NOTE TO SCHMOOZE PARTICIPANTS:

This is an incredibly lightly footnotes ticket. I have lots of cites – mostly from me and other people at this wonderful event – but have left the lion's share out as I have in years past. This draft should be read in the spirit in which it is offered. It is a collection of ever-developing but unvetted ideas that have been spawned from prior research and publications.

Shelby County v. Holder and Preclearance as Legislative Injunction

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INTRODUCTION

In *Shelby County v. Holder*,[1] the Supreme Court deemed section 4 of the Voting Rights Act's unconstitutional. Section 4 defines which states and jurisdictions were subject to the VRA's preclearance structure. Pursuant to §§4 and 5 of the Act, some states and jurisdictions were required to have any voting change they made precleared by the Department of Justice or a three-judge panel of the District Court of the District of Columbia before those voting changes could go into effect.[2] Other states and jurisdictions could enact voting changes that, like most normal legislation, would become effective upon passage. All voting changes from all jurisdictions, whether required to be precleared or not, are subject to section 2 of the Voting Rights Act. The *Shelby County* Court determined that section 4 is unconstitutional because §4 supposedly targeted specific states and jurisdictions and placed specific burdens on those states and jurisdictions. The Court's decision rested on the argument that a doctrine of equal sovereignty undergirds our federalism principles. That doctrine requires that states enjoy equal sovereignty and, therefore, should be treated the same under federal law. Consequently, any law that, in application, treats some states differently than others invades the sovereignty of the states that are more heavily burdened than other states. Unless the law addresses an extraordinary and current problem, the law is unconstitutional. Though such burdens stemming from the Act's preclearance structure may have been constitutional at one time, the Court determined that voting conditions in covered jurisdictions have improved so much that the burden of preclearance for those jurisdictions can no longer be justified. The effectiveness of the VRA in lessening the incidence of race-based voting discrimination and the passage of time have made the problem of such discrimination in the covered jurisdictions so much less troublesome that the Court thought that § 4 stood as an unnecessary and unconstitutional affront to the equal sovereignty of the covered jurisdictions.

The *Shelby County* Court's approach may appear simple and reasonable. However, it lacks context that should be considered when deciding voting rights cases and interpreting voting

[1] 133 S.Ct. 2612.
[2] 42 U.S.C. §1973(c).

rights statutes. A focus on state sovereignty or state's rights might be appropriate in a typical non-voting rights case. However, the preclearance structure embedded in the VRA was designed to address voting changes in states with histories of seeking to evade the 15th Amendment's command that the right to vote be provided to citizens without regard to race. Pointing to the equal sovereignty of such states as a justification for requiring that those states be treated no differently than states that may not have nearly as bad a history of attempting to evade the 15th Amendment's requirement is dubious.

The court misapprehends the nature of VRA preclearance. The *Shelby County* Court appears to view the preclearance structure as a standard law that, like section 2 of the VRA, provides substantive law and legal rules. However, the preclearance structure is a tool to enforce the VRA's underlying law. Consequently, it is more akin to a legislative injunction. Rather than treat states as sovereign entities whose sovereignty can only be infringed is specific narrow circumstances, the *Shelby County* Court should have treated states subject to preclearance as parties to an injunction. In that context, whether a state enjoys equal sovereignty as its sister states is irrelevant. The key questions are whether the covered jurisdictions ever should have been subject to the legislative injunction and under what circumstances should a court determine that the legislative injunction should be dissolved.

This brief ticket addresses a few of the underlying issues.

I. Shelby County v. Holder

In *Shelby County*, the Court reviewed the Voting Rights Act and found §4 of the Act to be wanting. The Court conceded that the VRA is a broad and majestic law passed pursuant to the 15th Amendment to deal with the scourge of race-based discrimination in voting.[3] However, the Court noted that the VRA provided strong remedies to address the problem. Fortunately, the Act's remedies had helped to reduce the incidence of race-based voting discrimination significantly.[4] Consequently, the time had come to evaluate whether some of the VRA's remedies should be withdrawn in light of the success of the VRA and the changed conditions that exist in the wake of VRA enforcement.[5] The core of the VRA – §2, with its broad nationwide bar on race-based voting discrimination – was not at issue and remains intact.[6] However, the VRA's most intrusive part – the preclearance structure – had to be reviewed.

[3] 133 S.Ct. 2612, 2618 (2013) ("The Voting Rights Act employed extraordinary measures to address an extraordinary problem.").
[4] 133 S.Ct. at 2618 ("There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."); see also Of course, the NAMUDNO Court noted how successful the Voting Rights Act had been. See North Austin Municipal Utility District No. 1 v. Holder (NAMUDNO), 557 U.S. 193, 201-02 (2009) (indicating that the VRA was largely responsible for the improvements in electoral conditions in parts of the United States).
[5] 133 S.Ct. at 2619 ("The question is whether the Act's extraordinary measures, including its disparate treatment of states, continue to satisfy constitutional requirements.").
[6] 133 S.Ct. at 2631 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2.").

The Court addressed two parts of the preclearance structure. The Court reviewed §4 of the Act, which defines the states and jurisdictions that are subject to preclearance, the covered jurisdictions. It also reviewed §5 of the Act, which requires that covered jurisdictions have their voting changes approved by the federal government before those changes become effective. The Court did not rule on §5;[7] it invalidated §4.[8]

The Court viewed the preclearance structure as an affront to federalism principles.[9] According to the Court, our system of federalism treats all states as co-equal sovereign entities.[10] By forcing some states to have their laws precleared while allowing the laws of other states to become effective without review, the preclearance structure tore at the fabric of federalism.[11] The preclearance structure's harm to federalism principles could be tolerated if justified. However, the justification for such harm had to be strong. The Court noted that current burdens can only be justified by current conditions.[12] Consequently, if current conditions were not extraordinary, extraordinary current burdens could not be justified.[13]

The Court reviewed the progress regarding voting rights that had been made since the VRA was passed in 1965 and found that current conditions could not justify current burdens. Conditions could justify the burdens when the preclearance structure was first reviewed and found constitutional in 1966. Though the preclearance structure was originally to be in effect only for five years, Congress has always renewed the structure as it approached its sunset. Following renewals in 1970, 1975 and 1982, the constitutionality of the preclearance structure was continually affirmed. The structure was last reauthorized in 2006 to extend through 2031. The *Shelby County* Court essentially reviewed the 2006 reauthorization. The Court criticized Congress for using a coverage formula that appeared to rely on decades-old data to support the singling out of covered jurisdictions to be subject to preclearance.[14] In the face of what the Court viewed as weak evidence of a justification to treat some states differently than others, it

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[7] This is similar to the NAMUDNO Court's approach of discussing and criticizing §5 then explicitly declining to address it. See 557 U.S. at 197.

[8] 42 U.S.C. §1973b.

[9] 133 S.Ct. 2612, 2618 (noting that section 5 was "a drastic departure from basic principles of federalism").

[10] 133 S.Ct. at 2623 ("Not only do State retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States.").

[11] 133 S.Ct. at 2618 ("And §4 of the Act applied that [preclearance] requirement only to some States – an equally dramatic departure from the principle that all States enjoy equal sovereignty.").

[12] 133 S.Ct. at 2619 (noting that current conditions must justify current burdens); 557 U.S. at 203 (noting that "the Act imposes current burdens and must be justified by current needs").

[13] The *Shelby County* Court relied in part on *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), to support its claim that §4 was an extraordinary remedy. However, the Court may have somewhat misconstrued *Katzenbach*'s discussion of section 4. The *Katzenbach* Court found §5 preclearance to be "an uncommon exercise of congressional power," not that the coverage formula was extraordinary. 383 U.S. at 334. Nonetheless, the *Katzenbach* Court made clear that once Congress had found that certain states had been continually intransigent in providing equal voting rights based on race, preclearance was an appropriate remedy. See 383 U.S. at 335 ("Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.").

[14] 133 S.Ct. at 2627 ("Coverage today is based on decades-old data and eradicated practices."); see also NAMUDNO, 557 U.S. at 203-4 (noting that the data used for the coverage formula in the 2006 reauthorization was more than 35 years old). . The government claimed that it was not merely using decades-old data. Indeed, Congress had amassed a 15,000 page record in support of reauthorization in 2006. See 133 S.Ct. at 2636 (Ginsburg, J., dissenting).

invalidated §4 – the coverage formula. However, it did not invalidate the preclearance structure. Section 5 – the preclearance requirement – survived for another day. Indeed, the Court noted that Congress could pass a new and legitimate §4 that might be upheld, thus reconstituting the entire preclearance structure.[15]

The *Shelby County* Court's language was clear. The VRA survives and Congress can provide broad remedies to effectuate the VRA's purpose. However, the doctrine of equal sovereignty limits state-specific remedies to those that can be justified by extraordinary circumstances. Unfortunately, the Court was not clear regarding the evidence that would be sufficient to prove that such extraordinary circumstances exist. Indeed, whether the Court believes that such evidence exists is unclear.

II. The Flawed Equal Sovereignty Argument

The *Shelby County* Court invalidated §4 of VRA in significant part because it believed that §4 violated a doctrine of equal sovereignly found in the Constitution. The Court's argument is flawed. There is little reason to believe that an equal sovereignty doctrine that may or may not be embedded in the Constitution should be operationalized, as the *Shelby County* Court suggests, to stop a preclearance structure that requires that some jurisdictions get their voting changes approved before those changes are effective. Indeed, operationalizing that doctrine to invalidate a law that was designed to minimize the effects of race-based voting discrimination is particularly ironic.

A doctrine of equal sovereignty may be embedded in the Constitution. However, the Supreme Court has, in the past, rejected its application in the voting rights context. In *South Carolina v. Katzenbach*,[16] the case in which the Supreme Court first ruled that the VRA's preclearance provisions were constitutional, the Court addressed South Carolina's claim that the doctrine of equal sovereignty invalidated the VRA's preclearance structure.[17] The *Katzenbach* Court rejected South Carolina's argument, ruling that the doctrine of equal sovereignty applies only at the time states are admitted to the Union.[18] However, even if one believes the *Katzenbach* erred regarding the general reach of the doctrine of equal sovereignty, *Katzenbach* rejected the doctrine's reach in the context of addressing race-based voting discrimination. Of course, the argument has been reintroduced and accepted by the current Court in the wake of *Katzenbach*.[19]

However, even if *Katzenbach* is incorrect and the doctrine of equal sovereignty should affect the interpretation of the Act, §4 arguably does not offend the doctrine. Section 4 is a generally applicable statute that applies to all jurisdictions. It merely covers jurisdictions that meet two specific voting-related criteria.[20] The *Shelby County* Court argued that, in application, §4 singles

[15] See 113 S.Ct. at 2631.
[16] 383 U.S. 301 (1966).
[17] Section 2 provides equal sovereignty to states.
[18] See 383 U.S. at 328-29 ("The doctrine of equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.").
[19] See NAMUDNO, 557 U.S. at 203.
[20] 42 U.S.C. §1973b.

out states for coverage.[21] *Katzenbach* arguably suggests the same.[22] Those conclusions rest on the belief that §4's criteria were chosen to cover specific states. However, even if the criteria were chosen to capture those jurisdictions, those states and jurisdictions were selected using voting-related criteria that suggest that those states should have been selected for the scrutiny that the preclearance structure provides.[23] The covered jurisdictions were covered under §4 only after they were shown to be different enough from other jurisdictions with respect to discrimination in providing voting rights based on race to warrant coverage. That made them subject to preclearance, the structure Congress used to help guarantee equal voting rights on the basis of race in particular jurisdictions. Congress did not select random criteria, e.g., all states whose name begin with the letter C, to create the covered jurisdictions subject to preclearance. It chose criteria set to capture offenders who had repeatedly violated the spirit if not the letter of the 15th Amendment. There is little inherently wrong with treating covered jurisdictions differently than others based on past actions or past conditions. Consequently, even if Section 4 singles out states for coverage, it does not do so in a way that necessarily implicates the doctrine of equal sovereignty.

The use of the doctrine of equal sovereignty to invalidate a preclearance structure designed to enforce voting rights is deeply ironic. The history of voting rights is a long one of attempts by some states and jurisdictions to deny the right to vote to citizens, often because of the race of those citizens. Given that not all jurisdictions share the same history with respect to the denial of voting rights, differential treatment of jurisdictions – based on their history of voting rights violations – is reasonable. An attempt to remedy that problem as thoroughly as possible may encourage differential treatment that might appear to implicate principles of equal sovereignty. However, that should not make the differential treatment unconstitutional.

The rights of the voters should matter as well. In providing voting rights, states are supposed to protect the voter's individual and collective right to vote. Consequently, states that have refused to provide equal voting rights should be treated as recalcitrant parties, not as sovereign states that must be provided the latitude to structure and change their voting processes in any way they see fit. Simply, those jurisdictions should be treated as entities that have or likely will deny voting rights to others.[24] In that context, §§4 and 5 look less like an attack on equal sovereignty and more like an attempt to make sure that the voting rights of the citizenry are protected prospectively. Indeed, in that context, complaints from covered jurisdictions regarding equal sovereignty – to be operationalized as the right to pass laws that might violate the rights of citizens to vote on the basis of race subject only to retrospective, but not prospective scrutiny – are almost nonsensical. At least, in the context of voting rights, the state's sovereignty should be balanced against the people's sovereignty and right to be heard through the political process. Preferably, the nature of voting rights – fundamental rights preservative of all others – is such

[21] 133 S.Ct. at 2619-20 (stating that §4 targeted jurisdictions).

[22] There is confusion in *Katzenbach* regarding whether the section 4 targets specific states or not. Compare 383 U.S. at 317 (noting that the coverage formula in the 1965 Act refers to "any State, or to any separate political subdivision such as a county or parish, for which two findings have been made") with 383 U.S. at 328 ("The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name.")

[23] 133 S.Ct. at 2628 (noting genesis of the coverage formula: "Congress identified the jurisdictions to be covered and then came up with criteria to describe them").

[24] See Katzenbach, 383 U.S. at 324 ("Nor does a State have standing as the parent of its citizens to invoke these constitutional protections against the Federal Government, the ultimate parens patriae of every American citizen.").

that the rights of voters ought to trump any right to equal sovereignty that a state can claim in the context where past violations of voting rights has triggered the preclearance structure. Simply, the doctrine of equal sovereignty should carry little, if any weight, in the context of VRA enforcement.

If the *Shelby County* Court had viewed covered jurisdictions less as states and more as litigants or potential violators of constitutional rights, it could have seen preclearance for what it is. Preclearance is a structure aimed at protecting citizens of jurisdictions from having their rights violated by an entity that has done so in the past. Preclearance is better thought of as a legislative injunction than as a pure law.

III. Preclearance as a Legislative Injunction

The *Shelby County* Court treated the preclearance structure as a typical law that intentionally imposed on certain states the burden of having their laws reviewed by the federal government before the laws could become effective. However, that approach to preclearance is somewhat narrow and misguided. That outlook focuses directly on §4's coverage formula and tangentially on §5's enforcement scheme. However, an appreciation of the full preclearance structure would have allowed the Court to conceive of the preclearance structure as a legislative injunction, a somewhat less dramatic remedy for the serious concern at hand. A brief explanation of the broader preclearance structure is necessary.

The preclearance structure has four essential parts: the coverage formula, preclearance enforcement, bail-out and bail-in. As noted above, §4 – the coverage formula – defines the jurisdictions that are to be required to seek preclearance for their voting changes. Section 5 requires that the covered jurisdiction submit their voting changes for preclearance by the Attorney General or a three-judge panel of the District Court of the District of Columbia. The bail-out provision is in §4(a) of the Act. It allows a jurisdiction to exit coverage and the preclearance regime if it can meet a certain list of criteria, including that it be free of voting rights violations for a number of years. Though some have argued that bailing out of the Act is nearly impossible, jurisdictions began bailing out of the Act in 1967 and continued to do so up until §4 was deemed unconstitutional.[25] Once a jurisdiction has bailed out, it is under the jurisdiction of a federal court for ten years. Conversely, §3(c) of the Act allows the Department of Justice to bail-in jurisdictions that have engaged in intentional discrimination with respect to voting rights.[26] Those jurisdictions then must have their voting changes precleared as if they were covered by §4.

When all of the parts of the preclearance regime are considered, the structure appears to be an attempt to make sure that jurisdictions that have engaged in unlawful conduct will be subject to having voting changes – the rules that they have used in the past to break the law – reviewed before those voting changes become effective. A jurisdiction that has shown that can be trusted over time to behave in a constitutional appropriate manner can exit preclearance. Conversely, a jurisdiction that had not been covered can, through unconstitutional conduct, enter the

[25] For a list of jurisdictions that have bailed out of preclearance coverage, see http://www.justice.gov/crt/about/vot/misc/sec_4.php .
[26] See 42 U.S.C. §1973a(c).

preclearance regime. The structure was built to make sure that jurisdictions that the federal government has reason to believe may issue discriminatory voting changes may be stopped from having those changes go into effect until a quick review of the changes occurred. The parts of the preclearance structure interact to allow those jurisdictions that need not be subject to preclearance to avoid it and to allow those jurisdictions that need to be subject to preclearance to be subject to it. The structure may look extraordinary because it is being imposed by a legislature. However, the substance of the structure is not particularly extraordinary. Indeed, it is not substantially different than injunctions against states or municipalities for other constitutional violations.

Preclearance is a structure for attempting to make sure that the voting rights laws are followed. It was not meant to provide a different or more onerous legal standard for the covered jurisdiction to meet. Since 1966, the courts and more recently Congress have built up a jurisprudence of §5 that differs from the jurisprudent of §2 – the broad voting rights legal standard that applies nationwide.[27] Consequently, it cannot be said that the standard for preclearance resembles the standard for avoiding §2 liability. Nonetheless, as originally drafted §§2 and 5 could have been read as encompassing the same substantive standard.

Looking at preclearance as a legislative injunction has a number of benefits. The structure of injunction fits fairly well with the structure of preclearance. Preclearance encourages the jurisdiction to follow the law prospectively rather than enjoining the enforcement of a law retrospectively. By stopping a voting change from becoming effective until it is precleared, preclearance effectively serves as a preliminary preemptive injunction. In addition, treating preclearance like an injunction would avoid the discussion of equal sovereignty that arguably sidetracked the *Shelby County* Court. Jurisdictions would be treated merely as litigants or parties. Lastly, the courts and commentators might stop discussing how onerous preclearance is. Many jurisdictions are subject to injunctions, consent decrees and the like. Certainly, those jurisdictions would rather not be subject to an injunction or other court supervision. However, those jurisdictions also realize that an injunction is not an impossible burden.

IV. Addressing a Preclearance as Legislative Injunction

Treating preclearance as a legislative injunction is convenient, but does not fully resolve the problem. If the *Shelby County* Court had viewed preclearance as a legislative injunction, it would still have had to consider how to approach and analyze Shelby County's request to dissolve. The Court's conclusion may or may not have been the same. However, the Court almost certainly would have approached the preclearance structure differently than it did. For example, the Court could have disposed of the equal sovereignty question quickly. When jurisdictions are subject to legal process, the issue is not whether the jurisdiction can be singled out for poor treatment. Rather, it is whether the jurisdiction deserves whatever treatment it gets.

[27] See, e.g., Reno v. Bossier Parish School Board, 520 U.S. 471, 477 (1997)(discussing differences between §2 and §5 jurisprudence).

Simply, the equal sovereignty question goes away. Nonetheless, there are a number of issues that the Court would have to engage.

For example, there are a few questions about legislative power that the Court would need address. The Court would need to address whether Congress had the authority to create a legislative injunction scheme. That question could be answered fairly quickly. The *Katzenbach* Court and *Shelby County* Court arguably already answered this question. The *Katzenbach* Court referenced the 15th Amendment as providing Congress the authority to create the preclearance structure, that is, the legislative injunction.[28] The *Shelby County* Court did not invalidate preclearance, it merely suggested that preclearance should be limited to extraordinary times.[29]

However, even if a legislative injunction is a legitimate tool to use, that does not say who should be able to dissolve it. Congress might argue that it created the preclearance/legislative injunction structure, so Congress alone should be able to dissolve the structure either by refusing to reauthorize preclearance in 2031 or by affirmatively repealing the structure. Congress might also argue that it should be allowed to continue preclearance in its sole discretion because of its right to pass enforcement legislation under the 15th Amendment. Conversely, the Court might argue that even though Congress could create the legislative injunction, injunctions and other remedies are judicial in nature. Consequently, the Court should have some say in whether the preclearance/judicial injunction structure can continue.

Assuming that the Court decided explicitly that preclearance as an injunction could continue, it must determine if Congress or the Court should be tasked with determining whether Shelby County should be able to exit preclearance. Congress could reasonably argue that it has already provided bailout as the only way to exit preclearance. Conversely, the Court could argue that it should be able to resolve legislative injunction cases the same way it would resolve other injunction cases, based on prudential grounds. The problem with the Court taking that path is that if the Court's grounds for dissolving the injunction with respect to Shelby County do not match with the bailout provisions that Congress already has in place, the Court is simply overriding Congress based purely on power. That clash of power is the problem that the *Shelby County* Court avoided by leaning so heavily on the equal sovereignty doctrine.

Though the questions in the last few paragraphs do not make it seem so, treating preclearance as a legislative injunction clarifies a few issues. First, it removes the equal sovereignty issue from the equation. Second, it forces the Court to consider whether Congress has the power under the 15th Amendment to create a legislative injunction. Third, it forces the Court consider whether Congress' only avenue for dissolving the legislative injunction – bailout – will be the only avenue for a jurisdiction to dissolve the legislative injunction. Last, it forces the Court to consider, without the cover of the equal sovereignty argument, whether it is willing to use raw power to override a remedial scheme that Congress almost certainly had the authority to create. Put slightly differently, Shelby County has been a covered jurisdiction under §4 for years and has never been able to bail out. Should Congress have sole control over whether Shelby County can exit the preclearance scheme or should the Court? The Court did not have to wrestle with that question when it focused on the equal sovereignty issue.

[28] 383 U.S. at 309.
[29] 113 S.Ct. at 2618.

CONCLUSION

In *Shelby County v. Holder*, the Supreme Court invalidated §4 of the Voting Rights Act because it viewed §4 – the formula used to determine which jurisdictions would be subject to the Act's preclearance provision – to be an inappropriate invasion of state sovereignty or state's rights. Section 5 of the Act – the preclearance provision – requires that jurisdictions covered by §4 have their voting changes approved by the federal government before taking effect. Such an invasion of sovereignty through §§4 and 5 had to be justified as necessary to address extraordinary current conditions, which the Court found not to exist. The Court's approach was unsurprising given that it had foreshadowed the approach in earlier cases. However, had the Court treated the preclearance scheme as the equivalent of a legislative injunction against the jurisdictions covered under section 4, it would have reached a more reasoned conclusion that more squarely addressed the subtext of the opinion – the proper scope of congressional authority under the 15th Amendment. Rather than address whether Congress should continue to make some states preclear voting changes – an equal protection-style argument – the Court should have focused more directly on whether Congress has authority under section 5 to make any state preclear voting changes – a due process-style argument. Of course, had it done so and had it followed prior precedent, it would likely have had to deem the preclearance process, with its coverage formula embedded in §4, constitutional.