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Ellen D. Katz

University of Michigan Law School, ekatz@umich.edu

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ELLEN D. KATZ

A Cure Worse than the Disease?

The pending challenge to section 5 of the Voting Rights Act insists the statute is no longer necessary. Should the Supreme Court agree, its ruling is likely to reflect the belief that section 5 is not only obsolete but that its requirements do more harm today than the condition it was crafted to address. In this Essay, Professor Ellen D. Katz examines why the Court might liken section 5 to a destructive treatment and why reliance on that analogy in the pending case threatens to leave the underlying condition unaddressed and Congress without the power to address it.

Following oral argument in *Shelby County v. Holder*, Abigail Thernstrom proposed a provocative analogy. Thernstrom, the vice chair of the U.S. Commission on Civil Rights and a longtime commentator on voting issues, suggested that places like Shelby County, Alabama might be likened to a patient with a heart problem, and section 5 of the Voting Rights Act (VRA) could be seen as the prescribed medication.¹ According to Thernstrom, the medication “helps” at the beginning, but soon it “starts to wreck the patient’s kidneys.” So too, Thernstrom argued, with section 5 of the VRA, a provision she says initially did a lot of good, but, in her view, has been wrecking things in covered jurisdictions for a long time now. Her message is clear: the treatment should be scrapped before it does any more damage to the patient.

Thernstrom’s destructive-treatment analogy is interesting and well worth considering. Unlike the medical analogies more frequently employed in the ongoing debate over section 5, Thernstrom’s does not liken the discrimination that Congress crafted section 5 to address to a physical disorder that has since been cured,² or, alternatively, a condition that will worsen absent the

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1. Abigail Thernstrom, *Commentary on Shelby County v. Holder*, SCOTUSblog (Feb. 28, 2013, 5:46 PM), <http://www.scotusblog.com/2013/02/commentary-on-shelby-county-v-holder>.
 2. See, e.g., Transcript of Oral Argument at 65-66, *Shelby County v. Holder*, No. 12-96 (U.S. argued Feb. 27, 2013) (statement of Bert Rein); Emily Bazelon, *Is the South Still Racist?*,

prescribed treatment.³ Instead, Thernstrom's concern, in this latest piece at least, is with the treatment itself. And she is not alone in thinking that section 5 has been unduly destructive. The destructive-treatment analogy succinctly captures a primary reason why many, and perhaps most, of the Justices are so unhappy with the section 5 preclearance regime.

This concern about section 5 transcends the suspicion that covered jurisdictions are insufficiently distinct from non-covered ones and the belief that Congress was not rigorous enough in considering that question. Instead, the destructive-treatment analogy nicely captures the Justices' longstanding frustration with the way in which section 5 has been used to require the creation and maintenance of electoral districts in which minority voters are a majority of the electorate.⁴ For Thernstrom, and for many of the Justices, such districts are deeply flawed structures that harm minority representatives, minority voters, and the democratic process as a whole.⁵

To be sure, not everyone agrees,⁶ and this disagreement explains, at least in part, why Justice Scalia's reference to "a racial entitlement" at oral argument sparked such strong reactions.⁷ But for Thernstrom and those who share her

SLATE (Feb. 27, 2013, 4:17 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2013/02/the_supreme_court_hears_shelby_county_argument_the_court_s_conservatives.html; Jeffrey Toobin, *Casting Votes*, NEW YORKER (Jan. 14, 2013), http://www.newyorker.com/talk/comment/2013/01/14/130114taco_talk_toobin (discussing Chief Justice Roberts's oral argument questioning in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), which suggested that the VRA is "a kind of legal smallpox vaccine," or a cure for a defunct disease).

3. See, e.g., Janell Ross, *Supreme Court Hears Voting Rights Act Challenge Brought by Shelby County, Alabama*, HUFFINGTON POST (Feb. 27, 2013, 11:12 AM), http://www.huffingtonpost.com/2013/02/27/supreme-court-voting-rights-act-shelby-county_n_2769901.html (reporting NAACP Legal Defense and Educational Fund attorney Ryan Haygood's suggestion that rejecting section 5 as no longer necessary "is akin to claiming that a needed medication has produced some healing so all patients should discontinue all treatment"); *The Melissa Harris-Perry Show* (NBC television broadcast Feb. 24, 2013) (comparing the claim that section 5 is no longer necessary because of reduced discrimination to withdrawing blood pressure medication from a patient whose blood pressure is not elevated when medicated).
4. See *infra* notes 13-20 and accompanying text.
5. See Thernstrom, *supra* note 1.
6. For different views on section 5's effect, see Brief for Professors Richard L. Engstrom et al. as Amici Curiae in Support of Respondents at 27-29, *Shelby County*, No. 12-96, 2013 WL 417741 (arguing that majority-minority districts "promote a 'politics of commonality'" that results in minority candidates being elected with cross-racial support).
7. Transcript of Oral Argument at 47, *Shelby County*, No. 12-96 (statement of Scalia, J.) (suggesting that the VRA is a "racial entitlement" and "[t]here are certain districts in the House that are black districts by law just about now"). For reactions, see, for example, Adam Liptak, *Voting Rights Law Draws Skepticism From Justices*, N.Y. TIMES, Feb. 27, 2013,

dislike for the way in which section 5 fosters the aggregation of voters based on race, the destructive-treatment analogy appears to be not only apt, but also good cause to scrap the regime.

This short Essay argues otherwise. It does so by taking issue with the implications of the analogy rather than with its substance. That is, it argues that even if section 5 has been damaging in the way Thernstrom suggests, that damage is not cause to invalidate the regime.

Part of the reason is fit. The destructive-treatment analogy targets section 5's application in the redistricting context, but section 5 applies more widely to a host of other actions that do not implicate the concerns the analogy identifies. Scrapping section 5 in order to address these concerns would be much like denying beneficial treatment to patients who are immune from the treatment's damaging side effects. In other words, even if the destructive-treatment analogy is correct, it is not cause to toss out section 5 in its entirety.

As critical, however, is the fact that section 5 need not be invalidated to address the concerns underlying the destructive-treatment analogy. The districting moves to which Thernstrom objects stem not from an inexorable statutory command—the “medicine,” so to speak—but from constructions of the statute the Justices themselves have either espoused or accepted—that is, the manner in which the medicine has been prescribed. Put differently, the issues that vex Thernstrom and many members of the Court are, as Justice Kennedy said in another context, problems “of our own creation.”⁸ As such, these problems are better addressed by statutory construction in future cases than by being bootstrapped into the distinct constitutional question at issue in *Shelby County*.

The Court today appears poised to scrap section 5 of the VRA. An opinion so holding would likely posit that covered jurisdictions no longer warrant distinct treatment. I have explained elsewhere why that is the wrong conclusion for the Court to make in this case.⁹ But an opinion striking down section 5 is also likely to be shaped by the destructive-treatment analogy and, specifically, the belief that the treatment Congress prescribed does more harm

<http://www.nytimes.com/2013/02/28/us/politics/conservative-justices-voice-skepticism-on-voting-law.html>; Amy Davidson, *In Voting Rights, Scalia Sees a “Racial Entitlement,”* NEW YORKER: CLOSE READ (Feb. 28, 2013), <http://www.newyorker.com/online/blogs/closetread/2013/02/in-voting-rights-scalia-sees-a-racial-entitlement.html>; and Josh Gerstein, *5 Takeaways from the Voting Rights Act Arguments*, POLITICO (Feb. 27, 2013, 7:10 PM), <http://www.politico.com/story/2013/02/takeaways-from-the-voting-rights-act-arguments-88207.html>.

8. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting).
9. Brief of Amici Curiae Ellen D. Katz and the Voting Rights Initiative in Support of Respondents, *Shelby County*, No. 12-96, 2013 WL 457386.

today than the condition it was crafted to address. This would be doubly unfortunate. The concerns underlying the destructive-treatment analogy warrant serious discussion, but *Shelby County* is not the venue in which that discussion can productively occur. Instead, reliance on the analogy in *Shelby County* threatens to leave the underlying condition unaddressed and Congress without the power to address it.

I. A COUNTERPRODUCTIVE REMEDY?

Section 5 of the VRA requires covered jurisdictions to demonstrate that proposed electoral changes will have neither the purpose nor the effect of denying or abridging the right to vote based on race or membership in a protected language community.¹⁰ As with other antidiscrimination measures barring actions with racially discriminatory effects, compliance requires public officials who are subject to the section 5 standard to consider race.¹¹ These officials cannot know, much less demonstrate, that proposed changes to their electoral processes would be nondiscriminatory in effect without first considering the ways the changes might affect particular racial groups. For this reason, section 5 is among the antidiscrimination measures that are increasingly worrisome to the modern Court.¹²

And yet, race consciousness per se is not why section 5 is seen by many to be a damaging and counterproductive remedy. The core objection is not that the statute fosters the creation of electoral districts drawn with an awareness of their racial composition, but instead that it fosters the creation and maintenance of districts drawn so that minority voters will constitute a majority of the district's electorate.

10. 42 U.S.C. § 1973c(a) (2006).

11. See Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw*, 149 U. PA. L. REV. 1, 55-67, 78-83 (2000).

12. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 579-93 (2009); *id.* at 594-95 (Scalia, J., concurring) (observing that “[g]overnment compulsion” through disparate impact laws “would therefore seemingly violate equal protection principles,” that it is irrelevant “that Title VII requires consideration of race on a wholesale, rather than retail, level,” and that the “purportedly benign motive for the disparate-impact provisions cannot save the statute”); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); see also *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”).

For example, when Chief Justice Roberts famously condemned this “sordid business, this divvying us up by race,”¹³ he was objecting to a specific type of race-based decision-making, and not to racially conscious redistricting writ large. Notably, the Chief Justice would have let the redistricting plan at issue in *LULAC v. Perry* stand despite the multitude of racially informed electoral lines it created.¹⁴ What troubled Chief Justice Roberts seven years ago was, as Thernstrom notes, a particular type of “racial sorting,” namely, “the districts carefully drawn to reserve legislative seats for African Americans.”¹⁵ It was to this specific practice that the Chief Justice directed his objection, a practice which Thernstrom describes as having “become a statutory mandate.”¹⁶

Chief Justice Roberts was not alone in objecting. Other Justices have also voiced discomfort with, and disapproval of, the practice of creating and maintaining districts in which minority voters will be the majority of the electorate. Twenty years ago, Justice O’Connor described some of these districts as threatening to “balkanize” the nation and resembling “political apartheid”;¹⁷ Justice Thomas derided the process of “segregating the races into political homelands” as “repugnant”;¹⁸ and Justice Souter deemed the majority-minority districts “the politics of second best.”¹⁹ Much more recently, majority-minority districts and claims to be placed within them were the “racial entitlements” Justice Scalia mocked at oral argument in *Shelby County*.²⁰

Thernstrom’s essay offers an account for why majority-minority districts are seen to be so destructive. She explains that these districts encourage minority candidates to rely on “the sort of overt racial appeals that are the staple of invidious identity politics.”²¹ The consequence, in her view, is that

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13. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring).
 14. See *id.* at 497 (Roberts, C.J., concurring); see also *Miller v. Johnson*, 515 U.S. 900 (1995) (holding that reliance on race in the redistricting process is a permissible practice that does not even trigger strict scrutiny so long as that reliance does not “predominate” over other districting principles).
 15. Thernstrom, *supra* note 1.
 16. *Id.* (describing “[t]he insistence on race-conscious districting to maximize the number of safe black legislative seats [that is] built into the enforcement of the Voting Rights Act”).
 17. *Shaw v. Reno*, 509 U.S. 630, 647, 657 (1993); see also *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring).
 18. *Holder*, 512 U.S. at 905 (Thomas, J., concurring).
 19. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (quoting BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 136 (1992)).
 20. Transcript of Oral Argument at 47, *Shelby County v. Holder*, No. 12-96 (U.S. argued Feb. 27, 2013).
 21. Thernstrom, *supra* note 1.

these candidates do not gain “experience building biracial coalitions” and hence lack “the skills to venture into the world of competitive politics in statewide majority-white settings.”²² They remain, instead, “clustered together” on the “sidelines” of American politics.²³ For this reason, Thernstrom sees the majority-minority district as a device that “stalled racial progress,” that operates as “a brake on minority political aspirations,” and that fosters “precisely the opposite of what the statute intended.”²⁴

Needless to say, Thernstrom’s critique is controversial.²⁵ For present purposes, however, let’s assume that Thernstrom is right and her account best captures the consequences that follow from majority-minority districts. If these districts have truly been destructive in the way she says, is she also right that section 5 should be scrapped before it does any more damage?

II. ABANDONMENT OR ADAPTATION?

When Thernstrom writes that the creation and maintenance of majority-minority districts has “become a statutory mandate” and that the obligation is “built into the enforcement of the VRA,” she is referring not to the statute’s text – which makes no mention of majority-minority districts²⁶ – but instead to

22. *Id.*

23. *Id.*

24. *Id.*

25. See Brief for Engstrom et al., *supra* note 6, at 27-29 (arguing that majority-minority districts “promote a ‘politics of commonality’” that results in minority candidates being elected with cross-racial support); DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 204-05, 261 (1999) (arguing that majority-minority districts offer a venue that may itself erode racial polarization among voters); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 741 (2008) (“The majority-minority district may be a positive instrument, enabling the leaders and citizens of the racial minority to engage in a broader competition of ideas, through a process of democratic contestation, moving beyond the racially polarized divide that dominates politics in the absence of the majority-minority district.”); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 31 (2004) (suggesting that majority-minority districts ensure a constant, rather than sporadic, minority legislative presence, which allows minority legislators to accumulate seniority and makes complete minority exclusion from important legislative deals less likely); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 300-01 (1997) (arguing that majority-minority districts are beneficial for minority voters because “insular, well-organized constituencies often enjoy disproportionate influence relative to diffuse groups”).

26. See 42 U.S.C. § 1973c(a) (2006) (requiring preclearance for any change to a “standard, practice, or procedure with respect to voting” and requiring covered jurisdictions to demonstrate the changes are nondiscriminatory in purpose and effect). On whether the

prevailing judicial and administrative constructions of it. These constructions have deemed redistricting plans to be among the changes that require federal approval under section 5,²⁷ and have posited that redistricting plans that deny minority voters the ability to aggregate their votes under certain circumstances may be discriminatory in purpose or effect within the meaning of section 5.²⁸

Numerous judicial and administrative constructions have propelled the creation and maintenance of majority-minority districts, but it was a 1987 decision which did not even involve section 5 that is most closely associated with the “statutory mandate” Thernstrom cites. *Thornburg v. Gingles* sought to resolve disagreement among lower courts regarding the application of the 1982 amendments to section 2 of the VRA,²⁹ and to clarify the circumstances under which section 2 liability exists. The *Gingles* Court did so by distilling three “preconditions” to a section 2 claim, the first of which is that plaintiffs must demonstrate that the minority group is “sufficiently large and geographically compact to constitute a majority in a single member district.”³⁰ After *Gingles*, plaintiffs who made this showing—and satisfied the other two *Gingles* preconditions—typically prevailed.³¹

Gingles, notably, did not mandate any specific remedy for the statutory violation it helped define. True, it called on plaintiffs to demonstrate that a compact majority-minority district might be drawn, but only in order to identify circumstances likely to give rise to liability under section 2. *Gingles* never said that the majority-minority district is the exclusive or even the preferred remedy for violations of section 2 or for racial vote dilution more

2006 amendments to the statute, known as the “*Georgia v. Ashcroft* fix,” created such a mandate, see *infra* note 47 and accompanying text.

27. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).
28. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Beer v. United States*, 425 U.S. 130 (1976) (holding that a plan containing one majority-minority district is nonretrogressive when compared to a prior plan that contained none); *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (holding that Texas’s 2011 redistricting plans were discriminatory in purpose and effect within the meaning of section 5).
29. *Thornburg v. Gingles*, 478 U.S. 30 (1986); see also GROFMAN ET AL., *supra* note 19, at 47-49.
30. *Gingles*, 478 U.S. at 50 (requiring that plaintiffs also demonstrate that the group is politically cohesive and that the white majority votes sufficiently as a bloc to defeat the minority-preferred candidate).
31. See, e.g., Ellen Katz et al., *Documenting Discrimination In Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 MICH. J.L. REF. 643, 660 (2006) (finding that, of the published section 2 decisions since 1982, courts in sixty-eight lawsuits found the preconditions to be satisfied, and fifty-seven of these lawsuits proceeded to outcomes favorable to the plaintiffs).

generally,³² and, indeed, the decision said nothing whatsoever about how violations of section 2 might be remedied.

Still, *Gingles* has been understood to mandate majority-minority districts,³³ and for good reason. Because the majority-minority district allows for minority influence when voting is racially polarized,³⁴ the framework *Gingles* established invited the creation of majority-minority districts both to avoid and to remedy section 2 violations,³⁵ and, not surprisingly, to secure compliance with section 5 as well. Covered jurisdictions had previously drawn majority-minority districts to meet their obligations under section 5,³⁶ but they drew many more after *Gingles*. They did so because compliance with section 5 was understood to require compliance with section 2 (at least until the Court ruled otherwise in 1997);³⁷ because the majority-minority districts addressed specific concerns arising under section 5; and because the Department of Justice repeatedly denied preclearance to redistricting plans the agency thought contained too few majority-minority districts.³⁸

These practices were controversial from the start, and, for Thernstrom, they are what solidified section 5's status as a destructive treatment. In her view, the proliferation of majority-minority districts that followed *Gingles* denied minority candidates and office-holders experience "building biracial coalitions," and accordingly stymied the sort of political participation the VRA

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32. See *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (noting that "the *Gingles* preconditions are designed to establish liability, and not a remedy").
 33. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 238-39 (2009) ("[*Gingles*] served as a mandate, for state lawmakers as well as Justice Department officials engaged in the preclearance process, to create 'majority-minority' voting districts in cities and states that contained sizable minority populations and had a record of racially polarized voting.").
 34. The majority-minority district is thought by some to yield additional benefits as well. See Brief for Engstrom et al., *supra* note 6, at 27-29.
 35. KEYSSAR, *supra* note 33, at 238 ("[*Gingles*] encouraged both the lower courts and the Justice Department to promote single-member and 'minority opportunity' districts in the numerous locales where the *Gingles* criteria were met.").
 36. See *Beer v. United States*, 425 U.S. 130 (1976) (finding that a districting plan that created a majority-minority district was nonretrogressive when compared to a prior plan which did not).
 37. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476 (1997); see also 28 C.F.R. § 51.55(b)(2) (1996) (providing that the Attorney General shall withhold preclearance where "necessary to prevent a clear violation of amended section 2"). This regulation has since been modified. See 28 C.F.R. § 51.55(b) (2012) ("Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change demonstrates that such action is appropriate.").
 38. See *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

aspired to create.³⁹ These concerns, in turn, help explain why many of the Justices began looking for ways to stem reliance on the majority-minority district in the years that followed *Gingles*.

The Justices did so in two related ways. First, they repeatedly read the VRA narrowly, thereby limiting the instances in which liability might arise and hence a new majority-minority district might be required.⁴⁰ They also recognized a new “analytically distinct” injury under the Equal Protection Clause that arose when jurisdictions created oddly shaped majority-minority districts that were not absolutely required by the VRA.⁴¹ This new constitutional injury blunted the incentive to draw majority-minority districts prophylactically to avoid liability under the VRA. Taken together, these steps scaled back the VRA’s reach and reduced opportunities to employ its dominant remedy.

But as contraction became the mantra and death by a thousand cuts the unstated goal,⁴² the Justices seemed to forget that the remedy they disfavored addressed an injury a majority of them believed required attention.⁴³ Specifically, majority-minority districts were crafted to address the harm understood to result when electoral boundaries are drawn in ways that deny minority voters the opportunity to participate meaningfully in the political process. That is, majority-minority districts were drawn to provide minority voters influence in circumstances where cross-racial coalitions did not exist and had no hope of developing under existing conditions.

Of course, following *Gingles*, the Justices might have developed other remedies for the injuries arising under the VRA. In particular, they might have explored ways to structure electoral districts to ensure meaningful minority influence in the absence of a majority-minority electorate.⁴⁴ Indeed, to the extent they suspected majority-minority districts were operating to stymie

39. Thernstrom, *supra* note 1.

40. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Bossier Parish*, 520 U.S. 471; *Abrams v. Johnson*, 521 U.S. 74 (1997); *Holder v. Hall*, 512 U.S. 874 (1994); *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491 (1992).

41. *Shaw v. Reno*, 509 U.S. 630, 652 (1993); see also *Vera*, 517 U.S. 952; *Miller*, 515 U.S. 900.

42. Cf. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 382 (2012).

43. A majority of the Justices believed this, but not all. See *Holder*, 512 U.S. at 931-36, 945 (Thomas, J., concurring) (urging the Court to scrap *Gingles*, the majority-minority district, and racial vote dilution as a cognizable harm).

44. Options include electoral oddities like cumulative or instant run-off voting, multi-member districts structured to avoid traditionally dilutive rules, and so-called coalition districts in circumstances favorable to such coalitions. See, e.g., SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (4th ed. 2012).

potentially viable cross-racial coalitions, they might have sought out remedial measures that held more promise in fostering them.

This project, however, never attracted much interest. The Court opted to contract the VRA rather than seek out ways to improve its performance. Thus, nearly twenty years ago, *Johnson v. De Grandy* said the majority-minority district was a device to be avoided when minority voters are able to “pull, haul, and trade” in the political process,⁴⁵ but left unexplored how to create the conditions necessary for the trades *De Grandy* hoped would occur. A decade later, in *Georgia v. Ashcroft*, five Justices read section 5 to allow covered jurisdictions discretion to “unpack” majority-minority districts,⁴⁶ but again provided no useful guidelines to ensure that minority voters had meaningful influence in the districts that resulted.⁴⁷

In 2006, *LULAC v. Perry* suggested some receptivity to developing alternatives to the majority-minority district. The decision held that Texas violated section 2 of the VRA when it dismantled a congressional district in Laredo in which Latino voters had yet to achieve majority status, but not when it splintered a Fort Worth district in which African American voters also fell short of majority status.⁴⁸ *LULAC*'s sense that Latino voters in Laredo had lost something worth protecting—but that African American voters in Fort Worth had not—hinted at a belief that the challenged electoral districts differed significantly in the quality of political participation they allowed.

More specifically, the holding suggested an inclination among at least some of the Justices to favor engagement over security and to privilege process rather than outcome in construing and implementing the VRA.⁴⁹ That suggestion not

45. 512 U.S. 997, 1020 (1994).

46. 539 U.S. 461, 477-85 (2003).

47. See *id.* at 492-94 (Souter, J., dissenting). In 2006, Congress responded by restoring the remedy to what it had been prior to *Georgia v. Ashcroft*. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (“VRARA”), Pub. L. No. 109-246, § 5, 120 Stat. 577, 580-81 (2006) (codified as amended at 42 U.S.C. § 1973c(b) (2006)). Congress might well have used the opportunity to adapt the regime to the changed conditions highlighted by the litigation instead of seeking to restore it to its historic contours. See Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349, 365 (2010). Still, there remains considerable doubt as to what precisely the *Georgia v. Ashcroft* “fix” accomplished, see Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 179-92, 217 (2007), and the Court has yet to construe it on the merits. It thus has had no opportunity to decide whether any concerns about the regime’s potentially damaging effects have been addressed or might be addressed through an appropriate construction of the provision.

48. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); see Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1173-81 (2007).

49. See generally Katz, *supra* note 48.

only cast doubt on the primacy of the majority-minority district as a remedial structure, but also introduced the idea that the VRA might serve as a catalyst for a different form of political participation, one more in keeping with the values the Court has celebrated and said the VRA should promote.

Three years after *LULAC*, however, the Court made clear that it was not interested in pursuing this approach. On the facts of *Bartlett v. Strickland*,⁵⁰ drawing district boundaries in some locations but not others would have allowed minority voters to form cross-racial coalitions and elect representatives of their choice. *Bartlett* held that the VRA did not require that such lines be drawn—even though it would require the specified boundaries if the minority voters had been able to claim majority status in a single district.⁵¹ In other words, the decision held that the VRA did not require jurisdictions to aggregate minority voters too few in number to constitute a majority of a district's electorate.

The statutory construction *Bartlett* rejected would unquestionably have enlarged the statute's reach and left more conduct subject to challenge under section 2. The case accordingly presented the Court with a choice between expanding and contracting the statute. That the Justices voted for contraction surprised no one. The move was nevertheless ironic. It cut off an application of the statute that promised to encourage the type of political participation the Justices have long claimed they want to see—namely, the type that involves cross-racial coalitions—while restricting the statute's reach to protect the type of participation they most dislike—namely, that secured by the majority-minority district. In other words, the Court opted to cut off treatment precisely at the moment it might have proven to be most beneficial.

By so doing, *Bartlett* offers a likely, albeit unfortunate, template for *Shelby County*. The Court's unhappiness with a specific application of the VRA—namely, the way in which it has fostered majority-minority districts—led it to circumscribe the statute at every opportunity and to do so in ways that appear antithetical to the goals the Court claims it wants to advance. That same unhappiness may now fuel the Court's inclination to scrap section 5 in its entirety. The sense that the treatment section 5 prescribes has been doing more harm than the condition it was crafted to address is likely to inform and may indeed propel the outcome widely expected in the case.

That would be a bad result. Section 5 need not be scrapped to address the facets of the regime that are viewed by some to be destructive. Targeted statutory interpretation would suffice to resolve most of these concerns. But reliance on the destructive-treatment analogy in *Shelby County* would be worse

50. 556 U.S. 1 (2009).

51. *Id.* at 14-17.

than the missed opportunity *Bartlett* represents. In a far more damaging way, the likely holding in *Shelby County* would terminate rather than modify the treatment prescribed by section 5, and leave Congress with vastly less power to address the underlying condition going forward.

Such a result is troubling. The electoral barriers that made majority-minority districts seem like a promising remedy decades ago have yet to be fully eradicated. Conditions have undeniably improved in significant ways, but, as Justice Ginsburg recognized four years ago, “it doesn’t go from blatant overt discrimination to everything is equal.”⁵² Scrapping the regime because a particular remedy might no longer be the best option ignores the ways in which improvements, even marked ones, are often fragile and require cultivation to survive and flourish.⁵³

As critical, reliance on the destructive-treatment analogy in *Shelby County* exposes section 2 of the VRA to invalidation as well. The analogy’s objection to particular aggregations of minority voters applies beyond the section 5 context to encompass the way in which both section 2 and section 5 have been applied to redistricting plans. Justice Thomas made this point nearly twenty years ago when he voiced a series of objections, much like those Thernstrom identifies, to the race-based redistricting moves the VRA has been understood to promote.⁵⁴ Put differently, insofar as section 5 constitutes unduly destructive treatment, section 2 does as well. And if the destructive-treatment analogy is grounds to invalidate section 5, it positions section 2 as the next provision up for a challenge. Accordingly, section 2 is far from an assured source of protection for minority voters should section 5 fall.

Those who find the destructive-treatment analogy persuasive may view this prospect as a welcome development, but they should not. The analogy posits that majority-minority districts are destructive devices because they stymie cross-racial coalitions. Scrapping the VRA, in part or in whole, would vastly restrict the creation of majority-minority districts, but would do nothing to foster the cross-racial coalitions that everyone seems to want.

Without doubt, the concerns underlying the destructive-treatment analogy warrant serious discussion. Majority-minority districts have been successful in important respects, and indeed troubling in others, and it is evident that they do not best serve minority interests in every circumstance. What follows from that observation requires discussion, however, and *Shelby County* is not a venue in which that discussion can productively occur. Collapsing the analogy’s

52. See Transcript of Oral Argument at 17, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322).

53. See Katz, *supra* note 47, at 372-73.

54. *Holder v. Hall*, 512 U.S. 874, 891-93 (1994) (Thomas, J., concurring).

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concerns into the constitutional inquiry in *Shelby County* prevents those concerns from receiving the consideration they require and obscures the question presented in the case itself. Reliance on the analogy in this case is misplaced, and threatens to foreclose a discussion we need to have.

Ellen D. Katz is the Ralph W. Aigler Professor of Law, University of Michigan Law School.

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