

## THE POST-SHELBY COUNTY GAME

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*Prior to 2008, the system of voting rights as established by the Voting Rights Act (VRA) entailed a stable Nash Equilibrium among the players. Developments in that year and thereafter destroyed the Equilibrium, resulting in the U.S. Supreme Court's opinion in Shelby County v. Holder. That opinion has triggered what I call the Post-Shelby County game. In the short-term, this game will favor jurisdictions that wish to enact discriminatory voting rules. In the medium-term, it will lead to a system of voting rights that is unstable, unpredictable, and unfair for both minority voters and jurisdictions. In the long-term, a new version of the VRA will emerge that is a better fit to current patterns of discrimination than the law the Shelby Court considered. This will be a salutary result, but also one that will have to address both pre-Shelby County discrimination and new discrimination that will have arisen because of the Court's opinion. This will also have been an unnecessary result, because the Shelby Court should not have invalidated section 4(b) of the VRA.*

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## *The Post-Shelby County Game*

### I. Introduction

Prior to 2008, the Voting Rights Act<sup>1</sup> (VRA) operated as a relatively stable and effective mechanism for adjudicating claims of discrimination and ensuring that deserving states and jurisdictions could bail out of coverage.<sup>2</sup> The VRA was a key component in creating a Nash Equilibrium, in which none of the players—congressional Democrats and Republicans, the executive branch, covered and uncovered jurisdictions, and those who alleged discrimination—had an incentive to change unilaterally its strategy.<sup>3</sup>

The election of Barack Obama, the rise of the new federalism, the emergence of the Roberts Court as activist and neo-Lochnerian, and the increasing absolute cost of section 5 preclearance all served to destabilize the system of voting rights under the VRA. These developments destroyed the Nash Equilibrium because they incentivized jurisdictions to challenge the constitutionality of the VRA and thereby gain freedom from federal oversight, even if the other players did not change their strategies. Their play paid off, with the Supreme Court in *Shelby County v. Holder* invalidating section 4(b)'s coverage formula<sup>4</sup> and, by implication, section 5's preclearance requirement.<sup>5</sup> In the short-term, jurisdictions that wish to operate without federal oversight have won, and levels of discrimination and inequality will increase.<sup>6</sup>

*Shelby County* has left the system of voting rights in Nash Disequilibrium and resulted in a less effective system for adjudicating claims of discrimination and ensuring that deserving jurisdictions can avoid federal oversight. I call this the Post-*Shelby County* game. Challenges will shift away from section 4-5 preclearance and toward absolutely costlier, more time-consuming section 2-3 litigation,<sup>7</sup> which entails delayed resolutions. In

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<sup>1</sup> 42 U.S.C. § 1973 et seq. (2013).

<sup>2</sup> See Ellen D. Katz, *South Carolina's "Evolutionary Process"*, 113 COLUM. L. REV. SIDEBAR 55, 56 (2013) (hereinafter *South Carolina*); Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. 151, 152 (2013) (hereinafter *Simulacrum*).

<sup>3</sup> A Nash Equilibrium refers to a condition in a non-cooperative game involving two or more players in which each player is assumed to know the behavior of the other players, and no player has anything to gain by changing only its own strategy unilaterally. See MARTIN J. OSBORNE & ARIEL RUBINSTEIN, A COURSE IN GAME THEORY 14-15 (1994).

<sup>4</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

<sup>5</sup> *Id.* at 2632 n. 1 (Ginsburg, J., dissenting).

<sup>6</sup> Although this is a contestable point, see Ilya Shapiro, *Supreme Court Recognizes Jim Crow's Demise, Restores Constitutional Order*, SCOTUSBLOG, June 25, 2013, available at <http://www.scotusblog.com/?p=165978>, I think that the cases of Texas and North Carolina, detailed below, confirm it.

<sup>7</sup> See Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG, June 25, 2013, available at <http://www.scotusblog.com/?p=165998> (hereinafter Levitt).

the medium-term, this new system will produce greater injustice (both for minority voters and jurisdictions acting in good faith) and greater costs (for minority voters and all defendant jurisdictions). Where the pre-*Shelby County* VRA operated to ensure quick, nuanced solutions that efficiently ensured both minority voting rights and deserving jurisdictions' freedom from federal oversight, the post-*Shelby County* regime will include delayed, broad stroke<sup>8</sup> judicial orders that sometimes excessively favor jurisdictions' interests, and sometimes excessively favor those who allege discrimination.

This inefficient post-*Shelby County* system will be characterized by an oscillating feedback loop, in which the stock of discrimination in jurisdictions and the stock of federal oversight will be indirectly proportional to each other and in constant flux, oscillating from one extreme to the other. Put another way, jurisdictions will be freer to discriminate, and those that want to do so will. This will result in high levels of discrimination in those jurisdictions, which will be addressed by belated and therefore robust—and to some, excessive—federal oversight. Discrimination will be reduced to systemically sustainable levels, and courts will then require oversight to be pulled back. The cycle will begin again. Given lingering resentment over heavy-handed federal intrusion, new forms of discrimination may be worse than before, requiring even more robust federal intervention. The antidiscrimination and state sovereignty interests will no longer be consistently balanced, as they were pre-*Shelby County*. For individual jurisdictions, this system will produce at times excessive discrimination and, at others, excessive oversight. It will also produce instability and higher costs. Nationally, pockets of great discrimination and of great federal oversight will develop. In the long-term, this situation will result in a new version of the VRA under which every player once again has an interest in nuanced, real time, light-touch regulation. This new VRA will include a form of section 5 preclearance, nimble bail in and bail out provisions, and an updated coverage formula that reflects the reality of second generation discrimination.<sup>9</sup> In this sense, the new VRA will be a salutary result of *Shelby County*, as section 4(b)'s coverage formula was outdated and in need of reform that Congress was unable to

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<sup>8</sup> Section 5 preclearance was nuanced because it was designed to consider individual voting rule changes quickly and before rule passage. To be sure, courts in section 2 litigation can perform similar individual analyses. However, challengers will request broader stroke remedies than that, see Defendants' Response to Plaintiffs and the United States Regarding Section 3(c) of the Voting Rights Act at 38, *Perez v. Texas*, No. SA-11-CA-360-OLG-JES-XR, Aug. 5, 2013, and courts, if they find for the challengers, will tend to impose such remedies. This outcome, furthermore, will be delayed and after-the-fact.

<sup>9</sup> To the extent that a new VRA closely fits the realities of discrimination on the ground, the Court's opinion in *Shelby County*, resting as it did on the *Boerne v. Flores* principle of congruence and proportionality, see Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 135-36 (2010), should protect the law from future Court invalidation.

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enact in 2006, when the VRA was up for renewal.<sup>10</sup> In another sense, however, this result will have been unnecessary because the Roberts Court should, constitutionally, have upheld section 4(b). This is so because the law should have been subject to rational basis review, and the coverage formula was not so unrelated to the reality of discrimination<sup>11</sup> as to perish under such deferential review. The new VRA will have to contend not only with pre-*Shelby County* discrimination, but also with new discrimination that the opinion has enabled.

This essay assumes a game theory and systems approach to describe *Shelby County's* effects. It provides a description of the pre-*Shelby County* regime; discusses the developments after 2008 that incentivized people to challenge the VRA; sets forth the holding in *Shelby County* and the immediate results in Texas and North Carolina; and predicts the opinion's short-, medium-, and long-term effects.

## **II. Pre-*Shelby County***

Prior to *Shelby County*, the system of voting rights established through the VRA was relatively efficient because it ensured a minimization of discrimination, a maximization of deserving jurisdictions' freedom from federal oversight, and a quick approval of covered jurisdictions' non-discriminatory voting rule changes. It did so through section 5 preclearance,<sup>12</sup> section 4 bail out,<sup>13</sup> and section 3 bail in.<sup>14</sup> These provisions, working together, were efficient because they favored quick, non-judicial preclearance<sup>15</sup> over expensive and lengthy litigation,<sup>16</sup> ensured permeability between the pools of covered and uncovered jurisdictions,<sup>17</sup> and provided, in concert with section 2 litigation,<sup>18</sup> systemic redundancy.<sup>19</sup>

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<sup>10</sup> Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 177-79, 194 (2007); *but see* Levitt, *supra* note 7 (arguing that bail in and bail out provisions provide mechanisms for updating the list of covered jurisdictions).

<sup>11</sup> First, the law served a deterrent effect. Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 613 (2005). Second, the Court had evidence that levels of discrimination were higher in covered jurisdictions. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 MICH. J. L. REFORM 643, 655-56 (2006) (hereinafter *Discrimination*).

<sup>12</sup> 42 U.S.C. § 1973c(a) (2013).

<sup>13</sup> 42 U.S.C. § 1973b(a) (2013).

<sup>14</sup> 42 U.S.C. § 1973a(c) (2013).

<sup>15</sup> Katz, *supra* note 2, at 64 (section 5 operated "often in real time.").

<sup>16</sup> *See* South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966) ("Voting suits are unusually onerous to prepare . . . Litigation has been exceedingly slow."); *see also* Dewey M. Clayton, PhD., *Voting Rights Under Seige*, THE COURIER JOURNAL, Aug. 18, 2013.

<sup>17</sup> *See* Levitt, *supra* note 7.

<sup>18</sup> 42 U.S.C. § 1973 (2013).

<sup>19</sup> *See* DONELLA MEADOWS, THINKING IN SYSTEMS: A PRIMER 3-4 (2008).

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This system also entailed a Nash Equilibrium because no player had a reason to change unilaterally its strategy. There were five players in this game. Plaintiffs were people who challenged jurisdictions' voting rule changes under section 2. Defendants were those jurisdictions that had to defend against such claims and, for covered jurisdictions, had to preclear voting rule changes under section 5. The Government was the executive branch, specifically the Department of Justice, which approved or rejected preclearance requests and could sue to enforce the VRA. The Democrats were members of Congress who supported the VRA, equal voting rights, and appropriate federal oversight. The Republicans were members of Congress who opposed the VRA and favored jurisdictions' interest in avoiding federal oversight.<sup>20</sup>

Plaintiffs did not want to change the pre-*Shelby County* regime because covered jurisdictions were subject to section 5 preclearance and Plaintiffs could use section 2 litigation against all jurisdictions. The VRA, furthermore, had a deterrent effect on potential discriminatory moves.<sup>21</sup> Defendants also had little incentive to change the status quo. Preclearance was often easy to obtain<sup>22</sup> (but not always, especially in high stakes cases<sup>23</sup>) and gave to covered jurisdictions the DOJ's imprimatur on their voting changes.<sup>24</sup> This imprimatur deterred section 2 litigation,<sup>25</sup> and made covered jurisdictions appear to be non-discriminatory and non-racist. Uncovered jurisdictions were not troubled by the VRA either, because they did not discriminate or because they did discriminate but had avoided coverage because of section 4(b)'s low-fit coverage formula. The Government was satisfied with the VRA because it continued to provide for preclearance oversight and the ability to reach into any jurisdiction through section 2 litigation and bail in. Democrats were supportive for largely the same reasons. In addition, any change to the VRA might have freed covered jurisdictions from preclearance oversight, watering down the law's effectiveness. Republicans did not want to vote against the VRA or seek to amend it because doing so would have

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<sup>20</sup> These labels are, of course, proxies, as some members of Congress crossed the aisle and some jurisdictions could file suit pursuant to the VRA, seeking to bail out.

<sup>21</sup> Pitts, *supra* note 11, at 613.

<sup>22</sup> See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1719 (2004); Levitt, *supra* note 7, at 153.

<sup>23</sup> Opinion for the Court Filed Per Curiam, *Florida v. United States*, No. 11-1428 (D.C. Cir. Aug. 16, 2012); Letter from Thomas E. Perez to Keith Ingram (Mar. 12, 2012), *available at* <http://www.documentcloud.org/documents/324586-justice-departments-decision-on-the-texas-voter.html>; Letter from Thomas E. Perez to C. Havird Jones, Jr. (Dec. 23, 2011), *available at* <http://www.brennancenter.org/sites/default/files/analysis/Justice-Department-Letter-To-South-Carolina-Blocking-Voter-ID-Law.pdf>.

<sup>24</sup> See Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1121 (2005).

<sup>25</sup> Persily, *supra* note 10, at 213-14.

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been politically unwise.<sup>26</sup> Both Democrats and Republicans also had an interest in reelection, and bringing any uncovered jurisdiction into coverage would have been bad politics. Votes to repeal the VRA or update section 4(b)'s formula would have been a political third rail. Some uncovered jurisdictions might become covered, and covered jurisdictions would have remained covered, given the 2006 Katz study, which revealed a higher comparative rate of discrimination in covered jurisdictions.<sup>27</sup>

### III. Toward Disequilibrium

Four developments in 2008 and thereafter led to the Nash Disequilibrium that ultimately resulted in *Shelby County*: the election of Barack Obama; the rise of the new federalism; the emergence of the Roberts Court as activist and neo-Lochnerian; and the greater absolute cost of preclearance.

First, the election of President Obama “provided a cue for people who believe that racism is dead.”<sup>28</sup> The election of a black man provided a “cultural symbol of racial progress”<sup>29</sup> and invited the hypothesis that we now live in a “post-racial” society.<sup>30</sup> Obama’s election was a symbol of the end of racism, or at least a shift to new forms of discrimination, and it informed the Court’s decision in *Shelby County*. The VRA itself is a symbol, “a cornerstone of the architecture of federal election law and civil rights guarantees.”<sup>31</sup> Justin Levitt cautioned against treating the VRA as a symbol because by doing so, its statutory and regulatory details might be overlooked in favor of blunt conclusions about racism and discrimination in society.<sup>32</sup> Indeed, to Levitt, this has come to pass.<sup>33</sup> The *Shelby* Court struck down section 4(b), noting that “[n]early 50 years [after the VRA’s passage], things have changed dramatically.”<sup>34</sup> Even though, as the Court acknowledged, “voting discrimination still exists,”<sup>35</sup> the symbol of a black man in the White House meant that the VRA as symbol was anachronistic and therefore constitutionally suspect.

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<sup>26</sup> *Id.* at 180.

<sup>27</sup> Katz et al., *supra* note 11, at 655-56.

<sup>28</sup> Jim Beckerman, *Now Playing: The Battle for Civil Rights*, HERALD NEWS, Aug. 17, 2013.

<sup>29</sup> Rinku Sen & Terry Keleher, “Preface,” in *Changing the Race: Racial Politics and the Election of Barack Obama* at 5 (Linda Burnham ed., Applied Research Center 2009).

<sup>30</sup> Keith Jennings & William Boone, “Grits and Gravy: Obama’s Challenge to the Southern Strategy,” in *Changing the Race: Racial Politics and the Election of Barack Obama* at 20 (Linda Burnham ed., Applied Research Center 2009).

<sup>31</sup> Persily, *supra* note 10, at 177.

<sup>32</sup> Levitt, *supra* note 7.

<sup>33</sup> Levitt, *supra* note 7.

<sup>34</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625 (2013).

<sup>35</sup> *Id.* at 2619.

Second, the rise of the new federalism added an important element. Historically, the Tenth Amendment was not meant to act as a substantive restraint on federal power.<sup>36</sup> Its substantive power, however, appears to be ascending.<sup>37</sup> President Obama has been held as an enemy of states' Tenth Amendment rights,<sup>38</sup> and the *Shelby* Court gave credence to Shelby County's federalism argument,<sup>39</sup> despite the fact that the Fifteenth Amendment should trump the Tenth Amendment because it empowered Congress to enact the VRA. In addition, the Court offered that the VRA violated states' right to "equal sovereignty,"<sup>40</sup> even though that principle is "made up" and there is no constitutional requirement for Congress to treat all states equally.<sup>41</sup>

Third, the Roberts Court's activism has become apparent.<sup>42</sup> One commentator has called the conservative justices a "mercenary majority."<sup>43</sup> It may be that the Roberts Court is no more activist than previous liberal Courts,<sup>44</sup> but its decisions certainly reflect conservative political preferences.<sup>45</sup> These preferences include a Lochnerian notion of race that ignores systemic inequality in favor of abstract equality. Justice Roberts expressed this sentiment in 2007, observing, "The way to stop discrimination

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<sup>36</sup> Christopher J. Parosa, *Federalism: Finding Meaning Through Historical Analysis*, 82 OR. L. REV. 119, 151 (2003).

<sup>37</sup> See Manny Fernandez & Emily Ramshaw, *As a States' Rights Stalwart, Perry Draws Doubts*, N.Y. TIMES, Aug. 29, 2011, at A1; see also Stanley Fields, *Leaving Wildlife Out of National Wildlife Refuges: The Irony of Wyoming v. United States*, 34 N.M. L. REV. 217, 224 (2004); Kirk Johnson, *States' Rights is Rallying Cry of Lawmakers*, N.Y. TIMES, Mar. 17, 2010, at A1; Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193, 212 (2011).

<sup>38</sup> *Shreeve v. Obama*, No. 1:10-CV-71, 2010 WL 4628177, at \*1 (E.D. Tenn. Nov. 4, 2010) (alleging violation of Tenth Amendment); Elizabeth Weeks Leonard, *The Rhetoric Hits the Road: State Challenges to the Affordable Care Act Implementation*, 46 U. RICH. L. REV. 781, 816 (2012).

<sup>39</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

<sup>40</sup> *Id.* at 2623.

<sup>41</sup> Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, (work in progress), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2291612](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291612).

<sup>42</sup> See Press Release, U.S. Senator Sheldon Whitehouse, Senate Judiciary Meeting on the Nomination of Solicitor General Elena Kagan to Be an Associate Justice of the Supreme Court (Jul. 20, 2010), available at <http://whitehouse.senate.gov/newsroom/press/release/?id=20C66640-20C3-4B3E-8959-AA302211486F>; see also Erwin Chemerinsky, *Conservatives Embrace Judicial Activism in Campaign Finance Ruling*, L.A. TIMES, Jan. 22, 2010, at A29; Simon Lazarus, *The Most Activist Court: How progressives should think about and respond to the assaults of the Roberts Court*, AMER. PROSPECT (June 29, 2007), [http://www.prospect.org/cs/articles?article=the\\_most\\_activist\\_court](http://www.prospect.org/cs/articles?article=the_most_activist_court); Dan Radmacher, *Judicial Activism for Me, Not for Thee*, ROANOKE TIMES, Mar. 28, 2010, at 1; Jeffrey Rosen, *Court Approval*, THE NEW REPUBLIC, July 23, 2007, at 9, 12; Jeffrey Toobin, *Activism v. Restraint*, THE NEW YORKER, May 24, 2010, at 19.

<sup>43</sup> Edward Pekarek & Genevieve Shingle, *The Land of Ligitation Make Believe: Janus Capital Group, Inc. et al. v. First Derivative Traders: A Case Comment*, 19 NO. 1 PIABA B.J. 1, 2 (2012).

<sup>44</sup> Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737, 737 (2012).

<sup>45</sup> *Id.* at 738.

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on the basis of race is to stop discriminating on the basis of race.”<sup>46</sup> In *Shelby County*, he voted to strike down section 4(b) not because voting discrimination was no longer a problem (it was, he admitted<sup>47</sup>), or because the VRA was ineffective in its anti-discrimination purpose (it was effective, he admitted<sup>48</sup>), but because section 4(b)’s coverage formula did not relate to current forms of discrimination.<sup>49</sup> Justice Roberts implicitly borrowed the “congruence and proportionality” standard from *Boerne v. Flores*, which entails a “subjective inquiry” that enables judicial activism.<sup>50</sup> Such a Lochnerian approach rejects the deference to lawmakers that underpins the rational basis test, to which the VRA should have been subjected.<sup>51</sup> Had rational basis review been applied, section 4(b) would have been upheld because of its deterrence value, which Justice Roberts acknowledged, and because the Katz study, which the Court had available,<sup>52</sup> showed greater discrimination in covered jurisdictions.

Fourth, preclearance had become more time consuming and costly because second generation discrimination became more complex.<sup>53</sup> Given the greater *absolute* costs associated with preclearance, section 2 litigation became *relatively* less expensive, incentivizing some jurisdictions in some cases to roll the dice on such litigation. Even if the change in relative costs was miniscule, jurisdictions may alter their game play based on previous cost comparison, not on the continued absolute low cost of preclearance.<sup>54</sup>

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<sup>46</sup> *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>47</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

<sup>48</sup> *Id.* at 2626.

<sup>49</sup> *Id.* at 2629.

<sup>50</sup> Fuentes-Rohwer, *supra* note 9, at 135-36.

<sup>51</sup> See *Shelby Cnty.*, 133 S. Ct. at 2630 (“Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the section 4 coverage formula.”), 2637 (Ginsburg, J., dissenting); *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) (“a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to” segregate voters.); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (“Congress could rationally have concluded that . . . it was proper to prohibit changes that have a discriminatory impact.”); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (“Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

<sup>52</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2642 (Ginsburg, J., dissenting).

<sup>53</sup> Issacharoff, *supra* note 22, at 1721. This is not to say that preclearance entailed increased delays; section 5 preclearance required the DOJ to make a decision with sixty days in any event. 42 U.S.C. § 1973c(a) (2013).

<sup>54</sup> See Bruce G.S. Hardie et al., *Modeling Loss Aversion and Reference Dependence Effects on Brand Choice*, 12 *MARKETING SCIENCE* 378, 379 (1993) (“consumers often evaluate product attributes relative to some reference level, and not simply in terms of absolute attribute levels.”).

These four developments altered the calculus of VRA Defendants. The myth of a post-racial America reinforced<sup>55</sup> by President Obama's election gave covered jurisdictions the chance to assert that they were not racist and to advance legal arguments without that presumption. The new federalism gave jurisdictions a constitutional hook on which to hang their arguments. The Roberts Court's neo-Lochnerianism<sup>56</sup> gave jurisdictions a receptive judicial audience, and the increased cost of preclearance meant that some jurisdictions were more willing to litigate their claims. The system was no longer a Nash Equilibrium because Defendants now had an incentive to change their strategy. They did so with the *Shelby County* litigation.

#### IV. *Shelby County v. Holder*

The *Shelby* Court<sup>57</sup> invalidated section 4(b), which provided the coverage formula that determined which jurisdictions had to receive preclearance for any voting change, even if the change was obviously not discriminatory. In striking down section 4(b), the Court made five key findings: (1) discrimination continues to exist,<sup>58</sup> (2) the VRA has been very successful in addressing discrimination,<sup>59</sup> (3) the forms of discrimination have changed over time,<sup>60</sup> (4) the VRA does not address these current forms of discrimination as well as it addressed first generation forms,<sup>61</sup> and, therefore, (5) section 4(b) the VRA contained a coverage formula that is so incongruent with second generation discrimination as to be unconstitutional.<sup>62</sup>

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<sup>55</sup> To be sure, this myth was created much earlier. See ROBERT COHEN, FREEDOM'S ORATOR: MARIO SAVIO AND THE RADICAL LEGACY OF THE 1960S 403 (2009) (In the 1990s, Bob Dole dismissed the effects of slavery because it occurred "a long time ago.").

<sup>56</sup> See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2685 (2011) (Breyer, J., dissenting) (contending that the majority's extension of First Amendment protection to commercial data mining repeats the error of *Lochner*); see also Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner's Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL'Y 311 (2010); but see Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 Y.B. ON ARB. & MEDIATION 1, 4 n. 20 (2013).

<sup>57</sup> I do not include the Court as a player in the *Shelby County* game for two reasons. First, the Court's explicit goal is one of neutral administration; the Court and its Justices are presumed not to pursue any self-interest in their opinions. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) ("it's my job to call balls and strikes and not to pitch or bat."). The second reason is that—although they do in fact pursue their own interests—in the *Shelby County* game the Court and its Justices were more the conduit through which other players played and part of the conditions that caused the Nash Disequilibrium.

<sup>58</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

<sup>59</sup> *Id.* at 2626.

<sup>60</sup> *Id.* at 2618.

<sup>61</sup> *Id.* at 2629.

<sup>62</sup> *Id.* at 2631.

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In support of its decision, the Court arrayed the law's "substantial federalism costs" to states and its violation of the principle of "equal sovereignty."<sup>63</sup> It held that the federal government does not have a "general right to review and veto state enactments before they go into effect."<sup>64</sup> Constitutionally, this holding was erroneous on a number of grounds. First, the Fifteenth Amendment provided substantive congressional authority to pass the VRA.<sup>65</sup> This should have trumped the Tenth Amendment, not least because the federalist structure created by the latter amendment actually supported Congress' power to pass the VRA subject to the former amendment. Furthermore, the Tenth Amendment carried little historical weight<sup>66</sup> compared with the Fifteenth Amendment.<sup>67</sup> Second, the principle of equal sovereignty was "made up" and, as Justice Ginsburg noted, misapplied.<sup>68</sup> Third, rational basis was the appropriate test for the Roberts Court, which has declared itself respectful of *stare decisis*.<sup>69</sup> Finally, the Court rejected judicial minimalism by entertaining a facial challenge to the VRA, when it should have considered the law as applied.<sup>70</sup> Had it done so, it would have given weight to evidence that Shelby County's discrimination required continued coverage.<sup>71</sup>

Texas<sup>72</sup> and North Carolina<sup>73</sup> have been quick to take advantage of *Shelby County*. Ongoing litigation in *Texas v. Holder* has recently resulted in intervenors' request to bail in Texas,<sup>74</sup> and Texas' request to dismiss all of the claims asserted against it, basing its request on the fact that it is no longer subject to preclearance.<sup>75</sup> In another lawsuit, the DOJ has sought to bail in

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<sup>63</sup> *Id.* at 2621.

<sup>64</sup> Shelby Cnty., 133 S. Ct. at 2623.

<sup>65</sup> Or at least the Supreme Court so held for a long time, until *Shelby County*. See *Lopez v. Monterey Cty.*, 525 U.S. 266, 269 (1999); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 221 (1996); *State of S.C. v. Katzenbach*, 383 U.S. 301, 327 (1966).

<sup>66</sup> Paul Porter, *A Tale of Conflicting Sovereignities: The Case Against Tribal Sovereign Immunity and Federal Preemption Doctrines Preventing States' Enforcement of Campaign Contribution Regulations on Indian Tribes*, 40 U. MICH. J.L. REFORM 191, 215 (2006).

<sup>67</sup> Thomas C. Mackey, "An Inestimable Jewel": *The Civil War Constitutional Amendments and Their Continued Relevance*, 3 ALB. GOV'T L. REV. 676, 679 (2010).

<sup>68</sup> Shelby Cnty., 133 S. Ct. at 2648 (Ginsburg, J., dissenting).

<sup>69</sup> Linda Greenhouse, *Precedents Begin to Fall for Roberts Court*, N.Y. TIMES, June 21, 2007.

<sup>70</sup> Shelby Cnty., 133 S. Ct. at 2644-45 (Ginsburg, J., dissenting).

<sup>71</sup> *Id.* at 2645-46.

<sup>72</sup> F. Michael Higginbotham, *Congress Must Act to Guard Our Most Important Right*, ORLANDO SENTINEL, Aug. 16, 2013.

<sup>73</sup> Janet Shan, *NC Pasquotank and Watauga Counties Election Boards Move to Curtail Student Voting*, HINTERLAND GAZETTE, Aug. 15, 2013.

<sup>74</sup> Defendant-Intervenors' Motion for Leave to File Amended Answer and Counterclaim at 1, *Texas v. Holder*, No. 1:11-cv-1303-RMC-TBG-BAH, July 3, 2013.

<sup>75</sup> Plaintiff's Motion to Dismiss at 1, *Texas v. Holder*, No. 1:11-cv-1303-RMC-TBG-BAH, July 3, 2013.

Texas.<sup>76</sup> Texas used *Shelby County* to refer to section 3(c) bail in and resulting preclearance as an “extreme sovereignty-infringing remedy.”<sup>77</sup> Finally, the DOJ has announced its intent to sue Texas over its new voter identification law, alleging a section 2 violation.<sup>78</sup> In response, Texas Senator John Cornyn observed, “Facts mean little to a politicized Justice Department bent on inserting itself into the sovereign affairs of Texas and a lame-duck administration trying to turn our state blue.”<sup>79</sup> Texas Attorney General Greg Abbott said the suit was without merit, and “Eric Holder is wrong to mess with Texas.”<sup>80</sup>

In North Carolina, the NAACP has sued the state over its new voting law, which was passed one month after the *Shelby County* opinion issued.<sup>81</sup> In its complaint, the NAACP argues that the many new voting requirements will have a discriminatory effect on minority voters<sup>82</sup>; North Carolina has a history of racial discrimination in voting<sup>83</sup>; North Carolina’s stated anti-fraud purpose is not the law’s real purpose<sup>84</sup>; and the discriminatory law was enabled by *Shelby County*.<sup>85</sup>

## V. Post-*Shelby County* Effects

The interests or strategies of the players in the Post-*Shelby County* game have changed, resulting in a Nash Disequilibrium that is resulting in a system that will less effectively adjudicate claims of discrimination and ensure that deserving jurisdictions can avoid federal oversight.

Plaintiffs will continue to press for non-discrimination and equality in voting, but will find it increasingly necessary to resort to section 2 litigation to do so, as section 5 preclearance has fallen away. Defendants continue to protect their jurisdictions from federal oversight, but will face an increasing number of section 2 lawsuits and section 3 bail in proceedings. The Government continues to want to protect voting rights, but now also needs to protect what remains of the VRA. It will channel its resources toward section 2 litigation or section 3 bail in proceedings. Democrats would like to strengthen and update the VRA, and protect it against further Court erosion.

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<sup>76</sup> Defendants’ Response to Plaintiffs and the United States Regarding Section 3(c) of the Voting Rights Act at 1, *Perez v. Texas*, No. SA-11-CA-360-OLG-JES-XR, Aug. 5, 2013.

<sup>77</sup> *Id.* at 2.

<sup>78</sup> Reid J. Epstein, *DOJ to File Suit Against Texas Over Voter ID Law*, POLITICO, Aug. 22, 2013.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Complaint at 2, *NAACP v. McCrory*, No. 1:13-cv-658 (Aug. 12, 2013).

<sup>82</sup> *Id.* at 2-5, 14.

<sup>83</sup> *Id.* at 12.

<sup>84</sup> *Id.* at 17.

<sup>85</sup> *Id.* at 13.

## *The Post-Shelby County Game*

Republicans would like to see the VRA eliminated, either through repeal or Court invalidation. Given congressional gridlock, it is likely that neither Democrats nor Republicans will make any substantive or effective moves until the long-term effects of the Post-*Shelby County* game have played out. This game, therefore, becomes one among Plaintiffs, Defendants, and the Government.

Unlike the pre-*Shelby County* game, the new game is zero sum.<sup>86</sup> Now, the stark choice appears to be between federal oversight that is “politicized,”<sup>87</sup> “extraordinary,”<sup>88</sup> and an “end-run around the Supreme Court,”<sup>89</sup> and states’ freedom that entails the “Old Confederacy[’s]” return to “the pre-1965 playbook”<sup>90</sup> and a “rollback for minorities.”<sup>91</sup> This new game is in disequilibrium because even if all other players make no move, Defendants will seek to increase their freedom from federal oversight, and the Government will seek to consolidate and find new strategies for exercising it. It will have short-, medium-, and long-term effects.

In the short term, this new game will benefit jurisdictions that wish to be free of federal oversight. Texas and North Carolina, for example, have passed laws that probably would not have been precleared.<sup>92</sup> Section 2 litigation, whether it includes a preliminary injunction or only a final order, will result in delayed and after-the-fact responses to discriminatory rule changes. Litigation may also result in jurisdictions enacting different, more hidden forms of discriminatory rules to stay a step ahead of lawsuits.<sup>93</sup> Preclearance contributed to an efficient system because it entailed quick responses to proposed rule changes and prevented discriminatory rules from taking effect. Litigation will have neither of these virtues, and will therefore increase the amount of discrimination and inequality and entail response delays.<sup>94</sup>

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<sup>86</sup> A zero sum game is one “in which the increase in the payoff to one player from one combination of strategies being played relative to another is associated with a corresponding decrease in the payoff to the other.” DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 317 (1994). The pre-*Shelby County* game was not zero sum, because preclearance gave payouts to every player: Plaintiffs got a non-discriminatory voting system, the Government got federal oversight, and Defendants got the Government’s imprimatur and avoided costly litigation.

<sup>87</sup> Epstein, *supra* note 78.

<sup>88</sup> Defendants’ Response to Plaintiffs and the United States Regarding Section 3(c) of the Voting Rights Act at 1, *Perez v. Texas*, No. SA-11-CA-360-OLG-JES-XR, Aug. 5, 2013.

<sup>89</sup> Pete Yost, *Texas Faces Federal Lawsuit Over Voter ID Law*, ASSOCIATED PRESS, Aug. 22, 2013.

<sup>90</sup> Ari Berman, *The Return of Jim Crow*, THE NATION, June 26, 2013.

<sup>91</sup> *Supreme Court Guts Voting Rights Act, Sparking Fears of Rollback for Minorities Long After Jim Crow*, DEMOCRACY NOW!, June 26, 2013.

<sup>92</sup> See Higginbotham, *supra* note 72; see also Sally Kalson, *Stacking the Deck With Voter Suppression*, PITTSBURGH POST-GAZETTE, Aug. 18, 2013.

<sup>93</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

<sup>94</sup> A shift toward litigation will also harm Plaintiffs. They will have to assume the added costs of section 2 litigation, and they have lost the opportunity to voice their concerns through the section

Medium-term systemic realities will emerge from these response delays. The system of VRA voting rights entails two stocks: discrimination and federal oversight. Assuming a causal relationship between discrimination and federal oversight, if the stock of one increases, then the stock of the other decreases. Discriminatory voting rules supply the stock of discrimination, while federal oversight operates to minimize that supply.

The system of voting rights depends upon an adequate balance between these two stocks. Clearly, discrimination is a bad that should be minimized, in part through federal oversight. This oversight itself is also a bad where it is not necessary. There can, in other words, be excessive discrimination and excessive oversight. Because preclearance was a nimble, pre-rule change operation that generally achieved correct results (discriminatory rules were rejected, other rules were accepted), and because the bail in and bail out procedures operated to impose preclearance only on deserving jurisdictions,<sup>95</sup> the pre-*Shelby County* VRA operated to balance discrimination against oversight.

Delays in responding to increases or decreases in a certain stock tend to create an oscillating feedback loop.<sup>96</sup> This means that at times, a particular jurisdiction will experience an excess of discrimination, and that at other times, it will experience an excess of federal oversight. This may already be occurring in Texas. There appears to be little doubt that Texas' new voting rules will create more inequality in voting than currently exists. The DOJ, in response, has requested that the court impose preclearance requirements for a ten-year period, and that it consider extending the bail-in period beyond ten years in the event of further discriminatory acts.<sup>97</sup> This preclearance requirement would include all sorts of voting rule changes, some of which could be salutary, non-discriminatory changes.<sup>98</sup> While it is appropriate for the DOJ to request some relief, its requested relief may exceed that which is necessary to address Texas' discrimination. If the court were to grant the DOJ's request, Texas might experience an excess of federal oversight, which it would view as a bad.

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5 preclearance process. Richard L. Hasen, *What's Lost If the Voting Rights Act Falls?*, SLATE, Jan. 10, 2013.

<sup>95</sup> Clearly, the *Shelby County* Court disagreed with this view. Nathaniel Persily, however, has argued that covered jurisdictions could have bailed out, but chose not to, in part because preclearance was not too burdensome and provided jurisdictions with the DOJ's stamp of approval on voting changes. Persily, *supra* note 10, at 213-14.

<sup>96</sup> MEADOWS, *supra* note 21, at 54-57.

<sup>97</sup> Defendants' Response to Plaintiffs and the United States Regarding Section 3(c) of the Voting Rights Act at 38, *Perez v. Texas*, No. SA-11-CA-360-OLG-JES-XR, Aug. 5, 2013.

<sup>98</sup> *Id.* at 39-40.

## *The Post-Shelby County Game*

Plaintiffs who fight against discrimination should not prefer this outcome. An excess of federal oversight would give Texas the public relations and substantive legal arguments it would need to avoid *any* federal oversight. This would swing the pendulum back, resulting in an excess of discrimination, and renewed section 2 lawsuits. Such response delays tend to entail drastic remedies, rather than nuanced alterations.

In the medium-term, then, jurisdictions in which voting laws exist that skirt the VRA line will at times see a great reduction in discrimination because of an excess of federal oversight, and will at other times see an excess of discrimination because federal oversight has been withdrawn.

In the long-term, this oscillating feedback loop will become obvious, individual jurisdictions will see radically shifting voting regimes, and the national trend will be toward pockets of heavy federal oversight and pockets of great discrimination. This system will be unstable, inefficient, unpredictable, and, most importantly, unjust. Democrats and Republicans in Congress will recognize the need for a new VRA, and will find common ground to pursue it.<sup>99</sup> Plaintiffs and Defendants will also recognize this need as levels of discrimination, the cost of litigation, and systemic uncertainty will all increase. The Nash Disequilibrium that prevails after *Shelby County* will have resulted in an oscillating feedback loop, which will in turn result in all players recognizing the mutual need for a new VRA.<sup>100</sup> It will not be a radically new law, but its bail in and bail out procedures, and its coverage formula, will all be updated to reflect today's second generation discrimination. Ideally, the law will be flexible enough both to address yet-to-emerge third generation discrimination and to incentivize non-discriminating jurisdictions to request bail out.

## **VI. Conclusion**

Most readers will argue that we ought to be more concerned with eradicating discrimination than with satisfying states' federalism interests. My analysis, therefore, should not equate freedom from oversight with anti-

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<sup>99</sup> Ellen Katz would probably find this too optimistic, or at least would argue that any new VRA would meet stiff resistance in the Court, which, to her, would uphold any new law only if jurisdictions engaged "in the sort of defiant obstructionism that made the VRA necessary in the first instance." Ellen Katz, *How Big is Shelby County?*, SCOTUSBLOG, June 25, 2013, available at <http://www.scotusblog.com/2013/06/how-big-is-shelby-county/>.

<sup>100</sup> This excepts the most recalcitrant jurisdictions that are bent on enacting discriminatory rules. Eventually, the need for a new VRA will become clear enough that these jurisdictions will lose credibility and effectively be ejected from the Post-*Shelby County* game. Against charges that my conclusion is too optimistic, one alternative is much more optimistic—that levels of discrimination become so low that a new VRA is not necessary.

discrimination. It seems fitting to conclude by addressing this important argument.

My point is not that the two interests are normatively equal, but that freedom from oversight is a legitimate interest that impinges upon the system of voting rights. Eradicating discrimination can only be achieved by recognizing such systemic realities, and the ideal system would impose such oversight only when necessary to address real discrimination or inequality.

The systemic tragedy of *Shelby County* was that the Court invalidated the part of the VRA that was most congruent and proportional to the reality of voting rights and minimized the law's impact on covered jurisdictions. The result will be more instability, higher litigation costs, at times greater discrimination and at other times excessive federal oversight, and ultimately, a new, closer-fit VRA that will have to address both pre-*Shelby County* discrimination and the additional discrimination resulting from the Court's decision.

*Shelby County* will have done much damage to the system of voting rights, in ways that will injure both Plaintiffs and Defendants. The words of John Lennon might have been sung to the *Shelby* Court:

*You say you want a revolution  
Well, you know  
We all want to change the world  
You tell me that it's evolution  
Well, you know  
We all want to change the world  
But when you talk about destruction  
Don't you know that you can count me out  
Don't you know it's gonna be all right  
All right, all right.<sup>101</sup>*

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<sup>101</sup> THE BEATLES, *Revolution*, on THE WHITE ALBUM (EMI 1968).