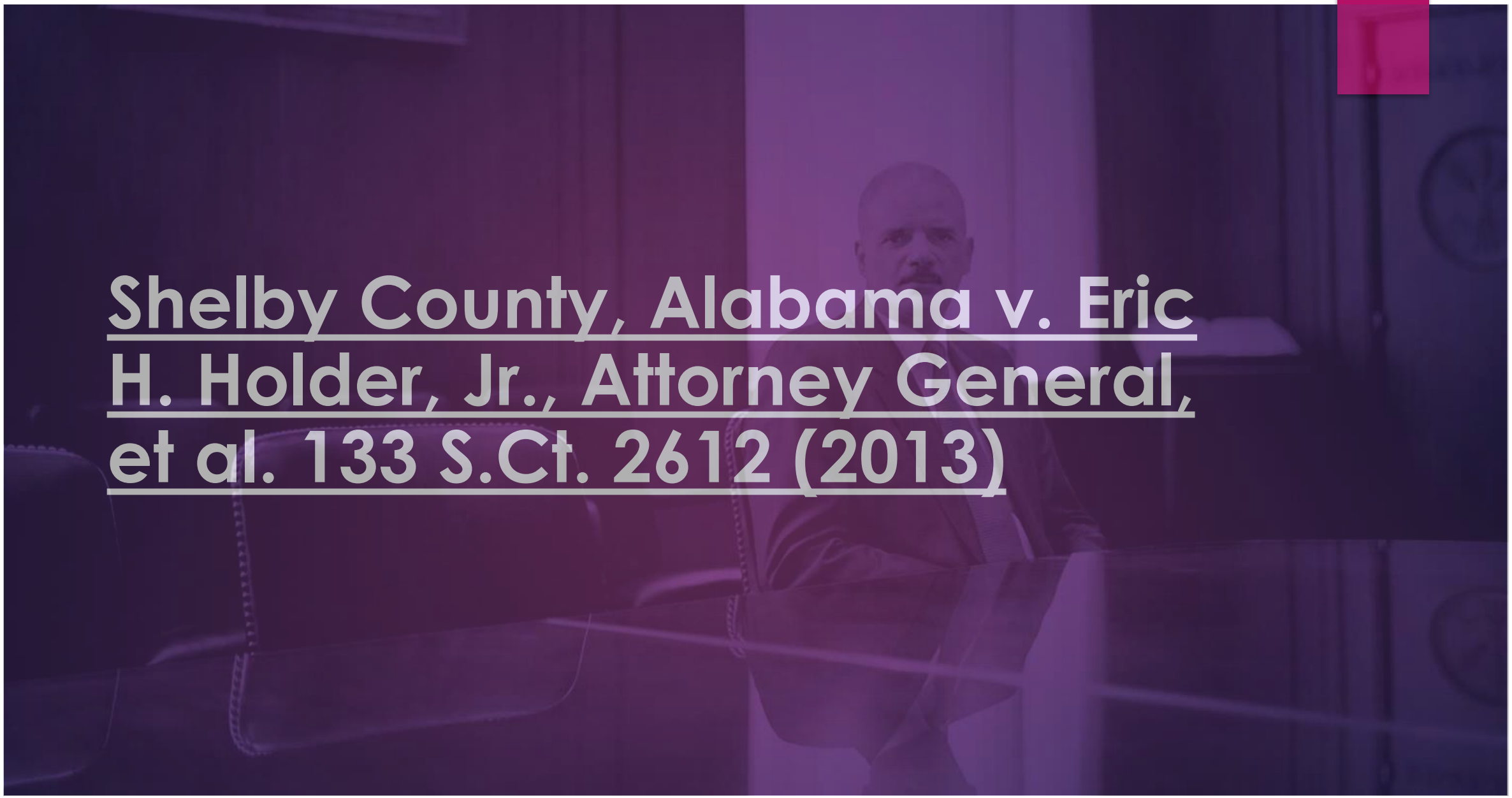


Shelby County, Alabama v. Eric H. Holder, Jr., Attorney General, et al. 133 S.Ct. 2612 (2013)

In Controversy

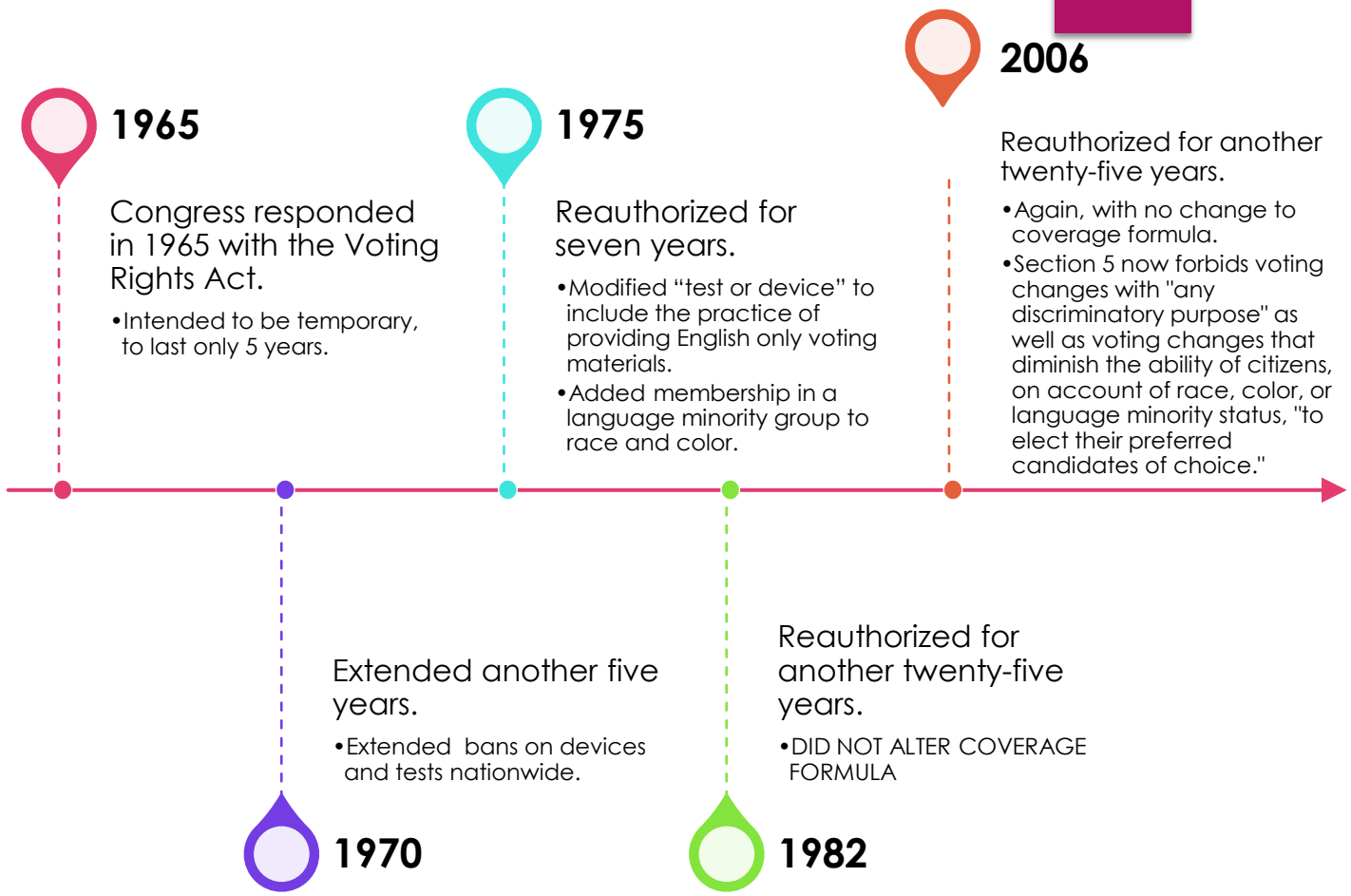
- §4 of the voting Rights Act of 1965 applied a "formula" to certain parts of the Country- covered jurisdictions- had maintained a test or device as a prerequisite to voting as of November 1, 1964 and had less than 50 percent voter registration or turnout in the 1964 Presidential election.

- §5 provided that no change in voting procedures could take effect until it was approved by Federal authorities in D.C.- either the Attorney General **or** a Court of Three Judges.
  - A jurisdiction could obtain such "Preclearance" only by providing that the change had neither the purpose nor the effect of denying or abridging the right to vote on account of either race or color.

Constitution Amendments 10, 14 & 15

- The **Tenth Amendment** was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people.
- Passed by the Senate on June 8, 1866, and ratified two years later, on July 9, 1868, the **Fourteenth Amendment** granted citizenship to all persons "born or naturalized in the United States," including formerly enslaved people, and provided all citizens with “equal protection under the laws,” extending the provisions of the Bill of Rights to the states.
- “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” The **Fifteenth Amendment** guaranteed African-American men the right to vote.

Voting Rights Act



We upheld each of these reauthorizations against constitutional challenge

- ***Georgia v. United States,* 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973)**
- **Rome v. United States, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980)**
- **Lopez v. Monterey County, 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999).**

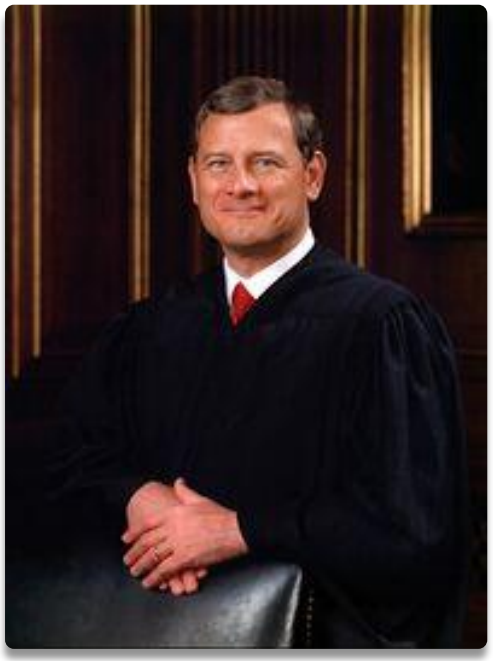
Challenging the Act's constitutionality

- *Northwest Austin Municipal Util. Dist. No. One v. Holder,129 S.Ct. 2504 (2009)*
  - Allowed a utility district to seek bailout and the Court expressed serious doubts about the Act's continued constitutionality.
  - §5- substantial Federalism costs and differentiates between the states despite our historic tradition that all the states enjoy equal sovereignty.

Challenging the Act's constitutionality

- *South Carolina v. Katzenbach, 86 S.Ct. 803 (1966)*
  - Exceptional conditions can justify legislative measures not otherwise appropriate!
    - "Stringent" and "Potent"

ROBERTS, J.P.



- Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives.
  - Amendment 10- This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States."

Katzenbach

- The coverage formula made sense- the means of linking the exercise of the unprecedented authority with the problem that warranted it- made sense.
- Nearly 50 years later things have changed dramatically…
  - Voter registration rates and turn-out now approach parity
  - Blatantly discriminatory evasions of federal decrees are rare.
  - Minority candidates hold office at unprecedented levels
  - The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years

Great strides have been made in large part due to the VRA.

- Yet congress has not eased the restrictions in § or narrowed the scope of the coverage formula in 4(b) along the way.
- In light of the two § 5 amendments- the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.
- Coverage today (under §4) is based on decades-old data and eradicated practice.
- The failure (of the Federal Government) to establish relevance is FATAL.

Roberts takes on RBG dissent…

- The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes.
- Access to the ballot v. dilution of the vote
  - We are not ignoring the record- we are simply recognizing it played no role in shaping the statutory formula before us today.

Dissent proceeds from a flawed premises

- The dissent proceeds from a flawed premise. It quotes the famous sentence from McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819), with the following emphasis: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Post, at 2637 (emphasis in dissent). But this case is about a part of the sentence that the dissent does not emphasize — the part that asks whether a legislative means is "consist[ent] with the letter and spirit of the constitution." The dissent states that "[i]t cannot tenably be maintained" that this is an issue with regard to the Voting Rights Act, post, at 2637, but four years ago, in an opinion joined by two of today's dissenters, the Court expressly stated that "[t]he Act's preclearance requirement and its coverage formula raise serious constitutional questions." Northwest Austin, supra, at 204, 129 S.Ct. 2504. The dissent does not explain how those "serious constitutional questions" became untenable in four short years.

Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite.

- Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Presley, 502 U.S., at 500-501, 112 S.Ct. 820. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

RBG's DISSENT

- In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable,[1] this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and *2633 should elicit this Court's unstinting approbation.
- Early attempts to cope with this vile infection resemble battling the Hydra.

Voting Rights Act of 1965 (VRA)

- Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions — those States and localities where opposition to the Constitution's commands were most virulent — the VRA provided a fit solution for minority voters as well as for States.
- After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting 7, 21 (B. Grofman & C. Davidson eds. 1992).
- 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. Shaw, 509 U.S., at 640-641, 113 S.Ct. 2816; Allen v. State Bd. of Elections, 393 U.S. 544, 569, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)

The 109th Congress that took responsibility for the renewal started early and conscientiously.

- House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays.
- The bill was read and debated in the Senate, where it passed by a vote of 98 to 0.
- President Bush signed it a week later, on July 27, 2006, recognizing the need for "further work ... in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect." 152 Cong. Rec. S8781 (Aug. 3, 2006).

The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages.

- Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." 679 F.3d, at 866.
- Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. 42 U.S.C. § 1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

- "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819) (emphasis added).
- So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. "It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." Katzenbach v. Morgan, 384 U.S. 641, 653, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).
- Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its *2638 judgments in this domain should garner. South Carolina v. Katzenbach supplies the standard of review: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S., at 324, 86 S.Ct. 803. Faced with subsequent reauthorizations of the VRA, the Court has reaffirmed this standard. E.g., City of Rome, 446 U.S., at 178, 100 S.Ct. 1548. Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed "rational means."

Between 1982 and 2006…

- DOJ objections blocked over 700 voting changes.
- DOJ and private plaintiffs succeeded in more than 100 actions to enforce the § 5 preclearance requirements.
- A reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See Persily 193-194.
- An additional 800 changes were modified or withdrawn since 1982 reauthorization.
- There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. Ante, at 2624-2625. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." Ante, at 2628. But the Court ignores that "what's past is prologue." W. Shakespeare, The Tempest, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, The Life of Reason 284 (1905). Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization § 2(b)(9).
- Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. Impact and Effectiveness 974. Controlling for population, there were nearly four times as many successful § 2 cases in covered jurisdictions as there were in noncovered jurisdictions.

Katz Study

- Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H.R.Rep. No. 109-478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so").

This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

-The "judicial Power" is limited to deciding particular "Cases" and "Controversies." U.S. Const., Art. III, § 2.

-The Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit — Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

-This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress' enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court.

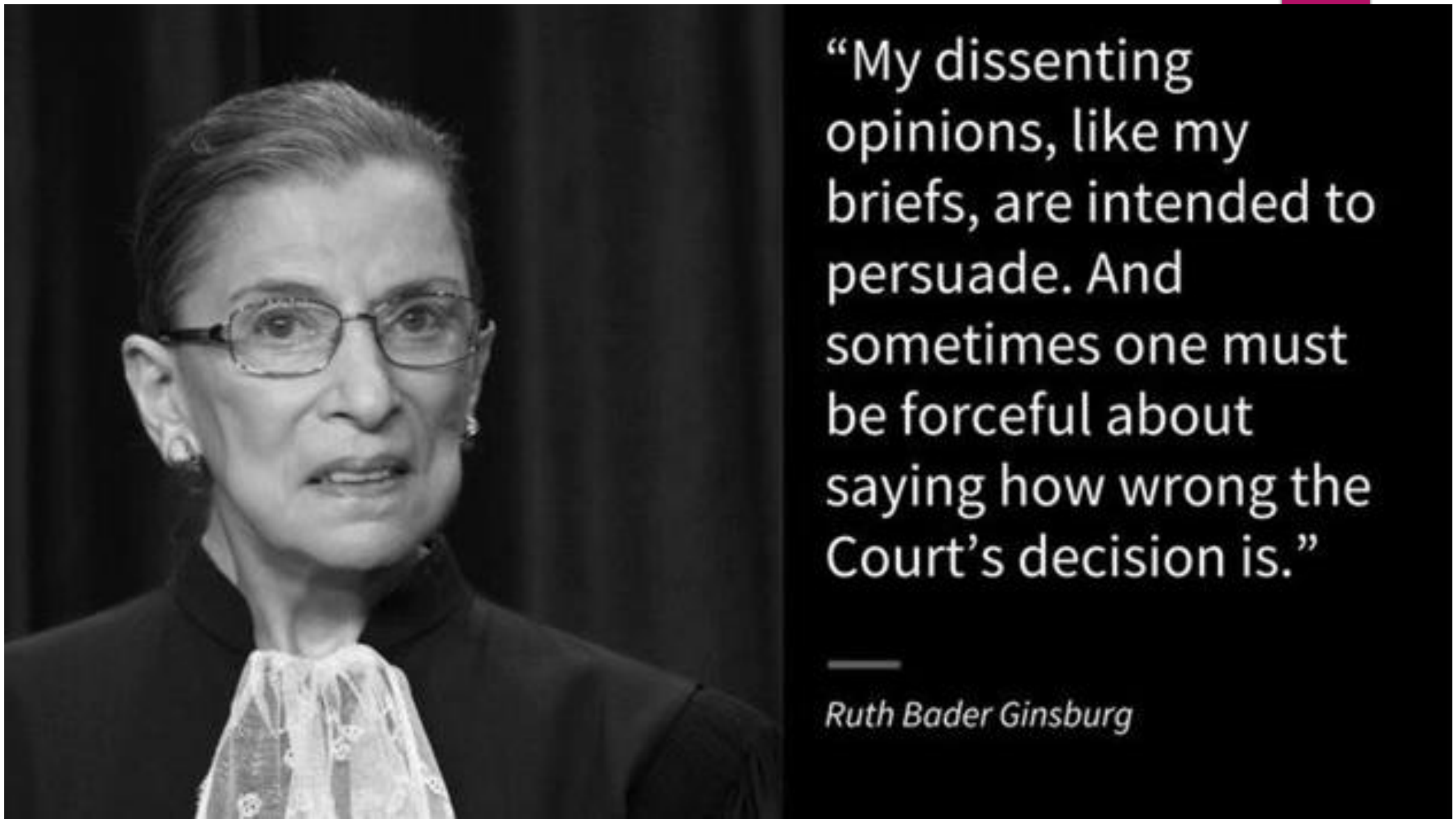
The severability provision states…

- "If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 42 U.S.C. § 1973p.
  - In other words, even if the VRA could not constitutionally be applied to certain States — e.g., Arizona and Alaska, see ante, at 2622 — § 1973p calls for those unconstitutional applications to be severed, leaving the Act in place for jurisdictions as to which its application does not transgress constitutional limits.
- Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion can hardly be described as an exemplar of restrained and moderate decision making. Quite the opposite. Hubris is a fit word for today's demolition of the VRA.

In the Court's conception, it appears, defenders of the VRA could not prevail upon showing what the record overwhelmingly bears out, i.e., that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. See Tr. of Oral Arg. 61-62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

Instead, the Court strikes § 4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." Ante, at 2627. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. 2006 Reauthorization § 2(b)(3), (9). Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. Ante, at 2629-2630, 2630-2631. With that belief, and the argument derived from it, history repeats itself. The same assumption — that the problem could be solved when particular methods of voting discrimination are identified and eliminated — was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the "variety and persistence" of measures designed to impair minority voting rights. Katzenbach, 383 U.S., at 311, 86 S.Ct. 803; supra, at 2633. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.


“My dissenting opinions, like my briefs, are intended to persuade. And sometimes one must be forceful about saying how wrong the Court’s decision is.”
Ruth Bader Ginsburg