

Shelby County v. Holder: The Restoration of Constitutional Order

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The Voting Rights Act of 1965 is possibly the most consequential federal law in our nation’s history. Passed in the aftermath of “Bloody Sunday” and pursuant to Congress’s authority to enforce the Fifteenth Amendment by “appropriate” legislation, the VRA represented a decisive federal response to the campaign of voting discrimination that had plagued the South since Reconstruction. The law included a plethora of remedies designed to root out systematic efforts to disenfranchise African Americans. Unique among them was Section 5’s “preclearance” obligation, which operated against certain states and political subdivisions pursuant to Section 4(b)’s “coverage” formula. Under those provisions, jurisdictions with the worst records of discrimination could not make changes to their voting laws until the Department of Justice—or a special three-judge federal district court in Washington, D.C.—approved them. It took time and effort, but Section 5 was remarkably successful. No one should doubt that preclearance helped transform the South from a bastion of voting discrimination into a place where racial equality is an institutional priority.

At the same time, that undeniable success came at a high cost. Preclearance deviates from our constitutional order in fundamental ways. Under our system of government, states are sovereign in the field of state and local elections. Yet preclearance deprived them of the right to self-government. It is therefore difficult to overstate just how novel preclearance is. For example, the Americans with Disabilities Act prevents state and local courthouses from denying access to the handicapped.¹ But it does not require state and local

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¹ See *Tennessee v. Lane*, 541 U.S. 509 (2004).

governments to “preclear” their architectural drawings with DOJ before breaking ground on a new building. Therein lies the difference. It is one thing to ban discrimination in voting. It is another to place an entire region of the country in federal receivership.

In 1966, the Supreme Court upheld Section 5, but only because Congress had shown that the emergency required special measures.² The Court made clear that preclearance would otherwise have been inappropriate and that two additional features ensured that this novel law would not permanently upset the division of power between the federal and state governments. First, the formula that Congress used to select those jurisdictions that would be subject to this harsh remedy made sense. It used statutory criteria that followed from the problem that Congress had identified as the chief evil: the use of discriminatory voting tests and devices to keep African Americans from voting. Second, Section 5 was temporary, a measure that would sunset after five years.

Flash forward to 2006. Section 5 is still the law; its substantive reach has expanded over time; Congress is still using the same coverage formula it did in 1965; and the law has just been reenacted for another 25 years. For places like Shelby County, Alabama, then, preclearance would remain in place until 2031 based on tests and devices that had been banned for over 40 years and voting statistics from the 1964 presidential election. But while the Supreme Court warned that Congress’s decision in 2006 to reenact the preclearance obligation under that coverage formula raised grave constitutional concerns, it avoided deciding the issue in the first case to raise the question.³ It was against this backdrop that Shelby County brought its constitutional challenge to Sections 4(b) and 5.

In a 5–4 decision, the Supreme Court ruled that Section 4(b)’s outdated formula was no longer constitutional.⁴ Chief Justice John Roberts authored the majority opinion, which was joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito. Without a valid formula, no jurisdiction is subject to preclearance. The majority thus declined to decide whether Section 5 itself exceeded Congress’s authority given the improvements that have

² See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

³ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (“NAMUDNO”).

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

taken place since 1965. Justice Thomas, who had previously found that Section 5 was no longer constitutional, would have decided that issue once and for all. Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, dissented. The dissenters would have upheld both challenged sections.

In deciding the case in the way it did, the Supreme Court side-stepped a contentious dispute over the standard that Congress should be held to when exercising Fourteenth or Fifteenth Amendment enforcement authority in the context of voting, afforded Congress the opportunity to go back to the drawing board to design a rational coverage formula, and, most notably, avoided deciding whether pre-clearance itself remained a constitutional remedy. Unless your definition of “minimalism” is judicial abdication, the Supreme Court’s decision invalidating a coverage formula that not even the attorney general could bring himself to defend on its own terms was modest in every relevant sense.

It’s now Congress’s move. If Congress and the president can find their way to a new coverage formula that can meet the constitutional standard, the battle over Section 5’s constitutionality will be joined for a third time since 2006. But perhaps those disappointed with the Supreme Court’s decision and interested in pursuing that course should think twice before reinstating the sweeping preclearance regime reenacted in 2006. “As the *Shelby County* decision shows, when the Court gives the political branches one last chance to remedy a program’s constitutional defects, it is probably not bluffing.”⁵ Congress would be wise to reconsider whether an emergency response to rampant voting discrimination remains justifiable given the transformation our nation has seen since 1965.

In the end, Justice Ginsburg may well be right that “what’s past is prologue.”⁶ But time marches on. President Barack Obama carried Florida, North Carolina, and Virginia. The only African-American senator is a Republican from South Carolina who was appointed by an Indian-American governor. Philadelphia, Mississippi, and Selma, Alabama, have African-American mayors. As Justice Thomas

⁵ Jeffrey Harris, *The Court Meant What It Said in Northwest Austin*, SCOTUSBlog, Jun. 25, 2013, <http://www.scotusblog.com/2013/06/the-court-meant-what-it-said-in-northwest-austin>.

⁶ *Shelby County*, 133 S. Ct. at 2642 (Ginsburg, J., dissenting).

eloquently put it, “Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory.”⁷

I. The Preclearance Regime: 1965–2006

A. *The Voting Rights Act of 1965*

The Fifteenth Amendment guarantees that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude” and empowers Congress “to enforce this article by appropriate legislation.”⁸ Following the amendment’s ratification, certain states and localities—mostly in the South—initiated a campaign to keep African Americans from voting through violence, intimidation, and discriminatory tests and devices such as literacy tests. In response, Congress passed laws to facilitate case-by-case litigation, and the Supreme Court struck down discriminatory laws and practices time and again. Yet widespread discrimination persisted, and the chances of defeating this campaign of voting interference one case at a time appeared dim. Each time a court struck down a law or practice as violating the Fifteenth Amendment, the state or local government would evade the judicial decree by shifting to a slightly different means of achieving the same discriminatory aim.

By 1965, Congress had seen quite enough and took decisive action. In response to this massive resistance, Congress passed the Voting Rights Act—sweeping legislation designed to root out the racial discrimination in voting that had “infected the electoral process in parts of our country for nearly a century.”⁹ The VRA created a network of federal remedies that signaled Congress’s determination to ensure that African Americans could freely vote. In particular, Section 2 of the VRA created a nationwide judicial remedy against any law or practice enacted “to deny or abridge the right of any citizen of the United States to vote on account of race or color.”¹⁰ And Congress

⁷ *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part).

⁸ U.S. Const. amend. XV, §§ 1, 2.

⁹ *Katzenbach*, 383 U.S. at 308.

¹⁰ Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

later revised that provision to more broadly outlaw any law or practice that “results” in the denial of the right to vote whether or not it was the product of intentional discrimination.¹¹ Both the United States and private plaintiffs may bring a Section 2 action.

Other remedies operated only against certain jurisdictions with an especially egregious record of discrimination against minority voters. Two remedies in particular imposed on those “covered” jurisdictions were Section 4(a)’s suspension of discriminatory voting tests and devices and Section 5’s “preclearance” requirement. Whether a state or political subdivision had a record of abuse serious enough to warrant application of these special measures was determined by a formula set forth in Section 4(b) of the VRA. Under that formula, a state or local jurisdiction became “covered” if it “maintained on November 1, 1964, any test or device” prohibited by Section 4(a) and “less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964” or “less than 50 per centum of such persons voted in the presidential election of November 1964.”¹² Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of Arizona, Idaho, Hawaii, and North Carolina became covered jurisdictions under this formula.¹³

Section 5 was a novel federal remedy. Unlike Section 2’s right of action or Section 4(a)’s ban on tests and devices, preclearance did not target specific acts of voting discrimination. “Section 5 . . . was enacted for a different purpose: to prevent covered jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§ 2 and 4(a).”¹⁴ Section 5 accomplished this goal by requiring those “covered” jurisdictions to preclear (with either DOJ or the U.S. District Court for the District of Columbia) new or amended laws involving “any voting qualification or prerequisite to voting, or

¹¹ Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982).

¹² Pub. L. No. 89-110, § 4(b), 79 Stat. at 438 (1965).

¹³ Congress permitted a covered jurisdiction to “bail out” of coverage by showing that it had not used a “test or device” in the preceding five years for the purpose or with the effect of denying or abridging the right to vote on account of race, *id.* § 4(a), 79 Stat. at 438, and empowered federal courts in appropriate circumstances to “bail in” a non-covered jurisdiction that violated the Fourteenth or Fifteenth Amendment, *id.* § 3(c), 79 Stat. at 437.

¹⁴ *NAMUDNO*, 557 U.S. at 218 (Thomas, J., concurring in the judgment in part and dissenting in part).

standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964.”¹⁵ Section 5 thus went “beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.”¹⁶ Congress enacted Section 5 for a period of five years.

B. The Supreme Court Upholds Section 5’s Preclearance Requirement under Section 4(b)’s Coverage Formula

In 1966, the Supreme Court rejected South Carolina’s constitutional challenge. In the Court’s view, Congress had compiled “reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act.”¹⁷ Indeed, the legislative record painstakingly documented the web of discriminatory practices used to deny African Americans the right to vote; statistical evidence verified the widespread impact of voting discrimination throughout the South. As the Court explained, the “registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.”¹⁸ Moreover, “voter turnout levels in covered jurisdictions ha[d] been at least 12% below the national average in the 1964 Presidential election.”¹⁹

The Supreme Court nevertheless recognized that preclearance was an “uncommon exercise of congressional power” and a departure from the normal course of relations between the federal government and the states.²⁰ Accordingly, the Court’s decision to uphold the statute turned on its conclusion that: (1) Congress had compiled overwhelming evidence showing that only a sweeping prior restraint

¹⁵ Pub. L. No. 89-110, § 5, 79 Stat. at 439 (1965).

¹⁶ *NAMUDNO*, 557 U.S. at 202 (emphasis in original).

¹⁷ *Katzenbach*, 383 U.S. at 329.

¹⁸ *Id.* at 313.

¹⁹ *NAMUDNO*, 557 U.S. at 222 (Thomas, J., concurring in the judgment in part and dissenting in part).

²⁰ *Katzenbach*, 383 U.S. at 328, 334.

like preclearance could successfully combat systematic evasion; and (2) that the formula Congress devised to select the “covered” jurisdictions was “rational in both practice and theory.”²¹

As to Section 5, preclearance met the urgent need to put an end to gamesmanship in covered jurisdictions. “Congress knew that some of the States covered by §4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.”²² It thus “had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies prescribed for voting discrimination contained in the Act itself.”²³ Given the failure of case-by-case litigation, preclearance was “an appropriate means of combatting the evil.”²⁴ “[L]egislative measures not otherwise appropriate” were constitutional under those “exceptional conditions” and “unique circumstances.”²⁵

As to Section 4(b), the coverage formula was rational in “theory” because it used criteria for coverage that bore a logical connection to the chief characteristics that distinguished those states and political subdivisions warranting preclearance from the rest of the country: the use of discriminatory tests and devices and the resulting low voting rates. The formula was rational in “practice” because it accurately captured those jurisdictions where voting discrimination was the worst.²⁶

C. The 1970, 1975, and 1982 Reenactments

In 1970, Congress reenacted preclearance for five more years and amended the formula to cover any jurisdiction that had maintained a prohibited “test or device” on November 1, 1968, and had voter registration on that date or turnout in the 1968 presidential election of less than 50 percent.²⁷ The legislation swept in parts of Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New

²¹ *Id.* at 330.

²² *Id.* at 335.

²³ *Id.*

²⁴ *Id.* at 328.

²⁵ Katzenbach, 383 U.S. at 334, 335.

²⁶ *Id.* at 331.

²⁷ Pub. L. No. 91-285, § 4, 84 Stat. 315 (1970).

Hampshire, New York, and Wyoming. The Supreme Court upheld the reenactment.²⁸

In 1975, Congress extended preclearance for another seven years and extended coverage to any jurisdiction that had maintained a prohibited “test or device” on November 1, 1972, and had voter registration on that date or turnout in the 1972 presidential election of less than 50 percent.²⁹ Alaska, Arizona, Texas, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota became covered.³⁰ In upholding this third reenactment, the Supreme Court stressed that it “was necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination.”³¹

In 1982, Congress reenacted the preclearance regime for 25 years.³² Congress did not amend Section 5 or Section 4(b). It did, however, alter the statute’s bail-out provision to, among other things, make a “political subdivision” within a fully covered state eligible.³³ Although this reenactment was not facially challenged,³⁴ in the following years the Supreme Court twice interpreted Section 5 to limit the law’s federalism burden by making it somewhat easier for covered jurisdictions to secure preclearance.³⁵

D. *The 2006 Reenactment*

In 2006, Congress reenacted the VRA for another 25 years.³⁶ Congress found “the number of African Americans who are registered

²⁸ *Georgia v. United States*, 411 U.S. 526, 535 (1973).

²⁹ Pub. L. No. 94-73, § 202, 89 Stat. 401 (1975). Congress also amended the definition of “test or device” to include, among other things, English-only ballots, *id.*, § 203, 89 Stat. at 401–02, and it permanently banned nationwide discriminatory tests and devices, *id.*, § 201, 89 Stat. at 400.

³⁰ *Id.* § 201, 89 Stat. at 400.

³¹ *City of Rome v. United States*, 446 U.S. 156, 182 (1980) (internal quotes omitted).

³² Pub. L. No. 97-205, 96 Stat. 131 (1982).

³³ *Id.* § 2(b)(2), 96 Stat. at 131.

³⁴ See *Lopez v. Monterey County*, 525 U.S. 266 (1999).

³⁵ See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

³⁶ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (“VRARAA”).

and who turn out to cast ballots ha[d] increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.”³⁷ Congress also found that “the disparities between African-American and white citizens who are registered to vote ha[d] narrowed considerably in six southern States covered by the temporary provisions . . . and . . . North Carolina” and that “many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA ha[d] been eliminated.”³⁸

Despite these notable gains, Congress did not update the coverage formula, choosing again to base coverage on election data from 1964, 1968, and 1972. Nor did it ease the preclearance burden. Rather, Congress made the burden even more onerous by amending Section 5 to overrule the Supreme Court decisions that had made it easier for covered jurisdictions to secure preclearance.

Congress purported to justify reenactment on its finding that “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”³⁹ It further found that evidence of “second generation” barriers could be seen in: (1) racially polarized voting; (2) Section 5 preclearance statistics; (3) “section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters; (4) enforcement actions filed to protect language minorities; and (5) tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the [VRA].”⁴⁰

E. Congress and DOJ Ignore the Supreme Court’s Grave Constitutional Concerns.

The constitutionality of the 2006 reenactment was immediately challenged in *Northwest Austin Municipal Utility District No. 1 v. Holder* (“NAMUDNO”). In that case, a small Texas water district claimed that it was eligible for bail out even though it was neither a state nor political subdivision and, if it was not, the law was unconstitutional. The Supreme Court ultimately ruled that the water

³⁷ H.R. Rep. 109-478, at 12 (2006), 2006 U.S.C.C.A.N. 618, 627 (2006).

³⁸ *Id.*

³⁹ VRARAA, § 2(b)(2), 120 Stat. at 577.

⁴⁰ *Id.* § 2(b)(8), 120 Stat. at 578.

district was in fact eligible for bail out and thus did not reach the constitutional question.

But the Supreme Court made clear that the “preclearance requirements and its coverage formula raise serious constitutional questions” in light of the dramatic changes in the covered jurisdictions since 1965.⁴¹ With eight justices in agreement, the Court explained that “the [VRA] imposes current burdens and must be justified by current needs” and that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”⁴²

“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance,” the Court explained. Moreover, Section 4(b)’s coverage formula “is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide.”⁴³ The Court added that the law’s “federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere.”⁴⁴

Justice Thomas would have decided the constitutional question. In his view, “the lack of current evidence of intentional discrimination with respect to voting” meant that Section 5 could “no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment.”⁴⁵ Justice Thomas recognized that

Congress passed §5 of the VRA in 1965 because that promise had remained unfulfilled for far too long. But now—more than 40 years later—the violence, intimidation, and subterfuge that led Congress to pass §5 and this Court to

⁴¹ *NAMUDNO*, 557 U.S. at 204.

⁴² *Id.* at 203.

⁴³ *Id.* (citation omitted).

⁴⁴ *Id.*

⁴⁵ *NAMUDNO*, 557 U.S. at 216 (Thomas, J., concurring in the judgment in part and dissenting in part).

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uphold it no longer remains. An acknowledgment of §5's unconstitutionality represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA.⁴⁶

NAMUDNO effectively put the political branches on notice that a future case challenging the law's constitutionality would have merit and gave Congress and the president the chance to address those serious concerns before that day came. Congress responded by doing absolutely nothing. It held not one hearing, proposed not one bill, and amended not one law.

The Justice Department's response was even more unproductive. Instead of judiciously exercising its statutory authority in order to avoid a constitutional confrontation, DOJ aggressively enforced the law in ways that only served to highlight the problems with the coverage formula. For example, DOJ refused to preclear the Texas and South Carolina voter identification laws even though the Supreme Court previously upheld Indiana's similar law.⁴⁷ Likewise, Florida—which needed to obtain preclearance of its laws because 5 of its 62 counties are covered jurisdictions—was forced into preclearance litigation to prove that reducing early voting from 14 days to 8 days is not discriminatory when states such as Connecticut, Pennsylvania, and Rhode Island, have no early voting at all.

Such questionable preclearance denials raised concerns about whether Section 5's mission had strayed from ensuring that minority voters were not disenfranchised to providing DOJ with a convenient and efficient means of imposing its preferred electoral system on covered jurisdictions. By 2010, another constitutional challenge was inevitable.

E. Shelby County's Road to the Supreme Court

1. Shelby County Seeks a Return to Self-Government

Shelby County became a covered jurisdiction not by virtue of any discriminatory conduct on its own part, but because it is located in a fully covered state: Alabama. In fact, Shelby County had never drawn a Section 5 objection to any voting change and had been

⁴⁶ *Id.* at 229.

⁴⁷ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

involved in almost no voting rights litigation since 1965. Yet it was ineligible for bail out because the City of Calera, a jurisdiction within Shelby County, had drawn one objection from DOJ in 2008. Thus, because Congress chose to retain Section 5 preclearance under Section 4(b)'s coverage formula in 2006, Shelby County faced the prospect of expending significant taxpayer dollars, time, and energy to submit every voting change for preclearance until 2031.

On April 27, 2010, Shelby County filed suit in federal court in Washington, D.C. to resolve the serious constitutional questions left unanswered in *NAMUDNO*. Shelby County sought a judgment declaring Sections 5 and 4(b) of the VRA facially unconstitutional. Shelby County did not seek "bail out" from coverage pursuant to Section 4(a) of the VRA, nor did it seek to have the application of the VRA to Shelby County declared unconstitutional because of facts relating to it alone. Rather, Shelby County argued from the outset that the legislative record assembled by Congress in 2006 contained insufficient justification to require preclearance by any covered jurisdiction.

2. The Attorney General Tries to Avoid a Constitutional Showdown

Because the facial constitutionality of Sections 4(b) and 5 would turn solely on whether the legislative record on which Congress acted in 2006 adequately supported reenactment, Shelby County quickly sought summary judgment.

Instead of addressing Shelby County's challenge on the merits, however, Attorney General Eric Holder pursued a course of delay by seeking discovery on irrelevant issues. Despite conceding that coverage under Section 4(b) subjected Shelby County to the burdens of preclearance, the attorney general sought to discover information concerning the amount of time and resources Shelby County devoted to complying with Section 5. The attorney general also sought discovery as to whether there were reasons, on top of those already pleaded by Shelby County, why it was ineligible for bail out, while suggesting that DOJ might grant Shelby County bail out despite its ineligibility. Last, the attorney general sought discovery as to Shelby County's history of elections and voting, although it was never clear why.

Had the Justice Department's strategy of delay succeeded, it might well have scuttled the case. The discovery sought was so onerous and expensive that it might have forced Shelby County to abandon

the case or, at a minimum, delayed resolution for years. Thankfully, the district court saw the attorney general's gambit for what it was and rejected all the requests. As the court explained, all the information that the government sought was either irrelevant or cumulative, and had no bearing on the outcome of Shelby County's facial challenge.⁴⁸ Notably, the district court highlighted that the attorney general had conceded in related litigation that a covered jurisdiction has standing to challenge Sections 4(b) and 5.⁴⁹

3. *The District Court Upholds Preclearance but Focuses the Constitutional Debate on Section 4(b)'s Coverage Formula*

After extensive briefing, in which the parties submitted over 1,000 pages of argument, the district court held oral argument. As had become clear during the exchange of briefs, the attorney general had very little to say in defense of the coverage formula. Shelby County thus sought to focus the court's attention on that issue, emphasizing that it was the narrowest and most obvious basis for striking down the preclearance obligation. It was the narrowest because it allowed the court to avoid reaching the question of preclearance more generally. It was the most obvious because the formula was indefensible irrespective of the proper constitutional standard—that is, whether “rational basis” or “congruence and proportionality” applied.

Two days after oral argument, the district court ordered the parties “to submit additional briefing” on “the following question: in considering the reauthorization of Section 5 of the Voting Rights Act in 2006, was it ‘rational in both practice and theory,’ *South Carolina v. Katzenbach*, . . . for Congress to preserve the existing coverage formula in Section 4(b) of the Act?”⁵⁰ The order encouraged the parties “to address each aspect of the question separately—that is, to explain both why Section 4(b) is or is not rational ‘in practice’ and why Section 4(b) is or is not rational ‘in theory.’”⁵¹ Notwithstanding the district court's encouragement, the attorney general declined to separately defend the formula as rational in theory. Instead, he argued that the coverage formula was “reverse-engineered.” In other words,

⁴⁸ *Shelby County v. Holder*, 270 F.R.D. 16, 19 (D.D.C. 2010).

⁴⁹ *Id.* at 18 n.3.

⁵⁰ *Shelby County v. Holder*, No. 10-cv-00651, Minute Order (Feb. 4, 2011).

⁵¹ *Id.*

the government argued that Congress knew the states it wanted to subject to preclearance and worked backward to construct a formula that would cover them.

In a 151-page opinion, Judge John Bates upheld both Sections 4(b) and 5.⁵² The court first ruled that the constitutionality of both sections must be judged under the “congruence and proportionality” standard set forth in *City of Boerne v. Flores*.⁵³ “*Boerne* merely explicated and refined the one standard of review that has been employed to assess legislation enacted pursuant to *both* the Fourteenth and Fifteenth Amendments.”⁵⁴ The district court held that, under this standard, “Section 5 remains a ‘congruent and proportional remedy’ to the 21st century problem of voting discrimination in covered jurisdictions.”⁵⁵

The district court also held that “Section 4(b)’s disparate geographic coverage remains ‘sufficiently related’ to the problem that it targets.”⁵⁶ First, it covers “those jurisdictions with the worst historical records of voting discrimination,” and second, “although the legislative record is primarily focused on the persistence of voting discrimination in covered jurisdictions—rather than on the comparative levels of voting discrimination in covered and non-covered jurisdictions—the record does contain several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement.”⁵⁷

4. *A Divided D.C. Circuit Panel Sides with the Attorney General but Sharpens the Focus on the Coverage Formula*

The D.C. Circuit affirmed.⁵⁸ Writing for the majority, Judge David Tatel (joined by Judge Thomas Griffith) concluded that *NAMUDNO* “sets the course for our analysis,” thus requiring that Section 5’s “‘current burdens’” be justified by “‘current needs’” and Section

⁵² *Shelby County v. Holder*, 811 F.Supp.2d 424 (D.D.C. 2011).

⁵³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁵⁴ *Shelby County*, 811 F. Supp. 2d at 449 (emphasis in original).

⁵⁵ *Id.*

⁵⁶ *Id.* at 507.

⁵⁷ *Id.* at 506, 507.

⁵⁸ *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

4(b)'s "'disparate geographic coverage [be] sufficiently related to the problem that it targets'" to justify departure from the fundamental principle of "'equal sovereignty.'"⁵⁹ The majority further interpreted *NAMUDNO* as "sending a powerful signal" that *Boerne's* congruence-and-proportionality test is the appropriate constitutional standard.⁶⁰

The majority then considered the nature of the evidentiary record necessary to justify retaining the preclearance obligation for another 25 years. Rejecting Shelby County's argument that preclearance was appropriate only in the face of obstructionist tactics, the majority concluded that Congress need not document "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment" to reenact Section 5.⁶¹ The question was not "whether the legislative record reflects the kind of 'ingenious defiance' that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that Section 2 litigation remains inadequate."⁶² The majority concluded that Section 5 passed muster under this standard.

The majority also upheld Section 4(b). It rejected Shelby County's argument that the coverage formula is irrational in theory because it relies on obsolete election data and creates an obvious mismatch between its first-generation triggers and the second-generation evidence in the legislative record. Echoing Attorney General Holder's position, the majority found that the argument "rest[ed] on a misunderstanding of the coverage formula" because "Congress identified the jurisdictions it sought to cover . . . and then worked backward, reverse-engineering a formula to cover those jurisdictions."⁶³ Indeed, the majority was quite dismissive of Shelby County's rational-in-theory argument, suggesting "Shelby County's real argument is that the statute . . . no longer actually identifies the jurisdictions uniquely interfering with the right Congress is seeking to protect through preclearance."⁶⁴

⁵⁹ *Id.* at 857–59 (quoting *NAMUDNO*, 557 U.S. at 203).

⁶⁰ *Id.* at 859.

⁶¹ *Id.* at 863 (quotation omitted).

⁶² *Id.* at 864.

⁶³ *Id.* at 879.

⁶⁴ *Id.*

The majority saw that as a “close question.”⁶⁵ Of the ten fully covered (or almost fully covered) states, five “are about on par with the worst non-covered jurisdictions” and two “had no successful published section 2 cases at all.”⁶⁶ But relying on data from outside the congressional record, the majority found that several covered states “appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the [legislative] data alone suggests.”⁶⁷ While recognizing that several covered states “appear comparable” to their non-covered peers, the majority reasoned that this was “only because section 5’s deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary.”⁶⁸ Last, the majority concluded that “bail in” and “bail out” alleviated any remaining concerns with the coverage formula, especially in light of the fact that “the pace of bailout increased” after *NAMUDNO*.⁶⁹

Senior Judge Stephen Williams dissented. Although he viewed Section 5 as problematic, he focused on Section 4(b), concluding that the formula’s criteria for coverage were defective “[w]hether . . . viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of § 5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?).”⁷⁰ Highlighting both the theoretical and practical irrationality of the coverage formula, Judge Williams colorfully noted that while “sometimes a skilled dart-thrower can hit the bull’s eye throwing a dart backwards over his shoulder . . . Congress hasn’t proven so adept.”⁷¹

He emphasized that *NAMUDNO*’s directive that Section 4(b) must be “sufficiently related to the problem it targets” means that “[t]he greater the burdens imposed by § 5, the more accurate the coverage scheme must be.”⁷² Judge Williams then discussed the severe burdens of Section 5, finding several aspects of preclearance consti-

⁶⁵ *Id.*

⁶⁶ *Id.* at 879–80.

⁶⁷ *Id.* at 880.

⁶⁸ *Id.*

⁶⁹ *Id.* at 881–82.

⁷⁰ *Id.* at 885 (Williams, J., dissenting).

⁷¹ *Id.*

⁷² *Id.* (internal quotations omitted).

tutionally troubling. First, Section 5 creates unparalleled federalism problems by “mandat[ing] anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to [DOJ] officialdom to seek approval of any and all proposed voting changes.”⁷³ Second, Section 5’s “broad sweep” applies “without regard to kind or magnitude” of the voting change.⁷⁴ And third, Congress’s 2006 amendments to the preclearance standard exacerbated Section 5’s federalism burden and “not only disregarded but flouted Justice Kennedy’s concern” that the statute created serious equal-protection problems.⁷⁵

Given these serious constitutional concerns, Judge Williams explained, “a distinct gap must exist between the current levels of discrimination in the covered and uncovered jurisdictions in order to justify subjecting the former group to § 5’s harsh remedy, even if one might find § 5 appropriate for a subset of that group.”⁷⁶ With regard to the “first generation” barriers on which coverage depends, he concluded that there was no such gap. He instead found a negative correlation “between inclusion in § 4(b)’s coverage formula and low black registration or turnout,” emphasizing that “condemnation under § 4(b) is a marker of higher black registration and turnout.”⁷⁷ He found this to be true for minority elected officials as well: “Covered jurisdictions have far more black officeholders as a proportion of the black population than do uncovered ones.”⁷⁸

Judge Williams then addressed the second-generation evidence in the record, explaining that it could not justify the coverage formula either. “The five worst uncovered jurisdictions . . . have worse records than eight of the covered jurisdictions Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered. . . . A formula with an error rate of 50% or more does not seem ‘congruent and proportional.’”⁷⁹

⁷³ *Id.*

⁷⁴ *Id.* at 886 (Williams, J., dissenting).

⁷⁵ *Id.*

⁷⁶ *Id.* at 889 (Williams, J., dissenting).

⁷⁷ *Id.* at 891 (Williams, J., dissenting).

⁷⁸ *Id.* at 892 (Williams, J., dissenting).

⁷⁹ *Id.* at 897 (Williams, J., dissenting).

Judge Williams also rejected the purported “blocking” or “deterrent effect” of preclearance as an excuse for the lack of evidence of discrimination peculiar to the covered jurisdictions. In his judgment, “the supposed deterrent effect would justify continued VRA renewals out to the crack of doom. Indeed, [NAMUDNO’s] insistence that ‘current burdens must be justified by current needs’ would mean little if § 5’s supposed deterrent effect were enough to justify the current scheme.”⁸⁰ Finally, Judge Williams found that “tacking on a waiver procedure such as bailout” could not save the defective coverage formula because “only 136 of the more than 12,000 covered political subdivisions (*i.e.*, about 1%) have applied for bailout (all successfully),” making it “only the most modest palliative to § 5’s burdens.”⁸¹

5. *The Supreme Court Accepts the Challenge It Avoided in NAMUDNO*

Shelby County’s certiorari petition was supported by seven covered states: Alabama, Alaska, Arizona, Georgia, South Carolina, South Dakota, and Texas. The presence of these states on Shelby County’s side was significant because it magnified the importance of the case, especially given that no states supported the Texas water district only four years earlier. That fact had been noted at oral argument in *NAMUDNO*.⁸²

The attorney general all but acceded to certiorari, acknowledging that Shelby County raised what “is certainly an important question of federal law”⁸³ and declining to contest that the case presented an appropriate vehicle for resolving the facial constitutionality of Section 5 and Section 4(b). His only argument opposing certiorari was to suggest that the Court defer resolution of these important constitutional questions “until a more fulsome record on bailouts develops in the wake of [*NAMUDNO*].”⁸⁴ The Court did not agree.

⁸⁰ *Id.* at 898 (Williams, J., dissenting).

⁸¹ *Id.* at 901 (Williams, J., dissenting).

⁸² Oral Arg. Tr. at 24, *NAMUDNO*, 129 S. Ct. 2504 (2008) (No. 08-322).

⁸³ *Shelby County v. Holder*, No. 12-96, Brief for the Respondents in Opposition at 15 (133 S. Ct. 2612 (2013) (No. 12-96)).

⁸⁴ *Id.* at 33.

II. Section 4(b) of the Voting Rights Act Is Unconstitutional Because Its Coverage Formula Is Irrational in Theory

On June 25, 2013, the Supreme Court invalidated Section 4(b)'s coverage formula as unconstitutional, thus rendering Section 5's preclearance obligation inoperative. Chief Justice Roberts authored the majority opinion, which Justices Scalia, Kennedy, Thomas, and Alito joined in full.

Chief Justice Roberts began the majority's analysis of Sections 4(b) and 5 by highlighting the extraordinary nature of the preclearance obligation. To place this extraordinary remedy in proper context, he reiterated the federalism principles that inhere in our constitutional order. As the chief justice explained, the "federal Government does not . . . have a general right to review and veto state enactments before they go into effect"; the authority to "negative" state laws was considered and rejected at the Constitutional Convention.⁸⁵ Rather, the "States retain broad autonomy in structuring their governments and pursuing legislative objectives," which includes "power to regulate elections."⁸⁶ "Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States."⁸⁷

Section 5, accordingly, "sharply departs" from these elemental constitutional principles by "suspend[ing] 'all changes to state election law . . . until they have been precleared by federal authorities in Washington, D.C.'"⁸⁸ Indeed, it leaves states powerless to implement laws, sometimes for years, "that they would otherwise have the right to enact and execute on their own."⁸⁹ Section 4(b) represents "an equally dramatic departure from the principle that all States enjoy equal sovereignty."⁹⁰ It makes nine states (and additional counties) wait "months or years and expend funds to implement a validly enacted law," all while their neighboring states "can typically put

⁸⁵ *Shelby County*, 133 S. Ct. at 2623 (citing 1 Records of the Federal Convention of 1787, pp. 21, 164–68 (M. Farrand ed. 1911); 2 *id.*, at 27–29, 390–92).

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting *NAMUDNO* 557 U.S. at 203).

⁸⁸ *Id.* at 2624 (citing *NAMUDNO*, 557 U.S. at 202).

⁸⁹ *Id.*

⁹⁰ *Id.* at 2618.

the same law into effect immediately, through the normal legislative process.”⁹¹

Chief Justice Roberts explained that these concerns were not new. Given this drastic departure from our constitutional order, the *Katzenbach* Court had recognized at the outset that preclearance was “stringent” and “potent,” an “uncommon exercise of congressional power.”⁹² So too did that Congress, as it tempered the extraordinary nature of preclearance by authorizing it for only five years. The extraordinary remedy of preclearance was thus held constitutional in *Katzenbach* because it was met by an equally extraordinary record of discriminatory conduct. This “strong medicine” was necessary in 1965 “to address entrenched 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.’”⁹³

Moreover, Chief Justice Roberts explained that the coverage formula was perfectly rational when enacted in 1965. Linking “the exercise of the unprecedented authority with the problem that warranted it . . . made sense.”⁹⁴ Section 4(b) had targeted for coverage the jurisdictions that “shared two characteristics: ‘the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average,’”⁹⁵ The *Katzenbach* Court had concluded that tying coverage to the use of tests and devices was rational in theory given “their long history as a tool for perpetrating the evil” and that tying coverage to low voting rates was likewise rational in theory “for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.”⁹⁶ In short, *Katzenbach* upheld the formula as “rational in both practice and theory” because “[i]t accurately reflected those jurisdictions uniquely characterized by voting discrimination

⁹¹ *Id.* at 2624.

⁹² *Id.*

⁹³ *Id.* at 2618 (quoting *Katzenbach*, 383 U.S. at 309).

⁹⁴ *Id.* at 2625.

⁹⁵ *Id.* (quoting *Katzenbach*, 383 U.S. at 330).

⁹⁶ *Id.* (quoting *Katzenbach*, 383 U.S. at 330) (internal quotation marks omitted).

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on a pervasive scale, linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement.”⁹⁷

The question for the majority, then, was whether that justification remained valid in 2006. As *NAMUDNO* made clear, there was reason for doubt. “Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”⁹⁸ These conclusions were “not [the Court’s] alone. Congress said the same when it reauthorized the Act in 2006.”⁹⁹ In particular, Congress found that “the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years” and that “[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.”¹⁰⁰ To highlight this point, the majority opinion displayed a chart comparing voter registration rates from 1965 to 2004 in the six states originally covered by Section 4(b):¹⁰¹

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

The chief justice added that Census Bureau data from the most recent election showed further improvements in minority turnout in

⁹⁷ *Id.* at 2625.

⁹⁸ *Id.* (quoting *NAMUDNO*, 557 U.S. at 202) (internal quotation marks omitted).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (quoting H.R. Rep. 109-478, at 12 (2006), 2006 U.S.C.C.A.N. 618, 627 (2006)). That same report concluded that there had been “significant increases in the number of African-Americans serving in elected offices,” in particular, “a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.” *Id.* (quoting H.R. Rep. 109-478, at 18 (2006), 2006 U.S.C.C.A.N. 618, 627 (2006)).

¹⁰¹ *Shelby County*, 133 S. Ct. at 2626.

the covered states, specifically that “African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.”¹⁰² Moreover, he noted that the Section 5 objection rate exhibited the same trend. Whereas “in the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes,”¹⁰³ in “the last decade before reenactment, the Attorney General objected to a mere 0.16 percent.”¹⁰⁴

The chief justice credited the VRA for these improvements, as it “has proved immensely successful at redressing racial discrimination and integrating the voting process.”¹⁰⁵ To illustrate the point, he highlighted the changes in two towns where voting discrimination had been rampant in the 1960s:

During the “Freedom Summer” of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African-American voters. On “Bloody Sunday” in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African-American enfranchisement. Today both of those towns are governed by African-American mayors.¹⁰⁶

Given these improvements, the majority lamented the fact that Congress neither “eased the restrictions in § 5 [n]or narrowed the scope of the coverage formula in § 4(b) along the way.”¹⁰⁷ Rather, while the nation was making “great strides,” Congress made preclearance even more burdensome in 2006 by reenacting the preclearance regime for “another 25 years on top of the previous 40—a far cry from the initial five-year period”—and “expanded the prohibitions in § 5” in the face of Supreme Court decisions attempting to alleviate constitutional concerns with the substantive preclearance standard.¹⁰⁸

¹⁰² *Id.* at 2626 (citing Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Table 4b)).

¹⁰³ *Id.* (citation omitted).

¹⁰⁴ *Id.* (citation omitted).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

In Shelby County's view, of course, these were the very reasons why Section 5 is no longer constitutional; and the majority was sympathetic, acknowledging that these "arguments have a good deal of force."¹⁰⁹ But the majority declined to reach that issue because, in its view, a constitutional coverage formula "is an initial prerequisite to a determination that exceptional conditions still exist justifying such an extraordinary departure from the traditional course of relations between the States and the Federal Government."¹¹⁰ The coverage-formula question needed to be resolved first.

Not surprisingly, the majority found that the coverage formula was unsustainable under *Katzenbach*. Whereas Congress, in 1965, "looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both," Congress, in 2006, relied on "a formula based on 40-year-old facts having no logical relation to the present day."¹¹¹ That Congress expressly sought to target vote dilution, yet chose to employ a formula tied to ballot access, provided decisive evidence that Section 4(b) was no longer rational in theory.¹¹² The vote dilution evidence on which Congress relied to reenact Section 5 "played *no role* in shaping the statutory formula" used to base coverage until 2031.¹¹³ In other words, the coverage formula was no longer rational in theory because it was now divorced from the conduct Congress targeted and the legislative record it compiled in support of that statutory aim.

The majority recognized what had been abundantly clear from the litigation's outset: the attorney general could not seriously grapple with the theoretical irrationality of the coverage formula. Instead, the attorney general stuck to the "reverse-engineered" argument. But, as the chief justice explained, that argument "does not even attempt to demonstrate the continued relevance of the formula to the problem it targets."¹¹⁴ In other words, it was not a theoretical defense of Section 4(b) at all, but an admission that the coverage formula

¹⁰⁹ *Id.* at 2625.

¹¹⁰ *Id.* at 2631 (citations and quotations omitted).

¹¹¹ *Id.* at 2629.

¹¹² *Id.*

¹¹³ *Id.* (emphasis added).

¹¹⁴ *Id.* at 2628.

could not be defended on its own terms. The majority simply could not accept reasoning under which “there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.”¹¹⁵ “[I]n the context of a decision as significant as this one—subjecting a disfavored subset of States to ‘extraordinary legislation otherwise unfamiliar to our federal system’—that failure to establish even relevance is fatal.”¹¹⁶

The majority also rejected the government’s “fallback argument”—that “because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965.”¹¹⁷ For good reason. The argument disclaimed any need to defend the coverage formula as “rational in . . . theory,”¹¹⁸ failed to look to “current political conditions,”¹¹⁹ and was incompatible with the Fifteenth Amendment purpose to “ensure a better future,” not “to punish for the past.”¹²⁰

Because it found the coverage formula irrational in theory, the majority did not reach any other issues. However, the majority not so subtly suggested it would have been hard to uphold the formula as rational in practice had it needed to reach that issue. In summarizing the points Judge Williams had made in greater detail, the majority found that “no one can fairly say that” the legislative record “shows anything approaching” the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that easily distinguished the covered jurisdictions from the rest of the nation in 1965.¹²¹

In closing, Chief Justice Roberts acknowledged that “[s]triking down an Act of Congress ‘is the gravest and most delicate duty that this Court is called on to perform,’”¹²² but explained that Congress had forced the Court’s hand. The Court “took care [in *NAMUDNO*] to avoid ruling on the constitutionality of the Voting Rights Act

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting *NAMUDNO*, 557 U.S. at 211).

¹¹⁷ *Id.*

¹¹⁸ *Katzenbach*, 383 U.S. at 330.

¹¹⁹ *NAMUDNO*, 557 U.S. at 203.

¹²⁰ *Shelby County*, 133 S. Ct. at 2629.

¹²¹ *Id.* (citations omitted).

¹²² *Id.* at 2631 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

when asked to do so, and instead resolved the case then before us on statutory grounds.”¹²³ At that time, he explained, “we expressed our broader concerns about the constitutionality of the Act.”¹²⁴ Because “Congress could have updated the coverage formula at that time, but did not do so,” its “failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.”¹²⁵

III. Justice Thomas: No Reason to Delay the Inevitable

Because Justice Thomas had concluded in *NAMUDNO* that Section 5 was unconstitutional, his views on the matter were no secret. He wrote separately only to note that all of the majority’s reasons for invalidating Section 4(b) require Section 5’s invalidation too.¹²⁶ Justice Thomas found it “quite fitting that the Court repeatedly points out that this legislation is ‘extraordinary’ and ‘unprecedented’ and recognizes the significant constitutional problems created by Congress’ decision to raise ‘the bar that covered jurisdictions must clear,’ even as ‘the conditions justifying that requirement have dramatically improved.’”¹²⁷

Justice Thomas concluded by laying down a marker: “While the Court claims to ‘issue no holding on § 5 itself,’ its own opinion compellingly demonstrates that Congress has failed to justify ‘current burdens’ with a record demonstrating ‘current needs.’ By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision.”¹²⁸

IV. The Dissent’s Passionate Defense of a Statute That the Majority Did Not Strike Down

Justice Ginsburg issued a lengthy and strongly worded dissent that was joined by Justices Breyer, Sotomayor, and Kagan. Yet for all of its tough rhetoric, the dissent is almost entirely unresponsive to the issue actually decided. All the majority held was that Section 4(b)’s coverage formula was no longer rational “in theory” because it

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 2631–32 (Thomas, J. concurring).

¹²⁷ *Id.* at 2632 (Thomas, J. concurring) (quoting *id.* at 2627).

¹²⁸ *Id.* (citations omitted).

targeted modern “second generation” barriers with a formula predicated on decades-old “first generation” barriers. Justice Ginsburg ostensibly devotes the final few pages of her dissent to that issue. Tellingly, however, she never really explains why Section 4(b) is rational in theory.

The dissent began by arguing that Shelby County could not bring a facial challenge because of its record of voting discrimination. In other words, because, in the dissent’s view, Shelby County would be covered either way, it had no right to challenge the formula as illogical. But that is a difficult argument to mount given that a formula determines coverage and Shelby County was challenging that formula. Surely, a state or political subdivision has standing to challenge the appropriateness of the means chosen to select it for coverage. As the majority put it, the dissent’s argument “is like saying that a driver pulled over pursuant to a policy of stopping redheads cannot complain about that policy, if it turns out his license has expired.”¹²⁹ Either the Congress’s formula is legitimate or it is not.

Justice Ginsburg responded that Shelby County “is no ‘redhead’ caught up in an arbitrary scheme” because Congress studied the issue before selecting it for coverage.¹³⁰ But that does not explain or justify why this broken formula was retained. A policy of profiling redheads would be no more defensible if the police department produced a study showing that redheads were statistically more likely to drive on an expired license or had a long-ago history of doing so. If Congress believed that current evidence showed that Shelby County—or any other jurisdiction for that matter—should be subject to preclearance, it should have used a formula based on that evidence. Framing a dispute over the coverage formula’s appropriateness as a standing issue just clouds the issue. The Supreme Court is in no position to step into Congress’s shoes and make a legislative finding that Shelby County would have been covered no matter what, especially given that Congress was unwilling to make such a finding itself. That is especially true given that Shelby County has *never* drawn a Section 5 objection and had almost no history of voting-rights litigation. Notably, the attorney general had multiple opportunities to challenge Shelby County’s standing—and every in-

¹²⁹ Shelby County, 133 S. Ct. at 2629.

¹³⁰ *Id.* at 2647 n.8 (Ginsburg, J., dissenting).

centive to do so. Instead, he conceded the issue in the district court and declined to press the argument on appeal.

Justice Ginsburg then chided the majority for relying on “equal sovereignty” in deciding the case, arguing that the principle applies only to the admission of states to the Union.¹³¹ As an initial matter, Justices Ginsburg and Breyer had an uphill battle as they joined the *NAMUDNO* decision on which the majority mainly relies for this proposition. Indeed, the majority correctly noted that “the dissent analyzes the question presented as if *NAMUDNO* “never happened.”¹³² Justice Ginsburg responded that “[a]cknowledging the existence of ‘serious constitutional questions,’ does not suggest how those questions should be answered.”¹³³ That may be true. But it does not remotely explain how the dissent can claim that precedent does not support the majority’s invocation of equal sovereignty when the author joined the relevant decision not four years earlier.

In any event, the dissent makes a mountain out of molehill. If equal sovereignty were to play a decisive role, it would have been in determining whether the formula is rational in practice. That is, the principle would logically bear on the statistical disparity of on-the-ground discrimination needed to justify imposing preclearance on some states but not others. A congressional finding that voting discrimination is three percent worse in New Mexico than in Tennessee, for example, would not be a justifiable basis for departing from the principle of equal sovereignty. But the majority never reached that issue. Equal sovereignty might also bear on whether the “second generation” voting problems Congress identified in 2006 are sufficient to warrant the drastic remedy of preclearance given the burden the law imposes on some states but not others. But the majority never reached that issue either.

The dissent thus spilled considerable ink disputing the validity of a legal principle that was not necessary to the decision. Irrespective of equal sovereignty, the Fifteenth Amendment requires, at a bare minimum, that Section 4(b)’s coverage formula be “appropriate.” This formula is inappropriate because it is irrational in theory even under the most generous constitutional standard potentially

¹³¹ *Id.* at 2649 (Ginsburg, J., dissenting).

¹³² *Id.* at 2630.

¹³³ *Id.* at 2637 n.3 (Ginsburg, J., dissenting) (citations omitted).

applicable to this statute. No more was required to declare Section 4(b) facially unconstitutional.

The dissent also claimed that the majority threw out preclearance even though “[v]olumes of evidence supported Congress’ determination that the prospect of retrogression was real.”¹³⁴ But a voluminous record cannot save a coverage formula that uses irrational criteria. As the majority explained, “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.”¹³⁵ It is untenable to defend Section 4(b)’s criteria for coverage based on the legislative record when “it played no role in shaping the statutory formula” Congress chose.¹³⁶ The majority thus did not ignore the legislative record developed in 2006. Congress did.

Justice Ginsburg next wondered why “it should be” that the coverage formula is invalid “[e]ven if the legislative record shows . . . that the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination[.]”¹³⁷ But that is an odd question to ask given *Katzenbach*’s command that the coverage formula be “rational in *both practice and theory*.”¹³⁸ It seems fair to ask, then, whether the dissent believed that *Katzenbach* controlled the dispute. At times, the dissent suggests that *Katzenbach* is not directly applicable because this case involves a *reenactment*. At other times, the dissent criticizes the majority for not following *Katzenbach*. Either way, it is difficult to accept the dissent’s charge that the majority’s decision to hold Congress in 2006 to the same legislative burden as the Court held Congress in 1965 is an example of judicial immodesty.

The dissent then tried to prove up its premise that as a practical matter the covered jurisdictions are distinguishable from the rest of the country. The majority rightly declined to engage on an issue beyond the scope of its judgment, other than to note that it cannot be disputed that the kind of discrimination that distinguished the South in 1965 no longer exists and that the dissent’s reliance on the South’s “unique history” is highly problematic.¹³⁹ As Justice Thomas

¹³⁴ *Id.* at 2650 (Ginsburg, J., dissenting).

¹³⁵ *Id.* at 2629.

¹³⁶ *Id.*

¹³⁷ *Id.* at 2650 (Ginsburg, J., dissenting).

¹³⁸ *Katzenbach*, 383 U.S. at 330 (emphasis added).

¹³⁹ *Shelby County*, 133 S. Ct. at 2642 (Ginsburg, J., dissenting).

has explained, “Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose.”¹⁴⁰

But the majority could have said far more had it been so inclined. The dissent, for example, relied on the fact that 56 percent of the so-called “successful” Section 2 claims between 1982 and 2006 were in covered jurisdictions. But it is difficult to see this statistic as evidence that the kind of rampant voting discrimination that would make preclearance an appropriate remedy is uniquely present in the jurisdictions selected for coverage. If anything, it shows that Section 2 is an effective remedy. Regardless, the Section 2 data lose any persuasive value once they are disaggregated state by state. No fewer than 12 non-covered states had more “successful” Section 2 lawsuits than two covered states—Alaska and Arizona—neither of which had any. The Section 2 data do not suggest that the coverage formula is rational in practice. They demonstrate the opposite.

The nearest the dissent came to grappling with the formula’s theoretical irrationality was its suggestion that the government’s reverse-engineering argument has merit. In Justice Ginsburg’s view, so long as Congress determined that “the jurisdictions captured by the coverage formula still belonged under the preclearance regime . . . there was no need to alter the formula.”¹⁴¹ As noted above, however, that answer is not responsive to the requirement set forth in *Katzenbach* that the formula’s criteria rationally relate to the problem Congress is targeting. In 1965, Congress was targeting jurisdictions that used tests and devices to depress minority voting, and it constructed a formula to target that problem. In 2006, Congress chose a new target—second-generation barriers—but used the old triggers.

Indeed, the dissent admitted that the formula’s use of voting tests that have been banned for decades as a coverage trigger is problematic. But other than pronouncements about the VRA’s “grand aim” and the emergence of “second-generation barriers . . . as attempted *substitutes* for the first-generation barriers,”¹⁴² Justice Ginsburg never explains why it is appropriate to rely on the latter to target the former.

¹⁴⁰ *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁴¹ *Shelby County*, 133 S. Ct. at 2651 (Ginsburg, J., dissenting).

¹⁴² *Id.* (emphasis in original).

The fundamental defect of the government's reverse-engineering argument that the dissent was incapable of curing is its reliance on the irrelevancy of the statute's criteria for coverage to sustain a formula that must be rational in theory.

In a final effort to salvage the coverage formula, the dissent pointed to "bail out" and "bail in" as solving any problems with Section 4(b). Again, these aspects of the VRA have nothing to do with whether the formula is rational in theory. At most, these statutory mechanisms for letting some jurisdictions out of preclearance and bringing others into the system might bear on whether the formula is rational in practice. That is, the judiciary might tolerate some imperfections in the coverage map so long as the jurisdictions that have been mistakenly captured have a means of freeing themselves and those wrongly left off the list can be subjected to preclearance if they are found to have violated the Fourteenth or Fifteenth Amendment. But this has nothing to do with whether coverage triggers continue to bear a logical and rational relationship to current conditions.

Had the Court needed to reach this issue, moreover, it would have had good reason to be skeptical of bail out's ability to save Section 4(b). First, history shows that it helps only at the margins and cannot solve the massive problems with this formula. Only about 1 percent of the more than 12,000 covered jurisdictions bailed out prior to the statute's reenactment in 2006. Second, bail out today is fundamentally different from bail out in 1965. As originally envisioned, bail out was intended to liberate those jurisdictions that should never have been covered in the first place. Since 1982, however, it is a kind of parole statute. Bail out lets jurisdictions that can show to DOJ's satisfaction that they are no longer troublemakers out of jail with 10 years of supervised release. Hence, bail out is no longer responsive to the formula's over-inclusiveness. Unlike the 1965 bail-out provision, which allowed jurisdictions to show that they were wrongly convicted, the 2006 version assumes their guilt and requires evidence of rehabilitation to secure release. Reliance on bail in is even less persuasive. Bail in operates nationwide and is tied to judicial findings of Fourteenth and Fifteenth Amendment violations. If anything, the availability of bail in highlights the flaws inherent in Section 5.

In sum, the dissent simply had no answer to the majority's conclusion that Section 4(b)'s coverage formula is irrational in theory. The dissent offers a host of reasons why Congress should no longer have

to defend the formula as rational in theory notwithstanding *Katzenbach*, why those leading the charge for reenactment might have assumed that the outdated formula would be upheld, and why the coverage formula is rational in practice. Whether or not those arguments have merit—we think not—they are no substitute for an argument on why *Katzenbach*'s requirement that the formula be rational in theory has been met or why that requirement has lost legal pertinence.

It therefore makes sense that the dissent would devote most of its opinion to why Section 5 remains constitutional. When you have little to say, change the subject. Because the issue was beyond the scope of the majority's holding, however, it turned into a one-sided conversation. Yet it would be wrong to assume that the majority's failure to decide that question amounted to implicit concurrence in the dissent's view. Congress and the president should learn from the *NAMUDNO* experience and take the Court's concerns seriously before attempting to reinstall this same preclearance regime under a revised coverage formula.

This is not to say that the dissent might not attract a fifth vote to its view if the Court is squarely confronted with Section 5's constitutionality in a future case. Indeed, it would be wrong to hazard a guess as to what might happen. But given the secondary evidence of discrimination that Congress relied on in 2006, the massive improvements in the covered jurisdictions since 1965, and Section 2's ability to respond to the "vestiges" of discrimination that concerned Congress in 2006, the dissent's suggestion that it is somehow "implausible" to reach the conclusion that Section 5 is unconstitutional seems like a stretch. Preclearance continues to raise serious constitutional questions that will need to be answered if the issue again reaches the Supreme Court.

V. Where to from Here?

By invalidating Section 4(b), the Court rendered Section 5 inoperable. Henceforth, no state or political subdivision must preclear its voting laws. But the Court was careful to point out that it was not issuing a decision as to Section 5 and that "Congress may draft another formula based on current conditions."¹⁴³ If Congress and the president can meet that challenge, the Section 5 preclearance regime

¹⁴³ *Id.* at 2631.

will be revived. But that may be easier said than done. Designing a formula to target those regions of the country where racially polarized voting and vote dilution—Congress’s principal concerns in 2006—might prove difficult as those and other second-generation barriers are not as amenable to description by formula as voting tests and devices and low registration and voting rates.

Congress would also need to ensure that the formula is rational in practice. Given that the second-generation barriers are not concentrated in jurisdictions covered under the old formula, Congress presumably would need to bring new jurisdictions into the preclearance regime and set others free. That may prove politically troublesome. The stigma of coverage and the burden that preclearance imposes on state and local governments make it unlikely that any jurisdiction would willingly subject itself to preclearance—let alone one that has never before been subject to that obligation. Moreover, DOJ’s promise to aggressively utilize the litigation-based remedies of VRA Sections 2 and 3 to bring challenges against jurisdictions it believes are interfering with minority voting rights may prove the points Shelby County was making all along: the emergency necessitating preclearance has passed; traditional litigation remedies can address the vestiges of discrimination that Congress targeted in 2006; and the places where these problems are most prominent are not concentrated in the jurisdictions that used discriminatory tests or devices in 1964, 1968, and 1972.

But if Congress overcomes these hurdles, questions as to Section 5’s constitutionality still remain. The Supreme Court has twice now expressed grave doubts about Congress’s ability to show that the conditions justifying unprecedented interference with the basic right of self-government persist today. Though the Court has shown restraint in declining to reach that issue when narrower grounds could resolve the dispute, it would be wrong to conclude that the Court would hesitate to do so if the issue needs deciding. The question now is whether Congress and the president want to provoke that confrontation.