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SHELBY COUNTY AS A SANCTION FOR STATES' RIGHTS IN ELECTIONS

JOSHUA S. SELLERS*

Few Supreme Court decisions are both intensely debated by the public and ultimately transformative. Most decisions either do not register in the mainstream or do not produce their anticipated consequences. The Court's 2013 decision, *Shelby County v. Holder*,¹ however, is a notable exception. The Court's acceptance of the case was widely reported on.² The decision itself was highly anticipated.³ And an abundance of commentary on the decision has followed.⁴ As such, it is salient in a way that most decisions are not. But it is also uniquely consequential. The decision dismantled the nation's long-established voting rights enforcement regime and, in turn, engendered a plethora of controversial state and local voting laws regarding voter identification, voter registration, and voter access that have resulted in racial and ethnic voter discrimination.

Since the Voting Rights Act (VRA) was passed in 1965, the federal government has enjoyed substantial authority in regulating elections, particularly when issues of race are implicated.⁵ *Shelby County* not only curbed

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1. 133 S. Ct. 2612 (2013).

2. Adam Liptak, *Justices to Revisit Voting Act in View of a Changing South*, N.Y. TIMES, Nov. 9, 2012; Robert Barnes, *Supreme Court to review key section of Voting Rights Act*, WASH. POST, Nov. 9, 2012; Jess Bravin & Brent Kendall, *High Court to Review Voting Rights, DNA Privacy*, WALL ST. J., Nov. 9, 2012.

3. For instance, SCOTUSblog organized an online symposium in advance of the decision. See *Online Symposium Announcement: Shelby County v. Holder*, SCOTUSBLOG (Feb. 7, 2013, 4:27 PM), <http://www.scotusblog.com/2013/02/online-symposium-announcement-shelby-county-v-holder/>.

4. See, e.g., Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713 (2014); Samuel Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby)*, 123 YALE L.J. 2838 (2014); Nicholas Stephanopolous, *The South After Shelby County*, 2013 SUP. CT. REV. 55 (2013); Ellen D. Katz, *What Was Wrong with the Record?*, 12 ELECTION L.J. 329 (2013); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481 (2014).

5. See Charles & Fuentes-Rohwer, *supra* note 4, at 485.

that authority—by rendering Section 5 of the VRA, the so-called “preclearance provision,” moot—but also signaled, in its language, that the VRA is no longer constitutionally sacrosanct. Viewed in isolation, the decision might be read as simply a soft rebuke of Congress’s failure to update the VRA to better address contemporary voting rights-related problems.⁶ Alternatively, and more accurately, I argue, the decision marked a culminating event in the resurgence of “states’ rights” efforts.

Specifically, the decision was seemingly informed by, and can be understood in combination with, the resurgence of arguments and actions in support of nullification, interposition, and states’ rights. The doctrine of nullification and the concept of interposition are evoked when states enact laws or adopt measures in direct defiance of federal law.⁷ Actions taken in furtherance of states’ rights, in contrast, do not categorically involve direct defiance of federal law, and may instead merely implicate unresolved, and therefore more legitimate, questions about the limits of federal power vis-à-vis the states. Unfortunately, the language used in support of nullification, interposition, and states’ rights arguments, respectively, is often quite similar. And the language in *Shelby County* regarding state sovereignty in the voting rights arena gives credence to all such arguments. Consequently, the decision gave the Court’s imprimatur to states that are actively, and contentiously, testing the boundaries of permissible voting-related changes.

This essay examines both the ideational and observable effects of *Shelby County*. Part I summarizes the decision’s constituent parts, including its dubious reliance on “the fundamental principle of equal sovereignty.” Part II relates the decision to resurgent attempts to vindicate nullification, interposition, and states’ rights efforts. Part III reviews the controversial voting laws that several states passed both immediately prior to and immediately following the decision, interpreting them as symbolic of states’ emboldened sense of authority in the electoral arena. A conclusion briefly discusses a likely implication of this shift in the federal-state voting rights enforcement balance—a constitutional challenge to Section 2 of the VRA.

I. SECTION 5, *SHELBY COUNTY*, AND “EQUAL SOVEREIGNTY”

Congress initially passed the VRA in response to the systematic and blatant denial of the right to vote to vast numbers of African Americans.

6. *See id.* at 484 (noting, though not defending, the view that “*Shelby County* could have been worse, a lot worse. It is possible to read *Shelby County* as a narrow and arguably minimalist opinion.”).

7. *See* Christian G. Fritz, *Interposition and the Heresy of Nullification: James Madison and the Exercise of Sovereign Constitutional Powers*, HERITAGE FOUND., Feb. 21, 2012, <http://www.heritage.org/research/reports/2012/02/interposition-and-heresy-of-nullification-james-madison-exercise-of-sovereign-constitutional-powers>.

Section 5, the preclearance provision, was always the most controversial element of the statute. The provision placed select jurisdictions (mostly in the South) under what is commonly referred to as a type of “federal receivership,” mandating that they obtain preclearance from either the Department of Justice or a three-judge panel of the US District Court for the District of Columbia for any change related to a voting qualification or prerequisite to voting.⁸ The primary evidentiary burden lay with the covered jurisdictions, which needed to demonstrate that their voting-related changes would not make minority voters any worse off. Thus, the statute aimed to prohibit backsliding, or what judges labeled “retrogression.”⁹

Predictably, Section 5 was strongly opposed by jurisdictions subject to the preclearance provision. For nearly fifty years, however, the Court upheld the provision’s constitutionality whenever it was challenged.¹⁰ Constitutional concerns were elevated, though, following Congress’s 2006 decision to reauthorize Section 5 for twenty-five additional years.¹¹ The principal questions raised by many at the time were whether the preclearance regime was still justifiable in light of changed political conditions, and given improved race relations.¹² Those questions were first given formal expression in the Court’s decision in *Northwest Austin Municipal Utility District No. One v. Holder* (“*NAMUDNO*”).¹³

Though the Court avoided resolution of the constitutional question in *NAMUDNO*, the decision characterized Section 5 as “authoriz[ing] federal intrusion into sensitive areas of state and local policymaking that [impose]

8. 42 U.S.C. § 1973c (2000) (“Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(b) . . . are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”).

9. *Beer v. United States*, 425 U.S. 130, 141 (1976).

10. *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966); *Georgia v. United States*, 411 U.S. 526, 535 (1973); *City of Rome v. United States*, 446 U.S. 156, 177, 179 (1980); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 283–84 (1999).

11. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 189–92 (2007) (discussing some of these concerns).

12. See, e.g., Richard H. Pildes, *The Next Generation*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY* 17, 22–25 (Guy-Uriel E. Charles et al. eds., 2011). Similar concerns were raised in preceding years. See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 *COLUM. L. REV.* 1710, 1728 (2004).

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

substantial federalism costs.”¹⁴ This quotation is drawn from the Court’s decision in *Lopez v. Monterey County*,¹⁵ where the Court additionally noted that with regard to legislation, like the VRA, passed pursuant to the Fifteenth Amendment, “some intrusion into areas traditionally reserved to the States” was to be expected.¹⁶ Chief Justice Roberts’s selective quotation of *Lopez* in *NAMUDNO* is therefore instructive. Even in reaching the same outcome in *NAMUDNO*, the chief justice might have framed the voting rights enforcement regime as something akin to a “harmonious system,”¹⁷ in which state governments share responsibility with the federal government. He might have emphasized the collaborative nature of state and federal election law practices.¹⁸ Instead, he misleadingly extracted a decidedly caustic phrase—“federal intrusion”—that disguises the holding of the case from which it was drawn and evokes some of our nation’s most contentious eras.¹⁹

NAMUDNO foreshadowed the Court’s decision in *Shelby County*. In *Shelby County*, the chief justice once again opted for intemperate language about federal encroachment, eliding any engagement with dynamic, interactive theories of federalism. His opinion framed our federal system as one in which “States retain broad autonomy in structuring their governments and pursuing legislative objectives.”²⁰ His inflammatory portrayal of the Section 5 process—“States must beseech the Federal Government for permission to implement laws that they otherwise have the right to enact and execute on their own”²¹—bolsters an unproductive conception of states as mere protectorates of the federal government.

The decision also heavily relied on what it deemed the “‘fundamental principle of equal sovereignty’ among the States.”²² Historically, that principle only applied to the terms upon which new states would be admitted to the

14. *Id.* at 200 (quoting *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999)).

15. 525 U.S. 266 (1999).

16. *Lopez*, 525 U.S. at 282.

17. *Ex parte Siebold*, 100 U.S. 371, 386 (1880).

18. See Kirsten Nussbaumer, *The Election Law Connection and U.S. Federalism*, 43 PUBLIUS 392, 396–97 (2013) (“The electoral interest of federal officials in state and local decision-making about federal elections is not always felt at a distance, away from the scene of the action, but may be expressed in information-sharing, lobbying, and other actions that are aimed at influencing the various stages of state rule formation and implementation, ranging, for example, from strategy and negotiations about the design of state electoral initiatives to the sharing of litigation funds and personnel in the heat of a disputed election count.”).

19. *NAMUDNO*, 557 U.S. at 202.

20. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

21. *Id.* at 2624.

22. *Id.* at 2621 (quoting *NAMUDNO*, 557 U.S. at 203).

Union;²³ it was not considered a principle governing the terms of remedial legislation. Chief Justice Roberts first refashioned the principle's import in *NAMUDNO*, in claiming 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.”²⁴ This dubious interpretation of the principle was irrelevant to the Court’s holding in *NAMUDNO*, and was decidedly instrumental insofar as it provided a precedent (albeit in dicta) for Chief Justice Roberts to later rely on in *Shelby County*.²⁵

In deciding *Shelby County*, then, Chief Justice Roberts interpreted his own disputable interpretation of the equal sovereignty principle in *NAMUDNO* as essentially dispositive.²⁶ What did this interpretation really signify? One possibility is that the Court is simply confused about the nature of our election law framework, and thereby privileges a faulty notion of state sovereignty, which the equal sovereignty principle reflects. Franita Tolson is a leading proponent of this view:

The Supreme Court conflates state autonomy with state sovereignty in the context of the VRA, in effect promoting the dualist undertones that characterize much of its federalism case law and giving the states significantly more power over elections than they otherwise would have. Its voting rights jurisprudence presupposes that the states retain a large amount of “sovereignty” over elections, leaving room for the Court to characterize the federal/state relationship over elections as one of shared power instead of viewing the state as subordinate to federal authority. The view of electoral authority as “shared” has led the Court to defer more to the states over the matter of elections. This deference is due in part to the misconception that placing meaningful limits on congressional authority extends to all federalism

23. See Charles & Fuentes-Rohwer, *supra* note 4, at 519 (“Prior to [*NAMUDNO*], the argument for ‘equal sovereignty’ was generally understood as applicable only at the time of admission.”).

24. *NAMUDNO*, 557 U.S. at 203.

25. See Charles & Fuentes-Rohwer, *supra* note 4, at 519 (“The Chief Justice attributed the ‘fundamental principle’ to the Court’s decision in [*NAMUDNO*]. But [*NAMUDNO*] simply asserted the point and provided no support for the assertion.”). It is for this reason that Richard Hasen categorized the Court’s decision in *NAMUDNO* as an “anticipatory overruling.” Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 62 EMORY L.J. 779, 782–83 (2011–2012).

26. *Shelby Cnty.*, 133 S. Ct. at 665 (“[A]s we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100–01 (2013) (“While the equal dignity requirement may be of questionable original constitutional pedigree, the foundation was set in *NAMUDNO*, a decision that was joined by the Court’s liberal wing—as Chief Justice Roberts recounted with some obvious glee.”).

issues, including those issues such as elections, which are not truly “federalist” in nature but instead reflect a decentralized system of authority.²⁷

While this perspective has merit, I believe the aforementioned word and phrase choices made by the chief justice represent more than just a commitment to extending the so-called “federalism revolution.”²⁸

More convincing, in my view, are arguments that the *Shelby County* decision represents a rejection of the principal ideational presumption of the civil rights era—namely, that absent federal oversight, state governments, and particularly state governments in the Deep South, cannot be trusted to equalize civil and voting rights for minorities. This presumption has always been an important dimension of the VRA, and specifically the Section 5 regime. For instance, in recounting President Johnson’s push for a voting rights bill, Hugh Davis Graham notes the following:

[N]o voting rights law had really worked since Reconstruction. This of course was part of the problem, because the federal manipulation of the postbellum franchise had stained the memory of Reconstruction with partisan corruption, and this legacy of “Black Reconstruction” had long provided conservatives with powerful practical as well as constitutional arguments for hedging the voting rights provisions of 1957, 1960, and even 1964 with elaborate judicial due process. The voting (and nonvoting) patterns of 1964, however, had demonstrated the bankruptcy of this good-faith approach in the face of so much blatant bad faith.²⁹

Section 5 was an aggressive response to this “blatant bad faith.”

Consequently, *Shelby County* is best viewed as a reactionary decision that resists the presumption that states are untrustworthy guardians of equality. Guy-Uriel Charles and Luis Fuentes-Rohwer endorse this interpretation in writing that “*Shelby County* is not simply about recalibrating the federal-state balance; the majority is after bigger game here. *Shelby County* is also about the redemption of the South. The *Shelby County* majority seeks to redeem the States and the South from the past.”³⁰ Samuel Issacharoff reads the case similarly: “In reality, the equal sovereignty doctrine captures less the constant differentiation of the states for purposes of routine legislative enactments than the perceived continued stain on the South from its racist past. The issue was

27. Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1258 (2012).

28. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 235–43 (2004) (summarizing the relevant case law).

29. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* 163 (1990).

30. Charles & Fuentes-Rohwer, *supra* note 4, at 522.

never addressed forthrightly by the majority but its presence was everywhere.”³¹

Viewed accordingly, *Shelby County* is much more than just an admonishment of Congress for failing to update Section 5’s coverage formula to better reflect current conditions. It is, more accurately, an approbation of states’ primacy in election-related matters, and an invitation to states to assert that primacy. It is an ideational reclamation project of sorts that paints the federal government as a meddlesome intruder that proscribes states from “passing laws that they otherwise have the right to enact and execute on their own.”³² As argued in Part II, this characterization sounds in the controversial doctrines of nullification, interposition, and states’ rights.

II. *SHELBY COUNTY* AND THE SOUNDS OF SOVEREIGNTY

In recent years there has been a revival of discussion about nullification, interposition, and states’ rights. So much so that leading constitutional scholars have been asked to debate the lawfulness of the doctrines on National Public Radio,³³ and last year, the *Arkansas Law Review* even organized a symposium to address the doctrines’ contemporary legitimacy.³⁴ In short, doctrines once thought dead have reemerged as, at the very least, conversation-worthy.

Nullification, defined as “a theory advocating a state’s right to declare a federal law unconstitutional and therefore void,”³⁵ is the most radical of the three, insofar as it promotes giving states a degree of power the other doctrines do not. That said, most scholars deem it outlandish. For example, Sanford Levinson describes the conventional view that

any suggestion of so-called “sovereign states” having the power to “nullify” federal law is utter nonsense. No federal judge (or, for that matter, all but the most deviant state counterpart) is going to uphold state authority against the Supremacy Clause in Article VI, which clearly and unequivocally gives all laws passed pursuant to the Constitution the power to negate any state laws—or, indeed, state constitutions—to the contrary.³⁶

31. Issacharoff, *supra* note 26, at 101.

32. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013).

33. *On Point with Tom Ashbrook*, NPR, Mar. 23, 2010, <https://www.youtube.com/watch?v=regbNVenUTA>.

34. Mark R. Killenbeck, *Symposium Introduction: Bad Company?*, 67 ARK. L. REV. 1 (2014).

35. BLACK’S LAW DICTIONARY 1830 (10th ed. 2014).

36. Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to Be Wrestled With?*, 67 ARK. L. REV. 17, 31–32 (2014).

Jack Rakove writes, “Nullification is a terribly interesting argument, but it is neither part of the Constitution nor consistent with its meaning.”³⁷ Mark Brandon claims, “Even if one recognizes an implied and later explicit reservation of powers in the several states, it is impossible to imagine that nullification was constitutionally permissible, even in the earliest years of the republic (well before the Fourteenth Amendment), when states continued to exercise expansive authority.”³⁸ Sean Wilentz, writing in the *New Republic*, chastises those he labels “new nullifiers” for their attempts to “repudiate the sacrifices of American history—and subvert the constitutional pillars of American nationhood.”³⁹ Ari Berman, the *Nation* magazine’s voting rights columnist, titled a recent column criticizing several states’ restrictive election laws “The New Nullification Movement.”⁴⁰ In short, nullification lacks endorsers.⁴¹

The related concept of interposition, defined as “[t]he action of a state, in the exercise of its sovereignty, rejecting a federal mandate that it believes is unconstitutional or overreaching,”⁴² is slightly less confrontational. However, what it exactly entails is uncertain. Levinson concludes that interposition “can mean only that states—like any citizen—are free to articulate their views about the possible unconstitutionality of national laws and to attempt to generate a national movement to repeal those laws.”⁴³ Rakove concurs, connecting the concept to James Madison’s 1798 Virginia Resolution:

In thinking about the role that states could play in checking constitutionally dubious policies, Madison was careful to remain consistent with his analysis of 1787–88. That is, he never thought of the states as retaining an independent *legal* authority to prevent the implementation of duly adopted national laws, but their *political* capacity remained intact. As the original compacting parties

37. Jack N. Rakove, *Some Hollow Hopes of States’-Rights Advocates*, 67 ARK. L. REV. 81, 85 (2014).

38. Mark E. Brandon, *Secession and Nullification in the Twenty-First Century*, 67 ARK. L. REV. 91, 97 (2014).

39. Sean Wilentz, *States of Anarchy: America’s Long, Sordid Affair with Nullification*, NEW REPUBLIC, Mar. 30, 2010, <http://www.newrepublic.com/article/politics/the-essence-anarchy>.

40. Ari Berman, *The New Nullification Movement*, NATION, Oct. 23, 2014, <http://www.the.nation.com/article/176808/new-nullification-movement#> (“In reality, the two-tiered system of registration being set up in Arizona and Kansas has far less to do with stopping voter registration fraud (which, as shown, is very rare in both states) than with ‘nullifying’ federal laws that Republicans don’t like, such as Obamacare. There’s a symmetry between shutting down the government and creating separate and unequal systems of voting.”).

41. *But see* THOMAS E. WOODS, NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY (2010).

42. BLACK’S LAW DICTIONARY 333 (9th ed. 2009).

43. Levinson, *supra* note 36, at 42.

to the Union, states had not forfeited their rights to express political opinions and, thus, mobilize opposition to positions they found objectionable.⁴⁴

Thus, interposition, responsibly defined,⁴⁵ serves a kind of expressive function through which states can oppose the constitutionality of federal laws.

The concept of states' rights refers more broadly to a multitude of efforts to preserve state sovereignty, including the bringing of legal challenges. By comparison with nullification and interposition, it has much more of a contemporary resonance, rendering arguments made under its banner more legitimate.⁴⁶ Unfortunately, however, for its advocates, that resonance is in part due to the use of states' rights arguments in opposition to desegregation.⁴⁷ Yet, as acknowledged by Rakove, "[t]hrough one may give states' rights a hard edge—equating it with the capacity to resist exercises of national authority—one may also use the term to identify areas of governance where the states have some residual power to act."⁴⁸ This understanding can be aligned with the Court's cases in recent decades finding some Tenth Amendment-based limitations on congressional power,⁴⁹ which purport to establish workable limits on Congress, rather than the complete independence of states.

How, then, does *Shelby County* fit with these doctrines? Most notably, it underwrites states' enactments of new, discriminatory voting rules and regulations. To be sure, not every action of this type was taken in direct response to *Shelby County*,⁵⁰ though many certainly were.⁵¹ But, as argued above, the ideational thrust of the decision countenances such actions. John Dinan, writing about recent states' rights efforts in opposition to federal

44. Rakove, *supra* note 37, at 85–86.

45. I say “responsibly” because, as referenced by Levinson, the concept of interposition was employed by Southern segregationists as grounds for rejecting the Supreme Court's decisions in *Brown v. Board of Education* and *Bolling v. Sharpe*. Levinson, *supra* note 36, at 45 n.159.

46. See Adam Liptak, *Suit Cites States' Rights on Behalf of Gay Rights*, N.Y. TIMES, July 9, 2012, http://www.nytimes.com/2012/07/10/us/an-unexpected-alliance-in-a-same-sex-marriage-case.html?_r=0; Kirk Johnson, *States' Rights Is Rallying Cry for Lawmakers*, N.Y. TIMES, Mar. 16, 2010, <http://www.nytimes.com/2010/03/17/us/17states.html>.

47. See ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 163 (4th ed. 2005) (noting that “much of th[e] disdain for ‘states'-rights’ arguments was triggered by the traditional use of such arguments to justify racial oppression or the harassment of those with unpopular political or cultural views”); RICHARD KLUGER, *SIMPLE JUSTICE* 752 (1975).

48. Rakove, *supra* note 37, at 82.

49. See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

50. See Samuel Issacharoff, *Ballot Bedlam*, N.Y.U. PUB. L. & LEGAL THEORY WORKING PAPERS 9 n.26 (2014).

51. *Statewide and Local Responses to the Supreme Court's Voting Rights Act Decision: June 25, 2013 – Present*, NAACP LEGAL DEF. & EDUC. FUND, Feb. 18, 2015, available at <http://www.naacpldf.org/document/states-responses-shelby-decision>.

firearm and health care initiatives, provides an apt description of what is occurring in the election law context as well:

[S]tates have various opportunities to exploit or anticipate changes in Supreme Court doctrine that create uncertainty about the legitimacy or applicability of federal directives. This is illustrated by the recent passage of state firearms and health freedom statutes. In neither case have states nullified federal laws in the sense of declaring them void or defying direct federal judicial orders. Rather, states enacted statutes that are intended to serve as vehicles for generating a Supreme Court case to determine the legitimate reach of congressional power.⁵²

Shelby County buoyed such efforts in the election law context with its intimations of state sovereignty

Part of the connection between *Shelby County* and states' efforts to restrict access to the franchise is merely semantic. That is, the specific language employed by states in defense of their restrictive voting laws sounds in nullification, interposition, and states' rights. For instance, two days after the *Shelby County* ruling, the state of Alabama announced the immediate implementation of a voter identification law that civil rights groups claimed would have a discriminatory effect on minority voters. Prior to the ruling that enactment would have required preclearance. In making the announcement, Alabama Attorney General Luther Strange asserted that the Court's decision "frees Alabama and other states from cumbersome and unreasonable federal oversight."⁵³

The state of Mississippi also implemented a voter identification law in the immediate wake of *Shelby County*. In response to the decision, US Senator Roger Wicker stated: "Today's decision is a good step in returning power back to the states. As the Court noted, the criteria being used by the Justice Department to implement portions of the 'Voting Rights Act' are outdated. I welcome today's ruling to treat all states equally under the law and hope it will finally clear the way for Mississippi to implement our commonsense voter identification laws in a way that is fair to all citizens."⁵⁴

Mississippi House Elections Committee Chairman Bill Denny expressed a similar sentiment: "I've always felt that [Section 5 of the VRA] was unconstitutional. . . . I would've agreed in 1965 that something had to be done, but it should've been done to all 50 states. I just always felt that was wrong,

52. John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALA. L. REV. 1637, 1668 (2011).

53. Bob Johnson, *Alabama officials say voter ID law can take effect*, GADSEN TIMES, June 26, 2013, <http://www.gadsentimes.com/article/20130626/WIRE/130629842?p=1&tc=pg>.

54. Press Release, Senator Roger Wicker, Wicker Statement on Voting Rights Ruling (June 25, 2013), available at <http://www.wicker.senate.gov/public/index.cfm/press-releases?ID=201971e4-e755-4c79-90d2-f73654144fff>.

that was a violation of the 10th Amendment to begin with, of states' rights."⁵⁵ South Carolina Representative Jeff Duncan, when asked about *Shelby County*, commented: "Today's Supreme Court's ruling invalidating the preclearance requirements contained within the Voting Rights Act is a win for fairness, South Carolina, and the rule of law. . . . The Court's ruling will hopefully end the practice of treating states differently and recognizes that we live in 2013, not the 1960s."⁵⁶ South Carolina's attorney general added, "This is a victory for all voters, as all states can now act equally, without some having to ask for permission or being required to jump through the extraordinary hoops demanded by federal bureaucracy."⁵⁷

These statements are clearly in harmony with Chief Justice Roberts's language in *Shelby County*. But the connection may be deeper than that. Consider the argument of James Read and Neal Allen regarding recent nullification efforts:

Nullification may still be dead as far as the U.S. Supreme Court is concerned. But whether nullification theory is upheld in federal court is not the only question. States in the past have sometimes successfully obstructed federal laws and rulings for years despite consistently losing in court. And if the Court—still rejecting nullification—should overturn on other grounds some federal laws currently targeted by state nullification legislation, advocates of nullification would likely claim political vindication for their efforts.⁵⁸

Viewed accordingly, *Shelby County* can be read as animating earlier states' rights efforts in the election law realm. Therefore, although recent state assertions of election law primacy may not technically constitute nullification or interposition, their logic is not entirely dissimilar.

Put differently, while state election laws—such as voter identification laws—may not present direct resistance to the VRA, they tacitly impair the nation's voting rights enforcement regime. *Shelby County* can be read as vindicating this impairment by overturning "on other grounds" Section 5 of the VRA. The other ground here is, of course, the equal sovereignty principle, a principle that James Blacksher and Lani Guinier refer to as "the oldest and

55. *Voting Rights Act ruling clears path for Mississippi voter ID use in 2014*, ASSOCIATED PRESS, June 25, 2013, http://blog.gulfive.com/mississippi-press-news/2013/06/voting_rights_act_ruling_clear.html.

56. Press Release, Representative Jeff Duncan, Duncan Issues Statement on SCOTUS Voting Rights Act Ruling (June 25, 2013), available at <https://jeffduncan.house.gov/press-release/duncan-issues-statement-scotus-voting-rights-act-ruling>.

57. Scott Bomboy, *Upcoming elections at the heart of new Voting Rights Act battle*, NAT'L CONST. CENTER, June 26, 2013, <http://blog.constitutioncenter.org/2013/06/elections-at-the-heart-of-new-voting-rights-act-battle/>.

58. James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 AM. POL. THOUGHT 263, 267 (2012).

most demeaning official insult to African Americans in American constitutional history.”⁵⁹

In retrospect, the Court’s 2008 decision in *Crawford v. Marion County Election Board*⁶⁰ regarding Indiana’s voter identification law was a harbinger. In *Crawford*, the plaintiffs alleged that Indiana’s law substantially burdened the right to vote in violation of the Fourteenth Amendment.⁶¹ Justice Stevens authored the lead opinion, in which he employed the “balancing approach” derived from two Court decisions, *Anderson v. Celebrezze*⁶² and *Burdick v. Takushi*.⁶³ This approach weighs a state’s interests against the burden imposed on voters. Justice Stevens’s opinion found the state’s interests in “detering and detecting voter fraud,”⁶⁴ and “protecting public confidence . . . in the integrity of the electoral process,”⁶⁵ to be sufficient. Justice Scalia, concurring, asserted that it “is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class.”⁶⁶

The decision notably privileges state election law decision making. As noted by Ellen Katz, *Crawford*’s reasoning “gives States license to structure electoral processes to impose barriers to participation, subject only to the most limited constraint that they not be *legally* impossible to traverse.”⁶⁷ Though the exact relationship between a decision like *Crawford* and *Shelby County* is difficult to identify,⁶⁸ the momentum it built towards state sovereignty in election law is undeniable. Writing after *Crawford* but prior to *NAMUDNO*, Pamela Karlan aptly summarized the shift:

[T]he justices who seemed most deferential to the Indiana Legislature’s judgment on how to strike the balance between the risk of disenfranchisement through fraudulent dilution and disenfranchisement through exclusion have expressed the greatest skepticism with respect to Congress’s decision to strike a different balance with respect to the risks of disenfranchisement in the

59. James U. Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote: Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39, 39 (2014).

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

61. *Id.* at 184.

62. *Anderson v. Celebrezze*, 460 U.S. 780, 780 (1983).

63. *Burdick v. Takushi*, 504 U.S. 428 (1992).

64. *Crawford*, 553 U.S. at 184.

65. *Id.* at 197.

66. *Id.* at 208 (Scalia, J., concurring).

67. Ellen D. Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1631 (2009).

68. *But see* Ellen D. Katz, *Election Law’s Lochnerian Turn*, 94 B.U. L. REV. 697, 697 n.5 (2014) (claiming that *Crawford*, “in important ways, both propelled *Shelby County* and heightened its consequences”).

context of the Voting Rights Act. A challenge to the renewal and amendment of that statute is currently before the Court, and it will be interesting to see whether the Court accords as much deference to congressional fact-finding as it did to the Indiana Legislature's conclusions.⁶⁹

As time revealed, in both *NAMUDNO* and in *Shelby County*, the Court was anything but deferential to congressional fact-finding.

Consider also the "proof of citizenship" voter registration laws passed by the state of Arizona and the state of Kansas in 2004 and 2011, respectively. Both laws sought to require prospective voters to verify their citizenship in order to vote in both federal and state elections. Arizona litigated this issue all the way to the Court, which held in *Arizona v. Inter Tribal Council of Arizona, Inc.* that the National Voter Registration Act preempted Arizona's registration law,⁷⁰ thereby limiting the citizenship requirement to voting in state elections.⁷¹ At first glance, then, *Arizona* might seem to be an anti-states' rights decision. Analyzed more closely, though, its confirmation of federal election law authority is arguably quite narrow. As Samuel Issacharoff recognized, "[w]hile confirming the plenary authority of Congress with regard to the time, place, and manner of voting in federal elections, the opinion took pains to distinguish the powers of the states to set voter qualifications under the Elections Clause."⁷²

The trend, therefore, prior to *Shelby County*, was decidedly in favor of state sovereignty in election law. What was most striking about the decision was its complete disengagement from the doctrines that most experts anticipated would drive the case outcome. For example, most experts expected the Court's *City of Boerne v. Flores*⁷³ doctrine to govern the Court's analysis.⁷⁴ Following *Boerne*, Congress's enforcement power under the Reconstruction Amendments is limited to enacting preventive and remedial legislation that

69. Pamela S. Karlan, *Bullets, Ballots, and Battles on the Roberts Court*, 35 OHIO N.U. L. REV. 445, 461–62 (2009).

70. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013).

71. The lawsuit, which Kansas later joined, continues with regard to other issues, most notably whether the Election Assistance Commission is required to assist Arizona and Kansas in confirming the citizenship of voter registrants in state elections. Associated Press, *States Seek Rehearing of Voter Citizenship Lawsuit*, N.Y. TIMES, Dec. 23, 2014, http://www.nytimes.com/aponline/2014/12/23/us/ap-us-voter-citizenship-lawsuit.html?_r=0; see also *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014).

72. Issacharoff, *supra* note 26, at 112; see also Marty Lederman, *Pyrrhic victory for federal government in Arizona voter registration case?*, SCOTUSBLOG (June 17, 2013), <http://www.scotusblog.com/2013/06/pyrrhic-victory-for-federal-government-in-arizona-voter-registration-case/>.

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

74. See, e.g., RICHARD L. HASEN, *Congressional Power to Renew Preclearance Provisions*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 81, 81–103 (David L. Epstein et al. eds., 2006).

demonstrates “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁷⁵

Oddly, the Court ignored this analysis entirely in deciding *Shelby County*. As summarized by Richard Hasen: “Perhaps the biggest surprise of *Shelby County* is that the majority purported to ignore this *Boerne* issue. The majority does not even cite to *Boerne* even though this has been a key issue involving the constitutionality of Section 5 for years.”⁷⁶ Couple this omission with only passing references to the Tenth Amendment and the Elections Clause,⁷⁷ and the equal sovereignty doctrine seems even more unmoored from standard election law doctrine.

Which brings us back to the Read and Allen quote above. For champions of state sovereignty in election law, it may be unnecessary to challenge federal election laws through nullification or interposition. By earning victories on various grounds in cases like *Crawford* and *Arizona*, the reliance on the equal sovereignty principle in *Shelby County* seemed tenable. In other words, because the tide had shifted so starkly towards the privileging of state interests in election law matters, the decision in *Shelby County* seemed less of an outlier than it might have been. The final section, Part III, examines more closely some of the controversial voting laws passed by several states just prior to and immediately following the decision.

III. SUMMARIZING STATES’ RIGHTS IN ELECTIONS

Given *Shelby County*’s transformative holding, most of the public and academic conversation since has focused on what has transpired in its wake.⁷⁸ And as I have argued here, the decision was uniquely consequential in both practical and ideational ways. But it is worth reiterating a point from above—that some of the most controversial election law changes made by states in recent years actually preceded *Shelby County*.⁷⁹ This is not to say that *Shelby County* did not influence the trajectory, momentum, or viability of those changes. It does, however, warrant acknowledgment.

A number of commentators identify the 2010 midterm elections as a critical juncture. For instance, the Brennan Center for Justice points to the “highly partisan battle over voting rights” that “started after the 2010 midterm

75. *Boerne*, 521 U.S. at 521.

76. Richard L. Hasen, *The curious disappearance of Boerne and the future jurisprudence of voting rights and race*, SCOTUSBLOG (June 25, 2013), <http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/>.

77. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013).

78. See, e.g., Jamie Fuller, *How has voting changed since Shelby County v. Holder*, WASH. POST, July 7, 2014 (stating that “[s]tate legislatures have been far more active since *Shelby County v. Holder*”); Stephanopoulos, *supra* note 4.

79. See Issacharoff, *supra* note 50, at 9 n.26.

elections, when new state legislative majorities pushed a wave of laws cracking down on voting.”⁸⁰ According to its research, by the time of the 2012 election, “19 states passed 27 restrictive voting measures,”⁸¹ and “a few months before the 2014 midterm elections, new voting restrictions [were] set to be in place in 22 states.”⁸² A closer look at what occurred in Wisconsin and South Carolina is instructive.

In 2011, Wisconsin Governor Scott Walker signed into law a strict voter identification requirement.⁸³ Several groups, including the League of Women Voters, immediately brought a challenge. Since that time the law has been enforced just once and remains mired in litigation.⁸⁴ South Carolina Governor Nikki Haley signed a similar bill into law, also in 2011.⁸⁵ At the time, South Carolina was a covered state, and was therefore required to request preclearance. The Department of Justice denied approval to the voter identification law because it had the potential to disenfranchise minority voters.⁸⁶ Following subsequent litigation, the voter identification law was approved, though its enforcement was delayed.⁸⁷

These scenarios might be distinguished from those in North Carolina, Texas, and Florida, where *Shelby County* itself had some observable effects. Consider North Carolina, which involves some of the most probative evidence of *Shelby County*'s influence. The North Carolina General Assembly first considered a voter identification bill in March 2013, three months prior to *Shelby County*. The bill proceeded rather quickly through both the general assembly and the North Carolina State Senate, which was already anticipating

80. WENDY WEISER & ERIK OPSAL, BRENNAN CTR. FOR JUSTICE, *THE STATE OF VOTING IN 2014*, at 1 (June 17, 2014), available at http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf; see also Marjorie Connelly & Bill Marsh, *Rightward, March: The Midterm Election Exit Polls*, N.Y. TIMES, Nov. 6, 2010, http://www.nytimes.com/2010/11/07/weekinreview/07marsh.html?_r=0.

81. WEISER & OPSAL, *supra* note 80, at 2.

82. *Id.*

83. Clay Barbour, *Election officials wary as Walker signs voter ID bill into law*, WISC. ST. J., May 26, 2011, http://host.madison.com/news/local/govt-and-politics/election-officials-wary-as-walker-signs-voter-id-bill-into/article_102393ae-86fe-11e0-9bb6-001cc4c002e0.html.

84. The case materials for *League of Women Voters of Wisconsin v. Walker* are available at: <http://moritzlaw.osu.edu/electionlaw/litigation/League.of.Women.php>. See Lyle Denniston, *Wisconsin voter ID law blocked*, SCOTUSBLOG (Oct. 9, 2014), <http://www.scotusblog.com/2014/10/wisconsin-voter-id-law-blocked/>.

85. Gina Smith, *Haley signs Voter ID bill into law*, STATE, May 18, 2011, <http://www.the.state.com/2011/05/18/1824061/haley-signs-voter-id-bill-into.html>.

86. Ellen D. Katz, *South Carolina's "Evolutionary Process"*, 113 COLUM. L. REV. SIDEBAR 55, 56–60 (2013).

87. *Id.* at 58–60; see also Charlie Savage, *Federal Court Blocks Voter ID Law in South Carolina, but Only for Now*, N.Y. TIMES, Oct. 10, 2012, <http://www.nytimes.com/2012/10/11/us/politics/court-blocks-south-carolina-voter-id-law-for-now.html>.

a preclearance submission.⁸⁸ Following the decision, however, a preclearance request was unnecessary. The Republican chairman of the rules committee, Thomas Apodaca, then stated, “So now we can go with the full bill.”⁸⁹

The “full bill,” which was eventually signed into law, contained both major changes to the voter identification bill⁹⁰ as well as a number of new provisions, including reductions to early voting periods, the elimination of same-day registration, and modifications to provisional ballot rules.⁹¹ As in Wisconsin, the League of Women Voters, and others, challenged the law on both constitutional and statutory grounds. They found some success in the Fourth Circuit, but the Supreme Court ultimately restored the full law.⁹² The sequence of events provides strong support for the argument that *Shelby County* engendered the full set of election law changes that took effect in North Carolina.

The Texas legislature was similarly attuned to *Shelby County*. Texas’s voter identification law went into effect in 2012.⁹³ Because of its likely retrogressive impact, the D.C. Circuit rejected the law and denied Texas preclearance.⁹⁴ A separate D.C. Circuit panel also rejected and denied preclearance to two of Texas’s 2011 redistricting plans.⁹⁵ Just hours after the Court announced its decision in *Shelby County*, Texas Attorney General Greg Abbott asserted that both the state’s voter identification law and the redistricting maps would “take effect immediately.”⁹⁶ A federal district court

88. This overview of the legislative process is drawn from *NAACP v. McCrory*, 997 F. Supp. 2d 322, 335–38 (M.D. N.C. 2014).

89. *Id.* at 336.

90. *Id.* (“The voter ID provisions contained significant changes. For example, the list of acceptable identifications no longer included those issued by a state university or community college.”).

91. *Id.*

92. Adam Liptak & Alan Blinder, *Parts of North Carolina Law Limiting Vote Are Restored by Justices*, N.Y. TIMES, Oct. 8, 2014, <http://nyti.ms/1BUodF8>.

93. These facts are drawn from *Veasey v. Perry*, No. 13-CV-193, 2014 U.S. Dist. LEXIS 90554, at *7 (S.D. Tex. July 2, 2014).

94. *Texas v. Holder*, 888 F. Supp. 2d 113, 127 (D.D.C. 2012).

95. *Texas v. United States*, 887 F. Supp. 2d 133, 178 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013).

96. Todd J. Gillman, *Texas voter ID law “will take effect immediately,” says Attorney General Greg Abbott*, DALLAS MORNING NEWS, June 25, 2013, <http://www.dallasnews.com/news/politics/national-politics/20130625-supreme-court-strikes-down-key-section-of-voting-rights-act-in-decision-with-huge-texas-impact.ece>.

later found the voter identification law to constitute an unconstitutional poll tax,⁹⁷ yet the Court again reversed and restored the law.⁹⁸

Finally, consider Florida in 2012, where Governor Rick Scott oversaw a program intended to purge noncitizens from the voting rolls.⁹⁹ That effort was challenged by several organizations, including the American Civil Liberties Union, which argued that Florida had failed to obtain preclearance for the program.¹⁰⁰ *Shelby County* cleared the way for Florida to move forward with the program, bolstering Florida's efforts.¹⁰¹ Early last year the Eleventh Circuit found the implementation of the purge to violate the National Voter Registration Act, but the program is still viable.¹⁰²

So again, the observable effects of *Shelby County* in North Carolina, Texas, and Florida, to take just three leading examples, are visible in a way that is distinguishable from those in Wisconsin and South Carolina. With that said, *Shelby County* is still relevant to the latter cases. The decision upended the voting rights enforcement regime, and through its characterization of states as autonomous election law entities, encouraged state election law recalcitrance going forward. As our nation's highest court, the Supreme Court has a special narrative function. The narrative contained in *Shelby County* is that decidedly partisan state attempts to restrict the franchise are legitimate, even normatively desirable, exercises of states' authority. In some cases, the decision's observable effects are quite obvious. But even beyond those cases, the decision represents a sea change in how we think about election law matters.

IV. CONCLUSION

In the run-up to *Shelby County*, much of the conversation involved the question of whether Section 2 of the VRA could serve as an adequate

97. *Veasey v. Perry*, No. 13-CV-193, 2014 U.S. Dist. LEXIS 90554, at *68–69 (S.D. Tex. July 2, 2014).

98. Robert Barnes, *Supreme Court allows Texas to use controversial voter-ID law*, WASH. POST, Oct. 18, 2014, http://www.washingtonpost.com/politics/courts_law/2014/10/18/0439b116-5623-11e4-892e-602188e70e9e_story.html.

99. See Fatma Marouf, *The Hunt for Noncitizen Voters*, 65 STAN. L. REV. ONLINE 66 (2012).

100. Complaint for Declaratory and Injunctive Relief and Request for Three Judge Panel at 1, *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012), available at <https://www.acluf.org/pdfs/2012-06-ACLUVoterPurgeComplaint.pdf>.

101. Lizette Alvarez, *Ruling Revives Florida Review of Voting Rolls*, N.Y. TIMES, Aug. 7, 2013, <http://www.nytimes.com/2013/08/08/us/ruling-revives-florida-review-of-voting-rolls.html>.

102. *Arcia v. Fla. Sec'y of State*, 746 F.3d 1273, 1286 (11th Cir. 2014).

substitute for Section 5.¹⁰³ Section 2, by comparison, applies nationwide. It forbids any “standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”¹⁰⁴ Yet unlike the now impotent Section 5, Section 2 places the primary evidentiary burden on plaintiffs. Section 2 is the nucleus of modern private voting rights litigation.¹⁰⁵

The operative presumption of Section 5’s opponents seemed to be that Section 5 was constitutionally problematic, but Section 2 was constitutionally sound. Now, of course, questions are being raised about Section 2’s constitutionality.¹⁰⁶ Opponents argue that it is too broad and goes beyond what Congress is permitted to do under its Fourteenth Amendment enforcement powers.¹⁰⁷ A challenge of this type would have been unlikely absent *Shelby County*. The message that case sent was that the VRA is vulnerable, and that the Court is more than willing, perhaps even eager, to scrutinize its operation. In this new climate, states are privileged and given great latitude in managing voting and elections. It will require active involvement on the part of many to preserve federal oversight.

103. See, e.g., Eric Posner & Nicholas Stephanopolous, *Don’t Worry about the Voting Rights Act*, SLATE, Nov. 20, 2012, http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/11/supreme_court_and_section_5_of_the_voting_rights_act_it_s_ok_to_strike_it.html.

104. 42 U.S.C. §1973(a) (2006).

105. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1501 (2008) (“After 1982, nearly every vote dilution challenge to an electoral practice included a claim that the practice violated § 2.”).

106. See, e.g., Roger Clegg & Hans A. von Spakovsky, “Disparate Impact” and Section 2 of the Voting Rights Act, 119 HERITAGE FOUND. 1, 4 (2014).

107. Under *City of Boerne* and its progeny, the argument goes, Section 2 is an unconstitutional exercise of Congress’s Fourteenth Amendment enforcement power insofar as it fails to remedy intentional discrimination. I challenge this argument in forthcoming work. Joshua S. Sellers, *The Irony of Intent: Statutory Interpretation and the Constitutionality of Section Two of the Voting Rights Act* (forthcoming LA. L. REV. 2015).