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A Recent Decision of the US Supreme Court on Legal Discrimination in the Access to Voting Rights: Five Readings of Shelby County

The way to stop discriminating on the basis of race is to stop discriminating on the basis of race.
Chief Justice John Roberts¹

1. Introduction

It is a commonplace that the abolition of all formal forms of racial discrimination in the United States has not led to the eradication of various vestiges of discrimination, usually indirect, in the law. An important sphere of traditional discrimination concerns voting rights – arguably the key aspect of civic self-determination in a democracy. The Voting Rights Act (VRA) of 1965 was aimed at making it illegal to enact any indirect measures of discrimination against African-Americans, in particular through various tests, such as literacy or property tests, which in effect adversely impact on racial minorities, traditionally disadvantaged in access to the goods and benefits which figured as criteria in such tests. Nevertheless it was not the end of the problem as local authorities at the state and sub-state level, especially in the Southern states, have been quite ingenious in designing various patterns which, while facially race neutral, led to the exclusion of black Americans from equal access to voting. Hence, the Act established some special procedures for vetting and scrutinizing, by federal authorities, any modifications of election rules in states and sub-state entities viewed as particularly prone to enacting such designs, for discriminatory reasons or with discriminatory effects.

But things have changed – or are said to have changed – over the half a century which has passed since the enactment of the VRA, and an increasing number of political actors and legal practitioners and scholars have come to a view that those extraordinary designs (which will be described, in some detail, below) have long passed their ‘use by’ date. The law cannot be static, it has been said, and must respond to changed social and political realities, rather than remain set in stone. This is, in

¹ *Parents Involved in Community Schools v Seattle School District No. 1*, 551 US 701 (2007).

a nutshell, the basis for bringing a challenge to some sections of the VRA by a county in Alabama which felt victimized by special requirements of having to have their electoral arrangements approved by federal authorities, in contrast to the majority of US territorial entities which are free of such a burden. *Shelby County v Holder*,² a decision of the United States Supreme Court of 25 June 2013, resolved this issue to the satisfaction of Shelby County. But a very strong dissent and the fact that, like in so many of the Court's most controversial decisions, the Court was sharply divided 5:4 indicates that the problem at the root of the litigation is far from closed.

In this article we will begin by summarizing the facts and describing the judgment of the Court, as delivered by Chief Justice Roberts (Part 1), then we will discuss the lengthy and weighty dissenting opinion by Justice Ginsburg (Part 2), after which we will provide an overview of the main and most representative responses by legal scholars to the *Shelby County* decision (Part 3). In the concluding remarks we will offer some suggestions about the more general, rather than purely US-related, significance of the *Shelby County* decision.

2. The judgment

The only two relevant parts of the Voting Rights Act 1965 which came under the scrutiny of the Supreme Court were Sections 4 and 5. For the sake of information, the non-problematic, for this particular case, section 2 banned any 'standard, practice or procedure' that 'results in a denial or abridgment of the right of any citizen ... to vote on account of race or color'.³ As one can see, it amounts to a very basic anti-discrimination in voting principle, and is self-evident. No wonder that the applicability of this Section was universal throughout the United States, and permanent, with no sunset clause. This was not the case of two crucially relevant parts of the Act, namely Section 4 and 5. The former, Section 4, defined 'covered jurisdictions', which is an important term of art for the purposes of this law, as those states and other territorial political entities which maintained tests as prerequisites to voting, with an implication of discrimination against some categories of potential voters on the basis of their race, and had low voter registration or turnout in the 1960s and early 1970s, with an implication that the tests effectively discriminated against African Americans in the period up to the enactment of the VRA. In turn, Section 5 of the Act provided that those states and territorial entities were not allowed to make any changes in their voting procedures without a special permission (the so-called: preclearance) by federal authorities.

It is important to note that the mechanism designed by the combination of Sections 4 and 5 was to expire after five years, ie in 1970. However, the Act was

² 133 S Ct 2612 (2013).

³ See *Shelby County v Holder*, 133 S Ct at 2615.

reauthorized several times, without any substantive discussion and out of the motive to avoid controversial racial issues, with the effect that most recently, prior to bringing the matter before the Supreme Court, the ‘coverage’ of the relevant jurisdictions, ie the characteristic which compelled a federal ‘preclearance’ of any change in the voting system, no matter how minute, depended on whether a given entity, namely a state or a sub-state territory, had a voting test and a low turnout almost fifty years ago. It therefore was only a matter of time before one of such ‘covered jurisdictions’, in this case, Shelby County, a small territorial entity in the state of Alabama, claimed that Sections 4 and 5 are unconstitutional. It was a so-called facial challenge, which – without going into any detail – corresponds to what we know in Europe as an ‘abstract’ claim of unconstitutionality, as opposed to a ‘concrete’ challenge arising out of a particular case or controversy. The matter duly went all the way along the appellate system, to the Supreme Court: the district court upheld the Act, so did the District of Columbia Circuit Court, but the Supreme Court of the United States reversed, and found the challenged provisions unconstitutional by the narrowest of margins, 5:4.

The judgment of the Court was delivered by Chief Justice Roberts, joined by four other ‘conservative’ judges: Justices Scalia, Kennedy, Thomas, and Alito. Before we summarize the judgment, it is useful to note the significant rhetoric deliberately adopted by Chief Justice and underlying the entire judgment: the rhetoric informed by the very first sentence: ‘The Voting Rights Act of 1965 employed *extraordinary* measures to address an *extraordinary* problem’.⁴ This sense of extraordinariness, of an unusual character of the measures, and of their high time-sensitivity returns in the last sentence of the opinion: ‘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’.⁵ The text sandwiched between the opening salvo and the concluding remark gives expression to the fundamental idea articulated in these two phrases: the special measures treating some parts of the country differently from the others must be particularly well justified by reference to current conditions, and must expire as soon as these conditions vanish. They must be seen as an exception rather than a norm; there is a strong presumption against unequal treatment of different states, and the presumption may be rebutted only by very strong arguments, which, according to the Court’s majority, are no longer available.

The judgment may be presented as making four main points.

First, there is a very strong emphasis in the judgment on states’ rights in fashioning and designing their electoral systems, including those applicable to federal elections. The judgment makes a strong use of the concept, rarely appearing in the Court’s

⁴ 133 S Ct at 2618, emphasis added.

⁵ 133 S Ct at 2631, emphasis added.

recent case law, of ‘equal sovereignty’ of states,⁶ and also, in a less bombastic manner, of the autonomy of states regarding the power to regulate elections. The judgment even quotes a statement from a judgment going back more than 100 years whereby the Nation is ‘a union of States equal in power, dignity, and authority’⁷ even though this formula was used in a totally different context, namely concerning the admission of new states into the Union. Normally, the judgment observes, while state laws must not contradict federal law, which is the meaning of the Supremacy Clause, Article VI (2) of the Constitution, federal authorities do not have the power of vetoing state enactments before they come into force. The VRA starkly departs from these principles by requiring some states to approach the federal authorities for permission to implement laws which otherwise, in the absence of the challenged VRA provisions, the states would have the right to adopt and implement on their own. Such an exception must be subject to a very stringent judicial scrutiny, as already observed by the Supreme Court in 1966, in *Katzenbach*,⁸ as requiring justification by ‘exceptional circumstances’.⁹ In *Katzenbach*, the Court had upheld the law as constitutional.

Second, the judgment notes that the circumstances may have justified the special measures of the VRA in 1965, and thus met the test of very strict judicial scrutiny at the time. The ‘coverage’ formula, linking the exercise of special preclearance authority by the federal government to the circumstances in the identified States, was then justified with regard to the States to which it applied. For instance, the judgment reveals that shortly before the enactment of the VRA, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, and only 6.4 percent in Mississippi.¹⁰ The evidence of actual voting discrimination was then provided by two relatively uncontroversial and precise criteria: the use of various tests and devices for voter registration, and a low voting rate, defined then by being at least 12 percent below the national average. A combination of these two criteria justified an observation that the tests used were responsible for producing racial discrimination in the exer-

⁶ 133 S Ct at 2623–2624,

⁷ 133 S Ct at 2623, quoting *Coyle v Smith*, 221 US 559, 567 (1911).

⁸ *South Carolina v Katzenbach*, 383 US 301 (1966). In this decision, the Supreme Court rejected a challenge by the state of South Carolina to the preclearance provisions of the VRA. South Carolina challenged the provisions as an unconstitutional encroachment on states’ rights, as a violation of equality between the states, and as an illegal bill of attainder (legislative punishment enforced without due process of law). In his opinion for the Court, Chief Justice Earl Warren wrote that the Voting Rights Act was a valid exercise of Congress’ power under the enforcement clause of the Fifteenth Amendment which provides ‘The Congress shall have power to enforce this article by appropriate legislation’. The enforcement clause refers to the first section of the Amendment: ‘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’.

⁹ 383 US at 334.

¹⁰ 133 S Ct at 2624.

cise of the right to vote. Hence, the special measures of the VRA were, at the time of the Act's enactment, a rational tool for addressing the problem of discrimination.

Third, the circumstances which had justified the use of the VRA's special measures in the first place changed dramatically – and for the better – in the subsequent nearly fifty years. As the judgment suggests, with the use of extensive empirical evidence, voter turnout and registration rates in the covered jurisdictions reached parity with the national rates, the tests which in the past blocked access to some voters had been forbidden everywhere for nearly forty years, and African-American candidates hold office at unprecedented levels.

Fourth, Section 4 formula, which defines covered jurisdictions, is unconstitutional because it is based on obsolete data and on practices which no longer occur; hence, it is not a rational method of solving the problem, identified as low voter registration and turnout by minority citizens. Since 1965 voter turnout have risen dramatically in covered States, and the tests which had been responsible for much of the problem, including literacy tests, have been banned for over forty years. The judgment admits that '[t]here is no doubt that these improvements are in large part *because of the Voting Rights Act*',¹¹ but this does not detract from the fact that the VRA divides the Nation along the lines which no longer exist. '[H]istory did not end in 1965'¹² – proclaims emphatically Chief Justice Roberts, and adds that the 15th Amendment to the Constitution, which prohibits denying a right to vote on the basis of race, colour, or previous condition of servitude, 'is not designed to punish for the past; its purpose is to ensure a better future'.¹³

So much for the main points made in the opinion of the Court delivered by Chief Justice Roberts. It may be added that, as far as the 'conservative' majority is concerned, there is also a short concurring opinion by Justice Clarence Thomas, the only African-American judge on the Court today, who actually goes one step further and would also strike down Section 5 of the VRA. The main judgment did not find it necessary to take this extra step: it is obvious that once Section 4 defining 'covered jurisdictions' has been struck down, Section 5 defining 'preclearance' is moot. In other words, if we can be permitted a motoring metaphor, once we remove the engine from the car, we do not need to remove the clutch to make it immobile. Justice Thomas, however, takes this opportunity to restate, even more emphatically than the main opinion does, the changes in the United States since the VRA and the alleged failure by the Congress to provide good reason for maintaining the special measures. He concludes that, by omitting to tackle explicitly the issue of Section 5 and by 'leaving the inevitable conclusion [that Section 5 is unconstitutional] unstated', the majority

¹¹ 133 S Ct at 2626 (emphasis in the original).

¹² 133 S Ct at 2628.

¹³ 133 S Ct at 2629.

decision ‘needlessly prolongs the demise of that provision’.¹⁴ In other words, for Justice Thomas a legally tidy solution would require an express invalidation of both Sections, 4 and 5, at the same time.

3. The dissent

The dissenting opinion by Justice Ginsburg, the sole dissenting opinion in the judgment, joined by Justices Breyer, Sotomayor and Kagan, is monumental in size: it is thirty-five percent longer than the opinion for the Court authored by Chief Justice, and emphatic in tone. As in the case of the opinion for the Court, the dissenting opinion begins with a powerful rhetorical salvo, which encapsulates in one single phrase the whole argument of the dissent: ‘In the Court’s view, the very success of §5 of the Voting Rights Act demands its dormancy’.¹⁵ The irony identified by Justice Ginsburg and depicted in this sentence, is stunning, and in a way, corresponds with the already-cited statement from the opinion for the Court by Chief Justice: ‘There is no doubt that these improvements are in large part *because of* the Voting Rights Act’.¹⁶ Of course, the evaluative implications of these two observations are diametrically opposed to each other.

The main thrust of Justice Ginsburg’s argument can be summarized in the following five points.

First, voting discrimination on racial grounds in the United States still exists; it is not merely a matter of the past. The VRA, with its Section 5 mechanism, has been the most effective of a whole array of legal devices aimed at remedying this problem, but despite its unquestionable effectiveness, it has not eliminated ‘all vestiges of discrimination against the exercise of the franchise by minority citizens’.¹⁷ Importantly, the jurisdictions defined in Section 4 and subject to Section 5 preclearance have been submitting, until quite recently, various proposed changes to the voting laws that the federal Attorney General *declined* to approve, on the basis that ‘barriers to minority voting would quickly resurface were the preclearance remedy eliminated’.¹⁸ In fact, as Justice Ginsburg says, for instance between 1982 and 2006, the Department of Justice blocked over 700 voting changes based on a determination that the changes were discriminatory.¹⁹ Hence, the implication is, the combined Section 4 and Section 5 mechanism has been effective until now, and has played a salutary role.

¹⁴ 133 S Ct at 2632 (Thomas J, concurring).

¹⁵ 133 S Ct at 2632 (Ginsburg J, dissenting).

¹⁶ 133 S Ct at 2626.

¹⁷ 133 S Ct at 2634 (Ginsburg J, dissenting).

¹⁸ 133 S Ct at 2634 (Ginsburg J, dissenting).

¹⁹ 133 S Ct at 2639 (Ginsburg J, dissenting).

Second, Justice Ginsburg spends a lot of time describing various ‘second-generation barriers’²⁰ to voting, such as racial gerrymandering, ie the redrawing of legislative districts in an effort to reduce the weight of minority votes, adoption of a system of „at-large voting” rather than district-by-district voting, with a result that a white majority can better control the election of each city council member, etc. Drawing on the scholarly literature of law, political science, and sociology, the dissenting judge shows how those various devices effectively hinder the growth in black voting occasioned by the operation of VRA. Justice Ginsburg also studies carefully the congressional debates surrounding the reauthorizations of VRA, and shows that the Congress on each such occasion has taken its task very seriously, conducting in-depth hearings and taking on board reliable data about voting. Justice Ginsburg approvingly discusses Congress’s findings that, without the mechanism designed by the VRA, the right to vote by minority citizens would have been greatly reduced and the weight of their votes considerably diluted.

Third, Justice Ginsburg considers the constitutional authority of Congress to adopt and reauthorize the mechanism designed by the VRA, and correspondingly, the Supreme Court’s power of judicial review in cases such as that of the VRA. She forcefully defends the thesis that in matters of ‘the most constitutionally invidious form[s] of discrimination, and the most fundamental right[s] in our constitutional system’,²¹ the congressional power to act ‘is at its height’,²² and the Court must adopt an attitude of ‘deference’.²³ Looking at a variety of sources, and in particular at the stated purposes of the post-Civil War Amendments, at the Court’s case law and at scholarly legal writings, Justice Ginsburg concludes that the Court should adopt a rational basis test, which is the most deferential in a panoply of tests that the Court exercises to scrutinize the constitutionality of legislative acts.²⁴ Under this test, the law must stand if it uses rational means to effectuate prohibition of discrimination. Such a test is easily met by the legislation reauthorizing a statute aimed at combatting discrimination in voting. This conclusion is supported by a large body of evidence on which Congress based its decision to continue the preclearance remedy towards the covered jurisdictions. What is particularly effective is a large number of real-life stories, taken from legislative records, that Justice Ginsburg includes to illustrate her proposition regarding the persistence of various devices and tricks meant to reduce the black vote or dilute its effect. Consider just one, to get the flavour of the problem: ‘In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce

²⁰ 133 S Ct at 2635 (Ginsburg J, dissenting).

²¹ 133 S Ct at 2636 (Ginsburg J, dissenting).

²² 133 S Ct at 2636 (Ginsburg J, dissenting).

²³ 133 S Ct at 2636 (Ginsburg J, dissenting).

²⁴ 133 S Ct at 2636–2639 (Ginsburg J, dissenting).

the availability of early voting in that election at polling places near a historically black university.²⁵

Fourth, Justice Ginsburg forcefully rejects the application of the principle of ‘equal sovereignty’ to the matter under scrutiny in *Shelby County*.²⁶ Looking at the relevant case law, and in particular the already-mentioned *Katzenbach* case, she argues that this principle applies only to the terms under which new States are admitted to the Union, and not to the remedies for various local problems which may have occurred *after* the admission of a State. Consequently, no differential treatment of some States compared to others may be found as violative of the principle of ‘equal sovereignty’. To support this legal proposition, she cites a number of Court-approved instances of a differential treatment of various States, as a function of different local problems and evils.²⁷

Fifth, Justice Ginsburg asserts that the description of covered jurisdictions, as defined in Section 4, retains its salience and relevance even now, fifty years after the adoption of the VRA. She cites a number of studies and congressional evidence which indicate that in those jurisdictions voting is more racially polarized than elsewhere in the United States, and while polarization *per se* is not a signal of discrimination, it increases the ‘vulnerability of racial minorities to discriminatory changes in voting law’.²⁸ The dissenting judge harshly criticizes the main opinion for its insensitivity to this matter and for its unwillingness to consider the massive legislative record that the Congress assembled in connection with the reauthorization of the VRA mechanism under scrutiny. In particular, the Court failed to consider the persistence of purposeful racial discrimination in Alabama – the state in which Shelby County is located. On this basis, Justice Ginsburg concludes that the Section 5’s ‘preclearance requirement is constitutional as applied to Alabama and its political subdivisions’.²⁹

4. Scholarly responses

It seems that the dominant scholarly response to *Shelby County* has been very critical. Perhaps the most emphatic condemnation of the judgment, analogized \ to openly racist judgments in the Court’s history, such as the infamous *Dred Scott*,³⁰ has

²⁵ 133 S Ct at 2641 (Ginsburg J, dissenting).

²⁶ 133 S Ct at 2648–49 (Ginsburg J, dissenting).

²⁷ 133 S Ct at 2649 (Ginsburg J, dissenting).

²⁸ 133 S Ct at 2643 (Ginsburg J, dissenting).

²⁹ 133 S Ct at 2647 (Ginsburg J, dissenting).

³⁰ *Dred Scott v Sandford*, 60 US 393 (1857). In this judgment, now universally held as the worst decision in the US Supreme Court’s history, the Court ruled that a Black could not be an American citizen and therefore had no standing to sue in federal court, and that the federal government had no power to regulate slavery in the federal territories acquired after the creation of the United States.

been expressed in an article by James Blacksher, a practicing lawyer, and Lani Guinier, an eminent Harvard Law School professor with an impressive record of work for the Department of Justice and also of activism within the NAACP Legal Defense Fund.³¹ Blacksher and Guinier are unabashed in exclaiming that the Supreme Court's decision in *Shelby County* 'revitalizes the oldest and most demeaning official insult to African Americans in American constitutional history'.³² As they point out, *Shelby County* is the first decision since *Dred Scott* to invoke the doctrine of equal sovereignty where the right to vote is involved and to find – as the Court did in *Dred Scott* – that the equal sovereignty of the State takes precedence over Congress's exercise of its explicit constitutional power to enforce the voting rights of the descendants of slaves.³³ It is in this context that Blacksher and Guinier make reference to a Yale Law School professor and a leading constitutional law scholar in the United States, Akhil Reed Amar, who points out that one major reason why the phrase 'right to vote' does not appear in the original Constitution is that the slave states 'were fiercely unwilling to give the federal government wide authority over states on this sensitive issue'.³⁴ Chief Justice Roberts' revitalization and use of the equal sovereignty principle is the main target of the criticism by these two authors. They also emphasize that it is beyond dispute that – in the words of Jed Rubenfeld – the right to vote is 'the quintessential right of citizenship'.³⁵

Some other critiques of *Shelby County* are perhaps less vehement, and less focused on the outcome than on the methodology employed in Chief Justice's reasoning, namely, criticizing the use of a relatively stringent scrutiny of assessing congressional regulations in this field. A representative example of such argument is provided in the article by Michael James Burns³⁶ who deplores the use of the 'congruence and proportionality standard' rather than the traditional, deferential 'rational basis test'. Burns outlines why he believes the congruence and proportionality standard was not intended to apply to the civil war amendments' core function of preventing racial discrimination³⁷ and how this standard increases Congress's burden to collect evidence of discrimination.³⁸ In conclusion Burns highlights that the Court in *Shelby County* failed to provide sufficient justification for its flagrant disregard for 'nearly a half-century of rationality deference to Congress's enforce-

³¹ J. Blacksher and L. Guinier, 'Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right To Vote *Shelby County v. Holder*' (2014) 8 Harvard Law & Policy Review, 39–69.

³² J. Blacksher and L. Guinier, 'Free at Last...' (n 31) 39.

³³ J. Blacksher and L. Guinier, 'Free at Last...' (n 31) 39.

³⁴ J. Blacksher and L. Guinier, 'Free at Last...' (n 31) 40.

³⁵ J. Blacksher and L. Guinier, 'Free at Last...' (n 31) 62.

³⁶ M.J. Burns, '*Shelby County v. Holder* and the Voting Rights Act: Getting the Right Answer with the Wrong Standard', (2012) 62 Catholic University Law Review, 227–252.

³⁷ M.J. Burns, '*Shelby County v. Holder*...' (n 36) 249–250.

³⁸ M.J. Burns, '*Shelby County v. Holder*...' (n 36) 250–251.

ment authority under Section 2 of the Fifteenth Amendment'.³⁹ Burns aptly points out that by shifting 'from the rational basis review to congruence and proportionality', the courts are essentially undermining 'Congress's primary purpose in enacting the prophylactic provisions' and thus, they are shifting 'the burden of proving discrimination from individuals and the federal government to the perpetrators to disprove discriminatory intent or effect'.⁴⁰ And this, Burns warns, is a dangerous position to be in. Ultimately, Burns comments that the Court in *Shelby County* should have 'continued to apply the rational means standard employed by the Supreme Court in *Katzenbach*'.⁴¹

Another strand of critique of *Shelby County* depicts what is seen as an illusory or even false 'judicial minimalism' evident in Chief Justice's argument. Representative for this theme is an article by Richard L. Hasen, professor of law and political science at the University of California, Irvine School of Law.⁴² Hasen labels Chief Justice Robert's majority opinion in *Shelby County* as 'a modest decision written with reluctance and humility'.⁴³ However, despite 'the projected judicial modesty', Hasen finds that the *Shelby County* decision was 'doing much more than calling balls and strikes'⁴⁴ – the decision amounted to 'an audacious opinion which ignores history, declines to engage the dissent's powerful argument that the VRA's bailout provisions solve any constitutional problem, and rejects the Roberts Court's stated commitment to judicial minimalism'.⁴⁵

Following the initial critique, Hasen claims that the *Shelby County* decision is 'minimalist in a different, important sense as well: its brevity seeks to mask major doctrinal and jurisprudential change'.⁴⁶ Hasen claims that, by writing a very short opinion which, in our view, is not entirely correct, and avoiding a discussion of the history of the Fifteenth Amendment, 'the Court tried to hide the major jurisprudential hurdles it jumped to reach a political decision'⁴⁷ – this Hansen terms as *Shelby County's* 'false minimalism'.⁴⁸ And one of the main defects that he finds in the judgment is the fact that it exclusively focuses on Section 4 coverage formula, while disregarding the issue of the constitutionality of Section 5 preclearance – a matter, as we have seen, addressed in the concurrence by Justice Thomas.

³⁹ M.J. Burns, '*Shelby County v. Holder...*' (n 36) 251.

⁴⁰ M.J. Burns, '*Shelby County v. Holder...*' (n 36).

⁴¹ M.J. Burns, '*Shelby County v. Holder...*' (n 36) 251–252.

⁴² R.L. Hasen, '*Shelby County* and the Illusion of Minimalism', (2013–2014) 22 *William and Mary Bill of Rights Journal*, 713–746.

⁴³ R.L. Hasen, '*Shelby County...*' (n 42) 713.

⁴⁴ R.L. Hasen, '*Shelby County...*' (n 42) 714.

⁴⁵ R.L. Hasen, '*Shelby County...*' (n 42).

⁴⁶ R.L. Hasen, '*Shelby County...*' (n 42).

⁴⁷ R.L. Hasen, '*Shelby County...*' (n 42).

⁴⁸ R.L. Hasen, '*Shelby County...*' (n 42) 722.

On the point of false minimalism, Hasen pinpoints two ways in which the *Shelby County* decision is falsely minimalist.⁴⁹ First, the Court's opinion 'purports to decide less than it could have, pretending to leave room for Congress to respond to the decision with a new preclearance regime'.⁵⁰ Second, 'the opinion is brief and breezy, eliding rather than confronting serious jurisprudential hurdles in the way of its decision'.⁵¹ With regard to the *Shelby County* dissent by Justice Ginsburg, Hansen asserts that the 'dissent has the stronger argument regarding the appropriate standard for reviewing federal voting legislation that Congress passes using its Fifteenth Amendment enforcement powers'.⁵²

Finally, yet another strand of scholarly commentary triggered by *Shelby County*, much less critical of the decision than the articles summarized so far, reflects upon the future of congressional regulatory authority, in the light of *Shelby County*. The leading 'Law of Democracy' scholar in the United States, NYU Law School Professor Samuel Issacharoff, in a comment published in the *Harvard Law Review* soon after *Shelby County* was decided,⁵³ observed that the decision should be seen as a demonstration of the view that the 'civil rights-era concerns could no longer justify requiring certain jurisdictions to obtain Department of Justice (DOJ) approval before altering voting procedures'.⁵⁴ For this reason, he has dubbed the *Shelby County* decision as an 'unromantic constitutional ruling', which he believes should prompt rethinking whether the regulatory model of prior federal approval of voting changes is truly responsive to the voting problems of today.⁵⁵ With respect to the impact of the *Shelby County* decision upon election regulations, Issacharoff comments that *Shelby County* effectively 'removes the VRA's ex ante prohibition from the agenda' such that this 'leaves a liability-based ex post regime as a potential alternative form of regulation'.⁵⁶ Ultimately, according to Issacharoff, the combination of *Shelby County* and *Arizona v Inter Tribal Council of Arizona* – a judgment handed down in the same Term as *Shelby County*, where the Court reaffirmed expansive congressional powers under the Election Clause of the Constitution (Article 1 Section 4) – provides 'an opportunity to overcome political stasis and perhaps devise a more effective regulatory regime to protect the franchise'.⁵⁷

⁴⁹ R.L. Hasen, '*Shelby County*...' (n 42) 726.

⁵⁰ R.L. Hasen, '*Shelby County*...' (n 42).

⁵¹ R.L. Hasen, '*Shelby County*...' (n 42).

⁵² R.L. Hasen, '*Shelby County*...' (n 42) 738.

⁵³ S. Issacharoff, 'Comments: Beyond the Discrimination Model on Voting', (2013) 127 *Harvard Law Review*, 95–126.

⁵⁴ S. Issacharoff, 'Comments: Beyond...' (n 53) 95.

⁵⁵ S. Issacharoff, 'Comments: Beyond...' (n 53) 96.

⁵⁶ S. Issacharoff, 'Comments: Beyond...' (n 53) 118.

⁵⁷ S. Issacharoff, 'Comments: Beyond...' (n 53) 125.

5. Conclusions

What are the broader implications of the *Shelby County* decision which may be of interest to non-US lawyers and the general public? Admittedly, much of the argument in the judgment and in dissent is strictly US-specific, and responds to the issues, doctrines, and facts which have no bearing outside the United States. But it does not follow that the judgment is of no interest, or of marginal interest only, to lawyers and scholars concerned with anti-discrimination law beyond the United States.

Shelby County can be read in different ways, mutually not incompatible, that can be of some interest even to those lawyers who are not primarily concerned with the US law. We wish to identify five such readings that may be of a relatively universal relevance.

The first reading is about the relationship between federal and local authorities with regard to anti-discrimination law, and more particularly, to non-discrimination in voting. To a non-US lawyer it may come as a surprise that state and local authorities in the United States retain such a powerful, controlling position vis-à-vis electoral system(s). It would seem, especially to a European observer, that some fundamental rules of voting in a modern state are a paradigmatic prerogative of central authorities because they should be uniform throughout the overall political entity – and this applies to federal and unitary states alike. And yet, as the controversy around the idea of ‘equal sovereignty’ of states endorsed by Chief Justice and challenged by Justice Ginsburg shows, this is far from a resolved matter in the United States. This raises an interesting theoretical issue: to what extent voting procedures should be a matter which defines citizens of the entity as a whole and thus, should be homogenous throughout that entity, and to what extent they should be left to a decision by local communities? After all, if the act of voting is the primary act of civic obligation and citizen’s identity, in a modern republic the circumstances and procedures of such voting should not depend crucially on the specific locality in which a citizen votes.

The second reading is about the permissibility of differential legal treatment, including more rigorous legal treatment, of some entities such as states, provinces, *Länder*, etc. in a federal republic, or of local entities in a decentralized although formally unitary state. Is it *prima facie* offensive to a particular sub-entity to impose upon it higher constitutional conditions for dealing with a particular problem if a central authority finds a particular gravity with which this problem occurs in some entities rather than others? Or should there be a strong presumption of legal equality throughout the whole territory – perhaps a presumption which can be rebutted only with the use of especially compelling evidence? The former solution, namely an easy availability for differential conditions, suggests a more individualist approach: the possible ‘offence’ may be to individuals only, and no offence is valid when individuals in some territories of the country face certain unconstitutional conditions.

On the other hand, the latter approach, of which the principle of equal sovereignty is an emblematic example, reveals a more communitarian approach: the ‘offence’ is to a territorial entity as a whole which is said to suffer a special form of indignity, stigma and opprobrium when subjected to more demanding constitutional tests than other sub-entities.

The third reading of the judgment is about the relationship between the legislative and the judiciary powers in defining the approaches that can be legitimately taken in order to eradicate vestiges of the past discrimination on racial grounds. This is, basically, an issue of the justification and limits of judicial deference in this matter. By opting for a non-deferential method Chief Justice and the conservative wing of the Court expressed high judicial distrust in the wisdom of Congress when designing the measures to eradicate such discrimination. In contrast, Justice Ginsburg and her liberal co-dissenters granted the federal legislature broad discretion in authoritatively finding the risk of discrimination and crafting legal measures to counteract. So the second interesting theoretical problem, of broader applicability than just to the US law, is whether a legislature which is clearly motivated by benign purposes (a point no-one seriously questioned here) should be viewed with distrust when it applies special measures only to selected territorial entities?

The fourth reading is about the significance of the passage of time. Should measures adopted, with reason, at time $t-1$, be actively and inquisitively reviewed at time $t-2$, $t-3$, etc., or should they be allowed to run their course for a significant period of time, and what period of time is sufficiently ‘significant’? The law is, by its very nature, a conservative instrument: it cannot be reviewed and changed every moment someone feels that it has already performed its purported function. On the other hand, a starkly anachronistic and obsolete law brings more harm than good: if the circumstances which triggered the need for the law in the first place have long ceased to exist, the law addresses a non-existing harm. It is then a bad law.

Related to the fourth is the fifth reading of *Shelby County*: it is about the use of empirical evidence. Both the main judgment and the dissenting opinion make generous use of empirical evidence about the persistence of racial discrimination in voting in the United States – but they draw opposite conclusions from the evidence they cite. Is it the case that they are both guilty of a disingenuous ‘cherry-picking’: of identifying and citing only these pieces of evidence which suit their predetermined conclusions while turning a blind eye to the evidence that is not favourable to their stance? Or is there something deeper to their evidence-based disagreement? Perhaps it is really the case that one and the same piece of evidence, when combined with different normative and interpretive assumptions, *may* be put to a different use? To render the disagreement between Chief Justice and Justice Ginsburg in a deliberately sharpened, simplified manner, it can be depicted in the following way: Chief Justice Roberts: ‘Special measures have already achieved their goal so we do not need them

any more’, Justice Ginsburg: ‘The goals have been achieved mainly thanks to the application of special measures so we need them in order to keep attaining these goals’.⁵⁸ The difference between the two positions is stark, but they can be well based on one and the same set of empirical evidence. This may show that the usage of empirical evidence by judges is more problematic than it may appear at first blush.

As noted by David Cole, legal columnist of the NYRB: ‘The evidence that race still matters in twenty-first century America is overwhelming. It includes the police killings of Eric Garner, Laquan McDonald, and countless other young black men; the passionate student movement for racial justice that is sweeping college campuses; the continuing glaring racial disparities in employment, income, incarceration, and life expectancy’⁵⁹. Undoubtedly, race ‘still matters’, also at the Supreme Court. Very recently, the Court once again dealt with the issue of constitutionality of affirmative action hearing the *Fisher v University of Texas* case.⁶⁰ And even though it seems unlikely for the Court to issue an opinion stating the definite end of affirmative action in the US, it is certain that the question will be revised again in the near future as the conflict between those attesting to the still existing need for affirmative action and those claiming the ‘color-blind’ society argument continues, not only among justices of the US Supreme Court.

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⁵⁸ Note that these are not quotations but our deliberate paraphrases of their views.

⁵⁹ D. Cole, ‘Race Matters at the Supreme Court’ *NYR Daily* (New York, 8 December 2015) <<http://www.nybooks.com/daily/2015/12/08/supreme-court-threat-to-campus-diversity-affirmative-action/>>.

⁶⁰ *Fisher v University of Texas at Austin*, 14–981 (2015).