasis on the VRA’s pernicious violation of equal state sovereignty. *See id.* at 2624 (stating “as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”).

136. *Id.* at 2623. Roberts criticized the dissent for refusing “to consider the principle of equal sovereignty, despite *Northwest Austin*’s emphasis on its significance.” *Id.* at 2630.

137. *Id.* at 2624 (citing *Katzenbach*, 383 U.S. at 334).

138. *Id.*

139. *Id.* at 2625.

140. *Jan. 1982 Memorandum*, *supra* note 110.

141. LED ZEPPELIN, *What is and What Should Never Be*, on LED ZEPPELIN II (Atlantic Records 1969).

*A. When Roberts Is in the Driver's Seat, Racism Is
Always in the Rear View Mirror, or Maybe It Is Just
in His Blind Spot*

As chief justice, Roberts's judicial opinions on race seem to gloss over, and perhaps rewrite history. Specifically, in his majority opinion of *Parents Involved in Community Schools v. Seattle School District*,¹⁴² Roberts attempted to rewrite the context of *Brown v. Board of Education*.¹⁴³ In *Parents Involved*, the Court addressed two Washington state school districts' adoption of a race-based integration program.¹⁴⁴ Roberts's opinion vilipended the nation's history of racial discrimination and the residual effects it continues to have on today's society.¹⁴⁵

In striking down the policies, the chief justice claimed *Brown* as his precedent and declared that the hallmark case had nothing to do with "the inequality of facilities."¹⁴⁶ To Roberts, because the current policies allowed race to play a role in determining to which schools children went to, the policies were just as evil as *Brown's*.¹⁴⁷ Both the *Parents Involved's* and *Brown's* policies, Roberts wrote, told children "where they could and could not go to school based on of the color of their skin."¹⁴⁸ Yet, only by removing the context behind the differing districts' policies could Roberts claim that *Parents Involved* was just like *Brown*.¹⁴⁹ There were profound differences; *Brown's* policies were enacted to keep black kids out of white schools while the contemporary policies were enacted to create opportunity.¹⁵⁰

Previously, the Court held that the Constitution does not require school districts to set up racial balancing quotas, yet "school authorities may well conclude that some kind of racial

142. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (Parents Involved)*, 551 U.S. 701 (2007).

143. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

144. The Seattle districts allowed students to rank which schools they wanted to attend. *Parents Involved*, 551 U.S. at 711. If a school reached its capacity, the tiebreaker used was based on race. *Id.* The other district involved, Jefferson County, allowed students to rank their preferred schools, and these preferences were subjected to a rule that each school must maintain an African American enrollment rate of 15 to 50 percent. *Id.* at 716.

145. *Id.* at 705.

146. *Id.*

147. *Id.* at 747.

148. *Id.*

149. *Id.*

150. Stevens put the differences between the cases perfectly in his dissent: "[t]he Chief Justice fails to note that it was only black schoolchildren who were so ordered [that they could not go to school based on their skin color]; indeed, the history books do not tell stories of white children struggling to attend black schools." *Id.* at 799 (Stevens, J., dissenting).

balance in schools is desirable.”¹⁵¹ The Court was not the only branch of government that accepted this constitutional principal. Congress has enacted numerous race-conscious statutes that seek to improve race conditions.¹⁵² Presidents have also used their executive authority to support race-conscious efforts.¹⁵³ These views exemplify the objectives of the Civil War Amendments; devices that brought those out of a darkness defined by chains and whips and into the light of American society defined by life, liberty, and the pursuit of happiness.¹⁵⁴

Though the chief justice believes in a colorblind Constitution, the only way to achieve such a reality would be to strip the document of its history. From their drafting, the Civil War Amendments etched out an undeniable distinction between race-conscious policies that were perniciously designed to keep races apart, and those that painstakingly worked to bring races together.¹⁵⁵ As Justice Stephen Breyer contended, the Equal Protection Clause “sought to bring into American society as full members those whom the nation had previously held in slavery.”¹⁵⁶ Breyer also reminded the Court that those who drafted the Constitution outlined a “practical difference between the use of race conscious criteria in defiance of [keeping races apart] and the use of race conscious criteria to [bring races together].”¹⁵⁷

151. *North Carolina Bd. of Ed. v. Swann*, 402 U.S. 43, 45 (1971). *See also Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) (stating “[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole”).

152. *See e.g.*, Title II of the Civil Rights Act, 42 U.S.C. § 2000a(a) (outlawing discrimination based on race, color, religion, or national origin in any place of public accommodation); 20 U.S.C. § 6311 (requiring state educational agencies to file education plans that focus on improving academic achievement of “major racial and ethnic subgroups” in order to receive grant money under The No Child Left Behind Act).

153. *See* Exec. Order No. 10925, 26 C.F.R. § 1977-79 (1961) (expressing President John F. Kennedy’s commitment to equal employment).

154. *See Slaughter-House Cases*, 83 U.S. at 71 (stating “[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] . . . the freedom of the slave race”); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (stating that the Fourteenth Amendment “is one of a serious of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that the superior race enjoy”).

155. *TRIBE & MATZ*, *supra* note 62, at 22-23.

156. *Id.*

157. *Id.* (stating “Breyer reasoned that the Constitution protects against the subordination of minorities but permits government to invoke race when it has solid justifications and beneficial purposes”). *See also Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (stating “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause”).

The chief justice, however, sees no difference between policies of inclusion and exclusion based on race. Rather, Roberts argued any integration policy that features race exposes the evils of segregation and discrimination.¹⁵⁸ To Roberts, the United States' infamous epidemic of racism has long since ceased to have any effect on today's society.¹⁵⁹ Roberts's indifference towards racial issues in the context of education mirrors his attitudes when he weighs voting issues.

1. *Roberts: The South Has Changed, but Only with a Little Help from Its Friends*

In 2009, the chief justice laid *Shelby County's* ground work in *Northwest Austin*. Though he was forced to forgo voiding the VRA's coverage formula completely because Northwest Austin was eligible for a bailout, Roberts did not refrain from expressing his disdain for the formula.¹⁶⁰ Shelby County, in contrast, was ineligible for a bailout because the attorney general "recently objected to voting changes proposed from within the county."¹⁶¹ Instead of reminding Roberts why the coverage formula was still appropriate, this distinction only paved the way for the chief justice to strike down the formula.¹⁶²

Just as he did in *Northwest Austin*, Roberts proclaimed that while no one doubts that voting discrimination still exists,¹⁶³ "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."¹⁶⁴ The chief justice declared that Congress could not "rely simply on the

158. See *TRIBE & MATZ*, *supra* note 62, at 25 (stating Justices "Roberts and Thomas believe that state-sponsored integration is reminiscent of segregation"). See also *Parents Involved*, 551 U.S. at 747 (striking down the integration policies because the districts did not carry "the heavy burden of demonstrating that we should allow [race to determine where one goes to school] even for very different reasons."); *League of United Latin A. Citizens v. Perry*, 548 U.S. 399, 449 (2006) (Roberts C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (condemning "the sordid business [of] divvying us up by race").

159. See *Shelby County*, 133 S. Ct. at 2625 (stating "[n]early 50 years later, things have changed dramatically").

160. See *generally Northwest Austin*, 557 U.S. at 197 (denying to reach the constitutional challenge because the "district is eligible under the Act to seek bailout").

161. *Shelby County*, 133 S. Ct. at 2621.

162. Shelby County strictly tailored its lawsuit and argued "sections 4(b) and 5 [of the VRA] are facially unconstitutional." *Id.* at 2615.

163. Compare *Northwest Austin*, 557 U.S. at 203 (stating "[i]t may be . . . that conditions continue to warrant preclearance"), with *Shelby County*, 133 S. Ct. at 2619 (conceding that "voting discrimination still exists; no one doubts that").

164. *Shelby County*, 133 S. Ct. at 2618.

past”¹⁶⁵ when it reauthorized the VRA.¹⁶⁶ Roberts lambasted Congress for reauthorizing the Act without considering the strides that the nation made.¹⁶⁷ This is not the first time that Roberts argued that Congress did not know what it was doing,¹⁶⁸ and thirty years of successful operation of the VRA did not make an impression on Roberts.¹⁶⁹

Congress, however, did not take this task of reauthorizing the VRA lightly; a fact Roberts’s opinion generally ignores.¹⁷⁰ In something we rarely see today,¹⁷¹ Congress vigorously went to work to determine whether the 1965 coverage formula was still appropriate in 2006.¹⁷² The legislative process included extensive

165. *Id.* at 2629.

166. When looking at this argument on its face, it is fairly agreeable. Yet, the best way of looking at today’s conditions is by recognizing the VRA’s role in this progress. As this section explains, today’s equality would not be realized without the VRA’s coverage formula and preclearance. Justice Ginsburg put it perfectly in her dissent when she explained “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.” *Id.* at 2650 (Ginsburg, J., dissenting).

167. *See id.* at 2626 (majority opinion) (scoffing at the lack of any easing of the VRA’s restrictions and arguing that instead “the Act’s unusual remedies have grown even stronger”).

168. *Jan. 1982 Memorandum*, *supra* note 110.

169. *See* Wade Henderson, *The Voting Rights Act of 1965: 40 Years After ‘Bloody Sunday,’ A Promise Still Unfulfilled*, THE LEADERSHIP CONFERENCE (Mar. 2, 2005), www.civilrights.org/voting-rights/vra/2006/the-voting-rights-act-of-1965-40-years-after-bloody-sunday-a-promise-still-unfulfilled.html (stating the “VRA has become one of the most successful civil rights laws in American history.” “it has guaranteed millions of minority voters the equal opportunity[,] . . . ended literacy tests, poll taxes and other purposefully prejudiced mechanisms”).

170. Throughout his opinion, Roberts cherry-picks from Congress’s findings; often citing the portions of the congressional reports that fit his narrative, while downplaying any findings of racial discrimination. *See Shelby County*, 133 S. Ct. at 2625 (stating “there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the [VRA]”) (citing H.R. REP. No. 109-478, at 12 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 628 [hereinafter 2006 House Report]); *Id.* at 2629 (stating the 2006 reauthorization “ignores these developments” and that “no one can fairly say that [Congress’s finding] shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965”).

171. The 113th Congress was the least productive in history. Chris Cillizza, *Yes, President Obama Is Right. The 113th Congress Will Be the Least Productive in History*, WASH. POST, Apr. 10, 2014, www.washingtonpost.com/blogs/the-fix/wp/2014/04/10/president-obama-said-the-113th-congress-is-the-least-productive-ever-is-he-right/ (explaining that “according to the Federal Register, there have only been 23 public laws enacted in the second session of the 113th Congress—a number that virtually ensures that this Congress will pass the fewest number of laws of any in history”).

172. *See generally* 2006 House Report, *supra* note 170; S. REP. No. 109-295

hearings in both chambers,¹⁷³ amassing a 15,000-page record.¹⁷⁴ In addition to oral testimony given at the hearings, Congress received scores of investigative reports and other statistical documentation.¹⁷⁵ Through these hearings, Congress learned the classic forms of racial discrimination were still occurring in jurisdictions covered by the decades old coverage formula.¹⁷⁶ Notably, this congressional enquiry revealed that state legislators in Mississippi referred to an early 1990s redistricting plan that would have increased the number of black majority districts as the “black plan” publically and “the nigger plan” in private.¹⁷⁷ Congress also found similar abhorrent racism in Georgia where the state’s House Reapportionment Committee chairman had on numerous occasions told his colleagues that he did not “want to draw nigger districts.”¹⁷⁸ The fact that these and hundreds of other instances of discrimination occurred at all only underscored the VRA’s vital role in inhibiting such prejudice.

The chief justice, however, was ultimately unconvinced.¹⁷⁹ Congress’s 15,000 pages were not enough, nor were its discovered examples of state congressional leaders using the “n” word.¹⁸⁰ It is

(2006) [hereinafter 2006 Senate Report] (detailing Congress’s extensive findings).

173. The Senate Judiciary Committee held nine hearings and received testimony from forty-six witnesses, while the House Judiciary Committee held twelve hearings where forty-six witnesses also testified. 2006 Senate Report, *supra* note 172, at 10.

174. *Id.*; 2006 House Report, *supra* note 170, at 5 (stating the House Committee’s report “results from the development of one of the most extensive legislative records in the Committee on the Judiciary’s history.”). Even Roberts’s majority opinion in *Northwest Austin* conceded, “Congress amassed a sizeable record in support of its decision to extend the preclearance requirements.” *Northwest Austin*, 557 U.S. at 205.

175. Specifically, during its hearings in front of the Subcommittee on the Constitution, the House Judiciary Committee received and incorporated into the legislative record a report from the ACLU’s Voting Rights Project that cited and assessed 293 cases involving allegations of voting discrimination since 1982. *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 435 (D.D.C. 2011) *aff’d*, 679 F.3d 848 (D.C. Cir. 2012) *rev’d*, 133 S. Ct. 2612 (2013) and *vacated and remanded*, 541 F. App’x 1 (D.C. Cir. 2013).

176. 2006 Senate Report, *supra* note 172, at 14; 2006 House Report, *supra* note 170, at 67.

177. 2006 Senate Report, *supra* note 172, at 14.

178. 2006 House Report, *supra* note 170, at 67.

179. As a Reagan advisor Roberts also disagreed that Congress had enough evidence to reauthorize the VRA in 1982. *See Confirmation Hearing, supra* note 2, at 171 (statement of Sen. Kennedy) (confronting Roberts with his past claims that “there [was] no evidence of voting abuses nationwide supporting the need for such a change” and adding that he [Kennedy] “was there . . . [at the] extensive hearings [where the House and Senate] considered detail-specific testimony from affected voters throughout the country.”).

180. The congressional record surpassed 15,000 pages and included multiple instances of state officials using the “n” word. *Shelby County*, 133 S.

hard to imagine what it would have took for Roberts to agree that these jurisdictions should remain covered. In one breath, Roberts asserted the cited instances of racism did not reach “the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965,” but in the next proclaimed “any racial discrimination in voting is too much.”¹⁸¹ Though it seems difficult to square these two assertions, what is clear is that *recent* history was most important to Roberts.¹⁸²

In his *Shelby County* majority opinion, the chief justice proclaimed, “history did not end in 1965”¹⁸³ when the VRA was enacted; however, “there had been 40 more years”¹⁸⁴ leading up to Congress’s most recent reauthorization.¹⁸⁵ Roberts demanded that it was *this* forty years of history that could not be ignored.¹⁸⁶ Roberts stressed that enormous strides made in the South defined this recent history.¹⁸⁷ Roberts did concede that the VRA was the driving force behind this progress.¹⁸⁸ Yet in order to conclude the way he did, Roberts inevitably downplayed the VRA’s role in insuring these developments.¹⁸⁹ The holding showed that the chief justice simply could not appreciate the level of resistance that still exists in today’s voting atmosphere.¹⁹⁰ Roberts claimed the passing of forty years led to a much more progressive and tolerant South.¹⁹¹ Yet, the congressional findings reveal that the South had not independently come as far as the chief justice professed.

Ct. at 2636 (Ginsburg, J., dissenting); 2006 Senate Report, *supra* note 172, at 14; 2006 House Report, *supra* note 170, at 67.

181. *Shelby County*, 133 S. Ct. at 2629, 2631 (internal citations omitted).

182. *See id.* at 2630-31 (explaining that it is “irrational for Congress to distinguish between States in such a fundamental way based on forty-year-old data when today’s statistics tell an entirely different story.”).

183. *Id.* at 2628.

184. *Id.*

185. Congress reauthorized the VRA’s coverage formula and preclearance requirement in 2006. Gaughan, *supra* note 25, at 118.

186. *Shelby County*, 133 S. Ct. at 2628.

187. *Id.* (explaining between 1965 and 2006 “voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers”).

188. *Id.* (stating the past forty years of progress is “largely because of the Voting Rights Act”).

189. *Id.* (asserting “largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula . . . ignores these developments . . .”).

190. Southern legislators using the “n” word and the amount of objectionable laws that would have gone into effect if not for federal preclearance demonstrates voting discrimination still occurs even in today’s society. *See* 2006 Senate Report, *supra* note 172, at 14 (referencing Mississippi legislators using the “n” word to describe a redistricting plan); 2006 House Report, *supra* note 170, at 67 (citing a Georgia congressman’s use of the “n” word).

191. *Shelby County*, 133 S. Ct. at 2625.

Without the coverage formula and federal preclearance, even covered jurisdictions' *recent* history would be unrecognizable. The Department of Justice (DOJ) objected to *more* voting laws between 1982 and 2004 than between 1965 and 1982.¹⁹² The violations were hardly innocuous. In 1995, a federal court struck down a Mississippi registration system "which was *initially enacted in 1892* to disenfranchise Black voters."¹⁹³ In 2001, the DOJ intervened after the white mayor of Kilmichael, Mississippi, and the city's five aldermen,¹⁹⁴ suddenly canceled the town's election after "an unprecedented number" of black candidates attempted to run for office.¹⁹⁵ Even as recently as 2006, the Supreme Court prevented Texas' attempt to redraw district lines that reduced the voting power of Latino voters.¹⁹⁶ Without the coverage formula and federal preclearance, southern legislatures would have been free to enact these and countless other discriminatory voting laws.¹⁹⁷

Roberts's conclusion that "things have changed dramatically" is naïve. Though schools are desegregated and the South is no longer riddled with "whites only" signs,¹⁹⁸ his assertion that the coverage formula does not warrant current conditions is misplaced.¹⁹⁹ If one just considers the past 20 years, it is clear that

192. *Id.* at 2639 (Ginsburg, J., dissenting). There were 626 objections between '82 and '04 and only 490 between '65 and '82. *Id.*

193. The coverage formula and preclearance facilitated the federal court's prevention of this Mississippi law from going into effect. 2006 House Report, *supra* note 170, at 39 (emphasis added).

194. The five aldermen were also white. *Id.* at 36.

195. After the DOJ required the election, the town elected its first black Mayor and three black aldermen. *Id.* at 36-37.

196. *Perry*, 548 U.S. at 440. In response, Texas then attempted to curtail early voting in the district, but this too was blocked by federal preclearance. *League of United Latin Am. Citizens v. Texas*, No. 06-cv-1046 (W.D. Tex.), Doc. 8.

197. *See* 2006 House Report, *supra* note 170, at 37 (stating following the 2000 census the DOJ found a redistricting plan adopted by Albany, Georgia had the "purpose to limit and retrogress the increased black voting strength"). *See also Shelby County*, 133 S. Ct. at 2641 (Ginsburg, J., dissenting) (explaining the DOJ blocked a proposed two year election delay of a majority black district in Millen, Georgia that would have left the district without representation on the city council for two years while majority white districts would be able to elect three representatives).

198. *Shelby County*, 133 S. Ct. at 2627 (majority opinion). *See* THE LEADERSHIP CONFERENCE, *School Desegregation and Equal Educational Opportunity*, www.civilrights.org/resources/civilrights101/desegregation.html (last visited May, 10, 2016) (discussing the desegregation of schools throughout the mid-20th century); Bob Greene, *Signs of America's racial past*, CNN, Jan. 22, 2012, www.cnn.com/2012/01/22/opinion/greene-racial-signs/index.html (detailing the prevalence of "white only" signs in the South as late as the 1970s).

199. *See Shelby County*, 133 S. Ct. at 2631 (holding "Congress must ensure that the legislation it passes to remedy [racial discrimination in voting] speaks to current conditions").

things simply would not have changed without the coverage formula.²⁰⁰ Congress's decision to reauthorize the VRA reflected findings of persistent racial voting discrimination in covered jurisdictions.²⁰¹ What's more, the Act also accommodated for dramatic changes in covered jurisdictions. If covered jurisdictions refrained from discriminating the Act's bailout provision released them from the coverage formula and preclearance.²⁰² *Northwest Austin* proved the bailout provision was capable of jettisoning any unjustified constraints.²⁰³ In *Shelby County*, however, Roberts ignored the bailout provision's ability to absolve tolerant jurisdictions.

2. *The Bailout Provision Will Set You Free*

In *Shelby County*, Roberts asserted that "the [VRA] has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b)" as our nation became more progressive.²⁰⁴ This argument, though on its face is true, is only persuasive if one ignores the 1982 changes to the VRA's bailout provision. The bailout provision terminates the preclearance requirement, rendering Sections 4 and 5 moot, if a covered jurisdiction satisfies certain conditions.²⁰⁵ During the first fifteen years of the VRA, the bailout provision was extremely difficult to satisfy. The pre-1982 bailout provision required covered jurisdictions to show that they did not reinstate any discriminatory devices or schemes within the past *seventeen* years.²⁰⁶ Additionally, sub-jurisdictions located within covered states were not allowed to bailout independently.²⁰⁷ This changed in 1982.²⁰⁸

200. *Id.* at 2639 (Ginsburg, J., dissenting).

201. 2006 Senate Report, *supra* note 172; 2006 House Report, *supra* note 170.

202. *Shelby County*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting) (asserting that the bailout provision enabled "the VRA to be a dynamic statute, capable of adjusting to changing conditions.").

203. *Northwest Austin*, 557 U.S. at 211 (finding Northwest Austin eligible for a bailout without holding preclearance unconstitutional). *See also Shelby County*, 133 S. Ct. at 2621 (stating "the Court's construction of the bailout provision [in *Northwest Austin*] left the constitutional issues for another day.").

204. *Shelby County*, 133 S. Ct. at 2626.

205. Serwer, *supra* note 111.

206. Hebert, *supra* note 112, at 260-62 (detailing the high hurdles preclearance imposed on states from 1965 to 1982 that required covered jurisdictions "to prove no test or device had been used for a racially discriminatory purpose or effect within the past *seventeen* years").

207. *Id.*

208. Serwer, *supra* note 111, (explaining Congress amended the VRA's bailout provision in 1982).

The 1982 Amendment to the bailout provision not only allowed jurisdictions within covered states to bailout independently, it also provided a more honest opportunity for eligible jurisdictions to bailout.²⁰⁹ Under the amended provisions, covered jurisdictions now only had to demonstrate that during the ten years following the passage of the VRA, they did not propose a law that was later thwarted by preclearance.²¹⁰ These jurisdictions also had to show that they took additional steps to prevent future discrimination.²¹¹ The updated provisions allowed jurisdictions that truly changed to rid themselves of their covered status and preclearance.²¹² This was not an impossible task for commendable jurisdictions; since the current bailout procedures became effective in 1984, nearly 200 jurisdictions have successfully escaped the preclearance requirement.²¹³ Roberts's assertion that Congress has not eased the coverage formula or preclearance requirements is just another example of the chief justice's disingenuous characterization of history.²¹⁴

209. The original bailout provision of the 1965 version of the VRA required any covered jurisdiction to show that it had not used a discriminatory device five years prior to the VRA's enactment. *Id.* at 260. When Congress reauthorized the VRA in 1970 and 1975, it abstained from adopting any sincere reforms to the bailout standards. *Id.* These unreachable benchmarks continued to preclude practically every covered jurisdiction from bailing out until the 1982 amendments. *Id.*

210. *Id.* at 262-63 (stating the full requirements as followed: "(1) [n]o test or device has been used to determine voter eligibility with the purpose or effect of discrimination; (2) [n]o final judgments, consent decrees, or settlements have been entered against the jurisdiction for racially discriminatory voting practices; (3) [n]o federal examiners have been assigned to monitor elections; (4) [t]here has been timely preclearance submission of all voting changes and full compliance with Section 5; and (5) [t]here have been no objections by the Department of Justice or the District Court for the District of Columbia to any submitted voting changes").

211. Specifically, the covered jurisdictions had to show "(1) [a]ny dilutive voting or election procedures have been eliminated; (2) [c]onstructive efforts have been made to eliminate any known harassment or intimidation of voters; [and] (3) [t]hey have engaged in other constructive efforts at increasing minority voter participation such as expanding opportunities for convenient registration and voting, and appointing minority election officials throughout all stages of the registration/election process." *Id.* at 263.

212. 2006 House Report, *supra* note 170, at 25 (explaining that the revised bailout provision "illustrates that . . . covered status is neither permanent nor over-broad" and that covered status is "within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so").

213. *Shelby County*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting).

214. *Id.* at 2626 (majority opinion) (stating that Congress "has not eased the restrictions [of federal preclearance] or narrowed the scope of the coverage formula").

Under the VRA, covered jurisdictions were not permanently subjected to federal preclearance.²¹⁵ Covered jurisdictions needed only show that they refrained from attempting to employ racially discriminatory voting laws.²¹⁶ The injustice Roberts sought to address—states subjected to federal preclearance despite current enlightened conditions²¹⁷—was perfectly capable of righting itself. If there remained jurisdictions that could not bailout, those realities only reinforced the arguments supporting the contemporary aptness of the coverage formula and preclearance.²¹⁸ A closer look reveals the chief justice’s disregarding of the Act’s ability to accommodate for current conditions was perhaps necessary to support his half hazard theme that carried the day; the coverage formula perniciously violated equal state sovereignty by singling out certain states, but not every state.

3. *Equal State Sovereignty: A Fundamental Voting Rights Principle That Dates Back All the Way To 2004*

In *Shelby County*’s figurative prologue, *Northwest Austin*, the chief justice repeatedly referenced a “historic tradition” of all states enjoying “equal sovereignty.”²¹⁹ Though our federalist system embodies a separation of powers that allows states to retain pieces of sovereignty,²²⁰ careful reading of the precedent cited by Roberts in *Northwest Austin* shows the principle of equal state sovereignty is not fundamental, let alone a historic tradition.²²¹ More importantly, the cases cited are far removed from the context of voting rights.²²²

215. 2006 House Report, *supra* note 170, at 25.

216. *Shelby County*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting).

217. *Id.* at 2629 (majority opinion) (contending that if Congress is to treat States differently, it must single out states “on a basis that makes sense in light of current conditions”).

218. *See id.* at 2644 (Ginsburg, J., dissenting) (stating the fact that many jurisdictions are unable to opt out “reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime”).

219. *Northwest Austin*, 557 U.S. at 203 (stating the VRA “differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty’”).

220. U.S. CONST. amend. X (stating, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

221. TRIBE & MATZ, *supra* note 62, at 34 (explaining equal state sovereignty was a “new doctrine”).

222. *See United States v. Louisiana*, 363 U.S. 1 (1960) (dealing with water rights); *Texas v. White*, 74 U.S. 700 (1868) (settling disputed sales of assets upon readmission into the union).

In the first case that Roberts cites, *United States v. Louisiana*, the Court resolved a territorial dispute between the United States and various states.²²³ The Court there stated:

[t]his Court early held that the 13 original States, by virtue of the sovereignty acquired through revolution against the Crown, owned the lands beneath navigable inland waters within their territorial boundaries, and that each subsequently admitted State acquired similar rights as an inseparable attribute of the *equal sovereignty* guaranteed to it upon admission.²²⁴

Neither the Court's words nor the context of this case suggests that the principle of equal sovereignty extends to further circumstances other than admission into the United States. The *Louisiana* Court pulled from *Pollard v. Hagan*,²²⁵ an 1845 case which held that states' navigable waters, and the soils under them, were not granted to the states by the Constitution.²²⁶ Rather, these rights were reserved to the states respectively.²²⁷ Put simply, the states had these rights before the federal government was created and kept them after the framing of the Constitution.²²⁸ Moreover, states that came into the union after the revolution had the same territorial rights and sovereignty as the original colonies.²²⁹ The *Louisiana* decision merely references *Pollard's* principle that every state has an equivalent interest to the *land* and *water* rights located within their territorial borders and they hold those specific interests against other states and the federal government.

Roberts's citation to the second case, *Texas v. White*, also fails to support a historic tradition of equal state sovereignty.²³⁰ In *White*, the Court held sales of state assets made by Texas' provisional Confederate government were void upon Texas' readmission into the Union.²³¹ Before analyzing the matters facing the Court, *White* begins with a lofty civics lesson: "[u]nder the Constitution, . . . the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people."²³² The broad language continues: "there [can] be no loss of separate and independent autonomy to the States, through their

223. *Louisiana*, 363 U.S. 1.

224. *Id.* at 16 (emphasis added) (citation omitted).

225. *Pollard v. Hagan*, 44 U.S. 212 (1845).

226. *See id.* at 212 (stating that "[u]pon the admission of Alabama into the union, the right of eminent domain, which had been temporarily held by the United States, passed to the state").

227. *Id.*

228. *Louisiana*, 363 U.S. at 16.

229. *Pollard*, 44 U.S. at 212.

230. *White*, 74 U.S. 700.

231. *Id.* at 733-34.

232. *Id.* at 725.

union under the Constitution[.]”²³³ The latter is seemingly the language Roberts cited to support his *Northwest Austin* claim that the nation holds a “historic tradition that all the States enjoy ‘equal sovereignty.’”²³⁴ Standing alone, *White’s* assertion appears seminal; however, the Court’s subsequent analysis and holding undercuts any significance.

Though *White* briefly talks about states retaining elements of sovereignty, the Court makes clear that states do not maintain unfettered “separate and independent autonomy[.]”²³⁵ Specifically, the Court held that “acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens . . . must, in general, be regarded as invalid and void.”²³⁶ The *White* Court, however, did not hold that all the Texas’ Confederate legislature’s acts were void simply because they were the products of a treasonous government.²³⁷ The Court explained “acts necessary to [the] peace and good order among citizens . . . must be regarded . . . as valid” even though they emanated from an unlawful government.²³⁸ The Court only voided the specific transactions at issue because their purpose defied the Constitution.²³⁹

White’s holding does not support Roberts’s *Shelby County* assertion that “the fundamental principle of equal sovereignty remains highly pertinent in assessing [the VRA’s] subsequent disparate treatment of States.”²⁴⁰ On the contrary, *White’s* holding supports a finding that the coverage formula’s operative effect outweighs the principles of equal state sovereignty.²⁴¹ Specifically, jurisdictions falling within the VRA’s coverage formula “intend[ed] to defeat the just rights of citizens,” specifically their Fifteenth Amendment rights.²⁴² *White* upheld federal voiding of state acts that violated the constitution even though such federal intervention infringed upon Texas’ equal sovereignty.²⁴³ In *Shelby*

233. *Id.* at 726.

234. *Northwest Austin*, 557 U.S. at 203 (citing *Louisiana*, 363 U.S. at 15; *White*, 74 U.S. at 725-26. Roberts does not cite any specific *White* language in *Northwest Austin. Id.*

235. *White*, 74 U.S. at 726.

236. *Id.* at 733.

237. *Id.*

238. *Id.* For example the Court asserted the legislature’s “acts sanctioning and protecting marriage and domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts” were valid. *Id.*

239. *Id.*

240. *Shelby County*, 133 S. Ct. at 2624.

241. *See White*, 74 U.S. at 733 (holding the Confederate legislature’s acts were invalid and voidable because they violated the Constitution).

242. *Id.*

243. *Id.* *White* upheld Texas’s post-Civil War provisional government’s

County, the coverage formula is a federal response to unconstitutional acts by certain states and should too have been upheld.

After reviewing Roberts's citations, the chief justice's *Northwest Austin* claim that equal state sovereignty is a fundamental principle appears shaky at best. To his credit, Roberts did recognize the principle's narrow foundation; conceding that the previous cases that referenced equal state sovereignty "concerned the admission of new states."²⁴⁴ Roberts further accepted that "*Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside [the admission of new states]."²⁴⁵ The doctrine's lack of effective precedential support,²⁴⁶ did not stop Roberts from relying on *Northwest Austin's* words throughout *Shelby County*.²⁴⁷ Doubling down, Roberts ignored forty plus years of precedent and claimed that *Northwest Austin* now trumped all.²⁴⁸ Roberts even chastised the dissent for "refus[ing] to consider the principle of equal [state] sovereignty, despite *Northwest Austin's* emphasis on its significance."²⁴⁹ Roberts clung to his own *Northwest Austin* words in *Shelby County* like a hanging chad to a ballot.²⁵⁰ And understandably so; *Northwest Austin* is the only case adjudicated after the year 1911, let alone a case involving voting rights, that the chief justice could cite to that refers to the "fundamental principle of equal sovereignty."²⁵¹ Lack of precedential support aside, Roberts's equal state sovereignty simply ignores federalism's flexibility when states act unequally.

voiding of the transactions. *Id.* at 734. The provisional government was created via federal intervention. *Id.* at 729. Admittedly, acting in furtherance of a rebellion against the federal government is more egregious than passing voting laws that violate the Fifteenth Amendment; however, each undertaking violates the Constitution.

244. In *Shelby County*, Roberts cites another case, *Coyle v. Smith*, 221 U.S. 559, 567 (1911), which similarly referenced equal state sovereignty in the context of States admission into the Union. *Shelby County*, 133 S. Ct. at 2623-24.

245. *Id.* (emphasis in original).

246. *TRIBE & MATZ, supra* note 62, at 34 (describing equal state sovereignty as a "new doctrine").

247. *See Shelby County*, 133 S. Ct. at 2623 (stating "as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States").

248. *Id.* at 2630.

249. *Id.*

250. A "chad" is the portion of a paper ballot that voters punch out to indicate which candidate they prefer. Carter M. Yang, *Presidency Hinges on Tiny Bits of Paper*, ABC NEWS, Nov. 12, 2000, <https://cseweb.ucsd.edu/~goguen/courses/275f00/abc-chads.html>. A "hanging chad" is any piece of paper that remains stuck to the ballot. *Id.* Florida hanging chads caused great controversy during the 2000 presidential election. *Id.*

251. *Shelby County*, 133 S. Ct. at 2630.

4. *When States Do Not Act Equally, Equal State Sovereignty Is Inapplicable*

Contrary to what Roberts contends, not every state is entitled to equal treatment in the context of voting rights because not every state equally attempts to enact discriminatory voting laws.²⁵² Relying on the chief justice's stance, one would expect the number of Section 2 suits coming out of non-covered jurisdictions to mirror the amount coming out of covered jurisdictions.²⁵³ Surprisingly though, dissimilarities persist.²⁵⁴ The rate of successful Section 2 suits coming out of covered jurisdictions consistently outnumbers the amount of successful suits arising out of non-covered jurisdictions.²⁵⁵ When adjusted for the population differences, there has been nearly four times the amount of successful Section 2 suits coming out covered jurisdictions than non-covered.²⁵⁶

IV. WHAT SHOULD HAVE BEEN AND WHAT NEEDS TO BE

By expanding equal state sovereignty's application to voting rights cases, the chief justice advanced the equality of the states over the equality of the people. However, equal state sovereignty contradicts the very nature of our country's history, particularly our history of race relations. Protecting the equal sovereignty of the states from hypothetical federal government overreach seems more important to Roberts than defending the people from the actual unacceptable deprivation of the fundamental constitutional right to vote. This section asserts how the chief justice should have

252. *Supra* part III. b.

253. Section 2 of the VRA applies nationwide and allows every citizen regardless of geographic location to file claims alleging that their state's voting laws violate the VRA. 52 U.S.C. § 10301(b). With the coverage formula and preclearance preventing the most egregiously discriminatory laws from coming into place, it is logical for one to predict non-covered jurisdictions would have exponentially more Section 2 suits than covered jurisdictions. *See Shelby County*, 133 S. Ct. at 2642 (Ginsburg, J., dissenting) (describing the same).

254. Because preclearance would prevent covered jurisdictions' most sordid voting laws, one could expect more borderline Section 2 cases arising out of covered jurisdictions. With less open and shut cases in the pool, there would assumedly be a lower rate of successful Section 2 plaintiffs in covered jurisdictions. Yet, we all know what happens when one assumes. *See The Odd Couple: My Strife in Court* (ABC television broadcast Feb. 16, 1973) (stating "[n]ever assume, because when you assume you make an ass of u and me").

255. *Shelby County*, 133 S. Ct. at 2643 (Ginsburg, J., dissenting) (explaining "covered jurisdictions account for less than twenty-five percent of the country's population [but] accounted for fifty-six percent of the successful § 2 litigation since 1982").

256. *Id.*

analyzed and held in *Shelby County*. It then proposes how Congress should fix the now gutted VRA by looking at previous congressional response to a Supreme Court opinion misapplying a section of the VRA.

A. *The Constitutional Centrality of Popular Sovereignty, Not State Sovereignty*

In *Shelby County*, Roberts derided the coverage formula for representing an extraordinary departure from the nation's tradition of equal state sovereignty.²⁵⁷ According to the chief justice, its imposition of substantial federalism costs inappropriately encroached on covered jurisdictions' sovereignty.²⁵⁸ That contention was the heart of Roberts's opinion.²⁵⁹ *Shelby County*'s key issue should have, however, hinged on protecting groups of people from discrimination at the hands of state governments.

Deciding whether any government, federal or state, should be allowed to deny the right to vote based on race is an easy task. The answer is barely debatable: the government cannot do it.²⁶⁰ *Shelby County*'s question should have been tailored to whether racism still existed in covered states warranting the VRA's protections. However, the chief justice instead framed *Shelby County* as a question of whether the federal government could constitutionally place restrictions on certain states and not others. In essence, *Shelby County* boiled down to where sovereignty truly lies.²⁶¹ Where sovereignty lies is not an open and shut issue; it is "our oldest question of constitutional law."²⁶² The debate continues today because the structure of the Constitution accomplished the unimaginable: it divided and limited sovereignty.²⁶³

257. *Id.* at 2618 (majority opinion).

258. *Id.* at 2621, 2631.

259. *Id.* at 2631.

260. See U.S. CONST. amend. XV, § 1.

261. Sovereignty derives its origin from the French *souverain*, which means "a supreme ruler not accountable to anyone, except perhaps to God." MICHAEL R. FOWLER & JULIE M. BUNCK, LAW POWER AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 4 (1995). The traditional concept of sovereignty reinforced the power of the king; "a unitary central authority should wield unlimited power over citizens and subjects[.]" Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 239 (2005) (describing Bodin's, "who advanced the first comprehensive concept of 'sovereignty,'" theory of sovereignty).

262. *New York v. United States*, 505 U.S. 144, 149 (1992).

263. See PETER S. ONUF, STATE SOVEREIGNTY AND THE MAKING OF THE CONSTITUTION, IN CONCEPTUAL CHANGE AND THE CONSTITUTION 78-98 (1988) (discussing the departure from the traditional concept of sovereignty that occurred during the development of the Constitution).

The Framers fiercely debated where sovereignty should rest between the federal and state governments;²⁶⁴ however, the Constitution's final draft avoided the term "sovereignty" altogether.²⁶⁵ This perhaps reflected the lessons learned through the failures of the Articles of Confederation, which specifically expressed that each state "retains its sovereignty, freedom and independence."²⁶⁶ Thus, the Constitution demonstrated a shift in American governance; an unworkable agreement between independent states transformed into a more nation-centered country. While the Constitution's ambiguity often defines the genius of the document,²⁶⁷ the sovereignty of the American people was hardly disputed then and should not have been discounted by Roberts in *Shelby County*.

When the battle over sovereignty pits the state's right to enact discriminatory voting laws against the federal government's authority to protect the rights of the people, the spirit of the Fifteenth Amendment shows that ultimate sovereignty lies in the hands of the citizens of the United States as a whole, rather than the state.²⁶⁸ Thomas Jefferson's Declaration of Independence characterized the sovereignty of the people as a self-evident truth.²⁶⁹ This principle was not lost after the Colonies won independence over a tyrannical monarchy. James Madison proclaimed that "[t]he ultimate authority, wherever the derivative

264. See THE FEDERALIST NO. 32 (Alexander Hamilton) (stating "the State governments would clearly retain all the rights of sovereignty which they before had and which were not . . . exclusively delegated to the United States"); see also THE FEDERALIST NO. 39 (James Madison) (explaining the federal government's "jurisdiction extends to certain enumerated objects only" while the States retain "a residuary and inviolable sovereignty over all other objects").

265. U.S. CONST. See also Zick, *supra* note 261, at 242 (explaining the Constitution does not specifically mention state sovereignty).

266. ARTICLES OF CONFEDERATION OF 1781, art. II.

267. See Justice William J. Brennan Jr., Address at Georgetown University Teaching Symposium: Constitutional Interpretation (Oct. 12, 1985) <http://teachingamericanhistory.org/library/document/constitutional-interpretation/> (stating "[f]or the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs").

268. See AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 361, 363, 399 (2005) (asserting that the Civil War Amendments "authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality" and provided "sweeping enforcement powers" "to enact 'appropriate' legislation targeting state abuses").

269. See THE DECLARATION OF INDEPENDENCE, para. 2 (stating "We hold these truths to be self-evident, that . . . it is the Right of the People to . . . institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.").

may be found, resides in the people alone[.]”²⁷⁰ The states and our nation as a whole are made by the people and for the people.²⁷¹ When weighing the sovereignty of the state against the sovereignty of the people, the scales tip in favor of the people.²⁷² This is especially true when states enact laws that violate the fundamental constitutional right for the American people to vote.²⁷³

No matter how much sovereignty the states retain from the federal government, Congress may still nonetheless engage in an “uncommon exercise of power” when dealing with “exceptional conditions.”²⁷⁴ Exceptional conditions were created by states hell-bent on disenfranchising black voters.²⁷⁵ To combat the states’ pernicious voting discrimination, Congress acted with an uncommon exercise of power and passed the VRA in 1965.²⁷⁶ It later concluded covered jurisdictions’ voting conditions still warranted this uncommon exercise of power by reauthorizing the VRA in 1970, 1975, 1982, and 2006.²⁷⁷ In *Shelby County*, Roberts

270. THE FEDERALIST NO. 46 (James Madison); *see also* *Chisolm v. Georgia*, 2 U.S. 419, 471 (1793) (stating that “[the people] are truly the sovereigns of the country”).

271. *See* James Wilson, *Pennsylvania Ratifying Convention* (1787), reprinted in 1 THE FOUNDERS’ CONSTITUTION 62 (Philip B. Kurland & Ralph Lerner eds., 1987) (stating, “I view the States as made for the people as well as by them, and not the people as made for the States”).

272. James Madison referred to the state and federal governments as mere “agents and trustees of the people” and not ultimate sovereigns. THE FEDERALIST NO. 46 (James Madison). Likewise, Thomas Jefferson repeatedly emphasized the people were the only legitimate source of government. Thomas Jefferson to Spencer Roane (1821), reprinted in 15 THE WRITINGS OF THOMAS JEFFERSON 328 (Lipscomb and Bergh, eds., 1903-1904) (Jefferson stating “[it is] the people, to whom all authority belongs.”). Moreover, Jefferson contended that the “constitutions of most of our States assert that all power is inherent in the people.” Thomas Jefferson to John Cartwright (1824), reprinted in 16 WRITINGS 45.

273. The right to vote has proved to be a tricky right for the Court to classify. *Compare* *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding the right to vote is a fundamental right) *with* *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (finding not all voting rights cases require strict scrutiny; i.e., that the right to vote is not always fundamental). Still, despite the inconsistencies chief justice Roberts maintained the right to vote was an essential right during his Senate Confirmation Hearing. *See Confirmation Hearing*, *supra* note 2, at 171 (Roberts stating the right to vote is “one of . . . the most precious rights we have as Americans.”).

274. *Katzenbach*, 383 U.S. at 334 (explaining “the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate”).

275. *See id.* at 309 (stating Congress was confronted by racial discrimination in voting; “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution”).

276. *Id.* at 308-09.

277. Hebert, *supra* note 112, at 258. The Civil-War Amendments were also

241 faced Congress's most recent comprehensive record.²⁷⁸ A record
242 containing scores of contemporary examples of states' attempts at
243 enacting discriminatory voting laws.²⁷⁹ Roberts's holding
244 minimized and ignored these egregious intrusions on the Fifteenth
245 Amendment rights of these citizens.²⁸⁰ Instead, Roberts chose to
246 emphasize the importance of preventing the federal government²⁸¹
247 from encroaching on the sovereignty of the states.²⁸² His reasoning
248 contradicts and disregards the aforementioned principles.

249 The rights and sovereignty of the people are not to be
250 outweighed by the right of governments to enact oppressive voting
251 laws that violate the Fifteenth Amendment. The concept of equal
252 state sovereignty is misguided because states are regularly
253 subordinated to the power of the federal government. For instance,
254 the EPA can regulate states that experience pollution problems,²⁸³
255 federal immigration authorities can survey border states,²⁸⁴ and
256 the Justice Department can watch over state governments that
257 suffer from internal corruption.²⁸⁵ Even if Roberts's equal state

a direct response to racial discrimination. *Race and Voting in the Segregated South*, *supra* note 11.

278. *Shelby County*, 133 S. Ct. at 2629-30.

279. 2006 House Report, *supra* note 170; 2006 Senate Report, *supra* note 172.

280. In his majority opinion, Roberts does not acknowledge the specific examples of the recent voting discrimination referenced in the congressional reports. *Shelby County*, 133 S. Ct. at 2618-32. Roberts simply absolves the cited instances for not "approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965." *Id.* at 2629 (citing *Katzenbach*, 383 U.S. at 308, 315, 331).

281. Following *Shelby County*, Eric Posner, a University of Chicago Law professor, authored an article questioning the significance of equal state sovereignty. Wrote Posner, "What exactly is wrong with the singling out of states by the federal government? Is the idea that when Alabama is on the playground with the other states, they're going to make fun of it because it had to ask its mama for permission before going out to play?" Eric Posner, *John Roberts' Opinion on the Voting Rights Act is Really Lame*, SLATE (June 25, 2013), www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html.

282. See *Shelby County*, 133 S. Ct. at 2624 (citing *Northwest Austin*, 557 U.S. at 211) (holding unconstitutional the VRA's disparate treatment of states because it "constitutes 'extraordinary legislation otherwise unfamiliar to our federal system'").

283. See U.S. ENVIRONMENTAL PROTECTION AGENCY, *The Clean Air Act: A Partnership Among Governments*, <https://www.epa.gov/clean-air-act-overview/clean-air-act-partnership-among-governments> (last visited May 11, 2016) (explaining, "[s]tates are responsible for developing enforceable state implementation plans to meet the standards" established by the EPA).

284. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), www.ice.gov/ero (last visited Nov. 14, 2014) (detailing that the agency operates within Southern states removing criminal aliens and those apprehended at the border).

285. Posner, *supra* note 281.

sovereignty were a valid constitutional principle,²⁸⁶ when the federal government is faced with exceptional circumstances occurring in some states but not others, the federal government is allowed to bypass equal state sovereignty.²⁸⁷

As previously noted, Congress clearly and thoroughly cited its reasons for treating the states differently when it reauthorized the VRA in 2006.²⁸⁸ Roberts overlooked the fact that states still engage in objectionable behavior, notwithstanding the enormous strides made since 1870.²⁸⁹ If Roberts really were the impartial umpire he said he would be during his confirmation hearings, it would have been hard for him to miss this call. Perhaps Roberts was like Ray's brother-in-law in the movie *Field of Dreams*, unable to see the ghosts of the past somehow still playing ball, despite the passing of decades.²⁹⁰

After *Shelby County*, relics of the South's voting past are reemerging. States now no longer required to seek preclearance before their laws go into effect, have already succeeded in effectively limiting the voting power of racial minorities.²⁹¹ The most recent election data following the *Shelby County* decision, the 2014 Midterm elections, reveals record low turnouts.²⁹² It is clear Congress must act to fix the damage Roberts has done.

286. Equal state sovereignty is hardly a recognized principle seeing that it has minimal precedential support. *Id.* (stating "Roberts is able to cite only the weakest support for this principle—a handful of very old cases that address entirely different matters").

287. *Katzenbach*, 383 U.S. at 334.

288. 2006 House Report, *supra* note 170; 2006 Senate Report, *supra* note 172.

289. *See Shelby County*, 133 S. Ct. at 2629-30 (downplaying contemporary examples of voting discrimination).

290. In the movie, Ray's (played by Kevin Costner) brother-in-law Mark (played by Timothy Busfield) cannot see any of the baseball players until one of them leaves the field to save Ray's daughter who had just fallen from the bleachers and was choking on a hotdog. *FIELD OF DREAMS* (Universal Pictures 1989).

291. For example, following the *Shelby County* decision, the State of Texas reenacted SB 14, an incredibly harsh voter ID law, which was previously blocked by federal preclearance. *Veasey v. Perry*, 135 S. Ct. 9, 13 (2014) (Ginsburg, J., dissenting) (citing *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (DC 2012)).

292. *Midterm Elections May Have Had Record Low Turnout*, NPR (Nov. 5, 2014), www.npr.org/2014/11/05/361820838/midterm-elections-may-have-had-record-low-turnout (explaining that according to numbers from the Associated Press 83 million people voted in the 2014 midterms—36.6 percent of the total voting population—and if the national turnout rate did not reach 38.1 percent, "it would be the lowest turnout since the midterm of elections of 1942," which was in the middle of WWII).

B. Congress Can Fix This, All They Have to Do Is Get to Work

Contrary to what the current political landscape may suggest, Congress is certainly capable of getting things done.²⁹³ If Congress does act here, it would not be the first time the legislative branch took the bite out of a holding it rightfully disagreed with.²⁹⁴ It would not even be the first time Congress did so after a VRA ruling.²⁹⁵

The Constitution's separation of powers precludes Congress from overriding a Supreme Court's interpretation of a law.²⁹⁶ Congress does, however, have the power to revise a law's literal words.²⁹⁷ This is exactly what Congress did following the Court's *Bolden* holding that interpreted Section 2 of the VRA to require plaintiffs to show the state had a discriminatory purpose or intent when it enacted a certain voting policy.²⁹⁸ Congress then literally changed the words of Section 2 to require effects not intent.²⁹⁹

Similarly, *Shelby County* is also quite easy to supersede. Seeing that Roberts and four other justices remain unconvinced that conditions occurring in or actions taken by southern states warranted differential treatment, the new amended coverage formula must cover all states and jurisdictions within equally.³⁰⁰ Senator Patrick Leahy (D-Vt.) and Representative Terri Sewell (D-Al.) have proposed identical bills titled the Voting Rights Advancement Act of 2015 that effectively resurrect the coverage formula.³⁰¹

293. The 113th Congress will pass the fewest amount of laws in United States History. Cillizza, *supra* note 171.

294. In 1991, Congress overturned at least five 1989 Supreme Court cases when it passed a broader Civil Rights Act. Leon Friedman, *Overruling the Court*, THE AMERICAN PROSPECT (Dec. 19, 2001), <http://prospect.org/article/overruling-court> (stating that the holdings "severely restricted and limited workers' rights under federal antidiscrimination laws," while the law's preamble cited its purpose was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes").

295. Congress overrode the Court's *Bolden* ruling in 1982. 1982 Senate Report, *supra* note 108.

296. See generally *Marbury v. Madison*, 5 U.S. 137 (1803) (standing for the proposition that it is the Judicial Branch's duty to decide the constitutionality of laws).

297. See 1982 Senate Report, *supra* note 108, at 2; H.R. REP. No. 97-227, at 2 (amending Section 2 of the VRA to not require discriminatory intent).

298. 1982 Senate Report, *supra* note 108, at 2; H.R. REP. No. 97-227, at 2. *Bolden*, 446 U.S. at 74.

299. 1982 Senate Report, *supra* note 108, at 28 (clarifying that plaintiffs may show a Section 2 violation by establishing discriminatory effects without proving any kind of discriminatory intent).

300. *Shelby County*, 133 S. Ct. at 2630-31.

301. S. 1659, 114th Cong. (2015); H.R. 2867 114th Cong. (2015). Rep. James Sensenbrenner Jr. (R-Wisc.) introduced a related bill, the Voting Rights

The proposed formula found within the Act would impose statewide preclearance for a ten-year period in any state where “15 or more voting rights violations occurred in the State during the previous 25 calendar years; or 10 or more voting rights violations occurred in the State during the previous 25 years” when the state committed at least one of the violations itself.³⁰² The act imposes a ten-year preclearance requirement on specific jurisdictions that had three or more violations during the previous twenty-five calendar years.³⁰³

This updated formula seems to right any perceived wrongs—no matter how illogical they may have been—cited by Roberts in his *Shelby County* majority opinion. The proposed Act’s formula ensures any state that is subjected to preclearance is so classified because of its most recent twenty-five years of political conditions.³⁰⁴ The Act also applies to every state; therefore, Roberts’s principle of equal state sovereignty is protected.³⁰⁵ Finally, the bailout option remains unchanged and still allows states to bailout of preclearance earlier than the coverage formula mandates.³⁰⁶

Though the bill seems to satisfy Roberts’s checklist, perhaps these Congress-people should now redirect their efforts at appeasing those who do not see the need for a coverage formula or preclearance. No action has been taken on the Senator Leahy’s bill since he introduced it on June 24, 2015. Representative Sewell’s version has remained in Subcommittee since July 9, 2015.³⁰⁷ It seems that the issue is not whether the VRA is a strike, but instead whether the VRA is a pitch worth throwing.³⁰⁸ It is up to

Amendment Act of 2015. H.R. 885, 114th Cong. (2015). Additionally, last year Sen. Leahy and Rep. Sensenbrenner Jr. introduced similar identical bills titled the Voting Rights Amendment Act of 2014. S. 1945, 113th Cong. (2014); H.R. 3899, 113th Cong. (2014).

302. S. 1659 §§ 4(b)(1)(A)(i)-(ii); H.R. 2867 §§ 4(b)(1)(A)(i)-(ii).

303. S. 1659 § 4(b)(1)(B); H.R. 2867 § 4(b)(1)(B).

304. S. 1659 § 4(b)(1); H.R. 2867 § 4(b)(1).

305. S. 1659 §§ 4(b)(1)(A)(i)-(ii); H.R. 2867 §§ 4(b)(1)(A)(i)-(ii). See *Shelby County*, 133 S. Ct. at 2624 (asserting “the fundamental principle of equal sovereignty [is] highly pertinent”).

306. S. 1659 § 4(b)(1); H.R. 2867 § 4(b)(1).

307. *All Actions S. 1659—114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1659/all-actions> (last visited Apr. 28 2016); *All Actions H.R. 2867—114th Congress (2015-2016)*, CONGRESS.GOV, www.congress.gov/bill/114th-congress/house-bill/2867/all-actions (last visited Apr. 28, 2016).

308. GovTrack.us predicts that each bill has a 1 percent chance of being enacted. *H.R. 2867: Voting Rights Advancement Act of 2015*, GOVTRACK.US, www.govtrack.us/congress/bills/114/hr2867 (last visited Apr. 28, 2016); *S. 1659: Voting Rights Advancement Act of 2015*, GOVTRACK.US, www.govtrack.us/congress/bills/114/s1659 (last visited Apr. 28, 2016). GovTrack.us employs logistic regression that incorporates factors that correlate with successful or failed bills in the past to predict a bill’s chances on becoming

those who are not blinded by our nation's enormous strides to convince others that there is still more work to be done. The right to vote is too precious of a right; the unrelenting efforts of those before us cannot be replaced by naïve content.

V. CONCLUSION

John Roberts is not the umpire he said he would be. His *Shelby County* opinion resurrects his pre-chief justice opinions of the Voting Rights Act. By manipulating precedent, Roberts made his personal agenda the law of the land. His opinion callously champions the right of every *state* to be treated equally by the federal government rather than protecting the right of every *person* to have equal access to the polls. Still, Congress has the ability to rectify the situation. The true question is whether it will choose to do so.

