UNCOVERING THE VOTING RIGHTS ACT: THE RACIAL PROGRESS ARGUMENT IN *SHELBY COUNTY*

By Derrick Darby[*]

I. INTRODUCTION

The Supreme Court recently removed an obstacle to making voting more burdensome in *Shelby County v. Holder*.[1] It invalidated a key provision of the 1965 Voting Rights Act ("VRA") that imposed a statutory requirement on certain states to secure federal permission before changing their voting laws.[2] The states affected by Section 4(b) of the VRA, the "coverage formula,"[3] not only wanted to be free from federal oversight of their sovereignty, they wanted to be treated "equally" with other states and have their "dignity" affirmed, or so the *Shelby County* majority would have us believe. Far from denying that states, like persons, can actually have dignity or claims to be treated equally, the Court conjured a "fundamental principle of equal sovereignty" to support giving them what they wanted.[4] This principle, as applied, demands that any departures from the presumption of equal treatment for equal states requires a "rational" relationship between the statute's exceptional allowance of unequal treatment

* Professor of Philosophy at the University of Michigan, Ann Arbor. I am indebted to Nicholas Stephanopoulos for commenting on this Article at a University of Chicago Law School workshop. For comments on an earlier draft I am grateful to Samuel Bagenstos, Joshua Cohen, Ellen Katz, Christopher Kutz, Richard Levy, Sophie Major, Richard Primus, and Margo Schlanger. I am also grateful for excellent exchanges with audiences at the University of Michigan Law School, the University of California, Berkeley Law, University of Chicago Practical Philosophy workshop, and audiences at the 2015 American Philosophical Association Pacific and Central Division meeting symposium sessions. Thanks also to the editors of this journal for excellent feedback during the editing process.

1. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

2. The Fifteenth Amendment to the U.S. Constitution outlaws government discrimination in voting based on race or color. U.S. CONST. amend. XV. The Voting Rights Act of 1965 (the "VRA") reaffirms this amendment by permanently proscribing state actions, nationwide, that result in vote denial or abridgement due to race or color. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (2012). Section 4(b), the "coverage formula," of the VRA singles out for special attention certain jurisdictions with egregious histories of Fifteenth Amendment violations through the use of poll taxes, literacy tests and other devices *and* with low voter registration and turnout. § 10303. Section 5, the "preclearance requirement," provides that voting changes in covered jurisdictions must gain preapproval either from the federal district court in Washington, D.C. or the U.S. Department of Justice. § 10304. Although, in the initial Act Congress understood sections 4 and 5 to be temporary measures and set them to expire after five years, the most recent reauthorization of the VRA in 2006 extended them for an additional 25 years leaving the coverage formula untouched. *Compare* Voting Rights of 1965, Pub.L. 89–110, §4–5, 79 Stat. 437, 438–39 (1965), *with* § 10303. This decision prompted Shelby County, Alabama, a covered jurisdiction, to seek judgment declaring the coverage formula and the preclearance requirement unconstitutional and barring their enforcement. *See* 133 S. Ct. 2612. The *Shelby County* ruling invalidated section 4(b) but did not rule on section 5. *Id.* at 2631.

3. The Voting Rights Act of 1965, 52 U.S.C. § 10303(b) (2012).

4. *Shelby Cty.* , 133 S. Ct. at 2623 (quoting Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009)).

(e.g., preclearance for covered states) and the problem being addressed (voting discrimination). As the Court puts it: "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."[5]

Chief Justice Roberts, writing for the 5-4 majority, agreed that this relationship once existed in areas affected by Section 4(b).[6] Back in 1966, for instance, there was evidence of tests and devices historically used as tools of voting discrimination *and* the voting rate in the 1964 presidential election was significantly below the national average in the covered areas.[7] But the Court argues that was then. This is now. In an opinion joined by the other conservatives and Justice Kennedy, Roberts presents a *racial progress argument* to deny that this rational relationship still exists, to conclude that the departure from the principle of equal state sovereignty is no longer justified, and to strike down Section 4(b) of the VRA as unconstitutional.[8]

Critics have taken the Court to task for appealing to the principle of equal sovereignty. Some have complained that the principle does not exist in legal precedent,[9] while others have argued that it does but has a dubious pedigree in the *Dred Scott v. Sandford*[10] decision denying black citizenship.[11] Some argue that the Court conflates "sovereignty" and "autonomy" in understanding the states' authority under the Elections Clause.[12] Others have sought to vindicate the Court by defending the principle of equal sovereignty and assigning it a more respectable pedigree.[13] But neither critics nor defenders have considered the racial progress argument the majority offers for why this controversial principle now prevails.

In this Article I reconstruct the Supreme Court's racial progress argument in *Shelby County*, and raise some concerns about ways of answering it that merely replace a conservative narrative about racial progress with a liberal one. Although I am partial to the latter narrative, and believe that the Court's overall

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5. *Id* at 2622.

6. *Id* at 2625.

7. *Id.*

8. *See id* at 2625–31.

9. *See* Richard A. Posner, *Supreme Court 2013: The Year in Review*, SLATE, (June 26, 2013), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html ("This is a principle of constitutional law of which I had never heard—for the excellent reason that…there is no such principle.").

10. Dred Scott v. Sandford, 60 U.S. 393 (1857).

11. *See* James Blacksher and 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 (2014).

12. *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012). The Elections Clause provides that "[t]he Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." U.S. CONST. art. I, § 4.

13. *See, e.g.*, Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L. J. 1087 (2016).

argument for striking down the coverage formula is deeply flawed, it seems unwise to rest the entire case for saving the VRA and defending the right to vote—moving forward—on winning the racial progress argument, especially in a nation so smitten by the view that we have reached the "postracial" promised land, and where this fanciful outlook is arguably now entrenched in Supreme Court equal protection doctrine.[14] I conclude with brief and very speculative remarks about where we might turn to safeguard the right to vote post-*Shelby County*, particularly in cases where vote denial rather than vote dilution is chiefly at issue.[15]

II. THE RACIAL PROGRESS ARGUMENT IN *SHELBY COUNTY*

In *Shelby County*, the coverage formula of the VRA, and for all practical purposes the preclearance requirement, are the immediate casualties of the majority's narrative of racial progress in America. While they concede that the nation has a tarnished racial history, and is far from perfect, the majority makes a big deal of the fact that "history did not end in 1965."[16] They rest their novel argument against the coverage formula on the claim that the "entrenched racial discrimination in voting" in covered states in 1965 that justified exceptional legislation back then is no longer prevalent or flagrant.[17] This perspective can be summed up with the motif, "that was then, this is now." On the basis of this, and two further grounds—a concern with fair elections and equal state sovereignty—the Supreme Court invalidates a primary federal statutory obstacle to selected jurisdictions imposing requirements on voting, including but not limited to, voter ID laws.[18]

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14. *See* Derrick Darby & Richard E. Levy, *Postracial Remedies*, SSRN (February 16, 2016), http://ssrn.com/abstract=2745614, forthcoming U. MICH. J. L. REFORM.

15. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006) (discussing the different ways of restricting voting). Vote denial practices also referred to as voter suppression prevent people from voting and having votes counted. Vote dilution practices weaken a group's political influence by making it harder for their political preferences for candidates or issues to win. *See* Daniel P. Tokaji, *Responding to* Shelby County*: A Grand Election Bargain*, 8 HARV. L. & POL'Y. REV. 71, 72, 96 (2014) (claiming that VRA preclearance was more effective at curbing vote dilution rather than vote denial in covered jurisdictions ["The reality is that preclearance was most effective in curbing redistricting plans and other practices thought to weaken minority representation, particularly in local jurisdictions that might otherwise have attracted scant notice."]. *Also see* Tokaji, *supra*, for more substantive recommendations regarding post-*Shelby County* election reform options including liberalized voter registration and uniform voter-identification requirements in federal elections.).

16. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2628 (2013).

17. *See* Ellen D. Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248, 250 (2014) ("Instead, *Shelby County* raised a distinct and novel objection to the 4(b) coverage formula. The opinion observed that the discrimination documented in the record was not as severe as it was when Congress first crafted the regime; that, despite these improvements, Congress had not altered the statute's pre-existing coverage formula; and that preclearance regulated practices beyond the ones that Congress listed in the original coverage formula.").

18. We should presume that these states are not seeking to enact intentionally discriminatory requirements, since these could not pass constitutional muster. However, it is also clear that these states need not worry too much about passing voting laws that have disparate impact on blacks, Latino and other voters as a constitutional matter. According to settled law this would not suffice

From the majority's perspective, the need for exceptional voting rights legislation was more obvious prior to 1965 than it is today.[19] They contend that significantly fewer blacks than whites were registered to vote in states throughout the South before the enactment of VRA. Writing for the majority, Roberts notes that only 19.4 percent of eligible black voters were registered to vote in Alabama prior to the enactment of the VRA.[20] Moreover, he points out that the coverage formula was warranted given the plausible assumption that this low percentage (nearly 50 percentage points below comparable rates for whites at 69.2 percent) was linked to the long history of Alabama and other states using tests and devices as a tool for perpetrating the injustice of racial discrimination in voting. Due to the long history—well before 1965—of these tools being used to disenfranchise black voters in Alabama and other covered jurisdictions, Roberts concedes that the rational relationship between their use and the lower black voting rates at the time was impossible to argue with.[21]

The regions singled out by the coverage formula shared two features: they

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to constitutionally invalidate them. *See* Washington v. Davis, 426 U.S. 229 (1976). To be found unconstitutional under the Fourteenth Amendment the laws must have racially discriminatory intent or purpose, and the Supreme Court has made it very challenging to invalidate voting and other laws on this basis. Based on the rule established in *Washington*, and elaborated in subsequent decisions, e.g., Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 278 (1979), petitioners must show that state legislatures, "selected or reaffirmed a particular course of action at least in part, 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." The Court applied this rule to a voting case involving the construction of electoral districts, finding facially neutral districting constitutional, even if they have the effect of diluting the black vote in at-large elections. *See* Mobile v. Bolden, 100 S. Ct. 1490 (1980). When section 2 of the VRA was amended two years later, Congress prohibited voting regulations that were discriminatory in effect regardless of whether they were designed or applied to discriminate. The Voting Rights Act of 1965, 52 U.S.C. § 10301 (2012). Some post-*Shelby County* commentators have argued that all hope is not lost for voting rights plaintiffs seeking relief from vote denial, as section 2 of the VRA provides ample power to press their claims. *See, e.g.*, Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015).

19. Justice Ginsburg takes issue with this in her dissent in *Shelby County*. *See* Shelby County v. Holder, 133 S. Ct. 2639–42 (2013) (Ginsburg, J., dissenting), *and see infra* Part V. And for criticism of the Court for not attending to record before Congress in 2006 when it reauthorized the VRA, *see* Ellen D. Katz, *What Was Wrong With the Record?*, 12 ELECTION L. J. 329, 330–31 (2013) ("Congress was not starting from scratch in 2006. Instead, it was considering whether a remedy everyone agreed had been lawfully imposed should continue. To answer that question, Congress assembled a detailed record documenting 'current conditions' in covered jurisdictions, based on which it concluded the remedy remained necessary in the places where it applied."). For a historical assessment of the Court's interpretation of the facts that provides evidence of differences in voting rights violations in covered and non-covered states, *see* J. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in Shelby County?*, SSRN (Aug. 13, 2015), http://ssrn.com/abstract=2592829.

20. *Shelby Cty.*, 133 S. Ct. at 2624. It should be noted that this 19.4 percent number does not match the 19.3 percent figure in the chart included in the opinion, which provides voter registration numbers for 1965 and 2004 for the six originally covered states: Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. *Id.* at 2626. According to this data compiled from Senate and House reports, in 1965, Mississippi had the largest gap at 63.2 percent, with only 6.7 percent of blacks registered to vote compared to 69.9 percent of whites. Virginia had the smallest gap at 22.8 percent, with 38.3 percent of registered black voters compared to 61.1 percent of whites. *Id.*

21. *Id.* at 2624–25.

relied upon tools that had been used historically to disenfranchise black voters, *and* in these areas the black voting rate in the 1964 presidential election was well below the national average. Thus, in 1965, it was reasonable to assume that the use of these tools was a cause of low black voter turnout in these areas. This position explains why Roberts concludes that the VRA coverage formula was "rational in both theory and practice" when it was first enacted in 1965.[22] But that was then, this is now, or so the Court claims.

America has undoubtedly come a long way since Bloody Sunday in Selma in 1965. Citing voter registration data from House and Senate reports compiled prior to the 2006 reauthorization of the VRA, Roberts notes that black voter registration in Alabama had increased dramatically by 2004, and the gap between black and white voter registration rates in the state virtually vanished, at 72.9 percent and 73.8 percent respectively.[23] And he considers similar data for other covered states. Although he does not make the point, which would have further strengthened the majority's hand, Mississippi—the state with the largest gap between white and black registered voters—was the state that made the most significant racial progress in voter registration outcomes by 2004, with the percentage of registered black voters (76.1) exceeding that of whites (72.3) by 3.8 percent.[24] However, Roberts does note that Selma now has an African American mayor, before concluding: "Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides."[25] Roberts thus calls attention not only to increases in black political representation in covered jurisdictions but to increases in black voter registration and a shrinking gap between black and white voter registration rates to support a racial progress argument.

Dissenters and critics argue that singling out states and jurisdictions—excepting those that satisfy a bailout provision—with a past history of voter discrimination against blacks for a special preclearance burden remains rational in theory and in practice. However, as Roberts puts it, "Nearly 50 years later, things have changed dramatically."[26] America has made progress in combating the kind of voter discrimination against blacks that was prevalent back then. And he contends that Congress has not adequately taken this into account in crafting the VRA, nor has the dissenting members of the Court in objecting to the

22. *Id* at 2625. In contrast to the rational basis review the Supreme Court sometimes employs in equal protection cases, the "rational relationship" test deployed here is much stronger: it requires a tight connection between uses of tools and likely consequences of such uses. And it allows the historical context to provide support for positing—or in the *Shelby County* case for rejecting—a tight connection. The crux of the argument is that the pre-1965 and post-1965 historical contexts are different enough to render unreasonable any inferences from the use of tools by states with a past history of racial discrimination to make voting harder to the effect of racial disparities in voting trends. The most germane difference in the present context, according the *Shelby County* majority, is that these trends have dramatically improved which suggests that whatever problems remain in states that had been covered by the preclearance requirement might reasonably be attributed to other causes. *Id.* at 2632.

23. *Id.* at 2626.

24. *Id.*

25. *Id.*

26. *Id* at 2625.

majority ruling.

Being out of step with what it views as clear national progress in combating first-generation voter discrimination—access to the polls problems of the sort that was commonplace in 1965—is not the totality of the majority's case against the coverage formula. Assuming further that statutes should reflect current not past conditions, and arguing that the coverage formula does not do this, Roberts concludes that this formula, an exceptional legislative measure not otherwise appropriate, must now be scraped given other weighty constitutional values and principles. Among these include the legitimate interests of states in maintaining the integrity and fairness of elections, and in retaining the broad power bestowed upon states under the Tenth Amendment to control voter eligibility requirements, qualifications for office, and determining congressional districts.[27] Respecting these powers, according to the Chief Justice, is essential to respecting the dignity of the states. Moreover, this ensures that the "fundamental principle of *equal* sovereignty" is upheld given that each state is equal in dignity. Roberts concludes that upholding these basic principles of federalism is also vital to the "harmonious operation of the scheme upon which the Republic was organized."[28]

Hence with this multi-layered argument rooted in a narrative of racial progress in America, the Court affords the southern states and other covered jurisdictions a momentous opportunity to get out from under the burdensome preclearance requirement imposed upon them by the now significantly diminished VRA. This argument places the burden squarely on the federal government to show a rational relationship between uses of certain voting tools and their effect on voting patterns and outcomes. While it could do this in Alabama and other states in 1965, it cannot do so today, according to the Court, unless it dubiously relies upon decades old data. Failure to establish this relationship, Roberts argues, is fatal to the cause of upholding the VRA status quo because only extraordinary circumstances can justify legislation violating the principle of equal sovereignty and contravening the states interest in running fair elections.

III. POLARIZATION ABOUT RACIAL PROGRESS AND PREJUDICE

Even though some may have been surprised that the Supreme Court struck down section 4 and not section 5 of the VRA, it is no surprise that this ruling generated much controversy and disagreement. Many people anticipated that the outcome would have a direct impact on voter access to the polls. States free from the constraint of the preclearance requirement would have more leeway to enact regulations to make voting more burdensome.

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27. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism and Voting Rights*, U. CHI. LEGAL F. 113, 115 (2015) (raising concerns about the Court's reliance on the Tenth Amendment) ("But relying on the Tenth Amendment is too facile; the argument assumes uncritically that the Reconstruction Amendments did not alter the federalism calculus.").

28. Shelby Cty. v. Holder 133 S. Ct. 2612, 2623 (2013).

Liberals wanting to make access to the ballot easier lament this ruling. Conservatives wanting to make voting impervious to fraud applaud it.[29] And here too, in the political and the public realm more broadly, we find sharply different views about racial progress in the United States since the civil rights era. The right generally argues that racial progress has been considerable, voting discrimination of the kind that existed in 1965 is ancient history, and so the oversight of state autonomy to regulate elections should be removed to reflect current conditions. The left generally rejects this argument noting that there is still work to be done, that voting discrimination still exists, and further argues for keeping the VRA fully intact to guard against rolling back the gains for black voting rights.[30]

A cursory review of Supreme Court cases involving voting rights, affirmative action, school desegregation, and disparate impact in employment reveals that conservative members of the Court are more inclined than liberal ones to endorse and promulgate narratives of racial progress that paint a blissful picture of current conditions in post-civil rights America.[31] And there is general evidence from political sociology and political psychology for thinking that the opposing sides will not agree on a single narrative about racial progress anytime soon.

One study finds that liberals and conservatives often do not see eye-to-eye on the relationship between a group's current conditions and its past mistreatment.[32] Whereas liberals are more likely to posit such a link and attribute current inequality or disadvantage to persistent discrimination, conservatives are more inclined to downplay it and look to choices, character, effort, and other factors unrelated to discrimination or prejudice to explain a historically disadvantaged group's current conditions.

Another study finds that where the left is more likely to take a long view of history when assessing these conditions, the right often takes relatively recent events as the reference point for assessing racial progress.[33] A recent case bears

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29. Conservatives have swiftly seized the opportunity to make voting more burdensome in states they control. *See* Tomas Lopez, *Shelby County: One Year Later*, BRENNAN CTR. FOR JUSTICE (June 24, 2014), http://www.brennancenter.org/analysis/shelby-county-one-year-later.

30. Assessment of how much racial progress there has been since the civil rights era is polarized by race as well as partisanship. *See, e.g.*, *King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RESEARCH CTR. (Aug. 22, 2013), http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities.

31. There is also evidence that Americans in general, not just members of the High Court, remain deeply divided by race, class, and political ideology over how to assess evidence of racial inequality and racial disadvantage in political representation, voting access and in many other areas. *See, e.g.*, Lawrence D. Bobo & Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, 621 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 243 (2009).

32. Jillian C. Banfield, Michael Ross, & Craig W. Blatz, *Responding to Historical Injustices: Does Group Membership Trump Liberal-Conservative Ideology?*, 44 EUR. J. SOC. PSYCHOL. 30 (2014).

33. *See, e.g.*, Richard P. Eibach & Joyce Ehrlinger, *'Keep Your Eyes on the Prize': Reference Points and Racial Differences in Assessing Progress Toward Equality*, 32 PERS. SOC. PSYCHOL.

this out. In a voter ID case, a panel for the U.S. Fifth Circuit Court of Appeals draws this distinction in discussing why the lower court striking down Texas's strict voter ID law erred by not appreciating the Supreme Court's focus in *Shelby County* on "relatively recent" history rather than on "long-past" history in claiming that there has been racial progress in America since 1965.[34]

With respect to voting rights, polarization on the Supreme Court is evident in how conservative and liberal Justices construe the scope of the VRA, as well as in what kind of voter discrimination they consider to be its target. We can distinguish between narrow and broad interpretations of the VRA. Conservatives on the Court, such as Justice Thomas, have endorsed the former. As Thomas sees it, the requirements of the VRA "reach only state enactments that limit citizens' access to the ballot or the processes of counting a ballot. The terms do not include a state's or subdivision's choice of one districting scheme over another."[35] On this narrow interpretation of the VRA, structural schemes such as at-large voting and racial gerrymandering, or schemes that have a disproportionate impact on certain groups such as racial vote dilution, are not ruled out.

In contrast, liberals on the Court such as Justice Ginsburg have favored a broad interpretation of the VRA. Partly conceding and qualifying Thomas's point, she observes: "Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot."[36] She further argues that Congress's 2006 reauthorization of the VRA made clear that it aimed to address these second-generation barriers as well. Quoting Congress she notes, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[37]

Ginsburg makes a sensible point here, though more evidence of polarization lurks in the background. Her point is that distinguishing between a narrow or broad interpretation of the VRA, or between first-generation and second-generation barriers to voting, is inconsequential. Both barriers have essentially the same effect: they deprive the targeted community (in this case black Americans) of an equal opportunity to participate in the electoral process by having a fair chance of electing their desired candidates. Denying blacks access to the ballot, making their access to the ballot more burdensome, and giving them access but watering down their votes, all have this result.

There is an important philosophical question at issue, which the Court does not take up, namely how should *equal opportunity* to participate in the electoral

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BULL. 66 (2006); Amanda B. Brodish, Paige C. Brazy, & Patricia G. Devine, *More Eyes on the Prize: Variability in White Americans' Perceptions of Progress Toward Racial Equality*, 34 PERS. SOC. PSYCHOL. BULL. 513 (2008).

34. Veasey v. Abbott, 796 F.3d 487, 500 (5th Cir. 2015).

35. Holder v. Hall 114 S. Ct. 2581, 2592, 2619 (1994) (Thomas, J., concurring).

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

37. *Id.* at 2636.

process be understood?[38] Some liberal philosophers have taken for granted that appealing to an anti-prejudice interpretation of equal opportunity can command the assent of both liberals and conservatives. Even if we suppose this to be so, applying this standard to the voting rights case will expose their divide about racial progress and the persistence of discrimination. Thus, as we will see, when attending to Ginsburg's *Shelby County* dissent in Part V, substituting a liberal for a conservative narrative of racial progress will not avoid the problem of polarization. But, let us first consider the limits of an anti-prejudice interpretation of equal opportunity to vote.

IV. THE LIMITS OF AN ANTI-PREJUDICE INTERPRETATION

Andrew Altman argues against a results test, e.g., a disparate-impact standard, for understanding equality of opportunity in the electoral process.[39] Rather than look to results, he proposes that we look to the processes leading to them. We want these to be fair. And they will be anything but that if they stem from invidious or arbitrary racial classifications. A significant point, according to Altman, is that this can happen directly when, say, election officials are racially prejudiced in their application of the voting rules, as was the case in the American South when literacy and other tests were used to deny blacks access to the ballot.[40] But it can also happen indirectly when officials set up an election system that allows "prejudice among voters from the racial majority to alter electoral outcomes to the detriment of the minority," which is the case when second-generation voting discrimination is at work.[41]

He takes his cue for this argument from a ruling in which the Supreme Court held that merely showing that racial minorities had unequal opportunity to elect representatives of their choice would not suffice for proving a violation of the VRA as amended in 1982. The simple idea underlying this ruling is that there could be many non-race related variables that account for racially disparate results in electoral outcomes. It may or may not be because of race. Therefore, to rule out other factors not related to race, plaintiffs must establish that certain preconditions are met before pressing their claims of unequal opportunity. In

38. Here, one might seek guidance from Section 2 of the VRA, as amended in 1982, which assigns liability if electoral practices result in racial minorities having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (2012). This broader interpretation came on the heels of a Supreme Court decision in *Mobile v. Bolden* which constituted a serious blow to second-generation voter discrimination claims. 446 U.S. 55 (1980). The Court ruled that only intentional discrimination based on race was unconstitutional, and given that Section 2 of the VRA was essentially a congressional restatement of the Fifteenth Amendment, this rule applied to the statute as well. *Id.* at 61. The amendment of Section 2 in 1982 placed racially disparate results in electoral outcomes alongside intentional discrimination in blocking access to the ballot as a way of falling short of the principle of equal opportunity to participate in the political process. § 10301.

39. Andrew Altman, *Race and Democracy: The Controversy Over Racial Vote Dilution*, 27 PHILOSOPHY AND PUBLIC AFFAIRS 175, 186 (1998).

40. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

41. Altman, *supra* note 39, at 187.

Thornburg v. Gingles, the Court required plaintiffs to show: (a) that the minority group alleging unconstitutional discrimination is large and compact, (b) that the minority group is politically cohesive, and (c) that whites vote as a bloc and defeat minority-preferred candidates.[42] Although these factors are not necessary and sufficient for determining whether illegal vote dilution exists, and courts have not taken them to be so, in practice they have played a rather decisive role.[43]

In addition to dominating the legal discussion, the *Gingles* factors, specifically the difficulty of satisfying them, account for why Altman ultimately rejects disparate impact as an inadequate standard for expounding the equal opportunity principle in the voting context. His main objection draws on the point that blacks are not politically cohesive and may fail to secure more proportionate outcomes in electing their preferred candidates for reasons that have little or nothing to do with race. For example, he considers the prospect that blacks may fail because they support candidates who favor a "libertarian political agenda" where most whites are not convinced that society needs a minimal state. To this we can add a more likely possibility, namely that blacks favor candidates pursing a more "radical," or far left, political agenda such as an expansive welfare state, greater oversight of police and prosecutors, more equity in the criminal justice system, and perhaps even black reparations for historical injustice. It is unlikely that mainstream white voters will support black candidates pursuing these policies. Rather than reject the principle of equal opportunity in view of these and other limitations, however, Altman proposes another mediating standard for fleshing it out that is not vulnerable to the *Gingles* challenges.

Altman's standard, which targets a peculiar form of unfairness, comes to this: voter discrimination—whether it involves first-generation or second-generation barriers—is unfair when: (a) it results in certain groups having an unequal opportunity to participate in the electoral process and to elect their desired candidates, (b) racial prejudice is a significant part of why this is the case, and (c) unequal opportunity stems from either current racial prejudice or the lingering effects of past racial prejudice. The most serious problem with this standard is (b). When we appeal to racial prejudice to take issue with electoral outcomes, or to set a standard for appraising them, we are directing attention to the manner in which they are produced and this involves speculating about their causes. Altman thinks that such speculation is vital for taking issue with second-generation voting discrimination. As he puts it, he seeks a standard that "focuses on the processes by which electoral outcomes are generated and rests on premises about those processes that can be reasonably endorsed in a nonpartisan way."[44] He offers the racial prejudice standard for this purpose.

But Altman's formulation of this standard, and his application of it to the problem of racial vote dilution, is puzzling: "According to [the racial prejudice]

42. Thornburg v. Gingles, 106 S. Ct. 2751, 2766 (1986).

43. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1500 (2008).

44. Altman, *supra* note 39, at 186.

standard, racial vote dilution exists in a jurisdiction when, under the existing election system, minority-favored candidates are consistently defeated and racial prejudice against the minority is a significant part of the reason for those defeats."[45] His commentary on it is equally puzzling: "[i]t is clear that the racial prejudice standard can be reasonably endorsed in nonpartisan fashion.[46]

The problem with this formulation is that it builds a significant point of contention between liberals and conservatives into his definition of a standard that is intended to be nonpartisan. Clearly, the left and the right will disagree strongly about the contemporary causes of unequal electoral outcomes, as they generally disagree about the causes of racial inequality in other areas. Indeed, Altman's black libertarian example makes precisely this point. While both sides can agree that racial prejudice is a problem, they will hardly agree on it being "a significant part of the reason" why minority-favored candidates are defeated at the polls. If Altman's example succeeds in taking down a disparate-impact standard, then it seems to apply with equal force to his preferred racial prejudice standard, which builds into the standard an explanation of the causes of electoral outcomes that liberals tend to favor. Thus nonpartisan endorsement isn't just unclear, it's plainly false.""

It is tempting to reply that persons who reject the role of current and past racial prejudice in determining unequal opportunity to participate in the electoral process simply lack the "good judgment" necessary to make this determination. But this can be met with the same response to the accusation that those who do not see the continued need for racial preferences are "out of touch with reality" and aiming to "wish away, rather than confront" racial inequality. In reply to this criticism leveled by Justice Sotomayor in her dissent in *Schuette v. Bamn* 572 U.S. ___(2014), Roberts responds: "People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate."[47] A similar point is likely to be made to rebut questioning the good judgment of those who reject or downplay the role of current or past racial prejudice in accounting for unequal racial outcomes in the electoral process.

Altman might insist that conservatives can get behind the racial prejudice standard in the abstract, if not in application, because it does not "blame" them for racial prejudice or otherwise suggest that their "electoral victories are generally achieved with the help of racial prejudice against minorities."[48] I have already conceded for the sake of argument that both conservatives and liberals believe that racial prejudice should not shape electoral outcomes. But this point, by itself, cannot do the work Altman needs done. He needs a more robust and meaningful account of when unequal opportunity to influence the electoral process is normatively problematic. This is precisely why he makes (b) *and* (c) essential elements of his racial prejudice standard. As formulated, this standard

45. *Id.*

46. *Id.*

47. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1639 (2014) (Roberts, C.J., concurring).

48. Altman, *supra* note 39, at 187.

is not merely about racial prejudice in the abstract. It makes concrete claims about the role it plays in outcomes. And it makes it impossible to apply the standard without signing on to them. So it is rather doubtful that conservatives or even moderates will get behind this standard given its decidedly liberal slant on the causes of unequal political outcomes, and on the implications for what courses of action regarding voting it makes sense to pursue legally and politically.

Those who hold a more upbeat view of racial progress in the United States, and profess the diminished significance of race in determining the life prospects of African Americans, will not buy the claim that racial prejudice accounts for whatever racial disparities remain in political representation and electoral outcomes. They will likely attribute this to differences in the political preferences of voters (e.g., a taste for small vs. big government or for lower vs. higher taxes), education, socioeconomic status, political mobilization, social networks, and other non-race based factors.[49] And it is precisely because they do not think that racial prejudice is at work in shaping voting outcomes—as it once was—that conservatives call for lifting the burdens imposed upon certain states by the VRA. They maintain that these unequal burdens are no longer appropriate for our current times—where serious disagreement over politics and how best to run the country do more to shape electoral outcomes than do racial discrimination and prejudice.[50]

Appreciating the depth and intractability of polarization about racial progress raises an interesting question: How should liberals and progressives defend the right to vote where there is intractable disagreement over the status of racial progress in America? Should they rely upon a race-specific justification or should they embrace a non-race-specific one? I believe that individual voting rights can and should be justified without getting mired in questions about whether and how much progress has been made in addressing invidious racial discrimination and racial prejudice against blacks in America. We have pragmatic as well as principled reasons for proceeding this way. An account of the latter reasons must wait for another occasion. Let us now consider why heeding the depth of polarization about racial progress and the continued significance of racial prejudice raises trouble for the dissent in *Shelby County*.

V. PROBLEMS WITH THE DISSENT IN *SHELBY COUNTY*

Chief Justice Roberts's presents a multi-layered argument for striking down the coverage formula that relies, in part, on a racial progress narrative. Any response to the argument, committed to working from more realistic assumptions regarding the depth of disagreement over racial progress and prejudice, should take seriously the futility of convincing a conservative court (or a general public that is increasingly skeptical of racial prejudice and racial

49. *See* Charles S. Bullock III & Ronald Keith Gaddie, *Voting Rights Progress in Georgia*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2006).

50. Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act*, 3 NAT'L AFF. 52, 53 (2010).

discrimination-based explanations of black disadvantage) to disavow this narrative.[51]

It is tempting to reply—as Justice Ginsburg does writing for the dissent[52]—by distinguishing two kinds of voter discrimination against blacks: first-generation and second-generation discrimination, and arguing that even if the former is less pronounced the latter is ubiquitous. After the VRA was enacted, it has been well documented that southern states found other ways to achieve the ends of diminishing black participation in the political process. Rather than imposing barriers to voting such as polls taxes, literary tests, and other tools designed to make access to the ballot more difficult, they increasingly relied upon tools such as racial gerrymandering and at-large voting designed to dilute the black vote thereby making it more difficult for blacks to get representatives they favored into office.

Thus the objection is that the majority's racial progress narrative falls flat if we consider second-generation voter discrimination. And we should certainly consider this since both forms of discrimination have the same intent and effect, namely to undermine equal participation of blacks and other minorities in the democratic process made possible by the right to vote. One line of response by the majority is to quibble over whether Congress intended to include this kind of discrimination in the original VRA. Another is to argue that subsequent congressional action expanding the law to proscribe these forms of discrimination, and Supreme Court rulings supporting this, were misguided. But these replies take a back seat to their most effective response.

Making the case for scraping the coverage formula of the VRA turn on taking a stand on the status of racial progress in America is an ingenious trap. Unfortunately, critics of the decision, including the dissenting justices, have taken the bait. I say that this is "unfortunate" because none of the replies to this argument currently on offer seem destined to get sufficient traction.

If one accepts Roberts's way of framing the issue, then a position *must* be taken on whether there has been racial progress on voting rights in America. And

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51. Any legal response to the decision aiming to argue that the coverage formula remains rational in theory and practice must take seriously the "basic principles" guiding the majority's review. A response strategy that I will not pursue here would be to deny that what the majority characterizes as "the fundamental principles of equal sovereignty" is really an established legal principle. This would be sufficient to derail the case for scraping the coverage formula because the Court's concerns about respecting the equal dignity of states seem to be the only positive normative foundation it has for objecting to the unequal treatment of covered and non-covered states, and only allowing for it under what it deems truly exceptional circumstances. However, resolving this issue requires diving into a thicket of constitutional and constitutional interpretation matters that go beyond the scope of this paper. For discussion and critical assessments of the majority's appeal to this principle, *see* Shelby County v. Holder 133 S. Ct. 2612, 2648–2649 (2013) (Ginsburg, J., dissenting); James Blacksher and 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 (2014); Richard L. Hansen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713 (2014); and Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

52. Shelby Cty v. Holder, 133 S. Ct. 2612, 2634–35 (2013).

the answer to this question has to be a simple "yes" or "no," notwithstanding whatever qualifications might be added about the degree of progress. The unrelenting cynic might reply that nothing at all has changed since the VRA was enacted in 1965. Blacks are still second-class citizens, and they still face both barriers to accessing the polls and to electing persons of their choosing, which effectively prevent them from participating in the democratic progress on equal terms with their fellow citizens. Among these current barriers include burdensome registration requirements, restrictive voting times, voter purges, and felon disfranchisement laws, all of which have a disparate impact on black voters.

But this "no progress" reply is implausible. Furthermore, it is a hard sell to both liberals and progressives not to mention conservatives and moderates. Even the dissenting liberal justices in *Shelby County* give the VRA credit for bringing about racial progress in America, particularly with respect to diminishing first-generation voting discrimination against blacks. Furthermore, some progressives have also canvassed evidence of progress in black voting and representation since 1965. And historian Manning Marable, a radical democratic socialist, has persuasively argued that we cannot make sense of the evolution from first-generation to second-generation barriers to black voting in America unless we see this as a response to the success of the VRA.[53] The no progress reply can also be countered by looking at 2012 election numbers.[54]

Yet the most serious problem with the no racial progress since 1965 thesis is that if we take this route then the hand for scraping the VRA seems stronger still. Why should we keep fully intact a law that has been utterly ineffective for 50 years? It is not clear that we should. Moreover, if true, this might be reason to undo the law altogether and go back to the drawing board. I believe that this is the majority's most forceful reply to the no racial progress thesis.

The majority relies upon empirical data to establish its case for racial progress. Consequently, one can certainly argue that they fail to consider other empirical findings, which undermine the racial progress narrative. There is, for instance, evidence that the observed trends in racial progress in voting, particularly in recent elections, is skewed by various contributing factors including the exclusion of prisoners[55] and disenfranchised felons[56] as well as the

53. MANNING MARABLE, THE GREAT WELLS OF DEMOCRACY: THE MEANING OF RACE IN AMERICAN LIFE 67–92 (2002).

54. Thom File, *U.S. Census Bureau, The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections)* U.S. CENSUS BUREAU (May 2013), https://www.census.gov/prod/2013pubs/p20-568.pdf. And as for evidence of disparate impact of current burdens on voting, this alone will not suffice to establish voter discrimination without a showing of intent. One way around this would be to find a middle-ground approach that could establish discrimination without having to show intent. But it is unclear whether this could be a winning argument before a Supreme Court with a conservative majority. For a useful analysis of the limits of disparate impact analysis, *see* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579 (Mar. 2013).

55. Jake Rosenfeld, Becky Pettit, Jennifer Laird, & Bryan Sykes, *Incarceration and Racial Inequality in Voter Turnout*, SSRN, http://ssrn.com/abstract=1901381 (last updated Aug. 12, 2011).

56. Christopher Uggen and Jeff Manza, *Democratic Contraction? Political Consequences of*

disproportionate impact of voter ID requirements on black youth (ages 18-29) not voting. A recent study finds that lack of proper ID is a common explanation for 17.3 percent of black youth not voting compared to 4.7 percent of white youth.[57] Such evidence suggests that public reports of shrinking voting gaps between blacks and whites may be grossly overstated due to the exclusion of large segments of would-be black voters from the calculations.

If this is the case, the problem is that Roberts relies upon some of the same data Ginsburg relies upon to affirm that some racial progress has indeed been made, and that Congress relies upon in defending the need for reauthorization of the VRA in 2006. She uses this data to support her argument that the coverage formula should be kept intact to guard against backsliding and rolling back the racial progress that has already been made. Roberts uses it to support the claim that there has been racial progress even if some voting problems persist.

So, if more accurate data on shrinking voting gaps undermines the majority's narrative of racial progress, it will likewise undermine liberal and progressive affirmations of racial progress based on similar data. The crux of the problem, then, is that taking this evidence seriously, as I believe we should, can only support one of two positions on the racial progress question—either that there has been no racial progress or that there has been some though not enough. The no racial progress conclusion would be fatal because it would suggest that the VRA has been entirely useless and should be scraped. Moreover, it would remove the rationale for being worried about backsliding, and for using this worry to justify maintaining the legal status quo. The other conclusion—that there has been some though not enough racial progress—gives the majority all that it needs to justify scraping the coverage formula.

To complete its case, and to put the dissent in a "catch-22," the majority does not need there to have been significant progress, complete parity, or even the elimination of all first-generation and second-generation barriers to black voting. All it needs is the claim that things now are better than they were back then, and frankly I find this difficult to argue with. If things are even somewhat better than they were back then, and the law should indeed be updated to reflect current conditions, then some modification of the VRA is clearly in order by this reasoning.[58]

To be sure, one might rightfully insist that functionally equivalent barriers to blacks fully participating in the democratic process (e.g., photo IDs) have

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Felon Disenfranchisement in the United States, 67 AM. SOC. REV. 777 (2002).

57. Jon C. Rogowski & Cathy J. Cohen, *Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Election*, BLACK YOUTH PROJECT 1–7, http://blackyouthproject.com/wp-content/uploads/2015/11/voter_id_effect_2012.pdf.

58. Even if this argument stands, it certainly does not follow that Congress was compelled to update or reshape the VRA by scraping the coverage formula, or that the Court was justified in replacing Congress's judgment about how to reshape a revised law to address "current conditions" with its' judgment, particularly if Congress found evidence of voter discrimination in the record before it notwithstanding whatever other progress there may have been. It had the authority to decide the proper remedy, which clearly involved keeping the coverage formula intact. For more on this astute criticism, *see* Katz, *supra* note 19, at 330.

replaced older ones (e.g., poll taxes). But if the majority grants this point for the sake of argument, they might plausibly reply that these tools do not *only* target blacks. If these barriers to voting do make it harder to vote they do so for a much broader class of citizens, namely those who would have trouble procuring the requisite ID, which most certainly includes not just blacks but other minorities as well as some whites, the poor, students, the disabled, etc. Of course some will say that this is precisely the problem; however, the majority might add—though perhaps not with a straight face—that this counts as some kind of "racial" progress in America that barriers to voting are more evenly distributed across the population and not directly tied to suspect racial classifications.

Here we might complain that Republicans have largely favored these newer strategies to gain and maintain a political advantage over Democrats by making it harder for citizens to vote that have historically supported Democrats at the polls. While this may be true, the majority will claim that this does not impugn the racial progress argument for scraping the coverage formula. And they might add that if this diagnosis is correct the most pressing need may be to craft laws that prevent Republicans in covered *and* non-covered states from disenfranchising voters who would support their Democratic rivals.

VI. WHERE DO WE GO FROM *SHELBY COUNTY*?

Justice Ginsburg and many others feared that weakening the VRA would open the floodgates to jurisdictions looking to reverse the civil rights gains in voting rights made since 1965. And from the looks of things—the proliferation of voter ID laws in Kansas, Mississippi, North Carolina and in other places making it more burdensome to cast a ballot[59]—these fears were not unfounded. A liberal narrative about racial progress supports the dissent and the case for keeping VRA at full strength, coverage formula and all.

Persons with more optimism than I can muster might try to convince those who hold the "that was then, this is now" view— including conservative members of the Supreme Court—to abandon this perspective, to follow Justice Ginsburg's call to heed the words of Shakespeare that "what's past is prologue,"[60] or the words of Santayana that "[t]hose who cannot remember the past are condemned to repeat it,"[61] and to affirm the continued need for the VRA and other civil rights era legislation meant to secure the full blessings of citizenship to blacks and other historically disadvantaged and vulnerable groups.

However, if the divide between liberals and conservatives on how to understand current racial conditions proves to be as deep and intractable, as I fear, it will be attractive to have in hand reasons for affording the right to vote protection that does not hinge on embracing the liberal or the conservative perspective on the racial progress matter. Indeed, particularly in voting denial

59. Lopez, *supra* note 29. *See also* Zachary Roth, *In 2015, Hope and fear on Voting Rights*, MSNBC (Dec. 29, 2015), http://www.msnbc.com/msnbc/2015-hope-and-fear-voting-rights.

60. Shelby County v. Holder 133 S. Ct. 2612, 2642 (2013) (Ginsburg, J., dissenting).

61. *Id.*

cases such as *Crawford v. Marion County Election Board*,[62] where the concern is with an individual's right to vote, it will be useful to have a defense that allows us to avoid any debate whatsoever over the role of prejudice or discrimination in altering existing electoral outcomes to the detriment of voters from certain racial or ethnic groups.

One consequence of appreciating the limits of efforts to contest the racial progress argument, in a society deeply polarized about race matters, is that this forces us to more carefully attend to the various interests at play in upholding the VRA status quo. Many of the regulations the critics feared would come to pass, leading to "backsliding," are ones that implicate an individual right to vote rather than group-interests. As vote denial becomes more of an issue in the United States—post-*Shelby County*—we must consider novel arguments for saving the VRA from further damage, and for protecting the right to vote. Such arguments need not begin with the question of how much progress has been made in advancing the interests of certain groups, e.g., African Americans, the disabled, or the poor. Rather they would ask whether the weighty substantive equality and dignity interests every individual citizen has in voting and having his or her vote counted, which has long been protected by the VRA, has been afforded sufficient judicial protection by being duly balanced against competing state interests.[63]

Some scholars, who are otherwise champions of the VRA, have expressed concerns that reviving the coverage formula, or a similar device, is not the way to go. While they do not deny the persistence of voting discrimination, they worry that such formula will be too static to accommodate rapidly changing conditions.[64] Others worry that because voting discrimination is shifting from vote dilution back to vote denial, any geographically restrictive formula will exempt places—such as Kansas or Ohio—that may have records of voting rights discrimination.[65] In view of these and other concerns, many of these commentators have observed, and I agree, that *Shelby County* creates an opportunity for federal legislators to enact voting regulations that aim to ensure that no eligible citizen is denied the right to vote.[66] Of course, given the depth of political polarization, this will not be an easy feat. Democrats and Republicans will likely have to reach a "Grand Election Bargain."[67] Whether they can do so, and save this "superstatute" from dying, remains to be seen.[68]

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

63. *See* Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289 (Fall 2011).

64. *See* Richard H. Pildes, *What Does the Court's Decision Mean?*, 12 ELECTION L. J. 317 (2013).

65. *See Responding to Shelby County*, *supra* note 15, at 72.

66. *Id.* at 73.

67. *Id.*

68. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (May 2015).

VII. CONCLUSION

In 1965, Martin Luther King, Jr. made the point that America's march toward his dream of a truly equal society must not be halted by "the myth of exaggerated progress."[69] We can apply his cautionary warning to our present circumstances because this myth still holds sway over many people (including conservative members of the Supreme Court) who mistake a bud on the plant of equality for the whole flower—to paraphrase King. As we come to terms with *Shelby County*, his words still ring true, "[s]o while we talk of the progress let us realize that we still have a long, long way to go."[70]

The VRA emerged out of America's lamentable voting rights history. It sought to permanently end racially discriminatory state practices that undermined the right to vote.[71] In *Shelby County*, the Supreme Court struck down a provision of the VRA that singled out for special attention states with particularly egregious histories of voting rights abuses. The Court did so by relying, in part, on an argument rooted in a peculiar narrative about racial progress in the United States. ""Although we should give lie to the myth of exaggerated racial progress, as Justice Ginsburg does in her *Shelby County* dissent, we must not underestimate the challenge it raises in a deeply polarized society for defending the right to vote. This challenge may ultimately call for a more universalistic approach to safeguarding this fundamental right.[72] Arriving at an approach that is politically achievable and able to withstand constitutional scrutiny will not be easy. But the importance of voting rights to publicly affirming the dignity of democratic citizens certainly warrants the effort.

69. Martin Luther King, Jr., Address to the Hungry Club in Atlanta 9 (Dec. 15, 1965), http://www.thekingcenter.org/archive/document/address-mlk-hungry-club.

70. *Id.*

71. KEYSSAR, *supra* note 40.

72. The need for such an approach was recognized some time ago, *see* Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L. J. 741 (2006). And it continues to have support, *see Responding to Shelby County*, *supra* note 15, at 95 ("The Court's decision in *Shelby County* provides an opportunity to adopt a voting rights act for the twenty-first century, built on the ideal of universal inclusion of all eligible citizens.").